TASMANIAN APPROACHES TO ENVIRONMENTAL OFFENCES

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TASMANIA'S ENVIRONMENT PROTECTION ACT 1973 IS A CONSOLIDATED pollution control Act, which deals with pollution of all sorts. Other miscellaneous Acts administered by the Department include the:

- Litter Control Act 1973;
- Chlorofluorocarbon and Other Ozone Depleting Substances Control Act 1987;
- Pollution of Waters by Oil and Noxious Substances Act 1987.

In common with many other jurisdictions, Tasmania has recently reviewed its environment protection legislation. The new Act, the Environmental Management and Pollution Control Act 1994, involves a very different approach to environmental offences than has been the case in the past. It is expected to commence operation early in 1995.

The Environment Protection Act 1973

The current Act imposes obligations on operators either to ensure that pollution does not occur or to ensure that, if it does, point source emission standards are not exceeded.

There are two enforcement systems under the legislation:

- A licensing system, with provision for public involvement in the terms and conditions upon which licences are granted. These "bubble" licences deal, or have the potential to deal, with all environmental issues arising from a particular operation.

Public involvement in the assessment process is through a right to object to and appeal against the terms and conditions of a licence. By administrative policy, significant proposals are required to include a Development Proposal and Environmental Management Plan to describe what environmental impacts are likely and what environmental management measures are proposed.
A series of offences, including operating without a licence or in breach of a licence condition, or "causing, permitting or knowingly permitting" pollution. The act uses the terms "emit, discharge, put and flow" in describing the act of pollution.

A pollutant may be:

- a substance prescribed to be so;
- a substance adversely affecting any beneficial use;
- a substance detrimental or hazardous to humans, animals, plants, microbes or property;
- offensive noise or odours.

Licences are required to operate any premise undertaking a "scheduled" activity, including:

- metallurgical works;
- mines, quarries, crushing and cement works;
- chemical works;
- gas works, oil refineries;
- woodchip, pulp and paper mills;
- boilers, incinerators, furnaces;
- dairy, meat and food processors;
- wool scours, tanneries and textile works;
- breweries;
- laundries;
- sewage treatment plants;
- refuse disposal sites;
- timber preserving plants.

Initially, such premises were scheduled without any threshold but subsequently thresholds were introduced to drop off minor operations.

A recent administrative change has been to introduce registration (as opposed to licensing) for minor operations.

The functioning of the licensing component of the Act is limited by a series of exemptions, granted by the Minister of the day.

Up until 1991, the Minister could exempt an otherwise scheduled premise from the need to hold a licence. Exemptions were used for premises that fell into the scheduled category but were not considered to pose an environmental threat. These exemptions have since been replaced by a requirement to register (as opposed to licence) the premise.

A different type of ministerial exemption—that exempting an operator from the requirement to comply with those sections of the Act prohibiting pollution—still exists,
however. There are approximately ten major industries operating under ministerial exemptions at present, almost all of them mining or metallurgical premises. There are approximately twenty municipal sewage treatment plants operating under exemptions.

As a part of the transition to the new 1994 Act, all ministerial exemptions are being phased out. Those operations which are still unable to comply with environmental regulations at the end of the five-year phase-out period—which expired on 30 June 1994—have been required to enter into binding environmental improvement programs under the new Act, to ensure their compliance with appropriate standards for the operation.

Since the Environment Protection Act took effect there has been a steady climb in the number of licensed premises in the State. The total number currently stands at approximately 800. In addition, there are some 300 minor premises registered. A number of legislative changes over the last 20 years has seen fluctuations in the total number of licensed premises and economic circumstances have also led to rises or falls in that number.

There has been a corresponding rise in the number of complaints although it is likely that this reflects a growing environmental awareness more than a strict correlation with the amount of industrial activity.

Prosecution is the only sanction against environmental offences provided for by the Environment Protection Act. The number of convictions achieved averages less than ten per year. Greatest success occurred in the mid-1980s but an increasing number of prosecutions came to be lost because of legal technicalities. This has lead to frustration and a reduction in the desire to prosecute in the first place. During the 1990s, convictions have been less than five per year.

The emphasis has shifted from prosecution towards an educative and encouragement role. In part this is a reflection of the frustrations associated with the 1973 Act and with the perennial problem of achieving a satisfactory nexus between the scientific and legal components of any environmental prosecution. However, it is also a recognition that prosecution is not an ideal solution even if the legal technicalities could be overcome.

The Act as it stands reflects the classic command and control approach to environmental management: "Do as I say or I will hit you with a stick". This is inflexible and ineffective. A far more productive approach is to use community attitudes as the driving force behind environmental protection. The government's role is then not to wield the big stick (although recourse to it as the ultimate sanction cannot be ruled out); its role is to educate, facilitate and encourage both the community and industry to actively participate in environmental management.

