

**Submission
No 195**

**INQUIRY INTO PERFORMANCE OF THE NSW
ENVIRONMENT PROTECTION AUTHORITY**

Name: Ms Lynda Newnam

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NSW Parliamentary Inquiry into the performance of the NSW Environment Protection Authority(EPA)

From: Lynda Newnam ⁱ

Attention: Chris Angus, phone (02) 9230 3534, gpscno5@parliament.nsw.gov.au

TO GENERAL PURPOSE STANDING COMMITTEE NO 5: The Hon Robert Brown MLC Shooters and Fishers Party Chair; Dr Mehreen Faruqi MLC The Greens Deputy Chair; The Hon Rick Colless MLC The Nationals; The Hon Greg Donnelly MLC Australian Labor Party; The Hon Luke Foley MLC Australian Labor Party; Mr Scot MacDonald MLC Liberal Party; The Hon Dr Peter Phelps MLC

1. INTRODUCTION

Thank you for allowing me to contribute to this Inquiry.

The NSW Auditor-General has produced two valuable reports in the past 4 years¹ which add to the work of the O'Reilly Inquiry² and the subsequent Upper House Inquiry into Kooragang.³

I provided a submission⁴ to the 2011 Kooragang Inquiry which was considered to fall outside those Terms of Reference. I commend this Inquiry for framing broader Terms which accommodate a full examination of accountabilities, challenges, and constraints and which will allow for the identification of opportunities for improving environmental protection throughout NSW.

¹ 2014: Managing Contaminated Sites <http://www.audit.nsw.gov.au/News/Managing-Contaminated-Sites>

2010: Reporting Pollution Incidents
http://www.audit.nsw.gov.au/ArticleDocuments/142/205_Protecting_The_Environment.pdf.aspx?Embed=Y

²

http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0012/131160/A_review_into_the_response_to_the_serious_pollution_incident_at_Orica_Australia_Pty._Ltd._ammonium_nitrate_plant_at_Walsh_Point,_Kooragang_Island_on_August_8,_2011.pdf

³

<http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/D5C264B9E319C719CA2578F7007FC585?open&refnavid=x>

⁴

[https://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/65f7db7dda054f11ca25794300146134/\\$FILE/Submission%2019.pdf](https://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/65f7db7dda054f11ca25794300146134/$FILE/Submission%2019.pdf)

My submission will be confined to a short discussion of identified case studies, community engagement and market mechanisms.

2. CASE STUDIES

The cases provided for intensive examination pinpoint some of the key problems in Environmental Protection.

The White Bay Cruise Terminal at Balmain demonstrates flaws in the planning process for Major Developments. It was announced by Premier Keneally in December 2009 and then staff from Sydney Ports Corporation (SPC), and their consultants, were tasked with developing the EIS⁵. I gather there would have been a focus group to which the then DECCW⁶ staff were invited to assist the proponent address environmental ‘challenges’. Had EPA experts considered that residents would be impacted by unacceptable noise and ship emissions⁷ would this have been heeded? I doubt it. SPC is an ‘arm’ of Treasury.⁸ What individual agency is a match for the Barangaroo juggernaut – then or now.

Noise, odour and air quality were always going to be issues⁹. They needed to be addressed upfront not with regulation tacked on afterwards. There should be a mechanism to ensure transparency throughout the planning process, including community participation at agency focus meetings. If the development is deemed workable then the EPA should take the lead in determining the necessary conditions of consent in collaboration with NSW Health and in consultation with impacted community members and their representatives¹⁰.

Along with a Transparency Test for the EIS process, the framing of Consent Conditions for Major Developments requires a total overhaul.¹¹

⁵ http://www.sydneyports.com.au/projects_and_planning/white_bay_cruise_terminal. Note approval was granted by Minister Tony Kelly in February 2011 – a month before the State election. He also had the Lands and Infrastructure portfolios at that time. There is no mention on the summary page of benefits of the project in not producing health impacts for residents.

⁶ EPA, NPWS and Office of Water were part of this super department at the time.

⁷ I think this recent exchange in Parliament featuring the Ports Minister demonstrates that there is a general lack of understanding of impacts of ship emissions (odour (note his term ‘smells’) and air quality) – US EPA have calculated that there will be a saving of up to 14000 American and Canadian lives every year by 2020 by imposing stricter environmental standards on large ships. The impost is US \$3.2 billion/year in 2020, while health-related benefits estimated at around US \$110 billion/year in 2020.

