LAW INSTITUTE VICTORIA

Independent Inquiry into the EPA

LIV SUBMISSION

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EXECUTIVE SUMMARY

In response to the Independent Inquiry into the Environment Protection Authority ('the Inquiry'), the Law Institute of Victoria ('LIV') provides its key concerns and recommendations as follows:

- The *Environment Protection Act 1970* ('EP Act') should be reviewed in its entirety as it is outdated, inconsistent and difficult to navigate due to amendments being made over the last 45 years.

- The Environment Protection Authority ('EPA') must be provided with the appropriate tools and powers to achieve its purpose of protecting Victoria's environment. The Inquiry should consider how the EPA facilitates environmental protection by engaging with relevant stakeholders, as well as its interfaces with various other government bodies.

- Stakeholders who engage with environmental law in Victoria will all appreciate more clarity, accessibility and transparency in the legislation, regulations and when dealing with the EPA. Giving certain instruments and processes (such as the Priority Sites Register, State Environment Planning Policies, environmental auditor guidelines and incident notifications) legal force, consistency and clarity should provide much needed certainty.

INTRODUCTION

The LIV is grateful for the opportunity to provide comments to the Inquiry.

The LIV understands that the Ministerial Advisory Committee for the Inquiry ('Inquiry MAC') has been proactively engaging with relevant stakeholders – from practitioners, industry and government groups and the general public across Victoria – in a number of consultation sessions to inform its response to the Inquiry. To this end, the LIV would also like to thank the Inquiry MAC for the opportunity to present at a consultation session held on 21 October 2015, and to discuss environmental issues in Victoria with others who regularly engage with the EPA and the EP Act.

Since the introduction of the EP Act 45 years ago, the nature of pollution in Victoria has seen significant change. Specifically, the focus has shifted from point-source pollution to diffuse pollution. The shift in paradigm of environmental harm has left the legislative framework around environment protection outdated and inadequate. This has resulted in the EPA not having the right legislative tools to keep up with current environmental challenges. It is for this reason that the LIV considers that the present Inquiry is crucial for the development of a sustainable framework of environmental protection in Victoria now and into the future.

The LIV's submission, below, considers the current regulatory and legislative landscape of environmental protection in Victoria, identifying important gaps and inconsistencies. It compares the Victorian model with those in other jurisdictions, in particular NSW, and recommends the establishment of a dedicated planning and environment Court in Victoria.

Following on from this, the LIV presents its concerns about specific aspects of the regulatory and legislative framework in Victoria, and puts forward its own recommendations for the future role and functions of the EPA.

The LIV Working Group

The LIV is the peak body for the Victorian legal profession, representing over 19,000 members. The LIV initiates programs to support the needs of the changing legal profession; promotes an active advocacy agenda; responds to issues affecting the profession and broader community; and consistently provides expert services and resources to support our members.

In order to respond to the Inquiry, the LIV formed a Working Group consisting of expert members from its Environmental Issues and Planning & Local Government Committee. The LIV would like to express its thanks to those Working Group members who volunteered their time in putting together this submission.

CURRENT LEGISLATIVE LANDSCAPE: GAPS AND INCONSISTENCIES

In Victoria, the EP Act deals with the establishment, functions, powers and administration of the EPA, as well as core aspects of Victorian environment law. Outside of these core aspects, there are multiple pieces of legislation dealing with environmental matters or which are environmental in character. These include, for example, the *Pollution of Waters by Oils and Noxious Substances Act 1986*, *Planning and Environment Act 1987* ('Planning & Environment Act'), *Flora and Fauna Guarantee Act 1988*, *Water Act 1989* ('Water Act') and *Heritage Rivers Act 1992*.

Whilst the compartmentalisation of legislation is not a bad thing in itself, in application, the LIV believes that the current structure results in inconsistencies and practical difficulties for lawyers, Courts, other users and the general public. These problems broadly fall into three areas of concern that have been identified by the LIV:

- Firstly, the structure causes difficulties for administrators, including the EPA and the Department of Environment, Land, Water and Planning (DELWP), as it is not often clear which authority is responsible for which Act (particularly where environmental and public health issues intersect). For example, in matters concerning interference with water, there are links between the Water Act and the EP Act which can lead to uncertainty as to which particular authority should assume responsibility.

