

SUBMISSION BY

NOISE TASMANIA Inc.

to the

STATUTORY REVIEW

of the

**ENVIRONMENTAL MANAGEMENT AND POLLUTION
CONTROL ACT**

Please direct any correspondence to;
The Secretary
Noise Tasmania Inc.
PO Box 1050 Rosny Park
Tasmania 7018

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1. Background

The Environmental Management and Pollution Control Act (EMPCA) has been in force for approximately 10 years.

The original Act was introduced at a time when there was little appreciation in the broader community of the importance of the environment. There was also little recognition of the wide variety of impacts that various forms of pollution can have on the human population.

In recent years there has been much progress in the strengthening of the controls on industry generated pollution – particularly air and water pollution.

There has also been considerable improvement in the control of noise in the workplace as well as reductions in accidents etc in the workplace caused by noise which have clearly assisted human health.

However, there has not been the same focus on improving acoustic environmental outcomes in neighbourhoods. Hence there is a need now for an emphasis on acoustic environmental outcomes – not just rules for some noise events.

So great has been the increase in noise in the neighbourhood combined with so little response shown by various authorities, that community groups have been established to seek to address this neglect.

One of the measures which can be used to address this neglect and to provide an improvement in Tasmania's acoustic environment is amendments to EMPCA.

Accordingly, Noise Tasmania welcomes this opportunity to make a submission to the review of EMPCA.

2. Noise Tasmania

Noise Tasmania Inc. is an incorporated body formed under the Associations Incorporation Act.

It developed from a desire to address the very poor framework in Tasmania for dealing with the issue of neighbourhood noise.

The primary objective of Noise Tasmania is to achieve a change in the acoustic environment so as to provide ordinary Tasmanians with the peace and quiet they are entitled to by common law. It is also consistent with international treaties and conventions on human rights.

It has a membership, support and encouragement of many hundreds of Tasmanians and, just like political parties, represents the aspirations of many tens of thousands of people also seeking peace and quiet in their neighbourhoods. It also has developed relationships with like minded organisations around the world.

Noise Tasmania has hundreds of reports in its files of people whose lives have virtually become unbearable as a result of excessive neighbourhood noise.

The evidence is now overwhelming that certain noise does have very deleterious effects on human health. These effects have been documented by the World Health Organisation. They have also recently been documented by an authoritative Australian group called the Enhealth Council – made up primarily of environmental health experts. (See “The health effects of environmental noise-other than hearing loss” published by the Commonwealth of Australia 2004. Web access: http://www.health.gov.au/internet/wcms/publishing.nsf/Content/health-publth-publicat-document-metadata-env_noise.htm-copy3)

The Director of Public Health in Tasmania has also indicated there are potential serious health effects from noise.

Given the above, Noise Tasmania makes this submission seeking significant changes to EMPCA to address the current serious problems of noise in the community.

3. Overview of Desired Changes to EMPCA

Whilst there are a number of pieces of legislation which deal with noise in Tasmania, it is clear that EMPCA is the pre eminent piece of legislation directed at environmental control.

It is this legislation which contains the overarching obligations to avoid causing environmental harm.

Whilst Noise Tasmania accepts that the enactment of EMPCA has led to great progress in the control of environmental harm to air and water which has had broad advantages for the broader natural environment, it does not believe that there has been sufficient progress in addressing noise related “environmental nuisance” – notwithstanding that, under EMPCA, “environmental harm”.... “includes an environmental nuisance” (section 5(1))

Noise Tasmania holds the view that it would seem that, in many cases, more attention has been given to the impacts of pollution on the natural environment than on humans and that this situation needs to be urgently addressed.

It is a major mistake, made by many, to think that the only human impacts of noise are aural – that is on the ears. It is carefully and authoritatively documented that noise can have serious health impacts. These include affecting sleep patterns, generating or exacerbating depression and increasing blood pressure. (Further impacts are outlined in the Enhealth Report referred to on the previous page.)

Those legislators who have recognised these very significant adverse impacts on human health have taken legislative and other action to address the problems.

Noise Tasmania recognises that neighbourhood or community noise is a difficult issue for Councils and the State Government to deal with – but that does not mean that the issue should not be addressed. Tightening rules concerning where people can smoke or requiring them to wear seat belts in cars were also difficult issues but, in the face of clear evidence that there were serious impacts from failing to do anything on these two health related issues, Governments have acted to deal with the problems.

Noise Tasmania believes that decisive legislative action is necessary to significantly reduce the negative impacts on the health of Tasmanians from the current situation where excessive noise in neighbourhoods is not effectively dealt with.

Whilst tempted to press for a special Act dealing with noise as has been done in some other countries (such as the UK), Noise Tasmania at this stage is seeking special amendments to deal with noise in EMPCA.

However, Noise Tasmania does not believe that black letter law of itself will deliver significant change in the acoustic environment nor significant benefits for the thousands of Tasmanians currently afflicted by noise nuisance.

There is no doubt that new laws tightening smoking controls and new laws requiring the wearing of seat belts have only been effective because the new laws were accompanied by;

(a) good education that there were such laws in place; and

(b) effective and visible enforcement of the laws.

