Australian Sustainable Business Group

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Mr Frank Sartor
Minister for Climate Change and the Environment
Level 35, Government Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

The Australian Sustainable Business Group (ASBG) wishes to comment on the *Protection of the Environment Operations (Environmental Monitoring) Bill 2010* (the bill).

The Australian Sustainable Business Group (ASBG) is a leading environment and energy business representative body that specializes in providing the latest information, including changes to environmental legislation, regulations and policy that may impact industry, business and other organisations. We operate in NSW and Queensland and have over 150 members comprising of Australia's largest manufacturing companies.

ASBG was surprised by the tabling of the bill on 24 September 2010. Effective consultation on new legislation, which affects our members has been a long term approach taken by government. Such consultation results in improved legislation and provides reassurance that the government is taking a broad range of views into the law making process. ASBG wishes to be involved in such processes in the future to ensure that there is some platform in which to provide comment.

Overall ASBG considers this bill redundant as its objectives can be well achieved by existing licence conditions. It also removes the necessary appeals mechanism that is available for such potentially onerous conditions imposed on licence holders.

BROAD NATURE OF THE BILL

A key justification for this bill is the time delay that the fourteen Hunter coal mines took to agree to a monitoring solution. ASBG considers this is flawed justification for such a broad based bill. Under the bill, unlimited environmental monitoring programs can be applied to any licensed site or group of sites in NSW, not just for coal mines.

If the government had issue with the Hunter coal mines, cannot this bill specifically target this issue and not be made to cover any licensed site?

Additionally, there is no guarantee that the processes for environmental monitoring contained within the bill will ensure faster results if the due processes outlined in the second reading speech and the bill is followed which includes:

1) Consultation with industry and the community regarding the design of the environmental monitoring program – second reading speech

2) s295Y(6) The EPA is to obtain, and take into consideration, advice from one or more independent persons or bodies with relevant technical and health expertise as to the cost effectiveness of any environmental monitoring program.
3) Implementation of the monitoring is to be conducted by the EPA, or at least under their financial control as from the Environmental Monitoring Fund.

Importantly the bill changes the development and operation of environmental monitoring away from the outcome process incorporated under Environment Protection Licenses (EPLs) to one where the EPA has the operational functionality of the program. ASBG considers the current outcome orientated approach to environmental monitoring implemented and conducted by licence holders is, by many measures, a more efficient process than the proposed process in the bill and run by the EPA.

It is recommended that environmental monitoring should continue to be outcome based, with the regulator establishing the outcomes from negotiations with the site/s requiring such.

ASBG has other concerns regarding this bill including:

- It is redundant, as there are many existing legislative means to perform the monitoring requirements the bill seeks to address.
- It undermines the well established approach of negotiated conditions on licensed sites and merit appeals.
- The retrospective nature of the levy payments.

REDUNDANCY ISSUES

The Bill is considered redundant in most of its aspects. Reasons for this claim include the following:

Environment Protection Licences (EPL) provide much scope to include substantial environmental monitoring conditions. There are many examples of current EPLs where Pollution Reduction Programs (PRP) include off-site monitoring requirements to deal with community concerns and complaints. Commonly these cover noise, dust and odour and require detailed studies to be conducted to identify and reduce such issues. PRPs offer much broader coverage than for monitoring, enforcing many investigation, treatments and other environmental protection measures. In short the PRP process alone can do most of what this bill proposes and more.

Not only can additional monitoring be placed within an EPL, under a PRP, it can simply be placed under section 6 Reporting Conditions. PRPs are commonly used to investigate environmental issues including ground level concentrations in the surrounding areas beyond the land covered under the EPL, especially for noise, dust and odour.

The second reading speech makes it clear that the purpose of the bill is to cover cumulative impacts from clusters of EPL sites. However, ASBG has found examples where the PRPs have covered this as well. One example of such cluster coverage is under Orica, Qenos and Huntsman's EPLs. These three licenses cover the clustered impacts of noise and storm water. To provide an example, Huntsman's EPL states for noise:

> *R4.1 A compliance report for all Botany Industrial Park (BIP) Licences (L7494 Hunstman Corporation; L2148 Orica Pty Ltd and L10000 Qenos Pty Ltd) demonstrating compliance with the noise conditions listed at Condition L6.1 to L6.2 must be appended to the yearly Annual Return for Qenos L10000.*

A similar requirement appears under the other two licenses. In addition, the following condition appears in all three licenses:

> *U6.1 A continuous improvement program must be implemented to address issues associated with the stormwater system on any part of the premises. The stormwater improvement program must be consistent with the Botany Industrial Park stormwater improvement plan.*

The above example of use of an area Stormwater Improvement Plan, which relates to a separate document that details the actions the cluster of Botany companies must undertake to manage stormwater across their sites. Use of such a document to cover clusters of licensed activities and reference to, in multiple Environment Protection Licences, demonstrates the ease in which licences can be used to manage cumulative emissions from a cluster of industries.

