

# Evaluating the EPA's performance in pollution regulation and management against its legislated objectives

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## 1. INTRODUCTION

The NSW Environment Protection Authority (EPA) fails to realise the full potential of its regulatory functions to improve the environmental performance of licensed polluters, preventing satisfactory achievement of the Authority's legislated objectives. This is apparent when assessing both aspects of the EPA's 'command and control' approach to pollution regulation under the *Protection of the Environment Operations Act 1997 (POEO Act)* regime: licensing and compliance/enforcement.<sup>1</sup> Firstly, the EPA's inability to address the cumulative impacts of emissions on receiving environments highlights the shortcomings of its approach to licensing. The EPA's goals for the protection and improvement of the environment are unattainable without accommodating for the effects of discharges from multiple licence-holders. Secondly, the shortcomings of the EPA's approach to its licensing functions are not compensated for by strong enforcement and compliance mechanisms to the extent that would be necessary to achieve substantial achievement of the EPA's objectives. The lack of criminal prosecutions for offences under the POEO Act is not entirely made good by other methods of compliance and enforcement. Significant improvement is needed before the EPA can achieve its environmental protection objectives.

A recent NSW Legislative Council Inquiry into the EPA's performance concluded that it is 'performing the majority of its functions in keeping with its objectives'.<sup>2</sup> This assessment, however, downplays the importance of the Authority's legislated goals under the POEA Act. This article focuses instead on areas where the EPA is significantly underperforming. With the performance of environmental regulators under scrutiny in other states<sup>3</sup>, the issues addressed in this article have broad relevance to the criteria being applied in such assessments.

## 2. OBJECTIVES OF THE EPA

In order to make a proper assessment of NSW EPA's performance, its objectives must be understood in the context of both its constituting legislation and its perceived role as an environmental regulator.

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<sup>1</sup> D Raha, 'Paradigm shift in water environment protection in New South Wales' (2007) 11(1) *Australian Journal of Water Resources* 67, 67.

<sup>2</sup> General Purpose Standing Committee No 5, Legislative Council – Parliament of NSW, *Final report into: The performance of the NSW Environment Protection Authority* (2014) xiii.

<sup>3</sup> A public inquiry into the operation of EPA Victoria commenced on 1 June 2015. The National Review of Environmental Regulation is also ongoing (see article by Wyllynko et al in *Australian Environmental Law Digest*, Volume 2, number 2, June 2015).



The POEA Act broadly aspires for the EPA:

- (a) to **protect, restore and enhance** the quality of the environment in NSW, having regard to the need to maintain **ecologically sustainable development**, and
- (b) to reduce the **risks to human health** and **prevent the degradation of the environment**...<sup>4</sup>

The EPA accepts these legislated objectives as binding upon its operations.<sup>5</sup> The Authority also acknowledges the ‘centrality of ESD to its work’ and its associated ‘effective integration of economic and environmental considerations’.<sup>6</sup> Balancing these considerations is reflected in the EPA’s ‘risk-based approach’ to compliance and, from 1 July 2015, licensing.<sup>7</sup>

However, little regard is had for ESD in the majority of the EPA’s decision-making.<sup>8</sup> Indicatively, ESD is conspicuously absent from its 2017 Strategic Plan.<sup>9</sup> It is perhaps inappropriate to place too much emphasis on this point as ‘there are very few legal obligations for the EPA... to consider ESD principles or the Act’s objectives in day-to-day decision-making’.<sup>10</sup> Nevertheless, effective integration of ESD is an important consideration when judging the performance of the EPA with respect to its legislated goals. Indeed, the establishment of a Parliamentary inquiry into the EPA is a reflection of community concerns that the Authority may not be meeting these objectives.

The EPA is in a challenging position as an independent environmental regulator of a legislative regime that permits pollution and reflects the development and industrial needs of modern society. Within this context, the EPA’s goals cannot be too overdrawn. Realistically, rather than aiming to eliminate pollution, the EPA seeks to improve the practices of inevitable polluters so as to reduce environmental impacts below the level of harm that would have been caused had that same activity occurred unregulated. Achievement, in this context, is measured by the extent to which the EPA can reduce these impacts, rather than its ability to ‘enhance the quality of the environment’ or prevent its degradation.

