



Regulatory Strategy – the Lawyer's Perspective

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Regulatory Strategy Landscape

- ▶ *Environmental Protection (Greentape Reduction) Act 2013.*
- ▶ The DEHP Regulatory Strategy released at that time represented a shift in focus- to make the person carrying out the activity responsible for managing the risk from the activity.
- ▶ The conditions imposed by the DEHP would set the outcomes to be achieved but not how to achieve those outcomes.
- ▶ DEHP indication that it would increase the amount of time spent monitoring performance.

Regulatory Strategy





EPOLA Bill

- ▶ Environmental Protection and Other Legislation Amendment Bill 2014 (**EPOLA Bill**) – introduced into Parliament 28 August 2014.
- ▶ Submissions closed on 29 September 2014.
- ▶ Committee to report to Parliament by 22 October 2014.

Increased Maximum Penalties

- Proposes an increase to the uppermost maximum penalty in the *Environmental Protection Act 1994* (**EP Act**).

Currently	EPOLA Bill
4165 penalty units	6250 penalty units
<i>\$474,185.25 for an individual \$2,370,926.25 for a corporation</i>	<i>\$711,562.50 for an individual \$3,557,812.50 for a corporation</i>
5 years imprisonment	5 years imprisonment

Increased Maximum Penalties

- ▶ 10 offences will attract this new maximum penalty when they are committed wilfully:
 - Section 357I – failure to comply with conditions of a TEL;
 - Section 361 – contravention an EPO;
 - Section 363I – failure to comply with a clean-up notice;
 - Section 430- contravention of a condition of an EA;
 - Section 432- contravention of a requirement of a TEP;
 - Section 432A – contravention of a condition of an approval of a TEP
 - Section 434 – contravention of a site management plan;
 - Section 437 – causing serious environmental harm; and
 - Section 478 – failure to comply with an authorised person's direction in an emergency.
 - Section 357 – contravention of an order of the Court made pending the Court's decision of an application made by the administering authority to set aside the immunity from prosecution after receipt of a program notice.

Transitional Environmental Programs (TEPs)

- ▶ Change in DEHP approach, “TEPs will not be available where a company is out of compliance through its fault”.
- ▶ No corresponding amendment to the EP Act proposed to reflect this limitation.
- ▶ Suggestion seems to be that TEPs will only be available if non-compliance is the result of external events, perhaps changes to standards or severe weather.
- ▶ Where a non-compliance is fault related, where does this leave approval holders?

Enforceable Undertakings

- ▶ The EPOLA Bill inserts a series of new provisions into the EP Act relating to **enforceable undertakings**.
- ▶ An enforceable undertaking is a binding agreement in which a person agrees to undertake specific actions in relation to a breach (or alleged breach) of the EP Act in return for the DEHP agreeing not to prosecute.
- ▶ Not available for breaches that attract a potential maximum penalty of imprisonment of 2 years or more. For example, serious environmental harm or wilful breach of an EA condition.

Enforceable Undertakings

- ▶ Serious consequences for not complying with an enforceable undertaking once accepted by the DEHP.
- ▶ Does not constitute an admission of guilt by the person making the undertaking. However no protection of privilege.
- ▶ The EPOLA Bill does not provide for the review or appeal of a decision made by the administering authority not to accept an enforceable undertaking.
- ▶ Enforceable undertakings will likely be considered high in the enforcement pyramid (likely above TEPs and possibly only one step below prosecution).

PIN Offences

- For offences committed after 1 September 2014, there is:
 - An increase in the number of offences for which a penalty infringement notice (**PIN**) can be issued; and
 - An increase in the uppermost maximum amount a PIN can be issued for.

Currently	From 1 September 2014
87 offences for which a PIN can be issued	151 offences for which a PIN can be issued
Maximum penalty cap of \$550 for an individual \$2200 for a corporation	Maximum penalty cap of \$2277 for an individual \$11,385 for a corporation

PIN Offences

▶ DEHP Compliance Alert statistics:

- 88 PINs issued in 2012
 - 172 PINs issued in 2013
 - 52 PINs issued in 2014 (as at 31 May 2014)
- Total of 312 PINs in 29 months.



▶ DEHP Enforcement Guideline, February 2014



Hypothetical Scenarios for discussion

- ▶ A company operates a large chemical manufacturing and processing facility. On 1 September 2014, a heavy rainfall event occurred and resulted in unauthorised discharge of processing water from a storage dam into a stormwater drain. The company undertakes sampling immediately following the rainfall event and discovers that the water in the stormwater drain is contaminated with cyanide in excess of the levels permitted by the environmental authority.



Hypothetical Scenarios for discussion

- ▶ A company operates a hotel in regional Queensland and the DEHP attend the site following complaints made about discharge of sewage effluent from a sewage treatment plant operating on the premises. Sampling taken by the DEHP indicates that effluent may have entered the nearby waterway.

Hypothetical scenarios for discussion

- ▶ An operator submits a report as required under conditions of its EA. The Department writes to the operator to query results or potential deficiencies in the information contained in that report.

Investigative Powers

- ▶ Engaging with the regulator.
- ▶ Powers to require answers to questions; provision of information.
- ▶ Seizure of evidence pursuant to a warrant.





Thank you

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