

OCTOBER 2015

***Principles-based regulation, in the form
of General Duties:***

*A better approach to environmental
protection in Victoria*



Context and limitations of this paper

This paper was primarily written as an assessment paper for the [REDACTED] course as part of the [REDACTED] delivered by [REDACTED]. As such, the objectives and scope of this essay were largely defined by the requirements of the assessment task.

This paper was written by me as an individual, not in my capacity as an EPA employee. However, it is through the lens of an EPA employee. [REDACTED]

From this diverse experience I have a holistic understanding of EPA and a strong understanding of the strengths, weaknesses and opportunities at a strategic, policy and operational level.

This paper explores some of the challenges with the existing framework and identifies the need for change. In considering alternative approaches this paper limited its review to principles-based regulation in the form of general duties. This scope was chosen as this concept was raised in the Inquiry Discussion Paper, was supported by a range of stakeholders, was approved for the course assessment and in order to meet the assessment task criteria (i.e. word limits etc.). It is important to note that there are a range of alternative frameworks that have not been explored in this paper and further consideration of this framework would be better assessed by considering and evaluating these alternatives.

Since completing this paper a few key messages have settled (regardless of the approach):

- Environmental policy objectives need to be holistic and owned by the Government of Victoria and other key stakeholders. EPA plays a key role in influencing, supporting and in some cases leading the development of policy objectives.
- EPA's role is to develop and implement 'regulation' to achieve these objectives. The meaning of regulation is evolving and maturing. I support the Freiberg view of regulation: "an intentional measure or intervention that seeks to change the behavior of individuals or groups". This is a broader definition than the traditional regulation is rules and compliance with those rules. Therefore EPA's role is both promoting compliance and enforcing against rules and regulations, but also developing and implementing a range of other measures and interventions to achieve these objectives. Separating the policy makers from the regulators has its strengths and weaknesses. But I think there is a more sophisticated model available where EPA leads, supports and implements the policy objectives and regulation alongside other agencies. Opposed to pigeonholing EPA as purely a regulator. Making the process of regulating more holistic and integrated will deliver more effective and efficient outcomes.
- Regulation in the form of 'rules' are necessary to achieve environmental policy objectives. What the rules requires though needs to change. The rules need to shift so that the regulatees are required to take proactive measures to minimise risks to the environment where reasonable and practical. Pollution rules and offences are still valuable, and support this approach.
- How the rules are couched, be they as general principles, general duties, specific industry focused rules etc etc.. needs to be further explored. However...
- Principles based-regulation in the form of general duties certainly presents a strong case particularly as it has been tried, tested and improved over many years.

Introduction	4
The problems arising in the environment	4
The environment is less resilient and predictable	4
Increasing population – increases activity and risk	5
Industry is changing – shifting, new and emerging risks	5
Increasing risks and impacts from cumulative, diffuse and small sources	5
Advances and access to knowledge, technology and better practice	5
Community aspirations and expectations have changed	6
Overview of the current framework	6
The act and the authority	6
Epas regulatory approach	6
Regulations and Policies	7
Pollution abatement and clean up notices	7
Offences	7
Sanctions	7
Guidelines	8
Other tools	8
Strengths and weaknesses with the current framework	8
Environmental harm is difficult to demonstrate	8
Responsibilities are unclear and diluted	8
Multiple standards across different documents with varying legality	9
Disconnect between the outcome, behaviour and knowledge	9
Many modern approaches, but not well established	9
Guidance can be confusing and a hindrance	10
Enforcement tools are difficult to enforce and limited	10
The objectives for government	11
Principles-based regulation and general duties	11
Overview of principles-based regulation and general duties	11
The Common Arguments For	12
The Common Arguments Against	12
General Duty and Principles-Based Regulation in Practice	12
The case for general duties	14
Critical elements to making principles and duties work	16
Build the framework around the duties	16
Defining the general duties	16
A tiered approach	17
Shift in the knowledge/guidance to industry practice	17
Relationship is important	17
Needs to be backed by enforcement	18
Transitioning	18
Supported by other regulatory tools	18
Conclusion	18

INTRODUCTION

The environment is critical to health, wellbeing and enjoyment of daily life. It includes land, waters, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factors of aesthetics.¹ All individuals, businesses, organisations and governments interact with the environment. The challenge, is that a large number of these activities can impact the environment and as a result, health, wellbeing and enjoyment. There is general consensus that the environment needs protection. At the same time, we understand that there are elements of the environment that we may need to forego to attain other social, economic and environmental objectives.

Due to the diversity of the environment and the diversity of Victorian's – there is not always consensus about this tradeoff. As society and technology advances, there is often a resulting shift where previous activities are no longer acceptable as there are improved alternatives. There have been several times in Victoria where this has occurred. In 1970, Victorian's introduced the Environment Protection Act (the Act), creating a legislative framework for the protection of the environment and the Environment Protection Authority (EPA). This was largely in response to community concerns about health and pollution from large industrial emitters. In 2001, eleven principles were introduced into the Act, such as intergenerational equity and the precautionary principle². Reflecting society's understanding of the importance of sustainable development and the value of the environment.

Victoria is once again, building towards a potentially defining moment of change. The Victorian government is currently undertaking a Public Inquiry into the EPA. This provides Victorian's an opportunity to contribute to shaping the framework that will protect the environment into the future.

