

## MINISTERIAL ADVISORY COMMITTEE INQUIRY INTO EPA VICTORIA

SUBMISSION TO THE INQUIRY – 30 th. October 2015 From: Roger Hawthorn

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The Discussion Paper has presented a comprehensive and thoughtful overview of some of the challenges and areas of concern facing the EPA as it goes forward into the 21<sup>st</sup> Century as the first Environment Regulatory Authority in Australia and the primary agency responsible for protecting the environment in the State of Victoria. The EPA has a proud history of leadership in environment protection matters in Australia and in making a significant difference in the quality of life and health of the environment in Victoria. Its endeavours have helped Melbourne to attain the mantle of the “most liveable city in the world.”

Unfortunately, in the last decade the EPA as a result of some systematic failures and poor performance in the handling of some critical incidents, has lost some credibility as a competent regulator in the eyes of the community. Some public trust has been eroded as result of these well documented failures<sup>1</sup> and in response to these criticisms and the recommendations of its own independent review,<sup>2</sup> the EPA has made several changes to its policies, and enforcement performance and has introduced “risk-based” audits and inspections of potential polluters. It has ‘over reacted’ to the Review.

Following on from these developments this Ministerial Inquiry is timely and appropriate in that the terms of reference give the wider community the opportunity to participate in and be informed about the wider socio-legal, economic and political context in which the EPA will be required to operate in the future, and the Ministerial Department as well as the peak body.

The community expectations of corporations has changed significantly over the last 20 years to the extent that making a profit is not enough, corporations must now meet sustainability targets and demonstrate that they have a social conscience. So too the community expects that government agencies perform their roles. With climate change and changes in primary production, manufacturing, population growth and the nature of business in Victoria making environmental matters more complex the old command and control approach of issuing fines to polluters has given way to new approaches such as “really responsive regulation” and Sec 67A Orders. The department should take the lead on the big picture issues and leave the EPA to concentrate of it enforcement and compliance role.

It should be remembered that waste disposal, noise control, smoke, smells, water supply, clean rivers and creeks and beaches, and open spaces are still just as important to the community as they were in 1970. The Yarra River today is still in need of significant attention. The core function of a regulator such as the EPA is to enforce the law, maintain standards and protect the community and the environment. It already has sufficient tools but

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<sup>1</sup> *Brookland Greens Estate: Investigation into methane gas leaks*, Ombudsman Victoria, Melbourne, October 2009; and *Hazardous waste management*, Victorian- Auditor General's Office, Melbourne, June 2010.

<sup>2</sup> Stan Krpan. *Compliance and Enforcement review: a review of EPA Victoria's approach*, Environment Protection Authority Victoria, Melbourne, Feb 2011.

sometimes chooses not to use them as pointed out in the Kpran Review, or lacks a consistent policy, or the enforcement outcomes are affected by other things such as EPA culture, use of resources, social and political factors.<sup>3</sup>

Other states in recent times have made significant innovations and created significant new bodies to deal more adequately with the increased community interest in environmental law and protection.

I would particularly like to draw attention to several matters not specifically addressed in the Discussion Paper but that arise out of the terms of reference which may be of interest to the Inquiry:

#### **1. The need for an Environment Court in Victoria**

Currently planning matters are handled by VCAT, a very large and busy Tribunal. Environment prosecutions are usually brought to the Magistrates' Court which is also a very busy court with a very broad civil and criminal jurisdiction, but with no specialisation in environment matters. Environment Law in Australia is only 50 years old but is growing in volume and complexity at an ever increasing rate. It is the right time to establish a new specialist jurisdiction in Victoria to provide a central authority for all planning and environment disputes and prosecutions. It would be a most significant commitment by the Government and send the right message to the community that the environment protection is being treated as high priority in the 21<sup>st</sup> Century.

Currently environment prosecutions and determinations get lost in the hubris and milieu of the Magistrates' Court.

A Specialist court Could focus on Environment and Planning matters and create its own Procedural Rules.

The EPA would work closely with this new court and it would make its regulatory and enforcement work easier and more efficient. It would provide a focus for all environment matters and developments in the law and in environment protection generally. By comparison with the current situation in Victoria other states have already taken the initiative, for example:-

##### **Queensland**

Queensland has had a Planning and Environment Court with its own specialised *Rules* since 1999. Court decisions are readily available from court records.

##### **South Australia**

South Australia established the Environment, Resources and Development Court in 1993. Court decisions are readily available from court records.

##### **New South Wales**

NSW established a Land and Environment Court in 1980 which was the first dedicated Environment Court in the world. It is a court of superior record and sits equal with the Supreme Court of NSW.

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<sup>3</sup> Roger Hawthorn, *Personal Liability of Directors for Corporate Breach of EPA Act* PHD Draft April 2015

Environment disputes arising under federal environment law are dealt with by the Federal Court system.

The EPA bodies in these states have a legal duty under legislative requirements to inform the community about applications of the environment law and enforcement results. These specialised courts also make publication of court decisions easier public access.

2. **There is a need for better transparency and community education through direct easier access to EPA compliance determinations and prosecutions. - "Justice must not only be done but be seen to be done."**

At present in Victoria the Annual Reports are not on EPA web-site, nor are prosecution summaries or Magistrate Court Result summaries readily available or on the front page of the home web-site, but have to be accessed by an indirect and complex publications link, using the State Library system.

The interested citizen has to go through a series of complicated EPA Web –site pages only to find a myriad of information on compliance plans, policies and reviews, and data about the number of inspections, but no readily accessible case prosecution summaries or court outcomes. Alternatively the citizen can go through the process of a Freedom of Information request and then only obtain limited access to limited information vetted by the EPA.

In comparison the same and if not more prosecution information is made more readily available on the respective EPA web-sites in other states.

Annual Reports are not even listed on the EPA (Vic) Web –site pages, whereas in other states they are. Victoria it would appear has fallen behind.

The EPA library and information centre at South bank where this data was made readily available was closed some years ago with the opening of the new EPA offices in Carlton, and was never reopened. By comparison in other states for example:-

#### **South Australia**

The EPA web-site in South Australia is simple, clear and direct. Summaries of all ERD Court sentencing remarks and judgements are immediately available on the web-site under "Data and Publications" – Completed Prosecutions and Civil Penalties.

#### **Tasmania**

In Tasmania the EPA web-site is clear and simple. A complete list of all Prosecutions by Court Proceedings is readily available with Compliance and Incident Response Information.

#### **Western Australia**

In Western Australia the front page of the EPA Home page lists Annual Reports as a direct link.

The EPA web-site in Victoria has become too complicated and confusing since the Review.