Accordingly, Noise Tasmania supports a much broader agenda for change to improve the acoustic environment in the State involving not only changes to EMPCA but also targeted education and effective enforcement.

In relation to changes to EMPCA, the primary problem at present is a lack of focussed attention on noise problems. There is a whole Part of the Act dealing with “ozone protection” (Part 6) but virtually no mention of or specific focus on noise. This is despite it being clear from many studies that the biggest neighbourhood environmental issue is noise nuisance.

Most other Australian States and a number of western countries have recognised this situation and have responded by dedicated legislative provisions dealing with noise – recognising the serious human health impacts which can arise from excessive noise.

Accordingly, in broad terms, Noise Tasmania seeks amendments to EMPCA that deliver improved acoustic outcomes in the neighbourhoods of Tasmania via;

- (a) special provisions directed at noise
- (b) providing a range of mechanisms to deal with the range of noise problems which exist
- (c) facilitating civil enforcement and mediation
- (d) providing a hierarchy of penalties so as to enable the “punishment to fit the crime”
- (e) providing, where appropriate, a formal “warning” to offenders; and
- (f) an encouragement to enforcement so that the “polluter pays”.

4. Amendments requested for EMPCA

In Attachment A (starting on page 9) there are 17 specific proposals outlined to change EMPCA.

In relation to each proposal there is;

- (a) a specific proposed change to EMPCA designed to lead to a better acoustic environment in Tasmania.
- (b) an explanation of the reasoning behind the proposed amendment to EMPCA.
- (c) a short discussion about potential ways for introducing the outlined proposal in EMPCA.

In Attachment B (starting on page 27) , there is a very rough draft of an amendment to EMPCA which shows how some of the various proposals could be implemented.

Whilst it is recognised that it is for the Office of Parliamentary Counsel to prepare legislative amendments after consideration by the Government, Noise Tasmania has made some specific suggestions. This is so that there is little capacity for misunderstanding what is being proposed and an opportunity to see how easy it is to actually implement, by amendment to EMPCA, what is being proposed.

5. Conclusion

There is no doubt that noise nuisance is one of the most serious environmental issues in Tasmania but particularly in urban areas.

Concerted attention to deal with this serious issue is consistent with the objectives which have been articulated in Tasmania Together and hence it warrants special consideration by the State Government.

The Minister for Environment has already committed the Government to a substantial improvement to the acoustic environment in Tasmania. This was clear in her decision to withdraw the totally ineffective draft “noise policy” for a thorough review taking into account concerns expressed by the community with the draft and to recognise that the community has identified noise nuisance as one of the most important urban environmental issues requiring attention.

The importance of improving the acoustic environment in Tasmania also featured significantly in the recently released independent assessment of the “State of the Environment” report undertaken by the Resource Planning and Development Commission.

What Noise Tasmania has done in this submission is to clearly identify the problem and to then outline solutions.

It is up to the State Government to act on the proposals which are put forward in this document. The review of EMPCA is the ideal time to address this serious problem.

There will be other issues which need addressing by amendments to EMPCA – and a number are outlined in the DPIWE Issues and Options paper. Noise Tasmania makes no comment on other issues other than to say that all areas where pollution leads to serious consequences for human health or biodiversity should be addressed.

However, in this submission, Noise Tasmania has laid out the case for substantial changes to EMPCA designed to address the very serious issue of noise pollution in the State – particularly in the neighbourhood.

There should be no doubt – noise pollution is causing significant health consequences in the Tasmanian community – consequences which can easily be avoided.

Tasmania’s “peace and tranquillity” is much touted but, in our urban environments where most of the population lives, peace and tranquillity are often hard to find. This is usually because of the actions of a small number of individuals.

Noise Tasmania hopes the State Government will take the initiative to provide this State with a genuinely tranquil acoustic environment as a result of adopting the proposals outlined in this submission.

SPECIFIC CHANGES REQUESTED FOR EMPCA

- (a) Create a separate Part in EMPCA dealing with noise issues.
- (b) Create a new instrument in EMPCA called a “noise reduction direction”.
- (c) Create a new instrument in EMPCA called a “noise control notice”.
- (d) Create a new instrument in EMPCA called a “noise abatement order”.
- (e) Create additional special offences in EMPCA dealing with noise.
- (f) Create a new exemptions provision in EMPCA dealing with noise.
- (g) Create a tiered penalty system in EMPCA – at least for noise offences.
- (h) Reconfigure some offences in EMPCA or its regulations to increase the likelihood of convictions – particularly in the infringement notice system.
- (i) Expand the scope of the provision dealing with regulations in EMPCA.
- (j) Introduce an incentive provision in EMPCA for regulatory bodies to act rather than do nothing about noise complaints.
- (k) Introduce the capacity in EMPCA for statutory declarations to be tended as prima facie evidence in relation to noise offences.
- (l) Introduce the capacity in EMPCA for a discount to be provided for early payment of an EIN.
- (m) Introduce fixed fines for some offences in EMPCA.
- (n) Enable a person to approach the Director of Public Prosecutions seeking initiation of a prosecution in relation to noise offences.
- (o) Make it explicit in EMPCA that a noise nuisance generated from licensed premises, roadways and animals are able to be dealt with under this Act.
- (p) Require the establishment of a register of noise complaints.
- (q) Introduce amendments to EMPCA to tighten up the infringement notice system.

