

27 May 2014

Barry Buffier  
Chief Executive  
Environment Protection Authority  
PO Box A290,  
SYDNEY SOUTH NSW 1232

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**RE: FINANCIAL ASSURANCE — USE OF ENVIRONMENTAL INSURANCE**

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Dear Barry

The Australian Sustainable Business Group (ASBG) has been working with the EPA since 2009 to investigate alternative means in which to arrange financial assurances.

This letter is to again promote the consideration of environmental insurance policies as an alternative or a supplement to bank guarantees in the EPA's use of financial assurances. ASBG believes such policies could offer a lower cost for Environmental Protection Licence (EPL) holders and a much deeper level of coverage providing improved outcomes for the EPA and the NSW Government.

### **Background**

Protection of environment has continued to be applied to an increasingly wider range of issues. Emergency incidents, such as major fires have similar if not larger environmental impacts as large spills. As a consequence the EPA and other agencies, in Australia and internationally, are obliged to manage firewater and other environmental impacts associated with industrial fires.

Last year a number of incidents came to head that identify a gap in General Insurance policies for business. This can be called the environmental gap, as *environmental gap insurance* is now actively promoted by the insurance industry to fill this gap. It is also an international issue, where cases have appeared in the UK, Europe and North America as well as in Australia. A local example is the [2005 Binary Chemicals fire](#) in Narangba Queensland. Put simply General Business Insurance only covers third party damage claims in civil court, hence regulator directed clean ups, such as under Clean-up Notices, are not generally covered.

In order to deal with this issue ASBG organised the Roundtable on Energy Incident Pollution Issues, which comprises the NSW EPA, Fire and Rescue, XL Insurance and Henry Davis York (Lawyers) to discuss the issues. Three meetings have been undertaken and progress has been conciliatory and positive.

At our last meeting the issue of use of a specific environmental insurance policy was raised again. Noting it was last raised with the DECCW in 2009, but then the EPA considered bank guarantees were a better means to gain access to emergency clean up funds following an event. Use of insurance policies were not well known by the DECCW, which doubted its ability to delivery of emergency funds and raised concerns that legal arguments may occur.

## **Financial Assurance and Insurance**

Financial assurances have been utilised as a tool by the EPA to ‘assure’ activities especially in the waste area. In practical application however, we discussed that there are insurance products available that may provide a ‘precautionary’ solution, thus lessening the need to have to lien on certain financial assurances.

The requirement of a financial assurance, for the holder of a waste management license, appears to be immediate access to moneys by the EPA where the Licensee has failed to exercise ‘precaution’ and reduce the impact of an incident and its potential contamination.

During discussion with the DECCW in 2009 there was agreement that environmental risks could be reasonably divided into:

- Immediate issues requiring immediate attention
- Clean up and management issues which can be managed over the longer term

ASBG supports the intention of financial assurances, but as there are certain conditions which must first be exercised before these funds may be drawn, we argue that if an insurance policy was issued that supports the ‘Precautionary Principal’ that there may be less need to lien on a financial assurance. [ASBG is not suggesting that financial assurances are unnecessary.]

It was proposed that for some, a financial *assurance* can be complimented with correct environmental pollution *insurance* offering a better coverage of the risks the EPA is attempting to secure where presently, the ‘size’ of the Financial Assurance required may be construed as an instrument to limit the potential liabilities that ought to be insured against.

For example, a Waste Management Facility operating under license risks an unexpected event having to close down at a future point due to certain community demands. The cost for closure (or ‘capping’) may need to be held in ‘escrow’ and Financial Assurances may assist. However, if an unexpected event occurs which may call for immediate remediation, is a Financial Assurance alone adequate to offset the increased costs of:

1. Community action calling for investigation.
2. Consequential loss to businesses who may need to temporarily close as a result of a contamination.
3. Consequential loss to the waste management centre as a result of the interruption to trade.

In our discussion we recommended that a combination of a realistic Financial Assurance combining correct Environmental Insurance may be a better model and we were interested to learn that whilst EPA ensured Waste Management facilities demonstrated that they also held insurance cover by presenting a ‘*Certificate of Insurance*’ that there was no method currently being employed to ensure that the covers arranged *actually* provided protection for their pollution risks.