Existing legislative instruments, especially under the Protection of the Environment Operations Act 1997 (POEO Act), can be used to deal with environmental monitoring and even for clusters of EPLs which includes:

- Section 66(1)(a)(iii) of the POEO Act permits that*: relevant ambient conditions prevailing on or outside premises,* and (c) *the analysis, reporting and retention of monitoring data* can be included as conditions under the licence.
- POEO Act *Part 7.3 – Powers to require Information or Records* and especially section 191 Notice provide considerable powers for the EPA to require information and records. S 192 also extends these powers to other reguatlory authorities, in particlar local government. There is nothing limiting these powers to also cover environmental monitoring and applying it to clusters of industrial activity. In fact this section is broader than the bill, as it can apply to any site or sites licensed or not.
- Part 6.2 Mandatory Audits can include monitoring requirements as part of an audit, but this can only be triggered if the EPA suspects the EPL holder is breeching licence or the POEO Act. Mandatory audits are meant to be punitive, but have not yet been used by the EPA.

ASBG recommends strengthening the existing application of licence conditions, if at all necessary to achieve the main objectives of this bill.

NEGOTIATION AND APPEALS PROCESS BY-PASSED

The bill, while repetitive in its outcomes of other parts of environmental law, does change the nature of the ways in which environmental monitoring is established and run.

Under POEO Act section 287 Appeals Regarding Licence Applications and Licences, *the holder of a licence and who is aggrieved by any decision of the appropriate regulatory authority with respect to the licence,* can lodge an appeal to the Land and Environment Court as a Class 1, merit appeal matter. The approach the bill proposes by-passes this appeals process.

ASBG notes that the use of s287 is rare for environment protection licenses. In fact the last known appeal was in 1999, EPA vs Australian Solvent Recyclers. Given the rarity of licence appeals there is little argument that excessive appeals will interfere with effective environmental monitoring programs being established under existing licenses.

While the bill does require that '*the EPA is to obtain, and take into consideration, advice from one or more independent persons or bodies with relevant technical and health expertise as to the cost effectiveness of any environmental monitoring program.'* This is not negotiation as it hands over the control of the monitoring program to the EPA, with only reference for consideration.

It is common for our members to be in negotiation with the EPA on Pollution Reduction Programs which at the first round of negotiations are very onerous and costly. Many PRPs can have initial costs exceeding $1 million and are questionable as to their environmental outcomes. The use of the legislative negotiation process is vital for the removing and re-negotiation of PRPs with high costs and focus on academic questions about environmental issues rather than to be a practical means in which to improve a sites environmental performance.

Given that onerous and costly requirements are commonly placed on licence holders this reinforces the need for an independent umpire to vet such initiatives by the regulator.

ASBG recommends that environmental monitoring programs are developed by a negotiation process comprising of the licensee or a group of licensees and the EPA and this be negotiated outcome subject to the right of appeal to the Land and Environment Court.

RETROSPECTIVE

Under s295Z(4)(a) of the bill it contains the clause:

> *(a) the costs of investigating the need for, and the development, implementation, operation and administration of, environmental monitoring programs (including any costs incurred by the EPA before the commencement of this Part),*

Clearly this bill is retrospective. While this section in intent targets the Hunter coal mines, it could apply to far older monitoring. Under the Ambient Air Quality National Pollutant Inventory, the EPA has ongoing monitoring stations across NSW which have been in operation for more than a decade. Can the government guarantee that this bill will not levy all licence holders to pay for these monitoring stations? Can this guarantee extend to other existing environmental monitoring which could be captured under this bill?

ASBG's members are very concerned over the extent to which this retrospectivity can be applied. The retrospective component of this bill should be removed.

It is recommended that any retrospectivity not be directly or indirectly applied under this bill.

CONCLUSION

This bill has many flaws and at best should be made specific to the issue addressed in the second reading speech namely the Hunter coal mines. It will deliver a more inefficient means of environmental monitoring, because it will be under government administration. Other more efficient and faster methods of achieving the same or better outcomes already exist under current environmental laws. In short the bill is virtually redundant, except that it removes appeal rights from licence holders.

Time delays for regulation making, community, industry, licence holder and independent experts required under this bill will ensure the outcome is further delayed. Using existing environmental legislation are likely to result in a faster, lower cost means of environmental monitoring based more on market

mechanisms. Faster delivery of better monitoring data will ensure quicker decisions and improved environmental outcomes.

Having a retrospective clause within the legislation is deeply concerning as this provides no limit to its retropectivity.

Filling the Environmental Monitoring Fund concerns all licence holders as none are exempt and there is no limit to the size of the fund and the scale of the levy amounts. The bill appears to have an outcome to establish a new EPA environmental monitoring arm, funded by licence holders, subject to investigations initiated by the whim of the EPA, Minister and community groups. Having only licensed sites pay for environmental monitoring when other sources comprise the majority of the sources is unfair.

Overall the bill will undermine the currently shrinking manufacturing industry in NSW and further deter investment from this state.

Should you require ASBG to clarify or elaborate on the above matter please contact me.

Yours Sincerely

Andrew Doig
National Director
AUSTRALIAN SUSTAINABLE BUSINESS GROUP