

# **AUSTRALIAN ENVIRONMENT BUSINESS NETWORK**

## **Review of the Protection of the Environment Operations Act 1997**

**September 2003**



**Sydney, Melbourne & Brisbane**

<b>Table of Contents</b>	<b>Page</b>
<b>EXECUTIVE SUMMARY</b>	iii
<b>RECOMMENDATIONS</b>	iv
<b>1. INTRODUCTION</b>	1
<b>2. LICENSING REGIME</b>	2
<b>3. WASTE ISSUES</b>	3
3.1 Definition of Wastes	3
3.2 Lack of Guidance	4
3.3 Waste Offences and Powers	6
3.4 Waste Levy	7
3.5 Waste Tracking	7
<b>4. OTHER ISSUES</b>	8
4.1 Sentencing Orders	8
4.2 Public Register	9
4.3 Mandatory Audits	9
4.4 Auditing of Annual Certificates	9
<b>5. TRADEABLE EMISSIONS SCHEMES</b>	10
<b>6. OFFSET SCHEMES</b>	11
<b>7. CONCLUSION</b>	12
<b>APPENDIX 1</b>	<b>AEBN's Submission: Review of the Protection of the Environment Operations Act 1997</b>
<b>APPENDIX 2</b>	<b>AEBN's Submission: The Review of the Protection of the Environment Operations Amendment (Tradeable Emissions Schemes) Bill 2000</b>
<b>APPENDIX 3</b>	<b>AEBN's Submission: Green offsets for sustainable development: A NSW Government Concept Paper</b>
<b>APPENDIX 4</b>	<b>AEBN and Resource NSW's Scoping Study: Blending of Various Waste Resources into Asphalt</b>

## EXECUTIVE SUMMARY

The Australian Environment Business Network (AEBN) is an industry and business representative organisation operating in NSW Victoria and Queensland. AEBN is growing and has over 200 members from a broad cross section on industry and business, covering food, chemicals, metal production, petroleum, beverages, printing, waste industry, electricity, water construction, building products and consumer goods.

The *Protection of the Environment Operations Act 1997* (POEO Act) has been in operation since 1 July 1999 and is the backbone piece of environmental legislation in NSW. Overall it has operated reasonably well and as a consequence AEBN does not have major issues with the Act. Nevertheless, fine-tuning of POEO Act is in order and a number of changes are recommended to improve the performance of the Act.

This is the second submission that AEBN has made in relation to the POEO Act review and supplements the first submission and previous submissions on the issues. It specifically addresses the issues outlined in the Review Of The Protection Of The Environment Issues Paper.

The main recommendations made by AEBN focus on waste issues and include:

- A registration system is suggested to replace the licence system for small generators of hazardous, industrial and Group A wastes. The current approach of licensing smaller generators is onerous on both the companies and the EPA. A simpler registration system would cover small generators of up to 50 tonnes per annum. Licences will continue to apply to large generators of controlled wastes.
- The current definition of waste is broad and traps many legitimate beneficial reuse practices in red tape. AEBN suggests that a new definition of recovered resources be considered to enable legitimate operations to proceed with minimal reporting and controls, but enough to prevent abuse by illegitimate waste practices.
- The EPA should develop a timetable for the making of guidelines for the beneficial use of wastes for a variety of re uses. This will most likely need to be developed along side the definition of recovered resource. Adding to this is the need to increase the policing of illegitimate waste operators, as most licensed sites are far more scrutinized than are unlicensed waste operations.
- Improvements to waste tracking include simplification of the waste data form and waste licences to be taken on licensed vehicles.

A number of other issues are covered including:

- Ceasing the practice of posting draft licence conditions on the Public register for obvious reasons.
- Local government should not be provided mandatory audit powers.
- Use of third party audits and signoff for annual compliance reports should be only offered as a voluntary option and accompanied with a substantial reduction in licence fees.
- Local government should not be provided powers to apply mandatory audits.
- The tradeable emissions schemes brought in under part 9.3 POEO Act should be subjected to the full regulatory review process, as under the current arrangements it is exempt.
- Green off set scheme has the potential to be applied by any government agency, which could result in subjective assessments of its application. As a result AEBN considers the emissions under a green offset scheme must be tangible, measurable and subject to EPA control rather than other government agencies.

