



SUBMISSION

To

Department of Infrastructure Planning and Environment

on

The Waste Management & Pollution Control Act

By

The Environmental Defender's Office (NT)

Funded, with thanks, from the Poola Foundation (Tom Kantor Fund), Australian Conservation Foundation and the Wilderness Society for their financial support through the Northern Australia Small Grants Program.

**Environmental Defenders Office (NT) Inc.
GPO Box 3180,
DARWIN NT 0801**

Environment and Planning Law Community Legal Service

• 8 Manton Street, Darwin NT 0800 • email edont@edo.org.au •
• Ph: 08 8982 1182 • Fax: 08 8982 1183 • NT Freecall: 1800 635 944 •

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SUMMARY

- 1 *The Waste Management and Pollution Control Act* (“the Act”) does not achieve its potential, as defined in its Objectives section, to provide for the protection of the environment through encouragement of effective waste management and pollution prevention.
- 2 Many definitions are either inadequate, pointless or a hindrance to better understanding of the meaning of the statute.
- 3 The Objectives of the Act must make the achievement of ecological sustainable development the core aim. This must be further supported in the Act by a Part devoted to ecosystem based management strategies and practical incentives for this to work.
- 4 The Act needs to apply to all situations where harm is caused to the environment through pollution.
- 5 Environmental Protection Objectives should be formulated for all areas at risk. The Act should be proactive and establish outcome goals for environmental protection and improvement.
- 6 Stringent conditions must be applied to all licensed activities conducted under this Act. The current licencing system does not protect the environment. The Act should provide for a system where outcome based goals are designed for environmental performance.
- 7 Transparency of licence issuing procedures must be a key objective of the Act. As a corollary to this public participation in the procedure for granting licences must be provided for in the Act.
- 8 Offences and Penalties should be strengthened.

SUBMISSION: *Waste Management & Pollution Control Act 1998*

This submission is prepared by the Environmental Defenders Office (NT) Inc (“EDO”). The EDO received a grant to examine four pieces of legislation that directly dealt with environmental matters.

The methodology that we adopted was to examine the legislation, define what it was trying to achieve, to assess whether this was being realised, to critically evaluate what else the legislation could achieve, to identify problems with the legislation in achieving its goals and potential goals and to offer suggestions for where the legislation could be improved.

This submission examines the *Waste Management and Pollution Control Act* (“the Act”).

General

The Act has a narrow focus in the way it goes about dealing with pollution and environmental degradation. What is needed is a grander vision of what a pollution control Act could do to protect the environment. The following principles are put forward for consideration.

Principle 1

The Act ought to create an environmental management regime based around the principle that the level of assessment and regulation of activities should be appropriate for their environmental risk.

The integration of approvals should be designed to minimise duplication in processes while ensuring that all environmentally relevant activities are subject to regulation and control.

Principle 2

What is required is a regime that integrates planning and environment approvals, so there is an explicit linkage between the two systems. The current Act actually exempts actions that have planning approval.

Principle 3

The waste management and pollution control Act should be more comprehensive to be more effective. There is nothing in the Act that encourages recycling or re-use as part of a waste management strategy. Nor is there a system for the return to source of electronic and like components. These concepts should be included in a comprehensive waste management and pollution control Act.

Principle 4

The Act should establish a system for creating measurable environmental improvement outcomes as objectives across the whole range of activities that cause problems with environmental health. For example there should be environmental improvement outcomes in relation to energy efficiency in the built environment and there should be environmental outcomes in relation to the production of greenhouse gases.

The long title of the Act is:

An Act to provide for the protection of the environment through encouragement of effective waste management and pollution prevention and control practices and for related purposes

Preliminary- including Definitions

Part 1 of the Act deals with “preliminary” matters including setting out definitions to be used in the Act (at section 4) and the Objectives of the Act (at section 5).

It is clear from the long title and the preliminary sections that the Act has been heavily influenced in its design by considerations of a commercial nature. Definitions have one eye on the cost to industry of the way a concept is defined. For instance “best practice environmental management” is defined to mean the management of an activity or premises in a cost effective manner. In the EDO view the place for caveats that lessen the burden on industry to comply with environmental standards is in the body of the Act itself and not in the definitions section. Either a management process is best practice or it is not. There ought not be limitations placed on the scope of such a concept by making the definition take into account cost considerations. Cost considerations will be taken into account by any enterprise striving to achieve best practice but the best practice goal post should not be lowered because it might cost a little more to get there. In fact the term only occurs twice in the Act and relates to matters to be taken into account, by the relevant authority, in determining whether to approve a licence (s32(1)(h)) or a compliance plan (s60(1)(c)). Not only is the definition not necessary but it detracts from the impact that the pursuit of best practice could have on improved environmental outcomes. The relevant authority could inform itself of the national or international best practice, as indeed it would have to do anyway in performing its functions and therefore a definition of the type provided is superfluous.