Proposal (a): Create a separate Part in EMPCA dealing with noise issues.

Reason for Proposal: So that there is a clear focus on noise issues and so that it is clear that the Government and Parliament have identified this issue as an especially important one for the Tasmanian community.

Potential mechanism for introduction:

It would seem that the best way to implement this proposal would be to establish a new Part 4A in EMPCA – between the existing Parts 4 and 5.

This would not be a major drafting change but would clearly signify that the noise was an important environmental issue.

It is noted that a number of other Australian States and a number of other countries have already taken action to have special Acts or special parts of Acts dealing just with noise as a specific and very important environmental issue. (For instance, the Noise Act 1996 in England.)

Proposal (b): Create a new instrument in EMPCA called a “noise reduction direction”.

Reason for Proposal: So that there is, in effect, a “cease and desist” order or a “warning notice” given to apparent offenders.

Many episodes of noise occur at night and are one off. In many of these circumstances, the objective of the complainant is to have the noise level reduced to an acceptable or appropriate level – not to take punitive action.

Given many of these episodes are at night and sometimes involve the consumption of alcohol, complainants are reluctant to make contact with the persons responsible for the noise or to even establish where the noise is coming from – because of potential danger to themselves by the generator of the excessive noise.

In these situations, a warning about the noise can be the most appropriate action to be taken – normally by a member of the police force. Whilst this is done on some occasions at present, a verbal warning does not have the same effect as a formal written notice being issued to the occupier of the premises.

Failure to comply with the noise reduction direction (NRD) would be an offence. This would provide a reinforcement of the need to comply with the “direction” which is not there at present with verbal warnings.

Police would have the discretion to issue a verbal warning before issuing a written “direction” if that was considered appropriate in the circumstances. (It may also be appropriate to issue an Environmental Infringement Notice which is in effect an on-the-spot fine.) But the important thing is that there is a capacity to provide a clear communication via a formal NRD warning which brings no consequence to the person making the noise – provided it is complied with.

Potential mechanism for introduction:

It would seem that the best way to implement this proposal would be to establish special provisions in EMPCA providing the power for the issue of “noise reduction directions” - together with an offence for non compliance.

It could look something like section 72B shown in Attachment B.

It is noted that a number of other Australian States have similar instruments. This instrument is understood to work well in NSW.

Proposal (c): Create a new instrument in EMPCA called a “noise control notice”.

Reason for Proposal; The creation of a “noise control notice” (NCN) is to provide another graduation in the armoury of instruments available to deal with the very substantial problem of noise in the community. There needs to be a variety of instruments so that there is the correct instrument available to deal with particular problems – which can be very different in nature.

The “one size fits all” approach of the current legislation simply does not provide an effective control/behaviour change framework.

The target of a NCN is more serious continual noise emissions – more likely to be from businesses. A NCN may specify that certain levels of noise are not to be exceeded after particular times at night or on certain days etc. In part these instruments can be used to respond to circumstances where the issue of a planning permit did not impose appropriate noise controls.

The NCN would be issued by the Director of Environmental Management and a Council.

Because compliance with such a notice may bring consequences to a business, it is considered that the person against whom the notice is issued could appeal to the Resource Management and Planning Appeal Tribunal (RMPAT) on the grounds that it was not appropriate.

This would serve to bring a mediation framework into play – so that the focus is on dealing with the problem of noise pollution rather than court action. However, once a NCN is in force, it would be a serious offence if there is non compliance.

Potential mechanism for introduction;

It would seem that the best way to implement this proposal would be to establish special legislative provisions providing the power for the issue of “noise control notices” - together with an offence for non compliance.

It could look something like section 72E shown in Attachment B.

It is noted that a number of other Australian States have similar instruments. This mechanism apparently works well in NSW.

Proposal (d): Create a new instrument in EMPCA called a “noise abatement order”.

Reason for Proposal: The creation of a “noise abatement order” (NAO) is to provide another instrument to deal with noise pollution – particularly in neighbourhoods.

The proposal is to provide a mechanism to facilitate cost effective mediation when dealing with on-going noise pollution by encouraging the complainant and the noise generator to confront the “problem”. Again, the objective is not to punish but to achieve a change in behaviour – being avoidance of noise nuisance.

In essence there would be an application to the RMPAT by any person for the Tribunal to issue a NAO. The Tribunal has expertise in planning and environmental control matters - as well as legal matters. It would require argument (and possibly evidence) to be put forward by one party and that would need to be responded to by the party who is allegedly creating the noise nuisance.

If the Tribunal is satisfied that there is a serious issue warranting attention, it can issue an NAO requiring a reduction in noise emissions etc. Such a mechanism is much better than the Magistrates Court for dealing with such matters and should be far more effective than the current arrangement in achieving civil enforcement and mediated settlements – but most importantly, improved acoustic environmental outcomes.

