

**REPORT OF PROCEEDINGS BEFORE**

**GENERAL PURPOSE STANDING COMMITTEE NO. 5**

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

---

**At Sydney on Monday 13 October 2014**

---

**The Committee met at 9.00 a.m.**

---

**PRESENT**

The Hon. R. L. Brown (Chair)

The Hon. R. H. Colless

The Hon. G. J. Donnelly

Dr M. Faruqi

Mr S. MacDonald

The Hon. Dr P. R. Phelps

**CHAIR:** Good morning, ladies and gentlemen, and welcome to the first hearing of the inquiry by General Purpose Standing Committee No. 5 into the performance of the Environment Protection Authority. Before I commence I acknowledge the Gadigal people who are the traditional custodians of this land. I also pay respects to the elders, past and present, of the Eora nation and extend that respect to other Aboriginals present.

Today is the first of four hearings we plan to hold in this inquiry. The second public hearing will be held at Lismore on 29 October, the third at Newcastle on 10 November and a final hearing at Parliament House on 24 November. Today we will hear from representatives of the Environment Protection Authority, Leichhardt Municipal Council, the White Bay-Rozelle Precinct Group, the Environmental Defenders Office, the Hillsdale and Eastgardens Resident Action Group, the Nature Conservation Council of New South Wales, and Mr Andrew Helps of HG Recoveries Pty Ltd.

Before we commence, I will make some brief comments about the procedures for the hearing today. Broadcasting guidelines are available from the secretariat desk. I remind media representatives that if they wish to take photographs or record that should only be of the witnesses and the Committee and they must not dwell on the public gallery. There may be questions on notice to a witness and at the end of the session I will state that we would like answers to those questions within 21 days.

I remind everyone that Committee hearings are not intended to provide a forum for people to make adverse reflection about other persons under the protection of parliamentary privilege. I therefore request that witnesses focus on the issues raised by the inquiry's terms of reference and avoid naming individuals unnecessarily. I warn everybody that I will be ruthless in that regard. In relation to delivery of messages and documents tendered to the Committee, the witnesses are advised that any messages to Committee members should be delivered through Committee staff. I ask everyone present to switch off mobile phones. If anyone in the public gallery wishes to make a phone call then they should go outside the committee room.

The Hon. Luke Foley who is the Opposition spokesperson on the environment is unfortunately ill and could not attend today. The secretariat may write to Mr Buffier and suggest that on 24 November we allocate extra time for the Hon. Luke Foley and the Opposition to ask questions, but that will be confirmed in writing to you. I welcome witnesses.

**BARRY BUFFIER**, Chair and Chief Executive Officer, New South Wales Environment Protection Authority and

**SARAH LOW**, Project Officer, Governance, sworn and examined; and

**FRANK JOSEPH GAROFALOW**, Manager, Infrastructure, New South Wales Environment Protection Authority,

**MARK GIFFORD**, Chief Environmental Regulator, Regulatory Services Division, New South Wales Environment Protection Authority and

**STEVEN GEORGE HARTLEY**, Principal Manager Forestry, New South Wales Environment Protection Authority, affirmed and examined:

**CHAIR:** Because the Opposition will not be asking any question in this morning's session it has been shortened and will conclude at 10.30 a.m. Do you want to make an opening statement?

**Mr BUFFIER:** Yes, for about seven minutes. I welcome this opportunity to address the inquiry and its members to demonstrate the effectiveness of the New South Wales Environment Protection Authority [EPA] as an environmental champion and regulator. Establishing a vision for the EPA was one of my first priorities when I was appointed chair and chief executive officer of the EPA just over 2½ years ago. The vision statement of the EPA is "Healthy environment, healthy community, healthy business". This is a vision built on the foundations of ecologically sustainable development, one that recognises the inter-relatedness of these three elements, and one that recognises that without a healthy environment the other two are not sustainable in the long term.

Our vision goes to the heart of objectives under section 6 of the Protection of the Environment Administration Act to protect, restore and enhance the quality of the environment in New South Wales having regard to the need to maintain ecologically sustainable development and the effective integration of economic and environmental considerations, and, secondly, to reduce the risks to human health and prevent the degradation of the environment. This vision underpinned our first three-year strategic plan which outlined our key priorities in transforming and modernising the EPA. Our submission to this inquiry contains a detailed time line of EPA achievements and changes since it was re-established in February 2012 and we will provide a hard copy of that for members for their reference this morning.

I note that part 1 (a) of the terms of reference for this inquiry refer to the recent performance of the EPA, by which I have taken it to mean since February 2012. However, some of the cases that we examine in detail and many of the issues raised in the various submissions have their origins well before February 2012. The time line that has just been distributed details the vast amount of work that has been done to modernise the EPA and achieve better outcomes for New South Wales in the 2½ years that I have been chair.

I will take this opportunity to briefly outline some of the key milestones that we have covered in our very extensive submission. Where we have strengthened environmental legislation we have had more effective engagement with the community. We have increased the resourcing for the EPA. We have expanded our enforcement activities. We have implemented Australia's largest waste and recycling program and we have had considerable success in remediating large contaminated sites. The EPA has significantly strengthened its environmental legislation giving the EPA more regulatory firepower to effectively protect the environment.

In the past 2½ years we have overseen 23 reviews of environmental legislation. We have seen a tenfold increase in some environmental penalties—now the highest in Australia. We have closed legal loopholes which have been used to avoid responsibilities under the legislation. We have taken action to make it much more difficult to stockpile large amounts of waste, including tyres. We have implemented tougher reporting requirements for pollution incidents. We have mandatory incident response plans for industry and we have custodial sentences for repeat offenders. Many of these changes were long overdue, as you can see from reading the nearly 250 submissions to this inquiry.

The EPA is also working much more effectively to engage communities. This was one of the key reasons for the re-establishment of the EPA. If you read the second reading speeches you will see that. We have established a branch dedicated to improving EPA governance and broadening our engagement activities. We are increasing direct engagement, such as via community committees. We conducted an independent survey of the

stakeholders of the EPA to get their full and frank assessment of their views of the EPA but, more importantly, to understand how we can improve. We have spent considerable resources developing a dedicated EPA website consisting of 6,500 pages, including an expanded public register and more community-focused pages. We have introduced a quarterly EPA stakeholder newsletter providing information about EPA projects. We have embraced new channels of communication such as Twitter to provide more timely information on environmental incidents to the community.

The EPA's resources have also increased significantly—from \$117 million in 2012 to \$142 million this year, a 21 per cent increase, plus an increase in our capital budget, from \$150,000 per annum to more than \$3.8 million this year. This has allowed us to invest much-needed resources in our IT and communications services to offer more interactive and responsive engagement with the community. Notably, there has been an additional \$8 million dedicated solely to air quality projects.

In terms of our enforcement activities, we have substantially increased our compliance and enforcement activity over the past 2½ years. Since the beginning of 2012 we have prosecuted nearly 200 matters for over \$2½ million in financial penalties, with a success rate of over 95 per cent. This record is second to none amongst environmental regulators in Australia. The recent result in the Land and Environment Court which saw a penalty of nearly three quarters of a million dollars for Orica for pollution incidents was particularly welcome. That money is to be put towards six projects at Newcastle and one at Botany aimed at restoring and enhancing the environment.

Our new compliance and enforcement policy provides additional transparency to the public about the way we regulate and aims to drive environmental performance. Under that policy sits the recently developed forestry compliance strategies. We are introducing risk-based licensing, a very significant development which will see all environment protection licensees receive an appropriate level of regulation based on the environmental risks of the activity. Just as importantly, this will lead to the EPA being able to better allocate its resources to those areas which are going to achieve significant results for the environment.

We are implementing Australia's largest waste and recycling program. That is not a topic of many of the submissions, I note, but the EPA is rolling out a \$465 million program over four years to reduce waste and increase recycling. This is the envy of every other State in Australia. This includes \$58 million to crack down on the problem of illegal dumping. It requires a strong partnership with local councils to develop and deliver localised, tailored waste and recycling projects to better support their communities.

In the area of contaminated site remediation we have been very active and have completed the clean-up of the old BHP Billiton steelworks site at Mayfield and of the Hunter River in Newcastle. This was one of the largest remediations in the Southern Hemisphere. The scale of these clean-ups is staggering. The continuing clean-up of the Orica site at Botany has so far required a commitment of \$315 million. We have now cleaned up most of the former gasworks in New South Wales with the assistance of an innovative funding program from the NSW Environmental Trust.

As the State's primary environmental regulator, we operate in a challenging environment. The community, environment groups, government and industry often have diverse and sometimes conflicting interests and concerns. We regularly make tough decisions based on due consideration of the risks, especially the likely impact on the environment, and the best information available to us at the time. We regularly call on specialist expertise and experience from outside the EPA to assist us or to undertake independent peer reviews of our work. Examples include: seeking advice from the New South Wales Chief Scientist and Engineer, a review of our actions by Emeritus Professor Chris Fell, engaging Macquarie University to undertake mercury testing, engaging Professor Louise Ryan to undertake statistical analysis, engaging Dr Luke Knibbs to do a peer review and engaging Dr Tim Driscoll to give us advice about asbestos contamination at Barangaroo. All of this is aimed at ensuring our work is best practice and helping us to identify areas for improvement.

In conclusion, we have achieved a lot in the past 2½ years since the EPA was re-established. We have learnt a great deal and we recognise there are areas of our operations which can be improved. We have reviewed in detail every one of the nearly 250 submissions to this inquiry. We are encouraged by their suggestions and the level of passion for the environment that they demonstrate. It is clear from the submissions that one of the key wishes of the community is for the EPA to provide them with more opportunities to engage with us and to see how we investigate and determine regulatory actions—in addition to providing solutions or regulatory responses, which you would expect us to be doing. The EPA is taking up this challenge and has already taken significant steps in this direction over the past 2½ years.

We work hard to ensure that the New South Wales environment is healthy, that communities are protected and that businesses meet their environmental responsibilities. The EPA has a track record of achieving environmental outcomes for New South Wales and innovative approaches to regulation. I am extremely confident of the EPA's ability to meet its objectives under section 6 of the Protection of the Environment Administration Act. The EPA is a credible and effective regulator. Our staff are passionate and committed to protecting the environment in New South Wales. I am proud of our work and achievements and consider myself very privileged to lead such a dedicated team achieving real outcome for the environment.

**CHAIR:** Before I ask Dr Faruqi to start questioning, I raise a point of clarification. Mr Buffier, you mentioned that your licensing regime has been altered now so that you do risk assessments on the types of licences. You also mentioned that you use outside consultants. Are the risk assessments done within the EPA or do you use specialist consultants for those?

**Mr BUFFIER:** We are moving to a risk-based licensing system. It comes into operation in July next year. There has been a very sophisticated process we have gone through in terms of arriving at those risk assessments. I will ask Mr Gifford to give you the details. The risk assessments that we are doing are internal but they will be very transparent.

**CHAIR:** There was no loading in my question; I just want to know who will actually be doing the probability analysis and the risk assessment.

**Mr BUFFIER:** I will ask Mr Gifford to elaborate on that because I think it is an important point.

**Mr GIFFORD:** The risk assessments will be undertaken by our operational staff who understand and have interactions with the particular activities that are being assessed. At the same time the operators of those activities themselves will be involved in that risk assessment. The overall methodology and approach to risk-based licensing has been the subject of quite widespread consultation with industry, with the community and with other interested stakeholders. All of the material that supports risk-based licensing is publicly available on our website. The methodology that we will use is also available. The overall strategy and approach has been assessed independently by a risk expert.

**CHAIR:** That is what I was leading to. Thank you.

**Dr MEHREEN FARUQI:** It seems in a lot of the submissions community members and environment NGOs feel that the EPA is too close to the industry they regulate and that industry has more of a say in what the EPA does than community members or environment stakeholders. Some of the submissions give examples of this such as soil contamination issues in Botany and Hillsdale and water contamination issues in the Pilliga. Why do you think this perception is prevalent? And is it justified?

