Submission

to the

Inquiry into the Environment Protection Authority

prepared by

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About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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Submitted to:

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1. Introduction

Environmental Justice Australia ('EJA') welcomes the opportunity to make a submission to the Independent Inquiry into the Environment Protection Authority ('EPA').

We welcome the review. While Victoria was a world leader in introducing the Environment Protection Act in 1970 many of its provisions have fallen behind community expectations and are not well suited to dealing with contemporary environmental issues, particularly climate change. In our view, fundamental reform of the legislation and current policy and practice is required, both to put what is working well on a more up to date footing, as well as to address major gaps in our current pollution regulation framework.

1.1 Our list of ten priority issues that should be addressed by this review

1. **Embed environmental justice in the law.** We are very pleased that the review has been asked consider how environmental justice ought to be incorporated into Victoria's pollution regulation system. For us, at its most basic, this is quite simple – our environmental protection laws need to be fair and equitable in both in substance and process. In our view, environmental justice needs to be incorporated as one of the objectives of the Environment Protection Act as well as being embedded in all aspects of the Acts administration.

2. **Introduce a general duty not to pollute.** Many Victorians would be be surprised to hear that there is no overarching obligation to avoid causing pollution in this state. Actually polluting air or water is an offence, but this after the event focus is inadequate and limits the EPA in dealing with accidents that are waiting to happen. We strongly support the introduction of an enforceable general duty not to pollute.

3. **Regulate carbon pollution.** While climate change was not a core focus for a pollution regulator when the EPA was established in 1970, there is a clear community expectation that it should be now. The Act needs to make clear that carbon pollution is one of our most pressing pollution problems and the EPA needs a clear legislative mandate to deal with it.

4. **Right to know and access to information.** There are too many obstacles in the path of individuals and communities who want to get information about pollution that affects them and activities that might harm their health and well being and the environment. The default settings need to change – all information held by the EPA ought to be available to the public in an accessible form, with limited exceptions where these are fair and necessary. Data on environmental quality needs to be systematically collected and published by the EPA to inform the community about issues that matter to them.

5. **Legal rights for affected communities.** The EPA should have the principal responsibility for enforcing pollution regulation and all Victorians should be able to rely upon the Authority to undertake its responsibilities in this regard. However it also needs to be acknowledged that a lack of resources and lack of will are an unfortunate reality of environmental protection

regulatory system. The solution is to ensure that affected communities have broad rights available to them to question decisions and enforce compliance with laws that are intended to protect them. All citizens should have the right to be protected by our pollution control laws and we should never have a situation where this right is frustrated by a failure of the bureaucracy to apply the law. This can be achieved by creating an enforceable right to environmental quality introducing open standing for citizens to enforce environmental protection laws.,

6. **A more powerful role for the EPA in land use planning decisions.** Land use planning decisions are critical to the health and well being of communities affected by both new proposals and existing developments. Yet the EPA is often marginalised in key decision making. We need an EPA that is a strong champion for community in these cases, with the power to stand up to development interests by having much greater influence in zoning and permit decisions.

7. **Better clean up of dirty mine sites.** The toxic legacy of un-rehabilitated mine sites is an unfortunate reality, but we ought not be allowing these mistakes to continue. At the moment the EPA has virtually no say in rehabilitation standards and mine clean up. It is untenable to leave these issues solely to the department responsible for encouraging and facilitating mining. The review should recommend a much stronger role for the EPA to ensure the community is protected and mining companies are clearly responsible for mine site rehabilitation.

8. **A strong, independent and well funded EPA.** We need an EPA that is accountable but strong and independent and the current governance arrangements need to be modernised to ensure that this is the case. The EPA relies for a large portion of its revenue on levies from waste. This clearly creates a conflict of interest and needs to be changed so that the EPA has the funding it needs to meet community expectations and retain the necessary technical expertise it needs to do its job. The funding model must also ensure that the EPA has the resources it needs to undertake major prosecutions without detracting from its day to day operations.

9. **A clearer role for the EPA on issues that affect our health and wellbeing.** Individual citizens have very little capacity to manage their exposure to pollution – that's why we need laws to protect ourselves and our families. Catastrophic pollution incidents like the Hazelwood mine fire demonstrate that the EPA needs a much strong role when it comes to protecting human health in emergency situations. In day to day situation too, much greater clarity is required around who is responsible for protecting us from noise, asbestos exposure, and other things that affect our health and wellbeing.

10. **A strong focus on regulation and enforcement.** Last but not least, the EPA needs to retain a strong focus on what we think is its core purpose – effective protection of the environment on which we all depend by regulation and enforcement of clear standards. While we are all for innovation in how these regulations work and we recognise the need for any regulatory system to work in a cost effective manner, it is important that we do not lose sight of the core environmental protection function.

1.2 Detailed submissions on specific issues – outline

This submission answers questions posed in the discussion paper*, Examining the future task of Victoria's Environment Protection Authority*, as well as responding to the Inquiry's Terms of Reference under the following headings:

Environmental Justice

Governance and funding

Regulation of carbon pollution

The general duty not to pollute

Land use planning

Amenity issues

Emergency management

Setting pollutions standards

Mine regulation

Regulating nonpoint source pollution

2. Environmental Justice

Environmental justice has been identified by the Ministerial Advisory Committee as an important pillar of reform to the EP Act and the regulatory and institutional framework for environmental protection in Victoria.

We agree. Our environmental protection laws need to be fair and equitable both in substance and process. We recommend that environmental justice be incorporated as one of the objects of the EP Act, as well as being embedded into all aspects of the EP Act's administration.

Environmental justice means that the burden of environmental risk and harm is not imposed on those communities that are most vulnerable or least able to afford to meet it. It also means that the social, health and other benefits of protecting and restoring environmental values are shared fairly across all communities and is a feature of social solidarity.

EJA has undertaken and published work with a particular focus on environmental justice.[1] Both our law reform and litigation programs have been informed by the concept over an extended period of time. The EP Act and the EPA have also been informed increasingly by concepts and principles of environmental justice over a period of time. The role of this concept as an express foundation of the EP Act framework has been however marginal overall, no doubt a product of the incremental development and amendment of the legislation and institutional arrangements and priorities over several decades.

It is our view that environmental justice should assume a more prominent role within the environment protection system. This may be achieved in a number of ways, reflective of the multiple facets and dimensions of the environmental justice concept. These include:

- Underpinning rights-based approach to environmental protection;
- The achievement of distributive justice as a foundation of environmental justice;
- The achievement of procedural justice as a foundation of environmental justice.

2.1 The right to a safe and healthy environment

Recommendation: *The Act should include a stand-alone cause of action attaching to the right to a safe and healthy environment. This cause of action should be enforceable.*

EJA has advocated for a substantive rights-based approach to environmental protection that includes a right to a 'clean and healthy environment' (a 'safe and healthy environment' is taken to have a comparable meaning). Recently, EJA has advocated this approach in its submissions to the 2011 review of the Victorian *Charter of Human Rights and Responsibilities Act* ('the **Charter Review**'). The right to a safe and healthy environment proceeds indirectly from basic norms of international law, such as the right to life, the right to health and rights to food and water. It can also, more expressly, be grounded in non-binding international instruments, such as the Stockholm Declaration of 1972, which underpins modern environmental law. Comparative domestic law provides an important third source of rights-based approaches to environmental rights and the right to a safe and healthy environment in particular.

[1] See for example Environment Defenders Office (Victoria) Ltd, 'Environmental Justice Project, Final Report' 26 July 2012, available online at https://envirojustice.org.au/major-reports/environmental-justice-in-australia.

While we are of the view that environmental rights should be adopted within the Charter framework, it is also appropriate and important for the EP Act to be a key statutory source of a right to a safe and healthy environment, notably as the right can be given substantive meaning and operational effect through this legislative framework.

Aspects of a right to safe and healthy environment will include provisions for distributive and procedural justice, which are considered further below. Pre-empting that discussion, two features of environmental justice will be important and relevant in positing and achieving a general right to a safe and healthy environment:

1. The existence of a stand-alone cause of action attaching to the right to a safe and healthy environment and amenable to enforceable remedies. As we noted in our submission to the Charter Review, 'an 'effective remedy' requires reparation to the person whose rights have been violated. Reparations include "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes to relevant laws and practices".'[2] Broad judicial discretion as to remedy or 'reparation' is appropriate.

2. The existence of a discrete right to a safe and healthy environment can be accompanied by and viewed in the context of a corresponding 'general environmental duty'. We make submissions on that form of duty below. Such a duty would be available to inform the construction and effective operation of the right to a safe and healthy environment.

2.2 Distributive environmental justice: who bears the burden of risk and harm

Earlier EJA work on environmental justice highlighted the tendencies for environmental harms and risks to be unevenly distributed across society and across regions. In particular, this report identified that the burdens of environmental risks or other impositions fall disproportionately on rural, regional and remote communities as distinct from larger population centres, on working class and poorer neighbourhoods (including in metropolitan areas) as distinct from wealthier areas, and fail to accommodate historic injustices against and dispossession of Aboriginal peoples. This work broadly echoes the considerable literature on environmental justice and distribution of impacts in the US in particular, as well as the emerging literature in Australia.

