



Draft 2 Response to the Protection of the Environment Operations Bill 1996

Discussion Paper

Table of Contents

- Introduction
 - Aspects of the bill which are affirmed
 - **Community concerns about major environmental damage**
 - Environmental protection and economic development
 - Objectives and their achievement
 - Chapter 1
 - Chapter 2 Protection of Environment Policies
 - Chapter 3 Environmental protection licences
 - Requirements for effective implementation and compliance
 - Encouraging compliance
 - Importance of the public's right to know
 - Implementing officials
 - Government commitment to implementation
-

Introduction

The Board for Social Responsibility responds to this paper for several reasons. First, the Uniting Church in Australia has a strong commitment to ecologically sustainable development (in Synod and national Assembly statements and resolutions, including a statement on the *Rights of future generations and the rights of nature*). This flows from our belief that God created this world and all its creatures, and declared it all very good. We believe that the earth and its biosphere have value in their own right, and that they are also given to all humankind for all generations to enjoy, care for, and use as is necessary to meet human need.

The second reason is that the church has general expertise in the area of personal, social and professional ethics, all of which are involved in environmental issues. The church from

time to time encourages environmental responsibility on the part of its members, through statements and educational material. We believe that individual effort can only accomplish limited aspects of environmental protection, however, and that personal moral responsibility must be accompanied by appropriate public policy for environmental protection, and by industrial compliance (or better) with such policy.

The community can evaluate the *Environmental Operations Bill 1996 Exposure Draft* and its accompanying discussion paper in two distinct ways: (a) evaluation of whether the bill is consistent with the general concerns and aspirations of the community concerning environmental protection and (b) evaluation of the technical aspects of the bill.

This paper offers the perspective of a community organisation committed to

environmental protection, and with general expertise in the area of public policy rather than specific expertise in environmental protection law and administration. We have used six basic criteria in assessing this bill:

1. The need for clear and consistent objectives;
2. Adequate causal theory;
3. Implementation process legally structured to enhance compliance by implementing officials and target groups; this should include transparency, and accountability;
4. Committed and skilful implementing officials;
5. Support of interest groups and relevant levels of government;
6. Impact of socio-economic change and emphasis on development.

It is beyond the technical expertise of the Board for Social Responsibility to comment in detail on the technical details of the bill. However, we believe that the Environment Operations Bill should include the best mechanisms available to achieve effective environmental protection and should therefore be amended where necessary to adopt proposals from local government and community groups which would enhance its effectiveness.

Aspects of the bill which are affirmed

A number of the basic approaches in this bill should be affirmed (these are based on section 2 of the Discussion Paper).

- Consolidation of environmental protection legislation to allow for the regulation of the different environmental impacts of a particular activity.
- Provision for the development of Protection of Environment Policies.

- Clarification of the roles of State and local government.
- Stronger investigative and enforcement powers, including increased penalties.
- Voluntary and mandatory audits.
- Scope for using economic instruments to achieve cost effective environment protection.
- Greater community access to information about terms and conditions of licences.

This submission also affirms the inclusion in the bill of:

- a. the right of any person to initiate proceedings for an offence against the Act in the Land and Environment Court, with the leave of the court (7.4.6)
- b. the right of any person to take civil action, without needing the leave of the court (7.6.2) - eg to obtain a restraining order
- c. a range of sentencing options such as publicising the offence and orders which prevent the offender from benefiting from the offence (section 7.5)
- d. the right given to the EPA to hold public inquiries, on its own initiative or at the Minister's direction, into "any matter relating to environmental protection". (7.3.1) Reports are to be made public (7.3.5)
- e. However, Protection of Environment Policies are crucial if this legislation is to offer effective improved protection of the environment. It is PEPs which offer the possibility of a coordinated approach to environmental protection. Without them, the bill offers little more than improved administrative efficiency.

Community concerns about major environmental damage

The community is becoming increasingly concerned about severe environmental damage. There is strong community support for environmental protection in general terms. The new legislation needs to address the most significant environmental problems, in the most effective way.