⁸ It comes down to a ‘weighting of opinions’. Treasury is more senior in Government – this is an opinion formed during and subsequent to the Commission of Inquiry into the Port Botany Expansion. At the time of the approval for White Bay the Treasurer was Eric Roozendaal.

⁹ See submissions - http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=2916

¹⁰ MPs and Local Councillors

¹¹ I can give a number of examples but will restrict to one recent. As part of 2005 Conditions of Consent for Port Botany Expansion Department of Planning mandated a Rail Noise Working Group. It met 2/5/2104 for the first time and there was agreement not to meet again but instead with approval from Department of Planning work through any issues at the Port Botany Community Consultative Committee (comment on this committee at <http://portbotany.org/2014/08/30/claytons-community-consultation-at-port-botany/>). I was the only

In consideration of the **Land contamination issues at Botany and Hillsdale** I commend the Auditor-General's recent report ¹². I would also underscore recommendations made concerning other agencies. The EPA is the lead agency in Environmental Protection but it needs to be fully supported by all other agencies, particularly Health, Workcover, Office of Water, DPI, OEH, Crown Lands¹³. This requires leadership from the very top of Government, and reinforcement through Treasury regulations¹⁴ and legislation.

The Hillsdale example reflects poorly on both the EPA and Health as well as the ABC¹⁵. Residents in Hillsdale have a right to ongoing information and support from EPA and Health experts particularly given the impacts and major cover ups they have endured in the past¹⁶ and given they live amongst the largest cluster of Major Hazard Facilities in the State.

The State through the EPA licences industries to pollute. The economic benefits are shared but the negative impacts are localised. The State has a duty to ensure that government agencies do what is required to support impacted communities.

community representative at the Rail Noise Working Group(RNWG) and there was no representative from the EPA even though noise is a major issue for residents www.facebook.com/portnoisecomplaints and the EPA is already leading an informal Noise Strategy 'Group'. I agreed that there was little point in continuing with the RNWG but I argued that we needed to address the intent of the Conditions of Consent rather than the 'poor wording'. The intent in 2005 was clearly to protect residential amenity and residents' health. The Conditions of Consent specified that there would be no changes to the cap at Port Botany until an Environmental Assessment was conducted. However, the Government in November 2012 was successful in passing a Bill to void the cap (of 3.2million TEU). There was no environmental assessment conducted and the Port was privatised in May 2013.

¹² <http://www.audit.nsw.gov.au/News/Managing-Contaminated-Sites>

¹³ A higher level of coordination between EPA and Local Councils is also required not just for contaminated sites but also with local development, framing LEPs, waste management.

¹⁴ The importance of coordination between agencies appears to have been poorly understood from the beginning. At the Upper House Inquiry into Kooragang Lisa Corbyn, the former head of the OEH (then including the EPA) stated: "I would only say that one of the changes in procedures that has been instituted is that it is very important that our staff actually contact health as well. So that we do not actually just rely on industry and one of the things that we did make in our submission, a comment that we did make in our submission is that we are changing the procedures to make sure that our staff know that it is also their responsibility to contact health. It is a standard practice that we would have." The organisation had the benefit of the Auditor-General's report in 2010 but the advice had been ignored leading up to Kooragang in 2011.

¹⁵ Note responses to the media watch report <http://www.abc.net.au/mediawatch/transcripts/s3813729.htm> and subsequent court win by journalist Natalie O'Brien <http://www.theaustralian.com.au/media/broadcast/journalist-wins-first-round-in-court-case/story-fna045gd-1226883045684>

¹⁶ Examples Huntsman - <http://laperouse.info/toxic-gas-emissions-cost-huntsman-68000> Orica - <http://www.miningaustralia.com.au/news/orica-leaks-mercury-vapours> and this study which showed residents were at unacceptable risk but was not released until tabled in Parliament 20 years later <http://www.parliament.nsw.gov.au/prod/la/latabdoc.nsf/062281a7012b5820ca257020000a3058/83bacb4c4e78cc0cca256bdc0024d020?OpenDocument&Highlight=0%2Crisk%2A%2Cassessment>

The EPA statements about the effects of coal dust pollution in the Hunter are of particular concern. Given the accountabilities under the POEA Act 1991 the community would be entitled to expect the utmost level of scrutiny for any coal related activities.

s6.1.a *to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development*

Subject to s6.2.a.i *careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment*

s6.2.a *inter-generational equity-namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations*

Again this pinpoints issues with transparency which need to be addressed at a whole of government level but also **political and scientific leadership in public discourse on ESD, the Precautionary Principle and Intergenerational Equity.**



3. COMMUNITY ENGAGEMENT



s6.1.b reference community.

promoting community involvement in decisions about environmental matters,

ensuring the community has access to relevant information about hazardous substances arising from, or stored, used or sold, by any industry or public authority,

conducting public education and awareness programs about environmental matters.

