



# environmental defender's office new south wales

## Submission on the Consultation Draft of the *Protection of the Environment Operations Amendment Bill 2005*

**22<sup>nd</sup> July 2005**

### **The EDO Mission Statement**

*To empower the community to protect the environment through law, recognising:*

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- ◆ *the importance of indigenous involvement in protection of the environment.*

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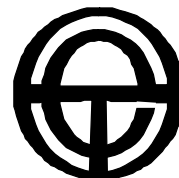
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TOTAL ENVIRONMENT CENTRE

## **Introduction**

The Environmental Defender's Office of NSW (EDO) and the Total Environment Centre (TEC) welcome the introduction of the *Protection of the Environment Operations Amendment Bill 2005* Consultation Draft, and the opportunity to comment on the proposed legislation.

The EDO and TEC have previously made submissions recommending amendments to the legislation, and we support the inclusion of many of those recommendations. These include a new land pollution offence, the deletion of the "no knowledge" offence for senior executives, the tightened definition of waste, the increased fines and expanded range of sentencing orders available, and the revised 'fit and proper person' test for licensees. We also support amendments to the *Protection of the Environment Operations (Waste) Regulation* dealing with hazardous waste in fertiliser applications.

The following comments relate to the central issues covered by the proposed legislation, and draw upon our previous recommendations on the key issues as identified in the *Issues Paper: Review of the POEO Act 1997* in 2003. Our comments relate to:

1. Licence Amendments
2. Water Quality
3. Penalties and enforcement
4. Waste
5. Smoke abatement notices
6. Land pollution
7. Powers of authorised officers
8. Noise pollution
9. Green offsets
10. Amendments to other legislation

### **1. Licence Amendments**

#### ***Proposed amendments***

- *Section 45 of the Protection of the Environment Operations Act 1997 ('POEO Act') is amended by clause [3] of the Protection of the Environment Operations Amendment Bill 2005 ("the Bill") to make it clear that, in exercising functions relating to licences, an appropriate regulatory authority may take into account the pollution previously caused by an activity.*

The EDO and TEC support this amendment as previous pollution caused should be an important consideration regarding licensing, and the current wording only applies to current or likely future pollution.

- *Section 50 is amended by clause [9] to prohibit the variation of a licence relating to development for which development consent is required but has not been obtained.*

The EDO and TEC support this amendment.

- *Section 57 is amended by clause [11] to clarify that a penalty imposed for failing to pay a licence fee by the required date is not payable until notice is given of the default and penalty.*

The EDO and TEC support this amendment as it is procedurally fair.

- *Section 66 is amended by clause [16] to enable licence conditions to require certification of compliance with licence conditions to be done by a person prescribed by the regulations. Section 66 is also amended by clauses [17] and [18] to enable a licence condition relating to certification to require certification of compliance with applicable provisions of the regulations, in addition to licence conditions.*

The EDO and TEC are unable to comment as we have not seen the proposed regulatory categories and provisions.

- *Section 70 is replaced by clause [20] to enable a condition of a surrender of a licence to require a former licence holder to provide a financial assurance.*

The EDO and TEC support the broadening of this clause to include conditions of suspension, revocation or surrender of a licence.

- *Clause [24] substitutes Section 76 to enable a licence condition to be imposed requiring any licence holder to prepare a post-closure plan and to implement such a plan.*

The EDO and TEC support this provision as post-closure remediation can be vital. (We note, the new clause removes reference to waste facilities. The proposed waste provisions are discussed below).

- *Section 78 is amended by clause [25] to extend from 3 years to 5 years the interval within which the appropriate regulatory authority must review a licence.*

The EDO and TEC do **not** support this amendment. As previously submitted, specific industry focused reviews are not an adequate qualitative replacement for comprehensive reviews.

The EDO and TEC commend the EPA on the pilot approach to targeted industry licence reviews (for example, regarding the wood preservation industry). However, we note that comprehensive reviews of high risk industries while necessary, are time and resource intensive. These cannot replace the 3-year across the board licence reviews, and must not lead to other industry sectors being overlooked.

Consideration should be given to how many of these intensive reviews could be run simultaneously. Care needs to be taken to ensure that there is a limitation on how long is the cycle of review for a particular industry sector. For example, it is hoped it would not be 10 years before resources were available to re-visit the wood preservation industry, leaving any new operating licenses unreviewed for a considerable time.

In addition, consistent with previous representations by conservation groups, the *POEO Act 1997* should provide for a review to be conducted by the EPA within the three year period of a licence *where a situation arises or an event occurs that may result in environmental damage or has resulted in environmental damage*. Currently the EPA is unable to initiate a licence review in response to a complaint or pollution incident; or outside of licence

advertising time limits. The decision to hold a review should be discretionary on the part of the EPA but reasons for not holding a review should be made publicly available.<sup>1</sup>

- *Section 78 is amended by clause [26] to remove the requirement for notice of the review of a licence to be published within a specified period before the review is undertaken.*

The amendment removes the 6 month notice requirement, but does not provide an alternative time frame. Will these time frames be discretionary on a case by case basis? Will notice be given to an industry sector generally before sector reviews instead? The Bill should clarify this.

- *Section 79 is amended by clause [27] to clarify that a licence may be revoked while the licence is suspended.*

The EDO and TEC support this amendment.

- *Section 79 is amended by clause [28] to provide that a licence may be suspended or revoked if the holder fails to pay a waste contribution under section 88 of the POEO Act.*

The EDO and TEC agree that failure to pay a waste levy is a valid reason for licence suspension or revocation.

- *Section 80 is amended by clause [29] to expressly provide for an application for surrender of a licence to be refused if the appropriate regulatory authority is of the opinion that it is appropriate to manage the ongoing environmental impact of an activity that has ceased to be carried on by way of licence conditions.*

The EDO and TEC strongly support the ability of the regulatory authority to require management of environmental impacts through licence conditions where there will be an ongoing impact even where the activity has ceased. This is vital to ensure effective impact minimisation and remediation is undertaken (and not avoided) by the appropriate party.

- *Section 83 is amended by clause [31] to allow additional factors to be taken into consideration by an appropriate regulatory authority in determining whether a person is a fit and proper person for the purposes of provisions relating to the grant, suspension or revocation of licences.*

The EDO and TEC strongly support the 12 considerations in clause 31 being included explicitly in the *POEO Act*. In particular, we support the inclusion of considerations regarding behaviour of corporate directors, and compliance with environmental protection legislation.