The community needs legislation which will effectively address major, complex environmental problems such as the following:

- pollution of inland waterways, including algal blooms, faecal contamination and so on;
- the air pollution, from numerous sources, which is apparently contributing to increased incidence of particular health problems in the west and southwest suburbs of Sydney;
- salination on agricultural land;
- soil pollution by agricultural chemicals, industrial and household waste;
- soil erosion by wind and water;
- ocean pollution, such as sewage, rubbish from stormwater drains, and toxic wastes;
- loss of ecological and biological diversity, ie loss of habitats and species;
- the greenhouse effect;
- aesthetic damage - smog, dirty waterways, rubbish dumped in inappropriate places, damaged landscapes.

There can be no doubt that the legislation does some things relevant to these problems. But the legislation seems to have been drafted as an exercise in greater legislative coherence and administrative efficiency rather than as an exercise in innovative responses to these actual complex environmental problems. While PEPs should assist with this, there are a

number of weaknesses with Chapter 2 of the Exposure Draft, as we outline below.

The EPA itself admitted at the EPA consultation that the legislation will do nothing about the problem of photochemical smog, which is mainly produced by cars. This seems a serious weakness of the Bill.

Environmental protection and economic development

The purpose of environmental protection legislation is to deal with the negative impacts of industry and development on the environment. The concept of *ecologically* sustainable development is often lost in the quest for improved economic performance in the short term. Environmental protection requirements are often seen as an unnecessary burden - "green tape" which is a plot rather than an expression of responsibility. Sometimes industry sees a particular development as crucial to its ongoing viability, and believes that this should take precedence over environmental protection, without regard to ecological viability or the costs imposed on the community as a whole when the environment is degraded. There is a history of litigation by business opposing decisions made by authorities for the sake of environmental protection. While some business leaders embrace environmental protection as an essential part of long term viability of their business and the economy, others continue to assume falsely that the environment is a huge sink which can absorb all that industry does to it without significant harm to the environment or to the community. This assumption is demonstrable nonsense.

When business is allowed to damage the environment, it externalises costs. Instead of the business bearing the costs of its total production, costs are imposed on the community - loss of biodiversity, loss of air and water quality, damage to Australian food industries which require non-toxic environments (land, air and water),

damage to health, and so on. Too often economic impacts are seen only as the cost to business of not allowing it to do as it likes, without looking at these externalised costs which occur when it is allowed to proceed unfettered. It is important that environmental protection be understood to have economic and social benefit, and not only economic and social costs. In the long term, compromising the effectiveness of environmental protection because of short term costs to business can lead to enormous economic and social costs for the community.

It is imperative that the new legislation ensure that when economic and social impacts are considered, the costs of inaction as well as action are considered. Indeed, **one of the purposes of the legislation should be to ensure that the costs of environmental degradation are internalised by the business or other body responsible for the activity causing that degradation.** Otherwise the legislation is balanced in favour of business and against environmental protection. Several matters in the legislation are therefore of particular concern:

- the failure to specify that costs related to environmental impact and protection of a licensed activity should be internalised;
- the failure to specify any circumstances where Protection of Environment Policies are required rather than merely an option;
- the elevation of administrative efficiency to a purpose of the Act;
- the inclusion of process matters alongside environmental protection issues, as if they are of the same kind and of equal weight;
- the failure to require that in developing PEPs and in licensing operations, the economic and social costs of not implementing a PEP or not imposing licensing

requirements are taken into account. (That is the bill requires that economic and social costs of taking action be considered, but not the costs of inaction);

- the failure to provide for public consultation in the licensing and licence review processes.

In the current economic climate, where there is so much emphasis on short term economic goals such as increasing economic growth, improving profitability of companies, reducing overheads and compliance costs for business, and so on, these inadequacies compromise the effectiveness of the *Environment Operations Bill*, and must be corrected.

In addition to these economic concerns, there is another - **the government must provide the economic resources required to effectively implement the bill.** Some activities required by the bill appear to be funded through licensing fees. This is an appropriate requirement that business internalise costs. However, it is not clear how the development of PEPs will be funded. In a time of economic restraint and with the state's goal of debt reduction, there will be a temptation for government to underfund this work. We understand, for example, that at the moment only two PEPs are envisaged, for Sydney Harbour and Nepean Hawkesbury catchment, although many other environments are also at risk.

Failing to fund the EPA adequately for this work would be short sighted and economically irresponsible. Again, the point is that the community is already incurring large, albeit hidden, costs, because of the failure to protect the environment adequately. The development of Protection of Environment Policies can be considered a form of **investment in infrastructure** - a mechanism for **maintaining the biological infrastructure** on which all human life and well being depends.