Distributive justice is a framework that will apply or be advanced through policy as well as law. For instance, allocation of public revenues or the construction and operation of statutory planning schemes will both be important factors in determining substantively fair outcomes in general but also the disposition of environmental harms and benefits across communities and geographies. Those are generally matters of public policy. Recommendations made in the EDO Environmental Justice report on distributive justice policies remain directly relevant to the EPA review:

- requirements for 'environmental justice assessments';

[2] EDO *Submission to the Inquiry into the Charter of Human Rights and Responsibilities Act 2006*, p 23.

- Resource and build organizational strength and capacity in community/grass-roots organisations dealing with environmental issues in rural and regional areas;
- Fund and build networks between affected communities and their organisations, public interest lawyers and relevant experts;
- Educate and build capacity in affected low-income communities
- Establishment of appropriate public interest litigation fund;
- High level government commitment to environmental justice as a policy objective.

While the distinction of policy and law is never straightforward, there are established *legal* principles that do seek to affect distributive environmental justice and these principles tend to function as considerations on statutory decision-makers in the exercise of discretions, such licensing, granting permits or approving actions with environmental impacts. Principles of inter-generational and intergenerational equity have been employed in decision-making (usually under the overall banner of ESD). Regard should be had to these principles and how they can be applied the specific circumstances of a legislative framework for environmental justice within the Act. It is curious in this regard that, while intergenerational equity is presently included as a guiding principle of the legislation, intergenerational equity is not.

Using intragenerational equity as a legal principle for distributive justice, that concept may be said to involve 'people within the present generation having equal rights to benefit from the exploitation of resources and from the enjoyment of a clean and healthy environment'.[3] It is also a principle developed and used in leading environmental litigation subsequent to the Environmental justice report. The concept was expressly invoked in considerations of distributive justice in Bulga Milbodale Progress Association v Minister for Planning and Infrastructure and Warkworth Mining Ltd [2013] NSWLEC 38. In that decision, Preston CJ analysed the relevance and application of distributive justice to a proposal to undertake a major mine expansion impacting on a small rural community. At [486] His Honour wrote:

> Distributive justice involves the just distribution or allocation of the benefits and burdens of economic activity. Principles of distributive justice vary according to what is the subject matter of distribution (such as resources, income, wealth, opportunities, jobs, welfare and utility); the entities to whom a distribution is to be made (such as natural persons, corporations, groups of persons, and non-human living organisms or ecological communities); and the basis on which a distribution is to be made (such as equality, wealth maximisation, or according to individual characteristics or free transactions). Issues of distributive justice not only apply within generations (intra-generational equity) but also extend across generations (inter-generational equity). In the context of environmental justice, distribution of environmental risks and harm should be equitable or fair.[4]

In application to the proposal specifically, he wrote:

> With respect to intra-generational equity, the BCA and Choice Modelling failed to consider adequately the burdens that would be imposed on some entities, including the people of Bulga and the components of biological diversity in the Bulga environment, and on the ability of those entities to live in and enjoy a clean and healthy environment.[5]

[3] Telstra v Hornsby Shire Council [2006] NSWLEC 133, [117]

[4] Bulga Milbodale Progress Association v Minister for Planning and Infrastructure and Warkworth Mining Ltd [2013] NSWLEC 38, [486]

[5] Bulga Milbodale Progress Association v Minister for Planning and Infrastructure and Warkworth Mining Ltd [2013] NSWLEC 38, [494]

Considerations of environmental justice in this context require proportionate calculation of burdens, not only on communities but on the environment itself, and significantly His Honour frames justice principles here in terms of the substantive baseline of a 'clean and healthy environment.'

2.3 Distributive environmental justice: who is supplied with the resources to restore and rehabilitate damaged environments

As a corollary of considerations of distributive justice above, considerations of equity in law and justice should require appropriate and proportionate distribution of environmental benefits and resources as well as the question of distribution of risks and harms. Certain points relating to policies aimed at beneficial justice are noted above, such as funding and resources to communities more affected or more likely to be affected by environmental risks or harms.

Overarching government policy on environmental justice can also include objectives, tools and obligations directed to the identification and rectification of damaged environments and distribution of benefits to communities living in and around those environments. Damage, risk or loss in this context should be widely conceived. For instance, communities dealing with the legacy of mining operations, poor land use decisions, industrial contamination, or excessive and harmful land clearing are all forms of historic environmental damage requiring rectification. The term 'rectification' in this context suggests the achievement of restorative or remedial outcomes but bearing in mind that restoring of environments to prior forms or qualities may never be possible, alternative outcomes and benefits may need to be envisioned and implemented, and also the needs of future generations in those communities will often need to be taken into account.

Distributive justice in respect of benefits will typically also need to taken account of socio-economic and other relevant community factors (such as education and health factors) in determining and constructing environmental justice policies and packages. Procedural dimensions will also be important, in particular robust and embedded models and institutions for community participation.

2.4 Procedural environmental justice: the tools to inform, participate, restrain and remedy

Procedural justice is a fundamental component of environmental justice, with multiple dimensions. We note that the EPA and the EP Act framework has sought over time to experiment with and adopt models of procedural justice in, for example, models of community consultation and participation at the planning and formative stages.[6] These experiments have met with mixed success. In other respects, procedural contributions to overall concept of environmental justice face significant shortcomings, including access to justice dimensions of the Act.

Procedural justice can be considered in the context of the overall cycles of decision-making, including formative processes (such as planning, informing, participation prior to decision-making), review and appeals from approvals decisions (however termed), and enforcement (restraining breaches and

[6] Eg Neighbourhood Environmental Improvement Plans under Part 3, Division 1B of the *Environment Protection Act 1970*

instituting remedies). The prevailing condition informing environmental protection law, we submit, is its characterisation by a high degree of public interest. This condition informs the general need and requirement for public participatory approaches to law and policy in this field. Historic and common law approaches to this area of law have been heavily influenced by models of private interest and individualised justice and in particular protection of harm to private property. The law of torts has been prominent in this regard. Those limited conceptions of protection from environmental harms have long since been overtaken (although not abolished) by the realities of advanced industrial societies and the need for much more sophisticated environmental protection regimes.

In this context, we submit some of the key reforms required of the Act include:

2.4.1 Environmental information, inquiry and expertise

In the context of the 2011 enforcement review, we made detailed submissions on relevant obligations to provide environmental information under the Act, including identified categories of information to be publicly supplied on a routine basis. Other comparable recommendations were made in the Environmental Justice report. The general approach to information provision, we submit, should be the public availability of all relevant, reliable environmental in easily accessible forms (as well as underpinning data or information in appropriate cases). In addition, the EP Act should establish an express positive obligation on both statutory bodies operating under the EP Act and identified industries and entities to collect and disseminate environmental information relevant to their functions and/or activities.[7]

Environmental information and science underpinning decision-making also have participatory dynamics and we submit the scope for public participation at this point of environmental protection and management should be recognised and incorporated into the legislative framework. While considerable deference should be given to experts working in relevant fields, community initiation of investigations, inquiries or assessments into environmental problems falling under the scope of the Act are appropriate and in many cases desirable tools. Our experience has shown over many years that communities and community organisations, for instance, have considerable levels of knowledge and expertise, especially around local environment issues. They have few channels available to compel investigations or studies into those issues. Environment impacts legislation is typically of limited assistance and such inquiries are at the discretion of a Government Minister in any case.

2.4.2 The right to know

Recommendation*: The EP Act should establish an express positive obligation on both statutory bodies operating under the EP Act and identified industries and entities to collect and disseminate environmental information relevant to their functions and/or activities*

It is EJA's view that there are too may obstacles in the path of individuals and communities who want to get information about pollution that affects them and activities that might harm their health and well being, and the environment. It is our submission that the default settings need to be changed – all information held by the EPA outright to be available to the public in an accessible form, with limited exceptions where these are fair and necessary.

[7] A continuing obligation of this nature operates under Article 5 of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* ('Aarhus Convention').

Information must be presented in a clear and understandable way. More innovative approaches to communications with community are needed. Further, as noted in the section above, data on environmental quality needs to be systematically collected and published by the EPA to inform the community about issues that matter to them.

