

Compliance and Enforcement Review

Overview of key themes and recommendations for EPA Victoria





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Introduction

This document provides an overview of the key themes and recommendations arising from the independent Compliance and Enforcement Review undertaken by consultant Stan Krpan. It includes the context for EPA commissioning the review, extracts of the report's preface from EPA's Chairman and an overview of the consultation process. It discusses the proposed principles of a modern regulator and the recommended, risk-based regulatory model that will be used to allocate EPA's enforcement efforts and apply the law. It provides a new way of describing EPA's key regulatory activities and approach to regulation. This overview also outlines key outcomes from the review, including a draft Compliance and Enforcement Policy and proposed internal review mechanism.

More details on the report, the consultation process and the original discussion paper are available from EPA's website (www.epa.vic.gov.au). Follow the links to the Compliance and Enforcement Review to read the report's executive summary, see a full list of recommendations, download the complete report or view report submissions.

Background to the review

In 2009 and 2010, EPA was the subject of external reviews by both the Victorian Ombudsman and Auditor-General that found its regulatory approach inadequate. In order to improve its effectiveness and prepare EPA for the future, EPA committed to an extensive review of its compliance and enforcement activities.

Stan Krpan, the former Director of Legal Services and Investigations at WorkSafe Victoria (Victoria's health and safety regulator) was commissioned to conduct this independent review (the Review). The Review involved a comprehensive assessment of how EPA educates and supports duty-holders (everyone who has a duty to protect the environment) to comply with the law, and how it enforces against those that do not.

Following an extensive consultation program Mr Krpan delivered the report, containing 119 recommendations, to EPA's Chairman and Chief Executive Officer on 31 December 2010.



A summary of key findings and recommendations

The Review found EPA had become confused as to the role of compliance and enforcement and had reduced the importance and prominence of these activities. This had limited EPA's ability to act strategically and resulted in the organisation becoming fractured, reactive and inconsistent. It had also resulted in a loss of confidence from community and business in EPA's ability to protect the environment.

The Review also found that there was a significant under-investment in the number of authorised officers and their training and support. A reactive strategy, limited procedures and lack of accredited training meant that EPA had not adequately supported authorised officers to consistently and effectively apply and explain the law.

The Review broadly recommended that EPA:

- significantly increase the level of compliance monitoring, including the number of authorised officers
- increase the level of enforcement and prosecutions
- re-establish its core role as an environmental regulator and adopt eight principles, to define how EPA Victoria will be a 'modern regulator' and significantly increase its focus on compliance monitoring and assurance
- broadly promote a social duty of care to the environment and broaden its reach beyond sites that it licenses, putting more effort into educating the community and businesses
- adopt a risk-based and responsive regulatory model, and clearly communicate its activities in the context of its regulatory role
- make smarter, more targeted and transparent decisions to tackle the issues that pose the greatest risk to human health and the environment
- provide more clarity on its approach to regulation, compliance and enforcement, by making the law and standards more accessible and publishing new policies on how enforcement decisions will be made
- refocus its energy on building staff expertise and knowledge (including establishing an operational support team), and using that expertise to support duty-holders to comply with the law and to provide necessary advice.

A more detailed discussion of these recommendations is included in the following sections.

EPA's response to the report

EPA's Chairman, Cheryl Batagol, commended the report, stating that the report 'marks an important next phase for EPA Victoria.'

Ms Batagol endorsed the review recommendations, highlighting these as 'a key component of the blueprint for how EPA will become the modern regulator that we have committed to become'. She noted that sustained investment would be required by EPA over a number of years to implement the findings of the report, and that EPA is 'now developing an implementation plan for the immediate, medium and long term to realise these recommendations'.

Ms Batagol also acknowledged the role of the community (including individual members of the public, companies and associations) in providing important and frank input into the Review, and that EPA will continue to provide updates on the report's implementation and to seek community input.

Transforming EPA into a modern regulator

EPA's Chairman and CEO redefined the organisation's objectives in early 2010, stating that their intention was to transform EPA into a 'modern regulator'. The Review is an important part of that transformation.

The Review proposes eight principles by which EPA should undertake its regulatory role. The principles provide a benchmark against which the community can judge EPA's performance. They also provide a basis for EPA to measure its own effectiveness as a regulator. The principles and their regulatory impact are:

Targeted: Compliance and enforcement activities will be targeted at preventing the most serious harm.

Proportionate: Regulatory measures will be proportional to the problem they seek to address.