**The Environmental Management and Pollution Control Act 1994: A New Approach**

Two principal thrusts of public administration at present are the implementation of sustainable development (or in the Australian context, ecologically sustainable development), and micro-economic reform. Both these factors require an integration and rationalisation of regulatory controls and management mechanisms.

Simple command and control instruments do not deal with environmental issues in the integrated way demanded by the nature of those issues. In addition, existing environmental controls overlay a whole series of other controls (planning, economic controls and so on) in a way which wrongly encourages regulators and the community
to focus on components of the regulatory scheme (such as licences) rather than the "big picture"—the environmental outcomes.

In general, there is an increasing recognition that improved environmental outcomes require broader community and industry commitment to environmental goals. Governments certainly cannot now, if they ever could, do it all alone.

Sustainable development requires a commitment from all players in the environmental arena. Everyone has an environmental responsibility.

In these circumstances, the role of government changes. It becomes a persuader, coordinator, and advocate, as well as an enforcer. New environmental management mechanisms need to reflect this changed role. In Tasmania, these concepts have been enacted in the Environmental Management and Pollution Control Act 1994, which is expected to commence operation early in 1995.

The application of the sustainable development and micro-economic reform objectives has meant that the policy and regulatory environment has become outcome focused, and increasingly in individual cases will be created as the result of a process of negotiation between the regulated and the regulator.

The policy and regulatory initiatives under the new Act will seek to lessen the environmental impact of industry through the encouragement of resource efficiency, through continuous improvement and through the optimisation of pollution management.

In common with other regulatory agencies in Australia, the Tasmanian Department of Environment and Land Management recognises the limitations of an approach to environmental protection which is based solely on standard setting and policing. In order to be effective, and to achieve the best overall outcomes for the environment, we need to work with the other players, rather than attempting to control them. The new Act provides the instruments necessary to do this effectively.

That is not to say that there is not a place for strong and effective sanctions under the new legislation. There must always be a capacity to deal with the worst case scenario, and legislation must be drafted with that in mind. Nonetheless, those types of sanctions need to be seen as a last resort, to be utilised in circumstances where a cooperative approach has not delivered the necessary improvements in environmental outcomes.

Environmental standards have been vital to achieving improved environmental performance, and will continue to have a very important role to play. Increasingly, it is likely that measures—which may include standards—developed by the proposed National Environment Protection Authority will be adopted in Tasmania, on the assumption that they will incorporate sufficient recognition of the particular circumstances affecting the Tasmanian environment.

These national standards, like earlier standards before them, are likely to lead to improvements in technology, and to inform and improve the increasing environmental skills and environmental awareness that now characterises industry.

However, standards need to be augmented by other regulatory tools, which focus more specifically upon the particular operation and its effect on the ambient environment. These new tools need to focus on the equipment to be employed, or the technical requirements necessary to meet a prescribed effluent/emission standard. In this respect, they will move the focus away from end-of-pipe solutions, back up the pipe to the processes which produce the waste in the first place, and away from the end of the pipe to the impact of those wastes on the ambient environment.
The underlying philosophy is to incorporate sensible environmental thinking into the mainstream of business development. Throughout the whole industry sector, technologies and systems of production are changing rapidly, and over the next five to ten years will continue to change. Industries will be undertaking new investment and going through technological change and restructuring. As that change and restructuring occurs, regulators will want to make sure that it is carried out in a way which raises environmental efficiency. This will mean installing different equipment from that which they might have done without the environmental policy—using different production processes, perhaps making different products.

It is also choosing a path which others will be pointing to. Lenders, for example, increasingly are becoming aware of potential environmental liabilities stemming from their business activities. It is not just government or the community which is demanding environmental responsibility.

Nonetheless, there are obvious difficulties in the implementation of such an approach in the Tasmanian context, with the constraints and difficulties which currently face Tasmanian industry. In many instances, it is a question of survival rather than a question of environmentally-friendly development. But in those situations where investment is occurring, the regulatory scheme should ensure that that investment is environmentally efficient.

The means by which these new directions can be set in place will involve negotiation with operators. Plainly, there must be a bottom line, and the community will demand that this is met and enforced. However, the bottom line should not become a constraint which causes operators to focus on what is prescribed and diminishes the incentive to achieve continuous improvement. Furthermore, from the regulatory agency's perspective, there is an increasing recognition that policing of standards is both expensive and reactive and fails to sufficiently emphasise pollution prevention.

The instruments which are available need to be much more flexible. They need to take account of the particular circumstances of particular operators, and the particular effects upon the environment which those operations entail. Similarly, the enforcement processes need to be much more imaginative than the simple command and control model which currently exists.