- *Section 88 is amended by clause [39] to allow regulations to be made that permit a contribution, payable by the operator of a licensed waste facility, to be calculated on the basis of estimates.*

The EDO and TEC are unable to comment, as we have not seen the draft regulatory provisions.

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<sup>1</sup> The Total Environment Centre suggests that there should be an additional ‘trigger mechanism’ when two or more named peak environment groups provide a case for review, that meets prescribed standards.

- *Section 88 is amended by clause [41] to allow the EPA to waive any contribution or interest, or any portion of any contribution or interest, that is payable under that section.*

The Explanatory note is unclear, as it states contributions may be ‘waived’ whereas the section says the interest is payable.

### ***Additional Comments***

#### **Licensing Schedule**

As previously submitted, there remains a disjuncture between the activities dealt with under Schedule 1 of the *POEO Act 1997* (for determining EPA involvement in licensing), and Schedule 3 of the planning laws (for determining when an EIS ought to accompany a development application). The Schedules should be made consistent as the discrepancies hinder the protection of the environment and do not allow for proper public participation.

We have previously argued that the ambit of both Schedules should be extended – for example, Schedule 3 of the *Environmental Planning and Assessment Act 1979* should be amended to include other developments which are likely to have a significant effect on the environment, such as major subdivisions, major tourist development and large scale agriculture (such as cotton farming). However, we note recent amendments to the *Environmental Planning and Assessment Act 1979*, and the introduction of a new Part 3A for major projects. There is a need for clear guidelines clarifying the new process for integrated development.

#### **Cleaner production**

The EDO and TEC previously submitted that the licensing system needs to be overhauled so that it can be proactive on cleaner production. Rather than focussing on ‘end of pipe’ processes, the EPA should be involved at the initial stages and advocate cleaner production. The EPA’s traditional narrow role, should be upgraded with a full dataset on cleaner production processes, that can be made available both at the early EIS stages and brought to bear when licences are being reviewed. Current EPA involvement in cleaner production is via a small grants scheme and a boutique approach. It should be a mainstream focus. The proposed amendments do not adequately address this.

#### **Licence conditions**

Part 3.5 of the *POEO Act 1997* currently sets out some non-exclusive conditions that may be attached to licences. By and large, a flexible, yet prescriptive, approach to licensing is appropriate. One exception, however, can be found in relation to pollution reduction programs. It is submitted that provisions regarding such programs should be mandatory requirements of all licences. This would help to attain one of the objectives of the *POEO Act 1997* regarding pollution prevention.

The particular mechanism for pollution reduction by the licence holder should be a matter of negotiation between the appropriate regulatory authority (where this is not the EPA, the EPA should be involved) and the licence holder. Regard should be had to such considerations as technology and operational procedures in devising programs, with identified chemicals of concern being given priority for such compulsory programs.

As part of such an approach, an additional licence condition should require the licence holder to comply with the mechanism provided for that licence holder to achieve the pollution standards, targets or goals in the time period prescribed in the licence. This should be explicit in the Bill.

### **Third party rights**

Licences to pollute have long been held to be privileges, not rights. Licences also have public costs and public impacts. This is the starting point for building on the role of the public in licensing decisions. Licensing decisions relating to pollution sources on Schedule 1, together with pollution sources which are not on the Schedule but which are likely to have a significant effect on the environment, should also be subject to third party appeal rights (along the lines of those provided for under the *Environmental Planning and Assessment Act 1979* s 98 for designated development).

It is further submitted that third party merits appeals should also be available where the EPA approves variations to a licence that will result in increased pollution. The trigger for a merits appeal should be:

- the variation of licence conditions allowing increased levels of existing pollutants or a change in the constitution of the pollution, or
- evidence of a breach of a PEP, or a serious breach or frequent breaches of licence conditions by the licence holder.

## **2. Water Quality**

### ***Proposed amendments***

- *Currently, water quality standards are imposed on certain classified waters of the State under the Clean Waters Regulations 1972 (as continued in force by the POEO Act). The standards do not apply to all the waters of the State. The amendments repeal a provision continuing those regulations and replace the current system with a general requirement that environmental values of water (being the values set out in the Australian and New Zealand Guidelines for Fresh and Marine Water Quality 2000) be considered when licensing functions are exercised or prevention notices issued under the Principal Act. Clause [156] omits the provision that continues the Clean Waters Regulations 1972 in force.*

The EDO and TEC are concerned about this amendment that terminates the classification system (of named streams) and replaces it with general considerations of environmental values. Environment groups have argued previously for the appropriate recognition of environmental values in legislation, however a number of key streams will lose protection as a result of how this amendment is drafted. The amendment fails to update the protection for streams generally.

- *Section 45 is amended by clause [5] to enable an appropriate regulatory authority, when exercising licensing functions, to consider the effect of an activity or work on environmental values of water and the practical measures that can be taken to restore or maintain those environmental values.*

As noted above, the EDO and TEC support the recognition of environmental values and the practical measures for restoring or maintaining those values. The legislation could be amended to go further and consider practical measures that would “maintain or improve” environmental values (rather than simply restore). This approach is consistent with the environmental test under the *Native Vegetation Act 2003*.

- *Section 96 is amended by clause [47] to require an appropriate regulatory authority considering issuing a prevention notice relating to an activity that causes or is likely to cause water pollution to consider the effect of the activity on environmental values of water and the practical measures that can be taken to restore or maintain those environmental values.*

We support prevention notices for activities causing or likely to effect the environmental values of water. The EDO and TEC submit that the guidelines referred to in section 3A (c) should contain a specific timetable, and the EPA or appropriate regulatory authority must be required to report on the considerations. This report must be made public.

- *Clause [158] inserts a definition of environmental values of water.*

The EDO and TEC support the inclusion of a definition, and that it is consistent with the definition accepted at a Federal level by DEH. (We note that the *Water Management Act 2000* NSW does not specifically define the environmental values).

### **3. Penalties and enforcement**

#### ***Proposed amendments***

- *Clauses [6]–[8], [13], [15], [35], [38], [42], [48], [52], [55], [56], [58]–[60], [62], [70], [74]–[80], [82] and [96] amend various sections of the POEO Act to increase the penalties for certain offences under that Act.*

The EDO and TEC strongly support the increased penalties outlined in the Bill.

