

21 February 2012

Our Ref: KS/FM
File No.:

Alex Schaap
General Manager
GPO Box 1751
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Dear Mr Schaap

**Environmental Management and Pollution Control (Amendment) Bill 2011 –
Consultation Draft**

Thank you for the opportunity to comment on the draft EMPCA Amendment Bill. We have consulted with our member councils (28 of the 29 Tasmanian councils) and have only one significant concern. This pertains to the proposed amendment to Section 95 with regard to self incrimination.

Councils feel that while these changes will undoubtedly allow the EPA to better carry out its compliance role this is likely to be at the expense of principles of natural justice for the individuals that are part of corporations and who should be offered the same basic protections. Council officers, and in particular General Managers would not be able to claim privilege in respect of self incrimination. There is no argument with the proposition that a council should not have protection from self incrimination and be obliged to provide truthful statements and information. The issue is the protection of the natural person. In the past, notices and prosecutions have been laid against officers and General Managers as individuals.

While it appears that Section 95A(2) seeks to reduce the seriousness of this move, the individual is placed in an invidious position with the employer. The scope of exempted sections appears to be so wide as to render the supposed preservation of privilege against self incrimination meaningless. We note, for example, that a General Manager is not protected from self incrimination by the proposed amendment to s95A as set out in the Explanatory Memorandum because ss95(1)(c) & (d) are exempted from the operation of s95A.

The effect of the proposed amendment in s95A is a natural person is required to provide the information that can be used to prosecute them for making a false or misleading statement. This makes a nonsense of the supposed protection from self incrimination.

It is strongly felt that there is no clear demonstration by the proposed Bill of the need to place individuals in such a position. Councils note that there are sufficient powers available under Part 4 – Enforcement Provisions of the Act to ensure the potential for ongoing environmental harm to be remedied.

Separate but related it there are risks in relation to council enforcement of the Act as a consequence of the changes to Section 95A. These changes will benefit the EPA as the majority if their enforcement work relates to corporations who are more likely than not to be involved in Level 2 and 3 activities. Councils however, while dealing with corporations, are more likely to be dealing with individuals rather than corporations in level 1 and environmentally relevant activities.

Section 95A while allowing further gathering of evidence under a Council Officers investigative powers will then limit use of that evidence such to the extent that Council will then not be able to use any of that evidence against the individual natural person hence Councils are in no better position, perhaps worse off, than they were before exercising their investigation powers.

The only outcome against the individual natural person would be to issue an EPN but any prosecutions based upon the investigative powers would be unable to be proceeded with. The section therefore potentially hamstrings Council from being able to enforce the Act against individual natural persons for whom Councils will be dealing with in relation to day to day complaints.

Councils are strongly opposed to the proposed amendment of Section 95.

In addition, the following points have been raised which may be useful in your considerations:

- S27A – Concern is raised at the arbitrary nature of the descriptors for Class A activities. It is recommended that Class A descriptors include, “does not involve a complex or multi-jurisdictional assessment process”.
- S27L – It is suggested that the proposed amendment wording does not reduce uncertainty for business in relation to the ability for the Board to ‘stop the clock’ throughout the process. It appears to only provide a mechanism for the Board to redress any issue raised during the exhibition period that has been inadvertently missed during an assessment by the Board under Section 27G(1). The amendment in its current form does not limit the application of the provision nor reduce uncertainty for business.
- S32 – The clarity of this Section would be enhanced by simply amending to read after “for”, “a level 1 activity or an activity that is to be treated as a level 1 activity in accordance with section 214(4), or” and deleting “an activity that is not a level 2 activity or a level 3 activity”. This would clarify the intent of the provision to deal with level 1 activities.
- S43B – the intent of this provision is accepted however, the complexities of serving an EPN on persons who were previously responsible for an ERA appears somewhat flawed as the condition of the EPN may conflict with current ownership of land.

- The amendments don't seem to provide any further clarity in relation to the "person who is or was responsible" when issuing an EPN. Kingborough Council provided an example last year of this issue as is outlined below.
 - Kingborough had previously issued an EPN for environmental nuisance (noise) coming from a local rifle range – the EPN was issued to the property owner (who was also the manager of the facility). However it was deemed that the EPN could not be upheld because it wasn't the property owner/manager creating the environmental nuisance, it was the actual individual shooters, therefore the EPN could not be issued to the property owner/manager. He was responsible for the property where the noise was being generated but wasn't the one actually generating the noise and causing an environmental nuisance. As I'm sure you appreciate, it would be somewhat challenging and impractical to issue an EPN to each individual shooter associated with the facility. It was a difficult situation and made it very hard to mitigate.

If you would like to discuss the matter further, please feel free to contact me on 03 6233 5973.

Yours sincerely

Dr Katrena Stephenson
POLICY DIRECTOR