



**Submission by  
The Australian Industry Group**

**In Response to the  
EPA Victoria Compliance and Enforcement  
Review  
Discussion Paper**

**October 2010**

## The Australian Industry Group

The Australian Industry Group (Ai Group) is a leading industry association in Australia. Ai Group member businesses employ around 750,000 staff in an expanding range of industry sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other related service industries. Ai Group represents over 4,000 businesses in Victoria.

Ai Group is pleased to make this submission in response to the issues raised in the EPA Victoria Compliance and Enforcement Review Discussion Paper. In the course of developing this submission, Ai Group consulted broadly with our membership and conducted an industry consultation session in conjunction with the EPA which was attended by some 90 industry representatives. Ai Group's consultation processes were guided by Mr Ross McCann, Executive Chairman, Qenos.

## Response to the Issues Raised in the Discussion Paper

**Question 1: What is the right balance between encouraging compliance through education, guidance and advice and taking enforcement action?**

**Question 2: How well is the EPA's current approach working? How could it be improved?**

Ai Group considers there is an important ongoing role for each of the steps included in the EPA's current approach to regulation:

- Setting the standards and supporting people to comply through education, persuasion, guidance and advice
- Enforcing the law through monitoring and enforcement
- Influencing people through incentive schemes and collaboration to go beyond compliance.

*Setting the standards and supporting people to comply through education, persuasion, guidance and advice*

Clarity around standards, regulatory and reporting requirements is fundamental to any compliance and enforcement framework. Ai Group supports a strengthening focus on ensuring industry and community understanding of their respective environmental obligations and on the provision of practical information and advice to enable compliance with these requirements.

This should include streamlining of regulatory and reporting obligations and provision of information in a format which facilitates ready understanding by industry of their obligations and access to the information and advice necessary to achieve compliance.

The consultation sessions conducted by Ai Group in the course of developing this submission in response to the discussion paper identified a number of areas where further clarity and support is required.

The EPA's increased focus on compliance coincides with a move by the EPA to a risk-based approach to environmental licences under which licence-holders are being required to:

- Develop and implement monitoring programs that enable the business and the EPA to determine compliance with their licence; and
- Submit a statement of annual environmental performance to EPA signed by the highest officer in the company

While Ai Group is supportive of the move towards risk based management, it is essential that industry is assisted in the implementation of this change through the provision by the EPA of appropriate information and support.

The EPA's frequently asked questions (FAQs) on the licensing reform program indicate that associated with the move to more 'outcome-focussed' conditions, "A licence-holder will now be able to determine how to achieve the outcomes specified by the conditions in their licences, with support and guidance provided by EPA". Ai Group considers that practical support beyond the issuing of guidelines will be required to assist industry in the implementation of the reforms and seeks clarification of the support and guidance that will be provided by the EPA.

This will be particularly important for new businesses or those with limited understanding of how their operations can affect the surrounding environment. Not all current or prospective licence-holders will have the experience, expertise and indeed the necessary internal resources to conduct risk assessments and design and implement monitoring systems on an ongoing basis.

The success of the reform process will rely on EPA investment in resources to help industry to adapt to the new framework. Ai Group believes that further guidance and support needs to be provided or refined so that industry can assess their performance against their new licences. This will help to ensure industry and community acceptance of the new system.

The EPA's compliance and enforcement policy must take account of the resourcing constraints on industry. The results from the Ai Group and Sustainability Victoria 2007 national survey *Environmental Sustainability and Industry: roadmap to a sustainable future* found that 54% of firms had no staff with environment responsibilities. The lack of environment skills within a company severely limits its ability to identify and implement opportunities to improve environmental management.

Implementation of a risk management approach can be expected to be less onerous for those licence-holders currently operating under an ISO14001 compliant environmental management system. In contrast, for those licence-holders that do not currently operate under a formal environmental management system, implementation of a risk management approach to assess compliance with licence conditions may necessitate engagement of additional staff or external consultants. Ai Group members have noted the shortage of suitable auditing skills. This is particularly relevant to the landfill sector where sites may require audits by EPA appointed auditors. EPA itself has highlighted that the shortage of these auditors presented a major risk to the implementation of the landfill sector licensing reforms.

#### *Clarification of terminology*

Clarification is also required of definitions of terminology. Attendees at Ai Group's consultation sessions noted what constitutes an environmental hazard is open to interpretation. There was also support for the need for clarification of 'measurable harm'.

Companies further noted the lack of clarity of what constitutes a reportable offence under the Victorian regulatory framework and 'clean up to the extent practicable'.