It needs to be acknowledged that the other side of the flexibility coin is a loss of certainty. Nonetheless, this is in essence a problem of timing and implementation strategies, rather than a reason to abandon this approach. Operators need realistic time frames to deliver environmental improvements.

Similarly, there must be openness and public accountability, to ensure that negotiated agreements reflect the community interest, and are not abused to provide preferential treatment or to impose commercial disadvantage.

What Evidence is there that this Change is Occurring?

Sustainable development is recognised at an international, at a national and at a State level. In the State context, the Environmental Management and Pollution Control Act 1994, and new planning legislation in Tasmania has enshrined sustainable development as the principal objective of the State's resource management and planning system.

There is also widespread acceptance of sustainable development as a community and industry goal. The ramifications of its implementation are starting to be considered.
An example of the more recent industry approach to this issue is the Australian Manufacturing Council work on best practice environmental regulation. This attempts to introduce a component of international competitiveness into the other two dimensions which have characterised environmental regulation in the past, namely:

- domestic environmental concerns and community expectations; and
- the need to fulfil the obligations of international environmental conventions.

Approaches of this nature demand a more strategic, open and efficient environmental regulatory framework.

Increasingly, commercial opportunities flow from "being seen to be a good environmental performer". Industries which take this attitude are seen to be responding to community demands, and they benefit accordingly. Environmental advertising claims manifest this approach.

It follows from this that government endorsement of an operation's environmental performance can be seen to be an asset in the hands of the regulator. Commercial operators may seek, and be prepared to pay for, that endorsement.

**Implications for Environmental Offences**

It needs to be understood that any regulatory regime must include criminal sanctions as the bottom line enforcement tool. Environmental performance needs to be seen in the same way as any other type of conduct which we as a community wish to require of our members.

It is also reasonable to ensure that consistency of approach is obtained where jurisdictional boundaries are crossed. The commitment contained in Item 18 of Schedule 4 of the Intergovernmental Agreement on the Environment—to establish a uniform hierarchy of offences and related penalty structures to apply to breaches of any requirements applied under any agreed law for the purposes of complying with national environmental protection measures—is directly relevant.

However, uniformity of approach is not as critical where environmental issues are location specific. In these circumstances it is more important that the approach should complement all the other components of the sustainable development regime that applies to that operation.

Although there will always be a role for prosecutions, the obstacles need to be recognised. Prosecution is a blunt instrument. It is:

- hard to prove the commission of an offence, and often detailed scientific evidence is required;
- resource intensive;
- susceptible to undue legal hurdles;
- most importantly, prosecution does not prevent the environmental harm. It is an *ex post facto* sanction.

In Tasmania, prosecutions have been limited almost—but not quite—exclusively to the Litter Act. In a number of recent instances, it has not been possible to prosecute because of evidentiary difficulties arising from the factors listed above.
In summary, criminal sanctions are but one component of a comprehensive environmental management regime.

When prosecution or criminal sanction is necessary, attention should be paid to the use of less resource intensive mechanisms such as infringement notices for more minor offences.

In addition, legislation can provide assistance with some of the more difficult evidentiary issues, through the use of presumptions and averments.

Finally, liability needs to be targeted to where responsibility for the environmental offence lies. This is the philosophy underlying the extensions of liability in relation to corporations.

**Other Components of a Regulatory Regime**

Whilst retaining command and control tools, it is desirable that enforcement mechanisms other than prosecutions should be available. These may include notices requiring an environmental operator to improve performance, with a sanction of prosecution for failure to comply with the notice, rather than prosecution for a substantive environmental offence.

A further option is greater use of civil enforcement powers—injunctions and the like—both by government, and by empowering other members of the community to seek such enforcement mechanisms. This broadening of the enforcement responsibility is consistent with tenets of sustainable development, but care needs to be taken to avoid the "busybody" factor. In Tasmania, the endorsement of a tribunal is required before a member of the public can take enforcement action.

Attention also needs to be paid to incentives as well as sanctions. These can include the way in which fees are structured, and the use of economic instruments. A recent example is the proposal to increase the price of unleaded petrol because of its harmful environmental impacts.

Another possibility is the encouragement and utilisation of government endorsement of environmental performance as an asset. This is the principle underlying the Environmental Choice Program, but it is capable of application far beyond the question of endorsement of the environmental credentials of products.

A further step is the introduction of market based measures. They are in their infancy at present, but could conceivably encompass issues such as transferable pollution rights.

The new Tasmanian legislation, like that recently enacted in South Australia, includes a variety of enforcement mechanisms, which reflect the changing demands on environmental regulators.