When Barry Buffier was appointed Chair of the EPA Board and CEO of the EPA in

March 2012 he was referred to as the *Community's Champion* by the Chief Environmental Regulator, and the *Community's Advocate* by Minister Parker¹⁷.

In other places the Chief Environmental Regulator has referred to the community as being the EPA's '*eyes and ears*'. These descriptions indicate that the political and bureaucratic leadership see the community as fulfilling a critical role¹⁸ and the relationship as being paramount. It is therefore essential for the EPA to harness the skills and goodwill of the community¹⁹ to improve efficiency and effectiveness. To do this the EPA needs to address current deficiencies.

The Environmental Hotline should be the key point of contact. Ringing the hotline or sending an email is the first step to building a relationship. Anyone successful in sales would understand the importance of responding to and following up on the immediate concern and then re-engaging at a later date. However, the Auditor-General in 2010 found this was not the case with the EPA. The Kooragang incident reinforced his findings and there has been little improvement since. On the EPA website page titled 'pollution' the '*eyes and ears*' are advised:

"In most cases, concerns about pollution should be referred to the source or person causing the problem."

How does the complainant establish the source when there is a cluster of industry? Why should he/she be expected to confront the polluter? And even if it

¹⁷ <http://blogs.abc.net.au/nsw/2012/03/news-interview-robyn-parker-nsw-environment-minister-16032012.html>

¹⁸ Agencies such as Police require the same.

¹⁹ This includes residents, employees, business owners.

were feasible to do this why wouldn't the EPA want a record? It is one thing to take on an '*eyes and ears*' role but another to be expected to solve the problem and maintain records²⁰.

A community member who has a positive experience with the Hotline is more likely to re-engage; making the hotline engagement user-friendly should be a priority.²¹

Any conversations about neighbouring polluting industries should be led by the EPA not the polluting industries. Yet this is contrary to what has been established policy of the EPA ²². The rights of communities impacted by major industry should be enshrined in legislation. Forums at present are either mandated by the Department of Planning under Conditions of Consent or conducted on a voluntary basis²³.

2.1 EPA Structure and EPA Board

There must be absolute transparency surrounding EPA processes. Clarity is essential. Communities need to know who does what, how the system works, what it can and can't achieve and how relationships with other agencies are conducted. The EPA Board members should be known by the community. Meeting Agendas and Minutes should also appear on the EPA website. There were questions raised when the current EPA Board was appointed as to the environmental leadership credentials of some of the members. This should be addressed as a range of businesses, neighbours, workers, and other community

²⁰ This is very important when dealing with serial offenders and understanding the bigger picture.

²¹ I have contacted the EPA Hotline on a number of occasions. This is one example where only through persistence did I get any action – what little there was. <http://laperouse.info/congwong-bay-pollution> A few weeks ago it was for inappropriate removal of asbestos during demolition of a neighbour's house. This time it was a round robin affair between Council, EPA and Workcover. Apparently Workcover issued a warning. What is the point after the event when asbestos fibres have been released into the air and possibly deposited into soil. Last week I witnessed similar inappropriate handling during the demolition of a property opposite the previous. This time I didn't bother reporting. The problem appears not to be owned by any agency so the general public are left to observe examples of poor environmental (human health) protection and as a result are likely to form a poor opinion of the Government's approach to environmental protection.

²² Industry led committees keep community activists busy so they are less likely to be requesting action/information through their local member or the responsible minister. I have a number of letters where an Environment Minister has advised me to seek further information via the industry led committee.

