

EPA Inquiry: Submission

Introduction

This submission is based on my personal experiences over the last four years, during which I have endeavoured to induce the EPA to enforce noise pollution laws SEPPN-1 in residential Brunswick. So far, despite considerable effort on my part, I have not been successful. Like many other people who attended Inquiry consultation meetings, the complaints process has been disillusioning and, frankly, disenfranchising. This submission will outline my experience of persistent noise pollution before commenting on the issues raised in the discussion paper.

Background Circumstances

In 2009-10, the Moreland Council approved renovations to the Brunswick Private Hospital, allowing it to operate from the residential street Davies Street, Brunswick in addition to its existing frontage in the main thoroughfare, Moreland Road. With works funded under the Rudd financial crisis stimulus package, Council 'fast tracked' the application and waived the usual bylaws and requirements about design, parking, trucks, and noise. The remodelled hospital located noisy plant, heating and air-conditioning equipment facing the residential area in Davies Street with no buffering of any kind. The noise is constant. It is unbearable in the small hours – 3.20 a.m. and 4.20 am – when, I believe, the water for a hydrotherapy pool is heated at off-peak rates. I cannot sleep through the high-pitched buzzing, which I perceive as something like fingers down a blackboard. During the day, the buzzing makes it impossible to read inside or enjoy the garden outside. I have spent more than \$35,000 so far trying to block out the noise, but its frequency penetrates insulation materials. My medical costs from lack-of-sleep and stress-induced illness are now over \$3,000. My home is all-but unliveable. This should not have been allowed to happen.

When the noise first began, I complained to the hospital. I was told that the noise was temporary because a second stage of development was planned. This never eventuated.

Then I complained to the Council. After a series of complaints a woman from the Council attended my house during the day (when the noise was at moderate intensity) and advised that "a bit of noise is like a snoring husband, you just have to get used to it". The Council advised me to contact the EPA - the noise was not their jurisdiction or responsibility, even though their negligence created the problem.

I started complaining to the EPA. At first I complained only a few times, assuming that the issue would be investigated. Nothing happened. After making further complaints to the Council, Council officers contacted the EPA on my behalf, and there was some action. Someone from the EPA attended my home, again during the day when the noise was moderate. He said "People living on busy streets have noise worse than this." He measured the noise with a hand-held monitor but didn't share the result with me. Nothing happened. A few weeks later I received a phone call from a market research firm asking if my complaint had been resolved to my satisfaction. The file had been closed.

I began complaining to the EPA every morning at 4.30 a.m., when I am not only awake but increasingly distressed by the persistent buzzing. The women on the phone at night are supportive, but nothing happens. It appears the EPA policy is to do nothing until residents affected by pollution give up and move out, in effect, agreeing to bear the cost of the pollution.

I tried complaining to the hospital again, thinking I could resolve the matter privately by offering to pay for noise buffering. A new manager said that “We know perfectly well the noise exceeds SEPPN-1 but fixing it will cost \$50,000 so we’re not doing anything unless someone makes us.” I wrote the hospital head office in Sydney, again offering to cooperate, and got a polite refusal.

Next I employed a noise monitoring firm, at my expense, to monitor the noise for a few days and nights. The noise clearly exceeded SEPPN-1. I also purchased a hand-held noise monitor and started reporting the decibels of the noise in my now-routine night-time complaints. After presenting the objective evidence, the EPA attitude softened. Had I been poor, nothing would ever have happened.

Eventually a woman on the EPA night line told me that the EPA wouldn’t act unless there were at least three independent complainants (this rule is not written down anywhere as far as I am aware). Given that there are only six houses affected by the noise, jumping through this hoop was a challenge. One house is occupied by people who work for the hospital, another by an elderly couple with Alzheimer’s, and a third by tenants who were not interested in attracting attention to their whereabouts. At least three residents did put in complaints to the EPA, others had complained to Council. The two files are never connected.

Eventually I went to my local member whose office made some inquiries. I now know – because I’ve since done a freedom information request – that this prompted the EPA into action. It conducted its own monitoring and instigated discussions with the hospital. I was not aware at the time because there was no communication.

The EPA issued a pollution abatement notice (PAN) dated 10 October 2014, more than three years after the noise began. The hospital was given six months to comply, and then an extension of a further three months. The hospital has spent some money to modify one noise source, reducing the worst of the night noise. But it has not complied with SEPPN-1, and has done nothing to reduce the noise from a second significant non-compliant source. I had sought clarification in 2014 as to whether the PAN applied to all machinery on the site, and was advised then (by phone) that it was. But now the second noise source is being treated as a new issue and I have to start the process all over again.

