

31 March 2013

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Dear Brad

The Australian Sustainable Business Group (ASBG) welcomes the opportunity to comment on the *Proposed Risk Based Environmental Regulatory Framework under the Protection of the Environment Operations Act 1997* (the Risk Framework).

The [Australian Sustainable Business Group](http://www.asbg.net.au) (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 130 members comprising of Australia's largest manufacturing companies. Members were fully involved in the development of this submission and ASBG thanks them for their contribution.

ASBG strives to assist regulatory agencies to prepare more efficient regulatory process, with the outcome of achieving practical, efficient, low cost solutions to achieve high environmental outcomes. This is achieved by feedback from members, mostly senior environment managers, who must implement the new controls in a cost effective and pragmatic manner where possible.

ASBG thanks the EPA for providing the initial consultation on the Risk Framework and also providing a follow up meeting with ASBG's Policy Reference Group.

The contents of the Risk Framework can be divided into two distinct areas:

- 1) Changes to the pricing of administrative and load based licensing fees and charges
- 2) A risk based tool used for assessing Environment Protection Licence (EPL) conditions, especially monitoring and inspection frequency. This also includes the Operator Performance Multiplier.

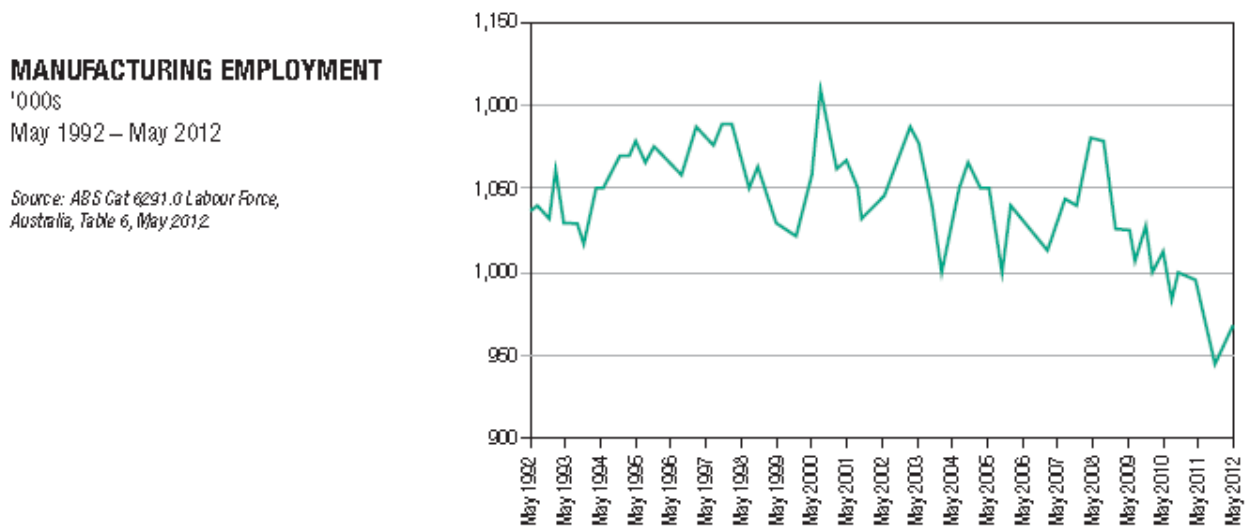
Due to the above each will be discussed separately as they have considerably different impacts on holders of EPLs.

The Risk Based Framework should be a practice, which provides for increased efficiency for both the EPA and the EPL holder. A risk based approach should deliver efficiency gains to both sides lowering costs. ASBG would measure the success of such a program by the increase efficiencies of administration for both parties. A key part of the fundamentals of a risk based approach is to permit increased self regulation, in part, to those EPL holders who can demonstrate their high level of operator

performance. In essence, the risk based approach outcome can be considered to identify those deserving of more trust by the regulator and those with less.

