



AUSTRALIAN INDUSTRY
GROUP

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Dear Mr Keely

Introduction of Enforceable Undertakings by EPA Victoria

The Australian Industry Group (Ai Group) is grateful for the opportunity to provide feedback to EPA Victoria regarding the introduction of Enforceable Undertakings and comments on related EPA documents, no. 1244 "Draft Guidelines" and no. 1255 "Discussion Paper".

Ai Group supports the introduction of Enforceable Undertakings by EPA Victoria as an effective enforcement option applied in appropriate circumstances in lieu of court prosecution. Ai Group recognises that Enforceable Undertakings endeavour to use behavioural change in a proactive manner to rectify or repair the consequences of a breach of the Environment Protection Act, develop action plans to prevent inadvertent pollution of the environment, implement management systems to avoid future breaches, achieve remediation of damaged sites and better contribute to sustainable outcomes. In appropriate circumstances the Enforceable Undertakings would be more effective than prosecution and financial penalty strategies to prevent unwanted behaviour. Ai Group believes Enforceable Undertakings are adaptable to situations where offences have occurred without wilful, malicious or criminal intentions by the offender(s).

Ai Group encourages companies to undertake actions for management and minimisation of environmental risks and impacts on a continuous improvement basis. We believe that implementation of sustainable industry practices are fundamental to competitiveness.

Ai Group also recognises the desirability of consistency of regulatory instruments across jurisdictions. Therefore we support the introduction of Enforceable Undertakings by EPA in Victoria so there is alignment in this regard with environmental regulations in NSW and Queensland. As acknowledged in EPA's Draft Guidelines document, Enforceable undertakings are already in use through the Occupational Health and Safety Act in Victoria (where they are relatively recent but effective additions), and also by the competition and corporate regulators ACCC and ASIC.

In relation to the Independent Advisory Panel referred to in the EPA's Draft Guidelines:

Recommendation

Ai Group recommends that members of the Independent Advisory Panel should be selected on a skills basis rather than a representative basis – scientific skills about environmental management and pollution abatement are essential.

However we believe that further clarification of the role of the Independent Advisory Panel is required. We believe that the decisions between regulatory instruments in response to environmental offences should be made by EPA. For example, consideration of evidence of an alleged offence under the provisions of the Environment Protection Act and the decision to proceed with a prosecution, we believe should be made by EPA. Separate decisions about remediation or preventative actions so that costs are commensurate with financial penalties for environmental offences, should be considered by the Independent Advisory Panel.

Recommendation

Ai Group recommends that decisions to proceed or not with a prosecution for an alleged environmental offence should be made exclusively by EPA, not by the Independent Advisory Panel. The Panel's role (based on the scientific composition of the Panel in our first recommendation) to assess and advise on the adequacy of offers of assistance with the development of the terms of an individual enforceable undertaking, negotiation of the terms, and assessment of progress in an enforceable undertaking, together with a formal ongoing role in monitoring its compliance and effectiveness. In that process there are two further matters that would need to be assessed:

- 1. A form of dispute resolution or administrative appeal process to address disputes on unresolvable issues with the enforceable undertaking; and**
- 2. The submission of material relevant to the creation of an enforceable undertaking may necessarily contain extremely commercially sensitive information.**

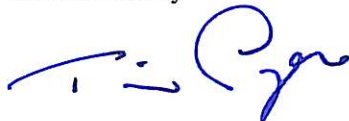
While Ai Group accepts that the actual enforceable undertaking will be a public document, there should be controls in place to preserve the underlying confidentiality or commercially sensitive information that is provided or discussed in the process towards execution.

Recommendation

EPA should implement provisions to ensure that confidential and/or commercially sensitive information is not contained in the public version of an enforceable undertaking. Underlying confidential or commercially sensitive information should be retained by EPA and not disclosed by EPA.

Ai Group would like to continue to liaise with EPA in regard to the development of enforceable undertakings and other instruments. Ai Group will seek your involvement in discussions with Ai Group's Environment Working Group regarding the items we have raised to assist in the development of effective enforcement options. For further information please contact Robert Lorenzon at Robert.Lorenzon@aigroup.asn.au or at 03 9867 0240.

Yours sincerely



Timothy Piper
Director - Victoria