²³ This can be a Public Relations exercise. It may start off with intentions to be a good neighbour but this is not a process that inspires confidence in the longer term. Corporations are bound to put the interests of shareholders above neighbours. Governance principles around 'social licence' have tightened but this is still at the self-regulatory level. Voluntary engagement can cease at will as was the case with Sydney Ports Corporation between 2003 – 2008 their neighbourhood forum was suspended during the Port Expansion EIS and approval period. I attend the Port Botany CCC which is convened by NSW Ports (a private corporation with Paul McClintock as Chair of Board see <http://portbotany.org/nsw-ports>), and mandated under Conditions. Attendees include Caltex, DP World, Elgas, Origin, Patrick, Qenos, SICTL (Hutchison Ports majority owner Li Ka-Shing richest man in Asia.) Terminals, Vopak. No one from Planning attends and the EPA has only recently become a regular attendee. These forums have limited value for community in their current form see <http://portbotany.org/2014/08/30/claytons-community-consultation-at-port-botany/>

members have a stake in how the Board oversees environmental protection, including regulation and prosecution.²⁴

3.2 Communication Tools

Consideration should be given to employing science communication staff to deliver messages. Education is required not Public Relations as noted in the cases on North Botany Bay and the Hunter. In major hazard risk zones engagement will be more frequent so human health risk specialists are required to report regularly on variations in cumulative impact.²⁵ The same applies for Emergency Management – preparedness, liaison during events, follow up and the sharing of lessons learned²⁶ - which involves the industries licensed by the EPA.



The EPA has improved in providing information via media releases and through the introduction of twitter but there is some way to go²⁷. In 2011 EPA information about pollution was buried on the OEH site that appeared to be dedicated to visitors to National Parks. Thankfully they now have a stand alone homepage, but again there is a long way to go. It is critical to improve community understanding of what the EPA does. The site still lacks customer focus. The reforms regarding publication of monitoring reports that were introduced after Kooragang have limited value²⁸. It maybe useful for residents in communities where there is only one industry but where there is a cluster of major industries it is another matter. Hazard zones require a different approach

²⁴ <http://www.epa.nsw.gov.au/resources/legislation/prosguide.pdf>

²⁵ Research confirms there is a low level of community trust in government agencies dealing with significant contamination see CRC CARE Technical Report 17: The Australian experience - A comparative analysis of the effects of contamination and its remediation on individuals and communities at two Australian sites: <http://www.crccare.com/files/dmfile/CRC CARE Tech Report 17- The Australian experience a comparative analysis of the effects of contamination and its remediation on individuals and communities 2.pdf> Trust needs to be established over a long period with regular dialogue.

²⁶ This continues to be a problem in the North Botany Bay region, eg. when this event occurred there were local residents who reported poor liaison with community <http://laperouse.info/open-day-awards-for-matraville-mascot-and-maroubra-fire-officers-who-prevented-catastrophe-at-port-botany> The area should have been blocked off with various alerts in place for residents (social media, sms, signage). There appears to be adequate number of exercises but they don't involve community. There is no community representation on the local Emergency Committee even though the most recent Emergency Plan for the State emphasises better community engagement eg. *c) emphasise community engagement in the development and exercise of plans as well as in their operational employment* <http://www.emergency.nsw.gov.au/content.php/476.html> This is not a criticism of the EPA but of the lack of whole of government approach to protection.

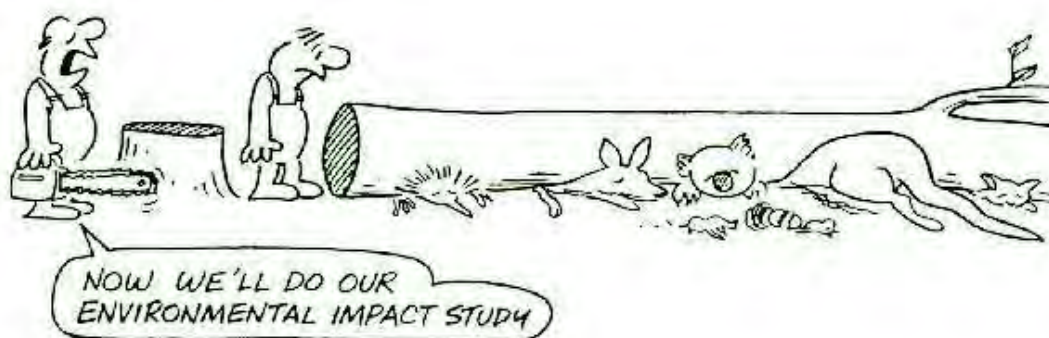
²⁷ Consideration should be given to a space where the public can share information eg. Facebook pages. These are run by agencies such as Police and Sydney Water.