2.4.3 Provisions for open standing for review and enforcement

***Recommendation**: Third party standing should be overhauled and simplified in the context of merits review so that 'any person' can seek review of a decision to grant a licence or works authority under the EP Act.*

***Recommendation:** Open standing should be available for third party enforcement proceedings so that 'any person' can bring proceedings to remedy or restrain a breach of the Environment Protection Act 1970. The Act should also be amended to contain a provision that costs will not follow the event if third party enforcement proceedings are brought by a member of the community, in the public interest.*

Third party review and enforcement of environmental protection law is a cornerstone of effective law. It is key to enabling public interest litigation and genuine environmental justice. The broad range of benefits to be derived from public interest litigation of and participation in environmental protection law are well recognised. s. Public interest litigation, by more deeply engaging members of the community with the law, enhance clarity and understanding within the community of the relevant laws and hold to account those who breach the law or fail to enforce those breaches. As a result, open standing laws in environmental statutes can improve environmental protection outcomes, and strengthen the legitimacy of those laws within the community. Third party standing and public interest litigation are also key to providing environmental justice, because it helps ensure fair consequences for those who cause environmental harm, and facilitates community participation the operation of environmental laws.
There is considerable literature in Australia and overseas of the utility of liberal standing to enable members of the community to review environmental decisions, both at law and on the merits, and to seek enforcement of those laws in the Courts (including statutory rules and instruments made under principal legislation).

'Open' standing to enforce environmental laws, we submit, is an essential prerequisite to any concept of environmental justice, as well as effective environmental law.

We take open standing to mean the unrestricted right of any person to apply to a court or tribunal of competent jurisdiction to restrain or remedy a breach of the law. This is the formulation of standing commonly adopted in NSW environmental laws and it is similar to the formula in Victorian planning law.

The current EP Act contains limited and, in our view, unnecessarily restrictive and convoluted rules regarding standing.

First, there are no provisions for third party or public interest standing to restrain breaches of the EP Act or its subordinate instruments or seek remedy for harm arising from breaches. In our view, provisions comparable to those in the NSW Protection of the Environment

Operations Act 1997, Part 8.4, should be introduced into the Act. There are two parts to these open standing provisions:

- the right to apply to the court (Land and Environment Court) to restrain or remedy a breach of the Act or its subordinate instruments where harm to the environment occurs or is likely to occur;
- the right to apply to the court to restrain or remedy a breach of any other Act or statutory rule that will cause or is likely to cause environmental harm.
- Provision for standing to seek criminal enforcement should also be introduced.[8]

In recognition of the value of third party standing in improving accountability and environmental outcomes, specific provisions protecting third party, public interest litigants against adverse costs orders should also be introduced to the Act. As has been shown in NSW, providing open standing is only the first step to facilitating citizens being able to take enforcement actions. Without further provisions protecting against the risk of adverse costs in genuine public interest cases, open standing will not bring about the full suite of benefits, discussed above, that third party, public interest litigation can bring. The US Clean Air Acts and Clean Water Acts recognise the value of citizen suits enforcing environmental laws by providing costs protection for community litigants.

Second, third party rights to seek merits review under s 33B of the Act contain elaborate tests for the demonstration of both 'interest' in a decision to grant a works approval or licence and grounds of review. It has been held that the test of standing applying to alleged inconsistencies with statutory instruments (such as SEPPs) is broad and is appropriate to the intervention of community groups representing a wide public interest.[9] Third party challenge to works approvals or licences otherwise require a narrow interests test held to be more applicable to private and corporate interests.[10] In both instances certain factual (or deemed factual) grounds of causation also need to be met, such as that emissions will occur if works are completed in the manner prescribed in a works approval.

The shortcomings of these provisions include:

- The likely need, in public interest matters, to demonstrate affected interests as a preliminary matter, with the cost, delay and complexity that may accompany this task. By contrast, open standing has provided courts and tribunals with little difficult over time in other jurisdictions and circumstances of environmental protection.

- Where more liberal standing rights apply, as in the operation of section 33B(2)(b) or 33B(2A)(b), the nexus with substantive environmental protection provisions established under relevant Orders (a discharge, emission, handling of waste etc inconsistent with an Order) is appropriate but ultimately relies on the rigour and standards contained in the Order - that is, the value of standing relies on the quality and force of the substantive environmental protection measures.

[8] Regarding open standing to seek criminal enforcement, see Protection of the Environment Operations Act 1997 (NSW), s 219

[9] Linaker v City of Greater Geelong (Red Dot) [2010] VCAT 1806, [24]

[10] Thirteenth Beach Coastwatch Inc v EPA [2009] VSC 53, [12]

- The restrictive test under 33B(2)(a) and 33B(2A)(a), which requires both 'adverse' and 'unreasonable' affectation of a person's interests and the relative certainty that those interests will be affected to this degree. Capacity for third party or public interest review outside of an action inconsistent with a statutory tool (ie Order) is highly confined even where 'damage or potential damage' to the environment will occur, although where no Order applies the action will cause pollution or environmental hazard.

- The affirmative language of certainty in the current provisions (such as 'will unreasonably and adversely affect the interests, whether wholly or partly of that person' or 'will be inconsistent with any relevant Order declared') also impose a high bar to the success of any review application11 and arguably runs counter to tendencies in environmental legislation to accommodate, to greater or lesser degree, risk and probabilities in environmental management. It would seem resort to the guiding principle of precaution offers little of assistance to ameliorate the standard of certainty required under 33B.[12]

Generally, the 33B provisions are complex and a deterrent to third party review. Such deterrence or restriction is unwarranted. Perceived threats of 'floodgates' and 'busybodies' where standing rules are relaxed or abolished have been shown to be alarmist, outdated and unfounded. Third party and public interest litigants are rarely on frolics and the limited volume of public interest litigation in public interest cases tends to show environmental laws under under-enforced. There are a multitude of other barriers to such litigation in practice, even in relatively low cost jurisdictions, such as the complexity, difficulty and resource-intensive nature of litigation in environmental cases. Courts and tribunals typically have a range of tools available to deal with clearly unmeritorious claims, such as striking out proceedings for abuse of process or showing no prima facie evidence.

In our view, third party standing should be overhauled and simplified in the context of merits review. Open standing should be available, by which 'any person' can seeks review of a decision to grant a licence or works authority under the Act.

[11] See eg Santos v East Gippsland SC [2008] VCAT 1658 (14 August 2008), [52]-[59]; Thirteenth Beach Coastwatch Inc v EPA [2008] VCAT 1880 (9 September 2008), [12]
[12] Thirteenth Beach Coastwatch Inc v EPA [2008] VCAT 1880 (9 September 2008), [18]

3. Governance and funding

Recommendation: Modernise the governance framework for the EPA to ensure that the Authority is independent and accountable.

Recommendation: Ensure that the EPA is funded under a model that avoids any perceived conflice of interest, and that ensures that the EPA has the resources necessary not only to carry out its day to day functions but also to undertake major investigations and prosecutions.

It is our submission that an EPA that is accountable, but also strong and independent requires a modernisation of the current governance arrangements.

Unfortunately there is little information available about how the EPA is funded and alternative funding models. We understand that the EPA has undertaken some work in this area and we would welcome the opportunity to engage further on this important issue if further information is made available. For the purposes of this submission, we note that the EPA relies for a large portion of its revenue on the levies from waste. This clearly creates a conflict of interest and needs to be changed so that the EPA has the funding it needs to meet community expectations and retain the necessary technical expertise it needs to do its job. The funding model must also ensure that the EPA has the resources it needs to undertake major prosecutions without detracting from its day to day operations.

Presently, the governance framework under the Act establishes an Environment Protection Board, responsible for broad policy setting, and Authority (formally vested in the Chair), which is responsible for the administration and operation of the Act. Both the Minister and Governor-in-Council also have functions under the Act, such as the declaration of the main regulatory instruments (eg SEPPS). In effect, while the Authority does operate with a fair degree of independence there is also retention of considerable political control over environmental protection functions and processes under the Act, especially by way of adoption of regulatory instruments and any directions given by the Minister. Governance arrangements under the Act are also influenced by the role of VCAT and the courts, as relevant to review of decisions and to enforcement.

The precise character of various environmental protection bodies can be a matter of some ambiguity. For instance, to what extent, if at all, should an environmental protection body be a regulator, expert, administrator, ombudsman, tribunal, police force, advisor or legislator? All of these functions can be relevant to the environmental protection task.

It is our view that as a matter of broad principle governance needs, first of all, to be underpinned by independence. This should include independence of environmental protection agencies/authorities from the political control of Executive Government. But it might also include using other tools, procedures and bodies to promote and contribute to the independence, oversight, rigour and/or integrity of EPA decisions. For example,

- In the context of enforcement, where there is an appeal from an EPA prosecution there could be a requirement that the matter is referred to the Office of Public Prosecutions, who would then be required to take over the matter.

- In the context of the making or review of legislative instruments, such as SEPPs or environmental plans, the use of independent expert advisory bodies, or combined expert-lay bodies, should be considered, including their capacity to conduct public hearings in relation to the making of environment protection tools.

- Within the broader framework of environmental governance in Victoria, of which the EPA is a part, there should be the establishment of an independent Environmental Ombudsman or equivalent office, whose functions and power include oversight of environmental protection, and who is an officer of the Victorian Parliament. Various models of Environmental Ombudsman or commissioners or similar bodies exist in other jurisdictions.

