Compliance and Enforcement Review

A review of EPA Victoria's approach

Stan Krpan, February 2011

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EPA Victoria
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Carlton 3053, Victoria, Australia

Disclaimer

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1 Gunningham N, *Compliance and Enfsxorcement Review: A comparative analysis of a selection of domestic and international environment agencies' Compliance and Enforcement Policies*, August 2010

2 Draft Report to EPA, Environment Defenders Office, to be published.

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Preface

The release of the Compliance and Enforcement Review marks an important next phase for EPA Victoria in our transformation. EPA commissioned this independent review by Stan Krpan to comprehensively assess our operations as part of the reform of EPA's regulatory approach and compliance and enforcement activities.

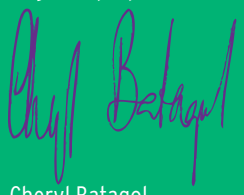
In the face of criticism over recent years, EPA has committed to re-establishing itself as the state's environmental regulator that more effectively undertakes its core role.

The Report provides key recommendations about how EPA needs to further develop our compliance and enforcement work. The Report is a key component of the blueprint for how EPA will transform into the modern regulator that we have committed to become. I endorse the recommendations and the direction they set for EPA.

The Report is just the beginning – EPA is now developing an implementation plan for the immediate, medium and long term to realise these recommendations. There will need to be a sustained investment of resources over a number of years to address the findings and recommendations of the Review and ensure we continue to develop our compliance and enforcement practices over time.

I'd particularly like to acknowledge the important and frank input provided by our community – individual members of the public, companies and associations. We have heard your feedback, we will use this to shape our directions and we will continue to update you and seek your input. Your continued involvement with EPA and our activities will be critical to our transformation.

I invite you to read the overview and report and participate in EPA's journey to implement the recommendations and realise its vision of being a world leading, modern environmental regulator that is *targeted, proportionate, transparent, consistent, accountable, inclusive, authoritative and effective*.



Cheryl Batagol
Chairman
EPA Victoria

Abbreviations

AELERT	Australasian Environmental Law Enforcement and Regulators Network
Ai Group	Australian Industry Group
AO	authorised officer – person who is authorised under the EP Act and can perform its statutory functions
APS	annual performance statement
ATO	Australian Taxation Office
BPEM	Best Practice Environmental Management Guidelines
CLC	community liaison committee
CRMs	client relationship managers
CUTEP	clean up to the extent practicable
DCPD	Department of Planning and Community Development
DEPOs	Designated Environment Protection Officer
DIIRD	Department of Innovation, Industry and Regional Development
DPI	Department of Primary Industries
DSE	Department of Sustainability and Environment
EIPs	environment improvement plans
EMMV	Emergency Management Manual Victoria
EPA	Environment Protection Authority
EPO	environment protection officer
EP Act	*Environment Protection Act 1970*
EREP	Environment and Resource Efficiency Program
IGAE	Intergovernmental Agreement on the Environment
INECE	International Network for Environmental Compliance and Enforcement
MWPAN	minor works pollution abatement notice
NEIPs	neighbourhood environment improvement plans

Abbreviations

PACIA	Plastics and Chemicals Industries Association
PAN	pollution abatement notice
PIN	penalty infringement notice
PIRO	Performance Improvement and Response Officer. This role is now called an Environment Protection Officer
POWBONs	*Pollution of Waters By Oil and Noxious Substances Act 1986.*
PolWatch	EPA Pollution Watch Line
QMS	quality management system
RON	Reporting, ownership and notification
SEPPs	state environment protection policies
Step+	EPA Corporate Database Step+ (Statutory Tools for Environment Protection)
SV	Sustainability Victoria
VAGO	Victorian Auditor-General's Office
VCAT	Victorian Civil and Administrative Tribunal
VCEC	Victorian Competition and Efficiency Commission
VECCI	Victorian Employers' Chamber of Commerce & Industry
VPS	Victorian Public Service
VWMA	Victorian Waste Management Association
YRIRP	Yarra River Investigation and Response Program

Acknowledgements

I have been greatly assisted in undertaking this review by the support and guidance provided by the Chairman of the Environment Protection Authority, Cheryl Batagol and its Chief Executive Officer, John Merritt. I am grateful to them for their time and assistance and their leadership which ensured that I was given broad access to EPA staff and resources.

My sincere thanks go to the team of EPA staff who supported me in the review with their expertise, research and drafting. The team was led by Adam Beaumont, Program Leader, who provided great energy, insight and experience in EPA operations and the direction of EPA.

The team included:

Kellie Ogilvie

Michael Barnes

Emma Gilmour

Louise Greig

Caroline Henwood

Derek Hollander

Heather Hutchinson

Jamie McCaffrey

Nicala Oakley.

I also wish to acknowledge Tim Piper, Victorian Director of the Australian Industry Group and Kelly O'Shanassy, Chief Executive of Environment Victoria, who were members of the Steering Group that guided the preparation of the Discussion Paper and my recommendations regarding a new Compliance and Enforcement Policy.

Acknowledgements

I also thank members of the Community Reference Group that guided the reporting of feedback from the community consultations and provided valuable personal contributions to the review:

Joe Cicero

Graeme Hodgson

Bruce Light

Suzanne McLean

Geoffrey Mitchelmore OAM

Tony O'Hara

Dr Bro Sheffield-Brotherton

Harry van Moorst

Thelma Wakelam.

I was fortunate enough to have observed and participated in EPA's Executive Management Team . This was a courtesy that I am grateful for and I appreciate their trust and support.

I acknowledge the excellent support I received from EPA's Community and Stakeholder Engagement Unit. The unit showed courage in seeking to engage the community in an innovative way and it proved to be enormously valuable to the consultation process.

There were countless other EPA staff who were of great assistance in providing information, informing my views and providing their own suggestions and ideas. I acknowledge their great support. Throughout my dealings with EPA staff, I found them to be extremely professional, frank, open and constructive in supporting the reform of the organisation.

Finally, I acknowledge the input of all the individuals and stakeholder representatives who contributed to the review, whether by submissions or otherwise. In many cases community members and business representatives revealed personal stories of their interactions with EPA – sometimes spanning many years. These were, in some cases, extremely difficult to share and I appreciate the spirit of trust and optimism with which they were shared with me.

Executive summary

During this review, I found an overwhelming acceptance that we all have a shared duty of care to the environment. I also found that there was overwhelming support for EPA to promote this duty – a social duty of care.

EPA has been the subject of considerable criticism arising from two reviews into matters involving its compliance and enforcement activity. In 2009 the Victorian Ombudsman criticised EPA's handling of methane leaks at a Cranbourne landfill. In 2010 the Victorian Auditor-General criticised its management of compliance monitoring of hazardous waste transport and handling. The Ombudsman found a culture which did not facilitate enforcement. In my view this culture and the resulting effect on EPA's systems, procedures and training also underlay the findings made by the Auditor-General. Common to these reviews and my observations during the review was a confusion in EPA as to the organisation's purpose and a neglect of its role as the regulator and its responsibility for enforcement of the law.

There were strong criticisms from community members that EPA had not met the community's aspirations for its environmental regulator; that EPA had in the past poorly responded to and handled pollution reports and that enforcement had been lax. There was a genuine concern that EPA had been too close to industry and was not effectively or independently discharging its statutory duties. In the many business consultations I undertook I was concerned that businesses were not clear about some of their statutory responsibilities and that there was ambiguity in the standards expected by EPA. Businesses were frustrated that there was a reluctance in EPA to provide authoritative advice on compliance or to provide interpretations of policies, guidelines or other standards.

Notwithstanding this background to my review, I felt an overwhelming consensus that environmental protection was a critical part of the prosperity of the state. While there were significant matters requiring improvement for EPA to regain trust and credibility, across community, business and EPA staff there was a strong desire to see EPA do its job, to improve and become a prominent and credible regulator.

I was left with optimism that, with a change in leadership and considerable efforts under way within EPA, it is capable of becoming the modern regulator it aspires to be.

In **Chapter 2**, I describe the functions and powers of EPA as outlined in the *Environment Protection Act 1970* (the EP Act), its mandate and current structure.

I have provided an overview of the consultations regarding EPA's approach to regulation in **Chapter 3** and some of the systemic issues that in my view contributed to the concerning findings made by the Ombudsman and Auditor-General in their inquiries. I describe the tendency of EPA in recent years to discount its regulatory role in the pursuit of programs that would address the significant and complex challenges of climate change and sustainability. I outline the rationale for a move to a 'client focus' by the organisation that in my view brought with it language that further diminished the importance of EPA's regulatory and enforcement roles. The use of the word 'client' within and external to EPA, while laudably endeavouring to improve service, was restricted to referring to businesses, further entrenching a perception in the community of imbalance and lack of independence of EPA from licensed businesses.

Chapter 3 also considers EPA's regulatory approach, which was described in the discussion paper as a way of articulating all of EPA's activities in a regulatory context, and develops this concept further, based on the high level of feedback I received during the consultations. Re-establishing EPA as a prominent and credible regulator requires rigour and discipline in decision making and the policies and procedures that underpin this. The lack of these policies and procedures informs many of the recommendations in subsequent chapters.

Chapter 4 provides an overview of the licensing scheme for large emitters established under the EP Act. This introduces the concept of outcome-based regulation that underpins reforms of licences and licence conditions undertaken during 2010. The rationale for licensing reform is in my view predominantly sound and has been well received by stakeholders. This has been in part because EPA has been open and sought to communicate broadly on the intentions and outcomes of the reform, which provide a good model for future consultations and administrative reform. However, a number of shortcomings were identified – specifically, the lack of explanation regarding what outcome-based regulation means for EPA's enforcement activities. This has led to a misconception that EPA should not provide advice on compliance.

Chapter 5 describes the current system for responding to complaints about pollution, which mostly emanate from members of the public. EPA's handling of pollution reports and lack of feedback was a strong feature in community consultations. Businesses were concerned that EPA's enforcement activity had tended to be reactive to active communities and media concerns arising from pollution reports. There is detailed analysis regarding the nature of reports and the sources. This provides a backdrop to the conclusion that EPA has been overly reactive and had a bifurcated approach to compliance and enforcement – a reactive approach to dealing with pollution with proactivity being predominantly directed at licensed premises.

Key concerns of businesses through my consultations and the submissions received were the perceived ambiguity in standards expected for compliance with the EP Act, policies and EPA guidelines, and EPA's reluctance or perceived lack of responsiveness to provide advice on what constitutes compliance. **Chapter 6** explores the circumstances in which EPA provides advice and how the quality of this advice can be improved. It includes recommendations for a hierarchy of guidance documents to make it clear the purpose for which various forms of guidance are published. It includes a recommendation for the development of 'EPA positions' which would provide authoritative interpretations of ambiguities in the legislation, regulations or state environment protection policies. These would be developed in consultation with stakeholders and make clear what EPA's position is.

There was a lack of clarity in the role of environment protection officers to provide advice on compliance. This has existed in the past but appears to have lost prominence (and legitimacy) in the move to a more outcome-based approach. The chapter explains that modern regulators now accept that their role is to provide clarity on what is expected for compliance, and to enforce when required. It ultimately recommends that environment protection officers be trained and supported to provide practical compliance advice.

Chapter 7 considers the significant concerns that there has been lack of consistency and predictability regarding EPA's approach to compliance and enforcement. Criticisms were made by the Ombudsman and Auditor-General of EPA's approach. Numerous submissions and feedback in consultations indicated that EPA's approach was not sufficiently clear, had in the past been too reactive and lacked strategic purpose. Much of EPA's enforcement activity was considered to be overly focused on known licensed premises. A proactive evidence and risk-based model is recommended.

In order to establish a risk-based model, a hierarchy of environmental risks has been developed which includes relative weightings for matters that impact on the environment and on human health. The lack of a defined policy position on the role of human health in EPA's regulatory activity underpins the recommendation that EPA publish a policy articulating the place of human health in environmental protection and its relative importance.

The enforcement models would ensure EPA proportionately allocates some proactive compliance monitoring and enforcement to licensed premises and some to non-licensed premises and problems of diffuse sources of pollution. It includes a recommendation for a number of models for targeting of EPA's compliance and enforcement activity. It recommends that enforcement tools be used and applied in order of severity, attributing the most serious forms of enforcement to breaches involving the highest consequences or risks to the environment and offenders who have the highest level of culpability.

The most prominent EPA compliance and enforcement activity is the conduct of compliance monitoring and inspections. The level of inspection, however, was criticised by the Auditor-General as being too low, given the move to reduce the number of licences and apparent level of non-compliance. **Chapter 8** explores EPA's current approach to inspection, some of the shortcomings of the current approach and how it could be improved. It provides suggestions for establishing a consistent methodology for inspection. More formality is needed in EPA's current approach, in order to ensure that EPA officers are confident and assertive in their field duties.

Chapter 9 considers the various enforcement tools available to EPA under the EP Act. It considers the preventative tools in particular and discusses the use of pollution abatement notices as a preventative tool and includes recommendations for using them more consistently and effectively. It includes recommendations for repositioning pollution abatement notices as a remedial and preventative tool, not a punishment. Additional recommendations to improve their effectiveness include specifying timeframes for compliance, removal of the service fee and including a way of complying with the notice. Notices would be subject to maximum time periods to ensure that they are regularly reviewed in accordance with current standards and followed up to ensure compliance.

Investigation, prosecution and infringement notices, which are enforcement tools with more punitive effect, are considered in Chapters 10 and 11.

Chapter 10 provides an overview of the investigations process and detailed analysis of the sources of referrals for investigation and the subject matter of EPA's major investigations.

I have recommended more consistent and proactive criteria for commencing a major investigation which bring a risk of prosecution. These are incorporated in a proposed compliance and enforcement policy. I have also considered the role of the Enforcement Review Panel, which approves matters for investigation and those matters which result in infringement notices or cautions. I have recommended that the panel continue but that its terms of reference be amended to more accurately reflect its governance role, including defining the roles of the members of the panel. I have recommended that the panel record and communicate its decisions on investigation referrals, including the reasons for those decisions, and audit its process over time. I have also made recommendations to ensure clearer accountability for matters referred to the panel and the remedial actions which should generally precede referral to the panel.

Chapter 11 considers the role of prosecution in ensuring effective deterrence against breaking environmental laws. EPA has since 2000 significantly reduced its number of prosecutions. The outcomes of prosecutions

are considered, including the level of average financial penalties, which appear to have increased since 2000 through the use of sentencing orders under section 67AC of the EP Act. Such orders are now the predominant form of sentencing disposition in EPA prosecutions. I have made numerous recommendations for policy positions to be developed and published on key aspects for the accountability of enforcement and prosecution decisions. I have also recommended EPA transparently commit to adopting the prosecution guidelines of the Director of Public Prosecutions and Victoria's Model Litigant Guidelines which apply to government agencies. The policies would also include EPA's approach to:

- legal professional privilege
- the privilege against self-incrimination
- enforcement and prosecution involving other government agencies
- appeals against sentence.

Chapter 12 proposes a revised compliance and enforcement policy that explains EPA's new approaches to compliance and enforcement and the various models proposed in chapter 7, and is intended to provide a clearer outline of the circumstances in which particular enforcement tools will be used. The policy includes eight principles underpinning EPA's compliance and enforcement. They should guide EPA in the discharge of its regulatory responsibilities and provide a reference point for stakeholders to scrutinise and, if necessary, challenge EPA decision making.

These are the eight principles:

Targeted: Enforcement activities will be targeted at preventing the most serious harm.

Proportionate: Regulatory measures will be proportionate 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 and enforcement decisions 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, 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.

The policy adopts principles of 'responsive sanctioning', which attempt to convert punitive enforcement such as prosecutions into constructive initiatives that seek to make good, restore harm and improve the environment.

In **Chapter 13** I consider the important role EPA authorised officers play in compliance and enforcement. As at September 2010 there were 109 authorised officers within EPA. Unfortunately, considerably fewer than this (58) are employed in active field duties as environment protection officers or investigators. There is currently no central accountability for maintaining records regarding the number of authorised officers. In my view the management of authorisations, the qualifications for appointment and the retention of appointments require more rigour and central accountability. I have also recommended that there be plain English descriptions of the respective roles of the various types of authorised officer to assist regulated entities in understanding the powers, rights and obligations of authorised officers and to assist the officers in understanding the scope of their roles. In order to ensure accountability and a robust process for complaints regarding the exercise of powers by authorised officers, I have recommended that EPA publish a complaints procedure.

There are a number of legislative changes that could be considered to improve transparency regarding the powers that can be exercised by EPA officers. The powers currently rely on inference and could be more clearly expressed. A comparison is undertaken with interstate and safety regulators, ultimately considering that EP Act powers should be considered for revision in the context of modern environmental challenges.

Chapter 14 considers the current training provided to authorised officers. Officers are provided training that is predominantly on the job, with formal courses presented by a number of separate units in EPA. There is currently no central responsibility for organising training for officers, nor for scheduling. This results in some officers not being appointed as authorised for up to two years. The training is not currently part of an accredited course of training. This is inadequate to equip authorised officers for their challenging roles. I have recommended that a comprehensive induction program be developed for authorised officers, leading to their appointment at the time they commence in the environment protection officer role. This would be supported by mentoring and coaching as required. I recommend the establishing of a central operations support unit that would be responsible for mapping competencies of authorised officers and establishing an accredited course. The operations support role would also be responsible for developing procedures to support authorised officers in their role and, in time, leading to a quality assurance program to improve consistency and the quality of field interventions by EPA.

A considerable concern of EPA staff that was well known externally was the problem of adequate resourcing in compliance monitoring and inspection. **Chapter 15** considers the current number of environment protection officers and their spread across EPA. A comparison is undertaken with comparable jurisdictions. Across community, business and EPA staff there was a view that the technical capability of EPA and its access to expertise had diminished over recent years, with high turnover of specialist staff. It is clear that, if EPA is to take a more proactive preventative role and move towards a higher level of presence in unlicensed premises, this will require additional field resources. Attracting and retaining qualified specialist field officers will be a particular challenge that may require closer collaboration with other Victorian regulators.

Chapter 16 considers the appropriate measures of compliance and enforcement activity and its effectiveness. EPA has made changes to more transparently measure its compliance and enforcement activity and developed reporting tools to help its management manage this activity and ultimately improve its timeliness

and effectiveness. EPA has committed in its 2010–11 business plan to a range of initiatives in which the environmental outcome of EPA's work will be measured. This is a laudable development which I support. I have recommended a range of other measures which would allow EPA to better report on the level of compliance, its enforcement activity and timeliness and the outcomes it can achieve in improving the environment. As it is difficult to attribute changes in outcomes to regulatory activity and the lag times may be long, I have suggested EPA consider interim measures that measure stakeholder perceptions of effectiveness. The majority of these measures should in my view published and promoted externally to EPA.

Chapter 17 provides an option for a pilot program of internal review of enforcement decisions made by authorised officers, including pollution abatement notices. While ideally an internal review scheme would be provided for in legislation, it is possible in my view to establish a voluntary administrative pilot that would enable persons who receive a pollution abatement notice or clean-up notice to seek a review by a person independent of the original decision maker. This chapter outlines the proposed process and the administrative steps that would need to be resolved in order to implement the proposed scheme.

Chapter 18 considers the role of co-regulators who also have responsibility for environmental regulation. The overlap in jurisdictions for environmental regulation have been the subject of a number of external reviews. Gaps in jurisdiction and a perception of 'buckpassing' between EPA and local government was a particular concern in the community consultations. I have recommended that EPA take steps to clearly define its jurisdictions vis-à-vis other government entities to promote awareness in the community about its rights and the appropriate agency for addressing pollution concerns. Defining jurisdiction will identify the many areas where responsibility is unclear and enable EPA to work on strategies to resolve these in a prioritised way.

Chapter 19 considers the role of encouraging businesses to move beyond compliance with current laws and standards. EPA has over recent years invested considerable time and resources in promoting this strategy, as have environmental regulators overseas. I consider 'beyond compliance' to be an important aspect of preparing for the regulatory standards of the future as science and technology develop. Unfortunately it appears that EPA has undertaken many projects that do not have a clear link to its regulatory jurisdiction. I have recommended as part of EPA's regulatory approach that it link more closely to its regulatory jurisdiction and the standards of the future. I have also made recommendations to remove the perception of bias involved in EPA providing grants to some businesses directly to move them beyond compliance, which in my view conflicts with its role as the regulator.

Chapter 20 explores the importance of the role of community in EPA's regulatory activity, with a particular focus on its role in compliance and enforcement. Community consultations confirmed a perception that EPA has tended to engage more closely with business and business representatives in the past and has not been transparent to the community. The role of stakeholders, including business and community, is critical to meeting the challenges of modern environmental protection and those for which we are yet to find a solution. There is a need for EPA to be more open to input from key stakeholder groups and to engage them in standard-setting and problem-solving. I have explored the concept of environmental justice and recommended a policy be developed by EPA in consultation with business and community as a key first step in establishing a constructive, tripartite dialogue. I have recommended the pilot of a restorative justice program that includes community conferencing between EPA, community representatives and offending businesses.

Chapter 21 briefly refers to the *Climate Change Act 2010*, which comes into effect from 1 July 2011. I have taken into account the prospect of EPA having an expanded jurisdiction to regulate greenhouse gases in the future in developing the compliance and enforcement models and compliance and enforcement policy. The role of compliance and enforcement in the implementation of the Climate Change Act will need to be considered by EPA as part of any implementation and will require consultation with stakeholders to ensure they are engaged in developing the regulatory model. EPA will also need to consider the adequacy of its existing powers of enquiry and inspection in the context of any changes.

Chapter 22 outlines a number of observations that EPA should consider in any subsequent amendments to the EP Act to better equip it to be an effective regulator. These observations were made during the review or raised in submissions or consultations. I have not made recommendations for amending the Act, as this is ultimately a matter for EPA and government. I note that the EP Act was first enacted in 1970 and, in its time, was ground-breaking and marked Victoria as one of the first jurisdictions in the world to enact legislation which sought to protect all segments of the environment – air, water and land – under one piece of legislation. The legislation was to be regulated by the one independent regulatory body – EPA.

The Act has enabled significant improvements to our environment over its history but has been amended some 80 times. There is a historic opportunity in the context of the significant environmental challenges we face as a community to better position the Act for the future and for EPA's future as a modern environmental regulator that will once again lead the world.

Stan Krpan

1.0 Introduction

1.1 Terms of reference

I was commissioned in June 2010 to undertake a review of Environment Protection Authority (EPA) Victoria's approach to compliance and enforcement. The review commenced with my formal appointment on 27 June 2010 and was agreed to be undertaken over a six-month period, concluding with a final report on 30 December 2010.

The terms of reference for the review (Appendix 1.1) were in my view clear, adequate and sufficiently broad for me to consider all aspects of EPA's compliance and enforcement activities.

1.2 Background to the Review

The review followed significant criticism of EPA and its approach to compliance and enforcement by the Victorian Ombudsman in October 2009[1]. The Ombudsman inquired into EPA's handling of methane leaks at the Stephensons Road landfill in Melbourne's southeastern suburb of Cranbourne. The Ombudsman concluded:

> My investigation identified that the EPA failed to take adequate enforcement action in relation to the landfill over a number of years. This was not as a result of a shortage of powers as the Act affords the EPA extensive statutory powers and an array of enforcement tools. In my view, the EPA ineffectively utilised the enforcement tools at its disposal. This failure resulted from several factors, including:
>
> - Delays associated with the EPA's enforcement process
> - Passive management
> - Lack of strategic direction at the South Metropolitan Region
> - EPA's culture and decision-making processes.[2]

Just prior to my appointment, in June 2010, the Victorian Auditor-General tabled his report into EPA's handling of hazardous waste and concluded:

> The EPA's monitoring and inspection activities lack coherence, purpose and coordination. This combined with poor business information because of the EPA's lack of data reliability, poor analysis and reporting and inadequate documentation of its rationale for decisions, means that there is neither sound compliance monitoring nor effective enforcement regimes. As a consequence, there is little assurance that hazardous waste is stored and disposed of appropriately.[3]

1 *Brookland Greens Estate – Investigation into methane gas leaks*, Ombudsman Victoria, October 2009
2 *Brookland Greens Estate – Investigation into methane gas leaks*, Ombudsman Victoria, October 2009 page 149
3 *Report into Hazardous Waste Management*, Victorian Auditor General's Office, 9 June 2010

EPA's responses to Ombudsman Victoria and the Victorian Auditor-General's Office (VAGO) accepted all findings and recommendations. EPA committed to undertake a review of its compliance and enforcement activity as part of the 'transformation' of Victoria's environmental regulator to become a 'modern regulator'.

Upon my appointment I was provided with the draft report of an initial review of compliance and enforcement which had been undertaken by EPA staff. This 'first stage' of the compliance and enforcement review (first stage review) involved consultation with enforcement staff throughout EPA. The staff undertaking the review also took advice from Professor Neil Gunningham of the Australian National University, barrister Paul Holdenson QC and Professor Malcolm Sparrow of Harvard University.

The report of the first stage review included a series of observations and suggestions made through those consultations. They were grouped broadly into six themes:

1. Vision and strategy
2. Performance measurement
3. Decision making, risk and escalation
4. Resourcing, structure, roles, intelligence and skills
5. Enforcement tools (and how they are used)
6. Quality management system.

I found the report very helpful in informing me about the operation of EPA and areas of concern.

I was commissioned to take the findings of the initial review, consult broadly on them with EPA staff to test their validity and make recommendations for improving EPA's compliance and enforcement activity. In addition, I was asked to engage as broadly as possible with business and the community and their associations and representatives. Consequently, as part of the review EPA undertook the most extensive consultation program in its history.

In September, EPA published a discussion paper (EPA publication 1353) seeking submissions and views on the appropriate regulatory models and policies for EPA to adopt. By the end of the public comment period on 24 October 2010, EPA had received more than 40 submissions. A number of submissions were received after this date and were accepted for completeness. A full list of submissions is included in Appendix 1.2.

I engaged broadly with business and community and consulted some 200 EPA staff in an interactive workshop format and 200 businesses in a variety of roundtables, conferences and open workshops. We met with 300 members of the community across the state in an 'open house' format[4], which included speaking directly with EPA leadership and staff and contributing comments to the review. More than 200 community members who attended the open houses participated in focus groups as part of the open house. A schedule of consultations undertaken forms Appendix 1.3.

EPA staff who attended the community consultations were very impressive. Some 100 staff attended the sessions to educate attendees about EPA and this review and to take feedback on specific review questions.

4 The open house process combines public information with in depth consultation. The process uses several information stations attended by EPA staff which break a topic into core educational messages, and then seeks and records participant opinions through a variety of station activates, active listening and structured focus groups.

I found them knowledgeable, professional and willing to listen and engage with the community, and to be open to their criticisms without appearing defensive. This was confirmed by the evaluation of the open house process which forms Appendix 1.4 to this report. This provides me with optimism that EPA has the potential to transform itself to be more open to scrutiny and to be more effective.

The focus groups were independently chaired and facilitated by a member of the Regional Development Corporation. I participated in 12 of 14 sessions and all were attended by a member of the EPA Executive. A copy of the report of those focus groups by Rob Carolane, who facilitated most of the sessions, forms Appendix 1.5 to this report.

Finally, EPA hosted an online forum – 'EPA Have your Say' – using 'Bang the Table' software. There were 200 comments posted by people who participated in the forum and provided feedback. The site received approximately 5000 hits.

EPA had already committed to an ambitious program of reform, including a review of its business systems, pollution response service and licensing scheme. I provided advice on my observations and likely recommendations to these reform teams to ensure alignment where possible. I also provided four interim reports to EPA on matters which I considered required pressing attention. I have drawn on those observations and recommendations within this report.

Across my consultations, I found considerable support for the findings of the Ombudsman and VAGO reports and criticism of EPA and its approach to compliance and enforcement activities. There was genuine concern that EPA had not met the expectations of an effective regulator. Many community members were cynical that EPA would implement changes as a result of this review.

While noting that EPA, through a change of leadership, had embarked on a journey of reform, there were mixed feelings. On the one hand, there was cautious optimism that EPA might deliver a more rigorous and transparent approach to enforcement. On the other hand, there was a view that questioned whether EPA had overreacted to criticism by arbitrarily undertaking enforcement action.

What I found was overwhelming support for the review and that EPA was undertaking this in an open and transparent way. I also felt an overwhelming consensus that environmental protection was a critical part of the prosperity of the state. While there were significant matters requiring improvement for EPA to regain trust and credibility, across community, business and EPA staff there was a strong desire to see EPA do its job, to improve and become a prominent and credible regulator.

1.3 Scope of the review

This review is of EPA's approach to compliance and enforcement. I therefore focused on EPA's administration of the Environment Protection Act 1970 (EP Act) rather than the adequacy of the Act itself. I have therefore not undertaken a comprehensive review of the EP Act or made recommendations regarding amendment. However, my terms of reference required me to consider the adequacy of the regulatory tools administered by EPA and any legislative impediments to proper exercising of the tools[5]. Many submissions and views expressed in the

5 Ombudsman Victoria has recently endorsed agencies regularly examining whether they are equipped with the requisite powers and resources to adequately manage and implement their regulatory responsibilities (Ombudsman Victoria Annual Report 2010 – Part 1, p.31)

consultations referred to issues arising from the EP Act itself that should be considered for amendment. Given the breadth of the consultations I undertook, I agreed with EPA that I would document these observations to be considered at a later stage as part of any subsequent legislative review or amendment. These observations form Chapter 22 of this report.

Victoria led the way in 1970 when it enacted the EP Act. Victoria was one of the first jurisdictions in the world to consolidate environmental protection legislation across environmental media – air, land and water – into one preventative legislative instrument. The care and protection of our environment, including the prospect of climate change, has emerged as one of the most significant public concerns and is arguably one of the greatest social and economic challenges of our time.

I am optimistic that government will recognise the need to comprehensively review the EP Act to modernise it and ensure it is capable of positioning Victoria as a lead state in environmental protection. A comprehensive review of the Act in the face of some of the significant modern environmental challenges such as greenhouse gas emissions would produce modern legislation that would support EPA to do its job and ensure it is capable of meeting the community's aspirations for an effective and modern environmental regulator.

2.0 An overview of EPA's purpose, mandate and functions

This chapter provides a brief overview of EPA as established under the EP Act, and its functions, powers and current structure.

2.1 EPA's mandate

EPA Victoria was established under the EP Act[1] and is responsible for the administration of the Act and regulations. EPA's purpose is to protect, care for and improve the environment. Its mandate is to:

- establish environmental standards
- regulate these standards
- work with organisations to meet the standards and go beyond[2].

EPA is responsible for coordination of activities relating to discharges of waste into the environment, the generation, storage, treatment, transport and disposal of industrial waste, and the emission of noise. EPA is also responsible for preventing or controlling pollution and litter.

The Authority resides in the Chairman. The Chairman delegates some powers to the Chief Executive Officer (CEO) and Deputy Chairman and other managers and authorised officers. EPA currently employs 419 staff[3].

The EP Act also establishes the Environment Protection Board, which is responsible for advice to the Minister and Chairman. The EP Board's functions include advice on the Authority's corporate plan, administration of policies, the strategic direction of EPA and significant trends in environment protection[4].

EPA's vision is for the Victorian community to live sustainably. EPA endeavours to be an effective and modern regulator that drives emission impact reduction and resource efficiency for the benefit of the Victorian community[5].

1 Section 5, *Environment Protection Act 1970*
2 EPA Business Plan 2010-11, p.6
3 As at June 2010.
4 Section 8, *Environment Protection Act 1970*
5 Environment Protection Authority Annual Report 2010 – p.3

2.2 EPA functions and powers

The EP Act does not differentiate between EPA's powers, duties and functions. Under the EP Act, EPA's powers, duties and functions include[6] to:

- recommend state environment protection policies (SEPPs) for the protection of the environment
- recommend waste management policies
- implement national environment protection measures
- develop economic incentives to avoid or minimise harm to the environment
- promote reductions in the ecological impacts of industry and improve resource efficiency
- require persons to undertake certain activities to implement Environment and Resource Efficiency Plans (EREPs)
- control environmental impacts of activities which create a state of potential danger to the environment or produce discharges, emissions or waste, by issuing works approvals, licences, permits, notices and other approvals
- control the use of notifiable chemicals
- undertake surveys and investigations as to the causes and extent of pollution and to prevent it
- promote and coordinate research in relation to pollution and its prevention
- specify standards and criteria for the protection of beneficial uses[7] and the quality of the environment
- engage panels of experts to assist EPA in relation to special problems
- publish reports and information with respect to environment protection
- specify methods to be adopted in taking samplings and making tests
- undertake investigations and inspections to ensure compliance with the EP Act
- provide information and education to the public regarding the protection and improvement of the environment[8]
- liaise with other states and the Commonwealth

6 Section 13, *Environment Protection Act 1970*

7 Section 13, *Environment Protection Act 1970*

The EP Act defines 'beneficial use' of the environment as: 'a use of the environment or any element or segment of the environment which– (a) is conducive to public benefit, welfare, safety, health or aesthetic enjoyment and which requires protection from the effects of waste discharges, emissions or deposits or of the emission of noise; or

(b) is declared in State environment protection policy to be a beneficial use.'

Beneficial uses are nominated in SEPPs and are typically environmental values or human activities that need protection. For example, the beneficial uses of the air environment in Victoria that are to be protected are:

- human health and wellbeing
- life, health and wellbeing of other forms of life, including animals and vegetation
- visibility
- useful life and aesthetic appearance of buildings, structures, property and materials
- aesthetic enjoyment and local amenity.

8 Section 1L, *Environmental Protection Act 1970*

- require the submission of plans relating to waste discharge
- enter into agreements, including to provide financial assistance to implement measures to reduce waste and pollution
- impose and collect an environment protection levy
- approve and monitor regional waste management plans
- report to the Minister and promote long-range planning in environment management, waste management and pollution control.

Compliance and enforcement activity undertaken by EPA is empowered under the EP Act in a number of ways. The functions and powers above enable EPA to undertake a broad range of activity to promote compliance and enforce the law. The EP Act provides powers of enquiry and enforcement to EPA which can be delegated to any person in EPA. Authorised officers of EPA also enjoy powers of enquiry and enforcement that vest by virtue of appointment as an authorised officer. Throughout the report I have sought to differentiate between those powers that are delegated and those that exist by virtue of appointment as an authorised officer.

2.3 Principles of the Environment Protection Act 1970

Significantly, the EP Act itself outlines the principles of environmental protection to which EPA must have regard in the discharge of its responsibilities. One of the principles is that the aspirations of the people of Victoria for environmental quality should drive environmental improvement[8].

The EP Act sets out the principles to which regard must be had when administering the Act. In short, these principles are:

1. Integration of economic, social and environmental considerations
2. The precautionary principle
3. The principle of intergenerational equity
4. Conservation of biological diversity and ecological integrity
5. Internalising environmental impacts
6. The principle of shared responsibility
7. Product stewardship
8. A hierarchy for managing waste
9. Integrated environmental management
10. Enforcement for the purpose of protecting the environment and influencing attitude and behaviour
11. Accountability of EPA to the public.

2.4 Organisational structure of EPA

In 2009, EPA moved to a new organisational structure to align the organisation better to delivering services and to be more client oriented.

EPA staff are structured in six directorates comprised broadly along functional lines. These directorates are outlined in the following sections.

2.4.1 Client Services Directorate

Delivers external services. The Directorate is responsible for compliance and enforcement personnel in EPA's five regional offices. The Directorate is also responsible for EPA's telephone advice line.

2.4.2 Environmental Services Directorate

Delivers environmental services including works approvals, licences, enforcement, pollution response, sustainability advice and environmental monitoring. The Directorate is responsible for metropolitan compliance and enforcement activity by EPA and takes a coordination role over pollution response and compliance monitoring activity. This includes creating the compliance plan which outlines EPA's compliance priorities. The enforcement unit, which includes EPA investigators, is also in this directorate, as is the management of the Hazardous Waste Fund (HazWaste Fund).

2.4.3 Business Development Directorate

Defines and improves current services and develops new external services to meet EPA's strategic objectives.

2.4.4 Future Focus Directorate

Develops corporate and environmental strategies that aim to prepare EPA for the future, including responsibility for the development and maintenance of state environmental protection policies.

2.4.5 Corporate Resources Directorate

Supports EPA with governance, business systems and internal support functions, including people and finance.

2.4.6 Office of Chairman and Chief Executive

Supports and advises the Chair and Chief Executive Officer on a range of strategic and legal issues. The Office of Chairman includes the Solicitor to EPA and legal unit undertaking prosecutions and administrative law functions of EPA.

2.5 EPA office locations

The majority of EPA staff are based at the metropolitan head office in Carlton and the Centre for Environmental Sciences in Macleod. A variety of roles and functions are also undertaken at each of five regional offices: Southern Metro (Dandenong), Gippsland (Traralgon), North East (Wangaratta), North West (Bendigo) and South West (Geelong). Each regional office is managed by a regional manager.

3.0 EPA'S approach to regulation

In this chapter I provide an overview of the feedback from consultations regarding EPA's approach to regulation and some of the systemic issues that in my view contributed to the concerning findings made by the Ombudsman and Auditor-General in their inquiries. I consider EPA's regulatory approach, which I described in the Discussion Paper as a way of articulating all of EPA's activities in a regulatory context, and develop this concept further based on the high-level feedback I received during the consultations.

3.1 Background

It was clear from my consultations and the reforms currently being undertaken by EPA that there was a need for EPA to reestablish itself as the state's environmental regulator and to articulate regulation as its core responsibility. In the light of the Ombudsman's and Auditor-General's reports, EPA sought to define its role as a 'modern regulator'.

It is unfortunate that a regulator would need to restate its core role as being regulation, but the pattern of moving away from core regulatory roles in pursuit of innovative ways of tackling harms and reducing risk is not unknown. However, such moves too often come at the expense of regulatory functions and have been associated with significant regulatory failures. In the context of the severe consequences of such failures, it is disappointing that there is not more public discourse regarding the role of regulation in modern societies and what is obviously a pattern of duplication and lack of learning by regulators in different subject matters[1]. There is a disappointing history of regulators who overlook their core function and are brought under the spotlight only after a significant regulatory failure or crisis[2].

It appeared to me from the consultations that EPA had sought to position itself as a progressive organisation that was client oriented and willing to take a role in influencing the community and business to tackle climate change. A number of innovative programs were undertaken by EPA that resulted in significant reduction in emissions or in developing concepts of sustainability. Unfortunately, it did not appear that these initiatives were met with corresponding investments in EPA's core work as the environmental regulator and the significant

1 An exception to this is the speech of US President Obama following the explosion and fire upon the Deep Water Horizon Rig in which he said: 'Over the last decade, this agency (Minerals Management Service) has become emblematic of a failed philosophy that views all regulation with hostility - a philosophy that says corporations should be allowed to play by their own rules and police themselves. At this agency, industry insiders were put in charge of industry oversight. Oil companies showered regulators with gifts and favours, and were essentially allowed to conduct their own safety inspections and write their own regulations.'

2 The phenomenon of tighter regulation and increased powers given to regulators in the wake of a regulatory crisis or instance of regulatory failure has been referred to as 'the regulatory dance'. This concept suggests that, over time, as memories of regulatory failure fade, there is increased pressure on regulators to relax requirements. See for instance, Tomasic R, *Corporate Law in Australia*, 2nd Edition. 2002. p.245. See also Snider L, 'The regulatory dance: Understanding Reform processes in Corporate Crime' (1991) 198 *International Journal of Sociology of Law*, 208 at pp.208-9.

infrastructure development need to regulate well, including policy and procedural development, building operational systems and training.

There appears, based on the data considered in subsequent chapters and my feedback, to have been a tendency to reduce compliance monitoring and enforcement activity.

The Auditor-General found:

> Significant limitations with [EPA's] compliance monitoring are:
> - a previously decentralised program of inspections not supported by clear, risk-based rationales;
> - compliance activities have significantly decreased since 2007–08 while the opportunity and incentive for non-compliance has increased;
> - no monitoring of hazardous waste that is recycled or reused;
> - limited review of licensee's annual performance statements and the results of environmental audits;
> - limited assurance that hazardous waste transporters' vehicles are safe and compliant[3];
> - no clear rationale for the limited use of financial assurances that protect the state from bearing the costs of non-compliance[4].

These observations could well have been directed at other areas of EPA's regulatory presence.

Regulation alone is unlikely to achieve the significant changes needed to address sustainability, including resource use and waste. A combination of tools, both regulatory and non-regulatory, maximises the potential that businesses will be influenced to comply and innovate to improve the environment and sustainability. Regulation is, however, a critical component and is the core role of EPA. It is the role that only EPA can perform and it must be prioritised and undertaken extremely well in order to legitimise activities directed at moving beyond the law.

The Ombudsman recently warned that some regulatory agencies have taken an approach:

> ...of developing programs and mechanisms to achieve compliance at the expense of a more vigorous approach to prosecute breaches. This approach sometimes sees agencies lose sight of their fundamental statutory duties and associated powers. It also leaves them unable to adjust their conciliatory approach quickly and effectively to a more coercive one if necessary.[5]

I consider that for a number of years and until very recently EPA has fitted this description.

EPA has during its history – and particularly over recent years – undertaken a wide variety of programs, projects and other interventions in seeking to reduce pollution and environmental harm. Some of these programs are based on statute and have been precipitated by legislative reform and others have been the result of strategies and business plans that are discretionary in nature.

3 A similar criticism was made by the Auditor-General in 1995-Special Report No 33 – Handle with Care: Dangerous Goods Management (at p56). The audit reviewed the Occupational Health and Safety Authority's handling of dangerous goods transport licences noting that there was inadequate assurance that vehicles were roadworthy or safe. The same observation was made by an attendee at the Traralgon community open house.

4 Hazardous Waste Management – Auditor-General's Report June 2010 – p.15.

5 Annual Report 2010. Ombudsman Victoria, p.31

The sources of harm to the environment are many and varied and there are significant legacies of industrialisation and urbanisation that confront Victoria and all modern economies. The history of environmental protection legislation has predominantly focused on large-impact single sources of pollution such as major hazard facilities and major industrial processes. The improvement in Victoria's air quality and quality of Melbourne's water in particular, since the EP Act was created, has been the result of regulating these large sources of emissions.

However, the consultations across the three stakeholder groups made it clear that EPA had been too reactive in the past and was driven by complaints and reports of pollution or other incidents. The resourcing of inspections to licensed premises, while notionally risk-based, did not appear to be systematically so. I consulted businesses with very low risk profiles and no incidents who were inspected frequently and on a regular basis. On the other hand, there were large manufacturing processes with significant risk profiles that had not been inspected or audited. In order to be effective at preventing pollution and environmental incidents and creating a deterrent to non-compliance, a proactive approach is required.

It was apparent in my consultations with EPA staff as well as the stakeholder groups that there was frustration that, while there had been significant gains in reducing 'point' sources of pollution, there was insufficient resource or attention invested in preventing and dealing with harm to the environment caused by far greater numbers of industrial and other activities which harm the environment. These include businesses and premises that do not require licences under the EP Act and regulations, and cumulative impacts from agricultural and human activity. This desire to focus regulatory attention more on 'diffuse' sources of pollution was a consistent theme in the consultations and is a challenge that confronts all environmental regulators.

Many stakeholders observed that EPA had been overly concerned with licensed premises and that it had not done enough to address harm caused by unlicensed businesses and diffuse sources of pollution. There was a broadly held view that EPA had been too reactive to such risks and that this caused disproportionate attention to licensed premises, many of whom considered their environmental performance to be superior to their non-licensed competitors[6]. This disparity was considered to undermine the competitiveness of licensed businesses and to undermine the logic of licensing and other regulatory requirements[7]. Community members also felt that, while licensed premises required a significant amount of attention to ensure compliance and the management of high-end risks, there was too little attention to non-licensed and diffuse sources of pollution of an industrial nature. I discuss below that pollution reports are received in relation to non-licensed businesses as much as they are for licensed businesses.

There may be a number of reasons for this, including the tension between discharging responsibilities to licensees while addressing pollution reports and the limited resources allocated to enforcement. It is disappointing that most regulatory attention has been targeted at licensed premises, as it means that significant cumulative risks have not been addressed. In my view it has also confined understanding of the EP Act and compliance with the Act to a relatively small, known cohort of regulated businesses. This is disappointing. In my view focusing activity predominantly on licensees does not meet community expectations and is not as effective at improving the environment at a holistic level[8].

6 Ai Group workshop, Victorian Water Industry Association Forum and Plastics and Chemicals Industries Association workshop.
7 Waste Management Association.
8 See for instance Submission 36.

Discussion regarding this lack of attention to diffuse sources of pollution was generally accompanied by suggestions that there should be broader attention from EPA to education, promoting environmental awareness, awareness of the EP Act and EPA itself.

I was struck by commonly held views that the lack of attention to diffuse sources by EPA was partly due to the fact the community did not consider the EP Act to have broad application and that most businesses did not consider themselves affected by the obligations in the EP Act. These views are based on a misconception that environmental regulation is predominantly about 'after the fact' responses to pollution incidents and that these predominantly arise from large industries, which are generally licensed.

Although licensing is a regulatory mechanism central to the scheme of the legislation[9], the Act is intended to apply whether a business has a licence or not[10].

The principle of shared responsibility states:

> Protection of the environment is a responsibility shared by all levels of Government and industry, business communities and the people of Victoria.[11]

I consulted with many businesses who were proud of their environmental performance and who promoted their businesses on the basis of their responsible attitude to the environment. I also engaged with community members who were frustrated that there was not a shared understanding and acceptance in the community that all Victorians and all businesses have a responsibility to avoid or (where not possible) minimise their impact on the environment. Their aspiration was for EPA to take a lead role as the custodian of the Act to promote these principles.

The future of environmental regulation requires a move toward promoting broader knowledge of environmental impacts and the ways in which these can be prevented or mitigated.

In the submissions and views shared with me throughout this review I found an overwhelming acceptance that we all have a duty of care to the environment. I also found that there was overwhelming support for EPA to promote this duty – a social duty of care.

The Discussion Paper to this review stated EPA's objective to become a more effective regulator, including being more energetic and willing to be judged on environmental outcomes[12].

These efforts to provide clarity on the regulator's role were necessary. EPA had, in my view, become confused as to the role of compliance and enforcement and had reduced its importance and prominence as a part of the regulator's role. Ombudsman Victoria found that the organisation's culture did not encourage enforcement[13] and that, even though the EP Act provides EPA with extensive statutory powers and enforcement tools, the governing culture at the time within EPA was to 'under-utilise' its powers – a conclusion which was confirmed in my extensive EPA staff consultations.[14]

9 Section 20, *Environment Protection Act 1970*.
10 See for instance section 39, which prohibits discharges into water that cause pollution, or section 41, which prohibits pollution to atmosphere.
11 Section 1G, *Environment Protection Act 1970*.
12 *Discussion paper – Compliance and Enforcement Review* (EPA publication 1353), August 2010.
13 *Ombudsman Victoria Annual Report 2010* – Part 1, p.6.
14 *Ombudsman Victoria Annual Report 2010* – Part 1, p.33.

3.2 The role of community

I was struck by the widespread and deep feelings of disappointment at the community consultations. These views were held particularly by community representative groups, who felt that there had been little engagement of the community and that there was an inequity in dialogue between EPA and community as compared with business groups. Attendees at one business consultation also considered that EPA had been insular when it came to community engagement[15].

The Western Region Environment Centre was highly critical of EPA's past, suggesting that community consultations were poor and that there had been a reluctance toward transparency or disclosure[16]. The Centre stated:

> EPA regularly invites business to participate in the setting of standards and changes to regulations but the community is rarely given such opportunities. This is one-sided and unacceptable.

The Environment Defenders Office said[17]:

> Public confidence in the EPA's ability to be an effective regulator has been seriously damaged over the last two decades as a result of major inadequacies in preventing and enforcing major environmental incidents. Statements made by the EPA in recent months have begun to rebuild this confidence but the EPA must back these statements up with concrete action.
>
> Improved transparency will help to build public confidence in the quality of EPA's regulation and the credibility of EPA's compliance and enforcement process. It is critical that the EPA can explain its decisions on compliance and enforcement.

The Climate Change and Environmental Law Panel of the Victorian Bar[18] also reflected this view:

> Community confidence in the EPA is very low. In the community it is generally regarded as being the subject of 'regulatory capture', insofar as it appeared more concerned about the interests of the entities it regulates than those of ordinary members of the public.

3.3 Client focus

In 2009, EPA moved to a new organisational structure to align the organisation better to delivering services and to be more 'client oriented'.

The three year business plan launched in 2009 stated the following objectives for the organisation:

- a world-leading environment protection organisation
- enhance its reputation with community and stakeholders
- delivering regulatory reform
- client-focused organisation
- reduce hazardous waste and enforce against illegal disposal
- beyond compliance services[19].

EPA's business model launched at that time sought to deliver greater outcomes by moving to a 'client service

15 Submission 13.
16 Submission 37.
17 Submission 41.
18 Submission 49.
19 *EPA Corporate and Business Plan 2009-12.*

approach'. This approach sought to redress inefficiencies between functional divisions within EPA and also sought to position EPA to deliver better service. The 'Client Strategy Framework' was intended to improve the environmental performance of regulated entities through two approaches:

1. a relationship agreement that would include statements of commitment from the organisation and goals shared by the regulated organisation and EPA
2. a client strategy internal to EPA which outlined the resources and EPA's approach to the client.

Facilitated by EPA's client relationship managers (CRMs) the framework sought to take a more holistic and strategic approach to business performance and streamline the delivery of services which included 'voluntary services' as well as 'mandatory services'. Mandatory services included enforcement where appropriate.

The Standard operating procedure for client relationship management defines 'clients' as follows:

> A client is a company, individual or special group that receives a service from the EPA and directly benefits from that service. The difference between a client and a stakeholder is that a stakeholder does not directly request a service. They benefit from the outcome of the delivery of services to EPA's clients. Some stakeholders may also be clients. For example PACIA and AIG are industry associations who are both stakeholders and clients.[20]

Unfortunately, the common use of the term 'client' by EPA staff within and outside of EPA makes it clear that it has been used exclusively to refer to businesses and thus reinforces a perception of imbalance in EPA between businesses and its other clients and stakeholders.

There were mixed views on the use of the term 'client' by EPA. Those supporting felt that it positioned the organisation to be more outward-looking and seeking to deliver better, more timely and relevant outcomes for those organisations that interacted with EPA. Many community members objected to the term as 'offensive'[21], as it was only used to describe businesses and not community members, pollution reporters and non-government organisations that have a role to play in environmental protection. EPA staff workshops also referred to a discomfort that the term was used exclusively for businesses.

The move to a 'client service approach', in an historical context where EPA was reducing its compliance and enforcement efforts, has been perceived by communities and some EPA staff as a demonstration that EPA has been too close to business and that it has not been balanced in the way that it deals with the community and issues of community concern.

Part of the confusion of the role of enforcement in EPA's client service method appears to be confirmed by the background presentations to EPA staff in the move to EPA's new client-focused structure. References to services are predominantly in the context of promoting services that 'will benefit clients and the environment'. There is little reference to EPA's regulatory mandate or enforcement[22] other than in the context of EPA's Enforcement Unit (which undertakes investigations) which delivers 'enforcement services'. Initial EPA staff briefings provided the rationale that, in order to move beyond EPA's role in dealing with pollution as the primary issue, it needed to move to a client-oriented structure to better deal with climate change and resource overuse. The rationale for the move to a new EPA structure in 2008–09 was said to be 'delivering services to our clients consistently and efficiently', focusing on 'client needs' and improving and developing new services for clients. Indeed for 'key clients', which were clients receiving three or more services, EPA proposed a strategy of 'up-selling' additional services[23].

20 *EPA Standard operating procedure – client relationship management,* p.4.
21 Dandenong, Geelong EPA staff workshops. Open house consultations – Moonee Ponds, Altona.
22 Proposed Organisational Structure Presentation Pack June 2008.
23 Proposed Organisational Structure Presentation Pack June 2008.

Unfortunately, the presentation to staff did not put the move to a client focus in a regulatory context and does not refer at all to EPA's legislative mandate or role as a regulator.

The Client Strategy Framework did not disregard the need to ensure compliance by regulated organisations. Indeed, the Framework envisaged that EPA should engage with high-risk 'clients' to understand compliance risks and clarify legal obligations and that it would hold the client to account if required[24]. However, it is clear that the strategy framework was built on assumptions that the majority of clients would move beyond compliance voluntarily and that the use of 'mandatory services' was to be limited.

A key objective of the 20 client relationship managers (CRMs) appointed at that time was to facilitate streamlined delivery of services to clients[25]. These were predominantly focused on services that encouraged businesses to go 'beyond compliance' with existing laws such as the Energy and Resource Efficiency Programs (EREP), sustainability covenants and trade waste agreements.

The Framework, however, does not clearly articulate the role of the CRM in relation to compliance and enforcement. In fact, the topics outlined to be covered in the initial meeting with key clients do not refer to compliance and enforcement or how the CRM is to be involved, if at all, in such activities. I was advised that CRMs routinely advised clients that they would not have involvement in compliance and enforcement activity. On the other hand, the Standard operating procedure for client relationship management refers to the importance that CRMs:

> ...be involved in deciding which service is most appropriate for meeting the client's needs (this may involve more than one Service Delivery Unit)

and further:

> be advised by the Enforcement Unit (EU) of any enforcement action to be taken against the client before it happens.[26]

Significant confusion was expressed regarding the role of the CRMs during EPA's first stage review of compliance and enforcement. The interactions between compliance and enforcement activity and the relationships established by CRMs in some regional offices worked well, with the CRM stepping back from any involvement in compliance and enforcement. Some EPA staff were complimentary of the collaborative arrangements that existed between compliance and enforcement personnel and the CRM to establish a joint approach to improving performance or dealing with non-compliance. In other settings, however, CRMs were perceived as advocates for the businesses they dealt with – overtly advocating against enforcement action as potentially damaging an established 'relationship' and viewing all correspondence to a business. Enforcement personnel must be able to exercise their judgement independently and free of such irrelevant considerations.

It is also important that there are transparent protocols for how information obtained by CRMs is to be used in any compliance and enforcement activity. These protocols should be shared with the businesses who are engaging with CRMs.

Much of the feedback indicated that the client service model had been established to build relationships with clients and engage them to take up 'beyond compliance' services offered by EPA, such as sustainability covenants. The model did not adequately explain the interactions between CRMs and enforcement staff and the need to preserve the independence of decision making regarding enforcement. A number of staff workshops

24 EPA *Client Strategy Framework – Guideline*, 15 September 2009, p.5.
25 EPA *Client Strategy Framework – Guideline*, 15 September 2009, p.5.
26 EPA *Client Classification Framework – Delivering Programs*, p.3.

indicated that there were different levels of involvement of CRMs in enforcement decision making, some of which were considered inappropriate.

The framework and supporting procedures require revision to clarify the role of CRMs in relation to compliance and enforcement activities. This is particularly important in the context of re-establishing EPA's regulatory role. The CRM unit had during the period of my review worked on clarifying the CRM role and ensuring consistency of approach. I commend this initiative.

The move to more client-focused approaches by regulators has evolved over recent years. The moves by government organisations including regulators to become more client-focused are logical in the context of government as a whole seeking to be more transparent and accountable to its constituents. The improvement of service delivery requires considering government services from the client's perspective to understand their needs and any issues which impede effective service and affect the client experience. Improvements in timeliness, responsiveness and quality of advice and service are important to regulators discharging their responsibilities. Moreover, these developments reinforce that people who interact with government agencies and rely on government for a service also have rights associated with the way that service is provided.

There are conflicting responses to the applicability of customer and client service concepts to regulators. Harvard Professor Malcolm Sparrow is critical of some of the consequences of customer service concepts on enforcement which generally involves 'services' that have not been requested or wanted by clients[27]. Concepts of customer service can inadvertently suggest to staff in regulatory agencies that their aim is to please or placate clients and to sell other services and products. The use of the language of 'customers', 'clients' and 'service' can send a message that enforcement is not important and can lead to these activities being neglected[28]. This is particularly so when the term 'enforcement' is not used or is referred to euphemistically through terms like 'mandatory service'. There were numerous observations from EPA staff regarding this downside[29]. The more significant risk is that the use of such language sends a message to the regulated community that the regulator is less willing to enforce the law or make decisions that are likely to be challenged. Clearly, this is a risk to be strongly guarded against.

Alford and Speed, on the other hand, argue that client-focused regulators are able to engender trust and willingness to comply in large numbers of regulatees, which ultimately leads to higher levels of compliance[30]. Perceptions of fairness of the regulatory model are improved where regulators endeavour to better understand their clients and target activities based on this improved understanding.

In my view client focus is an important aspect of effective regulation. Understanding clients and the effect of regulatory activities on the client is important to improving the effectiveness of regulation and the regulatory tools that support EPA in its efforts to achieve compliance. In order to effectively design compliance programs and interventions, EPA needs to develop an intimate understanding of the drivers and inhibitors to compliance. This understanding will allow EPA to better understand how to influence compliance behaviours. Client focus, in the sense that it encourages more timely and responsive services to all clients, is important in building credibility and support for the regulator and the laws that it administers. In my view it should also encourage EPA to be more balanced in dealing with all of its stakeholders and to be more open to challenge.

27 Customer Service: Merits and Limits in Sparrow M: *The Regulatory Craft,* 2000 at 52.

28 In a situation which the Environment Defenders Office believed had led EPA to have caused 'regulatory capture', EPA objected to use of the word 'client' as equating to a customer - Submission 41.

29 EPA staff workshops Dandenong, Gippsland.

30 Client focus in regulatory agencies – Oxymoron or Opportunity, Alford J and Speed R, *Public Management Review, Vol 8 – Issue 2*: 2006 313 ff.

3.4 The importance of language

I was struck by the use of language in relation to EPA's regulatory functions. It was apparent from a number of policies and procedures that the word 'service' was inappropriately used to describe enforcement activity. The word 'compliance' was used to describe EPA's compliance monitoring and enforcement activity rather than a descriptor of the end state required from regulated entities. The word 'enforcement' was used to describe the role of the Enforcement Unit which conducts major investigations and generally used to describe only punitive enforcement measures. Enforcement was not generally considered to refer to the activity undertaken by the Environmental Performance Unit which undertakes the majority of proactive compliance monitoring activity. Investigations were commonly referred to as 'prosecutions'.

I do not consider 'enforcement' to be limited to punishment and, for this reason, in the Discussion Paper I felt it necessary to define 'compliance' and 'enforcement'.

It is unsurprising therefore that EPA staff, particularly more recently appointed staff, have difficulty in understanding some of the core regulatory functions of EPA. It was clear to me from EPA staff and the reviews by the Ombudsman and Auditor-General that EPA staff were unclear about the importance of the regulatory role and the role of enforcement and that this was reinforced by a lack of clarity in the use of language. In my view the use of euphemisms for what is a community expectation that the law will be upheld is no longer acceptable. These are not mere semantics – in my view the use of appropriate language to describe regulatory activity is fundamental to EPA's identity as a regulator and to the importance of its statutory role to monitor compliance and enforce the law.

In order to provide clarity to EPA staff on their regulatory role and the importance of compliance and enforcement, diligence will be required to ensure that terminology is used appropriately and consistently in EPA's policies and procedures and externally published material.

During my consultations EPA staff expressed concern and frustration that much of their work had not been the subject of set policies or procedures. There was a high degree of concern regarding the lack of policies and procedures to support authorised officers, in particular, in undertaking their role and the exercise of discretion. There was a degree of concern that most policy was unwritten and took years to learn. There was a heavy reliance on experience in the job and 'knowing who to ask'[31]. A number of authorised officers spoke of 'going back to first principles' on many aspects of their work and the frustration of not being able to refer to documented procedures for their role[32]. One staff member was concerned that even where there was a written procedure a culture existed within EPA of not following procedures or creating 'workarounds'.

I felt an overwhelming desire from EPA staff that EPA be taken seriously as the state's environmental regulator. Taking a more prominent and assertive role as a regulator will require considerable investment in repositioning this culture. Effective regulation requires credibility that is earned from consistency

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.

31 EPA staff consultations – Geelong, Traralgon, Environment Performance Unit, Legal.
32 EPA staff consultations, Wangaratta.

and predictability of approach. It requires rigour and discipline in decision making and an openness to scrutiny and challenge. In many cases it requires the exercise of restraint in exercising authorities provided in the legislation. These have not been a feature of EPA's recent past. There were many suggestions during my consultations that EPA should become more like WorkSafe. Many businesses and community members recognised that WorkSafe was a prominent and assertive regulator and 'you know where you stand'.

3.5 Transforming EPA into a modern regulator

Following the report of the Ombudsman into Brookland Greens, EPA underwent significant leadership changes. Input from EPA staff during the first stage review of EPA's compliance and enforcement identified the need for a clear strategy and direction for EPA's regulatory work and for clarifying the role of enforcement. In my consultations with EPA staff, it was commonly observed by them that there was a lack of clear direction for the organisation and that regulatory functions, and particularly enforcement, had not been treated seriously in the past.

The new Chairman and the new Chief Executive Officer redefined the organisation's objectives in April 2010, stating their intention to transform EPA into a 'modern regulator'. Recognising that a key criticism of the Ombudsman's was that the organisation had not placed a high priority on enforcement and enforcement matters, EPA has sought to re-establish itself in its core role as the state's environmental regulator to provide clarity to EPA staff and the community. EPA publicly stated its intention to:

- improve its compliance and enforcement activity
- restore the perceived balance between community and business
- ensure independence[33].

EPA has since endeavoured to provide clarity to EPA staff in the discharge of regulatory and enforcement responsibilities by clarifying its mandate to:

- implement the legislation
- establish environmental standards and assess industries against them
- regulate against these standards
- work with organisations to meet the standards and go beyond
- create an effective, modern regulator that drives emission impact reduction and resource efficiency
- meet community aspirations by having EPA's actions open to scrutiny
- be transparent, accountable, responsive, decisive, supportive and respectful[34].

These efforts were broadly supported by EPA staff and the clarity provided was acknowledged as important in setting the direction for the organisation.

EPA also sought to clarify the concept of a 'modern regulator' by stating that a modern regulator:

33 EPA All-staff event – EPA's strategic direction, 21 April 2010.
34 EPA All-staff event – EPA's strategic direction, 21 April 2010.

- regulates
- treats businesses proportionately
- constructively helps organisations comply
- is transparent with decisions
- is assertive and decisive
- can be held accountable and is accessible to challenge decisions[35].

EPA's definition of a 'modern regulator' was supported by EPA staff as useful in providing clarity of direction and making clear a shift toward a more supportive environment for compliance and enforcement activity. Views were sought in the Discussion Paper and the consultation sessions with business and community as to whether these aspirations would make EPA more effective.

There was broad support for EPA's definition of a 'modern regulator' and that the concepts would generally meet the community's aspirations for its environmental regulator. There was some confusion among EPA staff and stakeholders as to the meaning of the term 'energetic' for a regulator. In my view, being more energetic refers to EPA's desire to be willing to enforce the law.

I have endeavoured to define the modern regulator in the principles which underpin the compliance and enforcement policy. The policy is discussed in Chapter 12. The principles should guide the way EPA undertakes its regulatory responsibility and serve as the benchmark against which it is willing to be judged by stakeholders. These principles also provide a high standard by which EPA and its staff can measure their own effectiveness as a regulator.

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.

3.6 Compliance advice

A common view expressed in the business consultations was that EPA had lost a considerable amount of experience and expertise in recent years. There was a concern that this resulted in a reluctance of EPA and its officers to be definitive about their expectations for compliance. Clear compliance standards are crucial to effective regulation and business productivity. The move to a more outcome-based regulatory model unfortunately resulted in a tendency for EPA and, in particular, its authorised officers to not provide compliance advice that would support businesses to comply with the Act. This is not a defensible approach, given numerous reviews of regulators around the world which recommend that regulators provide free, accessible and authoritative advice on their expectations for compliance.

These concepts have informed the principles underpinning the proposed Compliance and Enforcement Policy outlined in Chapter 12 of this report.

35 EPA All-staff event – EPA's strategic direction, 21 April 2010.

3.7 EPA's approach to regulation

During my consultations I found it necessary to explore the role of EPA as the environmental regulator and the various activities it undertakes and to test whether these fitted within the statutory mandate and regulatory context.

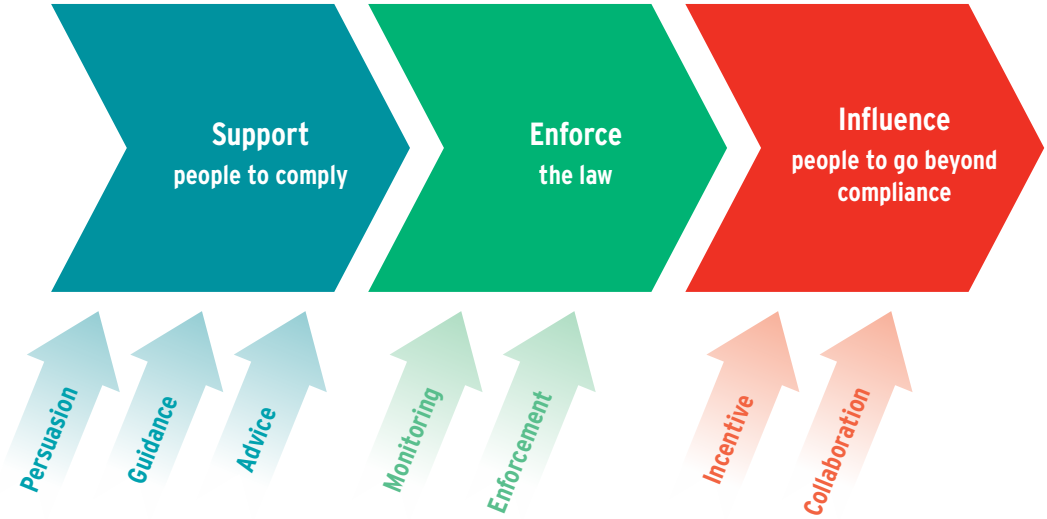
EPA has stated its mandate as being to:

- establish environmental standards
- regulate against these standards
- work with organisations to meet the standards and go beyond[36].

I used the following simple diagram to define EPA's current regulatory approach and to explain the various actions and programs in a conceptual framework.

The framework was intended to both explain the role of EPA (as well as its activity) and to test stakeholder views on the place and relative priority of these activities. The framework was shown in each of the consultations to explore the relative balance between the three themes of support, enforce and influence and to focus people's experiences and feedback.

Figure 3.1: EPA's regulatory approach



36 *EPA Business Plan 2010-11.*

3.8 Discussion

The consultations indicated a broad understanding of these three components of an environmental regulator's work and support for the underlying principle that EPA's work was to prevent harm to the environment.

Discussions centred on the balance between the three. In Chapter 6, 'Compliance advice', I discuss perceptions regarding insufficient attention to providing support to businesses and others to comply with the law. There was broad acceptance that EPA was required to monitor compliance and enforce the law and that this was an area that required attention in the context of the recent criticisms of EPA. There was also a strong view from the community that EPA had not been assertive or confident in exercising its enforcement powers. There were strong views expressed in all the community consultations that the level of EPA enforcement activity was too low. There was a perception that EPA had been reluctant to use enforcement powers and to prosecute, particularly larger businesses. It was also felt that EPA was reluctant to tackle complex issues which might require considerable expenditure by business to rectify[37].

On the other hand, a number of business consultations focused on a perceived increase in enforcement activity and use of media by EPA as evidence of a stronger regulatory stance and that this had occurred without consultation or clear strategy to prepare businesses.

The Climate Change Panel of the Victorian Bar supported the role of enforcement so long as it was 'strategic'. The Panel's submission[38] stated:

> Appropriate encouragement and incentives should be given by the EPA to obtain compliance. However, the EPA should not be reluctant to take enforcement action. In the Panel's view, such action should be strategic and designed to encourage more general compliance.

Most feedback indicated that there was a legitimate role for EPA to encourage businesses to go beyond compliance with current regulatory standards – particularly given scientific and technical developments which meant that standards at premises which were operating, as well as those that had ceased operation (but left behind a damaged environment), had to continue to evolve to improve the environment.

A number of common themes emerged across business, community and EPA staff consultations. Firstly was the need to include a standalone component in the framework which would represent the importance of education and broad promotion of environmental responsibility[39], environmental laws and EPA's role. Secondly, that the above diagram implied a continuum that relied upon enforcement before a business would move beyond compliance (which was not intended)[40]. Thirdly, that beyond compliance was a legitimate role for an environmental regulator[41] but that this activity should be linked more closely to the development of future regulatory standards[42] and that, therefore, fourthly the approach should be shown as a cycle[43].

It is important that regulators articulate all their activities with reference to their legislative mandate and their core role as a regulator. This explanation is useful for EPA staff as much as external stakeholders and the community. Accordingly, I have adapted the framework used to explain EPA's regulatory approach to take account of feedback in the consultation process. I have also sought to identify the importance of both monitoring compliance and enforcement, but indicating that enforcement is only required in circumstances of non-compliance.

37 For instance submission 51.
38 Submission 49.
39 EPA staff consultation Geelong, Enforcement Unit, Environmental Performance Unit. Community open house – Geelong, Warrnambool, Moonee Ponds. Ai Group workshop.
40 EPA Staff Consultations – Environment Performance Unit, Future Focus.
41 Ai Group workshop.
42 Community open house – Wodonga. EPA Staff consultations – Environment Performance Unit, Enforcement Unit.
43 EPA staff consultations Environmental Performance Unit. Community open house – Dandenong.

This conceptual framework for EPA's regulatory approach is shown in Figure 3.2.

Figure 3.2: EPA's regulatory approach

This approach provides for a broad spectrum of activities for EPA to ensure there are standards in place that are complied with and that its regulatory activity is effective at protecting and improving the environment.

I consider the six key themes of EPA's regulatory activity to be as follows.

Educate promoting awareness of the law and regulatory standards and EPA. Making the law more accessible, using outreach and promotional tactics. Encouraging and influencing regulated entities to comply.

Set standards ensuring that laws are supported by clear and enforceable standards in regulations, licences, policies and guidelines.

Support to comply providing compliance advice and guidance on risks, control measures and what constitutes compliance.

Monitor compliance undertaking inspection, monitoring and auditing to ensure compliance. Encouraging public reporting of incidents and potential breaches. Ensuring there is a credible risk that non-compliance will be detected.

Enforce the law ensuring there are real deterrents and consequences for breaches of the law and standards.

Move beyond compliance encouraging leading businesses to go beyond current standards, to build the case for continuously improving standards and inform the development of future standards where required.

4.0 Environmental licensing

4.1 Background

The environmental licensing program is EPA's keystone for regulating emissions and potential harm to the environment. Under the EP Act, licences are issued to certain premises and activities to prevent and control pollution as well as to improve the quality of the environment. In this chapter I provide an overview of EPA's licensing scheme and its interactions with compliance and enforcement.

The EP Act outlines the nature of activities undertaken which require a licence, including:

- discharge, emission or deposit of waste
- storage, handling and depositing of waste
- storage, handling or disposal of substances which are a danger or potential danger to the environment
- activities which create a state of potential danger to the quality of the environment.

The specific nature of the activities or types of premises requiring licences are contained in the *Environment Protection (Scheduled Premises and Exemptions) Regulations 2007*. The Regulations are intended to ensure categories of premises posing significant environmental risk are managed and monitored through licensing and approval of any major works which increase the level of risk to the environment (works approval)[1].

The EP Act empowers EPA to manage the impacts of these activities by regulating the volume, type, constituents and effects of discharges and the volume, intensity and quality of noise[2]. Licences are applied to control pollutants or other dangerous substances and wastes.

It is an offence to undertake activities at 'scheduled' premises without a licence or with a suspended licence, and a penalty of 2400 units applies (and a daily penalty up to 1200 units for continued non-compliance). A licence decision may be appealed by the applicant through VCAT within 21 days.

EPA has created three categories of licence:

Standard: These licences permit certain activity at single sites.

Corporate: These licences consolidate individual licences for companies that hold multiple licensed sites. They are intended to streamline the number of requirements and ensure consistency of obligations for licensed companies. Corporate licences may include a 'sustainability commitment' – a voluntary, non-binding commitment to undertake specific projects which may include support from EPA. This commitment is signed by the chief executives of the licence holder and EPA.

1 *Regulatory impact statement – Environment Protection (Scheduled Premises and Exemptions) Regulations 2007.*
2 *Section 20, Environment Protection Act 1970 and Scheduled Premises and Exemptions Regulations 2007.*

Accredited: These licences are notionally intended for well-performing companies with environmental management systems in place. The accredited licence carries reduced fees and streamlined works approval requirements where a company may avoid the need for works approvals altogether in certain circumstances.

All EPA licences:

- include the statutory requirements
- provide for control of emissions.

Most licences (in EPA's new format) are now published on EPA's website.

EPA currently manages 527 licences across Victoria, including single-site licences and corporate licenses covering 712 sites in total across the state. Of the 527 licences, 31 are corporate licenses and 18 are accredited licences.

The EPA licence is perpetual with no expiry date or mandated review. The licence sets out the conditions under which an activity will be permitted and may be amended by the Authority at any time. The licence-holder may also request amendments to the licence in writing at any time.

The EPA licence contains enforceable environmental performance conditions, and provides for annual reporting of environmental performance through an annual performance statement (APS) and reporting of major incidents.

EPA's Manager of Statutory Facilitation and designated environment protection officers hold delegations to issue and vary licences, although more recently it has become quite rare for delegates other than the Manager of Statutory Facilitation to issue licences, due to the centralisation of responsibility for licences and works approvals.

The number of current EPA licences has been reducing since 2005. A large reduction took place in 2007 and 2008, coinciding with the implementation of the *Environment Protection (Scheduled Premises and Exemptions) Regulations 2007*. The regulations reduced the number of activities and premises required to be licensed by focusing on higher-risk premises and relaxing requirements for lower-risk premises and activities. For instance, small wastewater treatment plants which discharged water to land were removed from the schedule to the regulations.

The following table shows the number of licences regulated by EPA over the period 2005–10.

Table 4.1: Licences between 2005 and 2010

YEAR	2005	2006	2007	2008	2009	2010
Number of licences	776	762	680	556	536	527
Licences revoked or surrendered	32	22	96	146	36	31

[Source: Data from EPA Corporate database STEP+ at October 2010]

4.2 Standard licence

A standard licence includes environmental performance conditions which set out the performance outcomes required to be met by the licence-holder, a locality plan of the premises and a plan of the premises provided by the licence-holder.

4.3 Corporate licence

A corporate licence is issued where a number of scheduled premises operated by the same company are consolidated. By sector, businesses holding multiple licences include water authorities (17 per cent), local government commercial operations (17 per cent), waste management companies (14 per cent), refineries and bulk storage operations (six per cent) and miscellaneous manufacturers (46 per cent). Approximately 40 per cent of these premises are located in Melbourne's metropolitan area, while the others are based in regional Victoria. There are 31 current corporate licences. Twenty of these include a sustainability commitment.

4.4 Accredited licence

Accredited licences apply to single premises requiring a licence under the EP Act. The accredited licence system is established under sections 26A–26E of the EP Act.

Accredited licences are intended to provide dispensations to high-performing businesses which have achieved environmental improvements through cooperation with EPA and local community.

To qualify for an accredited licence, the EP Act requires that the licensee:

- has demonstrated a high level of environmental performance at the premises
- can demonstrate ongoing capacity to maintain and improve this performance[3].

Although not mandatory, the following criteria are to be considered by EPA in granting an accreditation:

- whether the applicant has a certified environmental management system in place
- whether the applicant is undertaking an environmental audit program
- whether there is an environment improvement plan approved or likely to be approved by EPA.

Companies meeting these criteria are freed from the obligation to apply for works approval for works that do not increase the levels of discharge. Due to the statutory time frames for the works approvals process and public scrutiny of applications, this can result in increased operator flexibility and competitive advantage for such businesses. Accredited licences take the form of a 'bubble' licence specifying discharge limits for the whole of a plant rather than single process or plant limits. The underlying principle in awarding this level of flexibility is therefore one of providing incentive for good performance.

3 26B, Environment Protection Act 1970.

A range of other benefits can be achieved by participating in the system. These include:

- improved consultation and stronger relationships with the local community and EPA
- ability for the licensee to manage its own environmental performance without detailed regulatory prescription
- works approvals not required, except where there will be substantial changes to a process or a major change to a discharge or emission
- twenty-five per cent reduction in licence fees
- risk-based monitoring programs and tailored environmental performance reporting.

Curiously, the criteria for accreditation do not *require* community engagement. Environment improvement plans *should* involve a process for community engagement in evaluating performance[4] and it is arguable that an effective environmental management system would also involve community participation.

EPA has issued 16 current accredited licences (See Appendix 4.1).

4.5 Works approvals

Works approvals apply to construction and modification to premises that are scheduled and therefore required to be licensed. They essentially permit the construction or modification of operations that will significantly impact on the environment because they increase environmental hazards or will result in an increase of emissions[5].

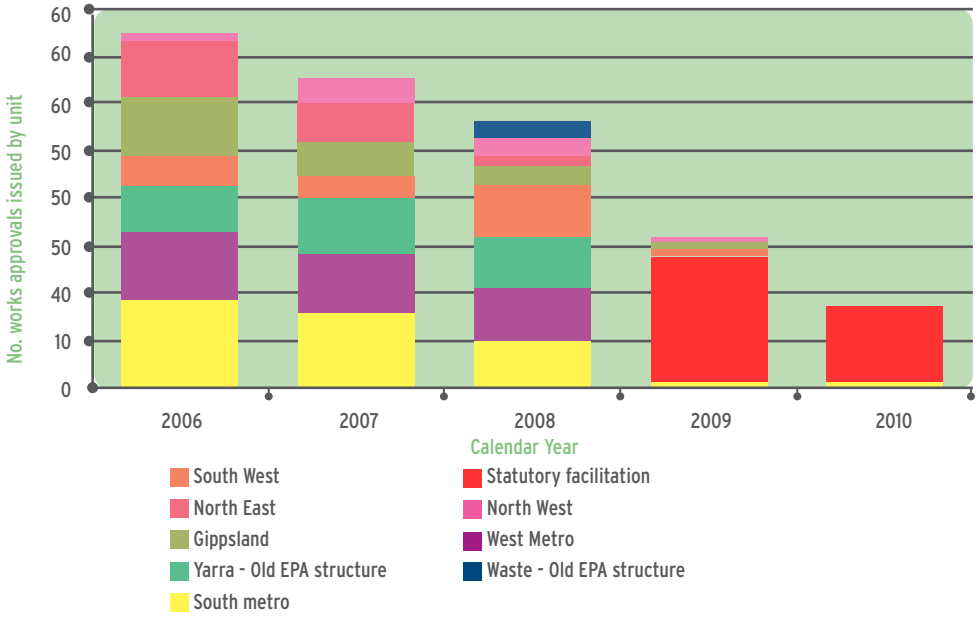
Approval or rejection of an application is required within four months of receiving a valid works approval application and the Authority may issue approval subject to conditions as it considers appropriate. Proposed conditions are discussed with the applicant. Works approvals generally expire after two years and are subject to a fee.

EPA may revoke, amend or add new conditions in writing as it considers appropriate. The use of works approval conditions (as with licence conditions) is a powerful and effective means of securing improvements to environmental outcomes and compliance with relevant standards.

4 31C, Environment Protection Act 1970.

5 Environment Protection (Scheduled Premise and Exemption) Regulations 2007, Guidelines for works approvals (EPA publication 1307), and Instructions for completing works approval, licence and licence amendment applications (EPA publication 375).

Figure 4.1: Works approvals issued by unit, 2006 to 2010



[Source: Data from Step+]

Table 4.2: Works approvals issued by officer, Statutory Facilitation Unit for 2010

OFFICER	NO.	OFFICER	NO.
Officer 1	4	Officer 5	2
Officer 2	4	Officer 6	1
Officer 3	3	Officer 7	1
Officer 4	2		

[Source: Data from Step+]

As illustrated in Figure 4.1, there has been a steady downward trend in the number of works approvals issued over the past five years, with a large decrease in 2009. EPA's new structure took effect in 2009, with a new unit, Statutory Facilitation, established to centrally manage all works approvals and the dissolving of the Waste Unit into the new Environmental Strategies Unit.

The trend in works approvals coincides with a downturn in infrastructure projects thought to be attributed to the global financial crisis and is not surprising. As part of an attempt to reduce administrative burdens on business or 'red tape', the Statutory Facilitation Unit has increased the use of exemptions for projects which do not require works approvals and has worked with companies to avoid the submission of low-risk and unnecessary works approvals. While the current number issued for 2010 is low, there are 32 pending approvals with Statutory Facilitation, indicating a return to levels prior to 2009. Prior to the change in EPA's structure in 2008–09, works approvals were issued across regional offices. This practice has now largely ceased and has been centralised to the Statutory Facilitation Unit.

4.6 Review of *Environment Protection (Scheduled Premises) Regulations 2007*

The last review of activities and premises requiring licences and works approval under the Scheduled Premises regulations was in 2007. EPA undertook an extensive review of existing activities at business premises to assess the individual and cumulative risks to the environment posed by those activities and any emerging industries or activities[6]. The regulations introduced new activities, such as container washing and composting, and reduced the number of licences by removing licensing requirements for small waste water treatment plants. The review led to a reduction in the number of licensed premises, including a number of activities and industries that are 'scheduled' in other Australian jurisdictions[7].

The most common category of licensed premises includes the following industries and premises:

- sewage
- landfills
- offsite waste storage
- chemical works
- emissions to air by factories and other industrial operations
- abattoirs
- power stations
- extractive industries such as quarries.

Numerous other industries also have licensing requirements but the number of premises falls away greatly beyond these industries.

The nature of drawing thresholds on emissions or risk as a precondition of licensing means that some industries or activities will be relieved of obligations for works approval and licences but will still pose some risk to the environment. That is not to say that these activities do not require regulatory attention but merely that they are not required to undertake the additional requirements of a permission to operate.

A number of hazardous activities and industries were not covered by the revised regulations, such as chicken broilers, concrete batching, timber preservation and brining of animal hides[8]. By way of comparison, numerous metal manufacturing and treatment operations such as galvanisers are scheduled but powder-coating and panel beating are not[9]. It was anticipated that there would be some compliance and enforcement activity directed at such industries to complement the licensing regime, but this attention has been ad hoc.

Victoria issues significantly fewer licences than other jurisdictions, as thresholds on licensing and works approvals are higher than in other jurisdictions and numerous industries which require licences in other states are not 'scheduled' in Victoria. A comparatively small number of licensed premises require diligence in the provision of any exemptions. It is also important that some targeted compliance and enforcement activity beyond licensed premises is undertaken, in order to ensure that risks are effectively managed. Targeted enforcement activity was recommended in high-risk premises that are unscheduled – such as broilers – that were not included in the 2007 regulations but was not undertaken. The targeting of these risks will be explored in more detail in Chapter 7, 'A new model for compliance and enforcement'.

6 See *Regulatory impact statement – Environment Protection (Scheduled Premises and Exemptions) Regulations 2007.*
7 *Regulatory impact statement – Environment Protection (Scheduled Premises and Exemptions) Regulations 2007.*
8 Interestingly, a number of attendees at community open houses complained about premises falling in these categories and of EPA's perceived lack of response to problems.
9 *Environment Protection (Scheduled Premises and Exemptions) Regulations 2007.*

4.7 Background to licensing reform

Licensing has been a critical feature of environmental protection in Victoria since the enactment of the EP Act in 1971. Licensing is a feature of most modern environmental regulatory regimes[10].

In June 2008, EPA began reforming the licensing system with three key aims:

- to simplify compliance obligations
- to make clear that the onus of compliance was on licensees
- to reduce administrative and cost burdens by reducing reporting.

The reform program also aims to reduce emissions and provide for commitments by licensees to improve sustainability through resource efficiency and reduction of carbon emissions.

Some 76 per cent of all licences have been revised and EPA expects to revise all remaining licences during 2011.

Over the history of environmental licensing in Victoria, inconsistencies emerged across industries and between scheduled premises of a similar nature. Drafting of conditions was considered to be overly prescriptive, inconsistent and unnecessarily complex. In some cases it was recognised that, due to inconsistency in the quality of drafting, some licence conditions were not enforceable or were in conflict with others. This resulted in confusion and doubt in EPA and among licensees as to the applicability and enforceability of licences and licence conditions. Indeed, in some cases there was argument as to the current version of the licence[11].

It was apparent from staff consultations as part of this review that variation of licence conditions had in the past been used as a way of managing non-compliance rather than enforcing applicable standards and that considerable discretion was exercised in doing so.

4.8 Principles behind reforming licensing

The underlying philosophy of EPA's licence reforms appeared to be to reduce licence conditions to those which are most important to improving environmental outcomes. This would allow EPA and licensees to concentrate on the most significant impacts on the environment and also on opportunities to improve efficiency and sustainability.

The reform allows EPA notionally to focus on monitoring more enforceable conditions and to concentrate on setting improved environmental standards.

The reform was linked to the following principles:

- consistency and equity
- onus of compliance resting on the licensee
- transparency and accountability
- outcome-focused and proportional
- improved development of conditions[12].

EPA explained these concepts further in the project design documentation.

10 See URS report *International Licensing Review* which preceded licence reform and evaluated the licence regimes of 11 comparable jurisdictions.
11 EPA Staff Consultation – Enforcement Unit.
12 EPA Program Plan – Licence Reform.

Consistency and equity

- The system should create a level playing field by ensuring like businesses receive like conditions and requirements.
- All parties are treated equitably, fairly and with regard to the principle of shared environmental responsibility.

Onus of compliance

- The licensee accepts responsibility for its own performance; is engaged at the highest levels through senior company officers' requirement to sign the annual performance statement; and establishes monitoring and management systems that enable EPA to determine compliance with their licence conditions.

Transparency

- Providing all parties with access to reliable and relevant information through public availability of licences, guidelines and submitted annual performance statements.

Outcome-focused

- The focus of the licence is on protecting beneficial uses and delivering net environmental outcomes – this is communicated through clearly specifying environmental 'outcomes' in licence conditions.
- Conditions should reflect the level of risk posed by scheduled activities or sites.
- Costs of compliance should be proportional to the level of environment protection required.
- The outcome focus of conditions seeks to ensure the least interventionist measures are used, giving the licence-holder the ability to meet the outcome in a way that suits their business.

4.9 Principles behind development of conditions

In addition to rewriting licences with a view to achieving these principles, EPA developed a number of principles to underpin the drafting of licence conditions including that drafting was simple, clear and written in plain English; that conditions were enforceable and avoided cross-referencing to other documents which required EPA approval.

4.10 What is different with the new licences?

Revised licences are drafted in plain English, contain a consistent format and plan of scheduled premises and activities. For the most part, the new licences include standard general conditions that apply across sectors or sites undertaking similar activities. The drafting of specific conditions tailored to particular sites or licensees is avoided unless necessary.

The licence reform program includes development of guidelines for licence compliance and inspection protocols that would enable more rigorous and consistent compliance and enforcement.

4.11 Monitoring

Prior to the licensing reforms, monitoring programs testing emissions and general compliance with standards undertaken by licensees required approval by EPA. These approvals were generally prescriptive, including the nature and frequency of monitoring and the qualifications of any testing or monitoring contractors. The licence reform provides that monitoring programs will no longer be reviewed or approved by EPA.

Consistent with the principle of the onus of compliance resting with the licensee, EPA took a position that the licensee should build its own adequate monitoring program that would enable them and EPA to determine compliance with their licence.

I was advised that this was based on the premise that EPA would divert resources expended in reviewing monitoring plans to focus on outcomes by better monitoring compliance at licensed premises.

4.12 Annual performance statements (APSs)

For the first time since its introduction in 2006, in 2010 EPA required the submission of an annual performance statement (APS) by all licensees. The APS includes a self-report on compliance with licence conditions and the EP Act, and is signed by the licence-holder or approved delegate[13]. EPA's policy position endorsed in the licensing guidelines is that the delegate be the licence-holder's most senior official in Australia.

The APS includes the level of compliance by the licensee. The standard form also requires information regarding causes of incidents or non-compliance and remedial measures undertaken as a result. It is an offence to include information which is false or misleading or conceals relevant information.

The APS will for the first time provide a central repository of compliance information to EPA. Although based on self-report and requiring understanding and consensus regarding what constitutes compliance, this data will be valuable to EPA establishing a baseline on the level of compliance among licensees that has either not been previously received or has been received in ad-hoc ways that have not been consolidated and systematically analysed.

Combined with electronic mapping of licensed premises, EPA will be equipped to undertake risk profiling of sites and geographic clusters of sites in order to carry out systematic risk assessments and target its compliance and enforcement activities accordingly.

4.13 Landfills and environmental auditors

As part of the licensing reforms, EPA has strengthened the requirements for environmental management of landfill operations. The changes include increased requirements for environmental assessments and environmental audits of landfill management activities by auditors appointed under the EP Act.

Specific criteria for landfill licence conditions and landfill management generally have now been included in the *Landfill licensing guidelines* (EPA publication 1323). The guidelines include provision for an environmental risk assessment of landfill operations and an auditor-endorsed monitoring program.

The schedules of the licence have also been standardised so that Schedule 1 contains the site locality and premises plan. Schedule 2 is only included for licence-holders which accept or treat wastes.

The change to spatially referenced plans of premises enables licence locations to be held and managed within EPA's corporate geospatial library. This will allow licence premises to be referenced and compared to other spatial information. An example is the analysis of residential population within 2000 metres of licence sites to calculate a risk ranking used to prioritise sites for inspection as part of the 2010–11 Compliance Plan.

13 Section 31D, *Environment Protection Act 1970*.

4.14 Environment improvement plans (EIPs)

Environment improvement plans (EIPs) are no longer required by EPA or by licence conditions.

I was advised that, during the licensing reform program, there was feedback from both EPA staff and licensees that EIPs unnecessarily duplicated existing environmental or corporate management systems. During consultations, however, EPA has encouraged licence-holders to retain and develop existing environment improvement plans and has encouraged the continuation of 'community environment improvement plans' on a voluntary basis.

4.15 Discussion

By focusing on environmental outcomes and removing unnecessary administrative burdens, licence reform will improve compliance with licence conditions. A key aspect of ensuring compliance is making it easier and articulating clear, measurable and enforceable compliance standards.

The concept of regulations moving from prescriptive standards to more performance-based or outcome-based standards has been a consistent feature of regulation and particularly preventative regulation for over 20 years. The approach has been supported by the *Victorian Guide to Regulation* published by the Department of Treasury and Finance, which encourages a move away from prescriptive standards to outcome and/or process standards which focus on end results[14]. The concept is underpinned by the notion that, in the face of technological advancement and innovation, prescriptive regulations simply cannot keep pace with the technology in order to provide meaningful standards. Prescriptive regulations are also criticised as stifling technical innovation. On the other hand, by focusing on defining the desired outcome, regulatees can find their own technical solutions to achieve those outcomes.

An underlying design principle of licensing reform was that the revised licences should be 'outcome focused and proportional'[15]. This was defined as ensuring that the focus of licences was on protecting beneficial uses and delivering improved environmental outcomes. By avoiding prescription, licences would provide for more flexibility and enable innovation to deliver improved outcomes. The approach was extended to the drafting of notices and other EPA directions.

This approach was endorsed by the Victorian Competition and Efficiency Commission's review into environmental regulation, which recommended that EPA simplify compliance and reporting requirements and performance-based conditions in corporate licences and, 'where appropriate', replace prescriptive conditions with performance-based conditions[16].

The design principles for licence reform referred to the need to support this move by providing 'clear public guidance/processes on risk evaluation'[17].

A number of businesses were complimentary of the method of engagement and communication involved in designing the reformed licences. The level of guidance provided on the strategy and principles underpinning the reform and the level of consultation and response to feedback provide a good template for EPA's consultation on future reform initiatives. There was a good level of communication in advance of the implementation of the APS and on the potential consequences of non-compliance. This again provides

14 Second Edition, April 2007.
15 Program Plan – Licence Reform.
16 *A Sustainable Future for Victoria: Getting Environmental Regulation Right*, Final Report, Victorian Competition and Efficiency Commission, July 2009, pp.211 and 214. The approach was supported in a number of submissions. See Submission 37.
17 Program Plan – Licence Reform.

a method for EPA to articulate its compliance expectations clearly and well in advance and then take enforcement against outlying behaviour.

Unfortunately, there appears to be little description of the underlying rationale for the move to an outcome focus that would guide EPA staff on their implementation of the new strategy. This appears to have led to misconceptions regarding the role of the regulator in providing guidance and advice to regulated businesses on their obligations and the standards to be complied with. I will explore this issue in detail in Chapter 6, 'Compliance advice'.

There were a number of shortcomings in the design of the licence reforms that have impacts on compliance and enforcement.

The reforms essentially modernised licence documents based on current discharges and emission levels by licensed premises. Unless a licence-holder requested amendment to conditions or discharge limits it was assumed that the same level of activity and emissions were occurring and that EPA had at all times been advised of any relevant modifications to facilities by way of works approval or licence amendment. If there were inconsistencies in discharge limits between premises in a given industry or sector – these continue.

In adopting this approach, EPA did not consider whether licence fees could be more clearly linked to pollutant load and risk, as for instance in the United Kingdom[18].

There was no on-site verification of facilities or controls prior to the transfer of licences. This would have been particularly important for co-located premises where multiple licence-holders occupy the premises or where existing facilities are interconnected.

A concern frequently raised by businesses related to the absolute nature of some provisions of the EP Act and some of the conditions which had been standardised in licences.

For instance, licence condition A1 provides:

> Offensive odours must not be discharged beyond the boundaries of the premises.

Businesses are concerned that the absolute nature of the condition means that such provisions are not capable of fulfilment[19]. Moreover, since a breach of licence conditions is unlawful regardless of the environmental impact, such provisions undermine the importance of conditions that actually cause environmental harm.

Any uncertainty as to whether a particular incident constitutes a breach is problematic when coupled with an obligation on licensees to 'immediately notify EPA of non-compliance with any condition of this licence'[20]. The condition assumes consensus on what constitutes a breach and I was not satisfied in the consultations that there was broad understanding or consensus on what EPA expected.

It will therefore be important that EPA provides clarity to licensees on what constitutes compliance (as I discuss in Chapter 6, 'Compliance advice') and also on formal ways of dealing with non-compliance, particularly where it is widespread – which I discuss further in Chapter 7 ('A new model for compliance and enforcement').

By removing the requirement for an EIP, in the absence of an express requirement to engage the community, there is a risk that community consultation will diminish[21]. This would be an unfortunate consequence of

18 Environmental Permitting Regulations Operational Risk Appraisal Scheme: http://www.environment-agency.gov.uk/static/documents/Opra_Scheme_for_EPR_v3_4(2).

19 Community open house – Portland. Ai Group workshop and PACIA Roundtable. See also EPA Staff Consultations – Gippsland and Enforcement Unit.

20 Standard Condition G1 – *Licence management guidelines.*

21 The removal of environment improvement plans as a licence condition attracted criticism as the plans were seen to be a proactive and positive measure – Community open houses Traralgon, Bulleen, Legal Practitioners Roundtable.

streamlining that will require diligence by EPA and clear policies promoting community engagement and involvement in management of environmental risks from licensed premises.

Some concerns were raised regarding uncertainty created by EPA adopting a less prescriptive approach to monitoring programs[22]. These concerns centred on the need for peace of mind for licensees that a monitoring program approved by an auditor would not later be considered by EPA to be inadequate.

Similar concerns were raised by EPA staff[23] in relation to enforcement of monitoring program conditions. An important consideration in licence conditions is that it is clear what compliance 'looks like', that it is possible to accurately assess compliance and that the licence-holder and the regulator should be able to accurately assess compliance[24].

While I understand the rationale for ceasing the requirement to approve monitoring programs, it is unhelpful for a condition to state, 'You must implement a monitoring program that enables you and EPA to determine compliance with this licence'.[25] While EPA has sought to outline some of the criteria to be considered in developing a monitoring program, there is insufficient clarity as to whether a monitoring program will later be considered by EPA to require amendment. Indeed, the *Licence management guidelines* foreshadow that 'the EPA will conduct random audits of your environmental performance and during those audits, will assess the adequacy of the monitoring program'.

It is likely that many businesses, particularly smaller and medium-sized businesses, will default to engaging expert advice from a consultant to devise a credible monitoring program.

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

4.16 Enforcement

The shortcomings in the licensing program I have referred to underscore the importance of a rigorous and systematic approach to verifying, auditing and monitoring data provided as part of APSs and a rigorous approach to on-site inspection and monitoring of compliance.
EPA should report publicly on the outcomes of its verifications of APS data to inform businesses and the public as to the current state of compliance at licensed premises and the provenance of compliance information reported in APSs.

It is apparent from the categories of activities that involve significant risks but are not currently scheduled that these non-licensed premises also require proactive enforcement, which I will consider in Chapter 8, 'Compliance monitoring and inspections'.

It is significant that, while there have been a number of prosecutions for breach of licence conditions, there have been no revocations for breach of condition or environmental offending. One licence was suspended on 6 October 2010 for failure to pay landfill levies. This is apparently the first suspension carried out by EPA.

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.

22 Ai Group workshop.
23 EPA staff consultations, Traralgon and Macleod.
24 See *Australasian Environmental Law Enforcement and Regulators Network Guide to Drafting Quality Conditions.*
25 Standard Condition G5 – see *Licence management guidelines*, p.5.

5.0 Response to pollution incidents

EPA provides a pollution response service which responds to reports of pollution from the community, businesses and other government agencies. These reports predominantly come via a phone service known as the Pollution Watch Line. This chapter provides an overview of the service and its performance and makes recommendations aimed at improving its accessibility.

5.1 Overview

The response to pollution notifications involves the investigation of reported pollution incidents, minimising the impact on the environment, advising or directing requirements for clean-up and remediation and responding to non-compliance when required.

The Environment Performance Unit also undertakes a number of proactive programs that have been developed to address specific pollution issues. An Illegal Dumping Strike Force has recently been established to identify, investigate and hold to account those who illegally dispose of waste. Similarly, the Yarra River Response and Investigation Program (YRIRP) that ran between 2006 and 2010 was undertaken to target small and medium businesses impacting on stormwater and other outlets to the Yarra River. YRIRP requirements were then enforced as required. A campaign has also been undertaken in 2010 focusing on specific sources of pollution affecting the Brooklyn area of western metropolitan Melbourne.

All Victorians have a vital role in protecting our environment, which includes identifying pollution and environmental hazards. Reports made by the public are an important source of intelligence on the state of the environment and potential pollution events. EPA is heavily reliant therefore on the community and often refers to it as its 'eyes and ears'.

The pollution response service is Victoria-wide and delivered from both the metropolitan head office and regional offices. The service runs from 8.30am to 10.00pm. I was advised that EPA is considering extending the telephone service coverage to 24 hours, which is an appropriate measure.

EPA's Customer Service Team manages incoming calls and refers to appropriate response resources. Regional offices receive direct calls from reporters. A range of EPA staff are responsible for running the service from 4.30pm to 10.00pm. The rosters for this service rotate on a weekly basis and it is intended that at least one of the two officers receiving calls has operational experience in order to refer enquiries requiring emergency response to relevant emergency response officers.

Over 150 EPA staff have participated in the service over the last 12 months. This is a commendable effort. Unfortunately, there is a considerable disparity in the experience and training of staff undertaking 'second shift' duties, which impacts on the consistency and quality of the service. I understand that EPA is investigating a more consistent approach to staffing the after-hours service. This would ensure that appropriately trained staff are involved in responding to all calls at first instance, with set protocols for the provision of advice or referral to a response officer. In my view, this is an appropriate and necessary measure.

5.2 EPA jurisdiction

EPA encourages people who observe pollution to report it. This includes smoke or odours from an industry or business, spills or slicks in waterways, illegal dumping of wastes and noise from a factory or industrial facility. Businesses that are concerned about other businesses that may be causing pollution or breaching environmental laws may also make reports.

5.3 Emergency response

EPA's Pollution Response Unit manages the Emergency Response Coordination service. The service consists of two full-time staff as well as a volunteer roster of EPA authorised officers who perform the following roles:

- After-Hours Emergency Response Coordinators manage the welfare of staff on call
- Emergency Response Officers respond to events after hours
- Secondary Emergency Response Officers respond to events during business hours
- Laboratory Emergency Response Officers provide advice and expertise on sampling requirements and handling or clean-up of chemicals and hazardous substances and chemical
- Regional Emergency Response Officers perform response duties in the regions.
- Pollution Control Response Officers operate in metropolitan Melbourne and Geelong and predominantly respond to pollution incidents and events during and after business hours
- an Oil Spill Response Officer specialises in oil spill incidents and provides a response service as well as advice to other EPA officers.

For significant emergencies, the Emergency Response Coordinator takes on the role of coordinating communications and response[1].

EPA's role in emergency events is outlined in the *Emergency Management Manual Victoria* (EMMV), which allocates responsibility for action and support. EPA is listed as a support agency. A number of other agencies with similar roles to EPA's are included on EPA's pager communication service, including Marine Safety Victoria and Melbourne Water. DSE also has access to EPA's emergency pager. The system is complex and operates differently in regional areas than in Melbourne. It relies on a small number of trained operational staff. EPA is currently reforming the system.

1 The Emergency Response Incident Coordination System (ERIC) standard operating procedure was last revised on 2 March 2005.