1 INCREASE IN FEES

ASBG members are disappointed at the proposed increase in administrative fees and the combination of load-based-licensing fees. This increase comes at a time when most EPL holders are suffering financially, especially the manufacturing sector. NSW manufacturing represents 28.5% of all of Australia’s total manufacturing employment, employing 272,000 in May 2012¹. From 1992, to May 2012 manufacturing has lost 106,775 jobs across Australia, with NSW. This is represented by the figure below Manufacturing Employment.



From the EPA’s Public Register, ASBG estimates over 55% of all licenses can be classified as manufacturing. The vast bulk of licence fees paid— administratively and from Load Based Licensing— are in the area of manufacturing and utilities. Increasing fees on the already stressed manufacturing sector may lead to increased unemployment especially in the areas of high skills and value added to the economy. To assist in sustaining manufacturing the NSW Government should be looking ways to reduce costs not increase them.

While the increases in fees being proposed are not substantial compared to other costs, these increases do contribute to corporate macroeconomic decisions on whether to continue to operate in NSW or not.

Overall ASBG calls on the NSW Government and the EPA to minimise the cost impacts associated with the review of administrative costs. As a consequence, ASBG recommends the cost of administration of EPLs should be benchmarked against other jurisdictions, with Victoria appearing to have the next closest licence types and scale of manufacturing.

ASBG understands the recovery of costs through administrative fees is a NSW Government decision, rather than an EPA one. This is understandable, as the downside for the EPA is as the scale, numbers and revenue from EPL holders in total shrinks, the agency’s administrative cost recovery and available resources will likely proportionally shrink.

¹ Source: ABS Cat. No. 6291.0.55.003

R1 ASBG recommends the review of administrative fees for licenses be kept to minimal price increases and be benchmarked against other jurisdictions costs for environmental licence administration.

ASBG is also concerned over the proposed increase in LBL fees which will undergo a review later in the year as well. Given the parlous nature of many large manufacturing sites in NSW large increases in LBL would add pressure to close sites leading to lower incomes for NSW Government's consolidated revenue.

2 RISK BASED PROCESS AND ITS APPLICATION

ASBG has long supported and promoted the use of a risk based approach to EPLs. Consequently, we congratulate the EPA in undertaking this approach in principle. ASBG considers the overall benefits of risk based licensing, should be good for both the licence holder and to the regulator. Well performing licence holders should be offered more streamline licence conditions and increase self regulation, which should reduce their costs of compliance, but maintain environmental protection levels. ASBG expects this will look similarly to the Victorian EPA model where licence holders with lower risk ranks are permitted to determine their own monitoring régime; therefore increasing their level of self regulation. The regulator can benefit by having a more structured and efficient inspection program, making better use of available resources focusing on the higher risk sites and lower resources used on low risk sites.

However, the limited information provided by the EPA on the details of the Risk Assessment Process and its tool and the other components means only broad based comments can be provided. Hence, further consultation on the Risk Framework is a major issue.

The main issues indentified include:

- Ranking of Risk Levels
- Consultation on the Risk Assessment Tool
- Review of the outcomes of the Risk Assessment Tool
- Public disclosure of the Risk Rank
- Policy on Monitoring and Licence conditions under the Risk Assessment Process ranks
- Administrative fee multiplier for Operational Performance

2.1 Ranking of Risk Levels

The brief descriptions of the Risk Assessment Process (RAP) shows it is quite comprehensive and will provide a detailed description of the risks associated with the EPL site in question. However, it is proposed that only three levels be used—*high, medium and low*. Verbal advice was that these three levels should be available for each EPL site. But, due to the tools' calculation method large sites will be rated high risk regardless of how well they perform.

ASBG proposes the RAP provide additional risk rankings dependent on the scale of the activity. Hence, for smaller EPL sites they can be assessed with three rankings, medium sites have five and the very large sites be provided with ten. Provision of additional risk ranks will permit a finer tuning of actual risks and provide a means for all EPLs to be able to improve and move to a lower risk rank.