Thus there are two choices when considering the extent to which the EPA achieves improvement for the environment. Either the EPA’s efforts are measured against the broader legislated goal of overall environmental *protection* or, its actions respond to more realistic objectives of gradually improving environmental practices among inevitable polluters with the aim of avoiding unacceptable risks. The Parliamentary Inquiry’s Committee clearly adopted a narrower understanding of the EPA’s capacity to achieve its goals and its conclusions should be read accordingly.

### **Legislative Council Inquiry**

The Committee for the Inquiry concluded that the EPA is ‘performing the majority of its functions in keeping with its objectives’ and is balancing ‘oversight and effective

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<sup>4</sup> *Protection of the Environment Administration Act 1991* (NSW) s 6(1) [emphasis added].

<sup>5</sup> NSW EPA, Submission No 156 to General Purpose Standing Committee No 5, *Inquiry into Performance of the NSW Environment Protection Authority*, 28 August 2014, 5.

<sup>6</sup> *Ibid.*

<sup>7</sup> NSW EPA, *Compliance Policy* (2013) 4

<<http://www.epa.nsw.gov.au/resources/legislation/130251epacompol.pdf>>; NSW EPA, *Introduction of the EPA’s risk-based licensing system* (4 December 2014) <<http://www.epa.nsw.gov.au/licensing/licenceintro.htm>>.

<sup>8</sup> EDO NSW, Submission No 162 to General Purpose Standing Committee No 5, *Inquiry into Performance of the NSW Environment Protection Authority*, 29 August 2014, 7.

<sup>9</sup> NSW EPA, *Strategic Plan 2014-17* <<http://www.epa.nsw.gov.au/resources/epa/140665StratPlan1417.pdf>>.

<sup>10</sup> EDO NSW, Submission, above n 8.

collaboration... appropriately and effectively.’<sup>11</sup> Without rejecting this assessment – informed by 253 public submissions to the inquiry<sup>12</sup> – the following discussion will highlight some of the areas where the EPA’s activities are clearly deficient, compromising achievement of its objectives. It appears clear that the EPA does not achieve its broader, legislated goals and, although it may encourage improved environmental practices, the measures that it adopts are insufficient to realise holistic environmental protection.

### 3. LICENSING

The EPA relies on its power to approve and set conditions for environment protection licences (EPLs) as the fundamental mechanism by which it aims to achieve its objectives. However, several shortcomings of the licensing system undermine the Authority’s ability to do so. For example, the legislative scheme regulating pollution focuses on single facility licences,<sup>13</sup> and there is no obligation on the EPA to adopt best practice standards or regional emissions targets.<sup>14</sup> Further, the involvement of the licence holder in setting discharge limits can result in EPLs based on questionable scientific foundations.<sup>15</sup> The inadequacies of this system are most apparent with respect to the cumulative impacts of multiple emissions sources.

Criticising the EPA for shortcomings in the structure of the licensing system is futile: it has little control over the legislative intentions of Parliament. Nevertheless, there are several mechanisms available to the EPA that would better address cumulative impacts in setting EPL conditions. Its failure to fully implement these strategies limits its ability to ‘protect, restore and enhance the quality of the environment’.

#### Cumulative impacts

It is impossible for the EPA to achieve effective environmental protection without making adequate provision for cumulative impacts on natural ecosystems. The EPA maintains that ‘[w]here appropriate, [it] considers cumulative impacts when making regulatory decisions’.<sup>16</sup> However, in addition to the systemic problems associated with the licensing system, the EPA’s own approach to licensing marginalises consideration of the capacity of the receiving environment to withstand cumulative impacts. A fundamental change in licensing policy is needed to ensure that the EPA adopts a preventative, rather than curative, approach to its licensing functions.<sup>17</sup> Introducing ‘risk-based licensing’ is a positive development,<sup>18</sup> however it, too, is restricted to premises-based considerations.<sup>19</sup>

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<sup>11</sup> General Purpose Standing Committee No 5, Legislative Council – Parliament of NSW, above n 2, xiii, [9.2].

