

Protection of the Environment Operations Amendment Bill 2005

By Craig Tidemann – Senior Associate, Henry Davis York

Massive increases in penalties for pollution offences in NSW are set to come into operation in changes to the *Protection of the Environment Operations Act 1997 (POEO Act)*.

The maximum penalties for Tier 1 offences are set to increase to \$5 million for wilful pollution (and \$2 million for negligent pollution) by companies that harm the environment. Maximum penalties for Tier 2 offences will be increased to \$1 million for companies. New pollution offences are proposed, as are changes to the waste regime and the defences available to company directors and managers.

These amendments follow a statutory review of the POEO Act which commenced in December 2002 and the subsequent release of an Issues Paper in June 2003. Overall, submissions revealed a high level of satisfaction with the POEO Act, and found that there was little need for a major change in direction. However, some concerns were expressed and the consultation process resulted in a report being tabled in Parliament in October 2003.

The draft *Protection of the Environment Operations Amendment Bill 2005 (draft Bill)* was tabled in Parliament on 23 June 2005 and was available for public comment until 22 July 2005. Following public consultation, the Bill was passed (without amendment) by the Lower House on 21 September 2005.

In addition to the increased penalties, other changes in the Bill include the following.

- The introduction of a new offence, under section 142A, of causing or permitting land pollution with a maximum penalty of \$1 million for companies.
- Amendments to section 169 under which company directors and managers will no longer be able to avoid a prosecution on the basis that they had no actual or implied knowledge that their company breached pollution laws. The amendments also allow evidence of the opinion, belief or purpose (in addition to intention) of an officer, employee or agent of a company to be used as evidence of that company's state of mind in proceedings against the company.
- An extended offence under section 144 in relation to waste facilities, and a revised definition of "waste".
- Provisions for smoke abatement notices to be issued to control smoke pollution.
- Additional powers for authorised offices including wide-ranging powers in relation to compelling the attendance of people to answer questions, the recording of questions asked, and extended powers in relation to the taking of samples.
- A new system of "Green offsets" to require EPA licence holders to provide or participate in schemes for the provision of green offsets to mitigate the effect of their licensed activities. For example, it is proposed that a green offset scheme might be used to carry out a program for the restoration or enhancement of the environment related to a licensed activity.

Changes to the Waste and Clean Air regulations

By Alison Cripps, Solicitor, Henry Davis York

Protection of the Environment Operations (Waste) Regulation 2005

Does your business produce Waste? If so, you should be aware of NEW regulations which will commence 1 March 2006. The Protection of the Environment Operations (Waste) Regulation 2005 (the new regulation) will replace the *Protection of the Environment Operations (Waste) Regulation 1996* (the old regulation) and will make changes in to the waste levy, waste transport and storage and waste tracking.

The Waste Levy

If your business produces waste, then you would already be familiar with the Waste Levy and the financial burden it creates for your company, but changes in March 2006 could mean you pay less! The idea of the

Levy is to discourage waste production by adding to the cost of waste disposal. Under the new regulations, the calculation of waste levy is clarified - waste generated outside the Sydney metropolitan area and extended Metropolitan area but disposed of at licensed landfill within the extended Metropolitan area is subject to levy at extended Metropolitan area rates. In addition, where inadequate records have been kept the Levy will be payable at Sydney Metropolitan Area rate with a penalty factor to discourage facilities from failing to keep proper records. To further encourage companies to be environmentally consciences, the new regulation also strengthens and clarifies the levy rebates which are provided for "good" waste production. This is where your business could save money! As of March 2001, rebates on the waste levy may be claimed if waste leaves the facility for genuine reuse, or is recycled or reused on premises. In addition rebates for approved operational purposes will no longer need to be identified in an approved environmental waste management plan. However, material can only be rebated at the levy rate applicable at the time the waste was received and claims must be made within two years of waste being received. Be careful - record keeping requirements in relation to rebates have increased- details must be kept on stockpiles of material held for recycling and reprocessing, materials added and residues requiring disposal.

Waste transport and storage

This aspect of the regulation deals with the storage of waste and the transport of waste in order to prevent harm to the environment and human health. Under the new Regulations general requirements relating to waste transport have been streamlined and made applicable to both licensed and non licensed persons. The old regulations prohibited the mixing of certain kinds of waste. This has been replaced by one requirement that all incompatible wastes must not be mixed or transported together on any vehicle. The requirement that the vehicle transporting waste had to be kept in a clean condition has been removed.

