Issues Paper:
Review of the Protection of the Environment Operations Act 1997

NSW EPA

ENVIRONMENT PROTECTION AUTHORITY

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Further Information

The Issues Paper is available on the EPA website at www.epa.nsw.gov.au. Printed copies are available from the EPA's Pollution Line on 131 555.

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Introduction

The New South Wales Government has a strong armoury of environmental legislation in place to protect our people and environmental resources. A major component is the Protection of the Environment Operations Act (POEO Act) which was enacted in 1997. This legislation has been in place for five years and in operation for over three years.

It is important to periodically review legislation to ensure that it is achieving what was intended and to update its provisions based on experience. The Government has committed to do this regularly and this Paper has been developed to help us do that, by facilitating discussion of the issues. It puts forward a number of issues based on the first round of comments from stakeholders and analysis conducted by the Environment Protection Authority (EPA).

Section 327 of the POEO Act requires the Minister to review whether the policy objectives of the Act remain valid and the terms of the Act remain appropriate. This review is to be undertaken as soon as possible after a period of five years from the date of assent (December 2002) and the result reported to Parliament in December 2003.

Comments received on the adequacy and effectiveness of the Act

The majority of submissions received to date as part of the review process indicate general support for the thrust of the Act and agreement that overall it operates well.

However comments on the waste regulatory provisions have highlighted concerns about their complexity, cost of compliance and lack of integration with other environmental provisions of the Act. Submissions have also raised concerns about the effectiveness of a number of other specific provisions in the Act and suggestions for improvements to the Act.

The majority of local councils provided positive feedback about the legislation, agreeing that the Act has strengthened the regulatory framework for local government environment protection work, given councils effective tools to manage environmental issues and clarified the regulatory roles of the EPA and local government. On the other hand, a significant proportion of councils experience ongoing issues regulating premises transferred to councils from the EPA, due primarily to lack of resources.

The EPA has produced a separate document which summarises the results of the submissions received and the responses from local councils to a survey.

More public feedback will be sought through consultation sessions following the release of this Issues Paper. The outcomes of the public consultation will be included in the Minister's report to Parliament on the POEO Act review, due to be tabled in December 2003.

The licensing regime and Schedule 1 of the Act

The POEO Act currently sets up two levels of environmental regulation. On the one hand, the EPA regulates the higher environmental risk activities listed in Schedule 1 by licensing, as well as all activities carried on by public authorities. Schedule 1 of the Act identifies those activities that need to be licensed by the EPA, based on the type or threshold of industrial or agricultural activity. These activities are those that are best regulated by licensing and are generally higher environmental risk activities.

On the other hand, local councils and other public authorities regulate other important 'non-scheduled' activities. These are activities less suitable for licensing and are generally lower risk activities. It is appropriate that the EPA regulates higher risk, larger industrial and agricultural activities.

Alternatives to licensing

The EPA regulates a wide range of industrial activities with differing environmental risk. Based on the experience of regulating Schedule 1 activities, some activities do not pose the same risk as others. However the licensing system requires the same effort regardless of the environmental risk posed by the activity. Spending time on licensing lower risk activities can divert the EPA's efforts from other areas without much environmental benefit in return. For example it can limit the time available for compliance and enforcement activities and complementary non-regulatory strategies such as education programs and cleaner production initiatives.

Possible alternative tools for regulating industrial activities with lower environmental risk include:

- simplified licensing – this could entail a licence of 1 or 2 pages, scaled down licence review and/or streamlined processing of annual returns
- industry based regulations – licences could be replaced by a regulation that sets environmental requirements for the whole sector. No licence fees
- relying on the offence provisions in the POEO Act – without the need for a licence or fees

Implementation of any of the alternative approaches would require detailed development including:

- full consultation with industry and community groups
- an appropriate education programme
- an effective inspection, compliance and enforcement strategy
- an effective review strategy.

The intention is not to either expand or reduce the range of activities regulated by the EPA but rather simplify the method of regulation.

Should the EPA's regulatory approach focus resources on higher environmental risk? Are there alternative approaches to licensing that would provide appropriate levels of control based on risk?

The licensing schedule

Schedule 1 of the POEO Act determines the need for an environment protection licence. The Act defines activities and sets thresholds for licensing. The EPA is the appropriate regulatory authority (ARA) for the activities specified in the Schedule. A summary of the Schedule is in Appendix 1.

The Schedule needs to be periodically reviewed to ensure that the higher environmental risk activities are appropriately licensed by the EPA and that regulatory effort reflects environmental risk. Concerns have also been raised that some definitions are unclear.