<sup>12</sup> Parliament of New South Wales, *Submissions to the Performance of the NSW Environment Protection Authority* <<http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/V3ListSubmissions?open&ParentUNID=743BDB8875807D85CA257CFC002142D1>>.

<sup>13</sup> EDO NSW, *Clearing the Air: Opportunities for improved regulation of pollution in NSW* (2012) 14 <[http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/280/attachments/original/1380668034/120322pollution\\_discussion\\_paper.pdf?1380668034](http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/280/attachments/original/1380668034/120322pollution_discussion_paper.pdf?1380668034)>.

<sup>14</sup> EDO NSW, Submission, above n 8, 8.

<sup>15</sup> Kristy Graham and Ian A Wright, ‘The potential and reality of the environment protection licensing system in NSW: The case of water pollution’ (2012) 29 *Environment and Policy Law Journal* 359, 361-3.

<sup>16</sup> See the EPA’s response at: EDO NSW, Submission, above n 8, 31.

<sup>17</sup> EDO NSW, *Clearing the air*, above n 13, 14-15, 18.

<sup>18</sup> *Protection of the Environment Operations (General) Amendment (Licensing Fees) Regulation 2014* (NSW).

<sup>19</sup> EDO NSW, *Submission on risk-based pollution licensing and the Protection of the Environment Operations (General) Amendment (Licensing Fees) Regulation 2013* (4 November 2013) 2 <<http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1054/attachments/original/1384228987/131104POEOGEnAmdmtLicensingFeesReg.pdf?1384228987>>.

The following three functions are available to the EPA to address cumulative impacts, yet their under-utilisation is at the expense of attaining its goals of environmental management and protection.

### **Protection of the Environment Policies (PEPs)**

PEPs are an ‘important mechanism’ by which the POEO Act seeks to address the cumulative impacts of polluting activities.<sup>20</sup> However, despite the value of this tool in setting local and regional standards for water or air quality, the EPA continues to rely on regulations to guide their decision-making.<sup>21</sup> This is problematic considering multiple discharges in the same area are not adequately accounted for in the provision of EPLs (as discussed above). For example, although 22 licensed premises discharge into the Upper Coxs River in the Hawkesbury-Nepean catchment, the individual licence concentration limits do not reflect any ‘assessment of the acceptable maximum environmental considerations for various contaminants’.<sup>22</sup>

A PEP is a logical solution to this problem; it would force the EPA to have specific regard to cumulative impacts in setting and varying licences in the region and devise management strategies accordingly.<sup>23</sup> The responsibility for this deficiency is shared; both the EPA and NSW Government have the capacity to draft PEPs,<sup>24</sup> yet neither has.<sup>25</sup> Setting local or regional limits to guide project assessment and issuing of EPLs could realise broader legislated objectives of environmental protection more effectively than considering each license application in isolation.

### **Load-Based Licences (LBLs)**

LBLs provide economic incentives for EPL-holders to monitor and reduce discharges and represent a significant improvement on concentration-based licences.<sup>26</sup> This approach is more closely aligned to an essential component of the EPA’s objectives and ESD in general: the polluter pays principle.<sup>27</sup> However, where LBLs do apply, fees are often too low to incentivise meaningful discharge reduction and do not account for the ‘true costs of pollution’.<sup>28</sup> Additionally, restricting the number of ‘assessable pollutants’ calculated in LBL fees ignores the costs of emissions outside the scheme (for example, ethanol) on human health and the environment.<sup>29</sup> The problem of low fees may be improved when the EPA introduces ‘risk-based licensing’ on 1 July 2015.<sup>30</sup> However, without making more facility types subject to LBL fees nor expanding the list of assessable pollutants, the EPA will not be able to properly account for cumulative impacts across the range of ecosystems in which licensees pollute.

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<sup>20</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 5 December 1997, 3170 (Jeffrey Shaw).

<sup>21</sup> EDO Victoria, *Statutory Environment Protection Policies: Their background and their future* (22 July 2011) 4 <[https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/sepp\\_review\\_briefing.pdf](https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/sepp_review_briefing.pdf)>

<sup>22</sup> Graham and Wright, above n 15, 364.