The definitions section of the Act should be clinical and clean. In an Act aimed at environmental protection the definitions should also be based in good scientific understanding of the concepts. For example contaminant is poorly defined-

"contaminant" means a solid, liquid or gas or any combination of such substances and includes –

- (a) noise, odour, heat and electromagnetic radiation;
- (b) a prescribed substance or prescribed class of substances; and
- (c) a substance having a prescribed property or prescribed class of properties;

This definition of contaminant is so general as to be meaningless. The word does not need defining as the plain meaning would suffice and certainly the definition provided does not clarify the plain meaning. Indeed the definition leaves it to the regulations to define the qualities that make a substance a contaminant. At this point this has not been done.

Attempts to define ecologically sustainable development (“ESD”) in statutes have generally met with little success. The concept is complex whereas definitions try to reduce the complexity to a few words or lines. The EDO is of the view that a new approach to definitions of scientifically complex concepts needs to be adopted. The statute’s dictionary could provide a reference to the definition from a recognised scientific journal. The definitions section could explain that the complex nature of the concept requires a more comprehensive definition and explanation so that users of the statute understand the principles and practical implications behind these complex concepts. Since statutes will refer to ESD and since users of the statute will be required to comply with principles of ESD in their practical application of the statute better guidance is required than a simplistic definition. The scientific referenced article could be attached to the Principal Act as a schedule or incorporated in the Regulations.

Recommendation

- 1.1 In any piece of legislation that aims to regulate environmental management or human interactions with the environment definitions of environmental concepts need to be based on the best scientific knowledge at the time. Definitional forms that refer to scientific manuals/journals/papers should be utilised to give scientific legitimacy to the intentions that underlie the need to have a definition in the first place.
- 1.2 In the *Waste Management and Pollution Control Act* the following definitions do not add clarity to the Act and should be removed or amended:
 - 1 air
 - 2 best practice environmental management
 - 3 contaminant

- | | |
|---|---|
| 4 | ecologically sustainable development |
| 5 | environment (includes the well being of humans) |
| 6 | holder of (redundant – a transferee is a holder) |
| 7 | improvement plan (illogical – can a plan be implemented any other way that by stages, if an improvement plan requires improvements and is created by authority of this Act how can it require improvements greater than those required under this Act?) |
| 8 | noise (unnecessary – its meaning is plain) |
| 9 | pollute – there are much better definitions available and this one involves a circular definition with the inadequate “contaminant”. |

The Objectives (section 5)

The objective section provides a general objective (to protect and where practicable to restore and enhance the quality of the Territory environment). It then provides a series of measures by which the Objective can be achieved. The second Object is to encourage ecological sustainable development (“ESD”) and the final Object is to facilitate the implementation of national environmental protection measures. The first and second Objects are manifestly linked; the environment can only be defined and understood in ecological terms. That the maintenance of ecologically sustainable development is, as an Object of the Act, introduced with the weasel words “to encourage” defines what is wrong with this Act. Put simply the sustainability of the ecosystems of which we are a part is essential. The scientific evidence that vast tracts of the world’s ecosystems are haemorrhaging, most recently the substantive Millennium Report released in April this year, is cause for serious concern and needs serious responses. An Act that purports to protect and enhance the Territory environment has its credentials severely challenged when the fundamental goal of achieving ecological sustainability is merely encouraged.

Recommendation

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| 2.1 | The Act must recognise the fundamental importance of ecological sustainability and eschew words that detract from this importance. |
| 2.2 | Delete “to encourage” and replace it with “to introduce systems to achieve” |
| 2.3 | Merely mentioning ESD in the Objects is paying lip service to the concept. The concept needs to be properly supported by relevant provisions within the body of the Act that impose a duty or establish bench-marks to achieve the Objects. |

Application of the Act (Section 6)

The Act applies in addition to and does not limit the application of other Acts. There are exceptions to where the Act applies and these exceptions actually mean that the majority of industries currently operating in the Territory, which are likely or liable to cause contamination or produce waste on any sort of scale, may not be covered under this Act (unless the pollution event is so massive that contaminants move off site).