Are changes needed to ensure that the Schedule categories are aligned with environmental risk? Do any definitions need to be clarified?

Annual returns

The issue of independent certification of annual returns arose in a 2001 Audit Office recommendation stating that the EPA consider introducing a certification scheme. The EPA agreed to consider whether a further step in the annual return process would be beneficial and cost effective.

Currently, CEOs are required to personally certify the accuracy of annual returns. The aim of a system of independent certification of annual returns is to improve confidence in the reliability of annual return data.

Would you support the use of independent certification of annual returns as an additional regulatory tool? Can you provide information on the costs of running such a certification process?

Fit and proper person

The Act currently prescribes matters to be taken into consideration when the EPA exercises its licensing functions, including whether the person concerned is a 'fit and proper person'. For example, the EPA can revoke a licence when it is of the opinion that a licensee is no longer a fit and proper person. The factors which can be considered when deciding whether a person is a fit and proper person are defined in s.83 of the Act and cl.49A of the Protection of the Environment Operations (General) Regulation 1998. The factors currently available are limited to matters such as contraventions of environmental legislation or licences.

Are there other factors that should be considered in determining whether a licensee is a fit and proper person?

Water protection licensing

Currently only activities that are listed in Schedule 1 of the POEO Act are required to be licensed. Operators of non-scheduled activities that discharge waste to waters, may voluntarily apply for a licence which, if granted, can provide a defence against water pollution. In some cases operators in sensitive environments, where there is a serious threat of water pollution, have not applied for a licence. Mismanagement has then led to water pollution. Operating in accordance with a licence may have prevented the pollution.

Are other approaches needed in sensitive environments to prevent pollution of waters?

Waste regulatory framework

The Government has two primary goals in relation to waste:

1. to protect the environment from potential negative impacts, and
2. to encourage resource recovery from wastes and waste avoidance.

The current framework under the POEO Act regulates waste to achieve the first goal primarily through licensing and tracking requirements and offence provisions, and in part achieves the second goal by using the economic mechanism of imposing a waste levy on the disposal of waste at licensed facilities. The second goal is also now principally being addressed through the mechanisms provided under the *Waste Avoidance and Resource Recovery Act 2001*, such as the recent adoption of a *Waste Strategy* for NSW and the work of Resource NSW.

Difficulties have been encountered with the current waste regulatory framework in deciding when something is no longer a 'waste'. This is an important question because the answer determines if the waste regulatory controls or imposts outlined above apply (i.e. licensing, the levy, offence provisions, tracking requirements etc).

In particular, the question has arisen when wastes are allegedly re-used or recovered as fill material, fertiliser or fuel. Where the re-use or recovery is harmful to the environment it may be worse than waste disposal.

The EPA has received a number of submissions raising concerns about re-use and recovery of waste that may be harmful to the environment. On the other hand, the EPA has also received submissions arguing that the current legislation discourages appropriate re-use and recovery.

Should there be specific controls to prevent the re-use of wastes that may be environmentally harmful? How can appropriate re-uses be encouraged through the mechanisms of the POEO Act?

Classification of waste

All waste must be classified into one of 8 possible classifications. These determine how the waste must be managed. For example, the particular classification of a waste will determine:

- the kind of facility that may be used to dispose of the waste
- whether a licence is required to dispose of, transport, process or otherwise manage the waste
- whether movement of the waste must be tracked.

The classifications are inert, solid, industrial, hazardous, Group A, Group B, Group C and non-controlled aqueous liquid waste. The highest risk wastes are hazardous, industrial and Group A wastes. Most waste may be automatically classified by where it comes from or what it is with reference to the lists of waste types set out in the Act. For example, all domestic waste is automatically classified as solid waste, all construction and demolition waste (that does not contain asbestos) is classified as inert waste, all asbestos wastes are classified industrial waste, all dangerous goods are hazardous waste, all non-aqueous liquids are Group A waste, all liquid grease trap wastes from food are Group B wastes, all septic tank waste is Group C waste etc. Where a waste cannot be automatically classified it must be assessed (using chemical analysis) and classified in accordance with the procedures set out in the guideline that has been developed by the EPA[1].

