



28 October 2015

EPA Ministerial Advisory Committee
EPA Inquiry Secretariat
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Little Lonsdale Street VIC 8011

Dear Committee Members

Thank you for the opportunity to make this submission. We welcome Government recognition of the importance of the EPA, the Inquiry, the public meetings and discussion paper.

Save Our Suburbs

SOS is a voluntary organisation, established in 1998 by residents concerned about the impact on residential amenity of the regulation and conduct of planning in Victoria¹.

1. Introduction

The suffering from injury and illness caused by long term exposure to ambient, diffuse and cumulative pollution can take years to trace and be under recognised, if at all, and thus cause added hardship. It is hard to see; it is hard to address; no one wants to acknowledge it and some have an interest in obscuring it.

'Big Issue' Vendor Ricky's family story of lead poisoning from Port Pirie briefly illustrates the importance of bodies like the EPA.²

2. The EPA's appropriate role in relation to public health

While the priority in the Terms of Reference and Discussion Paper is on public health, the EP Act sets out a broader role for the EPA. SOS consider that the role set out in the Act is appropriate and would like to see the EPA given the legal and political power and the resources to fulfill that role.

The EPA role in long term environment protection is appropriate. But in this role the EPA also plays a vital and unique role in protecting public health. The role of the EPA is 'the protection of the environment in Victoria having regard to [eleven] principles of environment protection'. The principles include protection for all human beings and future generations. Public health is central to the Act: the framework, processes, beneficial uses, works approvals, licences, offences, policies, assessment, referrals, consultations etc.

Many of the EPA principles and objectives are the same as those guiding public health policy. Health programs, particularly preventative health programs, rely on the precautionary approach. Environmental Justice is based on principles of social and intergenerational equity. It is efficient to link regulation as many of the same issues arise, with common causes and solutions.

Furthermore, a focus on human health alone, separating it from a healthy environment and ecosystem, has in the past led to a focus on short term, direct, obvious impacts only, missing many other serious impacts. The history of OH&S and for example asbestos, DDT, PCBs, lead

¹ <http://www.saveoursuburbs.org.au>

² <http://www.thebigissue.org.au/vendors/ricky/>

and diesel; and recent cases involving residents such as the Barkley St Spotless case, Brookland Greens, Fishermans Bend and the Hazelwood mine fire highlight the complexity of science, the unforeseeability of impacts and the importance of environment protection in itself as well as a means for protection of public health. The EPA offers an important and different perspective.

SOS would like to see recommendations that:

1. Strengthen environmental protection in Victoria
2. Reflect the links between the environment and health
3. Reinforce the importance of environment protection in itself and for public health
4. Support more legal and political power and resources for the EPA to fulfill its role
5. Implement the important EP Act Principles

3. Victorian community's expectations - the EPA in 2015

It is our experience that most Victorians expect a well resourced and expert EPA; an independent and authoritative EPA, working separately from business; an EPA with power to stop harmful activity; independent and comprehensive impact assessment, monitoring and review; transparency and proper process; a fair judicial system; appropriate controls and standards; penalties for offenders; redress for victims; that polluters, including miners, smelters, power stations, petrol stations, dry cleaning companies will pay clean up costs; that sites will be cleaned up not just capped; environmental justice, intergenerational equity; and scientific and evidence based decision making in the long term public interest.

It is also our experience that most Victorians expect the EPA would be playing a central role in regulating greenhouse gas emissions.

It is clear that the EPA does not currently have the power or resources to meet these expectations. The 2009 Brookland Greens Estate Report³ and the 2010 Hazardous Waste Management Audit⁴ reached some similar conclusions.

Time and again, at SOS, we see residents astonished and dismayed as they learn how planning is regulated and conducted. Many come to the conclusion that the community is not even at the decision making table, let alone partaking in a fair, transparent or evidence-based process.

SOS would like to see recommendations for an EPA that matches community expectations.

4. EPA future appropriate role in protecting the environment - the EPA in 2050

We consider it likely that Victoria will face significant impact due to: population levels; climate change and other pollution crises; energy, water and food shortage; and diversity crises. How these crises will unfold is unclear.

It is likely that most problems will continue to be left to future generations but we hope that better understanding of science and new technologies may reduce impacts.