5.4 Assessing and recording pollution reports

On receipt, pollution reports are assessed to determine whether EPA is the best-placed agency to respond to or manage the report. For the most part EPA will respond to reports relating to smoke or odours from an industry or business, spills or slicks in waterways, illegal dumping of wastes and noise from a factory or industrial premises. Reports regarding scheduled premises and premises where EPA has issued enforcement notices are considered clearly within jurisdiction.

There are a substantial number of reports received that EPA refers to other agencies. For instance, complaints of unreasonable noise emanating from residential premises or entertainment venues are referred to local government. Emissions from septic tanks of less than 5000 litres are also responded to by local government.

For matters falling within EPA jurisdiction a desktop assessment is made. This assesses the nature of the complaint and the environmental risk, including the sensitivity of the surrounding area or 'receiving environment', to determine whether physical attendance at the scene is required. If inspection is warranted, an EPA officer will attend and undertake a preliminary investigation to verify the report and identify sources of any emissions. The nature of the assessment undertaken after hours as part of the 'second shift' roster is less clear. This is largely due to the changing staff and different levels of understanding of pollution response, lack of procedures and disconnect from the approach taken by the specialist unit, Pollution Response. Once an officer is allocated the report, they will make enquiries and determine whether remedial action such as clean-up is required and who is responsible for taking the action. This assessment will also include consideration of whether a direction or other enforcement tool is required.

In the Melbourne head office, EPA staff specialise in pollution response and undertake these activities on a full-time basis as part of their core work. This is based on a view that the level of pollution response activity is a significant draw on resources and the unpredictable nature of the work requires full-time allocation to these duties. Proactive inspections of licensed and other premises and ongoing management of premises that are not compliant are undertaken by EPA's Environmental Performance Unit. In regional offices, both pollution response and general inspections are undertaken by environment protection officers.

For the most part, rostered emergency response officers are authorised and may conduct preliminary investigations and take required enforcement action. In the past, due to the level of resourcing, EPA officers who have been in training without authorisation have attended reports. I was advised that this practice had been discontinued with reallocation of resources to field duties in mid-2010. Needless to say, this practice is inappropriate and should be discontinued. The statutory powers of entry and enquiry are conferred on EPA officers and delegated staff. It is not appropriate to rely on staff without these powers and the other competencies. In my view it is also unfair to these staff to expose them to scenarios without adequate support and training. Accordingly, provision needs to be made for adequate resourcing of the roster, and training and authorisation of field staff at induction to ensure they are properly prepared and competent to deliver field services.

5.5 Local government

Under the EP Act, local councils have the authority to investigate and take enforcement action in relation to unreasonable noise at residential premises[2]. Council officers (and police) have the power to order offenders to abate noise and to issue infringement notices[3].

Councils may also implement SEPPs and guidelines through local laws, Victorian Planning Provisions, the *Health and Wellbeing Act 2008*[4] and the *Planning and Environment Act 1987*[5]. EPA may assist councils in administration of these local laws where there are more complex issues of measurement or interpretation.

Local councils are responsible for issuing permits for the construction, installation or alteration of septic tanks having a design discharge capacity of not more than 5000 litres per day[6]. The type and design of septic tank systems are approved by EPA but councils administer and enforce compliance with the EP Act.

Councils also generally take primary responsibility for a range of other local nuisance laws. Examples of these environmental laws include backyard burning, odour and noise from shops or small business, or noise from smaller entertainment venues.

EPA has delegated powers under the EP Act to local councils in relation to Part VIIA (which relates to litter), s48A, s48AB and Part IXB (relating to septic tanks).

5.6 Police

Police have the power to take action over complaints of unreasonable noise from residential premises and entertainment premises[7]. A member of the police force may direct any person apparently in charge to take action to abate the noise.

Police have also from time to time assisted EPA officers in the conduct of enforcement campaigns – for example, targeting litter, with both police and authorised officers undertaking joint operations or inspections.

5.7 Protection agencies

A protection agency is a body having powers under other legislation with respect to the environment. Examples of such agencies are the Melbourne Fire and Emergency Services Board, the Country Fire Authority, water authorities throughout Victoria and catchment management authorities.

A protection agency may conduct a clean-up where any segment or element of the environment is polluted or an environmental hazard occurs. Additionally, EPA may require the nominated agency to conduct a clean-up or undertake emergency actions in relation to polluted areas.

As part of its enforcement responsibilities for pollution of waters under the *Pollution of Waters by Oil and Noxious Substances Act 1986*, EPA works with maritime organisations, including the Australian Maritime Safety Authority and Marine Safety Victoria, in investigating marine pollution incidents, notably oil spills.

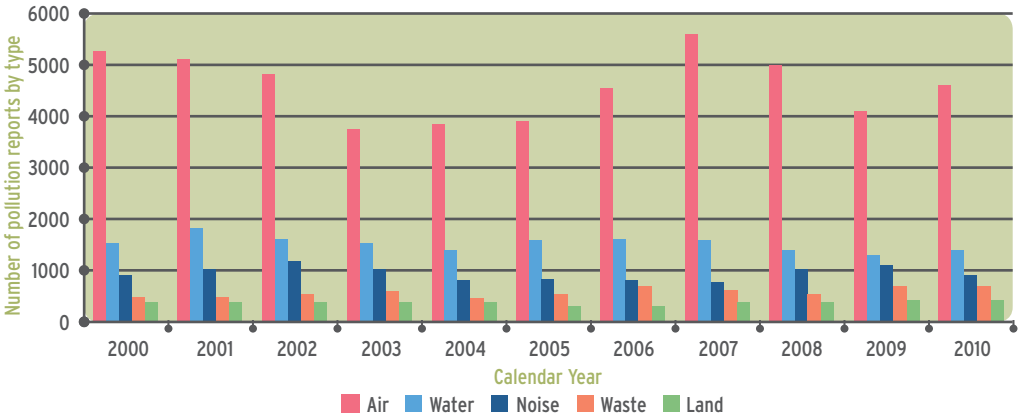
2 Section 48A, *Environment Protection Act 1970*.
3 Section 48A, Section 63B, *Environment Protection Act 1970*.
4 The *Health and Wellbeing Act 2008* replaced the *Health Act 1958* in January 2010.
5 Section 60, *Planning and Environment Act 1987*.
6 Section 53J, *Environment Protection Act 1970*.
7 Section 48A, section 48AB, *Environment Protection Act 1970*.

5.8 Overview of pollution reports

In 2009–10, 7792 pollution reports were received by EPA. Reports of alleged air pollution involving visible emissions and odour are by far the most frequent subject of reports. This is followed by land pollution which relates to dumping and waste deposited to land. Report numbers have fluctuated over time, but a significant amount of EPA resourcing and field activity is still focused on managing and responding to allegations of pollution.

Figure 5.1 shows the number of reports by type between 2000 and 2010. It should be noted that the data relates only to reports and does not indicate whether the reports are substantiated or where there have been multiple reports regarding the same incident or source. Figure 5.5 indicates the number of confirmed reports. It should also be noted that PolWatch, the EPA system that manages the tracking and allocation or public reports, cannot reliably differentiate between reports referred to other agencies and those responded to by EPA.

Figure 5.1: Number of pollutions reports by type and year



[Source: EPA PolRep System extract, at 24 December 2010]

The majority of public reports are received by EPA's Melbourne head office and involve incidents occurring in metropolitan Melbourne. The Southern Metro office receives the next largest number of reports, as can be seen in Table 5.1.

Table 5.1: Pollution reports by EPA regional office

REGION	2009–10	2008–09	2008–07	2007–06
Metropolitan	3990	4561	6208	5947
Southern Metro	1669	1122		
Gippsland	475	655	530	522
North East	686	761	609	693
North West	342	334	398	488
South West	630	584	820	628
Total pollution reports	**7792**	**8017**	**7745**	**8278**

[Source: Annual Report 2010, 2009, 2008 & 2007]

Over the last 10 years, reports most frequently involve observations of alleged air pollution, followed by water, as can be seen in Table 5.2.

Table 5.2: Pollution reports by report type

CALENDAR YEAR	AIR	LAND	NOISE	WASTE	WATER	TOTAL
2000	5226	346	882	447	1525	8426
2001	5055	350	1030	476	1812	8723
2002	4782	350	1170	526	1577	8405
2003	3685	407	981	577	1489	7139
2004	3836	385	774	458	1372	6825
2005	3855	335	819	519	1537	7065
2006	4519	316	752	705	1614	7906
2007	5541	359	749	615	1559	8823
2008	4985	371	1025	528	1374	8283
2009	4117	419	1084	651	1327	7598
2010	4565	389	869	698	1375	7896
Median	4565	359	882	528	1525	7859
Total	**50166**	**4027**	**10135**	**6200**	**16561**	**87089**

[Source: EPA PolRep System extract, at 24 December 2010]

An internal report commissioned by EPA in 2010 indicates that almost one in three calls to the response service is received from a person who has made a previous report[8].

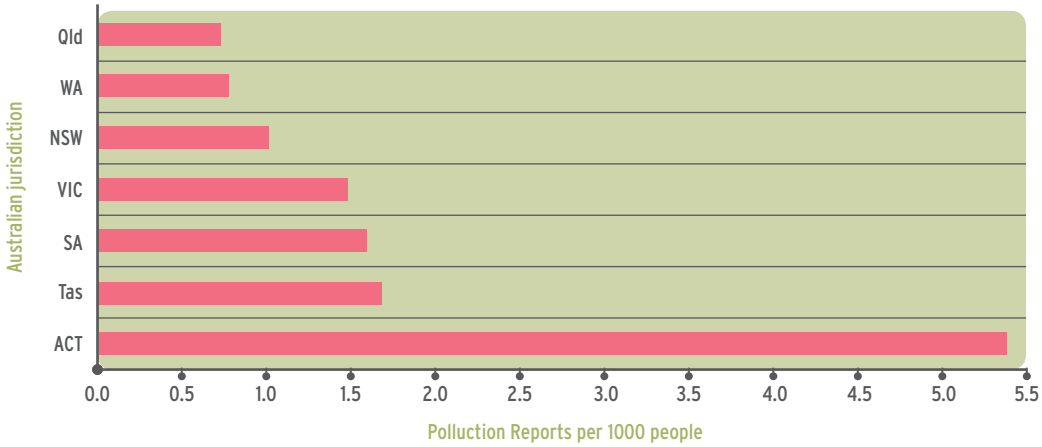
5.9 Interstate comparison

Comparison with corresponding authorities interstate is difficult as each state and territory has defined jurisdiction for environmental regulation differently and the agencies responsible for administering environmental protection have differing policy positions (for instance, in relation to unscheduled premises). NSW data, for example, does not include reports regarding unlicensed premises (although there are substantially more licences in NSW than Victoria). Notwithstanding this proviso, a comparison with corresponding jurisdictions was undertaken to provide an indicator of the level of complaints relative to population.

According to this data the level of reports in Victoria in comparison to other jurisdictions (other than ACT) is broadly on par and not unusually high or low.

8 DataAgility Report (Internal report) – June 2010.

Figure 5.2: Median number of pollution reports per 1000 people by Australian jurisdiction, 2004–09

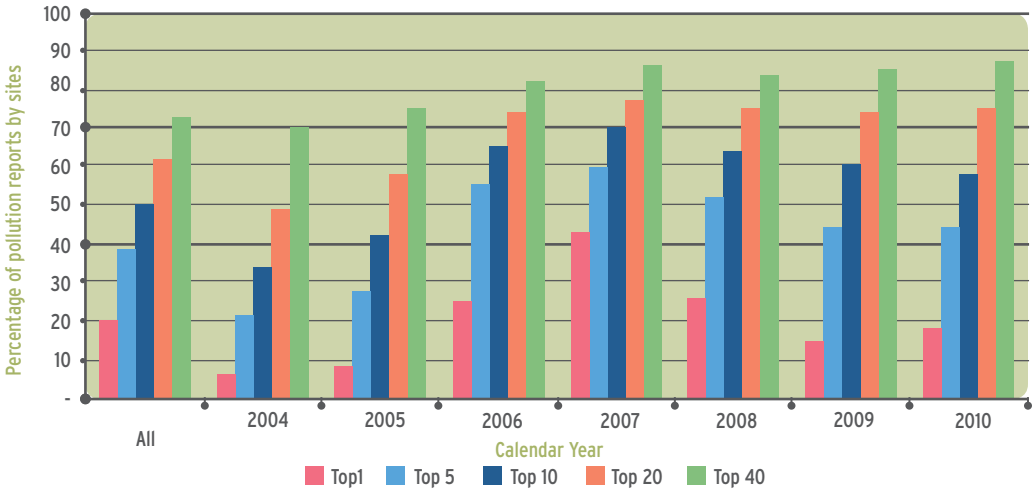


[Source: Annual Reports of Environment agencies in each jurisdiction and ABS population data.]

EPA has committed to 90 per cent of reports being responded to within three days of receipt, which it has been able to achieve.

A substantial number of reports are received in relation to a small number of premises, either through multiple reporters complaining about the same episode or because there are multiple episodes involving the same premises. Since 2005–06, between 22 per cent and 31 per cent of complaints have been received in relation to these premises. Figure 5.3 displays the proportion of pollution reports from the top sites. As can be seen, more than half of all reports consistently relate to fewer than 20 known sites. In the past five years, around 60 per cent of reports linked to known premises have related to less than 10 known sites.

Figure 5.3: Percentage of pollution reports for most-reported sites



[Source: Pollution response data analysed by 'known client' – 2009 EPA Compliance Plan]

The data in Table 5.3 indicate that the proportion of reports from premises that are scheduled and not scheduled is roughly equivalent. What is also significant is that a substantial number of reporters cannot identify the source, or EPA has not been able to establish the source following response and investigation. This is understandable due to the ephemeral nature of some emissions, but it is an important indicator of the challenge of responding to large numbers of calls where the source is not readily identifiable. These facts have significant implications for the targeting of EPA inspections.

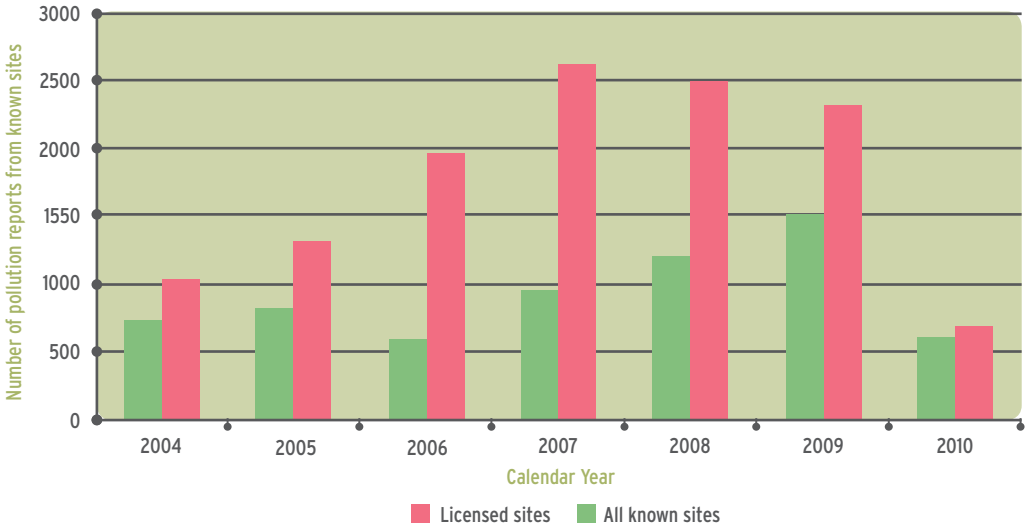
Table 5.3 provides a comparison of scheduled and unscheduled premises that have been the subject of reports where the reporter has been able to nominate the premises as part of their report.

Table 5.3: General pollution data (EPA Victoria)

Pollution reports	2000–01	2001–02	2002–03	2003–04	2004–05	2005–06	2006–07	2007–08	2008–09	2009–10
Pollution reports	8710	8622	7787	6756	7106	7344	8257	8550	8017	7792
No. of sites 10+ reports						37	43	38	41	43
No. of reports for 10+ sites						1599	2583	2415	2487	1995
% of total from 10+ sites						22%	31%	28%	31%	26%
No. of unknown sources	2145	2167	2162	2172	2428	2733	2866	3099	2960	3123
Pollution reports confirmed	1137	1064	857	771	729	758	673	859	600	583
Unresolved	1102	1349	951	21	21	24	9	47	141	511
% of unknown sources	25%	25%	28%	32%	34%	37%	35%	36%	37%	40%
% of scheduled sources	24%	24%	23%	22%	24%	25%	29%	31%	33%	28%
% of unscheduled sources	36%	33%	35%	44%	40%	36%	34%	31%	27%	25%

[Source: EPA Corporate PolRep Database, as at July 2010]

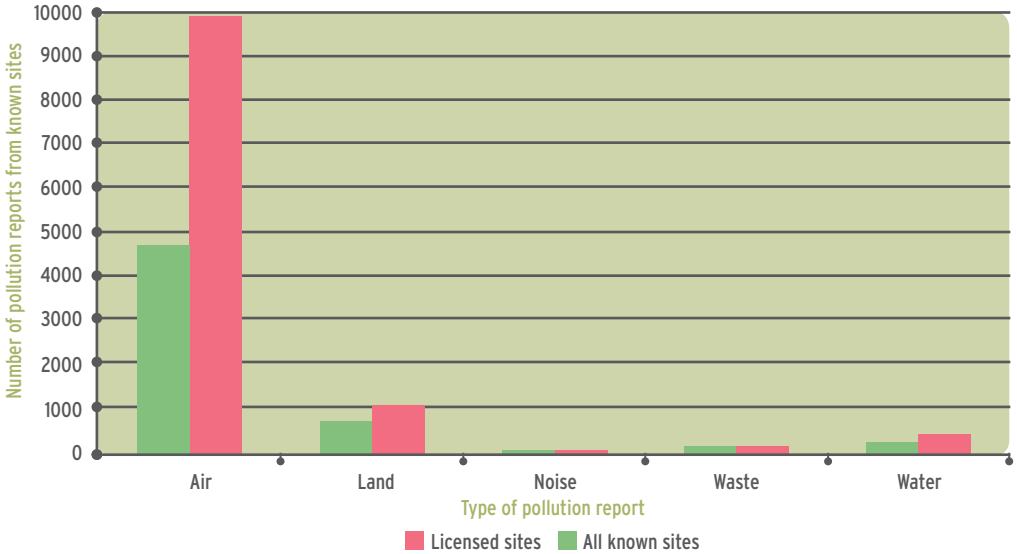
Figure 5.4: Public pollution reports linked to known sites, 2004–10



[Source: Analysis undertaken by DataAgility from EPA Corporate PolRep Database - September 2010]

Unfortunately the PolWatch system can not record the number of attendances or inspections that result from pollution reports to inform an analysis of the level of field activity resulting from pollution reports.

Figure 5.5: Types of public pollution reports linked to known sites, 2004–10



[Source: Analysis undertaken by DataAgility from EPA Corporate PolRep Database - September 2010]

The nature of the reports by environmental segment does not appear to indicate substantial trends. Over a five-year period the percentage of noise complaints received from scheduled premises, as a proportion to all noise complaints, is higher than the correlation that appears for air complaints. This suggests that it is equally likely that a complaint about noise pollution relates to scheduled premises as to non-scheduled premises. The data do suggest that an air report, most likely odour, is more likely to relate to a non-licensed site. This result may, however, be affected by the number of odour reports relating to one-off, non-licensed sites. For example, a single non-licensed and odorous site accounted for 20 per cent of all reports received between 2004 and 2010, peaking at 43 per cent in 2007.

EPA's project to reform the pollution response service involves reviewing the current service, with particular focus on improving the quality and responsiveness of the service. The aim of the project is to develop a more efficient, consistent and leading pollution response service, including:

- development of processes that will ensure pollution reports are addressed in the best way possible to prevent and minimise environmental harm. This will also support consistent service delivery
- development of measures and key performance indicators that will allow the organisation to assess the efficiency and effectiveness of the service
- provision of input into the development of a revised business system and application[9]
- identification of key strategic changes that are required.

5.10 Feedback to reporters

My consultations indicated that one of the most common interactions of community members, businesses and local governments with EPA was in relation to pollution reports. In many cases, businesses and community members were complimentary regarding the professionalism of EPA staff who responded to these issues, but many were left frustrated and disappointed by EPA's approach when taken as a whole.

The community consultations indicated serious concerns with a perceived lack of feedback when reporting an incident. In many cases this left the impression that it was futile to make a notification to EPA as reports were rarely followed up, even though in many cases an inspection did follow the report. EPA staff confirmed that the lack of feedback on reports, and in particular in relation to reports of litter[10] (which are the most frequent), frustrated many callers. It appeared from the consultations that there was a commonly held view that it was not worth reporting an incident[11].

A number of residents expressed the view that they had stopped reporting incidents as they had lost confidence that EPA would respond[12]. One Warrnambool resident opined, 'A lot of people have given up hope'[13]. I heard numerous accounts of residents across all 14 open house consultations who had made reports of concerns regarding noise and odour impacting on their health and wellbeing experiencing a dismissive response to their complaints from EPA. Many of these examples sometimes involved issues that had persisted for months and years and had seriously impacted physical and psychological health[14]. These experiences indicate that there is considerable disillusionment in the community with the responsiveness of environmental regulators generally, but EPA in particular as not being able to address longstanding issues and effectively respond to complaints.

9 The Business System Reform project is reviewing EPA's multiple business and database systems to develop a new integrated and central system.
10 Community open house Moonee Ponds, Ballarat.
11 Community open house Moonee Ponds, Geelong.
12 Community open house Geelong, Dandenong.
13 Community open house Warrnambool.
14 For instance, Community open houses in Geelong, Dandenong, Bulleen and Altona.

Residents attending the open houses referred to a combination of contemporary and historical dealings with EPA, but unless these perceptions are addressed and the experience of reporters changes markedly, EPA's approach of considering the community to be its 'eyes and ears' will not ring true. A spirit of cooperation with community relies upon EPA taking complaints seriously and providing feedback[15].

It was understood by people who had reported pollution that there would be confidential information obtained in some investigations and that this level of detail could not be disclosed by EPA. However, expectations were relatively modest, with many residents indicating they would be satisfied with written acknowledgement of their report and, where possible, an indication of whether the matter was dismissed, attended to or the subject of further enquiries.

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.

5.11 A duty to notify

Operators of licensed premises are required as a condition of their licence to report incidents impacting on the environment and breaches of licence conditions or environmental laws.[16] It is not currently possible to accurately match reports by licensees with reports from community members. However, such information would be valuable in ensuring that notification requirements are being followed. I heard anecdotal views that some businesses were aware that others routinely failed to report incidents to EPA[17]. The widespread belief that a failure to notify is not followed up by EPA undermines the willingness of some businesses to diligently report incidents. I was unable to identify a case in which a failure to notify had been prosecuted by EPA. In comparison, over three years, the NSW Department had undertaken regulatory action in 16 cases involving licensees failing to report incidents. There should be clear deterrents for failing to report incidents[18].

EPA enforcement staff were also concerned at a perceived lack of diligence by some licensees to report. It was suggested that Victoria adopt notification requirements that exist in NSW, which require the reporting of environmental incidents to the appropriate authority regardless of whether the premises are scheduled or not[19]. This was a position supported by the Environment Defenders Office[20].

Universal reporting requirements would relieve some of the reliance on active community members reporting their observations of pollution incidents and could provide a more objective and systematic approach to collection of data regarding pollution[21]. It is tempting to assume that a high number of reports about a particular site or geographic area are indicators of poor performance. This assumption may prove correct, particularly in cases of multiple reports of a particular incident. However, to assume the converse – that the lack of community reports is an indicator of good performance – would in my view be unwise. A number of community consultations made it clear that some communities had more organised and active representative groups to advocate for them than others. Some community members highlighted the issue of 'reporting

15 Submission 16.
16 Standard licence condition G3 requires that a licence-holder 'immediately notify EPA of non-compliance with any condition of this licence' and guidance clarifies 'immediately' as meaning 'the earliest practicable moment'.
17 Victorian Water Industry Association, Ai Group workshop.
18 Auditor-General's Report *Performance Audit – Protection the Environment: Pollution Incidents Department of Environment, Climate Change and Water,* September 2010.
19 Section 148 *Protection of the Environment Operations Act 1997* (NSW) requires a person carrying on an activity which causes or threatens 'material harm' to the environment to notify the appropriate regulatory authority. See Submission 41.
20 Submission 41
21 EPA staff consultation – North East office.

fatigue' where reporters would no longer call EPA. It is also difficult for vulnerable populations, including residents from culturally and linguistically diverse backgrounds or older citizens, to understand and be aware of their rights and which government agency has responsibility for addressing environmental issues. Community reports are therefore not necessarily a reliable proxy for non-compliance.

Similar reporting requirements exist in occupational health and safety legislation in relation to incidents involving dangerous goods or plant, for instance, in most jurisdictions[22], and NSW EPA has a mandatory requirement for reporting of pollution incidents.[23]

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.

Compulsory reporting of environmental incidents would have the advantage of ensuring non-scheduled businesses are educated about their obligations to prevent environmental incidents and report them in the event that they have been unable to prevent them.

5.12 Shared jurisdiction

While jurisdiction for reports of alleged pollution emanating from industrial premises is relatively clear, it is not so clear for a number of types of pollution or environmental hazard, particularly relating to noise and odour.

EPA's website provides a brief explanation of EPA's pollution response jurisdiction and refers to EPA taking responsibility for 'commercial and industrial complexes' and not activities involving residential premises, but there is currently no definitive description of EPA's jurisdiction for pollution reports[24].

Areas where jurisdiction is poorly defined include:

- emissions from small businesses
- dumping of waste and litter
- inadequate management of wastes such as wash waters
- poor building site practices; construction and subdivision management
- emissions of dust and other substances from quarries and other extractive industries
- management of rural industries such as large-scale animal industries – which are generally managed by the Department of Primary Industries (DPI).

There is therefore currently a considerable degree of confusion and inconsistency in the management of issues that are co-regulated by other government agencies.

For the most part, confusion occurs between the respective roles of EPA and local councils. These issues occur where both EPA and local governments may use the respective legislation they administer to respond to and enforce issues involving environment risk. Local government has powers to address many of these issues under the nuisance provisions of the Public Health and Wellbeing Act, and under conditions imposed by planning or building permits and their enforcement under local laws.

22 See for instance section 38ff, *Occupational Health and Safety Act 2004*.
23 See for instance Part 5.7, Duty to notify pollution incidents *Protection of the Environment Operations Act 1997*.
24 *.www.epa.vic.gov.au/reporting/polwatch.asp*

The EP Act and Public Health and Wellbeing Act do not deal with overlaps in their respective coverage and accordingly there is discretion as to which agency responds to an issue and assumes regulatory responsibility[25]. Accordingly, there is a good deal of informality in determinations regarding jurisdiction and varying local custom and practice applied by regional offices.

Gaps and overlaps in jurisdiction for administering environmental laws was the most commonly raised issue in the community consultation. I heard repeated accounts of situations involving noise and odour where residents had made a report to either their council or EPA regarding a concern and were dissatisfied with the response. Residents spoke of 'buck-passing' where neither EPA nor their local council would take their report seriously, and where responsibility was unclear[26]. Some residents reported acrimony between councils and EPA where staff of both openly expressed cynicism that the agency with perceived responsibility would be capable of fixing an issue[27]. Many community members consulted indicated that it took considerable effort and enquiry to ascertain the responsible authority and that this was frustrating[28].

Interestingly, the *Green Light Report 2009* confirms this view. In 2009, Sustainability Victoria surveyed Victorians on their experiences with pollution. Around 27 per cent of people surveyed indicated they had 'recently noticed some form of pollution' in their local neighbourhood. Of those who reported observing pollution the most common type was air pollution (42 per cent), with noise pollution second (38 per cent). The majority of those who reported observing pollution took no action as a result. Of those who reported the pollution, regardless of the segment affected, they were more likely to report the incident to the local council rather than EPA[29]. Of those who reported matters to EPA, pollution to water was the most common form.

There was considerable concern regarding a perceived lack of willingness for EPA to intervene in planning matters. A commonly held view was that, if EPA was more active in being consulted in planning decisions, providing advice and intervening if required, poor planning decisions such as approval of development which encroached on recommended buffer distances would be avoided. In many cases, EPA's inability to respond to an issue was explained to residents as being attributed to a planning permit issued by council which could only be enforced by council[30]. There was also a view that issues were exacerbated as a result[31]. There was support for EPA to take a leadership role in outlining respective jurisdictions and supporting councils to effectively and consistently administer those environmental standards for which councils were responsible[32].

Although considered from a different perspective, these concerns were shared by many businesses consulted[33].

25 Compare this with *Environment Operations Act 1997* (NSW), which defines the 'appropriate regulatory authority'.
26 Community open house – Geelong, Bendigo, Ballarat, Altona.
27 Community open house – Bendigo.
28 Community open house – Bulleen.
29 *Green Light Report 2009*, Sustainability Victoria:

- Eighty-eight percent of those who noticed air pollution said they had done nothing about it, 10% had reported it (6% to local council, 3% to EPA), 4% had complained to those responsible and 3% had closed their windows.
- Seventy-two percent of those who noticed noise pollution had done nothing about it, 16% had reported it (7% to council, 6% to police) and 7% had complained to those making the noise.
- Fifty-nine percent had done nothing about observed water wastage, 24% had reported it (18% to council) and 17% had complained to those responsible.
- Only 49% had done nothing about litter observed, 16% had reported it (11% to council) and 34% had cleaned it up themselves.
- Forty-eight percent had done nothing about pollution of waterways, 28% had reported it (19% to council, 11% to EPA), 23% had cleaned it up themselves and 11% had complained to those responsible.

30 Community open house – Portland, Warrnambool, Bendigo, Bulleen and Dandenong.
31 Community open house – Geelong, Mildura.
32 Community open house – Wodonga.
33 Ai Group workshop.

Blurring of jurisdictional lines was also one of the most commonly raised concerns of EPA staff, in particular on complaints of nuisance involving noise and odour[34]. An EPA staff member suggested a users guide for pollution reports would be as useful within EPA as it would with residents[35]. For EPA staff such a guide would be supported by decision-making criteria and a protocol for recording these decisions in a uniform way.

A key aspect of the reform of the pollution response service is to clearly define EPA jurisdiction and areas of overlap where jurisdiction is not clear. I commend this initiative as roles and responsibilities are not clearly established in the current legislation and there have only been ad-hoc attempts in the past to consider guidelines or memorandums to resolve ambiguity.

There is a pressing need for EPA to define its jurisdiction clearly and transparently and where there are overlaps, as for instance in relation to noise, these should be identified. A prioritisation based on frequency of reports and environmental risk should be undertaken, with issues of highest priority then being the subject of discussions with local government through peak metropolitan and regional bodies such as the Municipal Association of Victoria and local government networks. These discussions should seek to gain a shared understanding of gaps and overlaps and resolve them with definitive statements outlining:

- which agency is best placed to respond
- where there is shared responsibility, which agency will take the lead
- the criteria that will be applied to determine which agency will assume responsibility where individual cases require the exercise of judgment to determine the responsible agency.

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.

5.13 Regional and metropolitan response

The metropolitan head office of EPA receives the majority of pollution reports and processes these for allocation to specialist pollution response officers. The centralised nature of this service and line management reporting endeavour to ensure that consistent criteria are applied to decisions regarding deployment of authorised officers. The criteria to be applied are currently being documented, as EPA undertakes its reform project on pollution response.

Ensuring consistent triage and response to pollution reports in EPA's five regional offices (including Southern Metro, which covers the south-eastern and outer eastern metropolitan region) is more challenging.

EPA staff in regional offices indicated there was no standard framework or operating procedure for triaging pollution reports and making a decision on deployment of environment protection officers[36]. Two offices had developed a local risk-based approach with criteria on responding to calls, and a third was considering

34 EPA staff consultation – Pollution Response Unit, Centre for Environmental Sciences , EPA Head Office, North East Office.
35 EPA staff consultation North East office.
36 Pollution Response Service Reform – Internal Discussion Paper.

implementing the same[37]. Unfortunately, the existence of multiple frameworks for decision making inevitably leads to different standards being applied across the state, and different levels of response. Local variations differed according to the level of calls required to warrant a call-out, the nature and extent of the pollution and the premises, and whether they had previously been the subject of reports. All these criteria are relevant. Less compelling were criteria which included media attention and impacts on EPA's reputation if not attending. This was confirmed by views expressed by business stakeholders that EPA was much more likely to respond to an incident that had attracted media interest[38].

Unfortunately there is little documentation to support regional offices and field operations to make decisions, and risk assessment is largely unsupported.

In Chapter 7, 'A new model for compliance and enforcement', I outline in detail current approaches to risk-based enforcement and a recommended model for EPA to adopt in relation to environmental risk assessment for the purposes of prioritisation and targeting.

5.14 Responsibility of business

EPA field staff expressed considerable frustration that they were seemingly constantly occupied by reactive pollution response work and that, due to resourcing, this diverted attention from proactive inspections. A number of regional officers indicated that they were almost exclusively focused on pollution response and that this meant they were unable to focus attention on longer-term influencing and achieving change with particular premises. There were also concerns that some problem premises required continuous attention and repeated response to pollution reports, but that EPA could not fix the problems causing the reports. In some cases this was explained due to the financial viability of the business, which could not afford rectification works required to remedy a pollution issue. In others there was a view that the business was recalcitrant.

Of the reports to EPA's pollution response line linked to known sites and logged in the PolWatch system between 2004 and 2010:

- one site accounted for 20 per cent of calls. The proportion of calls in relation to the site from year to year ranged from 6 to 45 per cent
- the five sites most frequently the subject of calls accounted for 38 per cent of calls. The proportion of calls in relation to these sites from year to year ranged from 21 to 60 per cent
- twenty sites accounted for 62 per cent of calls and in one year accounted for 75 per cent of calls
- forty sites accounted for 73 per cent of calls and in one year accounted for 87 per cent of calls.

It is apparent that focusing on improving the performance of the most reported sites would focus resourcing on those sites attracting most community concern. In the event that community concern in the reports relates to genuine impacts on the environment, this would also be a legitimate target for field intervention. However, there is also a compelling case to suggest that those sites causing this level of concern and drawing significantly on the regulator's resources should contribute to the management of these concerns as well as addressing the problem. In my view this is a logical implication of the principle of improved valuation, pricing and incentive mechanisms provided for in section 1F of the EP Act:

> Persons who generate pollution and waste should bear the cost of containment, avoidance and abatement[39].

37 EPA Staff consultation North East. North West, Southern Metro.
38 Ai Group workshop, Waste Management Association workshop, Australian Environmental Business Network.
39 Section 1F(2).

Interstate and overseas regulators have sought to better manage pollution reports by triaging low-level environmental risks and not attending low-level matters. EPA has itself, for instance, from time to time used warning letters issued to businesses who have been the subject of a report in order to bring the matter to the business owner's attention, and to provide an opportunity for any corrective action to be taken voluntarily. Repeated concerns would escalate to onsite inspection as appropriate. Public guidance issued by the NSW Department of Environment, Climate Change and Water recommends that reporters report their concerns to the business at first instance before contacting the regulator[40].

A number of businesses consulted indicated that they were not advised as a matter of course when EPA received a report of alleged pollution emanating from their premises[41]. These businesses indicated a preference for reports to be directed to them in the first instance, so they could respond in a timely manner to community concerns. I am advised that as part of the licensing reform program EPA now has site contact details for all licensed sites and that this information could readily be displayed alongside the licence on EPA's website. It is an understandable expectation that businesses wish to be aware of or manage pollution reports. EPA considers the frequency of reports as an indicator of environmental performance and considers this intelligence in compliance and enforcement activity, while the business may be unaware of the extent of community concern.

A number of businesses indicated that they had good community relations and wished to preserve these, and that this could be achieved by addressing concerns directly without requiring the intervention of the regulator. This is a desirable outcome so long as reports directly to businesses are properly recorded and action taken to remedy any risks or breaches. In the absence of a satisfactory response it would remain open to the reporter to then contact EPA. One business broadly advertised its own 24-hour response line encouraging community members to contact the facility directly in the event of any concerns or incidents[42]. This is a commendable initiative which should be encouraged, particularly for larger complexes including co-located businesses.

In appropriate cases, EPA could seek to require businesses that are the subject of frequent reports or incidents to undertake community consultation and establish a response line to receive community reports directly. Such a scheme could be required under an enforceable undertaking[43] or court-imposed undertaking following prosecution. EPA could monitor usage of such services over time and the business's response to these reports. An advantage would be the reduction of calls about premises that are the subject of repeat reports. Devolving some level of reports directly to the business would have some advantage for the impost on EPA resources but would not alleviate the need to respond appropriately in the event of serious incidents or where community reports were not being effectively responded to by the business.

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.

40 *www.environment.nsw.gov.au/pollution/index.htm.*
41 Ai Group workshop.
42 Plastics and Chemicals Industries Association Roundtable.
43 See Chapter 11, 'Prosecutions'.

5.15 Record keeping and data analysis

It was difficult to draw detailed conclusions regarding the reporting of pollution based on the PolWatch system and EPA's available data. The data did not include, for instance, whether multiple reports related to the same incident, and did not differentiate between reports that were responded to and those that were triaged for no response or referred to other agencies. These would be helpful data to analyse and to inform targeting of future compliance activity. The nature and extent of pollution reports and their location over time would be valuable in determining hotspots for targeted compliance activity.

The NSW Auditor-General recently inquired into management of pollution incidents in NSW by the NSW Department of Environment, Climate Change and Water[44]. The Auditor-General noted that the Department should:

- analyse and report on the extent of environmental harm caused by pollution incidents reported to it
- indicate whether its response had minimised harm to the environment
- indicate whether its regulatory approach improved environmental compliance.

The Auditor-General concluded that the Department had a systematic approach to receiving, investigating and responding to reports of pollution incidents but that it could do more to monitor:

- the number of separate pollution incidents
- the level of risk to the environment caused
- the number of incidents relating to licensed premises.

In addition to informing the regulator's targeting, such information would be of value to the community in understanding local risks in parts of Melbourne and the state, and whether these issues were being improved by EPA's regulatory approach or not.

While the pollution response service has been operating for many years and is the subject of reforms to improve quality and responsiveness, a number of enabling provisions would support the current reforms, including clear performance measures for receipt of reports, responsiveness and feedback to reporters. A more rigorous and disciplined approach is required in relation to the entry of data and data integrity. This would ensure that data could be analysed holistically to identify trends and targets for future enforcement action.

In Chapter 14, 'Training and support to authorised officers', I identify the need for systematic training of EPA authorised officers. Currently the training of pollution response officers, who are effectively the frontline of EPA's response to environmental incidents and emergencies, is predominantly on the job. More formal training, supported by the procedures I have referred to above, would support authorised officers to more confidently and effectively perform their roles and ensure a more consistent response by EPA across the state.

44 Auditor-General's Report *Performance Audit - Protection the Environment: Pollution Incidents Department of Environment, Climate Change and Water*, September 2010

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.

6.0 Role of compliance advice

Key concerns of businesses through my consultations and the submissions received were the perceived ambiguity in standards expected for compliance with the EP Act, policies and EPA guidelines, and EPA's reluctance or perceived lack of responsiveness to provide advice on what constitutes compliance. This chapter explores the circumstances in which EPA provides advice and how the quality of this advice can be improved.

6.1 Background

Key concerns of businesses throughout my consultations and the submissions received were the perceived ambiguity in standards expected for compliance with the EP Act, policies and EPA guidelines and EPA's reluctance or perceived lack of responsiveness to provide advice on what constitutes compliance. This chapter explores the circumstances in which EPA provides advice and how the quality of this advice can be improved.

6.2 Supporting individuals and businesses to comply

The EP Act empowers EPA to provide information and education to the public regarding the protection and improvement of the environment and to publish reports and information with respect to 'any aspects of environment protection'[1].

Most regulatory regimes use a mix of approaches to encourage compliance, as well as to respond to breaches of laws and deter non-compliance. Similarly, EPA has a number of ways of achieving compliance.

6.3 Education

A key aspect of any regulator's role is to educate the community about the Act, regulations and policies which they must comply with. EPA has used a number of methods of educating the public about environment protection. There have been prominent media campaigns, for instance the litter reporting campaign of 2010, which sought to solicit community reports of offending as well as create a perception of the likelihood of getting caught.

EPA provides specific advice to the community and regulated businesses through its telephone advice service known as Frontline. Call staff provide general information regarding EPA and its role and relevant guidance or publications. Frontline also links to EPA's pollution response service.

1 Section 13(1), *Environment Protection Act 1970*.

The Frontline service is managed by EPA's Client Services Directorate. Where necessary, Frontline staff refer queries and requests for more technical advice to subject-matter experts in functional units within EPA. The most frequent requests for information include advice on the disposal of waste, recycling, individual rights, infringement notices and requests for EPA publications.

In relation to particular industries or issues of community concern, EPA has provided information sessions and workshops on proposed changes to regulations or its approach to particular aspects of regulation. In the development of regulations for instance, these forums are provided to receive feedback or exchange information.

EPA's website provides access to information and guidance material regarding the EP Act and EPA. The website contains EPA policies for air and water quality for instance, information on reporting pollution, upcoming forums and seminars and case studies on enforcement actions. Information is published regarding previous prosecutions, current groundwater use restrictions and contaminated sites. More recently, EPA has moved to create online tools and calculators to assist businesses and individuals. Mini-websites include the life cycle management portal, and the carbon offsets guide. Calculators including the greenhouse calculator and the car eco-meter are also provided. Tools include links for online reporting of litter and smoky vehicles.

6.4 Discussion

A consistent theme in consultations across the stakeholder groups was that there was insufficient attention paid by EPA to broad-based education regarding the EP Act and EPA's role in its administration[2]. Similarly, businesses with compliance obligations are influenced by education in relation to their obligations and how they might comply with these.

There was broad concern that EPA focused most of its attention for many years on licensed businesses which were considered to be well resourced and conversant with the EP Act[3]. This attention diverted focus from the need to broadly promote environmental responsibility, the EP Act and the role of EPA to the broader community and businesses that do not require works approvals or licences.

There was criticism of EPA's website from businesses, community and EPA staff alike. The website should be much more accessible and easy to navigate[4]. In many cases information that was provided, for instance regarding current investigations, had not been updated for some time. A number of community members suggested that more information should be provided regarding the current state of the environment, what is known about particular risks to health or the environment and how to guard against these. Residents who had made complaints suggested that up-to-date information by EPA on issues it was responding to or investigating and what action was being taken would be particularly helpful[5].

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.

2 EPA staff consultations – Enforcement Unit, Geelong and Environmental Performance Unit. Open house consultations – Warrnambool, Ballarat, Mildura, Wodonga, Geelong, Dandenong, Altona.
3 Victorian Waste Management Association workshop, Environment Victoria and Environment Defenders Office roundtable. Ai Group submission.
4 PACIA roundtable, open house consultation in Bulleen and Dandenong.
5 Open House consultation – Altona.

Public information and education campaigns are supported by the Victorian Guide to Regulation as useful particularly where the regulatory problem or 'harm' is caused by lack of awareness[6]. There are real gains to be made by educating the broader community and businesses on the duty of care to the environment.

Regulatory reforms in the United Kingdom encourage provision of general information and guidance to make it easier for regulated entities to understand and meet regulatory obligations. This of course requires that they are provided in easy-to-understand language and appropriate formats[7].

Currently the EP Act extends to more than 430 pages. With over 80 amendments it has become difficult to navigate and understand. Due to the changes in drafting practice over 40 years and increased use of plain English, the Act lacks coherence and uses terms which have become anachronistic.

The Hampton Review of effective regulation in the United Kingdom recommended that, when setting policy and drafting regulations, these should be written so that they are easily understood, easily implemented and easily enforced and that all interested parties should be consulted when they are being drafted. Although trite, compliance is likely to improve when laws and standards are clear and well understood. When new policies are being developed, explicit consideration should also be given to how they can be enforced using existing systems and data to minimise the administrative burden imposed[8].

A first step in making the law more accessible and relevant to a broader population of people and businesses would be to produce a plain English guide to the Act[9] and fact sheets targeted at particular cohorts – for instance, the community or small and medium businesses – that would assist them to understand the EP Act and its application to them. The Australian Environment Business Network suggested a 'communications charter' be developed which would commit EPA to providing clear and concise communication with the 'regulated community' on its obligations[10].

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.

6.5 State environment protection framework

The state environment protection policy framework is established under the EP Act and sets out the hierarchy of legislative and non-statutory standards against which compliance is judged. The policy framework to a large extent also explains the various sources of guidance for businesses and other regulated entities on what constitutes compliance.

6 Department of Treasury and Finance, Second Edition – April 2007.
7 *Regulators' Compliance Code*, United Kingdom Better Regulation Executive, December 2007.
8 Source: *Reducing administrative burdens: effective inspection and enforcement* (Hampton Report) March 2005. *www.hm-treasury.gov.uk/media/AAF/00/bud05hampton_641.pdf. For further information, see: www.cabinet-office.gov.uk/regulation.*
9 Open house consultation – Geelong. Submission 13.
10 Submission 13.

The state environment protection framework comprises:

Legislation

- Environment Protection Act 1970

Subordinate instruments

- State environmental protection policies (SEPPs)
  - SEPPs for air, land, noise and water
- Regulations
  For example:
  - *Environment Protection (Scheduled Premises and Exemptions) Regulations*

Best practice guidelines

- National environment protection measures (NEPMs)
  For example:
  - Air monitoring levels
  - Industrial waste guidelines
  - Used packaging materials.
- Best practice environmental management guidelines – (BPEMs)[11]
  For example:
  - Waste and landfill
  - Composting and waste water treatment systems
  - Concrete batching
  - Dairy processing
  - Urban stormwater
- Protocols for environmental management

Other guidelines and policies

For example:

- Licence guidelines: licence management, monitoring and assessment, annual performance statement and landfill management
- Environmental auditor guidelines
- Noise control guidelines
- Enforcement policy.

There are six SEPPs and seven waste management policies (see Appendix 6.1 for a list of current policies).These are made under the EP Act as subordinate instruments and seek to:

- document whole-of-government environmental policy
- articulate beneficial uses of the environment which are protected under the EP Act
- establish standards of environmental protection that must be adhered to and can be enforced against
- provide objective measures for the environmental audit system
- set parameters for licensing and works approval applications and conditions.

11 There are currently 15 best practice management guidelines.

The policies document commitments by various government agencies and impact on local government and planning. Thus, for instance, the State Environment Protection Policy (Waters of Victoria) aims to protect the integrity of surface waters for human uses and natural ecosystems. The policy sets benchmark water quality levels for surface water, levels required to maintain beneficial uses of waters, and thresholds for impacts on these waters. In some instances levels required to protect current uses are set for different geographical areas; such benchmarks are referred to as attainment levels. Government agencies including the Department of Sustainability and Environment (DSE) and EPA (among others) are allocated responsibility for regulating these activities, with EPA committed to a regulatory and coordinating role.

The EP Act creates duties requiring discharge, emission or deposit of wastes to air, water or land which are required to be in accordance with state environment policies and other standards. It is arguably an offence to breach the provisions of the policies. There is no equivalent offence provision linked to breach of a policy in relation to noise.

As with the EP Act itself, the style of drafting in the policies varies significantly. In some cases obligatory standards are expressed as discretionary standards and there appears to be little consistency in the use of the terms 'shall', 'must', 'should' or 'may', which can confuse the purpose of the policies, given their status as effectively equivalent to regulations.

EPA and DSE are reviewing the state environment protection framework in the context of a number of policies that require renewal.

In addition to the SEPPs and waste management policies, EPA publishes guidelines to provide support on compliance with the legislation and licensing requirements.

These guidelines can take the form of best practice guidelines which outline measures determined to be the most effective and practical means of preventing or reducing pollution and other environmental hazards. Best practice environmental management guidelines (BPEMs), such as *Siting, design, operation and rehabilitation of landfills* (EPA publication 788), effectively constitute minimum standards against which EPA regulates these facilities. Protocols for environmental management are also used as minimum standards by EPA and may form the basis for enforcement action such as a pollution abatement notice. Technical guidelines outline specific measures such as acceptable modifications that do not exceed emission standards.

EPA has also participated in the creation of industry codes of practice, which are voluntary in nature and seek to ensure standards of environmental practice in particular industries. Such codes are essentially self-regulated by the industry and provide guidance on best practice; for instance, the *Industry code of practice for the management of clinical and related wastes*.

EPA is frequently asked to provide guidance in interpreting legislation, regulations or SEPPs. These requests can range from questions relating to issues specific to one business or site, or may be of broader application to an industry or sector. In these cases EPA has provided letters of advice to provide guidance. Letters of advice may also be provided following site visits or inspections or as a formal response to specific queries and may contain follow-up actions required from the recipient. These are actions a company should follow to ensure they are compliant.

6.6 Discussion

To maintain consistency and deliver effective environmental outcomes as the regulator, it is vital that EPA not only sets the standard but has the ability to enforce against those standards where they are not met.

There was considerable concern raised in the business consultations that SEPPs were complex documents which were difficult to navigate. In some cases the policies and clauses of the policies are inconsistent or ambiguous. Community members also raised concern regarding the current coverage of the policies[12], that they were difficult to understand and many appeared not to be contemporary. EPA staff reflected this concern. It was felt that many of the terms used and standards included in the policies were subjective in nature. There was therefore a heavy reliance on consultants and auditors to interpret the standard required to meet compliance. The lack of clear standards and expectations is irritating to business and avoidable.

As subordinate instruments, the policies are required to be reviewed every 10 years. In some cases the policies have passed the 10-year review period, although in most cases these policies have been varied during their life. A number of the policies refer to extraneous material that is now superseded or no longer available. It remains, however, that the policies are not regularly updated or revised, as considerable effort and resource is required for such an undertaking. This means that any ambiguities or difficulties with interpretation cannot be remedied by simple amendment to the policies.

There ought to be a clear framework for statutory and non-statutory guidance produced by EPA. This framework would clearly and simply define each type of guidance document and its purpose. There should be a consistent naming convention for guidance documents so that duty-holders understand the legal status of the guidance, whether it is mandatory and whether, for instance, it is admissible as evidence in a court to demonstrate accepted standards.

A potential hierarchy for guiding compliance could be based on the following:

- the EP Act, which creates EPA and other statutory entities, and contains the principles of environmental protection, duties and offences
- regulations, which prescribe in further detail any activities, conduct or processes required to comply with duties or offences under the Act, and set any administrative measures which are required for the Act to operate, such as fees or licence categories
- state environmental protection policies (SEPPs), which specify beneficial uses for the environment and thresholds.[13]
- guidelines, which should provide practical guidance that is not binding but provides information regarding the environment, environmental hazards and risks and ways that these risks may be controlled.[14]

Ordinarily there should be a principle of subsidiarity applied to this hierarchy, which would suggest that guidance and standards should take the form of the least formal type of guidance capable of achieving the regulatory objective.

12 Submission 44

13 I consider the statement of government policy in the state environment protection policies and their use to commit arms of government to various implementations and actions to be unnecessary.

14 See for instance the *WorkSafe Compliance Framework Handbook (www.worksafe.vic.gov.au/wps/wcm/connect/8241cc004071f4bda075fee1fb554c40/Victoria+Compliance+Framework+Handbook.pdf?MOD=AJPERES)*

6.7 Guidance

In addition to raising awareness and understanding of environmental laws and standards, EPA has sought to support businesses to achieve compliance by setting clear standards and providing guidance on how standards can be met. Examples of this include guidelines relating to waste water reuse and landfill construction.

A description of EPA's legislative framework, along with guidelines and best practice policy documents, is published on EPA's website.

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.

EPA has also worked with industry associations including the Plastics and Chemicals Industries Association (PACIA), Australian Industry Group (Ai Group) and Victorian Employers' Chamber of Commerce and Industry (VECCI) to promote good environmental practices and communicate changes and new requirements. EPA support also extends to influencing some businesses to go beyond current legal requirements by arranging seminars and access to experts in the area of sustainability. Beyond-compliance initiatives are explored in more detail in Chapter 19.

EPA provides information regarding statutory obligations and compliance standards in a range of instruments. EPA provides guidelines supporting the SEPPs to outline 'best practice', usually for scheduled industries.

EPA operational staff have a need to deliver compliance advice. As such, a stronger training and development program would benefit EPA greatly.

The guidelines issued by EPA are helpful in providing guidance to duty-holders on practical means of complying with the law or other relevant standards. They are a more agile way for the regulator to provide guidance and be clear on what constitutes compliance. Current EPA guidelines are predominantly focused on environmental segment or media (for example, treatment of waste water). They are quite detailed but, where they have been created with the needs of the intended audience in mind, can be useful compliance guidance.

There was considerable criticism in my consultations regarding the quality of guidance and clarity it provided. The Victorian Competition and Efficiency Commission (VCEC) in its review also noted industry concerns that drafting of guidance took far too long and that a considerable amount of guidance had been in draft for a long period of time[15]. The Commission noted that, in many cases, EPA did not commit to timelines for publication of guidance that had been subject to public comment. This is an unnecessary irritation for business that the regulator should be avoiding. This led the Commission to recommend:

> That EPA Victoria, in developing protocols and guidelines for environmental management, publish the key steps in the process as well as timeframes.[16]

EPA's publications and guidelines are a key source of compliance advice. However, no central unit within EPA is responsible for their consistency, currency, accuracy or review. This means that guidance is developed with different approaches to stakeholder engagement and communication and consequential impacts on the timeliness, quality and take-up of guidance. There appears to be no formal method of review for guidelines, nor

15 *A Sustainable Future for Victoria: Getting Environmental Regulation Right*. Final Report, Victorian Competition and Efficiency Commission – July 2009. pp 221-2.
16 Ibid.

a review of the currency of publications on the website. EPA currently has more than 1000 publications in print. The median age of the publications is 8.4 years (Appendix 6.2). Accordingly, there are a significant number of publications of varying degrees of quality and currency on the EPA website without a process for their systematic review[17].

Importantly, in order to support authorised officers and ensure their activities and advice are undertaken cognisant of existing published guidance, there should be a systematic process for pre-briefing authorised officers on guidance to ensure they are conversant[18] with it.

To ensure this important work is undertaken effectively, a formal process should exist to identify sectors or industries that would benefit from compliance guidance (with good intelligence from field operations), to develop compliance guidance and test its usefulness and currency. This would ensure that guidance is developed consistently and to a high quality.

A further issue of concern is that it is not clear from the published material what the status and sequence of guidance documents is. There do not appear to be consistent naming conventions in relation to guidelines in particular. In one case the guideline is referred to as a code of practice[19]. Below is a list of current guidance document types:

- state environment protection policy
- industrial waste management policy
- protocol for environmental management
- industrial waste resource guidelines
- best practice environmental management guidelines
- community fact sheet
- information bulletin
- case study
- notifiable chemical order
- environmental improvement plan (EIPs and NEIPs).

Some guidelines do not use the word 'guideline' in the title, others are referred to as 'guides' and 'guidelines for environmental management'. Due to differing terminology in the standards set by the EP Act itself, the standards used by EPA guidance also vary. Thus, for instance, the guideline for landfills is referred to as a 'best practice guideline for landfill'. In my view this inconsistency in the naming of guidance documents contributes to the confusion regarding the status of non-statutory guidance produced by EPA and the purpose for which such publications are produced.

A further consideration is in the reference to guidelines in licence or notice conditions. I am advised that, as part of the licensing reform program, a business rule was set that conditions could not 'call up' by reference a subordinate document unless empowered by the EP Act, policy or regulation. For instance, all licences include a condition requiring an annual performance statement (APS) (which is required by the EP Act) to be prepared in accordance with EPA guidelines (which is not required by the EP Act). For landfills, compliance is required with the 'best practice management guideline for landfill management' produced by EPA.

17 Appendix 6.1 provides a breakdown of the age of current publications on the EPA website.
18 EPA staff consultation – Traralgon and Bendigo.
19 *Guidelines for environmental management: Code of practice – Onsite wastewater management* (EPA publication 891).

For annual performance statements (APSs), section 31D of the EP Act requires submission of an APS 'in the form approved by the Authority'. This form is prescribed in the EPA guideline and required by licence condition G3, which requires submission of an APS 'in accordance with the Annual performance statement guidelines (EPA publication 1320).' For landfill management a number of conditions require compliance with the 'landfill best practice guidelines', empowered by the Waste Management Policy (Siting, Design and Management of Landfills).

Guidelines are also referred to in licence conditions to describe the process necessary to obtain EPA approvals. For example, licence condition L7 requires landfill operators to obtain written approval from EPA prior to commencing construction of a new landfill cell. Guidelines referenced in the preamble of the licence describe the steps necessary to gain EPA approval for the use of EPA-appointed environmental auditors. This process enables landfill operators to construct new cells within their defined boundary that would otherwise require a formal works approval application.

If guidelines are to be referenced by licence condition, it is important that EPA ensures that any changes to referred guidelines are communicated to licence-holders along with any effect of the changes.

EPA currently offers training to become an authorised officer. A required module in this course is EPA's 'Legislative Framework and EPA Tools to Protect the Environment'. This module provides an overview of state environment protection and industrial waste policies, as well as guidance on the use of the EP Act.

Within EPA I was made aware of a number of 'unwritten policies' which had been carried forward in the organisation, sometimes over many years. These 'small-p' policies were not documented (and, in some cases, were disputed) and for this reason were not transparent or open to scrutiny[20]. The existence of such 'small-p' policy positions is difficult to trace because they are generally not documented, but they were spoken of frequently and well known throughout the field. An example of this is the notion of 'one site = one tool'; in other words, that there should only be one statutory instrument issued to any site[21]. Thus a site could hold a licence or have a notice issued to comply with, but not both. The amendment of licences was therefore a common method for dealing with non-compliance at licensed premises.

Disregarding the flaw in logic, the existence of such a policy should have been documented. Some of the policies may be sound and have origins based on a considered rationale, but it is not possible to ascertain this at a later time if they are not documented.

The lack of documentation and rigour makes enforcement decision making inconsistent and unnecessarily complex. Such policies should be well explained and promoted externally. They should also be explained and documented in a field operations manual, which I discuss in Chapter 14, 'Training and support to authorised officers'.

20 For instance, EPA staff workshop – Wangaratta.

21 This despite the EP Act contemplating that licence-holders could be in receipt of statutory notices. For instance, section 30(1) provides a defence for a licence-holder who contravened their licence but complied with any relevant notice.

6.8 EPA positions

A number of consultations suggested that there was additional scope for interpretative guidance of broader application that would be short and simple but provide a definitive interpretation by EPA on particular subject matter. This guidance would be capable of clarifying ambiguity and providing reliable information that the regulator would be prepared to uphold. A number of forums discussed the attractiveness of a document akin to a Tax Office ruling[22]. Such guidance would considerably improve understanding of current laws, regulations and standards applied by EPA and support businesses to comply.

I support this suggestion. In cases where there is a need to clarify the law, SEPPs or other standards, EPA should be prepared to provide an authoritative statement of its interpretation or expectation in a transparent and accountable way. Such an instrument – an 'EPA position' – would be definitive and provide clarity as to the regulator's expectations. These position statements would be developed with stakeholder and business input and be broadly communicated. EPA positions would provide a clear statement of EPA's interpretation of the law or policy and deal with any ambiguities. They would provide a basis for more consistent interpretations by EPA officers and ensure a more rigorous and accountable approach to interpretations.

Public rulings issued by the Commissioner for Taxation set out the Australian Tax Office's (ATO) opinion or interpretation of tax law. The rulings also articulate how the ATO will exercise its discretion. Although created under an enabling power in statute[23], what is significant about the public ruling is that it provides guidance to both the public and to ATO staff[24]. The statutory basis is important to the binding nature of the ruling on both taxpayers and the ATO; however, I do not consider this an essential prerequisite to providing a clear and definitive interpretation of the regulator's position. The ATO also produces 'interpretative decisions', which explain significant decisions made by the ATO in taxation matters and which do not directly constitute advisory positions. They are indicative of the ATO's view on particular provisions of the tax law[25]. Such guidance may be relevant to internal review decisions made by EPA. Internal review is discussed in Chapter 17 of this report.

Public rulings and interpretative decisions form part of a framework by which the ATO supports taxpayers to comply with information on rights and responsibilities, and 'making it as easy as possible' for taxpayers to comply[26].

An important aspect of the development of positions would be the engagement of stakeholders and regulated entities to identify priorities for clarification and ensure that a variety of views are taken into account in providing the interpretation. Such a process, if well managed, would reduce the likelihood of disagreements and highlight issues in the position that may be contested.

An EPA position would not be intended to substitute for 'one-off' compliance advice, such as is ordinarily required on a site-by-site basis by authorised officers or on specific issues raised (for instance, during inspections). Compliance advice in these circumstances is covered further below.

22 Legal practitioners' roundtable, Ai Group and Victorian Waste Management Association.
23 Section 358-5(2a) of Schedule 1 to the Tax Administration Act.
24 A similar example is WorkSafe positions issued under section 12, *Occupational Health and Safety Act 2004*.
25 See ATO Law Practice Statement: *http://law.ato.gov.au/atolaw/view.htm?docid=PSR/PS20018/NAT/ATO/00001*.
26 Speech by Commissioner of Taxation Michael D'Ascenzo to the Italian Chamber of Commerce and Industry business luncheon, Sydney, 22 May 2008.

In addition to stakeholder input, EPA would also take into account issues identified by the Legal Unit via litigation and court proceedings, environment protection officers and other operational staff. In the development of EPA positions it would be appropriate for EPA to consider:

- the nature of the interpretive problem to be addressed
- the number of people who are affected by the problem
- the ability of EPA to provide useful and practical interpretation on the problem
- the alignment to EPA priorities for environmental protection.

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.

6.9 General and industry-specific guidance

There is a significant demand for more guidance to be provided by EPA on practical ways of complying[27]. A number of businesses suggested that guidance tailored to an industry or sector would ensure that the guidance is more practical and relevant and more likely to be taken up. Many EPA staff supported the need for more sector or problem-based guidance[28]. There is considerable scope for EPA to improve its written guidance and to better support businesses to comply. I was provided with some good quality, practical guidance targeted at small business from the YRIRP program. Businesses were also generally complimentary of the guidance provided for licence conditions[29].

There was broad concern among businesses that EPA was reluctant to provide interpretative guidance on SEPPs30, regulations and best practice guidelines. A common view was that EPA was unwilling to give advice or lacked the technical knowledge required. In some cases, obtaining advice from EPA regarding such interpretations could take a number of months, was sometimes not documented or took various forms including letters or emails. There was a perception that where advice was requested in writing there was a greater tendency to use legalistic language and to be less practical and definitive in the advice provided[31]. In some cases advice was said to take months or not to be provided at all[32].

It is a legitimate expectation that, in a regulatory environment where there has been a substantial body of legislative and regulatory development and very little authoritative court interpretation, the regulator is prepared to provide guidance on compliance and be clear and authoritative as to its expectations. If for no other reason, standards need to be clear to be enforced. However, there is in my view a more positive aspect to promoting simple and practical compliance guidance – many of the businesses I consulted were committed to complying with the law – they simply wanted clarity as to what this required.

The Hampton Review in the United Kingdom in 2005 made clear the expectation that modern regulators should provide 'authoritative, accessible advice easily and cheaply'[33]. Following extensive consultation with business across a number of regulatory areas, Hampton found that greater focus on support and advice by regulators

27 Legal practitioners roundtable, Ai Group.
28For instance, EPA staff consultation – Bendigo.
29 *Stormwater management for food businesses, Five steps for protecting stormwater.* Interstate examples include: *Know your responsibilities: managing waste from construction sites.*
30 Ai Group workshop.
31 Ai Group workshop.
32 Submission 13.
33 *Reducing Administrative Burdens: Effective Inspection and Enforcement*, April 2005.

improved compliance and, conversely, that businesses were unlikely to comply with laws that were difficult to understand. These findings have since been adopted in the United Kingdom as a Regulators' Compliance Code.

The code sets out a number of good-practice steps in developing compliance guidance, including engaging regulated entities and their representative bodies in developing guidance, to ensure they are fit for purpose and use clear and accessible language. These consultations should also provide for assessing the effectiveness of the guidance[34]. The focus on guidance should be that it is practical and targeted to meet the needs of the individuals and businesses required to comply. Significantly, the United Kingdom Regulators' Compliance Code provides that, where compliance advice is provided, it should be provided in writing if requested and should clearly differentiate between what is required to comply and what goes beyond current minimum standards.

6.10 Key areas where EPA provides compliance advice

In Chapter 4 I referred to the move to an outcome-based approach in EPA's licensing reform. This approach has moved away from the traditional setting of prescriptive requirements to meet environmental objectives, towards defined outcomes to be achieved by licensees or other duty-holders. An example of this is not requiring the temperature of pollution control equipment to be set at 426 degrees, but simply stating that emissions beyond the site must be less than a defined level. This move from prescriptive, 'technical' requirements to 'performance-based' requirements follows the approach of many other regulators, both Australian and international, and provides business with more flexibility in achieving compliance.

In the face of rapidly expanding and developing technology and production, prescriptive approaches become out of date over time and can impede innovative approaches to environmental problems. On the other hand, some businesses (particularly small and medium-sized enterprises) may not have the required expertise to identify, avoid or reduce environmental risks or emissions without engaging external advice.

A need exists for EPA to provide clarity on what it expects from businesses. This compliance advice is not intended to substitute for a company's need to take responsibility for its performance or be a form of free consultancy on environmental matters. The advice should simply describe what standard of performance is expected by the regulator – in other words, what constitutes compliance.

EPA is requested to provide compliance advice in a variety of situations. This advice is often specific to an industry, site or to environmental risks. In many cases, advice is also sought by licensees during interactions with client relationship managers (CRMs).

During EPA monitoring and inspection, advice will be sought as to whether a particular site or operation is compliant. In other situations, both formal and informal requests are made of EPA officers to provide guidance on the regulatory requirements for particular processes or changes to premises. Advice is also sought in the context of works approvals and licensing applications as to the process or technical requirements for approval. In many cases, advice is also sought by licensees during interactions with CRMs, where these have been allocated.

EPA endeavours to support environment protection officers and other operational employees with access to officers possessing particular skill sets and subject-matter expertise to tailor an approach to a particular industry, site or compliance issue. In these cases, the team is in a position to provide ad-hoc advice to duty-holders as required during inspection activity.

34 Regulators Compliance Code, United Kingdom Better Regulation Executive, December 2007.

In the past, EPA officers have provided advice to duty-holders in combination with their enforcement activity. Such advice would include, for instance, how to remedy a breach of the Act to prevent pollution or to manage an environmental risk. Where such advice was provided within the officer's expertise, this was considered a valuable aspect of the role and allowed officers to exercise judgement and provide advice on better protecting the environment.

6.11 Discussion

The ability to provide clear and authoritative compliance advice is a significant component of a modern regulatory regime and, therefore, critical to EPA's role.

In the move to an outcome-based approach, environment protection officers reported that they had been instructed not to provide advice[35]. At the least there was broad confusion and uncertainty as to the legitimacy of environment protection officers empowered to enforce the law also providing compliance advice[36]. It is unsurprising that EPA staff were confused about what it means to be 'outcome-focused'. I was unable to locate an explanation of the rationale or parameters of EPA's version of 'outcome-based' regulation. Consultations revealed that it has remained the practice in a number of offices to provide advice where this was within the officer's field of expertise, but this would either not be documented, or documented in an email or letter[37]. A problem with not documenting such advice is that it is frequently disputed during investigations and prosecutions arising from potential breaches[38].

Officers indicated that they had been trained not to provide advice or practical directions on compliance in enforcement notices, as this would contradict the outcome-based approach. EPA officers indicated that, due to these concerns, they would refer businesses to consultants to explain notices and assist businesses to comply[39]. These views were broadly corroborated by the businesses consulted[40].

There are a number of reasons that regulators have been uncertain as to the role of advice in regulation. A genuine concern in providing compliance advice is that there is a responsibility to provide advice that is accurate and that does not disadvantage duty-holders. A number of EPA staff raised concerns regarding potential liability, either personally or for EPA, if they were to provide advice that was wrong[41].

Another concern in providing advice is that businesses become too reliant on the regulator for support when they should be investing in systems and internal resources to support compliance.

Significant concerns also arise on the technical aspects of providing advice and from the fact that it is difficult to distinguish advice on what the law or other standards require from what is more appropriately dealt with by experts with technical expertise, who are familiar with a site or its operation.

35 EPA staff consultation – Traralgon, Geelong, Dandenong and Wangaratta.
36 For instance, EPA staff consultation – Geelong.
37 EPA staff consultation – Traralgon, Bendigo.
38 Enforcement Unit.
39 For instance, EPA staff consultation – Geelong and Dandenong.
40 Ai Group workshop, Australian Environmental Business Network conference and Environmental Auditors focus group.
41 EPA staff consultation with Pollution Response Unit in Dandenong.

Considerable debate has occurred on the issue of the right approach to regulation. The 'punish or persuade' debate[42] suggests that there is a dichotomy between advice and enforcement, that one approach is invariably more effective and that regulators should structure themselves around one or other of these modes of operation. There are notable examples of regulators moving to a more advisory role and recruiting to that model in order to be seen as facilitators of business by encouraging them to comply, only to find that the focus on core regulatory and enforcement responsibility has lapsed. These organisations become confused as to their role, and enforcement practitioners lament the move from being regulators to quasi-consultants. On the other hand, strong enforcement regimes that are not practical or constructive in their approach can lead to a lack of respect for the regulatory scheme and distrust of the regulator which, perversely, undermines the level of compliance[43]. Many regulators who were persuaded to either punish or persuade created hybrids that allowed some practitioners to give advice and others to enforce – a 'white hat, black hat' arrangement.

There is a view that regulators providing both advice and enforcement is problematic. The Victorian Ombudsman commented:

The expectation that regulators enforce the law and simultaneously consult with individuals, business or groups to explore measures to improve compliance can generate misunderstanding and misdirection[44].

However, the prevailing view is that enforcement and compliance advice can coexist and are legitimate and necessary roles for modern regulators[45]. I considered this view to be generally supported in my consultations[46]. The critical aspect is getting the parameters of the advice right. This can be achieved by attracting and retaining field staff with technical expertise as well as the skills for regulation, and investing in professional development and refresher training for officers on technical matters.

6.12 Role of authorised officers in providing advice

As indicated above, it is incumbent on modern regulators to clearly explain the standards, policies and interpretation of policies that businesses are required to comply with. A number of environmental regulators have placed emphasis on their role in providing compliance advice and articulated their policy in regard to compliance advice.

The United Kingdom Environmental Agency, for instance, publicly states that its aims include providing advice, stating 'we know we're getting it right when you tell us – our advice has helped you do the right thing for the environment'[47]. The United States EPA has developed a national policy on the provision of compliance advice for inspecting officers during site inspections[48]. The US policy was developed after extensive consultation and research, and ultimately confirmed that EPA inspectors should be encouraged to provide 'appropriate general,

42 Braithwaite J, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985).
43 Alford J and Speed R, 'Client Focus in Regulatory Agencies', *Public Management Review* 2006 at 31a3.
44 *Ombudsman Victoria Annual Report 2010*.
45 This is broadly consistent with the approach of 'responsive regulation' articulated by Ayres I and Braithwaite J in *Responsive Regulation: Transcending the Deregulation Debate* (1992), Cambridge Press. See also Maxwell C, *Occupational Heath and Safety Review* – March 2004, pp.262ff.
46 See Submissions 16 and 40.
47 *www.environment-agency.gov.uk/cy/busnes/rheoleiddio/31993.aspx*.
48 *Final National Policy: Role of the EPA Inspector in Providing Compliance Assistance During Inspections,* United States Environment Protection Agency, June 2003.

and limited site-specific, compliance assistance'. The policy provides useful examples that form the subject of training to inspectors and includes an instruction that compliance advice does not extend to site-specific interpretive technical assistance or interpretive legal assistance.

The most frequent interaction of businesses with the regulator is likely to occur during inspections or monitoring of compliance. It is legitimate to expect that officers of the regulator will be able to identify breaches of the law and explain why they are breaches and how they might be remedied. An important requirement is that the advice is accessible and practical[49].

The purpose of conducting compliance inspections is to determine compliance with laws and regulations and achieve compliance where breaches are detected. This necessarily involves the EPA officer identifying the standard against which the duty-holder will be judged, whether that is of general industry performance or best practice. It follows that the EPA officer should be able to clearly articulate to the duty-holder how it has fallen short and what outcome is expected in order for the matter to be remedied. It is incumbent on the regulator in areas of performance-based or outcome-based regulation to identify at least one feasible means by which compliance may be achieved. In rare instances where this cannot be identified, technical advice might be sought or the duty-holder could obtain their own independent advice. However, it should not be the default position, as is currently the case in EPA.

EPA officers should therefore be encouraged to provide appropriate general and limited site-specific compliance assistance. Assistance should occur where it is associated with enforcement actions or to provide an understanding of what other support EPA can provide, such as guidelines or best-practice measures. They should not provide legal advice or interpretation that is not supported by policies, and should not provide complex technical or engineering advice or guidance.

Compliance advice of this nature is very different from consulting, or the advice that a business would receive from a consultancy. It should be differentiated from site-specific technical advice, which requires specialist knowledge and may require engineering or scientific solutions and recommendations on specific issues.

A number of businesses made submissions to the inquiry undertaken by the Victorian Competition and Efficiency Commission advocating for compliance advice to be provided by EPA and its officers, complaining of inconsistency and a lack of technical expertise in areas under EPA's regulatory jurisdiction[50].

In its Final Report, the Commission concluded:

> The Commission considers that the provision of consistent, good quality advice is an important component of the regulatory function. It is therefore important that regulators have in place appropriate procedures and programs which support this aspect of their activity.

Many businesses expressed concern regarding perceived inconsistencies in compliance advice on what was required, for instance, to comply with a licence condition and the technical expertise of EPA to provide this[51].

49 EPA staff consultation – EPA head office.

50 *A Sustainable Future for Victoria: Getting Environmental Regulation Right*, Final Report, Victorian Competition and Efficiency Commission, July 2009, pp.225 ff. This was supported in consultations and submissions to this review. See Submission 18.

51 See Submission 15.

In response to the Commission's recommendation that EPA 'promote the consistency of its advice to business, review its training procedures, internal guidance material, information systems and other methods of internal communication'[52], EPA indicated that it was reforming internal processes to centralise decision making regarding licensing and works approvals, and was moving to a 'client-focused' structure. A considerable investment was also made in client relationship managers, who would assist business to navigate different parts of EPA in order to receive services they required.

Businesses were generally positive about the support provided by EPA client relationship managers to better navigate EPA and ensure a more responsive service. However, it appeared from many businesses consulted that there was insufficient attention to the foundation required for improved service – the knowledge and expertise[53], the training and manuals that the Victorian Competition and Efficiency Commission referred to in 2009.

BP Australia Pty Ltd in its submission[54] said:

> BP notes the recent introduction of 'relationship' managers that are intended to act as an interface between industry and EPA operations. This concept, while appealing on the face of it, does not deal with the essential problem. That, the quality of information and depth of understanding of individuals to complex issues is a limitation on the process of efficient outcome focussed engagement. EPA must invest more heavily in experts, both from a technical and policy point of view. BP would like to see focus shift from 'relationship' versus 'compliance and operations' to 'technical expert' versus 'policy/decision-maker.'

There also appeared to be little attention by EPA in educating businesses so that they could make direct approaches to EPA staff responsible for giving compliance advice without relying on someone to navigate EPA for them.

There is an opportunity in my view to use the skills of client relationship managers less in helping individual businesses navigate EPA and acting as a conduit for third-party communications and more in identifying the characteristics of industries and sectors and barriers to compliance, and supporting EPA to develop sector-specific strategies through drawing together expertise from across EPA.

On-site assistance by authorised officers is already common. Most staff possess scientific and engineering backgrounds – a number have auditing experience and many have extensive industry and subject-matter expertise. Legitimising this role would offer field personnel the opportunity to contribute their experience and knowledge to supporting duty-holders to implement changes that improve their performance, and improve environmental outcomes.

Such advice would consist of:

- identifying relevant laws, regulations and policies
- conveying requirements
- providing general information, guidance, manuals and other material produced by EPA or relevant industry bodies
- providing information on what support EPA can provide
- sharing information on risk control practices and equipment generally used to control emissions
- providing published technical information and advice on simple solutions
- outlining prevention techniques and opportunities, including those to reduce emissions.

52 *A Sustainable Future for Victoria: Getting Environmental Regulation Right*. Final Report. Victorian Competition and Efficiency Commission, July 2009. pp.225 ff.
53 Submission 13.
54 Submission 39.

Such advice would assist businesses to comply with the law or come back into compliance if they have fallen short. In order to protect and improve the environment, businesses that breach the law should not be precluded from receiving advice. There is a case to suggest that non-complying businesses may need advice more.

In order to ensure that accurate advice is provided and that it is documented in a transparent and accountable way, EPA officers should provide a record of their entry into premises, their observations, the outcome of their entry or inspection and a record of any advice provided.

There was considerable support for a report to be provided by EPA officers following entry into premises[55]. There was also support amongst EPA officers to provide a report, subject to having the equipment to issue the report on the spot, or a formalised procedure and template to complete the report upon their return to the office[56]. Hard-copy pads of proforma reports could also be considered.

A number of businesses and EPA spoke favourably of their interactions with WorkSafe inspectors, who were required to provide an 'entry report' at the conclusion of their inspections[57]. If applied to EPA, such a report would record observations regarding the risks of a licensed site or operator's operations. This would provide important intelligence for EPA in understanding the level of compliance across industries or geographic areas. It is a matter of fairness that a business inspected by an EPA officer should know at the conclusion of an inspection whether the business is considered to be in compliance or not.

Where there is enforcement action by EPA, such as a notice or direction issued under the EP Act which requires remedial action, the authorised officer should clearly outline:

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

By providing one practical way of achieving compliance there would still be flexibility for businesses to consider alternatives that suited their operations. The standard form of notices or directions should also make clear that the onus for compliance remains at all times with the recipient of the notice.

Such advice could also include how to go 'beyond compliance' with current legal requirements, although such advice is more likely to be provided by specialist units in EPA rather than authorised officers.

In areas of ambiguity or matters requiring interpretation, it would be unfair for a duty-holder to anticipate what constitutes compliance without some clarity and accountability on the part of EPA and/or its authorised officers to outline what constitutes compliance.

55 Plastics and Chemicals Industries Association roundtable, Ai Group, Waste Management Association, Legal Practitioners' roundtable. See also Submission 11.
56 EPA staff consultations – Pollution Response Unit, Enforcement Unit.
57 Plastics and Chemicals Industries Association roundtable. EPA staff consultation – Pollution Response Unit.

Authorised officers will require sufficient training and opportunities to advance their technical knowledge to achieve this role. There would need to be clear procedures and training to ensure that advice was provided and recorded in a consistent way. For industry-specific issues and technical advice that is beyond the authorised officer's expertise it would be appropriate to support officers with access to relevant internal subject-matter experts.

Neither EPA nor its authorised officers are currently expressly authorised to provide advice to people with obligations under the Act. This is a significant shortcoming. A critical feature of modern regulatory regimes is that the regulator and its field force should be empowered and prepared to give advice and provide guidance about complying with a duty to a person under the legislation administered by the regulator.[58]

In my view, it is not essential that the EP Act expressly provide EPA or its officers with the power to provide compliance advice. However, in the event of legislative change it would be appropriate to put the issue beyond doubt and to provide some legislative clarity as to the status of the advice.

For instance, section 18 of the *Occupational Health and Safety Act 2004* provides:

1. The Authority may give advice to a person who has a duty or obligation under this Act or the regulations about complying with that duty or obligation.
2. The giving of such advice by the Authority does not give rise to–
   a. any liability of, or other claim against, the Authority; or
   b any right, expectation, duty or obligation that would not otherwise be conferred or imposed on the person given the advice; or
   c. any defence that would not otherwise be available to that person.
3. The Authority's power under this section to give advice may also be exercised by an inspector or, if the Authority authorises any other person to exercise the power, that other person.

Note: An inspector or other person exercising this power may not be liable for things done or omitted to be done in good faith (see section 22(5) of the Accident Compensation Act 1985).

Such a provision would provide clear expectation for EPA officers to provide practical and constructive advice about how to comply with Victoria's environmental laws and how to remedy a breach or risk when one is detected.

The EP Act currently only provides an indemnity from liability of authorised officers for enforcement decisions in relation to urgent directions to clean up under section 62B of the EP Act. For the most part, other enforcement decisions are undertaken under delegation and constitute decisions of the Authority itself.

Compliance advice should not provide any additional rights or defences in relation to an alleged breach. However, where EPA or its officers have provided advice which was acted upon by a person, that advice should be taken into account in assessing the level of culpability, and determining what (if any) enforcement should take place[59].

58 See for instance discussion by Maxwell C (as he then was), *Occupational Health and Safety Act Review*, March 2004 and section 18, *Occupational Health and Safety Act 2004.*

59 Such a provision exists in WorkSafe Victoria's *Compliance and Enforcement Policy* and *Prosecution Guidelines.*

6.13 New initiatives – guidelines, community fact sheets and general publications

A number of recent initiatives by EPA provide positive examples of practical guidance to support compliance. Guidance accompanying EPA's licence reform and new approach to annual performance statements has been developed in consultation with industry and broadly communicated.

Significantly, a 90 per cent rate of submission of annual performance statements was received, notwithstanding this was the first time EPA had implemented the requirement.

I am advised that this level of compliance is much higher than the submission rates of annual licence returns prior to the introduction of the APS. Learning from this experience and documenting the successful process steps in the development of the guidance, and any improvements, would support future development of effective guidance.

Although not strictly guidance documents, the recent publication of community fact sheets is also a positive measure designed to educate and empower the community by clarifying the law, rights and responsibilities, and using language and formatting that is tailored to the intended audience.

7.0 A new model for compliance and enforcement

This chapter considers the significant concerns regarding EPA's approach to compliance and enforcement in terms of lack of consistency and predictability. Criticisms were made by the Ombudsman and Auditor-General of this approach. Numerous submissions and feedback in consultations indicated that EPA's approach was not sufficiently clear, had in the past been too reactive and lacked strategic purpose. Much of EPA's enforcement activity was considered to be overly focused on known licensed premises. It includes a recommendation for a number of models for targeting of EPA's compliance and enforcement activity.

7.1 Background

Most regulatory regimes provide for broad discretion in how they address the harm which they are established to prevent or manage. This discretion generally extends to how the regulator prioritises its focus and where it allocates or targets its resources. At the level of regulated entities the discretion extends to the way in which enforcement decisions are made and the actions taken when non-compliance is detected.

A regulatory model seeks to explain the approach a regulator will take to implementing and enforcing the legislation it administers[1]. The regulatory model should explain:

how the regulator will prioritise its compliance and enforcement activity and allocate resources

the strategies it will apply when dealing with regulated entities[2].

Regulatory models are generally made clear by material published by the regulator to explain its approach or a published compliance and enforcement policy.

Since the 1990s, many regulators have adopted a risk-based approach (risk-based regulation), where resources are applied to areas where they can make the biggest difference and manage the biggest risks to health, safety or welfare. Such regulation is also referred to as preventative or protective regulation. Risk-based enforcement acknowledges that random inspections and enforcement that is not evidence-based is inefficient and unlikely to be effective[3]. In 2009, the Victorian Competition and Efficiency Commission (VCEC) suggested that 74 per cent of Victoria's 59 regulators adopted a risk-based approach[4]. Gunningham suggests there is 'something approaching consensus'[5] that risk-based models are the most effective. The approach has also been endorsed

1 There are alternatives to explicit government regulation, including self-regulation (based on voluntary standards and codes) and co-regulation (involving government enabling the development of a self-regulatory model that is not supported by government enforcement) as the EP Act clearly sets up a regulatory regime based on the criminal law that is enforceable.[Ed: implies there are no alternatives?]

2 Report to EPA by Neil Gunningham: *Comparison of regulatory models currently being used by regulators.*

3 Freiberg A, *The Tools of Regulation,* 2010.

4 Victorian Competition and Efficiency Commission Report – The Victorian Regulatory System. 2009. Such an approach to social harms is also generally supported by Victorian Guide to Regulation, Department of Treasury and Finance – 2007.

5 Gunningham N, Report to EPA – *Comparison of Regulatory models currently being used by regulators,* 2010.

in the United Kingdom as a foundation model that applies to all forms of regulation since the Hampton Review[6] and has been templated in the Statutory Code of Practice for Regulators[7]. The UK Environmental Agency is considered an exemplar in risk-based regulation with the transparent disclosure of its risk-based targeting, licensing and inspection approaches through the Operator Pollution and Risk Appraisal system (OPRA)[8].

A risk-based regulatory approach involves proportionate allocation of resources and targeted activity to 'the highest environmental risks and the poorest-performing businesses'[9]. Risk-based approaches can also extend to the response taken to particular incidents or breaches, which can escalate depending on the risk or actual consequence. The most serious consequences are directed at deliberate acts and offences.

In addition, a risk-based approach can provide an objective rationale to be applied to other aspects of regulatory activity, including where support and guidance should be directed. Risk should also be notionally considered as a basis for ensuring that proportionate resources and the best qualified staff are directed at the biggest problems.

Some regulators apply a responsive approach, in which they try to understand the pressures and drivers for whether a business will comply or not and use methods or enforcement measures that are tailored to the entity. These measures increase in severity, depending on the business's compliance history (responsive regulation). To be effective, a responsive approach requires a good understanding of the business or entity to calculate how best to influence it.

Another approach adopted by regulators focuses on the entity demonstrating its capacity to comply and operate safely through the implementation of an effective environmental management system. Where a business is able to demonstrate it has systems which operate at a higher level than current compliance requires, regulators take a less intensive inspection of individual hazards and risk control measures and focus on higher level auditing of the effectiveness of systems. Often these approaches reduce the number of transactional inspections and interactions with the regulator as a dispensation for this higher level of compliance assurance. This approach is most often referred to as meta-regulation; it is also known as a 'two-track' approach.

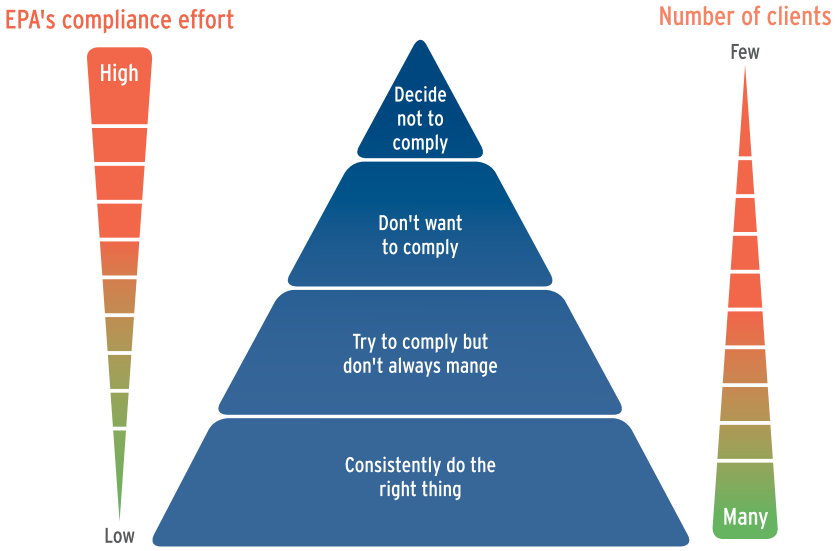
EPA currently uses a number of these approaches. The current regulatory model is expressed in the existing *Enforcement policy* (EPA publication 384), last revised in 2006, and the 'Compliance Framework' adopted in 2009. The approach articulated in the policy is difficult to categorise as either risk-based or responsive.

The Compliance Framework (shown in Figure 7.1 below) focuses on known, regulated entities, such as those required to have an EPA licence, and determines the approach EPA takes in relation to an entity by assessing its attitude and ability to comply. It implies that EPA will use regulatory approaches to address the risks identified. In doing so, the framework is based on the assumption that most companies want to comply and can be supported to do so and only in some cases is enforcement needed. It is based on the compliance model used by the Australian Taxation Office that targets taxpayers according to their motivations and responsiveness to positive motivators and deterrents[10].

6 *Reducing Administrative Burdens: Effective Inspection and Enforcement,* Hampton P, March 2005. See also *Striking the Right Balance.*
7 Better Regulation Executive 2007. See also *Striking the Right Balance – Better Regulation Executive Annual Review 2009.*
8 Neil Gunningham report to EPA Environment, *Compliance and Pollution Response Review,* May 2010.
9 *Environment Agency UK* website *www.environment-agency.gov.uk.*
10 Australian Taxation Office Compliance Program 2009–10.

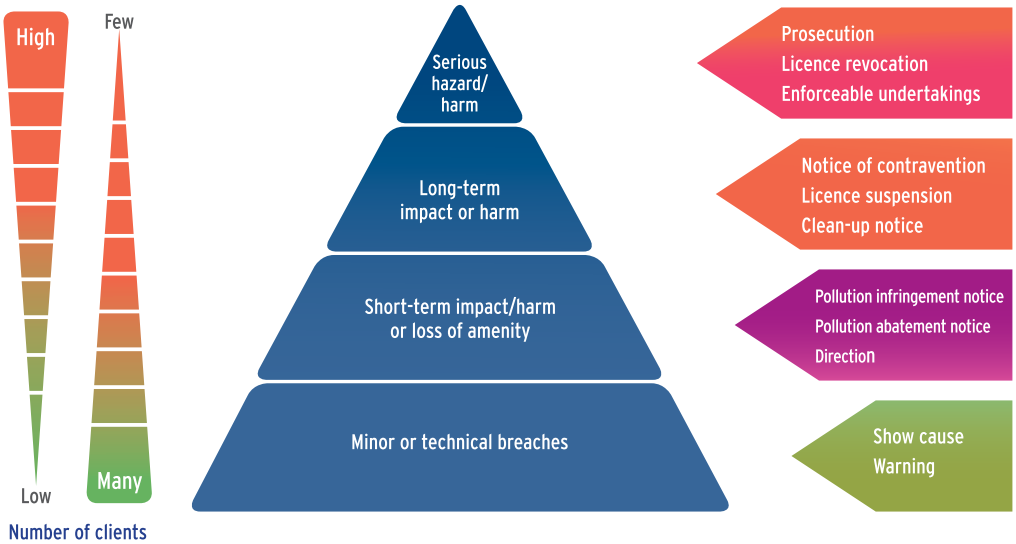
The Compliance Framework is more clearly a responsive model that takes into account the attributes of the regulated entity as a basis for allocating enforcement effort. The framework implies a risk-based regulatory approach, where compliance and enforcement activities are based on assessment of the likelihood of non-compliance with environmental laws – and thus by inference the degree of environmental risk posed by the regulated entity. The model does not expressly refer to environmental risk or harm (see Figure 7.1).

Figure 7.1: EPA's current approach to compliance – Compliance Framework



To enable a discussion regarding a risk-based approach, the review discussion paper outlined an alternative model that would be purely risk-based. That model is shown below. I also included an indicative hierarchy of enforcement tools currently in use by EPA to indicate an escalating regulatory intervention that would correspond with the level of environmental risk (including consequence) posed by a breach or incident.

Figure 7.2: A risk-based enforcement model



7.2 Discussion

The compliance framework used by EPA is essentially an attitudinal model that attempts to categorise entities according to the risk of non-compliance and links enforcement activity to this risk. It identifies willingness of a regulated entity to comply as a key factor to take into account in targeting. The model was broadly supported in consultations as being logical and consistent with experiences of business behaviour. Taking into account attitudes to compliance, previous history, willingness to comply and do the right thing, and the risk of non-compliance was seen as relevant and valid. There was scepticism in business consultations, however, that the model was actually being applied by EPA[11]. These were matched by similar concerns in the community forums[12]. A number of businesses felt that EPA had not applied the model and had undertaken enforcement action and prosecutions against businesses who 'consistently do the right thing'[13].

Amongst those who critiqued the model during the consultations, the most common concern was that it did not refer overtly to environmental risks. Secondly, there was doubt how these factors could be objectively measured by EPA and its officers[14]. EPA staff for the most part were supportive of the model. It was generally well understood and conceptually matched their experiences with businesses. Many EPA staff commented that it helped them categorise businesses and their approach to them. They felt it was particularly useful when the categorisation was transparently communicated to the business to explain EPA's approach to the business.

EPA staff had criticisms similar to those of other stakeholders regarding the absence of overt reference to environmental risks[15]. Another concern was that the model was strained when there was little known about a business and where objective data were not available[16]. There were also concerns that the model appeared to assume knowledge of the law and current standards and that this assumption was wrong[17], as their experience was of widespread non-compliance and ignorance of current standards. Finally, it was suggested that the model was not helpful in targeting support and guidance but focused entirely on enforcement effort.

The risk-based approach was also broadly supported across the three stakeholder groups. Many of those consulted who critiqued the compliance framework did so on the basis of the lack of overt reference to environmental risk. Accordingly, they supported a model which was focused expressly on risk of harm to the environment. The model was felt by some to more clearly show that catastrophic risks should attract enforcement, to create specific and general deterrence regardless of attitude and willingness[18].

Businesses supported a risk-based approach as it complemented the way they managed their own risks[19]. There was support for EPA to be more explicit and produce guidance as to how it considers risk[20] and that the approach should encourage EPA to take a more evidence-based approach similar to that taken by the UK Environment Agency. There was broad support from community consultations for the inclusion and prioritisation of risks to human health as relevant environmental risks.

11 Ai Group workshop
12 Community open house - Wodonga, Dandenong, Ballarat.
13 Ai Group workshop, Waste Management Association workshop, Victorian Water Industry Association.
14 Community open house - Mildura, Moonee Ponds, Bulleen, Dandenong.
15 EPA staff consultations - head office, Wangaratta, Dandenong.
16 EPA staff consultations Traralgon, Wangaratta.
17 Community open house - Geelong, Bulleen.
18 Community open house - Bendigo.
19 Community open house - Bendigo. AiGroup WorkShop, PACIA. Legal Practitioners' roundtable.
20 Plastics and Chemical Industries Association. EPA staff consultation Centre for Environmental Sciences. It was suggested that clearer links to Australian standards on risk assessment be considered.

Some businesses cautioned that the hierarchy was too simplistic, and focused too heavily on acute incidents as opposed to cumulative risks, including those from diffuse sources[21]. This concern was also raised at community forums[22]. Criticisms of this model included strong opposition to the relatively low ranking of amenity. This point attracted significant discussion at consultations with business, community and EPA staff. It was clear that the term 'amenity' was perceived to belittle exposure to emissions, noise, odour and dust that for many were considered to have serious health effects[23].

The reasoning underlying the inclusion of amenity in the risk-based model was, firstly, to identify it is as an important issue warranting specific mention and, secondly, to seek feedback on the correct placement of amenity in a hierarchy of risks, given that it largely does not impact permanently on the physical environment. I also considered whether amenity required its own hierarchy, as impacts on amenity cover a broad spectrum of consequences on residents and beneficial uses.

Adopting a risk-based model would require support for EPA staff and regulated entities to understand risk, how it is ranked and how it is applied to EPA decision making[24].

There was broad support for a regulatory approach which would take into account the factors articulated in both the compliance framework and risk based-model[25].

7.3 The role of human health, wellbeing and welfare

While there was support for the model prioritising risks to human health, some stakeholders felt that health should be more overtly referred to[26]. Many of the discussions at community meetings focused on the role of EPA in relation to health and a concern that this had been neglected. The most disturbing examples of poor handling of complaints and response to pollution reports in these forums involved residents whose physical and psychological health had been impacted by pollution. In some cases these health effects were exacerbated by what was considered a dismissive response from EPA or an inability of EPA to prevent ongoing noise, odour or other emissions.

Some concerns expressed by businesses cautioned that a move to position EPA more overtly in relation to human health would require clarity in relation to the interface with the Department of Health. Similarly, while most EPA staff supported overt references to human health in the regulatory model and clear prioritisation of human health in EPA's work, there were concerns regarding the level of internal expertise to assess and gather evidence regarding impacts on health[27].

I consider it necessary for EPA to articulate its policy position regarding the role of human health in the regulatory framework. I have stated above that EPA offices relied on a number of risk matrices and informal decision-making tools to prioritise their work and, in particular, their enforcement response. There were generally inconsistencies in relation to the treatment of certain risks and impacts between offices and EPA staff. There was particular inconsistency in the treatment of risks to human health and its relative importance.

21 Ai Group workshop.
22 For instance community open house – Altona.
23 Community open house – Dandenong, Bulleen, Moonee Ponds and Geelong.
24 EPA staff consultations – head office.
25 Community open house – Portland, Warrnambool.
26 For instance submission 14 advocated that human health was inextricably linked to the environment.
27 EPA staff consultations – head office, Centre for Environmental Science.

It is clear that the environment includes human beings and that beneficial uses of the environment by human beings are clearly contemplated and to be protected by the EP Act and EPA[28]. The concept of protecting beneficial uses of the environment is an integral part of the EP legislative and policy framework. The Act also links pollution offences to loss of beneficial uses[29]. The principles of environmental protection to which regard must be had in administering the Act include principles that unequivocally create a role for EPA in protecting public health. The principle of intergenerational equity provides:

The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations[30].

The principle of integration of economic, social and environmental consideration provides:

1. Sound environmental practices and procedures should be adopted as a basis for ecologically sustainable development for the benefit of all human beings and the environment.
2. This requires the effective integration of economic, social and environmental considerations in decision making processes with the need to improve community well-being and the benefit of future generations.
3. The measures adopted should be cost-effective and in proportion to the significance of the environmental problems being addressed[31].

The fact that responsibility for protecting public health is shared with other agencies, including the Department of Health and local councils, in my view only highlights the importance of this role and the challenges of effectively protecting health and welfare.

There was uncertainty in my consultations with EPA staff as to the relative importance and priority of human health in EPA's activity. There was also a concern that highlighting harm to human health as a priority above other environmental harms created an unnecessary dichotomy that suggests the need to trade this off. I do not consider there to be a disconnect between human health and environment, and believe that any tensions can be resolved through sound decision-making principles, guidance to EPA staff and good judgement. The lack of certainty regarding EPA's role in relation to health (including some impacts from noise, odour and dust) in my view requires a clear articulation of policy.

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.

28 Section 4, *Environment Protection Act 1970*.
29 Section 39 (Pollution of Waters), section 41 (Pollution of Atmosphere), *Environment Protection Act 1970*.
30 Section 1D, *Environment Protection Act 1970*.
31 Section 1D, *Environment Protection Act 1970*. The principles are consistent with the theory of 'ecosystems services' which states that humans benefit from a multitude of resources and processes that are supplied by natural ecosystems. Collectively, these benefits are known as ecosystem services and include products like clean drinking water and processes such as the decomposition of wastes. Protecting ecosystem services is critical to protecting public health. (See 'Ecosystem services – Joined up thinking in an interdependent world', *Environmental Scientist*, July 2009, p.15).

7.4 How do we define risk?

In order to effectively define risk I reviewed a number of risk hierarchies currently in use within EPA and, in particular, EPA's corporate risk management framework. It is generally accepted that risk is a function of both consequence and likelihood. A risk is defined by the Australia/New Zealand *Standard for Risk Management* (AS/NZS 4360:2004) as:

> ...the possibility of something happening that impacts on your objectives. It is the chance to either make a gain or a loss. It is measured in terms of likelihood and consequence.

The EP Act was at its inception among the first Acts in the world to deal with the whole of the environment in a systematic and integrated way. The EP Act focuses on prevention of environmental impacts and improving outcomes, focusing primarily on preventing pollution and environmental harm. The EP Act sets environmental quality objectives and provides a framework to establish programs to meet these objectives.

To help achieve these aims, the principles of environment protection provide guidance to EPA and its officers in decision making.[32] The principles parallel those included in the National Strategy on Ecologically Sustainable Development and the Intergovernmental Agreement on the Environment (IGAE)[33].

The EP Act embodies concepts of risk (and risk management) by defining 'environmental hazard' for instance as:

> a state of danger to human beings or the environment whether imminent or otherwise resulting from the location, storage or handling of any substance having toxic, corrosive, flammable, explosive, infectious or otherwise dangerous characteristics[34].

The system of environmental audits provided for in the Act since 2001 applies to planning, approving, regulating, managing or conducting of certain activities requiring an 'assessment of the nature and extent of any harm or detriment caused to, or the risk of any possible harm or detriment which may be caused to, any beneficial use made of any segment of the environment'[35].

The Act is clearly preventative, which requires the proactive identification, management and control of risks.

7.5 Precautionary principle

In 1992, the Australian Commonwealth government, the state and territory governments and the Australian Local Government Association agreed to the Intergovernmental Agreement on the Environment (IGAE). The IGAE is a broad, in-principle agreement about the division of responsibilities between the three levels of government. The IGAE specifies that the precautionary principle should inform Australian government decision-making processes. This formulation is similar to the Rio Declaration Principle 15, except that it replaces 'cost-effective' with 'practicable':

> Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation[36].

32 www.epa.vic.gov.au/about_us/legislation/epa.asp
33 Council of Australian Governments, 1992.
34 Section 4, *Environment Protection Act 1970*.
35 Section 4, *Environment Protection Act 1970*.
36 Section 3.5, Intergovernmental Agreement on the Environment.

The principle is adopted verbatim in the EP Act[37]. In the application of the precautionary principle, public and private decisions should be guided by:

- careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment
- an assessment of the risk-weighted consequences of various options.

Although the term 'measures' is not defined, it has generally been accepted to include actions by regulators such as the use of statutory powers to refuse environmental approval of proposed developments or activities[38].