However, we note that it is insufficient to have large penalties, in the absence of a comprehensive compliance and enforcement policy which is supported by adequate resources for implementation. This also requires political will to bring prosecutions.<sup>2</sup>

The EDO and TEC support penalties being increased, consistent with the principles of *He Kaw Teh*.<sup>3</sup> It is noted that many pollution offences are ‘instrumental’ or ‘calculated’ crimes and thus capable of being deterred. Nevertheless, it is also noted that criminological research points clearly to the fact that certainty of being caught is a more important factor in deterrence than the penalty. Therefore, increased penalties without increased resources being put into enforcement, are of limited value. As noted by Jacobs J of the High Court:

“The deterrent to an increased volume of serious crime is not so much heavier sentences as the impression on the minds of those who are persisting in a course of crime that detection is likely and punishment will be certain. The first of these factors is not within

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<sup>2</sup> See comment in “Biggest polluters face fines of \$5m” (*Sydney Morning Herald*, June 22).

<sup>3</sup> See the case of *He Kaw Teh v R* (1984) 157 CLR 523.

control of the courts; the second is. Consistency and certainty of sentence must be the aim... Certainty of punishment is more important than increasingly heavy punishment.”<sup>4</sup>

A further issue for consideration is that of civil penalties. The enforcement of pollution law in the United States has long been dependent on the existence and enforcement of civil penalties by the prosecuting authorities. The Australian Law Reform Commission has considered these issues.<sup>5</sup> Civil penalties are presently incorporated as an option under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and South Australia.<sup>6</sup>

- *Section 169 is amended by clauses [83]-[85] to remove the “no knowledge” defence in relation to corporations that contravene the POEO Act or regulations under that Act. The amendments also allow evidence of the opinion, belief or purpose (in addition to intention) of an officer, employee or agent of a corporation as evidence of that corporation’s state of mind in proceedings against the corporation for an alleged contravention of the POEO Act or regulations under that Act.*

The EDO and TEC strongly support the removal of the ‘no knowledge’ defence and the positive reforms in the Bill to tighten corporate liability provisions.

Furthermore, we note as previously submitted, “the problem of apportioning responsibility for pollution where a company has become de-registered could be addressed by attaching orders to Directors. Having a statutory power to pierce the corporate veil in this manner, could circumvent issues of personal knowledge.”<sup>7</sup>

- *Section 213 is amended by clause [99] to extend Chapter 8 of the POEO Act (which relates to proceedings for offences, penalty notices, remedies and civil enforcement) to the Environmentally Hazardous Chemicals Act 1985 (“EHC Act”) and the regulations under that Act. Clause [100] prevents a person other than the EPA from instituting proceedings for an offence under that Act or those regulations.*

The EDO and TEC support the extension to proceedings under the *EHC Act 1985*.

- *Section 216 is amended by clause [101] to provide that proceedings for offences under proposed sections 142A and 144AA or the Environmentally Hazardous Chemicals Act 1985 must be commenced within 3 years of the offence being committed or first coming to the attention of any relevant authorised officer.*

We welcome the inclusion of offences relating to land pollution, false and misleading information about waste, and *EHC Act* offences.

- *Clause [103] inserts proposed section 218A into the POEO Act. The proposed section clarifies that an agent of an appropriate regulatory authority may institute proceedings under the POEO Act on behalf of the authority.*

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4 *Griffiths* (1977) 137 CLR 293, 327.

5 See ALRC Discussion Paper 65 *Civil and Administrative Penalties: Civil and Administrative Penalties in Australian Federal Regulation* April 2002. The EDO made a submission to this discussion paper.

6 See, for example, (CTH) *Environment Protection and Biodiversity Conservation Act 1999* sections 20 and 20A.

7 Section 129 – Criminal liability of officers of a body corporate - of the South Australian *Environment Protection Act 1993* is a useful example of stronger provisions.

The EDO and TEC support this clause. We also strongly support retaining the power of any person to institute proceedings with leave of the Land and Environment Court in section 219.

- *Clause [104] inserts proposed sections 237A and 237B. The proposed sections provide for the recovery of costs of an appropriate regulatory authority associated with registering a charge, and lodging a caveat, on land to which a restraining order imposed under the POEO Act applies.*

The EDO and TEC support these two additional provisions for equitable recovery of costs.

- *Section 248 is amended by clause [105] to include the costs of transporting, storing or disposing of evidence during the investigation of the offence in the costs that may be recovered by order of a court from an offender.*

The EDO and TEC support the extension of this cost recovery provision. Significant costs can be incurred in relation to transport and storage, and full cost recovery will assist the effectiveness of the relevant compliance and enforcement authority. (The importance of appropriate resourcing for compliance and enforcement is discussed above).

- *Section 249 is amended by clause [106] to allow a court that finds an offence under the POEO Act proved to order the offender to pay a further penalty of an amount that the court is satisfied, on the balance of probabilities, represents the amount of any monetary benefit to the offender as a result of the commission of the offence.*

The EDO and TEC strongly approve of this amendment. It is essential, as part of the deterrence role, that offenders do not benefit from the offence and are required to forfeit the relevant and appropriate amount.

- *Section 250 is amended by [107] to enable a court that finds an offence under the POEO Act proved to order the offender to publicise the circumstances of an offence. Section 250 is also amended by clause [108] to enable a court that finds an offence under the POEO Act proved to make additional orders in relation to the offender, including orders requiring payment of amounts to the Environmental Trust, requiring offenders, employees and contractors to attend training courses, requiring offenders to establish training courses and requiring offenders to provide financial assurances.*

Previous submissions by EDO and TEC have included recommendations as to additional orders. Specifically we recommended a:

- **Corporate Probation Order**, which allows the court to insist that the corporate defendant undertake satisfactory internal disciplinary action in response to the commission of an offence; and
- **Equity fines** - whereby shares from a convicted corporation go to a public interest trust fund whose funds are directed to conservation groups.

We welcome the inclusion of new orders in the Bill. In particular we welcome innovative orders regarding publication of offence, payments to the environmental trust (which partly addresses our equity fines recommendation), training orders for employees and

contractors (which could constitute part of corporate probation), and orders regarding financial assurances.