<sup>23</sup> *Protection of the Environment Operations Act 1997* (NSW) ss 10(b), 45(a).

<sup>24</sup> *Ibid* s 12.

<sup>25</sup> In fact, the NSW Government even endorsed the creation of one following an independent inquiry into the Hawkesbury-Nepean River System in 2001: Department of Local Government, *Hawkesbury Nepean River System – Statement of Joint Intent for Integrated Environmental Management* (21 December 2001) 20 <<http://www.dlg.nsw.gov.au/DLG/Documents/Circulars/01-72.pdf>>.

<sup>26</sup> Raha, above n 1, 67-68.

<sup>27</sup> *POEA Act* s 6(2)(d)(i).

<sup>28</sup> Graham and Wright, above n 15, 369; EDO NSW, *Clearing the air*, above n 13, 20.

<sup>29</sup> Indeed, only 30 of the 93 substances listed in the National Pollutant Inventory are assessable under the LBL scheme: *ibid* 20.

<sup>30</sup> NSW EPA, *Introduction of the EPA’s risk-based licensing system*, above n 7.

## Emissions Trading Schemes

The EPA can develop and implement market-based approaches that have the capacity to effectively address cumulative impacts from multiple facilities,<sup>31</sup> yet this rarely occurs. The success of the Hunter River Salinity Trading Scheme demonstrates the potential for market-based mechanisms to overcome the problem of individualised EPL concentration limits in the absence of a PEP.<sup>32</sup> However, despite recognising the environmental benefits and precedential value of this pilot program,<sup>33</sup> the EPA has not developed any further schemes.

Settling for traditional compliance mechanisms as means of achieving environmental goals demonstrates a lack of initiative on the part of the EPA to develop preventative pollution strategies and address cumulative impacts. The 2014 Inquiry suggested that the EPA increase its use of 'innovative approaches' such as those discussed above to account for cumulative impacts and encourage meaningful emissions reductions.<sup>34</sup> Without acceding to these recommendations, the EPA cannot purport to achieve its legislated objectives, irrespective of EPL compliance levels.

## **4. COMPLIANCE AND ENFORCEMENT**

Without substantial enforcement 'the rule of law is simply devoid of meaningful content'.<sup>35</sup>

The considerable rates of non-compliance with EPLs highlight the essential role of enforcement mechanisms as means by which the EPA can better achieve its legislated objectives.<sup>36</sup> However, the EPA's cooperative approach to pollution control has undermined many of the strong enforcement mechanisms of the POEO Act.<sup>37</sup> As with its licensing functions, the EPA fails to utilise the compliance and enforcement tools at its disposal to the extent necessary to adequately protect the environment. The two options discussed below illustrate this point.

### Criminal Prosecutions

The threat of criminal prosecution is the backbone of environmental law enforcement.<sup>38</sup> However, the EPA is generally reluctant to instigate criminal proceedings to remedy a breach of the POEO Act.<sup>39</sup> Of the cases that are prosecuted, the majority are brought to the attention of the EPA by way of public complaint or an incident report from an EPL-holder.<sup>40</sup> The EPA instigates very few cases on its own initiative in response to, for example, periodic compliance auditing.<sup>41</sup> This is somewhat understandable. As an independent government agency, the EPA must consider the public interest as the dominant factor in deciding

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<sup>31</sup> POEO Act s 293(1); *Protection of the Environment Operations (General) Regulation 2009* (NSW) cl 23.

<sup>32</sup> NSW EPA, *Scheme successes* (5 February 2015) <<http://www.epa.nsw.gov.au/licensing/hrsts/success.htm>>; *Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Regulation 2002* (NSW).

<sup>33</sup> NSW EPA, *A basis for future market-based instruments* (18 June 2013) <<http://www.epa.nsw.gov.au/licensing/hrsts/precedence.htm>>.

<sup>34</sup> General Purpose Standing Committee No 5, above n 2, [9.4].