3.1 Collaborative governance approaches

Recommendation: *The objects of the EP Act should include the use and development of 'collaborative governance' methods as appropriate and adapted to decision-making under the Act. The EPA should be required to innovate and develop collaborative or co-regulatory approaches as appropriate to decision- and policy-making.*

The EP Act and the EPA have been relatively innovative and advanced in seeking to experiment with and use 'shared' or 'collaborative' governance approaches to management of environmental problems, such as through the Neighbourhood Environmental Improvement Plans (NEIPs) and provision for s 20B conferences. The paradigms of collaborative governance broadly include arrangements intended to depart from 'traditional' 'command and control' regulation and develop approaches to environmental management involving nongovernmental participants in the project of governance, including individual citizens, nongovernmental organisations, private sector and business interests, and other statutory agencies.

Methods of shared governance can range from notice and comment consultation provisions through to forms of surrogate or co-regulation in which nongovernmental actors are established participants in decision-making processes, with real or effective power alongside governmental actors. There is considerable research and literature on collaborative governance models in the environmental protection sphere, including in respect of the EPA specifically. Many important lessons are available from this research. In general, however, it is important to view collaborative models and strategies are complementary to other forms of regulation, including 'traditional' regulatory methods or market-based incentives. Indeed, we strongly believe that collaborative models will not work optimally or effectively outside of the functioning of the EPA as a strong and independent environmental regulator and use of other tools, such as pricing mechanisms, as appropriate.

While we do not intend to canvass the literature on collaborative governance here, there is a need to recognise the value, status and potential of the CEG approaches. As Holley et al have remarked, CEG is an ongoing social experiment but one that is maturing and consolidating.[13] Collaborative governance needs to be viewed in this light. A first point to make is that, in our view, collaborative

[13] Cameron Holley, Neil Gunningham and Clifford Shearing *New Environmental Governance* (Taylor and Francis, 2013), 172

governance should be expressly identified as a necessary approach underpinning the EP Act, albeit one appropriately deployed and adapted to the needs of environmental protection and management. Holley et al have proposed a range of design principles for the use and adoption of CEG approaches to environmental management including:[14]

- significant investment where these techniques are used;
- use of these methods in the context of severe (or potentially severe) environmental challenges;[15]
- carefully designed incentives to manage and guide participatory behaviour;
- capacity building, especially of under-represented and/or marginalised intersests or groups;
- consideration of size and scale;
- developing innovation means to engage environmental groups in governance;
- facilitate horizontal as well as vertical information exchange and collaborations;
- make implementation effective.

In consideration of such points, collaborative governance generally is best seen as a strategic policy or practical intervention in environmental protection and management. The circumstances in which these methods are best used need to be considered alongside optimal techniques. At the lesser end of the spectrum of complexity and/or severity of environmental concerns, provision for notice and comment consultation may be appropriate. At the other end of the spectrum, statutory underpinning and sufficient resourcing to nongovernmental, especially community-based interests is needed. The 'hybrid' (state-nonstate) approach Holley et al ascribe to collaborative governance also tends to operate as a matter of degree, as between a preponderant state role and a clearly co-regulatory or co-management role with non-state actors.

[14] Ibid, Ch 7

[15] Threshold triggers be commonplace and capable of legislative expression in other areas of environmental law and policy, such as the requirements for 'serious or irreversible' harm as a trigger for application of the precautionary principle in decision-making.

4. Climate change - the EPA needs a clear legislative mandate to regulate carbon pollution

Recommendation: *The EPA should act to regulate, limit and reduce greenhouse gas emissions from industry, as it already does for other dangerous wastes and pollutants.*

Recommendation: *The SEPP (AQM) needs to be updated and brought into line with current scientific knowledge on climate change.*

Recommendation: *The EPA should advocate for effective action by the state government on climate change.*

Carbon dioxide pollution, through its role in causing climate change, is the pollutant most critical to the lives and wellbeing of all Victorians. Industry, particularly the electricity generation industry, is the main contributor to greenhouse has emissions in Victoria.[16] It is unacceptable that the EPA, as the state body responsible for regulation of pollution and the environmental impacts of industry, does not have a meaningful and powerful role in the regulation of carbon pollution.

Existing industry, especially the existing electricity industry, must be regulated by the EPA to require reductions in greenhouse gas emissions. In other words, the EPA should treat carbon pollution as it does other dangerous pollutants.[17]

The current provisions in the State Environment Protection Policy (Air Quality Management) ('SEPP (AQM))[18] are not appropriate and adapted to deal with the threats presented by carbon pollution. Concepts such as best practice and continuous improvement do not provide a sound basis for the EPA to put in place effective obligations on operators of facilities to reduce greenhouse gas emissions. The ineffectiveness of the SEPP (AQM) to address greenhouse gas emissions can be seen by the fact that Victorian greenhouse gas emissions have not decreased over time, despite the continual improvements in our understandings of the seriousness and imminence of impacts of climate change.[19]

Furthermore, the requirement to "have regard" to climate change when assessing new applications for works approvals and licences[20] fails because, firstly, the requirement is too weak to ensure meaningful change, and secondly, it only applies to new applications.

The SEPP (AQM) needs to be updated and brought into line with current scientific knowledge on climate change. This requires limits upon, and mechanism to reduce over time, carbon emissions. Efficiency standards should be placed on coal fired and gas fired power generators,[21] noting that Victoria's inefficient electricity generation industry contributes over half of Victoria's greenhouse gas

[16] Department of Sustainability and Environment, *Report on Climate Change and Greenhouse Gas Emissions in Victoria*, March 2012
[17] See, for example, the management approach detailed in clause 20 of the SEPP (AQM)
[18] In particular, clauses 18, 19 and 33 of the SEPP (AQM), as well as the classifications of air quality indicators as Class 1, 2 and 3.
[19] Department of Environment (Cth), State Greenhouse Gas Inventory: Net CO2 emissions for VIC from National Greenhouse Gas Inventory Total, http://ageis.climatechange.gov.au/Chart_KP.aspx?OD_ID=49110757528&TypeID=2 , visited 29 October 2015
[20] Section 14 of the *Climate Change Act 2010.*
[21] The US EPA has recently introduced emissions standards on existing fossil fuel powered electricity generators – see the Clean Power Plan http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants

emissions. The US Clean Power Plan could be used as a model.[22] Limits on carbon emissions of other industrial activities that emit carbon should be designed, so that limits are both achievable for the respective industry and lead to meaningful reductions in greenhouse gas emissions

The updated SEPP (AQM) would provide a basis for existing regulatory tools, such as licences and sustainability covenants, to be used to achieve reductions in greenhouse gas emissions by existing industry. It would also be useful for the EPA to be given express powers to regulate greenhouse gas emissions on new and existing industries through amendments to the *Climate Change Act 2010* or the *Environment Protection Act 1970*.

We understand that for the EPA to be able to effectively deal with carbon pollution and Victoria's contribution to climate change, support of the state government is necessary. The EPA should be advocating for, and be seen to be advocating for, an effective and meaningful government response to climate change. We are of the view that this role is consistent with being an effective and modern environmental regulator.

We note that the government is currently undertaking a review of the *Climate Change Act 2010.* The review of the *Climate Change Act 2010* and this current review EPA should both consider and make recommendations on the role of the EPA in relation to reducing greenhouse gas emissions and responding to climate change. In our view, the EPA's role in dealing with climate change should be to regulate, limit and reduce greenhouse gas emissions from industry, as it already does for other dangerous wastes and pollutants. Broader policy change, including the setting of, and achievement of, greenhouse gas reduction targets, should be implemented using a whole of government approach through the *Climate Change Act 2010,* which can then inform and guide the EPA as to what reductions they should be aiming to achieve.[23]

[22] Australian Greenhouse Emissions Information System: http://ageis.climatechange.gov.au/. Visited 29 October 2015

[23] Environmental Justice Australia has developed a comprehensive policy proposal for a state wide approach to reducing greenhouse gas emissions, known as the Climate Charter. The Climate charter can be found at https://envirojustice.org.au/major-reports/proposal-for-a-victorian-climate-charter

5. General duty not to pollute

***Recommendation**: The EP Act should include an enforceable general environmental duty not to pollute.*

Such an overarching duty has been enacted into environmental protection laws in several Australian jurisdictions, including Queensland, South Australia, Tasmania, the ACT and the NT. In Queensland, for instance, the duty provides that:

> 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).[24]

Various issues may be considered in deciding on reasonable and practicable measures, including the nature of the pollution, the sensitivity of the receiving environment, financial implications, the current state of technical knowledge and likelihood of success of the proposed measures.

In Tasmania, the existence of general environmental duty is accompanied by a 'best endeavours' obligation on local councils to prevent or control acts or omissions which cause or are capable of causing pollution.[25]

Under the current Victorian EP Act there is no general duty although there are broad duties not to pollute waters,[26] the atmosphere,[27] or land.[28] The weakness of these provisions are, first, that there are no accessible mechanisms to seek enforcement of existing duties, and, second, while broad, they do operate as an overall environmental protection.

