

List of recommendations

From the Compliance and Enforcement
Review of EPA's operation



Stan Krpan, December 2010

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List of recommendations

Chapter 3 EPA's approach to regulation

Recommendation 3.1

That EPA define the concept of 'client focus' in the context of EPA's core role as the environmental regulator.

Recommendation 3.2

That EPA amend the Client Strategy Framework to clearly identify the role of CRMs in a regulatory context and their involvement (if any) in relation to enforcement.

Recommendation 3.3

That EPA publish a policy on the use of information obtained by CRMs in their interaction with businesses.

Recommendation 3.4

That EPA broadly promote the concept of being a modern regulator and define this in accordance with the principles of compliance and enforcement outlined in the proposed Compliance and Enforcement Policy.

A regulator that is:

- targeted
- proportionate
- transparent
- consistent
- accountable
- inclusive
- authoritative
- effective.

Chapter 4 Environmental licensing

Recommendation 4.1

That EPA provide guidance to licensed businesses on the frequency and type of monitoring that should occur in the most common industries. Such guidance would include positions on matters such as type of monitoring, qualifications of persons undertaking testing, location of testing and frequency.

Chapter 5 Response to pollution incidents

Recommendation 5.1

That litter reports and pollution reports from members of the public are acknowledged by EPA in writing where practical, with a system put in place where possible to indicate the outcome of the report.

Recommendation 5.2

That EPA undertake audits of pollution reports and compare these to notifications from industry to ascertain whether there is non-compliance with licence conditions requiring notification.

Recommendation 5.3

That EPA clearly outline its jurisdiction in relation to pollution to air, water and land, noise, odour and litter in a plain English guide to reporting.

Recommendation 5.4

That EPA provide plain English guidance to clarify the meanings of key terms such as 'pollution' and 'environmental hazard'.

Recommendation 5.5

That EPA identify those environmental problems that are shared with local government and other agencies and prioritise these to address uncertainty and define who has primary regulatory responsibility.

Recommendation 5.6

That EPA encourage businesses that are the subject of frequent pollution reports to establish reporting arrangements with the local community.

Recommendation 5.7

That EPA provide information on its website indicating the contact details for any local environmental reporting services operated by businesses and encourage first reports to be made directly to the operator, with the option of subsequently reporting directly to EPA.

Recommendation 5.8

That EPA require the establishment of local environmental reporting services in appropriate cases where there has been a breach of environmental laws as an effective means of dealing with future complaints and ensuring business meets its responsibility to work with local communities.

Recommendation 5.9

That as part of its Business Systems Reform project, EPA provide a mechanism by which pollution reports can be categorised and systematically analysed in relation to the following parameters:

- source of report, including whether the source is a member of the public, another business, or other agency
- reports relating to particular premises or locations
- reports that may relate to the same incident
- previous reports relating to particular premises or locations and any trends
- reporting across geographic areas
- trends in reports and incidents over time
- the statutory tool (pollution abatement notice or licence) or action (pollution abatement notice, direction, prosecution) resulting from the report

The system should also provide for a record to be made of any decision following triage of the report and feedback to reporters at an appropriate milestone.

The system should be capable of capturing whether an attendance by EPA resulted from a complaint, so that the number of visits or inspections in relation to pollution reporting can be tracked and reported upon.

Chapter 6 Role of compliance advice

Recommendation 6.1

That EPA promote awareness of a broad duty of care to the environment, the EP Act and EPA by educating the community in general and non-licensed businesses.

Recommendation 6.2

That EPA review its website to ensure it is accessible and navigable and that information is current.

Recommendation 6.3

That EPA publish a plain English guide to the *Environment Protection Act 1970* and fact sheets targeted to business and community readers.

Recommendation 6.4

That EPA clearly articulates a hierarchy for statutory and non-statutory guidance that would explain the purpose for which each type of guidance is provided and adopt a clear naming convention that would be applied consistently to its publications. The hierarchy and naming conventions would make clear the legal status of the publication.

Recommendation 6.5

That EPA develop and publish 'EPA positions' to provide clear and authoritative interpretations of the law and state environment protection policies. These would provide guidance to duty-holders where there are problems with interpreting the law or policies.