²⁸ The shortcomings were obvious at the time but there was inadequate consultation during the O'Reilly 'Inquiry'.

with EPA website pages providing summaries (which can be drilled further) of monitoring material, history of breaches, good practices as well as poor.

4. MARKET MECHANISMS – under POEA Act 1991 s6.2.d

Valuations of environment should be realistic and subject to review. I quote the following as an example. In 2002 the EPA issued a Draft Green Offsets policy²⁹. It was referenced in the Conditions of Consent³⁰ for the Port Botany Expansion, section on Penrhyn Estuary habitat Enhancement Plan(PEHEP). 3.4ha of migratory shorebird³¹ habitat was valued at \$340,000; 6.5ha of seagrass at \$900,000 and 1.4ha of saltmarsh at \$980,000. The PEHEP cost an estimated \$8 million³² but in the event that it proves ‘unsuccessful’ the Offset policy will be triggered and compensation (\$340,000+\$900,000 + \$980,000 = \$2,220,000)



provided for an ‘enhancement/offset’ elsewhere. In reality \$2.22 million represents a very small price to pay for an area that could end up as container port space. This was a major ‘enhancement’ project but with very little community involvement³³ or scrutiny. Any policy which involves loss of biodiversity or major changes to the local environment requires upfront community scrutiny and on-going EPA supervision involving community.³⁴

²⁹ <http://www.environment.nsw.gov.au/resources/greenoffsets/greenoffsets.pdf> This has remained as a Draft with submissions unacknowledged.

³⁰ Issued 13th October, 2005

http://www.sydneyports.com.au/data/assets/pdf_file/0015/10806/NSW_Minister_for_Planning_Conditions_of_Approval_for_Port_Botany_Expansion_Project_-_Updated_13_July_2009.pdf

³¹ Shorebirds protected under international agreements and the EPBC Act

³² http://www.sydneyports.com.au/sustainability/penrhyn_estuary_rehabilitation

³³ There were a small number of community members on the original PBCCC but they represented other interests eg. fishing and boating. The area is locked up from sunset to sunrise and sometimes remained locked during the day. The gates are not a deterrent for predators such as foxes or for vandals. It was noted that there was a significant reduction in seagrass (rarer *Posidonia australis*) before construction began but no explanation as to the cause.

³⁴ The Boat Ramp at Port Botany was another part of the Offset package. While activists at the Commission of Inquiry had argued that the remaining Botany(Foreshore) Beach would become highly eroded with poor water quality the proponent’s experts disagreed and residents were provided in newsletters with artist’s impressions of visitors swimming and sunbaking on an attractive sandy beach
<https://portbotany.files.wordpress.com/2014/08/foreshore-beach-1.jpg> Today, this beach has the worst

3.1 Penalties³⁵



An increase in the level of penalties is welcomed but there still needs to be greater community involvement in this part of the process³⁶. Even where the Department of Health deems a breach as not impacting human health there are residual impacts such as stigma and diminished sense of security /heightened anxiety. When recommending Environmental Service Orders(ESO) the first priority

should be to improve outcomes for those directly impacted. In the case of the most recent Orica breach³⁷ involving the Mercury Soil Washing Plant, \$35,000 was directed to a bush regeneration project at Sir Joseph Banks Park. In this case the EPA liaised with Botany Bay Council. Instead of identifying a project in the street impacted, where residents reside 150-250 metres from the offending plant, the community that benefits is around 4km away. There is an issue of Environmental Justice that needs to be addressed as well as one of on-going stakeholder engagement. This is not the first time that ESOs have been served where residents in this street have been affected. In the case of Huntsman, the benefit (\$28,000) went to a stormwater harvesting project for neighbouring council Randwick³⁸. Neighbours are impacted by businesses operating next to them. If a more responsible relationship is to be developed then the EPA can contribute to this by ensuring that recommendations on ESOs are targeted(where appropriate) to meet environmental justice goals. Councils need to be part of this when identifying projects that can be available for both ESOs and ongoing CSR.³⁹

water quality in Botany Bay (Beachwatch reports) and it is so highly eroded that Sydney Ports has to install 3 groynes (and further diminish amenity). No authority has overseen this.