- Secondly, the interface between the EP Act and other major pieces of environment legislation, regulation and other instruments is unclear and requires review. For example, there are currently crossovers between the EP Act, the Planning & Environment Act and instruments such as Ministerial Direction 1 on potentially contaminated land[1], which can cause significant confusion amongst practitioners and other stakeholders, let alone the general public.

- Finally, the current legislative structure has resulted in unstructured coordination, and information and data sharing between relevant State and Commonwealth government bodies – such as public health authorities and the Commissioner for Environmental Sustainability – and the EPA, DELWP and Sustainability Victoria as environment regulators.

To ensure that the operation of the EPA is as efficient and fair as possible, the LIV believes that the inconsistences and practical difficulties arising from the current legislative framework should be addressed as part of the Inquiry.

Lessons from NSW

Given the problems identified above in relation to the legislative framework in Victoria, it is helpful to contrast the Victorian model with those of other jurisdictions. In particular, the NSW model serves as an appropriate blueprint for what is widely considered a world-class regulatory and legislative framework for environmental protection.

The main aspects of administration and operation of the EPA in NSW is divided into three Acts:

- The *Protection of the Environment Administration Act 1991* (NSW) ('POEA Act') establishes the NSW EPA and sets out its objects, establishes the Board of the EPA and its role, establishes community consultation forums and the NSW Council on Environmental Education. It also requires the NSW EPA to make a report on the state of the environment in NSW every three years.

[1] Minister for Planning, *Potentially Contaminated Land*, Direction No. 1, 27 September 2001.

- The *Protection of the Environment Operations Act 1997* (NSW) ('POEO Act') is the NSW EPA's main source of power and responsibilities, and provides it with the tools to achieve the protection, restoration and enhancement of the quality of the environment. Other sources of power and responsibilities are provided through legislation dealing with specific subject matters, such as contaminated land, dangerous goods, hazardous chemicals, forestry, ozone protection, pesticides, radiation and resource recovery.

  The POEO Act does, however, give regulatory powers to the EPA for the risk to human health in relation to contamination of water (surface and groundwater), air, noise, land pollution and waste. The underlying test here is the risk to human health or the environment.

- The *Contaminated Lands Management Act 1997* (NSW) ('CLM Act') enables the EPA to respond to contamination that it has reason to believe is significant enough to warrant regulation.

Whilst not faultless (the LIV understands that the NSW legislative regime is currently the subject of its own review), the POEO Act, POEA Act and CLM Act nonetheless set out clear objectives for the protection of the environment, is easier to navigate compared to the EP Act, and serves as an example of legislative and regulatory coherence in environmental law which avoids confusion. Furthermore, NSW has produced a robust body of law in relation to the application of the three existing pieces of legislation above.

Specialist Planning and Environment Court

Whilst somewhat outside the scope of the Inquiry, the LIV would like to take this opportunity to address the lack of a dedicated planning and environment Court in Victoria.

With the exception of VCAT through its Planning and Environment List, which only has limited jurisdiction to review decisions made under the EP Act, Victoria lacks a specialist planning and environment Court or tribunal. As a result, Victoria lacks development of a coherent body of environmental case law. This leads to uncertainty and inconsistency in decision-making in Victoria, which ultimately has an impact on the stability and predictability of the regulatory environment in Victoria. Practitioners often refer to NSW decisions for guidance but this does not provide certainty as to whether the same approach will be adopted by, for example, VCAT.

The LIV submits that consideration should be given to the establishment of a dedicated planning and environment Court similar to those operating in NSW and Queensland – each subject-specific Act should vest jurisdiction in the Court.

The NSW Land and Environment Court was established in 1980 being the first specialist environmental superior Court in the world. Being a superior Court, it is equal to the Supreme Court of NSW. The Land and Environment Court has served as a model for environmental Courts and tribunals in overseas jurisdictions, including in England and New Zealand.