These exceptions include contamination arising from a mining activity, a petroleum exploration or extraction activity (where the contamination is confined to the land of the activity) or released from a pipeline (so long as it does not spread more than 1 kilometre from the pipe. The Act does come into operation if the contamination spreads beyond those boundaries.

One of the principles of democratic good governance is that decisions ought to be transparent. It is of concern (whether justified or not) that some categories of industry are exempted from the operation of a pollution Act on the assumption that contaminants released by those industries are covered by the Act specifically pertaining to those industries. The principles of transparency include that there must be the appearance of even-handedness and fairness in all dealings with pollution events. The immediate problem arises that the government authority responsible for licensing these industries and which encourages their activities is also the government authority that must investigate breaches of the Act and issue proceedings against persons responsible for the breaches. In earlier times this might have been acceptable practice but it no longer is so.

Recommendation

- 3.1 Do not make any exemptions to this Act.
- 3.2 Delete the exemptions currently in place.
- 3.3 Amend other Acts to ensure compliance with this Act.
- 3.4 Broaden the scope of this Act so that any pollution event can be addressed by this Act.

Administration

Environmental Duties

This Part of the Act creates environmental duties on any person who conducts an activity that might pollute and cause environmental harm. The Act also imposes the duty to take all measures that are reasonable and practicable (why not practical?) to prevent or minimise the pollution or environmental harm.

This section also provides some direction for considering which measures are reasonable and practicable. Included in these considerations are – the nature of the environmental harm, the sensitivity of the environment, current technical information reasonably available to the person with the duty and the financial implications of implementing or carrying out the measures.

A failure to comply with this duty is not an offence (section 12 subsection (3)).

The creation of an environmental duty is in itself a sound concept. The weakening of the duty is not as sound. A duty that is not enforceable is a duty in name only more likely observed in the breach. The EDO understands where the idea of not making a breach of the duty comes from. It is steeped in the policy of self regulation and also in the policy of setting down the ideal in the Act with the implicit understanding that the ideal might not be achieved. From this understanding it flows that a person who fails to achieve the ideal (as anticipated) should not be punished.

However in an Act where the primary objective is protection of the environment by prevention of pollution it is flawed reasoning to accept that the failure to live up to one's statutory duty ought to go unpunished.

It is not even as though the duty is particularly onerous. A person must take all measures that are *reasonable and practicable to prevent or minimise* pollution or environmental harm. Built into the duty itself are several escape clauses. Despite subsection (2) of section 12 defining some of the areas to be considered in determining what is reasonable and practicable the section provides arguable grounds for any person accused of not fulfilling their environmental duty to escape any opprobrium. If a person can satisfy the authorities that they have complied with the section (even though a pollution event has occurred or is imminent) the way the next subsection (3) reads, implies that the person could escape being issued with a pollution abatement notice. Subjectivity has been built into this Part by creating circumstances where there is too much room for discretionary decisions to be made. There is too much subjectivity for this Part to be very meaningful in achieving the Objects of the Act. The government's administration time should not be taken up proving whether or not a person complied with their environmental duty in order to issue an abatement notice.

Section 14 does make it mandatory to report incidents causing or threatening to cause pollution, where the threatened or real harm is not trivial or negligible. EDO understands that in the interests of administration the authority may not want every single act causing pollution to be reported. Unfortunately this approach does not take into account a series of

incidents, though trivial in themselves, that could indicate poor work practices. Such poor work practices could lead to a major incident which could have been avoided if the incidents had been notified. In these times of computer lodging of certificates it would not be onerous to design a form that could be used to report minor incidents. The computer system could be set up to alert the appropriate authority when a predetermined number of such incidents were reported from the same premises or licensee. Alternatively a log of all incidents could be lodged with the relevant agency every 6 or 12 months. There is, in other words, no good reason not to be more vigilant in protecting the environment.

The licensee is further protected against self incrimination by sections (5) and (6) of section 14 that disallows reports provided by the person of pollution events to be used as evidence of proof of those events (other for a breach of that section). Since the only offence is failure to notify presumably where the person notifies the authority within the time limits there has been no breach of the section.