Various stakeholders have reported difficulty in understanding and complying with the existing waste classification scheme[2]. The Independent Commission Against Corruption (ICAC) has also noted that whenever waste is subject to classification there is a risk that the generator will fraudulently classify the waste to avoid or minimise costs[3]. Costs of disposal are greater for higher risk wastes, therefore there is an incentive to classify these waste as lower risk wastes to reduce the price paid for disposal. To prevent this risk the ICAC has recommended that 'there must be a proper system for regulating waste generators'[4].

Are changes to the classification of the waste scheme necessary to make it easier to understand and harder to defraud? Are changes to the Act necessary to better regulate the activities of waste generators?

Waste tracking

Some higher risk wastes must be tracked to ensure they are transported safely to facilities that can lawfully and appropriately deal with them. The tracking system also provides statistical information to help the community, industry and the Government better understand and develop strategies on how to best handle these wastes. Currently under NSW requirements, wastes transported intrastate are required to be tracked using paper-based forms. When wastes are transported interstate they fall under the national requirements of the Controlled Waste NEPM[5].

A number of submissions have stated that the current system is unwieldy and should be replaced with an online tracking system. The EPA agrees that the current system is administratively cumbersome, placing a considerable reporting burden on some sectors of industry, and does not provide statistical information in a readily retrievable form.

Submissions have also raised a concern that the waste tracking system is too complex and onerous.

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[1] *Environmental Guidelines: Assessment, Classification & Management of Liquid & Non-Liquid Wastes,* EPA, May 1999.
[2] See also *Taking the Whiff out of Waste – Guidelines for managing corruption risks in the waste sector*, ICAC, November 2002, p26.
[3] Ibid.
[4] Ibid.
[5] The *National Environment Protection (Movement of Controlled Wastes between States and Territories) Measure* made under the *National Environment Protection Council Act 1994* (Cwlth) on 26 June 1998.

Would an online waste tracking system make waste tracking, reporting and data collection easier and more effective? What potential impacts would an online system have on business efficiencies and costs? Should the waste tracking system be simplified or modified?

Public participation and access to information

Environmental legislation needs to include effective mechanisms for public consultation on development proposals, licences and reviews of licence conditions. A number of mechanisms were included in the Act to do this. They include:

- establishing public registers of regulatory action taken by the EPA and local government – to ensure transparency in licensing and regulating industry
- inviting public comment and submissions on licence reviews
- introducing a duty to notify pollution incidents
- extensive public consultation process put in place for the development of Protection of the Environment Policies.

Public register

The 'community right to know' provisions of the POEO Act (s308) require that the EPA make available to the public a range of information about its regulatory activities. To facilitate this requirement the EPA has developed, and maintains, an online POEO Public Register. The Register provides a user-friendly self-service point of access to information about POEO licences, licence applications, environment protection and noise control notices, exemptions from the provisions of the POEO Act or regulations, and other regulatory information.

Since the launch of the Public Register in June 2001 the community's response to the site has been extremely positive and it remains one of the most visited areas of the EPA's website.

Is the Public Register an effective mechanism to provide information to the community? Are there changes you'd like to see made to the register?

Licence review

The Act requires the EPA to review all environment protection licences at least once every three years and to give public notice of licences to be reviewed, within specified timeframes.

The EPA's evaluation of the first cycle of licence reviews highlighted some limitations of the current review process and indicated scope to improve environmental outcomes.

For example, one limitation is that licence reviews must be advertised not less than one month and not more than six months before the review is undertaken, which means the EPA cannot initiate a licence review in response to a complaint or pollution incident, but must wait until arrangements have been made to advertise the licence and a further one month has passed. This makes it difficult for the EPA to integrate licence reviews with its other regulatory work.

The EPA is currently piloting a new approach aiming to achieve improved environmental outcomes from the licence review process. The new approach involves intensive reviews of all licences in selected industry sectors. The intensive reviews include literature reviews and research to establish international best practice and improvements in technologies, with the results being applied to individual licences to achieve significant environmental improvements. Consideration could be given to putting more effort into these intensive reviews of higher risk licences rather than attempting to review all licences every three years.

Should there be a more flexible advertising process? Do you think the EPA should be concentrating its efforts on comprehensive reviews of higher risk licences, or do you think it is more important that every licence be reviewed within a three-year timeframe?

Making public statements and warnings

In the course of administering the Act it is sometimes appropriate for the Minister, the EPA, another ARA or their officers to make a public statement or warning about an activity, incident or person. For example, the EPA may want to recommend that a particular product not be used because of its harm to the environment; provide information to the community about enforcement action taken; or explain why court proceedings couldn't be taken.

These types of comments can be unduly constrained by concerns about potential defamation action arising from such a statement or warning.