Our view is that a general environmental duty (duty not to pollute) is preferable and simpler. Further, this must be an enforceable duty. Consistent with principles of enforcement as accessible, providing a real deterrent, and proportionate, enforcement of the general environmental duty should:

- be accompanied by offence provisions (criminal sanction), as well as civil remedies (civil enforcement), and administrative penalties;
- be subject to a broad range of civil remedies, including pecuniary penalties, injunctions, orders appropriate to restoration of environmental damage or harm;
- be enforceable by anyone, ie open standing should apply to enforcement of the general duty.

[24] Environmental Protection Act 1994 (Qld), s 319
[25] Environmental Management and Pollution Control Act 1994 (Tas), s 20A
[26] EP Act, s 39
[27] EP Act, s 41
[28] EP ACt, s 45

6. The role of environmental protection and the EPA in land use planning

Recommendation: Amend the Environment Protect Act 1970 to provide with EPA with clear legislative precedence in situations where there is a risk that environmental protection objectives will be undermined by land use planning decisions.

Recommendation: Provide the EPA with a call in power for all other developments not covered by the preceding recommendation, to provide a clear right on the part of the EPA to veto development proposal that risk creating land use conflicts at a later date.

The discussion paper asks "[h]ow could environmental regulation and other statutory frameworks more effectively prevent future environmental risks and land use conflicts?" We agree that this is an important issue to be addressed as there are many prominent examples of decision making in the land use planning context undermining the pollution control and environmental and health protection objectives of the Environment Protection Act 1970.

Land use planning decisions are critical to the health and well being of communities affected by both new proposals and existing developments. In our observation, the EPA is often marginalised in key decision making processes. An example of this is the issues that arose with the Cranbourne landfill Victoria needs an EPA that can provide strong advocacy for the health and safety of the community in these cases, with the power to stand up to development interests by having much greater influence in zoning and permit decisions.

We understand that following the Ombudsman's report in relation to the Cranbourne landfill the EPA has recognised the need for greater engagement in land use planning decision making rather than hoping or expecting that Planning Authorities, Responsible Authorities and the Victorian Civil and Administrative Tribunal will ensure that the environmental protection objectives of the Environment Protection Act, SEPPs and the like are achieved.

These developments are welcome but not failsafe in the sense that they are heavily reliant on a culture of proactive intervention by the EPA and the existence of referral provisions in planning schemes created under another regulatory system. A better system would be to reform the Environment Protection Act 1970 to provide that the Act has precedence in identified circumstances, and to complement this with a "call in" type power in other situations such that the EPA has a right of veto with respect to development proposals that are going to lead to land use conflicts at a later date.

7. Public Health and Amenity issues

7.1 Integration of public health expertise into EPA functions

Recommendation: The EPA work with public health agencies to better integrate public health considerations and expertise into EPA functions.

Pollution has the potential to have serious impacts on human health, and environment has a significant influence on human health and wellbeing. As a result, a deep integration of public health expertise into the work and decision-making of the EPA is needed.

Advice from public health experts should be incorporated into the assessment and approval of works approvals and licences for scheduled premises, enabling the health impacts of emissions to be assessed before any emissions are licensed. This approach is consistent with the approach of protecting beneficial uses, as defined in the Act and the SEPPs.

Advice and expertise on the public health implications of pollution should also inform and enhance the EPA's approach to monitoring, compliance and enforcement. Incidents, pollution events and ongoing emissions that may have health implications should be prioritised for monitoring and compliance action. Consistent with our submissions on right to know and emergency management, the EPA should also communicate, in a targeted and accessible way, the results of any monitoring that indicate that there are potential public health implications of non-compliances with the Act or regulations.

Having an approach that is more focused on public health would also enable larger and complex environmental and health issues that do not solely result from point source pollution, such as urban air quality and climate change, to be better addressed in a more holistic fashion. Feeding in public health expertise to policies and standards designed to address such issues, as well as having public health agencies take some responsibility for dealing with them, will both improve the science upon which the standards and policies are based, and may result in more resources being devoted to dealing with such issues. This would have health and environmental benefits. On this point, see the discussion on standard setting.

7.2 Community health, environment and amenity concerns

Recommendation: Make the EPA a 'one-stop-shop' for all pollution issues.

We have assisted numerous community members affected by noise, odour and/or air pollution from nearby facilities, who are unable over periods of months and years, to get a regulatory response from the EPA or the relevant local Council, even if the pollution affecting them is occurring in breach of an applicable regulation. Often community members experience reluctance by the EPA and/or the Council to devote resources to investigating or monitoring their complaints, and reluctance by the agencies to take enforcement action. In addition, community members have also experienced both the EPA and the Council informing the affected community member that their issue is the

responsibility of the other agency. Further, often local councils are ill-equipped, in terms of expertise and equipment and technology, to deal with these issues and properly fulfil their responsibilities under the Public Health and Wellbeing Act 2008. These experiences cause the affected members of the community to feel deeply frustrated and often result in the community losing trust in the EPA.

One solution to this could be giving responsibility for all pollution enforcement, including the powers currently given to Councils under the Public Health and Wellbeing Act 2008 and the Environment Protection Act 1970 to the EPA and creating a 'one-stop-shop' for pollution. Having the EPA responsible for these matters would improve the way community concerns around pollution are dealt with, because the EPA has the requisite expertise. In addition, the EPA would get a better understanding of what community concerns arise and where, and develop strategies that can be efficiently implemented across the state. In addition, having clarity around responsibilities would likely improve the community's experiences with regulatory agencies, when they are dealing with pollution issues. The EPA would need additional resources if it were to take on these additional responsibilities. Greater access to public health expertise, as proposed above, would also assist the EPA undertake this role effectively.

Alternatively, if this centralisation of responsibility in the EPA is thought to be unworkable from the a regulatory agency point of view, a "one stop shop" could still implemented for members of the community seeking to deal with these issues by making the EPA responsible for a single point of contact for pollution complaints. This would have the effect of making the lead pollution regulation agency responsible for navigating any complexities around agency responsibility, rather than leaving members of the community to work out who is responsible.

8. The EPA's role in emergency management

Recommendation: *The EPA develop a memorandum of understanding with emergency services and emergency management agencies that requires the EPA to be notified of emergencies, and facilitates the EPA monitoring emissions and collecting evidence during emergencies.*

Recommendation: *The EPA continue to work on its capacity to respond to and monitor emissions from emergency events, in order to provide the community and health agencies with timely information about likely exposures to pollutants.*

Recommendation: *The EPA equip itself to undertaken rapid air quality monitoring at any location in Victoria to collect all data, and ensure that this data is used to inform decision making within 24 hours of the incident occurring*

Recommendation: *The EPA ensure it has the capability and resources needed for effective and rapid communications to affected communities during an emergency. Communication needs to be targeted to the specific community and emergency event, and be responsive to the public health concerns of community members.*

Emergency events are also often pollution events that have the potential to have significant impacts on human health and the environment. When an emergency creates pollution it is essential that the EPA be on the ground as soon as possible after the emergency, to monitor emissions and quickly provide the community with up-to-date information as to what's being emitted and what risks these emissions pose to human health. In addition, the EPA also needs to be able to collect evidence, in the event the emergency, by virtue of the pollution event, also constitutes a breach of the provisions of the *Environment Protection Act 1970.*

EPA needs to ensure that:

(a) they get notified of when emergencies occur; and
(b) their role in monitoring pollution during an emergency is accommodated by other agencies.

A memorandum of understanding or protocol between bodies such as Emergency Management Victoria, the Country Fire Authority and Metropolitan Fire Brigade and the EPA could be prepared, setting out the role of the EPA in emergencies, and how other emergency agencies should cooperate with the EPA. Any agreement should require the services that first respond to an emergency to notify the EPA, and share relevant information on pollution with the EPA. In addition, the agreement should ensure that in any clean up, evidence is not unnecessarily destroyed. Education about the terms of any agreement within the emergency services agencies should also be undertaken, so that emergency responders are aware of the terms of any agreement and can implement it and/or comply with it.

In addition, EPA needs to ensure it has the people, expertise and technology to respond and provide information to the community during an emergency, in a timely fashion. It is noted that often in an emergency, the most harmful emissions occur at the beginning of the incident. If the EPA does not respond, there will be no information about what the community has been exposed to. This will hamper efforts to ascertain what health impacts of exposure might be, and what the appropriate risk mitigation and treatment options are. Failure to respond in a timely fashion might also hamper the

EPA's ability to undertake appropriate compliance action, due to a lack of contemporaneous evidence.

Examples of the EPA not responding to an emergency and providing information in a sufficiently timely manner include during the Hazelwood Mine Fire in February 2014 and the recent fire, in October 2015, at the Sims scrap metal recycling plant in Brooklyn. It took several days after the Hazelwood mine fire commenced for the EPA to put in place the monitoring equipment needed to measure the emissions impacting residents closest to the mine. Because the EPA was not monitoring in the early days of the fire, the levels of harmful emissions, such as carbon monoxide, were not measured and as a result, there is no information on what the community were exposed to. At the fire at the Sims metal recycling plant, the EPA did not attend to measure emissions until the following day, inhibiting the ability of the EPA to inform people of any air quality impacts and associated risks, and collect evidence that would have been needed, in the event the fire constituted a breach of the Act. The EPA systems need to be improved to ensure that events like these do not occur in future.