Transparent: Regulation will be developed and enforced transparently, to promote the sharing of information and learnings. Enforcement actions will be public, to build the credibility of EPA's regulatory approach and processes.

Consistent: Enforcement should be consistent and predictable. EPA aims to ensure that similar circumstances, breaches and incidents lead to similar enforcement outcomes.

Accountable: To ensure accountability, compliance of duty-holders, enforcement decisions and the conduct of authorised officers will be explained and open to public scrutiny.

Inclusive: EPA will engage with community, business and government to promote environmental laws, set standards and provide opportunities to participate in compliance and enforcement.

Authoritative: EPA will be authoritative by setting clear standards, clarifying and interpreting the law and providing authoritative guidance and support on what is required to comply.

EPA will be prepared to be judged on whether individuals and business understand the law and their obligations.

EPA will also be an authoritative source of information on the state of the environment, level of compliance with the laws it regulates, key risks and new and emerging issues.

Effective: Enforcement will seek to prevent environmental harm and impacts to public health, and improve the environment. Enforcement action will be timely, to minimise environmental impacts and enhance the effectiveness of any deterrence.

Social duty of care and moving beyond licensed sites

The Review found an overwhelming acceptance that we all have a shared duty of care to the environment. It found that there was strong support in consultations for EPA to promote this duty - a social duty of care - and promote the *Environment Protection Act 1970* (EP Act) and the role of EPA.

It was acknowledged by many that this duty to protect the environment and manage potential environmental hazards extended to all businesses and individuals, regardless of whether they are licensed by EPA or not. Strong support was found for EPA to promote this duty more generally and move beyond those sites it directly licensed.

The Review recommends a strong regulatory and enforcement presence that is sufficiently proactive and risk-based to embed a social duty of care and ensure management of significant risks, wherever they may occur.



A risk-based and responsive regulatory model

A common theme during consultations was that EPA's regulatory model, its style of regulation, was not clear. The Review recommended that EPA adopt a regulatory model that is both risk-based and responsive. The model would ensure that enforcement effort is targeted to the issues that pose the greatest risk to human health and the environment, and that any enforcement takes account of the unique attributes of offenders such as previous compliance history, culpability and the risk of harm to the environment.

The Review recommended that EPA's regulatory model be clearly explained in a revised public compliance and enforcement policy. This would ensure that EPA is transparent in the way it assesses risk and enforces the law.

The importance of language

EPA's language was seen as confused and, in some cases, biased. Terms such as 'compliance', 'enforcement', 'partner', 'client' and 'service' were not clearly defined and were open to interpretation by EPA staff, business and the community.

It was observed that 'enforcement' was narrowly interpreted by business, community and many EPA staff as punishment, and that 'compliance' was an activity undertaken by EPA. The Review sought to clarify the terms by defining 'compliance' as the end state required of a business to meet standards set in licences, permits or the law, and 'enforcement' as having two separate elements: fixing the problem - the remedy; and, in appropriate cases, applying a sanction or penalty for breaking the law - the punishment.

The use of the term 'client' attracted particular focus during the consultation. The term is generally used by EPA to describe regulated businesses. Many community members felt that the term further entrenched a perception that EPA was more focused on business than the community, and questioned why pollution reporters or the general community were not clients.

The Review highlighted that the notion of 'client service' was important in the context of government improving the quality and consistency of the services it delivers. Equally, a better understanding of a 'client's' business and drivers enable the regulator to be more effective in ensuring compliance. However, the misuse of such language can send a message to the regulated community that the regulator is less willing to enforce the law. The Review noted that the emergence of these terms within EPA coincided with a decrease in the level of enforcement activity, which was of particular concern.

A better approach to targeted enforcement

It was felt that compliance and enforcement effort was overly focused on licensed sites, reactive in nature, largely based on complaints or too incident focused. Many submissions suggested that EPA's enforcement effort and the severity of punishment changed depending on the level of public or media interest and was not proportional to the level of environmental risk or harm. The review noted that, while EPA did consider risk when prioritising enforcement effort the methods of assessing risk varied greatly. These factors limit EPA's effectiveness.

The Review examined regulatory models adopted by regulators nationally and internationally and recommended that EPA adopt a risk-based and responsive model. The proposed model would require an analysis of the state of the environment, risk to the environment and the level of compliance to inform a proactive operational strategy.

This model would see EPA proportionately allocate resources and target enforcement activities where the biggest difference could be made, or where the highest risk or harm to health and the environment existed.