Should the EPA and other ARAs be afforded legal protection when making public statements or issue warnings on matters of public importance or community interest? What form should that protection take?

Compliance and enforcement

The POEO Act contains strong enforcement and compliance provisions to deal with environmental offenders. For example it has:

- powerful prosecution provisions
- strong investigation powers to collect evidence of offences
- substantial penalties for offences and a range of sentencing options the Court may use to deal with offenders
- notice powers to require pollution problems to be fixed.

This paper identifies issues with these provisions.

Powers to deal with odour incidents

Odour incidents can interfere with community amenity and can have health impacts. Some stakeholders have argued that the ARA should be able to issue clean-up notices requiring immediate action to prevent odours. The Act currently allows the ARA to issue prevention notices to manage odours but these have a delayed effect because of appeal rights.

Should odour be included within the scope of clean-up notices so that immediate action can be required to clean up odourous materials?

Cost recovery provisions for noise control notices

Cost recovery provisions were included in the POEO Act for most notices to encourage their use by councils. Noise provisions in the POEO Act were transferred directly from the Noise Control Act and did not include cost recovery.

Should there be cost recovery for noise control notices?

Disabling alarms

Continuously and intermittently sounding car and building intruder alarms can cause considerable community disturbance. Police, EPA and local council enforcement officers can issue on-the-spot fines for causing or permitting an alarm to be sounded for more than a specified time. However powers under the POEO Act to disable an illegally sounding alarm are limited and inconsistent.

There is no express power under the POEO Act to disable car alarms. In addition, compensation may be payable under s.202 for damage arising from entering the premises.

Should the powers of the police, EPA and council authorised officers to disable illegally sounding car and building intruder alarms be clarified or expanded? If so how should issues such as potential compensation being payable for damage caused by the use of those powers, technical difficulties in attempting to turn off the alarm and the need to re-secure the car or building, be addressed?

Notices requiring immediate action

Sometimes an ARA will want to issue a prevention notice, licence variation notice or noise control notice which requires action within the appeal period (21 days). The ability to implement these measures is hindered if there is legal doubt about whether this action can be required within the appeal period. For example, in the case where the EPA receives complaints about odour from a licensed premises and after investigation, it is determined that the odour is emanating from the effluent storage pond on the premises. The EPA then issues a prevention notice requiring action to be taken to prevent the odour, but at present, the licensee can take no action for 21 days, delaying immediate action and subjecting the complainants to ongoing odour.

In other Australian jurisdictions notices can require action within an appeal period. This is balanced by an ability for a recipient to apply for a postponement of the notice requirement as an aspect of the appeal. This type of provision allows timely action to remedy an environmental problem.

Should notices be able to require immediate action?

Mandatory audits

The EPA can require licensees to undertake mandatory audits when certain conditions are met, under section 175 of the Act. Some councils have requested an extension of their power to require mandatory audits of non-scheduled activities.

Should the power to require mandatory audits be extended to other ARAs?

Corporate liability

Section 169 deals with the liability of directors and others involved in the management of a corporation that contravenes the Act. The section provides a number of defences to directors and managers of corporations including:

- the corporation contravened the provision without the actual, imputed or constructive knowledge of the person
- the person was not in a position to influence the conduct of the corporation
- the person used all due diligence to prevent the contravention by the corporation.

Feedback is sought on whether these defences are still appropriate. For example, the NSW *Occupational Health and Safety Act 2000* has removed the defence relating to knowledge in keeping with more modern principles of corporate responsibility.

Also the Act does not provide guidance in the situation where a company with environmental liabilities is deregistered. The EPA is seeking views on who should be responsible for the

environmental liabilities (including clean up obligations) of a deregistered company and whether the Act should provide for this.

Are the existing corporate liability provisions appropriate? Who should be responsible for the environmental liabilities of deregistered companies?

Offence relating to woodsmoke emissions

While there are general provisions in NSW legislation enabling local councils to undertake enforcement relating to abatement of air pollution or mitigation of nuisance, there are no provisions relating specifically to the operation of domestic solid fuel heaters. Feedback received from councils indicates that many would welcome a provision such as an on-the-spot fine for poor operation of a solid fuel heater that results in adverse impacts on air quality, as a means of deterring poor operational practice.

Are any additional powers needed to control the operation of solid fuel heaters?

Increasing maximum fines and penalties

Fines and penalties provide a significant deterrent to potential environmental offenders.