We consider Government should prepare for a Victoria facing increased social instability and inequality with fewer resources per person and fewer resources for environment protection.

This means that the EPA should prioritise:

1. Immediate rather than longer term clean up solutions
2. Small-scale, decentralized solutions
3. Solutions that do not rely on future management or resourcing
4. Implementation of EP Act Principles, including Intergenerational Equity, Polluter Pays,

³ <http://www.parliament.vic.gov.au/papers/govpub/VPARL2006-10No237.pdf>

⁴ http://www.audit.vic.gov.au/reports_publications/reports_by_year/2009-10/20100906_hazardous_waste.aspx

and Precautionary Principles

5. An audit of historical pollution and liabilities
6. Reform to secure insurance/bonds/funds to cover clean up where possible
7. Reform to stop the James Hardy type restructure
8. Reform to ensure that in 2015 we are not adding to the burden for future generations, that future clean up costs are paid for by today's polluters
9. New tools and laws to address complex, diffuse, cumulative pollution. Application of polluter pays principles could assist.

The Discussion Paper refers to environmental levies on water users. Where is reference to implementation of polluter pays? SOS would like to see levies applied to polluting industries (manufacturing, car, packaging, plastics, pesticide, agricultural and electronic) to give consumers choice and allow the market place to work for environment protection. We need policies based on real economic cost and externalities.

The EPA will need substantially more resources and legal and political power if it is *'to better protect Victorians ... than we unfortunately sometimes have in the past'*.

5. Community involvement, education and transparency

5.1 Need for public reporting of pollution cases

In Victoria, unlike other states, there is very limited public record of pollution cases⁵.

On 19 August 2003, after three weeks in Court, Mobil was convicted of discharging oil under s9(1) of the Protection of the Sea (Prevention of Pollution from Ships) Act⁶. The oil was discovered when the New Zealand Government warship, HMNZS Te Kaha, followed a 31 km oil slick off Wilsons Promontory, tracked down a Mobil tanker and reported the spill to Australian authorities. In Court, the case involved many weeks of argument and evidence. There were findings of four distinct incidents of faulty equipment and/or process. For many reasons, this is a case of considerable public interest. There is no public record of this case.

On 3 March 2003, Caltex pleaded guilty to causing an environmental hazard under s27(1)(c) of the EPA Act. Caltex was fined \$53,000 over an oil spill at an Ampol Service Station in Hawthorn. An unknown quantity of fuel flowed into storm water and the Yarra River, when diesel and petrol tanks were misconnected. No convictions were recorded but Caltex was ordered to publish details in the AFR, HS, The Age and Progress Leader and in its Annual Report. Caltex appealed to the County Court and on 19 March 2003, the Court reduced the fine to \$33,000 and set aside the publication orders. There is some real public interest in why the publication orders were overturned. There were no reasons for decision published in this case.

Victorians can google details about a neighbour's planning dispute and find lengthy reasons for decision and comprehensive files. But they will find no trace of important pollution prosecutions, such as the above cases. There are often no reasons for decisions, and there is no public record of the cases. What limited documents there are, are somewhere, out of sight, in the Magistrates and County Courts. (Some EPA matters are heard at VCAT where there are also planning issues.

Public oversight is important for many reasons.

Judges and Crime Commissioners⁷ are on record stressing the importance of third party rights and public oversight in limiting corruption.

Some lawyers and defendants report that it is cheaper to pay fines than to comply. Large corporate defendants may be very concerned about adverse publicity. This is an important and

⁵ The reason appears to be historical and has been addressed in most/all? other states, see NSW LEC Crt etc.

⁶ R v Bhompal & Mobil Shipping and Transport (unreported) Victorian County Court 19/08/03

⁷ Third Party Participation in the Planning Permit Process, Stuart Morris

<http://www.austlii.edu.au/au/journals/VicJSchol/2005/5.pdf>

underutilised compliance and education tool for the EPA. The current lack of public transparency and accountability lets transgressors off the hook of public opinion, fails to use the fear of loss of reputation and social licence.

Public oversight also adds to public knowledge and education of the importance and effectiveness of EPA regulations and enforcement processes.