To date the focus of the EPA's educational efforts has been on licensed sites. Achievement of good environmental outcomes requires that non-licensed sites are similarly made aware of their obligations. It is therefore essential that resources are also allocated to assisting non-licensed sites with the required information and advice on their environmental compliance and reporting obligations.

Ai Group's consultation sessions further identified that there is an important role for the EPA to educate the community about what constitutes environmental risk/harm versus nuisance.

An enforcement policy must also be underpinned by provision of the information and assistance necessary to achieve compliance. Ai Group anticipates that achievement of the above will necessitate allocation of appropriate resources to the development of the EPA's own internal technical expertise including industry experience. This includes ensuring that relevant sections of the EPA are sufficiently resourced to ensure that they can respond in a timely and considered manner to queries from industry.

#### *Enforcing the law through monitoring and enforcement*

As noted above, the increased focus by the EPA on compliance coincides with a more risk-based approach to environmental licences. These are very significant reforms and will take some time to work through and Ai Group encourages the EPA to continue to work constructively with industry during implementation of the reforms. We anticipate that implementation may take a considerable period of time and include at least 2 reporting periods (ie financial years).

Ai Group requests ongoing close engagement in the development of the framework and notes that the move away from a prescriptive process towards risk based approaches can reduce business certainty.

Industry has benefited from the approach that the EPA has taken in recent times to working closely with businesses to assist them to comply with regulations and indeed move beyond compliance. This has assisted in the development of strong cooperative approaches to achievement of ongoing improvements in environmental performance by industry. It would be disappointing if an increased emphasis on enforcement undermined the spirit of cooperation that has been developed with a result that businesses adopt a more legalistic approach to communications with the EPA and less forthcoming in sharing information on best practice and innovations.

Ai Group supports a continued strengthening in this partnership approach and considers that this is not in itself incompatible with the EPA's responsibilities of ensuring compliance with environmental regulations.

It is important to the effectiveness of the monitoring and enforcement regime that the focus is not solely on licensed sites who seek to comply with environmental regulation and that it includes appropriate action for similar breaches at unlicensed sites.

#### *Influencing people through incentive schemes and collaboration to go beyond compliance*

One of the objectives of increasing the efficiency of the licensing system is to provide licence-holders time to focus on reducing carbon impact, improving resource efficiency and investigating new and more efficient practices.

In the EPA's licensing FAQs it states that the reforms will "Enable licence-holders to change the way they work so that risks of non-compliance are prevented and other environmental challenges (eg. climate change) can be adapted to more rapidly." This is something of an over simplification of reality and overstates what can be achieved in the short to medium term.

Ai Group enjoys a very positive working relationship with the EPA. We have strongly supported the focus of the EPA in working with industry to move beyond compliance. Ai Group therefore welcomes the commitment in the discussion paper to continued focus on beyond compliance in concert with the emphasis on enforcement.

Provision of practical assistance to industry, including through alliances with stakeholders such as industry associations can assist in achievement of better environmental outcomes than may be achieved through a focus solely on minimal compliance.

The Ai Group/EPA Sustainability Covenant is an example of a successful joint government and industry initiative providing funding support and assistance for beyond compliance (non capital) resource efficiency projects in industry.

**Question 3: Would achieving these aspirations make the EPA more effective? Should EPA aspire to something different?**

Ai Group is broadly supportive of the objectives of the Compliance and Enforcement Review which are to become more:

- Transparent
- Accountable
- Energetic
- Willing to be judged on environmental outcomes
- Open to scrutiny of our decision-making

Key issues raised by participants in Ai Group's consultation sessions included concerns about the lack of clarity and consistency in the EPA's enforcement policy. Participants further noted the expectations of environmental performance varied between regional offices and even within offices. Some participants called for clearer articulation by the EPA of environmental performance expectations at the time of granting of licences and works approvals.

In all instances, the EPA should be transparent regarding the basis for the decision for taking or not taking enforcement action with analysis of outcomes and trends in decision making processes made available.

As noted above, it is essential that the EPA is sufficiently resourced to ensure that it can respond in a timely and considered manner to queries from industry. As an example, a business attending the consultation session noted that it had experienced significant delay in receiving a response from the EPA in relation to an audit scope that it had submitted for approval. This delay had implications for compliance timeframes and for reporting to the company's board on compliance.

There are many enthusiastic supporters amongst Ai Group's membership for the introduction of Client Relationship Managers. Companies have noted that they are no longer impacted by requirements to deal with multiple contacts in the EPA.

However, some companies noted that the move to the CRM system had resulted in the disbanding of the knowledge hubs within the EPA. Further, the centralisation of contact through a single point in some instances leads to delays in getting a response. It is essential to the success of the CRM model that the CRM managers are supported by appropriate technical resources to enable speedy response to queries.