Should fines and penalties be increased to provide greater protection of the environment through higher deterrent value and also bring them into line with penalties for other environmental offences? For example, other environmental offences in NSW and other jurisdictions have higher financial penalties for equivalent Tier 1, Tier 2 and litter offences and gaol terms for equivalent Tier 2 offences.

What are your views on increasing maximum fines and penalties?

Litter

Some submissions have called for new litter powers in relation to bill posters, similar to those recently introduced in Victoria[6]. The submissions argue that bill posters are creating litter problems and that existing planning and environmental laws are not sufficiently targeted or do not go far enough to prevent the creation of bill poster litter. For example, the use of structures such as poles for bill poster advertising is generally without the consent of the owner of the structure. The submissions contend that if the use of a structure for bill postering is in breach of planning laws, enforcement action can only be taken against the owner of the structure rather than the person erecting the bill posters or the organisation carrying on the advertising.

Is litter from bill posters a significant problem? Does the problem warrant the introduction of new offence provisions to prevent this kind of litter?

Sentencing orders

When a person is convicted of an offence against the POEO Act or Regulations, the EPA may apply to the Court for various orders under Part 8.3 of the Act. The POEO Act introduced a number of new sentencing options such as investigation costs orders, monetary benefits penalty orders, publication orders, environmental service orders and environmental audit orders. The Act also carried forward existing powers to make orders regarding clean-up and compensation. The scope of the court orders under Part 8.3 of the Act could be widened further.

Should the scope of sentencing orders be expanded?

[6] See sections 45O-45R of the *Environment Protection Act 1970 (Vic).*

Court enforceable undertakings

Currently, the POEO Act does not allow the EPA to accept undertakings to remedy or restrain breaches of the Act without first commencing court proceedings.

Court enforceable undertakings have proven effective in providing an enhanced enforcement capability for other regulators such as the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC). Where an authority believes that a party has not complied with the terms of an undertaking, it may apply to the Court for appropriate orders, which might include:

1. an order directing compliance with the undertaking
2. an order to pay a sum up to the amount of any financial benefit that was obtained directly or indirectly and that is reasonably attributable to the breach
3. any order that the court considers appropriate to compensate any person who has suffered loss or damage as a result of the breach
4. any other order that the court considers appropriate.

Should the EPA be enabled to accept court enforceable undertakings?

Waste offences and powers

The ICAC review of the waste industry identified that, unlike most industries regulated by the EPA and councils, the waste industry has two major components – the regulated industry and the 'illegal' waste industry[7]. There is substantial money to be made by operating outside the regulated industry[8]. NSW is not alone in experiencing difficulties with an 'illegal' waste industry[9].

Examples of the types of illegal waste activities the EPA, Councils and RID Squads[10] are dealing with are:

- waste dumping – the dumping of waste in the bush, by the roadside, on public reserves and private land
- waste fill operations – where unsuitable processed or unprocessed wastes are used in fill operations, for example contaminated soils or building and demolition wastes
- recycling, sorting and processing facilities – where little genuine recycling etc occurs so large amounts of waste are accumulated and later abandoned by the operator
- mis-classification of waste – where unscrupulous operators are claiming a waste is, for example, uncontaminated with asbestos or a lower-risk waste, when it really contains hazardous contaminants and should be classified as a 'hazardous waste'. This results in the waste being accepted or disposed of inappropriately and at lower cost
- fertilisers or soil conditioners – where unsuitable wastes or waste derived substances are being processed for use as fertilisers or soil conditioners and applied to land.

Dealing with players that have no regard for the law presents major difficulties for regulators and, at times, dangers for enforcement officers. Illegal practices can also undermine the viability of legitimate waste enterprises. As a result regulating waste, in comparison to other forms of pollution, is substantially more challenging.

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[7] *Taking the Whiff out of Waste – Guidelines for managing corruption risks in the waste sector*, ICAC November 2002, pp6–8.

[8] Ibid, p12.

[9] Similar problems exist in other Australian jurisdictions and worldwide, e.g. California USA, Asia and the UK.

[10] The Regional Illegal Dumping Squads or RID Squads are an initiative of Resource NSW and Western Sydney councils and have been set up to target dumping hot spots across 20 local government areas in the Sydney greater metropolitan area, including Newcastle, the Central Coast and the Illawarra.

Some of the key tools for combating the 'illegal' waste industry are the offence and notice power provisions under the POEO Act. With a number of years of experience in enforcing these laws and using these powers, certain limitations have become apparent.