**Mr BUFFIER:** As I said in my opening address, the EPA is required to make a lot of tough decisions. We pride ourselves on making those decisions without fear or favour. That is something that I have been very firm on instilling within the EPA. It was already there when I got there; it has been a very strong basis on which we operate. Our staff were surveyed under the People Matter Employee Survey which went across the whole of the public sector—75 per cent of our staff responded to that survey. One of the questions in there was "Do you believe that you have objective decision-making within your organisation?" The exact figures for the responses to that question are in our submission. The figure for the positive response is very high. Our staff felt that we had very objective decision-making.

On the question about our managers ensuring there is no bias in decision-making, again we scored well above the average for the rest of the public service. Within our values and our strategic plan we have very clear indicators that integrity is the key issue for our staff. In the seven questions on integrity in the People Matter Employee Survey we scored about 13 percentage points above the average for the rest of the sector. So that just gives some idea of what the environment is like within the New South Wales EPA. We do put a lot of emphasis on that. Looking at the figures on integrity, we scored 87.5 per cent—that was 13 per cent above the rest of the sector.

I think the issue is: how do we know we have the right systems in place and the right processes in place to ensure that the decisions we make are objective, consistent and equitable across the State? We now have on our website our compliance policy and our prosecution guidelines. These set out in a lot of detail the things that

need to be taken into account in arriving at a decision. I would agree with you that a lot of the submissions raised the question of whether the EPA is too close to industry. I think some of that perception is probably brought about by the inadequate levels of fines and penalties that we are operating with. We are talking about a \$300 penalty or a \$1,500 penalty. The quantum of these penalties had not been changed for many years. I think the fact that they seem quite low does resonate with people.

So the question might have been: was a penalty notice the appropriate penalty to apply? We would look at our guidelines and say, "Yes, it is not something that would warrant a prosecution." Then you apply the penalty of \$1,500 and people would rightly say, "That is not sufficient", and people in the EPA would say it too. So I think that has created a perception that we have not been tough enough. That is why I particularly welcome the increase to \$15,000 of some of these penalties. There have been some other loopholes in the legislation which we have closed as well. We have looked at the issue of custodial sentences for repeat offenders—we have made that power now available to us whereas in the well celebrated case that we all know about we took action for contempt of court because that was the basis on which we could get a custodial sentence. The fact is that we did not get a custodial sentence in that case, but that was the basis for it. I invite Mr Gifford to tell you about some of the processes we have in place to ensure that our prosecution guidelines and our compliance policy are adhered to and are consistent.

**Dr MEHREEN FARUQI:** Before we go to Mr Gifford, I understand that you are increasing fines and that there are good processes in place within the EPA but what is being done to reassure communities who have this view that you are too close to industry? How can the community be assured that you are independent? What processes have you taken on board to make sure that the community is well engaged and better informed, and to ensure that you are listening to the community?

**Mr BUFFIER:** I think a good example is in relation to a licence variation down in West Cliff. I think one or two of the submissions referred to this as a good example of getting the community involved. In terms of some of the penalties and restorative justice issues, for example, there was a lot of community engagement with Orica at Botany in terms of what those fines should be applied to. I would be happy for Mr Gifford to give you some more detail on that if that is okay.

**Dr MEHREEN FARUQI:** Just briefly, that would be great.

**Mr GIFFORD:** To answer the question generally, in the last 2½ years we have made quite an extraordinary effort to engage, in a more listening fashion I guess, with the community and community members—in particular around our regulatory decisions. We have very good governance and decision-making processes within the organisation but perhaps it is fair to say, and the submissions reflect this, that some of that was not particularly transparent to the community. We have been placing quite a lot of attention on making those processes as transparent as possible where that is appropriate. In some circumstances when we are undertaking an investigation, obviously it is important to maintain confidentiality around that information until such time as we have finalised the regulatory decision or the matter has been brought to court.

Regarding the engagement pathway that we are on, really what we are looking to do is understand from the community what they would like to see of us as a regulator, what their concerns are and how those concerns might be addressed. I think how the community generally wants to see us operating is as an honest broker in that relationship. I think generally people within the community understand the need for us to engage with industry, to hear what industry has to say, and to work with industry to get good environmental outcomes; but they want us to be seen to be championing the environment. That is the pathway that we are on. That has always been our approach, but we are trying to ensure that the community members understand and are able to engage in that more fully.

The sorts of things are those that Mr Buffier just mentioned—things like working towards a restorative justice approach where there has been an environmental impact. The West Cliff Colliery is but one example of that where we have worked through with the community about what they would like to see in terms of the outcome from the issues at hand. We have done that with, as Mr Buffier mentioned in his opening address, the Orica prosecutions for incidents at Kooragang Island and here at Botany. In that process we worked through with the community to see what they would like or what interested them in terms of better environmental outcomes from any penalties the court might bring down. There were a number—seven—of environmental service orders that go towards projects to rehabilitate and restore the environment.

That is the kind of thing that we are looking to do more of. We are also looking to be more open and transparent, I guess, in publicising our regulatory actions and outcomes and we are moving to making sure that all the information around those regulatory decisions and outcomes is publicly available on our website. We are expanding our website to be able to make it more user-friendly, I guess, in terms of being able to find that information. A lot of that information has always been there. Perhaps it has been a little bit challenging to find it at times. We have expanded our public register of our major licensed facilities in New South Wales—2,500 licensees. We have all of the licences that have been issued and all of the regulatory instruments that have been issued, and licensees' responses to their compliance with those instruments over the preceding 12 months.

**Dr MEHREEN FARUQI:** Mr Gifford, I am sorry to interrupt you, but could I ask a specific question about the transparency and openness in terms of information? I understand that the laboratory results from testing around the Botany-Hillsdale contamination issue in April 2013 were made available to the public only through a Government Information (Public Access) Act [GIPA] request. I am wondering if that case study, and how you went through it, has changed how you provide that information to the public?

**Mr GIFFORD:** I think that is a really good example of where, from the EPA perspective, this is quite a challenging area. When we have a lot of scientific data and information, the challenge for us is to be able to make that information available in a way that the layperson can understand. We sometimes get criticised for not making all of the information available and at other times we get criticised for making too much information available that is not able to be readily understood. The challenge is trying to find that middle ground, I guess. That is something that we are actively working towards. We will as a matter of course ensure that we have summary documents of data and material that we require in order to make regulatory decisions and, where it is appropriate, make the full information available as well. Of course it is fair to say that when asked, we have always made that information available. It is just that our approach has been trying to encapsulate the information in a way that we felt the community would understand.

**Dr MEHREEN FARUQI:** You mentioned, and Mr Buffier did as well, the West Cliff example as a successful example of community engagement. I know that there also has been a Newcastle Community Consultative Committee set up.

**Mr BUFFIER:** Yes.

**Dr MEHREEN FARUQI:** Have you done any reviews of the effectiveness of that committee? Will they be made publicly available, if you have?

**Mr BUFFIER:** The short answer is no, we have not done any formal review of that committee but there has been good dialogue between the Minister and the chair of the committee. The feedback from the chair is that that committee is serving a very useful purpose in Newcastle. Recently we launched the new air monitoring network there, which was the principal reason that they were set up. But of course their role has now expanded into broader areas.

**Dr MEHREEN FARUQI:** Will a review be done, given that many of the issues arose because of miscommunication or not enough communication and engagement with the community? It would be wise, do you not think, to do a review and then learn from that and improve the processes?

**Mr BUFFIER:** Yes. We do not have any plans to immediately review the future of the Newcastle Community Consultative Committee on the Environment [NCCCE], if that is your question.

**Dr MEHREEN FARUQI:** Just the process that it is going through and whether it as successful as a committee, and does that model actually work.

**Mr GIFFORD:** I think it is fair to say that we are reviewing those things all the time and building on them. The NCCCE structure is one that is similarly replicated with the Rutherford community committee that is established there, and there are elements of both those committees that are working really well and worth replicating in other locations. It is also the case that the minutes from those meetings and the agenda are all publicly available on our website. We have got dedicated pages on our website to those committees and others that are established. I guess the short answer is that whilst we are not engaging in a formal review of the NCCCE we are learning from the way that committee and others operate in order to ensure that the positive aspects of those things, the best practice that we see in those things, can be replicated.

**Mr BUFFIER:** It is worthwhile saying that that is not the only model that we look at for community engagement. We do have a number of ad hoc community groups that we establish, the job is completed, and then they are disbanded. We also provide a support role to many ongoing community consultative groups, such as down at Port Kembla.

**Mr GIFFORD:** And we do not just rely on committees, either. We meet with individuals on a daily basis to hear their concerns and address them.

**Dr MEHREEN FARUQI:** I would like to ask a few questions about the EPA board. The board at the moment, as I see it, has a lot of experience working with businesses and not as much experience and expertise from the community and the environmental sector. The previous board had at least six out of the 10 members with environmental expertise such as environmental law, science, policy, environmental protection and regional environmental issues as well as community and local government representation. Do you believe that this board has sufficient scientific and environmental expertise?

**Mr BUFFIER:** Could I just preface my comments by saying that your question goes to the issue about board membership and I think that is a government policy issue. I will not comment on that. But do I think I have an effective board that I am working with? Absolutely. There is significant environmental and community expertise on that board. I think if you reviewed the board minutes or the board activities over the past 2½ years you would see just what a significant input that board is making to the operations of the EPA. I have found the board to be extremely competent and very knowledgeable. I think any of the EPA staff who have had to present papers to that board and recommendations to that board would attest to the value that they are adding to that whole process. But you have the opportunity to call the independent members of the board before this Committee, if you would like to, and you will see that they provided a submission with the EPA's submission setting out their views of how they view the EPA. I think I am privileged to have the calibre of people on the board that we have.

**Dr MEHREEN FARUQI:** I have read the board's latest report. It focuses quite heavily on EPA successes, and of course you have listed those as well.

**Mr BUFFIER:** Yes.

**Dr MEHREEN FARUQI:** This is obviously quite contrary to the community views we have read in the submissions. I am just wondering if you have any comments on that?

**Mr BUFFIER:** I think the community views expressed in some of the submissions are critical, as you said. There is a view that we are too close to industry, but if you look at some of the case studies and if you look at some of the issues that were raised, they were issues that were alive and well under the previous board. If you take a view that something should have been done about them, it should have been done when the previous board—with community and council representatives, industry representatives and environmental representatives—was in power. I do not think when you draw a comparison—if you look at the board minutes, which are available to you—since the operation of this board and the board minutes of the previous board, I think you would see that there is a substantial difference in the way this board operates, and it has been extremely effective.

**Dr MEHREEN FARUQI:** Moving on to the EPA's working relationship with other government departments, in many instances you work and collaborate with other agencies, such as the White Bay terminal because ports are involved as well as the Office of Coal Seam Gas.

**Mr BUFFIER:** Yes.

**Dr MEHREEN FARUQI:** How much influence do these agencies have with respect to the EPA's regulatory processes and investigation of pollution incidents?

**Mr BUFFIER:** I would like to say that we influence them rather than they influence us. I am not saying that in a trite manner. We do put a lot of time and effort into making sure that they understand what the environmental impacts are. We are not a consent authority but we certainly have very significant input into that. The White Bay issue is one at point where, with those planning conditions, we had the opportunity to comment on the environmental issues that we thought might become apparent there. In fact, some of that has proven to be the case. Some of the planning consents did take those concerns into account, but not to 100 per cent of the



issues we raised. If you are asking me is pressure put on me by those other agencies to go easy on them, the answer is no.

**Dr MEHREEN FARUQI:** You mention the White Bay case. I know that the EPA put in many conditions and not many of them were accepted in the final outcome. Do you think the EPA needs more power and more say in making sure that those conditions that protect the environment become part of the licence conditions?

**Mr BUFFIER:** The question of whether the EPA should be a consent authority is a government policy issue. It has been the situation under this Government and under previous governments that we have not been.

**Dr MEHREEN FARUQI:** But, given your experience, how could you ensure or what would be your recommendation to ensure that environmental conditions become part of the consent?