In principle Ai Group supports the intention that the EPA is willing to be judged on environmental outcomes. However, greater clarity is required as to how this assessment is undertaken. For example, an increase in the number of incidents reported should not in itself be considered an adverse outcome for the environment if such reporting promoted faster clean up and remediation response and reduced the extent of environmental harm than would have been the case if the incidents had not been reported.

Consistent with the concerns expressed in the preceding section in relation to perceptions that the EPA is increasingly adopting a media driven approach to environmental enforcement, increased media reporting on enforcement action would not in itself be a measure of environmental outcomes. Businesses question whether such an approach is most suited to achieving best environmental outcomes for the community and its effectiveness in fostering a cooperative relationship with the business community.

The EPA's compliance and enforcement activities should be informed by analysis of priority areas of environmental risk and impact and identification of where efforts should best be directed (eg licence holders, unlicensed sites, local government bodies) to achieve the desired outcomes.

**Question 4: What regulatory approach would best manage risks to the environment?**

Ai Group is supportive of the EPA's objective of introducing greater clarity around how it regulates and how it balances encouraging compliance with the need to enforce the law.

Of the various approaches identified in the discussion paper, Ai Group is supportive of the tailored approach in recognition of the need to provide the EPA with the flexibility to respond to the requirements and circumstances of different groups and target resources accordingly. Importantly the tailored approach incorporates continued support for industry for compliance and beyond compliance.

Ai Group considers that all proposals for the introduction of new reporting requirements on industry should be subjected to a cost benefit analysis.

**Question 5: Does EPA have a role in providing advice to business on how to comply?**

The current EPA Enforcement Policy identifies a clear role for the EPA in the provision of Technical Advice

“For all statutory processes, including licences, works approvals and notices, EPA will, where a need becomes apparent, or where requested, provide advice on how compliance might be achieved. This advice may be by way of direct information or by referral to where expert assistance can be obtained.

Where EPA possesses unique in-house skills, these will be made available, wherever practicable, to assist in achieving compliance”.

Ai Group welcomes the recognition on page 8 of the discussion paper that many smaller businesses may not have the required expertise to reduce environmental risks or emissions and seeks clarity from the EPA on what it expects for compliance.

This is consistent with the results noted above of the Ai Group and Sustainability Victoria 2007 national survey *Environmental Sustainability and Industry: roadmap to a sustainable future* which found that 54% of firms had no staff with environment responsibilities.

Ai Group identifies an ongoing role for the EPA in providing advice to business on how to comply and what it expects for compliance. Opportunity may exist for the EPA to work with key stakeholders such as industry associations in the provision of this assistance.

**Question 6: What impact (if any) should enforcement action have on this role?**

Where the EPA is working closely with industry to assist with compliance and there is genuine commitment on behalf of the business to achieving compliance, this should be taken into account. It is incumbent upon the EPA in such instances to advise the business of the non-conformance and monitor that organisation's commitment to and progress in achieving compliance. Ai Group considers that a higher priority for enforcement action would be instances where non-compliance is consistent and is not currently being addressed. Account should also be taken of The Factors to Consider in appendix 1 to the current enforcement policy.

**Question 7: Do you think a model that considers the risk of environmental damage from a business and its attitude would more effectively deal with environmental compliance?**

It is appropriate that the EPA compliance framework continues to provide consideration of the risk and impact in conjunction with the enforcement tools available to EPA. Ai Group is broadly supportive of the risk-based enforcement model depicted in the consultation paper. Appropriate recognition needs to be given to factors such as:

- Risk of harm
- Causal factors of the non-compliance
- Track record of the non-complying company, including commitment to environmental management

Ai Group considers that the Factors to Consider in appendix 1 to the current enforcement policy continue to be appropriate.

**Question 8: Are these principles and factors adequate to provide clarity on how EPA will respond to particular breaches?**

and

**Question 13: Does EPA's Enforcement Policy provide adequate guidance on when a prosecution should be undertaken?**

Ai Group considers that the guiding principles outlined in the enforcement policy are appropriate. Ai Group further supports the factors listed in the appendix to the enforcement policy which should be considered in relation to enforcement decisions.

However, a key issue for industry is the consistency with which the principles are implemented. The enforcement policy would benefit from increased guidance as to the practical implementation of the policy to provide clarity to stakeholders. As noted above, participants in Ai Group's consultation sessions raised concerns about the perceived inconsistency in EPA implementation of the enforcement policy.

Examples of concerns raised included:

- A perceived tendency for the EPA to focus on 'tall poppies' rather than implement a targeted proportionate approach
- When an incident attracts media attention the EPA feels obliged to be seen to be prosecuting
- The EPA is seen to increasingly use the media to publicise enforcement actions, including in some instances, some which are relatively insignificant
- Enforcement action is too heavily skewed towards licensed sites with the result that instances of breaches of environmental regulation by unlicensed sites do not receive the same enforcement action.

