

## **EPA Inquiry**

### **Submission to the Ministerial Advisory Committee**

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(Former EPA Deputy Chairman)

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I retired from EPA in January 2004. During my fifteen years with the Authority I held a number of senior executive positions, including Deputy Chairman and Executive Director. Since retiring, I have attempted to keep informed about developments at EPA through its annual reports and plans, through reports of various reviews and through continuing contact with the EPA Chair.

In the eleven years since I left, EPA has changed considerably. Though it continues to be well respected for its expertise and for the dedication of its staff, in my view, it has become, in comparison with the EPA of the 1990s and early 2000s, a less innovative organisation, more narrowly focussed on the regulatory components of its broader statutory charter.

While the Authority is still formally responsible for recommending State Environment Protection Policy to Governor in Council, in practice its vital policy and legislative development role has been transferred to the relevant department of state. This transfer is in line with the currently favoured (but in my opinion flawed) doctrine requiring the separation of regulatory and policy functions. In my experience, the greater the separation between those who devise and those who implement policy, the less likely it is that the policy's objectives will be achieved.

The community rightly expects EPA to make full use of its strong regulatory powers to protect the environment. However, many of the key remaining threats to environmental quality (particularly various forms of non-point/diffuse pollution) are best addressed through a mix of approaches in which the regulatory "sticks" play a secondary role to non-regulatory "carrots".

I hope the current review of the Authority and of the Environment Protection Act will reinvigorate the EPA, encouraging greater innovation and experimentation.

## Questions

1. What do you think are the key environmental challenges which will impact the EPA in the future?

Long term (20 – 50 years): While the following challenges will emerge over the medium term, their full impact will be felt in the longer term.

- the maintenance/enhancement of urban air quality in the face of changes in climate - specifically increases in concentrations of ozone at ground level (due to higher temperatures) and in fine particle levels with more frequent and severe wildfires impacting population centres.
- Likely increases in the frequency and intensity of storm events will threaten surface water quality due to increases in sedimentation and to nutrient and other pollutant loadings. Rises in temperature and reductions in stream flows will threaten aquatic biodiversity and resilience. Protection of high quality groundwater resources from contamination will be increasingly important.

Short to medium term (next 20 years): In addition to dealing with the progressively emerging effects of climate change, EPA will need to

- continue to work with governments, the private sector and the community to reduce the incidence and impact of a range of non-point sources of air and water pollution
- develop risk-based programs to address community concerns over possible impacts of low levels of persistent organic pollutants (including endocrine disruptors)
- continue action to drive waste avoidance and reduction (particularly of priority waste streams – including novel waste streams ) which will increase the likelihood of illegal activity by some generators and by elements of the waste management industry. Resourcing of monitoring and enforcement programs is likely to need to be increased to deal with this threat
- achieve further reductions in localised impacts of industry on amenity. This will require more effective cooperation between EPA and local government (in relation to planning policies and enforcement) and between EPA and industry bodies, along with greater use of non-regulatory tools
- work with local government to address the growing impact of noise on amenity and human health that is likely to accompany increasing population densities in inner and middle suburbs
- litter continues to be a major environmental challenge (particularly to the health of aquatic ecosystems) and is a significant blight on our urban places. Engagement of industry, state agencies, local government and the community in the development and implementation of effective anti-litter strategies and programs must remain a priority.

2. What aspects of the EPA's work do you value and wish to preserve in the future?

EPA's applied science programs (including long term monitoring of critical environmental quality parameters) are of fundamental importance, particularly in informing the development of State Environment Protection Policies (SEPPs) and Waste Management Policies (WMPs). While EPA's regulatory activities are essential to preventing harm to the environment, the potential for regulation alone to drive further improvement in environmental quality is limited. Innovative non-regulatory

approaches are essential to encourage best practice environmental management throughout both the public and private sectors.

3. How can the EPA effectively work in partnership with other government agencies to meet the environmental challenges of the future?