Legislative Review

The LIV supports the EP Act being reviewed in its entirety, in tandem with the Inquiry's consideration of the EPA's role more broadly, in order to:

- provide clarity of purpose and role for the EPA;

- free the EPA of having to work within the confines of what is currently a cumbersome statutory and regulatory regime; and

- provide clarity and ease-of-use for practitioners and other stakeholders.

Currently, the EP Act contains many unused sections and a significant number of sections and sub-sections which have been inserted through many subsequent amending Bills. As a result, from feedback that the LIV has received, the EP Act has become very difficult for users to navigate, is often repetitive and in some instances redundant, and important principles are obscured in very long and complex provisions. This situation gives rise to the risk that the EP Act will be incorrectly applied or even ignored.

SPECIFIC ISSUES

The following sets out concerns in relation to specific aspects of the legislative and regulatory framework which have been identified by the LIV. Where appropriate, the LIV has provided its recommendations on how these issues can be addressed.

Clean Up Notices

- It would be beneficial to implement different types of notices for each stage of the clean up process, including the initial investigatory step. Often, when a matter is merely investigatory in nature, a clean up notice is issued. These notices have an adverse impact on the reputation of the recipient even if they have done nothing wrong, and even if there is no risk of harm to human health or the environment. It would be more appropriate in those situations to issue a preliminary 'investigation notice'.

- In NSW, clean up notices are issued according to a hierarchy of recipients. So for example, the NSW EPA will issue notices in sequence to polluters, where possible or practicable, followed by owners and finally occupiers. This cascading hierarchy provides a clear line of responsibility.

  In Victoria, clean up notices may be issued to any or all parties at the same time. This often results in situations where an occupier or owner is issued with a clean up notice for something they had no connection with and, as clean up notices can only be appealed to the Supreme Court on an error of law, must resort to judicial review if they wish to challenge the notice. It can also result in a dispute between notice recipients as to who is to be responsible where multiple notices are issued.

- Whilst the LIV agrees with the idea of recovery under section 62A of the EP Act, its implementation poses practical difficulties (for example, the original polluter cannot be identified; there is insufficient evidence to prove causation by a polluter; the polluter cannot be located or has ceased to exist, or even if identified and located, the polluter has insufficient funds to reimburse clean-up costs). The LIV suggests that an alternative could be the development of a 'Superfund' similar to the model introduced in the United States. A Superfund can provide funds for the clean up of contaminated land through a levy on industry in Victoria.

  A Superfund would also address the lack of remedies currently available to innocent purchasers of contaminated land, where limitation periods have expired and/or there is no strong case against the remaining entities associated with the contamination of the land.

Review of Clean Up and Pollution Abatement Notices

- While the LIV supports the introduction of an internal review of remedial notices by the EPA, it submits that there should be a harmonised review mechanism for both clean up and pollution abatement notices ('PANs') in VCAT (or a designated planning and environment Court). It is not satisfactory that clean up notices can only be appealed to the Supreme Court on an error of law – the merits of clean up notices should be reviewable at VCAT as is the case for PANs.

Priority Sites Register

- The status of the EPA's Priority Sites Register ('PSR') should be formalised and updated through the EP Act or through subordinate legislation. Currently, the PSR is mostly a historical reference and is not useful for due diligence purposes. A regularly updated PSR should be made available and contain information on every site previously used for activities which may potentially contaminate the land (for example, service stations) even if they have since been sold, closed or decommissioned

Incident Notification

- A mandatory incident notification system in addition to that required for licence breaches (required as a standard condition in discharge licences issued by the EPA) should be implemented in order to capture previous issues and therefore avoid or minimise future problems. The notification requirement should not, however, require notification of inconsequential incidents.

- Thought will also need to be given to the authorities which should be notified of environmental incidents. The LIV is of the view that the EPA could act as a gatekeeper by receiving incident reports and then deciding which other authorities, if any, should be notified. For example, in NSW, Part 5.7 of the POEO Act imposes a duty to inform the NSW EPA and other relevant authorities if there is a pollution incident which causes, or is likely to cause, environmental harm.

Environmental Audits

- The role and relationship between the environmental audits that can be required under sections 53V and 53X of the EP Act should be more clearly articulated in the EP Act to aid understanding.