If more ranks levels are provided then especially for the larger EPL sites the rankings should be identified by a number rather than a descriptor word, which can be used misleadingly.

R2 *ASBG recommends that additional and variable risk ranking levels be considered in consultation with EPL holders.*

2.2 Consultation on the Risk Assessment Tool

ASBG members are concerned over the proposed consultation process, especially if the next step of going to draft legislation and Regulatory Impact Statement, without further consultation. Many of the details of the Risk Based Framework require considerable work, testing and evaluation. As a consequence, there is a need for on-going consultation on the Framework in the lead up to the draft legislation and final round of public consultation.

ASBG members are very keen to review and test drives the new RAP especially the tool. EPL holder input into the development of the fully transparent and calculable tool will assist it is good design. EPL holder input into the process of the RAP development will also provide creditability of the acceptance of the tool by the end users. Such consultation is valuable as future modifications to the RAP will be lowered with end user input. Getting a good process outcome first will save on later corrections.

ASBG would welcome the opportunity to be involved in the review of the RAP with our members and the EPA.

R3 *ASBG recommends on-going consultation with EPL holders on the development of the Risk Framework, the Risk Assessment Process and its tool.*

2.3 Review of the outcomes of the Risk Assessment Process

The EPA has indicated it will undertake the risk assessments itself. However, as with any risk assessment there are elements of subjectivity associated with its process. As the RAP tool will be made public, transparent and calculable, and available to each EPL holder, there is a potential for disputes to arise over its outcomes. ASBG members are concerned regarding the potential variability in the application of the RAP over multiple sites and wishes to maximize the objective and logical nature of the design of the RAP tool.

Larger EPL holders will in many cases undertake a parallel application of the RAP tool to its site. Such calculations will be a standard requirement under most Environmental Management Systems; a process of self assessment, which should be encouraged and be protected as per voluntary audits. RAP rank can have considerable impacts on licence conditions in the EPL and higher costs if a poor rank results. Consequently, ASBG considers there is a need for dispute resolution process on the RAP tool outcome and the subsequent Operational Performance Multiplier. ASBG considers this should be similar to the legislative processes laid out in the *Protection of the Environment Operations Act 1997* and other EPA documents for any EPL variation. In short these would include:

- A meeting with the EPA RAP team assessing the site and the EPL management to explain their findings.
- Draft notice of variation to the outcome of the tool and associated licence variations with the usual period for comment.

- A process of negotiation over subjective issues and conclusions derived under the EPA's application of the RAP.
- A process of negotiation over the proposed changes to the conditions under the EPL as a consequence of the RAP outcomes.
- Where disputes cannot be decided the process should be subject to the usual appeals processes under the s287 of the POEO Act.
- The frequency of review of the RAP should be initiated by either the EPA or the EPL holder as is the case for licence variations.

R4 *ASBG recommends that:*

- *The outcomes of the Risk Assessment Process and Tool and the Operational Performance Multiplier be subjected to the same negotiation and dispute resolution processes that apply to Environment Protection License variations.*
- *Use of the RAP tool by EPL holders be recognised as a voluntary audit under Part 6.3 of the POEO Act.*

2.4 Public disclosure of the Risk Rank

ASBG members are concerned over the publication of a risk rank for specific EPL sites. A high risk ranking can be misinterpreted and can lead to increased community conflict with such a labelled EPL site. This is most concerning as the EPA has indicated that in its current form the RAP tool will place some, generally larger sites in the high risk category with no means for them to move to a lower level. Members are concerned that local property prices may be affected by such publication of risk ranks.