Clause 48 of new regulation requires that people storing waste on a premises must store it in an environmentally safe way (both licensed and non licensed persons). This covers the old requirement that incompatible waste be stored separately. It adds the requirement that waste be stored in a way that minimises the possibility that it will catch on fire, explode, combust, emit harmful gases or have an adverse impact on air, land or water quality.

Waste tracking

Is the waste you produce dangerous? Are you required to track your waste? Under the current laws, wastes that present highest risk to the environment must be tracked both within NSW and between NSW and other states and territories. The idea is to minimise the possibility that these wastes will be transported or disposed of inappropriately. The new waste laws do not change much in this area, but simplify what was a very complex system. Watch out for future developments. An online waste tracking facility is currently being developed.

Protection of the Environment Operations (Clean Air) Regulation 2005

The *Protection of the Environment Operations (Clean Air) Regulation 2005* replaces the *Clean Air (Domestic Solid Fuel Heaters) Regulation 1997*, *Clean Air (Motor Vehicles and Motor Vehicle Fuels) Regulation 1997* and *Clean Air (Plant and Equipment) Regulation 1997*.

One of the main changes brought about by the *Protection of the Environment Operations (Clean Air) Regulation 2005* concerns the emission of air pollution by motor vehicles. It retains and strengthens the provisions relating to vehicles emitting excessive smoke (including increasing the on-the-spot fine to \$400 for corporations), and the provisions relating to tampering with and maintaining vehicle anti-pollution devices. Despite extensive opposition, it also retains the requirement for diesel vehicles over 4.5 tonnes to be fitted with vertical exhausts but allows for exemptions for vehicles that comply with the emission standards of Australian Design Rule 80/01.

Update on NSW Planning Reforms

By Paul Colagiuri, Senior Associate, Henry Davis York

On 16 June 2005, assent was given to the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*. Since that time, the Act has been proclaimed and various steps have been taken for the implementation of the provisions of the Act.

The provisions of the Act have commenced as follows:

- Part 3A commenced on 1 August 2005;
- Remaining parts, including local planning amendments, commenced on 30 September 2005.

Major Project Regulations and Guidelines

The *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005* commenced on 1 August 2005 and deals almost entirely with Major Projects. The Regulation deals with matters for inclusion in the Director-General's report on application for approval of a major project, time limits, appeals, owner's consent, and transitional provisions.

The Department issued Draft Guidelines for Part 3A projects in July 2005. These include Draft Guidelines for Construction Projects under the Major Projects SEPP, the Concept Plan Application Process under Part 3A and Guidelines for Threatened Species Assessment.

Local planning provisions and the Standard LEP

The local planning provisions have commenced including power to make a Standard LEP which must be used as the base document for all LEPs in the future.

The draft Standard LEP is on public exhibition until 28 October and includes:

- Mandatory and Optional Provisions;
- Standard format;
- Standard numbering and clauses;
- Standard definitions of land uses; and
- Standard zones.

The Mandatory and Optional Provisions are a set of standard provisions in a form approved by the Minister. The Mandatory provisions, such as subdivision, development in flight paths, foreshore building line and heritage conservation, must be included in Council's LEP. The Optional provisions, such as temporary uses of land or some subdivision clauses, may be included in a LEP at Council's discretion but their form cannot be changed. Councils may make additional provisions but only if they are not dealt with by a Mandatory or Optional Provision.

The Standard definitions of land uses are in the Dictionary of the Standard LEP and must be adopted. Councils can add to the list but only if there is sufficient justification that an existing definition does not adequately address an issue.

The Standard LEP prescribes a total of 25 zones which are divided into seven categories. The categories are Residential Zones, Rural Zones, Business Zones, Industrial Zones, Special Area Zones, Recreation Zones and Environment Protection Zones (see Part 2 clause 9 of the Standard LEP). The Standard LEP lists the types of uses which are permissible in each zone. For instance, in the Low Density Residential Zone, neighbourhood shops may be carried out with consent. Councils can add to the list of permissible or prohibited uses within a zone but cannot remove a use which is specified as permissible or prohibited in the Standard LEP.

Conclusion

The planning reforms are almost in full swing. Part 3A has commenced and projects are beginning to be assessed in accordance with its provisions. Regulations and draft Guidelines have been issued.

The local planning provisions have also commenced and the draft Standard LEP is on public exhibition in an advanced form. Once it is finalised and gazetted, it will have a major impact on local planning.