SEPPs provide an important statutory mechanism for setting out the roles of EPA and other government agencies in protecting the environment. Memoranda of Understanding (MOUs) have been successfully employed to establish frameworks for cooperation between EPA and various lead agencies in areas such as public health, emergency response and fuel reduction burning. Protocols between EPA and other approvals bodies (e.g. WorkSafe Victoria) can streamline approvals processes.

4. How can the EPA's role in safeguarding the community against the health impacts of pollution be clarified or strengthened?

I believe EPA's role in safeguarding public health follows clearly from the EP Act and from various SEPPs. However, significantly more effort is required in communicating EPA's role in relation to various types of public health incidents/concerns (e.g. periods of poor air quality, toxic algal blooms, major Hazmat incidents, etc.).

5. How could statutory frameworks more effectively prevent future environmental risks and land use conflicts?

Further strengthen links between the Environment Protection Act and the statutory planning framework in relation to provisions of State and local government planning policies and planning schemes (especially with respect to zoning); improve EPA's capacity to support local government planning staff (via training and referrals). Shifting responsibility for regulating major hazard facilities and dangerous goods from WorkSafe to EPA would simplify approvals, inspections and emergency response processes.

6. What role should the EPA play in emergency management?

I believe that EPA's role in emergency management is already clearly established: i.e. providing on-ground, real-time data on air and water quality to first line responders, to public health officials, local government and the community and providing advice/direction on measures to mitigate hazards to the environment .

7. How can the EPA better identify and, where necessary, address problems that are the result of past activity?

By far the most important type of *legacy issue* is contamination of land. Since the establishment of the statutory environmental audit system and changes to planning legislation in the early 1990's, the risk of inappropriate development taking place on contaminated land has been greatly reduced . Associated provisions in State Environment Protection Policy and in planning controls form a risk-based framework for recording of contamination on land titles and for clean up and management of contaminated land. This system has recently been reviewed by the Auditor General and strengthened. Where contamination of land at a site is not generating problems off-site and is not affecting health on-site, such contamination is unlikely to be identified as an issue and come to EPA's attention until a change to a more sensitive use is proposed (most often with a change in ownership). I believe the present system

provides an efficient and effective means of dealing with this type of legacy issue, ensuring that where practicable the “polluter pays principle” is applied.

8. What can the EPA do to avoid potential future problems?

- Work with statutory planners at State and local government levels to ensure planning policies, zoning plans and approval of planning permits minimise the likelihood of co-location of incompatible land uses leading to potential loss of amenity, impacts on health, etc.
- Monitor developments in relevant fields such as toxicology and epidemiology to identify emerging hazards associated with new materials and processes, e.g. in industry and in consumer products.
- Maintain/extend its ambient monitoring capability to provide data on existing and emerging risks to the environment, particularly to human health (e.g. sub-micron fine particles, new types of persistent chemicals).
- Continue to promote and where necessary require adoption of best practice to minimise environmental hazards, including threats to local amenity (odour, dust, smoke and noise).
- Work closely with local communities to identify and address emerging concerns about environmental quality.

9. What role should the EPA play in improving environmental outcomes beyond those necessary to safeguard human health?

EPA Chairman (1986 – 2002) the late Dr Brian Robinson AM once remarked:

EPA is the *Environment* Protection Authority, not the *Environmental* Protection Authority. That is to say its primary responsibility is to protect the environment, not to protect humans from the environment.

The health of human societies is fundamentally dependent on the environment and the services which it provides. Many organisms are far more sensitive to low levels of environmental pollutants than are humans (e.g. many types of aquatic life). Levels of environmental quality needed to protect such organisms (and thus the health and resilience of the ecological communities of which they are a part) are often significantly higher than those required to protect individual humans. This is reflected in the environmental quality standards and objectives set out in SEPPs to protect ecosystem health. The extent to which such systems are protected in SEPP is a function of the level of concern of the Victorian community expressed through the lengthy consultation processes associated with the preparation of State Environment Protection Policy.