The Review should recommend this overdue reform, so that:

1. EPA and other pollution cases should be heard at VCAT or higher Court
2. They should be publicly reported
3. Reasons for decisions should be required and published

5.2 Need to reverse declining 'information sharing'

A decade ago the EPA published comprehensive Compliance Reports, in standard format to allow easy comparison between years. It seems these reports are no longer available.

The 2003 Annual Report included a 30 page Compliance Report, with a five year comparison table⁸.

The 2014 Annual Report appears⁹ to have only very limited information imbedded in four pages of general text, pp 16- 20¹⁰. The new search tool, to access prosecution data by searching is less transparent and less user friendly for the public.

Changes to the VCAT website have also reduced transparency. Until 2010 VCAT published comprehensive annual statistics for the Planning and Environment List. It included types of appeals and outcomes for up to seven consecutive years, enabling detailed comparisons and trends to be identified. However, these datasets are no longer published nor accessible on the VCAT website. In stark contrast, the meagre data presented in the last few annual VCAT reports do not comprise a complete set and are also presented partly in different formats each year, making comparison impossible from one year to the next.

State and local government also seem to have developed the practice of deleting important older website content, and not recording the date when content was created and/or updated. These practices prevent data comparison over time and also obscure the timeliness of performance.

Public reporting is important for integrity, oversight, accountability and education.

SOS would like to see recommendations that:

1. Restore user friendly, on-line reports, including comprehensive, simple, table-format compliance reports, with multiple year comparison tables
2. Reports and updates that include relevant dates
3. Restore the practice of making public submissions available on departmental websites
4. Retain links or reference to important older content

In a democracy, reporting parameters and KPIs should focus on outcomes and the degree of satisfaction of stakeholders, including third parties and community representatives.

5.3 Need a more public EPA

Given the scarcity of resources, we would like to see the EPA use the media for education and deterrence. For example, a sensitive press release from the Minister about the recent Tianjin

⁸ <http://www.epa.vic.gov.au/~media/Publications/compliance%20report.pdf>

⁹ The author rang the EPA on 26 September 2015, to check whether there is somewhere a recent Compliance Report, but has not yet heard.

¹⁰ <http://www.epa.vic.gov.au/~media/Publications/1573.pdf>

explosions or the VW emissions testing scandal that explains what relevant laws we have in Victoria and why they are so important, would build respect and support for the EPA.

The EPA needs to build this political support and take a more active role to explain to the community and major parties, the importance of the EPA role, the need for adequate power and resources and to build respect for science and evidence based policy.

6. EPA Current Governance Structures and EPA Statutory Powers

6.1 Need for more comprehensive and long term EIA eg Webb Dock

In July 2010, the EPA made a submission to a Planning Panel on Webb Dock. Issues included diesel air pollution from the proposed new dock operations and an additional 800,000 trucks pa on Melbourne roads. The EPA said:

Internationally there is a growing body of evidence that air pollution arising from port activities can significantly impact on the health of surrounding communities ... Assess all of the environment risks that are posed by the ports. Go beyond the current amenity focus of the discussion paper, to consider the impacts on human health and overall environmental quality¹¹

Local residents expected a detailed assessment. As far as we know, there has been only a limited and general air quality assessment. We would like to see an EPA empowered to require the sort of EIA described in their submission, with emission controls and a comprehensive, long term impact assessment.

6.2 Brookland Greens – Multiple failures - Need to restore integrity and community trust

In May 2005 VCAT approved a proposal to reduce the buffer along the landfill boundary at Brookland Greens, leading to inappropriate development, health risk, emergency evacuation, loss to residents and compensation claims.

The 2009 Ombudsman Report found multiple professional, VCAT, EPA and Council failure:

Assessments were inadequate, standards compromised, negotiations inappropriate. There was poor procurement and contract management. There were failures of compliance, enforcement and prosecution. There was inadequate review and monitoring of site, consultants and contractors. There was a narrow focus on economics and failure to have regard to environmental protection. There was failure to address conflicts of interest.

