

Regulatory Comparison Table

Prepared by the Department of Environment and Climate Change & Orica

Issued to the Community Liaison Committee

Prior to the 17 March 2009 Meeting

At the December 2008 Community Liaison Committee (CLC) meeting, the Department of Environment and Climate Change (DECC) advised that the regulation of the Botany Groundwater Cleanup (BGC) Project is currently being reviewed to take into account cleanup progress and recent developments.

Orica's remediation of contaminated groundwater at Botany is currently administered under a Notice of Clean Up Action first issued in 2003. The majority of the tasks outlined in the NCUA and its subsequent Variation Notices have now been completed. Certain aspects of the Project are also administered under an Environment Protection Licence (EPL2148).

At the December 2008 meeting the CLC asked for more information about the regulatory options available. The draft minutes recorded the following actions in relation to this matter:

- Action Dec 08 #9: N Johnston to prepare a briefing paper describing the regulatory options for the Botany Groundwater Cleanup Project.
- Action Dec 08 #10: G Blaschke to brief K Rae, from the EDO, and seek advice about the pros and cons of the regulatory options.
- Action Dec 08 #11: Orica to contribute information to the review of regulatory options and present at the next CLC meeting.

DECC and Orica have discussed the best way to present an objective review of the regulatory options for the BGC Project to the CLC and agreed, in consultation with the CLC Chair, that submission of a combined document would be useful. This document has been prepared in response to action items 9 and 11 noted above.

The following table provides the legislative basis for the regulatory options for the Orica BGC Project under the following NSW legislation: Protection of the Environment Operations Act 1997 (POEO) and Contaminated Land Management Act 1997 (CLM) incorporating Contaminated Land Management Amendment Act (2008).

The table provides a comparison of the following matters under the POEO and CLM Acts:

1. Objects of the Act
2. Coverage
3. Legal Definitions
4. EPA's powers
5. Mechanisms for dealing with contaminated land
6. Where notices or orders are issued
7. s149 planning certificates

8. Community involvement

DECC can choose to regulate the BGC Project under either the POEO or CLM Acts. Regardless of the selected approach, Orica will continue to have an Environment Protection Licence for operational matters associated with the GTP and other activities at Botany.

The content of the regulatory tool will provide the detailed requirements going forward.

DECC aims to set a regulatory framework in place for the next five years and is keen to understand community views at this planning stage.

Orica has just submitted a proposed regulatory approach to the DECC and will outline this proposal to the CLC at the March meeting. Time will be allocated in the agenda for further discussion by the CLC. The DECC will be available to respond to questions from the community on enforceability, consultation, notification and access to instruments etc.

The acronyms used in this table are:

EPL – Environment Protection Licence

VMP - Voluntary Management Proposal

ESD Ecologically Sustainable Development

BIP – Botany Industry Park

PRP – Pollution Reduction Program

	POEO Act	CLM Act
<p>1. Objects of the Act</p>	<p>The POEO Act aims to:</p> <ul style="list-style-type: none"> (a) protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecologically sustainable development; (b) provide increased opportunities for public involvement and participation in environment protection; (c) ensure that the community has access to relevant and meaningful information about pollution; (d) reduce risks to human health and prevent the degradation of the environment by the use of mechanisms that promote, amongst other things, pollution prevention and cleaner production; the reduction to harmless levels of the discharge of substances likely to cause harm to the environment; the making of progressive environmental improvements, including the reduction of pollution at source; and the monitoring and reporting of environmental quality on a regular basis; (e) rationalise, simplify and strengthen the regulatory framework for environment protection; and (f) improve the efficiency of administration of the environment protection legislation. 	<p>The CLM Act aims, generally, to establish a process for investigating and remediating land that the EPA considers to be contaminated significantly enough to warrant regulation.</p> <p>Particular objects of the Act are to:</p> <ul style="list-style-type: none"> (a) set out accountabilities for managing contamination; (b) set out the role of the EPA in assessment, investigation, remediation and management of contaminated sites; (c) ensure appropriate standards of auditing in the management of contaminated land; and (d) ensure that contaminated land is managed with regard to the principles of ecologically sustainable development (ESD).
<p>Comment</p>	<p><i>The POEO Act is an overarching piece of environmental legislation which covers environmental protection, regulation of polluting activities and mechanisms to promote environmental improvements and pollution prevention.</i></p>	<p><i>The CLM Act specifically deals with identification, assessment and management of contaminated land and groundwater. It also sets out accountabilities and the role of the EPA in respect of contaminated sites.</i></p>