I went back to Council to suggest that it was time to pursue the Nuisance Law avenue. I have a polite email from the Moreland CEO declining to pursue Nuisance laws and reiterating that the problem is the EPA’s responsibility.

For four years now I have lived in two rooms at the back of my house, as far as possible from the noise, with a white noise machine running at volume 13 to block the buzzing. I go away on weekends to catch up on sleep. My attempts to block the noise have failed because the frequency of the noise passes through glass and insulation materials. The Council will not allow me to build a 16 foot high concrete fence, like the ones around freeways, to block the noise out. I have health repercussions from stress and lack of sleep. I have sinus infections from lack of ventilation, as my windows are now blocked with ‘stop noise’ secondary glazing. The medical costs are over \$3000 so far. Needless to say, my career has also suffered. I am not in a position to borrow money so I can’t move, and I don’t want to move. There is a principle at stake here too.

My overall experience is that without persistence, deep pockets and high-profile advocates who can prompt action, the EPA provides no protection for ordinary residents. The processes required to earn EPA attention are unclear, verging on secretive, and the criteria applied for action opaque. The EPA

officers phone at odd times, so there is no record of what's been said. There is no information about whether or not complaints are acted upon, and no means of tracing the progress of a complaint.

I guess after reading the discussion paper that my problem is categorised as 'minor' and therefore at the bottom the EPA's priorities. If that is true, then any agent can use pollution to dispossess another of their property, so long as the dispossessions occur one at a time to stay under the EPA's radar. This is the law of the jungle, not civilisation.

Questions

1. What do you think are the key environmental challenges which will impact the EPA in the future?

While orienting towards the future is important, the discussion paper goes too far in demanding that regulation respond to the particular imagined future scenario set up in the Discussion Paper's preamble. There are many reasons to expect that Melbourne's growth trajectory will not follow this anticipated path – not the least because population growth will not continue at the 2012 pace in a city losing jobs and apparently unable to create quality new jobs. Climate change is scary but actually we have no idea what will happen here in Melbourne. The future is unknowable. The regulatory horizon should pitch to the known short and medium term – to correcting the numerous failings of the current system and to addressing emerging practical issues. Adapting regulations to an unknown or imagined future is not only foolhardy, it's almost certain to be wrong.

2. What aspects of the EPA's work do you value and wish to preserve in the future?

My experience of the EPA has been overwhelmingly negative. The community consultations reveal that I am not alone, and that the EPA in its current form is spectacularly ineffective. This is in no small part due to reductions in its funding resources over the years. The Discussion paper reports that the number of licenses issued has fallen from 5000 in the 1980s to 700 in recent times. The earlier level of activity needs to be restored.

The fact that new threats require different approaches does not necessarily mean that old approaches are inappropriate. Rather, it means the range of technologies needs to be extended to respond to new demands.

3. How can the EPA effectively work in partnership with other government agencies to meet the environmental challenges of the future?

The scope of expertise required to do the EPA's job properly seems too wide for one agency, especially as new pollution sources (e.g. radiation) emerge. Revising the institutional arrangements seems warranted.

However, the Review's discussion paper suggests that Local Councils might have a greater role in pollution control through their 'Nuisance' laws. I have made numerous attempts to have the Council pursue my case via the nuisance provisions but they are not interested. They have told me that it would be too hard to apply the Nuisance laws.

My view is that the principal of subsidiarity – that tasks are allocated to the lowest level of government for effective management – suggests to me that the regulation of pollution not be delegated to Councils. Councils are too easily captured by the powerful local interests that are likely to also be the local polluters. Devolving responsibility to Councils looks like buck-passing the problem, with the likely result no effective regulation.

4. How can the EPA's role in safeguarding the community against the health impacts of pollution be clarified or strengthened?