Chapter 7 A new model for compliance and enforcement

Recommendation 7.1

That EPA articulate its policy regarding the role of human health in environment protection, its relative importance and EPA's approach to preventing impacts on human health and well-being.

Recommendation 7.2

That EPA adopt a risk-based model for its compliance and enforcement activity in licensed and non-licensed premises, as outlined in this chapter.

Recommendation 7.3

That EPA incorporate into this model responsive elements that consider the attributes of regulated entities, including their level of culpability, in determining the appropriate enforcement response, as outlined in this chapter.

Chapter 8 Compliance monitoring and inspections

Recommendation 8.1

That EPA undertake a risk assessment and prioritisation of licensed premises to inform its compliance monitoring activity at the start of each annual planning period.

Recommendation 8.2

That EPA undertake a categorisation of licensed premises to set time limits between inspections of licensed premises, in order for all licensed premises to receive at least one inspection during a specified period.

Recommendation 8.3

That EPA undertake an assessment of the state of the environment each year, based on available data, in order to inform its compliance plan and to ensure that it proportionately targets compliance monitoring and resourcing to areas causing the biggest environmental harm, where it has the capacity to influence and effect improvements.

Recommendation 8.4

That EPA prepare an annual compliance plan explaining its priorities for compliance monitoring and determine an appropriate proportion of compliance monitoring to non-licensed premises according to the cumulative risks they pose.

Recommendation 8.5

That EPA create a dedicated lead role for operational strategy development, independent of compliance operations and program delivery, with clear accountability for developing a compliance plan and compliance programs.

Recommendation 8.6

That EPA publish its compliance strategies and plans and broadly promote them to the community and businesses to encourage compliance and foreshadow its enforcement priorities.

Recommendation 8.7

That EPA align the operating model for authorised officers in its head office Pollution Response Unit and Environmental Performance Unit with that currently applied in regional offices, providing for generalist authorised officers capable of undertaking pollution response as well as proactive compliance inspections.

Recommendation 8.8

That EPA assign dedicated specialist resources to applying a systematic, audit-based approach to complex industrial facilities, including major hazard facilities and landfills.

Recommendation 8.9

That EPA explore opportunities to collaborate with other regulators responsible for managing risks at complex industrial facilities.

Chapter 9**Enforcement tools: an overview of regulatory tools available to EPA****Recommendation 9.1**

That EPA monitor the number of environmental audits being commissioned, and whether these have been required by a notice or direction from EPA to ensure that the audits are being appropriately commissioned and not imposing costs on businesses that are disproportionate or unnecessary.

Recommendation 9.2

That EPA reposition abatement notices as a remedial tool that is constructive and provides for the remedy of a breach of legislation, regulation or policy or the control of an environmental risk.

Recommendation 9.3

That EPA adopt a policy that, in the event of a substantive breach being detected by an authorised officer or an environmental risk requiring remedy, unless the breach or risk can be remedied in the officer's presence, an abatement notice should be issued.

Recommendation 9.4

That EPA authorised officers adopt a procedure for abatement notices to be provided to respondents in draft, to allow for any issues of clarification to be raised and to arrange realistic timeframes for compliance, unless by reason of urgency this is not practicable.

Recommendation 9.5

That EPA seek an amendment of the EP Act to remove the service fee under section 60C of the EP Act, which applies to the issue of a pollution abatement notice.

Recommendation 9.6

Where possible, that EPA include in the abatement notice the following:

- the nature of the breach or the environmental risk to be managed
- written explanation for the reasons for forming this view
- what action is required by the notice or direction
- outline one way of achieving compliance, where this is practicable, or alternatively pointing to other sources of guidance or advice to achieve compliance
- where there is avenue of appeal, this also be included.

Recommendation 9.7

That EPA urgently document procedures to confirm the purpose of the respective tools and how they ought to be used. In particular, that EPA provide guidance to EPA staff as well as regulated businesses regarding how it will interpret 'urgent' for the purposes of issue of a minor works notice.

Recommendation 9.8

That EPA remove the administrative limit of \$50,000 imposed in the delegation to authorised officers to issue pollution abatement notices.