Once a NAO is in force, it would be a serious offence if there is non compliance.

(It is noted that the DPIWE Issues and Options paper (page 22) acknowledges the fact that noise is the primary environmental nuisance and identifies the possibility of a “nuisance suppression order”. It is considered that the development of 3 instruments as outlined in (b), (c) and (d) – all to deal with different dimensions of this problem is a much better way to address the problems identified.)

Potential mechanism for introduction:

It would seem that the best way to implement this proposal would be to establish special sections in EMPCA providing the power for RMPAT to issue “noise abatement orders” - together with an offence for non compliance.

It could look something like section 72I shown in Attachment B.

It is noted that a number of other Australian States have similar instruments.

Proposal (e): Create additional special offences in EMPCA dealing with noise.

Reason for Proposal: So that there is a clearer basis for those who have responsibility for enforcement of legislation (including regulations etc) to have a variety of potential offences available which may better fit the “crime” and so that there is a easier chance of not just achieving a conviction but changing behaviour – which is the ultimate objective.

At present there is a very limited number of offences in EMPCA and courts are able to interpret the existing framework as being directed towards major and wanton pollution. However, whilst environmental nuisance caused by noise may be more minor in consequence by comparison with some major instances of pollution, there is clear and unequivocal evidence about the capacity for noise pollution (such as repeated excessive noise in a neighbourhood situation) to cause serious health impacts.

To address this situation and to target the problem of neighbourhood noise requires some new offences specially targeting noise.

Potential mechanism for introduction:

It would seem that the best way to implement this proposal would be to establish a number of new offences most of which could be associated with new noise control instruments. The offences would primarily directed at non compliance with the new instruments – as outlined in (b), (c) and (d).

Some of the proposed new offences could look like sections 72C, 72F and 72J in Attachment B. Some other offences are also outlined in Attachment B.

It is noted that a number of other Australian States and a number of other countries have already taken action to have special offences just dealing with noise. This is because noise is the most significant generator of environmental nuisance complaints and hence there is a clear need for legislative action.

Proposal (f): Create a new exemptions provision in EMPCA dealing with noise.

Reason for Proposal; A number of proposals have been identified to reduce the impact of noise in the community.

There are a number of circumstances where there is loud noise for short periods which are considered justifiable even though they may be technically in breach of some provisions or able to be classified as potentially in breach.

These would include church bells, Christmas carol singing etc.

To deal with these matters, it is proposed that there is an exemption framework developed.

Potential mechanism for introduction;

It would seem that the best way to implement this proposal would be to have a special section indicating that exemptions can be sought and granted.

It could look something like section 72R shown in Attachment B.

Proposal (g): Create a tiered penalty system in EMPCA – at least for noise offences.

Reason for Proposal: At present there is no incentive not to reoffend – other than the possibility of the court awarding the same penalty which is usually very small.

In other areas of law enforcement, there are disincentives for reoffending. For instance, in driving offences, there are points awarded (in addition to a fine) which can lead to a loss of driving privileges. In fishing offences directed at preserving the marine environment, there are also escalation provisions.

It is considered desirable that there is an explicit framework which clearly indicates that a second or subsequent offences in relation to noise pollution will result in higher penalties.

Potential mechanism for introduction:

One way to introduce such a proposal would be to introduce a points system depending on the offence. In such a system, the more points already collected, the greater is the fine.

Another way is to clearly state that for each offence, if there has been a previous conviction on that offence, the penalty will be twice as much for the second offence and three times as much for the third offence. (Table 1 in the New York City Noise Control Code contains a very good example of increasing penalties for subsequent offences.)

A third way is to define some new offences which provide that by definition, a “serious offence” is a repeat offence. This model is presently advocated for noise offences.

It could look something like section 72O shown in Attachment B.

Proposal (h): Reconfigure some offences in EMPCA or its regulations to increase the likelihood of convictions – particularly in the infringement notice system.

Reason for Proposal: The existing system of environmental infringement notices (EIN) in relation to noise are simply not effective. This is implied in the DPIWE Issues and Options paper (section 4.3).

The primary problem is the expense in acquisition of equipment, the use of specialist operators and the detailed evidence required to achieve a successful prosecution.

It would also seem that there is a need for some closer examination of the evidence needed to prove the offence or a change to the specification of the offence – at least in relation to noise pollution.

Potential mechanism for introduction:

It may be that an offence is created along the lines of “if it appears to officer that the noise was excessive”. Then the only evidence required is a statement from the officer. Whilst this is a subjective test, it may be necessary to bring about a change in behaviour.

Another option is an offence something like “if the noise can be heard more than 30 metres away”. This requires a distance to be established but it avoids the expensive noise measuring equipment and skilled operators.

A potential mechanism for implementation is shown in section 72S in Attachment B.

Proposal (i); Expand the scope of the provision dealing with regulations in EMPCA.

Reason for Proposal; The existing provision dealing with regulations (section 102) does not seem to have the power to deal with the range of provisions to deal with noise in the community.

Potential mechanism for introduction;

A broader expression of the regulation making power would broaden the capacity for regulations to be made to deal with noise problems as they arise.