It should also be noted that deterioration in local amenity can occur due to noise and odour at levels which do not impact on human health. Melbourne’s “liveability” may thus be affected even though the actual health of the inhabitants is not.

In summary, protection of human health is a critical objective of environment protection, but it is neither the sole nor always the most demanding objective.

10. What role should the EPA play in reducing greenhouse gas emissions?

EPA’s future role in this area will be strongly influenced by the willingness of the State Government to rely on Commonwealth emission reduction programs. In the continued absence of a national mechanism (tax or trading scheme) to put a price on carbon

emissions, EPA could develop regulations to control emissions from major sources (notably electricity generation, cement production). These could include provisions to require the sun setting of major emitters that are unable to meet regulatory requirements within a reasonable timeframe. A less “command and control” based approach would be to reinstate the provisions in the EP Act relating to Energy and Resource Efficiency Programs (EREP). This light-handed form of legal compulsion proved to be highly successful in getting major energy users to identify and implement cost-effective ways of improving the efficiency of their energy use.

EPA, on behalf of the Victorian Government, could argue the case for introduction of national vehicle fuel efficiency standards.

#### 11. How do you see environmental justice being applied to the work of the EPA?

While use of the term *environmental justice* is relatively recent, the basic principles which it encompasses have underpinned EPA’s work since its inception. For example:

- Environmental quality objectives and standards in SEPPs are established through widespread community consultation and are framed to provide equivalent protection from air, water or soil pollution and from noise, for all Victorians wherever they live.
- Data from EPA’s extensive environmental monitoring activities keep the community informed about performance against environmental quality standards.
- Works approval and licencing processes are designed to give effect to the principle of *equivalent protection* and provide for community input
- EPA’s *Enforcement Policy* is a public document which sets out procedures which ensure consistent and fair application of various regulatory sanctions

#### Environmental Justice and Melbourne’s Western Suburbs

For much of its history, Melbourne’s western suburbs were effectively treated by governments and regulators as a sacrifice zone where a range of noxious industries could be located with little if any regard for the health and amenity of local residents – a classic example of a lack of environmental justice. In the 1970s and 80s, a major driver behind EPA’s licencing of industries was to end the worst impacts of uncontrolled discharge of wastes on local environmental quality. This objective continues to be reflected in the EPA’s use of both statutory (licensing, works and abatement notices, prosecution, etc.) and non-statutory (e.g. neighbourhood environment improvement plans – NEIPs) tools to protect and enhance local amenity. While difficult problems remain in some areas (e.g. heavy vehicle noise and pollution and localised problems with road dust) over the past few decades, environmental quality in Melbourne’s west has improved dramatically.

#### 12. What can we adopt from other regulators and regulatory models to implement best-practice approaches and ensure that the EPA can rise to key future challenges?

I have no specific suggestions to make, but would note that under Dr Robinson’s Chairmanship, EPA was widely recognised nationally and internationally as a highly innovative regulator. One committed to “regulating at the margin” and looking to work with industry and the community to move “beyond compliance”. I believe that the potential of some of the innovative approaches and tools developed during this period

is still not well recognised. Examples that stand out are NEIPs and Sustainability Covenants.

13. Are there any other issues relevant to the Terms of Reference that you would like to raise?

See below.

### **Terms of Reference**

1. The EPA's appropriate role in relation to public health issues, including at least: community concerns such as exposure to asbestos, chemicals and other pollutants; the prevention and management of site contamination, air quality, and water quality in rivers and other waterways;
  - monitoring and publicly reporting on environment quality parameters relevant to public health (includes continuous fixed site air and water quality monitoring, special purpose fixed term monitoring and monitoring associated with emergency situations)
  - issue warnings when monitoring data indicate environmental quality standards relevant to human health are not being met (e.g. in relation to air quality, water quality at Melbourne's beaches)
  - a source of environmental toxicological expertise supporting the state's Chief Medical Officer
  - responsible agency for ensuring "cradle to grave" regulation of hazardous waste
  - together with local government, preventing and ameliorating loss of local amenity due emissions to odour, smoke, dust and noise from industry, utilities, waste management facilities and domestic sources
  - use of works approval and licensing to control emissions from scheduled premises and of tools such as abatement and works to deal with problems (both potential and actual) at non-scheduled premises
  - application of Notifiable Chemicals provisions of the EP Act (Section 30C & D) to prevent or abate a serious environmental hazard
2. The Victorian community's and industry's expectations of the EPA as its environmental regulator;

