

**ENVIRONMENTAL MANAGEMENT AND POLLUTION CONTROL
(AMENDMENT) BILL 2012**

SECOND READING SPEECH

Mr Speaker, I move that the Bill now be read a second time.

The *Environmental Management and Pollution Control Act 1994* [EMPCA] is Tasmania's principal pollution control legislation.

The EPA Division has kept the Act under review since it was last amended in 2007, and new amendments have been identified.

Late in 2010, a Statement of Intent was submitted to key industry and community stakeholder groups and local government for comment.

Mr Speaker, a draft of this Bill was subsequently reviewed by these groups. Stakeholder views have been given consideration in making changes wherever appropriate.

The Bill includes a broad range of amendments, some of which will contribute significantly to the administration and enforcement capacity of the Act.

In the course of identifying the amendments, an error was found in another Act that could seriously limit the ability of Tasmanian law to deal with oil pollution from small ships and recreational boats in Tasmanian waters. The Bill therefore also includes a consequential amendment to correct the error in the *Pollution of Waters by Oil and Noxious Substances Act 1987*.

Mr Speaker, there are a significant number of "machinery" changes designed to improve the effectiveness of the Act, to better deliver or clarify its intent, to take account of changes to other legislation, or to correct errors or anomalies.

Mr Speaker, the Bill also includes a range of more significant amendments, which I will briefly outline.

The definition of “environmental nuisance” in Section 3 is amended to confirm that nuisance may be caused by the discharge, depositing or disturbance of pollutants, and is not restricted to the “emission” of pollutants. This aligns with the meaning of “pollute” in the Act.

Section 9(2) is deleted to allow action to be taken under EMPCA in relation to oil spills in Tasmanian coastal waters, where that is appropriate, instead of under the *Pollution of Waters by Oil and Noxious Substances Act 1987* – which I will call the “Pollution of Waters Act” for short.

The amendment will allow EMPCA to apply to such incidents, particularly those of a minor scale, and to those involving small boats and recreational vessels, which is not what the Pollution of Waters Act is intended to focus on.

Also, for minor incidents involving any ship, the amendment will enable much less onerous and less formal enforcement action to be taken under EMPCA, for example via environmental infringement notices, rather than seeking summary conviction in the courts, as is the only option under the Pollution of Waters Act.

Mr Speaker, sections 27A to 27K were inserted into the Act in 2007 to provide for a series of assessment classes that are time-limited in accordance with the scale and complexity of proposed developments that are already required to be assessed under sections 25 or 27 of the Act. The current Bill includes a number of amendments to these provisions.

Section 27A is substituted to require the Board to use new and expanded criteria, now housed in a new Schedule 5, to determine the appropriate environmental impact assessment class for applications received under sections 25 and 27.

The new criteria do not “capture” any additional developments for assessment under the Act.

The Schedule 5 criteria will facilitate a clearer identification of the relatively small proportion of developments that should be subject to either the most simple, or the most complex assessment classes [2A or 2C respectively], thus separating them from the bulk of developments that are dealt with under class 2B assessments.

Schedule 5 may be amended by Order. The Order is to be interpreted as if it were regulations, and hence must be published in the *Gazette* and laid before both Houses of Parliament, either of which may resolve that the Order is disallowed.

Section 27B is amended to confirm the intent that the information included in a Notice of Intent must be to the satisfaction of the EPA Board.

Section 27C is amended to confirm that notification by the Board of its choice of assessment class is linked to receipt of a satisfactory Notice of Intent.

Section 27E is amended to extend the “clock-stop” provision, which currently applies to Class 2C assessments, to also apply to Class 2A and 2B assessments, where the Board requires additional information to assist in the compilation of detailed guidelines for the preparation by the applicant of the case for assessment.

In line with the independence of the current EPA Board as compared to the former Environmental Management and Pollution Control Board, Section 28 is amended to remove the requirement for the EPA Board to seek Ministerial approval before entering into an Environmental Agreement to reward industry that operates beyond the basic environmental performance requirements of the Act.

However, the current requirement of section 29(4) is retained, whereunder the Board must get Treasury or local council approval for any agreement that includes remission of fees, rates or taxes payable to the Crown or to the council, respectively.

Section 43A is inserted into Part 4, Division 1 of the Act which deals with the submission of information, to provide that it is an offence to submit false or misleading information.

Section 43B is inserted to confirm the existing intent that, for the purposes of Environment Protection Notices only, “environmentally relevant activities” can include activities that are no longer being conducted, but that may have caused, or still be causing environmental harm.

Section 44 is amended in respect of Environment Protection Notices issued to vary permit conditions. The amendments clearly set out what the term “vary” may include and what its limitations are, and confirm that a single such EPN may be issued to vary the environmental operating conditions of multiple permits, where these relate to activities that function as an integrated whole, provided that the variation and consolidation does not compromise any of the activities authorised by the individual permits.

Section 45 sets out the duties and obligations on a person to whom an EPN is served. The section is amended to clarify the notification obligations where a person ceases to be responsible for an activity that is subject to an environment protection notice, or ceases to conduct the activity.

Section 45A is inserted to provide that an EPN may be transferred from one person to another where a notification is received under section 45.

These amendments will enable a clear and seamless transfer of responsibility and obligation where an activity that is subject to an EPN passes from one person to another.

Section 46 is amended to confirm that, where it is considered necessary to cause an EPN to be registered on a land title, the owner of that land is bound by the notice, to the extent set out in the requirements of the notice.

That this is already the clear intent of the Act is confirmed by the existing section 44(6) which provides that such landowners may appeal to the Tribunal against the notice or its requirements.