For instance, the power could be inserted to enable regulations to be made dealing with audible burglar alarms in houses and working premises which are near houses. These powers could include;

- (a) the capacity for councils to declare the whole or part of their area “alarm notification areas”,
- (b) a requirement to notify to the council of a “nominated key holder” with the knowledge to turn the alarm off if the owners are away,
- (c) the capacity for, under certain circumstances, for the alarm to be disconnected.

Proposal (j): Introduce an incentive provision in EMPCA for regulatory bodies to act rather than do nothing about noise complaints.

Reason for Proposal: Whilst there are many offences being committed in relation to noise pollution each day, there has been a great reluctance by regulatory authorities to take action.

This is an indictment on the system where regulatory authorities can choose to ignore the law.

Once laws are in place, the community has right to expect that they will be enforced. This reluctance probably springs from such issues as “not wanting to be involved in domestic issues” or “someone else can do something” or “it just does not seem to be a big issue”.

It is very difficult for a lay person to get a regulatory body to act if it does not want to. It is possible that, on a very few occasions, there are legitimate reasons for a regulatory authority not to act. However at present the complainant, in relation to noise, rarely gets any action.

One way to change this situation is to make it more explicit that there is a responsibility on regulatory authorities to act on complaints. Section 8 of EMPCA goes some way but not clearly enough.

The proposal is that a person could initiate a civil action claiming that there had not been an appropriate response by an authority. This type of provision is being used increasingly and is colloquially referred to as a “whistle blower” clause.

There is still an opportunity to go to the Ombudsman claiming that nothing was done in relation to a complaint concerning noise. But if there was a mechanism where evidence could be presented and a regulatory authority was called to account, this would be far more effective.

The effectiveness of such a provision would arise more because of the existence of the provision – than the likelihood of a successful prosecution. Regulatory authorities would not want to be called before a court to answer a charge of “failing to act”.

Potential mechanism for introduction:

It would seem that the best way to implement this proposal would be to have a special section creating the obligation and creating an offence for non compliance.

It could look something like section 72Q in Attachment B.

Proposal (k): Introduce the capacity in EMPCA for statutory declarations to be tended as prima facie evidence in relation to noise offences.

Reason for Proposal: In many cases there is no credibility to the noise complainant in relation to alleged noise pollution.

It seems to be considered by some regulatory officials that most complaints about noise nuisance are vexatious or without foundation. This view is a sad reflection on such officials and is allowing personal biases to get in the way of enforcing the law.

The fact is that many people whose health has suffered greatly as a result of noise pollution are willing to be identified and to go to court if necessary – as a last resort – to improve their health.

There needs to be a far less costly mechanism to achieve a conviction in a court of law for what is effectively anti social behaviour.

The criminal test of “beyond reasonable doubt” could be reduced to “on the balance of probabilities” – as the end result sought is mostly not punitive action or a criminal record being created – simply a reduction in the noise.

Another possible way to assist in enforcement would be to create a register of “authorised persons” for the purposes of verification of a noise nuisance only. These persons would have some standing under legislation, would have been assessed as to independence and capacity to act honestly and be able to serve a civic duty of independently verifying a noise complaint.

Potential mechanism for introduction:

It would seem that the best way to implement this proposal would be to have a special section noting the acceptance of statutory declarations in relation to noise complaints. Statutory declarations are used in many Tasmanian Acts and in courts. Their use is governed by the Oaths Act 2001 and the Evidence Act 2001.

Implementation of this proposal could look something like section 72P in Attachment B.

Proposal (1): Introduce the capacity in EMPCA for a discount to be provided for early payment of an EIN.

Reason for Proposal: One of the big problems in getting efficient use of an EIN is recovery of the fine. Many people respond to financial incentives and early payment rewards are used in other areas.

Whilst it is clear that some people would apparently incur the extra expense of a court case to avoid dealing with an EIN, its possible that the “stick” is not as effective as the “carrot”.

Whilst the primary objective is to change behaviour, as income from fines can be used to generate funds to offset the costs of prosecutions etc, it is important that there are cost effective incentives to the payment of EINs.

Potential mechanism for introduction:

It would seem that the best way to implement this proposal would be to have a special section providing the capacity for extinguishment of EINs by a lesser amount for early payment.

A potential provision would be something like the following:

“Provision may be made in regulations for treating the penalty for an environmental infringement notice as having been paid if a lesser amount is paid before the end of a period specified in the notice.”

Proposal (m): Introduce fixed fines for some offences in EMPCA.

Reason for Proposal: One of the big problems for enforcement bodies in taking matters to court is that when the court sees that the range for the offence is from \$1 to a very large amount, they consider that neighbourhood offences for noise pollution, or more correctly, anti social behaviour, should only be small.

Hence it might cost \$2-3,000 to prepare a case for court but the fine determined may only be \$500. Firstly it involves additional expenditure to appeal and secondly, the fine may not be increased.

One way of dealing with this is better education of the judiciary. This is contemplated in the DPIWE Issues and Options paper and is supported – notwithstanding the difficulties in doing so.

Another mechanism is determining fixed penalties for some offences – mainly the more minor ones. This then means that the courts have to award a decent penalty if the offence is proven.