³⁵ As outlined in the 1989 Act - http://www.austlii.edu.au/au/legis/nsw/num_act/eoapa1989n150370.pdf

³⁶ Reputational damage as a result of community activism can be a more effective deterrent than court action. It was only after a local activist organised a petition and personally took it to the Orica AGM in Melbourne that action occurred to address concerns over Mercury contamination – see <http://www.theaustralian.com.au/news/latest-news/sydney-mum-to-front-origa-over-mercury/story-fn3dxiwe-1226565272425>

³⁷ <http://www.origa.com/news---media/orica-committed-to-ongoing-improvements-at-kooragang-island-and-botany-sites#.VAZyivmSwpo>

³⁸ <http://laperouse.info/toxic-gas-emissions-cost-huntsman-68000>

³⁹ Orica also provides community grants which benefited Botany Bay National Park – over 5km away – and Sutherland Shire which is the southern side of Botany Bay. At the same time local parks and footpaths in Hillsdale block (opposite the Botany Industrial Park) are run down and would benefit from vegetation plan, seating, BBQs, cycle track.

3.2 Incentivising Best Practice



Poor and inconsistent regulation ultimately distorts the market. When major polluters escape scrutiny or penalties are insufficient⁴⁰ there is no level playing field. Those who adopt a 'best practice' approach are disadvantaged and over time a culture develops where 'poorer practice' and the manta 'whatever it takes' prevails.

Incentives(s6.2.d.iii) are critical. At present there are no incentives for licensed industries to do better.

There is no clear picture of the extent of the pollution contributed by each licensed premise in a region, nor the cumulative impact. The NPI⁴¹ provides a broad picture but is not reliable. It's a tough business manufacturing in Australia with a high \$ and, compared to most



competitors, a more expensive workforce. Smart businesses that recognise the long term benefits of cleaning up operations, and act appropriately, should be acknowledged. Full disclosure is required⁴². Neighbours need to know who is clean and who is not and who is working to become cleaner⁴³ and who is dragging the chain. Workers need to know so they can make informed career choices.

⁴⁰ If set too low penalties can be incorporated into the way business is done – cheaper to pollute than clean up.

⁴¹ When requests are made reference is made to NPI <http://www.npi.gov.au/> but this is not a community friendly tool. It provides estimates based on licenses and other data. For example, the Hillsdale postcode 2036 delivers information about estimated pollution impacts from Malabar STP (4km away) but not the Botany Industry Park (Qenos, Orica, Huntsman) which are opposite, but in another postcode.

⁴² Information lacking in Reports to market. EPA does not track and from experience doesn't see need to yet it is important to know what Corporates are advising the market to ensure messages align with commitments made to neighbours. There are also issues regarding \$ assurances which need to be addressed. The EPA is up against expensive legal teams so they need all the support that can be provided by legal instruments, science, 'political will' and an informed and engaged community.

⁴³ Graphs of gains made could be provided on website pages dedicated to MHFs and other major polluters/high risk industries.

Neighbouring businesses need to know so they can make informed risk assessments. Shareholders need to know if the industries in which they have invested share their values.

The introduction of risk-based licensing is important for pursuing best practice but the value in proactive promotion should not be overlooked. The EPA showcases Councils that implement innovative and effective approaches to waste management, particularly in the area of illegal dumping. There is no reason why they can't be active in showcasing better industry practices.

4. RECOMMENDATIONS

1. Changes to planning process so best science and transparency prevail and EPA has lead role in determining Consent Conditions.
2. Coordination between agencies to present a whole of government approach to Environmental Protection with leadership at highest levels of government.
3. Support community as '*eyes and ears*' with leadership, IT, Law and education but not PR 'spin'.
4. Zero tolerance for poor performance and incentives for good. Naming and shaming along with celebrating best practice. No more market distortions. Support culture change.



ⁱ **BACKGROUND:** I have been a volunteer community activist in the Botany Bay catchment for the past 14 years and am a member of committees attended by EPA regulated industries: Orica Community Liaison Committee(Aquifer Chemical spill and Mercury) and Orica CPRC (for the HCB stockpile) since 2003; Botany Industrial Park (Qenos, Orica, Huntsman) since 2007; Port Botany CCC (NSW Ports and tenants SICTL, Patrick, DP World, Caltex, Elgas, Qenos, Origin, Vopak, Terminals) since 2008; Orora Liaison Committee since 2013