Section 51B is inserted into the General Offence provisions to create an offence for contravention of, or failure to comply with conditions or restrictions that the Board has required to be imposed on a permit, or that the Director has varied by EPN under s.44(1)(d).

This amendment is sought because serious doubts have arisen over the use by the Board or Director of the existing offence provision for breach of permit conditions, in section 63 of the *Land Use Planning and Approvals Act 1993*.

Section 102 is amended to allow Regulations made under the Act to set more substantial fines in relation to offences under the Regulations.

Mr Speaker, as stated earlier, in considering the amendment to section 9 to allow EMPCA to deal with coastal waters oil spills where appropriate, a serious error was discovered in the *Pollution of Waters by Oil and Noxious Substances Act 1987*, relating specifically to oil spills from small vessels under 400 tonnes gross weight.

This Amendment Bill therefore includes a consequential amendment to that Act to rectify the problem, as I will briefly discuss.

Section 8 of the Tasmanian *Pollution of Waters by Oil and Noxious Substances Act 1987*, which I'll continue to call the "Pollution of Waters Act", is amended to correct a major error in the provisions that establish a defence against a charge of causing an oil discharge. The amendment will also bring the provisions of that section into line with the corresponding section 9 of the current version of the Commonwealth *Protection of the Sea [Pollution from Ships] Act 1983*, for which the Pollution of Waters Act is "mirror" legislation for the purposes of giving effect in Tasmanian waters to Australia's obligations under the Prevention of Pollution from Ships Convention of 1973.

The wording of subsection 8(4)(i) of the Pollution of Waters Act is seriously deficient. Unlike the corresponding defence provision of the Commonwealth Act, section 8(4)(i) of the Tasmanian Act does not limit the defence to a maximum concentration of 15 parts per million of oil in any discharge from small ships or boats. This means that the protection of the defence under the Pollution of Waters Act could be claimed, regardless of volume or concentration of oil in any discharge or spill from small vessels, and this defence could also be claimed in action taken under EMPCA. The consequential amendment inserts that concentration limit.

Further, the Commonwealth Act has been progressively amended to clarify and simplify the provisions relating to the discharge of oil, and to the defences. It is therefore sensible that the amendment to rectify the current error to the Pollution of Waters Act should take account of the overall changes to s.9 of the Commonwealth Act.

Mr Speaker, I now wish to specifically address an issue that local government raised during the consultation process on the draft Bill.

The draft Bill inserts a new provision into Division 1, Part 7 of the Act, which provides the investigative powers of authorised officers and council officers under the Act.

The new section 95A provides that it is not an excuse to refuse or fail to comply with a requirement under the Division to provide answers or information, on the grounds of self incrimination.

The Tasmanian Local Government Association provided a consolidated reply from councils on this amendment, expressing a range of concerns, including that it attacked the common law principles of natural justice, that it would compromise individuals in their role as employees of corporations under investigation, and that it would make it very difficult for local government to take action against a natural person.

Mr Speaker, I do not share those concerns.

The current powers of section 92 are aimed at providing officers with a range of tools to assist them in conducting interviews and investigations into incidents that may cause environmental harm or nuisance. Section 95 of the Act already recognises the importance of being furnished with all relevant information, by providing that it is an offence to refuse or fail to comply with an officer's requirement under section 92 to answer questions or provide information.

However, recent Magistrate Court decisions have ruled that the mandatory nature of the section 92 powers does not expressly abolish the common law right to silence, and nor does it do so by necessary implication.

These rulings have significantly restricted EPA and council officers' ability to gather information about an incident. Without the power to obtain all relevant information without hindrance or delay, their ability to gauge the seriousness of environmental incidents, or make decisions regarding appropriate response to incidents that may cause serious or material environmental harm, will be significantly compromised.

In response to these rulings, the amendment inserts a new section 95A provision that confirms the abrogation of the common law privilege of the right to silence which is already implied by sections 92 and 95.

As I have said, this new section provides that it is not an excuse to refuse or fail to comply with a requirement to provide answers or information on the grounds of self incrimination.

However, Mr Speaker, while the provision may challenge the "right to silence" by compelling a response from either a corporation or an individual, it clearly confirms the principle of privilege against self incrimination for a natural person.

It does so by providing that, in any subsequent proceedings against the individual for a breach of the Act, any answer or information provided in response to the officer's requirements is not admissible in evidence against that individual.

So, concerns over an attack on natural justice for individuals cannot be supported.

With respect to corporations Mr Speaker, I would point out that section 187 of the *Evidence Act 2001* already clearly indicates that if any Act requires a corporation to answer questions or provide information, the corporation cannot claim the privilege against self incrimination.

However, the new section in EMPCA provides that, a person who is an employee of a corporation under investigation, while being legally obliged to assist with the investigation, is protected as an individual.

Mr Speaker, it is acknowledged that the prohibition against using such answers or information in evidence against an individual may seem to make it more difficult to bring an action under the Act against a natural person, but in reality that difficulty has always been present in the common law privilege.

In fact, I would suggest that the Magistrate Court decisions have further confirmed that privilege in respect of natural persons.

Mr Speaker, I submit that these Court rulings mean that, without the section 95A amendment, neither the EPA Division, nor councils, can confidently seek to administer or enforce the Act using the investigative powers of section 92, and hence the rulings cannot go unanswered.

In conclusion Mr Speaker, I submit that this Bill comprises a suite of amendments that will facilitate an improvement in the administrative and enforcement capacity of Tasmania's principal environmental management and pollution control legislation.

I commend the Bill to the House.