Despite the IGAE and its intention to apply broadly to decision making that impacts on the environment, the precautionary principle has not yet been adequately incorporated into state and Commonwealth legislation. A number of Victorian environmental and land use Acts do not refer to the principle, and many that do, do not incorporate it fully.

The precautionary principle in the context of environmental protection is essentially about the management of environmental risk. It is a fundamental component of the concept of ecologically sustainable development[39] and provides a sound basis for a risk-based approach to regulation, compliance and enforcement. The *Environment Protection and Biodiversity Conservation Act 1999* (Cwth) also adopts the precautionary principle. For instance, s391 of the Act requires the Minister to take account of the precautionary principle when making a wide range of decisions.

7.6 Overview of EPA's current risk management

Unfortunately, while the EP Act implies the principle of risk management, it does not categorise environmental risks and does not establish a hierarchy of environmental risk or consequences.

In the discussion paper, I proposed a five-tier ranking that would allow for discussion regarding the definitions and to test its usefulness. EPA staff felt that the use of a pyramid in the discussion paper to describe a hierarchy of risks was not as helpful as a matrix that plotted consequence against likelihood, consistent with the Australian Standard[40].

The Environment Protection Act (South Australia) differentiates levels of consequence in the statute itself as follows:

1. environmental nuisance
2. environmental harm
3. material environmental harm
4. serious environmental harm[41].

37 Section 1C, *Environment Protection Act 1970.*
38 Cole D (2005), *The precautionary principle – its origin and role in environmental law*. Adelaide, South Australia, Masters of Environmental Studies.
39 www.envirolaw.org.au/articles/precautionary_principle.
40 EPA staff consultation – Bendigo, head office, Centre for Environmental Sciences.
41 *Environment Protection Act 1993* (SA).

The levels are defined as follows:

'environmental nuisance' means -

(a) any adverse effect on an amenity value of an area that–

(i) is caused by pollution; and

(ii) unreasonably interferes with or is likely to interfere unreasonably with the enjoyment of the area by persons occupying a place within, or lawfully resorting to, the area; or

(b) any unsightly or offensive condition caused by pollution[42];

For the purposes of this Act, 'environmental harm' is any harm, or potential harm, to the environment (of whatever degree or duration) and includes–

(a) an environmental nuisance; and

(b) anything declared by regulation (after consultation under section 5A) or by an environment protection policy to be environmental harm[43].

It is significant that environmental harm includes 'potential harm' and 'risk of harm and future harm'.

Material environmental harm is defined as involving:

(i) environmental nuisance of a high impact or on a wide scale; or

(ii) actual or potential harm to the health or safety of human beings that is not trivial, or other actual or potential environmental harm (not being merely an environmental nuisance) that is not trivial; or

(iii) actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding $5,000;

Serious environmental harm involves:

(i) actual or potential harm to the health or safety of human beings that is of a high impact or on a wide scale, or other actual or potential environmental harm (not being merely an environmental nuisance) that is of a high impact or on a wide scale; or

(ii) actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding $50,000.

This hierarchy informs notification requirements, for instance, and is also a basis for differentiating penalties for offences that result in the varying degrees of harm. It is a transparent and helpful framework for decision making. EPA South Australia has produced a risk matrix based on the legislative definitions and supporting guidance to assist EPA staff in decision making[44]. The guidance is published externally to show transparency and assist businesses in managing their own environmental and compliance risks[45]. General publication of the regulator's approach to risk was broadly supported in consultations and is an approach I support.

EPA has established a corporate risk management framework and risk policy which is published internally. The framework applies to the management of EPA risks and is used as a management tool which informs, amongst other things, EPA's internal audit program. The framework was based on the International Standard for Risk Management (ISO 31000:2009)[46] and warrants consideration as a tool for risk-based regulatory decisions. Unfortunately, it was not designed as a tool to be used in risk prioritisation of environmental risks outside EPA and is therefore of limited use in informing EPA's regulatory role.

42 Section 3, *Environment Protection Act 1993* (SA).
43 Section 5, *Environment Protection Act 1993* (SA).
44 The hierarchy adds the category of 'minor consequence', which is not included in the Act.
45 www.epa.sa.gov.au/xstd_files/Licensing/Guideline/regulation.pdf.
46 Also referred to as AS/NZS 31000:2009, effectively replacing AS 4360.

EPA staff have also developed context-specific risk rankings and hierarchies to enable triage and decision making regarding various activities, including management of contaminated land, pollution response and compliance monitoring[47].

EPA also uses a risk ranking for escalation of issues requiring senior management attention – RON (RON stands for 'reporting, ownership and notification'). While using a five-tier scale, the terminology and definitions of risk categories in RON do not reflect the EPA corporate framework.

The existing frameworks which were identified were not broadly known or understood by EPA staff and not applied consistently across regions and EPA's head office. All the frameworks viewed attempted to categorise levels of environmental risk and to define these according to subject matter. However, there was substantial variation between them. Where a regional office had developed its own risk hierarchy[48], there were discussions regarding templating this across other regional offices but a position had not yet been finalised. There was broad support for a uniform ranking of risk that would apply across EPA to all subject matter, which would only be varied where necessary.

Hierarchies used to triage responses to pollution, for instance, included considerations such as number of calls, level of community concern and extent of risk. Invariably, the hierarchies included considerations of reputational and political risk, which in my view are irrelevant considerations to regulatory responses. They are also a poor substitute for evidence-based decision making. This is not surprising – EPA's *Corporate and business plan 2009–12* identified 'enhance our reputation' as one of five key objectives[49]. As a result of including reputational and political risk in these hierarchies as relevant decision-making criteria, the importance of reputational and political risk were overemphasised by field staff.

7.7 Discussion

There were strong views amongst EPA staff that, in the absence of a uniform organisational position, prioritisation often occurred according to personal value judgements or preferences[50]. Even if such criteria were considered appropriate, the lack of consistent definition and education of field staff on these criteria would result in subjectivity leading to inconsistency in decision making.

The overemphasis on reputational risk and public or media interest in EPA response and other decision making was a frequent concern raised by both businesses[51] and community[52], although it was conceded that public concern was a legitimate criterion in decision making. EPA's sensitivity to political and reputational risk was often referred to in the context of inconsistency and a lack of confidence by EPA to be decisive.

There was broad support for EPA to be more explicit about its definition and perception of environmental risk and how it would use risk in its targeting and other regulatory decision making[53].

47 Environmental regulation using a risk-based approach – A guide for EPA staff.
48 For example, North East office (Wangaratta).
49 EPA *Corporate and business plan 2009–12*, p.3.
50 EPA staff consultations – head office, Bendigo.
51 Ai Group workshop, Plastics and Chemicals Industries Association, Victorian Water Industry Association, Victorian Waste Management Association.
52 For instance, community open house – Bulleen.
53 For instance, Ai Group workshop, Plastics and Chemicals Industries Association, Victorian Water Industry Association.

The International Standard for Risk Management (ISO 31000:2009) defines risk management as 'coordinated activities to direct and control an organisation with regard to risk'[54].The risk management process involves identifying, analysing and evaluating risks, leading to treatment.

The framework established by the standard recommends five consequence tiers:

1. Low
2. Minor
3. Moderate
4. Major
5. Severe.

Environment management systems tailor consequence descriptors to environmental harms in each of the five tiers.

A series of internal and external risk consequence hierarchies were considered to prepare a hierarchy which would be applicable to EPA's regulatory activity and have broad application across subject matters. Ultimately I have recommended a hierarchy that is intended to be straightforward and support consistent assessments of risks for EPA decision making.

The hierarchy I propose is shown in the table below.

Table 7.1: Proposed descriptions of categories of harm

Risk category	Risk subheading	Description
Level 1	Low	No or minimal environmental or amenity impact, or no health impacts.
Level 2	Minor	Transient environmental impact or transient amenity impact on few. Low potential for health impact or low public concern.
Level 3	Moderate	Medium level or term of actual or potential harm to health, safety, welfare or the environment. Localised and short-term amenity impact on many or moderate public concern.
Level 4	Major	Actual or imminent serious environment harm, or actual high-level harm or potential harm to health, safety or welfare. Medium to long-term or wide-scale amenity impact, or high public concern.
Level 5	Severe	Permanent or long-term serious environmental harm, or actual or potential life threatening or long-term harm to health, safety and welfare. Long-term and wide-scale amenity impact with the potential to impact on health or high level of public concern.

For the purposes of administrative obligations under the EP Act, the hierarchy has been adapted and is shown in Table 7.2. This is because these obligations generally do not result in environmental harm.

54 Clause 2.2.

Table 7.2: Proposed descriptions of categories of administrative non-compliance

Risk category	Risk subheading	Description
Level 1	Nill	*Nill*
Level 2	Minor	Minor non-compliance of administrative requirements with no material impact. *E.g. Inadvertently providing wrong information, minor omission or lateness*
Level 3	Moderate	Moderate non-compliance of administrative requirements with minor material impact. *E.g. Several administrative non-compliances, careless or negligent records or information, failure to have required permit. Low level underpayment or discrepancies.*
Level 4	Major	Major administrative non-compliance that undermines the legislative scheme, avoids liability or conceals information. *E.g. Failure, delay or hindrance in reporting or providing information, avoidance of levies.*
Level 5	Severe	Administrative non-compliance that severely undermines the legislative scheme avoids liability or conceals information. *E.g. Providing false or misleading information, avoidance of licence or licence fees. Severe impact on scheme or market integrity.*

To assist the understanding of the frameworks, definitions of key terms are provided in Appendix 7.1.

7.8 A new regulatory model

There is unfortunately a lack of evidence as to the effectiveness of regulatory models in improving the environment. Reviewing environmental agencies in Australia, the USA, United Kingdom and Europe, there is a clear preference for risk-based models.

The compliance framework is based on normative patterns of behaviour that suggest businesses and people who are required to comply may be separated into three groups:

- those who will not comply unless forced
- those who will always comply
- those who are 'impressionable'.

Deterrence plays a significant part in influencing behaviours of 'impressionable' entities.

There are other theories as to why entities comply, including 'rationalist theory' that suggests some entities take the risk of compliance by gaming that they are unlikely to be caught or, if they are caught, that the consequences are an insufficient deterrent. Deterrence through enforcement can remove financial advantage for non-compliance and ensures everyone is held to the same standard. But in order for this method to work, enforcement actions must be:

- fair, swift and certain
- appropriate to the circumstances
- broadly understood.

The International Network for Environmental Compliance and Enforcement describes 12 reasons for non-compliance adopted by the Netherlands Ministry of Housing, Spatial Planning and the Environment which are of broad application[55]. They separated into those reasons attributable to the regulated entity, reasons attributable to the level of monitoring and those that are attributable to sanctions. They include:

Attributes of the regulated entity:

- Knowledge of the regulations
- Cost/benefit equations
- The degree of acceptance of laws
- Loyalty and obedience of the regulated community
- Informal monitoring including internal systems and culture.

Aspects of monitoring:

- Likelihood of reporting by other entities
- The likelihood of inspection
- The likelihood that a breach will be detected
- The nature of the inspector.

Aspects of sanctions:

- The likelihood of sanctions
- The severity of sanctions
- Political, legislative, economic and social pressures.

Any regulatory model must therefore seek to address these different drivers for compliance. The preferred model is one that would provide a balance between positive motivators and incentives for compliance, and effective deterrents for those that break the law.

In the first stage review undertaken by EPA staff, EPA commissioned regulatory academics Professor Neil Gunningham of the Australian National University and Christine Parker of Melbourne University to undertake a 'best-practice' review of current regulatory models employed by environmental regulators in Australia and overseas.

In undertaking this review Gunningham and Parker reviewed nine different enforcement styles in terms of effectiveness, efficiency, legitimacy and practicality, and found that no single approach unequivocally represents 'internationally accepted good practice' or best satisfies these criteria in all circumstances.

55 International Network for Environmental Compliance and Enforcement – *Principles of Environmental Compliance and Enforcement Handbook,* April 2009.

Gunningham and Parker advised that three enforcement styles come closest to 'good practice' and arguably approximate 'internationally accepted practice': risk-based regulation; responsive regulation; and (in relation to major hazard facilities) meta-regulation[56].

In reviewing EPA's existing *Enforcement policy* and compliance framework, Gunningham and Parker found that the underlying principles and approach to enforcement appeared to be primarily ones of risk-based regulation but that this was not necessarily coherent.

In addition to the environmental risk posed by a site or regulated entity, I consider that the regulated entity and its likelihood of damaging the environment are also critical components, particularly where licensing provides an avenue by which EPA has access to significant intelligence regarding risks, controls and the drivers of compliance in particular entities. A responsive approach would take into account these drivers to tailor regulatory approaches.

Having considered the research and feedback received during the review, I consider that a model that includes features of both a risk-based and responsive approach to regulating the environment would be generally supported and consistent with effective contemporary environmental regulatory schemes. I have therefore proposed a hybrid of a risk-based and responsive model[57].

The models I propose below take into account both the level of risk that is posed by a business or activity (where risk is a factor of likelihood and consequence) and the risk of non-compliance given the systems, capability, resourcing and past performance. They are intended to inform targeting and allocation of resources and how EPA should respond to instances of non-compliances and differences between regulated entities.

7.9 A segmented model

The breadth of EPA's jurisdiction and the nature of environmental risks means that EPA simultaneously regulates corporate businesses, small businesses and individuals. The drivers and barriers to compliance for each of these cohorts vary significantly. Moreover, EPA has had many interactions over a period of years with some premises that are licensed and has significantly more data on performance and likelihood of non-compliance than it does for unknown businesses. Gunningham and Parker considered that different duty-holders confronted different external pressures, and have different skills, capabilities and motivations. Therefore, best practice in design of a regulatory model may mean different things in different circumstances. They described four different groups that EPA regulates, with different capabilities and motivations, and stated that the best approach might require a different enforcement strategy for each group.

In the discussion paper, I defined four groups of regulated entities with corresponding strategies:

- Businesses that are motivated to innovate, go beyond minimum standards and continually improve environmental performance. Businesses in this group might have licences and other obligations with EPA, but their activities go beyond current legal requirements and should be treated differently by EPA. They are likely to be sensitive about their 'good' reputation.
- Large, sophisticated organisations with self-interest in good environmental performance. These organisations generally require a licence due to their size. They may be motivated to go beyond minimum standards with the right advice, persuasion or incentives implemented by EPA. Such businesses are usually able to comply as long as the standard or outcome expected by EPA is clear.

56 Gunningham N, Parker C, *Environment, Compliance and Pollution Response Review – Environment Law and Regulation*, May 2010
57 Such a model is employed by British Columbia – Ministry of Environment Compliance and Enforcement Policy and Procedure, May 2009.

Such businesses do not generally require EPA to specify the way by which the standard or outcome should be met and prefer flexibility.

- Firms or individuals with the potential to cause major environmental harm. These firms will have varying degrees of capability to comply.
- Non-licensed and lower-risk premises: Typically these are small and medium sized enterprises and individuals. They generally don't have regular contact with EPA, so little is known about their compliance history, attitude or capability. An approach that relies on an assessment of attitudes and ability to comply may not be appropriate. They are more likely to contribute to diffuse pollution through the cumulative impact of low-level risks to environment. They are likely to have low awareness and require support.

EPA also has regulatory jurisdiction and enforcement powers over low-level individual offending, including littering and noisy or smoky vehicles. These non-compliances should be dealt with according to the different characteristics of individuals.

In my view, different approaches are therefore justified in relation to these groups to take account of the risks they pose and their characteristics. The approach taken to each cohort would include considering what is likely to be most effective in achieving compliance.

7.10 Licensed premises

The nature of licensing and the level of interaction between EPA and licensed businesses means that EPA has knowledge and intelligence regarding the level of inherent risks posed by a business or facility and is able to ascertain the level of controls that exist to manage these risks.

Data gathered from community reports, licensing and works approval submissions and previous interventions can be analysed to ensure an evidence-based assessment of risks. Inspection and compliance monitoring can be used to consider systems and processes that exist within the operations of the business. More recently, EPA has developed a system for self-reporting by businesses using the annual performance statement (APS). This data enables a profile of all licensed premises to be built and added to over time. It should enable EPA to be transparent with businesses and community as to how it views risks, the relative risks of individual businesses and how it targets its resources.

In relation to these premises I propose a model that targets inspections and monitoring activity according to the risks posed. The strategy takes into account both the risk of harm to health and environment and the likelihood of non-compliance.

The model ranks the risk of harm to health and environment, divided in five categories of severity:

Level 1: Low

Level 2: Minor

Level 3: Moderate

Level 4: Major

Level 5: Severe.

Each level of risk is defined in the hierarchies described in Tables 7.1 and 7.2.

The likelihood of non-compliance takes into account criteria that are more objective than those implied by the compliance framework. The criteria to be taken into account are:

- the track record of the business, including previous incidents, previous EPA inspections and enforcement, notifications and pollution reports
- the systems in place, including any environmental management systems
- capability, including the operations of the business, process safety, training and procedures available to staff
- the level of resourcing, including for environmental management and compliance, as well as for operations and maintenance.

The likelihood of non-compliance is also ranked according to five levels:

Level 1: Low

Level 2: Unlikely

Level 3: Possible

Level 4: Likely

Level 5: Certain.

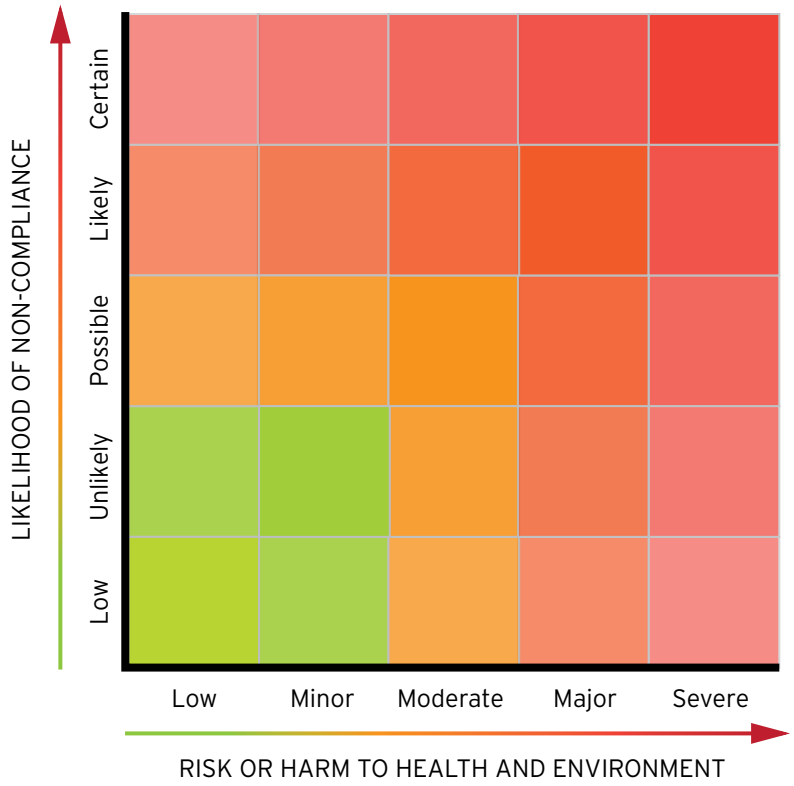
Table 7.3: Proposed descriptions for categories of likelihood of non-compliance

Likelihood category	Risk subheading	Description
I	Low	No previous occurrence of non-compliance. Good demonstrated awareness of and/or capacity to meet regulatory requirements and identify, eliminate or control environmental risks. Cooperative.
II	Unlikely	Fair record with previous isolated occurrences of non-compliance. Questionable awareness of and/or capacity to meet regulatory requirements and identify and control environmental risks.
III	Possible	Numerous previous occurrences of non-compliance. May not make adequate effort to comply. Little or no awareness of and/or capacity to meet regulatory requirements and identify or control environmental risks.
IV	Likely	Wilful non-compliance. Little or no demonstrated assurance and/or capacity to meet regulatory requirements. No attempts to identify or control environmental risks.
V	Certain	Repeated unlawful behaviour and more than likely not to make an effort to comply. Refusing to comply, furnish required information or intentionally including false or misleading information.

It will in some circumstances be difficult to clearly categorise a business or risk into one category, as there will be some overlap. However, the model and definitions are intended to use objective elements that can be considered in the targeting of inspection activity and other regulatory resources to those areas with the potential to cause the biggest harm. The model is also intended to be externally promoted to enable transparent discussions between a regulated business and EPA as to the level of attention it is likely to receive.

Diagrammatically the model is shown as a matrix.

Figure 7.3: EPA's approach to targeted enforcement



This approach would prioritise inspections and enforcement activity by directing these to businesses according to the risk they pose to the environment. This would be combined with a responsive regulatory approach for any incidents or breaches detected (outlined below), where EPA would use increasingly firmer action if a firm/individual continued to break the law. Such businesses would be visited more frequently by EPA, with EPA using advice as well as enforcement when required to achieve compliance.

7.11 Non-licensed premises

There are many smaller and medium-sized businesses that may not pose a substantial individual risk to the environment but which, when accumulated across a sector, industry or geographical area, have the potential to cause significant and widespread harm to the environment.

Businesses that operate premises that are not scheduled often need more education, support and advice on legal obligations and the ways to prevent environmental impacts. Individually and collectively, they pose environmental risks that are nevertheless subject to the EP Act and within EPA's jurisdiction. For the most part, these businesses currently attract regulatory attention if they are the subject of a pollution report. Unfortunately, pollution reports are an after-the-fact indicator and not a substitute for evidence-based, proactive prevention. In some cases businesses operate in relatively high-risk industries that are not currently scheduled. In others, there will be premises that are just under scheduled thresholds that would attract licensing requirements. However, these premises still require regulator attention for risks to be effectively managed and for there to be a credible deterrent to non-compliance. I have previously indicated that there is a willingness within EPA and its staff to address non-licensed premises[58].

I consider that it is possible for EPA to be proactive in relation to these businesses, to take a preventative role and to more effectively manage their risks. However, the nature of unlicensed premises and diffuse sources of pollution is that EPA will have little data or intelligence regarding the individual sites to accurately focus its targeting at the business level. As EPA cannot directly visit or contact every business, risk-based regulation is an appropriate means of prioritising attention to particular environmental problems.

EPA has already identified a number of industries that may warrant a proactive inspection and enforcement program as they have risk profiles that fall short of current scheduled premises thresholds including, for instance, concrete batching and brining of hides. I am pleased that EPA has committed to a number of targeted enforcement campaigns at both licensed and non-licensed premises in its most recent business plan[59]. These campaigns are sector-based as follows:

- landfills
- prescribed industrial waste treaters
- abattoirs/renderers
- milk processers
- chemical works
- fluoride emitters.

The publication of areas being targeted is an important aspect of any enforcement campaign, as it provides transparency and allows well-intentioned businesses in targeted areas to evaluate their performance and ensure they are compliant ahead of any possible EPA inspection.

I do not have a firm view on the segmentation of cumulative risks. Indeed there is insufficient data or experience of EPA tackling clusters of non-licensed premises and diffuse sources of pollution to know whether segmenting proactive regulatory programs along industry lines or geographic lines would be effective.

58 EPA staff consultations – Bendigo, Geelong, Traralgon, head office, Centre for Environmental Sciences.
59 *EPA Business Plan 2010-11* – p.8.

WorkSafe Victoria has segmented its regulatory approaches according to industry groupings[60]. The Australian Taxation Office targets its communications and regulatory programs according to industry size[61].

A number of regulatory approaches suggest a more agile 'problem-solving' approach by which the regulator identifies particular problems or harms to be addressed and then seeks to tackle them one by one. The concept of 'picking important problems and fixing them' is more flexible than long-term segmented strategies in that it allows different criteria to be applied to different problems, and the targeting of interventions accordingly. Malcolm Sparrow of Harvard University is considered the pre-eminent proponent of this approach[62]. The key elements of a regulatory strategy based on problem solving are:

- using data and evidence to identify patterns of harm and trends to identify problems
- defining the problem precisely
- determining how to measure impact
- developing solutions or interventions
- implementing the plan with periodic monitoring, review and adjustment
- closing the intervention when the problem is 'solved' with long-term monitoring and maintenance[63].

I would add a further element – the evaluation of effectiveness of any intervention to ensure the problem-solving method evolves and that EPA learns from its interventions.

A similar model is used in the Netherlands as a standardised method of evaluating responses to social harms, including environmental risks (referred to above), and centres on understanding the drivers of compliance behaviour and targeting interventions to those drivers[64].

EPA has access to a broad range of data that would support evidence-based prioritisation of proactive enforcement. There was a broadly held view among EPA staff that these data were underutilised and that there was real potential in linking data sets within and external to EPA to identify cumulative impacts on air, water and land quality, and to narrow these down to issues that EPA could address with a targeted campaign.

To focus EPA's attention to cumulative risks, it should undertake a regular assessment of problems or 'hot spots' involving cumulative impacts on the environment that could be considered for attention. This assessment would be integrated with business planning processes and inform decision making and resource allocation according to a risk prioritisation. This prioritisation would consider the cumulative risk of harm to health and environment and the sensitivity of the receiving environment (for instance, whether the activity had the potential to impact on people, vulnerable sub-populations, ecosystems and catchments. animals or wildlife or other beneficial uses).

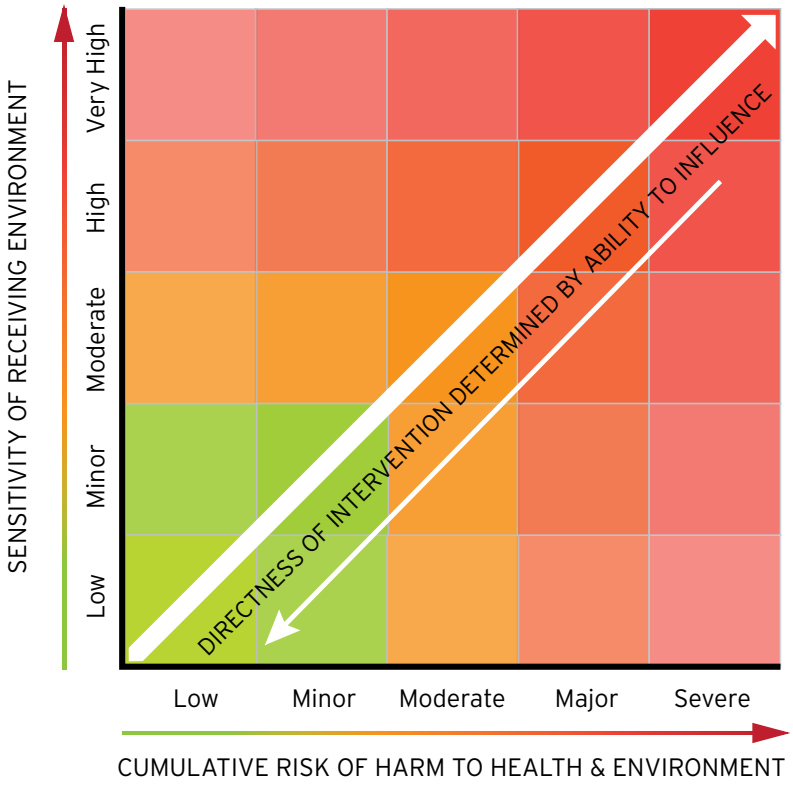
Interventions would then be designed according to EPA's ability to influence the particular problem. More direct interventions such as targeted inspections (which would be the highest draw on resources) should therefore be prioritised to the biggest risks and in areas where EPA can make the biggest difference. This might apply, for instance, with an industry where EPA could visit every business or an adequate sample to satisfy itself of compliance and create a sufficient deterrent through any enforcement activity. Enforcement action such as notices would be issued with advice on how to achieve compliance.

60 WorkSafe Victoria Compliance and Enforcement Policy and Prosecution Guidelines, 2005.
61 See for instance *Large Business and Tax Compliance* booklet, Australian Taxation Office.
62See Sparrow M, *The Regulatory Craft*, 2000.
63 Sparrow M, *The Regulatory Craft*, 2000, p.142.
64 Gunningham N, Report to EPA – *Comparison of regulatory models currently being used by regulators.*

Less direct interventions, including media, information campaigns, guidance and collaboration with industry associations could be used where there are small businesses with low understanding of the EP Act. These methods may be an adequate method to improve compliance and will be more efficient and are likely to be more effective in raising awareness of particular risks, such as impacts on stormwater management.

This approach is shown diagrammatically in Figure 7.4.

Figure 7.4: Compliance and enforcement strategy – non-licensees



I have focused mostly on enforcement in discussing the respective models and during my consultations. However, the models above also allow for prioritisation of education, guidance and compliance advice that would support businesses and individuals to comply.

7.12 Enforcement responses

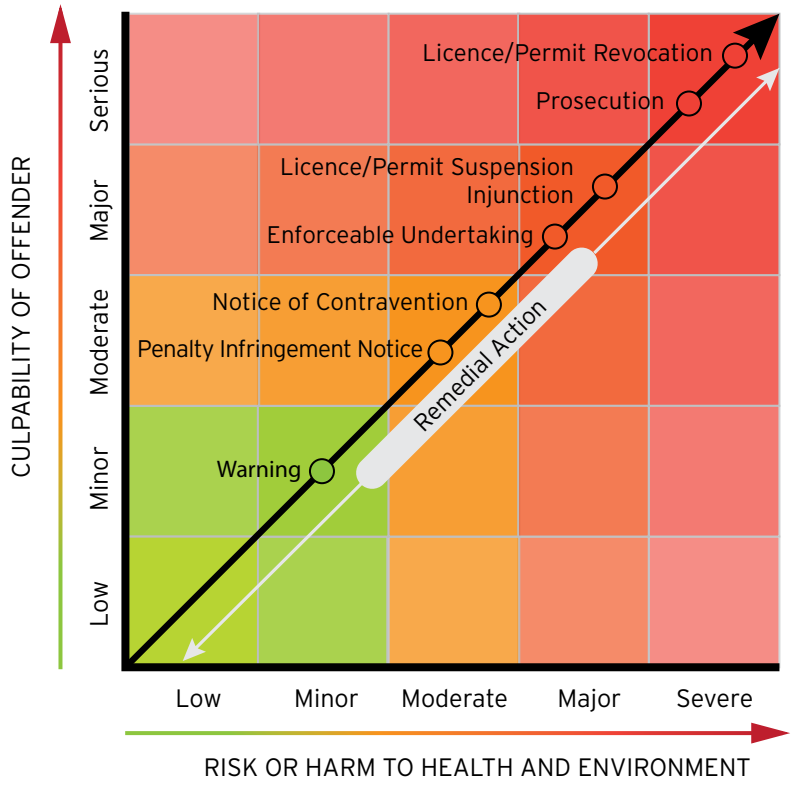
The response to significant incidents and breaches of the law that are detected ought not differentiate between licensed premises and non-licensed premises. A model for the appropriate response to breaches detected during both proactive and reactive interventions by EPA needs to take into account risk and responsive elements which tailor enforcement responses to the attributes of a particular business.

In my view there are two key considerations in the enforcement response to be taken by EPA to environmental incidents and breaches that it detects during its regulatory activity:

- risk of harm to health and environment
- the level of culpability associated with a breach.

It was broadly supported and understood in my consultations that the severity of EPA's enforcement response should be proportionate to any environmental harm or potential harm. It was also broadly supported that the nature and characteristics of the business or person causing harm or committing any breach (for instance, whether they had a record of previous breaches) should be relevant to the nature of any enforcement response. I support these matters being taken into account in determining the level of enforcement response required to address a particular non-compliance and to provide a just response to any breach, as well as to influence the behaviour of that person and others.

Figure 7.5: Enforcement response



To explain how the considerations of harm and culpability should be taken into account in enforcement I have used the diagram in Figure 7.5, which plots these criteria on the axes of a matrix.

In this model the level of response is a function of both risk of harm and culpability. The five levels of risk are identical to those in the risk hierarchy discussed above. Culpability is also graded into five levels. The five levels of culpability are described below.

Table 7.4: Proposed culpability for breach categories

Likelihood category	Risk subheading	Description
I	Low	Low culpability: No history of non-compliance and a genuine lack of awareness or understanding of obligations existed. Non-compliance of short duration (days), could not have been predicted or prevented and occurred despite high standards of operation. Harm abated, cleaned up and remedied.
II	Minor	Negligent: Past non-compliance reported or found. Little apparent regard to risk of harm with or without knowledge of risks caused by actions despite no intention to cause harm. Non-compliance of short-medium duration (weeks), difficult to predict and prevent and occurred despite reasonable standards of operation. Harm abated, partially cleaned up and remedied.
III	Moderate	Knowing: Past isolated non-compliance, relevant incidents or persistent complaints. Disregard of risks, acted knowing that harm could result. Non-compliance of medium duration (months), risk was foreseeable and was preventable. Non-compliance occurred due to poor standards of operation. Harm abated, partially cleaned up and remedial action initiated.
IV	Major	Reckless: Regular/repeated non-compliance, past enforcement activity or breaches of related environmental law. Acted recklessly, knowing harm would result, but gave no thought to risk despite obvious consequences. Non-compliance of long duration (years), risk was foreseeable and easily preventable. Concerns of employees or others ignored and non-compliance due to a significant falling short of accepted standards. Harm has not been abated. No clean-up or remedial action undertaken.
V	Serious	Intentional: Repeated non-compliance, past convictions or deliberate or wilful act. Acted with no regard to harm or prompted by financial motive to make a profit or save incurring an expense. Non-compliance of long duration (years) and is still occurring. Risk was obvious and preventable. Non-compliance involves a significant falling short of accepted standards or involved misleading conduct.

As with levels of risk it may be difficult to clearly categorise culpability for a breach neatly into one of the five levels. The model is intended to indicate the response EPA will generally take in given circumstances and to provide better understanding of how EPA considers each enforcement tool. The levels of culpability are intended to be linked to objective criteria as much as possible.

Applying this model, enforcement actions with the most severe consequences would be directed at breaches that result in severe consequences to the environment in which there is the highest level of culpability. An example might be an intentional discharge of a chemical causing widespread environmental damage from premises with a history of previous incidents. However, as the legislation is preventative there are circumstances in which a breach causing widespread harm, even where culpability is low, warrants prosecution. This might be the case, for instance, with a systems failure. Similarly, even when there is no environmental harm, as for instance with a breach of administrative requirements, high-level recalcitrance may warrant prosecution. At the other end of the spectrum, no enforcement action may be required to adequately address a minor administrative breach from a well-performing business.

The model is intended to address the shortcomings of the compliance framework which appeared to imply that significant environmental breaches from well- performing businesses may not result in an adequate enforcement response. Similarly, it seeks to address shortcomings of the risk-based pyramid I included in the discussion paper, which did not appear to take into account individual characteristics of the regulated entity such as the previous performance and any previous enforcement by EPA. Finally, it seeks to address a perception that a risk-based model would not adequately address administrative breaches which may be indicators of future breaches that may in fact cause harm.

More specific criteria applying to the use of particular enforcement tools are outlined in Chapter 12, 'Compliance and enforcement policy'.

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.

8.0 Compliance monitoring and inspections

The most prominent EPA compliance and enforcement activity is the conduct of compliance monitoring and inspections. This chapter explores EPA's current approach to inspection, some of the shortcomings of the current approach and how it could be improved.

8.1 Background

Common to many forms of regulation, environmental regulation depends heavily on on-site inspection of premises to physically observe business operations, environmental hazards and risks, and to verify whether businesses are compliant. Verification may involve the examination of items of plant or physical controls, secondary controls and containment and records. The auditing of monitoring records held by licensees is an important aspect of inspection of environmental compliance, due to the real-time and periodic recording of production and emissions in many premises.

EPA undertakes inspections of licensed premises and activities and responds to incidents and pollution reports. EPA also conducts preliminary investigations to determine sources and causes of these. Where other regulatory instruments have been imposed by EPA, these also require follow-up to ensure compliance. Observed breaches may result in enforcement action.

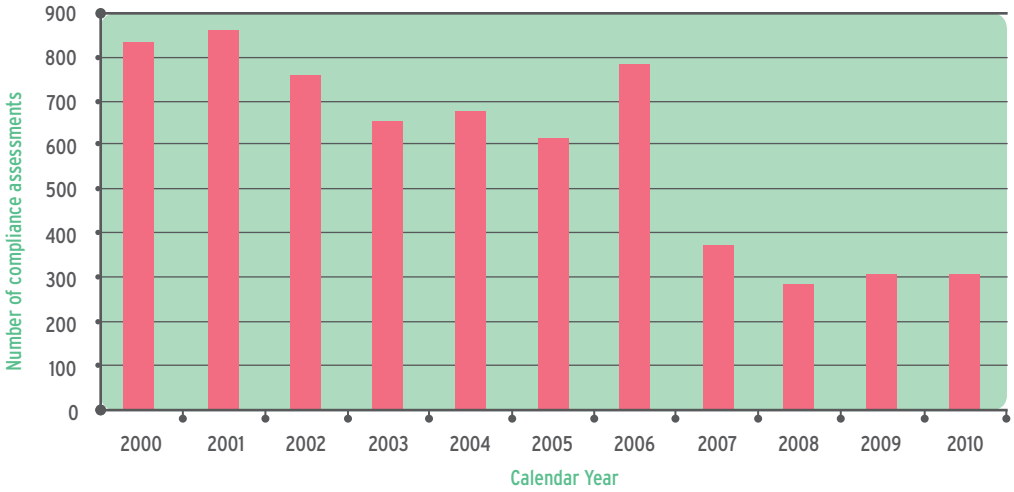
EPA also conducts desktop audits and assessments. These assessments involve a review of licences and conditions, any incident reports or pollution reports regarding the premises and an annual performance report of compliance with licence conditions. Any other relevant materials in EPA's possession may also be considered in assessing compliance, with issues for clarification leading to on-site inspections if required.

Figure 8.1 shows the number of compliance 'assessments' conducted by EPA over the past 10 years. Unfortunately, available data does not differentiate between on-site inspections and desktop audits. A further complication is the reliance on an EPA officer entering the assessment into the *Step+* database and a lack of rigour in using the system, and management auditing of individual officers' entries in the past[1].

There was a widespread view among EPA staff that these features undermined the value of data extracted from the system. The data is therefore provided only for indicative purposes. There has in the last year been a greater emphasis on the requirement for EPA officers to enter data into the *Step+* system and to enter inspections of licensed as well as unlicensed premises, which should improve data quality over time.

1 EPA staff consultations – Environment Performance Unit.

Figure 8.1: Number of compliance assessments conducted 2000–10

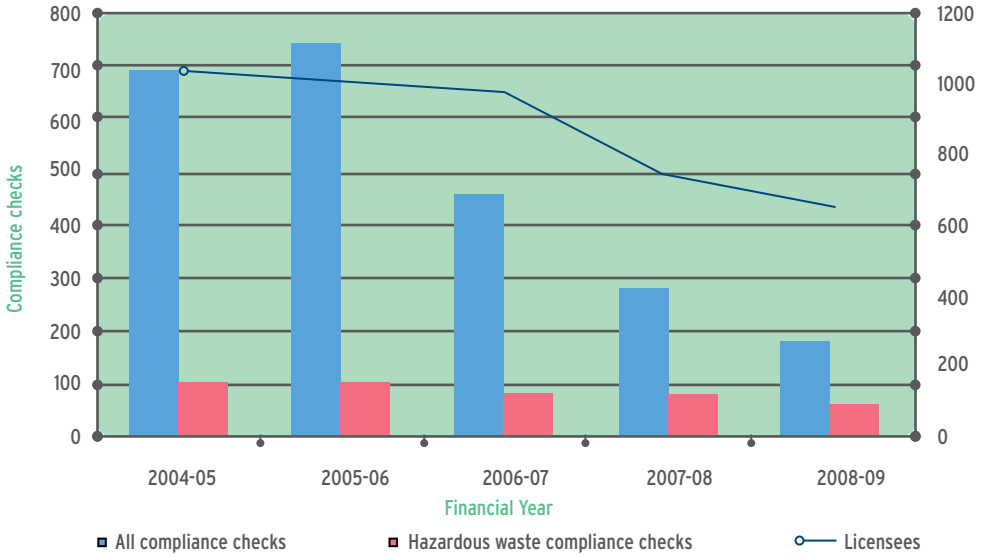


[Source: STEP+ Corporate Database, November 2010]

The data indicate a clear downward trend on compliance assessments and inspections, increasing slightly midway through 2010.

Since 2004-05 the number of compliance checks has been reducing at the same time as the review of regulations has led to a reduction in the number of licences. The Victorian Auditor-General plotted these trends as in Figure 8.2. It is clear that, notwithstanding the reduction in the number of licences, the reduction in compliance assessments was greater – hence a smaller proportion of licensees were the subject of compliance monitoring.

Figure 8.2: Compliance monitoring activity, 2004–05 to 2008–09



[Source: Based on data from the Auditor Generals Office]

There has been a move over the last 12 months to conduct more on-site inspections than desktop assessments and to improve data capture. Community consultations broadly criticised the level of monitoring by EPA and many referred to a 'self-regulatory' model that failed to hold businesses to account. One submission criticised the monitoring of accredited licence sites and the trust EPA had in these businesses complying[2].

EPA has recognised the need for a more rigorous and consistent method of inspection and is developing inspection protocols as part of its compliance reforms. The protocols will include three types of inspections, of increasing intensity:

- site visits (by any EPA officer)
- site inspections (by Environment Protection Officers verifying compliance with licence conditions and any other regulatory instruments)
- compliance audits.

Compliance audits would provide for rigorous evaluation of environmental compliance against audit criteria such as licence conditions and requirements created by policies, regulations, requirements or guidelines.

Compliance monitoring is undertaken in the metropolitan head office through EPA's Environmental Performance Unit and through the environment protection officers in each regional office. As the central unit with responsibility for setting the annual compliance program, the Environmental Performance Unit leads and coordinates the preparation of an annual compliance plan which identifies priorities for inspection. The priorities have to date been focused on known problems and areas of concern, which may be geographic, industry or sector-based, as well as focused on particular poor-performing or 'problem' premises. It is

2 Submission 10.

estimated that some 200 compliance visits will be undertaken by authorised officers in 2010–11.

The plan informs broad inspection programs across licensed premises and a number of 'blitzes' each year, in which officers from across Victoria attend to a geographic or industry-based hotspot to verify compliance. It is not currently externally published[3].

The Environmental Performance Unit has a broad portfolio of compliance responsibilities across diverse subject matter and expertise, including:

- compliance with works approvals and licences
- vehicle enforcement notices
- environmental auditors
- National Pollution Inventory
- ballast water
- Environmental Resource and Efficiency Plans (EREP) program
- contaminated land management
- waste transport and vehicle permitting.

The unit is also generally responsible for follow-up of pollution abatement notices in the metropolitan area where they have a compliance date greater than three months after the issue date. Notices of shorter duration are required to be followed up by the Pollution Response Unit.

The compliance and enforcement activity undertaken by the Unit is delivered by four teams in its 'compliance group' focused on particular environmental problems:

- industry compliance made up of licence inspections and 'blitz campaigns' to licensed and non-licensed premises
- landfills
- compliance with pollution abatement and other notices
- contaminated land sites.

These teams provide both a coordination role for regional offices and program delivery in metropolitan Melbourne.

3 Submission 49 criticised the lack of published goals and priorities for EPA enforcement.

8.2 Discussion

Ensuring compliance with legislative requirements and regulatory instruments such as licences is the core role of a regulator. Compliance is a requirement to support public confidence in the laws administered by EPA and it being an effective and credible regulator.

The International Network for Environmental Compliance and Enforcement (INECE) states:

> Compliance creates 'public value' when it promotes the rule of law and good governance; ensures fairness and strengthens the credibility of environmental requirements; protects the ecosystem and public health. Compliance creates 'private value' when it increases investor confidence by reducing business risks, stimulates innovation and increased competitiveness and creates new jobs and markets[4].

In his report on EPA's management of hazardous waste, the Victorian Auditor-General found:

> Compliance monitoring and enforcement activities are an essential part of regulation. They provide the regulator and the community with assurance about how well licensees are adhering to regulations, and they provide a framework to address and deter non-compliance[5].

Accordingly, the targeting of enforcement activity and the communication that surrounds it are important to maintain credibility and public confidence in the rule of law and establishing a credible risk of detection. In other words, if you are tempted to break the law, you are likely to get caught – and the regulator will catch up with you.

The Auditor-General stated further:

> Effective compliance monitoring and enforcement should enable the regulator not only to identify and analyse regulatory risk, but also to prioritise the risks and undertake compliance activities to mitigate these risks. This would also enable consistent and transparent enforcement decisions where non-compliance is detected.[6]

As I have indicated throughout this report, compliance may be achieved in a number of different ways and tailored according to the attributes of a particular risk or regulated entity to be effective.

Confusingly, the Environmental Performance Unit is frequently referred to as the 'compliance unit' and its work as 'compliance work'. I found this to suggest to many EPA staff that 'compliance' was an activity undertaken by EPA as opposed to what was required from regulated entities. More concerningly, this lead to a misconception that the unit's role did not include enforcement.

Enforcement is an important and necessary way of achieving compliance; however, there are a number of other tools. These include:

- compliance assistance and compliance promotion, which encourages compliance with the law – this includes outreach programs, education, and other promotional objectives. Information should be clear

4 International Network of Environmental Compliance and Enforcement, *Principles of Environmental Compliance and Enforcement Handbook*, April 2009.
5 *Hazardous Waste Management* – Auditor-General's report, June 2010. p.14.
6 *Hazardous Waste Management* – Auditor-General's report, June 2010. p.25.

and consistent and enable people to understand and meet their obligations. To be effective, assistance such as guidance must be practical and user-friendly. Partnering with trusted sources of other advice to business, such as industry and trade associations, should be considered

- compliance incentives, which could include grants, support, encouraging public reporting of environmental performance and market-based mechanisms. These measures seek to encourage companies to take proactive measures and to monitor their own compliance. Positive recognition may also be effective.
- compliance monitoring, which includes inspection, assessment and audit. There are two critical aspects that are required for compliance monitoring to be effective:
  1. that the monitoring is at a sufficient level to create a credible risk of detection for non-compliant entities
  2. that monitoring should be underpinned by a credible risk of consequences demonstrated through enforcement.

Throughout my consultations there was criticism by members of the community that EPA had been inadequate in its attention to compliance monitoring and enforcement over a period of years[7]. A number of submissions criticised the lack of compliance monitoring directed at non-licensed premises in particular[8].

For instance, the Environment Defenders Office[9] said:

> Public confidence in the EPA's ability to be an effective regulator has been seriously damaged over the last few years as a result of major inadequacies in preventing and enforcing major environmental incidents.

Many EPA staff felt that this was largely as a result of a reduction in operational resourcing[10]. The perceived lack of resources was well known to industry[11]. One attendee at Wodonga considered that EPA focused on the same licensed premises and rarely visited others.

Unfortunately, due to the relatively low number of inspections and poor data quality I am concerned that EPA is not able to establish a baseline of compliance across licensed sites or non-licensed sites in order to determine the current state of compliance[12]. This undermines the assumption in the compliance framework that most licensees 'consistently do the right thing' and is one of my concerns with this model[13]. A review undertaken by EPA in August 2009 at hazardous waste licensed premises indicated that, of 28 high-risk sites, only 18 per cent were considered compliant[14].

7 Community Open House – Bulleen, Geelong, Moonee Ponds. Submissions 36 and 44
8 Submission 36
9 Submission 41
10 EPA Staff consultations – Environment Performance Unit, Bendigo, Geelong
11 AiGroup Workshop. Submission 4
12 Submission 19 referred to community concerns arising from unlicensed sites being greater that of licensed premises
13 A similar observation was made by Neil Gunningham in his report to EPA in May 2010 – Environment, Compliance and Pollution Response Review. Environment Law and Regulation – p.39
14 Hazardous Waste Management – Auditor-General's Report June 2010 – p.16

8.3 Targeting of inspections

There is a large degree of discretion involved in EPA's targeting of inspections. The *Step+* system provides an indicator of the risks posed by a site and the likelihood of non-compliance, and has the capability to flag sites for inspection. Where possible, pollution reports are also referred to, but this process is time-consuming and laborious, as the PolWatch system, which records details of pollution reports, is not currently searchable by site name and only has limited capacity to search by site location. Premises that are subject to repeat complaints – so called 'problem premises' – are easier to identify in the PolWatch data due to the clusters of complaints that can be observed. These have been the subject of focused attention and compliance interventions by EPA.

The Auditor-General was highly critical of EPA's compliance monitoring and inspection regime[15].

Although focused on the management of hazardous waste, these criticisms could equally have been directed to other subject matter within EPA's jurisdiction.

8.4 Licensed premises

Compliance monitoring is currently only notionally risk-based and has used available data and the application of the compliance framework to focus inspections on high-risk premises. With the receipt of annual performance statements (APS) from licensed premises in October 2010, EPA will be in a better position to understand the risks of particular sites and their incident history. As the new APS documents are electronic and captured in a purpose built system, data can be more easily analysed to determine patterns and trends to inform compliance activity, including inspection. This is a significantly improved approach to targeting of inspections.

In my view, at the start of each annual planning period EPA should undertake a risk assessment and prioritisation of licensed premises to inform its compliance monitoring activity. In addition, a categorisation of licensed premises should be undertaken to set indicative maximum time limits between inspections of licensed premises, in order for all licensed premises to receive at least one inspection during a specified period. A similar process underpins the United Kingdom Environment Agency's Operator and Pollution Risk Appraisal (OPRA) system, which has been well supported by business and endorsed by the UK Better Regulation Executive Office[16].

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.

15 *Hazardous Waste Management* – Auditor-General's Report, June 2010, p.15.
16 *Effective Inspection and Enforcement: Implementing the Hampton vision in the Environment Agency,* p.11.

8.5 Unlicensed premises

A common concern was that EPA had in the past focused its compliance monitoring almost exclusively on licensed premises and that this was unfair and disproportionate to harm being caused by other businesses that did not require a licence[17]. I found that EPA staff spoke of compliance activity being directed to three categories of premises:

1. licensed premises
2. 'notice' premises, which were the subject of an abatement or other notice
3. pollution response.

This view of targeting resource restricts activity to businesses who are the subject of a regulatory instrument and reactive inspections according to public pollution reports. This approach seems to me to focus compliance on regulatory tools rather than a problem-solving approach which seeks to identify and rank priorities according to risk (likelihood and consequence). It assumes that 'notice' premises, for instance, are areas of high risk merely because EPA has previously attended them and issued a notice, notwithstanding this may have been some years prior and that performance may have significantly improved. It also confines EPA officers to being focused on responding to pollution events rather than preventing them in the first place.

I accept that this has largely been through a lack of priority being attached to proactive compliance monitoring in the past and insufficient resourcing[18].

In the consultations, EPA compliance activity was also considered to be too reactive and predominantly focused on after-the-fact pollution events. There was a strong desire across stakeholders for EPA to take a broader role and focus on preventing harm. In Chapter 7 I proposed an enforcement strategy that would enable more consistent targeting of licensed premises and a conceptual framework for targeting of compliance monitoring to risks identified from non-licensed premises and other diffuse sources.

In the United States, the Organisation for Economic Co-operation and Development (OECD) found that small and medium enterprises are significant contributors of pollution, particularly in manufacturing, chemicals, metal manufacture, and processing and production of building materials[19]. My consultations with EPA staff and some businesses suggested this is likely to be the case in Victoria.

EPA has at its disposal valuable data regarding air and water quality and the type and level of atmospheric pollutants. It also has capacity to analyse data regarding licensed and other premises that it has had previous interactions with, to identify trends and high-risk geographic areas or industry sectors.

As part of its annual planning for compliance activity, EPA should analyse these data to create a risk profile that would inform targeting of compliance monitoring activity to non-licensed premises that would have the biggest environmental impact – for instance, on air or water quality. This would enable evidence and risk-based allocation of compliance and enforcement activity. Below I have described such an initiative – the Yarra River Investigation and Response Program (YRIRP).

17 Ai Group Workshop. Environment Victoria and Environment Defenders Office roundtable.
18 For instance, one EPA local office estimated that 90 per cent of inspection activity was directed at pollution response.
19 International Network of Environmental Compliance and Enforcement, *Principles of Environmental Compliance and Enforcement Handbook*, April 2009.

The number of target areas would be matched to the level of resourcing and EPA's ability to influence the particular target, having regard to the level of monitoring required and the level of enforcement.

The compliance plan would allocate a proportion of compliance monitoring and resources to licensed premises and a proportion to non-licensed premises. The mix between licensed premises and non-licensed premises may vary from year to year, depending on balancing risks and the considerations I have referred to above.

8.6 Risk-based interventions

Between July 2006 and 2010, EPA conducted a state government-funded program to improve the Yarra River and its environs, the Yarra River Investigation and Response Program (YRIRP). The program was initially known as the 'Yarra Hotspots Program' and complemented a number of other initiatives aimed at catchment and river quality. It was designed to be a proactive program to reduce 'pollution hotspots', reducing pollutants from industrial and commercial sites, reducing litter and identifying and reducing the sources of faecal contamination.

There were four streams of work in the project:

- scientific analysis
- investigation and enforcement
- engagement and education
- evaluation and measurement of results[20].

The program took some time to establish internally and there were mixed views as to its effectiveness. Criticism centred on a perceived lack of clear strategy until some time into the project. Fortunately, an evaluation of the program was undertaken, which provides important learnings for any proactive prevention project directed at diffuse sources and small and medium businesses. A key learning was the early engagement and ongoing involvement of external stakeholders in prevention activities[21].

The program used four different approaches in four different locations in order to test effectiveness:

- firstly, a community change model focused on 100 sites conducted together with a public Waterwatch[22] officer focusing on education regarding stormwater issues
- secondly, targeted educational visits and the provision of guidance material by EPA contractors (in partnership with local government) regarding stormwater
- thirdly, the use of contractors to visit and inspect 300 sites. Interestingly, 30 of the sites (10 per cent) were identified as high risk requiring a follow-up inspection by EPA authorised officers
- fourthly, a 'blitz' approach using EPA authorised officers.

A key driver for the program being funded externally and resourced by contractors was the lack of adequate resources within EPA to undertake a proactive approach to pollution. A similar approach was taken to visiting dairy farms in the Western District.

20 *Evaluation of EPA Sweep Approaches*, Roberts Evaluation, May 2009.
21 *EPA YRIRP Evaluation*, CCI Consulting, September 2009.
22 WaterWatch is a national community-based water quality monitoring program. The program is aimed at community outreach and education and active monitoring of water quality. It is supported by local water authorities.

Unsurprisingly, the evaluation concluded that no single model was suitable for all situations and, accordingly, an effective diagnosis of the problem and causes is required.

Notwithstanding the high proportion of high-risk sites requiring follow-up visits, the evaluation concluded that non-compliant businesses interviewed were largely unaware of the harm they were causing or what was responsible environmental practice.

The program was well received by stakeholders and overwhelmingly participants were positive of the program as a proactive approach to the management of pollution[23].

Businesses visited supported a number of aspects of the program:

- the professionalism and courtesy of EPA officers
- that the reasons for the visit were clearly explained
- that any advice requesting change to a business was clearly explained
- that there was follow-up confirming that the changes implemented achieved compliance
- that there was affirmation that the business was doing the right thing.

Positive feedback greatly outnumbered negative responses but a number of issues were raised that businesses did not like:

- not getting the follow-up that was expected
- not having prior warning of the visit
- feeling intimidated by EPA
- feeling that they could not question EPA[24].

There was a strong belief that water quality in the subject section of the Yarra had improved. Unfortunately, the complexity of measuring water quality in just one part of a flowing river and attributing any improvement to the program made it difficult to draw a conclusion regarding the environmental impact of the intervention. Nevertheless, the method of identifying an environmental problem, considering upstream causes and understanding these in order to design an intervention is worthy of consideration and has been used effectively in other jurisdictions.

YRIRP in my view has important implications for the design of any proactive pollution prevention programs. An important aspect was early research of compliance behaviour, drivers and seeking an understanding of the level of awareness of environmental risks and controls[25]. The program was resource intensive due to the separation of the four different models of intervention piloted. The use of contractors in my view is not a substitute for well-trained EPA officers who are capable of engaging, guiding and enforcing when required.

In my view, with proper training and support, EPA officers can take educational approaches as well as using enforcement where required. While this is considered challenging, it is the most versatile and effective approach to dealing with the many drivers of non-compliance.

23 *EPA YRIRP Evaluation,* CCI Consulting September 2009.
24 Roberts Evaluation – The 'Sweep Evaluation' presentation, 25 June 2008.
25 Ipsos – Eureka Social Research Institute. Research for Melbourne Water and EPA, December 2008.

The NSW Department of Environment, Climate Change and Water has recently undertaken a risk-based campaign to improve the air quality of Sydney. The campaign is based on a systematic analysis of air monitoring data to identify pollutants, sources of pollutants and to prioritise inspections to metal manufacturing industries contributing sulphur and nitrogen oxides, which impact on air quality[26]. Although this project was carried out in relation to a licensed industry, it would equally apply to a non-licensed one.

Such approaches have also been used effectively in United States environmental protection. The Department of Environment Protection in Florida has established a problem-solving team in its Central District, known as Team SOS, and has published a problem-solving manual for design of regulatory interventions[27].

Having regard to these examples, a further filter on whether an area or industry should be targeted will be to understand whether the environmental impacts are caused by factors which EPA may be able to influence. For instance, emissions of oxides from the metal industry might lend themselves to education and direct EPA intervention, to ensure that solvents are properly handled and stored to reduce evaporation. On the other hand, waste oil and contaminated run-off from roads to stormwater would be a much more diffuse and difficult area to focus activity.

By applying this process, EPA would proportionately allocate resources to proactive interventions in areas of high environmental impact and where it has the capacity to make a difference.

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.

8.7 A strategic approach to problem solving

The 'problem solving approach' to regulation, which encourages regulators to direct compliance and enforcement responses to problems or harms, is now well established with safety and environmental regulators in Australia. This approach seeks to effect compliance through behavioural change. In some cases this will occur through encouragement and, in others, by enforcing standards. An important feature of this approach is identifying the harm that is to be addressed and setting goals against which the regulator will judge its effectiveness (and be judged).

26 Gregory Aboud, NSW Department of Environment, Climate Change and Water – Presentation to Australasian Environmental Law Enforcement and Regulators Network Conference, Canberra, 5 November, 2010.

27 *Guide to Environmental Problem Solving*, Department of Environmental Protection Florida, 2000. See also US EPA Office of Enforcement and Compliance Assurance (OECA) *National Program Manager Guidance*, April 2009, which provides a comprehensive approach to design of integrated compliance programs.

The United States EPA has published a *Guide for Addressing Environmental Problems: Using an Integrated Strategic Approach*[28]. The guide recommends a sequenced approach based on the model developed by Harvard regulatory expert Malcolm Sparrow, namely:

- clearly define the problem and its relative priority
- define success up front
- provide flexibility and allow for iterations to program design
- promote transparency of program design and decision making
- up-front consideration (but not necessarily use) of compliance and enforcement tools
- recognise the importance of communication and collaboration
- encourage leveraging of partners, such as industry and trade associations and community organisations.

In designing a compliance intervention or strategy EPA should develop a common program method that includes the following elements:

- identification of problems
- research of causes through engagement with community and industry stakeholders
- production of guidance on compliance and risk controls, if required
- promotion of EPA's intervention and any guidance
- compliance monitoring and enforcement, as required
- strategic use of media to educate, promote awareness and augment deterrence
- evaluation and reporting on the program outcomes.

The approach I advocate requires focused attention from resources skilled in data analysis, strategy development and with a sound understanding of EPA operations. These resources would focus on strategy development rather than program delivery and take an agile approach that would involve development of intervention programs and operational strategies across a range of environmental problems, and draw on expertise and skills as required from across EPA.

Unfortunately, at this time there is no clear accountability within EPA for the setting of operational strategy in a sector or industry and delivery of strategic programs targeted at problem solving. Such programs are currently designed and delivered through a number of EPA units including Environment Strategies, Service Knowledge and Environmental Performance.

Operational strategies for compliance activity in the Environmental Performance Unit are undertaken by subject matter experts, who are also responsible for the administration of permissioning schemes such as permits and approvals. These experts are also understandably strong advocates for the schemes they administer and are responsible for promoting them to industry and supporting applicants for permissions. Having each team design an annual compliance monitoring program for its own area of service delivery, such as the National Pollutant Inventory or EREP, is not optimal. The scale or nature of the compliance program they

28 US EPA, March 2007.

develop may not be warranted given the holistic risks to the environment. It is also unlikely that each unit is adequately resourced or has the right skills for proactive operational strategy development[29].

Each year an overarching holistic assessment of environmental and regulatory risks, including fraud risk, is necessary. In my view, to ensure the integrity of these schemes and that they are allocated an appropriate priority, this assessment and the design of any interventions is best done independently from program delivery (although developed in consultation with each program area).

In my view there should be a dedicated accountability for operational strategy development. This might be created by a cross-functional structure or by consolidating resources currently involved in operational strategy development into one unit. This accountability would be independent of compliance operations and program delivery and separate from program areas that currently undertake the administration of permissioning schemes such as appointment of auditors, assessment of audits or administration of waste transport permits and certificates.

The approach would evolve and become more sophisticated over time as data sets are improved and resources dedicated to strategic problem solving develop.

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.

8.8 Compliance plan

In 2010, EPA moved closer to a more systematic approach to compliance planning by undertaking extensive consultation with practitioners and other professionals across EPA with different subject-matter expertise. This informed the selection of target industries and geographic areas that would be the subject of compliance monitoring in 2010-11. I support the initiative of prioritising areas for focused compliance monitoring and the publication of these in a transparent compliance plan to guide EPA staff that clearly explains enforcement priorities.

This process would be considerably improved by taking an assessment at the commencement of the process, to evaluate the current state of the environment across Victoria based on available data, and using this to prioritise risks for attention by EPA. I understand that this approach is being considered for the next compliance plan and efforts are occurring to consolidate and use environmental condition data to inform this.

An important aspect of compliance planning is that these plans are transparent and publicised externally to industry and stakeholders. This provides clarity to community and business as to the process that EPA has undertaken in coming up with targets but, more importantly, allows targeted businesses to evaluate their performance and ensure they are compliant in advance of any EPA inspection.

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.

29 EPA Staff Consultation – Environmental Performance Unit

I note that Queensland Department of Environment and Resource Management has published a three year compliance strategy, which publicises its areas of focus for compliance and enforcement, and a clear annual compliance plan that identifies target areas and industries that may be subject to inspection[30]. Such an approach is an effective compliance strategy that creates a significant deterrent effect.

Taken a step further, to maximise the educational and deterrent effects of publishing compliance monitoring, the plan could refer to the environmental harm that is caused by the targeted activity and EPA's plans to address these causes in its compliance activity.

8.9 Principles of inspection and enforcement

Significant research has occurred in the United Kingdom across regulatory areas to identify features of effective inspection regimes.

The Hampton Review[31], outlines standard principles aimed at ensuring consistent approaches to inspection and regulatory programs. A number of the principles relate to inspections specifically, namely:

- regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most
- regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take
- no inspection should take place without a reason
- businesses should not have to give unnecessary information, nor give the same piece of information twice
- regulators should provide authoritative, accessible advice easily and cheaply
- regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work.

A number of the features identified in the evaluation of YRIRP reflect the Hampton principles.

That is not to say that I am advocating for inspection to be a part of every compliance program. Inspections are resource-intensive and draw on a scarce resource. The use of inspections should be targeted at areas of greatest risk of harm or non-compliance, as well as those problems which require direct intervention by EPA or enforcement. Enforcement, however, should at least be considered in every compliance program and discarded only if inappropriate.

In other cases, indirect approaches that may include broad educational and awareness-raising campaigns may be considered adequate. Gunningham also advocates for self-audits and checks by small and medium-sized businesses which attract the regulator's attention if they are not completed.[32] The approach taken will depend on the nature of the problem being addressed.

30 *www.derm.qld.gov.au/about/pdf/compliance-plan0910.pdf*.

31 Source: *Reducing administrative burdens: effective inspection and enforcement* (Hampton Report), March 2005. *www.hm-treasury.gov.uk/media/AAF/00/bud05hampton_641.pdf*. For further information, see: *www.cabinet-office.gov.uk/regulation*.

32 Gunningham N (2002), 'Regulating small and medium enterprises', *Journal of Environmental Law* 14, pp.3-32.

8.10 A different approach to inspection

EPA currently applies two models of inspection. In metropolitan Melbourne, pollution response officers specialise in pollution response and environment protection officers undertake general compliance inspections across a range of subject matter. In regional offices, environment protection officers are generalists and undertake both response and proactive duties.

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.

For the most part, regional officers were supportive of their combined role, although many felt they were diverted from proactive work by the intensity of pollution response and insufficient staff[33]. At the Melbourne head office views were mixed, with some supportive of the ability to specialise in either pollution response or proactive inspections[34].

I was advised that the logic of separating the two functions in the head office was to improve responsiveness and service delivery by having full-time dedicated specialists focused on pollution and emergency response, and other officers more focused on longer-term interventions and proactive work in the Environmental Performance Unit. However, handovers between the units, including in relation to follow-up of notices, are unclear and have caused uncertainty for staff.

Unfortunately, the Pollution Response Unit has suffered from considerable turnover and relies on new recruits to undertake field duties[35]. In my view the pollution response function is a critical one and involves challenging and hazardous duties for response officers. The nature of their investigations and the judgement required to deal with incidents requires technical expertise, maturity and experience. I see no reason for officers who respond to an incident not to also be involved in its longer-term management, including enforcement, and be provided with the opportunity to apply their skills over time to improve a business's compliance.

A frequent concern of business and community was the loss of valuable expertise in EPA over recent years, particularly in its field officers. This appears to have slowed, but dedicating qualified staff to merely reacting to pollution incidents is an unsustainable way of operating that risks the ability to attract and retain skilled staff[36] to the unit.

The divergence in approaches between the Pollution Response and Environmental Performance units has caused a bifurcation in the enforcement presence of EPA that is unnecessary and does not position it to be an effective and proactive regulator.

I was impressed by the qualifications and professionalism of EPA staff in its Pollution Response Unit. I was similarly impressed with the same skills and professionalism of those in Environment Performance Unit. In my view, subject to the appropriate level of resourcing, the justification for dedicating metropolitan officers to either pollution response or environmental performance would no longer be warranted. Generalist officers who

33 EPA staff consultations – Geelong, Traralgon, Wangaratta, Dandenong.
34 EPA staff consultations – Environment Performance Unit, Pollution Response Unit.
35 I was advised that this had reached 50 per cent in one year.
36 Ai Group workshop, Australian Environment Business Network Conference.

have been trained and skilled to deal with pollution response, and are able to take on more challenging and longer-term change with individual businesses through proactive work, would be more effective and provide a better opportunity for EPA to attract and retain skilled staff.

In relation to more complex facilities, such as major hazard facilities and landfills, I consider there to be a need for specialised resources that apply a more systematic approach to the significant environmental risks they pose. Many of these facilities are highly complex and employ specialist environment and process safety technical expertise. These specialists would be experienced regulatory practitioners with appropriate technical qualifications and experience in process safety, audit and environmental management systems.

The most complex and highest risk businesses, such as major hazard facilities, generally have their own safety and environmental management systems and highly documented systems. An inspection approach that focuses on containment and visual inspection is inadequate for these facilities. EPA requires an approach that is capable of assessing the robustness of these systems to prevent incidents. This systematic approach would involve auditing systems, documentation and operator understanding to satisfy EPA that risks are being adequately managed. A regular, comprehensive inspection at least annually would be undertaken to test and verify compliance systems in order for EPA to be satisfied of the site's capacity to operate safely.

A common concern of business was that EPA officers who attended such facilities were relatively inexperienced and were unfamiliar with the operation of such a facility or the hazards and risks they manage[37]. A number of EPA staff found their jobs difficult and felt ill-prepared to deal with businesses in a wide range of industries – some of which were highly technical.

It may not be possible to employ and retain highly sought-after or specialised expertise. This is a common dilemma for regulators who compete with high private-sector salaries. However, in order to ensure that such facilities are compliant and that environmental risks are appropriately managed, it is necessary for EPA to have access to such advice when required.

A number of regulators, such as the National Offshore Petroleum Safety Authority which deals with offshore platforms, and mining regulators such as WorkSafe Victoria and Department of Primary Industries (DPI), have similar challenges. There is an opportunity for EPA to network with such regulators to explore opportunities to draw on expertise or strategies for attracting and retaining specialist staff. DPI, for instance, employs a team of international experts on a sessional basis as part of its Technical Review Board. The board members assist DPI in undertaking regulatory risk assessment and engaging with complex businesses on their compliance systems. This may be a model EPA could consider. Legislative provision may be required to create such a board and to enable it to support EPA through providing advice directly to regulated businesses, if required.[38]

There may also be opportunities for EPA to partner with co-regulators such as WorkSafe Victoria and DPI in undertaking joint interventions. The 'safety case' required of major hazard facilities to obtain a licence under the occupational health and safety laws generally reflects a demonstration of safety that is relevant to prevention of incidents with safety as well as environmental consequences.

37 Ai Group workshop. Australian Environment Business Network Conference.

38 EPA uses a similar style of panel comprised of industry and academic experts to assess the suitability of candidates prior to their appointment as environmental auditors. EPA could review the suitability of these structures to appoint and use experts for any new advisor panel.

The Auditor-General pointed to potential overlap and potential duplication of the respective roles in relation to dangerous goods management in 1995[39]. The Auditor-General noted that most premises licensed by EPA for the storage, processing and treatment for disposal of industrial wastes are also within WorkSafe Victoria's jurisdiction[40].

Joint inspections by regulators with overlapping jurisdiction and responsibility or joint campaigns would be consistent with the Hampton principles of reducing unnecessary duplication and burdens on business.

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.

8.11 Inspection reports

A frequent concern raised by businesses is that they were provided with no feedback at the conclusion of an inspection. This left uncertainty as to whether the EPA officer considered the business to be compliant or not. A number of examples were provided in the consultations of inspections which concluded with no formal report back to the business at the conclusion of an inspection, only to find that an enforcement notice was issued weeks or even months later. This is unfair and not consistent with EPA's drive to be a modern regulator.

At the conclusion of an inspection EPA officers should provide verbal feedback to the business, confirmed in writing at the time or at the earliest practical opportunity after the inspection. Such an inspection report would record observations and any findings, confirm the use of any enforcement tools and record any compliance advice provided. The inspection report would provide an accountable and clear record of the inspection.

The use of inspection reports is recommended by INECE with the following items included[41]:

- the specific reason for the inspection
- participants in the inspection
- statement that all required procedures were obeyed
- a list of all actions taken during the inspection
- inventory of the evidence obtained
- observations made, including whether any substantive risks or potential breaches were remedied during the inspection
- confirmation of any advice
- the results of sample analysis.

I would add to this a reference to any right of review or complaint and rights in relation to having samples examined by the recipient's own experts, where this is provided for.

39 Special Report No 33, *Handle with Care: Dangerous Goods Management*, 1995.
40 Page 36. The report reviewed the operation of the Occupational Health and Safety Authority (now WorkSafe Victoria). The report preceded the relaxing of licensing requirements on sites storing and handling dangerous goods which occurred in 2000.
41 International Network for Environmental Compliance and Enforcement: *Principles of Environmental Compliance and Enforcement Handbook,* April 2009.

8.12 A common inspection process

The consultations revealed a common perception that many EPA authorised officers were relatively young and inexperienced in comparison to other regulators. This perception belies the fact that EPA staff, although relatively young, are well-educated and most have both undergraduate and post-graduate qualifications, predominantly in science, engineering or the environment. I was concerned, however, that there was a strong view that some authorised officers lacked confidence in their regulatory role.

EPA is seeking to re-establish itself as an assertive and decisive regulator. This requires authorised officers to be trained and supported to be confident in their roles.

Elsewhere in this report I have made findings and recommendations that EPA should take a more formal and disciplined approach to its regulatory role. In my view, authorised officers must also conduct themselves more formally to establish their regulatory presence. A common inspection method would ensure consistency in approach and that authorised officers present in the same way, regardless of individual styles and levels of experience.

Inspections should be conducted primarily to determine compliance; secondly to consider the appropriate level of compliance support (if required); and thirdly to assess any enforcement action required.

A common inspection method would include the following elements:

1. During the inspection the officer should formally announce their entry and power of entry to a person of appropriate seniority.
2. Present their identification and authority-confirming authorisation.
3. Advise the purpose of the visit or inspection.
4. Where enquiries are being made or assistance required, ensure that these are made of personnel of appropriate seniority.
5. Take environmental samples as appropriate.
6. Review records, reports, maps and documents as required.
7. Conduct physical observations of structures, plant, processes, premises boundary and environmental risk control measures.
8. Observe any monitoring program, equipment and results.
9. Where available, review and assess any risk (aspects and impacts) register.
10. Where required, review and audit environmental management systems.
11. Make notes of observations, equipment calibrations and take any recordings such as photographs or videos.
12. Provide feedback during a close-out meeting, including any ongoing investigations and whether any enforcement action is being contemplated.
13. Issue a report of the inspection as outlined above.
14. Advise the person of any rights of review or opportunity to test samples or observe physical exhibits taken[42].

This method would be reinforced through competency-based training for officers.

42 US EPA Memorandum – Final National Policy: Role of the EPA Inspector in Providing Compliance Assistance During Inspections. June 25, 2003.

9.0 Enforcement tools: an overview of regulatory tools available to EPA

This chapter considers the various enforcement tools available to EPA under the EP Act. It considers the preventative tools in particular and discusses the use of pollution abatement notices as a preventative tool and includes recommendations for using them more consistently and effectively. Investigation, prosecution and infringement notices, which are enforcement tools with more punitive effect, are considered in chapters 10 and 11.

9.1 Background

Consistent with most regulatory schemes, the EP Act sets out a broad range of 'regulatory tools' and enforcement options to address risks to the environment, achieve compliance and punish and deter breaches of the law. In addition, there are a number of administrative tools that have been developed that do not require legislative support that have been adopted by EPA.

As the responsible regulator, EPA maintains a broad discretion about whether and how it chooses to use these tools. Often the tools are used in combination and may be directed at more than one purpose.

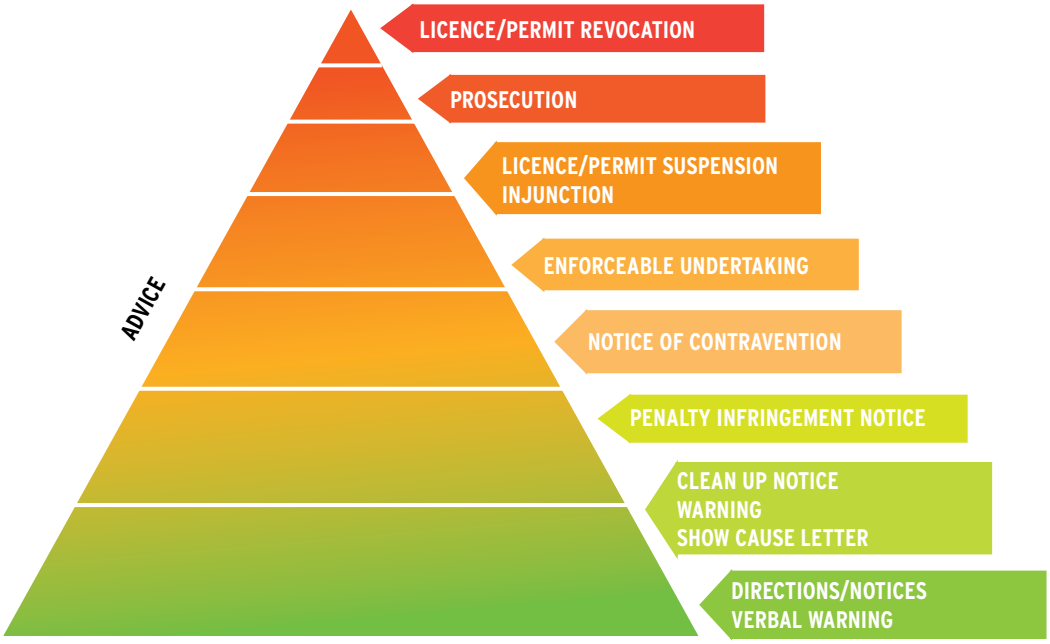
This chapter examines the regulatory and enforcement tools available to EPA under the EP Act and their use. A number of other informal approaches to achieving compliance are also used by EPA, including informal warnings, telephone calls to businesses and warning letters from authorised officers or managers. These can be effective in achieving compliance but do not require explanation.

The regulatory tools are of varying degrees of severity (and therefore intrusiveness) and can be graduated to correspond to different levels of non-compliance. This legislative framework enables EPA to use information, advice and assistance as a primary method of encouraging and promoting compliance and enforcement. Enforcement responses should be used when persuasive methods are inadequate or inappropriate and would escalate based either on the circumstances of any breach or the characteristics of the regulated entity.

Regulators have therefore often represented enforcement tools in the form of a pyramid[1]. Researchers of corporate crime and compliance behaviour support the use of a responsive or graduated response to breaches as the model most likely to maximise compliance[2]. A notional hierarchy of EPA enforcement tools is provided in Figure 9.1. Adopting an enforcement response that is proportionate to the severity of harm or breach would suggest that a tool higher in the hierarchy would only be used when a less severe tool cannot achieve the dual objectives of enforcement of remedying the breach and ensuring fair consequences for offending.

1 Based on research by Ayres I, Braithwaite J: *Responsive Regulation – Transcending the Deregulation Debate*, 1992 and advanced by Fisse B, Braithwaite J: *Corporations, Crime and Accountability*.
2 Fisse B, Braithwaite J: *Corporations, Crime and Accountability*, pp. 141ff.

Figure 9.1: A hierarchy of EPA enforcement tools



9.2 Regulatory tools

In addition to licences and works approvals (covered in Chapter 4), EPA has the power to permit and authorise other activities that would otherwise be unlawful.

Under section 30A of the EP Act, EPA can approve the emergency storage, treatment, handling or discharge of waste for the following purposes:

- to meet a temporary emergency
- to provide temporary relief of a public nuisance
- to enable the commission, repair, decommissioning or dismantling of items of industrial plant or fuel-burning equipment.

The number of approvals by type is provided below.

Table 9.1: All section 30A approvals issued

EP ACT SECTION	APPROVAL TYPE	2005	2006	2007	2008	2009	2010
30A(1A)(a)	Temporary emergency	36	9	23	12	42	54
30A(1A)(b)	Temporary relief	1	1	7	11	14	8
30A(1A)(c)	Commissioning/ decommissioning	48	32	55	45	52	48

[Source: Data from Step+]

Only the manager of the Statutory Facilitation Unit and designated environment protection officers are delegated to issue approvals under section 30A enabling commissioning, repair of plant etc. This restriction is based on the risk and complexity of these applications. All authorised officers are authorised to grant approvals for temporary emergency and temporary relief.

A breakdown of the number of 30A approvals by officer indicates that, up until 2010, it was relatively common for these approvals to be issued by officers from EPA's Gippsland and Geelong offices or the central Statutory Facilitation Unit. In 2010 the approvals were mainly issued by officers in the Statutory Facilitation Unit. These approvals were predominantly in situations involving emergency discharge by water authorities and water treatment plants where heavy rainfall caused winter storage capacity to be exceeded.

It is predicated that the number of 30A approvals enabling emergency discharge will increase slightly under the new licensing reform system. Some older licences contained historic conditions that allowed the operator to routinely exceed their licence limits for temporary or emergency relief. As these situations, if properly managed, should not arise regularly, enabling conditions have largely been removed from new licences, requiring the licence holder to apply for a 30A approval to exceed their licence limits.

Table 9.2: 30As issued by unit 2006–10 for temporary emergency

YEAR	TOTAL	POLLUTION RESPONSE	GIPPSLAND	NORTH WEST	SOUTH WEST
2010	28	2	2	0	1
2009	42	0	10	1	8
2008	12	0	6	3	2
2007	23	0	17	2	3
2006	9	0	5	1	0
Total	**114**	**2**	**40**	**7**	**14**

YEAR	TOTAL	NORTH EAST	EPU*	SOUTH METRO	WEST METRO	STATUTORY FACILITATION
2010	28	1	0	2	0	20
2009	42	1	1	1	0	20
2008	12	0	0	1	0	0
2007	23	0	0	0	1	0
2006	9	0	0	0	3	0
Total	**114**	**2**	**1**	**4**	**4**	**40**

**Environmental Performance Unit*
[Source: Data from Step+]

Table 9.3: 30As issued by officer for 2010 for temporary emergency

OFFICER	2010	OFFICER	2010
Officer 1 (Statutory Facilitation)	17	Officer 7 *(Traralgon)*	1
Officer 2 *(Statutory Facilitation)*	2	Officer 8 *(Pollution Response)*	1
Officer 3 *(Pollution Response)*	1	Officer 9 *(Statutory Facilitation)*	1
Officer 4 *(Statutory Facilitation)*	1	Officer 10 *(Geelong)*	1
Officer 5 *(Traralgon)*	1	Officer 11 *(Wangaratta)*	1
Officer 6 *(Statutory Facilitation)*	1		

[Source: Data from Step+]

A similar pattern exists for approvals provided for temporary relief. There were 40 such approvals between 2006 and 2010, with most being issued by Statutory Facilitation, particularly since 2009.

Section 30A approvals for commissioning and decommissioning are more frequent than those for emergencies, with 221 such approvals being issued between 2006 and 2010. These are commonly issued by regional offices as well as Statutory Facilitation, although again few were issued in 2010 by officers outside of Statutory Facilitation.

Table 9.4: 30As issued by unit 2006–10 for decommissioning/commissioning

YEAR	TOTAL	GIPPSLAND	NORTH WEST	SOUTH WEST	NORTH EAST	EPU*
2010	37	6	0	3	1	0
2009	52	13	0	3	5	1
2008	45	11	2	14	0	5
2007	55	6	1	15	1	0
2006	32	3	0	6	1	0
Total	**221**	**39**	**3**	**41**	**8**	**6**

YEAR	TOTAL	SOUTH METRO	YARRA	WEST METRO	STATUTORY FACILITATION
2010	37	2	0	0	25
2009	52	2	0	2	26
2008	45	2	3	8	0
2007	55	14	5	13	0
2006	32	6	1	15	0
Total	**221**	**26**	**9**	**38**	**51**

**Environmental Performance Unit*
[Source: Data from Step+]

With reduced numbers of these approvals being issued by authorised officers it is important to monitor their use and ensure that process and procedures are clearly documented, and that the criteria considered are documented. These procedures should be the subject of training and refresher training to ensure that they are consistently applied. Given the relatively infrequent use of the tool, consideration ought to be given to restricting the delegation to more senior authorised officers or to centralising the approvals to the Statutory Facilitation Unit.

9.3 Environment and Resource Efficiency Plans (EREPs)

Environment and Resource Efficiency Plans (EREPs) are an innovative regulatory program that EPA has adopted to require larger businesses to reduce energy and water usage. The program applies to large energy and water-using sites – those using more than 100 TJ of energy and/or 120 ML of water per annum. There are some 250 businesses currently required to participate[3].

These businesses are required to identify resource efficiency opportunities to save water, energy and waste, which consequently provide environmental benefits and cost savings. These opportunities are documented in a plan that includes actions to improve resource efficiency. Actions that would realise a positive return in three years or less must be implemented. Through EREP, industry can realise the business opportunities presented by resource efficiency by implementing actions that achieve environmental benefits and direct cost savings in a short time frame.

EPA interacts with businesses to explain the program and provide support in developing suitable plans or amending plans.

There have been substantial resource-use reductions as a result of the program and its innovative nature has caused it to be considered in other jurisdictions.

Businesses were complimentary of the EREP program in consultations. The nature of the program, as being based clearly on economic efficiency and environmental benefits, makes good business sense and is therefore compelling. EPA staff working with the program were clearly of the view that the program was regulatory in nature and that this underpinning was critical to its success[4]. EPA staff, however, reported some uncertainty from businesses as to whether the program was mandatory or not[5]. As the threshold quantities for participation in the program were very high relative to the energy and water usage by most businesses, EPA had a degree of confidence that all eligible businesses were included in the program and had submitted their programs. However, EPA staff considered there was a need to validate data and to undertake auditing of plans and delivery against them[6]. While the program would appear to be successful, it is important to ensure fairness and equity for businesses who are compliant with the program to ensure such a validation takes place.

9.4 Financial assurances

Financial assurances ensure adequate funds are available for rehabilitating a site that is polluted by industrial activity.

The assurance is intended to ensure sufficient private resources are available to cover the cost of site remediation or closure and to avoid the use of public monies. EPA may access a financial assurance to recover clean-up costs in the event an occupier abandons the site, becomes insolvent or lacks the resources to clean up after a major incident or emergency.

3 Section 26, and *Environment and Resource Efficiency Plans Regulations 2007*.
4 EPA staff consultation – Environmental Performance Unit.
5 EPA staff consultation – Statutory Facilitation Unit, Environmental Performance Unit.
6 EPA staff consultation – Environmental Performance Unit.

Financial assurances are required from respondents to other EPA regulatory tools such as works approvals, licences, pollution abatement notices and transport permits[7].

Liable businesses may apply to amend or discharge a financial assurance. Where a financial assurance is not received a licence may be suspended or revoked. The impost of a financial assurance may be appealed through VCAT within 21 days of notification.

There was concern amongst some businesses and local councils that the financial assurance scheme was unfair, as it effectively treated all operators as if they were likely to break the law and that they should therefore provide an assurance. The tying up of funds that might be used for other purposes by compliant businesses was raised as a reason to explore other options that would be less onerous[8]. Local government also raised concerns about needing to maintain a financial assurance when, unlike private enterprise, they were an arm of government charged with managing public land and therefore never going to abandon a site.[9] There was also scepticism raised by a number of businesses that EPA had been rigorous in pursuing businesses who had not paid financial assurances or that they were struck equitably. This view is partially supported by the fact that only 31 per cent of businesses required to have a financial assurance under the EP Act and scheduled premises regulations have submitted a financial assurance.[10]

Although considered by the Victorian Ombudsman in his investigation into methane leaks at Brookland Greens, no recommendations were made regarding the financial assurance scheme. The Auditor-General, however, recommended that EPA obtain required financial assurances for entities and review the adequacy of existing financial assurances held. EPA accepted this recommendation and is currently revising the financial assurance calculation methodology and governance process. The requirement to hold such an assurance 'is being addressed as part of the licence reform program currently being implemented'[11].

9.5 Environment improvement plans (EIPs)

Environment improvement plans (EIPs) are used to facilitate improvement of environmental performance through the adoption of a systematic and comprehensive approach to environmental management. The plans are intended to guide a company's environmental management and ensure continuous improvement. An EIP is effectively an action plan with goals, timelines and ongoing monitoring and reporting provisions on environmental performance. The plan is published and generally involves consultation with community or a representative community body, and seeks to embody a business's commitment to improve performance. An effective plan includes regular reporting on progress and review. EIPs may be prepared at the initiation of the company, may be required as a licence or notice condition to replace detailed prescriptive conditions or may be directed by EPA[12].

The total number of environment plans is difficult to verify but appears relatively small. The *STEP+* corporate database indicates that there are currently 30 EIPs. However, it is not apparent from this source whether:

- the plans were developed and submitted as licence conditions
- the plans were voluntarily entered into or required to be developed by EPA
- the plans included a community component.

7 Sections 21, 31A, 67, 36 and 53, *Environment Protection Act 1970* and *Environment Protection (Fees) Regulations 2001*.
8 Consultation – Gippsland Local Government Network, Peri-urban Councils Network.
9 Consultation – Landfill BPEM and licensing reform program: Bendigo, Geelong, Benalla, Melbourne and Traralgon.
10 Summary to EPA Executive Management Team from Assurance and Project Management Unit.
11 Victorian Auditor-General's report, *Hazardous Waste Management*, p.29.
12 Section 31C, *Environment Protection Act 1970*.

To further complicate evaluation of the effectiveness of EIPs, there is substantial variation in the way the plans were used and developed. Some plans are comprehensive and mirror an organisation's environmental management system – including community consultation arrangements and sustainability commitments. In others the plans were effectively staged plans to meet required compliance standards.

I will discuss EIPs further in Chapter 20 regarding the role of community.

9.6 Neighbourhood environment improvement plans (NEIPs)

Neighbourhood environment improvement plans (NEIPs) are similar to environment improvement plans but provide an action plan to address environmental concerns that impact on the health, safety and enjoyment of local areas, by the people who live and work in a geographic area.

NEIPs may be voluntary or be developed at the direction of EPA. EPA's program to promote these tools ended in 2008. No funding or staff are currently allocated to the program[13].

9.7 Warnings

Warnings have been adopted by EPA administratively and do not require an enabling provision in the EP Act. As the majority of offences under the EP Act can be subject to infringement notices, the *Infringements Act 2006* provides that warnings should be available in appropriate circumstances as an alternative to an infringement. A warning is generally issued by EPA officers for minor breaches or where the degree of harm or potential harm to the environment is minimal. Warnings are given verbally or in writing and are regarded as requiring the same standard of evidence and, therefore, effort as that to issue a PIN.

Warnings are required to be submitted to EPA's internal Enforcement Review Panel. Warnings are recorded and may be taken into account as part of an offender's history.

EPA practice is that warnings should only be used when the environmental harm or potential harm is minimal. Initial warnings may be given verbally but must be confirmed in writing, which includes details of the breach and, if relevant, a time limit for compliance. See Appendix 1 for an example of an 'official warning'.

There are three types of official warnings issued by EPA:

- for motor vehicles, issued by the Environmental Performance Unit
- for litter, issued by the Pollution Response Unit
- those issued to businesses, whether licensed or not, which are issued by the Enforcement Unit as an alternative to an infringement notice or prosecution.

Warnings were introduced by EPA in 2006-07 as a result of the *Infringements Act 2006*. Since that time the number of warnings issued has been relatively stable.

13 Section 19, *Environment Protection Act 1970*. See also *Neighbourhood environment improvement plans – developing a voluntary proposal* and *A guideline for submitting a voluntary neighbourhood environment improvement proposal*.

Table 9.5: Official warnings issued 2006–10

	TOTAL	LITTER	MOTOR VEHICLES				INDUSTRY
Type			Noisy	Tamper	Call in	Smoky	
2010	200	0	95	70	17	3	15
2009	151	0	82	51	5	0	13
2008	194	0	102	14	63	0	15
2007	38	3	7	10	0	0	18
2006	21	0	10	3	0	0	8
Total	**604**	**3**	**296**	**148**	**85**	**3**	**69**

[Source: Data from MOVER database]

The majority of official warnings are issued for motor vehicles and appear to be stable across all types. Most litter reports result in infringement notices, which is the reason that the number of warnings in this category is low.

9.8 Directions

The EP Act[14] provides for authorised officers to issue directions in situations where there is, or is likely to be, 'imminent danger to life, limb or the environment'. These directions may be issued verbally or in writing if:

- pollutants have been or are being discharged
- a condition of pollution is likely to arise
- any industrial waste or potentially hazardous substance appears to have been abandoned or dumped or
- any industrial waste or potentially hazardous substance is being handled.

Any directions considered appropriate are permitted 'to remove, disperse, destroy, dispose of, abate, neutralise or treat any pollutant, waste, substance, environmental hazard or noise'.

The power is clearly extensive and is intended to prevent or reduce harm to the environment.

The word 'imminent' is not defined in the EP Act, but clearly is a temporal element that requires urgency in averting or mitigating danger. For this reason, compliance can be required immediately. Non-compliance with a direction is an offence with a penalty equivalent to that of general pollution offences: 2400 penalty units or $286,680.[15] Section 62B cannot be appealed in VCAT.

62B directions are not recorded and therefore no data is available on their use. The Pollution Response Unit started tracking the number of 62B directions issued in May 2010.

14 Section 62B, *Environment Protection Act 1970*.
15 The value of a penalty unit is $119.45, as set on 1 July 2010.

9.9 Abatement notices — pollution abatement notices and litter abatement notices

Abatement notices are issued to prevent or remedy a range of breaches of the Act[16]. Unlike directions under section 62B, the power to issue abatement notices is delegated from the Authority to authorised officers. The notice may be issued to an occupier of premises or to a person responsible for a process or activity (or proposed process or activity) or person responsible for the use (or proposed use) of the premises.

The notice may be issued where a process or activity (whether actual or proposed):

- has caused or is likely to cause pollution (including noise)
- has caused or is likely to cause a breach of any regulation, or declared policy, any licence condition or neighbourhood environment improvement plan
- has created or is likely to create an environmental hazard
- is causing or is likely to cause an emission of unreasonable noise.

The notice may require the person to:

- cease the process, activity or use
- carry on, modify or control the process, activity or use
- supply to the Authority plans or other information
- take measures including installation, alteration, maintenance or operation of any plant or structures
- comply with any standard or relevant statutory instrument or licence condition
- provide monitoring equipment or carry out monitoring
- comply with any requirement in an environment improvement plan or neighbourhood environment improvement plan.

A financial assurance may be required where the subject premises are scheduled premises requiring an assurance by regulation or store over-threshold quantities of a notifiable chemical[17].

The notice may be extended, revoked or amended by 'notice of amendment in writing'[18].

It is not mandatory for a notice to specify a time in which the notice is to be complied with, although this is EPA practice. However, if a date is specified, it must not be less than 30 days after the issue of the notice, as the notice does not take effect for 30 days[19]. It is an offence not to comply with a pollution abatement notice (PAN), attracting a maximum penalty of 2400 penalty units.

16 Section 31A, *Environment Protection Act 1970*.
17 Section 4 defines notifiable chemicals as those whose handling or use may cause an environmental hazard, as there is no satisfactory process for their disposal or removal. The EP Act provides for EPA to issue an order restricting the use of such chemicals.
18 Section 31A(5), *Environment Protection Act 1970*.
19 Section 31A(6), *Environment Protection Act 1970*.

The respondent of these notices may apply to VCAT for review of decisions regarding the issue or contents of the notice, by making an application for review within 21 days of the notice[20].

The EP Act also provides for a notice to be issued if it is satisfied that urgent action is required. To issue a 'minor works pollution abatement notice', the Authority must be satisfied that the criteria warranting a regular pollution abatement notice are met and estimate that the cost of compliance will not exceed $50,000[21]. A respondent to a minor works pollution abatement notice cannot apply to VCAT for review.

Curiously, the breach of a minor works notice carries a maximum penalty of 300 units, significantly less than that attached to the breach of a regular abatement notice.

Similar notices may be issued in relation to specific, alleged breaches; for instance, a litter abatement notice[22] and a sewerage abatement notice[23].

9.10 Discussion

Pollution abatement notices attracted a significant amount of attention during consultations regarding the use of enforcement tools. The majority of views across the stakeholder groups was that the tool was preventative in nature and an effective method of achieving compliance. EPA staff were predominantly of the view that the tool was useful and effective in arresting non-compliance or controlling risks of pollution or other environmental harm[24]. A number of businesses considered that the pollution abatement notice was punitive in nature, due to the fee imposed and the increased likelihood that these would be used with EPA moving to a more assertive enforcement stance[25]. Additional concerns were raised over EPA issuing media releases to accompany notices being served and that these were considered to use sensationalist language[26]. A number of large businesses referred to a practice of disclosing abatement notices in their corporate reporting or in tender bids, which attracted stigma that was seen to be punitive[27].

More concerning, however, was that when abatement notices were issued they were considered to use vague and uncertain language and require additional clarification in order to be complied with[28]. I was advised that some authorised officers had adopted a practice of providing a pollution abatement notice in draft for consideration by a respondent prior to formal issue. This was seen to be desirable by some businesses and legal practitioners as a way of commenting on the proposed notice, clarifying any issues of drafting and negotiating a reasonable time frame. This in my view is an appropriate method of ensuring clarity in the requirements of a notice.

In Chapter 6 I explored the concept of 'compliance advice', particularly in the context of notices. A frequent concern raised by businesses is that authorised officers did not provide assistance in complying with notices and drafted notices that essentially required compliance with the Act, regulations or a state environment

20 Section 32, *Environment Protection Act 1970.*
21 Section 31B, *Environment Protection Act 1970.*
22 Section 28B, *Environment Protection Act 1970.*
23 Section 45ZB, *Environment Protection Act 1970.*
24 For instance, EPA staff consultations – head office, Traralgon, Bendigo, Wangaratta, Environmental Performance Unit.
25 Victorian Waste Management Association workshop, Ai Group Environmental Network, Australian Environment Business Network.
26 Legal Practitioners' roundtable.
27 Victorian Water Industry Association Conference.
28 Legal Practitioners' roundtable.

protection policy (SEPP) without indicating what would constitute compliance. The concern of businesses is that they would undertake remedial work at some expense and may not be advised until the work is completed whether EPA would be satisfied that the notice has been complied with and therefore revoke it. One business owner in Wodonga described it in this way: 'It is almost like you are led into non-compliance because they won't tell you whether you are on the right track – you are left guessing.'[29]

Given the confusion regarding the outcome-based enforcement and the move to being less prescriptive in notices and licences, it is not surprising that authorised officers have developed an informal practice of attaching correspondence to notices to explain what they expect[30]. In some cases the advice is provided verbally and not recorded at all. Unfortunately, this advice is not transparent, accountable or, most importantly, enforceable. I see no reason that such advice should not be articulated in writing in the body of the abatement notice itself.

Businesses and auditors indicated that there was a significant increase in the demand for audit services, as the common default position for outcome-focused notices was to require a report by an EPA-appointed auditor and to implement the findings of the report[31]. There was also a concern that auditors were being used at considerable expense to business respondents in circumstances where remedial measures were straightforward[32].

9.11 Statutory environmental audits

Environmental audits provide systematic assessment of the condition or impact of a process or activity on a segment of the environment.

Environmental audits must be conducted by EPA-appointed auditors, who systematically assess against audit criteria. On completion of a statutory audit, an environmental audit report must be issued. Audits undertaken under section 53X (environmental condition) may include the issuing of a certificate (site is clean and suitable for any use) or statement (site is suitable subject to conditions) by an auditor. An audit report must include the focus of the audit, who engaged the auditor, and results of the audit. It may include a clean-up assessment and further recommendations, including ongoing monitoring plans.

Environmental auditors also perform a number of other activities outside of formal statutory audits. Auditors are involved in verifying landfill monitoring programs, assessing new landfill cell designs and assessing the suitability of wastes for reuse under the secondary beneficial reuse (SBR) scheme.

EPA currently has 65 appointed environmental auditors, comprised of 44 contaminated land auditors, 18 industrial facilities auditors and three natural resource auditors. The power to appoint auditors has been delegated to the Manager of Environmental Performance and the Principal Environmental Auditor. Advertising for auditors usually occurs every two years.

The number of audits undertaken has remained relatively stable over the five years to 2010. Harmonisation of the environmental audit requirements on landfills across the state as part of the licensing reform program is likely to lead to an increase in the number of 53V industrial facilities audits. It is estimated that over the next two to three years, an additional 20 to 30 53V audits will occur each year.

29 Open house – Wodonga.
30 EPA staff consultations – Environmental Performance Unit, Traralgon, Geelong.
31 Ai Group workshop, community open house – Traralgon, Wodonga. Environmental Auditors Strategic Issues Group.
32 Ai Group workshop, Legal Practitioners' roundtable.

Table 9.6: Audits conducted over the past five years

YEAR	TOTAL	CONTAMINATED LAND *REFER ACT SECTION 53X*		INDUSTRIAL FACILITY *REFER ACT SECTION 53V*	NATURAL RESOURCE *REFER ACT SECTION 53V*
		CERTIFICATE	STATEMENT		
2005	175	21	67	86	1
2006	202	26	95	80	1
2007	189	23	73	93	
2008	207	20	96	90	1
2009	141	21	85	35	
2010*	159	14	76	69	
Total	**1,073**	**155**	**492**	**453**	**3**

** As of 15 December.*

[Source: Data from Environmental Data Tracker]

Section 53X audits are usually required through council planning. If the auditor issues a certificate for a 53X this indicates that the land is appropriate for any use. If the auditor issues a statement for a 53X this will indicate the recommended usage or non-usage of the land; that is, "it is appropriate for X conditions as long as Y occurs". EPA may occasionally require a section 53X audit.

Section 53V audits are required by EPA through various tools. For example, they may be included as a requirement in a licence or a notice. These audits look at specific, localised issues.

The number of audits undertaken in 2010 as at 15 December was 69, which is substantially higher than 2009 but at a comparable level to previous years. The number of contaminated land audits is 90, which again is consistent with the pattern in previous years.

9.12 Industrial facilities audits – 53V

Since 2003, the ability to capture the trigger and reason for undertaking an industrial facilities (53V) audit has been available. An analysis of 341 audits shows that the vast majority were required by EPA by licence (55 per cent) or notice (20 per cent) and around half related to landfill operations (47 per cent).[33]

For audits required by licence, three-quarters related to landfills – either annual or period groundwater audits (49 per cent) or audits relating to new landfill cells (28 per cent). Active and closed landfills also accounted for half (50 per cent) of the audits required by pollution abatement notice. With reforms to landfill licences it is predicted that the majority of industrial facility audits will be triggered by licence or new cell applications; only a small portion will be required by notice and these will be restricted to post-closure landfills.

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.

33 Analysis of the environmental audit 'EDT' database on 19 December 2010 shows industrial facilities audits were generally a requirement of licence (55%), clean-up notice (11%) or pollution abatement notice (9%). A small portion of audits related to works approvals (3%).