## RECOMMENDATIONS

AEBN recommends that:

- R1 A registration system, supported by regulation, be used to manage small-scale waste activities to cover all generators of controlled waste.
- R2 An additional definition defining recovered resources be included in the POEO Act and be separate from the current waste definitions.
- R3 The EPA establish a timetable to develop various guidelines to assist industry in the beneficial use and reuse of waste resources.
- R4 The policing of waste industry requires to be improved and made uniform in operation across all operators, whether licensed or not.
- R5 Listings of draft licence variations not be posted on the public register.
- R6 Local government not be provided mandatory audit powers.
- R7 Third party auditing of compliance certificates be only used on a voluntary basis where substantial licence fee reductions occur and where sites have comprehensive environmental management systems in place.
- R8 Any tradable emission scheme regulation made under the POEO Act be subject to the full Regulatory Review process, including a comprehensive Regulatory Impact Statement, public participation and five year repeal and review process consistent with other emission trading scheme regulations set up by the NSW Government.
- R9 The POEO Act be amended to bound green offset schemes to the EPA in which the schemes relate to environmental emissions normally regulated by the EPA.

## 1. INTRODUCTION

AEBN welcomes the opportunity to review the POEO Act and acknowledges and supports the NSW Government approach to a five year period for the review of major pieces of legislation, which is also consistent with the Subordinate Legislation Act 1989. This practice is working well and should be a standard requirement on all pieces of NSW legislation.

AEBN is an industry and business representative body specialising in environmental issues that affect our members. Our membership collectively has a turnover in excess of \$50 billion and employs well over 50,000 employees. Further information about AEBN can be found on our web site at [www.aebn.com.au](http://www.aebn.com.au).

The Protection of the Environment Operations Act 1997 (POEO Act) has been in operation since 1 July 1999 and is the backbone piece of environmental legislation in NSW. Overall the POEO Act has operated fairly much as it was intended, subjected to a few variations since its inception. So major changes are not sought by industry, but many amendments are warranted to improve the efficiency of the Act. This is true especially when addressing the issues raised in the EPA's *Review of the Protection of the Environment Operations Act 1997 Issues Paper*, which this submission specifically addresses. An additional area has been added in the issues paper, that of the management of wastes and the POEO (Waste) Regulation 1999.

This submission supplements the previous submission AEBN made on the POEO Act review process in February 2003. AEBN stands by its recommendations in this first submission, which should be considered as being part of this submission. This submission *Review of the Protection of the Environment Operations Act 1997* is attached as appendix 1.

The issues of the tradeable emissions scheme under part 9.3 of the POEO Act are also part of the review process. AEBN's issues in relation to the amendment made to this part in 2000 are still considered relevant hence our submission titled *The Review of the Protection of the Environment Operations Amendment (Tradeable Emissions Schemes) Bill 2000* is included as appendix 2.

Issues relating to the green offsets scheme are covered in more detail in AEBN's *Submission on Green offsets for sustainable development: A NSW Government Concept Paper* which is included as appendix 3.

To demonstrate the types of industrial wastes that could be diverted from landfill AEBN cites the *Scoping Study: Blending of Various Waste Resources into Asphalt* as appending 4.

As a result of the first round of submission the NSW Government's discussion paper crystallizes the views of stakeholders on areas for comment under the Act and especially the POEO (Waste) Regulation 1999.

## 2. LICENSING REGIME

One of the main difficulties facing the regulation of individual sites for the EPA is the substantial step between being a licensed premises (under schedule 1) or not. In the discussion paper the EPA asked the question:

*Should the EPA's regulatory approach focus resources on the higher environmental risk? Becoming a licensed premise is a substantial administrative burden on both the EPA and the licensed site. This is especially the case for when the generic trigger for waste activities is just exceeded. Currently, a site generating more than 10 tonnes or storing more than 2 tonnes per year of controlled waste triggers a full environment protection licence which in AEBN's opinion is inconsistent with other levels of environmental risk listed in schedule 1.*

For example, a chemical works which produces over 5,000 tonnes per annum of paints inks, etc or over 2,000 tonnes per annum of petrochemicals, is a long way—in terms of environmental risk—from a engine service company which produces 15 tonnes per annum of oily water Group A waste. However, both require environment protection licences under schedule 1.

In the discussion paper the EPA suggests the use of a simplified or scaled down licence, an option which AEBN considers has merit.

Prior to the introduction of the POEO Act hazardous waste generators were regulated via a registration system. AEBN considers that a simplified licence or a registration system could result in better management of controlled wastes.