Recommendation

- 3.5 The Environmental Duties ought to be given teeth by making compliance mandatory and by deleting those phrases that weaken the importance of the duties.
- 3.6 Section 12 subsection 3 ought to be reworded to allow pollution abatement notices to be issued whether or not a person can mount the argument that they have complied with their environmental duty.

Environmental Protection Objectives (“EPO”)

Part 4 provides for the creation of Environmental Protection Objectives. As far as the EDO is aware there have been no Environmental Protection Objectives created under this section since the Act came into force. Beneficial Uses promulgated under the *Water Act* are automatically Environmental Protection Objectives and are not considered in this submission.

There is an opportunity in this part of the Act to make some real inroads into regulating practices that can cause pollution. Of particular interest is the possibility of making Environmental Protection Objectives to maintain and enhance air, water and soil quality. Though it is noted there is a limiting phrase in relation to soil in that Environmental Protection Objectives can only relate to already polluted soils. This could be self defeating or limiting of a potentially very useful tool for environmental protection. An EPO could be drawn up covering soils that were at risk of pollution or even degradation.

Recommendation

- 4.1 That the provisions of Part 4 be fully utilised
- 4.2 That limitations on the remedies for soil pollution be deleted so that Environmental Protection Objectives can be created to protect non-polluted but at risk soil profiles.

There is no opportunity for the public to initiate the process that leads to a Draft Environmental Objective. The initiative is purely in the hands of the Minister. In the public interest consideration should be given to allowing community members to initiate a Draft Environment Protection Objective. A provision such as this could have safeguards built in to deter frivolous or vexatious proposals. In any event it is unlikely that the government administration would be overwhelmed with proposals but it is one avenue where grassroots people who might be aware of an area deserving of protection can put forward genuine proposals and perhaps fulfil one of the Objects of the Act through community participation..

Recommendation

- 4.3 Part 4 of the Act be amended to allow for the process of producing and evaluating a draft environmental objective to be initiated by any member of the public.

Environment Protection Approvals and Licences and best practice licences.

Part 5 deals with approvals and licensing of activity that are potentially harmful to the environment. The heading of the Part is misleading since an approval to conduct the activity under consideration will not lead to environmental protection. It may lead to less harm being caused to the environment compared to a situation if no licensing or approval system was in place but it does not lead to protection. It is inevitable that the activities under consideration will lead to a degraded environment. Even with the best waste disposal management plans and best practices experience has shown that degradation of the environment will occur. Having made that point it must be said that a system of licensing, where safeguards against environmental damage can be incorporated into the conditions of the licence is one of the steps on the road to achieving the Objectives of the Act. That is not to admit that the current system of waste disposal is sustainable. It is the EDO view that current practices are not sustainable, but the solutions are not confined to what we, as a society, do about our waste once it is produced. Solutions will be multi faceted. There is not scope in this submission to canvass this area.

It is noted that in section 30 subsection (5) of the Act if an activity has approval, pursuant to a development permit, under the *Planning Act* then it does not require a licence under this Act. It is the EDO view that expertise in certain areas, such as pollution control, is built up within a department over time and the department with the expertise is best placed to issue and supervise the licence arrangements. The Development Consent Authority (“DCA”) is not necessarily that body in relation to pollution management. It may be assumed that in a development application review the department with the pollution control expertise has been consulted and has contributed relevant conditions for approval. However it must be noted that there is a difference between being granted the development permit to construct the premises and the ongoing operation of the premises. The DCA interest in the project is not an ongoing operational interest, but the pollution management department will have an interest in seeing that the quality of the operations is maintained so that pollution is avoided.

Now we come to what really is one of the main failures of this Act. The scope of activities that can be licensed under this Act is extremely narrow.

All persons are prohibited from conducting an activity listed in Schedule 2 to the Act unless they have either an environmental approval (Part 1 of Schedule 2) or a licence or best practice licence (Part 2 Schedule 2). The activities listed in schedule 2 relate to works for disposal of waste by burial, works for treatment of listed wastes, work related to premises for processing hydrocarbons. As you can see the scope of the Act, which purports to “to protect, and where practicable to restore and enhance the quality of, the Territory environment” is exceedingly narrow. It has already been noted above the exceptions that the Act does not cover and now when we come to the section dealing with administrative arrangements for allowing activities with some control over their environmental performance the range is tiny.