PEPs should be based on significant biological research, and should serve the long term interests of the whole community. They should therefore be funded mainly by the NSW Government. However, as they are also required in order to manage the activities of industries, it would be appropriate to include a contribution to the cost of PEP development in licensing fees.

Objectives and their achievement

There is considerable pressure on authorities to minimise environmental protection for the sake of short term business convenience and economic return. Thus while we endorse any approach which streamlines the administration of environmental protection by removing unnecessary complications, and thereby increasing compliance, we believe that there are constant pressures to treat administrative streamlining as an end in itself, and to make environmental protection subordinate to simple, easy administration so that business can proceed unfettered. It is important therefore that the legislation is worded in such a way that there is no doubt that the absolute priority is effective environmental protection, and that administrative efficiency and such matters are subordinate to this.

Chapter 1

The objectives of the legislation are defined in 1.3, which refers to rationalising and strengthening the regulatory framework for environmental protection, improving administrative efficiency, and fulfilling the objectives of the EPA set out in the *Protection of the environment Administration Act 1991* and *Waste Minimisation and Management Act 1995*.

Clause 1.3 confuses means and ends, by making administrative efficiency a purpose of the legislation, apparently of equal weight with meeting the objectives of the EPA and the Waste Minimisation and Management Act. While we accept that administrative

efficiency is an important reason for the project of revising the environmental legislation, it does not seem to be an appropriate purpose for the Act itself. Neither the licensing authorities nor the courts should be put in a position of having to consider administrative efficiency as a purpose of equal weight to environmental protection. The section as it stands is an invitation to litigation.

It is not clear from clause 1.3 exactly what some of the objectives of the Act are, since reference must be made to other Acts. This makes the legislation less accessible to those who need to conform with its provisions, and to the general community.

Section 1.3 should include a further purpose of the Act, namely to ensure that environmental impact and protection costs of activities are internalised. This is consistent with a number of aspects of the Act, such as the section on licence fees. It is imperative that the costs of environmental impact and protection be internalised by each activity, if the community is to be able to assess its priorities with regard to the goods produced through those activities. Otherwise we end up with allocative inefficiency and free riders, with the community subsidising some activities by bearing externalised costs.

Section 1.3 should be redrafted to make clear that administrative efficiency is a purpose only to the extent that it contributes to the goal of environmental protection and internalisation of costs, and not an end in itself. The section should also spell out the objectives of the EPA and the waste management act that it is intended to meet.

While the Bill refers to objectives, it provides no way of measuring those objectives. We therefore support the proposal of the Local Government and Shires Association of NSW (draft distributed on February 24, 1997), **That the clause "1.10: The Board of the**

EPA and SWAC are to provide a publicly available annual report to the Minister regarding progress in achieving the objects of the Protection of Environment Operations Act and to provide advice and recommendations in this regard" be inserted in part 1.

Chapter 2 Protection of Environment Policies

Protection of the Environment Policies (PEPs) are a crucial part of the legislation. To a significant extent, the improved environmental protection which the Government is promising with this legislation depends on PEPs, since these have the potential to provide the basic strategies within which licensing and other mechanisms of environmental protection occur.

The environment is a complex entity, and most environments are affected in many different ways by many different activities under the control of a number of different regulatory authorities. PEPs have the potential, if the legislation is appropriately worded and implemented, and if appropriate PEPs are developed, to assist greatly in coordination of different activities affecting the one environment, and for providing a coordinated approach by the various regulatory authorities.

We welcome the proposal that there be Protection of Environment Policies, and that there be public consultation during their drafting.

However, the legislation seems insufficient to achieve the proper purpose of PEPs.

The priorities in determining PEPs are not clear in 2.1.2 and in 2.2.2.

In the exposure draft, 2.1.1 is about *allowing* PEPs to be developed rather than *requiring* PEPs to be developed. Section 2.7.1 requires that regulatory authorities take account of PEPs once they are in force. This is a welcome provision. However, there seems little point in requiring that PEPs be taken

into account unless it is required that PEPs exist in the first place.