	POEO Act	CLM Act
<p>2. Coverage</p>	<ol style="list-style-type: none"> 2. Protection of environment policies (Ch 2); 3. EPLs authorising scheduled operational activities and scheduled development work and any pollution arising from these activities or works (Ch 3); 4. Environment Protection Notices: Clean-up notices, Prevention notices, Prohibition notices (Ch 4); 5. Environmental protection offences (Ch 5); 6. Environmental compliance audits (Ch 6); 7. Environmental investigations (Ch 7); 8. Criminal proceedings (Ch 8); and 9. Miscellaneous, such as tradeable emission schemes and green offsets (Ch 9). 	<p>The CLM Act deals with all aspects of managing contaminated sites including:</p> <ul style="list-style-type: none"> • a duty to report contamination to EPA; • EPA's identification and assessment of sites (including Preliminary Investigation Orders: s 10); • EPA's declaration of a significantly contaminated site; • the issue of management orders (under s 14) to conduct various remediation activities - see below; • issue of voluntary management proposals (under s 17) (VMP); • the issue of ongoing maintenance orders (under s 28); and • independent statutory site audits.
<p>Comment</p>	<p>POEO Act covers a wide range of areas including environment protection policies, authorisation of polluting activities through EPLs, various types of pollution offences (e.g. air, noise as well as land and water), compliance audits and investigations and emissions trading schemes.</p>	<p>CLM Act is specifically designed to identify, assess and manage contaminated sites. It provides the EPA with wide ranging and flexible powers in respect of investigation, remediation, monitoring and ongoing management of contamination.</p>
<p>3. Legal Definitions</p>	<p>"land pollution" is "placing in or on, or otherwise introducing into or onto," the land (whether through an act or omission) any matter...</p> <p>"water pollution" is "placing in or on, or otherwise introducing into or onto" waters (including underground waters) whether through an act or omission any matter...</p> <p>"pollution incident" is an incident or set of circumstances as a consequence of which there is or is likely to be a "leak, spill or other escape or deposit of a substance" resulting in pollution which has occurred, is occurring or is likely to occur.</p>	<p>"contamination" of land is defined in section 5 and refers to "the presence in, on or under the land of a substance" above normal levels and that "presents a risk of harm to human health or any other aspect of the environment". Land includes water on or below the surface of the land.</p> <p>The CLM Act also expressly states that land can be contaminated as a result of migration of contamination into, onto or under the land from other land.</p>

	POEO Act	CLM Act
Comment	<p>There is no definition of contamination. Instead, the POEO Act has defined land and water pollution in terms of "acts or omissions" in the present tense. This could be construed to mean that a pollution event is a current rather than a historical event. The definition of pollution incident is unclear as it refers to a situation where there is or is likely to be a leak, spill or escape which results in "pollution having occurred" (i.e. a mix of language in the present and past tense).</p> <p>It does not specifically state that POEO should not be used for "past" pollution events.</p>	<p>There is an express contamination definition which refers to the "presence" of substances on land or in groundwater at concentrations above normal background levels. The Act also recognises that land and groundwater can become contaminated by reason of migration from another area.</p>
4. EPA's powers	<p>POEO Act gives power to EPA to regulate scheduled activities and scheduled development work by way of EPLs and to local authorities to regulate non-scheduled activities in their areas. The EPA also has power to make environmental policies and various powers in respect of investigating pollution incidents and issuing prohibition, prevention and clean-up notices.</p>	<p>The general functions of the EPA under section 8 of the CLM Act are to:</p> <ul style="list-style-type: none"> • examine and respond to information it receives about actual or possible contamination of land; • address contamination it considers significant enough to require regulation under the CLM Act; and • record actions taken and reasons for them. <p>The EPA may take such reasonable steps as it considers necessary in relation to investigating or managing contamination of land (including significantly contaminated land) or the threat of harm from any such contamination (s 8(3)).</p> <p>Under section 105, after consulting the public, the EPA has the power to make guidelines in line with the purposes of the CLM Act. EPA has made various guidelines including: <i>Guidelines for the Assessment and Management of Groundwater Contamination</i>, March 2007.</p>
Comment	<p>The EPA has no specific powers relating to the identification, assessment and management of contaminated land. The POEO Act does not preclude the use of instruments under this Act for regulating contamination events.</p>	<p>The EPA has specific powers to examine and respond to information about contamination and regulate, investigate and manage contaminated sites. This includes making specific guidelines, for example, in relation to the management of contaminated groundwater.</p>