This paper is taking this opportunity to explore an alternative regulatory approach that has been raised for consideration as part of the public inquiry – General Duties.³ This paper looks at this approach more broadly in the form of principles-based regulation expressed in the form of general duties. To evaluate the merits of this approach the paper: examines a range of issues facing environment protection in Victoria, puts forward potential objectives for the Government, reviews and evaluates the current regulatory system identifying a number of failings, explores the appropriateness and potential effectiveness of principles-based regulation in the form of general duties and provides recommendations about how to design the approach to maximise the advantages it offers.

THE PROBLEMS ARISING IN THE ENVIRONMENT

There is a range of issues giving rise to the need for action.

THE ENVIRONMENT IS LESS RESILIENT AND PREDICTABLE

¹ See for example *Environment Protection Act 1970* (Vic) s 4

² See for example *Environment Protection Act 1970* (Vic) s 1A–1L

³ Victorian Government, *Examining the future task of Victoria's Environment Protection Authority: Discussion Paper* (Victorian Government) 2015: 28

Years of industrial, commercial and recreational activities have altered and impacted the environment considerably. In impacted areas there are often limitations on the beneficial uses. These areas are unable to naturally manage additional pollution and without intervention the beneficial uses will further decline.

Cumulative impacts from long-term exposure continue to emerge. Such as land and groundwater contamination from underground petroleum tanks, slowly leaking over many years. Accumulative contamination also makes it difficult for regulators to easily track and identify sources of contamination. The effects of climate change make it more difficult to predict the impacts of discharges into the environment. As a result, the long-term impacts of particular activities are less predictable⁴.

INCREASING POPULATION – INCREASES ACTIVITY AND RISK

The Victorian population is projected to increase “from approximately 5.5 million in 2011 to 7.7 million by 2031 and then 10 million by 2051. With this increase in population, there will be an increase in activity, and along with it the risk and impacts to the environment from these activities. With a growing population, the cumulative risk and impacts from individuals is growing.”⁵

INDUSTRY IS CHANGING – SHIFTING, NEW AND EMERGING RISKS

Industry is shifting to an increasing number of small and medium sized businesses.⁶ The cumulative impacts from these businesses can have a significant impact on the receiving environment. These operators are more difficult to regulate using an inspection and pollution abatement notice approach, as a regulator could only ever inspect a small proportion.

Expanding industries such as medical technology and pharmaceuticals and energy technology (Inquiry paper) present new and unforeseen risks. Meanwhile, practices and technologies continue to change and diversify leading to a wider range of potential environmental harms.⁷

INCREASING RISKS AND IMPACTS FROM CUMULATIVE, DIFFUSE AND SMALL SOURCES

A growing area of concern includes cumulative impacts from dispersed and small-scale sources, cumulative impacts from long-term exposure to pollutants and amenity impacts and risks to human health from small to medium businesses.⁸ Whilst these have been mentioned in the previous themes, it is important to highlight as a theme, as they present a gap in the current regulatory approach.

ADVANCES AND ACCESS TO KNOWLEDGE, TECHNOLOGY AND BETTER PRACTICE

Globalisation has seen increased sharing and trading of knowledge, ideas, technology, management approaches, resources and more. The effect is increased access, availability, affordability and adoption of better practices. Many businesses can no longer justify poor practices, when reasonable and practical alternatives are readily adopted by others and available. Businesses that have adopted best practice approaches and reduced their risks are requesting in return that the system provides

⁴ EPA Victoria, Scheduled Premises Regulations review: Options paper (Victorian Government) 2015: 10-12

⁵ Victorian Government 2015: 6

⁶ Victorian Government 2015: 8

⁷ Victorian Government 2015: 8

⁸ EPA Victoria 2015: 10-12

them more autonomy and flexibility. There is also a market failure, where those that are failing to adopt appropriate practices are able to undercut good performers.

COMMUNITY ASPIRATIONS AND EXPECTATIONS HAVE CHANGED

Victoria has always aspired to be a leader in environmental protection. The EPA is the second oldest environmental regulatory agency in the world and Melbourne is frequently voted the most livable city in the world. The quality of the environment is a key contributor for this title.

Section 1L of the Act, *the Principle of Accountability* states that:

The aspirations of the people of Victoria for environmental quality should drive environment improvement.

Communities are more informed and connected than ever before. They are more attuned to environmental and health issues. People are travelling and visiting other countries and bringing back new perspectives on the potential for environmental protection and improvement. They are more aware of business practice and performance; what is possible and reasonable. As such, there is a greater desire and expectation to protect the environment, protect beneficial uses and for business and government to minimise their impacts.⁹

In summary, there appears to be increasing risks and impacts - eroding beneficial uses. At the same time business and the community are adopting and expecting improved practice. This suggests that a higher level of protection is required and desired to protect Victoria's environment.

OVERVIEW OF THE CURRENT FRAMEWORK

In Victoria the framework for protecting the environment is governed by a system of laws, regulations, policies and guidance. This paper focuses on the most commonly used tools and approaches.

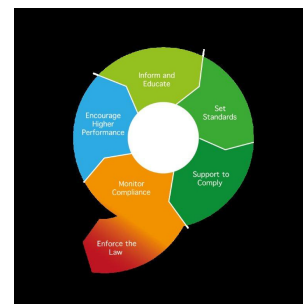
THE ACT AND THE AUTHORITY

The Act establishes the basis for Victoria's environment protection framework. The Act establishes the Environment Protection Authority; defines EPA's powers, duties and functions; established regulations and policies and contains a number of regulatory instruments. All Victorians are subject to the Act and must comply with its provisions.¹⁰

EPAS REGULATORY APPROACH

EPA's regulatory model and approach is outlined in the Compliance and Enforcement Policy.¹¹ The Regulatory Approach diagram shows the different elements and there are several tools to support these activities outlined below.