R5 *ASBG recommends the risk ranks not be published as is the case with other states.*

2.5 Policy on Monitoring and Condition variations under the Risk Assessment Process ranks

A cornerstone of the Risk Based Framework should be to incentivize EPL holders to improve their performance and be more self regulatory, with less need for the EPA to intervene. One major area the Risk Based Framework as a financial incentive is the potential for reduced monitoring costs and more self regulation compared with current licence conditions. While promised to EPL holders, the detail, of increased self regulation for low risk EPL holders, are vague and requires further development and clarification.

Note that ASBG members have been calling for changes and streamlining to monitoring for many years. There are many examples of excessive and high cost monitoring requirements which can be replaced by more cost effective methods and or alternative practices without compromising environmental performance and oversight.

To provide more confidence in a better outcome for EPL holders who are in the lower risk ranks clarification is required on what increased self regulation will mean such as levels of self determined monitoring and other licence conditions. ASBG proposes the EPA consider developing a policy, which identifies the benefits of achieving a lower risk rank and the converse.

2.6 Operator Performance Multiplier on Administrative fees

ASBG accepts the issue that increased EPA administrative costs will be associated with poorly performing EPL holders. However, the opposite also applies where good performers will also generate lower costs to the EPA as they are permitted more self regulation.

In discussions with the EPA the application of the Operator Performance Multiplier (OPM) can only result in higher administrative fees. This is unlike the licensing systems in Victoria and Queensland where good performance can result in lower fees. Again a major issue with the EPA's Risk Framework is that there appears only one benefit for EPL holders in the process; that being a possible reduction in monitoring costs and licence conditions being the only incentive to support the EPA's model Framework.

As an alternative, ASBG proposes the OPM or equivalent (see below), not only punishes poor performers as proposed, but also rewards good performance. Positive operator performance could include, but not limited to the following:

- Having a fully functional Environmental Management System
- Developing positive Pollution Reduction Programs (note PRPs can also be punitive, having both positive and negative impacts)
- Engaging in effective community consultation programs
- Achieving selective environmental awards

ASBG considers the maximum multiplier amount of the OPM should be no more than 1.5. Hence, the maximum payable amount for the poorest performer is 1.5 times the administrative fee. There is also an argument that additional costs resulting from the OPM should be also capped at a flat rate (e.g. \$25,000). Such upper limits are recommended to minimise member concerns on perceived incentives for the agency to boost its revenue from increasing the size of the OPMs.

ASBG is also concerned that large high paying administrative fee EPL sites will bear a disproportional impact of the OPM.

For example, a site with a \$100,000 administration fee is issued with a \$1,500 PIN. Under the OPM it receives a 5% increase in its administration fee, a \$5,000 increase. In contrast a smaller site with a \$2,000 administrative fee is prosecuted for \$50,000 and receives a 20% increase in administrative fees resulting in a \$400 administrative fee increase. Hence the multiplier is far more punitive for large high administrative fee sites than for smaller lower administration fee sites.

On the basis of the above the multiplier is flawed, unfairly punishing larger administrative fee paying EPL holders for similar poor performance. A better concept could be to use an additive approach where the increased inspections and additional costs associated with poor performers is calculated and added to the administrative fee. Such an additional approach would then be linked to the increase in inspection frequencies and other internal costs associated with poor performers. Even as such the maximum amount should be capped for reasons discussed above.

R6 ASBG recommends:

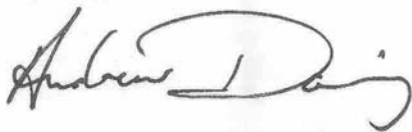
- ***The Operational Performance Multiplier be changed and an additive approach be considered, rather than a multiplier.***
- ***The maximum level of the administrative increase be capped to a reasonable level.***

- *Lower administrative fees be also available as an incentive to improve performance.*

Overall the OPM process requires far more thought and consultation as its consequences have disproportionate outcomes.

This submission was prepared in consultation with members of ASBG's Policy Reference Group. Should further details be required please contact Andrew Doig.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Andrew Doig', written in a cursive style.

Andrew Doig

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