- *Clause [112] inserts proposed section 253A. The proposed section establishes a scheme for the giving of binding undertakings to the EPA by a person in connection with matters relating to the EPA's functions under the POEO Act. An undertaking may be varied or withdrawn with the EPA's consent and is enforceable by the Land and Environment Court, which may also make specified orders for breaches.*

The EDO and TEC strongly support these amendments, consistent with our previous submission. We strongly support the range of court orders available in section 253A (3). Such undertakings have enhanced enforcement for regulators such as ASIC and the ACCC. The EDO and TEC support the EPA having this power.

#### **4. Waste**

##### ***Proposed amendments***

- *Section 87 is amended by clause [36] to remove the requirement for a supervisory licence relating to landfill sites used for the disposal of putrescible waste to be subject to a condition relating to the separation, re-use, reprocessing and recycling of waste.*

EDO and TEC do not support this amendment. Conditions relating to separation, re-use, reprocessing and recycling must be mandatory.

- *Section 88 is amended by clause [41] to make it clear that interest is payable on any part of an unpaid waste contribution under that section.*

The EDO and TEC support this amendment.

- *Section 143 is amended by clauses [67] and [68] to extend the offence of transporting waste to a place that cannot lawfully be used as a waste facility for the waste to causing or permitting the transport of waste to any such place.*

The EDO and TEC support the extension of the transporting offence to include depositing of waste, and the liability of both the transporter and the owner of the waste. The maximum penalties are appropriate.

- *Clause [69] substitutes section 144 of the POEO Act and inserts proposed section 144AA. Proposed section 144 extends the existing offence of permitting land that cannot lawfully be used as a waste facility to using land as a waste facility without lawful authority (this would cover the circumstances where a waste facility cannot be used to dispose of particular waste). Proposed section 144AA makes it an offence to supply information (including a record containing information), or cause or permit information to be supplied, about waste that is false or misleading in a material respect to another person in the course of dealing with the waste. The offence will apply to dealings relating to the sale or disposal of waste or the storage, transport, handling, deposit, transfer, processing, recycling, recovery, re-use or use of waste.*

The EDO and TEC strongly support the increased penalty for corporations in section 144 (1) (a). We strongly support the new section 144AA offence of providing false or misleading information about waste, and the definition of ‘information’ in subsection (4).

- *Clause [163] replaces the definition of **waste** for the purposes of the POEO Act. The new definition changes references to substances intended for “recycling, reprocessing, recovery” to references to “recycling, processing, recovery” and includes as waste (in the circumstances prescribed by the regulations) processed, recycled, re-used or recovered substances, produced wholly or partly from waste, that are applied to land or used as fuel.*

The EDO and TEC welcome the new definition of waste. As previously submitted, the current definition of waste is problematic. A review of relevant case law regarding recycled products indicates that there have been instances when clear pollution events have managed to avoid liability because of the definition of waste. As noted in the Issues Paper, an offender can only be prosecuted for willful or negligent disposal (under Tier 1) if it is proved beyond a reasonable doubt that the substance is a waste. It also must be shown that the person was disposing of the substance as a waste, and not simply using the substance as fill. The unclear status of recovered or recycled substances can therefore result in a court finding that there has been no act of disposal and no ‘waste.’

The clearer definition of waste, combined with the new land pollution offence (discussed below), will assist operators in correctly classifying waste; reduce levels of incorrectly classified waste; and assist the courts in correctly assessing prosecutions.

### ***Additional Comment***

The EDO and TEC have previously submitted further detail regarding **waste classification**:

In Schedule 1 Part 3, solid wastes should be classified not according to provenance (where they come from – for example, municipal council), but according to their physical composition. The range of materials included in Solid Waste class is currently inconsistent, as it includes materials classified both according to their physical description (for example, bio-solids) and their provenance (for example, municipal waste). Classifying wastes by their provenance ignores the possibility that the wastes may contain hazardous substances, for example, electronic waste. This system of classification allows wastes containing hazardous materials to escape chemical testing despite the fact that the EPA has targeted these materials as ‘wastes of concern’.

The ‘Non-chemical waste generated from manufacturing and services (including metal, timber, paper, ceramics, plastics, thermosets and composites)’ should not include composites which are often hazardous cocktails, for example, shredder flock from end-of-life vehicles.

The following materials, now classified as ‘inert’ waste, should be re-classified as ‘hazardous’:

- Copper Chrome Arsenic treated timber (identified by the EPA as a ‘waste of concern’)
- PVC plastic timber (identified by the EPA as a ‘waste of concern’)

The following materials, now classified as ‘solid’ waste by virtue of their provenance, should be re-classified as ‘hazardous’:

- Waste contaminated with lead
- End-of-life vehicle residuals (or ‘shredder flock’)
- Electric and electronic appliances, in particular, CRT monitors
- Refrigerators containing CFCs. This waste should be classified ‘industrial’ or ‘hazardous’
- Lead-acid batteries
- Ni-cad batteries

The *POEO Act* should require manufacturers of goods to provide evidence of the chemical make-up of products to allow for accurate classification when those products become wastes. The generator, as defined under the Act, rarely has factual knowledge or the means to obtain knowledge about the composition of manufactured products which it will have to dispose of.

The TCLP (toxicity characteristic leachate procedure) test is only relevant to landfill end-disposal. Any toxicity test should be further referenced against the form of disposal to which a material will be subjected, taking into account new alternative waste technologies including Waste to Energy.

The definition of what is “Capable of environmentally significant transformation” needs to be reviewed in the light of Alternative Waste Technologies.

The limits contained in Technical Appendix 1 for “contaminants” – better referred to as chemical content – should be revised and not be uniformly applied regardless of the manner of disposal which is intended for the waste.

Finally, the classification of hazardous waste in NSW should be consistent with, and at least as rigorous as, Federal classifications on hazardous waste. Current federal laws regulating the shipment of hazardous waste are far more stringent than current State laws. For example, electronic waste and lead-acid batteries are classified as hazardous and their export is banned, in line with the Basel Convention to which Australia is a signatory.

### **Guidelines**

The EDO and TEC support the development of Guidelines to encourage recycling and re-use, but importantly, also to help prevent the re-use of environmentally harmful wastes. We welcome the progress made in this area in relation to fertiliser waste.

### **Waste tracking**

The EDO and TEC support the development of an easily accessible internet tracking system.