One way this could work would be to introduce standard waste management requirements under a revamped POEO (Waste) Regulation and the issuing of registration certificates under this amendment. AEBN considers that the registration system would form a scaled down licence equivalent for smaller generators of controlled waste. Registration would be made available up to the threshold above which a full environmental protection licence for controlled waste activities would apply. As a suggested starting point this threshold could be set at up to 50 tonnes per annum for non-hazardous wastes (group A, and industrial) and 25 tonnes for hazardous wastes.

***R1 AEBN recommends that a registration system, supported by regulation, be used to manage small-scale waste activities to cover all generators of controlled waste.***

### 3. WASTE ISSUES

The discussion paper raises the issue in relation to the classification and management of controlled waste:

*Should there be specific controls to prevent the re-use of wastes that may be environmentally harmful? How can appropriate re-uses be encouraged through the mechanisms of the POEO Act?*

AEBN considers there needs to be a balance between preventing the environmentally harmful use of wastes versus the regulatory blockages and red tape which may prevent or limit the beneficial use of wastes. Currently there is a substantial policy drive by the government to divert wastes away from landfills, but for many wastes the best legal and economic outcome is to landfill them. Industry finds itself in a difficult position of being criticized for landfilling waste, but been given no or little legal options but to send most wastes to landfill. There is little legal comfort and considerable red tape—also including planning laws—to develop the beneficial use of wastes.

#### 3.1 Definition of Wastes

The POEO Act has broad definition of waste, which means a substance is not precluded from being waste for the purposes of this Act merely because it can be reprocessed, re-used or recycled. The full definition of waste under the POEO Act is:

*Waste (unless specifically defined) includes:*

- a) *any substance (whether solid, liquid or gaseous) that is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment, or*
- b) *any discarded, rejected, unwanted, surplus or abandoned substance, or*
- c) *any otherwise discarded, rejected, unwanted, surplus or abandoned substance intended for sale or for recycling, reprocessing, recovery or purification by a separate operation from that which produced the substance, or*
- d) *any substance prescribed by the regulations to be waste for the purposes of this Act.*

AEBN understands that past abuses of the old economic definition of waste<sup>1</sup> lead to the broadness of the current waste definition (above). Unfortunately in plugging a past loophole the legislation impedes or even prevents many legitimate and environmentally responsible reuse and recycling of wastes to take place. The EPA has introduced some minor changes to address some obvious beneficial uses, such as exemption for oil for recycling and other wastes under section 16(c) of the POEO (Waste) Regulation 1999. However, such practice has focused on existing

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<sup>1</sup> Waste use to be defined as a negatively valued product

beneficial waste management practices and does little to promote innovative practices.

**R2** *AEBN recommends an additional definition defining recovered resources be included in the POEO Act and be separate from the current waste definitions.*

### **3.2 Lack of Guidance**

Companies are frustrated with the complexity of the waste licensing system, especially if the company can accept a 'waste material' as a raw material from another company. Virtually all surplus and redundant chemicals are classed as controlled waste. As a result they cannot go to any company, except if it is licensed as a waste facility. Even though the receiving company is using the same or similar chemical as a raw material.

The current and expected rapidly rising costs of landfilling wastes, accompanied by the government's strong drive to reduce waste to landfill, is already placing increasing pressure on industry and business to find alternative management methods for their wastes and by-products.

Landfill prices are expected to increase sharply over the next 7 years. Currently the waste levy in Sydney is at \$19.80 per tonne but is estimated to increase to \$32 by 2010. In addition, the reduction in solid waste landfill capacity in the Sydney area will force landfill prices even higher. Prices in the order of \$130—\$150 per tonne are expected to be reached over the next 10 years, given the current waste market.

As a consequence of these cost increases, AEBN is sensitive to EPA guidelines and policies that affect alternative uses for wastes. Industry produces a wide range of wastes, many of which are recycled or reused and some are landfilled. With greater cost pressure the incentive to better segregate wastes—or find alternate and beneficial uses for wastes that do not have to go to landfill—is already considerable and will obviously increase.

Under ever-increasing legal scrutiny, industry and business turn to government to produce policies that will provide certainty and an appropriate level of legal comfort for actions undertaken in following such policies. Unfortunately there is a void in regulatory and policy guidelines on how to beneficially use many waste types other than disposing them to landfill.