The community expects EPA:

- to employ its full range of regulatory powers to ensure the protection of human health and maintenance/enhancement of environmental quality
- to be a trusted primary source of authoritative, independent information and advice on environmental quality and on threats to the environment
- To encourage and facilitate input from the community to key processes and decision making
- To note and take prompt and effective action to address complaints/concerns raised by individuals and community groups and to keep such individuals/groups informed of actions planned and taken
- To work cooperatively with other government agencies , local government and NGOs to improve environmental quality.

Industry expects EPA:

- to apply its statutory powers in a consistent and even-handed manner, reflecting a commitment to the principles of natural justice
- to ensure that enforcement action is taken in accordance with its publicly available Enforcement Policy which sets out a range of factors to be taken into account in deciding the appropriate form and severity of enforcement action (e.g., proportionality, level of cooperation, prior history, etc.)
- to provide clear and consistent advice and where necessary direction to enable industry to meet its environment protection obligations
- to frame conditions in works approvals, licences and abatement and works notices which reflect the nature and severity of risk to the environment and which focus on outcomes to be achieved.

3. The EPA's appropriate role in protecting the environment;

I believe this has been adequately dealt with in my answers to the above questions.

4. The ability of the EPA to ensure that the principle of environmental justice is adhered to, the environment is protected for the benefit of the community, and members of the community can be meaningfully involved in, and access fair treatment through, environmental regulation;

See my answer to question 11.

5. The ability of the EPA's current governance structures and funding arrangements to enable it to effectively and efficiently discharge its powers, perform its duties and implement its required functions;

The EPA's governance structures have been improved significantly in the decade since I left the organisation, notably through the separation of the roles of Chairman and CEO and through the establishment of the Risk and Audit Committee (4 independent members), the People and Culture Committee (4 independent members) and the Science and Engineering Advisory Committee (5 independent members). I believe these arrangements reflect current best practice for a regulatory body like EPA.

In respect of funding, for some years I have been concerned about EPA's increasing dependence on the landfill levy to fund its operations. Since a key role of EPA is to drive the State's commitment to minimising waste, this dependence creates a real conflict of interest. Priority should be given to returning to the situation prior to 2013 when a substantial part of EPA's funding came from appropriations.

6. the scope and adequacy of the EPA's statutory powers, and the effectiveness and efficiency of the suite of tools available to and utilised by the EPA, in enabling protection of the Victorian community and the environment, particularly in light of recent, new and emerging risks and issues;

I think that the broad range of statutory powers available to EPA through the EP Act, through regulations and statutory policies provides EPA with a highly effective set of tools with which to protect and enhance environmental quality throughout Victoria.

7. any other matter reasonably incidental to these above matters.

No further comment.

The Terms of Reference also direct the Inquiry to:

- consider the best way to combine environmental protection with economic viability and growing sustainable jobs in Victoria, including through improving regulatory efficiency and minimising regulatory burden;

### Comment

Section 1B of the EP Act provides a frame of reference for considering this important issue.

#### **1B Principle of integration of economic, social and environmental considerations**

- (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.

#### Environment Protection Act 1970

In developing SEPP and WMP the Authority is required to apply this principle. As a result, the beneficial uses, and environmental standards and objectives included in statutory policy are the product of a lengthy community consultation process which seeks to optimise net benefit across all three areas. This approach based on integration and optimisation contrasts with the *zero sum game* approach which views the areas as inherently conflicted.