

18 September 2014

Robert Stokes MP
Minister for the Environment

Barry Buffier
Chief Executive

Mark Gifford
Chief Environmental Regulator
Environment Protection Authority

**RE: PROTECTION OF THE ENVIRONMENT OPERATIONS AMENDMENT BILL 2014 –
A FEW MINOR ISSUES**

Dear Rob, Barry and Mark

The Australian Sustainable Business Group (ASBG) wishes to discuss a number of issues in relation to the recently tabled [Protection of the Environment Operations Amendment Bill 2014](#).

ASBG supports the overarching principles of the proposed legislation, but requests the opportunity to engage in detailed consultation to enable clarification supporting a number of the broad legal terms used. Areas where clarity would greatly assist in compliance are in s128 and in odour.

ASBG offers a few views on its interpretation of the more detailed meaning of the legislation as a start of clarification of the broad legal terms. A better outcome is for the EPA to develop further guidance in consultation with businesses and other stakeholders on clarification of these conditions.

S128 ISSUES – NON-POINT SOURCES

While section 128 has been in place since the 1970s, if not earlier, it has only recently been used by the EPA for undertaking prosecutions and or used as a supplemental condition in court in NSW. The broad ‘catch all’ for air pollution is under s128(2):

(2) Where neither such a standard nor rate has been so prescribed, the occupier of any premises must carry on any activity, or operate any plant, in or on the premises by such practicable means as may be necessary to prevent or minimise air pollution.

The key issue in this section is the meaning of the term ‘*by such practicable means as may be necessary to prevent or minimise air pollution.*’

Point sources discharges have better basis compared to non-point sources, in which to be assessed. The [POEO \(Clean Air\) Regulation 2009](#), provides a set of emission concentrations with which other sources not captured under this section can be compared with. EPA’s [Approved Methods](#) provide further guidance as to design criteria for point source emissions of other types of air emissions, which can be also derived back from ground level concentrations using computer modelling.

However, the difficulty lies with non-point sources. Non-point sources generally do not have reasonably¹ analytical measurement methods in which to measure their emissions with accuracy.

¹ It is possible to measure some non-point sources in certain circumstances. This may require placing a catchment ‘tent’ over the area in question. Installing large ‘tents’ or isolation systems over large areas can be very costly and impractical.

Ground level concentrations could be applied, but again it is with considerable difficulty to work this back to the source and establish a concentration limit.

It is also a worthy point that the application of s128 applies to all sources of air pollution and not just licensed sites. So s128 applies to all air emission activities across NSW. Arguably the NSW Government could undertake unilateral controls on, for example non-road diesels, using this section.

POEO Amendment Bill 2014

So the question is what does the Bill's version of s128(2) include and cover? Under the Bill it states:

(2) The occupier of any premises must carry on any activity, or operate any plant, in or on the premises by such practicable means as may be necessary to prevent or minimise air pollution if:

(a) in the case of point source emissions—neither a standard of concentration nor a rate has been prescribed for the emissions for the purposes of subsection (1), or

(b) the emissions are not point source emissions.

So the Bill specifically separates point sources from non-point sources, requiring that non-point sources be assessed under the broad terms of *by such practicable means as may be necessary to prevent or minimise air pollution*.

This provision has been always implied under s128, but with the enactment of the Bill, it makes it specific that non-point sources are also captured. Change to this section also implies the EPA is likely to use this section more frequently. ASBG understands it was not used before 2011, which was then on the [Unomedical case](#).

Another concern is that third parties can also now use the changed s128 to invoke third party actions under the s 219 of the POEO Act 1997. Again, how non-point sources are assessed will not only assist EPL holders wishing to be complaint, but also inform 'third parties' of what is a likely breach of s128.

With little guidance on how to apply this directly to non-point source pollution makes compliance a difficult guessing game, especially if complaints are used as measure of compliance. ASBG considers the types of assessments whether a site has exceeded s128(2)(b) is left to the following:

- Complaints from neighbours
- Best practice or equivalent peer practice
- Measurement of ground level concentration at receiver or point

Looking at each one of the above points each has it weaknesses.

Complaints

Complaints can be genuine vexatious or overly sensitive. As a consequence, for many other limits the EPA sets criteria generally below which the emitter is considered to be in compliance, and the complainant/s are made aware of this. However, it is difficult for both the EPA and the site if complaints continue and there is no measureable harm or emission. Generally the EPA feels obliged to act in some way. In many cases the emitter can continue at its measured performance. However, where there is difficulty in measurement of the performance of a source of complaints then the site may be assessed on a subjective rather than an objective measure. Such an outcome for setting design and determining operating conditions is fraught, lacking certainty. It also means a concerted campaign against a site could cause it considerable financial and operational difficulties based on emotive and subjective reactions rather than performance based on science.

Overly sensitive complainants can be assigned to where the measureable concentrations are below the criteria set by the EPA. For example, noise, dust and odour levels set under EPLs or via EPA

guidance documents establishes a low but reasonable threshold. However, complaints occur when these levels are not exceeded. Transient and nebulous emissions could be the cause, but this is difficult to measure and verify, not only where and when it occurred, but where did it come from. The issue is how the EPA deals with such complaints.

Overall complaints are an outcome based measure, which by itself is not scientific but, it is one the EPA increasingly reacts to. ASBG receives increasing concerns from member of the number of vexatious complaints being targeted at them. In a number of cases, provided by members, the complainant has an obvious commercial gain in sight. Weeding out vexatious from genuine complaints is another issue in which the regulator needs to further develop. As vexatious complaints increases, more pressure will apply to the EPA to investigate to ensure such complaints are *bona fide*. Education programs can also deliver better understanding and less conflict.