The EPA should be assisting industry to enhance the beneficial use of industrial wastes. AEBN considers there is a lack of government guidance and acceptable practice for the management of industrial wastes for beneficial purposes. Industry only has the Waste Guidelines as an official method for classifying of waste, but it is focused, mainly on acceptance to landfills. Ideally industry requires a set of criteria for the acceptance of treated or special types of waste for use in areas



outside landfills<sup>2</sup>. Areas for consideration in developing such guidelines on the beneficial use of wastes include:

- Use in stabilised or sealed earth works, (ie contained fill material)
- Energy from waste (including permitting and upgrading cement kilns to accept wastes as well as the use of the alternative technologies energy from waste to accept a broad range of industrial wastes)
- Use in marine environments
- Use in concrete, asphalt and other bonded matrices for non-residential purposes, for those exposed to weather and sealed from weather
- Use in soil conditioners
- Landfarming of wastes
- Re-used in building products
- Re-used in other non-residential products
- Re-use in infrastructural projects

AEBN understands that the research and test methods for the development of most of the above are not complete, but the list provides a potential path for future discussions and consideration. It is appreciated that a high level of scientific vigour would be necessary to satisfy the EPA and other regulatory agencies.

A major issue in the setting of any standards for the beneficial use of wastes is the costs of establishing whether the health and environmental risks are acceptable or not. Undertaking individual risk assessments on the application of a waste for beneficial use is an expensive process and limited to where the overall costs warrant such actions. This process suits contaminated land where the cost of remediation and the price for the cleaned land is much larger than undertaking a risk assessment on it. The high costs associated with a risk-assessment process means that only larger quantities of wastes could be assessed in this manner. Hence the issue is what to do about the smaller quantities of waste and where it would be uneconomic to undertake a risk assessment.

For landfills the use of the TCLP and general definitions for waste types has proved cost-effective, though not cheap, for even small quantities of wastes. However, the use of this limited technique<sup>3</sup> alone avoids the need for risk assessments, a sharper (and more expensive) method of assessment. Nevertheless, landfills are heavily controlled and must meet strict monitoring, operational and construction conditions, and they are subjected to environment protection licensing.

AEBN considers a new range of generic criteria, contaminant limits and test methods should be developed for the above list in conjunction with the permitted use of risk assessments. Many variables will need to be assessed, such as:

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<sup>2</sup> AEBN envisages waste that is treated and/or passes certain criteria could be used in major infrastructural projects, such as dams, roads and retaining walls etc.

<sup>3</sup> The EPA's Waste Guidelines are generic and do not distinguish between individual landfills within the same class. Using a risk assessment such variations between landfills could be assessed on a site by site basis.

- Local conditions (with contaminated sites the land use for the cleaned-up site and local conditions are always taken into consideration)
- Background levels
- Soil ion-exchange capacity
- Waste characteristics, such as contaminants, physical properties, mass
- Weathering, erosion and leaching
- Testing methods
- Sampling methods

While ambitious, obtaining clarity in this area will lead to reducing the amount of wastes to landfills and the best environmental outcomes at the lowest costs.

AEBN has commenced a major project to take the initiative and assist the EPA in developing guidelines along the areas discussed above. AEBN and Resource NSW's *Scoping Study: Blending Various Waste Resources Into Asphalt* is the first stage in developing a new industry based approach on the diversion wastes from landfills into asphalt, which suggests that up to 10% of Sydney's waste stream has the potential for diversion. A copy of the scoping study is attached in Appendix 4.

**R3** *AEBN recommends that the EPA establish a timetable to develop various guidelines to assist industry in the beneficial use and reuse of waste resources.*

### **3.3 Waste Offences and Powers**

The discussion paper raises the issue of the strength of the offences under the POEO Act covering waste. It summarises the issue as:

*Should additional controls be considered to address limitations in dealing with illegal waste practices? What regulatory measures might prevent disingenuous practices within the waste recovery sector which do not actually result in recovery or recycling?*

AEBN believes the issue is one of better policing rather than strengthening the powers. On many occasions AEBN has heard of complaints from legitimate operators complaining that other competitors are violating waste legislation. It appears that the legitimate operators by not hiding from the EPA are more exposed to scrutiny and more likely to be caught on minor breaches, or be subject to additional administrative work. On the other hand some waste operators are poorly policed and permitted to treat or manage waste not permitted by other operators.

**R4** *AEBN recommends that the policing of waste industry requires to be improved and made uniform in operation across all operators, whether licensed or not.*

However, there may be a case for the prevention of some practices, but these will need to be carefully defined. If poor definitions result the legitimate operators will

suffer and the illegal operators continue to undermine the economic viabilities of the legitimate operators.