Figure 1. EPA's Regulatory Approach



⁹ Victorian Government 2015: 6-12

¹⁰ See for example *Environment Protection Act 1970 (Vic)* s 5-15

¹¹ EPA Victoria, *Compliance and Enforcement Policy (Victorian Government) 2011*: 8

REGULATIONS AND POLICIES

Subordinate legislation under the EP Act includes EPA regulations, state environment protection policies, waste management policy and notifiable chemical orders. These flesh out the policy in primary legislation and create more specific obligations. SEPPs are a legal expression of the environmental state we wish to protect under the EP Act and how we get there.¹²

Under the Act certain types of premises are defined as 'scheduled' on the basis that those types of premises have the potential to cause significant impact to the environment. Scheduled premises require a works approval before they are built or modified and may require a licence to operate. The *Environment Protection (Scheduled Premises and Exemptions) Regulations 2007* specifically lists those industrial or commercial activities that are deemed to be 'scheduled': lists the activities that require works approval and/or licence; provides exemptions from licensing for certain activities and provides exemptions for certain discharges

WORKS APPROVALS AND LICENCES

A works approval is a document issued by EPA which approve subject to certain conditions the construction/modification of a plant which when operated could affect the environment.

They require operations to be designed for best practice and risk mitigation and are an assessment of potential environmental impacts against the Act and SEPP – air, energy, surface water, groundwater, noise, waste, landfill – to ensure compliance and prevention of pollution.

Licences contain standard conditions to control the operation of the premises and ensure that there is no adverse impact on the environment. These conditions address areas such as waste acceptance and treatment, air and water discharges, and noise and odour. The *Environment Protection Act 1970* ('the EP Act') specifies penalties for breach of licence conditions, and for operating a site without a licence. A monitoring program must be developed by each licence holder to ensure they, and EPA, can determine licence compliance. To do this, a licence holder should use a risk-based approach to determine the level of monitoring required.

POLLUTION ABATEMENT AND CLEAN UP NOTICES

A notice is a written statutory direction that requires, by law, that a notice recipient undertake works or activities as detailed in the notice. Remedial notices are served to prevent or remedy a range of non-compliances or likely non-compliances.¹³

OFFENCES

The Act includes a range of offences such as breach of licence conditions, breach of notices and pollution offences. There are pollution offences for causing pollution to air, water or land. Once a prohibited event has occurred, the person or organisation in control will be guilty of the offence.¹⁴

SANCTIONS

In addition to offences, there are several other sanctions including warnings, infringement notices, notices of contravention, enforceable undertakings, suspensions of licence or permit, injunctions, civil and criminal penalties.

¹² See *Environment Protection Act 1970* (Vic) s 16-19

¹³ See *Environment Protection Act 1970* (Vic) s 31A, s 31B

¹⁴ See *Environment Protection Act 1970* (Vic) s 27-31D, 39, 41, 45

GUIDELINES

EPA has published a range of statutory and non-statutory guidelines providing practical guidance to take to prevent impacts to the environment. The guidance may be focused on an industry, environmental segment, administrative laws etc.

OTHER TOOLS

The Act establishes a range of other tools that are less frequently used by the EPA at this time including economic measures, neighborhood environment improvement plans, accreditation and sustainability covenants.

STRENGTHS AND WEAKNESSES WITH THE CURRENT FRAMEWORK

The merits of general duties, partly depends on the performance of the existing framework.

ENVIRONMENTAL HARM IS DIFFICULT TO DEMONSTRATE

The high level objective is to protect the environment in Victoria. The Act, regulations and policies then provide more definition as to what this might mean: do not pollute water, air, land; do not harm the environment; do not impact the beneficial uses identified in the SEPPs and achieve the environmental quality objectives in the SEPPs.¹⁵

At a high level, this objective appears reasonable and achievable. And there are many cases where this is the case. But increasingly, this is becoming a complicated and unachievable task for the regulator, regulatees and the community. Whether a particular activity is likely to or has caused pollution depends on multiple factors including but not limited to: the source/activity/material such as chemicals and wastes and the receiving environment. Is it already altered, different receiving environments behave differently in a drought, flood, winter and summer; the rate, quantity and quality at which the material enters the receiving environment; and what happens with before/after it enters the receiving environment – is it treated? Is it diluted?

Combine this with increasing sources, diffuse and cumulative variability, climate variability and it becomes even more difficult. Focusing on outcomes is a good regulatory approach. But the outcome needs to be something that the regulator, regulatees and community can understand and achieve.

RESPONSIBILITIES ARE UNCLEAR AND DILUTED

Section 1G of the Act sets out the principle of shared responsibility:

(1) Protection of the environment is a responsibility shared by all levels of Government and industry, business, communities and the people of Victoria.

This supports the objective that all Victorians need to contribute to protecting the environment.

However, section 13 (1) (b) states that the powers duties and functions of the Authority shall be – to be responsible for and to co-ordinate all activities relating to the discharge of wastes into the

¹⁵ See *Environment Protection Act 1970* (Vic) s 27-31D, 39, 41, 45

environment and the generation, storage, treatment, transport and disposal of industrial waste and the emission of noise and for preventing or controlling pollution and noise and protecting and improving the quality of the environment.

This has the effect of putting the responsibility on EPA instead of on the regulatee in control of the activity.