This analysis suggests that, while landfills account for around half of all the required audits, consideration and further analysis is needed as to the reasons for other audits.[34] This is an important factor to consider whether the audit system is being overused by EPA, to deal with knowledge gaps within EPA or a reluctance to give compliance advice.

9.13 Issuing of notices

Where there is enforcement action by EPA, such as a notice or direction issued under the EP Act which requires remedial action, the authorised officer should clearly outline:

- the nature of the breach or the environmental risk to be managed
- the reasons for forming this view in writing
- what action is required by the notice or direction
- 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 should also be included.

By providing one practical way of achieving compliance there would still be flexibility for businesses to consider alternatives that suited their operations. The standard form of notices or directions should also make clear that the onus for compliance remains at all times with the recipient of the notice.

I was advised that, in the past, to avoid the punitive perceptions of a formal regulatory instrument such as a pollution abatement notice, some offices would serve a draft abatement notice with a view to formally issuing the notice only if compliance was not achieved in a given time period. This is an inappropriate practice that should be discontinued. While the provision of a draft for comment is an appropriate way of avoiding disputation and ensuring compliance, the lack of scrutiny of informal arrangements between some businesses and some officers makes it very difficult to track. It also makes it difficult to ensure consistency of treatment between businesses in similar circumstances, as different EPA officers will make different subjective assessments of the likelihood that compliance will be achieved. Fundamentally, however, such a process is not accountable or transparent to interested parties such as community members.

A more fundamental aspect of the discretion that is exercised by EPA officers in forbearing on formalising draft abatement notices is that the assessment of whether a business is likely to comply is largely based on subjective criteria such as trust, attitude and willingness. These matters are very difficult to measure and lack objectivity. It is accordingly not possible to ensure consistency in their application. For this reason, to ensure consistency and uniform application of this tool, I recommend that EPA officers issue pollution abatement notices in all circumstances where substantive breaches and environmental risks are detected and remedial action is required. In my view, no disadvantage is caused by bringing the breach to the attention of the business in these circumstances and formally requiring the business to remedy the breach and comply with the law. It provides for objectivity and fairness that businesses in these circumstances will be dealt with in the same way.

There were a number of limitations identified in using the notice. Most significantly, the delay of 30 days for a pollution abatement notice to take effect was seen as an inhibitor to achieving environmental protection. This time delay appears to be based on the appeal provision allowing for a review of the notice, but it is not

34 For example, audits required by clean-up notice largely related to land and groundwater (45%), surface water (18%) and air (7%).

clear from the legislation why (if this was the case) the trigger would not be 21 or 22 days rather than 30 days. However, in my view this could be achieved by allowing EPA the discretion to fix a compliance time that is shorter than 30 days, so long as it is commensurate to the breach or risk to be averted and that there is an external review right that has attached to it the ability to request a stay of the notice taking effect.

There are examples of other preventative regulatory schemes where more timely action is provided for by the issue of notices to control risks, even where review rights exist. *The Occupational Health and Safety Act 2004,* for instance, provides that an improvement notice (which is similar in effect to an abatement notice) must:

> c) specify a date (with or without a time) by which the person is required to remedy the contravention or likely contravention or the matters or activities causing the contravention or likely contravention, that the inspector considers is reasonable having regard to the severity of the risk to the health or safety of any person and the nature of the contravention or likely contravention[35].

It was also considered that the impost of a service fee was unwarranted and was considered by many small and medium businesses as a punishment. A number of EPA officers indicated that they did not issue abatement notices, due to the fee. Section 60C of the EP Act provides for a 40-fee-unit service fee to be paid by a respondent to a pollution abatement notice ($478)[36]. The fee may be removed in cases of hardship but this is rarely applied for. In some cases officers reported having used the minor works abatement notice in the past or preferring to use informal methods of achieving compliance. This is consistent with data regarding the extensive use of minor works notices below. The impost of the fee, which is not insignificant, causes confusion in my view for both business and EPA staff as to whether the notice is indeed a punishment, as opposed to a remedial tool.

It is therefore important for EPA to take steps to reposition the abatement notice 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. With the removal of the fee, such a notice should not be considered a punishment, as it merely requires the respondent to remedy the non-compliance or risk and achieve compliance – a state which is expected of all regulated entities. This will also require discipline in EPA's own use of the tool and the language used in its publications, such as media releases, to ensure that the issue of a notice is not used to stigmatise businesses who receive them. The question of whether a punishment is warranted for a given non-compliance matter is a secondary matter which I will consider further in the context of the compliance and enforcement policy.

Due to the public interest in ensuring that the law is applied appropriately and consistently, I consider that the issue of a pollution abatement notice should be recorded on EPA's website, with access to the notice and any conditions provided for.

A breakdown of pollution abatement notices issued over the last five years indicates that between 24 and 71 notices are issued per year, with the most notices during that period issued in 2010. This increase largely reflects the increased focus on regulatory compliance by EPA and its authorised officers. The majority of notices are issued by the Pollution Response Unit, which largely reflects the nature of their work as first responders to public pollution reports and environmental incidents.

35 Section 111, *Environment Protection Act 1970*.
36 *Monetary Unit Act 2004* for the 2010-11 financial year.

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

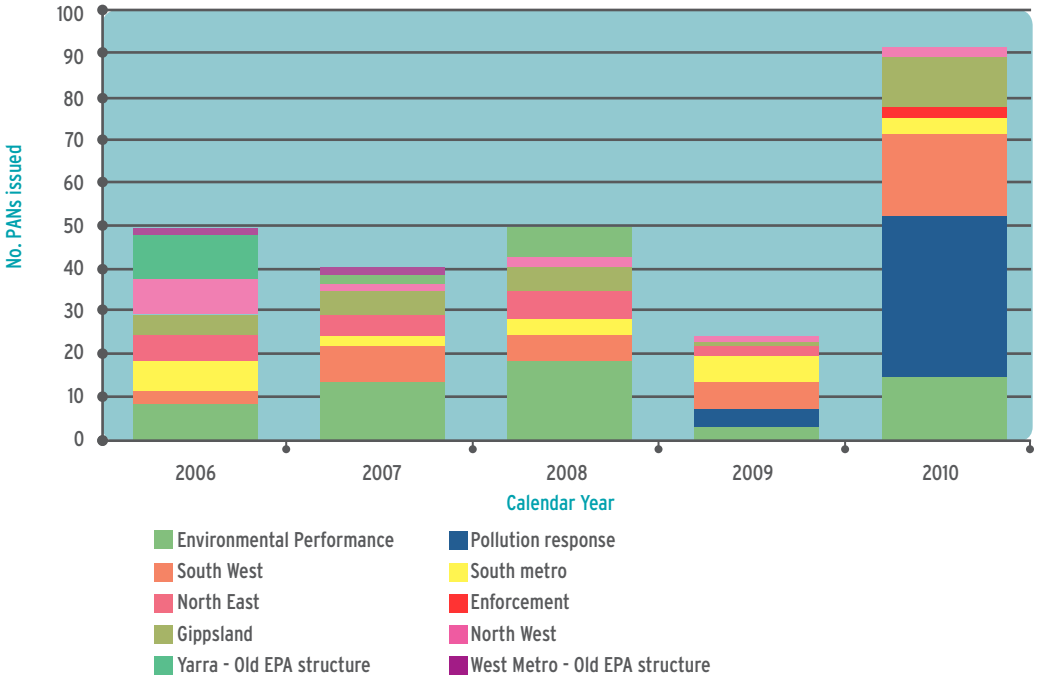
That EPA seek an amendment of the EP Act to remove the service fee under section 60C of the EP Act, which applies to the issue of a pollution abatement notice.

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.

Figure 9.2: Pollution abatement notices issued by unit, 2006–10



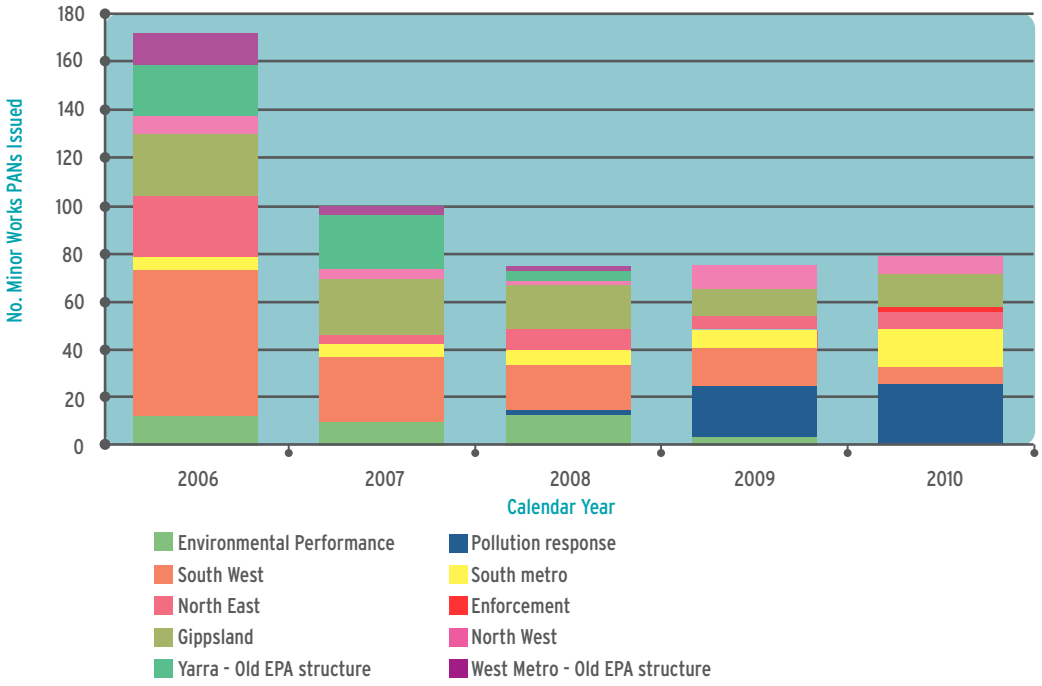
[Source: EPA Corporate database STEP+, as at December 2010]

As can be seen in Figure 9.2, in 2009 there was a significant drop in the number of pollution abatement notices (PANs) issued. This has since been reversed in 2010, with the highest number of PANs issued over the five-year period[37]. Prior to 2008, the majority of abatement notices were issued by the Environmental Performance Unit.[38] Since that time the Pollution Response Unit was the most frequent user of this tool. A large number of the PANs issued in 2010 have been linked to a focused compliance effort in the Brooklyn industrial area.

In the case of minor works notices, for the most part the number of these notices issued exceeded the number of regular pollution abatement notices until 2010. There has been a significant drop in minor works abatement notices issued over the past five years, with a notable disparity in use between regional offices. For example, the Gippsland and South West offices issued far more notices than other regional offices. As illustrated in Figure 9.3, the majority of minor works notices are now issued by the Pollution Response Unit.

37 This in part supports the common view of businesses that the EPA had been taking a stronger enforcement line since 2010.
38 Whilst the Environmental Performance Unit wasn't established until 2009, pollution abatement notices issued in 2006, 2007 and 2008 were retrospectively assigned to the unit.

Figure 9.3: Minor works pollution abatement notices (MWPANs) issued by unit, 2006–10



[Source: EPA Corporate database STEP+, as at December 2010]

It is of note that across the majority of offices there has been a significant reduction in the use of minor works notices between 2006 and 2010. When combined with the data on regular pollution abatement notices, it becomes apparent that the usage of formal regulatory tools differed across regional offices for most of the last five years, and that there was a tendency to use minor works notices in preference to pollution abatement notices up until 2010.

The issue of consistency was a common concern across the staff consultations, with a particular concern that it was well known by businesses that the regional offices had in the past had different approaches to compliance[39]. The issue of inconsistency, particularly between the regions and regional offices in Melbourne, was one of the most common and frustrating concerns raised by regulated businesses[40]. It is a reasonable expectation that, with a regulatory agency, similar approaches should be taken by whichever officer is involved.

This inconsistency appears partly to be attributed to the lack of clear procedures and decision criteria for the issue of regulatory tools, and thus there is a strong emphasis on mentoring and exercise of individual and collective judgement. The absence of procedures is exacerbated because individual officers infrequently issue pollution abatement notices and may therefore be less familiar with their drafting or less comfortable with being challenged on their decision making. For instance, in 2010 only five officers issued four or more notices

39 EPA staff consultations – Service Knowledge Unit, Bendigo, Wangaratta, Enforcement Unit.
40 Ai Group consultation, Victorian Waste Management Association workshop, Gippsland Local Government Network Meeting, Legal Practitioners' roundtable. See also Submission 30 – CitiPower and Powercor Australia Ltd.

and only one of those issued more than six[41]. The same pattern occurs in relation to minor works PANs, with less than half of authorised officers issuing a notice at all during 2010.

There is no place for local variations in regulatory approaches. This creates a subjective and unpredictable environment for regulated businesses in which too much depends on which EPA officer attends on a particular day and on the individual approaches and priorities of regional managers. This is not a sound platform for consistent and credible compliance and enforcement.

A number of theories were put forward as to why minor works notices were issued in preference to pollution abatement notices. Firstly, minor works notices take effect immediately (as opposed to regular pollution abatement notices) and officers used the notices to achieve results that could not wait 30 days to commence. Secondly, they were not appellable, which made it less likely that they would be challenged than regular notices. Thirdly, the absence of a service fee made this a more attractive and less confrontational tool.

It was considered that increased attention to the grounds warranting issue of minor works notices in 2010, and ensuring these were valid, has resulted in pollution abatement notices being used more.

The relatively quick change in the use of minor works notices and corresponding increase in pollution abatement notices, without clear documented rationale or procedural change, makes it clear that procedures are urgently required to confirm the purpose of the respective tools and how they ought to be used. The preference for minor works also appears to indicate a variation in the application of what is considered 'urgent' for the purpose of issuing a minor works notice. In my view there should be transparency as to how EPA will use minor works notices in particular, and that it should seek to 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 9.7

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.

9.14 The cost of remediation

The power to issue a pollution abatement notice is delegated to authorised officers on the condition that the cost of remedial works does not exceed $50,000. This limit appears to be linked to financial delegations and notionally corresponds with the maximum amount of costs for remediation work required under a minor works notice. Many EPA officers indicated that the $50,000 limit on both minor works and abatement notices was artificial and appeared arbitrary in the context of evaluating the issue of a notice. Many felt that they were not able to confidently assess the costs of remediation and that they were concerned about relying on information provided only by a regulated business. The $50,000 legislative limit on compliance costs included in minor works notices[42] was last reviewed in 2000. Costs of plant and advice have increased significantly since that time.

41 One officer in the Pollution Response Unit issued 23 notices, which is probably an indication of line management responsibility.
42 Section 31B(1)(b), *Environment Protection Act 1970*.

Continuing to apply this limit administratively to all enforcement tools delegated to authorised officers, not just the required minor works notice, appears to me to be unwarranted. With appropriate training and support I consider that competent authorised officers should be able to exercise the delegated power to issue abatement notices without imposing an artificial limit on the costs of remediation. The primary focus of the EP Act and authorised officers should be on protecting the environment. They are in my view capable of exercising their discretion, within the usual management reporting frameworks, to issue notices that remedy breaches and environmental risks, regardless of the costs of compliance.

As with abatement notices, clean-up notices may only be issued by specifically delegated managers if the estimated cost of the works is under $100,000, and by authorised officers if the estimated cost of the works required is under $50,000. Unfortunately not all the regional managers are currently delegated to issue, vary or revoke notices. This means that an authorised officer requires such decisions to be made outside their region by managers in EPA's head office. In my view this blurs line management accountability and accountability for enforcement decision making.

Recommendation 9.8

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

Recommendation 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.

9.15 Timeliness of abatement

The number of days between detection of a breach or risk requiring remedy and issuing of a regulatory instrument such as a pollution abatement notice, minor works notice or clean-up notice (see below), and the time given to comply with the notice itself was raised by a number of businesses. A number of examples were raised with me that involved businesses subject to inspections who received no feedback on the state of their compliance, only to find that (in some cases) months later they were served with an abatement notice[43]. This is undesirable and undermines confidence in EPA and its officers. It is also of concern that, during this intervening period, the breach is allowed to continue, with any accompanying environmental risk.

EPA staff were themselves concerned that there were too many procedural steps to follow to issue an abatement notice and that, where these were required, drafting, management approval and legal check could extend the time taken to complete a notice[44]. EPA officers are instructed to require confirmation in writing of the entity that occupies premises or relevant entity controlling any activity or process. This is achieved through serving a notice under section 53(3D) – even in the case of licensed premises, where the entity should be known.[45] This initial step can extend the drafting of a notice by up to seven days. In my view it could be dispensed with for licensed premises where a reformed licence has been issued. A further reform could involve inserting a provision that entitled an officer to presume that the licensee was the relevant occupier for the issue of a section 55(3D) and the ability to presume the ostensible occupier and to include an averment provision that would permit this to be relied upon on in any subsequent proceedings.

43 Open house consultations – Traralgon, Portland. Ai Group workshop.
44 EPA staff consultations - Pollution Response Unit and Environmental Performance Unit.
45 Section 55(3D) does provide for a response 'to the authorised officer orally' which could later, by requirement of the 55(3D) notice, be provided in writing.

Tables 9.7 and 9.8 show data for the period 1 January 2006 to 1 November 2010, including the median time elapsed from environmental incident or observation of a breach and standard deviation from the median. Subject to the qualification regarding data quality in the *Step+* system, the data indicate that timeliness of enforcement decisions has been relatively stable during the period, with the median time for issue of a minor works notice just over eight days and the median for a pollution abatement notice between 20 and 34 days. The large standard deviations indicate a great variability in the time frames for issue of the notice, with some notices appearing to take considerably longer than the median to issue. The large standard deviation may also be an indicator that, in some cases, the date of environmental incident may have been many years before detection.

Table 9.7: Median time elapsed from environmental incident or observation of a breach for issue of notices

	MWPANS	PANS	CLEAN-UP
2006	8	21	32
2007	9	27	30
2008	8	20	14
2009	13	31	34
2010	8	34	67

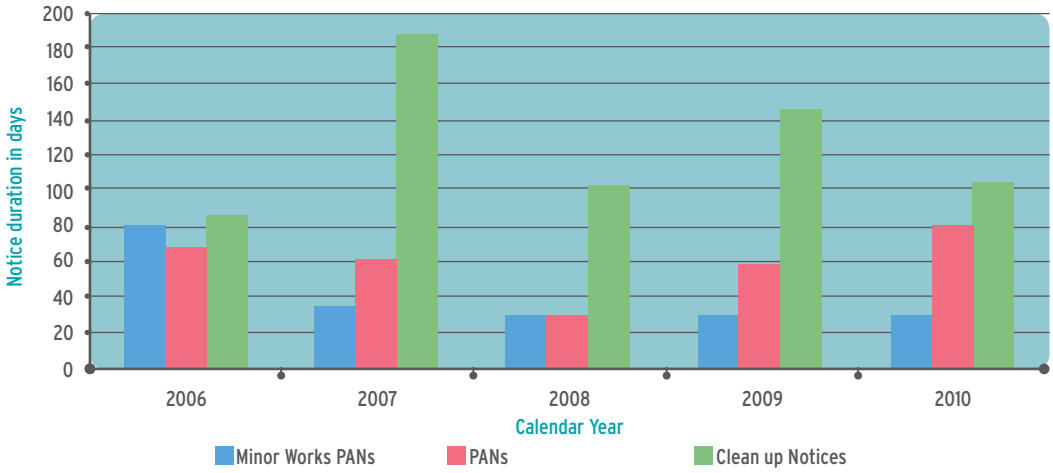
[Source: Data from Step+]

Table 9.8: Standard deviation from the median for issue of notices

	MWPANS	PANS	CLEAN-UP
2006	30	59	1,513
2007	35	56	178
2008	37	268	885
2009	56	173	1,081
2010	24	87	829

[Source: Data from Step+]

Figure 9.4: Median days from incident to notice issue



[Source: Data from Step+]

The median times appear consistent with the purpose and type of notices issued. For the most part, minor works notices are issued the quickest, followed by pollution abatement notices and then clean-up notices.

The median and standard variations for issuing a clean-up notice vary most dramatically. The median has a low in 2008 of 14 days and a high in 2010 of 67 days. However, the standard deviation for 2006 is the largest. In 2006 there were three instances, according to the data, when clean-up notices were issued 5945 days after the incident was detected. This is approximately 16 years. Looking at the data in more detail indicates that notices were issued in 2006 in relation to incidents occurring in 1992 (an environmental assessment of the industrial site) and 1995. These incidents indicate the complexity of the subject matter EPA is dealing with in its compliance and enforcement activity, and the legacy nature of some incidents and breaches that are detected.

The following tables indicate the median time for compliance with a relevant notice.

Tables 9.9 and 9.10 show the days given to achieve compliance with a notice between 2006 and 2010; the median and standard deviation are represented.

Table 9.9: Median for duration of notice

	MWPANS	PANS	CLEAN-UP
2006	82	69	86
2007	37	61	187
2008	30	30	102
2009	30	58	144
2010	30	81	106

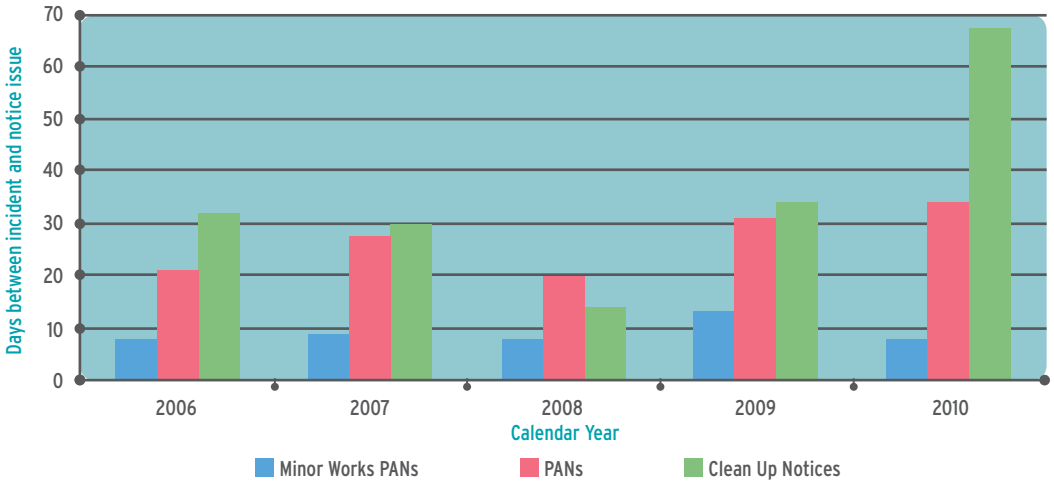
[Source: Data from Step+]

Table 9.10: Standard deviation for duration of notices

	MWPANS	PANS	CLEAN-UP
2006	167	396	390
2007	184	477	436
2008	133	1,479	335
2009	122	149	435
2010	90	370	557

[Source: Data from Step+]

Figure 9.5: Median days of notice, once issued



[Source: Data from Step+]

Trends for the duration of notices indicate that, broadly, the median times for compliance remain stable, with the median time to comply with a minor works notice between 2006 and 2010 at over 30 days, and for compliance with a regular abatement notice approximately 60 days. There is again considerable variation in the durations, which may be an indicator of the problem being addressed, or more or less lenience in the application of compliance dates by different officers. The clean-up notices attach the longest compliance dates, which is consistent with this notice in some cases being used to deal with legacy issues such as long-standing, contaminated sites.

The segments of environment to which these notices relate indicate that the most common affected segment is water, thus dealing with discharges to water being the most common enforcement subject matter in this context.

Table 9.11: Segment of the environment for which minor works notices were issued

	LAND	WATER	AIR	NOISE	INDUSTRY	NONE	MULTIPLE	TOTAL
2006	9	129	5	6	13	1	8	171
2007	1	77	8	4	5	0	5	100
2008	6	38	8	6	12	0	4	74
2009	7	26	14	10	11	0	7	75
2010	5	37	6	1	15	0	5	69

[Source: Data from Step+]

Table 9.12: Segment of the environment for which pollution abatement notices were issued

	LAND	WATER	AIR	NOISE	INDUSTRY	NONE	MULTIPLE	TOTAL
2006	11	11	7	2	8	2	8	49
2007	9	12	5	0	6	0	8	40
2008	10	10	6	8	19	0	9	62
2009	2	9	4	2	0	0	7	24
2010	6	12	38	4	0	0	17	77

[Source: Data from Step+]

Table 9.13: Segment of the environment for which clean-up notices were issued

	LAND	WATER	AIR	NOISE	INDUSTRY	NONE	MULTIPLE	TOTAL
2006	38	1	0	0	2	0	5	46
2007	33	1	0	0	6	0	7	47
2008	28	3	0	0	5	0	3	39
2009	23	1	0	0	24	0	2	50
2010	19	0	1	0	24	0	9	53

[Source: Data from Step+]

During 2010 there has been a significant increase in the number of notices issued for air pollution, with enforcement activity focused on the Brooklyn industrial area in western Melbourne, as mentioned previously.

Finally, a number of businesses expressed concerns regarding the conclusion or 'close-out' of EPA enforcement notices. The current practice adopted by EPA is that, upon satisfying EPA or its officers that a notice is complied with, the notice is revoked via an instrument of revocation. The current template gives no indication as to the reason for the revocation and does not differentiate between revocation due to compliance and revocation for some other purpose; for instance, the notice was disputed or uncertain.

As a matter of fairness and transparency, the instrument of revocation should indicate, where appropriate, that EPA is satisfied that compliance with the notice has been achieved and that, as a result, the notice has been revoked.

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.

9.16 Clean-up notices

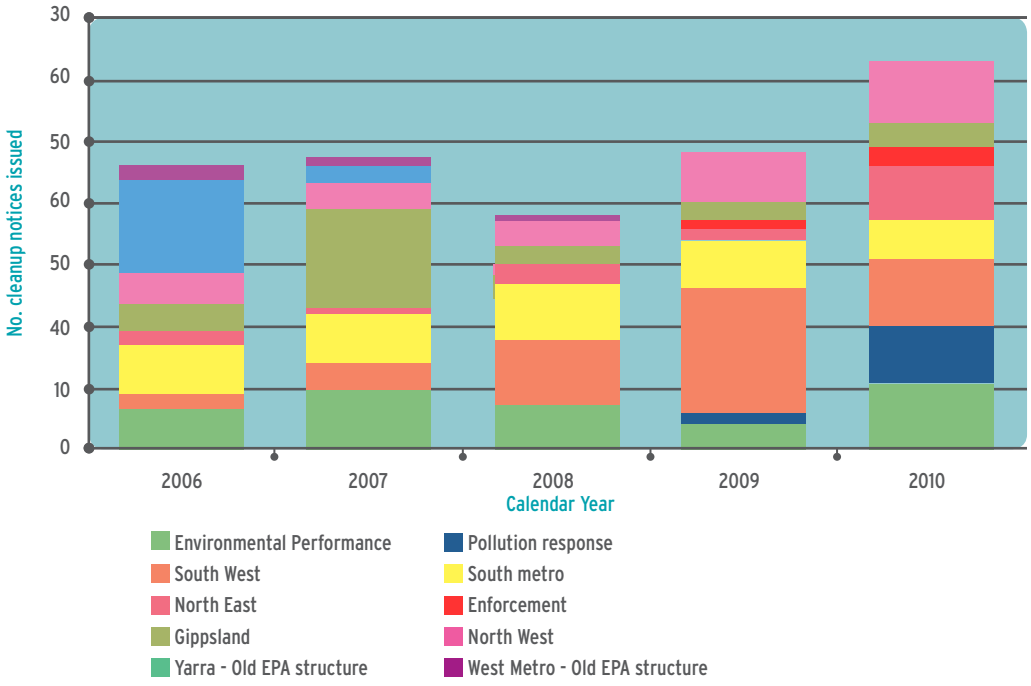
Clean-up notices are issued to the site occupier or to the person responsible for the clean-up of pollution, or to the person who has abandoned or dumped industrial waste or a potentially hazardous substance. They are typically used for contaminated land. They therefore require sound evidence to determine the party responsible for clean-up. The notice may request an environmental audit to determine the extent of pollution and provide clean-up recommendations. For example, an analysis of the audit database indicates that audits required by clean-up notice largely related to land and groundwater (45 per cent), surface water (18 per cent) and air (seven per cent).

A clean-up notice and any recommendations cannot be amended, but the notice can be revoked and reissued if required. Non-compliance is an indictable offence with a penalty of up to 2400 units. An infringement notice cannot be issued for non-compliance with a clean-up notice – prosecution must be undertaken. There is no provision to seek review by VCAT of such notices.

As with abatement notices, clean-up notices may only be issued by specifically delegated managers if the estimated cost of the works is under $100,000, and by authorised officers if the estimated cost of the works required is under $50,000. Due to the cost of environmental audits, notices requiring an audit are generally not issued by authorised officers and may, for many contaminated sites, be outside the delegation of managers.

The trend for the issuance of clean-up notices over the past five years has been consistent, with an average of 46 issued each year. The breakdown of these figures by region shows that each year at least 25 per cent of the notices have been issued from one region. In 2006, Yarra issued 32 per cent, in 2007 Gippsland issued 34 per cent, in 2008 distribution was more even with the South West issuing the most notices, and in 2009 they issued 40 per cent.

Figure 9.6: Clean-up notices issued by unit, 2006–10



[Source: Data from Step+]

9.17 Comparison with other jurisdictions

For the most part, enforcement tools in other jurisdictions parallel those that exist in the EP Act.

The EP Act powers are extensive. I have highlighted above some of the limitations for the use of pollution abatement notices, but broadly I consider that there are sufficient remedial tools to support EPA in its regulatory work. There are two issues, however, which warrant closer attention.

Firstly, a comparison with the legislation in other states indicates a much more modern approach to drafting, largely because of the more recent rewrite of legislation in other jurisdictions[46]. Accordingly, the legislative provisions creating certain remedial enforcement tools in other Australian jurisdictions are clearer. The nature of the tools and grounds for their use are also clearer than the current EP Act. It is also apparent from the name given in most other jurisdictions that they are preventative in nature and are not limited to traditional concepts of pollution. Thus, for instance, most jurisdictions use the term 'prevention notice'[47] or 'environment

46 NSW *Protection of Environment Operations Act 1997*, South Australia *Environment Protection Act 1993*, Western Australia *Environmental Protection Act 1986*,Queensland *Environmental Protection Act 1994, Environmental Management and Pollution Control Act 1994, Waste Management and Pollution Control Act 1998* and ACT *Environment Protection Act 1997*.

47 New South Wales *Protection of Environment Operations Act 1997*, Western Australia *Environmental Protection Act 1986*.

protection notice'[48] for the equivalent tool of Victoria's pollution abatement notice. In my view, this clearly explains the nature and purpose of the tool and would put beyond doubt any dispute that the pollution abatement notice is preventative and not punitive in nature.

A survey was undertaken of other jurisdictions and an attempt made to ascertain the usage of enforcement tools, based on publicly available information. Unfortunately, it was difficult to find comprehensive published data on enforcement by Australia's environmental regulators. This was in part due to significant changes in responsible authorities and departments and a number of recent interstate mergers. A comparison of the usage of various tools is problematic, as jurisdictions have employed different thresholds for licensing and, accordingly, most jurisdictions manage significantly more licensees under the equivalent of their Environment Protection Authority than Victoria[49]. Some jurisdictions do not undertake enforcement in non-licensed premises[50].

With these considerations in mind, the number of preventative enforcement tools used by the jurisdictions where this data is available is broadly comparable.

Table 9.14: Actions undertaken compared to other jurisdictions

	STATE	04-05	05-06	06-07	07-08	08-09	NOTES
TOTAL NUMBER OF NOTICES ISSUED							
	VIC	312	291	241	133	185	
	NSW	102	115	87	72	111	
	SA	52	44	21	14	22	
	QLD	N/A	N/A	N/A	67	83	
	WA	N/A	N/A	N/A	N/A	6	
	TAS	N/A	N/A	24	18	65	
	ACT	N/A	N/A	N/A	N/A	1	
INFRINGEMENT NOTICES ISSUED							
	VIC	82	78	80	56	58	
	NSW	286	108	91	141	153	
	QLD	N/A	N/A	N/A	151	216	
	WA	N/A	2	3	52	85	
	TAS	N/A	N/A	24	18	65	
	ACT	N/A	N/A	N/A	N/A	39	
Litter	VIC	18,223	22,089	23,522	18,459	19,468	
	NSW	1,388	964	939	789	820	
	WA	N/A	N/A	N/A	3,766	4,565	
Vehicle	VIC	138	180	107	148	249	
	NSW	1,825	1,035	991	1,064	756	

48 South Australia *Environment Protection Act 1993*, Western Australia *Environmental Protection Act 1986*, Queensland *Environmental Protection Act 1994*.

49 For instance, 2517 licences are managed in NSW, 2100 in South Australia.

50 For instance, New South Wales delegates this activity to local councils.

STATE	04-05	05-06	06-07	07-08	08-09	NOTES
PROSECUTIONS						
VIC	12	12	13	18	8	
	97	65	31	44	39	Includes litter and vehicles.
NSW	31	19	13	12	22	Only prosecutions issued under POEO Act (not including litter & vehicles)
SA	3	4	3	4	3	Not including prosecutions under the Radiation Act
QLD	N/A	N/A	N/A	8	5	
WA	N/A	5	3	5	4	Environmental pollution and land/vegetation prosecutions
TAS	N/A	N/A	8	10	18	Includes prosecutions by environmental infringement notice
ACT	N/A	N/A	N/A	N/A	3	
ENFORCEABLE UNDERTAKINGS						
VIC	N/A	N/A	N/A	N/A	1	1 has been entered into in 2010-11.
NSW	1	N/A	1	2	2	
WARNINGS						
VIC	N/A	N/A	21	18	11	Industry warnings only
NSW	N/A	N/A	N/A	N/A	N/A	
SA	52	44	21	14	22	
QLD	N/A	N/A	N/A	N/A	N/A	
WA	N/A	N/A	N/A	N/A	299	Field notice - caution and written warning
TAS	N/A	N/A	7	6	7	
ACT	N/A	N/A	N/A	N/A	1	

[Source: Data from annual reports for relevant states and responses to Benchmarking of EPAV against EPAs across Australia survey, conducted by Service Knowledge Unit.]

Secondly, during my consultations a number of stakeholders were concerned that there was a lack of consistency in the way that EPA deals with widespread non-compliance in relation to particular matters. As I discussed in relation to certain licence conditions, there was a view from many businesses that certain provisions of the EP Act were incapable of compliance[51], due to their absolute nature. For instance, some licensees were permitted to operate notwithstanding that they had openly admitted that they could not comply with discharge limits or certain conditions on their licence. In some industries, due to the widespread acceptance of certain risks across the industry or prohibitive cost of preventing certain breaches, it was considered that enforcement action would be futile, as any remedial action would be complex and may take some years. Of particular concern was a view that a number of businesses shared with me that, in such circumstances, EPA had been open to approaches which would result in informal agreements that it would not pursue enforcement. These arrangements are, in my view, inappropriate and lack credibility. They are not transparent to local communities or to competitors.

The EP Act makes it clear that it is preventative in nature[52] and that the enforcement scheme it outlines is one based on the primacy of prevention, supported by a graduated and constructive means of achieving compliance in the case of a breach or environmental risk. Accordingly, it is appropriate to provide tools which are capable of dealing with non-compliance even where that non-compliance is widespread or longstanding.

A number of tools exist under the EP Act for dealing with such a scenario, but they are not immediately apparent. A number of other Australian jurisdictions provide more flexible tools to deal with complex non-compliance that is either widespread or will take a considerable period of time to address.

South Australia provides for an environment performance agreement which:

(a) may contain terms providing for any matter that the Authority considers appropriate for securing the objects of this Act, including terms–

  (i) binding a party other than the Authority to undertake programmes of any kind directed towards protection, restoration or enhancement of the environment; or

  (ii) binding the Authority to provide financial or other assistance of any kind to the other party or parties or any of them; or

  (iii) providing a party other than the Authority with remission of rates or taxes.[53]

The agreement must be in writing and approved by the relevant minister. If the agreement relates to land, it may be registered with the Registrar of Land Titles to inform prospective purchasers of the land of any risks and remediation plans. The agreement is civilly enforceable by the environmental regulator[54]. A similar provision is included in the South Australian EP Act, although the provision specifically alludes to staged compliance and a continuous improvement mechanism, by allowing the agreement to require a party 'to meet progressively higher standards for the prevention, minimisation or elimination of environmental harm caused by the activity[55].

51 See Submission 17 - Australian Landfill Owners Association.
52 For example, Section 13(1)(b) describes EPA's function and role for preventing or controlling pollution.
53 Section 59, South Australian *Environment Protection Act 1993*.
54 Section 104, South Australian *Environment Protection Act 1993*.
55 Section 38, *Environment Protection Act 1997* (ACT).

The provision differs from an enforceable undertaking in that it does not rely on a contravention of the EP Act being established and is not punitive in that respect – it is clearly remedial in nature. An enforceable undertaking, which is more correctly characterised as an alternative to prosecution, would generally require a commitment beyond mere compliance.

The Northern Territory provides for a 'compliance plan', which also provides for phased implementation of activities to bring about compliance. The plan provides for staged actions and improvements in waste management and prevention, control, rectification or clean-up of pollution or environmental harm[56].

The concept of a staged plan to come into compliance has been considered by EPA. Some pollution abatement notices have included such plans in an enforceable format. In a number of complex compliance issues where their extent of environmental risk requires assessment or where controls may not be apparent, EPA has used staged conditions in a pollution abatement notice, coupled with requirements to seek advice from appointed auditors to achieve compliance.

This is a valid way of proceeding, as long as there is clarity as to the enforceability of each condition and clear staged deadlines for each milestone required to comply with the EP Act. Another important requirement is that the mechanism by which compliance will be achieved is transparent and open to scrutiny. I will comment further on the use of auditors in the next section. Within the current legislation, staged compliance in relation to complex problems can be achieved through the use of a risk control plan that is incorporated into the requirements of a pollution abatement notice. These should be used for complex risks; where the controls are not known by the authorised officer or EPA; where advice is required from experts engaged by the respondent; or where controls require regular review.

The risk control plan should be developed by the respondent in consultation with EPA and relate to the systematic and prioritised control of risks.

A risk control plan would be a staged plan which can be used by a business to ensure that, where numerous environmental hazards are present that do not involve an immediate risk, they are addressed in a planned manner, in order of priority. If the risk control plan is not being complied with or milestones are not achieved, further enforcement action may be taken.

9.18 Duration of notices

Some environmental hazards and incidents, such as contaminated sites and closed landfills, require considerable remediation work and may require ongoing monitoring for many years, in order to ensure that controls are effective or that controls evolve with the development of new knowledge on risks and control measures. These notices are predominantly used for closed landfills and are referred to as 'post-closure PANs' as they relate to control of risks which may emerge after a landfill ceases to operate.

These notices can run indefinitely, as they do not require the inclusion of an end date or compliance date. They do, however, require ongoing review and monitoring by EPA in its compliance activity. It is difficult to monitor ongoing compliance with notices that may have been issued many years prior to an inspection. Notice conditions and monitoring plans will inevitably have been imposed by officers who may no longer work at EPA and records may be difficult to locate. This will impact on the enforceability of the notice.

56 *Waste and Pollution Control Act* (NT).

I observed a tendency in EPA to consider notices in general, but post-closure notices in particular, as de-facto licences. I do not agree. As an enforcement tool, a notice firstly ought to be clearly enforceable and have conditions capable of compliance. Secondly, (by virtue of the EP Act) unlike licences, in most cases notices should have compliance dates which trigger a review of compliance against the notice. When a notice is complied with, it should be revoked. In cases where a longer-term enforcement tool is required, there should be clear triggers for ongoing review. Due to the evolving nature of the risks associated with closed sites and the controls available, it is appropriate to have long-term enforcement instruments in place over particular premises that allow for ongoing review and improvement in controls, where this is required. However, they should not be considered equivalent to a licence and should not, as a rule, be open-ended.

It is appropriate in my view to set a standard period of time for formal review of existing post-closure pollution abatement notices. This period of time would link to the risks of the subject site and would require formal review not less than once every five years. At each review, consideration should be given to whether the controls are adequate, given the current state of knowledge, or whether the notice requires amendment or replacement.

9.19 Follow-up on notices

Early in my consultations with EPA staff, it was identified that, due to a reduction in the number of authorised officers and an increase in pollution response activity, there had been a lack of attention to follow-up of notices. Follow-up involves assessing whether a respondent to an EPA enforcement notice has complied with the direction or any conditions and remedied any breach or risk. Due to the duration of some EPA notices and the fact that many issuing officers had since left EPA, it became a logistically difficult situation to manage, even though all EPA staff supported the need to confirm compliance with enforcement tools.

In 2009, a review of notices issued by authorised officers of EPA indicated that some 683 could not be verified as either complied with or not. Some long-standing notices such as post-closure pollution abatement notices are managed similarly to licences and have annual compliance assessments. However, there appeared to be a lapse in follow-up on EPA's intervention on the majority of the notices, notwithstanding that at some point in time an authorised officer had considered it necessary and issued a notice under the EP Act. The notices have been categorised by type, duration and environmental segment. There have been over 100 notices issued in 2009–10 that were not considered in the review.

The review undertaken by EPA staff revoked some 196 notices on the *Step+* system because the requirements of the notice had been met or are considered by EPA as no longer required.

The physical follow-up of enforcement notices, while seemingly doubling up on the number of attendances at a premise, is necessary to ensure compliance and the credibility of abatement notices as a remedial tool. An internal project had commenced to quantify the notices and group them according to risk and then geographically. This would allow for a prioritised campaign to address the notices. The initiative had previously lacked the necessary support from EPA for resourcing.

In August 2010, I supported this initiative as necessary to ensure the integrity of the pollution abatement notice as a preventative enforcement tool, and to ensure that environmental risks are being managed by those who are responsible for them.

It should be standard practice that every notice issued by EPA should result in follow-up action. The absence of follow-up creates significant concerns for the state of compliance at certain premises where EPA staff have observed environmental hazards, pollution incidents or contraventions. It is not open to EPA to rely on an assumption that those issued with notices generally want to and are capable of compliance with the notices and directions.

An effective enforcement regime relies on repeated and systematic evaluation and confirmation of the effectiveness of enforcement actions. This notion underpinned a recommendation of the Hampton Review[57] in the United Kingdom, which has since resulted in the acceptance of a principle of inspection applying to all UK regulators, namely:

> Regulators should follow up enforcement actions where appropriate.

This requires a system of confirming whether persons to whom notices are issued have complied with the conditions.

I am pleased that EPA accepted this recommendation: the EPA 2010–11 Compliance Plan notes the 'closing out' of outstanding notices as a priority issue. The issue was considered by the internal phase of the compliance and enforcement review.

The predominant focus of the notices is on land and water pollution and industrial waste. Only a small portion relate to licensed sites. The majority are less than five years old.

Because of the age of many of the notices (they extend up to a ten-year period) and the fact that many of the issuing officers have since left EPA, it is possible that some of the premises will have been closed, altered or no longer owned by the same person. Accordingly, there are likely to be some visits that prove to have been unnecessary. However, as I have said, it is not safe to rely on assumptions and some intervention is required.

Accordingly, I recommended an intervention that would initially focus on 100 notices ranked according to risk. The risk would be determined as a function of the likelihood of compliance with the notice and potential consequence – in other words, impact on health and the environment if the notice conditions were not complied with. Following this intervention I recommended an assessment to be made as to whether further follow-up work is required on more notices or whether it is safe to rely on only following up on notices when sites are visited in the normal course of EPA's work.

9.20 An integrated campaign

The intervention would take the form of an integrated campaign that would include notification to businesses that had been issued notices that EPA would follow up compliance, publicity for the campaign, and escalation to investigation where substantial non-compliance was detected.

A campaign of rolling blitzes across Victoria to follow up on remaining outstanding notices commenced in December 2010. The campaign was supported by a number of local initiatives in EPA's regional offices to undertake inspections and follow-up of notices issued in each region.

I commend the project and its aims and recommend that the inspections to confirm compliance with outstanding notices continue to be undertaken and prioritised according to environmental risk.

57 Hampton P, *Reducing administrative burdens: effective inspection and enforcement*, 2005.

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:

- 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.
- Include on its website a clear description of the different types of notice and the penalties which apply to non-compliance.
- 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.
- 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.
- Communicate EPA's campaign to follow up on notice compliance broadly and transparently, to maximise compliance with notice conditions and deter non-compliance.

10.0 EPA investigations

EPA conducts investigations in a number of contexts. This chapter explains the role of investigations in EPA's compliance and enforcement and the role of the Enforcement Review Panel, which provides authority to investigate. It includes recommendations for improving the strategic effect of investigations and their quality and timeliness.

10.1 Background

EPA conducts investigations in a number of contexts. Preliminary investigations are conducted in relation to pollution reports and incidents. These involve enquiries and inspections and may involve the taking of affidavits from witnesses and collection of samples, in order to assess compliance and determine the sources of any emissions. Although the outputs of such enquiries may form the start of an investigation that may lead to the preparation of a brief of evidence, such investigations are preliminary in nature and are generally limited to determining whether the law and standards have been complied with. Where a prima facie[1] breach has been established, an assessment occurs to determine whether further investigation is required.

Preliminary investigations are undertaken by officers in EPA's Pollution Response Unit and Environmental Performance Unit. In regional offices these investigations are undertaken by generalist environment protection officers. It is not a requirement for an initial investigation that the officer is an appointed informant. The term 'informant' refers to the officer's delegation to sign a charge sheet or summons to attend court[2] – traditionally known as an 'information'.

I observed that investigations that involve the compilation of briefs of evidence were commonly referred to within EPA as 'prosecutions'. This is because, at the completion of the brief of evidence, an assessment is made that may result in a prosecution being commenced through the issuing of criminal charges. The reference to investigations as 'prosecutions' is confusing and presumes that investigations will inevitably lead to a prosecution outcome. As will be seen below, this is not the case. I have referred to such investigations as 'major investigations', as they involve specialist skills and considerable enquiries being made by EPA officers.

A brief of evidence generally consists of:

- witness affidavits
- documentary evidence
- evidence of samples and expert affidavits
- corroborative and descriptive material, such as measurements, recordings, photographs and videos
- physical evidence in the nature of exhibits
- a record of any tape-recorded interview conducted.

1 A legal standard that, on first examination, there appears to be a non-compliance based on available facts and presumptions, which may be disputed by further evidence.

2 Section 59AC of the Environment Protection Act entitles an appointed informant to appear personally in criminal proceedings.

Major investigations are undertaken by investigators in EPA's head office Enforcement Unit or by appointed informants in EPA regional offices. Investigators and informants are authorised officers with powers under the EP Act. The Enforcement Unit consists of specialist investigators who conduct investigations generally in the metropolitan area. However, the nature of the workload of regional officers means that investigators often undertake major investigations in regional areas or support regional informants.

The Enforcement Unit receives referrals[3] from regional and metropolitan authorised officers to consider commencing a major investigation. The Manager Enforcement Unit provides advice to authorised officers on whether the relevant criteria have been met. The Manager Enforcement Unit tables referrals and supporting documentation at an Enforcement Review Panel (discussed below), which effectively provides authority to investigate.

Any investigation undertaken by EPA should aim to:

- determine whether a law, regulation, policy or other requirement has been contravened
- gather evidence to be admissible in criminal prosecutions or which may facilitate the use of other appropriate compliance and enforcement measures
- improve controls to prevent current and future non-compliance
- deter further or similar action to that which led to the non-compliance
- improve public confidence in the integrity of the regulatory system and administration of justice
- achieve an appropriate outcome within a reasonable time and at reasonable cost, according to legislative requirements and the nature of the investigation.

Although I was unable to locate a policy position or procedure, it was generally well understood that major investigations should be directed at the most serious environmental incidents and breaches that are likely to warrant a prosecution or other serious response.

Investigations are undertaken in order to determine:

- compliance with the legislation
- causes
- whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the law
- failings of law, policy or practice and to influence the law and guidance
- what response is appropriate to an alleged breach of the law.

10.2 Enforcement Review Panel

The Enforcement Review Panel (the Panel) is effectively the decision-making forum for enforcement actions involving an element of punishment. These include warnings and infringement notices. The Panel provides an authority to investigate by endorsing the preparation of a brief of evidence following an initial investigation. The Panel does not make decisions to commence a prosecution but, by endorsing a matter to proceed to major investigation, it acts as a gatekeeper to prosecution decisions, as any decision to not pursue investigation is effectively a decision by EPA not to prosecute.

The Panel meets weekly and consists of the following:

- Director Client Services

3 Via an 'incident summary sheet', which summarises an incident and any factors relevant to criteria for investigation.

- Director Environmental Services
- Solicitor or delegate[4].

The objective of the Panel is to 'provide for consistent decision making in respect to EPA's enforcement activities, and to ensure that such activities align with its priorities and the principles stated in the EP Act'.[5]

The Panel's role includes 'to provide high level direction to investigations as required'.

Finally, the Panel's role includes reviewing the timeliness and consistency of investigations and enforcement recommendations.

The Panel's terms of reference state that 'the Informant and lead investigators are welcome to attend to assist the Panel'.

The Panel was apparently established following amendments to the EP Act in 2000 that classified the majority of offences as indictable and resulted in an increase in the monetary penalty for infringement notices from $800 to $5000[6]. It was considered that, prior to this time, regional managers exercised considerable discretion as to enforcement responses to breaches. In his inquiry into methane leaks at the Brookland Greens Estate, the Ombudsman considered that the Panel caused significant delays to the issue of infringement notices. The Ombudsman found that these delays were excessive and 'substantially diluted their deterrent effect'[7].

The Auditor-General also found that the Panel was not meeting its objectives, which at that time included:

- Ensure process is maintained with respect to the quality of investigation evidence, points of proof and documentation
- Provide for consistent decision making in respect of enforcement activities
- Pursue natural justice and due process for alleged offenders
- Determine whether a penalty infringement notice (PIN) is appropriate or another tool will achieve the desired outcome
- Maximise the likelihood that, if a PIN is challenged, the EPA is likely to be successful in a subsequent court hearing
- Ensure continued learning and continuous improvement of investigators
- Ensure enforcement is consistent with EPA's objective[8].

The Panel's role included to decide on enforcement matters; endorse preparation of briefs; provide high-level direction to investigations, as required; support business units in decisions; review the timeliness and consistency of investigations and enforcement decisions; review and oversee enhancements.

The Auditor-General found that the Panel had not undertaken the role of reviewing the timeliness and consistency of investigations[9]. He found further that the Enforcement Unit had also not undertaken this role, noting poor record-keeping practices in the unit[10]. The report's recommendations include revitalising ERP by confirming its role and responsibilities, monitoring its performance and changing its membership to remove any potential conflicts of interest.

4 Enforcement Review Panel draft terms of reference, June 2010.
5 Enforcement Review Panel draft rerms of teference, June 2010.
6 *Brookland Greens Estate – Investigation into Methane Leaks,* Ombudsman Victoria, October 2009, p.127.
7 *Brookland Greens Estate – Investigation into Methane Leaks,* Ombudsman Victoria, October 2009, p.153.
8 *Hazardous Waste Management* – Victorian Auditor-General's report, June 2010, p.22.
9 *Hazardous Waste Management* – Victorian Auditor-General's report, June 2010, p.22.
10 *Hazardous Waste Management* – Victorian Auditor-General's Report, June 2010, p.23.

10.3 Major investigations

It was not possible to determine the number of preliminary investigations. As I have outlined above, current data do not differentiate between on-site attendance and desktop audits for proactive inspections, and pollution response attendances are not able to be confirmed. An indicator of preliminary investigations by the Pollution Response Unit is the number of substantiated pollution reports; however, the number of reports does not equate to the number of incidents responded to, as more than one report is frequently made regarding the same incident.

The number of major investigations can be ascertained based on Enforcement Review Panel data and line management records.

10.4 Overview of investigations/briefs of evidence

As part of this review, I was provided with access to EPA systems and databases. EPA has commenced reforming its business systems to improve quality of data and reliability. The following data require some degree of caution, due to the concerns regarding data quality I referred to above.

The number of referrals to the Enforcement Review Panel have been relatively stable over the last five years. There has been an increase in 2010, but this remains lower than the high of 269 matters referred during 2007. Table 10.1 indicates that, of those matters referred to the Panel, few proceed to major investigation. This suggests that the majority of matters either do not proceed or are dealt with by other enforcement tools, such as cautions and infringement notices.

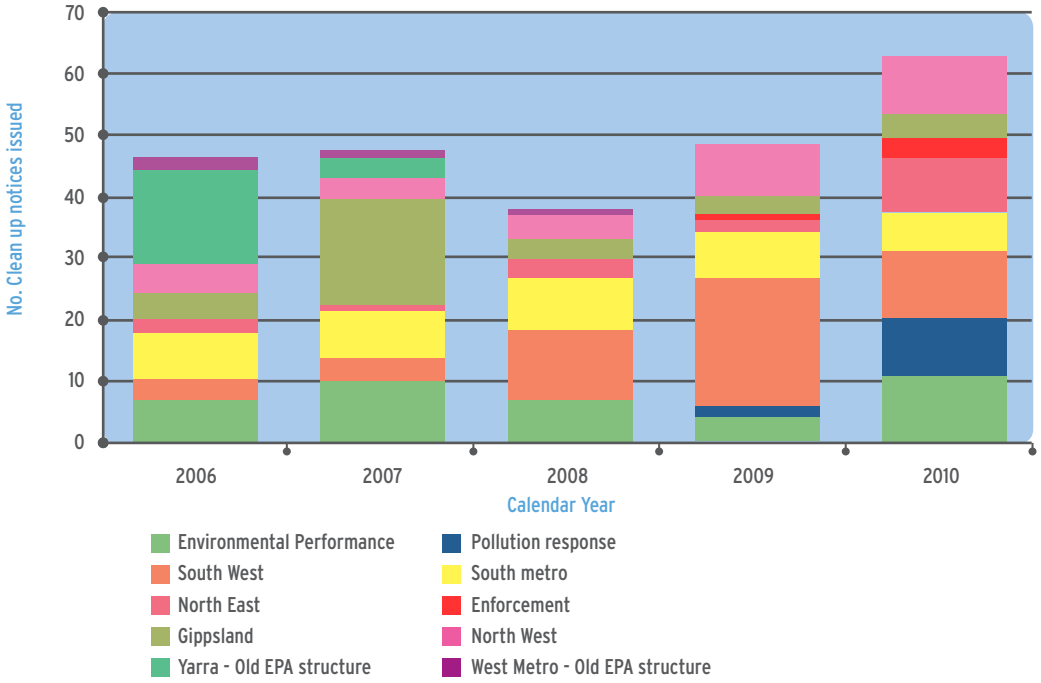
Table 10.1: Matters submitted to Enforcement Review Panel and recommended action to pursue 'prosecution'

Year	Matter to Panel	Panel recommended prosecution	% of matters recommended for prosecut
2006	172	24	14%
2007	269	11	4%
2008	174	5	3%
2009	174	21	12%
2010	231	25	11%
Average	**204**	**17**	**9%**

[Source: Based on Enforcement Review Panel data]

Figure 10.1 demonstrates the large disparity between matters considered by the Enforcement Review Panel and those that are recommended for major investigation.

Figure 10.1: Matters referred to Enforcement Review Panel 2006–10



[Source: Based on Enforcement Review Panel data]

Due to the time lag between recommendation and the review of a completed investigation brief for a decision on prosecution, it is not possible to correlate the number of proposed prosecutions from ERP with the number of prosecutions actually commenced or completed in a given year. This is because matters referred during one year will not necessarily be completed or result in a legal review in the same year. Assuming that the rates of prosecutions commenced were relatively stable from year to year, approximately 27 per cent of the matters referred for 'prosecution' actually resulted in charges being issued.

10.5 The sources of referrals

It is not possible to provide a longer-term view on matters referred for investigation by unit, due to a structural change in 2009 which consolidated staff from two metropolitan offices (Yarra and West) and allocated these staff to two separate functional units: Pollution Response Unit and 'compliance' in the Environmental Performance Unit.

Subject to this limitation, an analysis of referrals to the Panel by region indicates no real disparity in reporting of matters to the panel by region. There does appear, however, to be a significant disparity between matters referred by the Enforcement Unit itself, which suggests that the unit has entered data into the *Step+* system upon receipt or assessment of a referral from another office. Some cases may also have been self-initiated by the unit; for instance, an investigation arising from levy compliance. There also appears to be a disparity in the number of referrals from proactive inspections undertaken by the Environmental Performance Unit in 2010; however, the number of referrals is small.

Table 10.2: Matters referred to Enforcement Review Panel by unit

Year	2006	2007	2008	2009	2010	Sum	%
Total number of matters	172	269	174	174	231	**1020**	
Environmental Performance	-	-	-	11	11	**22**	2
Pollution Response	-	-	-	5	31	**36**	4
Enforcement	19	37	35	70	127	**288**	28
Solicitors	0	1	1	0	3	**5**	0
Statutory Facilitation	-	-	-	1*	1	**1**	0
Yarra	65	71	35	13	-	**184**	18
West Metro	18	36	40	4	-	**98**	10
South Metro	18	23	16	11	15	**83**	8
North East	9	17	7	13	13	**59**	6
North West	6	28	14	24	10	**82**	8
South West	25	17	11	5	9	**67**	7
Gippsland	12	39	15	17	11	**94**	9

In 2009 a structural change resulted in the Yarra and Western offices being combined and allocated between Pollution Response Unit and Environmental Performance Unit

**NB this includes the former Waste Management Unit*

[Source: Based on Enforcement Review Panel data]

Of those matters referred to the Panel and approved for major investigation, the highest proportion arise from referrals submitted by the Enforcement Unit (49 per cent) with a significant proportion in 2010 also coming from matters referred by Pollution Response (nine per cent). It is significant that, notwithstanding the comparable referral rates from regional offices over the five year period, no matters were recommended for major investigation arising from referrals from the North East Office.

Table 10.3: Enforcement Review Panel recommendations for major investigation by unit

Year	2006	2007	2008	2009	2010	Sum	% total matters referred
Total number of matters	24	11	5	21	25	**86**	
Environmental Performance	-	-	-	-	2	**2**	2%
Pollution Response	-	-	-	-	6	**6**	7%
Enforcement	1	1	2	13	11	**28**	33%
Yarra	14	2	1	-	-	**17**	20%
West Metro	2	4	1	2	-	**9**	10%
South Metro	1	1	1	1	2	**6**	7%
North East	0	0	0	0	0	**0**	0%
North West	3	2	0	5	1	**11**	13%
South West	0	0	0	0	2	**2**	2%
Gippsland	3	1	0	0	1	**5**	6%
South West	25	17	11	5	9	**67**	7
Gippsland	12	39	15	17	11	**94**	9

[Source: Based on Enforcement Review Panel data]

There are sufficient data in EPA's records to compare referrals generated by regional offices with metropolitan offices. See Table 10.3 for this comparison.

Table 10.4: Matters referred to the Enforcement Review Panel: metropolitan Melbourne and regional comparison

Year	Matters to ERP	Melbourne metro	Regional
2006	172	120	52
2007	269	168	101
2008	174	127	47
2009	174	114	59
2010	231	188	43
Sum	**1020**	**717**	**302**
% Contribution	70%	30%	
% recommended for prosecution	9%	6%	

[Source: Based on Enforcement Review Panel data]

Table 10.5: Matters Enforcement Review Panel approved for major investigation: metropolitan Melbourne and regional comparison

Year	Matters approved by ERP	Melbourne Metro	Regional
2006	24	18	6
2007	11	8	3
2008	5	5	0
2009	21	16	5
2010	25	21	4
Sum	**86**	**68**	**18**
% Contribution	79%	21%	

[Source: Based on Enforcement Review Panel data]

Referrals are more likely to be made from metropolitan offices or units, with only 25 per cent of the total matters arising from referrals from regional offices, but this does not account for referrals that the Enforcement Unit (a metropolitan unit) has made to the Enforcement Review Panel arising from information from a regional office.

It would appear from these data that the number of matters being brought to the Enforcement Review Panel has generally not changed in the past five years and the number has not been affected by EPA's restructure. There is a slightly higher proportion (nine per cent) of matters approved for major investigation referred by metropolitan-based units compared to regional offices (six per cent). There has also been a slightly higher proportion of matters recommended by the Panel to proceed to major investigation since 2009 (nine per cent versus seven per cent).

Unfortunately, current EPA data do not allow for comparison between the referring officer's recommendation to the Enforcement Review Panel and whether the recommendation was accepted.

Data were analysed to consider the proportion of matters referred for preparation of a brief of evidence by the Panel, the number of briefs actually prepared and those that have been 'endorsed' by Solicitors and resulted in charges being issued. Figure 10.6 shows this comparison.

Table 10.6: Matters referred for prosecution compared to briefs prepared and completed prosecutions

Year	Referred by Panel to 'prosecution'	Briefs of evidence prepared	Briefs endorsed by Solicitors resulting in prosecution commencing	Completed Prosecutions (reported in annual report)
2006	27	21	7	12
2007	13	4	2	12
2008	7	8*	3	19
2009	32	26	12	10
2010	30	15	22	12
Sum	**109**	**74**	**46**	**65**

NB: It is possible that a brief of evidence was prepared in any one year for a matter that was prepared in a previous year, hence the disparity. [Source: Based on Enforcement Panel Review Data & EPA Annual Reports]

As at 4 November 2010 there were 15 matters awaiting hearing in the Magistrate's Court, six briefs were undergoing review by the Solicitor's Office and five enforceable undertakings were under consideration.

While it is difficult to draw firm conclusions regarding these data, partly because the number of prosecutions is small, a number of issues are apparent:

- The majority of matters referred by the panel 'to prosecution' result in a brief of evidence being prepared.
- The proportion of completed investigation briefs resulting in a prosecution being commenced is relatively low.

Step+ data would suggest that more than half of the matters recorded as briefs of evidence prepared are referred to the solicitors. Unfortunately, the inability to match data and audit records creates a risk that investigations may be commenced or concluded without formal decision processes being followed.

The relatively small number of major investigations undertaken and their varying degree of complexity makes comparison of the resourcing level to undertake major investigations challenging.

With small numbers of major investigations undertaken, it is difficult to analyse trends in the nature of investigations undertaken and briefs of evidence prepared. Data provided by EPA indicate that the most common investigation type related to illegal dumping of industrial waste. The following table indicates the nature of recommendations by the Enforcement Review Panel to prepare a brief of evidence for the 2008–09 and 2009–10 financial years.

Table 10.7: Briefs approved by Enforcement Review Panel, 2008–09 and 2009–10

Brief type	Total 2008–09	Total 2009–10
Breach of EP Act – vehicle noise	3	1
Breach of licence conditions	2	5
Breach of pollution abatement notice	1	-
Cause or permit environmental hazard	4	4
Deposit/discard/dump industrial waste	10	8

Failure to pay penalty infringement notice for breach of minor works pollution abatement notice	1	-
Failure to pay penalty infringement notice for motor vehicle offence	2	-
False and misleading information	-	3
Pollution of waters	1	1
Transport prescribed industrial waste without transport documentation	1	-
(blank)	-	4
Total	**25**	**26**

[Source: Based on Enforcement Panel Review Data]

Table 10.8 indicates the number of briefs of evidence completed by officer.

Table 10.8: Brief preparation by officer

Year	Briefs of evidence prepared	Number of unique officers	Average briefs per officer	Maximum number of briefs prepared by officer
2006	21	6	3.5	6
2007	4	2	2.0	3
2008	8	3	2.7	4
2009	26	10	2.6	8
2010	15	8	1.9	4
Total	**74**	**Avg 6**	**Avg 2.5**	**Avg 5.0**

[Source: Based on Enforcement Panel Review Data & Step+ data]

It can be seen from the above that, on average, investigators produce between two to three and a half briefs per year, with some individuals preparing up to eight. On average, each year six unique officers are listed in Step+ as preparing briefs. This represents a third of the current number of appointed informants (18).

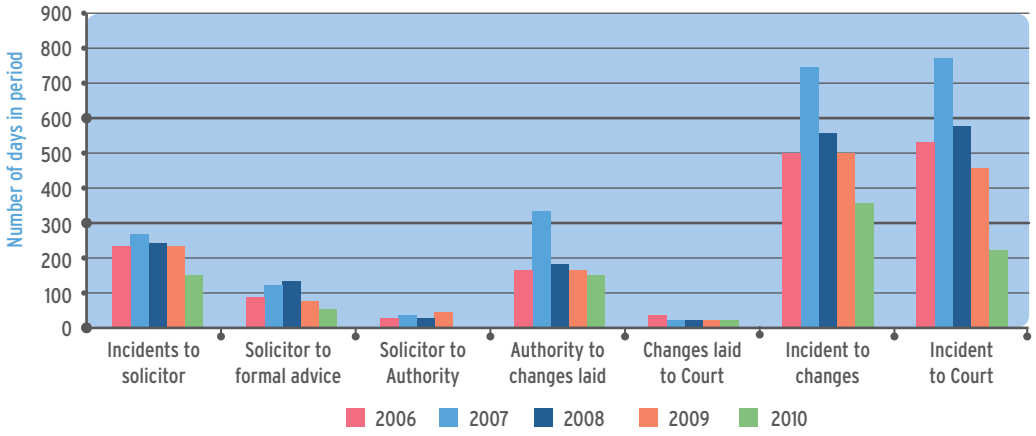
10.6 Timeliness of investigations and prosecutions

A key concern of businesses was the time taken for EPA to investigate incidents and alleged breaches[11]. This concern was echoed by legal practitioners who reported acting for clients that were compelled to approach EPA to request a decision on whether prosecution would be brought in order to reduce uncertainty[12].

11 Ai Group workshop.
12 Legal Practitioners' roundtable.

An analysis was undertaken of *Step+* records to understand the timeliness of investigations and each of the process steps leading to a court outcome where prosecution resulted. Figure 10.2 indicates the average time in days taken to complete each process step, including investigation. The standard deviations of each step were high (30 per cent), indicating that actual times taken in respective matters varied considerably. The maximum time periods were substantially higher, some measured in years; however, data could not be validated and appeared to include inaccurate data entry.

Figure 10.2: Prosecution key steps and timing



Description of process steps in bringing a prosecution:

- **Incident to Solicitor:** The period between an incident, referral to Enforcement Unit from the relevant unit of basic incident/brief, acceptance by the Enforcement Review Panel for prosecution, development of brief and delivery to EPA Solicitor.
- **To Solicitor, to formal advice:** The period between formal receipt of a brief by Solicitor to advice being provided on prosecution, including any improvements required to ensure the brief meets a suitable standard.
- **Solicitor to Authority:** The period between refinement of brief and provision of advice from Solicitor to Authority to begin formal prosecution action.
- **Authority to charges laid:** The period from formal acceptance by the Authority to pursue prosecution to the formal laying of charges against the company, director, master, ship owner or individual.
- **From charges to court:** The period between charges being served and a prosecution being heard.
- **Incident to charges:** The combination of all the above processes, prior to going to court.
- **Incident to court:** The total number of days from incident to the completion of all the above processes.

Unfortunately, errors in date entry and missing data make the data unreliable for anything other than indicative trends. This is apparent from the last two columns, which show that the number of days from

'incident to charges' data for 2009 and 2010 is greater than the average total days to complete a court case in the 'incident to court' value.

With these provisos, it would seem that:

- the average investigation duration inferred from the 'incident to Solicitor' step is some seven months
- there is an average of 17 months from incident to court result in those matters prosecuted.

In reality, the average length of investigation, when considering additional enquiries and work undertaken by the informant after initial legal review, is likely to be longer than seven months and contribute to some of the time taken between formal advice and charges being laid.

It is unfortunate that there has not been more attention to the quality of Step+ data and supporting databases, which would more accurately measure the timeliness of the investigation process and variations between individual investigators. Such data would be crucial to effective management of investigations and their resourcing. More accurate data would allow for conclusions to be drawn about potential bottlenecks in the process from incident to investigation to prosecution, which would allow for improvements to efficiency and the timeliness of investigations and decisions on prosecution.

These concerns were raised by the Auditor-General in his June 2010 report . While I understand that there is variation in the complexity of investigations and the time required to complete them, better data on timeliness and analysis of trends over time would provide a basis to manage individual performance and improve timeliness.

Appendix 10.1 outlines the applicable penalties attaching to infringement notices in each Australian jurisdiction.

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.

10.7 Investigation outcomes

A number of punitive tools are available in the EP Act and administratively to deal with breaches that are the subject of investigation.

10.7.1 Request to 'show cause'

Prior to most punitive enforcement action, EPA generally issues an invitation by letter to a person suspected of committing an offence to explain or justify the breach by providing any reasons. The letters are intended to bring the detection of a potential breach to the attention of the business and to provide an opportunity to respond in writing to the alleged breaches. 'Show cause' letters may be used in relation to late landfill levy payments, failure to pay notice service fees and providing false and misleading information to the Authority; for instance, false reports to the public litter report program.

'Show cause' letters were criticised by one environmental practitioner as requiring considerable time and expense from businesses, as there was a concern regarding self-incrimination and how the information provided would be used. It would appear appropriate to use 'show cause' letters for administrative breaches prior to punitive action such as a fine or suspension of a licence, but it is not an effective way of dealing with a more substantial breach that would warrant further investigation. There is currently no clarity or procedure indicating the use to which any response, including potentially incriminatory material, will be put. In any event, the 'show cause' letter should clearly demonstrate that response is voluntary, the purpose for which the response is being sought and how any information may be used.

10.7.2 Notice of contravention

A notice of contravention is used by EPA where there is a substantive ongoing contravention and it is envisaged that further enforcement action may be required. The entity is cautioned that, in the event of an offence being proven in a prosecution, EPA may seek to increase the available maximum penalty by making submissions to a court regarding the ongoing penalty provided for in the EP Act. The EP Act provides that a defendant will be liable upon prosecution for an additional financial penalty for breach of certain provisions for each day the contravention continues[13].

Unfortunately, although these notices are referred to as aggravating features in prosecution, there is no record of an additional penalty being invoked in a prosecution following a notice of contravention. In my view this questions the effectiveness of the notice of contravention and the maximum penalty currently available for offences under the Act. I will consider this issue further in relation to potential legislative amendments.

Notices of contravention may be issued by unit managers. Table 10.9 indicates their usage.

Table 10.9: Contravention notices issued, by type

Year	2005	2006	2007	2008	2009	2010
Notice of contravention (unlicensed)	0	0	1	0	0	0
Notice of contravention (licensed)	4	3	1	1	0	0
Notice of contravention (pollution abatement notice)	1	2	1	1	1	0
Notice of contravention (minor works pollution abatement cotice)	0	5	0	1	2	1

[Source: Based on Enforcement Panel Review Data & Step+ data]

13 For instance section 28B, 30C and 31B Environment Protection Act 1970

10.7.3 Infringement notices

Infringement notices are the most common punitive tool used by EPA. They are issued based on information received, predominantly in response to reports of litter from vehicles. In the context of substantive offences under the EP Act committed by licensed or other premises, they are issued following an investigation brief being compiled. The Department of Justice notes that penalty infringement notices are generally aimed at addressing minor criminal offences. EPA's current Enforcement Policy states that infringement notices may be applied to acts that have a low level of danger to the environment and are well defined in nature. Infringement notices may be issued for a number of indictable offences under the EP Act[14]. This is not generally the case in other Victorian enforcement regimes, where infringement notices are reserved for relatively minor offences of a regulatory or summary nature.

Infringement notices impose a financial penalty for breaches of the EP Act when a person has committed an offence. At least a *prima facie* case is required on available evidence, which generally requires EPA to undertake any investigation. Offences currently subject to infringement notices include: pollution offences; operation of scheduled premises without a licence; non-compliance with a works approval, licence, permit or notice; non-compliance with waste transport regulations; failure to submit an annual performance statement. An infringement offence is issued in line with the *Infringements Act 2006*. If required, the Authority may revoke a notice and reissue it to a different name, as identified.

The use of infringement notices over the five years since 2005 is shown in Table 10.9.

Table 10.10: Penalty infringement notices issued, by type

	2005-06	2006-07	2007-08	2008-09	2009-10
Industry	57	58	55	78	85
Waste transport	0	0	1	2	3
Motor vehicles	298	249	148	107	180
Litter	15,118	19,468	18,459	20,804	22,089
Total	**15,463**	**19,775**	**18,663**	**20,991**	**22,357**

[Source: Data sourced from EPA Annual Reports]

A small number of the litter penalty infringement notices (PINs) were issued from regional offices and not through the public reporting system.

14 Section 63B, Environment Protection Act 1970, Schedule A

Table 10.11: Penalty infringement notices issued by unit 2006–10

Year	2006	2007	2008	2009	2010	Total
Pollution Response	-	-	-	0	1	**1**
Enforcement	2	3	7	64	51	**127**
Gippsland	13	9	8	1	2	**33**
North West	3	7	13	0	0	**23**
South West	20	15	6	0	3	**44**
North East	7	12	4	2	1	**26**
Environmental Performance	-	-	-	5	0	**5**
South Metro	14	5	5	0	0	**24**
Yarra	48	15	9	-	-	**72**
West Metro	18	11	15	-	-	**44**
Total	**125**	**77**	**67**	**72**	**58**	

The above data relate only to penalty infringement notices (PINs) issued to businesses under the EP Act and exclude data for litter infringement notices, due to the number of litter notices issued. In 2006 there was a significantly higher number of PINs issued than has occurred in any subsequent year. Each year after has been fairly consistent in numbers issued. Before EPA's organisational restructure, PINs were issued consistently across the regions, including metropolitan Melbourne. The one exception occurred in 2006, when the Yarra region issued almost 40 per cent of PINs. Since the restructure most PINs are issued by the Enforcement Unit.

The nature of the PINs issued indicates that unlawful dumping of industrial waste and a breach of licence condition by licensed premises are the most common offence types leading to an infringement notice, followed by causing an environmental hazard. Table 10.12 shows infringement notices issued between 2008 and 2010.

Table 10.12: Penalty Infringement Notices issued by Enforcement Review Panel FOR 2008-09 and 2000-10

Nature of breach resulting in infringement notice	2008-09	2009-10
Breach of Environment Protection (Ships Ballast Water) Regulations	4	-
Breach of Environment Protection Act – vehicle noise	2	-
Breach of licence conditions	16	19
Breach of minor works pollution abatement notice	6	3
Breach of pollution abatement notice	3	1
Cause/permit environmental hazard	12	12
Deposit/discard/dump industrial waste	17	22
Operate scheduled premises without a licence	1	-
Transport prescribed industrial waste without transport documentation	2	-
Works without works approval	-	1
Total	**62**	**55**

[Source: Data sourced from Enforcement Review Panel data]

The fine imposed by infringement notices in Victoria is high in comparison with other jurisdictions. Appendix 10.1 outlines the applicable penalties attaching to infringement notices in each Australian jurisdiction.

10.7.4 Warnings

Warnings have been adopted by EPA administratively and do not require an enabling provision in the EP Act. As the majority of offences under the EP Act can be subject to infringement notices, the *Infringements Act 2006* provides that warnings should be available in appropriate circumstances as an alternative to an infringement.

Warnings are given as an alternative to offences that are subject to infringement notices. For this reason they are currently approved by the Enforcement Review Panel, having regard to the criteria in the Enforcement Policy. Fewer warnings are issued than infringement notices. The most common offence types match the profile of infringement notices, namely causing environmental hazard and dumping industrial waste.

The following table shows a comparison of offence types resulting in warnings for the 2008–09 and 2009–10 financial years.

Table 10.13 Official warnings issued by the Enforcement Review Panel for 2008–09 and 2009–10

Warning Type	2008–09	2009–10
Breach of licence conditions	3	1
Breach of minor works pollution abatement notice	2	–
Breach of permit	–	1
Cause/permit environmental hazard	3	3
Deposit/discard/dump Industrial waste	2	5
Operate scheduled premises without a licence	–	1
(blank)	–	1
Total	**10**	**12**

[Source: Data sourced from Enforcement Review Panel data]

Enforceable undertakings and prosecutions will be considered in detail in Chapter 11, 'Prosecutions'.

10.8 Discussion

The preparation of matters for a decision on prosecution is a critical aspect of any enforcement regime that relies upon prosecution to provide specific and general deterrence.

I found EPA's investigations function to be predominantly reactive and not driven by more strategic enforcement priorities. Focusing on areas of greatest harm and the highest culpability offences ensures that EPA's proactive enforcement strategies are augmented by the risk of consequences which follow breaches of the law. The investigations strategy therefore needs to be more closely aligned to EPA's strategic priorities.

Most regulators employ some formal method of providing authority to investigate and to endorse high-end enforcement decisions that impose administrative penalties such as infringement notices. The nature of prosecution decisions in particular must be founded on sound principles, fairness and objectivity in order to be beyond reproach. The reputational, legal and financial consequences for parties that are subject to penalties such as infringement notices and prosecutions are significant and require proper governance on decision making.

Due to the relatively low number of enforcement actions and differing levels of expertise of both authorised officers and regional managers, it would be premature in my view for EPA to devolve accountability for warnings and infringement notices to regional managers. These could be reconsidered at some later stage as the revised Compliance and Enforcement Policy, supporting procedures and data on decisions is developed. Financial penalties

of $5000, as are currently provided for in infringement notices, are a substantial impost. In future, consideration might be given to lower penalties for administrative breaches and whether authorised officers should be empowered to issue these 'on the spot'. However, this would require legislative change. For the time being, I consider an appropriate level of scrutiny and consistency is for these decisions to be approved by the Panel.

New terms of reference for the Panel were written following the Auditor-General's recommendations and it was made clear that the Manager Enforcement Unit was an attendee rather than a member of the Panel. The Manager Enforcement Unit was required to assist and support the Panel but not to participate in decision making.

Unfortunately, the revised terms of reference do not clearly articulate the role of each of the members of the Panel or the decision-making criteria to be applied to enforcement decisions. The decisions are in practice based on an application of the criteria in the current Enforcement Policy, following a consideration of an incident summary provided by the referring officer. However, this is not clear from the terms of reference themselves.

The terms of reference in place until June 2010 included objectives and a role that I consider to be line management accountabilities of the Manager Enforcement Unit and the team leaders who report to the Manager. The Manager in turn reports to the Director Environmental Services, who is responsible for ensuring the proper discharge of EPA's investigative functions. For instance, it is core to proper management of the Unit and function that the quality of investigations, evidence, points of proof and documentation are rigorously checked. Similarly, matters of systems, procedures and training are properly the responsibility of the Unit and its line management. Yet these functions are included as functions for the Enforcement Review Panel. I did not observe this role being performed by the Panel. There are only a small number of informants, who currently report through to regional managers, and in most cases these briefs are supervised by an investigator from the Enforcement Unit.

EPA staff were highly critical of the past operation of the Panel. There was a general view that the Panel lacked transparency and that decisions were inconsistent. A prevalent view was that the decisions were communicated informally and that reasons for decisions were not provided, so it was not possible to discern why a recommendation was approved by the Panel or not[15]. A number of officers indicated a reluctance to refer matters to the Panel for this reason, as they were uncertain as to the severity of a breach.

I support these criticisms. Decisions should be clearly documented, including the reasons for the decision and the criteria that were considered. These should be conveyed to the referring officer and proposed investigator, to improve understanding, consistency and the accountability of the Panel itself. Where a referral is endorsed as suitable for the preparation of a brief of evidence, a formal, written authority to investigate should be issued.

Until recently, recommendations from authorised officers were provided in unsigned, electronic drafts. This system did not preclude changes being made to electronic versions of documents, including to officers' recommendations. I understand that this practice has since been discontinued and that scanned, signed incident summaries are now considered by the Panel. Unfortunately, there is still no formal system for tracking referrals for investigation, to ensure that all referrals to the ERP are properly considered and that audits can be undertaken to ensure each referral has followed proper decision channels[16].

Over time it will also be necessary to examine data and any patterns or trends of the source of referrals to the Panel, by officer, to ensure consistency in application of enforcement criteria. This could be undertaken by the operational support unit I propose below. This would allow discussions with officers who have not

15 EPA Staff consultations – Geelong, Dandenong, Wangaratta, Bendigo.
16 This was a criticism of the Auditor-General's. *Hazardous Waste Management* – Victorian Auditor-General's Report, June 2010, p.23.

referred matters for the Panel's consideration, to ensure all officers properly understand the criteria and role of enforcement and to ensure consistency in enforcement outcomes. It would also allow for checks on consistency of approach between regional offices.

A number of EPA staff indicated that, in the past, they had been able to present their recommendations to the Panel and observe its deliberations, and that this was helpful in understanding the enforcement process and criteria applied. This had not occurred for some years. Authorised officers have been permitted to participate in the Panel since June 2010, but these attendances were not routine. The attendance of informants and investigations team leaders was also not routine. I consider this an important measure to aid transparency.

There was also considered to be a lack of clarity and consistency in the requirements to refer a matter to the Panel. I observed a checklist for referrals and an 'Enforcement Unit Evidentiary Requirements Checklist - Minimum' (sic), which were helpful, but these documents were not widely available and not included in an accessible operations manual. Such documentation would support officers in considering whether to refer a matter. I observed a number of referrals for punitive enforcement action where breaches continued, without remedial action being taken to attempt to stop a breach continuing. This put the Panel in a position of considering and recommending remedial enforcement action that is the accountability of line management in either the Environmental Services Directorate or Client Services Directorate. The checklists should make it clear, in my view, that remedial action should be taken prior to referral to the Panel and it should be clear from the incident summary whether a breach is continuing.

I observed the Enforcement Review Panel. In general I observed that referrals, which mostly resulted in infringement notices, were timely (generally within three months of incident) and properly considered with due regard for fairness. However, I observed that the Panel was unclear as to the relevance or weight of EPA strategic priorities to enforcement decisions, and that the Panel members confused remedial and punitive enforcement tools. I also observed an overemphasis on the cost of clean-up in determining whether punitive enforcement should take place.

The current Enforcement Policy provides a touchstone on the criteria to be applied to enforcement decisions, but is not sufficiently clear to provide a sound basis for consistent decision making. The deliberations on enforcement matters considered criteria broadly consistent with the Policy but, given the significance of the decisions, I would expect that each criterion is separately considered and the decisions made are documented, together with the criteria that supported or did not support the decisions. This would aid authorised officers and investigators to understand the importance of criteria and their application. With a revised enforcement policy this should provide clearer criteria and weighting to be applied to enforcement decisions.

I believe there continues to be a lack of clarity in the roles of the respective members of the Panel. The Manager Enforcement Unit continued to attend the Panel, which I consider appropriate. However, the Manager continued to provide advice to the Panel on the majority of referred matters and had in most cases earlier provided advice to environment protection officers and investigators prior to submission. It would be preferable to distribute this responsibility to team leaders, who would explain the factual circumstances and reasons for referring a matter for enforcement. The team leaders should also be responsible for providing feedback to the referring officer of any decision and reasons, together with any learnings that arise from the Panel's consideration. The Manager also maintained records of decisions, including statistical analyses of referrals. In my view this is best done by an independent minute-taker who has the skills to record and analyse the data created by the Panel process.

In many cases there were matters requiring legal advice. It was helpful from this perspective that the Solicitor to EPA is a member of the Panel. However, it is important that this role be properly defined and that it is clear that the role is one of legal input, including whether relevant criteria have been considered, and that no irrelevant considerations are taken into account. Considerations of the strategic importance of a potential enforcement action or investigation ought to be left to other Panel members.

The roles of the Director Client Services and Director Environmental Services are also unclear. The Director Environmental Services is accountable for the Enforcement Unit, Pollution Response Unit and Environmental Performance Unit. Hence, the Director Environmental Services is, in most cases, both responsible for the referring party and is a decision maker on whether the referral will be accepted for enforcement action or investigation. The Director is also responsible for some 'beyond compliance' initiatives, including direct grants to some qualifying businesses, who may be subject to enforcement action. The Director Client Services is responsible for regional staff who refer matters to ERP, but also manages client relationship managers (CRMs), who may have a conflicting view as to whether enforcement action is appropriate, given any other strategies being employed to improve the performance of a particular business.

In a relatively small organisation such as EPA it is difficult to create a structure that precludes such tensions. However, it is important that there is a clear policy and process for dealing with potential conflicts and ensuring these are properly managed. In time, EPA will need to consider whether such potentially conflicting tensions should be resolved with structural changes.

To ensure more effective challenge and governance in the Panel's deliberation, a fourth person should be added as a standing member who does not have responsibilities for enforcement but is familiar with regulatory operations. The director with line management accountability for a referral should approve the recommendation prior to proceeding to the Panel, so that it is clear that the matter is supported by senior line management. Matters that are not supported would be returned to the referring officer and discontinued.

In order to streamline some of the processes of the Panel, and ensure improved accountability, I would remove the following roles in the current terms of reference:

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

These functions have not been performed by the Panel and in any event are properly the responsibility of the Director Environmental Services through line management reporting. A report on the timeliness of investigations and the outcomes of investigations should form part of management reporting by the Director to the Executive and be published externally at appropriate intervals.

The *Infringements Act 1996* provides for formal warnings to be issued as an alternative to infringement notices. Formal warnings are also referred to the ERP, as they are effectively decisions on infringement notices. Given the quantum of penalty included in an infringement notice, I consider it appropriate to continue this practice.

However, there is in my view room for an additional tool to formally put an entity on notice of a breach where there is not a *prima facie* breach made out or where a breach is minor. Regional managers should be enabled to issue 'letters of advice' for less serious offences not warranting a formal warning or infringement. These could be issued following consultation with an investigations team leader or the Manager Enforcement Unit. They should be issued in a common template and centrally recorded. A 'letter of advice' could be used, in particular, where a *prima facie* case is not established but formally bringing the potential consequences of a breach to the attention of the entity is appropriate. The Manager Enforcement Unit should also be empowered to discontinue an investigation where there is insufficient evidence to prosecute or a matter ceases to warrant further investigation. These matters would be approved by the Director Environmental Services and only be tabled at the Panel for noting.

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.

10.9 Improvements to investigations

EPA has established a specialist investigations unit to centralise skills and expertise to the challenges of investigation. In my view the role of investigators is highly technical and requires skill and experience. The intensity of investigations work and the need to be able to undertake quality investigations and prepare quality briefs requires considerable care and attention. The outcome of investigations must be swift. It is therefore not practical to provide for major investigations to be undertaken by generalist officers who also have responsibilities for pollution response and inspections. Moreover, in relation to major investigations that may result in prosecution, it is of utmost importance that the independence of the investigation is assured. Regional managers currently manage a variety of functions, including those that provide support to businesses, such as CRMs, as well as enforcement practitioners – some of which have competing priorities.

Investigative skills are valuable to generalist inspectors. It is commendable that EPA officers are trained to take affidavits and prepare briefs of evidence as informants. I consider these necessary skills for generalist protection officers. However, due to the above reasons, I consider that

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.

all major investigations should be undertaken by specialist investigators reporting through the Enforcement Unit. Where investigators are based in regional offices, in order to ensure independence they should also report through the Enforcement Unit rather than local regional managers, who also manage CRMs and other support roles.

10.10 Improving investigations

Investigators considered that substantial delays were caused by waiting for EPA staff outside the Enforcement Unit, including authorised officers and experts, to complete preparation of their own statements. Although it is common for informants to prepare their own statements and many EPA staff have been trained to prepare statements, I consider a degree of independence is required. I therefore recommend 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. All experts should be briefed on the obligations of independence and impartiality in providing expert evidence that is to be relied upon in court. There are protocols in the Supreme Court for expert witnesses[17]. I consider that all EPA expert witnesses should be trained on the protocols and commit to them in the preparation of any reports or statements to be used in court proceedings.

There is currently a high level of additional work required after submission of a brief of evidence to the Legal Unit for review and advice on whether prosecution should be brought[18]. It is apparent that offences attracting criminal liability and the risk of penalty require sufficient evidence and should be prepared to a high standard of proof. I was struck by the frequency of issues that arose in investigation and general enforcement that required legal input. These matters arise frequently in the course of investigations and a timely response is required, often while an officer is in the field.

With any increase in the level of investigations or level of litigation this demand is likely to increase. In my view EPA should allocate a solicitor responsible for provision of real-time legal advice to guide investigators and support investigations. The solicitor allocated to this activity would either be co-located with investigators, to ensure learnings are maximised, or be available on call and work in close cooperation with the Enforcement Unit. The solicitor would support improvements to the quality of investigation briefs and be involved in writing policy and procedures for the investigation process.

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

17 Order 44 Supreme Court Rule.
18 EPA staff consultation – Enforcement Unit, Legal Unit.

11.0 Prosecutions

This chapter considers EPA's prosecutions, the level of prosecutions undertaken and the way in which these are conducted, including the outcomes from prosecutions. It recommends a number of policies be developed to improve transparency and accountability of prosecutions and produce more effective outcomes.

11.1 Background

Prosecution involves the formal bringing of criminal charges against individuals or businesses who have breached the EP Act or committed offences under other legislation or regulations administered by EPA that carry a criminal penalty. It is one of a range of legal sanctions that can be applied by EPA to offending parties. A number of other sanctions and avenues for legal address are also discussed briefly below.

Most offences under the EP Act are indictable[1]. However, the maximum penalty under general pollution offences is now within the Magistrates' Court sentencing limit and proceedings are almost exclusively prosecuted in the Magistrates' Court. Upon a finding of guilt to charges under the EP Act, a defendant is subject to punishment including financial and non-financial penalties available to a Magistrate. Imprisonment is not currently provided for in relation to general pollution and environmental hazard offences under the EP Act. Terms of imprisonment are only available for offences involving fraud and false information, obstruction and aggravated pollution and littering.

The use of prosecution as an enforcement option is currently explained in EPA's Enforcement Policy.

The decision to prosecute is made by EPA's CEO under delegation from EPA, considering legal advice addressing the 'factors to consider' set out in the Enforcement Policy. These include:

- prosecutions will be undertaken where to do so is in the public interest
- serious harm or risk to the environment, human health or welfare has occurred
- an offender has ignored a direction given by an EPA officer or obstructed or intimidated an officer or an investigation
- an infringement notice is not a sufficient deterrent
- there has been a deliberate attempt to circumvent a requirement of the Act, especially for personal gain
- a waste discharge continues after a licence is suspended or revoked, or transport of prescribed waste continues after a permit has been suspended or revoked.

1 Indictable offences are criminal offences that are more serious and may be prosecuted before a jury in the County or Supreme Court. Some indictable offences, including most EPA offences, may be heard in the Magistrates' Court, but only with the consent of the defendant. Summary offences are generally less serious and only heard in the Magistrates' Court.

11.2 Charge on property

The EP Act provides that, in certain circumstances such as the abatement of pollution, removal of hazardous waste or dumped or abandoned material, EPA may undertake any clean-up or recovery work required[2]. The Act allows EPA to recover reasonable costs associated with clean-up from the person who caused the situation or the occupier. Where the person who caused the pollution or the occupier cannot be contacted or is unable to meet the costs, EPA may take a charge on any property belonging to the occupier. If the property is land, the charge may be lodged with the Registrar of Titles.

The charge works to record EPA's debt and claim over the property if sold to discharge the debt. The charge may also be used to cause the sale of land.

11.3 Notice of intent to sell

The EP Act provides EPA with the ability to sell property, including land, over which a charge has been registered following site clean-up, to recover outstanding costs. A notice of intention to sell is required to be served and can only be used when a charge still has an amount owing and has been on the property for at least 12 months. The notice must be in writing and publicised broadly.

11.4 Injunction

An injunction is issued by the Supreme Court to prevent someone from contravening the Act or a condition in a licence, permit or notice[3]. An injunction is notionally intended to enforce statutory instruments such as notices and licences and to prevent an environmental offence or hazard from continuing. An injunction can be used to stop an activity or to take required action. Where an injunction is not complied with, proceedings may be commenced for contempt of court and EPA may take recovery action. There do not appear to have been any injunctions applied for or obtained in the last 10 years. I was advised that the last use of an injunction was probably in 1989.

11.5 Licence suspension or revocation

EPA can suspend or revoke a licence or permit where there is a history of breach of conditions, a serious breach has occurred or a breach continues after prosecution. Revocation is considered to be the most serious form of action that can be taken against a licensee and is rarely taken.

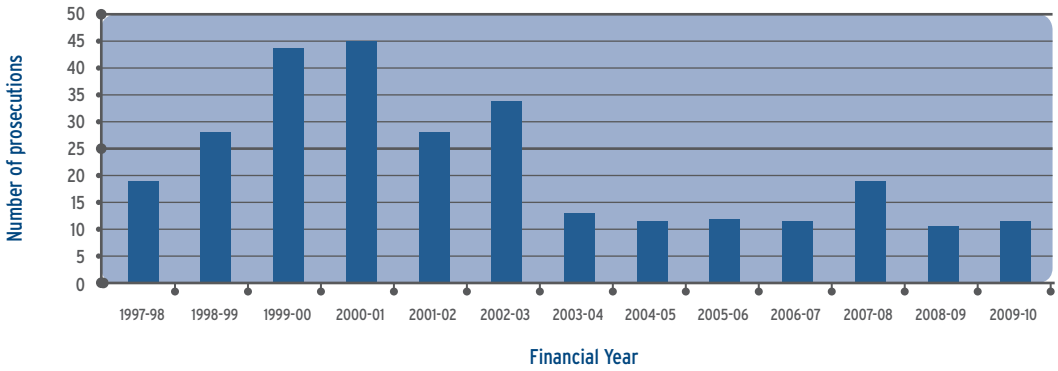
Licence suspensions are also rare. There was one suspension in 2010 arising from an allegation of non-payment of landfill levy.[4] There have been no revocations arising from EPA enforcement.

2 Section 62, *Environment Protection Act 1970*.
3 Section 64A, *Environment Protection Act 1970*.
4 EPA may suspend a licence if a landfill levy is not paid, in line with Section 50XB of the EP Act.

11.6 Prosecution activity

An analysis was undertaken of prosecution outcomes over the last 10 years based on data published in EPA's annual reports and a register of 'prior convictions' for each financial year available on EPA's website. Prosecution numbers have fallen rapidly since 2002-03, when there were 45. Since that time prosecution numbers have ranged between 10 and 15 annually. Between 1999 and 2001 more than 40 prosecutions were conducted each year. Figure 11.1 shows the number of prosecutions over the last 10 years.

Figure 11.1: Number of prosecutions over the past 10 years



[Source: Based on analysis of EPA Annual Reports]

The reduced number of prosecutions over the last seven years has coincided with an increase in the number of major environmental incidents as measured by emergency response deployments by EPA. As previously indicated, the number of pollution reports has also been increasing.

It was broadly considered that the reduction in prosecution numbers since 1999-2000 coincided with EP Act amendments which classified the majority of offences under the Act as indictable[5]. This caused an increased scrutiny of prosecution briefs and diligence from EPA and its lawyers in recommending prosecution[6], especially where there was a prospect that a defendant could elect to proceed by way of committal[7] to a prosecution in the County Court for trial by jury. The Australian Landfill Owners Association in its submission agreed with this assessment and also indicated that companies became much less cooperative with EPA in its investigations, including relying on the 'right to silence' to 'stymie' EPA enforcement[8]. While data were not available, it appears that most prosecutions since that time have not been contested and have resulted in pleas of guilty[9].

Prosecutions in other jurisdictions were difficult to compare, due to the variation in jurisdiction and different levels of reporting on outcomes. Information was obtained from seven comparable Australian jurisdictions.

5 EPA staff consultations - head office, Environmental Performance Unit.
6 EPA staff consultations - Enforcement Unit.
7 A preliminary hearing in the Magistrates' Court that allows a defendant to challenge prosecution evidence before a Magistrate. The Magistrate must decide whether there is sufficient evidence for a jury to be able to make a guilty finding.
8 Submission 17.
9 EPA staff consultations - head office, Legal Unit.

Table 11.1: Comparison of number of prosecutions between states/territories

YEAR	NSW	VIC	QLD	TAS	SA	ACT	WA	NT
2004-05	31	12	-	-	NA	-	-	-
2005-06	19	12	-	-	4	-	4	-
2006-07	13	11	-	5	7	-	1	-
2007-08	12	16	8	3	3	-	1	-
2008-09	22	9	5	6	3	3	2	-
Median	19	12	7	5	4	3	2	-

The comparison indicates a higher rate of prosecution in NSW than Victoria, but comparable numbers in other jurisdictions. In 2009–10, the NSW Department of Environment, Climate Change and Water undertook 134 prosecutions, including 23 under the *Protection of Environment Operations Act 1997*.

By way of further comparison, the Department of Sustainability of Environment (DSE) undertakes prosecutions involving breaches of Victorian laws protecting forests, biodiversity and ecosystem services. Offences include those involving forestry operations, impacts on Crown land and catchments and illegal trade in wildlife. The most recent public data are for 2007–08. In that year the department licensed 521 entities and undertook 112 prosecutions. Seven hundred and nine other penalties were issued. The number of prosecutions is slightly less than in 2005–06, when DSE prosecuted 150 cases[10].

WorkSafe Victoria, which regulates occupational health and safety in Victorian workplaces (including public safety arising from handling of hazardous substances and dangerous goods), conducts between 100 and 150 prosecutions per year. In 2009–10 it conducted 149 prosecutions[11].

Over the last five years the most frequent charge laid in EPA prosecutions has been causing or permitting an environmental hazard[12]. Twenty-one such prosecutions were undertaken. The next most frequent offences charged were dumping or abandoning waste at an unlicensed premises, harmful pollution of waters and operating premises without a licence.

The most common incidents resulting in prosecution have been dumping of waste and pollution of waters. The data do not indicate the size of the business or whether the business was licensed or not, but it appears that prosecutions of unlicensed, small and medium businesses were more common.

The following table categorises prosecutions according to the most frequently laid charges.

10 *The Victorian Regulatory System*, Victorian Competition and Efficiency Commission, April 2009, p.170.
11 *WorkSafe Victoria Annual Report 2010*, p.12.
12 Section 27A, *Environment Protection Act 1970*.

Table 11.2: Number of prosecution charges by Act section, 2005–10

EPA ACT SECTION	NUMBER OF APPLICATIONS	EPA ACT SECTION DESCRIPTION
27A(1)(c)	21	Cause or permit environmental hazard
27A(2)(a)	10	Dump/abandon at unlicensed site
39(1)(c)	10	Pollution of waters harmful etc to animals etc
27(2)	9	Contravene Licence condition
39(3)	6	Place waste so as could gain access to waters
39(1)(e)	5	Pollution of waters detrimental to beneficial use
62B(5)	4	Contravene direction of authorised officer re. imminent danger
62A(3)	3	Contravene requirement of cean-up notice
41(1)(a)	3	Air pollution noxious or poisonous or offensive to humans
59E(d)	3	Aggravated pollution – substantial risk to public health
27(1A)(a)	3	Unlicensed
39(1)(b)	3	Pollution of waters harmful etc to human beings
23B(1)	2	Disposal of garbage into state waters
41(1)(e)	2	Air pollution detrimental to beneficial use
31A(7)	2	Contravene PAN requirement
55(6)	2	Delay/obstruct/fail to comply/refuses to permit authorised officer
60C(3)	2	Fail to pay service fee
39(1)(a)	2	Pollution of waters noxious or poisonous

Three aggravated pollution offences have been laid but have not resulted in penalties. One offence of aggravated littering has been pursued.

Prosecutions most often involved pollution to water. This was consistent with staff consultations, which indicated that there was a shared understanding that pollution of waters by spills or other discharges, particularly where they involved damage to ecosystems or animals, would always be escalated for major investigation[13].

Table 11.3 provides a breakdown of prosecutions by environmental segment affected.

13 EPA staff consultations – head office, Enforcement Unit, Legal Unit.

Table 11.3: Number of prosecution charges by environmental segment, 2005–10

ENVIRONMENTAL SEGMENT IN CHARGE	NUMBER OF CHARGES
Water	48
Industrial waste	19
Industrial waste and land	5
Air	5
Land	4
Water and industrial waste	4
Water, industrial waste and air	4
Industrial waste and air	4
Water and land	3
Water and air	3
Air and land	1

The available data are not categorised according to location of offence.

The location of the court can generally be used as a proxy for the location of an offence. Magistrates' Court rules indicate that an offence should be charged in the court located closest to an alleged offence; however, a prosecution may also be dealt with in the court located closest to where a defendant resides. This rule can tend to be interpreted liberally to allow pleas of guilty (particularly in the case of corporate defendants) to be heard at the Melbourne Magistrates' Court, which would mask prosecutions which occurred in Melbourne but may have resulted from breaches elsewhere in Victoria.

Interestingly, after Melbourne Magistrates' Court, Sunshine is the next most common court. This indicates an overrepresentation of matters pursued in that court in comparison to all others. The most frequent regional court is Bendigo. There was only one prosecution in the five-year period in the Wangaratta court. The absence of prosecutions arising in any other regional court in the north or north-east of Victoria confirms a disparity in prosecution action arising from EPA regional offices. This is likely to arise from two things: whether an informant was appointed in the region and the local office's attitude toward prosecution as an enforcement measure. The data appear to confirm views expressed in EPA staff consultations that the Bendigo office was traditionally considered to pursue prosecution more rigorously and that it was rare to prosecute any matter arising in the area covered by the Wangaratta office[14].

Table 11.4 provides an indication of the location of court hearings over the last five years.

