

14 October 2011

Minister for the Environment
Robyn Parker
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Minister

The Australian Sustainable Business Group (ASBG) appeals to you to consider undertaking some amendments to the *Protection of the Environment Legislation Amendment Bill 2011* (the Bill). In its current form this Bill, especially the immediate reporting requirements, will subject NSW business and industry to substantial compliance cost increases. It also fails to address all community concerns which may arise over similar incidents which lead to this Bill's development.

The Australian Sustainable Business Group (ASBG) is a leading environment and energy industry representative body that specialises 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.

This submission will focus on the following issues with the Bill including;

- Immediate reporting requirement on incidents of Material Harm
- Forcing the Undertaking of Environmental and Health Risk Assessments
- Publication of Monitoring Data on Corporate Websites
- Other matters

Immediate Reporting

Simply replacing the term 'as soon as practical' with the term 'immediate' will result in many difficulties and costs for industry, business and government. As an alternative ASBG recommends that the need for immediate reporting should be limited to a set of hazardous chemicals based on their toxicity, carcinogenicity or other issue which may give rise to community concerns.

As it currently stands in the Bill the following issues can arise:

- Spills of similar toxic chemicals of similar size such as that which triggered this Bill may not be captured because they may not be considered to be meeting the threshold of Material Harm to the Environment of \$10,000 harm.
- Immediately reporting requirement is not limited to industry or businesses, but to everyone in NSW as a general environmental duty. Hence a householder or shop owner can be liable for not immediately reporting to the four or more agencies if their house or shop is on fire.
- Many false alarms will be triggered as the term immediate does not permit any time to assess or evaluate the scale or details of the incident. Many companies have automatic alarm systems

which may or may not indicate an incident has occurred but indicate plant failure. The reporting can only be *'we may have an incident, but we do not know much further information'*.

- When an incident is discovered, attention of the environmental manager is drawn first to contacting four plus agencies by phone rather than managing the incident. This process may take at least 5 minutes each agency, perhaps longer for larger incidents, as they ask their set of agency specific questions. This removes the key manager for at least 20 minutes, who should be also directly managing the incident and minimising its environmental impact and managing site safety.
- For larger incidents or where information about its type, scale and impacts are not forthcoming, the requirement for immediately reporting new information, from a legal standpoint, this can require an ongoing commentary of the incident. With four agencies to report to separately this is very difficult. Such ongoing commentary will take further time away from the key manager to address any environmental harm arising from the incident. Such immediate information cannot be considered 100% reliable. Government agencies must accept that many pieces of incorrect or mis-interpreted information should be expected.
- For many industries there is a conflict between the immediate reporting for environmental and community knowledge and its requirement to the safety of employees on the site. NSW's Occupational Health and Safety legislation require immediate assistance be given to an injured person and immediate reporting of serious harm to a person. Having two immediate requirements will again make compliance extremely difficult. The Government needs to also clarify which one takes priority.
- With immediate reporting of environmental incidents there will be a public expectation that NSW government agencies will also immediately respond to such an incident. As a consequence, a considerable increase in government resources will be required to manage the outcomes of this Bill. However, when a disaster does arise, the public are often quick to blame any Government for not reacting quickly enough. Satisfying the public's desire for quick action is equally difficult for government. There will be circumstances where this legislation will backfire on the Government.

The Bill also fails to meet the Premier's claim in his press release 'Tough New Pollution Laws: O'Reilly Report Accepted In Full' that he would accept Brenden O'Reilly's 9 recommendations in full. This is not the case. The Bill fails to consider:

- Recommendation 1 section 148(2) of the POEO Act be amended to read "*A person carrying on the activity and becoming aware of the incident must immediately or within one hour of the incident occurring notify the appropriate regulatory authority of the incident and all relevant information about it*". Use of the one hour was not included in the Bill and would provide considerable compliance relief to both government and industry from just using the term 'immediately'.
- Recommendation 2 *Irrespective of whether an emergency is declared or the accident is determined to be an Incident, when a hazardous material spill occurs which is not confined to the plant and impacts on neighbours be they other business houses or the community, and requires a coordinated inter-agency response, the community engagement system (PIFAC) will be activated immediately the incident becomes known.* No reference to identifications of hazardous chemicals incidents is made in the bill, nor is there any provision for this type of incident to be escalated if such is the case. The Bill fails to deal with hazardous chemicals separately and implies they are captured under the material harm trigger, which they may not be. It would be better use of resources to separate out the need to respond to objective harm and subjective issues. The PIFAC may be a good tool to do this. However, if the vetting process behind the immediate reporting is based on hazardous chemicals why cannot these be placed in the legislation? ASBG's approach covers the issue of hazardous chemicals.

