



28 October 2015

EPA Inquiry Secretariat
PO Box 21428
Little Lonsdale Street. VIC. 8011

Dear Ministerial Advisory Committee members,

Thank you for the opportunity to make this submission to the Inquiry into the Environment Protection Authority (EPA).

My area of expertise is regulatory theory and practice borne out of more than thirty years' experience working: first, as a senior executive within heavily regulated industries in Australia, Asia and the United States; next as a senior executive with Victoria's workers' compensation insurer and occupational health and safety regulator, WorkSafe Victoria; and now as an academic with the Monash University Faculty of Law and its Centre for Commercial Law and Regulatory Studies. In this latter capacity, I recently completed research into the challenges faced by the EPA to regain legitimacy in the eyes of key stakeholder groups, and the mechanisms employed by the EPA to overcome those challenges. This submission is based largely on that research (which is yet to be published). I would be pleased to meet with the Ministerial Advisory Committee or Inquiry Secretariat to expand upon this submission or the research upon which it is based, should this be considered helpful.

Diversity of legitimacy claims

The EPA interacts with a large number of businesses and community groups. My research revealed significant differences in how these two groups perceive the legitimacy (acceptability and credibility) of the EPA. Table 1 summarises how each group constructs their legitimacy claims.

Table 1 – Construction of Legitimacy Claims on EPA

Business	Community
1. Legal	1. Cognitive
2. Normative	2. Pragmatic
3. Cognitive	3. Normative
4. Pragmatic	4. Legal

As can be seen, for business groups, legal legitimacy is the most important legitimacy domain. The importance of a clear legislative mandate to exercise the state's coercive powers was central to business groups' conception of regulatory legitimacy. At the same

time, however, business also recognised that legal legitimacy was necessary but not sufficient. In this regard, normative legitimacy also is important to business. Especially important are outcomes (efficiency more so than effectiveness); role clarity; decisiveness in decision-making; transparency and clarity of what the EPA plans to do, how, when and why; expertise with respect to both the science and industries it regulates; consultative and inclusive decision making processes; and independence from both government and community influence. Cognitive dimensions of legitimacy, while important, are much weaker. Most business groups acknowledge the need for (or at least do not object to) environmental protection laws and regulators to enforce them. Pragmatic legitimacy was the weakest of business' legitimacy claims and arose only in the form of an expectation that the EPA would produce policies and outcomes aligned to their interests in a level playing field.

For community groups, cognitive and pragmatic legitimacy are the most important legitimacy domains. For these groups, the issue - protecting the environment - is the primary source of the EPA's legitimacy. These groups also believe an environmental regulator should share their values and concerns for the environment and produce policies and outcomes aligned to their shared interests. Normative legitimacy dimensions also are important to community groups. The normative dimensions most important to them include outcomes (effectiveness more so than efficiency), role clarity, consultative, inclusive and transparent decision-making processes, and independence from business. Community representatives were split on the importance of legal legitimacy, primarily because of differences of opinion about the utility of legislative mechanisms in the absence of regulatory courage to employ them.

The business and community groups interviewed for my research are not homogeneous entities. Within each group, significant variations exist. For example, business groups interviewed represented different industry sectors (e.g., agriculture, automotive, construction, plastics and chemical, waste, recycling and sewerage, and government); and businesses that ranged from large industrial and manufacturing sites licensed by the EPA through to small businesses the source of diffuse pollution. Similarly, community groups spanned comparatively well resourced, funded and administered environmental groups with a focus on national and/or state issues, through to small and less sophisticated (but no less passionate) volunteer organisations with a focus on specific local issues. My research also revealed these community groups had different conceptions of what should be protected. For some, it was ensuring sustainability and addressing the causes of climate change; for others, it was protecting public health from pollutants; and for others still, it was protecting amenities.

The different manner with which these different groups construct legitimacy claims - and the different ways they perceive the 'issue' - complicates the already challenging task of regulating, and has important implications for the questions raised by the Ministerial Advisory Committee in its Discussion Paper. It is on these implications that the rest of this submission focuses.

Clarity of role and responsibilities

Role clarity is essential for any regulator, but especially for one whose key stakeholders hold different and sometimes conflicting expectations. The Inquiry (and Government's response to the Inquiry) is an opportunity to clarify and affirm the EPA's role, purpose and responsibilities. My research revealed that the single most important recent strategic initiative impacting positively on the EPA's legitimacy is the clarity and consistency with which the EPA repositioned itself as a 'regulator'. Also important was the decisiveness with which it replaced the previous client service model that focused on assisting 'clients' to move 'beyond compliance' with a risk-based compliance and enforcement model focused on enforcing duty-holders' compliance with legal standards. It is submitted that this clear regulatory focus should be supported by the Inquiry.

Equally important, the Inquiry (and Government) should articulate those things for which the EPA is not (primarily) responsible. My research identified a lack of clarity in the division of roles and responsibilities between the EPA and other regulators within the environmental regulatory space as the most significant factor weakening the EPA's legitimacy. This challenge – which Thompson refers to as the problem of 'many hands'¹ – was evident in anecdotes of 'buck passing' and 'blame shifting' between agencies, and especially between the EPA and local government that also has an enforcement role. It is submitted that the Inquiry should investigate ways to better integrate the work of the EPA and local government. Integration of local government into the EPA compliance and enforcement model would provide better compliance monitoring and more consistent enforcement. It also has the potential to provide a vehicle for community level environmental justice initiatives.