## **5. Smoke abatement notices**

### ***Proposed amendment***

- *Clause [61] inserts proposed Division 3 of Part 5.4 (proposed sections 135A–135D) which provide a new scheme for managing smoke pollution arising from residential premises. An authorised officer of a local authority will be able to issue a smoke abatement notice if it appears to the officer that a specified amount of smoke has been emitted from a residence. The notice will allow 21 days for ceasing to emit excessive smoke and it will be an offence to contravene a notice without reasonable excuse. A smoke abatement notice will have effect for 6 months but may be revoked earlier.*

The EDO and TEC welcome the inclusion of specific provisions relating to domestic air pollution, consistent with our previous submission. It was noted at the EPA Sydney workshop (2003), that such provisions would have resource implications for certain local Councils. For instance, monitoring of wood smoke emissions would often be more appropriately done in the evenings. Sufficient resources should be made available for enforcement and compliance purposes.

The Bill should indicate a penalty for repeated contravention of a notice. On the spot fines could be appropriate for repeat offenders.

## **6. Land pollution**

### ***Proposed amendments***

- *Currently land pollution is regulated under the Act by regulating waste disposal, the transport of waste and littering. Clause [65] inserts Division 2 of Part 5.6 (proposed sections 142A–142E) relating to a specific new offence of land pollution. Land pollution is defined broadly (a definition is inserted by clause [160]) to mean placing or introducing matter in or on or into or onto land that causes degradation of the land resulting in specified harm or damage, or placing or introducing matter that is of a prescribed nature, description or class or does not comply with a prescribed standard. The proposed sections provide for a defence of authority conferred by regulation or a licence or lawful authority or if a substance placed on land is a pesticide or a fertiliser or another specified substance. There will also be a defence for substances placed into or onto an unlicensed landfill that is notified to the EPA and operated in accordance with the regulations.*

The EDO and TEC strongly support the introduction of a land pollution offence, consistent with our previous submission. We believe the proposed definition has been drafted in such a way as to capture the relevant actions, and overcome problems previously experienced by prosecutors relating to waste pollution.

As noted above and in previous submissions, the classification and definition of ‘waste’ and the act of disposal can cause difficulties for prosecutors. The Issues Paper notes that certain anomalies exist for example, the definition of ‘leak, spill or escape’ can be argued to avoid liability where a substance is ‘placed’ upon land. The Bill helps to clarify the definitions of waste, the requisite intention to dispose, and the relevant actions.

## **7. Powers of authorised officers**

### ***Proposed amendments***

- *Section 198 of the POEO Act is amended by clause [86] of the Bill to provide that an authorised officer may, on any premises entered lawfully under that Act, turn off or disable, or authorise another person to turn off or disable, a building intruder alarm that has been sounding in breach of the Act or the regulations.*

The EDO and TEC support this amendment.

- *Section 203 is amended by clause [87] to confer powers on authorised officers to require a person to attend to answer questions in relation to matters under the POEO Act, if such attendance is reasonably required so that questions can be put and answered and the place and time have been nominated by the person or are reasonable in the circumstances.*

The EDO and TEC support this amendment.

- *Clause [88] inserts proposed section 203A into the POEO Act. The proposed section provides that an authorised officer may record questions by authorised officers and answers to those questions and sets out recording methods if the officer has informed the person that the record is to be made.*

The EDO and TEC support the new provision regarding recording of evidence.

- *Section 204 is amended by clause [89] to authorise an authorised officer to request a person who is required to state his or her name and address to provide proof of the name and address. It will not be an offence to fail to provide the proof.*

The EDO and TEC support this amendment. This could be qualified by adding “without a reasonable excuse”.

- *Section 206 is amended by clause [91] to remove a limit on the quantity of a substance which may be removed by an authorised officer for testing.*

The EDO and TEC support this amendment.

- *Clause [92] inserts proposed section 206A into the POEO Act. The proposed section authorises an authorised officer, or a person acting under the direction of an authorised officer, to turn off or disable a motor vehicle intruder alarm that has been sounding in breach of the Act or the regulations.*

The EDO and TEC support this amendment. The Bill could also clarify whether the officer/EPA is liable for any damage caused by using ‘reasonable force’ to enter a car.

- *Section 208 is amended by clauses [93] and [95] to confer power on authorised officers to require a vehicle or vessel to be moved to a suitable place for inspection or testing. If it is not to be done immediately, the notice must be in writing and specify the date, time and place for inspection or testing.*

The EDO and TEC support the ability to require a suitable place for inspection of a vehicle or vessel.

- *Clause [98] inserts proposed section 212E. The proposed section enables the Minister to enter into arrangements with Ministers of other States or Territories to provide for authorised officers to exercise functions under the Principal Act in the other State or Territory. Such actions will relate only to matters that relate to the environment of this State.*

The EDO and TEC support this cooperative measure.

## **8. Noise pollution**

### ***Proposed amendments***

- *Section 264 is amended by clause [119] to confer on appropriate regulatory authorities the power to issue noise control notices to a person who proposes to carry on an activity or use an article at any premises.*

The EDO and TEC support the broadening of this provision.

- *Section 278 is amended by clause [124] to enable noise abatement directions approved by the EPA to be given to the State, a person acting on behalf of the State, a public authority or an employee of a public authority.*

The EDO and TEC support removing directions given to the State with approval of the EPA from this restriction.

### ***Additional comments***

As previously submitted, the EDO supports **cost recovery for noise offences**, as is included for most notices under the *POEO Act*. We therefore support clause [121] introducing section 267A which allows a regulatory authority to recover administering costs of preparing and giving noise control notices. Hopefully, this will encourage councils to utilise the provisions.

### **Notices requiring immediate action**

Certain prevention notices, licence variation notices, and control notices (for example regarding noise) have a delayed effect. This can mean that the noise or offending odour can continue for 21 days before the order/notice becomes effective. The regime needs to be amended to provide that certain orders are effective immediately followed by a right of appeal period. As noted in the Issues Paper, other Australian jurisdictions can require action within an appeal period, balanced by ‘an ability for a recipient to apply for a postponement of the notice requirement as an aspect of the appeal.’<sup>8</sup>

## **9. Green offsets**

The Bill, in clause [135], inserts proposed Part 9.3B (proposed sections 295M–295X). The Explanatory notes state:

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<sup>8</sup> Issues Paper, p7.