### **3.4 Waste Levy**

The discussion paper asks the question: *Is the application of the levy to licensed waste facilities encouraging the diversion of waste to unlicensed operations? Is this a concern? If so, how could this be addressed?*

AEBN considers the waste levy is having a major effect on industry in which alternatives to landfilling or other waste management activities affected by the levy are being sought. The impact of the levy will continue to increase pressure on industry to find alternatives to landfilling waste. This is another reason industry requires the EPA to develop guidelines on beneficial uses of waste as indicated by R3 in this submission.

Our members are very concerned to ensure their wastes are diverted to beneficial uses that are acceptable by the EPA. Many of the ways in which waste is beneficially used by industry is via unlicensed facilities. For example, breweries deliver waste barley to stock feed suppliers. Waste carbon dioxide is also captured from breweries and sold to gas companies. So industry has for since well before the POEO Act and the definition of waste, sent various wastes to unlicensed facilities, but many of these are environmentally beneficial. AEBN considers the question asked above was over simplified and reflects the need for R2.

The problem with the waste levy is that it is a blunt economic instrument. With the current budget diverting the entire levy to consolidated revenue away from the Waste Planning Fund, AEBN questions if the levy has become just another tax. If so the incentive for making the levy a sharper economic instrument is mute if not absent. However, if the NSW is serious in using the levy for environmental outcomes then it could be adjusted to be a sharper instrument.

For example if soils are moved off a construction site to a temporary storage areas then are brought back on site the levy applies.

### **3.5 Waste Tracking**

AEBN has always considered the current tracking system cumbersome and far from ideal. Our support for a centralized database remains as a core position. The current system relies on nodes of databases at the waste facilities. However, merging of this data even in summary form is a difficult task. Ideally the waste tracking system should be redesigned and this be done in the context of the national system covering interstate movement of controlled wastes. This would be a major task and requires planning and full public consultation and perhaps outside the review of the regulation. AEBN doubts that the EPA has time enough to undertake

such a review in the time before the regulation undergoes repeal under the Subordinate Legislation Act 1989.

Nevertheless, there are numerous improvement that could be made to the way in which tracking is undertaken. These include:

- A simplified waste data form – as most dangerous goods information will be require to be taken on the vehicle under the Road and Transport (Dangerous Goods) Regulation.
- A simplified transporter licence for carriage in each vehicle, which covers the issues specific for that vehicle rather than for the entire fleet of vehicles the company operates.
- Better training and education of generators (licensed and non-licensed) on their obligations under the regulations and licence conditions
- Improved set of classification codes for various wastes to eliminate duplicate classes and to improve the accuracy of the information about the waste.
- Use of electronic quarterly reports is supported provided the company has the ability to put in variations and adjustments if errors or additional information occurs.
- Use of electronic tracking system is also supported as a supplement to the current paper based system.

#### **4. OTHER ISSUES**

##### **4.1 Sentencing Orders**

The EPA raised the issue *Should the scope of sentencing orders be expanded?* AEBN considers that any court orders, which result in, direct environmental outcomes, rather than financial penalties are preferable. There is a limit to this option if the cost of the order is in excess of the fine that would other wise be applied.

##### **4.2 Public Register**

The discussion paper asked: *Is the Public Register an effective mechanism to provide information to the community? Are there changes you'd like to see made to the register?*

AEBN considers the current public register is an excellent method for providing licence details to the public. However, some members have noticed that draft conditions have been posted which leads to confusion with the local community miss reading the conditions.

***R5 AEBN recommends that listings of draft licence variations not be posted on the public register.***

### **4.3 Mandatory Audits**

AEBN does not support issuing powers to local government to apply mandatory audits on non-scheduled sites. Abuse of similar powers has already been seen by industry. A case in point is where a company was approached by a local government officer and given the choice between a penalty notice or an audit by the local government inspector, both costing about the same. This was considered an abuse of power.

Too often in planning matters where the local government does not fully understand the issues or wishes to divert responsibility to a third party a consultants report is required. The lack of expertise in local government and there current considered overuse of consultants in planning matters leads AEBN to be concerned on the provision of powers to issue mandatory audits.

**R6** *AEBN recommends that the local government not be provided mandatory audit powers.*

### **4.4 Auditing of Annual Certificates**

AEBN considers that annual returns for all licence holders should not be subject to independent third party audits. However, there is a special case in which such third party verification is acceptable, that on a voluntary basis and for a trade off with lower licence fees. As the work to police the company has been passed to a third party AEBN argues that this would reduce substantially the workload on the EPA for enforcing that licence.