**Mr BUFFIER:** Well, there is no way to absolutely ensure it unless you are a consent authority or a concurrence authority. We do not have that power, but we do work very hard to make sure that the consent authorities understand whether certain conditions are likely to be able to be met or not. In the case of White Bay, it is a long and complex issue. But the nub of the issue at White Bay is shipping traditionally has been regulated internationally and nationally. No State-based EPA has had any involvement in shipping. We have changed that. We have said we think there is an opportunity for us to do something. We are looking at some of the options there to effectively introduce lower sulphur conditions on fuel before the International Convention for the Prevention of Pollution from Ships [MARPOL] timetable of 2020.

We think we have some legislative power to do that. They said it has never been done before in New South Wales. The Minister has written to the Commonwealth Minister to indicate that this is an area we are getting involved in. I might say that ever since we have indicated an interest in this area, I have had a huge number of representatives of the shipping industry wanting to talk with my staff and me about us regulating anything to do with shipping. The question of are we too close to industry I think is well answered by looking at what we are doing with shipping.

**Dr MEHREEN FARUQI:** How are across-agency collaborations managed? Do you have protocols in the process? For example, how do the Office of Coal Seam Gas and the EPA work together?

**Mr BUFFIER:** I will ask Mr Gifford to talk about that in a bit more detail but, yes, we do have a memorandum of understanding [MOU] with the Office of Coal Seam Gas. Because this is a developing area of regulation for the EPA—we only took on responsibility for this about 18 months ago—we actually are in a space that I think is very good in terms of environmental outcomes and in terms of us exercising our influence there. I will ask Mr Gifford to comment briefly on that.

**Mr GIFFORD:** That MOU is not just with the Office of Coal Seam Gas but also with the Office of Water and the Department of Planning and Environment because, along with the EPA, those three agencies and the EPA have clear statutory responsibilities around the exploration, assessment and production phases of coal seam gas. I think coal seam gas is really a good example of the kind of issue that you are raising in terms of agencies working together and ensuring that there is clear understanding between the agencies about their roles and responsibilities and the statutes that they operate under as well.

The important aspect, particularly around coal seam gas, is ensuring that we are sharing information at any stage of the development through exploration, assessment, and production phases and also that there is particular expertise that resides in some of those agencies that each of the others needs to draw on in order to make their decisions about regulatory actions or other actions that they are planning to take. There is a difference with the EPA. The one difference is that our regulatory decisions are made by us. They are not influenced by others in the course of that actual decision-making. Yes, we gather information; yes, we engage and get technical advice and expertise, but the decision to take regulatory action is a sole decision of the EPA.

**Dr MEHREEN FARUQI:** In the EPA's submission you state that in 2003 the EPA was incorporated into the new Department of Environment and Conservation, which led to a change in the delivery of the EPA's core functions as environmental priorities shifted from pollution prevention and control to conservation. Will you please elaborate on this?

**Mr BUFFIER:** That certainly predates me. Mr Gifford was there at the time, so I will defer to him.

**Mr GIFFORD:** The EPA was affected by a number of machinery of government changes from 2003 onwards until its re-establishment. We are referring to a shift in emphasis there because the agency at the time was given responsibility by Government for a broader remit, particularly around the protection of threatened species, the regulation of native vegetation and Aboriginal cultural heritage. It meant that the regulatory division of the agency, as it was at the time, had to ensure its focus was adequate across all of those things not just the traditional pollution control areas of responsibility, but also across those others as well. That is really what that comment is referring to.

**Mr BUFFIER:** It is not written in there but it also refers to the fact that the EPA lost visibility. Its brand was reduced, it lost resources and it did not have the capacity to deal with the issues that it now is regaining.

**Dr MEHREEN FARUQI:** When the EPA was separated from the Office of Environment and Heritage, was the scientific division within OEH transferred with the EPA?

**Mr BUFFIER:** No. What we have is a service agreement with OEH, which relates to providing some of the basic administrative services—HR, payroll, et cetera. It also includes legal services and scientific services. Some of that changed a little bit. Air policy and water stayed with OEH but we have now transferred some of those resources into EPA with a subsequent adjustment in the service level agreement. We operate under a service level agreement.

**Mr GIFFORD:** The EPA also has its own expertise within the organisation, prior to and since those arrangements, through the service agreement. We have technical expertise in air and water and noise. Our operational staff have varied backgrounds but in some cases scientific backgrounds as well. It is not a matter that we have to rely entirely on that arrangement. However, the skill sets in particular areas in the Office of Environment and Heritage are important to us, particularly areas such as the Office of Environment and Heritage laboratories.

**Mr BUFFIER:** Yes, the laboratory analysis. The issue you raised earlier about the Hillsdale reports, those analyses were done by the analytical laboratories within OEH. They were not our reports.

**Dr MEHREEN FARUQI:** Is there ongoing expertise you can access with the service level agreements or is that done on a case-by-case basis?

**Mr BUFFIER:** There is a certain base level of expertise that is built into that. If we require additional support over and above that that is not in a service agreement we would purchase that. We can purchase it through OEH or externally, as we have done, as I commented on in my opening statement.

**Dr MEHREEN FARUQI:** Professor Fell.

**Mr BUFFIER:** Professor Fell—a wide range of outside expertise, which is very handy for us.

**CHAIR:** Good luck with the service agreements, sir.

**Mr BUFFIER:** We could have an inquiry on service agreements and it would occupy us extensively.

**CHAIR:** I can think of one.

**Mr SCOT MacDONALD:** I will ask a couple of general questions first and then some specifics. What do you think are the top five threats to the environment in New South Wales?

**Mr BUFFIER:** In our strategic plan, we identify our six key result areas. Certainly we have a focus on three key areas. One is waste, innovative waste management, which is a bigger issue in terms of how we deal with that. We have a massive program for that. The second area is responding to incidents and remediating contaminated sites, so that is a sort of historical—

**Mr SCOT MacDONALD:** Legacy.

**Mr BUFFIER:** —legacy issue. The third area is pollution incidents, which is the area that Mark Gifford runs up against most often. We have put a lot of emphasis on air quality as a priority area within the EPA. We have been fortunate to obtain an extra \$8 million in funding, specifically to look at air projects. That is over a three-year period. Air is a significant priority for us, and we have seen that in the Hunter Valley and more recently in Sydney with ground level ozone issues but also with the issues around White Bay. Asbestos is a looming area for us and we share some of the responsibilities with HACA on that.

**CHAIR:** Point of clarification. Can you please explain for Hansard what is HACA?

**Mr BUFFIER:** That is the Heads of Asbestos Coordinating Authorities, who are leading the Mr Fluffy issue. We are significantly involved in asbestos in terms of waste issues and remediation of sites, et cetera. Coal seam gas is an area for which we have picked up responsibility over the past 18 months. That looks as though it will be an expanding area for us. The issues raised by the Chief Scientist in her recent report will require that more resources are put into that area in order to deal with issues of concern to scientists in the community to ensure that the operating conditions under that are satisfactory.

**Mr SCOT MacDONALD:** You are leading on to the next part of my question, which is on coal seam gas. I was out at Narrabri on Tuesday listening to Professor Bill Collins from Newcastle University. He was saying the emissions from the Narrabri project were to amount to six cows. That was his description, not mine. I hear what you say in terms of coal seam gas; it is going to be a big resource issue for you. Are we in danger of prioritising an issue that might have, by some accounts, a relatively small impact on the environment in terms of water and emissions? Yes, it is the cause of the day for many people and I will ask some more questions about that.

**Mr BUFFIER:** As you say, this is a complex issue and it is one that the EPA is always conscious of. Where do we put our resources, where do we get best bang for the buck, as I often say? We know that when an issue becomes of concern to the community it really needs to have considerable resources put into it, otherwise you end up with perverse outcomes. A lot of the community concerns are valid such as a lack of knowledge and a lack of information. We do not have all the answers so we have to spend a fair bit of time and effort making sure that that understanding is sorted out. We do not claim to have perfect knowledge on any of these events. Is coal seam gas a significant environmental issue? My assessment is yes, it is. I am not sure what Bill Collins was referring to. Maybe he was referring to fugitive emissions from gas wells.

The evidence indicates that what happens with the produced water and the impact on the aquifers is likely to be the area where, environmentally, things could go wrong so a better understanding is needed of the operating environment of that exploration and production. Where are the aquifers, what are the connections to the gas bores, what is the integrity of the gas bores are areas where there are significant environmental issues. The Chief Scientist has been studying this area for 18 months and she says this is an area that requires more knowledge and more work going into it. I would say, yes, it does require those resources.

**Mr SCOT MacDONALD:** I will not labour the point, but we are putting tens of millions of litres of primary treated sewage into the ocean. We have got problems with the Hawkesbury and Nepean rivers, we have got issues with Cooks River. In terms of impact on the environment, I just think—anyway.

**CHAIR:** Was there a question?

**Mr SCOT MacDONALD:** No, there was not—bewilderment. I take you to chapter 16 of your report on coal seam gas and the \$1,500 fine that was imposed upon Santos. I will read out a couple of comments. One is from the National Toxics Network spokesperson, Marianne Lloyd Smith. She said she is not surprised Australia has seen its first case of aquifer contamination from CSG operations. However, she says the EPA's handling of the contamination is of most concern: "When they saw those levels they should have said, 'We need to go back and do some testing'", and it goes on. The Greens member of Parliament says much the same thing, that basically the EPA has been derelict in its duty, it cannot be trusted and it is too close to industry. Mr Gifford, can I get your reaction to that commentary?

**CHAIR:** Through Mr Buffier.

**Mr BUFFIER:** Could I just make a comment first? The Pilliga certainly was an issue that has been on the agenda and in a lot of submissions—about 15 or 20 submissions on this—so it was clearly an issue. Our assessment of this right from when we came to understand what the situation was was that this was a low-risk

situation for human health and the environment because it was small-scale, isolated and localised and there was no exposure pathway, and our view of that risk assessment has not changed.

I agree that that is at odds with some of the headlines, but that is the reality of our risk assessment of that situation. So to your point, Mr MacDonald, as to whether we are putting many resources into coal seam gas, no I do not think we are but we need to put a lot of resources in. In fact, in relation to this incident in the Pilliga, our assessment was that this was a very low risk to the environment and to human health. There were a lot of reasons why we believed that. One was, as I said, it was very small-scale. This is not excusing poor processes and leaking of ponds and poor construction.

**Mr SCOT MacDONALD:** Of the previous operator?

**Mr BUFFIER:** Of the previous operator, but it was the responsibility of the current operator none the less and we have significantly changed the requirements—us and Planning—in relation to the construction of ponds now, where you require double liners et cetera, where you require regular monitoring, where we have a much better handle on it. But the reality of this situation was these leaks were leaking into the perched watertable underneath the pond, there was a weak connection with an aquifer so the perched watertable went down to about 30 metres, the aquifer went down to 65 metres, there was a very small relationship there and the nearest bore drawing any water out of what may have been that aquifer was four kilometres away. The aquifer was not moving at any speed whatsoever. There was the opportunity to remediate it—

**The Hon. RICK COLLESS:** Can I just ask for a point of clarification? When you say the aquifer was not moving, are you referring to the 60-metre aquifer?

**Mr BUFFIER:** The 60-metre aquifer.

**The Hon. RICK COLLESS:** Not the perched watertable?

**Mr BUFFIER:** The perched watertable was perched and there was very little movement of that down to the next factor.

**Mr GIFFORD:** And no ability to access it either.

**Mr BUFFIER:** I am sorry, I have just been told that the perched watertable was 15 to 20 metres below the ground level and the deeper aquifer was 35.

**The Hon. RICK COLLESS:** And still no connectivity between the two?

**Mr BUFFIER:** A small amount of connectivity but not very much. What we have required Santos to do, or what they are doing, is we are undertaking remediation of that. That whole site will not be used in future; all that water is being transferred to a new state-of-the-art facility. That site will be rehabilitated and there are many millions of dollars involved in rehabilitating that site.