Considerable discussion occurred during consultation about how human health and amenity impact should be considered when assessing risk. The Review recommended that EPA articulate a clear policy position on the importance of human health in the regulatory framework and consider impacts on human health and amenity when determining risk.

In recommending a regulatory model, the Review considered the existing EPA Compliance Framework. This is a responsive model where enforcement action is based on the attitude of duty-holders. The framework does not refer to the level of environmental harm, but includes some subjective elements in determining the risks of non-compliance. However, when combined with a risk-based approach, it can be used to ensure a consistent and proportionate enforcement response.

The Review recommends that EPA target enforcement effort on the most significant harm to the environment, by considering, consequence and likelihood.

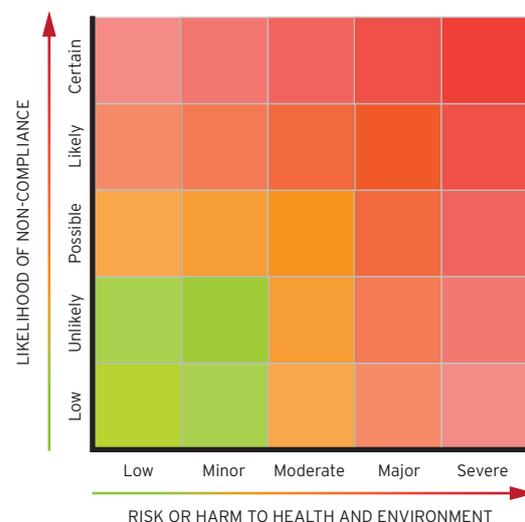
Consequence: The risk or harm to health and environment. This is categorised into: low, minor, moderate, major and severe. Consequence takes into account actual or potential impacts on human health, environment and amenity. It considers the scale and duration of any harm or impact and the level of public concern.

Likelihood: The chance that non-compliance will occur. This also has five categories: low, unlikely, possible, likely and certain. Likelihood takes into account objective elements of (a) the track record of the business - past incidents, inspections, enforcement and pollution reports - (b) systems in place to identify and manage environmental risk, (c) capability of the business and its operators and (d) the level of resources dedicated to environmental management, compliance and maintenance.

Additional benefits of adopting a risk-based approach include the ability to publicly provide a clear and objective rationale for resource allocation. This rationale can be applied to other EPA activities, including where compliance support and guidance should be directed. The model also allows a transparent discussion between a duty-holder and EPA about the level of attention it is likely to receive.

There was also support for adopting tailored approaches for groups of businesses, taking account of the risks they pose and their characteristics, such as size, capability or sector. The approach for a group would consider what is likely to be most effective in achieving compliance. For instance, the Review recommends a systematic, audit-based approach be used for complex industrial premises.

Figure 1: EPA's approach to targeted enforcement





Enforcement strategy for non-licensed sites

The desire to focus more regulatory attention on 'diffuse' sources of pollution was a consistent theme in the consultations. Licensing is a key aspect of Victoria's legislative framework. Licence categories are generally based on the largest risks, but some non-licensed industries and premises can pose significant risks. It was also generally understood that, in isolation, smaller non-licensed sites may not represent a significant impact on the environment but that, cumulatively, many polluting sites might.

The Review provided a variant of the regulatory model to support prioritisation of enforcement effort on non-licensed sites. The model considers the cumulative risk and impacts to health and environment, and the sensitivity of the local receiving environment.

It was felt better use could be made of EPA's existing environmental condition and pollution report data to identify hot-spots of pollutants or other environmental impacts.

Interventions would be designed based on EPA's ability to influence the particular business, sector or group of sites, and might use indirect approaches, such as partnerships with other government agencies, to address more complex problems.

Ensuring a consistent enforcement response

When undertaking enforcement for a risk or breach, the Review recommends that EPA also consider the circumstances and culpability of the offender. Culpability includes considering the offender's history, duration of the breach, whether the harm is still occurring or has been abated, whether the risk was foreseeable, and whether the act or omission was intentional.

The Review recommends that enforcement tools be used and applied in order of severity, using the most serious forms of enforcement for breaches involving the highest consequences or risks to the environment and offenders who have the highest level of culpability.