Potential mechanism for introduction:

It would seem that the best way to implement this proposal would be to have a special fixed penalty for some offences.

An example would be like section 72O(1) in Attachment B.

Proposal (n): Enable a person to approach the Director of Public Prosecutions seeking initiation of a prosecution in relation to noise offences.

Reason for Proposal: In many circumstances at present, there is no action taken by the Director of Environmental Management or a Council in whose area a noise offence has been committed to initiate a prosecution for alleged noise pollution.

Potential mechanism for introduction:

It would seem that one way to deal with this situation, in addition to others proposed in this submission, is to enable a person to approach the Director of Public Prosecutions (DPP) direct seeking the initiation of a prosecution for an alleged offence in relation to noise.

It could look something like section 72T in Attachment B.

To discourage the Director and Councils from shirking their responsibilities, an additional provision could be included enabling the DPP to recover all costs involved in the legal action from either the Council or the Director – depending on the circumstances.

Proposal (o): Make it explicit in EMPCA that a noise nuisance generated from licensed premises, roadways and animals are able to be dealt with under this Act.

Reason for Proposal: Persons seriously affected by noise nuisance or noise pollution are often faced with a “pass the parcel” type response where complaints are said to be the responsibility of someone else. Hence complaints about excessive noise from licensed premises are said to be the responsibility of the Licensing Commission and excessive noise from roadways is said to be the responsibility of the Transport Commission etc etc.

To the extent that there is environmental pollution from noise, EMPCA should be able to deal with it – notwithstanding that action may be able to be taken under another piece of legislation.

The objective must be to have enough authorities with enough legislative capacity as is necessary to deal with the myriad of noise pollution problems which exist in the community. It should be very clear in EMPCA that its noise control provisions apply irrespective of the cause and notwithstanding there is other specific legislation which is directed to particular issues as well.

Potential mechanism for introduction:

To avoid this situation, it is proposed that there be a clear provision in EMPCA stating that EMPCA can be used to deal with noise nuisance irrespective of whether other legislation could possibly be used.

It could look something like section 72U in Attachment B.

Proposal (p): Require the establishment of a register of noise complaints.

Reason for Proposal: At present there are a large number of complaints made in relation to community and other noise nuisances but no central record is kept of those complaints. This means there is no authoritative record of whether the problem is being effectively addressed.

Records are kept of many of situations like assaults or burglaries etc but there is no record of noise complaints.

Accordingly, given the serious health impacts which can arise from excessive noise, it is proposed that EMPCA require that records of noise complaints be kept. There would be a need to provide some privacy protection but the overall picture of statistics should be publicly released.

Potential mechanism for introduction:

Given that police, the DPIWE and councils are the primary areas to whom complaints are made, it is proposed that these bodies be required to keep records of complaints about noise and what action was taken.

It could look something like section 72V in Attachment B.

Proposal (q): Introduce amendments to EMPCA to tighten up the infringement notice system.

Reason for Proposal: The existing system of environmental infringement notices (EIN) is simply not effective. This is acknowledged in the DPIWE Issues and Options paper in section 4.3.

Unless the EIN notice system is made to work, there will not be available a relatively cheap and effective system of enforcement which works well in other areas of law enforcement.

Potential mechanism for introduction:

The DPIWE Issues and Options paper identified 2 possible options for improving the effectiveness of the EIN system. These are changing the description of the EIN and improving the collection mechanisms.

It would seem that both these mechanisms are desirable if they improve the effectiveness of the EIN system.

DRAFT AMENDMENTS TO EMPCA

being a new Part 4A

PART 4A SPECIAL NOISE PROVISIONS

Division 1 Noise reduction directions

72A Definition of “authorised person”

In this Part:

authorised person means an authorised officer or a council officer.

offensive noise means noise:

(a) that, by reason of its level, nature, character or quality, or the time at which it is made, or any other circumstances:

(i) is harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted, or

(ii) interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted, or

(b) that is of a level, nature, character or quality prescribed by the regulations or that is made at a time, or in other circumstances, prescribed by the regulations.

72B Issue of noise reduction directions

If it appears to an authorised person that offensive noise is being, or has at any time within the past 7 days been, emitted from any premises, the authorised person may:

(a) direct the person whom the authorised person believes to be the occupier of the premises in the way prescribed to cause the emission of the offensive noise to cease, or

(b) direct any person whom the authorised person believes to be making or contributing to the making of the noise in the way prescribed to cease making or contributing to the making of offensive noise,

or both.

72C Contravention of noise reduction directions

(1) A person to whom a noise reduction direction has been given under section 72B (a) must not, without reasonable excuse, while the direction remains in force:

(a) fail to cause the emission of the offensive noise from the premises to cease promptly, or

(b) at any time within 28 days following the time at which the direction was given (or such shorter period as is specified in the direction), cause or permit offensive noise to be emitted from the premises.

(2) A person to whom a noise reduction direction has been given under section 72B (b) must not, without reasonable excuse, while the direction remains in force:

(a) fail to promptly cease making or contributing to the making of the offensive noise, or

(b) at any time within 28 days following the time at which the direction was given (or such shorter period as is specified in the direction), make or contribute to the making of offensive noise that is emitted from the premises.