Recommendations 9.9

Where line management approval is required to revoke a notice as being complied with, that EPA delegate powers to regional managers to revoke such a notice.

Recommendation 9.10

That EPA confirm in its instrument of revocation, where appropriate, that a notice such as a pollution abatement notice or minor works notice has been complied with, and that this is the reason for the revocation.

Recommendation 9.11

That EPA relax the requirement on authorised officers to confirm the legal entity to whom a notice is issued by exercise of the power in section 55(3D) in circumstances where the occupier is a licence-holder and the holder of a reformed licence.

Recommendation 9.12

That in order to confirm the importance of a notice as a legislative instrument, ensure transparency and maximise the preventative and deterrent effect of notices, EPA:

1. Publish a list of notices issued by EPA issued on EPA's website with an 'Enforcement' home page established to centralise information regarding EPA's use of enforcement. This is particularly important in the case of post-closure pollution abatement notices, which may remain in force for many years - where the community has a clear entitlement to know. Careful consideration will be required as to whether non-compliance with a notice should also be published.
2. Include on its website a clear description of the different types of notice and the penalties which apply to non-compliance.
3. Issue a standing instruction as part of EPA's operating procedures requiring the re-attendance of an authorised officer at a site to check compliance with notice conditions. More complex notices and those with longer duration may require multiple visits to check progress towards compliance.
4. Issue an instruction that notice compliance dates should only be extended in writing using a common template, and a business rule should preclude extensions of time *after* the date for compliance has expired.

5. Communicate EPA's campaign to follow up on notice compliance broadly and transparently, to maximise compliance with notice conditions and deter non-compliance.

Chapter 10 EPA investigations

Recommendation 10.1

That EPA explore ways of improving data quality and ensuring accountability for data entry, in order for *Step+* data to be more accurate as to the number and timeliness of major investigations and prosecutions.

Recommendation 10.2

That EPA examine any trends in these data to improve the timeliness of investigations and process steps leading to prosecution.

Recommendation 10.3

That the Enforcement Review Panel continue to operate and continue to be required to review recommendations for enforcement decisions involving the issue of official warnings and infringement notices, and endorsing major investigations.

Recommendation 10.4

That the Enforcement Review Panel's Terms of Reference be revised to delete the following roles for the Panel:

- 'to provide high level direction to investigations as required'
- 'to review the timeliness and consistency of investigations and enforcement recommendations'

and that these roles be confirmed as the accountability of the Director Environmental Services.

Recommendation 10.5

That the Enforcement Review Panel include a fourth member without enforcement responsibilities, to ensure independence and sufficient challenge.

Recommendation 10.6

That the Director Environmental Services and the Director Client Services be required to support any referrals from officers in their respective directorates, in order for the referral to be tabled at the Enforcement Review Panel.

Recommendation 10.7

That the roles of the respective members, including the role of Solicitor, be properly articulated in the Enforcement Review Panel's terms of reference.

Recommendation 10.8

That referring officers and investigators be entitled to attend the Enforcement Review Panel to explain their referrals and hear deliberations.

Recommendation 10.9

That decisions of the Enforcement Review Panel and reasons for those decisions be recorded, provided to referring officers and available to all relevant staff.

Recommendation 10.10

That EPA continue to maintain a separate, specialist unit to undertake major investigations.

Recommendation 10.11

That, where investigators or informants are placed in regional offices, these officers should report through the Enforcement Unit, to maintain independence.

Recommendation 10.12

That EPA investigators take statements from EPA staff. In appropriate cases, to ensure independence of expert opinion, EPA should consider retaining suitably qualified external expertise in its major investigations.

Recommendation 10.13

That EPA allocate a solicitor to support the Enforcement Unit in undertaking investigations by providing on-call legal advice to support investigators in the field and guide investigations.

Chapter 11 Prosecutions

Recommendation 11.1

That EPA significantly increase the level of prosecutions in order to ensure there are fair and appropriate consequences for serious offences under the EP Act.

Recommendation 11.2

That EPA educate community and business on the lessons to be learnt from environmental incidents and prosecutions, and to maximise the deterrent effect of prosecutions by publicising the factual circumstances and outcomes of prosecutions.