**CHAIR:** I might make the point, Mr Buffier, that before the EPA was reconstituted the first inquiry that General Purpose Standing Committee No. 5 conducted was on the coal seam gas industry. One of our recommendations was that the Government should adopt a policy of no open tanking; instead, they should be all closed tank farms. It is a pity they did not adopt that, but never mind.

**Mr BUFFIER:** I think I have covered the main issue there but the question was, in part, why was the penalty notice appropriate.

**Mr SCOT MacDONALD:** Mr Gifford, as you answer can you try to shed some light on how we get credible commentary around this rather than some of the stuff that I just went through there where the facts are given as much weight as speculation that people are going to become radioactive and glow in the dark and words like "toxic" are used? Can you consider that as you answer?

**Mr GIFFORD:** Sure. I think those sorts of things are a challenge for the EPA every time we take regulatory action. We have learned from the particular activity there and our response to it at Santos' operations and that is really about how we communicate that regulatory decision-making and outcome, and we have made changes to ensure that. I think, similar to some of my statements previously to Dr Faruqi, we are engaging more

broadly in a more systematic way with the community and other stakeholders to ensure that we are able to communicate that message more effectively. In this particular instance, as Mr Buffier said, our assessment of that incident was that it posed a low environmental risk and it was a very thorough, detailed and methodical assessment that we went through because of the heightened level of interest and concern around coal seam gas activity. We were at pains to ensure that the investigation was absolutely as thorough as possible.

Whenever we are dealing with environmental impact it is often complex in terms of the nature of the impact and the regulatory response to it. That particular incident, as I say, was thoroughly investigated but the EPA commenced that investigation prior to even having the regulatory role. At the time that the EPA was informed of that incident we were not the regulator but, none the less, we took it on ourselves to commence that investigation and work our way through it, and with any investigation you have to have the evidence available in order to make a determination about whether or not there has been an offence.

The important point also with that particular response is that it was not simply about whether or not there should be a prosecution or penalty notices; our response was about ensuring that environmental impact was addressed, that controls were in place, that there were mitigation strategies and remediation strategies, and that is what we put in place to ensure that Santos undertook those works to achieve that. Subsequently we formalised that through the environment protection licence that was issued to Santos for that site and that licence has quite strict limits on it: it has monitoring requirements, it has reporting requirements, as is the case for the other nine coal seam gas licences that we have issued in New South Wales.

**CHAIR:** Are those conditions published anywhere?

**Mr GIFFORD:** Yes. All of those licences are available on our public register. We have a copy of the Santos licence here today; it runs to about 33 pages.

**Mr BUFFIER:** Can we table those?

**CHAIR:** Yes, thank you.

**Documents tabled.**

**Mr GIFFORD:** Not only are the licences available, also the regulatory actions that we take, statutory notices that are issued, the penalty notices, pollution reduction programs and the licensee's response to those requirements as well are all available on our public register.

**The Hon. RICK COLLESS:** Mr Buffier, can I just follow on from the questions that Mr MacDonald was asking in relation to the Pilliga incident? When you were doing your investigations there did you test the water in the pond for uranium in the water itself?

**Mr BUFFIER:** Yes. The water was tested for uranium and a number of other chemicals. I think uranium was probably the issue that got the most public media.

**Mr GIFFORD:** And the results of that testing were below the detection limit.

**Mr BUFFIER:** In the pond itself.

**The Hon. RICK COLLESS:** That raises the question, does it not, where did the uranium in the water in the perched watertable come from?

**Mr BUFFIER:** It was mobilised by the water in the pond, which was highly saline and highly alkaline, so when the water leaked into the soil beneath it—

**The Hon. RICK COLLESS:** So the uranium came out of the soil below the pond, is that what you are saying?

**Mr BUFFIER:** Yes. It was mobilised.

**The Hon. RICK COLLESS:** Did you do some analysis of the uranium levels in the soil and rock material below that pond?

**Mr BUFFIER:** I do not think we tested the uranium levels in the soil, but we know that the uranium levels in the perched watertable were quite high, which was the issue that was in the public arena. The uranium levels by the time it got down to the deeper aquifer were much lower. That is how we know that there was some connection but not a very significant connection.

**The Hon. RICK COLLESS:** The uranium level in the perched watertable, from memory, was something like 700 parts per billion, was it not?

**Mr BUFFIER:** It was 335 micrograms per litre against an ANZECC guideline for stock watering of 200. If that water in the perched watertable was used for stock watering, which it was not, then it was above where you would want it to be.

**The Hon. RICK COLLESS:** By the time it got down to the watertable itself—

**Mr BUFFIER:** The aquifer—it was down to 30, as opposed to an ANZECC guideline for stock watering of 200, which is why we were saying that our assessment of the risk of that situation was that it was low risk because the nearest bore was four kilometres away.

**CHAIR:** Just a point of clarification there: the aquitard below the perched was rock?

**The Hon. RICK COLLESS:** I do not think there is any aquitard below the perched watertable.

**Mr BUFFIER:** No. There is an aquifer. The perched watertable was about 15 metres; there was a deeper aquifer at about 35.

**CHAIR:** And the aquitard between the two?

**Mr BUFFIER:** I am not sure.

**Mr GIFFORD:** I think it is rock and sandy soils.

**The Hon. RICK COLLESS:** Has the EPA done any studies of background uranium levels in the geological formations in and around the Pilliga or in river sediments in the Namoi River, for example?

**Mr BUFFIER:** No.

**The Hon. RICK COLLESS:** I understand from research that I have done that in the Namoi River there is a background uranium level in the river sediments in the Namoi River adjacent to that area of something like 800 parts per billion, which would indicate that there is uranium in the environment generally that people are never worried about; it is simply something that is there. Would you agree to that?

**Mr BUFFIER:** I certainly know that uranium levels in soil vary quite dramatically across the landscape. I am not familiar with that particular level for the Namoi.

**Dr MEHREEN FARUQI:** Mr Buffier, in your opening statement you highlighted the importance of ecologically sustainable development and the principles of ecologically sustainable development in the role that the EPA does. I had a quick look at the strategic plan for the EPA and it did not refer to ecologically sustainable development at any time. Could you provide any reasons for why that might be the case?

**Mr BUFFIER:** Because the overarching principle of the strategic plan was the vision statement and, as I said, our vision statement is healthy environment, healthy community, healthy business. That, I think, sends a very strong message that the basis for the strategic plan is ecologically sustainable development. But the strategic plan is really around what are the actions and what are the key result areas that we are focusing on in order to deliver that vision statement and to have ecologically sustainable development. I would not think that normally the term "ecologically sustainable development" would be part of the strategic plan. But we have been quite clear in pursuing the vision statement. I have not had any negative feedback about our vision statement in the 2½ years that we have been using it.

**Dr MEHREEN FARUQI:** Could you explain a little bit about how the EPA operationalises ecologically sustainable development? An example would be great.

**Mr BUFFIER:** I can. There are quite a few principles that we abide by in relation to that: the effective integration of economic and environmental considerations, which is taken into account in our planning advice and concurrences, in our licensing conditions, in our pollution reduction programs, and the cost-benefit analyses of new legislation and stakeholder consultation for new policy positions. All of that is talking about the effective integration of economic and environmental considerations. The principle of polluter pays is central to what we are trying to do as an organisation.

Since I came on board I have put much more emphasis on cost recovery. In the first 12 months we had quite a big win with Treasury in terms of moving to a cost-recovery program for our licence administration, which is about \$17 million or \$18 million. I had bigger ambitions than that in terms of applying it to cost recovery for other licences and some of the work we do in remediation in sites. That was not agreed at the time but we subsequently have a bill before Parliament at the moment which will see cost recovery for the work we do in terms of remediation. The whole basis of our remediation of contaminated sites is around polluter pays. The \$315 million that we require Orica to commit to for Botany is all around polluter pays.

**Dr MEHREEN FARUQI:** What about the precautionary principle? I know that the EPA does a lot of work after a pollution incident has happened, and that is valid. How about proactive work? I understand that one of the instruments that you have is the ability to issue protection of environment policies—

**Mr BUFFIER:** Yes.

**Dr MEHREEN FARUQI:** —which might also give you an opportunity to address cumulative impacts. I also understand that there has not been any issued to date. Is that something you are looking into, to be more proactive in terms of preventing pollution and using the precautionary principle?

**Mr BUFFIER:** Yes. Certainly, the PEPs are something we are looking at. As you say, in the history of the EPA, none has been used. I will ask Mr Gifford to talk about that in more detail. We do regard the precautionary principle as a significant factor for us.

**CHAIR:** Can you define PEP for us?

**Mr BUFFIER:** Protection of the environment policies. In terms of the precautionary principle, we pay significant attention to the guidelines and the decisions set out by the Land and Environment Court. Judge Preston spelt that out in some considerable detail. The monitoring that we require of impacts under our licence conditions, the research that we do in order to understand the situation more effectively, working out the best approach to a problem is around that precautionary principle. I will ask Mr Gifford to cover that issue of PEPs specifically.

**Dr MEHREEN FARUQI:** I just want to know why no PEPs had been issued. Is there a problem with resources and funding of the EPA that you are unable to work more proactively and have those proactive instruments in place?

**Mr GIFFORD:** I would not say that that is the case. With protection of the environment policies, like any of the other powers that we have available to us under the Protection of the Environment Operations Act, they have been considered from time to time as to whether or not they are a good response to a particular environmental problem. On each of those occasions where we have done that we have found that there are other equally effective measures that we can take and we have done that. In that sort of category are things like dealing with salinity impacts on the Hunter River. The Hunter River Salinity Trading Scheme is an example of an approach, and a very successful approach, to reducing salinity in the Hunter River from mining and other discharges.

A PEP could have been something that could be used in a circumstance like that, but that cap and trade scheme that requires polluters to buy credits and through that credit trading reduce their discharges has been very successful. Similarly, approaches like bubble licensing in South Creek is another example of where we have taken a different tack to reduce cumulative impacts. Pollution reduction programs either on individual licensees or on industry sectors are another approach that we have taken. So it is not that there have been

particular challenges with using protection of the environment policies; it is just that we have felt that we have been able to achieve the same ends through other means.

**Dr MEHREEN FARUQI:** My time is limited so if we could move on.

**Mr BUFFIER:** I was just going to comment. We have not ruled it out entirely because we are doing a lot of work on the air quality NEPM at the moment. One of the tools that we want to look at for that, if those measures get approved, is PEP appropriate. So it is something that is alive and well in terms of our thinking.

**Dr MEHREEN FARUQI:** A large number of submissions have called for a more well-funded, well-resourced independent EPA with greater regulatory powers that can protect the environment and communities. Would you support this call?

**Mr BUFFIER:** Who would knock back more resources? When I came to the EPA what I did recognise was that we did need more resources. I set about getting more resources. As I said, our budget has increased from \$117 million to \$142 million.

**Dr MEHREEN FARUQI:** So have your responsibilities.

**Mr BUFFIER:** Yes, in part, but on top of that we have had the waste program, which has been \$465 million. So yes. Some of our responsibilities in coal seam gas have increased but that is about \$2 million a year. We are moving to cost recovery on that from July next year. We did require some extra regulatory firepower. I think that has been identified in the submissions, and we set about making that happen. By and large it has happened very significantly. I think that has been an important issue for us. We could always do with more resources but I think that cost-recovery issue will help significantly, but the Government has been very responsive in terms of looking at our requirements.

**Dr MEHREEN FARUQI:** I have a couple of questions on individual cases. Is there any environmental or technical reason why ship-to-shore power could not be used for White Bay? Do you think this would rectify many of the issues that residents face at the moment?

**Mr BUFFIER:** That was certainly one of the issues that we raised in our planning advice, that that was an option that should be looked at. Is there a technical problem with it? One of the technical problems with it is that not all ships are capable of using it. If it was mandated or required, then we would still have a situation where some ships technically would not be able to use it. But White Bay is an issue that we are committed to seeing if we can get something happening, way ahead of the MARPOL time frame. Shore to ship power is one of those but equally low sulphur fuel, use of scrubbers, et cetera, so it is one of the three options that we are exploring in more detail and we are just appointing some international consultants to help us in that regard.