- Avoid problems before they occur by strengthening the regulation of new enterprises and activities. I cannot see a problem with mandating that all new developments comply with noise, odour, chemical, waste, and emissions standards. My problem would not have existed.
- Strengthen existing pollution laws to protect residents. Under SEPPN-1, a facility like a hospital is permitted to emit 44.9db. from 7.00 a.m. to 11.00 p.m. every day and 38.9 db. from 11.00 p.m. to 7.00 a.m. every day in a residential area. This is lawful but not compatible with liveability.
- Restore adequate funding. The EPA's contemporary deficiencies reflect the contraction of its funding resources over the years.
- Make environmental protection a 24/7 responsibility. Currently the EPA has no capacity to monitor pollution that occurs outside of normal business hours. For just about everybody at the consultation meeting I attended, the pollution was occurring at night under cover of darkness - indicating a deliberate intention, on the part of polluters, to avoid the law. In my case, the pollution occurs in the early hours, but the hospital rotates the days so that it is almost impossible to predict which nights it will occur. At 3.20 a.m. on any particular night, when the noise is occurring, there is no one available to verify my claims.
- Do not rely only on complaints. The EPA only knows about pollution when somebody complains, but that means it is always on the back foot, reacting and enforcing. There should be more licensing and monitoring of industrial sites – including modern industries like hospitals. It's probably cheaper in the long run to intervene before there's a problem.
- Give the EPA powers to enforce its regulations. At a minimum, it needs similar rights of entry as Worksafe.
- Limit Council discretion over pollution-related by-laws. In my case, the Moreland Council waived all of their own building regulations to fast-track a development. When I complained initially, I was told that since the building permit did not stipulate that the hospital comply with SEPPN-1, Council had no grounds on which to demand compliance. Councils must be required to enforce pollution standards in the areas where they have responsibility (building permits).
- Regulate with the deliberate transgressor in mind. The fiasco of the regulation of Vocational Education in Victoria is a reminder that many firms are not socially responsible corporate citizens. If the EPA withdraws from the regulation of 'minor' incidents, some firms will interpret that as permission to act as they please up to the cut-off level. The law of the jungle will become the norm.
- Do not rely on calculative rules of thumb to categorise risk. If three people complain or three hundred, the fact is that some pollutants are incompatible with liveability. Ignoring an issue because a small number of people are affected is not consistent with justice in the common law sense or with the protection of property in the Magna Carta sense. Without the basic protection of the law, we'll all return to the dark ages.
- Introduce sanctions, under criminal law, for businesses that use pollution to seize control of land and resources. I believe that in my case, people associated with the noise source were making life impossible for residents deliberately, with a view to advancing some land use plan that was later abandoned. Since I live on a large block - 1000 sq. metres only 5 km from the GPO - it is not implausible to suggest that the aim was to induce me to sell at below market value. This should have been treated as criminal activity. I'd be happy to share my extensive documentation.

5. How could statutory frameworks more effectively prevent future environmental risks and land use conflicts?

Future environmental risks and land-use conflicts and hazards are inevitable. The issue is dealing with conflicts them fairly, following basic common law principles of fairness (what would a reasonable person do?). A calculation based on risk assessment as defined in the discussion paper is a synonym for law of the jungle, where the powerful hold sway and the weak bear the costs.

6. What role should the EPA play in emergency management?

None. It can't manage non-emergency issues.

7. How can the EPA better identify and, where necessary, address problems that are the result of past activity?

See Item 4.

8. What can the EPA do to avoid potential future problems?

See Item 4.

9. What role should the EPA play in improving environmental outcomes beyond those necessary to safeguard human health?

None – it can't discharge its current responsibilities.

10. What role should the EPA play in reducing greenhouse gas emissions?

Only in conjunction with other relevant Departments and agencies

11. How do you see environmental justice being applied to the work of the EPA?

The Discussion paper section on environmental justice begins by listing some definitions of environmental justice. But then it switches from justice to what it calls environmental 'citizenship', in which "communities in Victoria are actively protecting their local environment. ... In partnership with the EPA they report pollution, collect data and evidence, and 'co-create' solutions". In practice, this strategy simply means that I pay for all the monitoring and if I can't afford to pay, nothing will be done. I have proposed solutions to my problem - Nuisance laws, Abatement notices and building walls. I have offered to pay for a buffer - but nothing happens.

It is worrying that 'environment citizenship' constructs community not as a collective of all citizens, but as an interest group united by an issue. This is tantamount to a fundamental shift in the idea of citizenship, as I understand the term. It looks to organised groups to take responsibility and reduces the need for direct government intervention. In practice this requires community groups to access to expert advice and will the ability to match the resources that polluters will dedicate to non-compliance. This is dangerous. In the case of the Hazelwood firm, for example, nothing happened to protect the Latrobe community until Melbourne-based activists with the 'right' connections to expert advice and media outlets took up the cause. The real community did not have the resources to 'perform' environment citizenship. But the city-based activists did, and they could 'co-create' solutions with the EPA. This entangled the protection of residents (the real community) with the wider politics of anti-coal activism (whose activists understand the demands of 'environmental citizen' community). This approach implies that in the future protection of citizen's rights will only occur when that protection advances with other activist agenda. As Rose and Miller (1992, p. 188) warn, that this type of governance works only when ordinary people are empowered by their links with intermediaries that have the knowledge and expertise to engage with other experts and to discursively represent the problem in a way that elicits a positive response from regulators. It requires the community taking responsibility for the problem, but with an emphasis on accepting change ("healing the wounds") rather than addressing the problem. I cannot see how this approach would have helped me solve my problem. Another problem with this new definition of community is that firms have already worked out how to manufacture fake 'communities' with which to 'engage' so as to create the illusion of a social licence to operate (for example, Mayes et al. 2014). This process is guaranteed to stifle any genuine community concerns.