The policies also state that they apply to all Victorians and within the attainment program of the policy, there is useful guidance as to the expectations to prevent impacts and expectations on to what extent risks should be minimised¹⁶. But there is no offence prescribed in the Act for failing to comply with the attainment program. The policy also refers to achieving the policy objectives over a ten year time period and sets up a range of activities and priorities that EPA and other agencies need to implement in order to achieve the objectives¹⁷. This provides a significant defence for regulatees, in that they can argue that the system does not support compliance and they could not achieve their part, as others had not completed theirs.

MULTIPLE STANDARDS ACROSS DIFFERENT DOCUMENTS WITH VARYING LEGALITY

Identifying the specific standards that are relevant for a particular regulatee is a difficult task. There are a range of different documents for segments of the environment and environmental harms such as water, land, air, waste, noise and odour. There are also a range of documents for different industry sectors such as landfills and chemical plants. Any one industry may need to refer to multiple documents and find the specific section that 'may' relate to them. They also need to determine whether the standard is statutory or non-statutory. This can be difficult when it comes to guidelines and other forms of quasi-legislation.

With such a confusing collection of rules – whose role is it to work it out? While the regulatory approach states that the EPA will inform and educate and support to comply, these parts of the approach are not well developed. If a regulatee needs support to understand the rules, EPA's approach is ad-hoc and often depends on the circumstance and experience of the staff member or officer. Large industries may be able to invest in staff and consultants to break this down for them. But the expectation on small and medium sized businesses is unreasonable.

DISCONNECT BETWEEN THE OUTCOME, BEHAVIOUR AND KNOWLEDGE

The current framework relies heavily on voluntary compliance. This is not a strategic approach as such, but as the regulator can only focus on a small scope of regulates with limited resources, the wider regulatees are going it alone. The regulatees need to understand and then adapt their behaviour to comply. However, the standards are often defined by pollution, harm and beneficial uses. Regulatees do not have knowledge and skills to understand and evaluate these concepts. Their expertise lies in the activities and processes of their business. Whilst the high level objectives may still be the same – prevent pollution, the regulatory approach needs to provide outcomes and objectives that are more relevant for the regulatees.

MANY MODERN APPROACHES, BUT NOT WELL ESTABLISHED

¹⁶ See for example *Variation to the State Environment Protection Policy (Waters of Victoria), Part VI Attainment Program, Key Responsibilities from Implementing this Policy, s 23 Communities*.

¹⁷ See for example *Variation to the State Environment Protection Policy (Waters of Victoria), Part VI Attainment Program, Key Responsibilities from Implementing this Policy*

The EPA has adopted a range of modern approaches to regulation including: principles adopted in the Act and policies, risk-based approach, responsive regulation, problem solving and harms-based¹⁸. However, the EPA has not yet built the supporting platform around these approaches, and as a result they are not achieving their intended objectives.

GUIDANCE CAN BE CONFUSING AND A HINDERENCE

Guidelines can be useful to provide more direction as to what is expected and what the standard is within the industry. However, they can also hinder compliance. Guidance can be out of date and does not reflect current practice. As one of the key tools to guide EPA employees and officers, it is critical that it reflects the desired objectives so that they have the knowledge and tools to achieve these objectives. Similarly, standards developed by industry may not reflect best practice, as they needed to accommodate for the lowest common denominator. Regulatees can use this guidance as a defence against adopting improved practice, arguing that they already meet current standards.

ENFORCEMENT TOOLS ARE DIFFICULT TO ENFORCE AND LIMITED

The effects of these issues are that enforcement tools are difficult to enforce and have a limited impact. The majority of the enforcement tools, such as notices and offences, rely on EPA demonstrating likely or actual impacts to the environment.¹⁹ In many cases this task is extremely difficult, resource intensive and sometimes unachievable.

EPA must gather the evidence for each individual case to demonstrate likely or actual. This may require conducting odour surveillance for multiple hours for one site. Where the evidence is subjective or based on modeling, the regulatees engage in technical arguments over subjective assessments.

The current tools have limited scope to enforce against cumulative impacts from dispersed, small-scale sources. This is a critical gap in the existing framework.

Example (real world): Brickworks and fluoride emissions	
Dead and deformed kangaroos were found near a brickwork plant. Investigation found that the source of the problem was fluoride emissions discharging from the Brickworks. In this situation there was sufficient evidence for the EPA to require through a pollution abatement notice that the brickworks remedy the problem by making substantial upgrades to eliminate and minimise the risks. The problem was the potential that other brickworks may be impacting beneficial uses. In the case of another brickworks there was no evidence of impacts to animals. However there was evidence of impacts to trees (browning and curling of leaves) along the road near the brickworks. But it is unclear from the SEPP whether this would substantiate detrimental impacts to beneficial uses.	
Existing approach	
Are there impacts to beneficial uses?	Potential impacts to beneficial uses. But insufficient evidence at this stage to substantiate likely. To determine will require an assessment from a fluoride expert.
Has the duty-holder adopted reasonable and practicable measure to eliminate or minimise the risks?	No
Will the site voluntarily upgrade?	Moderate costs – site is unwilling to voluntarily adopt measures.
What next?	EPA needs to undertake extensive fluoride assessment to determine impacts to beneficial uses.
What next?	EPA audit determines impacts to beneficial uses. Brickworks audit determines no detrimental impacts to beneficial uses.