Regulatory Design

The wide variety of environmental issues with which the EPA has to deal, the different circumstances in which those issues can arise, and the different types and motivational postures of the regulatory actors with which the EPA has to deal,² call for the EPA to be armed with a flexible regulatory tool kit. 'One size fits all' approaches do not work. There is no single regulatory approach or predetermined combination of regulatory tools that will work satisfactorily (let alone optimally) in all circumstances. Rather, the EPA needs to be armed with a wide variety of regulatory tools and the flexibility to combine and tailor those tools to address the variety of regulatory problems with which it is presented. This is the essence of 'smart regulation' championed by Gunningham and Grabosky.³ Smart regulation advocates arming regulators with a broad suite of regulatory instruments that regulators can combine and adjust to match the regulatory intervention to the circumstances of those being regulated.

¹ D. F. Thompson, 'The Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) 74 *American Political Science Review* 905.

² The term 'regulatory actors' is used here broadly and in a manner capable of including polluters, potential polluters, compliant businesses, community groups impacted by pollution, environmental NGOs, and government agencies with whom the EPA must cooperate or otherwise engage in the discharge of its regulatory functions.

³ Neil Gunningham and Peter Grabosky, *Smart regulation: designing environmental policy* (Oxford University Press, 1992).

As the Discussion Paper notes, the EPA is already armed with a variety of regulatory tools. Some of these tools enable the EPA to act proactively to inform and persuade business and the broader community of the importance of environment protection, the nature and consequences of adverse environmental impacts, and the legal standards with which they must comply. Other tools enable the EPA to act reactively to ensure adverse environmental impacts are remedied, and those responsible for them are penalised in a manner commensurate with the harm caused and their culpability. Arguably missing from the EPA's arsenal, however, are tools to enable the EPA to act preemptively to address risks to the environment before they materialise into environmental harm.

One model for addressing this gap is found in the recently agreed national model work, health and safety legislation. The corner stone of this legislation is a series of positive duties on persons (or entities) whose acts or omissions are capable of affecting the health, safety and welfare of persons at work. These include persons conducting a business or undertaking, officers and managers of the business or undertaking, and other persons who carry out specific work related activities including designers, manufacturers and suppliers of plant, structures and substances used at the workplace. Generally speaking, the positive duties require these persons to ensure, so far as is reasonably practicable, that the health and safety of persons at work is not put at risk from their activities. These duties are then supported by a regulations that prescribe specific requirements and standards for high risk industries and activities, and codes and guidelines on how to comply. A breach of these duties or regulations is an offence under the Act. Also, and importantly, non-compliance with the duty empowers an Inspector to issue a notice or direction to compel the duty-holder to control the risk.

Consideration should be given to translating this model to environment protection. For example, there could be a positive duty on persons conducting a business or undertaking and other persons whose acts or omissions are capable of adversely affecting the environment to ensure, so far as is reasonably practicable, that the environment is not put at risk from their activities. This positive duty would, in effect, require duty holder to eliminate risks to the environment to the extent reasonably practicable, or if it is not reasonably practicable to eliminate those risks, to minimise them to the extent reasonably practicable. These general duties could then be supported by regulations focused on the greatest environmental risks and harms, be they specific sites (e.g., major polluters), industries (e.g., agriculture and construction), harms (e.g., noise, odour, waste and litter) or features (e.g., land, air and water). The regulations would be a mix of performance (outcome) based standards and prescriptive rules, tailored to the nature of the different environmental actors, harms and features.

Regulatory implementation

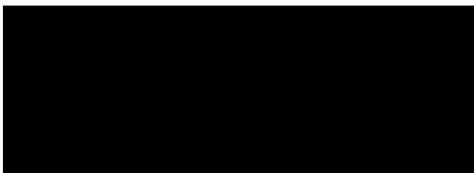
Regulatory implementation is both a science and an art. The 'science' component requires a systematic approach and the use of empirical methods and technical tools. The EPA's adoption of a risk-based approach to focus its compliance and enforcement activities is an example of such a systematic approach. The complex issues with which the EPA deals also requires it (and its people) to master a variety of scientific, engineering and technical disciplines, as well as understand the industries it regulates. However, good regulation also

requires the exercise of judgment that cannot (and should not) be totally systemised. This exercise of judgment is the 'artful' part.

Essential to good regulation is the judgement to know which regulatory tools to employ in which combination for which issues. It also is important that those tools are selected and deployed confidently and decisively, and with an understanding and appreciation of the context in which both the EPA and the people it seeks to influence operate. (The importance of it would increase significantly should the *Environment Protection Act* be amended to create positive duties in the manner discussed above.) People skills also are important in this regard. Regulation is about altering the behaviour of others. It is about persuading and motivating people to act in a certain manner. It also is about developing relationships with those people with whom the EPA partners or on whom it relies in the discharge of its regulatory responsibilities. This involves knowing how to engage with people constructively and transparently, to demonstrate that you have listened to and understood their views, and to provide authoritative explanations of regulatory decisions.

As discussed above, my research revealed that how the EPA discharges its regulatory function is important to how stakeholders assess its legitimacy (acceptability and credibility). My research also revealed that while there is near unanimity among business and community groups that the EPA's culture has improved over the past five and a half years, and that it is now a more confident, open and constructive regulator, concerns remain about the consistency and decisiveness with which the EPA discharges its responsibilities. The Committee should support the EPA to continue to invest in its culture, and to continue to develop its people's technical, decision making and people skills.

Yours sincerely,



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