Tier I offences

Currently, a person commits a Tier 1 offence if the person willfully or negligently disposes of waste in a manner that harms or is likely to harm the environment. An offender may only be prosecuted under this provision if it can be proved beyond reasonable doubt that the substance is a waste. There are cases where it is difficult to prove that the person was disposing of the substance as waste. For example, the person may argue that the substance is being used as fill or fertiliser and therefore there is no act of disposal and no waste.

A person also commits a Tier 1 offence if the person willfully or negligently causes any substance to leak, spill or escape in a manner that harms or is likely to harm the environment.

However, if a person willfully or negligently pollutes land with a substance that is not a waste or the incident does not involve a leak or spill of the substance (i.e. the substance is placed on land) the person cannot currently be prosecuted for a Tier 1 offence, regardless of the environmental harm. This is clearly an anomaly.

Tier 2 offences

A further limitation may be that the current Tier 2 waste offences are too narrow. The occupier or owner of land commits a Tier 2 waste offence if the person uses the land to store or dispose of waste without an environment protection licence or without planning approval. This offence is only committed if a licence or approval is required.

However, in some cases no licence or approval is required. For example, a licence or approval is not required for the storage (for sorting, recycling, processing or other purposes) or disposal of smaller amounts of waste. Further the planning laws may not require a planning approval in cases where the waste activity is ancillary to an existing activity.

It is also not always clear whether a licence or planning approval is required. For example, in cases involving so-called recycling operations, arguments can arise as to whether the operation is really recycling or *de facto* disposal, or in cases where waste is used as fill, arguments can arise as to whether the operation is rehabilitation of a void or waste disposal.

As a result, councils and the EPA can find it difficult to prosecute even if the person is undertaking these activities in a manner that may harm the environment.

Councils and the EPA can currently issue a clean-up notice if waste has been placed or disposed of on premises unlawfully. The notice can require the removal or storage of the waste. The notice can also require that the person must receive no more waste on the premises.

However, as noted in the discussion above, there have been cases where the storage or disposal of small amounts of waste has been lawful because it did not trigger the need for a licence or a planning approval. Nevertheless the storage or disposal may have caused problems. For example, it may be causing environmental harm or it may be unduly offensive because it is creating odour problems or is in an unsightly condition.

Should additional controls be considered to address limitations in dealing with illegal waste practices? What regulatory measures might prevent disingenuous practices within the waste recovery sector which do not actually result in recovery or recycling?

Economic measures and incentives

The Act introduced a number of financial and economic instruments to complement its new regulatory schemes and to assist in achieving cost-effective environmental protection. The types of new instruments include financial assurances, tradeable emission schemes and the load based licensing scheme.

An additional instrument (green offsets) is being developed by the EPA.

Tradeable emissions schemes (green offsets)

A green offset is an action taken outside a licensed premise (but near to it) that reduces pollution, resulting in cost-effective environmental protection. The thinking behind offsets, including when they could be applied, is outlined in the Government's concept paper *Green Offsets for Sustainable Development* released in May 2002.

Offsets are a form of emission trading, typically involving small numbers of participants at one time. The EPA currently has powers to establish tradeable emissions schemes, such as an offset scheme for a particular area or pollutant. However, in practice the EPA has found these powers may need to be varied when actually developing a scheme, as demonstrated when developing the *Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Regulation 2002*.

Simple forms of offsets are being considered by environment protection licensees finding smart ways to reduce their overall emissions. However, currently EPA licences require that all pollution reduction works take place within the licensed premises limiting the application of offsets.

Are any changes necessary to EPA's powers regarding economic measures (Part 9.3) or financial assurances (Part 9.4)? Should additional powers be provided to implement offsets?

Waste levy

Purpose of the levy

The purpose of the levy is to provide an economic incentive to encourage waste avoidance and resource recovery by increasing the cost of waste disposal. It encourages waste generators to consider ways to avoid making waste and to use, recycle or recover waste.

The current levy scheme

Essentially, the waste levy applies to waste disposal. The levy is directed at waste generated in the regulated area[11]. It is not directed at waste generated outside this area as there are not the same opportunities for resource recovery.

The levy is payable by licensed facilities located in the regulated area or disposing of waste from the regulated area.

Exemptions and rebates to the levy are discussed below. The EPA would appreciate feedback on the operation of the exemptions and rebates, and their impact on the objectives of the levy.