	POEO Act		CLM Act
5. Mechanisms for dealing with contaminated land	Clean-up Notice	EPL <i>[Note – an EPL will be required for operational matters of Orica’s operations at Botany, regardless of the regulatory approach]</i>	Management Order and/or VMP
	<p>Section 91: Clean-up by occupiers or polluters</p> <p>Clean-up notices may direct an occupier of premises at or from which the appropriate regulatory authority (usually the EPA or local council) reasonably suspects that a <u>pollution incident</u> has occurred, or a person reasonably suspected of causing or having caused pollution, to take the clean-up action specified in the notice.</p> <p>Clean up action is defined to include:</p> <p>(a) action to prevent, minimise, remove, disperse, destroy or mitigate any pollution resulting or likely to result from the incident; and</p> <p>(b) ascertaining the nature and extent of the pollution incident and of the actual or likely resulting pollution; and</p> <p>(c) <u>preparing and carrying out a</u></p>	<p>Chapter 3: Grant of EPLs</p> <p>EPLs authorise an entity’s operations such as the functioning of and output from a GTP.</p> <p>EPLs may be issued subject to conditions including with regard to:</p> <ul style="list-style-type: none"> • monitoring, measuring and recording and the analysis, reporting and retention of monitoring data; • mandatory environmental audits; • pollution studies and reduction programs (PRPs) (s 68); • remediation work; and • waste management. 	<p>Section 11: Declaration of significantly contaminated sites</p> <p>If the EPA has reason to believe that land is contaminated and that the contamination is "significant enough to warrant regulation", it may declare the land to be "significantly contaminated land" under section 11. The Declaration describes the land that is "significantly contaminated land", the suspected contaminants and the harm they may or have caused. Notice of the Declaration is served on any owners, occupiers and local authorities. The EPA is to publish a policy on DECC's website setting out how it intends to notify about land that is declared to be significantly contaminated and land that is no longer significantly contaminated.</p> <p>Section 14: Management Orders</p> <p>Management Orders can be served on an appropriate person in relation to any "significantly contaminated land" by the EPA at any time if it considers it is in the public interest. These orders may require the appropriate person to take any action specified in the order or comply with a "plan of management".</p> <p>Actions can include (s 16):</p> <ul style="list-style-type: none"> • investigating the nature and extent of the significant contamination and any harm that has been or may be caused; • investigating the most appropriate means for undertaking remediation; • monitoring the effectiveness of any remediation or the risk of harm; • treating, storing or containing or disposing of solid or liquid materials including any soil, sand, rock or water; • allowing a person to enter specified land (which need not be significantly

	POEO Act	CLM Act
	remedial plan of action.	<p>contaminated land) in order to carry out the management order;</p> <ul style="list-style-type: none"> • a requirement to have specified actions audited by a site auditor; • providing progress reports to EPA; • a requirement to make available for inspection by any person, free of charge, a report on the action taken under the management order or the plan of management and to provide a copy of the report for a reasonable fee; • advertising and conducting meetings for the public to receive progress reports and provide submissions on the actions taken under the management order; and • informing the EPA of any change in ownership or occupancy. <p>Notification: A copy of the management order must be served on the owner of the land and those persons who the EPA has reason to believe may be responsible for the significant contamination of the land (s 14(2)).</p> <p>Section 17: Voluntary Management Proposals (VMP)</p> <p>A person who realises that their land is significantly contaminated can enter voluntarily into a binding agreement called a VMP with the EPA to remediate and manage that contaminated land. The EPA must be satisfied that the terms of the VMP are appropriate.</p> <p>A Management Order can be issued if the VMP is not complied with or the subject of the Management Order is not adequately dealt with by the VMP. The EPA can withdraw its approval of the VMP at any time.</p> <p>Section 28: Ongoing Maintenance Orders</p> <p>Owners or occupiers of land the subject of a management order or VMP may be issued with an ongoing maintenance order (whether or not the land is significantly contaminated land):</p> <ul style="list-style-type: none"> • to carry out ongoing management; • to report to the EPA at specified periods and inform it of any change in