**The Hon. Dr PETER PHELPS:** I go back to the issue of perceptions. What do you say to the perception amongst certain businesses that you are too close to environmental activists and left-wing NGOs and that you are too tough on business?

**Mr BUFFIER:** The same response as I made to Dr Mehreen Faruqi previously, that what we try to do is have processes in place that ensure that the way in which we deal with an issue is consistent, that businesses can see what the basis for that is, that across the State and across industries we deal with things in a consistent manner, that we have staff who understand the issues of integrity and corruption. We have done some extensive training of our staff in relation to those aspects, ICAC training, ethics training, et cetera, so we are putting a lot of time and effort into ensuring that the culture in the organisation makes sure that that does not happen.

**The Hon. Dr PETER PHELPS:** Does that imply that you are concerned within your organisation that there is too close a relationship with left-wing NGOs and environmental activists currently?

**Mr BUFFIER:** No. It is around the governance of the EPA and having the EPA as a credible regulator. Client capture is always the danger for a regulator, and client capture can occur on either side of the fence. As I said, we are called upon to make tough decisions. I have addressed staff on this. I said that our job is to make tough decisions. Sometimes they are regarded as tough because business says, "You're penalising us." Sometimes they regard it as too tough because environmental groups are saying that we are too soft on business. The basic message is that we make tough decisions. We try to make them on the best information available to us. If business can help us in terms of understanding an issue and provide information to us, well and good. If an



environmental group can do their study and provide experts to us and help us with information, well and good. We take all of that into account. We have put a lot of emphasis on being an evidence-based and objective authority so that we can stand up to that scrutiny of you are favouring one side over the other.

**CHAIR:** That is an excellent answer. I am pleased to hear that at least one statutory authority recognises that there is a thing called the Stockholm syndrome.

**Mr BUFFIER:** Thank you. It is discussed in our report, too.

**The Hon. Dr PETER PHELPS:** Following on from another of Dr Faruqi's questions relating to the EPA board: generally speaking, would you say that you would prefer to have a cooperative relationship rather than a coercive relationship with businesses?

**Mr BUFFIER:** The Ipsos survey that we did highlighted this dilemma that in order to be a smart regulator, an innovative regulator, we need to understand the perspective of the business that we are trying to regulate. That is an important issue for us. But in doing that you run the risk that environmental groups see you as being too close to business and having too many discussions.

**The Hon. Dr PETER PHELPS:** But surely you would prefer a situation where you did not have to do anything because your advice was accepted by businesses and you had a cooperative relationship with those businesses and they took your advice and there is no need to ever prosecute anyone? Surely that would be the ultimate outcome.

**Mr BUFFIER:** It would be nirvana, yes.

**The Hon. Dr PETER PHELPS:** Do you think there is any advantage in that case in having an EPA board that is overwhelmingly stacked with environmental activists and members of left-wing NGOs, given the general antipathy that such people normally have towards businesses, the hostility they have towards extractive industries and the desire of many of them to close down a large number of industries which you regulate?

**CHAIR:** I would have thought that was a policy question.

**The Hon. RICK COLLESS:** It is a good question.

**CHAIR:** It is but I would have thought it was a policy question.

**The Hon. Dr PETER PHELPS:** It goes to the issue of, if you are working on a cooperative basis is there any benefit in having a group of people on the board who are actively antithetical towards the businesses you are trying to regulate?

**Mr BUFFIER:** I am prepared to comment. What you say is right; it is a policy issue so I will not go to that point. The point I would make is that regardless of the make-up of the board, which is a policy issue, once somebody is appointed to a board they are required to operate in terms of achieving the objectives for which they are established. The Board of Fire Commissioners' case, if I might quote this, makes that perfectly clear. So no matter where you are from, who you represent or anything else, once you are on the board of the EPA you are required to operate within the best interests of the EPA and according to the objectives and the legislation that sets it down for you. So in a sense I will not go any further. I think the board of fire commissioners' case covers that issue well; it is a policy question.

**The Hon. Dr PETER PHELPS:** I refer to a specific investigation by the EPA and that relates to the Dargues Reef goldmine. Are you aware of that investigation?

**Mr BUFFIER:** Yes, I am.

**The Hon. Dr PETER PHELPS:** And it was taken to the Land and Environment Court ultimately, was it not?

**Mr GIFFORD:** There was a successful prosecution in the Land and Environment Court.

**The Hon. Dr PETER PHELPS:** What was the nature of that? It was a spill from water following heavy rains, was it not, from holding tanks?

**Mr BUFFIER:** Yes, it was; a holding dam.

**The Hon. Dr PETER PHELPS:** My understanding is that, essentially, muddy water entered into the local stream, is that correct?

**Mr BUFFIER:** If you want the detail, I think we might have to take it on notice.

**The Hon. Dr PETER PHELPS:** That is okay, if you can take it on notice. At the same time, could you indicate whether any toxins were released by that spill, any heavy metals were released by that spill or was it, as I understand, simply a case that muddy water entered a stream? Is it appropriate for the regulatory regime of this State to be seeking prosecutions for muddy water because, presumably, streams got muddy not only prior to mining activities but also prior to the arrival of white men in this country?

**CHAIR:** Mr Buffier, the secretariat will send questions on notice. You do not have to write them down.

**Mr BUFFIER:** No, I was just doing something for my own assistance.

**CHAIR:** Okay.

**The Hon. Dr PETER PHELPS:** Given, obviously, that dirt and mud now are considered to be some sort of pollutant, are you planning to extend your remit into further areas?

**Mr GIFFORD:** I think in terms of that particular discharge, the issue was with respect to heavily sediment-laden water being discharged into the receiving environment. The potential generally there is for that sort of discharge, particularly if it is large, to affect the oxygen content of the receiving environment and then that can have ecological impacts. That is really generally why we would take action in those sorts of circumstances.

**The Hon. Dr PETER PHELPS:** Why was the money which was supposed to have been allocated for Upper Araluen riparian works—specifically the removal of non-native vegetation—not used for that purpose?

**Mr GIFFORD:** I would have to take that on notice.

**The Hon. Dr PETER PHELPS:** Thank you. One final thing is the requirement to publish the decision. The requirement was that it had to be published in the *Sydney Morning Herald*. Is there any reason you chose a paper that has a smaller circulation than, for example, the *Daily Telegraph*?

**Mr GIFFORD:** Not particularly. We often seek those kinds of orders when we have a successful prosecution. We generally look for publication in appropriate journals and a newspaper that has statewide distribution.

**The Hon. Dr PETER PHELPS:** The *Daily Telegraph* also has statewide distribution. It was not that the *Sydney Morning Herald* was chosen because under people such as Ben Cubby and Paddy Manning it has pursued a rigorous left-wing green agenda and this was a payback for them for doing that?

**Mr BUFFIER:** I can answer that. Certainly no issue of pay-off would have arisen in our mind. Why it was in the *Herald* versus the *Telegraph* I think we would need to take on notice. I am not sure of what decision-making process went on then.

**Mr SCOT MacDONALD:** Has the EPA calculated the externalities of bottled container waste in New South Wales?

**Mr BUFFIER:** I think we would need to take that question on notice. The issue is before COAG in terms of container deposit legislation and schemes. There has been a significant analysis of the costs of different types of schemes, which I am not sure are officially in the public arena as yet but certainly have been leaked into the public arena. So I would like to take that on notice, if I could.

CORRECTED

**CHAIR:** That is fine. Once you received the questions on notice, we would like the answers within 21 days.

**Mr BUFFIER:** Yes.

**CHAIR:** That concludes this session of today's hearing.

**(The witnesses withdrew)**

**(Short adjournment)**

**ROCHELLE PORTEOUS**, Mayor, Leichhardt Municipal Council, and

**RYAN COLE**, Manager, Compliance and Enforcement, Leichhardt Municipal Council, affirmed and examined:

**ERLA RONAN**, Acting Director, Community and Environmental Management, Leichhardt Municipal Council,

**KATRINA HORROBIN**, member, White Bay-Rozelle Precinct Group, and

**JOHN STAMOLIS**, member, White Bay-Rozelle Precinct Group, sworn and examined:

**CHAIR:** Before we proceed to questions from the Committee, I understand each group would like to make an opening statement. Will you proceed?

**Ms PORTEOUS:** Council considers that this cruise ship terminal should never have been built in this location. The close location to family homes of the cruise ships with their engines running and the 24-hour noise and diesel fumes being belted out across the peninsula was always going to have significant impacts on the nearby residential area. All this is in the fourth most densely populated area of Australia. Sydney Ports granted the DA approval under part 3A on 2 February 2011 just before the March State election. Council and the local community continue to be strongly opposed to this.

The environmental protection agency did not ensure the amenity of residents was adequately addressed during the planning stages for the White Bay cruise terminal. It could have imposed a requirement for shoreside power, a requirement of many north hemisphere cruise ship terminals, but it did not. It could have required stronger controls of sulphur dioxide concentrates, nitrous oxides and particulates; it did not. It could have required the retro-fitting of scrubbers, new exhaust gas cleaning systems on all ships berthed in White Bay; it did not. And very crucially, it could have and should have required Sydney Ports to do comprehensive and ongoing monitoring of air, odour and noise pollution for the entire period of time that the port was in operation. Instead, it allowed the monitoring of Sydney Ports to cease after one year, and that was in terms of the requirements of the DA. Now the monitoring equipment has been removed from the area.

I leave you with one final point if I can. The cruise ship terminal has been operating for 1.5 years now. The number of cruise ships is increasing significantly and we are now regularly seeing two cruise ships in at the same time. There are ever-increasing complaints on the amenity impacts and we are seeing the EPA doing very little to nothing to address these concerns to protect the health and the amenity of the residents on the Balmain peninsula.

**CHAIR:** Would the White Bay group like to make an opening statement?

**Ms HORROBIN:** In April last year the cruise ship terminal began operations in White Bay immediately adjacent to the high-density residential community of Balmain—literally at the end of my street 100 metres from my doorstep. The houses sit along the top of a cliff along the spine of the peninsula. There is no buffer zone between the community and the ship funnels. In the months following the terminal opening, local residents started to notice that we were getting sick. We had kids getting asthma for the first time, adults with worsening respiratory conditions, nausea, heart palpitations and bronchitis, just to name a few. We were also overpowered by the strong acrid smell from the thick smoke spewing out of the ship funnels, located at the same level as our houses. We needed to close all our windows and doors but the fumes came in anyway, became trapped and we started to experience headaches, lethargy and eye irritations.

As neighbours we started talking to each other and we realised that we were not alone and we began to wonder what was causing this outbreak of health symptoms, so we did some research and it became painfully clear. Imagine our horror as the realisation set in that none of the international requirements to which Rochelle referred had been implemented for the brand spanking new terminal in the middle of iconic Sydney Harbour and our incredulity at the realisation that our high-density family community, which very unusually is located only metres from the terminal, was being exposed to such significant health risks as a result of grossly inadequate regulation which lags so far behind other countries.

We think it is critical that the EPA be given the power, authority and support of government to be fearless, independent and accountable. It must act quickly on implementing the solutions identified for White

Bay. Additionally, we need immediate interim solutions to remove the unacceptable risks to our health and to that of our families. We cannot go through another peak cruise season like the last one.

**Dr MEHREEN FARUQI:** On behalf of Leichhardt council, Ms Porteous said in her opening statement that she raised many objections at the time the then Labor Government approved the site and the proposal for White Bay. Will you quickly highlight a couple of the key objections that you made? How did you make them? What was the response at that time?

**Ms PORTEOUS:** I was on council at the time and we were extremely concerned about the very near interface with the residential properties, as has been outlined by Ms Horrobin. Obviously some of the properties are only 100 metres away and they are actually on eyeball level with the cruise ships as well because they sit up on a cliff face. It was pretty clear to us very early on that there were going to be very significant noise impacts and light impacts because the lights of cruise ships are on all night. There were also going to be vibration issues. We were significantly concerned about the fact that there was no ship-to-shore power so that the ships would be running off their own power. Of course, that meant low quality fuel which was full of particulates, sulphur oxides and nitrates which are very damaging to health. I know our compliance and enforcement manager would be happy to speak further on those particular details. But all these issues were raised.