[11] The *regulated area* means the Sydney metropolitan area consisting of the local government areas of Ashfield, Auburn, Bankstown, Baulkham Hills, Blacktown, Botany, Burwood, Camden, Campbelltown, Canada Bay, Canterbury, Fairfield, Holroyd, Hornsby, Hunters Hill, Hurstville, Kogarah, Ku-ring-gai, Lane Cove, Leichhardt, Liverpool, Manly, Marrickville, Mosman, North Sydney, Parramatta, Penrith, Pittwater, Randwick, Rockdale, Ryde, South Sydney, Strathfield, Sutherland, Sydney, Warringah, Waverley, Willoughby and Woollahra; and the Hunter and Illawarra areas consisting of the local government areas of Cessnock, Gosford, Hawkesbury, Kiama, Lake Macquarie, Maitland, Newcastle, Port Stephens, Shellharbour, Shoalhaven, Wingecarribee, Wollongong and Wyong.

Avoidance of the levy by unlicensed facilities

Currently, small landfills that do not require a licence do not have to pay the levy. Small unlicensed landfills can offer cheaper rates as a result of not having to pass on the levy charge to their customers. This potentially undermines the effectiveness of the levy to act as an incentive for resource recovery and waste reduction. Larger licensed competitors are also potentially affected by this differentiation.

Is the application of the levy to licensed waste facilities encouraging the diversion of waste to unlicensed operations? Is this a concern? If so, how could this be addressed?

Exemption and rebate for waste used for operational purposes

Most landfills use some of the waste they receive for operational purposes such as constructing temporary roads, embankments, use as lining and cover material. Currently, landfill operators receive a full rebate of the levy for any waste approved for use for operational purposes. Operators also obtain a 10% exemption from the levy on all virgin excavated natural material received, on the assumption that it will be used for operational purposes.

There is concern that the operational purpose rebates and exemption are distorting landfilling practices. They are also administratively complex, with limited environmental gain.

Some concerns with the existing scheme include:

- Significant variations between landfilling operations in the volumes of material being claimed as used for operational purposes. The variations appear to be more than would be accounted for as variations in operating conditions at different landfills and reflect possible inequity in the implementation of the scheme.
- Each year the rebates have been increasing as a proportion of the total amount of levy paid; an indication that landfilling practices may be being distorted in order to maximise operational purpose rebates.
- The current scheme encourages particular wastes that could have higher uses (such as virgin natural excavated materials) to be used at landfills for operational purposes.

Should the levy be payable on waste used by landfill operators for operational purposes? Are the existing operational purpose exemption and rebates distorting landfilling practices? If so, how could this be addressed?

Exemption and rebate for recycled or reprocessed waste

The levy does not currently have to be paid on wastes that are separated for recycling prior to being received at the landfill. A full rebate of the levy is receivable for waste that is recycled or reprocessed at the landfill or leaves the site for recycling or reprocessing elsewhere.

The purpose of this scheme is to encourage recycling or recovery. Some concerns include:

- There is no mechanism to ensure that the separated waste is in fact recycled. For example there are instances where separated waste has been landfilled and the levy not paid.
- It is difficult to audit the exemption or rebate once the waste is received at the landfill, as the waste cannot be ‘tagged’ so it is not possible to know if exempted or rebated material has been disposed of or left the site to be recycled or reprocessed.

Is there a better way to provide an incentive to recycle or recover waste that provides more confidence that the waste has actually been recycled or recovered?

Levy avoidance through inadequate record keeping

The levy is calculated on the weight of the waste. Where there are no accurate records kept of the weight of waste received on site or where it came from, it is very difficult to calculate levy liability. This is usually the case with illegal waste dumps.

Most licensed landfills have a weighbridge and those that don't have an agreed volume to weight conversion factor that has been determined by the EPA, based on a survey of materials received over time.

Should a mechanism be introduced which would allow easy calculation of the levy where inadequate records are kept? Could the mechanism be based on volume, rather than weight, of waste received?

Environment Policies and Objectives

Best practice environmental regulation and effective environment protection require a focus on environmental objectives and outcomes, and involve all levels of government, industry, special interest groups and the public. The EPA and other bodies use a range of environmental protection tools including:

- regulation and enforcement
- community education programs
- comprehensive policies on environmental issues
- economic instruments
- monitoring, research and environmental reporting.

Protection of the environment policies

The previous legislation did not have any formal avenues for establishing plans, policies and strategies to secure positive environmental outcomes. The POEO Act sought to create such an opportunity with the provision under Part 2, for the EPA to develop Protection of the Environment Policies (PEPs). These PEPs can specify:

- environment protection goals
- environment protection standards
- guidance to help achieve goals set by PEPs
- protocols for assessing whether standards and goals have been achieved.