14 EPA staff consultations – Wangaratta, Bendigo, head office, Enforcement unit, Legal Unit.

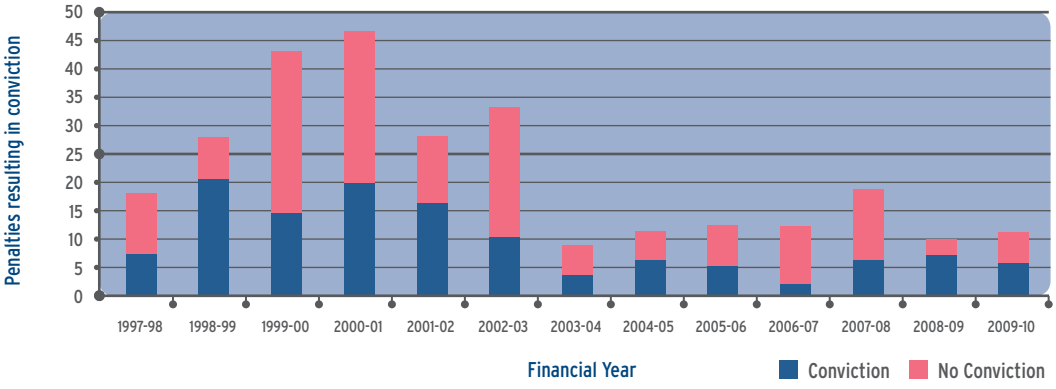
Table 11.4: Prosecution by court location, 2006–10

COURT LOCATION	NUMBER OF PROSECUTIONS	AVERAGE $ OF FINES	AVERAGE $ OF 67AC
Melbourne	44	12,903	102,182
Sunshine	22	10,040	39,110
Bendigo	12	5,125	50,000
County Court	6	N/A	N/A
Broadmeadows	5	10,413	37,200
Moorabbin	5	25,000	-
Morwell	4	-	-
Dandenong	3	11,182	30,000
Heidelberg	3	54,914	10,300
Latrobe Valley	3	2,200	22,500
Castlemaine	2	700	60,000
Geelong	1	10,667	45,300
Ringwood	1	14,261	61,667
Wangaratta	1	2,000	10,000
Werribee	1	-	-

NB: Average value of fines is sourced from all data.
Average value from 67ACs are from their introduction in 2001

Of the prosecutions undertaken, the success rate is very high – over 90 per cent. Of successful prosecutions, the majority do not result in a conviction being recorded by the court in conjunction with the penalty. Figure 11.2 shows the proportion of convictions recorded in EPA matters.

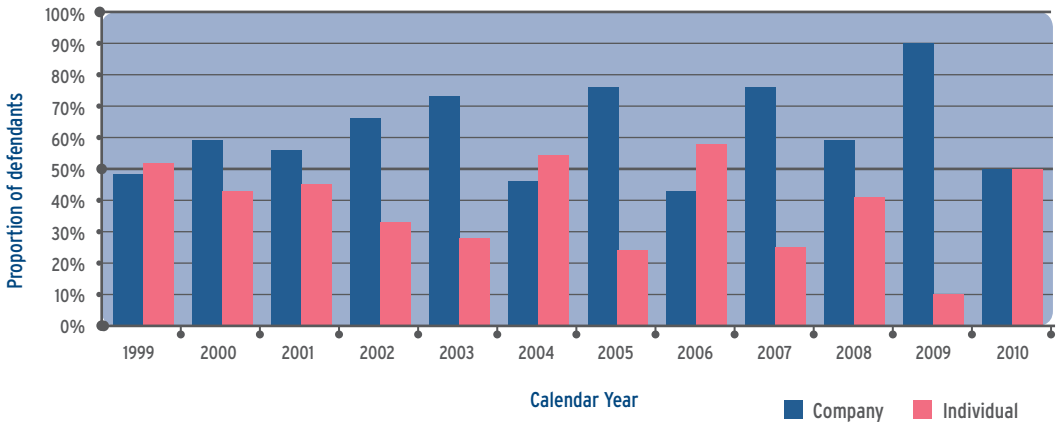
Figure 11.2: Number of penalties resulting in conviction, by year



[Source: Based on analysis of EPA Annual Reports]

Prosecutions were generally undertaken against corporate defendants rather than individuals. The proportion of individual defendants is relatively high but is more a reflection of the number of sole-proprietor businesses or other individuals committing offences (such as dumping) than an indication of the number of corporate directors, which is low.

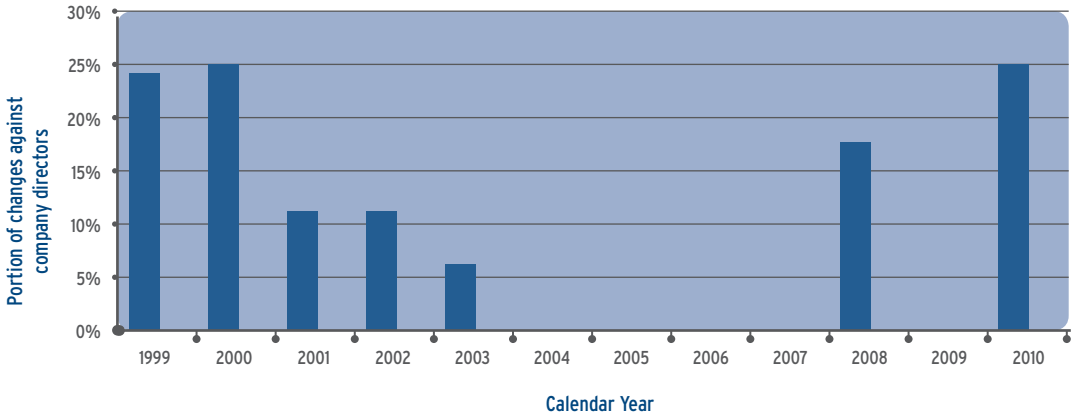
Figure 11.3: Individual and corporate defendants by year, 1999–2010



[Source: Based on analysis of EPA Annual Reports]

The number of charges laid against directors by EPA since 1999 has reduced and no charges were brought against any directors between 2004 and 2007. The directors charged were predominantly charged in stand-alone prosecutions and not simultaneously with their own companies. EPA staff consultations indicated that there was reluctance in the past to pursue directors, as a matter of informal or unwritten 'policy'.

Figure 11.4: Proportion of prosecutions against company directors by year, 1999–2010



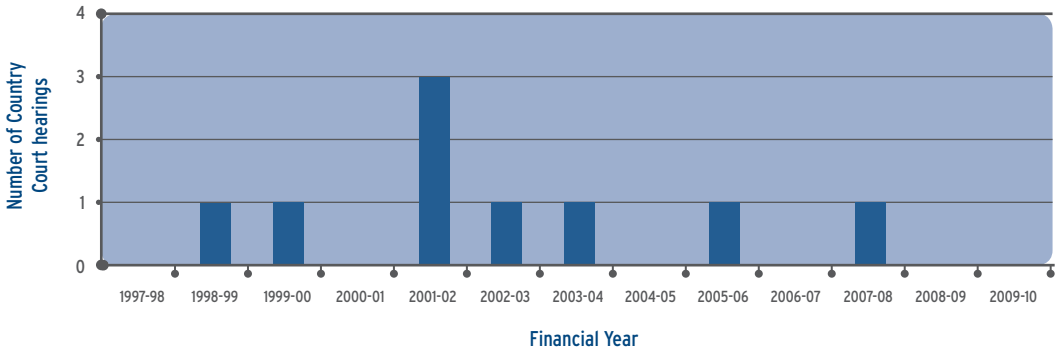
[Source: Based on analysis of EPA Annual Reports]

Court hearings and appeals in the County Court were rare. In 2001-02 there were three appeals to the County Court, and in most years since 1999-2000 there has either been one appeal or no appeals. There were no County Court trials.

Of the seven appeals to the County Court since 1999-2000, all were appeals against sentence by defendants who sought to have the penalty imposed by a Magistrate reduced, and the defendant was successful in reducing the penalty in all cases.

There were no prosecution appeals against the inadequacy of sentence, which are required to be brought by the Director of Public Prosecutions.

Figure 11.5: County Court hearings by year



[Source: Based on analysis of EPA Annual Reports]

11.7 Outcomes of prosecutions (past five years)

EPA prosecutions result in either fines, court-imposed undertakings (such as bonds), payments to the Court Fund and orders under section 67AC.

Under section 67AC of the EP Act a court, after finding a person guilty of an offence, may instead of, or in addition to any other penalty, impose an order to take action to:

- publicise the offence, the environmental or other consequences and any penalties imposed[15]
- take any action specified by the court to notify a person or class of people of these matters
- carry out a project for the restoration or enhancement of the environment (even if the project is unrelated to the offence)
- carry out a specified environmental audit of the activities.

The orders generally indicate an express monetary amount and specifically require publicising of the offence and order in local, state or national papers.

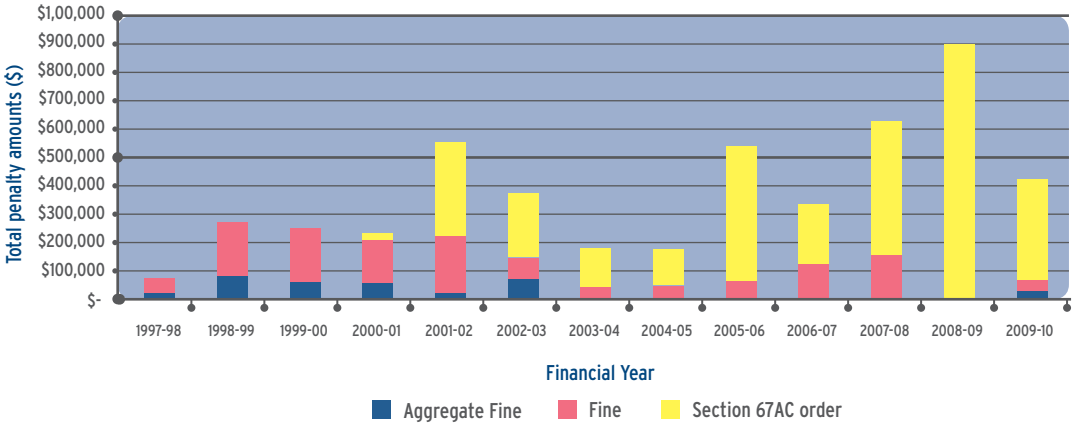
An examination was undertaken of the prosecutions undertaken between 1997-98 and 2009-10. The average financial penalty imposed, including all penalty types, during this 13-year period was $20,146[16]. On average during the same period, fines were imposed in seven out of 10 prosecutions. During the same period, EPA's average legal costs were $8,194, or 41 per cent of the average sum of penalty imposed. Data from EPA's annual reports shows costs were awarded 82 per cent of the time, increasing the average penalty and costs in EPA prosecutions to around $27,000. Further discussion on EPA's legal costs is outlined below.

15 An analysis of section 67AC outcomes from EPA's 2001-02 to 2009-10 annual reports shows that 78 per cent of all section 67AC orders included a requirement to publish the offence in a local, state or national paper.

16 By way of comparison, in 2008-9 the average fine imposed in prosecutions under the Occupational Health and Safety Act was $43,867

Section 67AC was inserted into the EP Act in 2000 and has been used in a majority of EPA prosecutions since that time. Figure 11.6 compares total financial penalties imposed in EPA prosecutions since 1997. Until 2001-02, only fines and aggregate fines[17] were imposed. Since that time financial penalties have predominantly been imposed under a section 67AC order, including a financial amount as part of its conditions.

Figure 11.6: Fine, aggregate fine and section 67AC amount ordered by court, 1997–98 to 2009–10

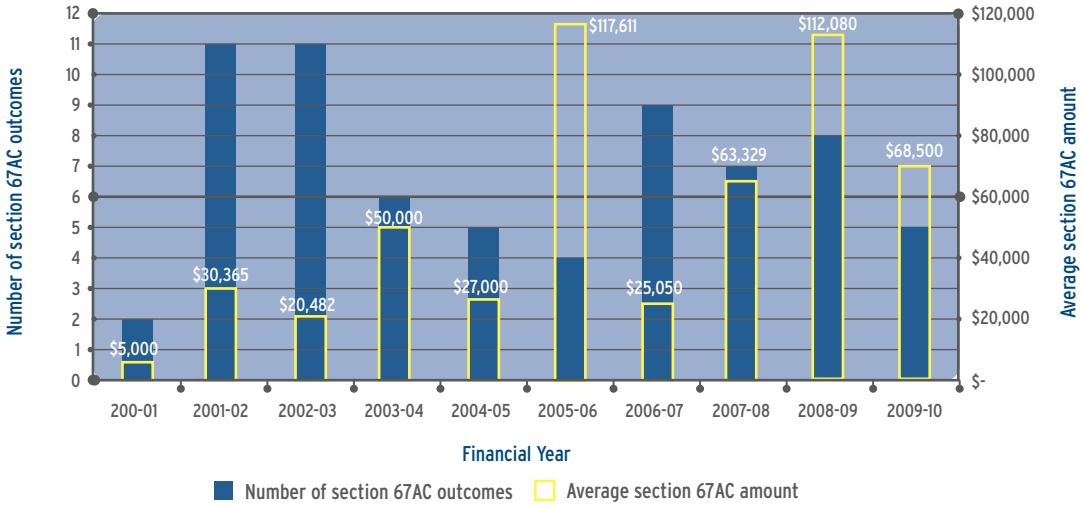


[Source: Based on analysis of EPA Annual Reports]

Of those penalties imposed under section 67AC, the average financial penalty is significant. For instance, the average penalty per year since 2004-05 has consistently been around $60,000 and in both 2005-06 and 2008-09 exceeded $112,000. Average penalties under section 67AC are therefore significantly higher than the average fines imposed. This may be partly due to a clear preference for pursing section 67AC orders and a tendency to leave fines for minor offences, and fines being more common for individual defendants who were unlikely to negotiate a longer-term agreement such as a section 67AC order.

17 Aggregate fines are imposed in relation to multiple charges but recorded against a single charge thus tending to be higher than fines which are not aggregated.

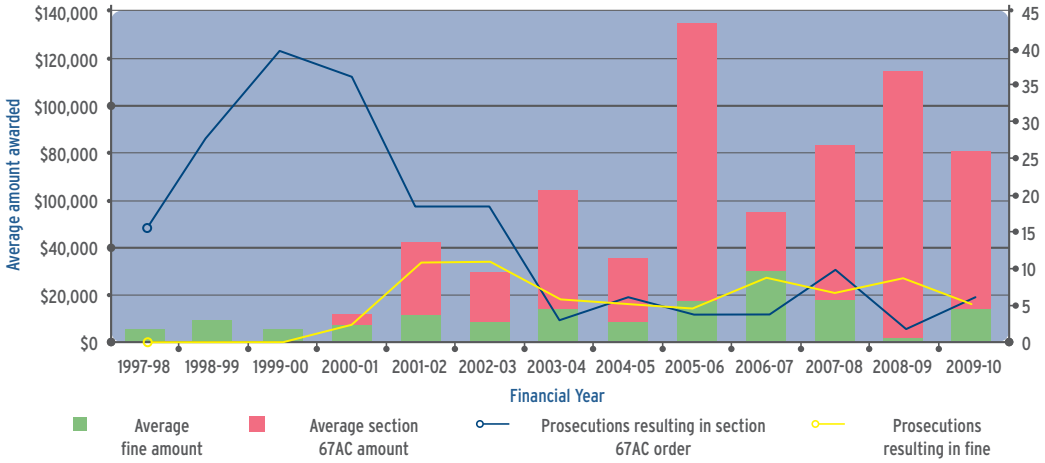
Figure 11.7: Number of section 67AC orders and average order amount



[Source: Based on analysis of EPA Annual Reports]

Figure 11.8 shows average fines imposed since 1997–98 and average financial commitments made under section 67AC. Average fines are significantly lower. The number of fines, as opposed to section 67AC orders, are also plotted, indicating the trend towards the latter.

Figure 11.8: Average fine, section 67AC amount and number of prosecutions



[Source: Based on analysis of EPA Annual Reports]

Table 11.5: Comparison of average penalties awarded between EPA and Magistrates' Court of Victoria

YEAR	AVERAGE AWARDED PER YEAR (IN DOLLARS)				
	FINE	67AC	67AC + FINE	MAGISTRATES' COURT (INDIVIDUAL)	MAGISTRATES' COURT (COMPANY)
1997–98	5,450	-	6,288	-	-
1998–99	9,483	-	9,821	-	-
1999–2000	6,998	-	8,232	-	-
2000–01	7,169	5,000	9,396	521	-
2001–02	12,083	30,365	19,018	611	-
2002–03	9,556	20,482	15,892	568	3,224
2003–04	14,500	50,000	38,167	548	3,066
2004–05	8,606	27,000	16,967	548	2,483
2005–06	17,588	117,611	67,599	553	2,340
2006–07	29,625	25,050	26,458	561	2,021
2007–08	18,300	64,329	42,220	541	2,337
2008–09	2,000	112,080	90,064	575	1,859
2009–10	13,000	68,500	42,050	611	3,123
Period average	11,110	49,774	22,394	564	2,475
GROWTH P.A.	6.0%	20.0%	19.9%	0.5%	-3.0%

Examining the general trend of average penalties since 1998 enabled an estimation of the annual average growth in penalties. Total fines awarded by EPA showed some growth over 13 years with, on average, six per cent growth per annum. A more significant increase was seen in the average amount awarded as a result of section 67AC orders, with annual average growth over the past 10 years of 20 per cent.

Taking into account inflation and indexing of fines under the *Monetary Units Act 2004*, EPA's penalties have been growing at around 15 per cent per year. This compares with more modest increases in fines ordered by the Magistrates' Court against either individuals or companies[18]. Over the past 10 years, the fines awarded by the Magistrates' Court were showing small (half a per cent) to negative growth (minus three per cent).

An analysis of EPA's legal costs (including engaging external barristers) and penalty outcomes is provided in the table below. As noted earlier, on average, eight out of 10 prosecutions result in an order for costs of around $8,000. When considering a ratio of the penalty awarded to the cost of bringing the action, it is clear that the cost of prosecutions resulting in fines is proportionately significantly greater than for those resulting in a section 67AC[19] order. This is despite the average section 67AC order costing almost double the average, at $15,602 per prosecution. In the past 10 years, section 67AC orders consistently yield a penalty of three times costs, compared to fines which, on average, are only a fifth more than the legal costs to bring the prosecution. Of course, prosecutions are not undertaken using a cost-benefit rationale, but there appears to be a more significant penalty imposed in prosecutions involving a section 67AC order and, arguably, these are more effective.

18 Department of Justice. Courts Unit.

19 For example, in 2001–02 the cost to prosecute a section 67AC outcome was, on average, approximately 30% of the expected penalty outcome and, historically, the average cost ratio is 34%.

Table 11.6: Comparison of court costs vs total fine and section 67AC amount in dollars

YEAR	TOTAL FINE	TOTAL 67AC	FINE + 67AC	LEGAL COSTS	COST: FINE + 67AC	COST: FINE	COST: 67AC*
1997-98	81,750		81,750	41,559	51%	51%	-
1998-99	275,000		275,000	128,475	47%	47%	-
1999-2000	279,900		279,900	135,145	48%	48%	-
2000-01	258,095	5,000	268,095	221,540	83%	86%	-
2001-02	217,500	334,010	551,510	145,621	26%	67%	30%
2002-03	172,000	225,300	397,300	260,593	66%	152%	29%
2003-04	43,500	300,000	343,500	161,871	47%	372%	50%
2004-05	51,635	135,000	186,635	91,736	49%	178%	14%
2005-06	70,350	470,445	540,795	111,004	21%	158%	23%
2006-07	118,500	225,450	343,950	191,960	56%	162%	76%
2007-08	183,000	450,300	633,300	152,694	24%	83%	23%
2008-09	4,000	896,640	900,640	238,812	27%	5970%	26%
2009-10	78,000	342,500	420,500	241,290	57%	309%	30%
Total	**1,833,230**	**3,384,645**	**5,222,875**	**2,122,300**	**46%**	**152%**	**34%**

**Note: The cost used to calculate this percentage only includes those costs relating to section 67ACs.*

11.8 Comparison of penalties awarded with maximum penalties available

An examination was carried out of the prosecutions undertaken during 2009-10 (see Table 11.7). The average financial penalty imposed was $38,227. This amount includes all financial sentences, including fines, aggregate fines, financial penalties attached to Court imposed undertakings and orders under section 67AC.

The total penalties applied during 2009-10 were $420,500 of a total maximum penalty which could have been imposed of $5,654,088. This is approximately just seven per cent of the maximum.

Table 11.7: Comparison of penalties awarded with maximum penalty available, 2009–10 prosecutions

CASE	EP ACT SECTION	CHARGE OFFENCE AREA	MAXIMUM PENALTY	PENALTY AWARDED	PERCENT OF MAXIMUM
1	39(3)	Waste	280,368	20,000	7.1%
2	27A(1)(c) 31A(7)	Environmental hazard Contravene notice	560,736	5,500	1.0%
3	41(1)(a)	Air pollution	280,368	160,000	57.1%
4	27(2)	Contravene licence	280,368	40,000	14.3%
5	27A(2)(a) 62A(3)	Dumping waste Contravene notice	1,144,836	10,000	0.9%
6	27A(2)(a) 62A(3)	Dumping waste Contravene notice	1,144,836	12,500	1.1%
7	39(1)(c)	Water pollution	280,368	80,000	28.5%
8	53A(1)	Transport waste without permit	280,368	5,000	1.8%
9	27(2) 62A(3)	Contravene licence Contravene notice	560,736	25,000	4.5%
10	39(4) 45(1)(e)	Waste Land pollution	560,736	60,000	10.7%
11	27A(1)(c)	Environmental hazard	280,368	2,500	0.9%
TOTAL			**5,654,088**	**420,500**	**7.4%**

This situation is similar to patterns observed in a study of prosecution outcomes between 1990–91 and 1999–2000[20] for the Institute of Criminology. That study confirmed that fines were imposed in just half or less of EPA prosecutions. Fines represented between five per cent (1998–99) and 25 per cent (1993–94) of available maxima.

The current maximum penalties available under the EP Act are significantly lower than in comparable jurisdictions interstate. A comparison of maximum penalties currently available in other Australian states can be seen in Appendix 11.1. The aggravated pollution offence in the EP Act currently carries the highest penalty in the Act at 10,000 penalty units, or $1,194,500[21]. This penalty applies only to corporations. Individuals found guilty of this offence can be subject to a maximum penalty of 2500 penalty units, or $298,625[22]. This is about one-quarter of the corporate penalty. In NSW the equivalent aggravated offence carries a maximum penalty of $5 million for reckless offending and $2 million for offences committed negligently[23].

The aggravated pollution offence was inserted into the EP Act in 1988. The maximum penalty was set in 1990 and has not been amended since. Incremental increases in the penalty since that time have only occurred by

20 Hain and Cocklin, 2001, referred to in Bricknell S, *Environmental Crime in Australia, Australian Institute of Criminology, 2010*, p.20.
21 Section 59E of the *Environment Protection Act 1970*.
22 The value of a penalty unit is $119.45, as of 1 July 2010.
23 Protection of Environment Operations Act 1997 (NSW).

virtue of indexation[24].

The maximum penalty for a general pollution offence is now $286,680. Curiously, the maximum penalty for this offence does not differentiate between corporations and individuals. The maximum penalty for the equivalent provision in NSW is $1,000,000. A general rule for applying corporate maximum penalties is that these should be 'five times' the applicable penalty set for an individual.[25]

11.9 Discussion

11.9.1 Prosecutions

A credible risk of enforcement action is effective at driving compliance behaviour. Empirical studies of the effectiveness of regulation support the view that business compliance behaviour is heavily influenced by the risk of detection[26]. Studies of industrial safety legislation in the mining and manufacturing industries in the United States have demonstrated a clear link in the increased level of regulation, enforcement and inspection resources and reductions in fatality rates[27]. Similarly, in the United States, Gray and Scholz studied more than 6000 large manufacturing plants between 1979 and 1985, revealing significantly lower rates of offences and injury levels in plants that had been inspected[28].

Although these empirical studies have been undertaken for industrial regulation, the fact that they occur in industries that also manage significant environmental risks suggests that firms would operate in the same way. Studies of environmental compliance also demonstrate a link between companies with strong environmental standards and those that perform well financially. One study has found that countries that have high environmental standards have a higher number of market-leading firms which contributed to superior economic performance of the country[29].

While a proportion of businesses will comply with laws regardless of any threat, a far greater proportion are influenced by the prospect of detection and the consequences for offending. For this group, a tangible threat of prosecution is a powerful incentive to comply with the law. This means there must be genuine consequences for breaches. The prospect of prosecution is necessary to deal with offending and confirm those consequences for the most serious offences.

Within the overall operation of the criminal justice system, prosecution of criminal offences (including those under the EP Act) serves to ensure there are fair and just consequences for offending that:

24 *Monetary Units Act 2004*.
25 *Corporations Act 2001* (Cwlth), section 1313(8), definition of 'prescribed penalty'.
26 Gunningham N, Parker C, Report for EPA: *Environment, Compliance and Pollution Response Review – Environmental Law and Regulation,* May 2010, p.39 (referring to the work of Robert Kagan and Eugene Bardach, 2002 and Robert Kagan et al, 2010).
27 Lewis-Bech M, Alford J, 'Can Government Regulate Safety: the Coal Mine Example' (1980) 76 *American Political Science Review*, 745.
28 Gray W, Schol J, 'Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement' (1993) 27 *Law and Society Review* 177.
29 Porter M, *The Competitive Advantage of Nations*, 1990. See also *Environmental Agency, England and Wales, Corporate Environmental Governance: a study into the influence of Environmental Governance and Financial Performance*; Network of Heads of European Environment Protection Agencies, *The Contribution of Good Environmental Regulation to Competitiveness,* November 2009.

- denounce the offending
- punish the offender
- deter the offender from reoffending and others from offending.

The principle of enforcement in the EP Act states:

Enforcement of environmental requirements should be undertaken for the purpose of–

(a) better protecting the environment and its economic and social uses;

(b) ensuring that no commercial advantage is obtained by any person who fails to comply with environmental requirements;

(c) influencing the attitude and behaviour of persons whose actions may have adverse environmental impacts or who develop, invest in, purchase or use goods and services which may have adverse environmental impacts.

Maximising the deterrent effect of prosecution for environmental breaches influences businesses to comply and contributes to improvements in the environment. This can be achieved through educating businesses and the community about the consequences of offending[30] and what can be learnt from prosecutions. Effective deterrence requires EPA to be clear that it is prepared to use prosecutions and serious sanctions[31] where appropriate. This will be achieved through publicising prosecutions and educating businesses[32].

EPA currently publishes prior convictions for each financial year in Adobe PDF format on its website. Unfortunately, the details of the prosecutions are brief. To view prosecutions over a number of years, in order to consider the performance of a company or trends in incidents and prosecutions, requires manually searching separate files. EPA should provide better access to factual accounts and aggregated information regarding its prosecution activity.

EPA staff considered the role of prosecution to be important to underpin accountability for environmental harm[33] and to make it clear that there were consequences for breaches. There was dissatisfaction with the level of prosecutions. Staff considered the number of prosecutions to be inadequate and they criticised the penalties imposed as being too weak[34]. The level of fines was also a concern, given that maximum penalties had not changed since 2000 and did not, in their view, reflect the severity of the offences. Staff expressed frustration that magistrates did not treat EPA prosecutions seriously and dispensed relatively low penalties.

There was a strong view across all community consultations that EPA had been lax in exercising its power to prosecute non-compliance[35]. A number of reasons for this were posited, but many community members believed that EPA had neglected its enforcement responsibilities, lacked confidence in tackling large businesses

30 As advocated by Macrory R, *Regulatory Justice – Making Sanctions Effective*, November 2006.
31 See Gunningham N, Johnstone R, *Regulating Workplace Safety – Systems and Sanctions, 1999*, pp.203.
32 Publicising prosecutions to promote their educative and deterrent effects, as well as good performance, was also supported by Philip Hampton in the United Kingdom in the Hampton Review, *Reducing Administrative Burdens,* March 2005.
33 EPA staff consultations – head office.
34 EPA staff consultations – head office, Geelong, Wangaratta.
35 See also Submissions 37, 51.

or complex issues, and was conservative and risk-averse[36]. One officer referred to the development of a 'plea culture' that depended largely on direct contact and negotiation between EPA and defendants at early stages of an investigation or prosecution, and avoided contested hearings. Many businesses also had the view that EPA was risk-averse and tended to focus on 'easy targets' or 'low-hanging fruit'[37]. EPA was considered to be particularly lenient with businesses that were struggling financially because of the concern enforcement may cause them to fail[38].

Businesses complained that there had been a sudden shift in EPA to become more 'enforcement oriented' and that this had come as a surprise and had not been explained[39]. However, I did not receive submissions or feedback that the level of prosecutions over the last 10 years was too high or that EPA prosecutions were taken for minor matters. Indeed, it was acknowledged by many businesses and practitioners that the level of prosecutions was low and that this caused distortions in competitiveness in some industries[40]. These criticisms related more to who was being targeted and that there was a perception prosecutions were being levelled at well-performing, licensed businesses.

I noted that the Auditor-General found that the reduction in EPA inspections since 2005–06 was likely to have occurred at the same time as the risk of non-compliance is likely to have increased[41].

I believe there is a strong case for increasing the level of prosecutions currently undertaken by EPA and to better promote their deterrent effect by educating businesses and community on what is learnt from significant environmental incidents and prosecutions.

I do not consider in the order of 50 prosecution actions to be excessive, given the number of major incidents and the consistent level of referrals to the Enforcement Review Panel. I consider the significant reduction in prosecutions since 2000 to have been unwarranted and potentially counterproductive to the level of compliance.

In my consultations, EPA staff confirmed the observations made by the Ombudsman that, until recently the culture of EPA did not encourage enforcement and, in fact, EPA had neglected its resourcing and downplayed its importance. There was a strong view that the level of prosecutions had been reduced due to the move to indictable offences. Many were also of the view that EPA and its legal unit had been overly conservative and risk-averse in undertaking prosecutions and that it only pursued cases that it was effectively guaranteed to win. Some staff suggested that the reduction was deliberate.

There are likely a number of reasons for the comparatively low level of prosecutions undertaken by EPA, including the standard of investigations required, the costs of unsuccessful prosecutions, and resourcing.

However, given that the number of significant environmental incidents has been increasing, as has the number of pollution reports, there is a need for EPA to ensure that prosecution activity is at a level that provides an adequate disincentive to breaking the law. The current level of prosecutions, coupled with the comparatively

36 Community open house – Moonee Ponds. See also Submission 37.
37 Ai Group workshop. Community open house – Ballarat, Altona.
38 Community open house – Dandenong.
39 Community open house – Traralgon, Wodonga, Ballarat. Submission 46.
40 Waste Management Association workshop, Victorian Water Industry Association workshop. See also Submission 45.
41 VAGO report, p.15.

low maximum penalty and low level of fines imposed for offences, is in my view not an adequate deterrent to incentivise compliance.

Prosecution of serious offences, particularly for serious incidents and deliberate and reckless behaviour, serves to support the efforts of those businesses who have a strong focus on compliance – it also removes the economic incentives for breaking the law.

Caution must be exercised, however. The significance of prosecution decisions and potential costs and reputational consequences for parties prosecuted requires that they are exercised with appropriate governance and in accordance with high prosecutorial standards. The standard applied by all Australian Directors of Public Prosecution are that a case:

1. has 'reasonable prospects of conviction'
2. is in the public interest.

This does not require that all prosecutions are successful. Prosecutions are required to meet the standards outlined above and should be courageous and independent in the exercise of prosecutorial discretion.

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.

11.9.2 Enforcement involving government entities

The EP Act binds both private and government entities. Local councils, in particular, hold a unique place in the environment protection regulatory framework. I discuss this in Chapter 18, 'The role of co-regulators'. Local councils are co-regulators of the environment and are also substantial commercial entities that manage environmental risks including, for instance, landfills. EPA is required to respond and enforce the law in relation to councils.

Some government entities, such as statutory authorities and departments, also have obligations to prevent pollution and environmental risks from their activities.

EPA staff raised a number of concerns regarding the apparent 'conflict' arising from the different interactions of EPA with government agencies. On the one hand, EPA is a partner with local governments and departments and would therefore benefit from closer interaction and integration. On the other hand, these were regulated entities with differing standards of performance and attitudes to compliance, and with their own obligations under the law. Local governments and some government entities also expressed concern that EPA's use of enforcement undermined any opportunities to 'partner' or improve interactions between councils and EPA.

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.

It is clear that the law applies to both government entities and non-government entities[42]. Equity would demand that governments are at least as compliant as private companies. Indeed, there is a strong argument that they should be modelling compliant behaviour. There is a considerable lack of clarity regarding EPA's role in enforcement and attitude to prosecution of government entities. In my view, equity and transparency require that EPA state its position in holding government entities to an equal standard with private entities and how it will discharge its prosecutorial discretion with fairness, given the unique standing of local government and government entities in the regulatory framework[43].

11.10 The outcome of prosecutions

The conduct of prosecutions alone is insufficient to create a credible deterrent – the consequences of prosecution must provide a sufficient disincentive to offending businesses and others that would take their chances. The current average penalty of $20,146 across all financial penalties is an insufficient deterrent and is not in line with comparable Australian jurisdictions.

The highest maximum penalty currently available under the EP Act requires proof of mental elements (intention or recklessness) that constrains the use of the aggravated pollution offence to only the most egregious examples. The penalties for general pollution offences fall short of comparable jurisdictions (NSW,

42 See section 2(1), Environment Protection Act, 'Application of Act'.

43 For examples, see: *Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies*, Memorandum by Steven Herman, Assistant Administrator US EPA, 30 September, 1999. WorkSafe Victoria *Supplementary Enforcement and Prosecution Policy – Prosecution of Government Departments, 2005.*

South Australia) and are approximately 25 per cent of the equivalent penalties under the *Occupational Health and Safety Act 2004*[44]. This could result in the perverse outcome that the same process failure in a business which has significant health impacts on the local community could conceivably carry higher penalties under the OHS Act than the EP Act for the same omission.

It is not my role to recommend amendment of the legislation. I note, however, that there is a curious anomaly in the EP Act that aggravated offences differentiate between corporate and individual defendants. Corporate defendants in this case face a penalty of four times the amount of individuals. The general pollution offences which are the most common, however, impose the same maximum penalty for both a corporation or an individual. In my view, consideration ought be given to requesting amendment to provide for differentiated penalties. I note that, despite the EP Act providing for corporations to face maximum penalties four times that of individuals, the standard rule across Australian jurisdictions is the 'five times' rule; in other words, that corporations should attract penalties five times the maximum penalty applicable to offences committed by individuals[45].

There was broad support for EPA's approach to the use of non-fine penalties under section 67AC of the EP Act. This was seen as a constructive alternative that promoted restorative principles[46] and was a more credible punishment than a fine which was paid to consolidated revenue[47]. There was a suggestion that the process for developing and recommending a project required more transparency[48], and that outcomes should be more clearly linked to the area affected by any breach[49].

On average, the Court-imposed fine is $9,598 – significantly lower than the average financial impost of an order under section 67AC of $49,774. EPA has therefore been able to negotiate constructive outcomes in the majority of its prosecutions that commit defendants to greater sanction than current sentencing practice, and producing community benefits through projects.

EPA staff were mostly supportive of section 67AC orders, though there was a concern that there were no clear guidelines for their use. It is apparent that these orders have been the predominant sentencing order sought and made in EPA prosecutions since they were instituted. I think this is a positive aspect of EPA prosecutions practice and is to be commended. The adoption of restorative orders in sentencing (and as an alternative to prosecution) is a practice endorsed by regulatory reforms in the United Kingdom[50].

EPA has established an 'Inspiring Environmental Solutions' program that attempts to solicit potential projects for restorative orders under section 67AC. Community groups and other applicants can express interest in proposing a beneficial environmental project for possible inclusion in a sentencing order. Where a suitable project proposal is received and coincides with a prospective sentencing order in a suitable geographic area, EPA endeavours to develop the proposal into a project to be recommended to a defendant and court for inclusion in an order.

44 As enacted on 1 July 2005.
45 This approach was recognised and supported by the panel reviewing national model occupational health and safety laws and later endorsed by Workplace Relations Ministerial Council, *National Review into Model OHS Laws*, First Report, October 2008.
46 Restorative principles are discussed in more detail later in this chapter.
47 Legal Practitioners' Roundtable
48 Environment Victoria and Environment Defenders Office Roundtable
49 Submissions 3, 40 and 45
50 See Woods, Michael and Macrory, Richard, Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach, Centre for Law and the environment, University College London

I believe the program is progressive and constructive. I believe the program could be enhanced in a number of ways:

- more clearly linking projects to the subject matter of a potential breach and the local community affected by a breach, in order to more clearly support restorative principles
- including conditions that reduce the risk of a defendant reoffending
- promoting the program and sentencing option as suitable dispositions in prosecutions of government entities (including committing to Model Litigant Guidelines and to early consultation with such entities to minimise costs to the public)
- allowing projects to be developed through community conferencing (to be discussed in Chapter 20, 'Role for community')
- where no suitable expressions of interest have been submitted in a geographical area, promoting the program and encouraging local communities to apply.

11.11 Sanctioning

The concept of using sanctions to achieve social benefits and prevention of harm has been adopted in the United Kingdom as a result of the work of Professor Richard Macrory[51]. The 'Macrory Principles' have been supported by regulators in the United Kingdom[52]. In some cases, due to the nature of a breach or history of an offender, a sanction or punishment should be responsive and take into account what is required for the particular offence and offender.

I have therefore included the principles of 'responsive sanctioning' in the proposed Compliance and Enforcement Policy to complement EPA's compliance and enforcement activities. This concept seeks to use punishment constructively to achieve improved environmental outcomes. It is particularly relevant to the use of enforceable undertakings and court-imposed alternative penalty orders.

The principles governing responsive sanctioning aim to:

- be responsive and consider what is appropriate for the particular offender to change the offender's behaviour
- eliminate any financial incentive for non-compliance

be proportionate to the nature of the offence and the harm caused

- make good or reduce the harm caused by a breach, where appropriate
- deter future non-compliance by the offender
- educate others about the potential consequences of breaking the law[53].

A clear policy is required to confirm EPA's apparent view that dispositions of this nature are to be preferred over fines in appropriate cases. Notwithstanding my support for this as an appropriate disposition, it is not

51 Macrory R, *Regulatory Justice – Making Sanctions Work*, March 2006.
52 The National Compliance and Enforcement Policy of the Heads of Workplace Safety Authorities also adopt the principles.
53 Macrory R, *Regulatory Justice – Making Sanctions Work*, March 2006.

suitable for all cases, as there are cases involving culpable behaviour, particularly involving deliberate conduct, warranting more serious consequences and denouncement of a purely financial penalty. Care will need to be taken that the consensual nature of these orders, which requires dialogue between defendant and EPA and their respective lawyers, does not deter EPA from pursuing financial penalties in appropriate cases. A risk of relying purely on consensual orders is that sentencing practice in the Magistrates' Court does not evolve and the magnitude of sentences does not keep pace with general sentencing practice and community expectations. EPA will therefore need to be diligent in monitoring sentencing trends and assertively pursuing cases warranting higher penalties. The policy should articulate the circumstances in which a section 67AC order is *not* appropriate.

The use of section 67AC involves a publicity component as a matter of course. In my view this provision could also be used to enable a court to order publicity of penalties involving fines. The use of adverse publicity orders has been recognised as an effective deterrent and educative tool used by regulators.

I am aware that 'an overreliance on deterrence' and unfair or oppressive prosecutions can be counterproductive and produce a culture of regulatory resistance from regulated entities. Businesses and practitioners were concerned that, with EPA moving to a stronger enforcement stance and using prosecutions more rigorously, businesses would end up being less cooperative with EPA and be less likely to conduct constructive dialogue or negotiations with the regulator.

I believe that these concerns can be greatly alleviated through increased transparency of EPA as a prosecutor and the accountability that is provided by court scrutiny of prosecutions undertaken. The most widely used accountability and transparency measure regarding prosecution is to publish and promote a compliance and enforcement policy and prosecution guidelines.

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.

In Chapter 12 I introduce the proposed draft Compliance and Enforcement Policy for EPA. The draft policy includes the adoption of the Prosecution Guidelines that are common to all Australian Directors of Public Prosecutions (and adopted by the Victorian Director). In my view the policy would be supported by EPA 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
- submissions to be made regarding imposing a conviction, and aggravating and mitigating features to be taken into account
- appeals against sentence.

EPA has included its criteria for proceeding against company directors in its Enforcement Policy. Unfortunately, it appears that the number of directors prosecuted is very low and that such prosecutions are generally undertaken in the absence of a corporate defendant. I was advised that, in the past, there had been a reluctance to pursue directors, as it was unlikely that EPA would support such a recommendation.

11.12 Quantifying economic benefit

The principle of enforcement includes 'ensuring that no commercial advantage is obtained by any person who fails to comply with environmental requirements'. EPA staff and community consultations indicated that economic disincentives to breaking the law did not appear to be adequate in Magistrates' Court penalties. For business, particularly in competitive industries or sectors, the disincentives are critical to creating a 'level playing field' in which they can compete.

A number of jurisdictions have moved in recent times to seek to more precisely quantify the economic benefit gained by breaking the law. This is in order to impose penalties and influence court sentences to take account of financial advantage obtained from offending. The Queensland Government has recently introduced a bill to amend the *Environment Protection Act 1994* to include alternative sentencing options, including adverse publicity orders and a monetary benefit order, which may require an offender to repay any financial benefit obtained from committing an environmental offence[54].

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.

54 *Environmental Protection and Other Legislation Amendment Bill 2010*. Introduced on 24 November 2010. Clause 88 of the Bill provides for a monetary benefit order requiring the person against whom it is made to pay an amount representing any financial or other benefit the person has received because of the act or omission constituting the offence in relation to which the order is made.

In the United States, a recent focus in litigation undertaken by US EPA has been to provide courts with an assessment of the economic benefit obtained from delayed or avoided compliance. The concept of recapturing the economic benefit or competitive advantage seeks to provide substance to the notion of 'levelling the playing field' for business and internalising the cost of breaking the law. The US EPA has developed a financial model, BEN (benefit of noncompliance), which enables calculation of the avoided or delayed costs associated with complying with an environmental requirement. The model considers factors such as avoided capital outlay, holding costs of capital, operating and staffing costs and, importantly, opportunity costs of the unspent monies[55]. Economic benefits are considered in addition to any clean-up costs. For instance, discharging emissions to air in contravention of a licence condition may have involved a failure to invest in abatement equipment that meets industry standards for many years, avoiding the cost of capital upgrade and unfairly benefiting the operator[56].

11.13 Appeals and County Court hearings

There have been no appeals against sentences in cases where penalties were considered manifestly inadequate. The low level of penalties is likely to be caused by a number of factors, including:

- the level of maximum penalties in the EP Act
- the familiarity of magistrates with environmental crimes[57]
- magistrates considering environmental offences as not being criminal or being less serious[58]
- the preference for using consensual orders such as 67AC over recent years
- the lack of appeals against sentence.

Appeals against Magistrates' Court sentences considered by the prosecution to be too lenient can only be brought by the Director of Public Prosecutions (DPP). The DPP is an independent prosecuting authority but entertains applications and submissions from prosecuting agencies regarding matters which are considered to warrant appeal. I was advised that, although some penalties were considered inadequate, EPA had not applied to the DPP for a review of any sentence to consider an appeal. In my view, where penalties are considered inadequate, the DPP should be approached for advice to consider the adequacy of the penalty imposed.

EPA should be guided by the principles set out in the DPP's Prosecution Policy and guidelines on appeals.

It is surprising to me that there has not yet been a successful prosecution involving aggravated pollution. Such a prosecution would require proceeding in the committal stream of the Magistrates' Court and pursuing a suitable matter in the County Court. This would require consultation and appropriate arrangements to be put in place between the Office of Public Prosecutions and EPA.

The lack of prosecutions under this provision, in my view, undermines the severity of this offence and the deterrent effect of the highest penalty currently available under the EP Act. The lack of prosecutions under this provision did not appear to be associated with its drafting or any legislative impediment. EPA should consider the necessary 'points of proof' required to establish such a case and provide guidance to investigators to support investigations of appropriate matters according to these points of proof.

55 *www.epa.gov/oecaerth/resources/policies/federalfacilities/enforcement/cleanup/econben20.pdf.*
56 See *Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies*. Memorandum by Steven Herman, Assistant Administrator US EPA, 30 September 1999. See also *Settlement Guidelines for Civil and Administrative Penalties*. Florida Department of Environmental Protection Administrative Directive, 17 July 2007.
57 Brickness S, *Environmental Crime in Australia*, Australian Institute of Criminology 2010, pp.18-19
58 Ibid.

11.14 Suspension or revocation of licence or permit

EPA may grant a licence to authorise the discharge or handling of waste. The licence-holder is required to comply with the conditions of the licence. Similarly, the holder of a waste transport permit is responsible for complying with the conditions of the permit. In cases involving serious culpability or recalcitrance, EPA should exercise the power to suspend or revoke licences. EPA should consider suspending a licence or permit where the holder:

- has a history of repeated breaches of licence conditions
- repeatedly fails to submit an annual performance statement (APS) on time in the required form
- fails to provide evidence or respond to requests for information relating to purported compliance in an APS
- has failed to pay the annual fee or, if applicable, landfill levy
- obstructs or fails to respond to a direction from an authorised officer

or

- subject to a financial assurance requirement, has failed to provide it to the satisfaction of EPA.

A licence or permit suspension may be for a specified period or until the fulfillment of any specified conditions.

EPA should consider revocation of a licence or permit where:

- the licensee or permit-holder has a history of serious breaches of licence conditions
- the licensee or permit-holder has been convicted of an offence against the EP Act and, in the opinion of EPA, is no longer a fit and proper person

or

- serious breaches continue to occur after prosecution.

I note that the revocation power has not been used by EPA. The Ombudsman found that revocation was not considered in the Brookland Greens matter.

EPA will accord the licensee or permit-holder procedural fairness before deciding whether or not to proceed with suspension or revocation. EPA will give notice to the holder its intention to suspend or revoke the permit or licence and the grounds for suspension.

The licence or permit-holder should be given a reasonable opportunity to show cause as to why the proposed suspension or revocation should not occur. Any decision to suspend or revoke by EPA should take into consideration any submissions made by the holder of the licence or permit.

11.15 Charge

Section 62 applies to occupiers who subsequently come into possession of a site that has been the subject of abandoned waste or contamination. It does not expressly apply to landowners who may not come into possession. This is likely to be the case when a corporate landowner is liquidated and the next occupier to come into possession is a bank or subsequent purchaser. The provision is onerous in that it is intended to apply in such circumstances to persons who are unrelated to the polluter or unaware of any clean-up. For this reason, EPA publishes a priority sites register which allows prospective purchasers of land to be aware of an interest claimed by EPA and clean-up action being ordered. This is a shortcoming in the legislation that should be considered for amendment.

The power to issue a charge has not been used, although I am advised that there is one matter under consideration.

There is currently no guidance or EPA policy which explains EPA's power to pursue an occupier (other than the person who caused pollution or an environmental hazard) for recovery of costs incurred by EPA to clean up. In my view this is a serious shortcoming.

The provision in section 62A which provides for recovery of costs from either the offender or the occupier is a powerful and intrusive one which is warranted in the public interest. However, there must be clarity over when EPA is likely to use it.

In the absence of guidance and a policy position, the provision will be difficult to use fairly and consistently, as it is unlikely that occupiers and owners of industrial and commercial property are familiar with the provision. There is also a substantial deterrent effect, in my view, in promoting to occupiers and owners and prospective occupiers that they should be diligent in letting out their property to businesses operating with known environmental hazards such as chemical processing, storage of flammable materials and industrial waste. Such guidance would aim to reduce the number of sites containing abandoned waste and contaminated land.

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.

11.16 Injunctions

EPA can apply for an injunction from the Supreme Court to stop a person contravening the EP Act or a condition of a licence, notice, works approval or permit where there is an urgent and serious environmental problem. .

Whether or not prosecution proceedings have been taken, EPA can consider making an application to the Supreme Court for an injunction to restrain any person from contravening the law or requiring them to comply with the law or statutory instrument.

Injunction can also be sought where other enforcement measures have not been effective. The Ombudsman observed that there was no evidence that this power was considered in dealing with non-compliance at Brookland Greens.[59]

Recommendation 11.19

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

I am surprised that EPA has not sought and been granted injunctions in relation to ongoing non-compliance, particularly with cases involving deliberate evasion of environmental laws, refusal to comply with a notice or direction or to clean-up hazardous material. In my view such action is appropriate and it ought be clear EPA is prepared to use this power in appropriate circumstances.

Unfortunately, there is no public policy position on the use of injunctions that would promote the deterrent effect of this provision.

11.17 Enforceable undertakings

An enforceable undertaking is a constructive alternative to prosecution. An undertaking allows an alleged offender to voluntarily enter into a binding agreement to undertake tasks in settlement of a contravention of the law.

Enforceable undertakings are a relatively recent enforcement tool, available to EPA since 2006. They allow an alleged offender to voluntarily undertake various tasks in settlement of a contravention of the EP Act. The objective of the undertaking is to implement systemic change in an organisation to prevent future breaches of an Act or Regulation.

The undertaking forms an enforceable civil agreement between an offender and EPA. The agreement records a commitment by the offender to take some action to avoid prosecution. The current policy position, which I support, is that undertakings are only suitable where the commitment extends to actions taken to go beyond mere compliance. The actions in an enforceable undertaking must deliver benefits to a business, industry sector or community which go beyond mere compliance with the law.

EPA only accepts an undertaking when it is the most appropriate form of enforcement response and will achieve a more effective and long-term environmental outcome than prosecution. An independent advisory panel provides advice to EPA on individual undertakings.

Enforceable undertakings were generally supported in my consultations[60]. Though the Western Region Environment Centre supported restorative sanctions, in its submission it expressed concern that undertakings should not be used where there was substantial damage or considerable risks of environmental harm[61]. There is currently limited experience with their use, as only two have been accepted[62], but a number of businesses

59 Ombudsman Victoria report, p.152.
60 See, for instance, Submission 43.
61 Submission 37
62 Enforceable undertakings have been entered into by South East Water Ltd and Boskalis P/L Australia. A number are under negotiation.

publicly stated their support and positive experience with them[63]. There was also a concern from businesses and EPA staff that the negotiations took too long and involved more costs and negotiations than a prosecution.

Undertakings are a constructive alternative to prosecution. I support EPA's development of a guideline and policy position in relation to their use. The policy should make it clear in what circumstances an undertaking will not be appropriate and where a prosecution will be pursued. This will be the case in relation to:

- serious breaches of the EP Act involving recklessness or recalcitrance
- multiple serious breaches or systemic failures
- significant incidents involving considerable public interest that warrant a transparent hearing in Court
- applicants who have been the subject of previous prosecutions of a serious nature
- circumstances where EPA cannot be satisfied of ongoing compliance.

The following recommendations are intended to enhance the current process and effectiveness of enforceable undertakings.

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.

63 Ai Group Workshop. Community open house – Dandenong.

11.18 Selecting the appropriate defendant

In a number of cases, EPA has undertaken prosecutions arising from single incidents that involve multiple parties. I support such an approach to ensure equity and fairness in apportioning responsibility. In such matters EPA should consider who is primarily responsible for the offence and ensure that there is a 'chain of responsibility' involving all complicit parties.

For instance, an illegal dumping incident may involve the producer of waste, the transporter and the receiver. EPA has undertaken a number of such investigations. 'Multi-party prosecutions affirm the shared duty of care to the environment'[64].

It is rare for employees to be prosecuted in relation to environmental offences. This is largely because employees are generally not in a position of sufficient influence to be responsible for serious breaches or systemic failures. In considering whether to charge an individual employee in circumstances where a company is being prosecuted, EPA should consider the employee's level of seniority and ability to influence compliance. EPA should also consider to what extent the person reasonably complied with a direction or instruction from their employer.

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.

11.19 Company directors

Company officers are responsible for the environmental performance of their companies. They directly influence decision making and organisational cultures in companies. The EP Act provides that, if a corporation contravenes a provision of the Act, 'each person who is a director or is concerned in the management of the corporation' is guilty of an offence and liable to the penalty for the offence[65].

This appears at first glance to be an absolute liability offence that deems directors responsible for the offences of their corporation. However, in order to defend such a charge, the EP Act requires that a director prosecuted under the provision prove that:

64 Gunningham N, Parker C, Report to EPA: *Environment, Compliance and Pollution Response Review, Environment Law and Regulation, May 2010*

65 Section 66B, *Environment Protection Act 1970.*

(b) the person was not in a position to influence the conduct of the corporation in relation to the contravention

(c) the person, being in such a position, used all due diligence to prevent the contravention by the corporation

or

(d) the corporation would not have been found guilty of the offence by reason of its being able to establish a defence under the EP Act.

A relevant officer of a corporation may be prosecuted under the provision, whether or not the prosecution has been prosecuted. The level of prosecutions of company directors attracted criticism from the Environment Defenders Office[66].

Although broader, the term 'director' is based on the definition of officer provided for in the *Commonwealth Corporations Act 2001*.

The link to the definition of 'officer' means that only persons who have the capacity to make decisions – or to participate in making decisions – that have a real or direct influence on an organisation's policy and planning or financial standing will be considered 'officers'. A person who only has responsibility for implementing those decisions is not an officer.

Most Australian environmental statutes have similar provisions imposing liability on corporate officers. The move to prominently position individual responsibility of company officers in corporate regulation generally follows significant criticism in research regarding the effectiveness of corporate regulation that focuses exclusively on prosecuting corporations[67]. This position argument suggests that, because of the artificial nature of corporations, deterrence is more effective when there is individual criminal responsibility for corporate offending. More recently, in the context of OHS prosecutions, it has been argued that prosecution of individual officers that lack moral culpability is counterproductive and can undermine perceptions regarding the fairness of regulations[68].

What is significant about the EP Act provision is its absolute nature and the reverse onus of proof. It could seemingly be applied to all directors in all prosecutions of companies. Similar provisions have attracted the attention of the High Court recently in the context of OHS prosecutions – highlighting the perils of perceived overzealous prosecution of company directors[69].

The current criteria included in EPA's Enforcement Policy[70] are a combination of criteria relevant to corporate culpability and the points of proof in the offence provision.

In determining when to prosecute directors and officers, EPA will need to consider not just whether the provision applies to directors of companies involved in EPA investigations, but also whether there is moral culpability. This is to ensure the provision is used fairly and only in cases where there has been a significant

66 Submission 41.
67 Fisse B, Braithwaite J, *Corporations, Crime and Accountability (Sydney: Cambridge University Press, 1993)*.
68 Gunningham N, 'Prosecution for OHS Offences: Deterrent or Disincentive?', *Sydney Law Review,* Vol.29.
69 *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1, 3 February 2010.
70 Appendix 1 to EPA *Enforcement Policy*, 2006, p.21.

falling short of the standard that would be expected of a company officer.

This requires consideration of both objective standards (what would be expected of a reasonable officer in that position) and subjective standards (what was the role of this officer).

I have included the following criteria in the Compliance and Enforcement Policy to guide decision making regarding prosecution of company officers:

- the person's role and whether they were responsible for the matters leading to an incident or breach
- the position of influence the person had over the conduct of the corporation and its systems at the time
- whether the person exercised due diligence in the performance of the company and actions to prevent the incident, having regard to:
- the officer's degree of knowledge
- the officer's capacity for decision making
- the actions or inactions of others
- other relevant matters

The criteria would be further broken down into the following questions:

- Did the officer fail to take obvious steps to prevent the incident?
- What was the degree of culpability involved in the officer's behaviour?
- Has the officer had previous advice or warnings regarding matters leading to the incident, or should the officer have reasonably known about the advice or warnings?
- Did the officer knowingly compromise safety for personal gain, or for commercial gain of the organisation, without undue pressure from the organisation to do so?
- Was the breach attributable to another person and, if so, to what extent?
- What could reasonably be expected of the officer, bearing in mind all the circumstances?

Considering the above criteria it will be rare that a manager who is not an officer and does not meet the Corporations Act definition of being 'concerned in the management' of the corporate will be of a sufficient level to attract criminal liability.

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.

12.0 Compliance and enforcement policy

This chapter outlines the key aspects of a revised Compliance and Enforcement Policy for EPA. I have recommended a set of principles to underpin EPA's approach to compliance and enforcement and a number of policy positions to guide EPA enforcement decisions.

12.1 Background

The terms of reference for this review included that I consider and make recommendations regarding:

- the compliance framework
- the principles that underpin EPA's regulatory functions
- EPA's approach to investigation and prosecution
- the systems and measures required to support these matters.

The first stage review of compliance and enforcement in early 2010 sought the views of EPA staff and independent experts on the existing Enforcement Policy. In the consultations undertaken by EPA at that time, there was general support among staff that the current Enforcement Policy served its purpose, was coherent and generally logical. The views of a leading criminal law barrister familiar with EPA enforcement were sought. This view also supported the current policy.

To properly address the matters raised in my terms of reference (see Appendix 1.1) I undertook a review of the current Enforcement Policy – last updated in 2006. Soon after my appointment it became apparent that the policy required revision in the light of the findings of the Ombudsman and Victorian Auditor-General reviews. I agreed to develop a new Compliance and Enforcement Policy, having regard to the external reviews and the input of stakeholders during the review. I agreed to seek submissions and views on the current policy and the revised policy. The discussion paper also highlighted a number of important questions for consultation on the new regulatory model and compliance and enforcement policy.

The Auditor-General considered the policy in the context of his review of EPA's handling of hazardous waste regulation, stating:

> While EPA has an enforcement policy, it lacks the detail sufficient to provide authorised officers with clear guidance to enable informed, transparent and consistent decisions. The enforcement policy outlines the enforcement measures available to its authorised officers. However, it does not include guidance on appropriate penalties and graduated enforcement responses. Graduated responses are fundamental to effective enforcement, guiding staff on sanctions or actions that are proportionate to the risk that the non-compliance poses. The lack of graduated responses increases the risk that inappropriate and inconsistent enforcement action will occur. [1]

1 Hazardous Waste Management, Victorian Auditor-General's report June 2010, p.14.

EPA had also commissioned a review of EPA's compliance and enforcement approach by leading regulatory academic Professor Neil Gunningham. The report included a review of the Enforcement Policy and new compliance framework. Gunningham also undertook a 'best practice' literature review of compliance and enforcement approaches and policies used by environmental regulators.

Gunningham's review highlighted that the current policy and the compliance framework were limited in their ability to assist EPA officers in decision making, and recommended a clearer statement of the regulatory model and approach supported by EPA. In particular, Gunningham stated[2]:

> Neither the Compliance Framework nor the Enforcement Policy sets out clearly and coherently, in a manner that is readily accessible to an external audience the structures for enforcement decision-making. It would be preferable to create a new document, accessible to both internal and external audiences that draws substantially on both existing documents, but more clearly incorporates the principles and processes of good practice internationally. These principles... include developing enforcement implementation guidelines and an enforcement matrix. The Policy should also include a mechanism providing avenues of complaint or review, and transparency should be of paramount importance.
>
> While the Enforcement Policy (EP) states that it is intended 'to provide clarity and certainty to individuals, companies (including directors and managers) and government agencies about the approach adopted by EPA in the Enforcement of the Environmental Protection Act and regulations' and to outline 'the principles for fair and consistent enforcement' (Enforcement Policy p.1), it provides insufficient detail to meet these aspirations. While the set of guiding principles are helpful, they need to be supported by a much more detailed indication of how they will be delivered on in practice. But instead, the following sections are primarily concerned with describing EPA's functions.
>
> Certainly the Enforcement Policy does contain important information but it does not adequately address the need for accountability and consistency in decision-making. Measured against alternative structures/processes that best support consistent and transparent decision-making, particularly in terms of achieving consistency and demonstrating that this is the case, the Enforcement Policy no longer stands up.

A review was undertaken of existing compliance and enforcement policies of all Australian jurisdictions, the United Kingdom, United States and Ireland, and the guidance provided by the International Network of Environmental Compliance and Enforcement (INECE).

In the consultations I undertook, EPA staff were generally supportive of the considerations and criteria outlined in the current Enforcement Policy and felt that it was being relied on in decisions[3]. Criticism centred on the purpose and use of particular enforcement tools which were considered to be unclear[4]. The weighting given to particular criteria was also said to be unclear. Most commonly concerns were raised that the policy currently states:

> Within the limitation of resources available, EPA will endeavour to investigate all suspected offences'[5]

The Policy also states:

> If, after investigation, it is determined that an offence appears to have been committed against the Act, regulations or orders made under the Act, enforcement action *will* [my emphasis] be taken.

This is clearly an unrealistic aspiration and suggests that such decisions are made regardless of risk or the characteristics of the suspect offender.

2 Gunningham, Neil and Parker, Christine, Environment, Compliance and Pollution Response Review, Environment Law and Regulation, May 2010, pp.4 and 35.
3 EPA Staff Consultations – Enforcement Unit, Legal Unit.
4 EPA Staff Consultations – Geelong.
5 *Enforcement Policy*, EPA Victoria, 2006, p.1.

Some EPA staff considered that the level of trust or confidence that a business would comply was a relevant consideration[6]. There was also discussion regarding the 'public interest' test in the current policy and the importance of reputational risk in decision making. There was support for explicitly adopting the Director of Public Prosecution (DPP) Guidelines[7]. There was also acknowledgement that EPA officers were more inclined to issue formal notices now if there was doubt as to whether a business would comply[8].

Many community members in the consultations doubted that EPA had applied the existing policy, particularly as they were dissatisfied with the level of enforcement and considered that EPA had neglected its enforcement role[9]. Many attributed inconsistency to turnover of EPA staff and a perceived lack of experience[10].

Some businesses and EPA staff questioned the need to include a principle that enforcement action be 'lawful', stating that it was essential and assumed[11]. Businesses also doubted that EPA had actually applied the compliance framework in practice[12]. A number of businesses supported the existing principles so long as they were applied in practice[13]. The Plastics and Chemicals Industries Association (PACIA) suggested clarity and more guidance was required in order for the principles to be appropriately applied[14].

The most significant concerns from business, however, related to the proportionality of EPA's response to incidents or breaches and 'parity' or consistency between officers when dealing with similar circumstances[15].

For instance, the Ai Group said:

> The enforcement policy would benefit from increased guidance as to the practical implementation of the policy to provide clarity to stakeholders. As noted above, participants in Ai Group's consultation sessions raised concerns about the perceived inconsistency in EPA implementation of the enforcement policy.

Examples of concerns raised included:

- a perceived tendency for EPA to focus on 'tall poppies' rather than implement a targeted proportionate approach
- when an incident attracts media attention, the EPA feels obliged to be seen to be prosecuting
- EPA is seen to increasingly use the media to publicise enforcement actions, including, in some instances, some which are relatively insignificant
- enforcement action is too heavily skewed towards licensed sites, with the result that instances of breaches of environmental regulation by unlicensed sites do not receive the same enforcement action.[16]

The other key concern was consistency[17]. Any policy would therefore need supporting processes, to ensure it was being applied and applied consistently.

6 EPA staff consultations – Bendigo.
7 EPA staff consultations – Wangaratta, Legal Unit.
8 EPA staff consultations – Wangaratta, Bendigo.
9 Community open house consultations – Moonee Ponds, Altona, Dandenong. Submissions 16, 36.
10 Submission 9, Submission 11.
11 Plastics and Chemicals Industries Association roundtable. EPA staff consultations – Wangaratta, head office.
12 Submissions 11 and 13.
13 Submission 27.
14 Plastics and Chemicals Industries Association roundtable.
15 Ai Group workshop. Submission 13.
16 Submission 11.
17 Submissions 17, 21.

12.2 Discussion

The preferred mechanism for ensuring fair and consistent decision making on enforcement is documenting a clear compliance and enforcement policy[18]. In his landmark report, Macrory recommended the following ways of achieving improved transparency from regulators:

- the publication of an enforcement policy
- publicly disclosing who enforcement actions have been taken against
- publishing information of the outcomes of enforcement action[19].

One purpose of a compliance and enforcement policy is to transparently show the choices the regulator will make in enforcing the law, what it considers important and what it does not. In order to achieve consistency and predictability, most modern regulators seek to confine their own broad discretion by outlining the relevant criteria on enforcement decisions.

The Environment Defenders Office expressed the following view[20]:

> The EPA's current enforcement policy is little more than a description of the EPA's responsibilities under the EP Act, and the regulatory tools available to it. There is little to no guidance as to when or how these tools should be used.

Similarly, the Climate Change Panel of the Victorian Bar[21] said:

> The EPA's current enforcement policy is little more than a codification of the existing EP Act. It does not provide anything other than general guidance as to the way that the EPA will exercise its discretion to prosecute a breach of the EP Act.

The deficiencies in EPA's current approach can partly be attributed to an inadequate and inappropriate enforcement policy and partly to the fact that, in many instances, monitoring and enforcement simply has not occurred (as evidenced by the findings of the Auditor-General).

The current policy appeared to me to be descriptive of EPA's role and the various enforcement tools available to EPA and its authorised officers. It indicated that the choices of enforcement measure were 'matters of judgement' based on a 'range of factors' outlined in the policy[22]. While I agree that enforcement involves the exercise of judgement, consistent enforcement requires a greater degree of certainty in the criteria applied to particular enforcement decisions, and guidance on the exercise of discretion. The current policy allows for considerable discretion and does not appear to confine decision makers to objective rather than subjective criteria. The policy, in my view, allows too much discretion and is not adequate to guide decision makers.

A further advantage of publicly committing to a more structured framework for the exercise of regulatory discretion is the accountability achieved by educating stakeholders in the policy. This allows opportunities for stakeholders to challenge enforcement decisions, as appropriate, and challenge the regulator as to its application of the policy to individual decisions. This is required to engender community confidence that the laws are being administered fairly.

18 Gunningham N, Parker C, Report to EPA: *Environment, Compliance and Pollution Response Review, Environment Law and Regulation*, May 2010, p.31.
19 Macrory R, *Regulatory Justice: Making Sanctions Effective*, Final Report, November 2006, p.86.
20 Submission 41.
21 Submission 49.
22 Enforcement Policy, EPA Victoria, 2006, p.10.

12.3 Principles of compliance and enforcement

There have been numerous authoritative statements of the principles which should underpin regulation and compliance and enforcement activities. The leading jurisdiction is generally considered to be the United Kingdom, where considerable research and evaluation has been undertaken of regulatory effectiveness and stakeholder perception. Much of this work has been undertaken in relation to regulators whose role is to prevent social harms such as risks to health, safety and the environment.

The UK Better Regulation Taskforce[23] first recommended five principles of 'good regulation' to govern decision making by regulators:

- **Proportionate:** Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.
- **Accountable:** Regulators must be able to justify decisions, and be subject to public scrutiny.
- **Consistent:** Government rules and standards must be joined up and implemented fairly.
- **Transparent:** Regulators should be open, and keep regulations simple and user friendly.
- **Targeted:** Regulation should be focused on the problem, and minimise side-effects.

These principles have been supported in subsequent reviews, with only additional guidance added regarding aspects of regulatory schemes, particularly inspection[24] and sanctioning[25]. The Victorian Department of Treasury and Finance has largely adopted the principles in its *Victorian Guide to Regulation*[26].

The Victorian Guide adds the following:

- effectiveness
- flexibility
- cooperation
- subject to appeal.

The proposed Compliance and Enforcement Policy which has been drafted is included at Appendix 12.1. The policy is drafted to reflect EPA's stated intention to be a modern regulator. It seeks to provide transparency and more clarity in explaining EPA's approach to compliance and enforcement. By providing additional criteria for the exercise of discretion and more definition regarding the suitability of certain enforcement tools it should provide greater consistency in enforcement outcomes.

I undertook additional consultation on the principles to be included in the policy, the regulatory model and draft policy positions with the EPA Executive, Community Reference Group and Environment Protection Board. I also presented the proposed principles to EPA's first general Community Forum. The input from these consultations was very helpful.

The policy should in time achieve greater accountability for EPA and its officers, allowing for scrutiny of its decisions and application of the policy.

23 *Principles of Good Regulation*, Better Regulation Task Force, 2003.
24 Hampton P, *Reducing Administrative Burdens: Effective Inspection and Enforcement.*
25 Macrory R, *Regulatory Justice: Making Sanctions Effective*, November 2006.
26 Treasury and Finance, 2007.

Having regard to the principles of 'good regulation' and the feedback received in this review, I have included the following principles in the proposed policy to guide EPA and its officers in their compliance and enforcement activity.

Targeted: 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 and enforcement decisions 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, 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.

I am satisfied in my consultations that EPA is prepared to commit to applying the principles in its work.

12.4 Other aspects of the proposed policy

The new policy includes the principle of enforcement included in the EP Act[27]. It also explains the regulatory model I propose above and explains my view on EPA taking a risk-based approach to compliance and enforcement, with responsive elements that consider the regulated entity's risk of non-compliance and previous performance and level of culpability.

In drafting the content of the policy, I have been guided by research undertaken into policies in other jurisdictions. The new policy has also considered a second review undertaken by Professor Neil Gunningham, comparing regulatory models and policies adopted by environmental agencies and other regulators, both domestically and internationally[28]. A summary table of his comparative analysis of the compliance and enforcement policies of environmental agencies is provided in Appendix 12.2.

27 Supported by Submission 49.

28 Gunningham N, *Compliance and Enforcement Review: A comparative analysis of a selection of domestic and international environment agencies' Compliance and Enforcement Policies*, August 2010.

Gunningham's international research, outlined in his first report[29], enabled him to identify the characteristics of a good compliance and enforcement policy. According to Gunningham, a good policy should emphasise the importance of consistent decision making and should 'facilitate and incentivise regulators to make decisions on a fair and consistent basis by giving them a reference point for how they should react in different circumstances'. In particular, Gunningham identified the characteristics of a good compliance and enforcement policy as including:

- the purpose of the policy
- the key principles underpinning the policy
- a brief description of the compliance and enforcement measures available
- the criteria for how the regulator decides to use the different compliance and enforcement measures, including prevention notices and prosecutions
- the principles with regard to the application of sanctions, investigation and prosecution.

The purpose of the policy is to provide greater certainty on EPA's approach to compliance and enforcement, so that it is predictable. In Gunningham's second review, he noted that all Australian jurisdictions, with the exception of Victoria and Northern Territory, provided this certainty/predictability in their policies.

The policy is intended for an external audience as well as EPA staff. The policy is intended to provide a framework for decision making, training and the development of a shared understanding of how to use EPA's compliance and enforcement tools.

The policy aims to support EPA officers in making appropriate enforcement decisions that are effective in protecting and enhancing our environment, and reducing harmful impacts.

The policy seeks to prioritise the use of education as a primary means of promoting compliance[30].

It describes what EPA means by 'compliance' and 'enforcement'. In describing enforcement, we have stated that it has two elements: fixing the problem or making good – often called the 'remedy' – and applying a sanction or penalty for breaking the law – the 'punishment'.

The policy confirms the expectation that EPA and its officers will provide advice and that, where they are required to enforce, they will also guide the actions that can be taken to comply. Where advice is provided this should be committed in writing, to provide regulated entities with feedback on their performance and the likely outcome of any inspection.

The policy confirms the primary purpose of environmental regulation and EPA regulatory activity as being the achievement of prevention, in order to protect and improve the environment[31]. Accordingly, action to remedy a breach should be taken before considering any punitive action.

To provide certainty in the use of prevention tools the policy makes clear that a statutory notice or direction is a preventative tool and is not a punishment. To confine discretion and provide certainty the policy states that, where substantive works or actions are required to bring an entity into compliance with the law or to control a substantive risk, this will be required by a formal instrument such as a pollution abatement notice.

29 Gunningham N, Parker C – Environment, Compliance and Pollution Response Review, Environment Law and Regulation, May 2010.
30 Support for the primary role of education was broad. See Submission 2.
31 That this should be the primary role for EPA enforcement was supported in Submission 23.

The policy makes it clear that infringement notices should be used only for minor offences when the facts appear indisputable. I have also stated my view that infringement notices are inappropriate to deal with a breach that is continuing.

The policy commits to the principles of 'responsive sanctioning' outlined by Professor Richard Macrory, namely:

- Be responsive and consider what is appropriate for the particular offender to change the behaviour of the offender.
- Eliminate any financial incentive for non-compliance.
- Be proportionate to the nature of the offence and the harm caused.
- Make good or reduce the harm caused by a breach, where appropriate.
- Deter future non-compliance by the offender.
- Educate others of the potential consequences of breaking the law.

In my view, while EPA should pursue deterrence through significant penalties being applied to intentional and deliberate breaches of the law, the experience of EPA suggests that many breaches are associated with failures of control systems rather than deliberate conduct. In many cases the local community is impacted by the breach. In these circumstances it is appropriate for EPA to continue its preference for constructive sanctions, such as section 67AC orders and enforceable undertakings. These tools, in my view, satisfy the Macrory principles and are an appropriate response to many environmental offences. The principles provide an important foundation for an increased role of community in EPA enforcement, which I will discuss in Chapter 20, 'Role of community'.

Criteria for 'major investigations' are also outlined in the new draft policy. It should be clear when a response by EPA is likely to escalate beyond the attendance of an authorised officer and the use of enforcement tools such as notices and infringement notices, to an investigation that may result in prosecution. For this reason, criteria are outlined to ensure that major investigations are undertaken for the most serious incidents[32] and offences, and other offences meeting three sets of criteria:

- strategic importance
- consequence
- culpability.

In addition to serious incidents requiring investigation, major investigations should be strategically targeted to EPA's priorities for proactive enforcement. This will ensure that there are sufficient deterrents for regulated entities in target areas and contribute to environmental outcomes. Their outcomes and reasons for those outcomes should be explained to interested parties.

The policy decouples decisions on strategic enforcement from decisions on prosecution and commits to apply the prosecution guidelines of Australian Directors of Public Prosecutions, ensuring the highest standard of integrity is applied to EPA's discharge of prosecutorial discretion.

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.

32 See Submission 16.

13.0 Authorised officers and their powers

This chapter provides an overview of the role of authorised officers and their powers, and compares these with those of other regulators, to consider their adequacy.

13.1 Overview of the role of authorised officers

Compliance and enforcement activity undertaken by EPA is primarily undertaken by its authorised officers. Authorised officers respond to pollution reports and emergency events, investigate incidents and potential breaches of the Act, monitor compliance at licensed and other premises, and gather evidence which may be used in prosecutions.

Authorised officers are appointed by EPA[1] and appointment is not restricted to EPA staff[2]. The Act does not set out the qualifications or any prerequisites to becoming authorised. The qualifications for appointment are imposed by EPA administratively. Appointment is made by the Authority upon the recommendation of an authorised officer's unit manager, who confirms that the officer has completed required training and practical expertise.

The duties of authorised officers include:

- carrying out inspections and assessments to verify and ensure compliance with the EP Act and regulations, and with notices, licences and works approvals
- where non-compliance is found, reviewing options for prevention and corrective action, including warnings or notices of contravention
- advising and assisting in emergency situations concerning the environment
- conducting investigations to obtain evidence as to whether a contravention has occurred
- taking samples and measurements as required
- advising and giving directions in relation to pollution and emergency incidents.

Authorised officers undertake their activities using a combination of powers that are conferred by the act of appointment (for example, the power to enter premises under section 55 of the EP Act) and EPA powers that are delegated to them under an instrument of delegation (for instance, the power to issue a pollution abatement notice)[3].

1 Section 57(1), *Environment Protection Act 1970.*
2 For instance, on 27 July 2006, EPA authorised five employees of Oil Response Company of Australia Pty Ltd.
3 Section 31A, *Environment Protection Act 1970.*

In essence, the authorised officers perform the role of an inspector, to monitor compliance with the EP Act, the *Pollution of Waters by Oil and Noxious Substances Act 1986* and regulations. In its metropolitan head office EPA administratively designates authorised officers to the Pollution Response Unit, Environmental Performance Unit and Enforcement Unit.

Authorised officers in the Pollution Response Unit respond to public and other complaints of pollution incidents. The Pollution Response Unit is also responsible for EPA's response to emergency incidents. The Environmental Performance Unit's authorised officers essentially undertake monitoring of compliance by licensed premises, as well as proactive inspections of some non-licensed premises. The Enforcement Unit undertakes major investigations, which include compiling briefs of evidence that are used to determine whether prosecution action ought to be brought.

In the regional offices, EPA adopts a generalist approach to compliance and enforcement activity by authorised officers.

13.2 Current allocation of authorised officers across EPA

The most recent comprehensive review of authorisations to EPA officers was undertaken by an independent consultant in 2002[4]. Zormann concluded:

> At present there are some 135 authorised officers (AOs) are employed at EPA. These AOs undertake a variety of tasks, many of which do not relate to the specific powers of an AO detailed in the *Environment Protection Act 1970* (the Act). This is in part due to many AOs having changed their roles with EPA over time, to the extent that they in fact exercise few, if any, of the statutory powers of an AO.

At the time of this report (2002), EPA employed 341 people. Thus, approximately 40 per cent of EPA staff in 2002 were authorised.

I was provided with numerous records containing the names of EPA employees who are authorised. The reports were inconsistent. I was advised, however, that since 2002, an attempt was made to revoke authorisations of all officers who were no longer employed by EPA.

EPA has recognised the need for an accurate record of authorisations. EPA's Service Knowledge Unit undertook a validation exercise in September 2010. This exercise showed that 111 officers were authorised. Thus, of the 402 current staff, 27 per cent are now authorised officers. While this would suggest a reduction in field capability, unfortunately the database of authorisations does not indicate whether the officer is undertaking operational duties – indeed, many are not. Numerous authorised officers have transferred to non-operational units in EPA, as managers or in other roles. Many of these roles do not require the powers of authorised officers. Apart from making it very difficult to ascertain the number of authorised field operations staff in EPA, the maintenance of authorised officer status by EPA staff who are no longer practising as such, and who are not undertaking refresher training and other professional development, undermines the importance of a role that is invested with significant statutory powers. It also carries risks of confusing the role being performed by such officers when they are undertaking activities that would not generally be considered to be those of an authorised officer.

In order to maintain the accuracy of the records of authorised officers and the integrity of the exercise of powers by staff with authorised officer status, EPA should set clear criteria regarding the maintenance of authorised officer status by non-field staff and revoke authorisations where these criteria are not being met.

4 Zormann W, *Report into Authorisation and Authorized Officers at the Environment Protection Authority*, June 2002.

Table 13.1 sets out the number of authorised officers by unit and directorate.

Table 13.1: Authorised officers by directorate and unit, October 2010

DIRECTORATE AND UNIT	STAFF POSITIONS	AUTHORISED OFFICERS	DEPO	INFORMANTS
Client Services	**87**	**34**	**7**	**5**
Client Customer & Services	18	1 (6%)	0	0
EPA South East (Gippsland)	19	12 (65%)	3	3
EPA North East (Wangaratta)	10	4 (40%)	1	0
EPA North West (Bendigo)	11	4 (36%)	0	0
EPA Southern Metro (Dandenong)	12	6 (50%)	3	2
EPA South West (Geelong)	13	7 (54%)	0	0
Major Projects	4	0	0	0
Environmental Services	**167**	**57**	**10**	**6**
Enforcement	11	9 (82%)	0	4
Environmental Monitoring	42	6 (14%)	0	0
Environmental Performance	50	18 (36%)	4	1
Pollution Response	21	5 (24%)	2	0
Statutory Facilitation	24	17 (71%)	4	1
Sustainable Solutions	15	2 (13%)	0	0
Business Development	**71**	**3**	**0**	**0**
Community & Stakeholder Engagement	16	0	0	0
Regulatory Innovation	10	0	0	0
Service Growth	13	2 (15%)	0	0
Service Knowledge	18	1 (5%)	0	0
Strategic Communications	11	0	0	0
Future Focus	**61**	**9**	**1**	**0**
Corporate Strategy	5	0	0	0
Environmental Assessment	19	3 (15%)	0	0
Environmental Strategies	20	5 (20%)	1	0
Knowledge & Research	17	1 (6%)	0	0
Corporate Resources	**80**	**5**	**2**	**2**
Assurance & Project Management	11	1	0	0
Business Systems & Applications	21	4	2	2
Business Systems Reform	1	0	0	0
Finance	13	0	0	0
Information Technology	10	0	0	0
People & Culture	16	0	0	0
Legal services	**10**	**1**	**0**	**0**
TOTAL	**451***	**109**	**20**	**13**

[Source: EPA's intranet staff list and corporate database STEP+, as of October 2010]

*Note: This number includes maternity leave positions, contractors and temporary staff. As of 30 June 2010, EPA had a total of 419 employees, equating to 397 full-time equivalent staff.

13.3 Overview of authorised officer powers and current delegations

EPA's current instrument of delegation under the EP Act delegates significant powers to the position of designated environment protection officer (DEPO). These officers are authorised officers that have been delegated additional powers by delegation. The powers include the ability to issue and amend licences, issue works approvals (for projects under $5 million value not requiring a community conference) and to require the production of additional information under section 20 of the EP Act. There are 20 designated environment protection officers with current delegation.

There appears to be no guidance or position description for the role of designated environment protection officer. There also appear to be no restrictions or conditions on regional designated officers exercising significant powers with regard to licensing and works approvals. Historically, regional managers were permitted to issue and amend licences and works approvals. This is no longer the case. In any event, the policies and procedures now being applied to such decisions are managed in the Statutory Facilitation Unit in EPA's head office.

A recommendation to delegate powers to a designated environment protection officer is also made by the unit manager on a case-by-case basis. Curiously, the unit manager can be a regional manager who does not hold delegations. However, once the officer is delegated, there is no review of the appointment made when the officer transfers to another unit.

13.4 Overview of delegated roles

There has been no attempt to define the role of authorised officer, designated environment protection officer or informant beyond those powers and responsibilities that are conferred by the legislation. This is despite a review of authorised officer roles and training in 2002 recommending the development of a duty description for the various roles performed by officers[5]. Defining these roles is important, as the respective positions carry different levels of authority and different powers, some of which are granted on appointment to the role and some of which are Authority powers delegated to the officer.

In order to ensure accountability and transparency regarding the extent of the powers of respective EPA officers, EPA should define the respective roles and the prerequisites for appointment to the roles. There should be a clear and plain English description of the various powers which can be exercised in the respective roles. This will allow businesses and individuals who come into contact with EPA authorised officers to understand the officer's role and powers and their own obligations toward those officers[6].

5 Zormann W, *Report into Authorisation and Authorized Officers at the Environment Protection Authority,* June 2002.
6 See, for instance, *WorkSafe Victoria Inspectors*, 2nd Edition, June 2007: www.worksafe.vic.gov.au/wps/wcm/connect/ead989004071f54fa66bfee1fb554c40/WORK7405_Inspectors_Guide_V10_190707.pdf?MOD=AJPERES

13.5 Function and powers for authorised officers

By virtue of appointment, an authorised officer is entitled to exercise the following powers under the EP Act:

1. Entry to certain premises to determine whether there has been compliance with the Act approvals, licenses or other permits and generally to administer the Act and protect the environment.
2. Taking and removal of samples.
3. Drilling of bores to obtain groundwater samples (on giving 14 days written notice).
4. Taking of photographs, video or other recordings at any premises to investigate possible breaches of the Act.
5. By notice in writing, request documents related to waste or pollution.
6. Require the production of any documents related to waste or pollution and to take copies.
7. Entry to premises to test equipment to determine whether it complies with the Act.
8. Entry to premises and test vehicles to determine whether they comply with the Act.
9. By notice in writing, request details as to who is or was an occupier of any premises.
10. Taking samples from premises where fuel is sold.
11. Entry to private premises where, on reasonable grounds, it is believed pollutants are being discharged or noise breaches regulatory levels.
12. The power tot request the name and address of persons found offending a provision of the Act.

EPA authorised officers have extensive powers to enter any premises:

- used to store, reprocess, treat or otherwise handle industrial waste
- used as a factory

or

- any premises in which an industry or trade is being carried on, or a scheduled activity is being undertaken.

EPA authorised officers have the power to enter private residences in limited circumstances[7].

Authority powers delegated to authorised officers in various roles can vary, depending on whether the person is an authorised officer or designated environment protection officer.

By virtue of delegation, authorised officers can perform the following functions:

- Issue 30A emergency discharge approvals – emergency discharges.
- Issue ballast water approvals as per Section 55 of the *Ballast Water Regulations 2006*.
- Issue, vary and revoke pollution abatement notices – section 30A.
- Issue, vary and revoke minor works pollution abatement notices – section 30B.
- Issue and revoke a clean-up notice – section 62A.
- Issue direction to clean up – section 62B.
- Issue direction to remove or dispose of litter – section 45.

7 Section 55(1)(b), *Environment Protection Act 1970*.

13.6 Comparison of authorised powers between environmental regulators

In order to consider the adequacy of authorised powers it is important to consider the powers of EPA authorised officers to make enquiries and/or take other action to monitor and require compliance with the EP Act, and consider these in the context of comparable preventative legislation. A comparison was undertaken with the general powers available in other Australian jurisdictions.

Table 13.2 provides a comparison of the powers of authorised officers or inspectors across Australian jurisdictions.

Table 13.2: General powers of an authorised officer across states

POWER	VICTORIA[8]	NSW[9]	SA[10]	WA[11]	NT[12]	QLD[13]
Apply for the issue of a search warrant	-	199	88	-	73(2), 73(3)	456(1)
Arrest	-	204(3)	-	-	-	-
Disable intruder alarms (noise)	-	198A	-	99 - only police	-	-
Entry - break in or open as necessary	-	-	87(1)(b)	-	72(1)(g)	453(4)
Entry - general	55(a) -ANY Commercial, Trade or industry 55(5) private residence if pollution occurring s45ZF - Litter 55(3B) - Vehicles	196	87(1)(a) - limited 87(2), 87(3), 87(4)	89, 91	72(1)(a)	452(1), 452(3), 459(1)
Give direction	62B	-	87(1)(m)	81, 82 - Noise	72(1)(k), (m), (n)	363 463A - litter 467(2) - Emrg.
Powers assumed (reverse burden)	68B(9)	-	-	-	-	-
Produce authorisation (licence etc)	57(3) On request produce authorisation.	-	87(1)(l)	90(1a)	72(1)(h)	-

POWER	VICTORIA[8]	NSW[9]	SA[10]	WA[11]	NT[12]	QLD[13]
Require – answers	–	203	87(1)(k)	90(1b)(b)	74 – partial	465
Require – equipment to be tested	55(A) and (B) by Notice	207	–	–	–	–
Require – identity of occupier	55(3D) by Notice	–	–	92(1)	72(1)(j)	–
Require – information about plant, motor or other vehicle, aircraft, vessel or other thing	55 3A in relation to pollution 54 however that is not admissible as evidence other than failing to supply info	210	-	-	74	-
Require – name/ address if offence suspected	56 Giving name and address 45ZJ, 45ZI, 45ZG - Litter	204(1) 204(2) – Noise	87(1)(j)	92(2)	72(1)(j)	464
Require – details of person in charge of activity/process	55(3DB) 55(3DA) – Scheduled	–	–	92(2)	72(1)(j)	–
Require – assistance	55 (1) such assistance as required		87(6)	92F	72(1)(q)	460(1)(h)
Sample deemed accurate (reverse burden)	59AB	–	–	–	–	–
Stop vehicles for inspection or testing	- no ability	208	87(1)(c)	–	72(1)(p)	459(2)
Take – documents	55(3), 55(2A), 55(3A)	193	87(1)(e), 87(1)(f)	90(1)	72(1)(d)	460(1)(e), 466
Take – equipment/ test and inspect	55(3AB)	206, 209 (noise)	87(1)(h), 87(1)(i), 89	92A	72(1)(f)	–
Take – photos/ audio/video	55(2)	203A	87(1)(g)	–	72(1)(c)	460(1)(b)
Take – samples	55(1) 55(3F) – Fuel sample 55(1B) – Install bore	198, 203A	87(1)(d) 87(1)(ia) – bores	89(3) – inc. bores	72(1)(e)	460(1)(c), 460(1)(d) 460(1)(g)

[Source: Environmental legislation from listed jurisdictions as of November 2010.]

8 Environment Protection Act 1970.
9 Protection of the Environment Operations Act 1997.
10 Environment Protection Act 1993.
11 Environment Protection Act 1986.
12 Waste Management And Pollution Control Act 2006.
13 Environmental Protection Act 1994.

13.7 Discussion

What is apparent from the comparison is that the interstate (and Commonwealth) legislation conferring powers on environment protection officers is more explicit as to the powers that are being conferred. For instance, the EP Act contains no express power to make enquiries, although these can be inferred by the other investigative powers. Section 55 of the EP Act, which contains the powers of authorised officers upon entry, includes the power to 'do any act or thing, including the taking and removal of samples, which in the opinion of the authorised officer is necessary to be done for the purposes specified'[8]. There have been numerous amendments to the provision and a number of drafting styles have been applied, thus making the provision unclear and difficult to follow. The practical consequence of this is that there is little transparency to a person subject to an EPA officer's entry as to the powers that the officer is entitled to exercise.

Section 55(1) includes the power of an officer to receive assistance in entry. It is not clear from the provision whether this relates merely to assistance necessary to *facilitate* entry or whether assistance includes an obligation on the subject to provide that assistance *during* any inspection or the exercise of other powers. It would appear to cover a scenario where an officer brings with them a person or equipment to assist them in their enquiries. The provision is also relied upon by authorised officers to bring with them another EPA employee who is not authorised, for the purposes of training, for instance. This lack of clarity is undesirable. Similarly, there is no express power to bring equipment or materials required to undertake an inspection or any testing or sampling, which would also be desirable[9]. Chapter 22, 'Legislative change', includes further discussion of provisions that may be considered for legislative amendment.

EPA staff consultations referred to the lack of power of officers to insist on answers to questions asked in the context of entry. With some variations, all other jurisdictions examined included a provision for the making of enquiries and the ability to require answers to questions[10]. There were, however, variations between jurisdictions as to whether these provisions attracted the privilege against self-incrimination.

The EP Act empowers EPA to require information relating to 'any manufacturing, industrial, or trade process carried on in or on the premises' or 'as to any waste which has been, is being or is likely to be discharged from, or any noise which has been, is being or is likely to be emitted from, or any waste which is being or is likely to be stored on, those premises.'[11] The power is delegated to authorised officers but is curiously not delegated to regional managers. The power is restricted to a number of pollution types but does not appear to cover all documents that may be relevant to an EPA investigation. It is unclear why the power is so restricted. The power is also restricted only to subject premises and does not account for information or documents which may be held offsite, for instance.

Moreover, it does not apply to information or documents relevant to an investigation that may be held by third parties such as related companies, contractors or service entities such as utilities. In seeking to investigate offences involving multiple parties, such a provision is not adequate. Similar provisions interstate are not so limited and generally authorise the seeking of information related to *any* potential offence under the relevant Act[12]. Notwithstanding the power's current limited application, due to its coercive and intrusive nature, in my

8 Section 55(1), *Environment Protection Act 1970*.
9 See, for instance, section 407, *Environment Protection and Biodiversity Act 1999* (Cwlth).
10 For instance, Queensland moved recently to strengthen its provision – section 465 *Environment Protection and Other Legislation Amendment Bill 2010*.
11 Section 54(1), *Environment Protection Act 1970*.
12 See, for instance, section 191 (relating to authority powers) and section 192 (relating to officer powers), *Protection of Environment Operations Act 1997* (NSW).

view to ensure appropriate use of the power there should be a process by which an authorised officer seeks approval to issue a notice under section 54, to ensure it is being appropriately exercised. Consideration should also be given to revising the EP Act to provide for EPA to require production of documents from third parties necessary to enquire into or ensure compliance.

The powers of officers to require production of documents[13] include only the power to 'take copies of those reports, books, plans, maps or documents' and not to seize originals of documents which may afford evidence of the commission of an offence against the EP Act or the regulations. The power of seizure of evidence is necessary for effective law enforcement and is consistent across the jurisdictions examined[14]. In many cases the exercise of the power of EPA officers to 'take copies' has resulted in original documents and exhibits being provided[15]. The powers have also been relied upon to take copies of computer records by physically removing them[16].

It is at least arguable that the power to do any 'act' or 'thing' necessary includes seizure of evidence where required, but it is undesirable to have such vagueness in relation to coercive powers that are intrusive of privacy and other rights.

I was advised that there have been occasions when EPA officers have relied upon the power under section 55 (1) to take and remove samples, or to seize equipment and other evidence.

The New South Wales *Protection of the Environment Operations Act 1997* provides authorised officers with the power to 'seize anything that the authorised officer has reasonable grounds for believing is connected with an offence against this Act or the regulations'.

Seizure of documents and other things that afford evidence requires that they are stored securely in an appropriate facility and that there is a way of tracking them, to ensure accountability and continuity.

Curiously, many of the powers contained in section 55 of the EP Act are limited to the particular subject matter being investigated. For instance, section 55(3A) provides that an officer may enter any premises used 'for or in relation to the manufacture, assemblage, supply, distribution, storage or sale of any new tool, machine, equipment or vehicle and make any inspection measurement or test at the premises' in order to determine compliance. Section 55(3B) contains the same power, but is confined to 'premises used principally for or in connection with the manufacture, construction, assembly, distribution, maintenance, repair or sale of motor vehicles'. The drafting is unnecessarily complex and not consistent with modern drafting.

Coercive powers provided in similar legislation generally apply to the whole of the relevant legislation and the investigation of compliance with any of the obligations under the legislation. It is only where it is necessary to restrict a power to a specific circumstance that the Act should divide powers in this way.

Section 24 of Pollution of Waters by Oil and Noxious Substances Act 1986 outlines the powers of authorised officers under that Act, which are broader in application. The provision includes the power to:

> (m) require a person to answer questions.

Thus, the Act provides the broader power of requiring a person to answer questions that is not currently mirrored in the EP Act. There is no additional requirement for training to obtain authorisation under the *Pollution of Waters by Oil and Noxious Substances Act 1986* before an officer is authorised. Alignment of the

13 Sections 55(3), 55(2A) and 55(3A).
14 See also section 445, *Environment Protection and Biodiversity Conservation Act 1999.*
15 EPA staff consultation – Enforcement Unit.
16 EPA staff consultation – Enforcement Unit.

powers in the two Acts would be desirable.

13.8 Comparison of EPA officer powers with other regulators

The most recent consolidation of coercive powers of regulators in the context of preventative legislation has been the Model Work, Health and Safety Act undertaken as part of the harmonisation of OHS laws.

The Act provides a clear description of the purposes for which coercive powers may be used and a clear and express articulation of the powers that can be exercised. The Act includes the power of officers to:

- require assistance from a person
- seize documents or other things that afford evidence of a breach of the Act
- enquire and require answers to questions
- undertake testing, analysis, seizure and forfeiture of relevant plant, substances and materials
- take a person into a workplace to provide assistance to an officer in the proper exercise of the officer's powers
- apply for a search warrant in appropriate cases.

Table 13.3 provides a comparison of the powers of EPA authorised officers with inspectors appointed under the Model Work Health and Safety Act when enacted.

Table 13.3: Comparison of the powers of authorised officers under the EP Act with the Model Work Health and Safety Act[17]

Current or proposed power for OH&S inspectors	Equivalent EP Act provision
Conduct biological testing	55 (1)
Make audio recordings	55 (1)
Make inspections	55 (1) & 55 (3A)
Make sketches	55 (2)
Make video recordings	55 (2)
Measure and test	55
Open or operate plant or systems	55 1 (taking and removing samples
Require assistance from owner, employer etc	55 (1) only with regard to entry
Take materials and equipment onto premises	55 (2) photographs, video etc. or 55 (1) to take and remove samples
Take photos	55 (2)
Take samples of substances or things	55 (1)

17 Based on National review into Model occupational Health and safety laws, Second Report 2 – January 2009. http://www.nationalohsreview.gov.au/NR/rdonlyres/C90F4B10-D633-4EFA-AF76-6D3C24CBEA24/0/NationalOHSReview_secondreport.pdf

Request production of and copy or take extracts from documents	55 (2A), or 55 (3) (a)
Seize documents	Only to produce and take copies
Current or proposed power for OH&S inspectors	**Equivalent EP Act provision**
Seize and remove plant, substances and materials	Under 55 (1) restricted to taking as 'samples'
Dismantle plant etc	-
Ask questions and make enquiries	55 3D regarding the identity of the occupier
56 Give name and address	
Require/compel answers	-
Request name and address	56
Take affidavit or statutory declaration	Evidence Act 1958
Inspection, examination and recording, including– taking samples of substances and things (including biological samples)	55 (1)
Taking measurements and conduct tests (e.g. noise, temperature, atmospheric pollution and radiation)	55 (1)
Taking photographs and make audio and video recordings	55 (2)
Requesting assistance from owners, employers and others at a workplace in exercising their powers and functions	55 (1) regarding entry
Access to documents	55 (3)(a) only involved with industrial waste (including noise) 55 (3)(b) only documents related to industrial waste
Testing, analysis, seizure and forfeiture of plant (but not operation of it) and substances	Have used 55 (1) only provides for taking of 'samples'
Take affidavits	Evidence Act 1958
Taking of persons who are providing assistance to an inspector in the proper exercise of a power or function, to a workplace for the purpose of providing such assistance (e.g. interpreters and technical experts)	No express provisions however "may do any act or thing which in the opinion of the authorised officer is necessary" hasn't been tested
Issue notices and directions including: safety directions, infringement notices, improvement notices, prohibition notices, direction to leave a site undisturbed	62B imminent threat to life, limb or the environment
Make minor changes to notices including; extending timeframe of compliance, improve clarity, change address or other circumstances, correct errors or reference	Specific to each notice 31A. 31B, not available to 62B would need to revoke and re-issue

[Source: National review into Model occupational Health and safety laws, Second Report. January 2009]

EPA staff consultations centred on regulatory tools, rather than the powers of authorised officers. A number of

provisions, however, were discussed in the context of inhibitors to the authorised officers being effective in the discharge of their roles.

Section 55(3)(a) provides that an authorised officer may require the production of various documents relating to the discharges of wastes and pollutants or the handling of wastes *carried on at the premises*. Clearly the provision relates to those premises from which it is alleged there are discharges or where an offence may have been committed. Curiously, and unnecessarily in my view, the provision restricts documents to those that 'relate to the discharge from the premises of any waste or pollutant or the storage, reprocessing, treatment or handling of industrial waste or the emission from the premises of noise or relating to any manufacturing, industrial or trade process carried on at the premises'.

The provision is unnecessarily restrictive in the context of modern environmental regulation, where premises may be co-located or interconnected and where an environmental hazard or environmental harm may be being caused in a multitude of ways.

However, what is also significant is that section 55(3)(b) extends the power to seek production of documents to 'any person or body'. This power applies to a broader population; however, it is restricted to documents 'relating to any *apparatus, equipment, or works used for the discharge, emission, or deposit of wastes or the storage, reprocessing, treatment or handling of industrial waste…*'. Thus, it provides for access to documents regarding equipment used in the discharge and not the broader category of documents 'relating to the discharge' that is provided for in section 55(3)(a). The distinction between the nature of the documents that may be sought is restrictive and unnecessary[18]. Apart from simplifying the language, section 55(3)(b) could mirror section 55(3)(a).

It is also problematic that both provisions are limited to documents that are in the person's possession, as opposed to documents that may be *under their control* or that may be stored offsite, as is commonly the case in many industrial settings.

The provisions are particularly restrictive in the context of some of the matters regulated by EPA. For instance, EPA requires certain businesses to enter into an EREP. The EP Act does not appear to contemplate a requirement to produce documents made from a third party for information that could verify information provided under the EREP program.

The EP Act provides a broader power of production of 'information' from the occupier of any premises:

> …such information as to any manufacturing, industrial, or trade process carried on in or on the premises or as to any waste which has been, is being or is likely to be discharged from, or any noise which has been, is being or is likely to be emitted from, or any waste which is being or is likely to be stored on, those premises as is specified in the notice..[19]

but there are, again, limited categories of information covered by the provision.

Neither EPA nor its authorised officers are currently expressly authorised to provide advice to people who have obligations under the EP Act. This is a significant shortcoming. A critical feature of modern regulatory regimes is that the regulator and its field force should be empowered and prepared to provide compliance advice to a person with a duty under the legislation administered by the regulator[20]. Such a provision would be

18 EPA staff consultation - Enforcement Unit
19 Section 54(1), *Environment Protection Act 1970*.
20 See, for instance, discussion by Maxwell C (as he then was), *Occupational Health and Safety Act Review*, March 2004, and section 18, *Occupational Health and Safety Act 2004*.

an important foundation for EPA officers. I have explored this issue in more detail in Chapter 6, 'Role of compliance advice'.

13.9 Limitations in tracking and application of EPA powers

It was not possible to quantify the use of coercive powers by EPA and its officers. The only tool by which EPA powers are tracked is '*Step+*' (the EPA corporate database generally used for recording compliance activity), which only records the exercise of powers such as to issue, amend, revoke and transfer licences, and pollution abatement notices or clean-up notices. It does not record the use of coercive requests for information, entry or service of notices relating to identifying occupier or furnishing documents. The *Step+* database has limited functionality. For instance, *Step+* records the number of prosecutions but not the number of infringement notices.

The Authority 'item database' also tracks some powers exercised by the Authority to issue amend, revoke and transfer licences, pollution abatement or clean-up notices and prosecutions. It also records appointment and delegations. It again has limited functionality and is not able to be accurately searched to confirm the exercise of coercive powers of enquiry.