<sup>35</sup> Chief Justice (NSW) James Spigleman, 'The Rule of Law and Enforcement' (Speech delivered at the ICAC – Interpol Conference, Hong Kong, 22 January 2003) 128 <[http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman\\_speeche\\_s\\_2003.pdf](http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeche_s_2003.pdf)>.

<sup>36</sup> EDO NSW, *Clearing the air*, above n 13, 34.

<sup>37</sup> Graham and Wright, above n 15, 370.

<sup>38</sup> Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 2010) 663.

<sup>39</sup> Carolyn Abbot, 'The Regulatory Enforcement of Pollution Control Laws: The Australian Experience' (2005) 17(2) *Journal of Environmental Law* 161, 179.

<sup>40</sup> Graham and Wright, above n 15, 365.

<sup>41</sup> POEO Act s 78(4A).

whether to prosecute.<sup>42</sup> The EPA has a duty to spend its finite resources in a manner which achieves its environmental protection objectives most efficiently.

A progressive decline in the number of annual completed cases brought under the POEO Act indicates that the EPA regards the cost of criminal prosecution as disproportionately greater than the environmental benefits to be gained by this method of enforcement.<sup>43</sup> Additionally, the low fines that tend to be imposed by the courts limits their deterrent effect for pollution offences,<sup>44</sup> and the payment of fines to the NSW Treasury (rather than a fund dedicated to environmental matters) fails to ensure any remedying of the environmental damage caused.<sup>45</sup>

However, regardless of efficiency considerations, some of the most effective enforcement tools (such as environment restoration and publicity orders)<sup>46</sup> rely on a court order. Non-monetary court sanctions have the actual 'effect of enhancing the environment and encouraging its protection',<sup>47</sup> and are therefore preferable to fines. These options are often precluded by the EPA's reluctance to institute proceedings. In the few cases that are brought to court, fines are overwhelmingly the most common sentencing option sought and issued for offences under EPA legislation.<sup>48</sup>

The lack of prosecutions by the EPA also undermines public confidence in the Authority's ability to protect the environment. Although negative public sentiment does not necessarily imply poor regulatory performance, it does explain to some extent the recent scrutiny of the EPA's capacity to meet its legislated objectives. Targeting corporate officers of companies in breach of the POEO Act or their licence conditions can be an effective means by which the EPA can improve environmental compliance.<sup>49</sup> It may also lead to the restoration of some public faith in the EPA's regulatory value. Regrettably, recent amendments have removed the presumption of responsibility from Tier 2 executive liability offences,<sup>50</sup> making the EPA's task more onerous and further increasing the cost of prosecution as an enforcement mechanism.<sup>51</sup> Nevertheless, it is an option that the EPA should consider pursuing to better achieve its objectives.

### **Non-Court Based Forms of Compliance and Enforcement**

The low rate of criminal prosecutions for pollution offences also reflects the EPA's assessment that cooperative compliance strategies are the most efficient methods of environmental protection. This is certainly plausible, and the EPA has several tools available by which it can pursue this objective (such as environment protection notices).<sup>52</sup> However, in the context of a licensing system that fails to adequately manage cumulative impacts and in the absence of significant criminal enforcement, many of these options are under-utilised by the EPA. Much more rigorous use of these enforcement mechanisms would be needed to compensate for licensing deficiencies and to achieve adequate environmental protection.

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<sup>42</sup> NSW EPA, *Prosecution Guidelines* (March 2013) [2.2.3]

<<http://www.epa.nsw.gov.au/resources/legislation/20130141EPAProsGuide.pdf>>.

<sup>43</sup> Tim Poisel, '(Environmental) crime does not pay: The effectiveness of the criminal prosecutions under pollution legislation in NSW' (2013) 18 *Local Government Law Journal* 77, 81.

<sup>44</sup> Abbot, above n 39, 170-1.

<sup>45</sup> Poisel, above n 43, 82.

<sup>46</sup> *POEO Act* s 250(1)(a)-(c).

<sup>47</sup> *EPA v Simplot Australia Pty Ltd* [2001] NSWLEC 264, [20] (Pearlman J).

<sup>48</sup> Poisel, above n 43, 81-82 [Table 1].

<sup>49</sup> *Ibid* 90-92.