	POEO Act		CLM Act
			<p>ownership;</p> <ul style="list-style-type: none"> to not carry out specified activities or use the land for specified purposes.
<p>Comment</p>	<p>Clean-up notices are issued on persons and do not require land to be declared.</p> <p>The scope of "clean up actions" that can be ordered is wide and the EPA has a broad discretion in respect of what it can order.</p>	<p>EPLs regulate polluting activities that are included in Schedule 1 of the POEO Act plus scheduled development work. When a facility has an EPL all other activities that impact the environment can be regulated via the EPL. EPLs are appropriate for the operational parts of any remediation activities proposed by Orica (that fall within Schedule 1 or are scheduled development work) e.g. the licensing of the GTP.</p> <p>PRPs may include requirements to carry out works or to install plant for the purpose of preventing, controlling, abating or mitigating pollution. PRPs are typically used to reduce emissions of polluting substances but have also been used to investigate contamination and action remedial activities.</p>	<p>The EPA has extensive powers to make owners and occupiers take action in relation to contaminated land and groundwater under this Act.</p> <p>Management Orders and plans of management can include a wide variety of actions in relation to investigating, remediating and managing contaminated land. They can also include detailed information, report obligations to EPA and a requirement to publicise and conduct community liaison meetings.</p> <p>Notification obligations may be extensive depending on the mechanism used.</p> <p>Voluntary agreements can be effective due to their co-operative nature.</p> <p>Ongoing maintenance order adds an extra level of protection that contaminated land will be dealt with over the long term.</p> <p>The CLM Act also has the benefit that independent auditors can be used to conduct statutory site audits to independently verify investigation and remediation.</p>

	POEO Act	CLM Act
<p>6. When are notices or orders issued?</p>	<p>The DECC record shows that 87 clean-up notices have been issued for sites with current licences (with a total of 245 notices for other sites that do not have EPLs. These primarily relate to littering notices and illegal waste dumping notices).</p> <p>These notices have been issued contemporaneously with a pollution incident, generally within months (or sooner).</p> <p>No Clean-up Notices appear to relate to legacy contamination except in relation to Orca at BIP.</p>	<p>The DECC record of EPA notices (as of January 2009) records as follows:</p> <ul style="list-style-type: none"> • 25 declarations of investigation area on 29 sites; • 42 investigation orders on 30 sites; • 30 voluntary investigation proposals on 35 sites; • 92 declarations of remediation on 101 sites; • 339 remediation orders relating to 121 sites (of which 126 notices on 65 sites are current); • 96 voluntary remediation proposals on 100 sites; and • 33 notices for maintaining remediation on 20 sites.
<p>Comment</p>	<p><i>The Orca BIP is unique in that contamination remediation is regulated under a clean-up notice.</i></p>	<p><i>The CLM Act gives the EPA a range of regulatory tools to enforce investigation and remediation activities. Remediation orders (which in the future will be management orders) have been used on a significant number of sites.</i></p>
<p>7. s149 Certificates. This is a planning certificate issued for a parcel of land – it describes the zoning and planning and environmental considerations</p>	<p>There is no express requirement for clean-up notices to be recorded on section 149 certificates. However as s149 certificates are a matter for council this is their prerogative.</p>	<p>Section 59(2) of the amended CLM Act will continue to require section 149 certificates to record land which is declared to be significantly contaminated land or land which is subject to a management order, VMP or site audit statement.</p>
<p>8. Community involvement.. There is no proposal to change the existing CLC and IMC processes as part of this regulatory review.</p>	<p>Provision of information to the wider community is through the maintenance of a public register recording details of licences, decisions, certificates, notices, convictions in prosecutions, the results of civil proceedings and other matters. There is no specific reference to providing information or education programs relating to contaminated land, however these may be required as part of a licence condition or PRP.</p>	<p>The CLM Act states that the EPA may undertake education programs, public awareness campaigns and other measures for the information of the public concerning particular types of contamination, sources of contamination, the environmental and health implications of contamination and how contamination may be reduced or minimised. Note: see public consultation requirements for Management Orders above.</p> <p>The EPA is to publish a policy on its website setting out how it intends to notify the public about significantly contaminated land (s 11(5)).</p>