In this respect, we adopt Recommendation 5 of the Hazelwood Mine Fire Inquiry, that states "the state equip itself to undertaken rapid air quality monitoring at any location in Victoria to collect all data, including data on PM2.5, carbon monoxide and ozone and ensure that this data is used to inform decision making within 24 hours of the incident occurring".[29] We note that such an approach would also improve the EPA's ability to monitor compliance and undertaken appropriate enforcement action in relation to air pollution incidents generally, including those not occurring in an emergency situation.

In addition, we echo the findings of the 2014 Hazelwood Mine Fire Inquiry in relation to communication of information by state agencies to the community during and following an emergency. In Recommendation 11, the Board of Inquiry recommended that emergency response agencies have the capability and resources needed for effective and rapid communications during an emergency.[30] We also note the Board's comments in respect to the EPA, that communication needs to be targeted to the specific community and the specific emergency event, and responsive to the public health concerns of community members.[31]

On this matter, we reiterate our submission in relation to ensuring that the EPA also is able to work closely with agencies with public health expertise to ensure that there is clear and understandable information publicly available about what the risks and health impacts of any pollution events are, and what measures communities should be taking to decrease these risks.

[29] Hazelwood Mine Fire Inquiry Report 2014, page 30 and 292
[30] Hazelwood Mine Fire Inquiry Report 2014, page 31
[31] Hazelwood Mine Fire Inquiry Report 2014, page 402

9. Setting pollution standards

9.1 The Current Mechanism

The mechanism for setting many of the pollution standards that apply in Victoria is managed by a national body, the National Environment Protection Council (NEPC). This body is responsible for establishing National Environment Protection Measures(NEPMs), of which there are currently seven, mandated under Victorian legislation.[32]

The following description of each NEPM is provided from the NEPC annual report,[33] together with status details available on the NEPC website[34]:

> Air Toxics—sets out a nationally consistent approach to collection of data on toxic air pollutants (such as benzene) in order to deliver a comprehensive information base from which standards can be developed to manage these air pollutants to protect human health. **Commenced 2004, has not been amended.**
>
> Ambient Air Quality—establishes a nationally consistent framework for monitoring and reporting on air quality, including the presence of pollutants such as carbon monoxide, lead and particulates. Work, including a public consultation, commenced in 2013–14 towards making a variation to this NEPM. It is expected that the final variation will be completed in 2015–16. **Commenced 1999, not has not been amended.**
>
> Assessment of Site Contamination—provides a nationally consistent approach to the assessment of site contamination to ensure sound environmental management practices by regulators, site assessors, environmental auditors, landowners, developers and industry. **Commenced 1998, amended 2013.**
>
> Diesel Vehicle Emissions—supports reducing pollution from diesel vehicles. Several jurisdictions operate a suite of programmes to reduce exhaust emissions from diesel vehicles. **Commenced 2001, has not been amended.**
>
> Movement of Controlled Waste—operates to minimise potential environmental and human health impacts related to the movement of certain waste materials, by ensuring that waste to be moved between states and territories is properly identified, transported and handled in ways consistent with environmentally sound management practices. **Commenced 1998, amendment proposed 2012 but not yet agreed.**
>
> National Pollutant Inventory—provides a framework for collection and dissemination of information to improve ambient air and water quality, minimise environmental impacts associated with hazardous wastes and improve the sustainable use of resources. **Commenced 1998, amended to remove Greenhouse gas and energy reporting, 2008.**
>
> Used Packaging Materials—operates to minimise environmental impacts of packaging materials, through design (optimising packaging to use resources more efficiently), recycling (efficiently collecting and recycling packaging) and product stewardship (demonstrating commitment by stakeholders). **Commenced 1998, amendments agreed in 2010 but not implemented yet.**

The NEPMs seek to achieve distinct monitoring and assessment goals. They do not define any methods of enforcement, or any targets for pollution abatement. They reflect agreed positions between all states and territories and the Commonwealth, on discrete issues that are capable of being agreed. A national forum of environment ministers is unsuited to setting challenging goals, and ensuring that the standards keep pace with scientific developments.

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[32] National Environment Protection Council (Victoria) Act 1995

[33] National Environment Protection Council, Annual Report, 2013-2014

[34] Accessed at http://www.scew.gov.au/nepms

Naturally, the standards reflect the lowest common denominator reached by negotiation and compromise, rather than the scientifically-verified standards that will effectively protect the community. As such, it is the position of many environmental and community groups that this method of pollution standard-setting is ineffective.

The NEPMs have become an inefficient and ineffective way to set, maintain and review pollution standards.

This has been most obviously shown in relation to the air pollution standards. When the Air NEPM was first made in 1998 it was a useful first step in understanding Australia's air pollution levels and beginning to address this problem as a national issue. However the science, technology, and needs of the community have moved far beyond what was required at that time and the NEPMs have failed to keep pace. The NEPM process is no longer a useful tool in reducing harmful levels of air pollution in Australia.

NEPMs require input and negotiation from nine separate governments to develop standards, and then two-thirds majority agreement to make them. This process has to be repeated each time a NEPM is revised.

The processes can be unacceptably slow, as shown by the sixteen years of failure to make a compliance standard for $PM_{2.5}$

- In 1998, ministers first discussed making a $PM_{2.5}$ standard, but determined that there was not enough data to set an appropriate standard.
- In 2001, ministers committed to a review to consider setting a standard.
- In 2003, ministers concluded there was not enough data to make a compliance standard, so made a reporting standard instead.[35]
- In 2007, 2011 and 2014, ministers again considered the need for a compliance standard but have failed to make one on each occasion, despite over a decade of overwhelming evidence of serious health impacts.
- Despite monitoring and reporting of $PM_{2.5}$ being compulsory since 2004, there remains no compliance standard. In contrast, the United States and Canada have had compulsory $PM_{2.5}$ standards in place for over 14 years.[36]

The most recent review of the Ambient Air Quality NEPM was completed in 2011, and found significant problems, gaps and failures of the NEPM. 23 recommendations were made to improve it but none have yet been implemented. The Commonwealth Environment Minister Greg Hunt stated that the reform process would be delayed another two years until 2016.[37] Many of the recommendations that were made by the National Environmental Protection Council would be a valuable improvement to the NEPM, but they are of little use if the process for making them is so flawed that they cannot be implemented.

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[35] National Environmental Protection Council, *Review of the National Environment Protection (Ambient Air Quality) Measure, Issues Scoping Paper* October 2005.

[36] *National Ambient Air Quality Standards for Particulate Matter*, 40 CFR Part 50 (1997).

[37] The Hon Greg Hunt MP, Inaugral Alan Hunt Oration, Speech to the Urban Development Institute of Australia 7 March 2014 http://www.environment.gov.au/minister/hunt/2014/sp20140307.html.

9.2 Monitoring and enforcement is weak or non-existent

Another significant problem with the way NEPMs operate is that there is no penalty if States and Territories don't comply with them. Jurisdictions are required to report to the National Environmental Protection Council each year on their implementation of NEPMs, but there are no consequences from a failure to meet the standards.

The NEPMs are designed to set national standards and encourage jurisdictions to work towards them, rather than result in any consequences for the States and Territories themselves if standards are not met or monitoring is not properly conducted.

Monitoring under the Air NEPM is designed to capture data on the average air quality in a region in order to understand the general impacts on the population.[38] Monitoring stations are therefore located away from major pollution sources such as roads, industrial areas and mines. There is strong criticism from many sectors that this type of monitoring hides the true levels of air pollution many communities are exposed to.[39] For example, motor vehicles cause about 30 per cent of PM pollution in Melbourne. A study from the EPA has confirmed that the PM standards are not met near some busy roads in Melbourne.[40] It is clear that there are many communities who are exposed to much higher levels of harmful pollutants on a much more frequent basis than the NEPM data reveals.[41] Indeed some communities experience air quality exceeding NEPM standards on an almost daily basis.[42]

Similarly, some pollutants are measured over a period of time such as 24 hours that allows the levels to be averaged out, hiding any spikes in emissions. This ignores the fact that short-term exposure to some pollutants can be very damaging to health.[43]

Monitoring of known pollution sources such as industrial sites usually occurs as a result of State Government requirements on individual polluters as part of their operating licence. This type of monitoring has also been criticised as being inaccurate and very difficult for the community to access. For example in Victoria, it took years for the local community exposed to particulate pollution from the Alcoa coal mine to access air pollution data collected by the company.[44]Inaccuracies can result

[38] National Environment Protection (Ambient Air Quality) Measure (Cth) clause 11; see also EPA NSW submission in response to Hunter Community Environment Centre submission no 5 to Senate Community Affairs References Committee, Parliament of Australia, *Impacts on health of air quality in Australia*, 2013 for an illustration of the effect of this shortcoming in practice.