Expert witnesses failed in their duty and VCAT was not adequately informed of key information. Incorrect legal advice meant there was no appeal. Despite public interest and exceptional circumstances, VCAT did not visit the site. VCAT redefined EPA Policy, without power or jurisdiction or explanation. There were badly written contracts, ambiguous documentation and an unexplained removal of reference to the landfill in the s 173 Agreement. There was failure to keep file notes, loss of records, inadequate knowledge management and failures of accountability. The EPA was affected by pressure from Council, 'lacked expertise', 'capitulated' and 'lacked courage'.

VCAT delivered oral reasons without detailed reasons for its decision. Five years later, once the Brookland Greens case had escalated to a public emergency, VCAT produced a brief summary and an incomplete transcript. This is not really good enough.

We note the 2010 Ombudsman Report and implementation of some recommendations.

What should the public to make of this case?

¹¹ EPA Comments Port and Advisory Committee Discussion Paper 15/07/10

On the one hand, Brookland Greens and this VCAT experience is not an isolated example and is consistent with SOS experience of poor and inconsistent process occurring all too frequently. There seem just too many failures in some of these cases to be explained simply by accidental unrelated individual errors. Many Victorians express cynicism.

Regardless of their real cause, these failures lead to very unfair outcomes.

Because of the overwhelming inequality of resources, commercial interests can take full advantage of loopholes and the complexity of the EPA compliance regime, in the way they conduct their reviews, appeals, lobbying etc. Residents and to a lesser extent, government do not have the resources and expertise and room to move, 'with agility, flexibility and nimbleness' to handle these failures in order to achieve outcomes in the best public interest.

6.2 The myth and the reality - independent experts and conflicts of interest

The Ombudsman found that experts failed to raise important and decisive evidence:

*... the performance of a number of witnesses at the VCAT hearing was deficient ... the environmental expert failed in his duty to VCAT.¹²
... the City did not present VCAT with all relevant facts.¹³*

The Ombudsman found 'perceived conflicts of interest':

My investigation found identified three perceived conflicts of interest ... EPA ... dual role of advisor and assessor ... Shire ... being both applicant and responsible authority ... the assessing officer for the EPA transitioning to project officer for the landfill manager.¹⁴

These problems are not confined to the actions of state and local government.

It is SOS experience that across industry and government, in Parliament and in the Courts, there are failures of independent advice and conflicts of interest. Experts, including lawyers and consultants, who rely on income and advancement from their profession, government or industry are the same experts who give advice to courts, government and Industry. The issue has been exacerbated by privatisation and the lack of non market place expertise.

Judges, lawyers and consultants give assurance of 'professional conduct rules' 'information barriers' 'fiduciary duties' 'confidentiality clauses' 'undue influence' and 'financial disclosure'. It is our experience that outside the professions, few Victorians have confidence in these assurances.

There is a perception and risk of corruption in Victoria. See the comments of Justice Stephen Charles on:

... the culture of improper ... relationships ... the consistency of complaints demonstrating conflict of interest both in local government and the public sector.¹⁵

As an experienced commercial barrister and former Judge of Victoria's highest Court, Mr Charles would have a good insight into how business is done in Victoria.

This culture of conflicts of interest and a lack of independent expert advice undermines community confidence in the integrity of courts, government, developers and Industry. It is a serious and much overlooked issue.

¹² Brookland Greens Estate – Investigation into methane gas leaks October 2009 <https://www.ombudsman.vic.gov.au/getattachment/cf1ba5e6-20c3-4d19-ae5f-90e616b5d6ff/publications/parliamentary-reports/brookland-greens-estate-investigation-into-methane.aspx> at para 84

¹³ above at para 95

¹⁴ above at para 383

¹⁵ Victoria needs better tools to fight corruption - The Age 13 May 2015 <http://www.theage.com.au/comment/victoria-needs-better-tools-to-fight-corruption-20150511-ggyo1o.html#ixzz3pd303jW5>

SOS would like to see recommendations that: address the myth of independent experts and the reality of conflicts of interest to restore integrity and community trust.

7. Other Matters

7.1 Growth

Many Victorians express concern about Melbourne's growth. The issue is often bypassed, with some good reason, because of genuine fear of compounding anti immigration bigotry. The EPA may be the neutral body best able to start a sensitive and disciplined consideration and assessment of social, environmental and economic impact of current growth policies. Along with climate change (which it exacerbates), population growth is Victoria's most significant environmental impact and future challenge.

Yours sincerely



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