¹⁸ See for example the Compliance and Enforcement Policy 2011: 8

¹⁹ See *Environment Protection Act 1970 (Vic)* s 31A

THE OBJECTIVES FOR GOVERNMENT

Considering these issues, the high level objective remains to protect the environment in Victoria, having regard to other critical objectives, such as social and economic. However, there appears to be a greater emphasis on protecting the environment. Communities increasingly value their beneficial uses and are less willing to ignore and passively allow them to be degraded. Particularly where risk and harm can be reasonably and practicably avoided. As such, there is a growing expectation on individuals, business and government to eliminate and minimise risks to the environment.

All individuals, businesses, organisations and governments interact with the environment and partake in activities that can present risks to and impact the environment. As such they are also in a position to change these activities and behaviour, which will have a flow on change to the level of risk and potential impact. As the risks to the environment are wide spread across individuals, business and government, it is no longer viable that government is largely responsible for protecting the environment. The risks are also spread across multiple industries and activities and the Government is not always the key source of best practice technologies and pollution controls.

With a growing population and diffuse risks and impacts, the regulatory framework should leverage self-regulation and/or voluntary compliance where possible. The framework should also require proactive instead of reactive behaviour. As the risks to the environment are wide and varied a framework that can accommodate a broad scale of issues and regulatees would be necessary.

Therefore, the key objective appears to be to eliminate or minimise risks to the environment, by increasing proactive behaviour by all Victorians including government, industry, business, communities and individuals where reasonable and practical.

PRINCIPLES-BASED REGULATION AND GENERAL DUTIES

After considering the environmental problems, challenges with the existing legislation and objectives for government – it is clear that reforms are necessary to establish a framework that achieves the outcomes and objectives. One of the options being considered by the public inquiry is ‘general duties’. The following sections will explore this approach and evaluate its merits.

OVERVIEW OF PRINCIPLES-BASED REGULATION AND GENERAL DUTIES

Freiberg defines three forms of regulation: principles-based, performance-based and prescriptive.²⁰ Using principles-based regulations, regulators use principles or general duties to communicate the outcome expected, by setting broadly stated standards or objectives. Regulatees are then able to decide how best to achieve the outcome.^{21,22}

²⁰ Freiberg A, *The Tools of Regulation* (Federation Press) 2010: 88-95

²¹ Black J, *Forms and paradoxes of principles-based regulation* (Capital Markets Law Journal, Vol 3, No. 4) 2008: 430

²² Tiner J, *Principles based regulation: the EU context*, Speech for Annual Conference Hotel Arts, Barcelona, 2006

Whereas the prescriptive example describes exactly what the regulatee must do, focusing on the input, not the output.²³ Prescriptive regulation may still be designed to achieve a particular outcome. However this may not be obvious from the rule and it is only providing one or minimal means to achieve the outcome.

A common application of principles-based regulation is a 'general duty' - an all-encompassing principle to achieve a particular outcome. General duties focus on an objective but allow the duty-holder substantial discretion in meeting the standard.²⁴

THE COMMON ARGUMENTS FOR

The common arguments for principles-based regulation are that; allow regulatees flexibility to meet the regulatory requirements by adopting the approach that suits them best; which facilitates innovation and ultimately enhances competitiveness.²⁵ Senior management needs to be more active in the process as the regulatee needs to make a decision about how to meet the regulatory obligations.²⁶ This allows a much greater alignment of regulation with good business practice.²⁷

Principles-based regulation can also benefit regulators as it can "provide them with flexibility, facilitate regulatory innovation in the methods of supervision adopted; enable the regulatory regime to have some durability in a rapidly changing market environment; and enhance regulatory competitiveness."²⁸ For both regulators and regulatees, it can be more flexible and adaptable to changing time, standards and technologies.²⁹

THE COMMON ARGUMENTS AGAINST

Key criticisms of principles-based regulation are that it can fail to provide certainty and predictability and as a consequence results in conservative behavior.³⁰ In response, regulators often release a range of guidance and other material (statutory and non-statutory) to provide additional direction as to what constitutes compliance.³¹ The result can be a "move back toward a de facto system of prescriptive regulation, often featuring significantly greater prescriptive detail than formerly."^{32,33}

Black explains that while principles can facilitate communication, they can also hinder it. There is a risk that the regulator might become avoidant to provide advice and officers may be hesitant to provide advice unless they fully understand and are certain it is adequate and could not be used to defend compliance against the principle.³⁴

GENERAL DUTY AND PRINCIPLES-BASED REGULATION IN PRACTICE

²³ Deighton-Smith R, What do we mean by rethinking regulation? The Australian Journal of Public Administration, vol. 67, no. 1, pp. 41-56, 2008: 51

²⁴ Coglianese C, Performance-based regulation: prospects and limitations in health, safety and environmental protection (Harvard University) 2002: 5

²⁵ Deighton-Smith 2008: 51; Black 2008: 426

²⁶ Fraser M and Barnes S, Communications Law Centre 2010. Consumers First: Smart regulation for digital Australia, Australian Communications Network, Sydney 2010: 4

²⁷ Tiner 2006

²⁸ Black 2008: 426

²⁹ Deighton-Smith 2006: 108

³⁰ Black 2008: 426 & 449

³¹ Black 2008: 426

³² Deighton-Smith 2008: 51

³³ McBarnet D, Centre for Tax System Integrity, When Compliance is not the solution but the problem: from changes in law to changes in attitude, 2001

³⁴ Black 2008: 447

Principles-based regulation generally, and general duties have been adopted in a range of regulatory areas including environmental, occupational health and safety, financial services, taxation law and corporate governance.³⁵