<sup>50</sup> *POEO Act* s 169A.

<sup>51</sup> Poisel, above n 43, 92.

<sup>52</sup> *POEO Act* Ch 4.



Consistent with balancing ecological and economic considerations under ESD, the EPA prefers to keep non-compliant licensees within the regulatory system rather than removing them from it by suspending or revoking an EPL.<sup>53</sup> However, even for offending EPL-holders, there is little incentive for long-term performance improvement. Pollution Reduction Programs remain a non-standard licence condition, despite having been identified as a key feature of the POEO Act's licensing system with the capacity to incentivise continual improvement of environmental performance.<sup>54</sup> Even with the benefits of load-based licensing, without Pollution Reduction Programs it is difficult to see how the EPA intends to achieve long-term environmental improvement beyond individualised compliance with concentration limits.

Furthermore, the EPA rarely makes orders for mandatory environmental audits to investigate suspected breaches, despite the advantages they possess over voluntary and compliance audits.<sup>55</sup> Mandatory audits are effective in uncovering unsatisfactory environmental performance across several facilities of the same company, more so than routine site inspections, and therefore provide the opportunity to address sub-standard practices before significant harm is caused.<sup>56</sup>

Finally, penalty notices for Tier 3 offences are also under-utilised by the EPA. Local councils more commonly exercise this option for littering offences and activities not controlled by an EPL, but only the EPA has the authority to issue penalty notices to licensees and State or public authorities.<sup>57</sup> The fines imposed by way of penalty notice are likely to be lower than those sanctioned in court, but their ease of use encourages enforcement by EPA and therefore improves their deterrent function.<sup>58</sup> There is considerable scope for the EPA to make greater use of these notices and increase the levels of fines imposed to better reflect the seriousness of the offence.<sup>59</sup>

Even though the Authority claimed a recent tenfold increase in penalty notice fines,<sup>60</sup> the Parliamentary Inquiry Committee still recommended that the EPA 'give serious consideration to applying a multiplier effect' to deter repeat offenders.<sup>61</sup> Currently, the EPA resists this approach on the basis that issuing successive penalty notices indicates an obvious compliance problem that is better dealt with through court proceedings.<sup>62</sup> However, as discussed above, court proceedings are rare and are generally reserved for exceptional public interest cases.

## 5. CONCLUSION

The shortcomings of the EPA's current regulatory approach hamper its ability to achieve its legislated objectives. Although its current methods may lead to improved environmental performance among individual licensed polluters, this alone is insufficient to 'protect, restore and enhance the quality of the environment' or 'reduce the risks to human health'. That is not to say that the EPA's successes in developing innovative approaches to waste management and gradual increases in public participation are not positive achievements

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<sup>53</sup> *POEO Act* s 79; Abbot, above n 39, 167.

<sup>54</sup> Graham and Wright, above n 15, 370.

<sup>55</sup> *POEO Act* s 175; Abbot, above n 39, 178.

<sup>56</sup> Abbot, above n 39, 177-178.

<sup>57</sup> *POEO Act* s 226.

<sup>58</sup> Abbot, above n 39, 168.

<sup>59</sup> EDO NSW, *Clearing the air*, above n 13, 8.

<sup>60</sup> NSW EPA, Submission, above n 5, v.

<sup>61</sup> General Purpose Standing Committee No 5, above n 2, 100 [Recommendation 17].

<sup>62</sup> NSW EPA, *Compliance Policy*, above n 7, 14.

that contribute to its objectives.<sup>63</sup> However, notwithstanding the lenient conclusions of the Parliamentary Inquiry, unless new approaches to licensing and compliance/enforcement are adopted, the EPA will not be able to achieve its objectives to the extent that is mandated by law. As a result, the EPA will continue to fall short of exerting a satisfactory influence on environmental protection in NSW.

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<sup>63</sup> NSW EPA, *Strategic Plan 2014-17*, above n 9, 4; On public participation, see, for example: NSW EPA, *Rutherford Air Quality Liaison Committee* (5 January 2015) <<http://www.epa.nsw.gov.au/rutherfordcttee/index.htm>>.