Best Practice or Peer Performance

ASBG has been aware in the past the EPA has assessed s128(2) to mean as not following its industry (peers) 'Best Practice' on air pollution control.

Where no measureable limit is used another method is to move upstream to assess the controls and practices used are good. In many cases the EPA likes to use Best Practice type measures and their broad set of variations, favouring the very high standard of Worlds Best Practice. The problems with this approach are many. Air pollution limits are based on grandfathered provisions (up to a point), so can Best Practice provisions be also based on grandfathered provisions? This is where Peer Performance, rather than Best Practice may be a fairer approach. At least it takes grandfathering into account.

Another problem is the variations in what is meant by Best Practice, is it World's Best Practice (WPB), or Best Practice Economically Achievable (BPEA)? All can be moving feasts as times and practices change, which again brings in the grandfathering issue. ASBG considers WBP is generally not warranted, as it is usually based on performance in a very stress air shed, such as in Los Angeles. ASBG generally accepts BPEA as an effective balance, though the inclusion of grandfathering is still missing.

Application of BPEA on non-point source is to consider the operations of the process, in consideration of its design. If the facility that has a common non-point source such as a landfills, sewage treatment works, wastewater treatment ponds, coke production, contaminated land remediation project or other practice in which materials are spread over an area, etc, sectoral industry practice guidelines representing BPEA could apply. Each BPEA would need to be developed for each sectoral type with some variations permitted. Such guidance is not a small task, but it should lead to increased compliance with s128.

Ground level concentrations

A final means in which to measure the outcomes of non-point source emissions is the use of ground level concentration measurements at sensitive receptors. Use of ground level concentrations is not a cheap measurement approach but can be used to support a scientific measure of non-point source performance. It may be useful for dealing with complaints. However, it may also cause conflict with a BPEA methodology, which is being met, but still causes a higher ground level concentration.

Ground level concentrations are already used, in part, for most of the complaints based. Dust deposition, measurements of odour units are contained in the EPA's documents and or appear in Environment Protection Licences (EPLs). However, unlike point sources, ground level sources cannot be converted into a concentration at the source for non-point sources. So lowering the emission levels at the source may not lead to a direct reduction at that point of measurement.

Ground level emissions at a sensitive receptor, also has the issue of contribution from other sources. Hence, dust or odour or other common contaminants may come from multiple sources. Weeding out the other sources can be difficult, though the methods practiced in noise pollution measurement may yield some possible solutions.

Summary For Non-Point Sources

Separating out non-point sources of air pollution from all air pollution in s128 brings about confusion and lack of clarity over how this amended section will be enforced by the EPA in the future. ASBG has provided a number of methods that could be used to clarify the application of s128 to non-point sources. Yet it would be better for business to work with the EPA to develop a scientific based guidance for all NSW businesses. Such guidance as to what is meant and expected from *by such practicable means as may be necessary to prevent or minimise air pollution* for non-point sources will greatly assist businesses, Government and others affected by s128 to better comply.

ASBG recommends the EPA develop guidance material for non-point sources so that compliance can be arranged upfront. This guidance material should be developed with the assistance of EPL holders.

CHANGE TO ODOUR

The amendment to make odour a pollution incident under s148 of the POEO Act 1997, results in a series of knock-on effects. These bring about a few questions and issues including:

- What is an odour incident of material harm?
- How can immediate reporting be triggered for material harm odour?
- Impacts on non-point sources

A material harm incident for odour is not well defined, but is more based on being non-trivial than the \$10,000 trigger. ASBG considers that a material harm odour trigger would be based on the definition of offensive odour:

POEO Act 1997 Dictionary:

(a) that, by reason of its strength, nature, duration, character or quality, or the time at which it is emitted, or any other circumstances:

(i) is harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted, or

(ii) interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted, or

However, it materiality should be based on (a)(i), a harmful or likely to be harmful emission. Measurement of this has been to use either a medical certificate or admission to hospital as a result of the odour impact. Obviously if staff on-site are overcome by strong odour then this should be considered a potential material harm incident. Odour complaints should not in themselves trigger a material harm incident, assuming no medical evidence is provided. If the odour is of such strength and duration then the site should from its own staff consider if this is likely to cause a harmful odour exposures to persons outside the site. Current Work Health and Safety protocols should trigger actions following a strong odour event.

A problem then occurs of the EPL holder being aware of the materiality of the odour incident. If a person has been made ill by an odour incident and obtain medical evidence to that effect, the issue of immediate reporting under s148 becomes rather mute and meaningless. This is assuming that no one noticed the odour on the site or emitting from the site at the time. The EPA will have to accept, in many

cases of material odour events, that immediate reporting will only be possible after the site becomes aware of the impact of the odour on persons outside the site.

Changing odour to a pollution incident status add impetus to the concerns over the application of s128 to non-point sources. Together s128 and odour as a pollution incident in the POEO Amendment Bill 2014 raise concerns that odour will be new focus of control and this will be exercised through the non-point source powers under s128.

ASBG recommends the EPA clarify what it considers are material odour incidents, considering the above ideas or other approaches.

I look forward to having further discussions with the EPA on how to progress guidance in the area of these changes to air pollution and to odour.

Yours sincerely

A handwritten signature in black ink, appearing to read "Andrew Doig". The signature is fluid and cursive, with a large loop at the end.

ANDREW DOIG
CEO
AUSTRALIAN SUSTAINABLE BUSINESS GROUP