## **Use of Environmental Insurance in Licences**

ASBG believes it is possible to require correct issuance of environmental insurance in Environmental Protection Licenses (EPL) under section 72, of the POEO Act quote:

## 72 Conditions for insurance cover

The conditions of a licence may require the holder of the licence to take out and maintain a policy of insurance for the payment of costs for clean-up action, and for claims for compensation or damages, resulting from pollution in connection with the activity or work authorised or controlled by the licence.

Alternatively, ASBG also considers that section 298 under Part 9.4 of the POEO Act does permit the use of insurance policy under subsection (2)(c):

S298 (2) Form of financial assurance A financial assurance may be in one or more of the following forms:

- (a) a bank guarantee,
- (b) a bond,
- (c) another form of security that the appropriate regulatory authority considers appropriate and specifies in the condition.

ASBG understand that EPA may be interested to learn of the services that can be developed by our members in the insurance sector to support the above, for example:

1. A special environmental insurance policy that will provide emergency access to funds to the regulator / combat agencies to deal with immediate threats and longer term remediation costs.
2. A hybrid financial assurance comprising of:
  - A bank guarantee which is limited to a few days of incident response capital this would be smaller than the current scale of financial assurances, perhaps 25% of the total
  - An insurance policy to take over the long term costs associated with the incident this can likely be much larger coverage than currently maximum required under financial assurances, generally starting at \$10m, but can be scaled according the risk associated with the EPL

An environmental insurance policy will most likely include the following in its packaging:

- Provide an insurance Certificate of Currency ‘audit’ to ensure the risks covered by the policy are minimised.
- Arrange a (e.g. \$20,000,000+) Environmental insurance Public Liability Policy the main.
- Arrange a (e.g. \$5,000,000) Environmental insurance Professional Indemnity Policy, if required for professionals arranging the risk control actions and measures.
- Provide Risk management service to encourage active site management and report potential risks.
- Seek to increase the affordability of Financial Assurances.

What are the advantages?

1. An expected lower cost product in the both single policy and hybrid approaches compared to a bank guarantee alone.
2. A much larger coverage (i.e. > \$10m).
3. Cover established for accidental risks of contamination of land, firewater, water courses and other areas of the environment.
4. Cover established for consequential loss.
5. Potential reduction of orphaned sites, where company goes bankrupt over clean-up costs.
6. Reduction of community concern if cover exists may require under the insurance conditions that better community liaison occurs.

The key to a satisfactory environmental insurance policy to cover fully or in part the financial assurance required is the quality of the policy. Fortunately there are a number of examples where such arrangements currently exist. Under Part 20 of the *Dangerous Goods (Road and Rail Transport) Regulation 2009*, owner of the vehicle must have insurance for at least \$5 million. The regulation also spells out briefly what the insurance policy must cover as a minimum.

Insurance policy requirements are a common action under NSW legislation with motor vehicles, health, workers compensation and various professionals – e.g. lawyers, builders etc.

Depending on the policy and the costs associated with time delay of mitigation action, some insurance policies can work very quickly. At our Roundtable meeting the example of gaining cost expenditure from boat insurance was provided. Approval can be given quickly, in some cases over the phone. Refloating a sunk or preventing a boat from sinking can reduce the damage and claims. Such urgency for action, based on similar market forces, can also apply for expanding and encroaching spills, especially if they impact on water bodies or soils.

## **Conclusion**

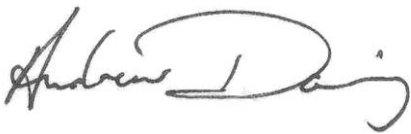
Both the EPA and EPL holders will be better served having the option of use of environmental insurance to cover their Financial Assurance obligations.

ASBG recommends the EPA consider the use of environmental insurance as means in which to cover its Financial Assurance requirements either wholly or in part.

ASBG also recommends the use of environmental insurance be an option, permitting EPL holders to determine the lowest cost option for any environmental Financial Assurances it requires.

I look forward to having further discussions with ASBG insurance members on how to progress the use of environmental insurance to assist in financial assurance and other environmental protection issues.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Doig', with a stylized flourish at the end.

ANDREW DOIG  
CEO  
AUSTRALIAN SUSTAINABLE BUSINESS GROUP