PEPs may apply to the whole of NSW or specific areas. They may deal with any aspect of the Environment, or with any activity that may impact detrimentally on the environment.

To date PEPs have not progressed past the conceptual stage, generally because the issues they were meant to address were more appropriately dealt with through other planning or catchment management instruments (for example Sydney Harbour and Georges River). The EPA continues to explore the use of PEPs in addressing emerging issues which do not clearly lend themselves to management through other existing tools.

Are there any improvements you can think of to the PEP provisions? Do you have any examples of issues which could be dealt with via a PEP?

POEO Act objectives

The review also considers the objectives of the Act for their validity and context. The six objectives outlined under Section 3 of the POEO Act are:

(a) to protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecologically sustainable development

(b) to provide increased opportunities for public involvement and participation in environment protection

(c) to ensure that the community has access to relevant and meaningful information about pollution

(d) to reduce risks to human health and prevent the degradation of the environment by the use of mechanisms that promote the following:

(i)pollution prevention and cleaner production

(ii) the reduction to harmless levels of the discharge of substances likely to cause harm to the environment

(iii)the reduction in the use of materials and re-use or recycling of materials

(iv)the making of progressive environmental improvements, including the reduction of pollution at source

(v)the monitoring and reporting of environmental quality on a regular basis

(e) to rationalise, simplify and strengthen the regulatory framework for environment protection

(f) to improve the efficiency of administration of the environment protection legislation

(g) to assist in the achievement of the objectives of the Waste Avoidance and Resource Recovery Act 2001.

The POEO Act replaced the pollution control legislation that focused on limiting the amount of pollutants emitted to various media. The emphasis was on 'end of pipe' control of pollution. The POEO Act objectives are much broader and call for the use of a variety of tools to protect, restore and enhance the environment and reduce pollution. These include pollution prevention measures, cleaner production and measures to reduce pollution at source.

The POEO Act objectives relate to the operation of the environment protection regime for NSW and not the EPA which is set up under the *Protection of the Environment Administration Act 1991*. The POEO Act is about environment protection operations and regulation, which is a subset of the broader range of activities administered by the EPA, local councils etc. Its focus is generally on industry regulation, protection of the environmental media, such as air, water, noise and waste as well as pollution prevention. The EPA has responsibilities for administering a number of NSW environment protection laws (including chemicals, radiation etc) of which the POEO Act is one. The objectives in these various pieces of legislation translate into the EPA's three corporate goals which are to improve the state of the environment in NSW, to support an environmentally responsible community, and to continually improve the EPA's organisational performance.

The POEO Act is one of many State laws relating to pollution control, development, natural resource management and conservation. It will be important not to duplicate these other laws. In considering the objectives of the POEO Act, it is important to consider them in this broader context.

Are the objectives of the Act still valid as a means of reducing the risks to human health and preventing degradation of the environment?

Appendix 1

Schedule of EPA-licensed activities

Schedule 1 of the POEO Act provides a definition of each activity and a threshold criteria which sets the minimum size of an activity that requires an environment protection licence from the EPA.

There are two types of activities listed in the Schedule – premises-based and non-premises based activities. Following is a list of those activities included in Schedule 1. The precise definitions of each activity and thresholds can be found in the POEO Act which is available on the EPA's website.

Premises-based scheduled activities

- Agricultural produce industries
- Aircraft (helicopter) facilities
- Aquaculture or mariculture
- Bitumen pre-mix or hot-mix industries
- Breweries or distilleries
- Cement works
- Ceramic works
- Chemical industries or works
- Chemical storage facilities
- Coal mines
- Coal works
- Composting and related reprocessing or treatment facilities
- Concrete works
- Contaminated soil treatment works
- Crushing, grinding or separating works
- Dredging works
- Drum or container reconditioning works
- Electricity generating works
- Extractive industries
- Freeway or tollway construction
- Irrigated agriculture
- Livestock intensive industries
- Livestock processing industries
- Logging operations
- Marinas and boat repair facilities
- Mineral processing or metallurgical works
- Mines
- Paper, pulp or pulp products industries

- Petroleum works
- Railway systems activities
- Sewage treatment systems
- Shipping facilities (bulk)
- Waste activities
- Waste facilities
- Wood or timber milling or processing works
- Wood preservation works

Non premises-based scheduled activities

- Mobile plant scheduled activities
- Mobile plant waste processing
- Transporting of waste