(3) A noise reduction direction does not prevent the emission of noise that is not offensive noise.

(4) A person who contravenes this section is guilty of an offence.

Maximum penalty: 30 penalty units.

72D Revocation of noise reduction directions

A noise reduction direction may be revoked by the person who gave (or could have given) the direction or by a person of a class prescribed by the regulations.

Division 2 Noise control notices

72E Noise control notices relating to premises

(1) This section applies to:

(a) the person who is the occupier of any premises, or

(b) the person who carries on an activity at any premises or who uses or operates an article at any premises.

(2) An authorised person may, by notice in writing given to such a person, prohibit the person from causing, permitting or allowing:

(a) any specified activity to be carried on at the premises, or

(b) any specified article to be used or operated at the premises, or both, in such a manner as to cause the emission from the premises at all times or on specified days, or between specified times on all days or on specified days, of noise that, when measured at any specified point (whether within or outside the premises), is in excess of a specified level.

(3) If, in a noise control notice, there is no reference to the times or days during or on which the prohibition imposed by the notice is to operate, the prohibition operates at all times.

(4) Nothing in this section affects the power under this Act to attach conditions to an environment protection notice.

72F Offence to contravene noise control notice

(1) A person who contravenes a noise control notice is guilty of an offence.

(2) A person is not guilty of an offence unless it is established that the alleged offence resulted in the emission, from the premises to which the alleged offence relates, of noise that was able to be detected or perceived outside those premises without the aid of an instrument, machine or device.

Maximum penalty:

- in the case of a corporation—600 penalty units and, in the case of a continuing offence, a further penalty of 60 penalty units for each day the offence continues, or
- in the case of an individual—300 penalty units and, in the case of a continuing offence, a further penalty of 6 penalty units for each day the offence continues.

72G Revocation or variation of noise control notices

A noise control notice may be revoked or varied by the regulatory authority that issued it by a further notice under this Division.

72H Delayed operation of noise control notices

(1) A noise control notice (including any notice varying such a notice) has no force:

(a) until the effective date occurred without an appeal being lodged, and

(b) if such an appeal is lodged within that period, until the Appeal Tribunal confirms the notice or the appeal is withdrawn.

(2) In this section, “effective date” means the date shown on the notice which shall not be less than 14 days from the date of issue of the notice.

(3) The Appeal Tribunal has the power to consider whether, in all the circumstances, the contents of the noise control notice are appropriate and to treat an application for a change to a noise control notice as an appeal under the Resource Management and Planning Appeal Tribunal Act.

Division 3 Noise abatement orders

72I Issue of noise abatement orders

(1) The occupier of any premises may apply to the Appeal Tribunal for an order under this section.

(2) The Appeal Tribunal, following an application which it considers is not vexatious, shall issue an application notice that alleges that the occupier’s occupation of premises is affected by offensive noise.

(3) The respondent to the application may be a person alleged to be making or contributing to the noise or the occupier of premises from which the noise is alleged to be emitted.

(4) If the Appeal Tribunal is satisfied, on the balance of probabilities, that the alleged offensive noise exists, or that although abated it is likely to recur on the same premises, the Appeal Tribunal may make either or both of the following orders:

(a) an order directing the respondent to abate the offensive noise within the time specified in the order,

(b) an order directing the respondent to prevent a recurrence of the offensive noise.

72J Contravention of noise abatement order

A person who contravenes a noise abatement order is guilty of an offence.

Maximum penalty: 30 penalty units.

72K Operation of noise abatement orders

A noise abatement order takes effect when it is made or at a later time specified in the order.

72L Revocation or variation of noise abatement orders

A noise abatement order may be revoked or varied by the Appeal Tribunal upon application.

72M Costs

The provisions of section 28 of the Resource Management and Planning Appeal Tribunal Act apply in relation to any proceedings before the Appeal Tribunal under this Part.

Division 4 Repeat Offenders

72N Repetition of environmental noise nuisance

(1) A person shall not repeatedly cause an environmental noise nuisance.

Penalty: A natural person 10 penalty units

 A body corporate 50 penalty units

(2) It shall be prima facie evidence that a person has committed the offence described in sub-section (1) if evidence is tendered that there has been three noise related infringement notices issued in the name of that person in a continuous period of 365 days.

(3) For the purposes of this section;

(a) a “noise related infringement notice” means any instrument issued under this Act that alleges that an offence involving the generation of noise has been committed.

(b) it shall be sufficient prima facie evidence to tender a statutory declaration signed by an authorized officer that three noise related infringement notices have been issued in the name of that person.

72O Repetition of noise offences

(1) A person shall not repeatedly cause a serious environmental noise nuisance.

Penalty: A natural person 200 penalty units

 A body corporate 1000 penalty units

(2) It shall be prima facie evidence that a person has committed the offence described in sub-section (1) if evidence is tendered that a person has been found guilty of any offence under this Division on three occasions in any two year period.

(3) For the purposes of this section;

(a) a “serious environmental noise nuisance” means the repetition of noise related offences.