There needs to be clear definition of the circumstances under which PEPs must be developed. Otherwise this provision could remain unused. Criteria for requiring a PEP to be developed should include those situations where there is serious environmental damage and where other actions available under the legislation itself are inadequate to meet the complexity of the problem - for example, where there are cumulative impacts from many activities. **Either 2.1.2 or 2.2.1 should clearly set out situations in which the EPA is required to develop PEPs, which should include those situations where current environmental protection provisions in the Act are by themselves insufficient to meet the needs of an environment which (a) is already suffering serious damage or (b) is at risk of serious damage.**

The objectives of PEPs need to be clearly defined as the protection of the environment. Section 2.2.2 (1) is confused and confusing, because it includes environmental, economic and social impacts in clause (1), as if the development of PEPs should consider economic and social impacts on the same basis as environmental impacts. This means PEPs are compromised from their very beginning. **Clause 2.2.2 (1) (a) should refer only to the environmental impact of the proposed policy. Economic and social impact should be dealt with in a subclause (g), which should refer to the economic and social impact of both making, and not making, the policy.**

As it stands the impact statement in 2.3.3 is weighted in favour of limiting a PEP on social and economic grounds, because it ignores the social and economic impact of not making a PEP. This is unbalanced, and is likely in practice to favour lack of action over action and to allow externalisation of

costs. **Section 2.3.3 (2) (d) should include an assessment of the economic and social impact of both making, and not making, the proposed PEP.**

Section 2.2.2 (1) (b) requires that the EPA have regard to simplicity, efficiency and effectiveness of the administration of the proposed policy. While we agree that this is an important factor in implementing the legislation, it seems to be confusing means and ends, since the other subclauses refer to environmental matters. It is more about strategies for implementing environmental protection, than about the actual policy of protection. **The material in 2.2.2. (1) (b) should be removed from its present position, and reworded and repositioned so that strategies are not confused with content, and it is clear that administrative concerns are subordinate to the environmental protection issues.**

Section 2.3.2 requires the EPA to give notice that it will draft a PEP, 2.3.3 requires an impact statement on the draft PEP to be prepared, taking into account a number of specified matters, and 2.3.4 requires public consultation for at least 2 months. **We welcome these provisions.** However, we suggest that 2 months is a very short time for adequate public consultation, since these are often technical issues on which organisations would need to do research or seek advice. **The time in 2.3.4 be lengthened to at least 3 months, and agree with the Local Government and Shires Association of NSW that the time should be at least four months if the draft is released later than 31 October in any year. There should also be a requirement that there be a summary of the material referred to in 2.3.4 (1) (a) available, and that the EPA should hold some public meetings or hearings, so that the consultation process is more accessible.**

We agree with the Local Government and Shires Association of NSW that **2.3.3 (2) should be amended so that the impact statement in will include "the proposed means by which the success of the PEP in achieving the desired environmental outcomes will be measured."**

Section 2.4 provides for the Minister to direct that a PEP be prepared. While we recognise that it is appropriate for the Minister to be able to direct the EPA to take action when necessary, this section, especially 2.4.2. (3) which provides for direction when there are unspecified "special reasons" would seem to be a two edged sword. It is appropriate that the Minister be able to control the work within the portfolio, but this section opens the way for political rather than environmental needs to determine the priority of PEP development. **Perhaps the legislation should require that the EPA publish annually a list of priorities for PEP preparation, and require that the Minister publish reasons for any direction given under 2.4.2 (3) so that there is accountability and transparency in the determination of priorities.**

Section 2.7 requires that authorities take PEPs into account. This falls short of requiring that they comply with them. Section 2.7.4 gives priority to the statutory discretion of a public authority over any action required of it by a PEP - all it has to do is "take the policy into account", which, in other processes, often means very little. This seems to have the potential to undermine the whole point of PEPs. There appears to be no accountability, thus undermining the potential usefulness of PEPs. **Section 2.7. needs to include a provision that public authorities must act as consistently as possible with the requirements of the relevant PEPs and must show cause for any divergence from the PEP, including those cases where a public authority exercises its statutory discretion.**

Chapter 3 Environmental protection licences

Licences cover both development and operation approval, and are for an indefinite time, but must be reviewed by the EPA at least once every three years.

This section provides for licences for scheduled development work and scheduled activities. This section consolidates and streamlines licensing provisions from the several Acts which this legislation will replace. It allows integrated environmental protection through one licensing process for all the environmental aspects of an activity, whereas the Acts it replaces were each media specific (eg air, water, land).