Figure 2: Enforcement strategy for non-licensed sites

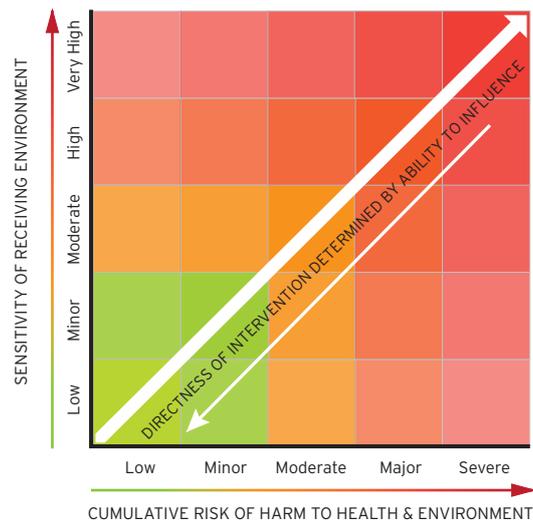
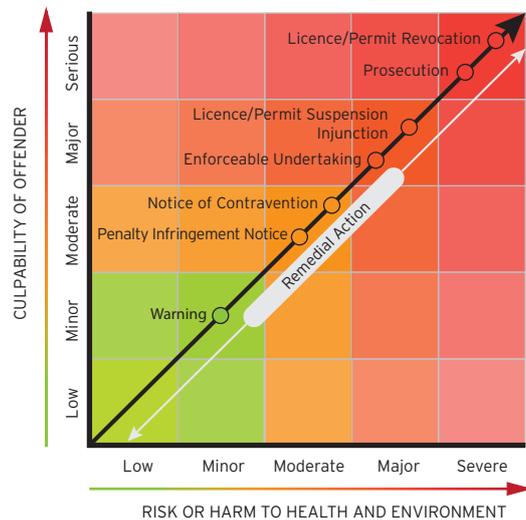


Figure 3: EPA's enforcement response



EPA's approach to regulation

It is important that regulators articulate all their activities with reference to their legislative function and their core role as a regulator. EPA has stated that its core activities are to set environmental standards, regulate against these standards and work with organisations to meet and go beyond current standards.

During the Review consultation, a model was presented in the discussion paper that attempted to articulate all of EPA's activities in the context of its approach to regulation.

Figure 4: EPA's regulatory approach



The Review found general support for EPA undertaking these activities, but questioned the current effort in supporting business to comply and the level of compliance monitoring and enforcement. The role of moving organisations beyond compliance was seen as a legitimate role for a regulator, but it was felt that this activity should more closely link to the development of future standards. Additional concerns were raised about perceived conflicts between the role of EPA as regulator and enforcer while also supporting certain businesses by providing direct grants. Business, community and EPA staff also considered that educating duty-holders on their environmental responsibilities was an important first step in achieving compliance.

As part of the Review, Figure 4, EPA's Regulatory Approach, was proposed to better articulate EPA's key activities, and their combined role in ensuring compliance and protecting the environment. The key activities and how these contribute to achieving compliance are:

Educate: Promoting awareness of the law, regulatory standards and explaining EPA's role. Making the law more accessible (e.g. a plain English guide to the EP Act and other policies) and using innovative communication tools to raise awareness of impacts, obligations and a social duty of care.

Set standards: Ensuring that standards are clear, accompanied by helpful guidance, that they continuously evolve to address environmental risks and needs, and that they are enforceable.

Support to comply: Providing advice and guidance on risks, prevention measures and what constitutes compliance. This requires EPA to accept its role in providing such advice in an authoritative and accountable way, by proposing an 'EPA position' on any standards requiring clarification. A hierarchy of guiding documents is proposed, which would make clear the status of guidance and advice, introducing inspection reports for inspected businesses. The Review notes that significant investment is required in people, procedures and policy to ensure high-quality compliance advice.

Monitor compliance: Undertaking inspections, monitoring and auditing to ensure compliance, and applying expertise to the highest risk industries. Encouraging public reporting of incidents and potential breaches.



Ensuring there is a credible risk that non-compliance will be detected, through a significant increase in resourcing and capability, and that EPA has the expertise to focus on preventing non-compliance.

Enforce the law: Ensuring there are real deterrents and consequences for breaches of the law and standards. Ensuring that enforcement actions - both the requirement to remedy or make good the harm caused, and punishment - are constructive and publicly available, and that the outcomes are widely communicated - including to interested communities and third parties.

Move beyond compliance: Encouraging businesses to go beyond current standards, to build the case for continuously improving standards, and informing the development of future standards.

Draft Compliance and Enforcement Policy

A key output of the Review was a draft compliance and enforcement policy based on international best practice. The proposed policy encapsulates the eight principles outlined in section four of this overview and articulates EPA's regulatory model and approach, along with clear criteria for when enforcement action will be taken.