There was modelling that was done at the time but it is important to point out that the modelling was done with levels which, in fact, were set far too high so it was reasonably easy to comply with levels which were already far too high. The other problem is there is no real base level locally because the nearest monitoring station is actually in Callan Park. It is called Rozelle but, I do not know if you know the area locally, but Callan Park is a long way away from White Bay. The other one that is closest is Randwick and that also shows just how impossible it was to actually have a base level in terms of the air monitoring quality in the local area. So levels were too high. We were very concerned about all of these not being adequately addressed, and we continue to be very concerned about them. When the operational management plan was put forward we were again very concerned about the fact that monitoring was only for 12 months.

**Mr STAMOLIS:** Can I add some points?

**Dr MEHREEN FARUQI:** Yes.

**Mr STAMOLIS:** I think the other thing that occurred was that we had two extraordinary meetings of council, two major public meetings. On every occasion resolutions were passed by our community saying this was a completely inappropriate location for a cruise ship terminal in a high density residential community. It is within a high-density residential community and we cannot understand why such a decision was made. But at every opportunity our community had to vote on this, and the ongoing debate was in council itself over several years, it showed a high-level of concern and high-level of opposition was in the community to this going forward.

**Mr COLE:** Could I add one thing?

**Dr MEHREEN FARUQI:** Yes, very quickly. I have limited time.

**Mr COLE:** Fair enough. I was just going to mention that the conditions that were actually placed on the consent, basically even if you just do a quick Google search, diesel exhaust has an extensive list of different chemicals that are pumped out into the atmosphere but the conditions only require sulphur dioxide, nitrates and particulates to be tested. For example, the sulphur dioxide condition that has been placed on the consent, the breach level of 10 times higher than what the World Health Organization guidelines were in 2005 which gives a bit of an indication of, I guess, how loose the condition as to obtain the breach level.

We have one testing station located very close to the terminal. The height of the exhaust flues on top of the ship and any prevailing wind would push it over into the peninsula and there is no testing or monitoring there, which makes it very difficult. For example, the recent incident in Rozelle with the fire, we were constantly testing for asbestos. We had numerous air quality monitors around there testing for particles in a radius surrounding the facility. This is a large facility, huge ships and we have one monitor with limited testing as required in the conditions.

**Dr MEHREEN FARUQI:** You mentioned limited monitoring but in council's submission a statement was made that there is under-investigation by the EPA and other regulators. Why do you think that is the case?

**Mr COLE:** I keep in contact with the EPA and there have been a number of community meetings. Everything that keeps coming out at these community meetings and all the statements that keep coming back are that everything is under investigation. There have been no mitigation strategies. The facility has been in operation for 1½ years. It is a long time. The number of submissions that council has forwarded alone to the EPA totalled about 158 at the time of that letter and more and more have come in. At the beginning of the year the EPA was talking about creating an investigation plan for the noise testing. To date I understand the EPA has done one ship inspection. Everything is on a fairly distinct time lag, if that makes sense. We have been talking to the EPA for a long period. There is no mitigation strategy. There are no known long-term strategies put in place. It took a very long time to even just get an investigation strategy up and running for noise, even though there were 75 breaches in the test period.

**Dr MEHREEN FARUQI:** What could be done immediately to address all these concerns that you have or, indeed, some of the more major ones before the start of the upcoming cruise season?

**Ms HORROBIN:** I am happy to take that. I understand that if we were to move to low sulphur fuel immediately then that would clearly be one way to mitigate the risks. Beyond that I think the ships need to be removed until such time as they are appropriately regulated.

**Dr MEHREEN FARUQI:** And over the long term, the medium term, what do you think?

**Ms HORROBIN:** Over the medium term we have been calling for and certainly what appears to be international best practice in the Northern Hemisphere is the installation of shore-to-ship power, use of low sulphur fuel, 0.1 per cent fuel as in the emission control areas in the Northern Hemisphere and possibly the investigation of the use of scrubbers which are filtration systems for the smoke stacks.

**The Hon. GREG DONNELLY:** I thank you for the work you are doing on behalf of your local community on this very important issue. Ms Horrobin referred in her opening statement to health matters that have been brought to her attention from the community. She went through a list and said "to name just a few" or words to that effect. Ms Horrobin, do you have a definitive list that you have established on the nature of the various complaints that have arisen as a result of this matter?

**Ms HORROBIN:** We do not have a definitive list of every single symptom that the community has been experiencing but we definitely do have anecdotal listings of a variety of symptoms—all of which are consistent with extensive documentation available through both medical research houses in Australia and the World Health Organization internationally.

**The Hon. GREG DONNELLY:** I am just trying to establish whether there is a hierarchy of complaints. I presume you field phone calls, emails and other forms of communication from the community. Have you been keeping a tally to work out which are the most serious?

**Ms HORROBIN:** I am a member of the community so the evidence that I can give you is based on the discussions I have with my neighbours and other community members. So from my perspective respiratory conditions are definitely high on the list—both asthma in kids and other respiratory conditions in adults—as is eye irritation such as bloodshot eyes, which is my symptom, and other forms of eye irritation which people have not previously had; certainly I had not. People are also reporting heart palpitations and nausea. So people feel unwell when the ships are in port. For example, if you are sitting in a room trying to work a headache will begin—locally we now call it the cruise ship headache—which makes you feel lethargic and means you are unable to complete tasks that you are doing. Those are the top symptoms that I hear of.

**The Hon. GREG DONNELLY:** Is that last one you mentioned arising from noise? Is that what causes it?

**Ms HORROBIN:** For me personally, no; it arises from fumes. But for those residents who live close to the cruise ship terminal there is definitely an issue with noise. Some ships in particular literally sound like aeroplanes taking off.

**The Hon. GREG DONNELLY:** For the benefit of the Committee and people who are not familiar with the actual sounds, are we talking about particular sounds from the ships? Are they horn sounds?

**Ms HORROBIN:** For some of the ships it is the noise of the engines.

**The Hon. Dr PETER PHELPS:** Most ships run on turbines so Ms Horrobin is correct—they do sound like aircraft because they are running on turbines.

**The Hon. GREG DONNELLY:** For the purpose of the record I was just giving the witness an opportunity to explain.

**Ms HORROBIN:** There are multiple complaints but the most consistent noise is the noise of the turbines of the ships. Some ships are worse than others in that regard. I am several blocks back from the cruise terminal but I know when a particular ship has arrived at 6.35 a.m. because I can hear it arriving when I am in bed. There are other complaints that come from residents nearby about noise from sound systems, PA systems, music et cetera emanating from the ships. The most consistent noise that occurs throughout the stay of many of the ships is from the turbines.

**Mr STAMOLIS:** The other key point of course is that we know there is ongoing noncompliance in terms of noise. That is an ongoing thing. It has been monitored. I think Mr Cole pointed out earlier that the initial measuring of noise showed that 75 per cent of the ships were exceeding or noncompliant with noise levels. They continue to do so right now.

**The Hon. GREG DONNELLY:** So this is noise from turbines and/or other sound emanating from the ships?

**Mr STAMOLIS:** Yes, there is a wide variety of noises associated with cruise ships.

**Ms PORTEOUS:** Council keeps a record because a lot of the submissions that have gone to the EPA have also been sent to council. So we have a record of all of those. Obviously they are the record of the different issues that have been raised.

**Mr COLE:** Absolutely. I guess there are the top five or six that come to mind from reading the 158 submissions, including noise—the turbines, the announcements and those types of things. Then we have vibration. A lot of the time when the ships are powering up or coming in they vibrate. This is an old area. A lot of houses have not been designed to deal with this. So vibrations are felt through houses and windows start rattling. Another issue is air quality. A lot of people say they cannot even walk outside their kitchen door without getting an influx of odour and toxins—it is similar to walking next to an old diesel bus. Those are the primary issues. Another one is reduced quality of life.

**The Hon. GREG DONNELLY:** On the issue of air quality, to differentiate the issues, if they are to be differentiated, obviously there is the pollution emanating from the funnels of the ship and the diesel being burnt by the engines. Are there odours that emanate from the ships other than the odour from the engines?

**Mr COLE:** They have not been highlighted in any of the submissions that have been made. It is normally just the odour from the exhaust, in my understanding.

**Ms HORROBIN:** That is right.

**The Hon. GREG DONNELLY:** So if we combine the two together, that is quite a comprehensive coverage of the key concerns raised by the community?

**Ms HORROBIN:** Yes, obviously the odours then raise awareness in the community members. The research we have done shows that the World Health Organization says that diesel exhaust is a group 1 carcinogen, which means it does cause cancer, and is associated with all of the health symptoms we have spoken about.

**Mr STAMOLIS:** We have talked about the impacts outside, but in fact a gust of diesel through your bedroom or lounge room window is similar to a smoker being inside your house. You do not get rid of that odour very quickly; it tends to stay there for quite some time.

**The Hon. GREG DONNELLY:** So it is there and it does not disperse quickly?

**Mr STAMOLIS:** No.

**CHAIR:** Before I move on to the Government members for questions I have a point of clarification for witnesses from Leichhardt Municipal Council. Who does the noise monitoring? Is it the council, the EPA or some other agency?

**Mr COLE:** My understanding is that it is done by consultants engaged by the Sydney Ports Corporation.

**The Hon. Dr PETER PHELPS:** My understanding is that up until recently this area was a discharge point for car ferries from Asia in particular. Is it still being used as a discharge point for the car ferries?

**Ms PORTEOUS:** It has not been used by the car ferries I think since about 2008. That was really not so much wharves Nos 5 and 4—they were more for general cargo. They were used as a working harbour; they have been used as a working harbour for many years. They worked very well with the community in that sense. But the impacts of the cruise ship terminal are completely different.

**The Hon. Dr PETER PHELPS:** Is your chief objection to the quantum of the ships coming or likely to be coming or is there a material difference in the output of fumes and smoke?

**Ms HORROBIN:** These ships are fundamentally different to anything that has ever entered White Bay.

**The Hon. Dr PETER PHELPS:** Has the council thought about using some council funds to establish its own air quality monitoring facility in the local area? If the complaint is that the EPA is not doing enough, has the council said that maybe it will establish its own air monitoring facility?

**Ms PORTEOUS:** I think it would be fair to say that, as far as we can see, the EPA is not doing anything in terms of actually addressing the concerns of the residents. We have been talking about this for 1½ years and it is getting worse and worse. Yes, we have certainly asked questions about what the cost would be of putting our own monitoring in. It is a very substantial cost. Mr Cole can provide more details on the cost.

**Mr COLE:** At one stage we got some quotes from an air monitoring company and over a two-week period the dollar value was upwards of \$20,000 to \$25,000. Council is not the regulator here and our funds are limited to the areas that we are the regulator for. We cannot really divert those funds to something which is the responsibility of State regulators.

**Ms HORROBIN:** I have a very quick point to make about monitoring. The cruise lines will tell you that the measured results from the monitors are 40 per cent below the legal limit. Therein lies the problem. The community does not believe that more monitoring is the solution here. We know what is coming out of the funnels. There are readily available calculators—you can enter the amount of fuel that needs to be burned and they will tell you exactly what is coming out of the funnels. We do not need single, stationary monitors to tell us what is going on; we know what is in the air we breathe.

**The Hon. Dr PETER PHELPS:** Has council looked at the idea of seeking legal representation for a nuisance tort? Is council statutorily prohibited from bringing a nuisance tort against the cruise lines? I honestly do not know the answer to that question

**Mr COLE:** I would have to take that on notice and talk to our legal advisers.

**The Hon. Dr PETER PHELPS:** It would seem on the face of it, unless council is statutorily barred, council would have the ability to seek redress via a nuisance tort. The old ruling of *Rylands v Fletcher* has been statutorily abolished in New South Wales but a nuisance tort would seem to be an option. In relation to the actual presence of cruise ships themselves, are you objecting entirely to cruise ships berthing there? Or would appropriately scrubbed ships, with shore-to-ship power, be acceptable to both the council and the community?