[39] See for example submissions discussed in the Senate Community Affairs References Committee, Parliament of Australia, *Impacts on health of air quality in Australia*, 2013.

[40] EPA Victoria (2006). *Review of air quality near major roads.* Publication 1025. February 2006. Environment Protection Authority Victoria.

[41] Senate Community Affairs References Committee, Parliament of Australia, *Impacts on health of air quality in Australia*, 2013.

[42] For example in the Lower Hunter where monitoring over a one month period showed the PM10 standard exceed by more than 50% every day. Hunter Community Environment Centre submission no 5 (Supplementary submission) *to the* Senate Community Affairs References Committee, Parliament of Australia, *Impacts on health of air quality in Australia*, 2013.

[43] Coal Terminal Action Group, *Coal train signature study*, (2013) p.6, available at http://www.hcec.org.au/sites/default/files/CoalTrainSignatureReportAug2013.pdf#overlay-context=node/103.

[44] Evidence to Senate Community Affairs References Committee, Parliament of Australia, Canberra 17 May 2013, 54 (Dr Merryn Redenbach, Quit Coal).

from poorly written licences which do not require monitoring at sites that will accurately record community exposure.[45]

Enforcement of air pollution is also a significant problem. Over 3000 pollution licence breaches were recorded in NSW between 2000 and 2008 but only six were taken to court[46] and in Victoria the EPA has only taken companies to court for air pollution offences five times in the last five years.[47]

9.3 Victoria to develop its own standards, with the national standards as a baseline only

Recommendation: *That Victoria recognise any national standards as a baseline requirement, and adopt higher Victorian standards for permitted concentrations of major pollutants, based on independent established research, and which are the subject of expert and public consultation processes.*

Recommendation: *That Victoria develop particular standards for known harmful activities to be harmonised with world's best practice, for example: waste dumps; coal trains; vehicle emissions; other mining or industrial processes; and domestic wood heaters.*

Recommendation: *That the Victorian Government develop a "citizens enforcement" mechanism to entitle members of the public to commence legal action to enforce pollution standards and pollution license requirements, where government agencies have not responded.*

Recommendation*: That specific reduction targets be identified for higher-risk communities such as those that live near a major pollution source.*

Recommendation: *Improve implementation requirements to ensure that air quality standards are properly implemented at the state, regional and point source level.*

Recommendation: *Implement a requirement that existing pollution sources that contribute to breaching the standard be brought within standard within three years.*

Recommendation: *Implement improved monitoring of all known pollutants including monitoring at all major population centres and near known pollution sources at both urban and rural locations.*

9.4 Access to pollution monitoring data

Recommendation: *That the EPA improve access to pollution monitoring data that supports real-time web-access to consistent monitoring data, of all known pollutant categories.*

Pollution monitoring data must be readily accessible to community members. This would enable medically vulnerable people to assess the environment themselves and make informed decisions about how to manage their exposure to pollutants. The EPA website does not currently enable ready access to data.

[45] ANEDO submission no 85 to Senate Community Affairs References Committee, Impacts on health of air quality in Australia, 2013.
[46] Australian Network of Environmental Defenders Officers, Submission no 85 to Senate Community Affairs References Committee, Parliament of Australia, *Impacts on health of air quality in Australia*, 2013.
[47] EPA Victoria prosecutions database available at http://www.epa.vic.gov.au/our-work/compliance-and-enforcement/epa-sanctions/prosecutions.

The NSW EPA website illustrates best practice: http://www.environment.nsw.gov.au/AQMS/search.htm The NSW website allows community members to download data for any period of time (hours, days or years) from any or all of the state's 45 monitoring sites.

By contrast, the Victorian website is out of date and does not include up-to-date data: http://www.epa.vic.gov.au/our-work/monitoring-the-environment/monitoring-victorias-air/monitoring-results The EPA takes several months to upload data. To access monitoring data, it is necessary to liaise directly with EPA staff. If the Victorian EPA air pollution website had the same functionality as the NSW site, residents in the Latrobe Valley would have had a comprehensive picture of air pollution throughout the Hazelwood mine fire. They would have been able to compare pollution concentrations to historic trends and to monitoring sites in other parts of the state.

In the Latrobe Valley, most air pollution monitoring is undertaken by industry rather than the EPA. The data from this monitoring is not readily available. This data should be integrated with the EPA monitoring data and made available through the same interface (the EPA website). There is no reason why this data should not be readily accessible. EJA has experienced significant delays of several months in accessing pollution data and from industry sources.

9.5 Arrangements for standard-setting and making regulatory instruments

Recommendation: *That the mechanism for the setting of pollution standards be open, public and open to legal challenge, with appropriate safeguards.*

Currently the making of regulatory instruments under the Act occurs through conventional administrative and/or legislative processes. For instance, State Environment Protection Policies or other statutory policies are made by the Governor in Council on the EPA's recommendation. The EPA ordinarily undertakes rounds of 'consultation' around such instrument-making and the ultimate approval and promulgation of such instruments are political decisions endorsed by the relevant Minister. Some subject matter regulated under the Act, such as vehicle emissions or noise standards, are incorporated into Regulations and therefore proceed through the ordinary processes of making Regulations (including tabling in Parliament).

It is our submission that the making of statutory instruments under the Act which concern standard-setting in relation to an environmental subject-matter, or rule- or policy-making relating to environmental subject-matter under the Act, needs to occur in more transparent ways. In particular, we propose that instrument-making should include the capacity to review on the merits instruments that are not made, or that are arguably not made, in conformity with the principles of the Act and best practice. Such as review would be undertaken in a quasi-judicial manner as merits review on, for example, works approval decisions are now undertaken, and that jurisdiction could be given to VCAT to conduct the review.

There are numerous other circumstances in which the making of legislative and regulatory instruments occurs via quasi-judicial procedure, giving them an arms-length and expert character. Planning panels routinely undertake inquiries of a quasi-judicial nature into planning scheme amendments, for example, although these are only advisory in nature. The making of industrial

awards under workplace relations legislation occurs, at legislative direction[48] or on an application[49], in a quasi-judicial manner before the Fair Work Commission This is an example of the making of binding regulatory instruments at arms-length by an expert body. Although not strictly analogous to merits review, these examples do demonstrate that the use of independent bodies, with open, public and quasi-judicial methods is appropriate to the making of statutory instruments. Also by way of comparison, we note the well-established US practices of requiring trial-like procedures in formal legislative rule-making, including in the context of environmental protection standards. This occurs prior to an instrument being promulgated. Formal procedures such as these are one mechanism among a number that are used to provide for public participation in instrument-making. Others include 'notice and comment' type consultation and 'negotiated rule-making'.[50]

9.6 Continual improvement

Recommendation: *That the EPA adopt an exposure reduction framework and actively manage the Victorian environment to continuously reduce pollution levels.*

For many pollutants, there is no threshold below which there are no adverse health impacts. Even where pollution concentrations are below the relevant state or national standard, there is a direct benefit of further reducing pollution levels. Reducing short-term exposure to PM_{10}, for instance, would reduce hospital admissions for childhood respiratory disease and pneumonia/bronchitis in people aged 65 and above by as much as 65% (Reference: Draft Variation to the National Environment Protection (Ambient Air Quality) Measure Impact Statement, p.xviii). Reducing exposure to $PM_{2.5}$ to the proposed standard of 6 micrograms per cubic metre would prevent 530 deaths in Melbourne, Brisbane, Sydney and Perth.

The current pollution management regime provides little impetus for polluters to reduce emissions. Pollution licences should be reviewed on an annual basis, with stricter conditions imposed wherever they are achievable.

The setting of standards, thresholds or environmental quality parameters under the Act should be based on and integrate 'best available techniques' (BAT) relevant to the industry or activity in question. The BAT measure should inform, as a general requirement, any licence or works authority granted under the Act. Hence, licence holders and holders of works authorities would generally be obliged to meet BAT conditions. Obligations on both the EPA to inform themselves and grant approvals according to BAT, and licence and works authority holders to conform to BAT, will have the effect of ensuring that there is continuing improvement in pollution control standards. BAT are an advancing and incremental base on which to frame agency approvals and polluter conduct.
A model for the incorporation of BAT into pollution control can be found in the EU Directive 2008/1/EC Integrated Pollution Prevention and Control.[51]

[48] See eg Fair Work Act 2009 (Cth), s 156
[49] See Fair Work Act 2009 (Cth), s 158(1), item 7
[50] See eg Vanessa Burrows and Todd Garvey A Brief Overview of Rule-making and Judicial Review (Congressional Research Service, 2011), http://www.wise-intern.org/orientation/documents/crsrulemakingcb.pdf (retrieved 29 October 2011)
[51] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:024:0008:0029:en:PDF (retrieved 29 October 2015)

9.7 Hotspot pollution monitoring

Recommendation: *The EPA establish permanent monitoring stations in locations that are known or suspected to have elevated levels of pollution.*

The Victorian EPA monitors should routinely monitor in locations that are known or suspected to have elevated levels of air pollution. Community members are concerned about pollution along major motorways and in residential areas near industry, but there is no ongoing monitoring in these locations. The burden of air pollution is often distributed unfairly. Locations for the state's permanent monitoring stations are selected to measure pollution concentrations in 'background' locations, far removed from known pollution sources. This does not provide an accurate or representative picture of the state's air environment and no information about local air pollution for those community members living with the highest levels of pollution.