*“The proposed Part, together with section 69, establishes a scheme to require licence holders to provide or participate in schemes for the provision of green offsets to mitigate the effect of licensed activities. A green offset scheme or green offset works may be used to prevent, control, abate, mitigate or otherwise offset harm to the environment caused by a licensed activity or to make good environmental damage arising from such an activity. A green offset scheme may also be used to carry out a specified program for the restoration or enhancement of the environment related to a licensed activity. A green offset scheme may contain elements, including contractual arrangements, creation of a market for participation entitlements and credits and the payment of financial contributions. Both a scheme and offset works may relate to activities and premises other than those covered by the licence and be arranged, implemented or managed by a person on behalf of the licence holder, but must relate to licensed activities. The provisions enable regulations to impose conditions on licences. Regulations may also be made for or with respect to green offset schemes and green offset works, including in relation to determination of whether specified outcomes are met, cost recovery and conferring on the EPA functions relating to credits and participation rights. The provisions also confer on the EPA functions relating to management or appointment of managers for green offset schemes or green offset works and entering into agreements with managers. A Green Offsets Fund is established. The Crown is protected by the provisions from liability for acts done in good faith in connection with the operation of green offset schemes or green offset works and green offset credits are excluded from liability for duty.”*

The additional provisions to facilitate the scheme are:

- *Section 45 is amended by clause [4] to enable an appropriate regulatory authority, in exercising functions relating to licences, to consider any relevant green offset scheme or green offset works.*
- *Section 66 is amended by clauses [14] and [17] to extend monitoring under licence conditions to matters required by a licence, such as requirements to implement green offset schemes or green offset works.*
- *Clause [19] substitutes section 69 of the Principal Act to enable licence conditions to be imposed that implement or otherwise relate to green offset schemes and green offset works.*

### **Comment**

This submission supports, in principle, exploring alternative and/or non-regulatory means of protecting the environment in addition to regulation, providing there are appropriate safeguards and outcomes.<sup>9</sup> It is desirable to use a suite of tools to protect the environment, providing the environment is not compromised, the tools are not in conflict, and the principles of ecologically sustainable development are adhered to.

Environmental problems, of course, take many forms. The corollary of this is that solutions also require a tailored approach. Given this, it is difficult to support the notion of offsets in the abstract. Rather, the devil will always be in the details. It is noted, for example, there are vastly different considerations that attach to offset schemes depending on the type of issue involved - for example, offsets for quantifiable air or water pollution, as opposed to offsets for qualitative damage to biodiversity habitat.

Offset schemes need an evidence-based approach. Evaluation is a necessary corollary to targeted programs. Such evaluations need to use scientific principles – such as pilot studies or reviews – as a basis for learning.<sup>10</sup>

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<sup>9</sup> The views expressed are those of the EDO. For the NCC position on green offsets, please refer to the NCC's submission on the EPA *Green Offsets Concept Paper*, June 2002.

<sup>10</sup> We note some success with the Hunter River Salinity Trading Scheme.

Offset schemes have not been extensively tried in an Australian environment. There is still a need to actually develop the best available scientific information. This should be the explicit purpose of further pilot programs. In this respect, it is suggested that any schemes should be both monitored and evaluated, with adequate funding being provided for this purpose. Consistency with sustainable development should be the yardstick against which the success or otherwise of the schemes are measured.

Previous investigations by TEC and NCC have suggested certain offset schemes have more disadvantages than advantages, and therefore it is imperative that the EPA carries out further research on proposed schemes.<sup>11</sup>

In relation to the specific scheme proposed under the Bill, as noted in *Environmental Manager*, the EDO “want to see a lot more detail on the green offsets proposal and any such schemes should not be at the expense of a focus on pollution reduction at source.”<sup>12</sup> Our specific comments are outlined below.

The proposed scheme does not include any standards or criteria for assessment of the activity site and the offset site. This is in contrast to the offset regime established under the *Native Vegetation Conservation Act 2003* and the imminent *Native Vegetation Regulation 2005*. Under the native vegetation regime, a extensive assessment methodology has been developed in order to assess applications. Every application must meet the test of ‘maintain or improve environmental outcomes’ and the assessment methodology sets out criteria for determining what will meet this test. The proposed regime under the *POEO Act* does not have a strong environmental test or assessment criteria.

Proposed section 295N provides that licence conditions may be imposed even though the offset scheme or work does not relate to the licensed premises or the harm arising from the activity. While we appreciate the need for some flexibility in order to develop innovative offsets, the lack of required nexus between activity and offset is of concern. There are two key issues – qualitative nexus and geographical nexus. First, an offset should involve “like for like” or “like for better.” For example, where an activity has a negative impact on a particular aquatic species, any offset has to be related to improving the aquatic environment for that particular species. Under the vegetation regime, an offset for clearing an endangered ecological community, may only occur if the offset area includes that same community. Second, where no geographical nexus is required between the activity and the offset site, then this can lead to areas of highly concentrated polluting activities (with cumulative impacts) with unrelated offset sites at a distance. Without qualitative assessment criteria (as noted above) it will be difficult to show a direct benefit to the environment at the site of the activity.

Will conservation measures and outcomes be safeguarded in the future where possible? For example, will there be conservation covenants on relevant offset sites or similar measures to ensure offset sites are protected in perpetuity? A requirement for this could be inserted into the proposed section 295O(2).

The proposed section 295Q provides for regulations to support the scheme. Draft regulations must be made available for public comment before they are finalised. We

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<sup>11</sup> Please refer to the Joint groups submission on Green Offsets for the Sydney Water Project on the TEC website at: <http://www.tec.nccnsw.org.au/member/tec/projects/NaturalAreas/scp.html/>

<sup>12</sup> *Environmental Manager* 28<sup>th</sup> June 2005.

seek further detail to be included regarding, for example, public consultation on proposed offset projects, and details on regular reporting and reviews on offsets sites. Furthermore, clear plans must be made regarding continuation of offset measures where there has been a cancellation or suspension of participation rights or credits (under section 295R, and section 295S(3)(b)).

Proposed section 295V deals with the exercise of the offset scheme by other persons and bodies. For the initial stages (at least the first 2 years) of the proposed offsets scheme, it is appropriate for the EPA to retain full exercise of the functions regarding green offsets. As noted, community and environment groups have concerns about offsets generally and would not support delegation of functions, until the scheme has been tested, rigorously reviewed and found to improve environmental outcomes. If committees are established (as provided for in section 295V (2)) at a later stage, they must include community and environmental representatives.