The Review confirmed the findings of the Ombudsman and Auditor-General that EPA's Enforcement Policy did not give sufficient detail to provide clarity and certainty on EPA's approach to enforcement. The draft policy supports the principle of enforcement outlined in the EP Act. It explains EPA's regulatory approach and details the risk-based model for allocated enforcement effort and responding to non-compliance.

The draft policy provides a high-level framework for decision making, criteria for initiating major investigations and guidance on the use of EPA's enforcement tools. It prioritises education as a primary means of promoting compliance and describes what EPA means by 'compliance' and 'enforcement'. It supports EPA to make enforcement decisions that are effective in protecting and enhancing our environment, and reducing harmful impacts.

The draft policy requires EPA and its officers to provide written compliance advice and support on what actions should be taken to comply when undertaking enforcement. The policy also sets the expectation that feedback be provided to duty-holders at the end of any inspection, providing information on their performance and the likely outcome of the inspection.

The draft policy states that a statutory notice or direction is a preventative and remedial tool, not a punishment. It requires that a pollution abatement notice always be issued where a non-compliance or risk is identified that cannot be remedied in front of the EPA officer. Punishment does not fix an environmental problem. Where applied, punishment will always be in addition to the requirement to fix the problem or make good the non-compliance. This ensures that remedy and punishment are two distinct parts of EPA's enforcement.

The policy also commits EPA to the principles of 'responsive sanctioning', which aim to use punishment constructively to change the behaviour of the offender and eliminate any economic benefit of delayed or avoided compliance. The Review proposes a number of formal mechanisms for community involvement in EPA enforcement, including community conferencing following environmental incidents.

To support effective implementation of the policy, the Review recommends that EPA establish a centralised team responsible for improved procedures, training and support for all authorised officers undertaking compliance and enforcement work. This team would ensure all officers complete accredited training before exercising their powers.

Internal review of enforcement decisions

The terms of reference for the Review included the requirement to consider frameworks that support good decision making. A key aspect of sound administrative decision making is that the processes are open to scrutiny and challenge.

The Review suggests piloting a voluntary internal review mechanism for enforcement decisions made by EPA's authorised officers. This is consistent with the proposed principle of a modern regulator being 'transparent'. The pilot would allow duty-holders to seek review of some enforcement decisions prior to referring the matter to an external tribunal. Legislative change would be required for a more extensive review process.

The administrative pilot would only allow a party subject to an enforcement action to request a review of enforcement decisions relating to (a) a pollution abatement notice (other than those requiring urgent action), (b) clean-up notices (other than those requiring urgent action) or (c) requests for variations and extensions of time of these notices.

During the consultation there was significant discussion around who should have the ability to seek internal review. The Review concluded that the right to internal review should be limited to the party to whom the notice was served. This view was taken in light of the fact that allowing third-party internal review would be at odds with the EP Act and may impinge on the rights of notice-holders. The review recommended that, to ensure suitable scrutiny exists, details of all enforcement actions should be publicly available.

The internal review would be undertaken by a qualified EPA officer who is independent of the original decision. The grounds for review would include whether the notice was issued contrary to law, had been issued to the wrong person (mistaken identity), or compliance with the notice is technically impossible.

The benefits of a strong, efficient system of internal review include increased transparency, and improved consistency and efficiency of decision making. This in turn leads to improved public confidence in EPA's decision-making processes. Decisions that would otherwise not be open to challenge, or those that can only be challenged in an external court or tribunal, can be reviewed promptly to correct errors or unfairness.

An overview of the consultation process

From April to December 2010, Stan Krpan led an in-depth consultation process, which involved over 200 EPA staff, 300 community members and 200 businesses in a variety of roundtables, conferences and open workshops. EPA also hosted an online forum, which received approximately 5000 hits and resulted in 200 posted comments.

A Community Reference Group was established as part of the consultation program to independently observe the open houses and focus groups, ensure that consultations were faithfully reported on, and provide feedback during the development of the compliance and enforcement principles.

EPA published a discussion paper (EPA publication 1353) in September 2010, seeking submissions and views on the appropriate regulatory models and policies for EPA to adopt. More than 40 submissions were received. A full list of submissions is included in Appendix 1.2 of the full report.

Regulatory experts, including Professor Malcolm Sparrow of Harvard University, Professor Neil Gunningham of the Australian National University and Christine Parker of Melbourne University, were also consulted as part of the Review.

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