It will be argued that there are other Acts that cover other potentially polluting activities and this is true to some extent. But the better argument is that this Act should be much more thorough in the areas that it covers. And the areas that it covers should be much more comprehensive. The better approach would be to require the concurrence of the pollution agency as a precondition for any development approval since this agency has the expertise to assess whether and on what conditions to grant licences or approvals for relevant industry.

Consideration needs to be given to providing for measures to reduce greenhouse gas emissions, which must be defined as pollutants. The Act should be amended to provide statutory support for these measures.

Recommendation

- 5.1 The licensing system should be amended to ensure that all activities that have the potential to cause pollution require a licence.
- 5.2 While it is recognised that some activities require a licence under other Acts it is appropriate that those licences be endorsed by the administration overseeing this Act and appropriate conditions attached.
- 5.3 Schedule 2 would need to be radically amended to ensure that all activities capable of causing pollution or generating waste are brought under the umbrella of the statutory licensing regime.
- 5.4 Section 30 subsection (5) should be deleted. If it is a policy position that a multiplicity of licenses for the same activity is to be avoided, and such a policy position would be supported by the EDO, then the department that has expertise in pollution control and management should be the determining authority in issuing the licence. In any event the system of one licence but endorsed by all relevant departments each contributing appropriate conditions to the licence would be the most effective way to issue licences that are designed to achieve the established environmental improvement outcomes.

It is noted that under the existing Act there is no provision for public participation in the application and approval process of issuing licences. There may be an oblique way for the public to participate if the activity required a development consent and the development consent required a public environmental report or and environmental impact statement. In that case the public would have an opportunity to make submissions about the proposal. However there is no where in this Act itself that allows for public participation in the licensing process. It is the EDO view that all administrative processes that provide for the licensing and therefore the carrying out of activities that have the potential to damage the environment and thus impact on the community well-being should involve the public in the approval process.

Recommendation

- 5.5 The Act be amended to provide for public participation in the licensing process by allowing any person an opportunity of making a submission
- 5.6 Provide the right of appeal of all parties to a licence application and any person who makes a submission based on the merits of the application. Safeguards can be imposed to avoid frivolous submissions.
- 5.7 Licence reviews should be conducted on a regular basis and the Act amended to provide for public and community input into the review process.

Environmental Audits

Environmental audits are a valuable tool in assessing the performance of persons carrying out activities that may impact adversely on the environment. Part 6, which deals with environmental audits, ought to provide for a system of accreditation for expert environmental auditors. This would ensure independence and transparency of the process. It is noted that Part 9 provides for the accreditation of environmental auditors but to avoid ambiguity reference should be made to independent accredited auditors in the section that provides for audits.

Recommendation

6.1 The Part relating to environmental auditors ought to be amended to specify that the people conducting audits are accredited and independent expert environmental auditors.

Compliance Plans

Compliance Plans are basically a mechanism for allowing persons carrying on activities that require a licence but have not reached the standard required for a licence to be issued to continue to operate while gradually improving the performance of the operation.

Section 57 provides for a person to voluntarily submit a compliance plan where the person is of the opinion that it is not practical to comply with a provision of the Regulations that came into effect after the activity had been commenced. A draft compliance plan submitted under this section cannot be used as evidence for an offence against a provision of the Act contained in the plan. It is the EDO view that this section is too lenient towards potential polluters. At the least there should be an independent assessment of whether compliance with a new regulation is practical or not. It should not be the polluters themselves who decide whether they can comply with new regulations.

Recommendation

7.1 Section 57 should be amended to require an independent assessment where there is a question concerning the practicality of implementing a new regulatory requirement for a particular existing activity.

Enforcement

Persons can be appointed as authorised officers to enforce the Act under section 70. Section 72 sets out the powers of these authorised officers. To be appointed as an “authorised

officer” under Part 10 of this Act is to be given more far sweeping and controlling powers than even police officers have. These powers appear unfettered, except in relation to residential premises. In the case of residential premises the powers provided for under sections 72 and 74 can be exercised if a warrant has been issued.

The EDO recognises and supports the need for suitably qualified persons to have broad ranging powers to enable the objects of the Act to be achieved. The EDO does not support the idea that the exercise of these powers should have no limits, no checks or balances. At the least an authorised officer should have a reasonable belief that a breach of the Act has occurred or is liable to occur before they can exercise their powers under section 72 or section 74.