## **10. Other amendments and additional issues**

### ***Appropriate Regulatory Authorities***

- *Clause [2] inserts a note into section 6 of the POEO Act for the purpose of clarifying matters relating to appropriate regulatory authorities.*
- *Clauses [90], [102], [113], [114], [115], [118], [123] and [161] make amendments consequential on the Waterways Authority being declared an appropriate regulatory authority by the Protection of the Environment Operations (General) Regulation 1998 and on the Minister administering the Ports Corporatisation and Waterways Management Act 1995 no longer assuming the role of an appropriate regulatory authority in relation to noise from certain activities connected with vessels.*
- *Clause [97] amends section 212C to allow an appropriate regulatory authority or an authorised officer of an authority to exercise a function that is not authorised or controlled by a licence, or a function in relation to which the authority is not the appropriate regulatory authority, in certain circumstances without the current requirement that the functions be exercised in good faith.*

The EDO and TEC generally support these amendments, however, consistent with our previous submissions, we would like to make the following general comment about appropriate regulatory authorities (“ARAs”).

It is submitted that the conservation groups have a number of continuing concerns in this area. These include that

- officers within appropriate regulatory authorities should be properly trained;
- mechanisms and policies need to be in place to ensure a consistency of approach;
- mechanisms and policies need to be in place to address issues pertaining to cumulative impacts;
- appropriate regulatory authorities need to be adequately resourced; and that
- the EPA should retain overarching authority – in law and in practice - to intervene to ensure appropriate policy and regulatory outcomes that ensure the proper protection of the environment.<sup>13</sup>

It is noted that Lgov NSW has – in conjunction with the EPA and local councils – prepared a comprehensive guidance document in relation to the *POEO Act 1997*. On its face, this document goes a long way towards addressing the above concerns. However, there remains a concern that some of these issues are not capable of “technical” solutions - for instance, the different accountabilities and priorities of Councils as compared to the EPA.

### **Notices**

- *Clauses [32], [34], [49], [120], [122] and [128]–[131] amend sections 84, 86, 99, 267, 271, 287, 288, 289 and 290 of the Act, respectively, to provide that an appeal lodged against a licence decision, breach notice, prevention notice, noise control notice or noise abatement order does not operate to stay the decision, notice or order appealed against except to the extent that the Land and Environment Court otherwise directs. The amendments also provide for the operation of the decisions, notices or orders if a stay is granted.*

The EDO and TEC support these amendments.

- *Section 94 is amended by clause [43] so that an appropriate regulatory authority can waive a prescribed fee for preparing and giving a clean-up notice without a request from the recipient of the notice to do so. Similarly, clause [50] amends section 100 so that an appropriate regulatory authority can waive a prescribed fee for preparing and giving a prevention notice without a request from the recipient of the notice to do so.*

What are examples of situations where it may be appropriate to waive the fee?

- *Section 95 is amended by clause [45] to extend the circumstances in which a prevention notice may be given to the situation where an activity is being carried on in contravention of, or is likely to cause a contravention of, a condition of a surrender of a licence or an exemption.*

The EDO and TEC support this amendment.

### **Cost recovery**

- *Section 107 is amended by clause [53] to provide for the recovery of costs of an appropriate regulatory authority associated with registering a compliance cost notice, and any resulting charge on land, arising out of environment protection notices.*

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<sup>13</sup> Section 318 presently allows the Minister to direct the EPA to become involved.

- *Clause [121] inserts proposed sections 267A and 267B. The proposed sections enable the charging and recovery of the administrative costs of preparing and giving noise control notices and the costs of monitoring and ensuring compliance with noise control notices.*

The EDO and TEC support the cost recovery provisions.

### **Notification**

- *Clause [72] amends section 148 to clarify that an employer who is notified by an employee of a pollution incident related to an activity carried on by or on behalf of the employer, or who otherwise becomes aware of such an incident, must notify the appropriate regulatory authority of the incident.*

The EDO and TEC strongly support mandatory notification provisions.

### **Odour incidents**

- *Clause [73] amends section 148 (as a result of the inclusion of the emission of odours as pollution incidents by clause [162]) to provide that obligations to report pollution incidents do not extend to incidents involving only the emission of an odour.*

The rationale is unclear for excluding reporting requirements for odour.

We note our previous comment in relation to odour incidents:

Section 129 makes it an offence for an occupier to cause or permit the emission of any *offensive* odour from premises. "Offensive odour" is defined as an odour:

- (a) that, by reason of its strength, nature, duration, character or quality, or the time at which it is emitted, or any other circumstances:
  - (i) is harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted, or
  - (ii) interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted, or
- (b) that is of a strength, nature, duration, character or quality prescribed by the regulations or that is emitted at a time, or in other circumstances, prescribed by the regulations.

This provision represents a retreat from the previous standard whereby it was an offence (subject to some defences) to permit the emission of any odour from premises.<sup>14</sup>

The former standard was at least consistent with the quest for ecologically sustainable development, seeking to contain odour within the boundary. Given the preponderance of land use conflicts currently being played out, it is submitted that there should be a return to the previous approach. The current standard also poses considerable difficulties around proving the level and characteristics of odour being emitted from premises.

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<sup>14</sup> The former section 15A of the *Clean Air Act 1961*.

The EDO and TEC support a power for the EPA (or ARA) to issue clean up notices requiring immediate action on offensive odours. The delayed effect of current prevention notices is inadequate.

We welcome the inclusion of the emission of odours as pollution incidents by clause [162].

### **Evidence**

- *Section 261 is amended by clause [116] to insert evidentiary provisions enabling certain matters to be proved by the production of certificates.*
- *Section 262 is amended by clause [117] to provide that an analyst's certificate which states that a container containing a sample was sealed, and the seal securing the container was unbroken, is admissible in evidence in any proceedings under the Principal Act. Currently, to be admissible, the certificate must certify that a container containing the sample was sealed and signed by an authorised officer.*

The EDO and TEC support these amendments.