The EPA should expand the state's permanent air pollution monitoring network, adding locations that are identified by community groups and other stakeholders as pollution hotspots.

9.8 Accessible polluter reports

Recommendation: *That the EPA develop enhanced methods of public access to information about licensed polluters to enable improved assessment and monitoring of licensed polluter's performance.*

Major polluters are licenced by the EPA and submit compliance reports annually. Licences and compliance reports are available on the EPA's Interaction Portal: https://portal.epa.vic.gov.au/irj/portal

While this level of transparency is valued, it does not meaningfully facilitate performance monitoring. With modest changes and the right level of staffing, this portal could provide profiles for the state's major polluters, showing their track record of non/compliance with their licence conditions and identifying the measures they have taken to address non-compliance and to minimise emissions. Ideally, this should be integrated with the National Pollutant Inventory (NPI), where companies describe measures they have taken to reduce emissions.

A significant shortcoming of the NPI is that it does not require the Latrobe Valley's energy companies to report on particle emissions from their open cut coal mines. An NPI technicality allows them, instead, to report on the combined emissions of their power stations and mines. Both the power stations and coal mines are significant sources of pollution, so this anomaly should be corrected.

10. Regulation of mining activity

Recommendation: *The EPA have a direct regulatory or at the very least a referral body role in the assessment of mine work plans and rehabilitation plans under the Mineral Resources (Sustainable Development) Act 1990*

Mine regulation, despite its potential to cause pollution and impact the environment, is primarily the responsibility of the Earth Resources division of the Department of Economic Development, Jobs, Transport and Resources ('the mine regulator'). This sometimes results in the EPA dealing with the consequences of the actions, or lack of action, on the part of the mine regulator, without having the benefit of being able to take an active role in managing or preventing those consequences. Notable examples of this occurring include the Hazelwood Mine fire in 2014 and the Yallourn mine collapses into the Morwell River in 2007 and 2012. We note that the 2014 Hazelwood Mine Fire Inquiry revealed problems with the regulation of mines, in terms of risk management.[52] Regulatory failure in relation to mine stability is also a long running problem, although recently steps have been made to improve regulation of this issue.[53]

Mine rehabilitation and legacy mines are areas of particular concern. There are thousands of legacy mines around the state, several of which continue to pose pollution risks, such as remaining arsenic tailings dams in the Central Goldfields.[54] Operating mines whose rehabilitation will take place in coming decades also present significant environmental risks, which are all the greater if rehabilitation regulations and bonds are inadequate. The adequacy of rehabilitation plans and bonds is to be considered in relation to all the major Latrobe Valley coal mines in the 2015 Hazelwood Mine Fire Inquiry.

Currently the EPA has limited say in assessment and approval of mines, as well as mine rehabilitation standards and mine clean up.[55] The main instruments for regulating mines and mine rehabilitation are work plans and rehabilitation plans. The mine regulator is responsible for approving work plans, including rehabilitation plans and is not required to seek the advice of, or ascertain whether the EPA has any concerns with a particular proposal. The EPA must issue a works approval and licence for mines, but these only relate to discharges from the mine, as opposed to addressing operational and structural matters, and do not deal with mine rehabilitation.

The EPA's expertise in relation to contaminated land and surface and groundwater pollution mean that in some cases EPA's involvement could greatly improve the assessment of the impacts of mines, and whether proposals for their rehabilitation ensure that environmental issues are adequately addressed. In addition, given the EPA often has responsibilities for cleaning up after incidents at mines, its involvement may lead to a more careful approach and greater focus on disaster prevention in mine regulation. It is our submission that the review should recommend a much stronger role for the EPA to ensure the community is protected and mining companies are clearly responsible for mine site rehabilitation. We submit that the EPA should be given a direct regulatory responsibility for pollution issues related to mine management and rehabilitation. This could be achieved by giving the EPA direct responsibility with respect to these matters, or at the very

[52] Hazelwood Mine Fire Inquiry Report 2014, page 169

[53] Arup, Tom, '7 Coal Mine Sites at Risk', *The Age,* 21 June 2013, http://www.theage.com.au/national/7-coal-mine-sites-at-risk-20130620-2olr7.html, visited 30 October 2015

[54] Minerals Policy Institute, 'Mining Legacies', http://www.mininglegacies.org/mines/vic/, visited 29 October 2015

[55] The EPA has the opportunity to be involved in mine assessment if the mine is being assessed by way of Environmental Effects Statement. Whether a proposal will be assessed via and Environmental Effects Statement is ad hoc.

least ensuring a referral role in decision making by the mining regulator, similar to the role it has in assessing planning permit applications under the *Planning and Environment Act 1987.*

11. Regulating Nonpoint Source Pollution

Non-point source, or diffuse source, pollution is among the more difficult, complex and intractable problems of environmental impairment with which the EP Act is seeking to contend. Historically, a principal focus of the Act and the EP Act framework has been to regulate and reduce pollution from point source locations, such as factories and industrial facilities, which have been entirely appropriate, especially in the early years of the Act's operation. Emissions and pollution from large-scale facilities does remain a substantial environmental concern in Victoria and new sources of pollution have emerged over time, such as large agricultural feedlots. However, the Act has broadly failed to come to terms with the more difficult issue of non-point source pollution. We recommend that the architecture of a new Act expressly provides for the management and reduction of nonpoint source pollution.

In a 2011 report conducted for the Victorian Department of Primary Industries by the renowned US environmental law academic, Robin Kundis Craig, the management of non point source pollution through various Victorian legislation was analysed.[56] There is considerable other important literature, with valuable recommendations, on regulating nonpoint source pollution in Australian contexts.[57] There is abundant literature on the US context as well. Overall Professor Kundis Craig expressed considerable criticism of the shortcomings and limits of Victoria's approach to regulation of non point source pollution. In summary, the report identifies US rejection of primary reliance on water quality standard setting as a vehicle for regulation and implementing instead a range of complementary and integrated water quality measures including:

- Setting Total Maximum Daily Loads for identified pollutants from which permitting proceeds and regulating identifiable polluters within that cap.

- Deeming certain nonpoint pollution sources as point source pollution sites and therefore amenable to regulation under the Clean Water Act. This is especially the case with storm water runoff.
- Funding State water quality management programs and setting standards and plans at local levels via appropriations.

It certain cases nonpoint source pollution can be regulated by way of identifying and controlling the activities of industries or activities within a particular area (for example, water or air catchment). Identifying key sources of storm water or riparian runoff may fall into this category. In other circumstances, managing nonpoint source pollution necessarily interacts with issues of land-use

[56] Robin Kundis Craig Victoria's *Legal Options for Addressing Agricultural Diffuse Water Pollution: Perspectives from the US Experience in Regulating Non-Point Source Pollution, A Report to the Victorian Department of Primary Industries* (2011)

[57] See eg Rebecca Nelson 'Regulating Non-Point Source Pollution in the US: A Regulatory Theory Approach to Lessons and Research Paths for Australia' (2011) 35 UWA Law Review 340; Alex Gardiner and Tim Setter 'Legal powers and responsibilities for managing diffuse pollution from agriculture: regulating the flow of water – the 'common enemy'' (1998) 5 Australasian Journal of Natural Resources Law and Policy 2 188; Marie Waschka and Alex Gardiner 'Using regulation to tackle the challenge of diffuse source pollution and its impact on the Great Barrier Reef' (2012) 15 Australasian Journal of Natural Resources Law and Policy 2 109;

management and planning. For example, turbidity and nutrient loads into waterways can arise from extensive (and historic) vegetation clearing as well as use of pesticides and fertilizers. Where non point source pollution is likely to interact with land use planning matters these are properly areas to be regulated by the EPA and on which specific and considered (and enforceable) regulatory tools, as well as funding programs, should be developed.

We note that EPA work, for instance, on regulating vehicle emissions falls within regulatory activity directed to management nonpoint source pollution. Far greater and proactive regulatory effort however needs to go into managing nonpoint source pollution is areas such as water quality management. We have made separate remarks on regulating this type of pollution in relation to air quality standards. In areas such as water management in particular we also recommend that the EPA be given powers, as appropriate to the challenges of nonpoint source pollution in a particular context, to direct other agencies to take action reasonable practicable and complementary to an express EPA mandate to manage, prevent and reduce nonpoint source pollution. This might be applied to water management and air quality management is ways appropriate to those problems. So far as regulating and reducing nonpoint source pollution impacts or overlaps with land use controls the EPA needs to be given express obligations to develop appropriate regulatory standards and tools , which may or may not accompany funding arrangements, to manage land uses and development.