12. What can we adopt from other regulators and regulatory models to implement best-practice approaches and ensure that the EPA can rise to key future challenges?

The discussion paper looks for best practice overseas – at the consultation we were dazzled with references to experts from Harvard – when in fact the global best practice in environmental protection is found here in Victoria in the 1980s. We need to be very wary of importing best practice regulation from overseas, and especially wary of importing ideas from the United States where the structures of government and the regulations of firms is very different to how it is here. Here there is a stronger acceptance of regulation by reputable firms, and this advantage of our system should not be overlooked. The structure of the Australian federation is significantly different to both the United States and United Kingdom. Here the weak power of local government - a structural problem that cannot be resolved without reform of the Federation – means that overseas ideas of ‘devolution’ of regulation are not possible. My experience is that there are no obvious incentives for Councils to work in the interests of residents in regard to pollution issues.

The discussion paper raises the possibility of moving to new modes of regulation that involve less direct state involvement. It seems attracted to risk-based management. The discussion paper’s implied definition echoes Dean’s (1999, p. 177) characterisation of risk as “a way—or rather, a set of different ways—of ordering reality, of rendering it into a calculable form. It is a way of representing events in a certain form so they might be made governable in particular ways, with particular techniques and for particular goals.” When risk is understood through the lens of governmentality, it is an “outcome of the ordering practices through which community is rendered visible and calculable”, and governing becomes a process of ordering risk (Schofield, 2002, p. 679). Already the EPA is using rules of thumb – the number of complaints, the degree of harm, intentionality, media interest or vocal lobby groups – to order the importance of pollution events. This approach also entails a fundamental rethinking of citizenship (see Rose, 1999). It assumes an underlying social contract in which citizens and firms behave ethically. These fictions fall apart when confronted with anti-social behaviour of firms (e.g. VET deregulation). Risk-based regulation implies the abandonment of the social as a universal category.

The discussion paper proposes soft regulations, like the ‘nudge’, that do not require direct government involvement. But the discussion paper applies knowledge that is valid in some contexts to the pollution context, where it is less appropriate. Nudge techniques are effective for guiding individual choices, say about smoking or fast food consumption, but are not effective in practice in contested contexts or where the pay-off for ‘good’ choices is lower than the benefits of ‘poor’ choices (see Schnellenbach, 2012).

The idea that environment regulation and business competitiveness are no longer opposites is appealing and may be true in the restricted context of firms developing innovative new products or building brand reputation (Porter and Linde, 1995). But it does not apply generally, and certainly does not apply when firms transgress social norms, for example, dumping of asbestos or tipping heavy metals into the water table. The realities of unequal resources and power need to be considered.

13. Are there any other issues relevant to the Terms of Reference that you would like to raise?

The terms of reference ask that the Inquiry consider economic viability and sustaining jobs, but the published Discussion paper interprets this responsibility narrowly, as requiring solutions that place “the least burden on business.” On page 27, the discussion paper wrongly asserts that the terms of reference require it to “consider ways to reduce the regulatory burden.” The repeated use of the word ‘burden’ associates regulation with something heavy that needs to be reduced. This is wrong and a subtle way of directing the discussion. The purpose of regulation is to ensure that the economy is able to reproduce itself and prosper in the long term. For that to occur, all the actors – governments, businesses and communities – have to trust that the rules of the game protect

individuals from injustice and respect private property (by definitions grounded in Common Law). If reducing the short-term burden on business compromises these basic responsibilities of government then their exercise will be counter-productive in the longer term.

A benefit of interventionist regulation is that creates more jobs for regulators and technicians. But in the case of my noise, in Davies Street, Brunswick, if we added up all the hours that the Council, the Councillors and the EPA have spent managing my complaints rather than addressing the problem, the much needed buffering would have been paid for in spades. What has happened instead is that all this time has been wasted to insulate a commercial enterprise from what should have been its social responsibility.

References

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