- To provide a more robust structure, certain elements currently in the numerous environment auditor guidelines should be inserted as provisions in the EP Act or regulations. For example, the *Environmental auditor (contaminated land): Guidelines for issue of certificates and statements of environmental audit*[2] sets out what an auditor needs to do when preparing their statements and provides information about the concept of 'clean up to the extent practicable' or CUTEP, which is not provided in the EP Act at all. These guidelines, and in particular the concept of CUTEP, should be formalised in the EP Act or as regulations.

  Guidance on these types of provisions can be found in the NSW CLM Act, *Contaminated Land Management Regulation 1998* (NSW), and the *CLM (Site Auditors) Regulation 1998* (NSW).

Transfer of Liability for Contaminated Land

- The LIV submits that there should be a system in place, similar to those in Western Australia (ie. section 30 of the *Contaminated Sites Act 2003* (WA)) or South Australia (ie. section 103E of the *Environmental Protection Act 1993* (SA)), to recognise contractual transfers of liabilities for contaminated land under the EP Act.

State Environment Planning Policies

- The legal status of State Environment Planning Policies ('SEPPs') is currently uncertain and should therefore be clarified and strengthened by drafting relevant provisions as regulations under the EP Act.

Waste Management Policies

- Similar to SEPPs, the legal status of Waste Management Policies should be clarified and strengthened by drafting relevant provisions as regulations under the EP Act.

Environmental Impact Assessments

- The operation of environmental impact assessments ('EIAs') is exceedingly complicated. The processes have not been integrated well into other legislative regimes (such as the Planning and Environment Act and the EP Act). It is currently difficult to determine the triggers for EIAs. The NSW CLM Act once again provides appropriate guidance.

Financial Assurances

- The EP Act would benefit from clarification that financial assurances apply with respect to premises and not waste.

[2] Environmental Protection Authority of Victoria, *Environmental auditor (contaminated land): Guidelines for issue of certificates and statements of environmental audit* (Publication 759.2 of February 2014).

Buffer Zones

- The LIV is of the view that buffer zones must continue to be enforced and with greater involvement from Local Councils. For example, Councils should not provide planning scheme amendments to the Minister for authorisation if the amendment does not implement appropriate buffers. Too often, practitioners have to act for industry in their objections to inappropriate planning applications around established industrial facilities.

- It would also be helpful if scientific evidence behind the development of particular buffer distances is updated, or research carried out where buffer distances have not been set by reference to any scientific data.

Prosecutions

- In *Allen v United Carpet Mills Pty Ltd* [1989] VR 323, the Court found that offences under the EP Act were on an absolute liability basis, so the defence of honest and reasonable mistake was not available. The LIV contends that this decision was made in error, and that offences under the EP Act should be on a strict liability basis where the defence is available to bring Victoria into line with other Australian jurisdictions.

Climate Change

- An appropriate regulator needs to be identified to administer legislation and policies in relation to climate change in Victoria. The LIV is of the view that the EPA is well placed to liaise with Commonwealth agencies to gather data, report and conduct enforcement on the Commonwealth Emissions Reduction Fund Safeguard Mechanism (ERFSM). The EPA could also play a more prominent role in working with State Government to implement programs and incentivise action on climate change.

- It is important that climate change considerations be taken into account in the works approvals process. At the moment, there is uncertainty regarding the legal status of protocols for the management of greenhouse gas emissions and energy efficiency in industry and this should be clarified.

Renewable Energy / Resource Management

- Consideration should be given to the *Resource Management Act 1991* (NZ) which facilitates the approval of all renewable energy projects. For example, the Act requires that when considering an application for a resource consent, the consenting authority must not have regard to the effects of such pollution on climate change except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases either in absolute terms, or relative to the use and development of non-renewable energy. This varies the precautionary principle (section 1C, Ep Act), in comparison to practices in Victoria.

Access to Justice Issues

The LIV notes that section 60 of the EP Act makes it an offence for an employee of the EPA (and Sustainability Victoria) to disclose or use certain information, subject to some exceptions (performance of duty under the EP Act; consent; disclosure made in legal proceedings; public domain information). The LIV submits that even with the guidance of section 60 of the EP Act, there is a lack of clarity as to what information must or can be made available by the EPA.