(b) it shall be sufficient prima facie evidence to tender a statutory declaration signed by an authorized officer that a person has been found guilty of two offences under this Division.

Division 5 Miscellaneous matters

72P Evidence of noise nuisance

(1) It shall be prima facie evidence of noise nuisance if evidence is presented of a complying statutory declaration from:

- (a) an authorized officer; and
- (b) another person.

(2) For the purposes of this section a “complying statutory declaration” is;

- (a) a statutory declaration made pursuant to the Oaths Act 2001; and
- (b) contains at least;
 - (i) the nature of the alleged noise nuisance;
 - (ii) the time or times the alleged noise nuisance was made;
 - (iii) the place from which the alleged noise nuisance was emanating;
 - (iv) the place where the alleged noise nuisance was heard and the approximate distance of that place from where the noise was emanating;
 - (v) such other matters as may be prescribed.

72Q Duty to pursue noise complaints

(1) If a noise complaint is made in writing to an administrative unit that administrative unit must investigate that complaint.

(2) If following the investigation of a noise complaint it is established that there is reasonable evidence that an offence has been committed, that administrative unit must take reasonable action to deal with that complaint.

(3) It is an offence;

- (a) for an administrative unit not to investigate a noise complaint;
- (b) for an administrative unit not to take reasonable action if an investigation of a noise complaint indicates that there is reasonable evidence that an offence has been committed.

Penalty: A fine not exceeding 500 penalty units.

(4) For the purposes of this section;

- (a) a “noise complaint” means an allegation in writing that there has been a breach of noise regulations;

- (b) “noise regulations” means any legal instrument made under this Act but including the provisions of this Act concerning the control of noise;
- (c) “administrative unit” means;
 - (i) the Department responsible for the administration of this Act
 - (ii) a council
 - (iii) such other bodies which are prescribed.

72R Exemptions

(1) Persons in control of or owning premises or land from which the following noise generating activities are occurring are exempt from prosecution under this Part;

- (a) church bells, chimes or carillons,
- (b) sirens used for safety warning purposes,
- (c) activities which are authorised by the Director of Environmental Management by way of a noise authorisation,
- (d) such activities as are prescribed.

(2) For an activity to be authorised by the Director of Environmental Management, an application must be made in writing to the Director at least 14 days prior to the commencement of the activity.

(3) The Director following consideration of an application, may;

- (a) issue a noise authorisation, or
- (b) refuse to issue a noise authorisation.

(4) A noise authorisation;

- (a) must be in writing,
- (b) must contain an expiry date which shall not be more than 12 months from the date of issue, and
- (c) may contain conditions.

(5) The Director may cancel a noise authorisation by issuing a notice in writing to the person in whose name a noise authorisation was issued.

(6) A person shall not breach a condition of a noise authorisation.

Maximum penalty:

- in the case of a corporation—300 penalty units and, in the case of a continuing offence, a further penalty of 30 penalty units for each day the offence continues, or

- in the case of an individual—100 penalty units and, in the case of a continuing offence, a further penalty of 10 penalty units for each day the offence continues.

72S Noise based EIN

- (1) Notwithstanding any other provision of Part 4, an environmental infringement notice may be issued if it appears to an authorised officer that noise emanating from those premises is excessive.
- (2) The penalty shall be as prescribed or if no penalty is prescribed, 2 penalty units.

72T Approach to DPP

A person may request that the Director of Public Prosecutions initiate a prosecution for a breach under this Part.

72U Avoidance of doubt

- (1) Notwithstanding any provision of any other Act, a prosecution may be launched under this Act where a noise nuisance emanates from;
 - (a) premises which are licensed to serve alcohol
 - (b) roadways
 - (c) animals
 - (d) an activity which is prescribed.
- (2) It shall be a defence in a prosecution that;
 - (a) there was an environmental protection notice in force which authorised the noise nuisance
 - (b) there was a lawful excuse for making the environmental nuisance
- (3) Where there is an environmental nuisance and there is a successful defence under sub-section (2), the Director of Environmental Management shall, within 3 months, review the situation and assess as to whether changes to the current arrangements are necessary to provide protection against that environmental nuisance.
- (4) The Director of Environmental Management shall report each year in writing as part of the annual report of the Department which administers this Act on any assessments made pursuant to sub-section (3).

72V Keeping records of noise complaints

- (1) Nominated bodies must keep records of all complaints made involving what is alleged to be excessive noise or a noise nuisance.
- (2) For the purpose of this section, “nominated bodies” are;
 - (a) the Department administering this Act

- (b) a council
- (c) the Department responsible for the police
- (d) an body prescribed for the purpose of this section.

(3) The records to be kept in accordance with sub-section (1) are;

- (a) the date of the complaint
- (b) to whom the complaint was made
- (c) the nature of the complaint
- (d) the action taken
- (e) such other information as is prescribed.

(4) The Director of Environmental Management shall;

- (a) at least quarterly obtain detailed of noise complaints from nominated bodies and prepare a consolidated report of the complaints.
- (b) report each year in writing as part of the annual report of the Department which administers this Act on the noise complaints of the previous year.