A 'General Environmental Duty' is adopted in the environment protection acts in Queensland, South Australia, Tasmania and Australian Capital Territory.³⁶ The Victorian EP Act does not have a general duty or similar principle. While each is crafted slightly differently they all have the following generally in common:

- A person
- Must not undertake an activity that pollutes or may pollute the environment (unless they)
- Take all reasonable and practicable measures to prevent or minimise environmental harm
- In determining what action needs to be taken regard must be given to:
 - The nature of the pollution
 - The sensitivity of the receiving environment
 - Financial implications
 - The state of technical knowledge
 - The likelihood of proposed measures succeeding³⁷

Whilst these frameworks have adopted 'duties', they do not appear to be the cornerstone of the regulatory framework. The focus of the duty is also still heavily on environmental harm as a measure for compliance. *"Failure to comply with the general environmental duty does not, alone, give rise to civil or criminal liability, but compliance may be enforced via the issue of an environment protection or clean-up order, or via an application to a court or tribunal for a civil or criminal remedy to restrain breaches (or anticipated breaches) of the legislation"*.³⁸ There also appears to be little in the way of published reviews on the duties adopted in these states. As such, the strengths and weaknesses for this approach will be further demonstrated through other examples.

The most established use of general duties in regulation is in OHS where it has been widely adopted across Australia and the United Kingdom. The duties impose on duty holder's absolute or strict liability duties to take care for various aspects of worker health and safety.³⁹

A review of the OHS legislation in 2004 (Maxwell review)⁴⁰ found that many of the potential benefits in this approach were being realised. However, it also identified some of the weaknesses.⁴¹ For example, the review found that the approach was being impinged by lack of clarity and certainty, lack of knowledge of duties and what constitutes compliance. The review found that the "factors which determine what is and is not 'practicable' [were] ill-defined and poorly-understood". The Maxwell review also found that regulatees found officers reluctant to provide guidance and give advice as to how they should go about complying. A number of improvements were adopted to address these

³⁵ Black 2008: 2-3

³⁶ See Environment Protection Act 1994 (Qld) s 36; Environment Protection Act 1993 (SA) s 25; Environment Protection Act 1997 (ACT) s 22; Environment Protection Act 1986 (WA) s 51b

³⁷ Bates G, A duty of care for the protection of biodiversity on Land, Consultance Report, Report to the Productivity Commission, AusInfo, Canberra 2001

³⁸ Bates G, A duty of care for the protection of biodiversity on Land, Consultance Report, Report to the Productivity Commission, AusInfo, Canberra 2001: 25

³⁹ Bluff L and Johnstone R, The relationship between 'reasonably practicable and risk management regulation, National research centre for OHS regulation, 2004: 5-9

⁴⁰ Maxwell C, Occupational Health and Safety Act Review, Victorian Government, 2004

⁴¹ Maxwell 2004: 6-14

issues.⁴² This paper did not investigate what effect these had – but this would be a valuable process for future reviews.

Principles-based regulation has been adopted by the financial services industries in the United States and the United Kingdom.⁴³ Interestingly the approach has had positive outcomes in the UK, whereas in the US the approach is often criticised. Some believe the difference lies in the enforcement approach. Similarly to the OHS approach, the UK FSA take enforcement action if the principles are breached. However, the US approach did not adopt a strong enforcement approach.⁴⁴ This would suggest that enforcement might be a critical factor to the success of the model.

There are further similarities and differences across these approaches that can be noted:

- principles/duties vary – can be very high level, medium, more prescriptive. Can be on all or on specific targets
- reasonably practicable - complying by undertaking a risk assessment and taking measures that are reasonably practicable appears to be a common approach. The OHS review found it was not enough just to have the high level measure. Further guidance as to how to determine what is reasonably practical was required.
- supporting regulations and guidelines - in all examples, the principles were supported by other forms of regulation such as detailed regulations, codes of practice and ‘deemed to comply’ guidance to provide greater clarity about expectations where necessary.
- enforcement – as discussed.

THE CASE FOR GENERAL DUTIES

Adopting a general duty into the Act would enunciate the basic and overriding responsibility of all Victorians to take reasonable and practicable measures to prevent impacts to the environment. This reflects the higher standards being demanded from society, and the need for Victorians to take a more proactive approach.⁴⁵ This is not a major shift, as the Act and SEPPs already include a range of responsibilities on Victorians to prevent and minimise impacts to beneficial uses. However, by building the framework around the general duties, it would create a systematic, rather than ad-hoc approach to prevention and establish a universal understanding by duty-holders, that they have a statutory duty to eliminate or minimise risks from activities that may impact upon the environment, in order to protect the environment.⁴⁶ Thereby, shifting the system from reactive to proactive.