Recommendation 11.3

That EPA publish on its website factual accounts of all prosecutions undertaken. These accounts should include identifying information regarding the court and court proceedings, and an account of the circumstances of any incident or breach and any remedial action to maximise the deterrent and educative effects of prosecutions.

Recommendation 11.4

That EPA consolidate information regarding previous prosecutions in a searchable format and provide better access to this information on its website.

Recommendation 11.5

That, in publicising prosecutions, EPA should explain the reasons that the offending warranted prosecution.

Recommendation 11.6

That EPA document a policy on enforcement and prosecution of government entities, including local governments - clearly explaining that they are subject to the law and how it will discharge its discretions equitably and fairly.

Recommendation 11.7

That EPA maintain the Inspiring Environmental Solutions program (with a number of enhancements) and continue its practice of using section 67AC.

Recommendation 11.8

That EPA document a policy position that articulates its preference for restorative orders under section 67AC.

Recommendation 11.9

That EPA include in the Compliance and Enforcement Policy or associated policies the criteria it will apply to use of section 67AC, including the circumstances in which it considers dispositions of this nature to be inappropriate.

Recommendation 11.10

That EPA use the adverse publicity component of section 67AC coupled with financial penalties to promote the deterrent effect of prosecutions.

Recommendation 11.11

That EPA publish a policy regarding enforcement and prosecution of government entities (including committing to Model Litigant Guidelines). The policy should include any considerations or protocols to be followed, how independence will be maintained and how outcomes will be communicated.

Recommendation 11.12

That EPA adopt the Prosecution Guidelines that are common to all Australian Directors of Public Prosecutions (and adopted by the Victorian Director).

Recommendation 11.13

That EPA support the Prosecution Guidelines by developing policy positions on the following aspects of prosecutorial practice:

- the choice of jurisdiction to prosecute matters
- the choice of defendant where there are multiple potential defendants including corporations and corporate directors
- EPA's approach to claims of legal professional privilege and privilege against self-incrimination
- prosecution of government entities, including local councils.

Recommendation 11.14

That EPA prepare standard submissions to be used in sentencing hearings that seek Courts to take account of financial benefits obtained as a result of delayed or avoided compliance under the EP Act.

Recommendation 11.15

That EPA, in appropriate cases, seek to quantify economic benefits obtained as a result of offending to support sentencing submissions, and the development of appropriate orders under section 67AC and enforceable undertakings.

Recommendation 11.16

That EPA publish guidance on its calculation of economic benefits in administrative and court-imposed sanctions.

Recommendation 11.17

That EPA publish its policy position in relation to recovery of clean-up costs, including the circumstances and criteria which it will consider in seeking to recover costs against an occupier which subsequently comes into possession of property, when it will register a charge and seek to sell the subject property to recoup clean-up costs.

Recommendation 11.18

That EPA promote the responsibility of owners and occupiers of commercial premises that may be subject to the provision in section 62 of the EP Act to encourage them to exercise diligence in letting property to hazardous industries.

Recommendation 11.19

That EPA publish and promote a policy on the use of injunctions to enforce compliance with enforcement instruments and control risks.

Recommendations 11.20

That EPA amend its current guidance regarding enforceable undertakings to ensure that:

1. The primary focus of the undertaking is to prevent recurrence of any incidents or breaches, and therefore in general enforceable undertakings will be used to require an environmental management system to be implemented (and/or audited)
2. Where EPA is satisfied that the incident is unlikely to reoccur, the undertaking should provide for improvements to the defendant's own performance
3. Undertakings to be used to improve overall industry or sector performance
4. For this reason, it would be helpful to include example initiatives in each of the sections. There should be a primary preference for undertakings to include a commitment to implement environmental management systems to an appropriate standard
5. EPA should proactively suggest undertakings in appropriate cases

6. The policy should expressly state that, in considering an undertaking, EPA will consider any co-offenders and their contribution and that acceptance of an undertaking in relation to one offender will not necessarily warrant the same outcome for the co-offenders
7. The contact point for approaches to EPA on undertakings should be the Legal Unit, to ensure that negotiations are privileged and that independence can be assured
8. The informant in any major investigation potentially impacted by negotiations regarding an undertaking should be consulted.