**Ms PORTEOUS:** I think the position of the council remains that it is opposed to the location of the ships there. That was never actually the preferred location if you look back historically at the planning proposals—it was more of a default position because there were plans for Glebe Island. There were plans for some of the other wharf bays. It was never the best position for it, because it was acknowledged that there would



be a very significant impact on residents. As they are located there, the important thing now is to put all those measures in place to limit, as much as we can, the impacts of air, odour and noise pollution on residents—and none of that is in place at the moment.

**Mr STAMOLIS:** I think it was clear from our early campaigning that the community has a high level of concern about operating this sort of industry in a high-density residential location—right next to family homes. In fact over the past 18 months it has brought the most serious health risk to Balmain's population in many decades. This could be the most serious health risk for residents of Balmain—certainly it is for the nearly 30 years that I have lived in Balmain.

**The Hon. Dr PETER PHELPS:** But isn't the housing in the Rocks high-density too? It is right next to the main terminal.

**Ms PORTEOUS:** It is quite a way away.

**Mr STAMOLIS:** Yes, it is a lot further away.

**The Hon. Dr PETER PHELPS:** In that regard, the majority of the area around White Bay was previously industrial, including the White Bay power station, was it not?

**Mr STAMOLIS:** No, in fact this wharf, as you know, was built in 1970. There was a major community protest in the late 1960s to stop this from being extended to become part of the working harbour. So in fact this area here has not been intensively used as other areas may have been, like Glebe Island in particular.

**The Hon. Dr PETER PHELPS:** Was there any opposition from the local member at the time to the positioning of the cruise ship facilities at this location?

**Ms PORTEOUS:** The local member at the time was Verity Firth. My recollection is that she was advocating for the cruise ship terminal to be at this location. That position was not shared by council, and it was not shared by many of the residents.

**The Hon. Dr PETER PHELPS:** Presumably a member of Parliament would not do that arbitrarily or to the detriment of their own position, especially a local member of Parliament, unless they believed there was a material benefit to be gained from locating something there, would they?

**Ms PORTEOUS:** I think you are asking me to second-guess the local member at the time and I do not think that is a fair question to ask.

**The Hon. Dr PETER PHELPS:** I am. I withdraw the question. Just in terms of the location of this terminal, if the problems of the noise and the fumes were to be resolved, really the only impact you could possibly complain about is traffic. Short of the traffic on Robert Street leading up to the highway, what other lack of amenity is there in locating the terminal there if we can solve the problems of noise and fumes?

**Ms PORTEOUS:** I guess we are going into other territory here. If we want to go into traffic issues then I am happy to do so. Traffic is actually a really significant problem there, and it is getting worse by the minute. It is being compounded significantly by the location of the conference centre down at Glebe Island. We now regularly see traffic backed up all the way to the CBD when we have a large conference on Glebe Island and we have a cruise ship in. It is becoming incredibly difficult for residents to get off the peninsula when we have cruise ships in. We are also much more regularly getting two cruise ships in at the same time. Traffic is extremely significant and it is getting worse, but in terms of the other issues, none of them have been addressed. We would like to see them being addressed but there has been no effort, really, to address all of the current amenity impacts that we have got on the residents.

**Ms HORROBIN:** And certainly we are being told that any solutions that are implemented will take a long time to implement, so that is our biggest concern at the moment.

**Dr MEHREEN FARUQI:** Ms Horrobin, in the White Bay and Rozelle precinct group's submission, it states, " ... the EPA has been unable to control Sydney Ports Authority & other Government Agencies with vested interests." Could you expand a little on that? Is this because of a lack of resources that the EPA has or a lack of regulatory power, or are there any other reasons?

**Ms HORROBIN:** Look, I think it is clear that the Australian regulations are inadequate when compared with what is happening in Europe and North America. I think that comment comes from the discussion we have just been having, which is around the time frame that it is taking to actually have lots of discussions but to not actually get tangible results or a program for rollout of solutions. We would certainly want the EPA to have the necessary authority and power to quickly implement the solutions that are proven around the world and that the EPA themselves raised in their public submission in 2010 during the planning process for the terminal. I guess that comment also comes from the fact that those recommendations were addressed at the right time but were completely ignored, and that indicated to us that there was some issue.

**Mr STAMOLIS:** I think there are other things too, and the other side of it is that sometimes we know in the past when we have dealt with industries and public concerns, industries can put a lot of pressure on government and undue pressure on government at certain times. We are wondering why the cruise ship industry has been able to get away with non-compliance. They do not have to conform with international best practice. Why are we not pressuring them to do this? It is obvious that the industry is pressuring government in some ways as well, and that needs to stop.

**Dr MEHREEN FARUQI:** This is a question for the council: You have also mentioned that because there are so many agencies involved in White Bay, there is a lack of coordination. Who do you think is responsible, or who does the community think at the end of the day is responsible, for that coordination and who should be responsible?

**Mr COLE:** I guess the best example I can give you is actually when councils started forwarding all the submissions to start with. The EPA redirected pretty much all of them to its other agencies—the Department of Planning and Environment; they tried to get Roads and Maritime Services [RMS] involved because the ships were actually in the harbour, and everything went back to Sydney Ports, "Oh, they're the ones undertaking the functions so they are responsible"—and they wanted to, I guess, sit in the background and just provide the technical advice. I do not know about you but when I think of the EPA I think of an environmental leader, an independent regulator who can come in and sits over the top. These are large issues. They are within the harbour. They affect a large community. I would assume that the EPA would take responsibility for that and say, "We're the regulator. We will find the solutions and implement them without any influence, or as an independent agency."

**Dr MEHREEN FARUQI:** What role has the council played to address community concerns? I know that you have been a focal point, I guess, for the community to raise concerns with, but what other roles have you played in terms of community liaison, community engagement or helping to facilitate that engagement with the EPA?

**Mr COLE:** When we received complaints about health concerns, we actually contacted the New South Wales health department. We discussed it with our local public health unit and it was actually the public health unit that dragged all the other regulators—Planning, the EPA and Ports—to have ongoing community meetings. These have been happening fairly infrequently but every three or four months, so we have been liaising with those groups and talking to those communities. Where possible the council has been sending out updates to the community. There have not been a lot of updates coming from the actual regulators themselves. We have been forwarding correspondence. We get some fairly standard responses back—"the whole-of-government approach" and those types of responses and "We're investigating and working with the community to fix things"—but that information has not readily been coming from the State or State agencies, in my opinion.

**Ms PORTEOUS:** We have also been putting political pressure on by, you know, writing to the various Ministers and also to Sydney Ports. I was the mayor when a lot of the negotiation was happening with Sydney Ports and we were getting a lot of assurances at the time that there would be no environmental impacts on the residents, and we had those assurances given to us very strongly. Since then, they have gone very quiet and now that the one year monitoring has ceased, they have really stopped engaging on the issue. But we continue to advocate very strongly for our community on those issues.

**The Hon. GREG DONNELLY:** You have just mentioned "assurances" that were given. What assurances were given? Were they given in writing, or were they verbal assurances given over the phone?

**Ms PORTEOUS:** They were verbal assurances that were given at meetings that were held with the chief executive officer of Sydney Ports and some of the staff of Sydney Ports with council staff and myself; also

in public meetings with Sydney Ports representatives where over and over again the issue about the concerns with the quality of the air, with the noise, with the vibration and with the odour that were going to be emanating from the cruise ships were raised and assurances were given.

**The Hon. GREG DONNELLY:** I am sorry to cut you off, but do you have, for the purposes of helping us to understand this, a record that may have been kept of your own minutes or file notes of meetings with these representatives and undertakings or assurances they gave? Do you have that information—that level of precision?

**Ms PORTEOUS:** Look, I would have to take it on notice. The meetings that were held were official meetings. There were a lot of staff members present. A lot of Sydney Ports employees were present. There would be minutes that were taken at those meetings, so we would seek to—

**The Hon. GREG DONNELLY:** Could I ask you to take on notice—

**Ms PORTEOUS:** Yes.

**The Hon. GREG DONNELLY:** —providing all meetings with the relevant government representatives where assurances or undertakings were made, including the dates of those meetings and, if possible, who was present, who made those undertakings and what were the undertakings? Were there any undertakings made in regard to any Ministers who said that this would be done or that would be done in terms of the issues that had been raised on this matter? It is obviously bureaucrats to whom you refer in your meetings, but I am asking about a ministerial level.

**Ms PORTEOUS:** It is something that has actually travelled across different Ministers.

**The Hon. GREG DONNELLY:** Yes.

**Ms PORTEOUS:** And, in fact, different governments as well because it is something that actually began back in 2008. It has still been continuing. Obviously in 2013 we have been negotiating on these issues, so it has actually travelled through a few different ministerial hands. But there have been various assurances that were made during that period of time about the fact that the controls that were in place would adequately ensure that the residents were protected. Obviously, that has not come about.

**The Hon. GREG DONNELLY:** We are talking about the current Government here. They are the ones in charge, so to speak. Since March 2011, with the various Ministers who have had responsibility for this, have assurances or undertakings been given to you or indeed the community group represented here today about the issues that have been raised?

**Mr STAMOLIS:** Look, I think it is only natural that as any industry opens up and operates in an area, they will be monitoring their impact on an area, review that over time, and make adjustments. The cruise ship industry has made none. Ports have made absolutely zero attempts to address the problems. You would expect in any case that, regardless of assurances or not, any industry would want to operate in its surrounding environment in the most pleasant way possible and with least impact. They should be doing that as an industry initiative anyway, but from my understanding of it—and I will check this just in case it is not correct—the Minister had made specific reference to the need for onshore power, should it be needed. I think it is quite clear over the past 18 months that this has been needed from very, very early on in the process. But I will check that out and I will submit that later.

**The Hon. GREG DONNELLY:** Is it also the case that the current Government has driven very hard the issue of increasing and enhancing the number of visits of cruise ships to Sydney? It has been part of their policy that they have been very unapologetic in promoting that in the community?

**The Hon. Dr PETER PHELPS:** Point of order.

**Ms PORTEOUS:** What we know is that there is a very significant increase in the number of cruise ships. It has increased from year to year.

**CHAIR:** Excuse me, councillor. A point of order has been taken.

**The Hon. Dr PETER PHELPS:** I am not sure that the Mayor of Leichardt council can give an overview of what the State Government policy is in relation to cruise ships.

**Ms PORTEOUS:** I was not going to give that. I was going to give anecdotal—

**The Hon. GREG DONNELLY:** To the point of order: With the greatest respect, we have the Mayor whose council boundaries are impacted directly in the area where the cruise ships are arriving. She along with the council would be equally aware of the various utterances by the Minister in the public domain and in the Parliament about boosting the number of visits by ships to Sydney.

**The Hon. Dr PETER PHELPS:** Further to the point of order: Victoria Road runs through the council's boundary as well, but I am not sure that it would be appropriate to ask the Mayor about Duncan Gay's pronouncements in relation to trucking in New South Wales.

**CHAIR:** I uphold the point of order. Perhaps the Hon. Greg Donnelly could direct his question more to any observed increase in the number of ships.

**The Hon. GREG DONNELLY:** Thank you. I accept your ruling, Chair. In terms of looking at or examining ship visits to the relevant area, are you able to say that there has been a small, medium or significant increase in ship visits, say, over the last 18 months to two-year period, or the 18 months period, basically since it opened?

**Ms HORROBIN:** There has certainly been an increase in the number of ship visits and looking back even further than that; and, more to the point, looking at the ships' schedule for the next two years, it is scheduled to increase by 56 per cent in terms of ships visiting Sydney Harbour.