Principles are an effective approach to regulating diverse groups where the high level objective is the same. As the principles or duties are broad and general in nature, they can apply to multiple environmental segments, varying regulatees from individuals to large business and varying industries. They will also cover new and emerging risks, technologies and regulatory gaps. As such, they will not need to be updated as frequently. This is an improvement to the existing system, where the legislation is slow to respond to technological, social and economic change.⁴⁷

⁴² Maxwell 2004: 6-14

⁴³ The Financial Services Authority (FSA), Principles-based regulation: Focusing on outcomes that matter, 2007: 3

⁴⁴ Black J, Making a success of principles-based regulation, Law and Financial Markets Review, Special Feature, 2007: 202

⁴⁵ Deighton-Smith 2008: 47

⁴⁶ Maxwell 2004: 97

⁴⁷ Maxwell 2004: 97

With a growing population, diverse and diffuse issues, the regulatory approaches adopted need to leverage self-regulation or voluntary compliance where possible. A principles-based approach can build mutual trust and encourage greater levels of compliance by regulatees. This approach has the effect of shifting responsibility to manage risk to the duty-holders. This supports the theory that the risk should be shared between the person who takes the risk and the system that is trying to support them.⁴⁸ At the same time, it provides them with benefits to adopt practices that suit them. EPA would also take on some risk, but the aim is that by building trust, it will improve the system.⁴⁹

This approach would shift the focus away from ‘demonstrating environmental harm’ to demonstrating ‘reasonable and practicable measures’. This provides many advantages from the existing system: defining likely and actual impacts to the environment is becoming increasingly difficult with cumulative and diffuse sources; it enables the duty-holders to better understand the objectives by using a language and means that they are familiar with; and accumulative impacts are difficult to quantify and some may not visualise themselves until far into the future. General duties would not eliminate difficult analysis and decision-making about what is reasonable and practicable and the likely impacts to the environment. However, it would provide a clear and logical approach, specifying critical criteria, which is adopted by all duty-holders.

From the duty-holders perspective, one of the primary advantages is that they are able to adopt an approach that most suits their activities; which can lead to more effective, efficient and innovative practices. This flexibility also has the effect of shifting the responsibility to more senior management, which may lead to better integration and more improved practice. Whether this approach reduces the regulatory burden will depend upon the duty-holder and the existing laws for their activities. Large businesses are likely to have risk management systems and this approach would integrate easily into their management approaches. Smaller businesses may need to make a substantial investment to understand and comply with the obligations. Though, this would appear to already be the case with the existing legislation and the focus on business practice (instead of environmental harm) may better serve these duty-holders in the longer-term. Further to this, by qualifying the duties, duty-holders need only take measures that are reasonable and practicable. However, whether principles-based approaches provide more certainty and predictability for regulatees appears varied. They can also “impose a bigger burden as each company effectively needs to work out their own compliance approach.”⁵⁰

More prescriptive regulations and guidelines can still be developed to account for specific needs. For some duty-holders, they may only need to follow the principles to comply. This would reduce the regulatory burden with the existing legislation that requires duty-holders to refer to multiple laws across different segments.

From the regulators perspective, general duties provide significant advantages to the existing system. There is reduced reliance on demonstration of harm and pollution limit breach, which has been highlighted as a significant challenge with the existing system. As a result there is reduced reliance on resource intensive, low yield activities such as odour surveillance and noise monitoring for specific industries. Instead, the regulator is able to intervene prior to harm, acting on the absence of basic controls. This will provide an important tool to address diffuse source and

⁴⁸ Better Regulation Commission, Risk, Responsibility and Regulation – Whose risk is it anyway? 2006

⁴⁹ Bates 2001: 35

⁵⁰ Deighton-Smith 2008: 51

cumulative impacts where the contribution from one is low. The evidence burden for regulators would reduce, as the focus would be on practice, equipment etc. – rather than technical arguments over the subjective assessment of harm. The regulator can leverage good performers to set the benchmark for industry standard performance and innovative practices can be more easily achieved, which can further encourage higher performance. These differences have been illustrated in the following example.

Example: Brickworks and fluoride emissions	
Dead and deformed kangaroos were found near a brickwork plant. Investigation found that the source of the problem was fluoride emissions discharging from the Brickworks. In this situation there was sufficient evidence for the EPA to require through a pollution abatement notice that the brickworks remedy the problem by making substantial upgrades to eliminate and minimise the risks. The problem was the potential that other brickworks may be impacting beneficial uses. In the case of another brickworks there was no evidence of impacts to animals. However there was evidence of impacts to trees (browning and curling of leaves) along the road near the brickworks. But it is unclear from the SEPP whether this would substantiate detrimental impacts to beneficial uses.	
Existing	Principles-based in the form of general duties
Are there impacts to beneficial uses? <i>Potential impacts to beneficial uses. But insufficient evidence at this stage to substantiate likely. To determine will require an assessment from a fluoride expert.</i>	Has the duty-holder adopted reasonable and practicable measure to eliminate or minimise risks? <i>No, as determined by referring to industry guidance</i>
Has the duty-holder adopted reasonable and practicable measure to eliminate or minimise the risks? <i>No</i>	What next? <i>As duty-holder legally required could use advice, support or enforcement measures.</i>
Will the site voluntarily upgrade? <i>Moderate costs – site is unwilling to voluntarily adopt measures.</i>	
What next? <i>EPA needs to undertake extensive fluoride assessment to determine impacts to beneficial uses.</i>	
What next? <i>EPA audit determines impacts to beneficial uses. Brickworks auditor determines no detrimental impacts to beneficial uses.</i>	
And so on...	

CRITICAL ELEMENTS TO MAKING PRINCIPLES AND DUTIES WORK

Reviewing the theory and practice of this approach reveals a number of critical elements to optimising the benefits from this approach.

BUILD THE FRAMEWORK AROUND THE DUTIES

Make it the cornerstone of statutory responsibilities. There are several reasons for this including: ensuring that the objectives and standards for regulatees are clear; ensuring that the accompanying tools support and do not hinder the principles; and ensuring that the regulator builds the framework that supports the principles.