Also of concern are the substantial costs associated on industry, business, government and even the general public of the poor drafting of this Bill. Industry and businesses will find it very costly to introduce additional incident monitoring controls and methods and additional resources to report while minimising further harm. Hence, the introduction of the Bill appears contrary to NSW's COAG commitment to improve regulatory reform. On 16 September 2011 Australian Environment and Water Ministers as the Standing Council on Environment and Water (SCEW) released a communiqué¹. The following is an extract:

Environment law reform

Ministers endorsed COAG's recommended major reform of environmental regulation across all levels of government, aiming to cut red tape, reduce duplication and, most importantly, improve environmental outcomes.

The Australian Government will work closely with the states on achieving these outcomes, through a more strategic approach and by setting national environmental standards and harmonising environmental regulatory practice.

It appears the Bill flows contrary to the above position and adds to green tape costs on business and industry in NSW.

To greatly reduce the costs to businesses and government an amendment to the Bill is required to reduce costs to business and government and to better report chemical substances of high community concern.

ASBG recommends the Bill be amended to include a new reportable condition of 'Serious Environmental Incident', which is linked to immediate reporting of incidents resulting in releases outside the site containing a specific chemical or substance contained in a list.

In detail the Serious Environmental Incident may be framed in the POEO Act:

- To include a new definition of a 'serious environmental incident' which:
 - Refers to a list of chemicals and substances considered serious environmental chemical/s or substance/s
 - Be considered to have escaped outside the site
 - Be a quantity which is not trivial given the properties of the substance.
 - Or includes environmental harm from any substance greater than \$100,000
- To include a new section "Serious Environmental Incident" which:
 - Includes the subsections (1) to (5) in s148 in which 'immediate or one hour' replaces 'as soon as practical'.
 - References to materials harm to the environment are replaced with 'a serious environmental incident'.
- Omit the Bill's changes to s148.
- Link the changes to s150 to Serious Environmental Incident and not to the entire section.

Using the Serious Environment Incident, which is not limited to the \$10,000 material harm criteria, but is limited to a list of chemicals of community concern, the subject issues associated with such incidents can be better handled and more quickly. Industries and businesses with such chemicals will be able to install better incident prevention and management systems. The list of chemicals can be formed using community consultation and periodically reviewed. This approach is more consistent with the O'Reilly Report's recommendation 2. Overall it is a better means in which to manage future incident issues.

Reporting to the four or more regulatory agencies is also a difficult challenge. In the case of a serious incident, then reporting to all four at the same time appears to be only legally correct route. Having four

¹ <http://www.ephc.gov.au/sites/default/files/Environment%20and%20Water%20Ministers%20Communique.pdf>

officers fully briefed reporting the same information about the incident is considered very difficult. More efficient means should be developed to report, especially for large incidents.

Other emergency services use the 000 telephone number. A similar multi-agency number could be employed for reporting environmental incidents.

Alternatively, use of specific email addresses to each agency should result in more immediate notification. Here a simple tick box email sent simultaneously to each agency would be a faster means than phoning each agency in sequence and answering each agencies set of questions.

Forcing the Undertaking of Environmental and Health Risk Assessments

Under the Bill's proposed sections 295ZC *Conduct and Health Risk Assessment* and 295ZD *Conduct of Environmental Risk Analysis* permits the Environment Protection Authority to undertake a health or environmental risk analysis and send the costs to the relevant person. This places considerable trust in that the Regulator will be fair and just and that such costs are reasonable.

Unfortunately, ASBG is concerned that this section can be abused. The EPA in the past has been subject to ICAC inquiries where officers have taken advantage of their position. As a consequence, there should be provision to vet this process and where necessary be able to appeal excessive costs and or unnecessary analysis.

Publication of Monitoring Data on Corporate Websites

s66(6) Publication of results of monitoring on a company website requires further clarification. Some of the issues required to be worked out or expanded include:

- 14 days may not be enough to ensure the accuracy of the data posted, especially for
- Dealing with vexatious complainants – this provision will result in an increase in vexatious complaints to the EPA. How these will be reasonably managed by the EPA requires further clarification.

ASBG recommends that further guidance material be developed in consultation with licence holders on provision of web based monitoring data.

Other matters

The formation of the Environment Protection Authority is welcomed and ASBG looks forward to working with a professional highly skilled agency.

Duty to prepare incident management plans is generally welcomed by members as most have well developed plans. ASBG looks forward to being involved with the development of the regulations detailing these plans as members can provide considerable practical and technical knowledge to this process.

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

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 of the last name.

Andrew Doig
National Director
AUSTRALIAN SUSTAINABLE BUSINESS GROUP
Ph (02) 9453 3348
andrew@asbg.net.au