Recommendation

8.1 The exercise of powers defined in section 72 be restrained by the need for the authorised officer to have a reasonable belief that a breach of the Act is liable to occur or has already occurred.

Pollution Abatement Notices

Pollution abatement notices may be issued to any person who fails to fulfil their general environmental duty (section 12) or who has breached section 83, which defines general environmental offences, or who is the owner or occupier of polluted land.

It is an environmental offence to contravene or fail to comply with a pollution abatement notice.

Pollution abatement notices are personal and create responsibilities for the person to whom the notice is issued. These responsibilities continue even if the person sells, quits or otherwise disposes of the land. It is not clear whether a person could sell a property the subject of the pollution abatement notice and include the responsibilities in the sale. It is not hard to imagine a situation where a person might own polluted property but have insufficient funds to comply with the notice. If the person had the opportunity to sell the property with the notice and transfer the obligations to the purchaser, the purchaser with the appropriate financial backing could clean up the contamination. In this scenario the purchaser would acquire the land more cheaply and the environmental outcome would be better. The Act ought to allow for this possibility.

Recommendation

9.1 The Act be amended at Part 10 Division 2 to allow the sale of pollution abatement notices with property and the transfer of the obligations imposed by the notice. The administering authority would have to approve such a transfer which would be contingent upon verification of the purchaser's financial standing and might include a suitable "environmental bond" being deposited with the agency.

Offences and Penalties and Criminal Proceedings

Section 83 defines the range of general environmental offences that are penalised under this Act. These offences range from intentional pollution that causes serious environmental harm to storing a contaminant or waste in such a way that it might leak and cause environmental harm.

Section 84 provides two defences to a prosecution for a general environmental offence. The first defence lies in the defendant having exercised reasonable diligence. The second defence lies in the defendant complying with a provision of an environmental protection objective, a condition of an approval or licence or compliance with a provision of the Regulations. There is no indication whether the burden of proof lies with the defendant who relies on the defences offered by this section or with the prosecution. If the burden of proof lies with the prosecution it would need to prove that the defendant cannot rely on the defences offered. While it may be assumed that the burden of proof rests with the party seeking to rely on the defences it ought to be made clear in the section that this is so.

Recommendation

10.1 Section 84 be amended to make it clear that the burden of proof of the defences offered rests with the party trying to rely on that defence.

What is the exercise of due diligence or "all due diligence"? It is not defined in the Act and nor have the Courts provided a definition. In the NSW case of *NSW State Pollution Control Commission –v- RV Kelly & E Kelly Pty Ltd* in 1991 Hemmings J pointed out that the defendant company must prove not only that it was exercising due diligence but that it used "all due diligence". In relation to the exercise of all due diligence Hemmings J rejected the standard of perfection (see *Holmes and V Arato* (1983) 32 SASR 106) and stated that while due diligence depended on the circumstances of the case, it did contemplate a mind "concentrated on the likely risks". He found this lacking in the proceedings before him. He stated:

“the requirements are not satisfied by precautions merely general in the business of the corporation, unless also designed to prevent the contravention. Whether the defendant took precautions that ought to have been taken must always be a question of fact and degree and, in my opinion, must be decided objectively, according to the standard of a reasonable man in the circumstances. It would be no answer for a person to say that he did his best, given his particular abilities, resources and circumstances.”

Another example may assist further. Bata Industries Limited was charged with unlawfully discharging industrial waste from its shoe factory. The directors and senior managers were also charged and raised the defence of due diligence (*R v Bata Industries Limited* 7/2/92 Supreme Court of Ontario). The Court said that in order to establish the due diligence defence the defendants must:

- show that they were aware of the environmental risks;
- had instituted a system of environmental compliance;
- had properly supervised those responsible for compliance; and
- had immediately responded to a situation where the system failed.

The Court then assessed each individual defendant against these criteria:

- the site manager was the responsible officer who knew of the emission but did not remedy it and was fined;
- the company president, who had been advised of the problem also failed to rectify it and was similarly fined;
- the Chief Executive Officer however, was not liable because having been instrumental in formulating an environmental policy he had delegated to other senior officers responsibility for administering and enforcing it. He himself had been unaware of the offending discharge.

The Act ought to give some guidance as to what reasonable diligence involves to assist the Court and to help persons who may need to demonstrate due diligence.