Recommendation 11.21

That EPA continues to investigate all parties related to incidents or breaches in its investigations.

Recommendation 11.22

That EPA include in its Compliance and Enforcement Policy or associated policies a policy that it will investigate the complicity of all parties involved in significant incidents and breaches, to support the shared duty of care to the environment.

Recommendation 11.23

That EPA consider application to the Magistrates' Court for all complex factual and legal scenarios that may require consideration of unsettled legal concepts to have such matters heard in the County Court.

Recommendation 11.24

That EPA consult with the Office of Public Prosecutions to support effective preparation and conduct of prosecutions that may be determined by way of committal and County Court trial.

Recommendation 11.25

That EPA promote the officer liability provision as a duty on officers to exercise due diligence. Guidance should be provided on practical ways in which officers can exercise due diligence in compliance with environmental laws.

Chapter 12**Compliance and enforcement policy****Recommendation 12.1**

That EPA adopt and publish a revised Compliance and Enforcement Policy in accordance with the proposed draft included as Appendix 12.1 to this report.

Chapter 13 Authorised officers and their powers

Recommendation 13.1

That EPA nominate a responsible person or unit to be accountable for the maintenance of accurate records regarding the authorisation of EPA authorised officers. These records should include the original instruments of authorisation and authorisation and revocation dates.

Recommendation 13.2

That the management of recommendations for appointment and revocation of authorised officers be centralised, to ensure consistency in process and the attainment of relevant prerequisites and accountability for record keeping.

Recommendation 13.3

That EPA set clear criteria regarding the maintenance of authorised officer status by non-field staff and revoke authorisations where these criteria are not being met.

Recommendation 13.4

That EPA set a clear policy regarding the appointment of authorised officers as designated environment protection officers, with clear prerequisites for appointment and guidance on the exercise of the powers delegated to them.

Recommendation 13.5

That EPA review whether designated environment protection officers should continue to be delegated to issue and amend works approvals and licences, given the central management of these decisions and the risks associated with these decisions.

Recommendation 13.6

That EPA publish a plain English description of the respective roles performed by authorised officers, delegated officers and investigators or informants, and the powers and obligations that accompany these roles.

Recommendation 13.7

That EPA publish guidance on its policy for applying the privileges against self-incrimination and for legal professional privilege, and clearly articulate how the privileges may be claimed and how they will be treated or resolved by EPA.

Recommendation 13.8

That EPA develop and publish a formal complaints procedure for persons interacting with EPA authorised officers. The procedure would provide for a suitable level

of independence, to ensure that external complaints are appropriately investigated and addressed with due regard to the rights of authorised officers as public service employees. The procedure should be published on EPA's website and be made available upon request.

Chapter 14

Training and support to authorised officers

Recommendation 14.1

That EPA establish an operations support function, incorporating the elements I have outlined above.

Recommendation 14.2

That EPA document a policy that requires trainee authorised officers to be accompanied while undertaking field duties. This policy would state EPA's position that enquiries and powers are only permitted to be exercised by appointed authorised officers. The policy would be accompanied by a procedure for the conduct of trainee officers while accompanying authorised officers, and the limitations of their role. This procedure would include trainee officers identifying themselves as such when undertaking field duties.

Recommendation 14.3

That a central unit be responsible for induction and training of environment protection officers, to ensure consistency. The training itself would be delivered by a combination of internal and external subject-matter experts against agreed competencies.

Recommendation 14.4

That EPA seek accreditation of the training program for authorised officers through alignment with a relevant educational institution.

Recommendation 14.5

That EPA require new placements to field duties to undertake a standard induction course - including the components necessary for authorisation - upon commencement of their role and be appointed as authorised officers prior to commencement of field duties. The course would be competency based and assessed. Consideration should be given to whether any statutory powers or delegations would be restricted during the first six months of active field placement until the attainment of in-field competencies.

Chapter 15

Resourcing of compliance and enforcement

Recommendation 15.1

That EPA significantly increase the number of environment protection officers, in order to effectively discharge its compliance monitoring and assurance functions, and to take a more proactive role to prevent environmental incidents and harm.