13.10 Related matters

Obstruction of authorised officers in the course of their duties is an offence. The offence is one of few that carry a maximum penalty that includes imprisonment. The Act prohibits the delay or obstruction of an authorised officer or refusing to permit an authorised officer to do anything which they are authorised to do under the EP Act. It is also an offence to fail to comply with any requirement made by an authorised officer in the exercise of their powers under the Act. The provision is not as broad as other legislation seeking to protect officers in their discharge of legislative powers. For instance, the *Occupational Health and Safety Act 2004* also prohibits intentionally assaulting, hindering, threatening or intimidating an officer[21].

13.11 The protection of legal rights

The EP Act currently only provides for privilege against self-incrimination in relation to the use of certain enquiry provisions. This privilege forbids investigating authorities from compelling a person to give information or evidence that is likely to incriminate them during a subsequent criminal case.

The authority enquiry power under section 54 of the EP Act provides for a person to object to providing information if it might tend to incriminate them, and provides that such information is not admissible in proceedings against that person. The privilege is excluded from operation in relation to the provision of a name and address required by an authorised officer under sections 55(3)(D), 55(3DA) and 55(3DB). The Act is, however, silent in relation to how the privilege would apply (if at all) to other powers exercised by authorised officers. The Act is also silent on whether the privilege applies to corporations. Although the common law is now settled that it does not,[22] it would be desirable to transparently express this.

The Act is also silent on the treatment of legal professional privilege. Again this common law principle would

21 Section 125, *Occupational Health and Safety Act 2004*.
22 *EPA v Caltex* (1993) 178 CLR 477.

be implied to apply to the powers exercised under the Act to protect the rights of entities subjected to coercive powers. However, it would be preferable to provide clarity on the treatment of such an important right[23]. In the absence of a legislative provision, it is incumbent in my view on the regulator to clearly state its policy on legal professional privilege, how it can be claimed and how EPA will respond. Such a statement would provide an important assurance to those who are the subject of EPA investigations that their rights will be protected[24].

Where practicable, it should be incumbent on an EPA authorised officer to announce their entry to premises that are occupied. Comparable legislation requires this[25].

13.12 Complaints against authorised officers

Authorised officers exercise considerable power by virtue of the EP Act. They frequently operate alone and have the capacity to make enquiries and effect changes to places they enter which can be intrusive. It is important that these powers are exercised appropriately and diligently, and with high standards of professionalism and impartiality. Unfortunately, EPA does not have a transparent policy for a complaint in the event of a perceived falling short of these high standards. A critical component of proper use of legislative power is the accountability for exercise of that power. It is generally accepted that there should be formal and transparent methods of questioning or making a complaint about the abuse of powers by enforcement officers.

EPA currently only provides for complaints against its staff under the Victorian Public Service Certified Agreement[26]. The procedure set out in the Agreement is focused on the employee and not intended for a person who may be aggrieved by their interaction with an EPA authorised officer. A formal complaints procedure is required. The procedure should 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.

23 See, for instance, section 155, *Occupational Health and Safety Act 2004*.

24 See, for instance, WorkSafe Supplementary Enforcement and Prosecution Policy – Legal Professional Privilege, www.worksafe.vic.gov.au/wps/wcm/connect/c19453804071f8028758dfe1fb554c40/legal_professional_privilege.pdf?MOD=AJPERES. See also ATO Information Access Manual: www.ato.gov.au/print.asp?doc=/content/7029.htm.

25 See, for instance, section 412, *Environment Protection and Biodiversity Conservation Act 1999*.

26 Clause 17, which sets out provision for dealing with misconduct and 'improper conduct in an official capacity', applies to all public servants and does not differentiate between those that have legislative authority or exercise coercive 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.

14.0 Training and support for authorised officers

This chapter considers the infrastructure needed to support authorised officers. It provides an overview of the current prerequisites for appointment as an authorised officer and other key enforcement personnel. I consider the current training and make recommendations for improving induction and training of authorised officers.

14.1 Background

In 2008–09 the Victorian Competition and Efficiency Commission (VCEC) conducted a review into Victoria's environmental regulation called *A Sustainable Future for Victoria – Getting Environmental Regulation Right*. VCEC recommended that EPA Victoria 'promote the consistency of its advice to business, review its training procedures, internal guidance material, information systems and other methods of internal communication'[1].

In January 2010 the Victorian Government responded to VCEC's report, accepting this recommendation and stating:

> EPA Victoria is implementing a quality management system (QMS).
>
> This will incorporate the development of policies, procedures, forms and guidelines to complement and align with the overarching corporate documents. This work will support knowledge and practices to be constructive, flexible and produce high quality services. The implementation of a QMS will ensure consistency among internal guidance and procedures. EPA Victoria has already made progress in improving the internal communication system through the review of how information is communicated via the internal intranet site. EPA Victoria will complete this project by June 2010. These changes will build on the improvements already made through EPA Victoria's recent restructure which centralised statutory decision making and advice and has ensured that clients have a single client manager to manage all contact points with EPA Victoria.

The first stage review also made critical observations regarding consistency in conduct of enforcement activities. The review considered that a comprehensive quality management system (QMS) should be established to ensure EPA activities were delivered consistently and to a defined standard. The background to this observation was based on EPA staff input:

- There is no consistent method in how staff are supported and guided in the delivery of services.
- Different units have different ways of delivering the same service – this leads to differing quality standards and outcomes across the state.

1 Recommendation 7.12.

- While much of the service delivery has been centralised (thus improving consistency), regional staff have a different line of reporting. Therefore, without definition of how services are to be delivered, it is very difficult to assure the quality of delivery.
- Service delivery is currently difficult to audit, due to the lack of a defined process.
- There is a lack of understanding of the objectives of each of the services and how these fits into the bigger picture of EPA's responsibilities.
- There is no consistent source of information on how to deliver a service and the information is presented in many different forms. Such information may be in the Operations Manual, in training course manuals, on a unit's computer drive, or even in externally available publications, among other places. In many cases, staff are reliant on more experienced staff for their insight and instruction.
- Lack of clear direction as to roles and expectation, and lack of procedures and training results in different officers dealing with similar issues in very different ways. This leads to inconsistencies and industry saying 'it depends on who you get on the day'.
- We need a system that can record and track service delivery.
- Once recorded, data should be analysed and monitored to identify inconsistencies and procedures, and training can be targeted to drive improvements.

The Auditor-General also observed that there was insufficient guidance to authorised officers regarding the allocation of enforcement responses to risk[2].

It appears that the lack of attention to resourcing the development of procedures is consistent with the reduction in resourcing to enforcement activities and the limited provision of training to authorised officers. In the absence of procedures, there was a consistent view that legal advice was used to cover gaps in knowledge or procedure. I was advised that legal advice was sought on repeated occasions regarding similar matters – sometimes with different outcomes.

EPA has an operations manual for authorised officers. Although there appear to have been recent amendments to the manual, I was advised that it had fallen out of date and was not relied upon by operational staff. This was confirmed by a number of the procedures I accessed. The manual appeared to me to have been updated in relation to enforcement matters regarding the Enforcement Review Panel in 2006. I was advised that there had been no instruction to officers on whether to rely on the manual or not. The manual is electronic and hosted on EPA's intranet. I was advised that it was cumbersome and slow to access.

The lack of standard procedures and documented, accessible policy positions for authorised officers manifests itself in a lack of certainty and consistency when authorised officers attend businesses[3].

14.2 Discussion

The transition of EPA to a modern and effective regulator requires authorised officers with a high standard of competency and professionalism. The effectiveness of EPA as a regulator will to a large extent be judged on the experience of businesses and community members who interact with EPA authorised officers, investigators and other field staff. The challenges of the role performed by these officers include the intensity and level of

2 *Hazardous Waste Management*, Victorian Auditor-General's Report, June 2010, p14.
3 Ai Group workshop, Australian Environment Business Network, Legal Practitioners' roundtable.

response and the diversity of industries and businesses attended. They are required to deal with dynamic and unpredictable situations and exercise judgement under pressure. They require both technical knowledge and the confidence and competence to enforce the law. In short, I consider it to be one of the most important and challenging roles within EPA.

Authorised officers require support from EPA to perform their roles at a high standard. In addition to the comprehensive induction and training, authorised officers require support through the provision of documented procedures to guide them in their roles and decision making. This requires the comprehensive documentation of the role of an authorised officer (and the various specialist roles) and the tasks undertaken, including:

- compliance monitoring
- compliance advice
- enforcement and
- involvement in prosecutions.

The Victorian Ombudsman wrote in his annual report:

> It is critical that staff members receive adequate training in how to undertake their roles. Spending money on improving technology and investing time in devising processes to achieve efficiency are wasted measures if staff members are unfamiliar with how to carry out operational functions'.[4]

They also require comprehensive procedures as a foundation for them in their work and to improve operational consistency and coordination.

The lack of ownership of the Operations Manual and its lapse requires urgent clarification so that authorised officers know whether and to what extent it can be relied upon. A review is required to clarify which (if any) of the procedures are still valid and which can be revised or rewritten.

The lack of documented procedures was, in my view, symptomatic of a broader problem, which was the lack of a coordinated support function for field operations. Effective support for field staff, in my view, requires the allocation of clear accountability for the preparation and coordination of support to field staff.

Considerable effort has been put into training of authorised officers and informants over the years. This has included the creation of an operations manual and accredited training for informants. There are also field training modules undertaken by program leaders in legislative framework and services, field safety and field sampling. However, it was apparent from staff feedback and the external inquiries I have referred to that there are considerable gaps in procedure and guidance for field staff, and consequently a lack of consistency and coordination of field activity.

In some cases, where there are procedures these are not well understood or adopted. In the absence of a robust procedure for operations, staff rely on each other, their unit managers and a number of key, experienced personnel within the EPA for guidance.

4 Ombudsman Victoria – *Annual Report 2010*, p.34.

There was also considered to be a lack of clarity and consistency in the requirements to refer a matter to ERP. I referred above to a checklist for referrals to the Enforcement Review Panel, which was helpful, but these documents were not widely available and not included in an accessible operations manual. Such a document would support officers in considering whether to refer a matter. I observed a number of referrals for punitive enforcement action where breaches continued without remedial action being taken to attempt to stop a breach continuing. The checklists should make it clear, in my view, that remedial action should be taken prior to referral to ERP, and it should be clear from the incident summary whether a breach is continuing.

Unfortunately, a number of key EPA subject-matter experts are 'single point' dependencies and consistency relies too heavily on the advice provided by these same individuals. In short, the current situation is not adequate to achieve EPA's ambition to be a modern regulator and to grow its enforcement activity while achieving consistency and being open to scrutiny and challenge.

14.3 A central unit to provide 'operations support'

In response to the first stage review, EPA committed to developing a quality management system for its field operations. In August 2010, I provided an interim report to EPA regarding the establishment of a central unit responsible for coordination of support to field operations. This report was accepted and I am pleased that EPA has moved to establish such a function in its Business Development Directorate. Given the pressing need for improved support and the deficiencies identified by the Ombudsman and Auditor-General, an aggressive implementation timetable will be required.

There are a number of elements to the operations support function that are required to properly support the exercise of powers and operations of authorised officers:

1. a policy and commitment to quality management
2. policies and procedures
3. training
4. operations support to field officers using the procedures
5. regular quality assurance through individual review and broader audits
6. feedback to individuals and groups
7. continuous improvement through evaluation of the QMS itself.

14.4 Guidance for improving practice – a checklist

EPA is not alone among Victorian regulatory agencies which need to improve the support they provide to regulatory practitioners. The Victorian Ombudsman has recently provided guidance on supporting operational staff in undertaking their regulatory role, based on his inquiries into a number of Victorian regulators[5]. I have outlined these below. Many of them are consistent with recommendations I have made in this report.

5 Ombudsman Victoria - *Annual Report 2010*, p.40.

Agencies should:

- provide staff with training on both the administrative and enforcement aspects of their role
- clearly define and document their role and functions
- devise and implement a method to review internal and external documentation
- develop, document and formally endorse comprehensive guidelines and policies for staff on the agency's statutory requirements and the responsibilities of the employee
- ensure staff members are familiar with internal policies, guidelines and practices
- support organisational policy and procedure through ongoing training and professional development of staff
- plan for all investigations and major enquiries
- document decision-making processes
- use staff supervision and training as measures to guard against poor decision-making
- ensure adequate resources are assigned to high priority matters
- respond to complaints in an informative and timely manner and advise complainants of any obstacles that may delay a response
- maintain ongoing and accurate communication with complainants to demonstrate transparent practice and sustain the public's confidence
- utilise staff expertise and complaints to the agency to identify weaknesses with policies, procedures and legislation
- make continuous improvement a key objective
- review internal practices on an ongoing basis to ensure the systemic issues raised by complainants or agency staff are identified and resolved.

In addition, regulatory agencies should:

- maintain comprehensive and up-to-date legal advice regarding their role and powers
- ensure senior leadership promotes a culture in which officers have the confidence to use the agency's powers appropriately
- provide complainants with information about the regulatory role of the agency and advise complainants of any decisions or delays made in relation to the complaint
- develop and promulgate internal policies which facilitate communication between staff within a regulatory agency
- ensure senior staff monitor the quality of complaints management so that significant matters are not overlooked
- notify the government about how deficient or out-dated legislation limits an agency's ability to fulfil its regulatory obligations
- enter into protocols that clarify and communicate the functions of agencies where more than one agency is responsible for regulating an industry or subject area.

The operations support function would also have input into reporting on compliance monitoring and enforcement activity and its effectiveness, as these are important inputs into effective operations support.

The success of any QMS depends on accountability being allocated for central coordination and creation of operational procedures supporting all of EPA's 'field work'. This focus would primarily be on compliance and enforcement activity undertaken by Pollution Response and Environmental Performance units and the work of authorised officers in the regional offices.

The central unit would also be responsible for induction and training of officers, to ensure consistency before being placed in relevant regions. The training itself would be delivered by a combination of internal and external subject-matter experts against agreed competencies. The unit would also take on responsibility for seeking accreditation of the training program I recommend below, through alignment with a relevant educational institution.

The unit would be responsible for reviewing or replacing the existing operations manual, as appropriate, to ensure clarity is provided forthwith as to those procedures which are current, those under review and those which have been superseded.

During the review, I was approached by a number of other Victorian regulators who were facing the challenge of documenting a procedural manual for inspectors and/or investigators. In my view, there is scope for EPA to work in partnership with these agencies in developing its manual and, where possible, to draw upon established models and procedures that have been established by other relevant regulators in Victoria or interstate.

Procedural consistency requires ongoing checking and support, and continuous development and improvement. This consistency would require ongoing operations support. Operations support would include a subject-matter expert or lead practitioner who would be available for questions from the field on interpretation, policy positions and procedures. The expert would be an experienced enforcement practitioner and be responsible for documenting advice and frequently asked questions, and be in a position to inform the development of new policies and procedures, as required.

The unit would also establish a quality assurance program to be delivered by the expert/s. Quality assurance would include auditing documents and interventions by authorised officers against operating procedures and policies by sampling and reviewing interventions by authorised officers, and providing individual coaching to support continuous improvements. This would allow a view to be formed regarding individual and collective knowledge gaps and issues of inconsistency between officers and regions. Once mature, consideration could be given to devolving the quality assurance process to regional managers or team leaders.

For an initial period, the expert would also act as a 'clearing house' for requests for legal advice from authorised officers. This would provide a number of advantages over the current process of directly approaching the solicitor or individual lawyers. It would allow a determination of whether, in fact, legal advice was required or whether the request stems from a lack of effective policies and procedures, and would ensure that any legal advice is translated into policies and procedures, and that interpretations are centrally recorded and available. The learnings from individual matters would also provide an input into policies and procedures. This role could be complemented by providing regular communications and newsletters to authorised officers on changes to policies, procedures, case studies and other issues relevant to field staff.

There is a pressing need for procedures and guidance on the conduct of an inspection and enquiries relevant to the exercise of discretion under the Compliance and Enforcement Policy. I understand that EPA has commenced documenting inspection protocols and procedures for its Pollution Response Unit. It is important that this work is properly resourced and is completed in a timely way.

I also believe that clarity should be provided on the referral process for investigations and the elements required to make a referral to the Enforcement Review Panel (ERP), as well as the tracking of documents proceeding to the panel. It is also essential to continuous improvement that the learnings from the ERP are captured. This is particularly true where cases have not been pursued due to a lack of clarity of policy, procedures or legal interpretations. This would again allow for the procedures and 'body of knowledge' in operations support to develop over time. Training would also be arranged in a more timely way on commonly occurring issues.

I am pleased that EPA accepted the interim recommendation I made in August and has moved to establish an operations support function.

Recommendation 14.1
That EPA establish an operations support function, incorporating the elements I have outlined above.

14.5 Overview of authorised officer training

EPA staff seeking appointment as an authorised officer are required to undertake a training program prior to qualification. The training program is generally undertaken simultaneously with field duties and, accordingly, EPA staff are employed directly into vacancies for field staff as either pollution response officers, environment protection officers or investigators.

The EPA operations manual states that, in order to gain authorised officer appointment, a staff member needs to complete a number of courses and demonstrate competencies through an assessment devised by the Solicitor's Office.

The required training courses are:

- 'EPA's Legislative Framework' and 'EPA Tools to Protect the Environment'
- 'Investigations', including sampling and field investigations
- 'Field Safety'.

The following competencies must be assessed and met prior to authorisation:

- sound knowledge and understanding of the Act and regulations
- a comprehensive understanding of the powers and responsibilities of authorised officers
- the ability to understand and define the concept of a 'legal person'
- the ability to analyse an offence provision to determine what elements need to be established

- sound knowledge of the basic rules of evidence
- knowledge of the requirements for the conduct of an investigation
- the ability to prepare a statement of evidence using accepted techniques.

In addition, the EPA Operations Manual requires additional tasks be completed to be appointed as an authorised officer:

- Demonstration of required standard of knowledge by passing a written assessment.
- Six months practical experience in an operations unit or demonstrated equivalent.
- Assessment by the unit manager as to the capacity to properly exercise the powers of an AO conferred under the Act, specifically (a) suitable knowledge and experience and (b) maturity.
- Recommendations from (a) the relevant unit manager; (b) Special Prosecutions Unit, (c) Human Resources; (d) Solicitor; and (e) Executive Director Regional Services.
- A number of recommendations and approvals are required to be submitted to the Authority to trigger formal appointment.

Unfortunately, the Operations Manual is out of date and a number of the roles and accountabilities have changed since the current procedure was written. There appears to be no formal checklist and assessment process to ensure that different unit managers apply the same criteria to the competencies outlined. In any event, the competencies are limited to basic levels of understanding of the legislation itself and a number of legal principles. The competencies of particular importance to consistent and authoritative enforcement of the law are much broader and would include technical subject matter and the regulations and state environment protection policies (SEPPs) that are administered by EPA. Additional competencies on the *way* in which monitoring, inspection and enforcement are undertaken are required.

The training courses are undertaken internally and taught by EPA staff. The training programs do not form part of an accredited training program or course of qualification.

Practical experience is described as 'hands on practical experience' and distinguished from 'graduate placements' in the initial training period (previously occurring in the first 12 months). However, it would seem that some appointments have been made of officers who have not attained the full six months of operational experience and, in some cases, the timing of the courses offered can delay an officer's appointment considerably, with some officers operating for up to two years without formal appointment. This is an undesirable situation. Firstly, the nature of the duties relating to pollution response, in particular, mean that the officers would be inadequately equipped for that role and, secondly, there is a lack of clarity for regulated entities as to whether a trainee officer is authorised to enter or undertake any activity on site. I was advised that trainee EPA officers always accompany an authorised officer and that they were *no longer* permitted to undertake field work unaccompanied[6]. However, this convention, which applied across regional offices, was not written in procedure.

Authorised officers rely predominantly on mentoring and on-the-job training from more senior officers of EPA. Staff were generally complimentary of the mentoring approach and the importance that was placed on it by more senior staff (particularly in regional offices) in supporting junior colleagues[7]. A number of mentors were also supportive of the arrangement, but considered that there was insufficient recognition of this part of their role and that they could themselves benefit from refresher training and building mentoring skills[8].

6 EPA staff consultations Traralgon, Dandenong, Geelong
7 EPA staff consultations Traralgon, Dandenong, Geelong and Bendigo
8 For instance EPA staff consultation Dandenong and Environmental Performance Unit

A more systematic approach to training and qualification for the role of authorised officer is required. Authorised officers require a consistent foundation to prepare them for the challenge of field duties. In my view, it is inadequate to have EPA field officers, who could objectively be assumed by entities to be appointed and possess all the powers of an authorised officer, operating without the appropriate training. There are also serious implications for admissibility of evidence obtained and for the rights of subjects in the event that an unauthorised officer obtains information and evidence during the course of inquiries without being appointed.

Possible skills and competencies required of an authorised officer[9] may include:

- sound knowledge and understanding of the Act and regulations
- a comprehensive understanding of the powers and responsibilities of authorised officers
- the ability to understand and define the concept of a 'legal person'
- the ability to analyse an offence provision to determine what elements need to be established
- sound knowledge of the basic rules of evidence
- knowledge of the requirements for the conduct of an investigation
- the ability to prepare a statement of evidence using accepted techniques
- knowledge of the hazards and precautions involved in sampling procedures
- knowledge of occupational health and safety duties and protections
- knowledge of the hazards/precautions associated with industrial premises
- knowledge of basic principles and methods of personal protection
- knowledge of hazards/precautions associated with working alone
- understanding the basics of legal systems and the three arms of government
- understanding how EPA is established, empowered and limited by the EP Act
- understanding the subordinate legislation relevant to EPA
- understanding EPA's powers and responsibilities regarding planning proposals with significant environmental impacts
- increased awareness and knowledge of EPA's range of tools and approaches
- ability to select the approach most appropriate to a given situation
- skills in determining the advantages/disadvantages of each approach
- ability to conduct a fair and thorough inquiry
- ability to use correct enquiry procedures to enable all options to be pursued
- ability to state the powers of an authorised officer
- ability to use the enforcement provisions of the EP Act
- knowledge of legislation relating to scheduled and non-scheduled premises
- knowledge of legislation relating to industrial wastes
- knowledge of legislation relating to motor vehicles
- ability to take field samples and measurements to the prescribed standard.

9 EPA Operations Manual templates – Section 57 Authorization Appointment Assessment and Section 59 Informant Appointment Assessment

The International Network of Environmental Compliance and Enforcement (INECE) proposes the following elements to be considered as core components of inspector training for environmental regulators[10]:

1. Basics of Compliance and Enforcement
   a. Introduction to Environmental Compliance
   b. Summary of Environmental Requirements
   c. Components of an Enforcement Program
   d. Organisational Structure for Compliance and Enforcement
   e. Role of the Inspector/Field Investigator
2. Legal Aspects of Inspections and Enforcement
   a. Enforcement Litigation
   b. Entry and Information-gathering Tools
   c. Evidence
3. Pre-inspection Activities
   a. Pre-inspection Planning and Preparation
   b. Administrative Considerations for Inspectors
4. On-site Activities
   a. Gaining Entry and Opening Conference
   b. Ensuring Inspector Health and Safety
   c. Records Review
   d. Physical Sampling
   e. Interviews
   f. Observations and Illustrations
   g. Closing Conference/Travel Security Measures
5. Post-inspection Activities
   a. Reports and Files
   b. Laboratory Analysis
   c. Enforcement Proceedings
6. Communications
   a. Serving as an Expert Witness at Enforcement Proceedings
   b. Press and Public Relations
   c. Communications Skills.

10 *Principles of Environmental Compliance and Enforcement* handbook, International Network of Environmental Compliance and Enforcement, April 2009, p.54.

14.6 Discussion

The training program is undertaken by different units within EPA and is scheduled according to demand and unit resourcing and availability. Unfortunately there is currently no overarching responsibility for the scheduling or delivery of the four components of the authorised officer training. There is also no central system for recording the completion of relevant units or competencies.

It is unusual that EPA has chosen an on-the-job training model for its authorised officers. The preferred method for most regulators training enforcement officers is to provide comprehensive induction and training upon appointment to role, and to undertake competency-based training based on adult learning principles[11]. This is particularly important in the context of the complexity of field duties and the dynamic nature of workplace inspection that environment protection officers work in.

Many EPA staff were complimentary of on-the-job training and of their mentors. However, relying on this as effectively an induction can be inconsistent and unreliable, given the different standards that would be applied by mentors. It is simply not a substitute for standardised, comprehensive training. Due to the relatively low numbers of candidates, some environment protection officers indicated that they did not qualify for authorisation for more than 12 months, due to the lack of opportunities to undertake the requisite courses.

The training and development of EPA officers is too heavily reliant on on-the-job training to be comprehensive and consistent. In a number of regional areas the experience and availability of senior EPA officers is limited and this inevitably impacts on the quality of training and mentoring received by officers. In order to ensure consistency in the level of training, skills and competencies, EPA should map the competencies required of an authorised officer and develop a comprehensive induction program that would be offered to EPA authorised officers *upon commencement* of their field placements and not after a minimum of six months of field duties, as is currently the case. It is particularly important that the field safety program is provided to EPA officers upon commencement, prior to them undertaking field duties[12]. Officers would be appointed as authorised officers upon completion of the induction.

It is clear that even the more senior authorised officers have a need for professional development and skills refreshers. A number of competencies and training programs were outlined in staff consultations, including:

- inspection technique[13]
- auditing[14]
- communicating as a regulator[15]
- administrative law principles and rights and responsibilities
- ethics
- dealing with challenging and aggressive behaviours[16].

11 EPA staff consultations - Traralgon.
12 EPA staff consultations - Geelong.
13 EPA staff consultations -Environmental Performance Unit.
14 EPA staff consultations -Traralgon.
15 EPA staff consultations - Environmental Performance Unit and Geelong.
16 EPA staff consultations - Geelong and Traralgon.

In my view, these are competencies that are necessary and appropriate for enforcement officers. A number of EPA officers expressed a desire to develop more technical skills in regulatory subject matter, such as hazardous substances and dangerous goods[17] and SEPPs[18], and wished to receive refresher training[19], particularly in the area of investigations.

Businesses and community members were critical of the technical expertise of some authorised officers[20] and considered that there had been a depletion of expertise over recent years, with high staff turnover. Many EPA staff have technical qualifications but these also require continued professional development and instruction in emerging science and techniques.

As officers have legislative powers by virtue of appointment and a number of the powers are subject to external merits review by the Victorian Civil and Administrative Tribunal (VCAT), it is also important that officers receive administrative law training.

A significant number of environment protection officers have been recruited relatively recently and, across the cohort of authorised officers, there are officers who have been recruited to EPA at different parts of its history, when it adopted differing approaches to the role of authorised officers in enforcement. This disparity in some measure contributes to the inconsistency in approach that is perceived by many businesses and community members. In order to ensure a consistency of approaches to compliance monitoring and the role of authorised officer generally, a standard training program is required.

A number of Australian jurisdictions have now moved to adopt accredited training programs, leading to formal qualifications for authorised officers. The Australasian Environmental Law Enforcement and Regulators Network (AELERT) provides a nationally accredited training package (Certificate IV in Statutory Compliance, Certificate IV in Investigations or Diploma in Government (Investigations)). Flinders University offers a Graduate Certificate in Environmental Compliance. There are also private providers offering courses leading to qualifications such as Certificates and Diplomas in Environmental Compliance, Workplace Inspection and Government. There are existing Victorian regulators who offer these qualifications. It would be desirable to explore opportunities for collaboration. There is also likely to be a need for formal compliance and inspection qualifications in other Victorian regulators.

In my view, it is desirable for EPA to evaluate the strengths of existing training programs and consider whether these are adequate to ensure that all authorised officers receive a consistent and appropriate level of competence. Where an existing program is not available, EPA should move to seek formal accreditation for an appropriate qualification. Over a reasonable period of time, EPA should move to have all current environment protection officers and informants complete this qualification. The qualification should then be a requirement for environment protection officers to obtain within a prescribed time of being authorised.

There should be a program for refresher training of authorised officers at appropriate intervals. It is also necessary that EPA provide appropriate training and briefings to authorised officers prior to publication of significant policies or guidance material, in order to support them in their role of providing compliance advice.

17 EPA staff consultations – Traralgon, head office.
18 EPA staff consultations – Bendigo.
19 EPA staff consultations – Geelong, Traralgon and Dandenong.
20 See, for instance, Submission 36.

14.7 What training is required of an informant?

To be qualified as an informant, authorised officers require additional training and competencies. EPA has developed a 'Prosecutions' course which seeks to develop the following competencies for subsequent assessment:

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.

- a basic understanding of the Victorian court system and related court procedures
- knowledge of the main defences to an offence against the EP Act
- the ability to conduct a fair and thorough investigation
- skills in preparing for and conducting a record of interview
- the ability to assemble a prosecution brief in an orderly and logical fashion
- the ability to confidently present evidence in court.

The Prosecutions course is accredited as a Graduate Certificate in Environment Protection (Enforcement) from Holmesglen Institute of TAFE. The Graduate Certificate is a nationally recognised training qualification.

The Operations Manual requires additional tasks be completed to be appointed as an informant:

- completion of the Prosecutions course AND assignment work
- competency assessment, in the form of a logbook approved by the equivalent of the Manager Enforcement Unit
- Demonstration of practical legal experience, determined in consultation with the Manager Enforcement Unit.

Upon completion of the prerequisites, the relevant unit manager makes recommendation for a formal instrument of delegation to be executed by the Authority.

14.8 Maintenance of informant status

The Operations Manual also provides for maintenance of qualifications as an Informant, which requires:

- a case study discussion with the Solicitor to the EPA[21]
- preparation of a 'number of briefs' in a three-year period or repeat participation in the Prosecutions course.
- undertaking other relevant training, as identified in the officer's personal development plan.

It is clear that the relevant procedure requires revision.

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.

21 EPA training database – Authorised Officer and Informant Training.

15.0 Resourcing of compliance and enforcement

This chapter considers the number of environment protection officers currently employed by EPA and implications for adequate resourcing of field operators, particularly in relation to the technical expertise required. It compares EPA with other jurisdictions and recommends a significant increase in the number of environment protection officers.

The scope of this review, as outlined in the terms of reference, included:

Make recommendations regarding any strategic themes which the EPA should take into account in preparing its future strategies and business plans, including any implications for resourcing.

15.1 Background

Unfortunately, EPA does not currently keep central data on environment protection officers, pollution response officers and investigators. The number of authorised officers is not an accurate reflection of field-active 'inspectors', as many authorised officers no longer undertake compliance inspections or pollution response. Conversely, the number of environment protection officers (a title used to describe a role) does not indicate whether the officer is appointed as an authorised officer.

Most EPA staff consultations focused on issues of resourcing. In particular, staff were concerned that there were inadequate numbers of staff involved in compliance monitoring and assurance functions. In most regional offices there was a concern that almost all inspection work was undertaken in response to pollution response or other reactive compliance inspections[1].

It was considered that more effective compliance assurance was required in relation to particular regulatory challenges, such as validation of EREP compliance[2], landfill levy compliance and noise pollution. Inadequate field resources were considered to be the main cause for not being able to follow up on the substantial number of notices[3]. One council suggested that there was significant non-compliance with septic tank requirements, as EPA had not been resourced to conduct adequate inspections[4].

A significant focus of the first stage review was on concerns regarding the perceived inadequacy of resources, particularly in the area of staffing to the inspection and investigation functions. In July 2010, EPA undertook an extensive expression-of-interest program to reallocate resources internally to the inspection and investigation activity by placing additional staff in its Pollution Response and Environmental Performance units and the Enforcement Unit.

1 EPA staff consultation – head office, Dandenong, Geelong, Wangaratta, Bendigo.
2 EPA staff consultation – Environmental Performance Unit.
3 EPA staff consultation – Bendigo.
4 Community open house – Wodonga.

Business consultations attributed many of the shortcomings in enforcement and compliance advice they observed to the level of resourcing of EPA field operations and turnover in staff. The turnover of staff was seen as the driver to a loss of technical expertise in undertaking compliance inspections, particularly of complex premises.

In its submission Ai Group supported broadening the reach beyond licensed premises, saying:

> It is important to the effectiveness of the monitoring and enforcement regime that the focus is not solely on licensed sites who seek to comply with environmental regulation and that it includes appropriate action for similar breaches at unlicensed sites[5].

This requires significant technical and specialist expertise to be employed and retained in EPA's field operations. Ai Group said:

> It is essential that the EPA is sufficiently resourced to ensure that it can respond in a timely and considered manner to queries from industry.

As an example, a business attending the consultation session noted that it had experienced significant delay in receiving a response from the EPA in relation to an audit scope that it had submitted for approval. This delay had implications for compliance time frames and for reporting to the company's board on compliance.

Community consultations also raised concerns that the perceived inadequate level of inspections and enforcement were also due to insufficient inspection resources. Community members suggested that it was well known that EPA resources were low and that this was often used as a reason for not being able to address a community concern[6].

Resourcing featured in a number of submissions as a critical feature of any reform. The City of Casey said:

> The EPA is viewed as an organisation with expertise in the field of environmental protection; however as an organisation it appears under-resourced for this task. Many staff are inexperienced particularly in site operations. EPA staff should be provided with appropriate training to ensure an adequate knowledge of industry best practice and operational realities.[7]

In addition to resourcing, the technical capacity of EPA attracted significant concern from business and community. CitiPower and Powercor Australia Ltd[8] stated:

> It is essential to have access to relevant specific expertise regarding the particular incident in addition to the individual officer initiating the enforcement process. It is likely that many officers may not have expertise in all areas of their jurisdiction and without assistance from specific experts an inconsistent outcome across businesses or in dealing with similar incidents across various regions may occur.

Ai Group's submission[9] stated:

> There are many enthusiastic supporters amongst Ai Group's membership for the introduction of Client Relationship Managers. Companies have noted that they are no longer impacted by requirements to deal with multiple contacts in the EPA.

5 Submission 11.
6 Community open house - Geelong, Bulleen.
7 Submission 40.
8 Submission 30.
9 Submission 11.

> However, some companies noted that the move to the CRM system had resulted in the disbanding of the knowledge hubs within the EPA. Further, the centralisation of contact through a single point in some instances leads to delays in getting a response. It is essential to the success of the CRM model that the CRM managers are supported by appropriate technical resources to enable speedy response to queries.

Transpacific Industries Group Ltd's submission[10] stated:

> TWM feels that EPA needs to increase its technical resources to offer such support to businesses. EPA's previous structure of various technical groups, for example, the landfill team the ground water team etc seemed to work quite well...

Insufficient technical expertise in chemical facilities in particular was also a concern in community consultations[11].

15.2 EPA's current workforce data

EPA centrally maintains general workforce data. The number of EPA staff has increased only marginally since 2006. The number of ongoing employees, as opposed to fixed-term contractors, has increased significantly over that time.

The number of authorised officers has also been increasing, as has the proportion of total EPA staff who are authorised. However, the number of authorised officers cannot be relied upon as an indicator of the number of staff in field inspection roles. This is because EPA has allowed officers who transferred to non-operational roles to retain their authorisation. A number of technical specialists and officers who undertake compliance auditing and monitoring but who are not environment protection officers also have authorisations. Table 15.1 provides data on the number of authorised officers since 2006.

Table 15.1: Proportion of authorised officers to full-time employees

YEAR	EPA FULL TIME EQUIVALENT EMPLOYEES	AUTHORISED OFFICERS	PROPORTION OF AUTHORISED OFFICERS TO FULL-TIME EQUIVALENT EMPLOYEES
2005-06	386	69	18%
2006-07	390	54	14%
2007-08	378	91	24%
2008-09	401	103	26%
2009-10	397	109	28%

[Source: EPA Annual Reports and EPA corporate database STEP+]

It was difficult to obtain an accurate point-in-time analysis of the number of environment protection officers.

Data on authorised officers, whilst stored in EPA's corporate database *Step+*, are not centrally managed and not linked to general workforce data held by EPA's human resources (HR) unit, People and Culture. When a new authorised officer is appointed, this information is captured and the *STEP+* database updated. However, the system cannot account for transfers of authorised officers to non-operational roles. Maintenance of the authorised officer data therefore relies on unit and regional managers having accurate records of number of staff and of those who hold appointments.

10 Submission 15.
11 Community open house – Moonee Ponds, Altona and Dandenong.

EPA staff records use some seven different role descriptions for staff with authorisation or field operational duties. Due to a significant number of internal transfers during 2010, many environment protection officers are still in training and are accordingly not yet appointed as authorised officers. The number of environment protection officers therefore artificially inflates perceived enforcement capacity, as trainee officers have no statutory powers.

The following table indicates the spread of environment protection officers across units.

Table 15.2: Environment protection officers and team leaders in EPA compliance and enforcement units

UNIT	STAFF
Metropolitan Units	
Enforcement	1 Manager 2 Team Leaders 7 Investigators
Environmental Performance	1 Manager Industry Compliance Team 1 Team Leader 7.4 Environment Protection Officers Notice Compliance Team 1 Team Leader Contaminated Land & Clean Up Notice Compliance 1 Team Leader 2 Environment Protection Officers Landfill Compliance Team 1 Team Leader 1 Environment Protection Officers Waste Certificate Compliance Team 1 Program Leader 1.4 Environment Protection Officers Ballast Water Compliance Team 1 Team Leader 2 Environment Protection Officers National Pollution Inventory 1 Team Leader 2 Environment Protection Officers Total Resources 7 Team Leaders 15.8 Environment Protection Officers

UNIT	STAFF
Pollution Response	1 Manager Pollution Response Team 1 Team Leader 5 Environment Protection Officers Emergency Response Team 1 Coordinator 1 Environment Protection Officer Litter Team 1 Team Leader 2.5 Environment Protection Officers Illegal Dumping Strike Force 1 Program Manager 6 Environment Protection Officers Total Resources 4 Team Leaders / Program Managers 14.5 Environment Protection officers
Regional Units	
Gippsland (Traralgon)	1 Manager 2 Team Leader 7 Environment Protection Officers
North East (Wangaratta)	1 Manager 1 Team Leader 4 Environment Protection Officers
North West (Bendigo)	1 Manager 1 Team Leader 3 Environment Protection Officers
Southern Metro (Dandenong)	1 Manager 1 Team Leader 6 Environment Protection Officers
South West (Geelong)	1 Manager 1 Program Leader 2 Environment Protection Officers
TOTAL COMPLIANCE AND ENFORCEMENT STAFF	8 Managers 19 Team / Program Leaders 7 Investigators 45 Environment Protection Officers

[Source: Compliance and Enforcement Review, Internal EPA Phase 1 Report, April 2010]

Accordingly, on data provided by individual unit managers, EPA currently has 52 full-time equivalents acting as environment protection officers and seven investigators, made up of the following:

Metropolitan:

- Illegal Dumping Strike force — 6.0 environment protection officers
- Environmental Performance Unit — 15.8 environment protection officers
- Pollution Response Unit — 8.5 environment protection officers
- Enforcement Unit — 7.0 investigators

Regional:

- Across all five regional offices — 22.0 environment protection officers

There are 19 team and program leaders across the metropolitan and regional units.

It should be noted that there are additional EPA staff who undertake compliance monitoring activity who are neither environment protection officers nor authorised.

For instance, a program manager in the Corporate Services Directorate undertakes the audit program for landfill levy and a program manager, assisted by four full-time officers, undertakes compliance for the EREP program.

15.3 Survey of Australian jurisdictions

EPA surveyed members of the Australasian Environmental Law Enforcement and Regulators network (AELERT), asking for information on the size of their inspectorate (number of officers), regulated population (number of facilities) and the number of inspections annually.

Unfortunately, only two responses which could be directly compared to EPA Victoria's jurisdiction were received within the time available.

Queensland's Department of Environment and Resource Management has 246 officers authorised under its legislation, who are charged with enforcing licence compliance for some 4000 sites. The South Australian EPA has 35 inspectors who ensure compliance for approximately 1500 licensed sites.

15.4 European agencies

The European Union Network for the Implementation and Enforcement of Environmental Law consists of environmental authorities from all EU member states.

In October 2007, the network undertook a project to review compliance and inspection practices for facilities covered by the *Integrated Pollution Prevention and Control Directive 1996* (IPPC)[12].

The report comprised a survey of 14 European Union member states on the size of their inspectorate (number of officers), number of facilities and the number of inspections annually (see Table 15.3). The survey took account that some inspectors also perform other enforcement functions outside of IPPC facilities and apportioned resource accordingly.

12 'IMPEL Project on Review of Compliance promotion, Inspection practices and Enforcement for IPPC installations.'

Benchmarking against jurisdictions with very different industry and population profiles, licensing regimes and approaches to inspection is problematic. Achieving equivalent ratios of inspectors to licensed premises of Western European countries and Queensland would require a significant increase in the number of authorised officers employed by EPA to about 100.

15.5 Methods for estimating the number of inspectors required

In 2004, the Organisation for Economic Co-operation and Development (OECD) developed a toolkit to assist emerging European countries in building environmental inspectorates – *Assuring Environmental Compliance – A Toolkit for Building Better Environmental Inspectorates in Eastern Europe, Caucasus, and Central Asia.*

The toolkit presents 'good international practice in the field of management and operations of environmental inspectorates' and helps 'decision-making on the allocation of human and financial resources.'

The process suggested the calculation of the number of staff resources required to undertake inspections includes:

- dividing facilities into risk categories and indicating how many facilities belong to each category
- establishing the normal frequency of inspection per year
- assessing how much time (days) is spent annually on other tasks, annual leave, seek leaves, meetings
- estimating the total inspection time per site
- dividing the total time of inspection by effective time to evaluate the number of inspectors required.

The method also considers additional staffing requirements in the form of management, administration and attendance at court, and applies additional weightings for staff turnover.

15.6 Discussion

I have explored in detail a need for EPA to broaden its compliance monitoring activity to undertake more extensive compliance monitoring and assurance in complex licensed premises. This requires significant technical and specialist expertise to be employed and retained in EPA's field operations. I have recommended that EPA broaden its reach beyond licensed premises. I agree with concerns heard broadly in consultations across stakeholder groups that EPA has, for a number of years, been reactive to reports of incidents and breaches, and not been sufficiently proactive to seek to prevent them through a strong regulatory and enforcement presence. Finally, I also consider the criteria I have proposed for major investigation will require adequate investigations capability.

Importantly, I have also recommended a stronger focus on providing authoritative and technically competent compliance advice. This will require the attraction and retention of experienced compliance professionals, and infrastructure that supports their professional development.

It will ultimately be a matter for EPA to consider if and how it will be able to implement these changes to its operational activities. However, it would seem to me that a significant increase in the level of operational resourcing is required – in the order of 50–100 per cent of current capacity.

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.

16.0 Performance measures of enforcement activity

This chapter considers possible measures of EPA's compliance and enforcement activity and its performance and effectiveness. It recommends a number of output and outcome measures.

16.1 Background

The Auditor-General recommended that EPA:

- implement routine data analysis to report to management on performance and also inform other EPA activities, including compliance monitoring
- undertake more timely and meaningful review of environmental audits and annual performance statements, with greater emphasis on findings and recommendations
- extend the program of compliance inspections to cover both waste reusers and transporters, and establish a rationale for the number of inspections
- track and analyse environmental auditor recommendations, including timely assurance that auditees have addressed and identified issues.

The Auditor-General found a number of serious deficiencies in data availability and EPA record keeping, particularly in relation to compliance monitoring, inspections and enforcement decisions[1].

EPA agreed with the Auditor-General's recommendations.

EPA's Business Systems Reform program is intended to provide integrated reporting and business intelligence capabilities to support management and operational reporting. EPA also committed to implementing enhanced management reporting to monitor key metrics 'around activity, status and action'[2].

The Auditor-General found that EPA had not been undertaking reviews of timeliness and consistency of investigations and enforcement decisions[3].

The first stage review identified the need for EPA to define measures for compliance and enforcement activity. The review team found that EPA's current measures did not align to organisational strategies and that there was considerable concern with the quality of data and systems available to record performance, particularly in the area of enforcement.

That review recommended the development of a 'Compliance Committee' to coordinate development of the compliance plan and oversee the development of measures for this activity and its effectiveness.

1 *Hazardous Waste Management*, Victorian Auditor-General's Report, June 2010, p.14.
2 Ibid, p.29.
3 Ibid, p.22.

The review recommended the following role for the Committee:

- Develop, monitor and evaluate compliance key performance indicators (KPIs), to identify and address adverse trends.
- Identify opportunities for improving client compliance performance.
- Measure compliance service across EPA – is compliance improving?
- Review of annual compliance plans.
- Account for sectoral and client data to ensure strategic compliance planning[4].

The Compliance Advisory Committee was established in September 2010 and includes representation from across EPA, including operational and support units. It is chaired by the Manager Environmental Performance Unit.

Following the first stage review, EPA has put considerable effort into the development of measures of corporate performance against the five priorities in the EPA Business Plan:

- Improve air quality
- Target high-risk sectors
- Enforce the law
- Improve resource efficiency
- Transform the way we work.

A corporate scorecard was developed, including measures and targets for each priority. The scorecard includes a combination of outcome measures in terms of environmental improvement such as air quality, and output measures of activity such as the number of prosecutions undertaken. The scorecard is used as a high-level performance measurement and management tool that is tabled with the EPA executive and Environment Protection Board.

The scorecard is supported by more detailed definitions of performance indicators and a suite of measures of output and outcome that are more specific and can be used by managers of operational functions to manage performance and observe trends in output and outcome.

It is generally accepted that regulators should measure their effectiveness based on the outcome of their work. EPA has committed to this in its Business Plan for 2010–11 and in its definition of a 'modern regulator'. Thus, its success will be judged on its effectiveness at protecting and improving the current quality of the Victorian environment. Measuring the quality of our environment at a holistic and local level is a significant challenge. In some cases, there are comprehensive data on matters such as air quality, water quality and the pollutant load. Some of these data are measured by EPA or are accessible by EPA. EPA has commenced using these data and promoting them publicly to educate stakeholders. I support this approach. The suite of measures and quality of data used to measure them is likely to improve over time with greater attention to them and greater sophistication in measurement and public reporting.

It is important that holistic environmental quality measures are supported by local measures where 'hot spots' appear that require regulatory attention from EPA. EPA has recently been informing stakeholders of localised data in 'problem areas' such as Brooklyn.

Some holistic measures will be difficult for EPA to influence or improve, as some contributors to environmental

4 Internal Report to EPA Compliance and Enforcement Reform, p.55.

quality are affected by factors beyond EPA control or regulatory jurisdiction. Nevertheless, understanding these factors better, and their impact on the environment, will allow EPA to target its activity to areas where it can have an impact. It will also allow EPA to partner with other agencies which are better placed to implement effective change.

It is important in measuring EPA's effectiveness as a regulator that outcome-based measures are complemented by output measures – in other words, measures of activity[5]. These measures are important for transparency and for accountability to stakeholders regarding EPA regulatory activity and any trends in EPA activity that may be associated with improvements or reductions in environmental outcomes.

The *EPA Business Plan for 2010-11* includes the following measures and targets of quantity, 'quality' and timeliness.

Quantity

- 54 environmental condition research reports issued, improvement tools, guidelines, policies, systems and plans completed and issued.
- Increase in EPA notices issued for illegal dumping of waste by 15 per cent.

Quality

- Compliance with statutory requirements, as a proportion of assessments of discharge licences and enforcement notices – 87 per cent.
- Hours during which air quality standards were met, as a proportion of hours in the reporting cycle – 99 per cent.
- Land audits complying with statutory requirements and system guidelines – 90 per cent.

Timeliness

- Pollution incident reports acted on within three days – 92 per cent
- Statutory actions completed within required timelines – 96 per cent.

The UK Environment Agency publicly reports internal performance indicators in the form of a 'Corporate Score-card' and publishes performance reports provided to its Board. The Agency reports performance against targets set out in its Corporate Plan and publishes a five-yearly State of the Environment Report[6]. Significantly, the Environment Agency publishes an annual environmental performance report, called 'Spotlight on Business', which reports on environmental compliance and enforcement activity, including a breakdown by industry sector of the number of serious breaches and highlighting examples of good performance. It effectively provides public information on the current state of 'compliance'[7], which EPA does not currently provide. Such a report, if adopted by EPA, could include aggregated data from inspections, investigations, prosecutions and self reported compliance provided by the annual performance statement (APS) system.[8] In the UK agency a National Enforcement Steering Group, comprising relevant Agency managers, monitors compliance with the Agency's Compliance Policy. I support such an approach.

In Australia the Banks Review[9], among others, endorsed the publication of performance indicators in annual reports of regulatory agencies, including a report on risk-based strategies for regulation[10].

5 Robinson B, *Report to Department of Environment Western Australia*, 2003.
6 *Effective Inspection and Enforcement: Implementing the Hampton Vision in the Environment Agency*, p.17.
7 *Effective Inspection and Enforcement: Implementing the Hampton Vision in the Environment Agency*, p.16.
8 I note that EPA released a December 2010 publication (1363) which provides a broad summary of the APS data for the 2009-10 financial year by schedule category. This is a good basis from which to build more detailed reporting.
9 *Rethinking Regulation – Report of the Taskforce on Reducing Regulatory Burdens on Business. Regulation Taskforce*, January 2006.
10 See also Sparrow M, *The Regulatory Craft*, 2000, p.293-6, 303-8.

16.2 Discussion

In August 2010, I provided preliminary recommendations to EPA regarding a suite of output measures to be used to track enforcement activity. A number of these have been adopted or are being developed. As I have discussed elsewhere, there is currently a paucity of reliable data and systems capable of tracking output of enforcement measures.

At that time there was limited reporting of compliance and enforcement activity within EPA in relation to performance monitoring, and very little other than public reporting of prosecution data on its website and annual report.

The *EPA Business Plan 2010–11* includes a range of measures which is an improvement on previous years and indicates a willingness to be more transparent regarding enforcement activity, timeliness and effectiveness.

The Plan includes a 'compliance' measure which is reported internally as a measure of compliance with notices and licence conditions. This measure is said to represent compliance with statutory requirements. The measure is used as a proxy measure for 'compliance' and is made up of two inputs:

- 'Notices Satisfactorily Complied' as a proportion of 'Notices assessed'
- 'Licensee Satisfactory Performance' as a proportion of 'Licensee Performance Assessments Completed'.

Unfortunately, this measure is very limited in scope and does not adequately represent the performance of EPA in its regulatory function. EPA staff were concerned that the limited nature of the data provided a snapshot of compliance information that did not represent the widespread non-compliance they observed[11].

Unfortunately, EPA has not in the past reported an overall measure of output or productivity, including the number of inspections and investigations and the number of enforcement measures undertaken. The 'compliance' measure does not give an indication of the number of notices issued and followed up, or whether the 'inspections' are on-site attendances by authorised officers or desktop assessments and audits. This information is important for EPA to effectively discharge its oversight role and be transparent regarding both the level of compliance monitoring and the state of compliance detected in this.

Due to difficulties in attribution of changes in environmental quality to regulatory interventions, intermediate measures can be a lead indicator of potential effectiveness. The Yarra River Improvement Project (YRIRP) included a number of 'social indicators' that sought to understand perceptions regarding regulatory activity and the drivers for compliance behaviour. Another example is WorkSafe Victoria, which currently measures business and community perceptions regarding:

- the likelihood that people who break the law will be caught and prosecuted
- its effectiveness as a regulator
- whether it is meeting community expectations of enforcement[12].

Such intermediate measures of public and stakeholder perceptions would complement EPA's current output and outcome measures and provide an indicator of awareness of EPA and its regulatory role, perceptions regarding the risk of detection and perceptions of EPA's fairness.

A critical component of becoming a modern regulator is that EPA more effectively monitors trends and outcomes in compliance and enforcement activity. In my view, improvements can be readily made to current

11 EPA staff consultations – Environmental Performance Unit, Dandenong.
12 See *WorkSafe Victoria Annual Report 2010*.

reporting of enforcement.

A report on compliance and enforcement operations should be developed, based on existing data, to better monitor and track EPA's objective of increasing the level of activity and the attention it receives from EPA's Executive Management Team.

The following measures are proposed for inclusion in a regular compliance and enforcement operations report:

- the number of calls to EPA's information centre
- the number of public reports received, including pollution reports
- the number of public reports responded to
- the number of pollution reports for which a source could not be identified
- the proportion of pollution reports responded to within three days
- the number of licence or notice non-compliance notifications
- the number of imminent environmental hazard notifications from environmental auditors
- the number of environmental auditor recommendations for licensed sites, and the proportion followed up
- inspections (involving on site physical presence) and assessments (desktop or audit type assessments)
- the difference between compliance levels reported by licence-holders in their APS and as assessed by EPA through inspection or audit
- the number of notices and directions issued
- the number and proportion of notices and directions followed up
- the number of notices revoked due to compliance action
- investigations undertaken by type
- the number of referrals to ERP by type and office
- the number of warnings issued
- the number of infringement notices issued
- prosecution briefs awaiting review by the solicitor
- investigations, legal reviews of briefs and prosecutions in progress
- prosecutions undertaken
- the success rate of prosecutions
- other enforcement actions taken.

Much of this data is currently available from an internal EPA 'Quarterly Statistics Summary' and other internal EPA unit reports. Unfortunately, data are not readily available to allow comparison between regional offices[13].

In any event, the report should compare results with the corresponding period in 2009–10 or, alternatively, be compared with total figures for 2009–10, and identify any trends in enforcement activity and allow corrective action where required.

It was apparent that there are significant improvements required to data from the Enforcement Review Panel. The Ombudsman criticised the timeliness of the panel and the lack of a tracking and auditing process for panel referrals and decisions. The Victorian Auditor-General indicated that the quality of enforcement files made it 'impossible' to audit their quality. Proper analysis of the source and quality of referrals to the panel would

13 EPA staff consultations – Bendigo, Wangaratta.

provide a basis to compare referrals between offices and officers, to ensure that there is consistency and that any trends be analysed. A trend in referral patterns might identify, for instance, that an officer has not referred matters to the panel or has a tendency to report disproportionately more than others. Steps can then be taken to understand the reasons for these patterns.

Quantitative measures were treated with caution by EPA staff, as they did not convey the quality or complexity of work required to undertake effective enforcement[14]. Apart from quality being assessed through normal management reporting lines and feedback, a range of other measures could be developed at an aggregate level as proxies for quality of enforcement. These could include:

- the success rate in prosecutions
- the proportion of referrals to the Enforcement Review Panel that are approved
- the proportion of investigation briefs being approved for prosecution
- the proportion of enforcement actions followed up and complied with.

Measures of effectiveness should also include measures of timeliness. Limited timeliness data are available for issue of infringement notices. In order to address community and business concerns regarding the timeliness of EPA enforcement actions, EPA should measure the timeliness of issue of enforcement tools, including:

- issuing of infringement notices
- issuing of pollution abatement and other notices
- major investigations
- prosecutions.

There should be transparent, public disclosure of this information and commitments to improving the timeliness of these processes over time[15].

I am pleased that EPA has commenced reporting on some of these measures and defined a set of operational measures for tabling with EPA's Executive Management Team and the Environment Protection Board.

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.

14 EPA staff consultations – Environmental Performance Unit, Enforcement Unit, Legal Unit.
15 A view supported in a report to EPA by the Environment Defenders Office. To be published.

17.0 Internal review of enforcement decisions

This chapter considers existing processes for internal review within EPA and makes recommendations for a pilot administrative process for review of key EPA enforcement decisions to ensure accountability.

The terms of reference for this review required me to consider:

The skills, training and frameworks that support good decision-making in relation to compliance and enforcement.

I was specifically asked to consider the place of internal review. A key aspect of sound administrative decision making by government is that decision-making processes should be open to scrutiny and challenge. One way of achieving this is through a process for internal review – a review by a person within the organisation, but not the original decision maker.

17.1 Background

There are many benefits of a strong, efficient system of internal review. These include increased transparency and improved public confidence in EPA's decision-making processes, improved consistency of decision making, and increased efficiency, as decisions can be reviewed in a more timely manner. 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 to correct errors or unfairness. With the right supporting features in place, internal review also provides for improved decision making, as errors are corrected and trends or patterns observed over time are fed back into training and guidance for decision making.

Under Part IV of the EP Act, a number of decisions of the Authority are reviewable externally by the Victorian Civil and Administrative Tribunal (VCAT); this is known as external merits review. These reviews include decisions regarding licences, works approvals, pollution abatement notices and directions.

Decisions by EPA to prosecute or not prosecute are not reviewable. This is because decisions on prosecution involve the exercise of independent prosecutorial discretion and are subject to public scrutiny and review by courts who hear prosecution matters.

There are currently only limited circumstances in which a community member can apply for review of EPA's decisions, either internally or externally. Internal review currently exists for members of the public who are:

- recipients of infringement notices issued by the Authority (under the *Infringements Act 2006*)
- applicants requesting access to EPA's documents under the *Freedom of Information Act 1982*[1] who are dissatisfied with a decision under that Act.

1 See section (4) below for an outline of these existing EPA internal review processes.

Many regulatory models now provide some form of internal process to challenge decisions, to ensure they are lawful and applied consistently. For example, the concept of internal review exists currently under:

- environmental legislation–
  - Department of Environment and Resource Management in the Planning and Environment Court (Queensland) under the *Environment Protection Act 1994*[2]
  - *Department of Natural Resources, Environment, The Arts and Sport* (Northern Territory) under the *Waste Management And Pollution Control Act 1998*[3]
- safety legislation–
- *Occupational Health and Safety Act 2004* (Vic)[4]
- Model National Work Health Safety Act[5]
- Commonwealth departments[6]–
- Centrelink[7]
  - Therapeutic Goods Administration[8]
  - Australian Customs Service[9].

17.2 What is internal review?

Internal review is the reconsideration of a decision made by a government agency or its delegate by a person other than the original decision-maker. In most cases, the reviewing officer makes a new decision which either affirms the original decision or sets it aside. The facts considered may be limited to those that are apparent from documents or other materials available to the decision-maker. In some cases, a broader approach may be taken that allows for new submissions and facts to be considered as at the time of the review decision. The reviewing officer should be independent of the original decision maker.

Internal review is generally less formal than review by a tribunal or court. The predominant tribunal for external administrative review of government decisions in Victoria is VCAT. These reviews are generally conducted 'on the merits', which means that the reviewer is not bound by the views of the original decision maker and makes a fresh decision on the facts. Judicial review involves only questions of legal correctness of an original decision; for instance, whether the decision was within power. It does not generally involve the consideration of new facts.

2 See *Department of Environment and Resource Management Information Sheet Internal Review (DERM), and appeal to Planning and Environment Court* at *www.derm.qld.gov.au/register/p00462aa.pdf.*
3 Section 108 provides a mechanism for a person who is directly affected by an original decision made under the Act to apply for a review of that decision. Section 109 enables a person to apply for a further review by the Minister or review panel if the original review was undertaken by the Chief Executive Officer or delegate.
4 See *WorkCover Authority's Internal Review Unit* fact sheet on *Internal Review of Inspector's Decisions*, *www.worksafe.vic.gov.au/wps/wcm/connect/78887c004071f45d9bd1dfe1fb554c40/internal_review_4pguide.pdf?MOD=AJPERES.*
5 It is planned that the model health and safety act is to be adopted by all states and territories in 2012.
6 For a summary of the Commonwealth schemes, see Australian Law Reform Commission, *Principles Regulation Report: Federal Civil and Administrative Penalties in Australia*, Report 95, December 2002.
7 Internal reviews are undertaken by the *Social Security Appeals Tribunal* (SSAT). SSAT is an independent administrative merits review tribunal. See *www.ssat.gov.au/iNet/ssat.nsf/pubh/role.4.0.*
8 For example, see *Australian regulatory guidelines for OTC medicines, Chapter 8, 'Review of decisions', www.tga.gov.au/docs/pdf/argom_7.pdf.*
9 Internal mechanisms exist to review decisions relating to tariff and valuation decisions. See *Customs Client Service Charter*.

While judicial review is not expressly referred to in the EP Act, the right to judicial review in Victoria is available under other forms of legislation, including the *Administrative Law Act 1978* and the *Supreme Court (General Civil Procedure) Rules 2005.* The establishment of an internal review process would have no effect on the right to judicial review through these existing means.

Although usually provided for in legislation, particularly where there are rights to external review, internal review can also be set up administratively. Legislation establishing internal review generally provides that it should be a precondition to any recourse to external review.[10]

Internal review is generally less formal than external merits review or judicial review. Most effective internal review processes are, therefore, more accessible to applicants. They are designed to be quick and either free or less expensive than court or tribunal proceedings.

There are a number of downsides to internal review, including the risk of delay to decisions caused by introducing another layer of review and the second-guessing of judgement exercised by administrative decision makers. However, internal review is generally encouraged, provided that it is established in a way that makes it efficient, free and independent.[11]

Internal review schemes support the principles of accountability and transparency which I have included in the proposed Compliance and Enforcement Policy.

The UK Better Regulation Executive Principles of Good Regulation[12] include:

> **Accountability** – Regulators must be able to justify decisions and be subject to scrutiny. Regulators should clearly explain how and why final decisions have been reached. Regulators and enforcers should establish clear standards and criteria against which they can be judged. These should be well-publicised, accessible, fair and effective complaints and appeals procedures.

17.3 How is internal review different from external merits review?

Part IV of the EP Act specifies the EPA decisions that are reviewable by VCAT, including decisions regarding licences, works approvals, some notices and directions. In reviewing these decisions, VCAT undertakes a merits review. VCAT is provided with all the relevant information and then makes its own decision as if it were the primary decision maker. The facts considered by the tribunal are considered on the material available at the date of the hearing.

10 This is the case with the Model Health and Safety Act, *Victorian Occupational Health and Safety Act 2004* and freedom of information legislation such as the *Government Information (Public Access) Act 2009 (NSW).*

11 Australian Law Reform Commission, *Principles Regulation Report: Federal Civil and Administrative Penalties in Australia*, Report 95, December 2002, p.688. See also *Rethinking Regulation – Report of the Taskforce on Reducing Regulator Burdens on Business*, January 2006, p.93 (in the context of economic regulators).

12 Better Regulation Executive, United Kingdom.

17.4 Internal review under the *Freedom of Information Act 1982*

EPA currently provides for internal review under the *Freedom of Information Act 1982* (the FOI Act). A person who makes an application for access to documents in EPA's possession under FOI, but disagrees with a decision to limit or deny access, may apply to internal and external review. These reviews are undertaken by a senior EPA officer (usually a director or manager) independent of the decision maker. The reviewer must conduct the internal review within 14 days of EPA receiving the application.

An applicant must be advised of the reviewer's decision within 14 days of the date of receipt of the request for review and has the right of appeal to VCAT within 60 days. A reference to the process for internal review is included on EPA's website[13].

17.5 Internal review under the *Infringements Act 2006*[14]

The *Infringements Act 2006* establishes a consistent infringements regime for Victoria. This Act also provides for internal review of decisions to issue an infringement notice under the EP Act. The review provides an opportunity to correct a decision which was flawed or where strict enforcement of a penalty would be unjust. The reviewer may affirm or set aside the infringement notice, waive any fee or issue a caution.

The key features of this process are:

- The request must be in writing and must be made on one of the grounds including that the decision was unlawful, issued to the wrong person or unjust due to special circumstances – for instance, by reason of disability or other exceptional circumstances.
- The review must be conducted within a statutory deadline (90 days), with up to an additional 21 days' suspension if the agency requests further material from the defendant.
- The review must be conducted by an officer who was not involved in the decision to serve the notice.

Nine internal reviews were undertaken in 2008–09, with two infringement notices being withdrawn. In 2007–08, 11 applications for review were received, leading to two notices being withdrawn. Reviews are undertaken by former EPA directors.

Unfortunately, although the statutory penalty notice includes a reference to the right of review, there is no explanation of the process for internal review under the Infringements Act on EPA's website.

17.6 Discussion

In the discussion paper, I asked the following questions:

> Question 16: What types of decisions should internal review apply to?
>
> Question 17: Who should be able to apply for internal review?

13 www.epa.vic.gov.au/about_us/foi.asp.

14 See Department of Justice, *The internal review provisions: Internal reviews under the Infringements Act 2006 (Vic)*, An information paper, February 2008.

EPA staff were generally supportive of provisions for an internal review of enforcement notices such as pollution abatement notices. There were, however, some concerns that additional rights might be created in relation to minor works abatement notices or clean-up notices, which were not currently subject to review. I was advised that many notices were already subject to a 'peer review' process which had improved the quality of notices[15]. Internal review would be in addition to this process. It was suggested that the process should clearly outline the grounds upon which decisions could be challenged and that the test for the review should be whether the decision was open on the facts available[16].

Businesses were overwhelmingly supportive of an internal review scheme, particularly for notices issued by authorised officers[17]. One proviso was that the reviewer should be sufficiently independent of the original decision maker[18]. One water board in the consultations had recently introduced a similar scheme for its decisions and found it to be very helpful in improving transparency and quality of decision making[19]. A number of submissions from individual businesses supported the concept[20].

In its submission, the Plastics and Chemicals Industries Association (PACIA) [21] stated:

> Our members also have a number of concerns regarding the rigidity of enforcement measures such as Clean-up Notices, or similar statutory outcomes:
>
> Some measures address an environmental issue that requires a long period of time to be dealt with, for example the clean up of a groundwater plume. As these measures are not readily open for review, it is difficult for the responsible party to be able to adapt their approach in response to new information (from internal learnings, EPA, peers or other sources), changes in external conditions, or the availability of new and improved technology. This limitation is also the case where the measure prescribed is overly prescriptive. These measures often do not consider or promote the broader concept of sustainability. Measures may require a statutory audit process that can add significant complexity, time and cost but do not necessarily add value to the ultimate environmental outcomes.
>
> PACIA recommends that EPA provide mechanisms that allow these types of long-term measures to be open for review, in order to ensure that all parties continue to work most effectively towards the goal of protecting and improving the environment.

Community members recommended that there should be third-party rights of review of both enforcement decisions and non-decisions[22]. This position was supported by the Environment Defenders Office and Western Region Environment Centre. This would allow, for instance, a third party to challenge a decision not to issue an enforcement decision such as a pollution abatement notice[23]. One attendee at Moonee Ponds suggested that a community member be included on existing internal review panels[24].

The Environment Defenders Office did not support internal review, stating:

> The EPA should focus on improving its enforcement policy and procedures so that it can make sound enforcement decisions. Internal review will add to the burden imposed on the EPA and will encourage all people subject to enforcement to object to the action. Provided the EPA's enforcement process is transparent and consistent this should meet the same objectives.

15 EPA staff consultation – Pollution Response Unit, Bendigo, Environmental Performance Unit.
16 EPA staff consultation – Environmental Performance Unit.
17 Ai Group workshop, Victorian Water Industry Association workshop.
18 Ai Group Workshop.
19 Victorian Water Industry Association workshop.
20 Submission 27.
21 Submission 35.
22 Submission 34.
23 Such a provision is made in the *Occupational Health and Safety Act 2004* for affected workers who consider that an inspector should have issued an enforcement notice.
24 Community open house – Moonee Ponds.

> If the EPA is going to allow internal review, it must allow the right to review to be available to the community as well as industry to provide fairness and balance to the process.

In my view, an internal review process is an important aspect to a modern regulatory regime, where enforcement decisions have significant implications. Such decisions should be based on sound administrative law principles and be open to challenge. The increased transparency provided by an internal review process would, in time, improve confidence in EPA's enforcement decision making and provide an important opportunity to improve consistency in decision making. An internal review process would also allow decisions to be made and reviewed in a timely manner, to reduce controversy and uncertainty.

An internal review process would not replace existing 'peer review' or internal quality assurance processes aimed at improving the drafting of notices and their enforceability. Similarly, such a process would not affect my recommendation in Chapter 9, 'Enforcement tools', that pollution abatement notices should be shown to a respondent in draft to ensure that the notice is clear and understood.

17.7 Should internal review have a statutory basis?

As I indicated above, most internal review mechanisms have been provided for in statute. The Administrative Review Council has also specified other advantages in having a legislative framework for internal review.[25] Legislative provision would allow for a formal delegation of power to review officers. Legislation would allow further detail to be specified, such as the conditions under which review can occur, and the categories of cases amenable to review by a delegate. It would also clarify the external review rights in relation to decisions that have been subject to internal review.

For a legislative scheme, a number of issues would need to be addressed in the EP Act, including:

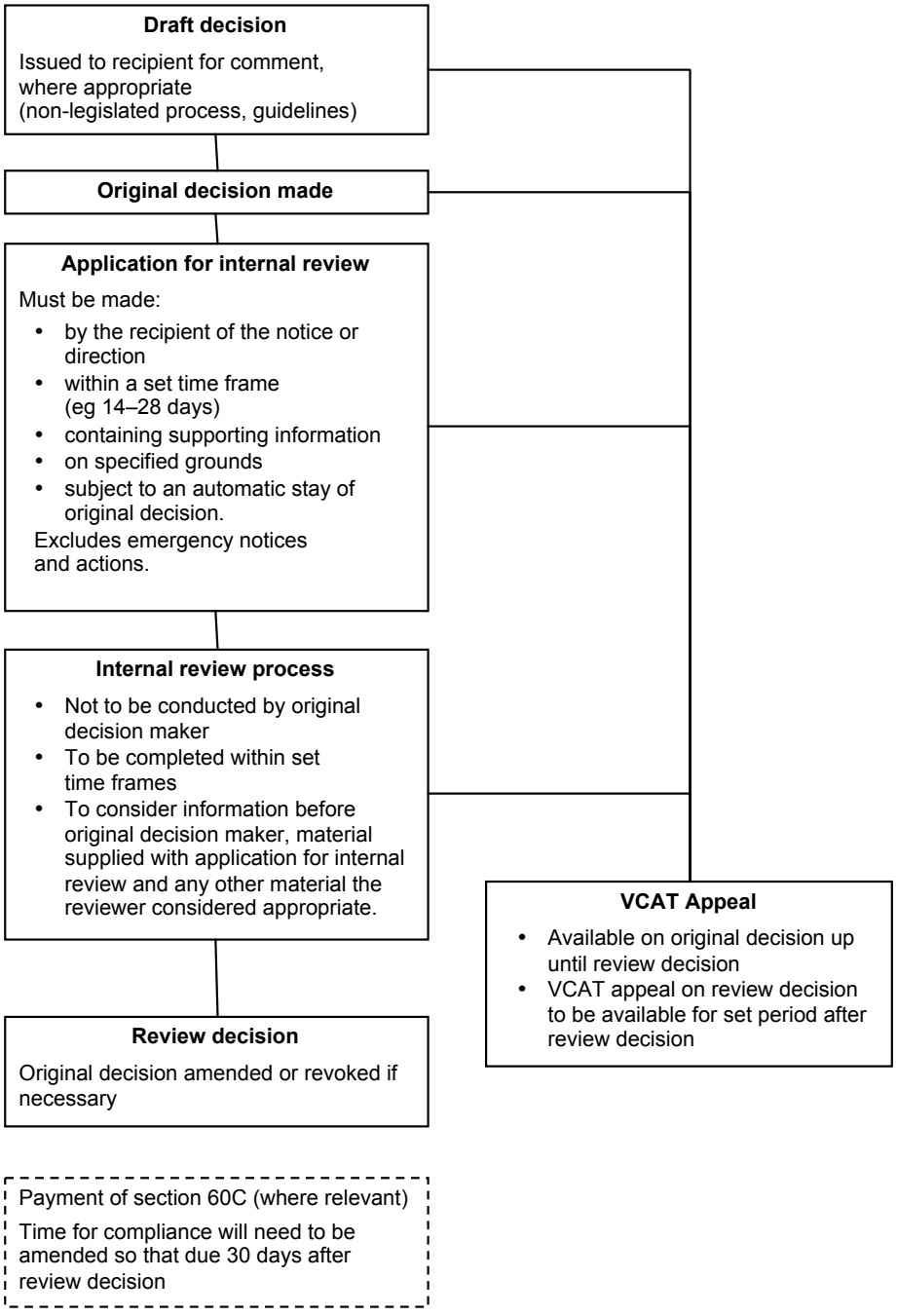
1. The parties to the internal review: this could include the recipient of the notice or direction and EPA. Consideration could be given to third-party rights.
2. Whether a request for internal review be 'as of right' or only upon certain grounds.
3. Whether the right of review would apply to decisions as well as to failure or refusal to make a decision.
4. The internal review process: Who would conduct the review? What material could be considered? What are the time limits on an application and decision? What are the consequences of not making an application or a decision in time?
5. The status of the internal reviewer's decision. Would it replace the original decision?
6. What external rights of review to VCAT should exist? Should internal review be mandated prior to VCAT review?
7. What rights (if any) should exist for a stay of an original decision?

A possible model for internal review based on legislative platform could look as shown in Figure 17.1.

In the absence of legislative amendment, I have been asked to consider an administrative scheme that could be established by EPA to provide for internal review of enforcement decisions.

25 Administrative Review Council, *Internal Review of Agency Decision Making*, Report No. 44, November 2000.

Figure 17.1 Preferred legislated internal review process



17.8 A pilot for internal review of decisions

An administrative scheme for review of enforcement decisions would necessarily be voluntary, as the most frequent EPA enforcement decisions (other than infringement notices, which are already reviewable) involve businesses that are respondents to pollution abatement notices. To a lesser extent they receive minor works abatement notices and clean-up notices, which are not currently externally reviewable.

These decisions are on occasion the subject of external review, either by VCAT or, less often, in the Supreme Court in judicial review proceedings. In anticipation of such litigation, I am advised that it is common for EPA to be approached to reconsider its decision and to consider revocation or variation.

One of the concerns of businesses, which was confirmed by EPA staff, was the informality with which extensions of time are granted to pollution abatement notices. This can cause difficulties for businesses that would prefer written confirmation of such a decision and later enforcement of an amended notice, if required. It is clear that amendments and variations should be provided in writing. I am concerned that such extensions are largely left to the individual attitudes of authorised officers and that businesses receive different outcomes, depending on the issuing officer. Requests for amendments can be directed at EPA in a number of ways, including through the issuing authorised officers, their managers and the Legal Unit.

I therefore propose a pilot which would allow for a limited number of enforcement notices to be reviewed internally by an officer independent of the decision-maker. The reviewer would be a person trained in the principles of administrative decision making, and have a sufficient degree of technical knowledge of the subject matter EPA regulates and a familiarity with enforcement under the EP Act.

The reviewer would provide a central, transparent and consistent method of considering applications to review the following enforcement decisions:

- pollution abatement notices (other than those requiring urgent action)
- clean-up notices (other than those requiring urgent action)
- requests for variation and extensions of time of these notices.

I have not considered minor works notices or directions as being appropriate, due to the urgency with which such actions need to be undertaken.

The internal review process would be independent of the issuing or attending officer, but would take into account the officer's views. In a voluntary scheme it would be difficult to demonstrate independence in a review of a decision by the Authority itself or the CEO. Accordingly, I do not consider that decisions made by the Authority or CEO should be included in the pilot.

Given that the scheme is a pilot, I have not considered the scheme for licensing and works approval decisions. These are generally more complex decisions, and would take considerably longer than general enforcement decisions.

Internal review would not be a precondition to review a pollution abatement notice in VCAT. The right to appeal to VCAT would continue unaffected. Equally, the ability for a respondent to apply to the Supreme Court to judicially review clean-up notices would not be impinged.

Participation in the pilot would be voluntary. Importantly, the ability to seek internal review would provide a free and accessible way of challenging an enforcement decision without the time and expense of a VCAT hearing.

17.9 Principles of an internal review system

Based on my consultations, the following principles are useful in guiding EPA's internal review mechanism. The principles have been drawn from a number of recent reviews of regulatory models and administrative penalties[26]:

- Transparency. The procedures and timelines must be set out in public guidelines. Publications should also include the process for internal review and contact details. The internal review process should also be informal and accessible.
- Speed. The Authority must be able to deal with matters expeditiously, particularly as some enforcement decisions will have strict time limits on applications for external review or may impact on business operations.
- Discretion. The Authority should retain the power to review an EPA authorised officer's decision of its own motion.
- Authority. The reviewer should be able to make any decision which the authorised officer could have made and exercise any power which the authorised officer could have exercised.
- Clarity. Clear guidance as to which persons affected can apply for internal review is crucial in this regard.
- Independence. The review must be independent of the original decision maker. It will be important that the reviewer has the authority and experience to overturn the original decision and manage any conflicts that may arise. The reviewer should have sound judgment and be familiar with administrative law principles.
- Accountability. The reviewing officer should give reasons for the decision arrived at on the review.
- Involvement. The authorised officer should be a full participant in the review process and should be informed of the outcome and of the reasons for it.
- Fairness. The internal review process should conform to the principles of procedural fairness. The reviewing officer must act fairly and in good faith. In practice, this means that the officer must:
- decide the outcome of the review based only on the material available to them for the review
- exercise discretionary powers according to EPA's policies and procedures and do this objectively.

26 Chris Maxwell, *Occupational Health and Safety Act Review* (Maxwell Report), March 2004, pp.394–5; Australian Law Reform Commission, *Principles Regulation Report: Federal Civil and Administrative Penalties in Australia*, Report 95, December 2002, pp.692–5; Department of Justice, *The internal review provisions: Internal reviews under the Infringements Act 2006 (Vic),* An information paper, February 2008, pp.7–8.

17.10 The possible grounds for requesting an internal review

There appears to be little information available on the grounds for internal review from other jurisdictions and agencies. The grounds for internal review under the *Infringements Act 2006* are somewhat instructive.

Having regard to the limited scope of external review provided for in EP Act, I propose the following grounds:

1. **Contrary to law**
   a. An action or decision could be considered contrary to law if an EPA officer had acted unlawfully, unfairly, improperly or beyond his or her authority in taking that action or decision.
   b. The Department of Justice recommends that agencies develop a checklist of matters relevant to a 'contrary to law' review. For example, if a person claims that a decision to serve an infringement notice was contrary to law, some of the matters that the agency would need to consider on review are:[27]
      i. was the officer authorised to make the decision to serve the notice?
      ii. has the agency complied with all the procedural requirements?
      iii. were all the relevant signs etc clear, visible and unambiguous?
      iv. did the issuing officer make a mistake in deciding to issue the notice?
      v. did the issuing officer act improperly or unfairly in deciding to issue the notice?
2. **Mistake of identity**
   a. This ground of review would apply to those situations where the applicant considers that it is not the person who breached the law or to whom a notice should have been issued'
   b. A mistake as to fact.
3. **Compliance with the notice or condition is technically impossible.**

There may be other grounds that EPA considers appropriate as it consults on the preparation of guidance to support the scheme and the establishment of a pilot.

17.11 Who should have standing to seek a review?

A right of internal review should clearly be provided to a person who is the subject of a decision and who is the respondent to an EPA enforcement action such as a pollution abatement notice. In relation to such notices, the EP Act already provides for external review by VCAT.

A number of community members and representative organisations submitted that the review should consider third-party rights of review against enforcement decisions. For the most part, third-party reviews would involve decisions not to undertake enforcement action or to challenge conditions imposed as part of an enforcement action.

27 Department of Justice, *The internal review provisions: Internal reviews under the Infringements Act 2006 (Vic),* An information paper, February 2008, pp.7-8.

The EP Act currently permits third-party external appeals under section 33B with respect to decisions relating to licences and works approvals that are reviewable by VCAT.[28] The EP Act does not provide for internal review of such decisions. The EP Act does not provide for internal review of enforcement decisions by authorised officers.

Section 219 of the *Protection of Environment Operations Act 1997* (NSW) provides that 'other persons' may institute proceedings with leave of the Land and Environment Court. Effectively, the provision provides an avenue for review of enforcement action where a third party considers the regulator's response to be inadequate. It provides a right for a third party to seek the leave of the Land and Environment Court to issue a prosecution. Prosecution can only occur in circumstances where the EPA has decided not to take any action within 90 days after the person or authority requested the EPA to institute the proceedings. Actions may include any remedial enforcement. It is therefore effectively a de-facto right to seek enforcement action and a limited right to bring a private prosecution if no enforcement action is taken.

In contrast, under Queensland's *Environmental Protection Act 1994,* only a 'dissatisfied person' may apply for internal review of a decision. Section 520 lists who a dissatisfied person may be in relation to a number of decisions under the Act and, in summary, this person is an applicant, licence-holder or recipient, not a third party.

The Victorian Occupational Health and Safety Act 2004 provides standing for internal review to an 'eligible person', including:

- an employee whose interests are affected by the decision
- an employer whose interests are affected by the decision
- a person who received a notice
- a health and safety representative who represents a person whose interests are affected by the decision
- a health and safety representative who issued a provisional improvement notice or directed work to cease.

In contrast to the situations involving works approval (which expressly provides a framework for third-party interest to be expressed) or the legislation in NSW and the OHS arena, the EP Act does not contemplate internal review of enforcement decisions and therefore does not explain a basis for standing involving third parties. While as a matter of equity and accountability it would be arguable that third parties who are affected by EPA enforcement decisions should have standing for review, the EP Act does not currently provide for external rights, other than in relation to works approval and licences. Accordingly, I do not consider it appropriate to go against the clear legislative intention so as to impinge on the rights of businesses which may be affected.

In these circumstances EPA will need to explore other avenues, to ensure there is scrutiny and appropriate accountability to the community for enforcement decisions and decisions not to take action. These include publishing information regarding enforcement decisions and ensuring that interested communities and third parties are adequately informed of decisions (and non-decisions) and the reasons for these.

28 A useful discussion of the operation of section 33B, and the various cases which have been decided by the Supreme Court and by VCAT and its predecessors limiting the scope of matters under the section, is found in the paper 'Third Party Appeals Against Works Approvals: A Personal Journey' by Justice Stuart Morris. Available from VCAT's website.

17.12 Material to be considered

The review should be based upon the information available to the original decision maker, additional information provided with the application for internal review in support of any grounds, and any other material which the reviewer considers appropriate.

17.13 Decision arising from a review

In most legislated internal review processes, the legislation provides that the review decision replaces the original decision and would articulate the decisions able to be made. In these cases the reviewer would set aside the original decision and remake it by either affirming, revoking or amending the decision.

In the case of an administrative pilot, to avoid confusion that might arise from two decisions that the applicant disputes, the reviewer should either confirm that the original decision is considered sound and leave it intact, or revoke the original decision and replace it with an amended decision.

17.14 Time frame for appeal

An application for review should be required to be timely. The current time limit for making an application for external review of a pollution abatement notice is 21 days[29].

Accordingly, it would be appropriate to have internal review triggered before that time. The EPA guidelines establishing the pilot should provide that EPA will consent to a VCAT application being made up until the point that decision is made on the internal review. This would allow a person's rights to VCAT (in the case of an abatement notice) to be unaffected and still provide the benefit of internal review. This time frame would also allow EPA and the applicant, who might become parties in VCAT litigation, to seek to resolve the matter or, if external review appears inevitable, to agree to suspend the internal review and proceed straight to VCAT.

To preserve the applicant's rights, EPA should have to publicly state its policy that, in cases of internal review, it would:

- revoke the original decision and remake it

or

- consent to late filing of a VCAT application (this would probably require a VCAT practice direction to provide applicants with certainty that they would not lose their rights to apply to VCAT for a review).

Discussions should occur with VCAT to consult on the development of the pilot and to consider a standing order in VCAT which would allow EPA and an applicant to internal review to waive statutory time limits for bringing a VCAT appeal. This would provide for time in the VCAT case management process to allow an internal review to be completed. Such a process would be in VCAT's interest, as it would reduce the need for some matters to proceed in VCAT and, in many cases, at least narrow the issues that are in contention.

Reviews should be carried out as quickly as possible. I would consider 14-28 days after an application is made to be reasonable.

29 Section 35(1) of the *Environment Protection Act 1970*.

17.15 Cost of appeal

A feature of most systems of internal review is that no application fee is required. This ensures that avenues to challenge are more accessible. Internal review for EPA's FOI decisions currently attracts a fee under the *Freedom of Information (Fees and Charges) Regulations*.

If a fee is to be imposed, this should be considered in the context of whether there is a fee payable upon service of a notice or direction itself.

17.16 Proposed model of internal review system

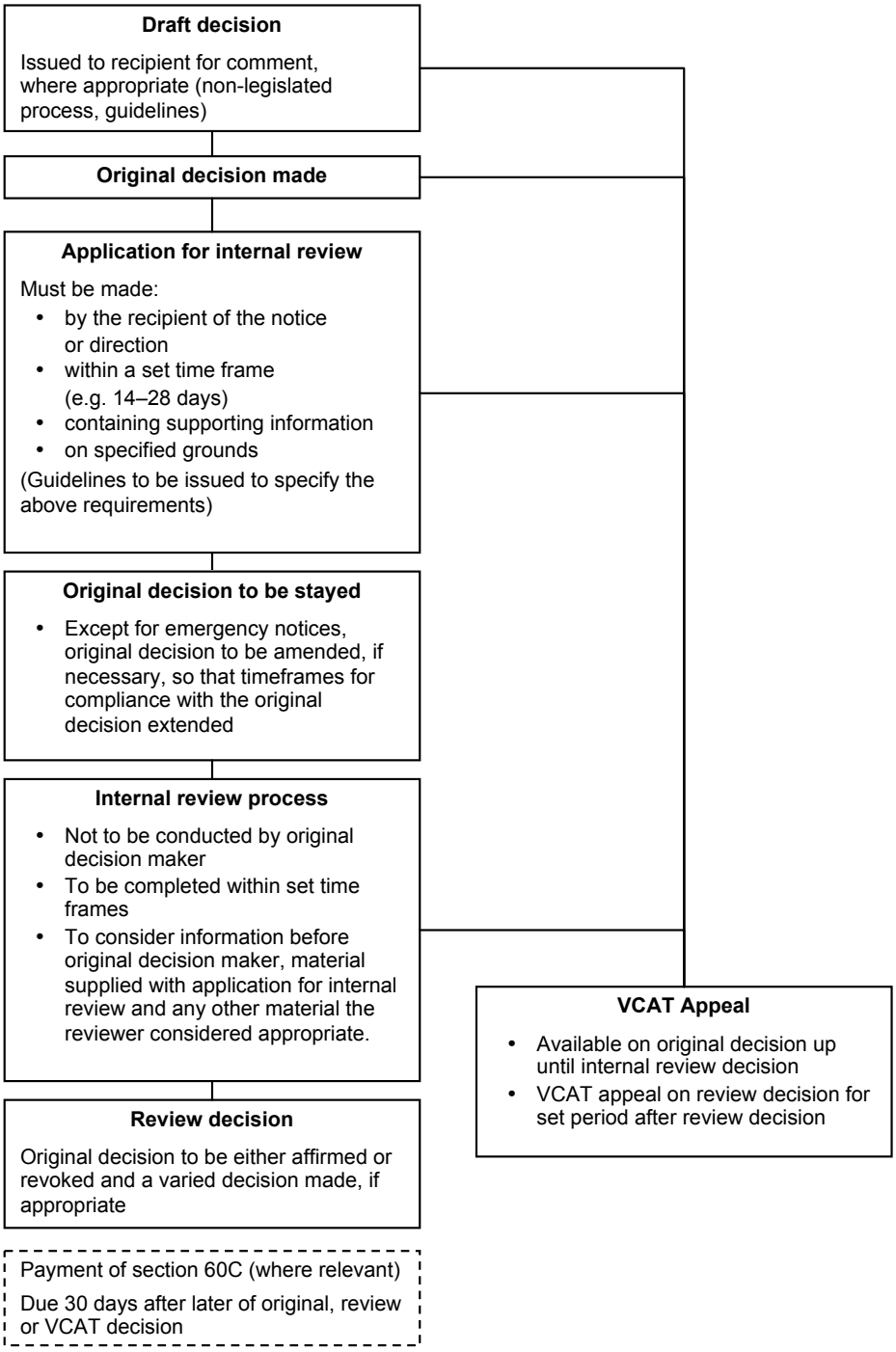
The following table sets out the steps necessary to establish an administrative scheme for internal review.

Table 17.1: Steps required to establish an administrative scheme of internal review

	ELEMENT OF INTERNAL REVIEW PROCESS	ADMINISTRATIVE ACTION REQUIRED
1.	Draft decision referred to recipient for comment	None, this already occurs. Guidelines indicating when this process is likely to occur may be useful.
2.	Original decision made	None.
3.	Application for internal review	Guidelines would need to be issued setting out the decisions for which internal review is available (decisions arising during or on completion of internal review process to be expressly excluded), requirements for an application, the grounds upon which it can be made and the time frames in which the internal review process will be carried out.
4.	Stay of decision *Only necessary if decision not revoked on application for internal review to preserve VCAT appeal rights.*	As there will be no formal 'stay' of the obligation to comply, the time frame for compliance specified in the notice must take account of the time frame for the internal review process, in addition to the reasonable time required to implement remedial action (except in emergency situations, if they are subject to internal review). Guidelines to be developed by the EPA should set out in generic terms the emergency situations in which such an 'extension' is inappropriate.
5.	Internal review process	Guidelines can also specify the manner in which the internal review will be carried out (eg material that will be considered, timelines for completing the review and persons that will carry out the internal review).
6.	Review decision	There are powers within the EP Act or *Interpretation of Legislation Act 1984* which allow the EPA to unilaterally amend or revoke the original decision.
7.	VCAT review	Time for bringing a VCAT application will need to be extended: a. by revoking and remaking the decision, thereby giving rise to new VCAT appeal rights and/or b. by VCAT consenting to the waiver of time frames for bringing a VCAT appeal (declaration on whether this will generally be agreed to by VCAT could be brought by EPA, to confirm that VCAT will allow an extension of time following internal review process which mirrors time lines for bringing appeal after original decision).
8.	Payment of section 60C fee	If internal review application is made, time for complying with 60C fee requirements will need to be extended to 30 days after the completion of the internal review process.

A flowchart of the proposed process is shown in Figure 17.2.

Figure 17.2 Non-legislated internal review process mirroring legislated system



In the event of legislative change, additional provisions could be included in the process. These are outlined in the flowchart shown in Figure 17.1.

17.17 Guidelines

Detailed guidelines would need to be drafted, so that the pilot scheme is understood. Consultation with practitioners and industry would also be required, to ensure that the pilot scheme is clear, well designed and accessible.

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*.

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

This chapter considers the role of local government and other government agencies in the regulation of the environment, including gaps and overlaps in current approaches. It considers ways of dealing with a lack of clarity in the respective roles experienced by the community and many businesses.

18.1 Local government

A consistent theme throughout the consultations was the fragmentation of responsibility for the environment[1] across government. There was a lack of clarity regarding the jurisdiction of EPA, particularly in relation to local government. Local government co-regulates parts of the EP Act, such as noise, odour and nuisance, as part of its public and environmental health regulation. Local government also has responsibility for planning and development. There are 79 local councils undertaking significant regulatory responsibilities[2] impacting on the environment. Local government is also subject to EPA regulation, which makes for a difficult relationship, with multiple interactions and purposes.

The Victorian Competition and Efficiency Commission noted business concerns regarding the potential conflict of interest which manifests where councils undertake a number of roles, including in relation to council-owned contaminated land[3].

A frequent concern was the lack of clarity of respective jurisdictions in areas such as nuisance[4]. Frequently, EPA was seen as the responsible agency for planning decisions that encroached on recommended buffer distances[5]. A number of submissions and a significant amount of discussion at community consultations suggested EPA should be more confident and robust in intervening in potentially adverse planning[6] decisions. Where there were planning permits in place, it was perceived that councils were reluctant to enforce against permit conditions[7]. Getting involved in planning decisions at an early stage, thereby avoiding poor planning outcomes, would be an efficiency gain for EPA. This is because impacts on communities arising from poorly placed or

1 Environment Victoria and Environment Defenders Office roundtable.
2 *Local Government for a Better Victoria: An Inquiry into Streamlining Local Government Regulation,* Victorian Competition and Efficiency Commission, April 2010.
3 *A Sustainable Future for Victoria: Getting Environmental Regulation Right,* final report, Victorian Competition and Efficiency Commission, July 2009, p.31.
4 Water Industry Association workshop. See, for instance, *Public Health and Wellbeing Act 2008. Guidance Manual for Local Government Authorised Officers*, which supports application of the Act to nuisance but does not address jurisdictional overlaps with EPA.
5 See, for instance, Submission 44.
6 For instance, Community open house – Bulleen, Dandenong, Geelong and Mildura. See also *Local Government for a Better Victoria: An Inquiry into Streamlining Local Government Regulation,* Victorian Competition and Efficiency Commission, April 2010, which recommends processes for streamlining the referral of planning application to State 'referral' agencies.
7 Community open house – Geelong, Portland and Bendigo.

co-located land uses would inevitably fall into EPA's jurisdiction[8]. Some EPA staff agreed that this was the case[9]. Similar observations were made by the Ombudsman in his inquiry into Brookland Greens.

The lack of clarity in jurisdiction to respond to pollution, for instance, required many community members to explore for themselves the relationship and respective responsibilities of councils and EPA. Consequently, there was broad dissatisfaction with 'buck-passing' between councils and EPA[10]. Some EPA staff described the relationship as strained and competitive[11].

There was, however, a willingness on behalf of EPA staff and some councils to work on improving the relationships. Some EPA regional offices referred to a collaborative approach with local council, built on informal networks that had developed[12]. Initial discussions had occurred with local government representative bodies to explore a more collaborative approach and jointly seeking to define jurisdictional ambiguities[13]. Such a move was supported by at least one business association[14]. A number of EPA staff and local councils referred to a positive example of cooperation with councils, based on EPA providing support and professional development in the area of noise investigation. This initiative involved EPA funding a consultant to work with council environmental health officers to build capacity in dealing with noise complaints and investigations[15]. I support these efforts.

In September 2009, the Honourable John Lenders MP, then Treasurer of Victoria, commissioned the Victorian Competition and Efficiency Commission (VCEC) to undertake an inquiry into streamlining local government regulation. The Commission was directed, among other things, to inquire and report into the scope for streamlining and harmonising practices of regulation by local government. The review included consideration of the role of land-use planning, one of the key regulatory areas for local government. The draft overview and recommendations arising from the review noted the 'legitimate tensions' which exist between land-use planning and statewide objectives of the State Government[16]. Although primarily focused on land-use planning, the Commission recognised the need for the State to 'make its regulatory objectives clear' and support councils in discharging these.

The capacity and resourcing of councils to deal with environmental issues varies considerably, as do operating budgets for councils[17].

In Chapter 12 I discussed the principles of compliance and enforcement which EPA should adopt. Underpinning the principle of being authoritative is that EPA should espouse its responsibility to make the law accessible[18]. A key aspect of accessibility is awareness of rights and avenues for redress in relation to potential breaches of the EP Act. Rights and avenues for redress are undermined in the absence of clarity regarding which level of government or government entity has responsibility and power to effect this redress. Accordingly, it is incumbent on EPA to clarify its jurisdiction and areas of interface with local government. In particular, this would require EPA to commence a dialogue with local government to resolve issues which impact on the effectiveness of regulatory responses to pollution and other environmental hazards. I note that a number

8 For instance, Community open house – Portland, Bendigo, Wodonga and Dandenong.
9 For instance, EPA staff consultation – EPA head office.
10 Community Open House - Geelong, Bendigo, Ballarat and Altona
11 EPA Staff Consultation - Pollution Response Unit. Community Open House – Warrnambool
12 EPA Staff Consultation – Bendigo
13 EPA Draft Concept Paper – Pollution Response Local Government Capacity Building Project
14 Submission 22
15 EPA Staff Consultation – Bendigo. Peri-Urban Local Government Network
16 Local Government for a Better Victoria: An Inquiry into Streamlining Local Government Regulation, Victorian Competition and Efficiency Commission – April 2010, p.11
17 Local Government for a Better Victoria: An Inquiry into Streamlining Local Government Regulation, Victorian Competition and Efficiency Commission – April 2010
18 See Reducing Administrative Burdens: Effective Inspection and Enforcement, Hampton, P, March 2005 and Regulators' Compliance Code – United Kingdom Better Regulation Executive, December 2007.

of states have resolved to delegate regulatory responsibility for environmental protection at non-licensed premises[19]. An alternative would be for EPA to take a broader role in regulating the environment in areas traditionally covered by local councils. An important first step is for EPA to comprehensively map its current jurisdiction vis-à-vis councils.

18.2 State government

At state government level, the Department of Sustainability and Environment (DSE) has portfolio responsibility for environmental protection, including the development of policy. DSE also has regulatory responsibility for forests, water catchments and biodiversity, and is responsible for crown land, including illegal dumping. Regional consultations drew concerns regarding the overlaps in responsibility between DSE and EPA on public land[20].

Sustainability Victoria (SV) is a separate statutory authority and is essentially responsible for behavioural change and promotion of environmental responsibility, working with communities, businesses and government to promote sustainability, including reduction of waste, energy and resource consumption. Sustainability Victoria administers a substantial grant function on behalf of the State Government under the Sustainability Fund (now Climate Communities Fund).

In July 2009, the Victorian Competition and Efficiency Commission examined in detail regulatory overlaps between government departments and agencies, not just in the environmental and sustainability portfolio, but also in relation to the Department of Primary Industries, Department of Premier and Cabinet and catchment management authorities[21]. These overlaps cause duplication in government resources and inefficiency, but also undermine business efficiency and confidence, as was noted by the Victorian Competition and Efficiency Commission's review. Unclear responsibilities can also cause gaps in regulatory oversight, which is more concerning.

There is considerable overlap in areas of waste policy and planning and in the funding of waste reduction initiatives, which are currently undertaken by both SV and EPA[22]. Similarly there are programs providing assistance, such as carbon advice or other information regarding sustainability, offered by both organisations.

It is commendable that, during 2010 DSE, SV and EPA commenced discussions to more clearly define their respective roles and to better coordinate their strategies and programs. This is in contrast to the past, when there appeared to be duplication and overlapping programs.

Cement Concrete and Aggregates Australia recommended improved coordination amongst the various agencies involved in extractive industries:

> EPA does not operate as the only regulator of extractive industry sites. Clear interaction with other regulators, such as the Department of Primary Industries and WorkSafe, together with other key stakeholders such as the local council, Catchment Management Authorities and water authorities is required during the sites approval process and ongoing operation so that jurisdictional boundaries are understood by all parties.[23]

19 New South Wales Department of Environment, Climate Change and Water: www.environment.nsw.gov.au/licensing/Dutytonotify.htm#4.
20 Community open house – Wodonga and Bulleen.
21 *A Sustainable Future for Victoria: Getting Environmental Regulation Right*, final report, Victorian Competition and Efficiency Commission, July 2009, p.29.
22 For instance, community open house – Wodonga.
23 Submission 21.

18.3 Discussion

The lack of coordination with councils and desire for clarity regarding jurisdiction was also perceived by EPA staff[24]. EPA staff felt that the respective jurisdictions should be much more clearly defined and interpreted consistently across EPA offices.

EPA staff also pointed to overlaps in the jurisdiction over agricultural industries with the Department of Primary Industries (DPI)[25]. The role of central government policy on planning and regional development would require closer relationships and involvement from EPA with the Departments of Planning and Community Development (DPCD), and Innovation, Industry and Regional Development (DIIRD).

Clearer descriptions of the roles and jurisdictions would provide greater clarity to community members about who to call in relation to particular complaints. It would also provide accountability for EPA to deal with matters appropriately[26].

Issues of amenity, health and environmental condition will continue to compound as urban areas expand, residential density increases and there is additional pressure on peri-urban areas. To manage current and future issues, it will be critical to improve coordination and delineate jurisdiction between state and local government agencies that share jurisdiction for environmental matters.

I note that the Ombudsman made recommendations regarding EPA's role in council planning decisions, its role as a referral authority and approach to intervening in legal proceedings. EPA responded to those recommendations[27]. I do not consider further recommendations to be required.

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.

24 Pollution Response Unit, EPA head office, Wangaratta.
25 EPA staff consultation – Wangaratta. A community member also referred to this in her submission. Submission 32.
26 One staff member suggested a user's guide to be included in the EPA Operations Manual (Wangaratta).
27 *Brookland Greens Estate – Investigation into methane gas leaks*, Ombudsman Victoria report, pp.206–7.

19.0 Beyond compliance

This chapter considers the role of EPA in encouraging businesses to go beyond compliance with the current law and standards, to ensure an improved environment and sustainability. It considers two issues in detail: better linking beyond compliance initiatives to EPA's regulatory jurisdiction, and the role of EPA in providing grants.

EPA has for a number of years focused considerable attention on encouraging businesses to go 'beyond compliance' with current laws and standards[1]. It does this in a number of ways that are voluntary. The EP Act itself creates some non-mandatory provisions that provide a legislative framework for voluntary agreements between EPA and organisations and individual businesses. Initiatives EPA has undertaken can broadly be grouped into collaborations or partnerships, and incentives that are directed at supporting business to go beyond compliance.

The term 'beyond compliance' is now commonly used by environmental (and other) regulators to describe programs seeking to influence business attitudes and performance, particularly in encouraging social responsibility.

In addition to grants and covenants, EPA has used informal ways of encouraging beyond compliance. EPA has provided access to influential national and international experts and has helped in establishing networks. EPA has also held seminars, published case studies and organised field visits that encourage businesses to learn from each other.

1 EPA *Corporate and Business Plan 2009-12*

19.1 Sustainability covenants

Sustainability covenants are voluntary agreements between EPA and a 'person or body'. They seek to achieve improvements in the use of resources, and promote best practice to advance social and economic development. They are established by the EP Act[2], which provides for agreements:

- to increase the efficiency with which the person or body uses resources to produce products or services
- to reduce the ecological impact of production of services and of the processes by which they are produced.