In contaminated land or point-source pollution matters, there is currently a heavy reliance on freedom-of-information ('FOI') processes in order to access certain information – for example, information about preventative or remedial works at landfills, including certain documents required by PANs – for even routine matters. This results in costs, delays and other practical challenges for all users of the system.

Furthermore, greater availability of information on the public record about contaminated sites and point source pollution should enhance access to justice and improve enforcement. To facilitate this, the LIV supports the development of formal registers and databases in collaboration with other relevant bodies (ie. DELWP, Sustainability Victoria and the Commissioner for Environmental Sustainability), using modern data sharing and analysis technologies, to provide an accessible and transparent means through which users can access relevant information about the environment.

For an example of easily accessible information in this context, see the website of the NSW EPA[3].

Standing

The question of standing in the context of judicial reviews will depend on the net changes resulting from the Inquiry and needs to be considered holistically. For guidance on issues in relation to standing in environmental law, the LIV would like to refer the Inquiry to the Law Council of Australia's submission to the Commonwealth Senate Environment and Communications Legislation Committee on the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth)[4]

[3] NSW Environmental Protection Authority <http://www.epa.nsw.gov.au>

[4] Law Council of Australia, Submission No 3050 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conversation Amendment (Standing) Bill 2015*, 10 September 2015.

THE FUTURE ROLE AND FUNCTIONS OF THE EPA

If the objectives of the EPA and the EP Act are to protect the environment in Victoria through effective regulation, the LIV believes that the EPA should be equipped with the toolset and powers necessary to deal with environmental issues now and into the future. These include:

- expansion and clear articulation of the EPA's purpose and role under the EP Act. Currently, under the EP Act, the EPA's responsibilities are limited to the regulation of pollution, and it has limited scope to deal with broader environmental protection issues; and

- providing the EPA with the resources and powers to effectively facilitate forums between all relevant stakeholders in environmental disputes.

It is also important for the EPA to be involved in planning scheme amendments and planning permits earlier in the process, for example, through conducting mandatory preliminary site investigations and consultations. Issues with sites are often only discovered during subsequent audits. Whilst Councils will sometimes consult EPA at the beginning of the process, this is not always the case.

In order to carry out its current and future functions, the EPA requires not only regulatory and administrative expertise, but also legal expertise. The EPA should be provided with the necessary legal resources internally which can provide input into other areas of its operations, and also gather evidence and conduct prosecutions in the Courts.

Given that environmental issues such as diffuse pollution and climate change affect many aspects of society, from public health to the economy; the EPA's policy role needs to expand to cover such considerations. It would be beneficial for the EPA to conduct its activities with more commercial awareness and backing of scientific evidence, in order to resonate with relevant stakeholders and provide authoritative advice.

CONCLUSION

As indicated in the 'Examining the future task of Victoria's Environment Protection Authority' Discussion Paper, the operating environment of the EPA is changing both in terms of new and emerging environmental challenges and public health concerns; and changing expectations from business, industry, the community and government about best-practice regulation[5]. Therefore, the LIV considers that it would be appropriate that the Inquiry into EPA and EP Act be contextualised within the wider environmental protection system – including judicial review in Courts – in Victoria.

A balanced, clear and robust environment protection system requires input from all stakeholders. The LIV therefore commends the Inquiry MAC for its consultative approach to the Inquiry and its active engagement with all those concerned – from practitioners, industry and government groups and the general public.

The LIV supports a purposeful and robust EPA in Victoria. In order to achieve this:

- existing policies, principles, guidelines and other quasi-regulatory instruments need to have legal effect and be formalised in legislation or regulations;
- the EPA must be provided with the necessary resources, tools and powers to effectively carry out its role of protecting the environment in Victoria; and
- the EP Act needs to be reviewed in its entirety.

Contact Details

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[5] Ministerial Advisory Committee for the Inquiry into the Environment Protection Authority, 'Examining the future task of Victoria's Environment Protection Authority' (Discussion Paper, August 2015) 4.