DEFINING THE GENERAL DUTIES

Defining the general duties so that they best achieve the objectives is no simple task. The duties need to best achieve the objectives, without being too stringent and imposing unnecessary regulatory burden.⁵¹ Some key considerations include:

Statutory or non-statutory – The most effective model appears to be the OHS model where the duties are statutory duties.

Who should the duties be on? - The argument has been presented that all Victorians need to be responsible for preventing and minimising impacts to the environment. However, a statutory duty

⁵¹ Deighton-Smith 2008: 44

on all may impose an unnecessary legal obligation. The risks and impacts to the environment are wide ranging from individuals, business and government. However, the proportion of risk and impacts from different sources should be analysed to better inform the decision.

The Maxwell Review found that the legislation “must have adequate coverage to that is applies to all risks” and “must impose appropriate duties on those who are in a position to eliminate or control risks.”⁵²

What should they require? - This paper has put forward the recommendation that the duties emphasise ‘taking action’, opposed to ‘avoiding harm’. For example, the duty may require a duty holder to ‘eliminate and minimise risks’ to beneficial uses. A duty could also be imposed that requires a duty-holder to remedy and/or clean-up pollution.

How to qualify the duties - “reasonable and practicable measures” or something similar appears to work well in OHS. But could this be expected of individuals participating in recreational activities? There may need to be different qualifications on industry and the general public.

A TIERED APPROACH

*“There are strong arguments for saying that a tiered approach to rule design should be adopted – principles need an under-pinning of detailed rules in some areas – and detailed rules in turn need the support and coverage of principles to thwart strategies, which seek to exploit gaps and inconsistencies in those detailed provisions”.*⁵³

This is supported by the approach taken by OHS, finance and environment. As such, the EPA should adopt a tiered approach. Black recommends developing criteria to identify the appropriate balance between principles and other types of rules.⁵⁴ EPA will need to produce industry specific guidance or codes and keep them up to date. The EPA will need to be mindful that if there is no or inadequate guidance, the industry sector may fill the gap with industry standards. Whilst this guidance is not statutory, the courts may interpret it as such – which could cause problems if the standards do not reflect the desired objectives. If developed well however, this guidance can be used to support and improve the system.

SHIFT IN THE KNOWLEDGE/GUIDANCE TO INDUSTRY PRACTICE

The current expertise and guidance within EPA is focused on environmental harm and pollution. The EPA would need to make a significant investment into building a body of knowledge, expertise and supporting guidance about industry practice.

RELATIONSHIP IS IMPORTANT

Black suggests that principles-based regulation is most effective where there is a strong relationship between the regulator, regulatee and impacted community. Black builds on this by adding:

“if PBR is to be effective, there needs to be close engagement between regulator and regulatee based on mutual trust; firms need to be concerned to go beyond minimal compliance with the regulatory

⁵² Maxwell 2004: 6

⁵³ Black 2008: 429

⁵⁴ Black 2008: 200

*requirements; outcomes and goals have to be clearly communicated by the regulator, the enforcement regime has to be predictable*⁵⁵

EPA's existing approach emphasises the important of these relationships and includes a range of business and community reference groups and other methods to engage and consult. However, the challenge is the scale and diversity of stakeholders that are encompassed in the framework. It is unrealistic that EPA will be able to build such relationships with all of these stakeholders. A stakeholder engagement plan will need to be developed that supports this approach.

NEEDS TO BE BACKED BY ENFORCMENET

The lessons learnt from the financial services sector in the UK and USA, highlight the important of enforcement to achieving compliance with the principles. Enforcement is also a critical element in the OHS approach.

TRANSITIONING

Building the full framework will involve changes to the Act, new regulations, new guidance, new policies and procedures, training for EPA staff, large scale inform and educate campaigns and so on. Change management will be critical to bring EPA employees, other agencies, regulatees and the community along. Phased approaches or embargoes on offences for a limited period could be adopted while the framework is being established.

SUPPORTED BY OTHER REGULATORY TOOLS

The scale and diversity of issues under environmental protection means that the framework will need to be supported by a range of other regulatory tools including:

- Inform and educate approaches – to ensure that stakeholders are aware of and understand the framework.
- Capability, advice, attitude change – both for the regulator, regulatees and broader stakeholders.
- Works approvals and licencing – are still necessary but may be applied differently, for example to activities operating in 'areas of significance' where stricter limits or controls may be imposed to reflect the specific objectives in that area or the licence may require demonstration of reasonably and practicable.
- Notices – are still a critical tool to remedy and enforce non-compliance with the duties and other laws. Though as notices are already outcome focused, they may need to be more performance-based or process-based. Specifying the thing that has yet to be achieved.
- Regulations and SEPPs - as discussed above
- Quasi-legislation – as discussed above
- Sanctions – as discussed above

CONCLUSION

Increasing risks and impacts to the environment, increasing demand from the community to protect it and improvements in practices emphasises the need to focus on prevention to protect the

⁵⁵ Black 2008: 427

environment. At the same time, the existing legislation is confusing and difficult to enforce. Suggesting that reform to the existing legislation is necessary.

This paper has found that a principles-based approach in the form of general duties could provide an improved approach as it can establish overarching duties that can cover the broad and diverse scope and withstand changes in the environment, technology etc. Regulatees are then able to comply using the methods that most suits them.

This approach has the potential to deliver more effective and efficient outcomes. However, realisation of these benefits is closely linked to the design and implementation of the approach. To optimise the benefits from this approach the duties should be the cornerstone of the framework, a tiered approach should be adopted, EPA will need to build industry guidance and expertise and it should be backed by enforcement and other complementary approaches.