Covenants are generally entered into with business or industry bodies. Sustainability covenants may apply to the whole of an industry. An industry may also be declared by the Governor-in-Council as having the potential for significant environmental impact. I am advised that no industries are currently 'declared' under the provision. A member of a declared industry that is the subject of a sustainability covenant may be required to undergo an ecological impact statement (EIS). EPA can then require an industry to take action to address any inefficiencies or impacts identified in its impact statement. Impact statements can also be required if an insufficient number of members of an industry are prepared to sign a covenant[3]. To date, EPA has used sustainability covenants solely in a voluntary capacity, to encourage rather than compel sustainable business.

Non-compliance with a requirement related to an impact statement is an offence carrying a penalty up to 2400 units. Covenants have also been used to give formal legal recognition to work already done by some leading businesses in relation to waste reduction and management.

There are currently 24 sustainability covenants[4]. They include industry associations and representative groups, and some individual companies. It is not a mandatory requirement, but approximately one half of existing covenants involve funding by EPA of various initiatives.

For instance, the Victorian Economic Chamber of Commerce and Industry (VECCI) Covenant provides support for the *Grow Me The Money* program, which supports small and medium enterprises to reduce resource use and become more sustainable. In 2009–10, business involved in the program reduced carbon dioxide emissions by a further 8356 tonnes, water by 250,000ML and saved $548,334. The covenant also aims to support VECCI to become more sustainable within its own operations.

A number of the covenants involve provision of funding, via industry associations, to individual businesses for sustainability improvements. Other covenants involve businesses as direct signatories. For instance, Veolia, one of Australia's largest waste management companies, is a party to a covenant supporting a capital upgrade to its Brooklyn facility to reduce generation of hazardous waste and improve reuse of customer waste.

19.2 Grants

EPA provides funding to minimise the environmental impact and increase the resource efficiency of products and services. Grants are available as part of a number of programs to reduce environmental impacts, including:

- reducing prescribed industrial waste (HazWaste Fund)
- carbon and water services

2 Section 49AA–49AC, *Environment Protection Act 1970.*
3 Section 49AG, *Environment Protection Act 1970.*
4 www.epa.vic.gov.au/bus/sustainability_covenants/default.asp, accessed 28 December 2010.

- Asbestos Fund
- Beyond Waste fund
- contaminated land fund.

The HazWaste Fund is designed to support industry to accelerate reductions in the volume of hazardous waste (or prescribed industrial waste) generated in Victoria. The Fund invests in projects to avoid waste or productively use wastes that cannot be avoided.

The fund includes a $30 million commitment over four years from 2007 to 2011. Each funding program sets criteria for assessment of proposed projects. Successful projects result in a contract being entered into between EPA and successful bidders. Projects and contract conditions must align with the fund's purpose.

EPA does not provide grant funding to achieve compliance and grants are therefore directed to moving 'beyond compliance' with current standards. There are no penalties associated with grants, as they are civil agreements, but they may involve civil remedies for enforcement of contracts. A review process is provided for in relation to unsuccessful applications.

The HazWaste fund is managed in EPA's Sustainable Solutions Unit in the Environmental Services Directorate. The unit also provides advice on resource efficiency and waste reduction. The fund invests in three types of projects:

- infrastructure and implementation projects
- research, development and demonstration
- knowledge and capacity-building.

An external panel of experts provides advice on suitability of funding applications. The panel's advice to the CEO of EPA informs a recommendation made to the Minister for Environment and Climate Change for approval.

19.3 Other programs

Other programs run by EPA which I have discussed above and are based on business going beyond compliance include:

- enforceable undertakings
- Inspiring Environmental Solutions and the use of section 67AC orders
- the promotion of environmental improvement programs
- the promotion of environmental management systems
- memoranda of understanding (there are currently 14 such agreements, predominantly with other government entities).

Environmental regulators in the UK[5] and US[6] have undertaken programs to promote 'beyond compliance'. For instance, the US EPA runs a number of sustainability programs that seek to go beyond compliance, including:

Energy Star - a joint program with the US Department of Energy, providing branding and promotion of energy-efficient products and practices.

Green Building – promoting sustainable building and construction through encouraging innovative construction, renovation, operation, maintenance and demolition techniques.

5 *Delivering for the Environment – A 21st Century approach to regulation*, UK Environment Agency.
6 See, for instance, Compliance Assurance and Enforcement Division Mission Statement, US EPA. www.epa.gov/earth1r6/6en/index.html.

Design for the Environment – partners with industry, environmental groups, and academics to explore design solutions to preventing pollution.

Partnership for Sustainable Healthcare – working with hospitals to encourage sustainable operation and waste reduction.

The UK Environment Agency seeks to encourage corporate responsibility and higher commitment than current laws require, through the negotiation of voluntary agreements with industries and sectors. Similarly to sustainability covenants, such agreements are used to achieve higher standards without regulatory intervention, and sometimes in order to avoid it.

The Agency also seeks to promote performance above minimum standards by providing incentives for good performance to encourage proactive measures by organisations, and the use of assistance resources and opportunities. It encourages self-monitoring and may be used as a reason to reduce penalties and monitoring activities for an organisation. It supports improvement of environmental performance through recycling and reuse opportunities and the development of research and innovative technology.

19.4 Discussion

The review discussion paper and my subsequent consultations asked for feedback on the role (if any) of beyond compliance measures in EPA's regulatory approach. Input was also sought on the right balance between supporting compliance, enforcing standards and encouraging going beyond.

I have not conducted an evaluation of the extensive programs and projects which EPA runs to encourage businesses to go beyond compliance. Such a review was suggested by the Environment Defenders Office[7], which stated:

> It is unclear whether the EPA's beyond compliance activities do in fact encourage beyond compliance action by industry, and whether that in turn leads other parts of the sector to improve. If the EPA intends to continue this function, it should commission an independent review of the level of uptake and the impacts of beyond compliance activity on the broader sector and on the environment.

There are two aspects of EPA's 'beyond compliance' work which impact on compliance and enforcement specifically and which featured in consultations: firstly, the role of beyond compliance in EPA's regulatory framework and approach to compliance and enforcement; and secondly, the issue of incentives and grants to regulated entities.

There was general understanding that the nature of environmental regulation involved regulating practices and decisions that have long lifetimes. It was also understood that, as science and technology develop, our knowledge of risks and the control measures that may prevent or mitigate them also evolves. Some practices considered compliant or even 'best practice' today are unlikely to be so in years to come. For this reason it is appropriate for the regulator to be investing in research in relation to processes and practices that may reduce environmental risks and protect or improve the environment.

Businesses were clearly supportive of the need for government and EPA support for innovation and beyond compliance[8]. Sustainability covenants were particularly well regarded[9]. For instance, the Plastics and Chemicals Industries Association (PACIA) said[10]:

> EPA's partnership support has been key to facilitating the development and implementation of PACIA's Sustainability Leadership Framework, which has driven step change improvement across the industry. Through the formal EPA-

7 Submission 41.
8 Ai Group workshop, Australian Environment Business Network, Plastics and Chemicals Industries Association roundtable.
9 Submissions 23, 35.
10 Submission 35.

> PACIA partnership under a Sustainability Covenant, PACIA has been able to provide the necessary support for many companies to undertake step changes within their businesses.

The Australian Industry Group (Ai Group) was similarly supportive[11]:

> Industry has benefited from the approach that the EPA has taken in recent times to working closely with businesses to assist them to comply with regulations and indeed move beyond compliance. This has assisted in the development of strong cooperative approaches to achievement of ongoing improvements in environmental performance by industry.

Community organisations were less supportive. Western Region Environment Centre described the role of EPA in beyond compliance, particularly where it involved funding, as 'dubious'. Its submission[12] stated:

> This is primarily the role of Sustainability Victoria. Furthermore, for EPA to get into the business of advising on specific technologies or industrial processes or on sustainability products and processes runs a substantial risk of EPA becoming complicit in such technologies and unable to be an independent (or seen to be independent) when such technologies need to be assessed.

EPA's Service Growth Unit has led a strategy to explore opportunities for influencing businesses to go 'beyond compliance' in a range of areas, predominantly focusing on climate change and resource use[13]. It has sought to develop products and programs to fill identified gaps in these areas. The projects have promoted improved environmental performance and reduction in carbon emissions, in particular, but have not necessarily been aligned to regulatory programs or enforcement priorities.

I was advised that, in 2009, the Service Growth Unit had 40 projects under its management. One project, the 'Carbon Offset Guide', involved the creation of an independent directory of Australian carbon offset providers, developed in partnership with RMIT and Global Sustainability. It was intended as a resource for businesses, government, non-government agencies and individuals[14]. While laudable, this work could readily be undertaken by the many local and international non-government organisations undertaking promotion of offsets. Moreover, the carbon offset market is subject to a crowded regulatory space.

EPA's work in partnering with industries and sectors such as dairy, food and construction is commendable[15]. They allow EPA as the regulator to understand the unique circumstances of each industry and to understand barriers and drivers that are relevant to its regulatory work. Unfortunately, it appeared to me that many of the 'beyond compliance' projects undertaken were decoupled from enforcement priorities and real areas of environmental risk. The collaborative partnerships between EPA and businesses and industry associations established by EPA's Service Growth Unit, particularly in the area of beyond compliance, could be effective in augmenting EPA's current regulatory priorities, including setting future standards. The model I have proposed for the regulatory framework would involve a much clearer alignment between current beyond compliance projects and priority areas for regulation.

I am advised that EPA has been considering the role of beyond compliance in its regulatory approach and how to better align these initiatives with its regulatory jurisdiction. I support this initiative. It will be important to ensure that the effort in beyond compliance aligns with strategic priorities for enforcement, to ensure that the biggest risks to health and environment are also being addressed through beyond compliance projects.

A number of community members raised with me concerns regarding the 'conflict' between EPA's role as

11 Submission 11.
12 Submission 37.
13 EPA Market Growth Strategy.
14 www.carbonoffsetguide.com.au.
15 Partnerships with industries, including in sustainability covenants, were considered positively; see, for instance, Submissions 11, 41, 28, all of which advocated for industry-level stakeholder relationships.

regulator and its language of partnering with business, particularly in the context of grants funding[16]. A community member at the Altona open house was concerned that EPA had issued media releases confirming the issue of an infringement notice related to breaches by a company which, one week later, received funding of $3.6 million from EPA's HazWaste fund.

The corporations involved were separate but related companies[17], but it is understandable that the public would be concerned regarding the implications of EPA acting as regulator whilst interacting with regulated entities to put in place a successful funding proposal of such magnitude. This perception has the potential to undermine EPA's role as an impartial prosecutor with community and other businesses. Moreover, in many cases, the grant funding will be directed at scheduled premises which will require works approval or licences. The involvement of EPA in the capital investment of such projects also brings with it perceptions of bias.

Both Ombudsman Victoria and the State Services Authority have issued guidance to the Victorian Public Sector regarding conflict of interest. The State Services Authority provides the following definition:

> Conflicts of interest in the public sector are conflicts between public duties and private interests. These can be actual, potential or perceived.[18]

The Ombudsman has provided the following clarification:

> The Code of the Victorian Public Service makes distinctions between 'actual', 'potential' or 'perceived' conflict of interest. This is important because a recurring theme in my enquiry was the confusion caused when agencies or individuals attempted to discriminate between 'real' and 'apparent' or 'perceived' conflicts of interest. I consider that the existence of a conflict of interest should be based on whether a reasonable observer can conclude that a conflict may exist.[19]

Both these definitions focus on private interests of individuals involved in public decision making. They do not neatly translate to an organisational setting where one aspect of an agency's work conflicts or appears to conflict with another.

The governance framework in place for EPA's processing of grants appeared to be well developed and involved ensuring an independent decision was made, guided by an independent advisory panel that included external representatives. Clear criteria were also set.

I was concerned, however, by two issues. Firstly, it did not appear that there was provision for an inspection of businesses seeking grant funding, as a part of the application process. In my view this should be a mandatory part of the process. If funding is genuinely to be linked to genuinely go beyond compliance, EPA will need to be diligent to ensure that businesses are indeed compliant. This shortcoming has since been resolved. I was advised that a process now exists for compliance records to be checked as part of the application process, and an inspection is mandatory. I support this approach.

Secondly, I am concerned that EPA's management of both grant applications from individual businesses and concurrent enforcement activity conflict in public perception and in fact. The grants function for the HazWaste

16 Community open house – Moonee Ponds, Altona. See also Submission 36.
17 EPA media release, 16 September 2010: *Seasoned landfill operator falls flat in Clayton South*. EPA media release, 23 September 2010: *Hazardous waste treater gets $3.6m funding.*
18 *Conflict of Interest Policy Framework – Victorian Public Sector,* State Services Authority.
19 *Conflict of Interest in the Public Sector,* Ombudsman Victoria, March 2008.

fund currently reports through to the director with central line management accountability for most of EPA's enforcement functions. This, in my view, reflects a conflict and a perception of potential bias on important decisions in both areas that should be precluded. In my view, this issue requires urgent attention.

Given that the support of the CEO is required to recommend a project for approval to the Minister, even with an interim reporting line change, the delegate of the Authority for this decision will also be the delegate for significant enforcement decisions such as prosecution. This creates unnecessary perceptions and speculation regarding the impartiality of such decisions. Consideration should be given to whether direct grants of funds to individual businesses should continue to be managed by EPA.

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.

There are a number of improvements to transparency that should be made in the meantime, including publishing the decision-making process and criteria for funds managed by EPA. I also consider that the reporting lines for staff managing the fund should change to involve a senior manager who is not involved in enforcement decision making, to avoid any perception of conflict or bias.

20.0 The role of community

This chapter considers the role of community in EPA's regulatory activity. It provides an overview of feedback from open house sessions and submissions regarding a more prominent role for community, and stakeholders generally, in the setting of standards and EPA's regulatory work, and makes recommendations to achieve this.

I have previously referred to the principle of shared responsibility under the EP Act. The principle provides that industry, business and communities share responsibility for the environment[1]. The principle of accountability in the EP Act complements this by providing:

Members of the public should therefore be given:

a. access to reliable and relevant information in appropriate forms to facilitate a good understanding of environmental issues;

b. opportunities to participate in policy and program development[2].

In the discussion paper I sought views as to the role of community (and therefore all stakeholders) in EPA's compliance and enforcement activity, in achieving compliance and how the community could contribute to EPA becoming a more effective regulator. The discussion paper was broadly publicised to allow for community input. EPA also hosted an online discussion forum and numerous open house community sessions.

The open house format used for community consultations was designed to provide a convenient and accessible way for members of the community to engage in this review. The format also sought to demonstrate EPA's willingness to provide opportunities in the future for genuine input into the development of policy and its programs. Some 100 EPA staff attended the 14 sessions. Staff provided information and advice to community members and engaged them in receiving feedback. Feedback was sought on their experiences with EPA and input into the questions that formed part of the review discussion paper.

1 Section 1G, *Environment Protection Act 1970*.
2 Section 1L, *Environment Protection Act 1970*.

20.1 What do we mean by community?

EPA Victoria's purpose is to protect, care for and improve the environment of all Victorians. The Victorian community is therefore its most important client and the beneficiary of its actions.

The community EPA engages with is broad and diverse. According to EPA's Community Engagement Strategy, it includes:

> Communities of interest and place, such as licence holders, local government, the education sector, individuals who make pollution reports and stakeholders in policy development. It also includes communities that we want to engage with more, such as large users of energy and water, householders and interest groups wanting to make change, and agencies we partner with to achieve organisational goals. Just as importantly, it also includes EPA staff[3].

At an EPA all-staff meeting on 9 September 2010, EPA Chief Executive John Merritt offered this definition of community:

> Community could also be defined simply by applying a common definition of stakeholders: anyone that can affect what EPA does or is affected by what EPA does. The Act talks about acting on the aspirations of the Victorian community, which includes everyone, businesses, organisations and individuals alike.[4]

20.2 Demographics of Victoria

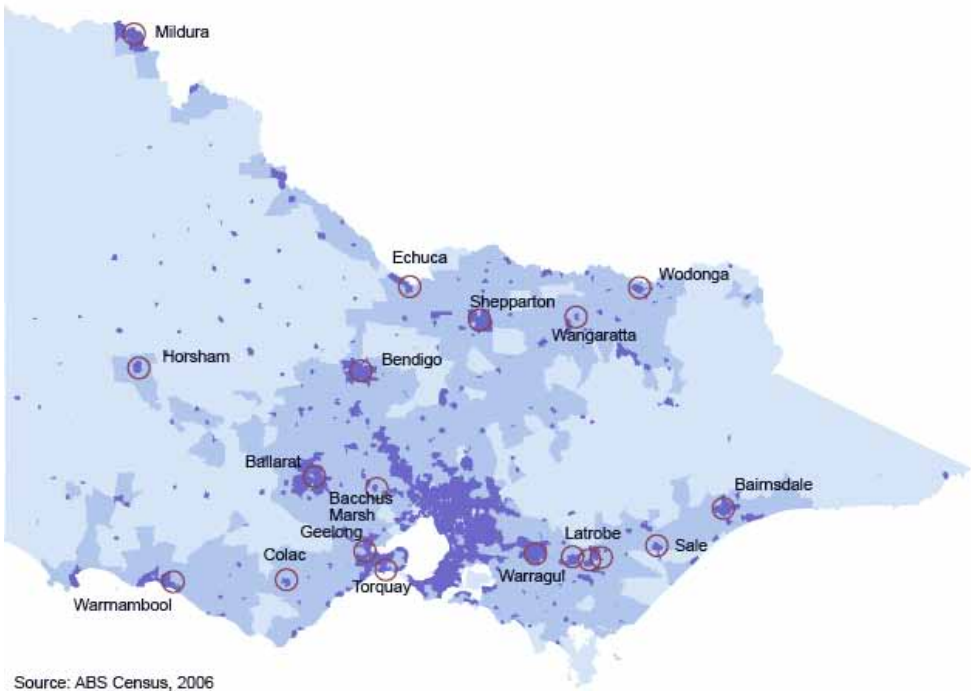
Melbourne and Victoria have seen steady population growth over the last 10 years. The Victorian Population Bulletin 2010[5] puts the annual growth rate of Melbourne at 2.4 per cent, the highest rate of growth since the 1960s, reaching 3,996,160 as at 30 June 2009. The population of regional Victoria grew by 1.6 per cent to reach 1,447,068 people and the estimated total population of Victoria reached 5,443,228[6].

20.3 Recent population change

The settlement pattern of Victoria (Figure 20.1) shows the dominance of Melbourne. Beyond the metropolitan area, the regional cities of Geelong, Ballarat and Bendigo and the Latrobe Valley form a ring of cities within two hours of Melbourne. Beyond this, another group of regional cities are evident – these cities have important service roles within large rural hinterlands[7].

3 EPA Victoria, *Engaging People Actively,* EPA Victoria Community Engagement Improvement Strategy 2007–10.
4 Merritt's Remit, 24 September 2010, Responses to staff questions from staff meeting on 9 September 2010.
5 Department of Sustainability and Environment, *Victorian Population Bulletin 2010*, ISBN 1834-6650.
6 Ibid.
7 *Department of Sustainability and Environment, Regional Victoria: Trends & Prospects, www.dse.vic.gov.au/CA256F310024B628/0/F940820B3B98AFB1CA2576E9007EFDA5/$File/Regional+Victoria+Trends+and+Prospects.pdf.*

Figure 20.1 Settlement pattern of Victoria



Regional Victoria: Trends and Prospects states that the relative population growth between regional Victoria and Melbourne has fluctuated since the 1970s. During the late 1970s and early 1980s, regional Victoria experienced higher population growth rates than Melbourne ('counter-urbanisation'). By the 1990s, this was replaced by a resurgence of urbanisation, with Melbourne (especially the inner suburbs) experiencing redevelopment and population increase[8].

In regional Victoria, the most significant growth was seen in the local government areas (LGAs) that border Melbourne. Three LGAs (on Melbourne's south-eastern and western fringes) were amongst the fastest growing municipalities in Australia: Wyndham (up 8.1 per cent), Casey (up 3.5 per cent) and Melton (up 7.9 per cent)[9].

20.4 Community involvement in current EPA activity

EPA currently seeks input from members of the public and businesses and their representatives in its stakeholder engagement, as well as in a range of compliance and enforcement processes.

8 *Department of Planning and Community Development, Regional Victoria: Trends and Prospects, March 2010: www.dpcd.vic.gov.au/__data/assets/pdf_file/0009/32310/Regional_Victoria_Trends_and_Prospects.pdf.*

9 Department of Sustainability and Environment, *Victorian Population Bulletin 2010*, ISBN 1834-6650.

EPA's compliance and enforcement actions rely on community input. This is received through reports to EPA's Pollution Watch Line and Litter and Smoky Vehicle Report Lines. Reports received from the public alert EPA to pollution events and unlawful activities. These public reports ensure EPA has timely information and witnesses needed to effectively take enforcement action.

A number of other mechanisms for community involvement exist and are discussed below.

20.5 Community liaison committees

Community liaison committees (CLCs) are community and business-driven forums. EPA helps to establish CLCs where local communities are significantly impacted by the activities of local industry or businesses – particularly licensed premises. There are over 55 CLCs that are run across the state. Eight per cent of licensees have a CLC.[10] EPA attends these as required.

Through these committees, industry/business and EPA inform the community of activities at the site, any changing conditions that might impact the community, and work with the community to develop strategies and new approaches. Guidelines and information on how to set up a CLC are available on EPA's website[11].

There was support in my consultations for the CLC program, although it was noted that there were disparities in the level of effectiveness of some committees[12].

A good example of a CLC is the Brooklyn Community Reference Group (BCRG). This group aims to 'foster collaboration between community, industry and government to ensure ongoing clean air and reduced noise in the Brooklyn area'[13]. Meetings are held every four months and are attended by industry, community, local government and EPA representatives. The minutes from every meeting are published via EPA's website[14]. The Group was referred to as a positive example of community engagement by local businesses at a number of community forums[15].

20.6 Works approvals

When EPA receives an application by a business for a works approval, community members are invited to submit comments in writing and stay informed of the application's progress. Works approvals permit work or activities to be undertaken which will result in a new or modified discharge of waste to the environment.

The works approval process includes a public comment stage, designed to identify any community concerns early on and to facilitate prompt resolution. A 21-day public comment period is advertised in relevant newspapers and on EPA's website. If comments are received from any third parties, they are provided with an opportunity to address their concerns. EPA may convene a conference of the parties to assist in resolving concerns[16].

10 As part of the licensing reform program, the presence or absence of CLC was noted against each reformed licence. As of December 2010, 5% of issued reformed licences had a CLC. Of approximately 90 licences left to be reformed, almost 20% have a CLC

11 *EPA Victoria, Inspiring Environmental Solutions - Program guidelines, http://epanote2.epa.vic.gov.au/EPA%5Cpublications.nsf/PubDocsLU/740?OpenDocument.*

12 Submission 41.

13 *EPA Victoria, www.epa.vic.gov.au/air/brooklyn_estate.asp#group.*

14 *www.epa.vic.gov.au/air/brooklyn_estate.asp#group.*

15 Community open house – Moonee Ponds, Dandenong, Altona.

16 *EPA Victoria Licence Reform website: www.epa.vic.gov.au/bus/licences/appeals.asp.*

Given the possible impact of these decisions on the community, EPA is required to take into account the input of interested parties. Interested parties can include individuals or groups, including local community members, local government, other businesses or practitioners.

20.7 Environment improvement plans (EIPs)

EPA describes environment improvement plans (EIPs) as 'a public commitment by a company to improve its environmental performance. An EIP outlines areas for improvement including actions and time lines. An EIP is usually but not always developed in consultation with the local community in the area surrounding the company's premises[17].'

I observed some confusion in EPA over what an EIP actually is, due to it being included in some licence conditions and also being used as part of an exemption from the schedule premises regulations[18]. Prior to 2010, some licences had a condition requiring the development and implementation of an EIP. This requirement was not included as a new standard licence condition in the licensing reform project (2009–10), as part of reinforcing the onus of compliance on licence-holders. I was advised that most licence-holders have an environment management system (EMS), which incorporates many elements of the EIP, including community engagement.[19]

EPA currently requires accredited licence-holders to have an EIP that they establish in consultation with their local community. An EIP may also be required by EPA in the case of non-compliance. EPA does not have current data which differentiates between 'mandatory' EIPs of this nature.

The number of EIPs requested by EPA from 2006 to October 2010 is 30[20]. EPA provides guidance to licence-holders on how to set up an EIP[21].

20.8 Neighbourhood environment improvement plans (NEIPs)

Neighbourhood environment improvement plans (NEIPs) are designed to 'address complex environmental problems at a local level'[22], particularly where pollution or beneficial use to be protected arise from multiple sources rather than one main emitter. They are not intended to address environmental impacts from single factories or premises where other measures are more appropriate[23]. Examples of environmental impacts include impacts on water catchment areas.

17 EPA Victoria, *Environment improvement plans – an overview*, publication 938, February 2004, pp.1–2.
18 See page 452 of report for a detailed breakdown of the types of EIPs. Holley C, Gunningham N, 'Environment Improvement Plans: Facilitative regulation in practice', *Environment Planning Law Journal*, 23, 448, 2006, p.452.
19 As part of the licensing reform program, licence-holders were asked if they had an EMS. 70% of licence-holders answered the question; of these, 82% (370) said they did have some type of EMS.
20 See Chapter 9, 'Enforcement tools'.
21 EPA Victoria, *Guidelines for the preparation of environment improvement plans*, publication 739, June 2002.
22 Holley C, Gunningham N, Shearing C, *Neighbourhood environment improvement plans: Community empowerment, voluntary collaboration and legislative design*, ANU.
23 EPA Victoria, *Enforcement Policy*, publication 384.3, p.9.

NEIPs may be developed voluntarily or by direction of EPA upon application by a 'protection agency'; in other words, an agency with regulatory powers under the Act, as, for instance, a local council. The NEIP is required to:

- provide for the monitoring of compliance with the plan and reporting on agreed outcomes
- provide for consultation with all persons whose interests are affected
- provide for the participation of persons involved in the plan's development to evaluate its effectiveness.

EPA guidance indicates that the NEIP 'should seek to develop and nurture collaboration between the diversity of community actors and stakeholders who, acting in a more coordinated fashion towards commonly agreed goals, will achieve far more collectively, than individually'[24]. EPA does not currently run a program to promote the use of NEIPs.

According to the *EPA external services handbook*[25] there are only five current NEIPs. These are in Traralgon, Edwardes Lake, Eskdale, Stony Creek and Gippsland Lakes.

20.9 Environmental awareness of the Victorian community

The *Green Light Report*[26] is a social research project commissioned by Sustainability Victoria in partnership with the Department of Sustainability and Environment (DSE) and EPA Victoria. It considers patterns in community awareness regarding the environment and sustainability. The report is a Victorian Government initiative to provide insight into the environmental attitudes, behaviours and household features of Victorians.

In 2009, questions specifically relating to local pollution problems were included in the *Green Light Report*. Data collection for the report comprised a telephone survey of a random sample of 2,150 Victorians aged 15 years or older.

20.9.1 Concern for present state of the environment

All survey respondents were asked how concerned they were about the present state of the environment.

- Forty-two percent were 'very concerned', 30 per cent were 'fairly concerned' and 14 per cent were 'slightly concerned'.
- Some degree of concern over the present state of the environment was expressed by 86 per cent of Victorians aged 15 years or over, while just 14 per cent were 'not concerned' about this issue.
- Males were more likely than females to claim they were 'not concerned' about the state of the environment (17 per cent versus 10 per cent of females). This lack of concern was particularly evident among younger males (29 per cent of those 15 to 24 years) and males who were students (27 per cent).
- Females were more likely than males to be 'very concerned' about the present state of the environment (47 per cent versus 36 per cent of males), particularly women aged 45 or over (58 per cent) and those with a university education (54 per cent).

24 Holley C, Gunningham N, Shearing C, *Neighbourhood environment improvement plans: Community empowerment, voluntary collaboration and legislative design*, ANU.
25 *External services handbook, http://intranet/docmgt/SK-GL-18-EPA-External-Services-Handbook-100111-V1.pdf.*
26 Sustainability Victoria, 2009 *Green Light Report*.

20.9.2 Awareness of local pollution problems

For the first time in 2009, all respondents were asked if they had recently noticed obvious air, water, waste or noise pollution in their neighbourhood. Those who had were asked to describe what this pollution was and what, if anything, they had done in response.

As this was the first time these questions were included in the survey, it is not possible to compare the results with previous years to ascertain, for instance, whether there has been a change in the level of awareness. It is important to note that the tragic bushfires in February 2009 make it likely that more people were aware or had experienced air pollution from bushfires. Due to severe drought conditions, awareness of water pollution may also be higher than usual. Otherwise, key findings included:

- Around one in four (27 per cent) Victorians had recently noticed some form of pollution in their local neighbourhood.
- Melbourne residents (29 per cent versus 24 per cent of regional Victorians), people with a university education (33 per cent) and those 'very concerned' about the environment (32 per cent) were all slightly more likely to have noticed such pollution.
- People at both ends of the age spectrum (21 per cent of those aged 15 to 24, 21 per cent of those aged 65 or over) and those who were 'not concerned' about the environment (19 per cent) were less likely to have done so.

20.9.3 Types of local pollution observed

- Air pollution was mentioned by 42 per cent of those who had observed any pollution, particularly smoke from bushfires and burning off (22 per cent overall; slightly higher at 28 per cent for regional Victorians).
- Noise pollution was mentioned next most often by 38 per cent of the respondents.
- Traffic noise (22 per cent) was the specific noise problem encountered most often.
- Water pollution and waste of water (21 per cent) fell into the only other category mentioned by more than one in five respondents.

20.9.4 Action taken in response to local pollution

Significantly, 71 per cent of respondents took no action regarding the pollution they observed. Fifteen per cent reported the pollution, but most often to the local council (10 per cent). A further 15 per cent of respondents had taken some other action, typically speaking to the people responsible (eight per cent) or cleaning it up themselves (four per cent).

Those working in professional and white-collar occupations (21 per cent) and people living in single-person households (23 per cent) were the most likely to have reported the pollution.

There was some variation in response to different types of pollution:

- Eighty-eight percent of those who noticed air pollution said they had done nothing about it, 10 per cent had reported it (six per cent to local council and three per cent to EPA), four per cent had complained to those responsible and three per cent reported closing their windows to stop exposure.
- Seventy-two percent of those who noticed noise pollution did not report. Sixteen per cent of these reported (seven per cent to council and six per cent to police), and seven per cent had complained to those making the noise.
- Of those who observed water wastage, 59 per cent did not report. About 24 per cent reported (18 per cent to council) and 17 per cent had complained to those responsible).
- Forty-nine per cent did not report litter 'pollution' that they observed. Sixteen per cent had reported it (11 per cent to council) and 34 per cent had taken steps to clean up the litter themselves.
- Of those who observed pollution of waterways, 48 per cent had done nothing to report it. Twenty-eight per cent reported (19 per cent to council and 11 per cent to EPA). Twenty-three per cent had cleaned it up themselves and 11 per cent had complained to those responsible.

Accordingly, most Victorians are unlikely to report pollution incidents that they observe. Those who do report are more likely to make a report of observing pollution of waterways than any other category of pollution. It is also more likely that some action would be taken by a person observing litter and water wastage than other forms of pollution.

Importantly, people who observed pollution were more likely to make a report to their local council. Reports to EPA by respondents featured most often in relation to pollution to water and, secondly, if the pollution involved impact on air. This is despite EPA's Pollution Response Line receiving calls regarding pollution to air most frequently. Significantly, none of the respondents reported litter pollution to EPA, despite the operation of the Litter Reporting service.

Notwithstanding this, as I have discussed in Chapter 5, 'Pollution response', EPA's pollution response service receives between 7000 and 8000 calls per year, mostly from residents.

In 2008, EPA commissioned a market analysis of Polwatch and litter reporters. The results categorised respondents into 47 types and 11 broad groups, based on location, education, lifestyle, income, heritage and family makeup. The results of the survey showed that, broadly speaking, the more affluent and the more educated a community member is, the more likely they are to report pollution[27]. This information has important implications regarding the accessibility and awareness of environmental laws and avenues of redress.

20.9.5 Community involvement in EPA enforcement activities

EPA involves the community in a number of ways:

- using the community as its 'eyes and ears' on pollution and other potential breaches
- pollution reporting (Polwatch, Litter and Smoky Vehicle line).

EPA's recent launch of annual performance statement requirements from licensed premises and the publication of all 'reformed' licences on EPA's website provide transparency and the opportunity for community members to inform themselves of the nature of licensed premises, their conditions and environmental and compliance

27 *Report to EPA* – Mosaic.

performance. A greater level of transparency will also contribute to the accountability of licence-holders, as well as EPA.

EPA targets some of its general promotional activity, including media and advertisements, at promoting compliance and enforcement activity – particularly in relation to litter and vehicle emissions.

20.10 Litter reporting and smoky vehicle reporting

EPA's most frequent enforcement activity arises from litter offences and breaches involving 'smoky' vehicles. Information regarding these offences originates from concerned community members.

Since EPA commenced its litter campaign, more than 200,000 infringement notices have been issued. EPA data indicate that, each year, approximately 90 per cent of reports relate to cigarette butts tossed from vehicles. This equates to around 20,000 reports per year. Food packaging, drink containers and poorly secured rubbish are also reported, but less frequently[28].

In June 2010, EPA undertook a survey of 1520 litter reporters. Interestingly, 67 per cent of reporters said that they initially registered to report litter because they witnessed a litter event. A further 25 per cent said they registered because they cared about the environment or were sick of seeing litter on the side of the road. Only three per cent registered because they heard or saw an EPA advertisement. When asked what would encourage them to report more often, 54 per cent said receiving a response from EPA about the outcome of their report and how it contributed to reducing litter would help. I am advised that EPA is looking to provide an aggregated response to litter reporters quarterly, along with features on repeat reporters.

Later in 2010, EPA launched a broad advertising campaign targeting litter. The campaign aimed to increase public awareness of the program, stigmatise littering and encourage people to report.

20.11 Section 67AC sentencing orders

EPA invites community groups with ideas for innovative environmental solutions to apply for funding as part of the Inspiring Environmental Solutions program. Sixty-two community based projects, valued at over $3.8 million in equivalent financial commitment, have been funded through sentencing orders by magistrates under the provision.

EPA invites Victorian communities to propose ideas for programs involving environmental restoration and improvement which require funding. Program proposals are sought in the categories of:

- climate change
- resource sustainability
- environmental improvement[29].

Through the program, EPA collates a pool of community and environment-based projects, and makes recommendations to courts considered suitable for suggestion to defendants in upcoming prosecutions.

28 EPA Victoria Litter Campaign website: *www.epa.vic.gov.au/litter/campaign.asp.*
29 *Inspiring Environmental Solutions program guide*, EPA.

Individual prosecution orders generally range from $10,000 to $100,000 and applications are invited within this range. As funding is contingent upon the successful prosecution of pollution incidents, and at the discretion of the presiding magistrate, the total amount of funding possible will vary each year[30].

Examples of current projects funded under section 67AC[31] include:

- The Mt. Alexander Sustainability Group, Pathways to a Sustainable Low CO_2 Future Project, which involves $60,000 to a project with Mt Alexander Shire residents to reduce household resource use. It specifically delivers educational materials on environmental awareness and low-carbon living, pre-program audit and action plans for all participants, practical assistance via training sessions and follow-up evaluation after six months.
- Brooklyn Environmental and Educational Sustainability Program, which commits $40,000 for the City of Hobsons Bay City Council, in collaboration with the Brooklyn Residents Action Group (BRAG), to develop the sustainability of the Brooklyn area via a program that includes:
  - retrofitting of local Brooklyn facilities comprising Francis Sullivan Kindergarten, Brooklyn Hall, Brooklyn Tennis Club and Duane Sporting Pavilion. This will be based on the outcomes of an energy audit of these facilities
  - development of a community-based tree planting program, which will also act as a local community launch of sustainability workshops and opportunity for home energy audits
  - delivery of a series of workshops on sustainable living.

The agreement of a magistrate is required to make such an order in the terms proposed by EPA and a defendant. The suitability of projects is assessed by a panel of EPA staff.

20.12 Enforceable undertakings

EPA enforceable undertakings currently involve an independent advisory panel made up of experts familiar with environmental laws.

The panel considers the appropriateness of EPA entering an agreement with a offender for an alleged breach as an alternative to prosecution, where this will result in a better environmental outcome.

A key consideration in the panel process is the likely impact and reaction of the local community, and whether the agreement could include a commitment to carry out restoration projects to enhance the environment in the form of community service.

The terms of an enforceable undertaking are negotiated between EPA and a potential defendant. The initiatives included in an undertaking are, 'at large,' subject to negotiations and do not necessarily involve community engagement. Two undertakings have now been entered into by EPA. The first matter involved South-East Water and was formalised on 11 June 2010.

The undertaking followed a sewage spill of approximately 40,000 litres at the company's Mt Martha premises in September 2008. It was alleged that the company had, by the discharge of effluent to the waters of Balcombe

30 *EPA Victoria, Inspiring Environmental Solutions – Program guidelines, www.epa.vic.gov.au/projects/docs/IES-program-guidelines.pdf.*
31 *EPA Victoria website: www.epa.vic.gov.au/projects/community-project-funding.asp.*

Creek and surrounding environment, breached its licence in contravention of the EP Act. It was also alleged that the company caused or permitted an environmental hazard and polluted the waters of Balcombe Creek.

Under the terms of the enforceable undertaking, South-East Water committed to a range of improvements to the facility and inspection programs to reduce the risk of a recurrence. The undertaking included a condition that the findings of the inspections be disseminated to the water industry and interested community members.

20.13 Community information fact sheets

EPA has recently published information fact sheets targeted at a community audience. The fact sheets provide plain English information to the community regarding EPA reform projects. Factsheets are available through the website.

Examples of current fact sheets include the *Things you need to know about EPA's licensing reform program* fact sheet[32].

20.14 The role of community in overseas environment protection agencies

A range of other initiatives are used by environment protection regulators, and some common themes emerge from these, including:

- A Right-to-Know – empowering local community members to know what the environmental impacts are in their local area. And to know the environmental performance of licence-holders.
- Act Local, Think Global – giving community members the tools and information they need to improve the environment in their local area.
- Self-Promotion and Transparency – promoting the activities of EPA through plain English guides, web-based information and increasingly social media.

20.14.1 United Kingdom – Environment Agency (EA)

The United Kingdom EA provides access to a public register of licensed premises via its website. The register includes information on monitoring, details of any breaches of the terms of licence, any enforcement actions that have been taken and any applications to vary the terms of licences.

According to the EA website, 'any member of the public has the right to access information about how we are carrying out our responsibilities. This right of access provides the opportunity to participate in the decision-making processes'[33]. The UK EA also has an interactive map where community members can see all the licensed premises in their area and all environmental impacts. A similar service is provided by the United States EPA.

32 EPA Victoria, *Things you need to know about EPA's licensing reform program*, publication 1324, March 2010.
33 *UK Environment Agency: www.environment-agency.gov.uk/research/library/publicregisters/default.aspx.*

20.14.2 Ireland – EPA

EPA Ireland is currently conducting a review of its regulatory activities, including broad stakeholder consultation and a public comment process. Part of this review includes an analysis of stakeholder engagement looking at three broad issues:

- Has the EPA been successful in meeting the appropriate expectations of stakeholders and regulatory partners in the delivery of its functions?
- Do significant structural, operational or other barriers exist which impede/inhibit the Agency's ability to achieve optimal environmental outcomes through working in partnership with key stakeholders?
- 'In an era wherein public engagement is fundamental to effective environmental protection, how successful has the Agency been in supporting citizen participation in this process?'[34]

EPA Ireland also provides for public participation through:

- oral hearings
- online content, including real-time news feeds (RSS)
- a guidance and 'Help-Queries' unit
- community meetings.

20.14.3 Canada – Environment Canada

Environment Canada has recently undertaken a proactive approach to communication with public and community organisations using social media. CEO Jim Prentice provides public updates on Environment Canada programs and initiatives via *Twitter* and *Flickr* media[35].

20.14.4 Europe – European Environment Agency

Eye on Earth is a two-way communication platform on the environment which brings together air quality monitoring data in real time and the capability of receiving feedback and observations from members of the community. Comparative data and live feeds are available on air quality, including roadside emissions and bathing water quality across Europe[36].

20.14.5 United States (US) EPA

The US EPA provides extensive information regarding its policies and activities on its website[37]. Consultation with the community is provided online. The US EPA also makes compliance information about licence-holders publicly available. Its website provides an interactive map of local neighbourhoods to enable residents to be informed of local licence-holders and their compliance history.

The US EPA also promotes several formal mechanisms for communities to be represented on policy development and EPA program delivery, including community advisory groups. A Superfund Community Advisory Group (CAG) is made up of members of the community and is designed to serve as the focal point for the exchange of information among the local community and the EPA, the state regulatory agency, and other

34 Review of the Environmental Protection Agency Consultation Document, April 2010: *www.environ.ie/en/Publications/Environment/Miscellaneous/FileDownLoad,22728,en.pdf.*
35 *Environment Canada: www.ec.gc.ca/default.asp?lang=En.*
36 *European Environment Agency: www.eea.europa.eu.*
37 *www.epa.gov/epahome/r2k.htm.*

pertinent federal agencies involved in clean-up of Superfund sites[38]. Superfund is the name given to EPA's environmental program established to address abandoned hazardous waste sites.

US 'right-to-know' laws are promoted by the US EPA[39]. These laws apply to information regarding the risks of exposure to hazardous substances. The US EPA currently provides guidance targeting communities on environmental hazards standards and quality, and the known risks of:

- information on toxic substances and releases
- community environmental issues
- air pollution
- water quality
- lead program
- hazardous waste.

US EPA has a comprehensive environmental justice program, which I discuss below.

20.15 Recent developments in EPA's community engagement

Through the compliance and enforcement review, several new community-based initiatives have been trialled. These include:

- Community reference group
  A reference group of community representatives who had knowledge and experience dealing with EPA enforcement (in some cases spanning many years) agreed to participate in a community reference group to support me in the review. The group comprised eight individuals who acted as an advisory group and attended all 14 community open house forums. Their role was to independently observe the open house and focus groups. The group has been valuable to ensure that consultations were faithfully reported on and provided helpful feedback during the development of the compliance and enforcement principles. I am advised that EPA is considering more formal reference and advisory groups of this nature.
- Community forums
  In early December 2010 EPA's CEO John Merritt hosted EPA's first community forum. The forum was attended by about 100 community members. It was an opportunity to hear on EPA's compliance and enforcement activity and current programs, and to have input into future information and consultation sessions. I provided an overview of the proposed principles to be included in the Compliance and Enforcement Policy.

38 *US EPA, Superfund Community Groups: www.epa.gov/superfund/community.*
39 See *www.epa.gov/epahome/r2k.htm#epcra#epcra.*

20.16 Discussion

The challenges of protecting the environment and ensuring sustainability are, in my view, the most significant we face as a community. Meeting these challenges requires the collective input of government, business and community. These three stakeholder groups are dependent on each other's input to identify solutions, and the successful implementation of solutions similarly depends on their input. This requires positive relationships, constructive dialogue and opportunities for engagement.

Businesses were complimentary of EPA's past engagement with business at individual and industry level. Many businesses and associations spoke of a 'partnership' approach based on cooperation between industry and regulator. Ai Group summarised as follows[40]:

> Industry has benefited from the approach that the EPA has taken in recent times to working closely with businesses to assist them to comply with regulations and indeed move beyond compliance. This has assisted in the development of strong cooperative approaches to achievement of ongoing improvements in environmental performance by industry.....
>
> Ai Group supports a continued strengthening in this partnership approach and considers that this is not in itself incompatible with the EPA's responsibilities of ensuring compliance with environmental regulations.

The Plastics and Chemicals Industries Association (PACIA) complimented EPA's support of the development of a sustainability leadership framework across its industry[41]:

> Through the formal EPA–PACIA partnership under a Sustainability Covenant, PACIA has been able to provide the necessary support for many companies to undertake step changes within their businesses. As a result, significant positive and tangible outcomes have been achieved for the environment – such as the diversion of prescribed industrial waste from landfill, the capture and reuse of water, and large increases in process efficiencies at many facilities. Importantly, this has built on the industry's stewardship and Responsible Care® culture, and taken it to a new level.

Business and industry stakeholders, particularly through their representative organisations, have an important role in supporting EPA in the development and continuous improvement of standards. These organisations have also assisted EPA in ensuring standards are appropriate and realistic, and that impacts on business and potential issues do not impede implementation. Such bodies hold a unique role also as trusted advisors to businesses who have an insight into business challenges that EPA should have regard to in its regulatory work.

A number of initiatives and programs have arisen from these stakeholder networks. For instance, PACIA in its submission discussed recent moves toward harmonisation of environmental laws at the national level and its support for EPA to take a leadership role. There were concerns that more assertive enforcement of the EP Act would reduce this level of cooperation. I believe that these networks and formal opportunities for engagement of business are important aspects of modern regulation.

A significant majority of the 300 people who attended the open houses had direct interaction with EPA, sometimes spanning decades. I was cautioned that the consultation would raise expectations in the community and that activists and community members would be satisfied only by the closure and movement of businesses

40 Submission 11.
41 Submission 35.

they were concerned with.

There were indeed a number of activists and campaigners for their community who attended the sessions and vigorously put forward their views that EPA had been ineffective in its regulatory work. However, despite their disappointment, and in many cases anger, I found the residents who attended demanded only that the law was complied with. They demanded that EPA regulated standards by taking enforcement action where appropriate to remedy risks to environment and impacts on local communities.

20.17 Stakeholder input

The value of stakeholder input and engagement and its contribution to effective regulation has been generally supported. The Banks Review[42] suggested that regulators 'enhance consultation' by establishing:

- protocols on their public consultation procedures
- standing consultative bodies comprising senior stakeholder representatives
- a code of conduct setting out the rights and responsibilities of the agency and those it regulates, and reporting annually against it.

In my view, it is clear from the EP Act, its principles and the consultations undertaken that business and community both have legitimate claims to consultation and participation in EPA's policy and program development, and to be informed of its regulatory activity[43]. Citizen involvement via access to information on hazardous materials is supported by Principle 10 of the Rio Declaration on Environment and Development. The declaration includes provision that 'States shall facilitate and encourage public awareness and participation by making information widely available'.

EPA has recently commenced engaging with community and providing more formal avenues of engagement and consultation that extend beyond transactional involvement in individual matters, such as works approval applications. This is to be commended. In time, I expect that these networks and arrangements will lead to more constructive dialogue and opportunities for three-way collaboration between government, business and community in the work of EPA.

This engagement would include ways of participating in policy and regulatory development, by providing opportunities for consultation and including representative bodies on stakeholder groups.

The Hampton Review recommended[44]:

> All regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all parties should be consulted when they are being drafted.

It also recommended:

> ...that all regulators set up business reference groups on a sectoral basis and involve them at all stages when introducing a new form, including form design.

42 *Rethinking Regulation*, Report of the Taskforce on Reducing Regulatory Burdens on Business, January 2006.
43 Neil Gunningham describes the benefits of moving beyond governments alone to achieve improved environmental outcomes through regulation, and encourages a broader approach of consensus building, dialogue and engagement. 'The New Collaborative Environmental Governance: The Localization of Regulation', Gunningham N, *Journal of Law and Society* 36(1): 200, pp.145-166.
44 Hampton P, *Reducing Administrative Burdens – Effective inspection and enforcement,* March 2005, p.17.

20.18 Making the law more accessible

I have recommended above that EPA develop a plain English guide to the EP Act and promote broad awareness of the law and its obligations. In order to support the principle of shared responsibilities and support communities to effectively participate in EPA's protection for the environment, it is important that the law is accessible and understood.

High-level guidance and information regarding the role of EPA and avenues for reporting should be available in appropriate community languages where these are particularly prevalent. One submission suggested this should extend to state environment protection policies (SEPPs)[45].

The Environment Defenders Office considered:

> The way in which SEPPS are written and laid out makes them inaccessible to the public and difficult to read and understand.

The recent publication of community fact sheets is also a positive measure designed to educate and empower the community by clarifying the law, rights and responsibilities, and using language and format that are tailored to the intended audience.

Where guidance and policy are being developed, stakeholders who represent the target audience should be engaged in its development, to ensure it meets their needs and is written in appropriate language. For businesses this would mean that guidance is practical and easily understood, is developed in consultation with industry associations and/or is distributed by associations. It would be designed to provide confidence in how to comply[46]. For community members, guidance would be written in accessible language and focus on rights and avenues for help.

20.19 Access to information

A common concern of community members attending open houses was that EPA had not been transparent in providing information regarding compliance and enforcement activity. Community members also noted that it was difficult to find information regarding particular incidents or premises. Information regarding ongoing investigations is also not readily available. I noted, for instance, that information on EPA's website regarding current investigations had not been updated for some time. This information is important to providing communities with information regarding local risks and to allay concerns regarding perceived inaction.

Where enforcement actions are issued, such as pollution abatement notices or infringement notices, these should be available or referred to on EPA's website. Much of the information on enforcement currently available is via media releases, which are written with a particular focus and may not be suitable or comprehensive enough to adequately inform a local community.

I was advised that, in order to access information on enforcement actions, including the number of enforcement notices,

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.

45 Submission 41.

46 See *Code of Practice on Guidance on Regulation*, October 2009. The Code also discourages the use of disclaimers in regulatory guidance, p.6.

investigations and prosecutions, a non-government organisation was required to submit a request under the Freedom of Information Act. In my view, this information, so long as confidentiality of personal information can be preserved, should be publicly available. Indeed, it should be broadly promoted by EPA as a matter of transparency and accountability for its regulatory activity.

The Environment Defenders Office provided a recommended list of information which it considered ought to be made available by EPA[47]. A copy of the list forms Appendix 20.1 to this report, as I believe these are valuable suggestions.

The Macrory Review in the UK strongly supported the notion of accountability of regulators to the people they regulate and those on whose behalf they regulate[48]. Macrory acknowledged the importance of transparency to stakeholders and commended efforts by UK regulators to be more answerable to stakeholders, including:

- corporate plans, setting out priorities and details of how these will be achieved
- open meetings
- accessible and affordable appeal mechanisms
- open consultation exercises and feedback
- publication of board agendas, papers and minutes, where appropriate
- regulatory impact assessments
- comprehensive and easy-to-use websites[49].

A number of these initiatives have already been undertaken by EPA and a number I have recommended elsewhere in this report.

In line with the compliance and enforcement principle that EPA be authoritative, it should explore opportunities to make monitoring information publicly available (online and in real time, if possible). This information could include information regarding emissions from hazardous facilities and information regarding any health risks, and ways of mitigating against these. I am advised that, for individual premises, a limited array of discharge data is now provided in annual performance statements and as part of the National Pollutant Inventory (NPI), but that no general strategy exists on making more general information public. I note that the UK Environment Agency has a strategy of requiring operators to provide this information[50].

In my view, there should be a bias to disclosure of information that would provide an insight into EPA, its regulatory activity and whether it is effective in its compliance and enforcement activity. Such information would include performance information regarding the outputs of compliance and enforcement, as well as outcomes (in other words, impacts on the quality of the environment).

47 Draft Report to EPA. Environment Defenders Office. To be published.
48 Macrory R, *Regulatory Justice: Making Sanctions Effective*. Final Report November 2006, p.88.
49 See also *Opportunities for Advancing Environmental Justice: An Analysis of US EPA Statutory Authorities,* Environmental Law Institute, November 2001.
50 *Delivering for the Environment: A 21st Century Approach to Regulation*, UK Environment Agency.

20.20 Environment improvement plans

EIPs are a formal instrument which provide access to information to local communities and an ability to monitor environmental performance of local licensed premises. The plans reflect the importance of engaging with the community for both EPA and business. The process of consultation in developing an EIP, if done well, provides for openness between the various parties that might otherwise be very difficult to achieve. It can also lead to greater mutual understanding and resolution of concerns[51] without the need for regulatory intervention. This in turn can lead to improved coexistence of local industry with concerned communities.

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.

The EIP created for the Altona Chemical Complex involved some $1.8 million invested in the area between 1992 and 1995 – a dramatic change compared to the late 1980s, when the local community opposed most applications for works approvals[52]. The consultation model at that complex was also viewed positively by business representatives[53].

An evaluation of the EIP program undertaken by Cameron Holley and Professor Neil Gunningham supported the use of EIPs[54], reporting that they have delivered significant improvements in community engagement and were generally supported by all stakeholders. It was noted, however, that developing EIPs was resource intensive and that gains reduced after initial enthusiasm at commencing dialogue and negotiations for developing the plan.

They wrote:

> Many EIPs, particularly in their initial phase, achieve good results, but there is reason to doubt whether these are sustained in the case of most mature EIPs. The reasons include a drop off in community interest after the initial crisis has been addressed, the incapacity or unwillingness of many community advocates to engage with the more complex and challenging environmental issues that are more likely to be the focus of mature EIPs, and the entrenched resistance of reluctant industry participants to far reaching change.[55]

20.21 A pilot of restorative justice

I have stated my support for EPA's Inspiring Environmental Solutions program and its broader use beyond section 67AC sentencing orders to enforceable undertakings. In my view, the policy and program guidelines should endeavour to more clearly link funded projects to benefits to local communities who have been impacted by environmental incidents or breaches.

I am advised that EPA has previously sought victim impact statements from affected community members,

51 EPA Victoria, *Environment Improvement Plans – An Overview*, publication 938, February 2004, pp.1-2.
52 Ibid.
53 Plastics and Chemicals Industries Association roundtable.
54 Holley C, Gunningham N, 'Environment Improvement Plans: Facilitative regulation in practice', *Environment Planning Law Journal*, 23, 448, 2006, pp.448-464.
55 Ibid, p.460.

and produced these in court in prosecutions to demonstrate the impact on communities. I consider this appropriate to ensure that sentencing courts are aware of the impact of environmental offences on communities and can take this impact into account in sentencing. There is an important, symbolic benefit of producing such statements, which is to validate the concerns of residents who are impacted.

Recommendation 20.4

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

Victoria has been a leader in the use of restorative justice. In my view, the move to use section 67AC orders as the predominant sentencing disposition has been a positive initiative by EPA. These are an example of restorative justice involving 'making good' for the offending conduct. The area of environmental protection is well suited to restorative resolutions to offending in appropriate cases. In my view, restorative justice and conferencing would promote the duty of care to the environment and principles of shared responsibility.

The Macrory Report consulted regulated communities in a range of regulatory settings and found overwhelming support for restorative justice initiatives[56]. The review recommended the introduction of pilot programs to consider the effectiveness of such initiatives.

In my view, there is a significant role for communities to play in piloting a restorative justice program arising from EPA investigations. The pilot could operate to use conferencing as part of the resolution of matters considered suitable for enforceable undertakings. A conference would be independently facilitated and involve EPA, the applicant for the undertaking and representatives of the community. This would obviously be more manageable where there was a local community organisation or similar, which could formally represent the community. The conference would seek mutually acceptable outcomes which aim to address the restorative principles included in the Compliance and Enforcement Policy. A particular focus would be on formally acknowledging the alleged offence, preventing recurrence and making good any harm. An agreement would be included in the body of an enforceable undertaking. The undertaking could also include community involvement in the monitoring of compliance with the undertaking or reporting on its progress. Where appropriate and consented to, it may also involve an apology.

I note that restorative justice in an environmental context has been considered by the Australian Institute of Criminology[57]. John Verry argues that restorative justice is suitable for use in environmental contexts as an alternative to prosecution, and cites examples from the New Zealand Environment Court. The resolution of a prosecution from emissions of fumes from a printing factory affecting local residents in that country involved:

- an apology
- a donation to the local college for native tree planting
- payment for health testing of residents
- a planted barrier around the site, to reduce dust
- a new entrapment device for emissions.

A similar outcome was achieved in the Land and Environment Court in NSW, in which a restorative conference

56 *Regulatory Justice: Making Sanctions Effective,* final report, November 2006, p.69.
57 Verry, John et al, *Safety, Crime and Justice: from data to Policy,* Australian Institute of Criminology Conference, 6-7 June 2005.

prior to court hearing led to an agreed resolution between the regulator, an offender and representatives of the indigenous community arising from offences against cultural artifacts[58].

It would be beneficial to include a community member on the panel which considers enforceable undertakings, to ensure the panel provides advice with the benefit of community views. Similarly, EPA should consider appointing a community representative to the panel which considers projects for suitability for the Inspiring Environmental Solutions program linked to section 67AC orders.

20.22 Further opportunities for community involvement

There are a number of other opportunities for EPA to further its engagement with the community in the near future:

- employing new technologies and media formats to enhance engagement (applications; social media; stronger, more interactive web presence);
- formalising a community board forum to review EPA activities
- a roadshow to promote EPA's corporate plan – building on the momentum of the compliance and enforcement review
- a promotional campaign to build community awareness of EPA
- encouraging positive community engagement by sponsoring events, competitions etc.

An additional advantage of effective engagement of stakeholders such as industry associations and community non-government organisations is the accountability this provides. Third parties have a critical role in ensuring the effective discharge of regulatory responsibility[59].

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.

20.23 Environmental justice

A number of concerned community members expressed their concerns regarding the state of their local environment in terms of equity of lifestyle, and said that they were concerned that there was inequity in the standards applied to Melbourne's outer suburban areas[60]. Equity issues were particularly challenging in areas where industries had existed for many years and planning decisions had been made to allow development within close proximity to existing facilities.

58 Hamilton M, 'Restorative Justice intervention in an environmental law context: Garrett v Williams', *Prosecutions under the Resource Management Act 1991 (NZ) and beyond.*
59 Macrory R, *Regulatory Justice: Making Sanctions Effective,* final report, November 2006, p.94.
60 Community open house – Altona and Moonee Ponds.

Over the last 20 years, particularly in the United States, the concept of 'environmental justice' has influenced the policy positions of environmental regulators[61].

Environmental justice is defined by the US EPA as:

> The fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic or socio-economic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal and commercial operations or the execution of federal, state, local and tribal programs and policies.[62]

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.

'Meaningful involvement' has also been defined by the US EPA[63]:

1. potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health
2. the public's contribution can influence the regulatory agency's decision
3. the concerns of all participating involved will be considered in the decision-making process
4. the decision makers seek out and facilitate the involvement of those potentially affected.

The formal adoption of environmental justice policies and principles by the US EPA followed public debate regarding disproportionate incidences of environmental harms in vulnerable communities. In part, this correlation arose from the location of socioeconomic demographics on the periphery of major cities and industrial areas. The US EPA was also criticised for apparent disparities in its enforcement activity and a tendency not to enforce in these areas[64].

The US EPA has stated nine priorities and goals for its Environmental Justice Program[65]:

Clean Air and Global Climate Change:

1. Reduce number of asthma attacks
2. Reduce exposure to air toxics

Clean and Safe Water:

3. safe fish/shellfish
4. clean and safe drinking water

Healthy Communities and Ecosystems

5. reduced elevated blood lead levels
6. collaborative problem-solving
7. revitalisation of brown fields and contaminated sites

61 See, for instance, Intra-Agency Environmental Justice Strategy. California Environmental Protection Agency Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations.
62 *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*, US EPA 1998.
63 Grijalva J, Gogal D, 'The Evolving Path Toward Achieving Environmental Justice for Native America', 40, *Environmental Law Review, 10905.*
64 Grijalva J, Gogal D, 'The Evolving Path Toward Achieving Environmental Justice for Native America', 40, *Environmental Law Review,* 10905.
65 See US EPA EJ priorities.

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8. ensuring compliance

Cross-Cutting Strategies:

9. Capacity building.

The US EPA convenes a National Environmental Justice Advisory Committee, which includes community representation to ensure the effectiveness of EPA in applying the environmental justice program to its activities.

In becoming more authoritative and a trusted source of information regarding the state of the environment and any health risks, it is important that EPA is vigilant regarding any trends in incidents or exposure that would impact on vulnerable populations or sensitive receiving environments.

Notwithstanding a very different context in Victoria, much about the US EPA's environmental justice program is, in my view, relevant and would enable EPA to more effectively engage the community.

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

20.24 Transparency in implementation of this report

There were significant concerns amongst participants in the consultation process regarding EPA's response to this report and implementation of any recommendations.

For businesses, the concerns centred on whether EPA, in moving to a more rigorous approach to enforcement, would undermine existing partnerships and collaborations with industry and associations.

Community members and organisations were not confident that the review would be public, and cynical about EPA's response to feedback from the consultations and focus groups – adopting a 'wait and see' stance.

A critical aspect of any implementation will be the involvement of both business and community stakeholders. This involvement will ensure that EPA is approaching the reforms necessary for its future with the benefit of the experience and advice from the coalface of business and our suburbs and towns[66]. I believe that these insights are necessary to ensure that reform is appropriate, balanced and will succeed. Without pre-empting EPA's response, there is a historic opportunity for EPA to engage business and community as partners in implementation of

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.

66 See, for instance, The Auditor-General (Cwlth) Audit Report No.12, 2010–11, *Home Insulation Program*, pp 76–7 and pp.173–4.

any recommendations which it accepts. In any event, formal mechanisms for tripartite discussions will be an important aspect of EPA's transformation to a modern regulator.

These mechanisms may include a continuation of the high-level stakeholder steering group that assisted me in the review.

At the least, EPA should ensure that the community and business are provided with an opportunity to hear the review findings and recommendations, and EPA's response, and to have an input into implementation. This would be complemented by regular reports on the progress of implementation of any adopted recommendations.

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.

21.0 Greenhouse gas regulation

This chapter refers to the *Climate Change Act 2010*, which comes into effect from 1 July 2011. It provides a brief overview of the impact of the Act on EPA jurisdiction. No recommendations are made, but it suggests that the role of compliance and enforcement in the implementation of the Act will need to be considered by EPA as part of any implementation, as will the adequacy of its existing powers of enquiry and inspection in the context of any changes.

21.1 Background

The timing of this review coincided with growing community awareness of shared responsibility for environmental impacts and strong public debate regarding action on climate change. Furthermore, following my appointment, the Victorian Labor Government released the *Victorian Climate Change White Paper* in July 2010. The white paper builds on public discussion and feedback and outlines the responsibilities of all Victorians – governments, businesses, households and individuals – to reduce greenhouse gas emissions.

The *Climate Change Act 2010*[1] was made in September 2010 during the consultation phase of my review. It provides the legislative framework underpinning actions in the white paper and provides EPA with a head of power to regulate greenhouse gas emissions, requiring it to consider climate change impacts in some key statutory decisions.

Among other things, the Climate Change Act:

- legislates Victoria's emissions reduction target of 20 per cent by 2020 (based on 2000 levels)
- requires some government decision makers to take climate change into account when making specified decisions under the *Catchment and Land Protection Act 1994, Coastal Management Act 1995, Environment Protection Act 1970, Flora and Fauna Guarantee Act 1988, Public Health and Wellbeing Act 2008 and Water Act 1989*
- requires the Government to develop a Climate Change Adaptation Plan every four years, outlining the climate change impacts and risks to Victoria and the Government's priority areas for response
- amends the *Environment Protection Act 1970* to enable EPA Victoria to regulate greenhouse gases
- enables the setting of an emissions intensity standard for coal-fired power stations using existing technologies

1 Assented to 14 September 2010.

- renames the Sustainability Fund the Climate Communities Fund and broadens the purposes for which the Fund can be applied to foster local action and innovation on climate change
- enables the Government to enter into 'climate covenants' with communities, regions, industry and other stakeholders, enabling them to take ownership of climate change issues and empowering them to be innovative and proactive in their response to climate change[2]
- requires the Government to report every two years on climate change science and emissions data, including Victoria's progress towards its emissions reduction target.

The amendments to the EP Act will establish express powers for EPA to regulate greenhouse gas emissions through the various statutory instruments available in the EP Act, including state environment protection policies, waste management policies and regulations, and the works approval and licensing scheme under the Act.

The Climate Change Act commences operation on 1 July 2011 unless proclaimed earlier[3].

The then Premier John Brumby MP introduced the Bill. In his Second Reading speech, he stated:

> These amendments to the Environment Protection Act will also clarify that regulations may be introduced that set a greenhouse gas trigger to require licensing and works approvals for general industrial and commercial sites that are large emitters and energy users.

He said further:

> Any changes in this regard will also be subject to consultation through regulatory impact statements or equivalent processes.
>
> This power may be used for other purposes in the future, such as establishing emissions standards for existing power stations – with the aim of moving Victoria's brown coal generators into line with international best practice and providing a strong investment signal to upgrade technology.
>
> Again, any new standards in this area will be subject to full public consultation and regulatory impact statements[4].

The Climate Change White Paper and Bill (as it then was) were referred to in the discussion paper as a matter of transparency. My review was predominantly concerned with the discharge of regulatory responsibilities over existing laws and regulations. I was not required to consider the works approval and licensing process in detail or the prospect of legislation which does not commence operation until 1 July 2011.

The submissions and public comment did not focus attention on the prospect of additional regulatory jurisdiction of EPA for greenhouse gases, similarly focusing on high-level principles and criteria that should apply to EPA enforcement, regardless of subject matter.

I note that there was a commitment by the government to further consultation and regulatory impact assessment prior to any introduction of additional regulatory requirements for greenhouse gases. Accordingly, it is not necessary for me to consider the Climate Change Act in detail.

2 The climate covenant provisions are based on the existing regime for sustainability covenants under the EP Act.
3 Section 2, *Climate Change Act 2010*.
4 29 July 2010, Assembly. Hansard 2837.

21.2 Discussion

A number of developed economies have now moved to regulate carbon and other greenhouse gas emissions. A variety of regulatory mechanisms have been used to achieve this, including cap and trade, and emissions trading schemes. The European Union's (EU) cap-and-trade scheme is the largest such scheme in the world, covering 27 EU states and around 12,000 installations. In the United States, the Regional Greenhouse Gas Initiative commenced on 25 September 2008 and involves 10 north-eastern and mid-Atlantic states of the United States. The scheme is a mandatory, market-based scheme. The scheme is aimed at reducing emissions from the power sector by 10 per cent by 2018[5].

In the United States, EPA has taken steps to classify carbon as a pollutant to be regulated under the US Clean Air Act. On 7 December 2009, US EPA made two findings regarding greenhouse gases under section 202(a) of the Clean Air Act.

Firstly, the US EPA found that the current and projected concentrations of six greenhouse gases – carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6) – in the atmosphere threaten the public health and welfare of current and future generations. This instrument is known as the Endangerment Finding.

Secondly, US EPA found that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution which threatens public health and welfare.

These findings do not of themselves impose any requirements on industry or other entities. However, this action is a prerequisite to finalising a proposed emission standard for light vehicles.

In my view, the principles that have been set out in the proposed Compliance and Enforcement Policy and criteria to apply to enforcement decisions on EPA's existing jurisdiction will apply to any prospective jurisdiction regarding greenhouse gases. However, expanding EPA's regulatory role in this way will require further consultation as part of the implementation of the greenhouse gas amendments to the EP Act. EPA will need to consider the role that compliance and enforcement will play in underpinning the regulatory regime and, in particular, consider whether current powers of enquiry are adequate. A number of findings of my review will be relevant to these consultations, including:

- the resourcing required to effectively discharge regulatory responsibility
- the technical expertise required
- communication of regulatory changes well in advance, to allow adaptation
- phasing in of the requirements as appropriate
- clear standards for compliance
- the nature of emissions measurement and monitoring programs.

5 www.rggi.org/home.

22.0 Legislative changes

This chapter brings together suggestions for legislative reform that have been raised during the review. It is provided to assist EPA in considering any recommendations to government to amend the EP Act. In the event of a comprehensive review of the EP Act, I have outlined an alternative model for articulating duties and offences.

22.1 Background 1.1

The EP Act was first enacted in 1970 and, in its time, was ground-breaking and marked Victoria as one of the first jurisdictions in the world to enact legislation which sought to protect all segments of the environment: air, water and land under the one piece of legislation. The legislation was to be regulated by the one independent regulatory body – EPA Victoria.

The Act has enabled significant improvements to our environment over its history and has been successively amended to implement innovative and progressive ways of reducing adverse impacts on public health and the environment. These have included a robust licensing regime, neighbourhood improvement plans (NEIPs), Environmental Resource and Efficiency Programs (EREPs) and alternative sentencing options (section 67AC).

The terms of reference to this review include:

> The review will have the scope to consider issues in the current legislation, if required as an enabler to the recommendations or to remove an inhibitor to any recommendations, but the review will not comprehensively review the legislation itself.

22.2 Discussion

The EP Act has undergone significant amendments in almost every year of its existence. It is now the oldest state environment protection Act not to have been comprehensively reviewed and re-enacted, despite being amended more than 80 times in its 40-year history. Most Australian jurisdictions have undergone comprehensive reviews of their equivalent of the EP Act and many have been remade since the 1990s.

It is now complex and difficult to navigate, and contains drafting which is convoluted and does not meet the principles that apply to modern legislation, including that it be accessible and easy to comply with.

The Climate Change Panel of the Victorian Bar in its submission[1] said:

> The Panel is of the view that no review of the compliance or enforcement policies of the EPA is complete without a review of the mechanisms by which enforcement is effected. In particular, the Panel supports the establishment of a specialist land and environment list in either the Supreme Court or the County Court where prosecutions under the EP Act (and other planning and environmental proceedings) can be heard by dedicated judges. However, many of the issues identified by the Panel in relation to the fairness and transparency of compliance and enforcement of environmental law in Victoria stem from limitations in the EP Act itself. As far as the Panel is aware, the EP Act has never been subject to comprehensive review and amendment since its introduction in 1970, but rather has been amended in a piecemeal way, often in response to limitations in the EP Act identified by environmental incidents or as a consequence of legal proceedings...

We are at a historical crossroads in respect of our need to protect the environment and to take action to address climate change. In order to meet the community's quickly evolving expectations for environmental regulation and the maintenance of standards, there is an opportunity to undertake a comprehensive review of the Act, to position Victoria for the future and to support EPA to more effectively undertake its regulatory role.

I note that the former Victorian Government committed to a number of legislative reforms which will require amendment of Victoria's environmental laws, including amendments supported in the Government's response to the Victorian Competition and Efficiency Commission's report, *A Sustainable Future for Victoria: Getting Environmental Regulation Right*, directed at improving works approvals and the transparency of EPA's own performance.

In his 2009-10 Annual Report, the Victorian Ombudsman stated:

> Agencies functioning within a statutory framework should seek to identify and remedy inadequate or outdated provisions: their staff are well placed to do this. Officers at operational levels of an organisation are often familiar with legislative problems in the areas that they administer but experience difficulty making these concerns known to the agency. There is considerable potential for agencies to draw more fully on operational experience to identify how practices can be improved and where legislation should be reconsidered. This should form part of an agency's corporate plan.

And further:

> Agencies need to be more proactive about reporting weaknesses in legislation caused by changing circumstances or legal deficiencies. The advice to government should identify how resources could be used more efficiently; how the legislation could better address the problems it seeks to manage or the outcomes it aims to achieve and how greater certainty could be provided for those working towards compliance.[2]

In relation to regulatory powers the Ombudsman said:

> My investigations have also identified that, in addition to high thresholds for proving allegations, some regulatory agencies have inadequate investigative powers. This highlights the necessity for agencies to notify the government when legislative provisions restrict their ability to adequately fulfil their regulatory role.

In my view it is appropriate for regulators and other government agencies to periodically review their legislation for effectiveness, and ability to meet changing circumstances and emerging challenges. Indeed, I consider it incumbent on regulators to undertake this role – particularly where deficiencies or outdated provisions limit the ability of EPA to effectively undertake its regulatory role – and advise government on opportunities for improving legislation.

1 Submission 48.
2 Ombudsman Victoria *Annual Report 2010*. P.38.

A number of such examples were identified or raised with me in consultations during the review. Accordingly, I consider it appropriate to outline these below for consideration by EPA.

22.3 Duties under the Act

Many businesses raised concerns regarding the absolute nature of most offences under the EPA Act. It was said that this was reflected in licensing conditions and that there are provisions in the Act and current licence conditions which are incapable of compliance. The Act is heavily focused on pollution, which is its historical focus.

Pollution offences are not qualified[3] and therefore apply an absolute standard to compliance. However, the EP Act provides a limited defence to offences under the Act if a person charged proves that the discharge, emission or deposit of waste to which the charge relates, 'occurred in an emergency to prevent danger to life or limb' other than an emergency arising from the negligence of the defendant, and notifies EPA[4].

The Act uses a number of different standards to assess compliance against. For instance, the Act uses the terms 'best practice'[5], 'as close as practicable'[6] and 'commonly available'[7] to describe duties or discretions available to EPA. In addition, state environment protection policies (SEPPs) and EPA guidance use the terms 'best practicable measure or approach', 'best available technology' and 'maximum extent achievable' as standards of compliance. This is confusing and has implications for the ease of compliance with the EP Act, how courts apply the law and the extent to which they consider the seriousness and gravity of certain conduct. A number of businesses and practitioners identified the concept of 'as low as reasonably practicable' as being commonly used in industry to manage both environmental and safety duties[8].

A number of Australian states have now sought to define environmental obligations in terms of a general environmental duty. No Victorian environmental legislation has a general environmental duty for individuals, in contrast to other states.[9]

For instance, Queensland's *Environmental Protection Act 1994* provides:

> A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the "general environmental duty").

The provision is qualified to 'all reasonable and practicable measures'. This standard is defined in the Act:

3 See for instance, section 39(1), 'Pollution of Waters'.
4 Section 30B, *Environment Protection Act 1970*.
5 For instance, section 49, *Environment Protection Act 1970*. The Victorian Competition and Efficiency Commission recommended EPA provide guidance on the definition of 'best practice' and its application of the standard. *A Sustainable Future of Victoria: Getting Environmental Regulation Right*, final report, July 2009, p.225.
6 In defining the term 'clean up', section 4, *Environment Protection Act 1970*.
7 Section 20(3), *Environment Protection Act 1970*.
8 Ai Group workshop. Australian Environment Business Network Conference. Plastics and Chemicals Industries Association roundtable. Community open house – Wodonga. See, for instance, *Offshore Petroleum and Greenhouse Act 2006*, administered by the National Offshore Petroleum Safety Authority.
9 The *Catchment and Land Protection Act 1994* (CALP Act) and the *Pipelines Act 2005* have a specific environmental duty. The CALP Act (section 20) provides a legislative basis to common law property rights, in that it requires land owners to 'take all reasonable steps to avoid causing or contributing to land degradation which causes or may cause damage to land of another land owner.' Like other jurisdictions, the provision is not a criminal offence but is enforceable through the use of other enforcement instruments. The Pipelines Act (section 124), however, has a general duty on licensees with a penalty to 'manage any pipeline operation so as to minimise as far as is reasonably practicable hazards and risks to the environment.' Penalties are $28,688 for an individual and $143,340 in the case of a corporation.

In deciding the measures required to be taken under subsection (1), regard must be had to, for example:

(a) the nature of the harm or potential harm; and

(b) the sensitivity of the receiving environment; and

(c) the current state of technical knowledge for the activity; and

(d) the likelihood of successful application of the different measures that might be taken; and

(e) the financial implications of the different measures as they would relate to the type of activity.'

The South Australian equivalent[10] provides:

General Environmental Duty

(1) A person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes all reasonable and practicable measures to prevent or minimise any resulting environmental harm.

(2) In determining what measures are required to be taken under subsection (1), regard is to be had, amongst other things, to–

(a) the nature of the pollution or potential pollution and the sensitivity of the receiving environment; and

(b) the financial implications of the various measures that might be taken as those implications relate to the class of persons undertaking activities of the same or a similar kind; and

(c) the current state of technical knowledge and likelihood of successful application of the various measures that might be taken.

A breach of the provision is not a criminal offence. However, it is enforceable through the use of other enforcement instruments. Defences are also provided for. The ACT and Northern Territory have also moved to such models.

The concept of general duties without prescriptive elements is well known in other social and preventative legislation, such as occupational health and safety[11], and has been effective in ensuring shared responsibility through the provision of coexisting and overlapping duties for different types of regulated entities. Models differ as to whether they create civil, criminal or enforceable duties.

A general duty of care has also been supported in relation to ecologically sustainable development and biodiversity legislation[12], following a review of existing environmental duties in interstate jurisdictions.

The inclusion of duties and offences drafted with an objective standard would, in my view, support the principle of 'shared responsibility' in the EP Act and the duty of care to the environment, which the consultations suggest is well established in the community and is one of its aspirations.

10 Section 25, *Environment Protection Act 1993* (SA).
11 Section 21(1), *Occupational Health and Safety Act 2004.*
12 See, in particular, Bates G, *A duty of Care for the Protection of Biodiversity on Land*, report to the Productivity Commission, 2001.

22.4 Categories of harm

The Act currently characterises environmental harm in numerous ways, creating confusion and unnecessary complexity in proofs.

For example, section:

1C	'*threats* of serious or irreversible environmental *damage*'
1K	'adverse environmental impacts'
19AA	'*harm* to the environment'
20	'*danger* or potential danger to the *quality* of the environment'
27,30	'*state of potential danger*'
31A	*'environmental hazard'* where section 4 defines 'environmental hazard' as 'a state of *danger to human beings* or the environment whether *imminent* or otherwise'
30D	'*serious* environmental hazard'
41(1)	'*harmful or potentially harmful* to the health, welfare, *safety or property* of human beings'
45(1)	'harmful or potentially harmful to the *health or welfare* of human beings....animals, bird or wildlife...poisonous, harmful or potentially harmful to plants or vegetation...'
45F	*'danger* to any person or animal or to any land, waters or vehicle'
45Y	*'detrimental* to the health, safety or welfare'

A number of interstate Acts provide a hierarchy of harm to the environment, linking to graduated penalties[13]. Consideration should be given to aligning the categories of harm to health and environment contained in the EP Act.

22.5 Penalties for offences under the Act

The maximum penalty available under the EP Act has not been reviewed since 2000. One purpose of provision of maximum penalties is to indicate the view of Parliament (and thereby the community) and provide guidance to the judiciary about the relative seriousness of an offence compared with other criminal offences[14].

Increases to the available maximum have been incremental and by virtue only of indexation. I have outlined above that fines imposed by courts are generally only a fraction of the maximum available penalty and that the highest penalties imposed have been as part of negotiated orders under section 67AC.

The highest penalties for environmental offences currently only apply to *mens rea* offences[15], which makes them an unlikely consequence of offending and an inadequate deterrent. The current penalties amount to only about 25 per cent of the equivalent penalties under the Occupational Health and Safety Act (OHS Act), which

13 For example, Queensland, South Australia and Western Australia.
14 *Maximum Penalties: Principles and Purposes*, Preliminary Issues Paper, Sentencing Advisory Council, October 2010, p.vii.
15 Mens rea is the legal requirement for a guilty mind, or intent to commit an offence.

can arise from the same acts or omissions by a business with the same level of culpability. An offence that results in significant health impacts on the local community could conceivably carry higher penalties under the OHS Act[16] than the EP Act. In Chapter 11, 'Prosecutions', I outlined the comparisons with maximum penalties available under equivalent legislation interstate.

The maximum penalty for general pollution offences does not differentiate between offences by corporations and individuals[17]. Curiously, the offence of aggravated pollution[18] provides for a maximum penalty four times as high for corporations than for individuals. If this rule was applied to the general pollution offences, the penalty would increase from 2400 to 9600 penalty units or almost $1.2 million.

Consideration should be given to increasing the maximum penalties available under the EP Act for general pollution offences.

It is curious that the breach of a minor works notice carries a maximum penalty of 300 units – significantly less than that attached to the breach of a regular abatement notice (2400 units).

22.6 Powers of inspection and enquiry

In Chapter 13, 'Powers of EPA authorised officers', I examined the powers of enquiry and inspection available to EPA and its authorised officers. The powers available to authorised officers have undergone amendment, but have not been the subject of comprehensive review to ensure they are capable of adequately equipping EPA and its officers to deal with new subject matter in the EP Act. The provisions rely on implication, as opposed to express powers, for critical functions of authorised officers. For instance, there is currently no express provision for making verbal enquiries or for requiring answers to questions. They fall short of equivalent powers available to safety regulators and are unnecessarily limited to certain subject matter, as opposed to broadly applying to any offences under the Act.

By way of comparison, the *Occupational Health and Safety Act 2004* provides:

An inspector who enters a place under this Division may do any of the following–

(a) inspect, examine and make enquiries at the place;

(b) inspect and examine any thing (including a document) at the place;

(c) bring any equipment or materials to the place that may be required;

(d) seize any thing (including a document) at the place that may afford evidence of the commission of an offence against this Act or the regulations;

(e) seize any thing at the place for further examination or testing but only if the inspector reasonably believes that the examination or testing is reasonably necessary and cannot be reasonably conducted on site;

(f) take photographs or measurements or make sketches or recordings;

(g) exercise any other power conferred on the inspector by this Act or the regulations;

(h) do any other thing that is reasonably necessary for the purpose of the inspector performing his or her functions or exercising his or her powers under this Act or the regulations.

16 Under section 23 of the *Occupational Health and Safety Act 2004*, it is an offence to fail to control risks to health and safety of persons other than employees, arising from a business or undertaking.
17 Section 39(5), *Environment Protection Act 1970.*
18 Section 59E, *Environment Protection Act 1970.*

I referred in Chapter 13, 'Powers of EPA authorised officers', to the power of authorised officers to make enquiries and require answers to questions. The *Protection of the Environment Operations Act 1997* (NSW) provides an example:

Power of Authorised Officers to require Answers

(1) An authorised officer may require a person whom the authorised officer suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required for the purposes of this Act to answer questions in relation to those matters.

(2) The EPA or any other regulatory authority may, by notice in writing, require a corporation to nominate, in writing within the time specified in the notice, a director or officer of the corporation to be the corporation's representative for the purpose of answering questions under this section.

(3) Answers given by a person nominated under subsection (2) bind the corporation.

(4) In the case of authorised officers appointed by the EPA, subsection (1) is not limited to matters in respect of which the EPA is the appropriate regulatory authority.

(5) An authorised officer may, by notice in writing, require a person to attend at a specified place and time to answer questions under this section if attendance at that place is reasonably required in order that the questions can be properly put and answered.

(6) The place and time at which a person may be required to attend under subsection (5) is to be:

(a) a place or time nominated by the person, or

(b) if the place and time nominated is not reasonable in the circumstances or a place and time is not nominated by the person, a place and time nominated by the authorised officer that is reasonable in the circumstances.

However, this power comes with the following caveat:

Information or answer not admissible if objection made

However, any information furnished or answer given by a natural person in compliance with a requirement under this Chapter is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence under this Chapter) if:

(a) the person objected at the time to doing so on the ground that it might incriminate the person, or

(b) the person was not warned on that occasion that the person may object to furnishing the information or giving the answer on the ground that it might incriminate the person.

I have referred in Chapter 13, 'Powers of EPA authorised officers', to the need for EPA and its authorised officers to provide compliance advice. Neither EPA nor its authorised officers are currently expressly authorised to provide advice to people with obligations under the Act. This is a significant shortcoming. A critical feature of modern regulatory regimes is that the regulator and its field force should be empowered and prepared to provide advice to a person with a duty under the legislation administered by the regulator, and provide guidance about complying with that duty[19].

19 See, for instance, discussion by Maxwell C (as he then was), *Occupational Health and Safety Act Review*, March 2004 and section 18, *Occupational Health and Safety Act 2004*.

In my view, while it is not essential that the EP Act expressly provide EPA or its officers with the power to provide compliance advice in order to enable such advice, in the event of legislative change it would be appropriate to put the issue beyond doubt and to provide some legislative clarity as to the status of the advice.

For instance, section 18 of the *Occupational Health and Safety Act 2004* provides:

> (1) The Authority may give advice to a person who has a duty or obligation under this Act or the regulations about complying with that duty or obligation.
>
> (2) The giving of such advice by the Authority does not give rise to–
>
> (a) any liability of, or other claim against, the Authority; or
>
> (b) any right, expectation, duty or obligation that would not otherwise be conferred or imposed on the person given the advice; or
>
> (c) any defence that would not otherwise be available to that person.
>
> (3) The Authority's power under this section to give advice may also be exercised by an inspector or, if the Authority authorises any other person to exercise the power, that other person.'

It should be noted that the EP Act currently only provides an indemnity from liability of authorised officers for enforcement decisions in relation to urgent directions to clean up under section 62B of the EP Act. For the most part, other enforcement decisions are undertaken under delegation and constitute decisions of the Authority itself.

EPA staff consultations centred on regulatory tools, rather than the powers of authorised officers. A number of provisions, however, were discussed in the context of inhibitors to the authorised officers being effective in the discharge of their roles.

Section 55(3)(a) provides that an authorised officer may require the production of various documents relating to the discharges of wastes and pollutants or the handling of wastes *carried on at the premises*. Clearly the provision relates to those premises from which it is alleged there are discharges or where an offence may have been committed. Curiously, and unnecessarily in my view, the provision restricts documents to those that:

> ... relate to the discharge from the premises of any waste or pollutant or the storage, reprocessing, treatment or handling of industrial waste or the emission from the premises of noise or relating to any manufacturing, industrial or trade process carried on at the premises.

The provision is unnecessarily restrictive.

However, it is also significant that section 55(3)(b) extends the power to seek production of documents to 'any person or body'. This power applies to a broader population; however, it is restricted to documents 'relating to any apparatus, equipment, or works used for the discharge, emission, or deposit of wastes or the storage, reprocessing, treatment or handling of industrial waste...'.

The distinction between the nature of the documents that may be sought is unnecessary[20]. Apart from simplifying the language, section 55(3)(b) could mirror section 55(3)(a).

20 EPA staff consultation – Enforcement Unit.

It is also problematic that both provisions are limited to documents that are in the person's possession, as opposed to documents that may be under their control or that may be stored offsite, as is the case in many industrial settings.

The provisions are particularly restrictive in the context of EPA requiring certain businesses to enter into an Environment and Resource Efficiency Plan (EREP). The EP Act does not appear to contemplate a requirement for a third party to produce documents or information that could verify information provided under the EREP program.

The EP Act provides a broader power of production of 'information' from the occupier of any premises but there are restrictions on the type of information covered by the provision.

The NSW *Protection of the Environment Operations Act 1997* provides an example of a broader provision that could be considered:

> **Requirement to provide information and records (other regulatory authorities)**
>
> (1) A regulatory authority (other than the EPA) may, by notice in writing given to a person, require the person to furnish to it such information or records (or both) as it requires by the notice in connection with any matter relating to its responsibilities or functions under this Act.
>
> (2) This section is limited to matters in respect of which the authority is the appropriate regulatory authority.
>
> **Requirement to provide information and records (authorised officers)**
>
> (1) An authorised officer may, by notice in writing given to a person, require the person to furnish to the officer such information or records (or both) as the officer requires by the notice in connection with any matter within the responsibilities and functions of the regulatory authority that appointed the officer.
>
> (2) In the case of authorised officers appointed by the EPA, this section is not limited to matters in respect of which the EPA is the appropriate regulatory authority.[21]

There is currently inadequate power of seizure of evidence which may be required in order to prove an offence under the EP Act. Consideration should be given to a power of seizure that would apply to offences being investigated by EPA and its officers.

This power exists in section 198 of the NSW *Protection of the Environment Operations Act 1997:*

> **Powers of authorised officers to do things at premises**
>
> An authorised officer may, at any premises lawfully entered, do anything that in the opinion of the authorised officer is necessary to be done for the purposes of this Chapter, including (but not limited to) the things specified in subsection (2).....
>
> (h) seize anything that the authorised officer has reasonable grounds for believing is connected with an offence against this Act or the regulations..

Consideration should be given to reviewing the inspection and enquiry powers available to EPA authorised officers in determining compliance with the Act.

21 Sections 192 and 193.

22.7 Obstruction of officers

Obstruction of authorised officers in the course of their duties is an offence. The offence is one of few that carry a maximum penalty that includes imprisonment. The Act prohibits the delay or obstruction of an authorised officer, or refusing to permit an authorised officer to do anything which they are authorised to do under the EP Act. It is also an offence to fail to comply with any requirement made by an authorised officer in the exercise of their powers under the Act. The provision is not as broad as other legislation seeking to protect officers in their discharge of legislative powers. For instance, the *Occupational Health and Safety Act 2004* also prohibits intentionally assaulting, hindering, threatening or intimidating an officer[22].

Consideration should be given to reviewing this provision to better protect authorised officers in the discharge of their roles.

22.8 Pollution abatement notices

In Chapter 9, 'Enforcement tools', I encourage EPA to consider seeking an amendment of the EP Act to remove the service fee under section 60C of the Act, which applies to the issue of a pollution abatement notice. In my view, this is necessary to avoid confusion over whether the pollution abatement notice is intended as a remedial tool or a punitive one.

It was considered by many EPA staff that the impost of a service fee was unwarranted and was considered by many small and medium businesses as a punishment. A number of EPA officers indicated that they did not issue abatement notices, due to the fee. In some cases, officers reported having used the minor works abatement notice in the past or preferring to use informal methods of achieving compliance.

The delay of 30 days for a pollution abatement notice to take effect was seen as an inhibitor to achieving environmental protection. This time delay appears to be based on the appeal provision allowing for a review of the notice, but it is not clear from the legislation why (if this was the case) the trigger would not be 22 days, the normal period of appeal, rather than 30 days. However, in my view, this could be achieved by allowing EPA the discretion to fix a compliance time that is shorter than 30 days. Compliance time could be shorter, provided it was commensurate to the breach or risk to be averted. There would also need to be a right of external review, including the ability to request a stay of the notice taking effect.

There are examples of other preventative regulatory schemes where more timely action is provided for by the issue of notices to control risk, even where review rights exist. The *Occupational Health and Safety Act 2004*, for instance, provides that an improvement notice (which is similar in effect to an abatement notice) must:

c) specify a date (with or without a time) by which the person is required to remedy the contravention or likely contravention or the matters or activities causing the contravention or likely contravention, that the inspector considers is reasonable having regard to the severity of the risk to the health or safety of any person and the nature of the contravention or likely contravention[23].

The power to issue a minor works abatement notice is limited to requiring remedial works totalling no more than $50,000. This limit is artificial and appears arbitrary in the context of evaluating the issue of a notice requiring urgent remedial works to prevent recurrence or further risks. My consultations with EPA staff indicated that they were not able to confidently assess the costs of remediation and that they were concerned about relying on information provided only by a regulated business. The $50,000 legislative limit on compliance

22 Section 125, *Occupational Health and Safety Act 2004.*
23 Section 111 *Environment Protection Act 1970.*

costs included in minor works notices[24] was last reviewed in 2000. Costs of plant and advice have increased significantly since that time. In my view, the provision should be reconsidered. In addition, the name of this notice is misleading as, although the work is currently limited to minor work, the nature of the notice is more clearly directed to the urgency with which the work is required.

In a number of jurisdictions, abatement notices have been named to more clearly link to preventing, controlling or investigating risks arising from any breach of a provision of the Act, regulations and other significant risks. These are variously referred to as prevention notices, environment protection notices, investigation notices or hazard abatement notices.[25] This would be more consistent with a focus on a duty of care to the environment by all businesses and individuals, by not focusing on 'pollution' alone.

22.9 Pollution abatement notices – landfill 'post closure PANs'

In Chapter 9, 'Enforcement tools', I discussed the duration of notices issued by EPA, specifically 'post-closure PANs' used for closed landfills. These are notices applied to control risks which may emerge after a landfill ceases to operate. I note that some work has been undertaken by EPA to ensure 'post-closure' PANs more closely follow the format of new reformed licences. Many EPA staff questioned why closed landfills weren't licensed, particularly when long-term monitoring and management requirements would continue for at least the next 10 years. I understand that closed landfills were considered to be included in the review of the scheduled premises regulations and therefore be licensed but that, due to the then definition of 'scheduled activity' in the EP Act, they were not be included. The EP Act in section 4 now defines scheduled premises as:

(a) prescribed by regulation; or

(b) which is of a class prescribed by regulation as premises at or from which–

  (i) waste is, or is likely to be, discharged, emitted or deposited to the environment; or

  (ii) noise is, or is likely to be, emitted; or

  (iii) waste is, or substances which are a danger or potential danger to the quality of the environment or any segment of the environment are, reprocessed, treated, stored, contained, disposed of or handled; or

  (iv) any activity is conducted which creates a state of potential danger to the quality of the environment or any segment of the environment;

I don't believe that the current definition in the Act would preclude closed landfills from being included in the scheduled premises regulations. Closed landfills are likely to present a 'potential danger to the quality of the environment' and result in some discharge which should be monitored and assessed. This, after all, is the basis on which current pollution abatement notices are issued. Given the time scale under which this discharge is likely to occur, it would seem more appropriate to use a longer-term management instrument, such as a licence, to manage *the ongoing risks to the environment.*

24 Section 31B(1)(b) *Environment Protection Act 1970*.
25 Western Australia, New South Wales and Tasmania have Prevention Notices, South Australia and ACT Environment Protection Notices, and Western Australia and Tasmania Investigation Notices. Western Australia also have Hazard Abatement Notices.

22.10 Clean-up notices

Clean-up notices do not have an express provision for their amendment. Rather, they require revocation and reissue. While it is arguable that a clean-up notice may be varied by virtue of being an instrument covered by the *Interpretation of Legislation Act 1984* and, therefore, a power of variation would be implied, it would be preferable to put the position beyond doubt.

I note also that a number of the issues referred to in 'clean up' do not strictly involve cleaning up. For instance, section 62A may require monitoring works to be undertaken, or risk control works that are directed at preventing recurrence. I note that, in Western Australian and South Australia, the separate tasks of investigating potential contamination, undertaking clean-up and then validating that clean-up has occurred are enabled using separate notices.[26]

22.11 Occupier liability for clean-up

The EP Act[27] provides that occupiers who subsequently come into possession of a site that has been the subject of abandoned waste or contamination may be subject to recovery action for clean-up costs. It does not expressly apply to landowners who may not come into possession. This is likely to be the case when a corporate landowner is liquidated and the next occupier to come into possession may be a bank or subsequent purchaser. The provision is onerous, in that it is intended to apply in such circumstances to persons who are unrelated to the polluter or may be unaware of any clean-up. The limitation to occupiers and not landowners and occupiers is a shortcoming in the legislation that ought to be addressed.

22.12 Notification requirements

EPA enforcement staff and some businesses were concerned at a perceived lack of diligence by some licensees to report. There is no express provision requiring non-licensed premises to notify EPA of significant environmental incidents or potential offences. The scheme is heavily reliant on licensee reports or reports from the public. Similarly, it does not appear that there is a requirement to notify of contamination of land that may have preceded a person's occupation of the premises. It was suggested that Victoria adopt notification requirements which exist in New South Wales, which require the reporting of environmental incidents to the appropriate authority, regardless of whether the premises are scheduled or not[28].

Section 148 of the *Protection of the Environment Operations Act 1997* (NSW) provides:

> Pollution incidents causing or threatening material harm to be notified
>
> (1) Kinds of incidents to be notified – This Part applies where a pollution incident occurs in the course of an activity so that material harm to the environment is caused or threatened.
>
> (2) Duty of person carrying on activity to notify – A person carrying on the activity must, as soon as practicable after the person becomes aware of the incident, notify the appropriate regulatory authority of the incident and all relevant information about it.

26 For example, in South Australia, a 'site contamination assessment order' and 'site remediation order' are used while, in Western Australia, an 'investigation notice', 'clean-up notice' and 'closure notice' are used.
27 Section 62, *Environment Protection Act 1970*.
28 Protection of the Environment Operations Act 1997 (NSW)

(3) Duty of employee engaged in carrying on activity to notify – A person engaged as an employee in carrying on an activity must, as soon as practicable after the person becomes aware of the incident, notify the employer of the incident and all relevant information about it. If the employer cannot be contacted, the person is required to notify the appropriate regulatory authority.

(3A) Duty of employer to notify – Without limiting subsection (2), an employer who is notified of an incident under subsection (3) or who otherwise becomes aware of a pollution incident which is related to an activity of the employer, must, as soon as practicable after being notified or otherwise becoming aware of the incident, notify the appropriate regulatory authority of the incident and all relevant information about it.

(4) Duty of occupier of premises to notify – The occupier of the premises on which the incident occurs must, as soon as practicable after the occupier becomes aware of the incident, notify the appropriate regulatory authority of the incident and all relevant information about it.

(5) Duty on employer and occupier to ensure notification – An employer or an occupier of premises must take all reasonable steps to ensure that, if a pollution incident occurs in carrying on the activity of the employer or occurs on the premises, as the case may be, the persons engaged by the employer or occupier will, as soon as practicable, notify the employer or occupier of the incident and all relevant information about it.

(6) Extension of duty to agents and principals – This section extends to a person engaged in carrying on an activity as an agent for another. In that case, a reference in this section to an employee extends to such an agent and a reference to an employer extends to the principal.

(7) Odour not required to be reported – This section does not extend to a pollution incident involving only the emission of an odour.

Similar provisions exist in South Australia[29] and Queensland[30], for instance.

22.13 Accountability for exercise of enquiry and enforcement reports

The Act does not expressly refer to protections of legal professional privilege and is limited in its provision of the privilege against self-incrimination. One submission expressed the following concern:

> It is important to ensure that any increase in powers available to EPA and authorised officers is complemented by adequate checks and balances for the proper use of these powers.
>
> Additional mechanisms for accountability may include requirements for:
>
> - announcement upon entry to premises where practicable;
> - production of identification upon entry;
> - provision of written reports confirming entry and exercise of powers;
> - service of entry reports and notices to affected parties such as land owners;
> - requiring publication of certain enforcement actions and decisions taken by the EPA.

29 S83, *Environment Protection Act 1993.*
30 S37, *Environmental Protection Act 1994.*

22.14 Internal review

As I indicated in Chapter 17, 'Internal review', most internal review mechanisms have been provided for in statute. The Administrative Review Council has also specified other advantages in having a legislative framework for internal review.[31] Legislative provision would allow for a formal delegation of power to review officers, and allows further detail to be specified, such as the conditions under which review can occur. Further, the categories of cases amenable to review by a delegate can be delineated. It would also clarify rights to external review in relation to decisions that have been already subject to internal review.

For a legislative scheme, a number of issues would need to be addressed in the EP Act, including:

(1) The parties to the internal review: This could include the recipient of the notice or direction and EPA. Consideration could be given to third party rights.

(2) Should a request for internal review be as of right or only upon certain grounds?

(3) The internal review process: Who would conduct the review? What material can be considered? What are the time limits on an application and decision? What are the consequences of not making an application or a decision in time?

(4) The status of the internal reviewer's decision. Would it replace the original decision?

(5) What external rights of review to VCAT should exist? Should internal review be mandated prior to VCAT review?

(6) What rights (if any) should exist for a stay of a direction or order?

Consideration should be given to providing a right to internal review of enforcement decisions in the EP Act.

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.

31 Administrative Review Council, Internal Review of Agency Decision Making, Report No. 44, November 2000.

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.

Appendices 1.0

1 Gunningham N, *Compliance and Enforcement Review: A comparative analysis of a selection of domestic and international environment agencies' Compliance and Enforcement Policies*, August 2010

2 Draft Report to EPA, Environment Defenders Office, to be published.

Appendix 1.1: Terms of Reference

Review of the Environment Protection Authority's approach to regulation and enforcement

1 Background

The Environment Protection Authority is transforming its regulatory approach in order to fulfil its legislative and community mandate to protect, care for and improve Victoria's environment.

EPA has already committed to strengthen works approval, compliance, enforcement and knowledge management capabilities. It also intends to increase its prosecutions and better promote their deterrent effect.

EPA aspires to be a modern regulator, which is:

- more energetic
- more transparent
- more accountable
- more willing to be judged on its environmental performance
- willing to be challenged on its decision-making.

Accordingly, EPA has commissioned a review of its operations in order to reform its regulatory approach and its compliance and enforcement activities.

2 Scope of the review

The review will:

- consider contemporary practice of environment protection regulators interstate and internationally in order to create a framework by which EPA will become a contemporary, world-class regulator
- consolidate findings and recommendations of previous reviews – including those by the Ombudsman Victoria and Victorian Auditor-General
- seek the views of government, stakeholders and community on EPA's performance and regulatory approach
- consider whether the right regulatory tools exist and how they should be used in achieving compliance – including the role of licensing, persuasion, enforcement and prosecutions. This will include any enablers or inhibitors to their effectiveness
- make recommendations regarding any strategic themes which EPA should take into account in preparing its future strategies and business plans, including any implications for resourcing

engage the professionals and practitioners within EPA to explore their views on the balance of persuasion and enforcement, barriers and enablers, and work with EPA employees to ensure recommendations are relevant and capable of being implemented

consider jurisdictional boundaries and overlaps with EPA's work, if relevant

make any additional findings or recommendations as required.

Specifically, the review will consider and make recommendations regarding:

the compliance framework

the principles that underpin EPA's regulatory functions

the skills, training and frameworks that support good decision making in relation to compliance and enforcement

the tools and effective targeting and use of tools to achieve compliance

EPA's approach to investigation and prosecution

the systems and measures required to support these matters.

The review will have the scope to consider issues in the current legislation, if required as an enabler to the recommendations or to remove an inhibitor to any recommendations, but the review will not comprehensively review the legislation itself.

The review will inform and integrate with the reform initiatives already under way by EPA.