It is essential that the internal EPA skill set is addressed to ensure consistency and fairness in the application of the policy. In particular, companies participating in the Ai Group consultation sessions recommended increased training for EPA staff around risk management.

Further, a significant number attending Ai Group's consultation sessions indicated that the objective of the EPA's compliance framework was not clear. Clearly more work needs to be done to communicate to stakeholders the compliance framework aims, objectives and processes. For example, there was support from businesses for greater clarity around the relative weight given to actual harm as opposed to potential harm and how this informs the decision on appropriate enforcement action. Businesses also requested greater clarity around the decision path, including timing, from the point of incident investigation to the EPA initiating enforcement action.

Ai Group would further support adoption of processes currently employed by WorkSafe inspectors under which businesses receiving a visit from an inspector are provided with an entry report outlining the issues identified during the visit which need to be addressed by the company.

This would assist the company to respond quickly to address concerns and would also help ensure procedural fairness. Delayed enforcement action also presents practical difficulties to businesses wishing to prepare an appropriate defence.

**Question 9: Is this an appropriate ranking of risks and severity?**

Ai Group supports development of a hierarchy of environmental risks and severity to assist the making of consistent, risk-based decisions. Some Ai Group members have commented that the ranking of severity of environmental harm contained in the discussion paper is overly complex and that the proposed number of categories could create problems for consistency of interpretation. The ranking needs to be accompanied by detailed and practical examples for each of the proposed categories to assist in achievement of consistency in decision making processes.

**Question 10: What priority should EPA give to breaches of financial obligations such as evasion of landfill levies?**

Waste management regulations created by EPA, including levies, can have a significant influence on an organisation's profitability and competitiveness, especially with current and planned levy increases. Suitable compliance monitoring and enforcement activities help to ensure the ongoing business sustainability of organisations that seek to act in accordance with legal requirements.

**Question 11: What, if any, is the relevance of self-reporting or cooperation by business?**

Self-reporting and disclosure should be encouraged to detect and prevent environmental harm. Policies to encourage such self-reporting and disclosure must recognise that company reputational risk is a significant issue for business. Ai Group considers that self reporting and cooperation by business are both key factors for consideration in relation to enforcement action, as are the seriousness of the incident; the previous history of the offender; and whether the incident was intentional or accidental.

Ai Group further notes the need to provide improved guidance to both licensed and un-licensed sites on what constitutes a reportable incident.

**Question 12: Do the examples provided demonstrate an appropriate use of EPA's enforcement tools?**

The discussion paper provides examples of 2 incidents in which a pollution abatement notice and an injunction were issued. Ai Group would support provision of a broader range of examples by industry and incident type to provide greater clarity and promote consistency in the use of enforcement tools.

**Question 14: What are the best ways of ensuring consistency and efficiency in the enforcement process?**

During the consultation sessions conducted by Ai Group, participants raised concerns about the current internal review process. It was noted that when seeking a review of a decision, companies are provided with inconsistent messages about the basis for those decisions and noted that the EPA officer with whom a company is dealing in relation to the issue may change numerous times.

Essential factors to ensuring consistency and efficiency in the enforcement process are the availability of suitably skilled staff with relevant expertise and who are provided with practical guidance and support in the application of the enforcement process.

**Question 15: What other opportunities should the community have to contribute to EPA's compliance and enforcement?**

Ai Group would welcome the opportunity to consider analysis of the issues raised by community representatives during the consultations on the discussion paper. Provision of timely advice by the EPA to businesses in relation to concerns raised by the community would be very helpful in enabling those businesses to respond promptly to address concerns. Again, it is important that the EPA implement a consistent approach to advising business of the level of community concern and providing assistance to address those concerns.

**Question 16: What types of decisions should internal review apply to?**

Participants in Ai Group's consultation sessions indicated support for the ability for internal review of enforcement decisions. This is particularly appropriate given the EPA's stated intention of strengthening its compliance and enforcement activities. During these sessions participants cited the cost, time, diversion of management attention and risk to reputation of applying for VCAT review. It is essential that the appeals mechanism is appropriately resourced to ensure that businesses can obtain remedies in a cost effective and timely manner.

**Question 17: Who should be able to apply for internal review?**

The ability to apply for internal review should not be restricted to entities that are the subject of enforcement decisions but should extend to negotiations in relation to appropriate ongoing management of environmental impacts. Ai Group has been advised of situations in which businesses have received inconsistent and conflicting direction from the EPA and have been offered no opportunity for review of the decision.

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