The integration of licensing of different impacts of an activity is to be welcomed. This seems to both streamline administration and to provide for a more holistic approach to the needs of the environment.

Some community groups have criticised the licensing provisions on the grounds that they appear to be licences to pollute rather than environmental protection licences. While we recognise the need for realistic mechanisms to regulate commercial interests, we have some sympathy with this criticism. The integration seems only to serve the needs of business, rather than the needs of an environment. The problem is that while the Bill integrates regulation of any one activity, it does not integrate regulation of all the activities that affect a particular environment. PEPs have some potential to assist with this, but the Bill only *allows* them - it does not *require* that any PEPs actually be produced (see comments on PEPs above). It is thus not clear how the licensing system will improve the environmental protection of those environments affected by many activities and under the control of many different regulatory authorities, especially if any of those authorities have statutory discretion

with regard to any PEPs that exist. Hence our recommendations elsewhere on these matters.

A second problem is that the Chapter provides for so many matters to be taken into account in section 3.1.4 that the purpose of Environmental Protection Licences becomes very unclear. As with some other sections, the problem is the confusion of means and ends. **Section 3.1.4 should be redrafted (a) to make clear that the functions exercised under this chapter must be in accordance with the objective of environmental protection and must lead to internalisation of the costs of environmental impact and protection, and (b) to make the mechanics which are part of this section in the Exposure Draft subordinate to these over-riding purposes.**

However, this would still leave a major problem with this chapter, namely the lack of public consultation, since it provides for a purely administrative process of determining an application for a licence, without any provision for the public being informed of the application, or making comment.

There will now be one licence to cover both development and operation of an activity, so some aspects of approval come under the *Environmental Planning and Assessment Act*, which may require, for example, an Environmental Impact Statement. The Discussion Paper claims:

The draft Bill strikes a balance between the principles of openness and efficiency. It links the environmental protection licences with the land use planning approvals process. It also uses the planning legislation as the mechanism to provide for public participation and appeal on environment protection issues.

The close correlation (between the schedules in the two acts) will mean

that licensed activities will generally require an EIS and therefore will be the subject of public participation. Coupled with provisions to ensure consideration of environment protection issues at the development consent stage, this system will ensure that pollution control issues are subject to meaningful public participation and third party appeals. (Discussion Paper p 18-9)

The problem with this is that it allows the public to comment on the environmental impact of a proposed development, but not explicitly on the environmental protection measures that the EPA requires. As Lisa Ogle has argued,

the EPA makes important value judgements on behalf of the public. The EPA decides, on our behalf:

- what impact on the environment is "acceptable";
- what impact on human health is "acceptable"; and
- how much the polluter should pay for the privilege to pollute our environmental and when this amount should be paid.

The assumptions of these responsibilities on our behalf is why public involvement in the licensing process is crucial.

We would add that they also decide the extent to which costs of environmental impact and protection are externalised, ie born by the community rather than the polluter.

It seems appropriate to follow the Victorian model of providing for public submissions on the question of appropriate terms and conditions, as distinct from environmental impact. The EPA should be required to inform the public that it is considering a licence application, and to consult with the public. **We therefore support the proposal of Lisa Ogle of the**

Environmental Defenders' Office that the Operations Bill provide:

- **a mechanism for public notice that a licence is to be issued or reviewed, granting access to the licence and monitoring results and calling for submissions;**
- **an obligation for the EPA to take submissions into account;**
- **an obligation for the EPA to specify its reasons for its decisions relating to licensing;**
- **third party merits appeals for licences issued for scheduled activities.**

Requirements for effective implementation and compliance

Encouraging compliance

The bill is designed to provide a legally structured process to ensure industry etc complies with environmental protection policy. The bill is expected to enhance compliance by providing for licensing under one piece of legislation rather than several, by bringing licensing, environmental protection notices and offences and enforcement together under one act and by providing for voluntary and compulsory audits.