Appendix 1.2: List of Submissions Received During the Compliance and Enforcement Review Public Comment Period

NO.	DATE RECEIVED	NAME/POSITION	COMPANY/ORGANISATION	PUBLISHED ON WEBSITE
1	6/09/2010	Anjelka Obradovic	Individual	Yes
2	9/09/2010	Paul Rasmussen	Individual	Yes
3	16/9/2010	Geoffrey Mitchelmore OAM	Individual	Yes
4	20/09/2010	Barry La Fontaine	Barann Consulting Services	Yes
5	23/09/2010	Paul Worden	Individual	Yes
6	24/09/2010	Martin Drerup	Individual	Yes
7	8/10/2010	Dean Beckman	Tyrecycle	X
8	10/10/2010	Carol Pelham-Thorman	Individual	X
9	12/10/2010	Dr Madonna Grehan & Matthew Robertson	Individuals	X
10	12/10/2010	Dr Harry Blutstein	Integrating Sustainability	Yes
11	12/10/2010	Vivienne Filling, National Manager	The Australian Industry Group (Ai Group)	Yes
12	13/10/2010	David Burton	Individual	X
13	16/10/2010	Tina Khoury, CEO	Australian Environment Business Network (AEBN)	Yes
14	16/10/2010	Ingrid Hindell	Individual	X
15	18/10/2010	Nadia Verga	Transpacific Cleanaway (VIC Post Collections)	Yes
16	20/10/2010	Graeme Hodgson	Individual	Yes
17	22/10/2010	Betty Mitzifiris	Australian Landfill Owners Association	Yes

NO.	DATE RECEIVED	NAME/POSITION	COMPANY/ORGANISATION	PUBLISHED ON WEBSITE
18	22/10/2010	David Barkley, Manager Water Reclamation	Barwon Water	Yes
19	22/10/2010	Hannah Duncan-Jones, Director Planning & Env't	Bass Coast Shire Council	X
20	22/10/2010	Anita Ransom, Planning Policy and Projects	Cardinia Shire Council	Yes
21	22/10/2010	Brian Hauser, State Director VIC/TAS/SA	Cement Concrete & Aggregates Australia	Yes
22	22/10/2010	Bruce McClure, General Manager	Construction Material Processors Association (CMPA)	Yes
23	22/10/2010	Martin Jones, General Mgr Government Relations	CSR Limited	Yes
24	22/10/2010	Andrew and Carol Dawson	Heatherton RAID Inc.	Yes
25	22/10/2010	Jani Breider	Individual	Yes
26	22/10/2010	Peter Linaker	Individual	X
27	22/10/2010	Daniel Fyfe, State General Manager	SITA Environmental Solutions	Yes
28	22/10/2010	Cameron Herrington, Environmental Advisor	The Shell Company of Australia	X
29	22/10/2010	Melanie Brown, Policy Advisor Land Management	Victorian Farmers Federation	Yes
30	24/10/2010	Kathryn Franklin & Ross Irving	CitiPower Pty & Powercor Australia Ltd	Yes
31	24/10/2010	Suzanne Kelly-Turner	Individual	Yes
32	24/10/2010	Virginia Giles	Individual	Yes
33	24/10/2010	John Hancock	Inglewood Study Group	Yes
34	24/10/2010	Lisa Sheahan, Contract Coordinator Cleansing	Mornington Peninsula Shire	Yes

NO.	DATE RECEIVED	NAME/POSITION	COMPANY/ORGANISATION	PUBLISHED ON WEBSITE
35	24/10/2010	Margaret Donnan, Chief Executive	Plastics and Chemicals Industries Association (PACIA)	Yes
36	24/10/2010	Helen van den Berg, Secretary	Terminate Tulla Toxic Dump Action Group Inc (TTTDAG) & Friends of Steele Creek (FOSC)	Yes
37	24/10/2010	Harry van Moorst, Director	Western Region Environment Centre	Yes
38	24/10/2010	John Wilson	Member of TGCCC	X
39	25/10/2010	Steven Mourtikas, Project Mgr Remediation Mgt	BP Australia Pty Ltd	Yes
40	25/10/2010	Michael Jansen, Manager Waste Management	City of Casey	Yes
41	25/10/2010	Nicola Rivers, Law Reform Director	Environment Defenders Office (Victoria) Ltd (EDO)	Yes
42	25/10/2010	Vanessa Richardson	Individual	X
43	25/10/2010	Craig Heiner, Managing Director	North East Water	Yes
44	26/10/2010	Michele Potter	Individual	Yes
45	26/10/2010	Nick Nagle, Executive Officer	Resource GV	Yes
46	28/10/2010	Andrew Tytherleigh	Victorian Waste Management Association	Yes
47	29/10/2010	Tim Johnson, CEO to Chair	Gippsland Local Government Network	Yes
48	29/10/2010	Maria Riedl	Individual	Yes
49	29/10/2010	Tom Pikusa	Victorian Bar	Yes
50	29/10/2010	Barbara Porter	Individual	X
51	24/12/2010	Sue McLean and Catherine Jones	Geelong Community for Good Life and Bellarine Seastar	X

Appendix 1.3: Full Schedule of Compliance and Enforcement Review Consultations

Table 1: **Consultation with government, business and non-government organisations for the Compliance and Enforcement Review**

DATE	TIME	ORGANISATION	CHAIR	ORGANISER
25/08/2010	11.30am - 12.30pm	Victorian Employers' Chamber of Commerce and Industry	Stan Krpan	Wayne Kayler-Thompson
27/08/2010	2.30pm - 4.00pm	Ai Group Environment Working Group	Stan Krpan	Vivienne Filling
31/08/2010	8.00am - 9.30am	Leading Legal Practitioners roundtable (breakfast meeting)	Stan Krpan	Stan Krpan
9/09/2010	3.00pm - 4.30pm	Victorian Waste Management Association roundtable	Stan Krpan	Andrew Tytherleigh
10/09/2010	9.00am - 11.30am	AI Group broader industry workshop	Stan Krpan	Vivienne Filling
13/09/2010	2.00pm - 4.30pm	Plastics and Chemical Industry Association Members roundtable	Stan Krpan	Margaret Donnan
14/09/2010	6.00pm - 8.00pm	Environment Victoria and Environment Defenders' Office	Stan Krpan	Kelly O'Shanassy
17/09/2010	3.00pm - 4.00pm	Australian Environment Business Network Conference	Stan Krpan	Tina Khoury
4/10/2010	12.30pm - 1.30pm	Municipal Association Victoria	Stan Krpan	Rob Spence
8/10/2010	10.00am - 11.00am	Peri Urban Group of Rural Councils	Stan Krpan	Gavin Alford
13/10/2010	11.00am - 12.00pm	Sustainability Victoria	Stan Krpan	Susan Knight
15/10/2010	9.00am - 11.00am	Victorian Water Industry Association	Stan Krpan	Steve Bird
15/10/2010	2.00pm - 3.00pm	Department of Sustainability and Environment	Stan Krpan	Peter Graham
18/10/2010	5.30pm - 7.30pm	Victorian Bar	Stan Krpan	Tom Pikusa
22/10/2010	12.30pm - 1.30pm	Gippsland Local Government Network	Stan Krpan	Rachael Sweeney
28/10/2010	2.00pm - 4.00pm	Environmental Auditors	Stan Krpan	Michael Caldwell
25/10/2010		Close of public consultations		

Table 2: Open House Consultations with the community for the Compliance and Enforcement Review

DATE	TIME	WHO/ WHERE	INTERNAL/ EXTERNAL	CHAIR	EMT	STAKEHOLDER REPRESENTATIVE GROUP ATTENDEES
15/09/2010	5.00pm - 8.30pm	Portland	External/public consultation	Stan Krpan	Chris Webb	Geoff Mitchelmore
16/09/2010	5.00pm - 8.30pm	Warrnambool	External/public consultation	Stan Krpan	Cheryl Batagol, Stuart McConnell, Chris Webb	Geoff Mitchelmore, Joe Cicero
29/09/2010	5.00pm - 8.30pm	Moonee Valley	External/public consultation	Stan Krpan	John Merritt, Jason Borg, Chris Webb	Joe Cicero, Graeme Hodgson, Bruce Light
29/09/2010	5.00pm - 8.30pm	Bairnsdale	External/public consultation	Matt Vincent	Matt Vincent	Tony O'Hara, Thelma Wakelam
30/09/2010	5.00pm - 8.30pm	Traralgon	External/public consultation	Stan Krpan	John Merritt	Tony O'Hara, Thelma Wakelam
4/10/2010	5.00pm - 8.30pm	Bulleen	External/public consultation	Stan Krpan	John Merritt	Graeme Hodgson, Thelma Wakelam
5/10/2010	5.00pm - 8.30pm	Wodonga	External/public consultation	Stan Krpan	Matt Vincent	Bro Sheffield-Brotherton
6/10/2010	5.00pm - 8.30pm	Geelong	External/public consultation	Stan Krpan	John Merritt, Jason Borg	Graeme Hodgson, Bruce Light
6/10/2010	5.00pm - 8.30pm	Shepparton	External/public consultation	Stuart McConnell	Stuart McConnell	Bro Sheffield-Brotherton
7/10/2010	5.00pm - 8.30pm	Dandenong	External/public consultation	Stan Krpan	John Merritt	Bruce Light, Harry Van Moorst
12/10/2010	5.00pm - 8.30pm	Mildura	External/public consultation	Stan Krpan	Katrina McKenzie	Harry Van Moorst, Geoff Mitchelmore
13/10/2010	5.00pm - 8.30pm	Ballarat	External/public consultation	Stan Krpan	Chris Webb	Geoff Mitchelmore, Joe Cicero

DATE	TIME	WHO/ WHERE	INTERNAL/ EXTERNAL	CHAIR	EMT	STAKEHOLDER REPRESENTATIVE GROUP ATTENDEES
14/10/2010	5.00pm - 8.30pm	Bendigo	External/public consultation	Stan Krpan	Jason Borg	Graeme Hodgson, Harry Van Moorst
19/10/2010	5.00pm - 8.30pm	Altona	External/public consultation	Stan Krpan	Chris Webb, Stuart McConnell	Bruce Light, Graeme Hodgson
25/10/2010		Close of public submissions				

Table 3: Consultation with EPA staff for the Compliance and Enforcement Review

DATE	TIME	WHO/WHERE	INTERNAL/EXTERNAL	CHAIR
5/08/2010	2.00pm - 4.00pm	Pollution Response Unit (Melbourne)	Internal	Stan Krpan
18/08/2010	10.30am - 2.30pm	Traralgon office	Internal	Stan Krpan
19/08/2010	10.00am - 1.30pm	Compliance Plan Launch (RMIT)	Internal	Stan Krpan
20/08/2010	1:30pm - 4.00pm	All-staff consultation session 1 (Melbourne)	Internal	Stan Krpan
23/08/2010	9.30am - 12.00pm	Bendigo office	Internal	Stan Krpan
24/08/2010	10.00am - 1.00pm	Enforcement Unit (Melbourne)	Internal	Stan Krpan
25/08/2010	1:00pm - 5.00pm	Environmental Performance Unit (Melbourne)	Internal	Stan Krpan
26/08/2010	9.00am - 1.00pm	Geelong office	Internal	Stan Krpan
27/08/2010	9.30am - 1.00pm	Macleod office	Internal	Stan Krpan
30/08/2010	9.30am - 12.00pm	All-staff consultation session 2 (Melbourne)	Internal	Stan Krpan
31/08/2010	10.30am - 1.00pm	Dandenong office	Internal	Stan Krpan
2/09/2010	10.00am - 1.00pm	Wangaratta office	Internal	Stan Krpan
3/09/2010	9.30am - 12.00pm	All-staff consultation session 3 (Melbourne)	Internal	Stan Krpan
7/09/2010	10.00am - 12.00pm	Legal Unit (Melbourne)	Internal	Stan Krpan

Appendix 1.4: Open House Participant Assessment Data, September–October 2010

Question 1: Do you know more about EPA and the Compliance and Enforcement Review now?

No	Maybe	Yes
9.5% (22)	31.5% (73)	59% (138)

Question 2: Do you feel that you were listened to?

No	Maybe	Yes
3% (7)	16.5% (40)	80.5% (193)

Question 3: Was the Open House a good way for you to obtain information and share your ideas?

No	Maybe	Yes
9% (22)	26.5% (64)	64.5% (155)

Question 4: Were EPA staff helpful, friendly and knowledgeable?

No	Maybe	Yes
1% (3)	11.5% (27)	87.5% (206)

Overall assessment: (Where 0 is poor, 10 is excellent)

RATING	0	1	2	3	4	5	6	7	8	9	10
Number	0	5	6	5	6	23	34	66	63	27	11
Percentage	%	2	2.5	2	2.5	9	14	27	25.5	11	4.5

EPA VICTORIA

EPA Victoria

Compliance and Enforcement Review

Focus Group Outcomes Report

November 2010

The Regional Development Company Pty Ltd

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Introduction

EPA Victoria (EPA) conducted a series of 14 Open House forums throughout Victoria between 15 September 2010 and 19 October 2010. These forums provided community and stakeholder input to the Compliance and Enforcement Review being undertaken by EPA.

EPA published an Information Bulletin (Publication 1354) and a Discussion Paper (Publication 1353) to:

- Invite participation in the consultation
- Inform the consultations
- Pose a number of questions for consideration

The purpose and scope of the review is described in Fig 1.

What is the Compliance and Enforcement Review?

EPA Victoria is reviewing its approach to compliance and enforcement. The review involves a comprehensive assessment of how we educate, support and encourage business to comply and how we enforce against those that don't.

The Compliance and Enforcement Review will investigate the following areas:

- Public engagement — Consult broadly with the community and businesses to educate on regulatory approaches and better understand expectations.
- Regulatory model — Develop a new model that balances our roles of supporting people to comply, enforcing the law and influencing companies to go beyond minimum standards
- Compliance and Enforcement Policy — Develop a new policy to guide enforcement decision making
- Transparency and accountability frameworks — Develop approaches that make enforcement decisions consistent, timely, transparent and open to scrutiny and challenge.

EPA has commissioned Stan Krpan, the former Director of Legal Services and Investigations at WorkSafe (Victoria's health and safety regulator) to conduct this independent review.
Through the Compliance and Enforcement Review, EPA will seek to develop a regulatory model that will enable us to become a more effective regulator.
We want to be more:

- transparent
- accountable
- energetic
- willing to be judged on environmental outcomes
- open to scrutiny of our decision-making

Fig 1. What is the Compliance and Enforcement Review? Information Bulletin Publication No 1354

Open House sessions were one way for EPA to encourage community and stakeholders to provide input to the Review.

Each Open House had a series of information stations, supported by EPA staff members, to invite discussion about different aspects of the Review. Open House sessions ran from 5:00 to 8:30pm.

Two focus group sessions were scheduled at each Open House at 5:30 and 7:00pm. These focus groups were independently facilitated and provided an opportunity for feedback on specific aspects of the Review.

This report summarises the feedback to EPA generated by the 249 people attending the 22 focus groups at the 14 Open House sessions.

Community Reference Group

To ensure that the messages from community at the Open House sessions were accurately received, EPA established a Compliance and Enforcement Review Community Reference Group (CRG).

EPA invited community members who had had significant ongoing interaction with EPA on issues affecting local environments to nominate for membership of the CRG.

Nine people were accepted onto the CRG, five of whom were able to attend the first CRG meeting. These members established that the purpose of the CRG was to:

- Make sure EPA listens to the community
- Ensure messages are accurately recorded
- Be a conduit from community to EPA

It was agreed that the role of CRG members at the consultation sessions was to:

- Listen to what is being said/written
- Collect information about how compliance and enforcement should work
- Debrief each session with the EPA team
- If appropriate, help community members to express their views

The meeting also felt that members of the CRG at consultation sessions should not express personal views. In order to allow CRG members to provide full input to the Review, they could attend a local Open House session without the constraint of representing the CRG.

With one unavoidable exception, at least one member of the CRG attended every focus group.

Preliminary findings from the focus groups were presented to a meeting of the CRG to test the range and interpretation of feedback observed at the focus groups.

A draft of this report was discussed at a third and final meeting of the CRG on 18 November 2010. Feedback from this meeting was included in the final report.

Focus Group Methodology

The purpose of the focus groups was to give feedback to EPA on some specific aspects of the Compliance and Enforcement Review – particularly the basic models to describe the compliance and enforcement framework and the balance between education and enforcement.

The focus groups were conducted by independent facilitators from The Regional Development Company.

Attendees at the Open House sessions were invited to participate in a focus group. Most accepted this offer.

Focus group numbers varied from one to over thirty. A flexible agenda was used that comprised:

- Welcome
- Introductions
- Context – Why EPA was conducting the Review
- Discussions of three models
    - Regulatory Model
    - Compliance Approach
    - Enforcement Approach
- Summary and thank you

In some focus groups it was not possible to complete the full agenda due to the group wishing to raise other concerns with EPA.

Each focus group was attended by a member of the EPA executive who set the context for the session with an overview of why EPA was conducting the Review.

Most of the sessions (12) were attended by Stan Krpan, the consultant conducting the Review. Stan, or a member of the executive in his absence, introduced each model for discussion and then listened to the discussions. Sometimes other EPA staff were present at the focus groups, including Cheryl Batagol (EPA Chairperson), as observers of the process. Members of the CRG were introduced by the facilitator at each focus group session with an explanation of their role.

For groups below about 15, whole group discussions were facilitated. For larger groups, table-based discussions were facilitated. Most focus groups ran for 1 hour and 15 minutes.

Participants were invited to introduce themselves to the whole group (less than 15) or to their table and indicate their experiences about how EPA delivers Compliance and Enforcement. This was to help develop an understanding of their perspective. Responses were not specifically recorded.

Discussions about each model were recorded by the facilitator (whole group discussions) or by volunteer scribes at each table (table-based discussions).

This report summarises the facilitator's notes and the written table-based notes.

Appendix 1 summarises the focus group locations and attendance numbers.

Focus Group Output Summary

A wide variety of views was expressed during the focus groups on many different aspects of EPA operations. This report forms part of the Compliance and Enforcement Review and therefore concentrates on feedback from the participants. It interprets and synthesises the outcomes from the focus groups, rather than relating specific comments.

While the purpose of the focus groups was to collect feedback on the proposed regulatory, compliance and enforcement approaches, many participants took the opportunity to inform EPA of matters of concern to them.

All the feedback received is reported here because it informs EPA of the perception by concerned community and industry. It can be assumed that participants at the focus groups had stronger opinions and/or concerns about the way EPA operates than the wider community.

General feedback is reported next because it forms part of the backdrop to any new compliance and enforcement approach.

Feedback on three proposed models intended to describe EPA's compliance and enforcement then follows.

General feedback

Feedback about EPA Victoria

A number of messages were about EPA's reputation and perceived ability to do its job.

- A strong message was given that EPA is a very important organisation. Participants wanted it to be more effective and courageous in protecting community and the environment.
- Deep frustrations were expressed by some participants that EPA is failing in its duty.
- There has been a loss of trust about the ability of EPA to fulfil its role. This was expressed by industry and community participants. There was optimism that things would improve and a caution that improvements needed to be demonstrated, not just talked about.
- There is a concern that EPA is losing technical expertise thus limiting the ability to be independent and make strong decisions when enforcing regulations.
- The perceived loss of expertise affects EPA's reputation as a trusted source of independent advice in supporting industry.
- There is also concern about the lack of a visible presence of EPA, particularly in regional towns.
- There is substantial belief that EPA is showing signs of "corporate capture" e.g. forewarning of site visits and not enforcing if there is a negative impact on profitability.

People wanted EPA to take a leadership role as a regulator.

- EPA needs to re-establish trust with community and respect from industry and define its identity.
- EPA should be clear, consistent, understand its place as a regulator, and create a level playing field. It should act with rigor, transparency and effectiveness.
- EPA should be working for the environment and community.
- Community participants commonly mentioned a mistrust of self regulation.
- Pollution reporters acting as the eyes and ears of EPA must be given feedback and EPA should be accountable for the action taken on the report.
- EPA and other agencies, particularly local government, should operate in a clear consistent fashion.

- When EPA has requirements of industry, clear explanations of reasons should be given and feedback provided. "If a thing is worth doing it's worth giving feedback."

- There were messages that EPA should do its existing work better and there were concerns that it needs to take action in new areas. Numerous examples were given where small diffuse discharges should be recognised as collectively significant. Dairy effluent, oil filters, oily rags and septic tanks were mentioned.

- Many participants expressed a desire that current standards should be under review to make them stronger.

There was a strong message that mistakes of the past should be rectified as part of EPA's new Compliance and Enforcement approach.

- Many community participants were focused on existing issues that had become apparently intractable due to errors and inconsistency in EPA's approach in the past. Issues raised included those associated with landfills, urban development into industrial areas, industrial development into urban areas, standards for emissions, and failures to enforce against the EP Act.

- Concern was expressed that the Compliance and Enforcement would be focused on new issues, leaving existing issues as problems into the future.

Feedback about EPA relating with community

A large number of the community members who attended the focus groups had had a poor experience, with EPA failing to assist them effectively. Sometimes these issues had eventually been recognised as valid by EPA but this had come at great personal cost.

- Several people reported that EPA staff treated them as "the problem" when they reported issues. They found this very frustrating and disillusioning.

- A number of participants reported that a lot of people have stopped reporting pollution because they thought there would be no response.

- Noise issues in particular had caused a lot of distress for people. Inconsistent action, circular referrals (duck shoving) with no agency taking responsibility, lack of feedback, and a perception that EPA sided with industry was reported by participants.

Suggestions for improvement were that pollution reporters need support from EPA and protection against negative ramifications. They should be valued, given feedback about the progress of their report, and have a clear role.

There were concerns expressed that EPA does not focus on areas of community concern.

Many participants want to exercise their right to have input into the setting of standards and licence conditions for industries that affect them.

Community reference group models have mixed effectiveness for meeting community, business and EPA needs. Some participants spoke of examples where they worked well and others reported they were dysfunctional. They are highly valued when they work well.

Where external assessments of a situation need to be made, e.g. the long term human health impacts of low level exposure to pollution, assessments need to be made by a trusted source. The process should be transparent.

Feedback about EPA relating with industry

Participants from industry at the focus groups tended to be licence holders, waste transporters and waste processors seeking information about the proposed changes to compliance and enforcement. A number of consultants to industry also participated. There was a general sense that the loss of technical expertise at EPA has resulted in a reduction in support for industry and greater difficulty in accessing existing expertise.

- Industry needs to be confident that EPA will be fair and consistent in dealing with reports of incidents.
- Industry wants flexibility, not a rigid approach. While a single definition of "flexibility" was not apparent, aspects of recognition of past performance and differentiating between administrative breaches and actual harm to the environment were involved.
- Industry would like to be recognised in some way for past good performance.
- Industry would like "offsets" to be considered as a way to get better environmental outcomes. An example given was where the cost to improve a minor breach in one area would be better spent to give a larger improvement in another area.

Industry participants did not like having enforcement action taken against them but understood the need and wanted it applied fairly.

- Several people told stories about the hurt and anger they felt when they were treated rather poorly by EPA staff. They were not commenting on the enforcement action, rather on the way in which it was done.
- In some cases enforcement action had led to positive changes in the attitude of senior management. This occurred where enforcement notices made senior management aware of issues that had been hidden in routine processes.

Feedback about EPA relating with local government

People attending from local government tended to be environmental health officers or environment staff managing litter, waste and landfills.

- A number of landfill managers in regional towns felt that they were losing contact with local staff as EPA becomes more centralised. This led to a loss of local knowledge and understanding.
- Local government is dependent on EPA to provide support to manage landfill licence obligations.
- There should be consistency of relationships with councils.
- EPA should provide specialist training, such as landfill design and management, to local government staff.

Feedback about EPA and planning issues

It was frequently identified that poor planning processes and decisions led to problems and frustration for communities and industry. Some examples were:

- Businesses claiming a "right of prior use" as an excuse to continue poor practices and EPA not enforcing current standards
- Industry buffer zones being breached by residential development
- Industry activity growth within an industrial zone so that community was now affected
- Planning permits being unenforceable
- Residential development being allowed with septic tanks when problems already exist
- Sewerage schemes not being included in developments
- Issues associated with state borders and federal/state jurisdictions confusing the ability to take enforcement action

A role for EPA to specifically support state and local government planners to understand the ramifications of their decisions and their role in preventing future problems was identified. Some participants suggested legislative changes may be required.

Feedback about EPA's relationships with other state government agencies

Focus group participants included staff from water authorities, regional waste management groups and state government departments. Comments about relationships with other departments came from many participants. The community does not like "duck shoving".

- Where there is an overlap between the responsibilities of EPA and other agencies such as the Health Department, the boundaries need to be clear and transparent.
- Agencies undertaking work that supports EPA's objectives, such as regional waste management groups and agencies using the litter provisions of the EP Act, should be recognised and supported by EPA for the work they do.

Feedback on Compliance and Enforcement models

The feedback reported here was generated from the discussions of three proposed models intended to describe EPA's compliance and enforcement approach.

Three models (graphic representations) used to describe aspects of the proposed Compliance and Enforcement Framework were individually discussed at the focus groups after a short introduction about the intended purpose of the framework.

There were a number of comments that apply to all three models.

- The models need a set of definitions of the terms used.
- There needs to be an explanation of what each model is describing used consistently by EPA staff.
- The relationship between the models needs to be clear.

Many participants wanted to see much stronger standards than is currently the case.

EPA's Regulatory Approach

Fig 2: Regulatory approach model

There was some confusion about the relationship between the elements of this model. Was this a progression or should the elements be stand-alone activities? Would it be better arranged as a triangle with the elements interacting?

It was recognised that there was a strong interaction between the elements of this model. The uptake of "support" will be stronger if it is known that "enforcement" is likely. Leaders in a sector going beyond compliance should influence others seeking support. This interaction is not shown by the model.

As elements of the model interact with one another, there needs to be flexibility to move resources between the elements.

Aspects of support

Many people expressed views about aspects of support.

- There was a feeling that education was separate from support and should therefore be a fourth element.
- The EPA web site was an important tool to provide "support". A number of participants noted that they found the site difficult to use.
- Providing support to enable the community, as pollution reporters, to better serve as the "eyes and ears" of EPA would encourage businesses to comply.
- Businesses should be supported to report other businesses.
- It is important to build a shared sense of responsibility where community, business and other government agencies all have a role to play in supporting EPA.
- Small businesses need a lot of encouragement to improve environmental performance. Specific support is necessary because they have many individual excuses for poor performance.
- EPA staff being more visible is an important aspect of support, similar to having "police on the beat".
- There should be a clear separation of EPA support and enforcement staff to ensure a clear understanding of relationships and roles.
- Support needs to be more than just written material. "There is no point in referring me back to the same information I didn't understand in the first place."
- Support material needs to be tailored to the audience, such as industry-specific support services.
- Some problems, such as effluent management in the dairy industry, have had a lot of support to do the right thing over the years but still have a poor record. When should the balance change to enforcement?

Aspects of enforcement

Many people felt the "real" job was enforcement and that EPA should just get on and apply the law. The largest arrow on the model should be "Enforce".

Community participants frequently expressed the expectation that industry has a responsibility to know its obligation and that EPA should be much firmer in its initial responses.

The view was often expressed that enforcement is critical and needs to be skilfully applied with fairness and impartiality.

One participant from industry noted that a strong EPA would be a good thing because business will divert more internal resources into compliance.

Many participants gave the "Worksafe model" as an example of how EPA should act.

Aspects of influence

A number of participants made the observation that support and enforcement are about minimum standards while influence is encouraging performance well beyond minimums.

There was a concern expressed that if there is a concentration on support and enforcement to achieve compliance with a minimum, it is harder to encourage excellence. One person expressed this as "How do you normalise the best behaviours?"

It was noted that there is a potential conflict of interest if EPA is providing encouragement with incentives but still has a role to enforce against the same company.

Compliance Approach

Fig 3: Compliance Approach Model

Most participants seemed to find that this model did describe their experience, although some participants did not like the model at all. Some participants felt an industry sector had parts of the triangle missing or that the triangle should be distorted. Some felt that the triangle should be a diamond as most did not do the right thing.

- Individual experiences focused on the top of the triangle in many cases.
- A clear explanation of the definitions and context of the model needs to be developed as highlighted on page 11.
- This model has a strong link to the enforcement approach model.
- Quite apart from attitude, compliance needs to be focused on environment and community benefit.
- A potential gap in the model was noted by a number of participants where a person or business is ignorant of their responsibilities and therefore does not have a place in the triangle.
- The triangle may be top heavy for an industry sector in decline while for other industries it was felt they had no "top" to the triangle. A sector-specific approach may need to be developed.

- Another point made was that when improvements are required a "practicability" test is needed. Are these the best improvements for this expenditure?

Aspects of attitude

There were many comments on what affects the attitude of businesses. Most people agreed that the vast majority want to do the right thing but some will always intend to do the wrong thing. The following points were made:

- As costs increase businesses may be tempted to avoid compliance; this may lead to behaviours such as illegal dumping.
  - This was seen as a particular problem in regional areas. One example given was that the cost of proper disposal of a 20 litre drum of hazardous waste may be $30 in Melbourne and $500 in a regional town.
- Forming attitudes is a dynamic process between EPA, industries, businesses, individuals and community. If EPA staff don't begin with a "neutral" attitude the response will not be neutral and a business could be unfairly labelled.
- For licensed premises, attitudes are formed over time and are affected by changes of personnel (both EPA and business) and attitudes of management, amongst other things. It was felt that if EPA is to use an attitude-based system then businesses should be aware of where they were being placed in the model.
  - Site visits should have a defined purpose and outcomes reported back to the business.
  - Feedback should be provided on annual and other reports submitted to EPA.
- Responses to incidents need to be timely and enforcement prompt so that cause and effect are linked.
- Decision-making should be consistent, transparent and subject to review.
- EPA staff need to understand business as well as their own policies to help build constructive, respectful relationships.
- The place of a business on the pyramid should be continually assessed.
- Industry participants commonly felt that there should be recognition of good performance.

Enforcement Approach

Fig 4: Enforcement approach model

Participants generally agreed that risk needed to be part of the assessment process and that this model interacts strongly with the compliance model.

There was not clear agreement that the arrows associated with the enforcement tools on the right of the model were correct:

- Community members tended to want stronger application earlier
- Industry tended to argue for less consequences for technical breaches

Some community participants wanted recognition of cumulative impact over time included in the model.

As previously identified (page 11) there is a need for a clear set of definitions for each of the terms used.

It was a particular concern of many community participants that the standards used to measure compliance were not strong enough. They felt standards needed to be continuously reviewed to "lift the bar".

Time was mentioned as something that should be shown on this model; if there was no action over time in a particular circumstance, there should be a change in consequences.

Many participants advocated that EPA should be using the Worksafe approach to industry. This was described as having regular inspections and support to correct the situation if a fault is identified. If a second fault is identified, punishment and publicity of the breach occurs.

Aspects of amenity

Human amenity was an area of strong concern for many participants, with a feeling that inadequate attention was given to the impact on individuals and communities of amenity loss.

- Many participants felt that amenity should be a higher risk as it impacts on individual and community health.
- Some participants suggested that amenity should be described as "health and wellbeing".
- Many people expressed a view that EPA staff did not recognise the negative impact that odour and noise had on people's daily lives.

Assessment of risk

The assessment of risk was seen as a critical task with the need for clear definitions and a transparent process. There was concern, possibly a lack of trust, about methods available to assess risk.

- It was widely expressed that risk to human health should be at the top of the triangle.
- Balancing the assessment of the risk to human health against the risk to the environment was mentioned as a challenge.
- A system of assessing risk that has community input was identified as a possibility to achieve transparency and accountability.
- A frequently raised issue was how to compare the risk of many diffuse events against a single big event; some examples were:
    - Many septic tanks discharging effluent compared with a sewer spill
    - Dairy effluent discharge (unlicensed) compared with a breach of a licensed aquaculture discharge
    - Many oily rags and oil filters going to landfill compared with a leaking oil drum
- It was noted that this model did not recognise the likelihood of the impact occurring.

Aspects on the use of enforcement tools

One area where there were marked differences of opinion between industry and community participants was on the selection of enforcement tools.

- Community participants tended to say stronger enforcement should be used for minor or technical breaches.
- Business participants tended to say that even an official warning for minor or technical breaches was too strong as an initial response.
- One participant suggested that enforceable undertakings could be used for a much wider range of circumstances with "undertakings" tailored to the situation.
- It was suggested that repeat offenders should be treated as a higher risk.

Next Steps

Representatives of EPA, including Chairperson Cheryl Batagol, CEO John Merritt, and members of the Executive Management team, attended the focus groups and received first-hand feedback from community, industry and agency participants.

Stan Krpan, who is conducting the Compliance and Enforcement Review on behalf of EPA, participated in 12 of the focus groups receiving first-hand feedback.

Involvement in the focus groups has directly informed development of the Compliance and Enforcement Review.

This report will also be considered by Stan Krpan as he conducts the review. The review is due to be delivered to EPA by 31 December 2010.

Appendices

Focus Group Summary Table

Location	Date	Executive Member	Stan Krpan	CRG Members	Facilitator	Numbers FG 1	Numbers FG2
Portland	15 September	Chris Webb	Yes	Geoff Mitchelmore	RC	8	1
Warrnambool	16 September	Chris Webb	Yes	Geoff Mitchelmore, Joe Cicero	RC	16	1
Moonee Valley	29 September	John Merritt	Yes	Joe Cicero, Bruce Light, Graeme Hodgson	SB	32	
Bairnsdale	29 September	Matt Vincent	No	Tony O'Hara	RC	3	
Traralgon	30 September	John Merritt	Yes	Tony O'Hara, Thelma Wakelam	RC	16	
Bulleen	4 October	John Merritt	Yes	Thelma Wakelam, Graeme Hodgson	RC	20	2
Wodonga	5 October	Matt Vincent	Yes	Dr Bro Sheffield - Brotherton	RC	`13	1
Shepparton	6 October	Stuart McConnell	No	Dr Bro Sheffield - Brotherton	RC	4	1
Geelong	6 October	John Merritt	Yes	Graeme Hodgson, Bruce Light	CB	15	10
Dandenong	7 October	John Merritt	Yes	Bruce Light, Harry Van Moorst	RC	30	13
Mildura	12 October	Katrina McKenzie	Yes	Harry Van Moorst, Geoff Mitchelmore	RC	2	
Ballarat	13 October	Chris Webb	Yes	Geoff Mitchelmore, Joe Cicero, Sue McLean	RC	8	
Bendigo	14 October	Jason Borg	Yes	Graeme Hodgson, Harry Van Moorst	RC	15	
Altona	19 October	John Merritt	Yes	Sue McLean, Bruce Light, Graeme Hodgson	CB	25	13

Appendix 4.1: Accredited Licensee Information

Table 1.0: List of current accredited licences

EPA currently has 16 accredited licences.

LICENCE NUMBER	LICENCE STATUS	LICENCE-HOLDER
EA18869	Current	FORD MOTOR CO OF AUST LTD
EA22341	Current	TOYOTA MOTOR CORP AUST LTD
EA7	Current	BASF AUST LTD
EM20933	Current	BLUESCOPE STEEL LTD
EM29213	Current	TRUENERGY YALLOURN P/L
EM29221	Current	ECOGEN ENERGY P/L
EM29227	Current	TERMINALS P/L
EM30856	Current	NATIONAL POWER AUST INVESTMENTS LTD
EM31241	Current	LOY YANG POWER MANAGEMENT P/L
EM31466	Current	QENOS P/L
EM32171	Current	FORD MOTOR CO OF AUST LTD
EM32312	Current	ALCOA OF AUST LTD
EM32313	Current	ALCOA PORTLAND ALUMINIUM P/L
EW844	Current	MELBOURNE WATER CORP
LA122	Current	IPM OPERATION & MAINTENANCE LOY YANG P/L
LA93	Current	ECOGEN ENERGY P/L

[Source: STEP+ Corporate database, as of December 2010]

NB: several corporate licences (amalgamated licences) also contain past single site licences that are accredited. As these do not appear in the Step+ system they were not included in this table.

Table 2.0: History of revoked/surrendered accredited licences

LICENCE NUMBER	LICENCE STATUS	LICENCE HOLDER
EA135	Revoke	KEMCOR AUST P/L
EA150	Revoke	KEMCOR AUST P/L
EA82	Revoke	KEMCOR AUST P/L
EX205	Revoke	KEMCOR AUST P/L
EA23356	Surrender	COOGEE ENERGY P/L

EM31771	Revoke (corporate licence)	FONTERRA AUST P/L
EW449	Revoke (corporate licence)	CENTRAL GIPPSLAND REGION WATER CORP
EW777	Revoke (corporate licence)	YARRA VALLEY WATER LTD
EA38	EPA initiated - revoke	MOBIL REFINING AUST P/L

[Source: STEP+ Corporate database, as of December 2010]

NB: Kemcor Australia accredited licences were revoked and reissued as part of the new Qenos Corporate Licence.

Appendix 6.1: State Environment Protection Policies

State environment protection policies (SEPPs) are created under the Environment Protection Act 1970 for the purposes of providing support, depth and detail to the Act. They are aspirational documents, in that they set objectives to be met at the present time and also into the future; they are binding for organisations and businesses and community[1] (persons that don't meet their various policy obligations can be subject to enforcement action); and they guide the activities of a range of stakeholders in relation to their impacts on the environment.

SEPPs are developed based on key segments of the environment, and identify the key 'beneficial uses' of the environment and the necessary regional standards to protect these uses. All SEPPs require review every 10 years and, due to the period of drafting, may not completely reflect the current level scientific knowledge.

Air policies

- State Environment Protection Policy (Ambient Air Quality)
- State Environment Protection Policy (Air Quality Management)

Land and groundwater policies

- State Environment Protection Policy (Prevention and Management of Contamination of Land)
- State Environment Protection Policy (Groundwaters of Victoria)

Noise policies

- State Environment Protection Policy (Control of Music Noise from Public Premises)
- State Environment Protection Policy (Control of Noise from Commerce, Industry and Trade)

Water policies

- State Environment Protection Policy (Waters of Victoria)

Industrial waste management policies (IWMPs):

Like SEPPs, IWMPs are created under the *Environment Protection Act 1970* to improve the management of industrial waste and to inform stakeholders of their obligations around management of particular kinds of wastes or a particular kind of activity. IWMPs also require review every 10 years.

- Industrial Waste Management Policy (Movement of Controlled Waste between States and Territories)
- Industrial Waste Management Policy (National Pollutant Inventory)
- Industrial Waste Management Policy (Protection of the Ozone Layer)
- Industrial Waste Management Policy (Waste Acid Sulfate Soils)
- Waste Management Policy (Ships' Ballast Water)

1 Sections 39–41, *Environment Protection Act 1970*.

- Waste Management Policy (Siting, Design and Management of Landfills)
- Waste Management Policy (Solid Fuel Heating)
- Waste Management Policy (Used Packaging Materials)

Appendix 6.2: Age of EPA Published Documents

EPA has approximately 1072 publications in print. The median age of these documents (as of November 2010) is 8.4 years. The publications are broken into three dominant ages: less than five years (30 per cent); 5-10 years (36 per cent); and more than 10 years (34 per cent). Approximately one in 10 publications (76 or 7 per cent) has been actively updated with two to four revisions in the past 15 years.

Figures 1.0 and 2.0 illustrate the total number of publications by their age.

Figure 1.0: Number of EPA publication by age

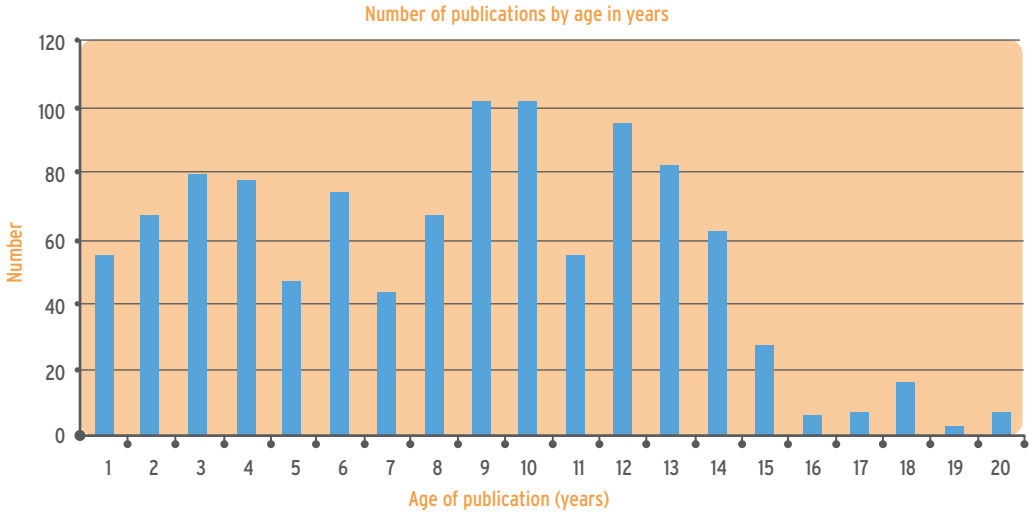
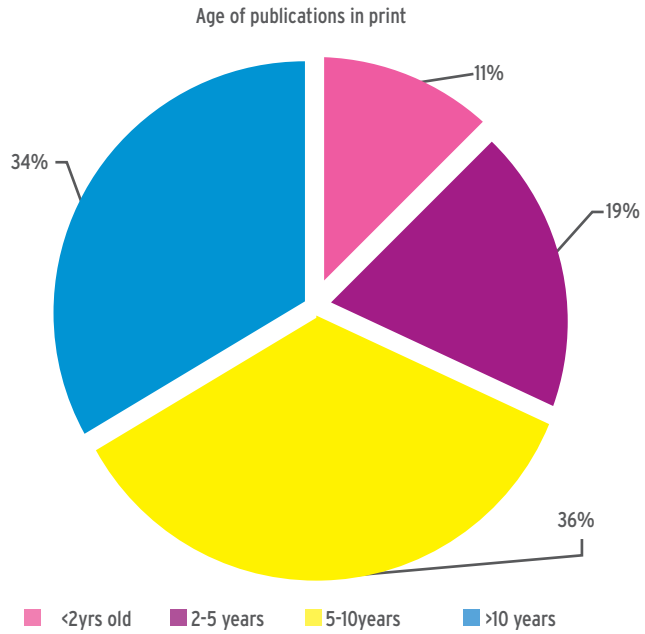


Figure 2.0: Number of EPA publication by age



This assessment of all EPA publications in print according to EPA's internal publications database was undertaken based on 'file date' of the final version of the publication. The database does not distinguish between a report, guideline or other published document.

Appendix 7.1: Definition of Key Terms

Table 1.0: Description, likelihood of harm and compliance categories

TERM	DEFINITION
LIKELIHOOD	In risk management terminology the word 'likelihood' is used to refer to the chance of something happening, whether defined, measured or determined objectively or subjectively or quantitatively, and described using general terms or mathematically (such as probability or frequency given to a period).
FREQUENCY	The number of occurrences within a given time period.
NON-COMPLIANCE	The failure to achieve performance criteria of a regulation or authority.
FAIR	Not excessive.
QUESTIONABLE	Open to doubt or challenge.
WILFUL	Intentional or deliberate.

	VIC[1] ($119.45)	TAS[2] ($120)	SA[3]	WA[4]
IMPRISONMENT	Max. period varies with offence. Highest is 7 years.	Max. period varies with offence Highest is 4 years.	Max. period varies with offence. Highest is 15 years.	Max. period varies with offence Highest is 5 years.
COURT-ENFORCEABLE AGGRAVATED POLLUTION PENALTIES	Higher penalty for intentional offences. Individual: 5,000 penalty units ($597,250) Body corporate: 10,000 penalty units ($1,194,500)	Causing serious environmental harm. (intentionally & recklessly) Natural person: 2,500 ($300K) Body corporate 10,000 ($1.2 m) (Guilty of pollution) Natural person: 1200 penalty units Body corporate: 2500 penalty units	Causing serious environmental harm. (Intentionally or recklessly) Natural person: $500,000 Body corporate: up to $2,000,000 (Guilty of pollution) Natural person: $250,000 Body corporate: $500,000	Causing serious environmental harm (intentionally or criminal negligence). Individual $500,000 Body corporate $1,000,000

Appendix 11.1: Comparison of Maximum Penalties for Pollution and Aggravated Pollution

NSW[5]	QLD[6] ($100)	NT[7]	ACT[8] ($110)
Max. period varies with offence. Highest is 7 years.	Max. period varies with offence. Highest is 5 years.	Max. period varies with offence. Highest is 5 years.	Max. period varies with offence. Highest is 5 years.
Tier 1: Individual: $1,000, 000 (committed wilfully) $500,000 (committed negligently) Body corporate $5,000,000 (committed wilfully) $2,000,000 (committed negligently)	Individual: $416,500 4,165 penalty units Body corporate Unless specified otherwise, individual criminal fine may be multiplied x 5 individual = $2,082,500	If found guilty of offence Level 1: Individual Min $25,000 Max of $250,000 Body corporate Min $250,000 Max $1,250,000	Causing serious environmental harm: Individual: Knowingly/recklessly 2000 penalty units Individual: negligently 1500 penalty units Individual: not pollute 1000 penalty units

	VIC[1] ($119.45)	TAS[2] ($120)	SA[3]	WA[4]
COURT-ENFORCEABLE POLLUTION PENALTIES	Pollution Body corporate: N/A Individual: 2400 penalty units ($286,680)	Causing material environmental harm (intentionally or recklessly) Natural person: 1200 Body corporate: 2500 (Guilty of pollution) Natural person: 600 Body corporate: **1200**	Causing material environmental harm (intentionally or recklessly) Natural person: $250,000 Body corporate: $500,000 (Guilty of pollution) Natural person: $150,000 Body corporate: $250,000	Causing material environmental harm (intentionally or criminal negligence) Individual: $250,000 Body corporate: $500,000

1 Environment Protection Act 1970
2 Environmental Management and Pollution Control Act 1994& Penalty unit & other penalties Act 1987
3 Environment Protection Act 1993
4 Environment Protection Act 1986
5 Protection of the Environment Operations 1997
6 Environment Protection Act 1994 & Penalties & Sentencing Act 1996
7 Environment Assessment Act 1982
8 Environment Protection Act 1997 & Legislation Act 2001

NSW[5]	QLD[6] ($100)	NT[7]	ACT[8] ($110)
Tier 2: If found guilty Individual: $250,000 Body corporate: $1,000,000 Tier 3 : Notices/Infringements notices – prosecutions at Tier 2	Contravention of condition Individual: (Wilfully) Level 1 authority 2000 penalty units ($200,000) Level 2 authority 300 penalty units ($30,000) Individual: (Contravention) Level 1 authority 1665 penalty units ($166,500) Level 2 authority 250 penalty units ($25,000)	Level 2: Individual: Max $100,000 Body corporate: Max $500,000 Level 3: Individual: Max $50,000 Body corporate: Max $250,000 Level 4: Individual: $5,000 Body corporate: $25,000	Causing material environmental harm: Individual: Knowingly/recklessly 1000 penalty units Individual: negligently 750 penalty units Individual: not pollute 500 penalty units

DRAFT COMPLIANCE AND ENFORCEMENT POLICY

APPENDIX 12.1 *Compliance and Enforcement Review*

1. PURPOSE OF COMPLIANCE AND ENFORCEMENT

The purpose of the Environment Protection Authority (EPA) is to protect, care for and improve our environment by preventing harm to public health and the environment.

EPA's role as the environmental regulator is to monitor and ensure compliance with the *Environment Protection Act 1970* (EP Act) and Victoria's environmental law.[1] EPA and its authorised officers are also responsible for ensuring compliance with the *Pollution of Waters by Oils and Noxious Substances Act 1986* (POWBONS Act) and *National Environment Protection Council (Victoria) Act 1995* (NEPM Act).

EPA aims to be an effective regulator that exercises its statutory authority fairly and credibly. EPA has outlined how it will discharge its compliance and enforcement powers in this policy. EPA commits itself to this policy and the principles it establishes.

EPA aims to find the right balance between the use of positive motivators and enforcement tools to achieve compliance and uphold environmental standards. This policy explains how EPA uses enforcement to achieve compliance and create credible deterrents for breaking the law.

2. PRINCIPLES: COMPLIANCE AND ENFORCEMENT

In undertaking its enforcement role EPA is guided by eight principles. The principles are relied upon by EPA in discharging its regulatory responsibility and administering the EP Act. The principles 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.

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1 Including environment protection regulations (regulations) and state environment protection and industrial waste management policies (policies).

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3. ENVIRONMENT PROTECTION – EPA VICTORIA'S REGULATORY MODEL

EPA's regulatory model is based on risk. EPA will prioritise compliance and enforcement activity and allocate resources where it can make the biggest difference by addressing the biggest risks to health, safety or welfare.

The EP Act establishes EPA Victoria and provides a framework for the prevention and control of air, land and water pollution and noise. EPA is responsible for the coordination of activities relating to discharges of wastes into the environment; the generation, storage, treatment, transport and disposal of industrial waste; and the emission of noise.

The EP Act provides broad discretion on how EPA exercises its functions and addresses the harms and impacts it was established to prevent and control. This discretion extends to how EPA prioritises and allocates its resources and how enforcement decisions are made and actions taken. EPA's regulatory model and this policy explain how EPA enforces the legislation it administers, prioritises its compliance and enforcement activity and outlines the strategies it will apply when dealing with regulated entities.

A risk-based and responsive regulatory model

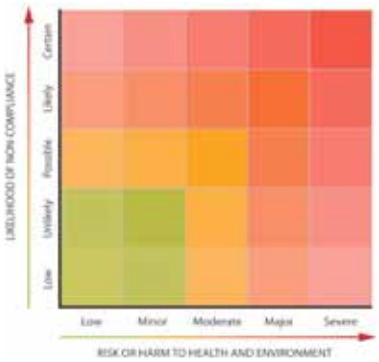
EPA will allocate resources where the biggest difference can be made or where the biggest risks to health, safety or welfare can be managed.

EPA has adopted a risk-based model where its targeting of enforcement and responses to incidents, breaches and pollution reports will change depending on the risk or harm to health and the environment.

EPA prioritises its compliance monitoring and inspection efforts towards the biggest risks of harm to the environment, and to those people and businesses that are likely to not comply.

EPA defines risk as a combination of two elements, consequence – the risk or harm to health and environment; and likelihood – the chance that non-compliance will occur.

EPA's Approach to targeted enforcement



Consequence: Risk or harm to health or environment is categorised into five levels: 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 likelihood of non-compliance also has five levels: low, unlikely, possible, likely and certain. Likelihood takes into account (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.

In undertaking enforcement arising from a risk or breach, EPA considers risk or harm and takes into account the circumstances and culpability of the offender. Culpability considers the offender's history, duration of breach, whether or not the harm is still occurring or has been abated, whether the risk was foreseeable and whether the act or omission was intentional.

The regulatory model is intended to use objective elements that can be considered in the targeting of inspection activity and other regulatory resources to those areas with the potential to cause the biggest harm. The model also enables a transparent discussion between a regulated business and EPA as to the level of attention it is likely to receive. Definitions of key terms in the model are provided in Appendix 1.

DRAFT COMPLIANCE AND ENFORCEMENT POLICY

EPA also takes into account the nature of the entities it regulates and tailors its strategies accordingly. These can be grouped as follows: (a) complex licensed premises, (b) licensed premises, (c) other business and (d) individuals.

4. OUR REGULATORY APPROACH

'Compliance' means following the law. It means obtaining the right approvals or permissions. It means conducting authorised activities in accordance with any conditions, regulatory requirements or guidelines.

EPA undertakes a range of activities on behalf of the Victorian community to achieve compliance with the EP Act. EPA uses a balanced regulatory approach with a mix of mandatory and voluntary methods.

Our approach to regulation involves a number of key steps:

A. Educate: Educating broadly to raise awareness of Victoria's environmental laws, EPA's role and to prevent harm to public health and the environment.

B. Set standards: Setting environmental standards in state environmental and waste policy, regulations and through environmental licences.

C. Support to comply: Supporting people to comply through education, persuasion, guidance and providing advice on compliance.

D. Monitor compliance: Monitoring compliance with the law and relevant standards.

E. Enforce the law: Enforcing the law independently and assertively.

F. Move beyond compliance: Influencing people through incentive schemes and collaborative actions to go beyond current regulatory requirements.

EPA believes compliance is the responsibility of businesses, governments and individuals with obligations under the law. All these parties have a social duty of care to the environment. These duty-holders are accountable to the regulator and the public to prevent and minimise environmental harm.

A. **Educate:** Raising awareness of impacts, obligations and a social duty of care

A key role for EPA is to promote awareness of environmental impacts, the law and EPA's role as the regulator broadly.

EPA will promote, on behalf of the community, its aspirations for an improved environment. EPA does this by advocating a broad sense of responsibility for environmental impacts from the activities of duty-holders – business, industry, local and state government bodies and individuals.

EPA believes all of us share a social duty of care to protect the environment and to not cause harm.

EPA places an emphasis on education and raising awareness as an effective way of encouraging people to comply. Knowledge of the law and environmental obligations increases the likelihood that compliance will be achieved and provides the basis for EPA to enforce the law.

EPA will broadly promote its enforcement strategy, compliance plan and campaigns to provide a clear warning of areas or issues it is focusing on at any time.

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B. Set standards: Providing clear and authoritative standards

EPA promotes compliance by setting clear standards and raising awareness of risks and controls to protect the environment.

EPA's role is to be clear about what the law requires and support duty-holders to achieve compliance, by setting clear standards and providing guidance on how they can be met. Standards focus on the key causes of environmental harm and seek to protect our most sensitive environments.

EPA will work with industry associations, businesses, community organisations, and local and state governments in developing standards and promoting good practice.

In order to ensure laws and standards evolve and that standards of protection continuously rise, we support duty-holders to go beyond current standards.

C. Support to comply: Providing practical, constructive and authoritative advice on how to comply

EPA promotes compliance by providing advice on how to comply with the law and, where non-compliance is detected, how to remedy the non-compliance.

A key function of EPA is to provide advice to any person who has a duty or obligation under the EP Act, regulations or policy in relation to how to comply with that duty or obligation.

EPA's authorised officers will provide practical and constructive advice on how to comply with the law and, where necessary, provide support in how to remedy non-compliance.

Compliance advice may include referring people to applicable codes of practice, best practice management guidelines, protocols for environmental management, international standards or other relevant information.

The onus for compliance will always rest with the party who has a duty or obligation under the law.

Advice provided by EPA will not provide additional rights or defences in relation to any alleged breach. However, the degree to which a party takes into account advice provided by EPA will be considered in determining the level of culpability when deciding whether to prosecute.

D. Monitor compliance: Monitoring compliance and investigating non-compliance

EPA's primary focus is on prevention; wherever possible we want to ensure that incidents of non-compliance and their impacts are avoided.

EPA strives to constantly improve its capacity to detect and respond to non-compliance. When EPA identifies or becomes aware of a problem or a risk, it seeks to resolve the problem before it leads to an impact on the environment. Monitoring compliance and investigating non-compliance is therefore a key role for EPA.

Section five of this policy provides more details on monitoring methods, the purpose of investigations and criteria for major investigations.

DRAFT COMPLIANCE AND ENFORCEMENT POLICY

E. Enforce the law: Make good the harm caused by breaches and deter non-compliance

'Enforcement' means the use of influence and statutory methods to compel compliance with the law.

The EP Act includes a range of principles to guide EPA's day-to-day activities and decisions. This policy supports the application of Principle 1K of the Act – the principle of enforcement (outlined below).

Principle of enforcement

Enforcement of environmental requirements should be undertaken for the purpose of

(a) better protecting the environment and its economic and social uses;
(b) ensuring that no commercial advantage is obtained by any person who fails to comply with environmental requirements;
(c) influencing the attitude and behaviour of persons whose actions may have adverse environmental impacts or who develop, invest in, purchase or use goods and services which may have adverse environmental impacts.

Enforcement is just one way of achieving compliance. EPA is empowered to take enforcement action when legal requirements are breached or someone has failed to comply. Requiring parties to meet their legal obligations or remedy their breach is a key part of enforcing the law.

Enforcement has two key elements:

- Remedy: Fixing the problem or 'making good'
- Punishment: Applying a sanction or penalty for breaking the law

EPA will use enforcement to address non-compliance, and to restore and 'make good' the harm caused by breaches of the law. Remedy and punishment can be used in combination, but all breaches of the law will be met with a requirement to fix the problem and make good.

i. Remedy: *Fix the problem or make good*

The first goal of enforcement is to stop breaches of the law and prevent further harm.

Stopping breaches or requiring action to prevent harm may be done, for example, through the issue of a pollution abatement notice or direction by an authorised officer.

Generally, formally bringing the breaches to the attention of a duty-holder and documenting an enforcement action is enough to fix the problem and no further action by EPA is required.

ii. Punishment: *Apply a penalty or sanction for breaking the law*

Sometimes remedying a breach is insufficient to deter lawbreakers.

In some cases enforcement can include punishment, such as when prosecution is brought for serious breaches of the law. Punishing lawbreakers is an important and effective way of deterring people from breaching their environmental obligations.

Punishment deters those who might evade their obligations or seek to profit from breaking the law. It also levels the playing field financially for those who do the right thing.

See sections six and seven for more information on compliance, enforcement measures and sanctions.

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F. Move beyond compliance: Ensure standards increase by helping people go beyond compliance

In order to ensure laws and standards evolve and that standards of protection continuously rise, we support duty-holders to go beyond minimum standards.

We support duty-holders by providing grants and incentives for people who do the right thing and go beyond current standards. This encourages others to follow leading businesses and ensure regulatory standards continuously improve.

EPA will also ensure duty-holders learn from each other, by establishing and supporting networks, holding seminars, publicising case studies and organising field visits.

5. MONITORING, DETECTING AND INVESTIGATING NON-COMPLIANCE.

EPA delivers its role by monitoring compliance and detecting non-compliance through both proactive and responsive methods and undertaking both regular and major investigations. EPA is strongly supported in detecting pollution through reporting by the public, local communities, business and other government and non-government organisations.

A. Monitoring and detecting non-compliance

Compliance is monitored and breaches detected through a number of proactive and responsive methods.

Methods used by EPA include:

- site visits and inspections
- field and desktop audits
- community, employee, duty-holder or public reports
- monitoring data and sample collections
- observations by EPA officers, other agencies or regulatory authorities
- intelligence analysis of information, data, financial records, aerial photography and reports.

More details are provided on site visits, inspections and public reporting in the following sections.

i. Site visits and inspections

Proactive site inspections are an important method by which EPA can determine compliance and prevent incidents and breaches.

EPA seeks to maximise proactive inspections, and to target areas of greatest risk and where non-compliance is most likely. EPA's position is that, during an inspection, its staff will provide feedback to duty-holders of their observations and any proposed further investigations or actions.

ii. Community and public reports

The community plays an important role in detecting and reporting pollution and potential impacts to the environment.

Information from the general public, industry, non-government organisations and other government agencies is a key source of intelligence for EPA inspections. EPA will constructively receive and use public reports, and ensure feedback is provided to reporters on any action taken and the result of that action.

EPA's pollution report line is available 24 hours a day. EPA also encourages business to establish a reporter line, to better understand and respond to impacts on neighbourhood amenity.

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B. Investigating non-compliance

All reported or detected contraventions of the law, regulations and other requirements are assessed to ascertain their priority for further compliance and enforcement action.

Prioritisation is undertaken to ensure EPA's resources are used in the most effective manner.

Initial assessment typically includes a preliminary examination and analysis of the report or allegation in order to decide the seriousness, the likelihood that a contravention has occurred and the probable consequences. Wherever possible, EPA will act to prevent a potential breach and discourage ongoing and future breaches.

Based on the outcome of the initial assessment and the relevant provisions of legislation, EPA will determine the appropriate level, if any, of further investigation or response.

i. Aim of EPA investigations

Any investigation undertaken by EPA aims to:

- determine whether a law, regulation, policy or other requirement has been contravened
- gather evidence to be admissible in criminal prosecutions or which may facilitate the use of other appropriate compliance and enforcement measures
- improve controls to prevent current and future non-compliance
- deter further or similar action to that which led to the non-compliance
- improve public confidence in the integrity of the regulatory system
- achieve an appropriate outcome within a reasonable time and at reasonable cost, according to legislative requirements and the nature of the investigation.

ii. Major investigations

Major investigations are directed at the most serious environmental incidents and breaches that are likely to warrant a prosecution or other serous response.

A major investigation is one that includes preparation of an investigation brief that will be reviewed for possible prosecution.

Investigations are undertaken in order to determine:

- compliance with the legislation
- the causes of non-compliance
- whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the law
- failings of law, policy or practice and to influence the law and guidance
- what response is appropriate to an alleged breach of the law.

Major investigations will generally commence where there has been an incident resulting in a very high impact on human health, animals, wildlife or significant ecological damage.

iii. Criteria for a major investigation

EPA considers three sets of criteria in determining whether to undertake a major investigation: (a) strategic value, (b) consequence and (c) culpability. The sum of these criteria determines whether EPA will undertake a major prosecution.

(A) Strategic value

The alleged breach:

a. occurred in a targeted sector
b. was part of a compliance program or campaign, e.g. illegal dumping
c. involved a breach of a statutory notice

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d. involved other parties including company officers, transporters, suppliers and manufacturers, i.e. parties involved upstream or downstream of the primary offender.

(B) Consequence

a. the seriousness of the alleged breach due to the harm or potential harm to the environment
b. impact on public health
c. impact on animals and wildlife
d. public concern arising from the alleged breach
e. prevalence of the offence.

(C) Culpability

a. alleged breach involves a significant falling short of accepted standards
b. environmental harm has not been cleaned up or remedied
c. history of previous notices
d. history of relevant previous incidents or persistent complaints
e. deliberate behaviour or recklessness contributing to the alleged breach
f. alleged breach and consequences were foreseeable
g. the length of time during which the alleged breach continued
h. recency of, or time elapsed, since the alleged breach.

iv. Situations leading to a major investigation

Some situations will generally warrant a major investigation due to their seriousness.

Examples of where major investigations may be undertaken include:

- a waste discharge continues after a licence is suspended or revoked, or transport of prescribed waste continues after a permit has been suspended or revoked
- repeated offences warranting infringement notices have occurred
- failure to comply with a notice (e.g. pollution abatement notice or clean up notice) or other lawful direction by an authorised officer
- failure to comply with a direction given by an authorised officer in a situation of imminent danger
- obstruction, assault[2], intimidation or attempt to bribe an authorised officer has taken place
- false or misleading information, obstruction, or interference by the alleged offender
- fraud or a breach that undermines a market mechanism or scheme in the legislation (e.g. non-licensed premises, no financial assurance, avoidance of levies)
- failure to notify (where this is required by law or a licence)
- the nature of the offence and action or attitudes of the alleged offender indicate that an infringement notice is unlikely to act as a sufficient deterrent (e.g. deliberate contravention, contravention despite advice or warning given by an authorised officer).

If, after investigation, it is determined that an offence appears to have been committed, enforcement action will be taken. This may involve prosecution or the issuing of a penalty (see sections six and seven). Decisions to prosecute are taken in line with section seven of this policy and the Director of Public Prosecution's Prosecution Policy and Guidelines.

iv. Communicating investigations and progress

2 Any assault on an authorised officer will be referred to Victoria Police.

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EPA will regularly communicate the progress of investigations to persons under investigation or affected community members.

At the conclusion of an investigation, EPA will explain the outcomes and why any action is being or is not being taken.

6. COMPLIANCE AND ENFORCEMENT MEASURES

The following measures are available to EPA to enforce the law and respond to incidents of non-compliance.

A. Compliance advice

Advice from EPA officers are given in writing or confirmed in writing.

Advice may be given by an EPA authorised officer where:

- the degree of harm or potential harm to the environment or human health and welfare is minimal
- breaches of works approvals, licences, notices, permits, regulations and policies are of a administrative nature, with no material impact.

Advice is an effective way of dealing with minor issues or risks where simple, immediate or short-term action can be taken by a duty-holder to comply. An example of where advice may be provided is where non-compliance can be immediately remedied in the presence of the officer.

B. Warnings

Warnings from EPA officers are given in writing. In the first instance, the warning may be given verbally, but this will be confirmed in writing as soon as possible.

Warnings may be given by an EPA authorised officer where:

- in the interests of fairness, a warning is warranted to signal that further non-compliance will result in an escalating enforcement response
- the degree of harm or potential harm to the environment or human health and welfare is minimal
- breaches of works approvals, licences, notices, permits, regulations and policies are of a administrative nature, with no material impact.

In determining whether to give a warning, the authorised officer may consider (i) whether the duty-holder has a good history of compliance and (ii) whether the duty-holder has taken reasonable steps to remedy the situation and prevent a recurrence of the breach.

Failure to comply with a warning will be documented and considered in further enforcement action.

EPA will maintain a public register of warnings issued by authorised officers.

B. Oral or written directions by an authorised officer

Where there is imminent danger to life, limb or the environment, an authorised officer may give directions.

Directions require a person to remove, dispose of, destroy, neutralise or treat any pollutant, waste, substance, environmental hazard or noise.

Because of the emergency nature of these situations, such directions will normally be given verbally in the first instance. Verbal directions will be confirmed in writing as soon as possible.

Failure to comply with directions in the above circumstances without reasonable cause is a serious offence and may result in prosecution.

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C. Statutory notices and directions

Notices will be issued where works or actions are required to control risk, prevent further harm or comply with the law and they cannot be completed while the EPA officer is still present.

Notices and directions, such as pollution abatement notices, are legal directions to carry out works, cease activities or carry out investigations.

Statutory notices are not punishments. Notices seek to ensure there is a formal record that EPA has required action to remedy a risk or prevent further harm, and that people are treated consistently. They will often hold recipients to a given time frame to comply with the requirements. Notices are not generally issued for minor risks.

Generally, three types of notices are applied by EPA:

(i) minor works pollution abatement notice (these require immediate action)

(ii) pollution abatement notice (requiring action after 30 days)

(iii) clean-up notice (requiring action after 30 days).

Authorised officers will advise recipients of a proposed notice prior to its issue. Where the situation allows, an officer will consult on its draft contents, including the timeframe for compliance.

Notices may be accompanied by other enforcement measures, such as an infringement notice or prosecution. Failure to comply with a notice will lead to enforcement.

D. Infringement notices

Infringement notices are a way of dealing with common breaches of the law where the impacts are not considered serious enough to warrant prosecution.

An infringement notice imposes a financial penalty for breaches of the law or EPA requirement and can be issued by an authorised officer. Schedule A of the EP Act sets out the specific offences for which an infringement notice can be issued and the value of the penalty.

Offences for which infringement notices may be applied are of a well-defined nature and usually present a low level of danger to the environment and human life. Examples are:

- failure to comply with waste transport regulations
- littering, including dropping a lit cigarette butt from a vehicle
- motor vehicle (noise or emissions) offences.

Where use is appropriate:

Infringement notices are generally appropriate where the following criteria are met:

a. the breach is minor, a one-off situation or easily remedied

b. the facts are apparently indisputable

c. inspection discovers a breach that should have been prevented by normal operating procedures

d. an infringement notice is likely to act as a deterrent.

Where use is inappropriate:

Infringement notices are generally not appropriate where:

a. large-scale environmental damage has occurred

b. the breach is continuing and has not been remedied

c. substantial breaches of notices or other EPA directions are involved

d. the penalty would be inadequate for the severity of the offence

e. a warning is appropriate, in accordance with the criteria in this Policy

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f. a prosecution is appropriate in accordance with the criteria in this Policy (e.g. for repeated offences or an offence where no reasonable steps were taken to remedy the situation)

g. an offence leads to an additional offence for which an infringement notice is not available (e.g. unlicensed discharge resulting in pollution).

Resolving an infringement notice

The recipient of an infringement notice has the option of paying the penalty within a given time or appearing in court to answer the charges. Payment of the penalty resolves the matter and avoids the recording of a criminal conviction. The fine process is outlined below.

Within 28 days of the date stated on the infringement an individual can choose to do one of the following:

a. Make payment: pay the penalty in full or request an extension of time to pay
b. Seek internal review: see 'internal review of an infringement' section below
c. Appeal: apply to have the matter heard in a court.

With regards to a litter fine:

- If no action is taken within 28 days, a courtesy letter will be sent advising of additional costs that have been incurred. An individual can then choose to (a) pay the new amount in full or (b) apply to have the matter referred to a court.
- If no action is taken within 28 days of the date of the courtesy letter, EPA will refer the mater to the Infringements Court, a branch of the Magistrates' Court of Victoria. Once referred to the Infringements Court, payment can no longer be accepted and EPA can no longer deal with the matter.

With regards to an infringement notice,

- If a penalty is not paid within the specified time, EPA will initiate prosecution proceedings.
- If a person elects to have the matter heard in court, proceedings are commenced in the criminal jurisdiction of the Magistrates' Court.

Internal review of an infringement

The *Infringements Act 2006* provides for an internal review of a decision to issue an infringement notice. The review is undertaken by a party separate to that which issued the fine. The right of review is limited to the following grounds of appeal:

(i) a mistake of identity

(ii) the decision was contrary to law

(iii) special circumstances (defined in the Infringements Act, such as mental or intellectual disability) apply

or

(iv) that exceptional circumstances should excuse the conduct for which the infringement notice was served.

In the case of a litter fine, an individual may dispute the penalty by providing evidence to EPA's satisfaction that someone else deposited the litter.

E. Notices of contravention

A notice of contravention formally advises the recipient of a contravention of a legal requirement and applies a daily penalty.

A notice of contravention will be issued where there is a substantive ongoing contravention and it is envisaged that further enforcement action is required. The recipient of a notice becomes liable at prosecution to substantial daily penalties for every additional day the contravention continues. The issue of

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a notice of contravention indicates that EPA considers any further breach a serious offence. Notices may be a precursor to prosecution or a statutory injunction to restrain further breaches.

7. SANCTIONING

In some cases, due to the nature of a breach or history of an offender, a sanction or punishment should be responsive and take into account what is required for the particular offence and offender.

EPA supports 'responsive sanctioning' that complements its compliance and enforcement activities. This concept seeks to use punishment constructively to achieve improved environmental outcomes. It is particularly relevant to the use of enforceable undertakings and court-imposed alternative penalty orders. Alternative penalty orders allow the Court to require an offender to carry out a specified project to restore or enhance the environment, rather than issue a fine.

The principles governing responsive sanctioning aim to:

- be responsive and consider what is appropriate for the particular offender to change the behaviour of the offender
- eliminate any financial incentive of non-compliance by recapturing the economic benefit of delayed or avoided compliance
- be proportionate to the nature of the offence and the harm caused
- make good or reduce the harm caused by a breach, where appropriate
- deter future non-compliance by the offender
- educate others about the potential consequences of breaking the law.

A. Prosecutions

Prosecutions will be undertaken for the most serious breaches of the law and where other enforcement measures are inadequate to ensure ongoing compliance.

The decision on whether to bring a prosecution for a breach of environmental laws is significant, as the effect on those impacted by the decision (the defendant, the community) will be considerable.

Environmental offences are generally indictable or serious criminal offences. EPA must operate within a broader prosecutorial framework as part of the criminal justice system. This requires the highest standard of integrity to be applied to prosecutorial decision making.

In cases where there are several possible defendants, EPA may prosecute one, some, or all parties, depending on the circumstances. If a corporation has broken the law, section 66B of the EP Act also holds individual directors and those concerned in the management of the corporation guilty, subject to some defences.

Criteria for a prosecution

In determining whether or not to prosecute, EPA adopts the guidelines of the Director of Public Prosecutions (DPP).[3] Three tests set by the DPP guidelines need to be met.

A. Sufficient evidence exists:
   - The existence of a *prima facie* case
   - Evidence is sufficient to justify the institution of proceedings

B. Prospect of conviction:

3 In particular, Policy 2: the Prosecutorial Discretion, available at www.opp.vic.gov.au.

- There needs to be a reasonable prospect of conviction, that is, an evaluation of how strong is the case is likely to be when presented in court.

  This takes into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter, and the admissibility of any confession or other evidence, and any lines of defence available to the defendant.

C. Public interest considerations, including but not limited to:

- Seriousness or, conversely, triviality of the alleged offence or whether it is only of a technical nature.
- Any mitigating or aggravating circumstances.
- The characteristics of the alleged offender – any special infirmities / medical conditions, prior compliance history and background.
- Consideration to its impact, the age of the alleged offence.
- The degree of culpability of the alleged offender.
- Whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute.
- The availability and efficacy of any alternatives to prosecution.
- The prevalence of the alleged offence and the need for deterrence, both specific and general.
- Whether the alleged offence is of considerable public concern.

Criteria for a prosecution against a director or manager

Company officers are responsible for environmental protection. They, and not just the company, may be personally accountable if their company fails to comply.

EPA regards anyone who has the capacity to make decisions, or participates in making decisions, that have a real or direct influence on an organisation's policy, planning or financial standing as a company officer. A person who only has responsibility for implementing those decisions will not be regarded as an officer. In addition, the following matters will be considered in deciding whether or not to prosecute company officers:

a. Whether the person exercised due diligence in the performance of the company and actions to prevent the incident, including:
   i. the officer's degree of knowledge
   ii. the officer's capacity for decision making
   iii. the actions or inactions of others
   iv. any other relevant matter.
b. Whether the officer failed to take obvious steps to prevent the incident.
c. The degree of culpability involved in the officer's behaviour.
d. Past advice or warnings provided to the officer regarding matters leading to the incident, or whether the officer should have reasonably known about past advice or warnings.

Considering the above criteria, it will be rare that a manager who is not an officer will be of a sufficient level of authority or influence to attract criminal liability.

Appeals

EPA may seek to appeal sentences imposed on environmental offenders.

Appeals are brought by the Director of Public Prosecutions in the public interest, on recommendation by EPA. Appeals will only be sought where there is a reasonable prospect of the appeal succeeding, such as where a penalty imposed by a court is considered manifestly inadequate.

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EPA will be guided by the principles set out in the Director of Public Prosecution's Prosecution Policy and Guidelines.[4]

B. Suspension or revocation of licence or permit

Suspending or revoking a licence or permit removes the ability for a licence-holder or waste transporter to operate, either temporarily or permanently.

A licence may be granted by EPA authorising the discharge or handling of waste. The licence-holder is required to comply with the conditions of the licence. Similarly, the holder of a waste transport permit is responsible for complying with the conditions of the permit.

EPA will consider suspending a licence or permit where the holder:

- has failed to pay the annual fee or if applicable, landfill levy
- has a history of repeated breaches of licence conditions
- repeatably fails to submit an annual performance statement (APS) on time or in the required form
- fails to provide evidence or respond to requests for information relating to purported compliance in an their APS
- obstructs or fails to respond to a direction from an authorised officer

or

- subject to a financial assurance requirement, has failed to provide it to the satisfaction of EPA.

A licence or permit suspension may be for a specified period or until the fulfilment of any specified conditions.

EPA will consider revocation of a licence or permit where:

- the licensee or permit-holder has a history of serious breaches of licence conditions
- the licensee or permit-holder has been convicted of an offence against the EP Act and in the opinion of EPA is no longer a fit and proper person
- serious breaches continue to occur after prosecution

or

- EPA cannot be assured that the premises will continue to be safe

EPA will accord the licensee or permit-holder procedural fairness before deciding whether or not to proceed with suspension or revocation. EPA will give notice to the holder its intention to suspend or revoke the permit or licence, and the grounds for suspension.

The licence- or permit-holder will be given a reasonable opportunity to show cause as to why the proposed suspension or revocation should not occur. Any decision to suspend or revoke by EPA will take into consideration any submissions made by the holder of the licence or permit.

C. Injunctions

EPA can apply for an injunction from the Supreme Court to stop a person contravening the EP Act or a condition of a licence, notice, works approval or permit.

Whether or not prosecution proceedings have been taken, EPA can consider making an application to the Supreme Court for an injunction to restrain any person from contravening the law or requiring them to comply with the law or statutory instrument.

An injunction can be used to restrain a contravention of a works approval, licence or notice where there is an urgent and serious environmental problem. Injunction can also be sought where other enforcement measures have not been effective.

4 In particular, Policy 11: Appeals by the DPP to the Court of Appeal, available at: www.opp.vic.gov.au.

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D. Enforceable undertakings

An enforceable undertaking is a constructive alternative to prosecution. It allows an alleged offender to voluntarily enter into a binding agreement to undertake tasks in settlement of a contravention of the law.

The objective of an enforceable undertaking is to implement systemic change within a business or by an individual to prevent future breaches of the law. The actions in an enforceable undertaking must deliver benefits to a business, industry sector or community which go beyond mere compliance with the law.

EPA will only accept an undertaking when it is the most appropriate form of enforcement response and will achieve a more effective and long-term environmental outcome than prosecution. An independent advisory panel provides advice to EPA on proposed undertakings.

8. PUBLICATION OF ENFORCEMENT INFORMATION

EPA's role includes communicating its enforcement activities to the community.

Where EPA undertakes enforcement it will make information publicly available regarding the offence, the offender, EPA's action and the action of the polluter to resolve the issue. This information will be published on EPA's website.

The website will include various types of enforcement, including abatement notices, infringements, directions or prosecution, and will ensure that the community affected by pollution is aware of action taken by EPA. All prosecutions undertaken by EPA will be made public with an accurate account of the case provided on our website and a summary in our Annual Report. Any enforceable undertaking will be publicised and a copy published on our website. All active investigations will also be identified.

All published information will be accurate and measured.

This public disclosure forms an integral part of both specific and general deterrence and will include the name of the company, director or individual against whom the abatement notice or infringement notice has been issued or in relation to whom a prosecution has been launched, the nature of the infringement or offences committed and the geographical area affected.

9. DECISION-MAKING FRAMEWORK FOR ENFORCEMENT ACTION

When deciding what enforcement action is appropriate, EPA will consider the level of harm, risk of harm, likelihood of non-compliance and culpability of the offender.

The following framework will guide EPA and its authorised officers when undertaking enforcement action. The framework seeks to ensure consistency in enforcement actions and predictability for the community or anyone with a duty or obligation under the law.

The framework does not provide a definitive guide to the exact enforcement approach adopted by EPA, but gives an indication as to how the severity of EPA's response will change to take account of:

- the harm and impact caused by any breach
- the level of culpability of the regulated entity

The principles and criteria detailed in this policy will be used in determining the most appropriate enforcement action for a given situation.

EPA enforcement response

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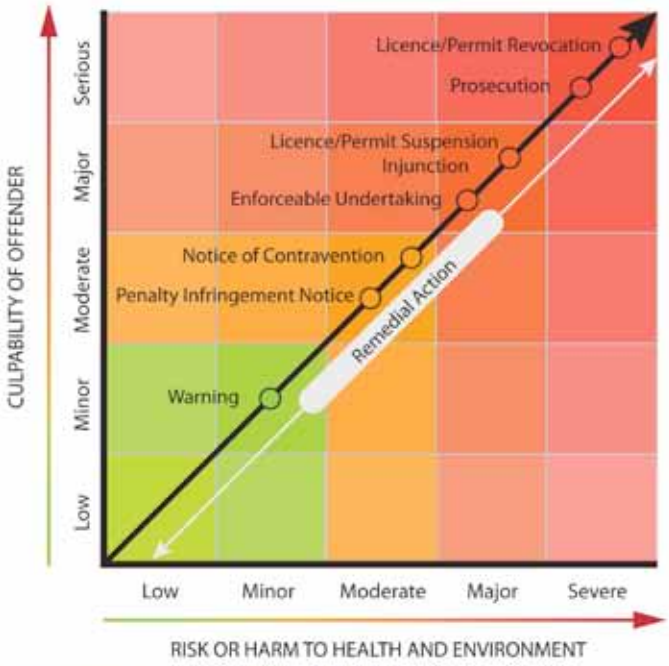
Serious

Intentional: Repeated non-compliance, past convictions or deliberate or wilful act. Acted with no regard to harm or prompted by financial motive to make a profit or save incurring an expense. Non-compliance of long duration (years) and is still occurring. Risk was obvious and preventable. Non-complianceinvolves a significant falling short of accepted standards or involved misleading conduct.

Major

Reckless: Regular / repeated non-compliance, past enforcement activity or breaches of related environmental law. Acted recklessly – knowing harm would result but gave no thought to risk despite obvious consequences. Non-compliance of long duration (years), risk was foreseeable and easily preventable. Concerns of employees or others ignored and non-compliance due to a significant falling short of accepted standards. Harm has not been abated. No clean up or remedial action undertaken.



Low No or minimal environmental or amenity impact, or no health impacts.

Minor Transient environmental impact or transient amenity impact on few. Low potential for health impact or low public concern.

Moderate Medium level or term of actual or potential harm to health, safety, welfare or the environment. Localised and short term amenity impact on many or moderate public concern.

Major Actual or imminent serious environment harm, or actual high level harm or potential harm to health, safety or welfare. Medium to long term or wide scale amenity impact, or high public concern.

Severe Permanent or long term serious environmental harm, or actual or potential life threatening or long term harm to health, safety and welfare. Long term and wide scale amenity impact with the potential to impact on health or high level of public concern.

Moderate

Knowing: Past isolated non-compliance, relevant incidents or persistent complaints. Disregard of risks, acted knowing that harm could result. Non-compliance of medium duration (months), risk was foreseeable and whilst difficult to prevent was preventable. Non-compliance occurred due to poor standards of operation. Harm abated, clean up and remedial action initiated.

Minor

Negligent: Past non-compliance reported or found. Little apparent regard to risk of harm with or without knowledge of risks caused by actions despite no intention to cause harm. Non-compliance of short-medium duration (weeks), difficult to predict and prevent and occurred despite reasonable standards of operation. Harm abated, partially cleaned up and remedied.

Low

Low culpability: No history of non-compliance and a genuine lack of awareness or understanding of obligations existed. Non-compliance of short duration (days), could not have been predicted or prevented and occurred despite high standards of operation. Harm abated, cleaned up and remedied.

Draft Compliance and Enforcement Policy

Appendix 1 – Risk or Harm & Likelihood of Non-Compliance

EPA's approach to targeted enforcement

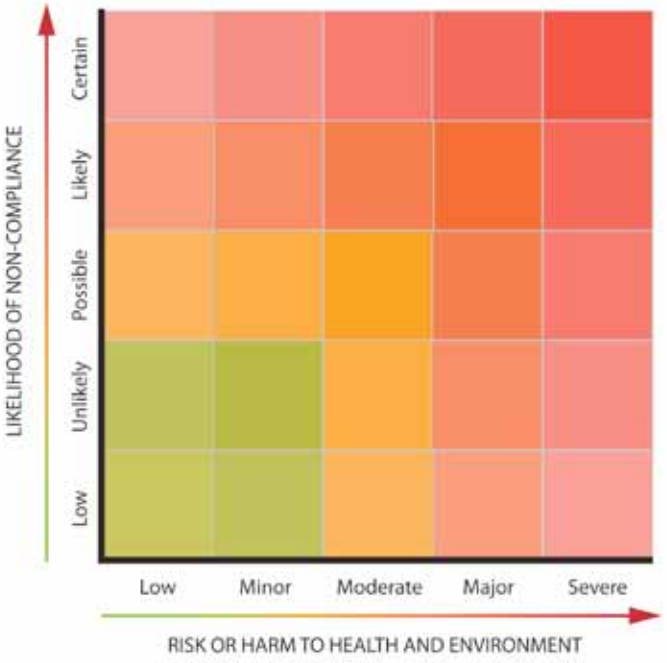
Certain
Repeated unlawful behaviour and more than likely not to make an effort to comply. Refusing to comply, furnish required information or intentionally including false or misleading information.

Likely
Wilful non compliance. Little or no demonstrated assurance and/or capacity to meet regulatory requirements. No attempts to identify or control environmental risks.

Possible
Numerous previous occurrences of non compliance. May not make adequate effort to comply. Little or no awareness of and/or capacity to meet regulatory requirements and, identify or control environmental risks.

Unlikely
Fair record with previous isolated occurrences of non compliance. Questionable awareness of and/or capacity to meet regulatory requirements and, identify and control environmental risks.

Low
No previous occurrence of non compliance. Good demonstrated awareness of and/or capacity to meet regulatory requirements, and identify, eliminate or control environmental risks. Co-operative attitude. Consistently do the right thing.



Severe	Permanent or long term serious environmental harm, or actual or potential life threatening or long term harm to health, safety and welfare. Long term and wide scale amenity impact with the potential to impact on health or high level of public concern.
Major	Actual or imminent serious environment harm, or actual high level harm or potential harm to health, safety or welfare. Medium to long term or wide scale amenity impact, or high public concern.
Moderate	Medium level or term of actual or potential harm to health, safety, welfare or the environment. Localised and short term amenity impact or moderate public concern.
Minor	Transient environmental impact or transient amenity impact on few. Low potential for health impact or low public concern.
Low	No or minimal environmental or amenity impact, or no health impacts.

Appendix 12.2: Comparison of International Environmental Compliance and Enforcement Guidelines, Gunningham 2010

A comparative analysis of the existing state and federal environmental compliance and enforcement policies of the United Kingdom, Florida, the United States and the Netherlands.

	UK	FLORIDA	NETHERLANDS	US
GENERAL				
Prosecution guidelines exist?	YES	NO refer: The Prosecutor's Guide to Environmental Crimes	YES Dutch Public Prosecutions 'Environmental Strategy'	NO
Related compliance/ enforcement policy?	YES	YES	YES Compliance Strategy of the Ministry of Housing Spatial Planning and the Environment, The Compliance Strategy in the Netherlands, National Strategy for Environmental Legislation Enforcement, Decisiveness in Enforcement	YES OECA: National Program Manager Guidance EPA: 2006-2011 EPA Strategic Plan: Charting Our Course
Other related policy	YES Guidance for the Enforcement and Prosecution Policy	YES Settlement Guidelines for Civil and Administrative Penalties	YES Environmental Compliance and Enforcement Indicators in the Netherlands,	YES multitude of very specific policy documents

	UK	FLORIDA	NETHERLANDS	US
Guidelines published externally?	YES	YES	YES - Compliance and Enforcement NO - Prosecution Guidelines	YES
Purpose of policy	Ensure a consistent decision making process and enforcement responses can be justified.	Public education and staff guidance to achieve a rational, fair and consistent method for compliance and enforcement.	Policy and enforcement must together promote compliance, essential to this is agreeing on the rules to be assigned highest priority, how compliance can be achieved most effectively and where the compliance responsibilities lie	Encourage innovation and provide incentives for government, business, and the public that promote environment stewardship and long-term sustainable outcomes
Objective	Provide a better environment for the present and the future.	To resolve violations of Florida's environmental requirements effectively and return violators to compliance as quickly as possible	Bring about demonstrably better compliance with the Ministry's policy and with legislation	Protect human health and the environment by ensuring compliance through enforcement, prevention, and promotion of environment stewardship

	UK	FLORIDA	NETHERLANDS	US
Guiding principles	Proportionality, Transparency, Consistency, Targeting, Accountability	Compliance is essential to environment and public health protection.	Risks (where is the quality of the human environment at risk?), Non-compliance rate (who is failing to comply and why?), Priorities (highest priority to areas of greatest risk and non-compliance rate), Reasons for non-compliance, Smart Enforcement, Cooperation (Define clear common goal), Feedback	Responsible stewardship (sense of responsibility and ownership that goes with not only meeting, but exceeding regulatory requirements), sustainability, accountability, collaboration between government and tribal partners, minimise or eliminate pollution
Intended audience	Staff, does not state further.	Settlement Guidelines: internal staff Website Info: the public	Policy makers, Inspectorate, the public, companies and authorities	EPA staff, state, local and tribal environmental regulatory agencies, stakeholders
General approach	Prevention is better than cure	DEP promotes compliance through collaborative and educational approaches and also through enforcement.	Dutch government instructions: professional, responsive and transparent. (government position papers: Framework for Supervision, and High Level Enforcement)	Strong enforcement is important and a priority focus. But also innovative Partnerships to minimise or eliminate pollution before it is generated.

	UK	FLORIDA	NETHERLANDS	US
Cooperative action	YES Encourages individuals and businesses to put the environment first and to integrate good environment practices into normal working methods	YES develops rules with public input, provides technical assistance and public education	YES Efforts by different organisations should involve cooperation and defining clear goals and jointly taking responsibility	YES Share compliance assistance tools and opportunities within the regions with other assistance providers incl. states, tribes, trade associations etc (Environment Justice Action Plans)

	UK	FLORIDA	NETHERLANDS	US
Monitoring and review mechanisms **(internal/external?)**	YES Internal implementation and effectiveness will be monitored by the Environment Agency	YES external Larger Penalties (including those over $25,000 etc) require Office of General Counsel to review to determine whether they are consistent with policy	YES Internal The VROM Inspectorate will share its experience with the policy directorates, who will want to know to what degree policy and legislation are being observed and whether they are enforceable, executable and fraud resistant. 'Solutions to old problems are not necessarily the right solutions for new problems'	YES External ie. Inspector General evaluated CA112(r) program and program was appropriately amended and conducting reviews under the State Review Framework (SRF) and Oversight Inspections and National Environmental Policy Act (NEPA) review Internal OECA regularly assesses effectiveness of programs

	UK	FLORIDA	NETHERLANDS	US
Management of discretionary powers of authorised officers	Transparency 'making clear why an officer intends to, or has taken enforcement action'	Settlement Guidelines provide guidance in determining the agency's position in settlement negotiations	VROM Inspectorate under the authority of the Public Prosecution Service (Joint Public Prosecutors) Detailed role of Inspectorate in 'Decisiveness in Enforcement'	YES EPA inspector to observe, judge and coach/inform state inspector
Incentives to encourage business to exceed compliance requirements?	NO	NO	NO	YES various compliance incentive programs to go beyond compliance. Small Business Compliance Policy, Audit Policy (Self-Policing Policy), Corporate-wide auditing agreements
INVESTIGATION/ REFERRAL CRITERIA				

	UK	FLORIDA	NETHERLANDS	US
Criteria for: (i) assessment (ii) prioritisation (iii) prosecution priorities	Very detailed list of offences and action to follow in Guidance for the Enforcement and Prosecution Policy	YES Three levels of environmental harm (minor, moderate and major) and three levels of deviation from legal requirements (minor, moderate and major)	Two tracks: The task-oriented track (inside-out, beginning with: what rules must be enforced) The problem-oriented track (outside-in, beginning with: what risks exist for sustainable environment?)	NO 'Exploratory investigations' to confirm the suspected problem's existence, refocus attention on more serious or additional problems, reveal underlying causes or find the problem does not exist
High level of culpability	**YES**	YES	Not mentioned	Not mentioned
– Reckless/ negligent	**YES**	YES	Not mentioned	Not mentioned
– Knowledge	YES forseeability	YES top of penalty ranges	YES ...of the regulations	Not mentioned
– Intent	YES	YES Deliberate - top of penalty ranges	YES deliberate	Not mentioned
– Recidivist (repeat offender)	**YES**	YES	YES 'Isolated incident'	Not mentioned

	UK	FLORIDA	NETHERLANDS	US
– Efforts to comply considered	YES	YES	YES 'Loyalty and obedience', 'otherwise good record... willing to take remedial action immediately'	Not mentioned
Non-compliance with notice/direction	YES - normally prosecute	YES 'History of Non-Compliance'	YES 'Ongoing'	Not mentioned
Balance strategically with cost considerations?	YES Proportionality – balance of action to protect environment against risks and costs	YES in some cases the benefits are not worth the costs and effort necessary to recover a penalty	YES Cost/benefit ratio	YES Work with industry sectors to save costs associated with existing and alternative pollution prevention technologies and processes
ENFORCEMENT				

	UK	FLORIDA	NETHERLANDS	US
Role of enforcement mechanisms	provide punishment to deter future, restore harm caused, bring under regulatory control, prevent, stop or restrict activity, eliminate financial gain or benefit from non-compliance	In all cases, ensuring the violator fixes the problem and comes back into compliance is the first objective. Punishment for non-compliance, deterrence to violator and others.	'Enforcement means putting words into action.' By enforcing the laws and regulations the government demonstrates its credibility. Compliance enforcement is focused on changing the behaviour of the regulatee (sic) so he or she will comply	To correct violations and deter future non-compliance
If contravention observed <u>something</u> must be done?	Where available	Not stated	YES 'decisive action against every infraction'	NO Aggressively go after pollution problems that make a dif in communities, target most serious offences
Warnings	**YES**	Not mentioned	YES	

	UK	FLORIDA	NETHERLANDS	US
Factors determining response/ enforcement criteria	both preventative/ remedial action and criminal enforcement will be taken, unless minor offence (no criminal enforcement)	Severity of violation, recidivist, inadvertent or willful, can site or facility be brought back to compliance without formal enforcement, potentiality of quick remediation of environment damage, violator responding in good faith Does enforcement eliminate any economic benefit gained from violation, is enforcement enough of a financial disincentive to future violations?	Smart enforcement: What are the reasons for non-compliance? How necessary is intervention? How broadly should intervention be? How will regulated parties react to certain interventions? 'Actions taken should depend on individual situation.'	Environment Justice Action Plans (considerations for minority and low-income populations)
Specified penalties?	To an extent: Considerable scope (i.e. magistrates; up to 6months imprison and/ or £20,000)	YES *www.dep.state.fl.us/ mainpage/ce/penalties. htm*	NO	Not mentioned
AVAILABLE TOOLS				

	UK	FLORIDA	NETHERLANDS	US
Available tools	**Preventative or remedial actions:** Enforcement notices; suspension, variation or revocation of environmental licences; Environmental Agency carrying out works and recovering costs; bringing offender within regulatory regime (requiring application for a permission); injunctions; antisocial behaviour orders/serious crime prevention orders **Criminal enforcement responses:** prosecutions; formal cautions; fixed-penalty notices; warnings	Notice of violation, consent orders, final orders, civil complaints, final judgements, multiple and multi-day penalties, in-kind penalties, pollution prevention credits,	Warning, fine, criminal proceedings, policy interventions, policy development (new regulation, cost-reduction programs etc), communication, prevention, compliance assistance, deterrence, enforcement (admin, civil, criminal), feedback to the minister and parliament (annual report of the Inspectorate)	Compliance assistance, compliance incentives, compliance monitoring, civil and criminal enforcement
Administrative measures		YES for cases with penalties of $10,000 and less (Environment Litigation Reform Act 2001)	YES	
Civil remedies			YES	

	UK	FLORIDA	NETHERLANDS	US
Criminal penalties			YES	
PRINCIPLES OF PROSECUTION/PROSECUTION CRITERIA				
	PUBLIC INTEREST: environmental effect, forseeability, intent, individually and/or corporately, history of offending, attitude of the offender, deterrent effect of a prosecution, on the offender and others. personal circumstances of the offender	The Prosecutor's Guide to Environmental Crime: A Resource	Dutch Public Prosecutions 'Environmental Strategy'	Not mentioned
Sufficient evidence	YES	Not mentioned	YES 'must be able to prove that the alleged offence actually took place'	Not mentioned
DPP guidelines	Not mentioned	Not mentioned	YES	Not mentioned

	UK	FLORIDA	NETHERLANDS	US
Prospect of conviction	YES realistic prospect	Not mentioned	YES likelihood of success	Not mentioned
Public interest	YES	Not mentioned	Not mentioned	Not mentioned
- Culpability	YES	Not mentioned	Not mentioned	Not mentioned
- Cost of prosecution	Not mentioned	Not mentioned	YES cost:benefit	Not mentioned
- Need for deterrence	YES	Not mentioned	YES	Not mentioned
- Public concern	Not mentioned	Not mentioned	Not mentioned	Not mentioned
- Unduly harsh or oppressive consequences	Not mentioned	Not mentioned	Not mentioned	Not mentioned
- Offender's antecedents/ characteristics	YES	Not mentioned	YES 'a calculating or mala fide attitude'	Not mentioned

	UK	FLORIDA	NETHERLANDS	US
	PUBLIC INTEREST: environmental effect, forseeability, intent, individually and/ or corporately, history of offending, attitude of the offender, deterrent effect of a prosecution, on the offender and others. personal circumstances of the offender			
Decision to prosecute	YES Environment Agency	Not mentioned	between regulatory authorities and the Public Prosecutions Department	In cases of potential civil or criminal violation, documented and transmitted to the Department of Justice
Considerations	Not mentioned	Actual or potential environmental harm and extent of deviation from statutory of regulatory requirement	Not mentioned	Not mentioned

	UK	FLORIDA	NETHERLANDS	US
Choice of defendant/ who may be prosecuted	YES realistic prospect	Not mentioned	Government Authorities, businesses, general public	Not mentioned
Prosecuting agency	YES Environmental Agency	DEP	Public Prosecutions Department	Not mentioned
Directors and managers	YES	Not mentioned	Not mentioned	Not mentioned
PROSECUTION APPEAL				
Appeals	'Written explanation is given of any rights of appeal against formal enforcement action at the time the action is taken'	Not mentioned	Not mentioned	Not mentioned

Appendix 20.1: Extract from Submission by Environment Defenders Office: 'Information that should be published annually by the EPA'

1. **State environment protection policies (SEPPs)**
   - 1.1 Number of new SEPPs initiated
   - 1.2 Variations to SEPPs
   - 1.3 Review of SEPPs
2. **Industrial/waste management policies**
   - 2.1 Number of new WMPs initiated
   - 2.2 Variations to WMPs
   - 2.3 Review of WMPs
3. **Notifiable chemical orders (NCOs)**
   - 3.1 Number of existing NCOs
   - 3.2 Variations to NCOs
4. **Economic mechanisms to create incentives for environment protection**
   - 4.1 New mechanisms
   - 4.2 Variations to existing incentives
5. **Neighbourhood environment improvement plans**
   - 5.1 Voluntary
   - 5.2 Directed
   - 5.3 Number entered into during reporting period
   - 5.4 Total number current
6. **Environment plans**
   - 6.1 Total number currently entered into/required during the year
7. **Environment and Resource Efficiency Plans**
   - 7.1 Total number currently entered into/required during the year
8. **Sustainability covenant agreements**
   - 8.1 Entered into
   - 8.2 Total number current
9. **Any industries declared by the EPA to have a significant impact on the environment**

   9.1 If no industries have been declared, has the EPA utilised its power under s 49A0 of the Act to audit an industry for ecological impact, product and services stewardship approaches; and/or identified any industries during the year where efficiency and reduced impacts could be made?

10. **Ecological impact statement**
    - 10.1 Number required by the EPA during the year [s 49Ak]

11. **Environmental audits**
    - 11.1 Number required by EPA during the year

12. **EPA-initiated inspections**
    - 12.1 Number initiated across all regulatory functions (broken into industry categories and regulatory focus; for example, oil pollution, hazardous waste)

13. **Priority sites**
    - 13.1 Number received
    - 13.2 Number of newly registered during the year by location/region
    - 13.3 Number current

14. **Victorian Auditor-General's June 2010 Hazardous Waste Management report recommendations**
    - 14.1 Progress made in relation to 9 recommendations

15. **Works approvals**
    - 15.1 Number of inspections to test compliance in year as a % of the whole

16. **Warnings and directions**
    - 16.1 By industry sector/nature of potential offences

17. **Notices**
    - 17.1 Pollution abatement notices
    - 17.2 Clean up orders
    - 17.3 Infringement notices by industry/nature of environmental harm.

    NB: EPA should distinguish between number of notices issued by it as distinct from local government [litter] and Victoria Police [motor vehicles] Environment Defenders Office (Victoria) Ltd 34

18. **Accredited licence-holders**
    - 18.1 Number issued during the year
    - 18.2 Number revoked
    - 18.3 Number suspended
    - 18.3 Number with conditions imposed upon existing licensee/permit holder
    - 18.4 Number of injunctions
    - 18.5 Number of performance reports and annual statements due/actually submitted by licensees
    - 18.6 Number inspected during term of accreditation contrasted with number inspected upon renewal

19. **Licences/permits**
    - 19.1 Number of licences/permits issues during the year

19.2 Number revoked

19.3 Number suspended

19.4 Conditions imposed upon existing licensee/permit holder

19.5 Injunctions

19.6 Number of performance reports and annual statements due/actually submitted by licensees

19.7 Number inspected during term of accreditation contrasted with number inspected upon renewal

20. **Enforcement activity**

20.1 Public (third-party) complaints of possible hazard waste disposal offences (e.g. break of licence and number received by area)

20.2 Prosecutions and outcomes against corporation and individuals

20.3 Total number of court orders directed to community/public environment benefit projects; amounts involved in such; and case studies being publicised.

20.4 Appeals against EPA or EP Act decisions by category of decisions and number in each category. For example, licence or permit refused, licence accreditation revolved, works approvals, third-party reviews.

20.5 EP Act offences and penalties, by offence type and penalty. For example, see table on following page.

Index

Biography: Stan Krpan

Stan Krpan is a lawyer by training, specialising in criminal law, and has practised in private, community and government settings.

Stan was a prosecutor with WorkSafe Victoria (Victoria's health and safety regulator) and has undertaken some of Australia's most significant OHS prosecutions. For five years he was Director of Legal Services and Investigations for WorkSafe, responsible for WorkSafe's investigation and prosecution activity. He was involved in major reforms of WorkSafe's approach to regulation, enforcement and prosecution, and has also been a key leader in the harmonisation of OHS laws and regulatory approaches nationally.

Immediately prior to his engagement by EPA in June 2010, Stan was WorkSafe's Acting Executive Director, Health and Safety.

Stan has a master's degree in criminal law and litigation, and has undertaken postgraduate research in the area of regulation and enforcement. He undertakes guest lectures in postgraduate regulatory courses at major universities and other speaking engagements.