### **Financial assurances**

- *Section 300 is amended by clause [136] to enable an appropriate regulatory authority to require a licence holder who is required to give a financial assurance to provide an independent assessment of the cost of the relevant work or program for which the assurance is required. This is to enable the authority to determine the amount of the assurance, which may not exceed the total cost of the work or program.*
- *Section 301 is amended by clause [137] to enable regulations to be made for or with respect to guidelines to be observed in calculating the amount of a financial assurance.*

The EDO and TEC support amendments relating to financial assurances. We support independent assessment of costs, however submit that the EPA or ARA should nominate the independent assessor, rather than the licence holder or former licence holder.

### **Public interest**

- *Clause [138] amends section 308 to make it clear that an appropriate regulatory authority is required only to include in its public register matters that are applicable to it.*
- *Clauses [139]–[141] amend section 319, in relation to the disclosure of information obtained in connection with the administration or execution of the Act. The amendments provide that disclosure may be made to a person engaged in administering another law of this State providing for the protection of the environment and permit the EPA to disclose information formerly required to be kept on a register. The amendments also prevent a person from being required to produce a document or thing, or to disclose information, to a court if the EPA certifies in writing that it is not in the public interest to do so.*

Public interest is not defined in relation to this amendment. The EDO and TEC would like further clarification or examples of situations where this clause may be applicable.

### ***Licences***

- *Clauses [142]–[144] amend section 319A to make it clear that a condition of a licence that specifies a time by which action is to be taken continues to have effect until it is complied with and that a condition that does not specify a time continues to have effect until it is complied with.*

The EDO and TEC support this amendment.

- *Clause [145] amends section 320A to provide that a person is guilty of an offence if the person, knowing it to be false or misleading, represents that the person holds a licence that permits certain activities.*

The EDO and TEC support this amendment.

- *Clause [146] amends section 323 of the POEO Act to provide that a condition of a licence may be inconsistent with a requirement of the same kind in a regulation, but only to the extent that the condition imposes a more stringent requirement than the regulation. Section 323 (5) currently provides that a condition that is inconsistent with a regulation has no force or effect. Clause [157] inserts a savings and transitional provision into the Act to provide that the amendment to section 323 applies to a condition that was attached to a licence before the commencement of that section.*

The EDO and TEC strongly support these provisions.

### ***Regulation-making powers***

- *Clause [153] amends Schedule 2 to expand the regulation-making power relating to the payment of fees for services provided by the EPA to include services provided by other appropriate regulatory authorities and to clarify that these fees include administrative costs and the costs associated with the functions of the EPA and other appropriate regulatory authorities under the POEO Act.*

The EDO and TEC support this amendment.

- *Clause [154] amends Schedule 2 to provide for a regulation-making power in respect of the independent certification of load-based licences.*

The EDO and TEC support this amendment. We would like to see the draft regulatory provision regarding the independence of the certifier. Will the relevant class of person be officially accredited certifiers?

## **10. Amendment of other Acts and regulations**

Schedule 2 of the Bill makes a number of amendments to related legislation.

### ***EHC Act 1985***

- *Schedule 2.1 amends the Environmentally Hazardous Chemicals Act 1985 to remove provisions relating to enforcement, as these matters will now be covered by the application of the Principal Act.*

This is supported, as noted above.

### ***Pesticides Act 1999***

- *Schedule 2.2 [1] and [2] amend the Pesticides Act 1999 to provide that an accredited rescue unit, whose members are given an exemption under section 116 of that Act for an offence done or omitted in good faith, has the same meaning as it has in the State Emergency and Rescue Management Act 1989.*
- *Schedule 2.2 [3] amends the Pesticides Act 1999 to insert proposed section 118A. The proposed section makes it clear that a notice or order given under that Act, or a condition of a licence or certificate of competency under that Act, that specifies a time by which action is to be taken continues to have effect until it is complied with and that a requirement that does not specify a time continues to have effect until it is complied with.*
- *Schedule 2.2 [4] and [5] amend the Pesticides Act 1999 to enable savings and transitional regulations to be made as a consequence of the amendment of that Act by the proposed Act.*

The EDO and TEC support these amendments.

### ***Protection of the Environment Administration Act 1991***

- *Schedule 2.3, clauses [1] and [3] amend the Protection of the Environment Administration Act 1991 to provide that the EPA must make its report on the state of the environment every 4 years rather than every 3 years, with the first report due on or before 1 October 2007.*

The EDO and TEC do **not** support this amendment. The rationale that a 4 year cycle will align with the NRC standards and targets framework (as noted in the Minister's second reading speech) is not satisfactory as many issues under the *POEO Act* are not relevant to natural resources issues.

We submit that SOE Reporting should be linked to the electoral cycle, similar to local government reporting. The Act should be amended to require a SOE Report in the first 12 months after an election, and in the last 12 months before the next election.

### ***Protection of the Environment Operations (General) Regulation 1998***

- **Schedule 2.4** *amends the Protection of the Environment Operations (General) Regulation 1998 to provide for additional matters that are to be included in a public register held by a regulatory authority.*

The EDO and TEC support these additional issues relating to detail of actual, agreed and weighted loads of assessable pollutants being added to the public register.

Our previous comment on the public register noted that in addition to the range of matters dealt with under section 308, it is submitted that the public register should contain information regarding reasons for decisions regarding licences (granting, varying,

suspending, exemptions and so on), monitoring data relating to any licence and the results of any review of a licence.

Furthermore, with regard to reasons, it should be noted that there are provisions under the *POEO Act 1997* where reasons for a decision need to be given (such as in relation to the grant or refusal of a licence or the grant of an exemption from the Act).<sup>15</sup> In such circumstances, the *POEO Act 1997* makes provisions for these to be dealt with under Regulation.<sup>16</sup> It is submitted that these provisions should be elevated into the legislation itself. These reasons should be publicly available on the register.

### ***Sydney Olympic Park Authority Act 2001***

- *Schedule 2.5 amends the Sydney Olympic Park Authority Act 2001 to remove a provision that makes the EPA the appropriate regulatory authority for the premises of Sydney Olympic Park.*

The EDO and TEC seek clarification as to who will be the ARA for ‘premises’, and why it is no longer necessary for the EPA to have that role? Furthermore, we seek clarification as to whether the EPA will retain its ARA role over other aspects such as contaminated sites?

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<sup>15</sup> See sections 61 and 284(9).

<sup>16</sup> *Protection of the Environment Operations (General) Regulation 1998* clause 46.