Importance of the public's right to know

However, the Environment Operations Bill does not include any "right to know" provisions. There is evidence that the public's "right to know" is a crucial part of environmental protection, since it makes industry accountable not merely to government in private, but to the whole community, in public. Neil Gunningham, for example, argues that it is the "Right to Know" in the USA which has had a substantial impact on the attitude and practice of industry. For example, chemical companies had to reveal that they pumped 2.7 billion pounds of hazardous chemicals in to

the air in 1987, and this created a community backlash which in turn prompted better industry processes without further government legislation. ("Thinking about regulatory mix: regulating occupational health and safety, futures markets and environment law" in Peter Grabosky and John Braithwaite (eds) *Business regulation and Australia's future* Canberra: Australian Institute of Criminology 1993).

That is, the public right to know makes the relationship between industry and regulatory authority transparent, and reminds both that in the end they are accountable to the community for their operations.

At a consultation organised by the Environmental Defender's Office on March 19, 1997, the Minister, Pam Allen, claimed there will be "right to know" legislation later in the year. (SMH 20/3/97) That is, the community is being asked to trust not only this legislation, but the government's future intention. Australian governments do not have a good record with respect to freedom of information legislation, and it is not appropriate for the NSW Government to expect the community to accept a deficient piece of draft legislation on the basis that it should trust the government to do something at some future date.

The Environmental Operations Bill should include "right to know" provisions within it.

This has been advocated by the Environmental Defender's Office with regard to the licensing provisions.

There are a number of places in the Bill where it would appropriate to have "right to know" provisions, including:

- *Section 2.3.7* - the report about relevant submissions which the EPA makes to the minister should be publicly available. This has been advocated also by the Local

Government Association in its submission.

- *Section 3.6* the process of review of licences should be public, not confidential.
- *Section 5 Environment protection offences* - Names of offenders convicted under this section should be made public, eg in the EPA's report each year or in a separate annual report to be tabled in Parliament. The public should have a right to know who has committed offences (once a conviction has been obtained), what offences have been committed, what penalties have been imposed, and what steps have been taken to ensure similar offences are not committed in the future. Industry needs to know that it is accountable publicly for its impact on the environment.
- The public right to know about licences which have been granted (under Section 3) , and environmental protection notices which have been issued (under Section 4) is provided for in Section 8.5.1 which requires each regulatory authority to keep a public register of licence holders, the terms and conditions of the licence, any environmental protection notices that have been issued and are currently in force, and other information.

Section 8.5.1 is an important provision which should be included in the final legislation.

Implementing officials

Implementation and compliance also requires committed and skilful implementing officials. This was questioned at the EPA consultation - especially with regard to local government councillors. According to comments made at that consultation, there are councils which lack both competence among staff and an adequate level of commitment by

councillors. Councils do not adequately fulfil all their current responsibilities. Other issues raised were the problem of consistency across councils, the problem of conflict of interest (regional need for development in areas of high unemployment versus regional need for environmental protection), and the problem that councils often do not use the powers already available to them.

We welcome the Schedule which ensures that all activities which are likely to have a major environmental impact will be licensed by the EPA.

What will ensure that adequate resources (staff, skills, expertise and training) will be provided by councils to enable them to fulfil the functions required by the legislation?

What will ensure that councils use the powers available to them to protect the environment?

The *Impact Analysis* notes that it is not evident what costs the legislation will impose on councils. Councils will be able to charge fees for licenses, but the revenue implications of this are also not clear. No attention appears to be given to the question of the basis on which licensing fees will be charged by councils or the importance of consistency in charges by different councils.

Government commitment to implementation

The legislation assumes that *the EPA will have the resources* to fulfil the task required of it under the legislation. The *Impact Analysis* looks at the cost of implementing the Schedule of EPA licensed activities, but not at the cost of other components of the legislation. This is particularly important with regard to the resources needed - staff, research equipment and consultation processes - to develop PEPs.

Rev. Ann Wansbrough UnitingCare
NSW.ACT PO Box A 2178 Sydney
South NSW 1235.

Phone (02) 8267 4300 Fax (02) 9267
4842

© **Copyright.** UnitingCare NSW.ACT. Uniting
Church in Australia NSW Synod

This material is copyright. It is intended for your general use and information. You may download, store in cache, display, print and copy the information in unaltered form only. Uniting Church in Australia congregations, councils and agencies may copy and distribute the material, in unaltered form, for purposes consistent with being part of the Uniting Church in Australia. With this exception, you may not re-transmit, distribute, publish or commercialise the material without the permission of the Board for Social Responsibility.

For further information contact: