2. Obligations to Notify – A Practical Guide

By Jacqui Robertson

Significantly expanded notification requirements will shortly be inserted by the *Natural Resources and Other Legislation Amendment Act (No. 2)* 2010 (Qld) (NROLA No 2 2010) into the *Environmental Protection Act* 1994 (Qld) (EP Act) and there is a much greater risk that operators could find themselves unintentionally in non-compliance with these complex requirements. However, there are practical steps that a prudent operator can take, preferably before the new provisions commence, that would help to minimise this risk.

This paper discusses the background to the changes, what the new provisions require, practical situations where an operator might face difficulties with the new requirements and finally some suggested steps that would mitigate the risks.

Background to legislative amendments

The coal seam gas industry faced heavy criticism over its environmental record in the second half of 2010.[1] In response to these criticisms, reforms were introduced to the legislative framework to address the needs of landholders.[2] This paper discusses the reforms which expanded the statutory duty to notify when a threat of environmental harm was discovered.

In other areas of law, the High Court of Australia, has insisted in the past upon the duty at common law of those with superior knowledge to notify or inform those exposed to known risks by their actions.[3] This common law duty to inform third parties who could reasonably foreseeably suffer harm (such as neighbours) has always existed alongside the statutory duty to notify the administering authority under section 320 of the EP Act. The provisions could be seen as an attempt to codify and expand on the common law, although perhaps without taking into account the nuances and flexibility of the common law to accommodate a wide range of circumstances, which this paper suggests needs to be addressed through guidelines, at the very least.

Provisions in the Bill as introduced 5 October 2010

The Bill that was introduced to Parliament on 5 October 2010 included the following changes to section 320 of the EP Act:

- A requirement that a person carrying out an activity who becomes aware (while carrying out that activity) that serious material environmental harm is caused or threatened by the person's or someone else's act or omission in carrying out that activity (or another activity associated with that activity), to notify the event, its nature and the circumstances in which it happened, not only to Department of Environment and Resource Management but also to any occupiers of the land who are reasonably likely to be affected within 24 hours of the event.
- A fivefold increase to the penalty for non-compliance with these requirements; and

[1] M Wenham, 'Mayor blasts Kingaroy groundwater contamination results in coal seam gas row', *The Courier-Mail* (Brisbane, 19 July 2010); J McCarthy, 'Gas fields a battleground for farmers', *The Courier-Mail* (Brisbane, 16 November 2010).

[2] As highlighted at page 2 of the Explanatory Notes to the Natural Resources and Other Legislation Amendment Bill (No. 2) 2010.

[3] In respect of medical negligence and the duty of a doctor to inform patients of foreseeable risks see *Rogers v Whitaker* [1992) 175 CLR 479; *Chappel v Hart* (1998) 195 CLR 232; *Rosenberg v Percival* (2001) 205 CLR 434 and in relation to economic damage subsequent to the sale of seed that contained weed species see *Dovuro v Wilkins* (2003) CLR 317, [120], Kirby J.

- If the person who becomes aware of the threatened harm is an employee, that person must notify the employer. If the employer cannot be contacted, the employee must make the notification to DERM and in any event must notify the relevant third parties.[4]

Peak industry bodies made submissions to the Scrutiny of Legislation Committee arguing that these obligations were problematic.[5] The Queensland Law Society explained, in its submission on the legislation:

> *In summary, it is unworkable to require:*
> *(a) That a person who is an employee, agent or contractor should have a duty of notification to neighbours in any circumstances;*
> *(b) Notification within 24 hours;*
> *(c) Notification to 'occupiers' as opposed to landowners;*
> *(d) Notification for an indeterminate area;*
> *(e) Notification in circumstances where the required contents are likely to be unknown.*[6]

Each of these concerns was explained in more detail in the submission, in terms of the original drafting of the amending Bill.

Changes introduced into the Bill during consideration in detail

The Minister introduced changes during the consideration of the Bill to address these concerns. The earlier two clauses that were introduced became a whole new division.[7] These amendments were passed[8] but the date of their commencement is yet to be fixed.

Briefly, the new provisions provide:

(a) Definitions which include 'affected land', 'occupier', 'public notice' and 'registered owner'.

(b) A requirement that a person carrying out an activity who becomes aware while carrying out that activity that serious or material environmental harm is caused or threatened by the person's or someone else's act or omission in carrying out that activity (or another activity associated with that activity), no later than 24 hours after becoming aware of the event and unless the person has a reasonable excuse, give written notice of the event, nature and surrounding circumstances to DERM.9

(c) That if the person is an employee, notice is required to be given to his or her employer who in turn holds the same duty to inform DERM10 but if the employer cannot be contacted the employee must give the notice to DERM.11

(d) A requirement that the person or employer who becomes aware of actual or threated environmental harm (not an employee), gives details of the event (unless that person has a reasonable excuse), its nature and the relevant facts and surrounding circumstances as soon as is reasonably practicable after becoming aware of the event, by either:

i. Written notice to an occupier of the affected land

[4] Natural Resources and Other Legislation Bill (No. 2) 2010, cl 17(1).
[5] Letter from the Minister for Natural Resources, Mines and Energy and Minister for Trade to the Chair of the Scrutiny of Legislation Committee, *Legislation Alert* (14/10, 18 November 2010) Part 3A Ministerial correspondence, p 2.
[6] Letter, Queensland Law Society to Scrutiny of Legislation Committee (20 October 2010), http://www.qls.com.au/content/lwp/wcm/connect/QLS/Knowledge%20Centre/Submissions/
[7] Chapter 7 Part 1 Division 1, Duty to notify of environmental harm.
[8] *Natural Resources and Other Legislation Amendment Act (No.2)* 2010, assented to on 1 December 2010.
[9] ss 320C(2).
[10] s 320D(2).
[11] s 320B (2).

ii. Written notice to the registered owner of the affected land; or
iii. Public notice to persons on the affected land.[12]

(e) That written notice given by a person or employer to an occupier of the affected land will be effected if the notice is given to an adult living or working on the affected land, or if no one can be found or access is denied, left on the land where it is reasonably likely to come to the occupier's attention or posted to the affected land and addressed to 'The Occupier'.13

(f) A defence (where there had been failure to comply with these provisions) that the person or employer made reasonable efforts to identify the affected land and give written notice to each registered owner or occupier.14

(g) Penalties for a person or employer for failing to comply that have been increased fivefold (to 500 penalty units or $50,000).[15] The penalties for employees who fail to comply remain the same as the current rate (100 penalty units or $10,000).[16]

The new division retains the original provisions in the EP Act[17] that state:

(a) It is not a reasonable excuse to fail to comply with the requirements on the basis that the notice may incriminate the person;[18]
(b) Such notice is inadmissible in a prosecution for an offence against the EP Act;[19] and
(c) There is no prevention as to admissibility of other evidence obtained because of the notice.[20]

[The provision that makes a notice inadmissible in a prosecution for an offence avoids the problems in dealing with the question as to the precise significance of 'admissions' or statements by a defendant which can occur at common law in negligence cases.[21]]

Effect of new provisions and persistent areas of uncertainty

The changes made during consideration of the Bill have clarified most of the inadequacies of the original Bill that were highlighted by the Queensland Law Society. In particular, employees, agents and contractors are not required to give notice directly to owners or occupiers, but rather this is the responsibility of the company. Also, whilst notification to DERM is still required within 24 hours of the person becoming aware of the event, notice to owners or occupiers is required as soon as is reasonably practicable. There are now provisions that clarify how notice may be given to an occupier and provide the excuse that reasonable efforts were made if there is a failure to comply with the third party notice requirements.

However, there continue to be practical difficulties that an operator should be aware of before the provisions become law.

'Serious or material harm'

The provisions relate to where there is actual or threatened 'serious or material environmental harm'. There can be practical problems in figuring out whether an incident falls into the category of 'material or serious environmental harm'. Both of the terms 'serious environmental harm' and

[12] sub-ss 320C(3) and 320D(3).
[13] s 320E.
[14] sub-s 320F(1).
[15] sub-ss 320C(2) and (3) and 320D(2) and (3).
[16] s 320B(2).
[17] sub-ss 320(6),(7),and(8).
[18] s 320F(2).
[19] s 320G(1).
[20] s 320G(2).
[21] An example of the treatment of such statements can be seen in *Dovuro v Wilkins* (2003) CLR 317.

'material environmental harm' are defined in sections 16 and 17 of the EP Act.[22] Put simply, 'material environmental harm' is harm that is either not trivial or negligible in nature or causes damage greater than $5000. 'Serious environmental harm' is irreversible, of a high impact or widespread, or caused to an area of high conservation value or that causes damage of greater than $50,000.

It is erroneous to assume that simply because the damage may be less than $5000 it is not 'material environmental harm'. If it is anything more than trivial or negligible it will still fit within this definition. 'Environmental nuisance' is also defined in the EP Act (section 15) as (generally) being unreasonable interference or likely interference with an environmental value caused by aerosols, fumes, light, noise, odour, particles or smoke or an unhealthy, offensive or unsightly condition because of contamination. There is an overlap between the definitions of 'material environmental harm' and 'environmental nuisance'[23] which could usefully be the subject of future legislative reform.

It is sometimes incorrectly assumed that, if there are specific notification requirements in environmental conditions (eg, relating to breaches of conditions), that these entirely override and replace the notification requirements under section 320. The requirements often overlap and there should be no need to give two separate notices about the same incident, but often, the same incident constitutes both a notifiable event under the Act and under conditions, and the content requirements of the notice may not be the same. If so, both sets of requirements need to be complied with. This can be very confusing to operators dealing with an emergency.

Uncertain extent and nature of environmental harm

Problems will certainly occur where the extent and nature of any harm is unclear immediately after an event. It is not difficult to imagine environmental accidents where this could occur.

In January 2011 the failure of a sewerage treatment plant led to discharges of untreated sewage into Oxley Creek. Disinfection was forecast to take six weeks and the facility would not be operational for another three months.[24] Residents along the creek, the Brisbane River as well as Moreton Bay were affected. The *Courier Mail* reported, "*The major environmental impact of the floods is starting to emerge, with professional fishermen finding diseased fish in Moreton Bay and scientists recording damage to waterways, the Great Barrier Reef, seagrass and corals and outbreaks of dengue and other flood-borne diseases.*"[25] In a case like this, the notice to DERM, which was required within 24 hours of the incident, could not have included many of the relevant facts and circumstances of the incident as the extent of the damage would have been unknown at that time. Obviously, the only appropriate means of giving notice to affected third parties would have been via public notice in the media but relevant details would only be available later in time.

Another example of a problematic situation for reporting is where a fuel truck travels along a major highway such as the Capricorn Highway, travelling through rural as well as urban areas. The driver discovers that his tanker has been leaking fuel. The driver has to ascertain firstly were the contents of the tank harmful to the environment? Could it have been absorbed into the ground and then groundwater? Did it leak into any waterways or areas of high conservation value? If so, who would have been affected? The rural landholders along the route? The residents and businesses in the

[22] In *Darwen v Pacific Reef Fisheries (Australia) Pty Ltd* [2009] QPEC 109, the applicant cane farmers (who sought enforcement orders and declaratory relief against an aquaculture operator) had difficulty in narrowing the pleadings so as to distinguish between serious and material environmental harm.

[23] As discussed in *Crowther v State of Queensland* [2002] QPEC 79 which involved odours and particulate emissions from the local TAFE.

[24] B Williams, 'Oxley Creek contaminated with faecal pollution after Brisbane flood disaster' *The Courier Mail* (Brisbane, 29 January 2011); see also: Urban Utilities, *Media Release* (1 February 2011) http://www.urbanutilities.com.au/uploads/File/Media_Releases/20110201_Media_release_sewage_treatment.pdf

[25] B Williams, 'Oxley Creek contaminated with faecal pollution after Brisbane flood disaster', *The Courier Mail* (Brisbane, 29 January 2011).

towns? The fishermen in the local marine catchment? It might be months or even years before the full extent of the harm becomes known. Alternatively it may turn out to be a 'storm in a tea cup' where extensive notice puts the State and the community on unnecessary high alert.

Whenever a statute attempts to codify the common law, there are difficulties with accommodating the wide range of circumstances which can be addressed more flexibly under the common law. It would be helpful if guidelines could examine difficult scenarios such as these, and emphasise the need for a common sense approach.

Content of notice generally

The content of the notice required to be given in each of the provisions is described as 'the event, its nature and the circumstances in which it happened'. Just what will be considered enough to satisfy these words is unclear. In the early stage of discovery of such an event, the first response should be containment and minimisation of the harm. However, the 24 hour time limit means that a very early step must be to notify DERM. Clearly, even where there is doubt as to the nature of the harm, notice to DERM is warranted but the combination of the timing and the level of detail required in that notification is what is challenging. It follows that the shorter the time frame, the less detailed the notice is able to be.

In the hypothetical example of the truck driver above, obviously the first thing he should do is stop the vehicle and try to stem the flow and deal with any emergency issues such as fire risk. Very early in this process he should try to contact his employer. As the written notice to DERM is required within 24 hours, if the employee cannot immediately contact his employer, he will need to arrange for this himself at the same time as trying to stem the flow of a leak on the side of the highway, perhaps in a remote location. It would be hoped that his employer would be contactable and could address the next problem, the content of the notice.

At the very least, the content of the notice should be factually correct which, as discussed above, may be difficult to ascertain soon after the event. Severe penalties exist for providing false, misleading or incomplete documents (1665 penalty units or $166,500 or two years imprisonment).[26] Perversely, not giving the notice at all has a lesser penalty for an employee (100 penalty units or $10,000). The difference in the penalties leads to a disincentive to giving notice especially where the circumstances are already difficult such as for the truck driver in the example. A suggested solution is for an employer to have a pro forma notification form ready to fill in the blanks, including disclaimers about whether the information may be incomplete or mistaken given the short timeframe and that, if and when further information becomes available this will be provided.

Content of notice to third parties

The question of what should be included in notice to third parties is even more challenging and guidance can be found in the case law involving common law negligence and nuisance cases.

There are two competing issues that relate to the drafting of the content of notice to third parties. Firstly, once the obligation to notify arises (both at common law and by statute), consideration should be given to the duty of care that is owed when giving advice.[27] Too much information can lead to careless words which can cause both physical and economic loss and are actionable where there is negligence.[28]

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[26] ss 480 and 480A EP Act.

[27] As laid down in *Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225.

[28] *Shaddock v Parramatta City Council* (1981)150 CLR 225. Where notice is given by a person who can reasonably be expected to have a special knowledge relating to the event in question (such as notice of an actual or threatened

Secondly and conversely, not enough information included in a notice will lead to a failure in one's duty to inform. The factors that must be balanced were elucidated by Mason J in *Wyong Shire Council v Shirt*,[29] "*The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.*" Kirby J stated succinctly that the greater the risk of harm, the higher the duty to notify.[30]

However, case law (such as the many medical negligence cases involving failure to inform) shows that there can be great difficulty in determining what information should be disclosed so as to satisfy a duty of care in any situation. In the High Court decision of *Dovuro v Wilkins*[31] which involved the sale of imported seed that proved to contain weed species, the Court decision was split 2:5 in terms of whether negligence had occurred (the majority finding that the events that led to the loss were not reasonably foreseeable) and involved 5 separate judgements. The minority judgements that found that there was a duty of care in respect of the importation of the seed had the opportunity of discussing the further duty of notification in such circumstances. The critical passage relating to the duty to notify third parties is by Kirby J: "*where there is potentially a high risk, as in the supply of imported seed into a vulnerable domestic farming area, the importer with technical and scientific expertise available to it, will be held to a high standard of care for, and of notification to, the growers who were necessarily reliant on being alerted to any unusual risks to which they are exposed.*"[32]

In applying these principles to the practical example of the unwitting truck driver with the fuel leak (assuming that the media is not a viable option for conveying the notice[33]), consideration will need to be given to identifying the third parties who, it is reasonably foreseeable, will be threatened or affected by this event. The magnitude of the harm and the probability of its impact on the set of individuals connected in some way to the area of the spill will be the persons who will need to be notified. Then finally the content of the notice to these individuals will need to be drafted carefully so as not to cause panic but inform them in a timely way of the unusual risk to which they have been exposed. A relevant factor in drafting will be the level of knowledge that would usually be ascribed to the person giving the notice. For example, if the employer is in a position to know of the magnitude of the effects of a certain substance on the environment and the health of those people connected to that ecosystem, a higher level of what will be adequate notice will be required.

Again, guidelines from DERM that give examples of difficult scenarios where a common sense approach is recommended would be extremely helpful.

Reasonable excuse

As noted, the defence of 'reasonable excuse' has been inserted in the final version of the Bill as passed. The scope of this defence has been considered in many other statutory contexts (such as criminal law, taxation, legal professional privilege and company law) but caution needs to be used when applying principles gleaned from this caselaw. "*What is a reasonable excuse depends not only on the*

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environmental harm), it would be reasonable to expect the recipients to rely on the notice especially when the risk of harm to such persons is reasonably foreseeable.

[29] (1980) 146 CLR 40, 48.

[30] *Dovuro v Wilkins* (2003) CLR 317, [122] Kirby J.

[31] (2003) CLR 317.

[32] (2003) CLR 317, [120].

[33] If it is immediately apparent that significant harm is likely to have been caused over an uncertain and large area, the fuel truck leak example would be an obvious candidate for notification to owners and occupiers via the media. However, the solution would be less obvious if it is unclear at first that there has been any significant harm and the media could either create unnecessary panic or fail to convey the message because it is not considered to be a 'story'.

circumstances of the individual case but also on the purpose of the provision to which the defence of 'reasonable excuse' is an exception".[34]

Nonetheless, cases involving the *Clean Water Act* 1970 (NSW) indicate that the defence of 'reasonable excuse' relates to the capacity of a person to comply with the obligations and the physical or practical difficulty in compliance.[35] Excessive workload has not been considered a 'reasonable excuse' for failures in environmental systems.[36]

Public notice

Whilst the details of when and how public notice could be used as an alternative to written notice is yet to be prescribed by regulation, the examples of radio or television broadcasts were given in the explanatory notes.[37] This avenue of notice would be most appropriate where there is a very large and perhaps indeterminate class of person who may be affected by actual or threatened harm. The examples given above of the failure of a sewerage treatment plant or an accident involving pollutants released to a wide or unknown area would fit the category of incident where public notice would be advisable. The type of notice could be a media release on ABC radio or an advertisement in local newspapers. Just telling the local television, radio or print media in the hope that they publish the relevant information would probably not satisfy the provisions.

Again, caution needs to be taken in light of the discussion above in respect of the duties owed when giving advice and the extent of the common law duty to notify. The prescription by regulation of what is sufficient to satisfy this type of notice (such as whether advertisements are sufficient) will be helpful before the provisions come into force.

Prudent steps an operator should take

Before the new statutory provisions come into effect, it would be sensible for any operator of an environmentally relevant activity to be prepared for an incident. The following steps are suggested:

(a) Training of the employees, contractors, consultants and agents who might potentially be caught by the notification provision about their notification obligations if there is an incident. In a recent NSW case,[38] a general manager's serious misunderstanding of the environmental compliance requirements of the *Protection of the Environment Operations Act* 1997 (NSW) and the 'woefully inadequate' systems of the corporation led to the offence. In that case, the general manager himself was prosecuted. Employees and contractors in organisations that conduct environmentally relevant activities need to understand that they may be liable personally if they fail to comply with notification requirements.

(b) An emergency response plan or guide should be prepared and maintained so that employees can resort to it in the event of an environmental incident. This should include pro forma notification from the employee or contractor to the employer or principal, so that the content requirements are covered and ensuring that all after hours contact details and alternative contact details are included.

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[34] As per joint judgment of Brennan CJ, Toohey, McHugh and Gummow JJ in *Taikato v R* (1996) 186 CLR 454, 464.

[35] *Environmental Protection Authority v Cockburn* [1995] NSWLEC 83 (Stein J, 23 May 1995) which involved environmental notices relating to the efforts of a landowner to reclaim land from the waters of Batemans Bay; and *Environmental Protection Agency v Taylor* [1995] NSWLEC 35 (10 March 1995) involving environmental notices relating to a piggery. Both cases applied *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 336, Dawson J involving the *Companies (NSW) Code*.

[36] See *Environmental Protection Authority v Hogan* [2008] NSWLEC 125 (Jagot J, 31 March 2008) involving a waste facility which continued operations after its licence was suspended.

[37] Explanatory Notes, Amendments moved during Consideration In Detail by the Honourable Stephen Robertson MP to the *Natural Resources and Other Legislation Bill (No. 2)* 2010, p 5.

[38] *Environmental Protection Authority v Hogan* [2008] NSWLEC 125 (31 March 2008)

(c) Pro forma notice forms to DERM should be drafted and included in the emergency response plan or guide to facilitate notice to the DERM, including standard disclaimers about potential mistaken or incomplete information, so as to set up a defence to any allegation of false, misleading or incomplete information.

(d) It has always been prudent to undertake a risk analysis of the business in order to determine potential environmental incidents. (This analysis will also involve consideration of the likelihood of such events and the costs of alternatives to prevent such events.) However the extra step of keeping updated addresses and full contact details of all third parties which could potentially be affected in a worst case scenario is now warranted. Title searches of properties in the neighbourhood of the business (or downstream of the business) should be undertaken beforehand, rather than having to rush to do this after an incident. If there are absentee landlords for nearby properties, it is also worth checking who lives there. Given that the legislation will offer a choice between contacting owners or occupiers, a choice should be made beforehand about whether it would be more efficient and effective to contact the occupier (eg, if there is an absentee landlord) or whether there are so many technical 'occupiers' (such as absent easement holders) for a particular property that it would be more sensible to contact the registered owner instead. Again, it would be difficult to rush around working this out just after an emergency has occurred.

(e) Once likely third parties are identified, a draft form and 'merge' for addresses can also be prepared so as to facilitate a quick response in the event of an emergency.

(f) The information is useless unless it is kept updated.

(g) If public notice is an appropriate option for any likely incident, consideration should be given to the media that would best suit such notice. Contact details of the local newspapers and radio stations could be helpfully included in the emergency response plan or guide for the business operators.

Essentially, taking the time to be fully prepared for an incident that might cause environmental harm before it arises is a prudent step which should be considered. Then, if anything goes wrong, at least the defence will be available that reasonable steps were taken.

Conclusions

The new provisions contain more onerous statutory provisions relating to the notification required to be given in the event of actual or threatened environmental harm. Some of the content requirements of notification are likely to be challenging, given the short timeframe, in a range of circumstances.

Guidelines which take into account the history of case law in suggesting examples of what constitutes a reasonable excuse would be helpful. There is also a need for further details about the methods of public notice that would satisfy the provisions. If DERM is able to produce guidelines which examine some difficult hypothetical scenarios and recommend common sense solutions, this will go a long way to help facilitate an understanding of what is intended.

In the meantime, before the amendments take effect, there are steps that a prudent operator ought to take to limit exposure to inadvertent breach of these provisions. These steps would also minimise the risk of breaching common law duties in negligence and nuisance that operators already face in addition to their statutory obligations.

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