A similar scheme is the Victorian Accredited Licences where reduced licence fees apply to companies with full Environmental management systems with third party sign off. Here substantial reductions in licence fees are traded with larger companies that have effective systems in place to ensure self third party policing of the environmental performance of the site.

**R7** *AEBN recommends that third party auditing of compliance certificates be only used on a voluntary basis where substantial licence fee reductions occur and where sites have comprehensive environmental management systems in place.*

## 5. TRADEABLE EMISSIONS SCHEMES

The *Protection of the Environment Operations Amendment (Tradeable Emission Schemes) Act 2000* amended the POEO Act in 2000 introducing large changes to Part 9.3 of the Act. As this section is part of the POEO Act AEBN considers it subject to the 5 year review process covering the whole Act. Otherwise we would need to only review the POEO Act as it was originally proclaimed in 1997.

The introduction of the tradeable emissions scheme (TES) component of the POEO Act has to date not caused a direct concern for industry. Nevertheless, there are a number of concerns about this section of the POEO Act that make it inconsistent with the majority of the POEO Act as well as other pieces of NSW legislation relating to trading schemes.

AEBN has attached its submission made in 2000 on the *Protection of the Environment Operations Amendment (Tradeable Emission Schemes) Act 2000* as an appendix as none of the recommendations presented to the NSW Government were either taken up or answered. No public consultation was held over the TES amendment and many errors and pitfalls exist for industry.

A major issue with TES is the exemption of any regulation made under it to be subjected to the Subordinate Legislation Act 1989. The EPA's argument has been that the Regulatory Impact process, repeal and remaking of any regulation may make a trading scheme illegal, even for a short time period. This is out of step with other emission regulations for example, the NSW Government has established the *Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Regulation 2002* under the *Electricity Supply (General) Regulation 2001* which complies with the Subordinate Legislation Act 1989.

***R8 AEBN recommends that any tradeable emission scheme regulation made under the POEO Act be subject to the full Regulatory Review process, including a comprehensive Regulatory Impact Statement, public participation and five year repeal and review process consistent with other emission trading schemes regulations set up by the NSW Government.***

In addition AEBN's 2000 submission on TES (Appendix 1) is considered valid and current on the present sections now under Part 9.3 POEO Act.

## 6. OFFSET SCHEMES

AEBN has previously commented on the EPA's Green Offset Scheme proposal last year. In general industry welcomes any new regulatory mechanism, which provides greater flexibility in meeting environmental requirements set by the Government.

Nevertheless, AEBN is concerned that the use of the scheme could be overzealously applied, and the basis for triggering an offset scheme could be the driver for setting load limits and conditions rather than actual environmental impacts. In addition, use of the scheme appears to have no central control point. Consequently any government agency could apply a scheme anywhere on anyone. AEBN considers that use of these schemes should be bound to the agency that has regulatory control over the environmental issue being managed by an offset scheme.

Hence for any environmental emission AEBN believes the EPA should be the central agency. For water allocation this could extend to Department of Land and Water Conservation. As the environmental issue becomes more nebulous, such as visual amenity, heritage and cultural issues, green offsets could become imprecise and potential political tools rather than been tied down to concrete measurable mechanisms. Limiting green offset scheme use to easily measurable criteria should prevent its misuse.

***R9 AEBN recommends that the POEO Act be amended to bound green offset schemes to the EPA in which the schemes relate to environmental emissions normally regulated by the EPA.***

## **7. CONCLUSION**

The process of undertaking the review on the POEO Act will result in a better piece of environmental legislation for NSW.

Improving the regulative framework for the beneficial use of wastes will result in substantial quantities of materials being diverted from landfills to alternative waste management options. Critical to achieving this outcome is the ongoing development of a wide range of guidance materials providing all stakeholders that the beneficial use will not harm the environment and provide legal comfort to generators and end users that they are not inheriting a long-term liability.

A streamlined controlled waste management system will provide easier use and approval for the management of controlled wastes.

Offering an equivalent scheme to the Victorian Accredited Licence program on a voluntary basis should permit certain companies to virtually self regulate with minimal costs to the EPA. This trade off will also permit the reduction in licence fees to reflect reduced administrative burden.

Linking the regulations made under tradeable emissions schemes to the Subordinate Legislation Act will provide consistency across NSW laws in relation to emissions schemes, thereby removing any incompatibles that could surface if there is a cross over between schemes.

Green offsets will be firmly bedded into respective government agencies with the expertise and resources in which to manage them. The EPA will be a leading agency taking up the central role of managing schemes that deal with environmental emissions otherwise regulated by the EPA.