Recommendation 15.2

That EPA consider the technical expertise required to deal with complex and specialised subject matter within its jurisdiction.

Chapter 16

Performance measures of enforcement activity

Recommendation 16.1

That EPA prepare an internal and external report on its compliance and enforcement activity, including the number and timeliness of enforcement measures.

Recommendation 16.2

That EPA report on trends regarding the level of compliance it observes during monitoring and inspection, and on the actions taken as a result.

Recommendation 16.3

That EPA report on the state of compliance from data received in annual performance statements submitted by licensees, including any patterns and trends.

Chapter 17

Internal review of enforcement decisions

Recommendation 17.1

That EPA establish a pilot scheme for review of enforcement decisions by authorised officers, namely pollution abatement notices and clean-up notices, in accordance with this chapter.

Recommendation 17.2

That EPA publish on its website information regarding the process for internal review of infringement notices, provided under the *Infringements Act 2006*.

Chapter 18

The role of co-regulators: local and state-based

Recommendation 18.1

EPA should clearly define its regulatory jurisdiction with particular reference to the role of local councils and other government departments, and publish this information internally and externally, to promote community awareness of its role. Where there are currently uncertainties regarding EPA's role vis-à-vis other government entities, these should be identified with a plan to address these in a staged and prioritised way.

Chapter 19

Beyond Compliance

Recommendation 19.1

That EPA evaluate current beyond compliance initiatives to align these projects to strategic priorities for regulation, compliance and enforcement.

Recommendation 19.2

That EPA urgently alter reporting lines in relation to its HazWaste fund and any funds that involve direct grants to individual businesses, to avoid any perceived or actual conflict between the discharge of its compliance and enforcement functions and the granting of financial assistance directly to regulated entities.

Recommendation 19.3

That EPA provide transparency in the current decision-making process and criteria for its grants programs.

Recommendation 19.4

That EPA consider alternatives to managing funds that involve direct grants to individual businesses, including placing management of these funds in another government agency or developing a process that puts it at 'arms length' from EPA.

Chapter 20

The role of community

Recommendation 20.1

That EPA establishes a protocol for stakeholder participation in standard and policy setting. The protocol should include opportunities to participate in the development of regulatory standards and compliance guidance.

Recommendation 20.2

That guidance provided to community members to make laws more accessible be written in accessible language.

Recommendation 20.3

That EPA include in its protocol for stakeholder participation a statement of policy that supports disclosure of:

- information regarding the state of the environment
- information regarding the risks of certain environmental hazards that may affect health and how to mitigate this
- information regarding EPA's compliance and enforcement activity, including outputs and outcomes.

Recommendation 20.4

That EPA continue to promote environmental improvement plans that involve dialogue between businesses and community.

Recommendation 20.5

That EPA pilot a program for community conferencing based on the restorative justice principles embodied in the Compliance and Enforcement Policy as part of its use of enforceable undertakings for environmental offences.

Recommendation 20.6

That EPA consider appointing a community representative to the panels that consider suitability of enforceable undertakings and eligibility for the Inspiring Environmental Solutions program.

Recommendation 20.7

That EPA continue to explore opportunities to engage community and make environmental laws and policies more accessible, to educate them on EPA's role and promote awareness of the duty of care to the environment.

Recommendation 20.8

That EPA monitor data available to it regarding the state of environment, exposure to environmental hazards and any trends or patterns that may indicate disproportionate impacts on vulnerable communities or sensitive receiving environments.

Recommendation 20.9

That, in consultation with community and business, EPA consider developing a policy position on environmental justice, to guide it in decision making.

Recommendation 20.10

That EPA inform community and business of this review and its response, and report on implementation of any accepted recommendations.

Recommendation 20.11

That EPA consider establishing a steering group to guide its implementation of any recommendations of this review which it accepts.

Chapter 22**Legislative changes****Recommendation 22.1**

That EPA consider a request to government to amend the EP Act, to address shortcomings identified in this review and enable it to better perform its regulatory and enforcement role.

WATER FOR PEOPLE