Recommendation

10.2 The parameters of reasonable diligence ought to be canvassed in the Act.

Subsection (3) of section 84 provides that a person who would have been found guilty of a breach of section 83 but for the defences provided in the Act is deemed to have failed to comply with section 83 for the purposes of being granted, issued or having enforced an approval, licence or pollution abatement notice and the making of a court order under section 97. This means that while a person may have exercised due diligence and complied with a provision of an environmental protection objective or a condition of a licence they will be

deemed to have breached section 83 when they apply for a licence or approval. Presumably a breach of section 83 will be deemed to have occurred for the purposes of this subsection even though the person might have been acquitted of any charges brought against them for a breach of section 83. That is, a deemed breach will be entered onto their record and be taken into account if they apply for a licence in the future. It is not clear what the policy purpose is behind this subsection but it seems contrary to principles of natural justice.

In some sections specific monetary penalties are indicated. The better approach with legislative drafting is to set a penalty in terms of penalty units. A penalty unit is given a monetary amount in a Regulation that can be more readily changed. This is of course a recommendation that reach across all Acts that contain penalty provisions and would require enabling legislation. Where the structure of the Act, in relation to enforcement, defines penalties it should reflect the High Court case of *He Kan Teh* –

- Intent (may incorporate very big fines – e.g. \$1 million to \$5 million + custodial sentence)
- Strict liability offences, that provide for defences of due diligence and honest and reasonable mistake; and
- Absolute liability where no defences are available and provide for fines of e.g. \$1,500.

Recommendation

10.3 Delete specific monetary values for penalties and substitute a penalty unit regime. The penalty can be defined and given a specific monetary value in the enabling legislation Regulations.

Considerations of degree of liability should be included in penalty provisions.

Section 91 provides that where a body corporate commits an offence every director is deemed to have committed the offence. Subsection (2) provides defences including at (2) (d) the defendant could not by the exercise of reasonable diligence have prevented the commission of the offence by the body corporate. The defence does not actually require the director to have demonstrated reasonable diligence but just that if reasonable diligence had been applied the offence would still have occurred. The EDO is of the view that this falls short of the standard of due care and diligence that ought to be expected of the director of a

body corporate. At the very least the director must be required to demonstrate that they had acted with reasonable diligence and that despite this the breach still occurred.

Recommendation

10.4 Section 91 subsection (2)(d) be amended to require a director to demonstrate they have exercised actual reasonable diligence before the defence becomes available.

10.5 The same recommendation should also be applied to sections 92 and 93 subsections (3)(d) in each case, so that actual reasonable diligence has to be demonstrated before the defence becomes available.

The claim that “If I had been reasonably diligent it would not have prevented the breach” by a defendant has to be answered with the question: How do you know? A hypothetical scenario is being put forward as grounds for a legitimate defence. We are not necessarily talking about the rogue partner or employee here but the full range of possible situations where a breach could occur and the directors be held vicariously liable. A legitimate defence ought to rely on what reasonable diligence the directors can demonstrate that they had actually practised rather than what might have been the hypothetical case.

Regulations

Section 117 of the Act lists over 18 areas of pollution or waste management that Regulations could make specific provisions about. So far the Regulations have not made any provisions for these matters. The framers of the legislation clearly contemplated that Regulations would assist the efficient management of pollution and waste services in those specific areas. It is unfortunate that no regulations in those areas have yet been drafted.

General Considerations

As has previously been mentioned the Act is quite narrow in scope. The Act could have been and still could be a more comprehensive instrument for pollution prevention and waste management. What is needed is a grander vision of what a pollution control Act could do to protect the environment.

Principle 1

The Act ought to create an environmental management regime based around the principle that the level of assessment and regulation of activities should be appropriate for their environmental risk.

The integration of approvals should be designed to minimise duplication in processes while ensuring that all environmentally relevant activities are subject to regulation and control.

Principle 2

What is required is a regime that integrates planning and environment approvals, so there is an explicit linkage between the two systems. The current Act actually exempts actions that have planning approval.

Principle 3

The waste management and pollution control Act should be more comprehensive to be more effective. There is nothing in the Act that encourages recycling or re-use as part of a waste management strategy. Nor is there a system for the return to source of electronic and like components. These concepts should be included in a comprehensive waste management and pollution control Act.

Principle 4

The Act should incorporate environmental improvement outcomes as aprt of the process for achieving its Objectives.

The EDO NT again thanks you for the opportunity to make this submission.

Yours faithfully,



Tom Cowen
Principal Lawyer