**The Hon. GREG DONNELLY:** Where do you get that percentage from?

**Ms HORROBIN:** Because Sydney Ports publish a ship arrival or ships' schedule.

**CHAIR:** Okay.

**The Hon. GREG DONNELLY:** Sure. So it is on their website?

**Ms HORROBIN:** You can see day by day and simply do the calculation.

**The Hon. GREG DONNELLY:** Great. Thank you.

**Ms PORTEOUS:** Could I add a point as well because what we are also seeing more often is two cruise ships being in at the same time. It is important to note that there was no modelling ever done on having two cruise ships in at the same time. There is no modelling in terms of traffic, but there is also no modelling in terms of the impacts on air, odour and noise.

**Ms HORROBIN:** Can I just also add in terms of this discussion of cruise lines: Sydney and Australia, as I understand it, are the fastest-growing cruise market in the world. With that in mind, you will hear I am sure during the course of this inquiry that cruise lines are acting within the law in terms of what they are doing and the way that they are operating their ships. Whilst this may be correct, we believe that living within the law whilst knowing the law is inadequate and harming citizens' health is not reasonable, nor is it safe. We know they know because they have needed to put mitigating solutions in place in the Northern Hemisphere.

**The Hon. GREG DONNELLY:** Thank you.

**Mr STAMOLIS:** I would also like to add that I think the cruise ship industry will grow more in Sydney once more and more non-complying ships in the Northern Hemisphere cannot locate a port up there and will be coming down here. We will be faced with a great problem.

**Mr SCOT MacDONALD:** Do you engage with the cruise operators? I understand here that you are talking to Ports and various other government agencies, but do you engage directly with Carnival or anybody else like that about some of these things?

**Mr COLE:** Not at a staffing level. I understand that the former mayor might have had a conversation but I was not privy to any of the details of that.

**Ms PORTEOUS:** I have had informal meetings with the cruise industry, yes.

**The Hon. RICK COLLESS:** The shape of White Bay is roughly circular. When the ships come in—and you made the point about two ships being in there at once—where are they actually parked? I gather it is on the northern side of the bay.

**The Hon. Dr PETER PHELPS:** I think you berth a ship rather than park it.

**The Hon. RICK COLLESS:** Park it or berth it.

**Mr SCOT MacDONALD:** He is from Inverell.

**The Hon. RICK COLLESS:** When these ships berth, where are they actually pulled up—on the northern side of the bay and on the eastern-most end? Is that correct?

**Mr COLE:** I would say that that would probably be a fair description. It is right next to the actual terminal facility. Grafton Street—if you can see Grafton Street.

**CHAIR:** I think it is called line astern.

**Mr COLE:** Yes, that is the one.

**The Hon. RICK COLLESS:** Grafton Lane, yes. I know where you mean now.

**Ms PORTEOUS:** Grafton is wharf 5.

**The Hon. RICK COLLESS:** There is a terminal there.

**Ms HORROBIN:** Wharf 5, which is most the most frequently visited wharf, is immediately parallel to Grafton Street, and wharf 4, at which ships stayed for an entire week last week, is immediately parallel to Donnelly Street and Birrung Park.

**The Hon. RICK COLLESS:** You mentioned low quality fuel and the problems resulting from its emissions. Would those problems be overcome by using Australian Standard diesel, which is low in sulphur?

**Mr COLE:** I am not a technical expert but I understand that if you use better quality fuel it can improve the exhaust.

**Ms HORROBIN:** We would certainly be delighted if they used the same fuel that is used on our roads.

**CHAIR:** Or better?

**The Hon. RICK COLLESS:** I guess that is the fuel that is available in Australia rather than fuel they bring with them?

**Ms HORROBIN:** Correct.

**The Hon. Dr PETER PHELPS:** There have been instances in the past where there has been more than one cruise ship in port. Prior to the use of White Bay did they go to Barangaroo where there was still an operating port?

**Ms PORTEOUS:** Temporarily they were at Barangaroo, yes.

**The Hon. RICK COLLESS:** Which is 100 metres away?

**Ms PORTEOUS:** It is on the other side, directly opposite.

**The Hon. RICK COLLESS:** Two hundred metres away?

**The Hon. Dr PETER PHELPS:** A prevailing southerly wind would then disperse it over the harbour. Did you have comparable concerns when Barangaroo was being used as an active port?

**Ms PORTEOUS:** No, we did not.

**The Hon. Dr PETER PHELPS:** Because you would expect that a prevailing southerly or south-easterly would blow it over the harbour and disperse it in time rather than flying straight up over the sandstone escarpment and hitting the houses?

**Ms HORROBIN:** Correct.

**The Hon. Dr PETER PHELPS:** Perhaps if we kept Barangaroo as an operating facility—

**CHAIR:** There is an idea.

**The Hon. Dr PETER PHELPS:** —rather than the polite bourgeoisification and parkisation of our working facilities it would have been better in the long run for people.

**CHAIR:** Do you have further questions?

**The Hon. Dr PETER PHELPS:** No, it was just an observation.

**The Hon. GREG DONNELLY:** Ms Horrobin, you made comment in your opening statement about interim solutions and the longer term permanent solutions—my words. You distinguish between the two. The council representatives might also like to assist in this regard. Can you take us through the differentiation between the interim solutions and the more permanent ones so we can understand what you are getting at?

**Ms HORROBIN:** If I start with the permanent ones first, it is clear from the experience in the Northern Hemisphere that the best solution is implementation of an emissions control area. It is possible to do this at a State level because the state of California did it in the United States. That would mandate the use of 0.1 per cent low sulphur fuel. That is the first step. The second is the use of shore-to-ship power. Shore-to-ship power gives us two benefits that address our two issues. One is that ships can turn their engines off while they are at berth, so they literally come in, power down, turn their engines off for the remaining seven hours or so that they are typically at berth and then power up again to leave.

**Mr SCOT MacDONALD:** Can I ask a question? Sorry, Mr Donnelly. I wonder if that is likely to happen. My understanding is that engines of that size do not like to be shut down for two or three days; they are more efficient if they just run.

**Ms HORROBIN:** The vast majority of the ships that come into White Bay are there for the day. They come in about 7.00 a.m. and leave around four or five in the afternoon, on average. Certainly there are ships that come in overnight. We have had 24 of them in 2014, but the majority are there during the day. I point to the experience in the Northern Hemisphere, which is what they do.

**The Hon. Dr PETER PHELPS:** Turbine engines—turn them on, shut them off.

**CHAIR:** Thank you, Mr technical expert. I believe the Opposition has the lemon. Sorry for the interruption, Mr Donnelly.

**The Hon. GREG DONNELLY:** I am grateful that we can now hear the answer without interruption.

**Ms HORROBIN:** Coming back to what we are talking about, we are asking for low sulphur fuel, shore power and an emissions control area. It addresses the noise issue and the emissions issue. The reason we are asking for interim solutions is because we have consistently, through the multi-agency meetings, heard the message it is very complex and very difficult and it is going to take a very long time. That, to me, says more than a year to implement something like shore-to-ship power. If that is the case, we say we cannot live through another cruise season like we have in the past. That is why we are calling for interim measures.

**The Hon. GREG DONNELLY:** Do you have a view about what they specifically mean?

**Ms HORROBIN:** As I have said to the Environment Protection Authority many times, I am open to any solutions. However, I cannot see how you remove the immediate risk beyond removing the ships until such time as the regulations meet the standards that we require that are met internationally.

**The Hon. GREG DONNELLY:** Does the council have any comment about distinguishing between interim and permanent?

**Ms PORTEOUS:** We concur with that. Obviously we want to see the number of ships limited. At the moment there is no monitoring going on because the monitoring equipment has been removed. We want to see monitoring equipment reinstalled.

**The Hon. GREG DONNELLY:** What monitoring equipment has been removed?

**Ms PORTEOUS:** The air monitoring equipment that was installed by Sydney Ports has been removed. There is no air monitoring equipment in the local area. There is no permanent noise monitoring installed in the area. Consultants come in, measure for a day and go out again. We want to see permanent monitoring equipment installed in the appropriate locations so that we can properly monitor. We would like to see increased penalties and we would like to see that there are legislative penalties for any breaches that are, in fact, acted upon as well.

**CHAIR:** Before we conclude, I will ask this question of either group: Insofar as the noise is concerned, has anybody offered the solution of noise-proofing the houses that are affected as we did with Sydney airport, for example?

**Ms PORTEOUS:** No, it is not possible.

**CHAIR:** Because of the heritage type of building?

**Ms PORTEOUS:** Yes, because of the heritage buildings in the area.

**CHAIR:** Thank you. The time for this session of the inquiry has now concluded. Thank you to the two groups for agreeing to talk to us today. The secretariat will send to you any questions on notice. We would be very grateful if you could respond within 21 days. Thank you for your attendance.

**(The witnesses withdrew)**

**RACHEL LOUISE WALMSLEY**, Policy and Law Reform Director, Environmental Defenders Office,

**JEFFERY OWEN SMITH**, Chief Executive Director, Environmental Defenders Office, and

**NARI SAHUKAR**, Senior Policy and Law Reform Solicitor, Environmental Defenders Office, affirmed and examined:

**CHAIR:** Before we proceed to questions from the Committee, would any of you like to make an opening statement?

**Ms WALMSLEY:** Yes, we would, thank you. Thank you for the opportunity to appear today. As many of you know, the Environmental Defenders Office [EDO] New South Wales is a community legal centre. We specialise in public interests environmental law. EDO has a history of constructively engaging with the New South Wales Environment Protection Authority [EPA]. It has made numerous law reform submissions on specific issues and general compliance and enforcement policy, participated in consultation processes on various programs and policies such as licensing reviews, load-based licensing and contaminated lands, and engaged on behalf of community clients in regard to specific projects and pollution incidents. Many callers on our community advice line are referred to us by the EPA and we note the willingness of the agency to discuss law reform with stakeholders.

In the wake of the Orica Kooragang Island incidents of 2011 and the subsequent Legislative Council inquiry, EDO New South Wales prepared a report for the Nature Conservation Council entitled "Clearing the Air: Opportunities for improved regulation of pollution in NSW". Our submission to this inquiry draws on the analysis and the 33 recommendations in that report, on community feedback from our advice line, on EDO's experience in advising on environmental laws and bringing public interest cases in the Land and Environment Court on behalf of local communities.

We note that the EPA is making progress in some key areas. For example, since 2011-12 there have been improvements to the public register of pollution licences and publication of monitoring data. The EPA has also had recent success in prosecuting Orica for the breaches in Kooragang Island and Botany and we also welcome and support recent legislative amendments to increase penalties. However, there are opportunities to improve the performance of the EPA, as noted in our submission, which Mr Sahukar will now summarise.

**Mr SAHUKAR:** Our submission examines four key areas for an effective regulator and makes recommendations relating to these. First is the improved use of regulatory tools. For example, we propose that pollution laws be amended to build ecologically sustainable development [ESD] and its principles into EPA and other Government decision-making and to report on how that is done. The legislation should also specify the EPA's responsibilities as enforceable duties. These duties should require that the EPA sets and reviews lists of pollutants and emission standards and imposes best practice standards on all licensed facilities. This is currently open to discretion.

Legislation should also impose a duty on all facility operators to prevent or minimise environmental harm arising from their activities. Licensing should take better account of cumulative impacts in the receiving environment, for example, protection of the environment policies could be used to reduce ambient pollution and discharges. Fees for load-based licensing should be increased to reflect the social and environmental costs of pollution, including for greenhouse gas emissions and other substances. This reflects the polluter-pays principle, which is part of the objectives, and could also allow better cost recovery.

The second area is community awareness, involvement and access to information. The EPA has emphasised that community engagement is one of the most important areas for improved EPA performance. Ways to improve community trust and the EPA's responsiveness would include improving formal opportunities to participate in licensing decisions and reviews, reinstating community representation on the EPA board as per the O'Reilly review recommendations, addressing public perceptions about lack of independence from industry and further improving access to pollution information, decisions and enforcement. Thirdly, we address compliance, monitoring and enforcement. For example, the Committee should support stronger offences and higher fines and penalty notices for forestry breaches, allowing community members to bring action to remedy forestry breaches, and a review of environmental enforcement to ensure Government policies minimise harm.



Finally, we made recommendations on regulatory aims, resourcing and Government priorities. For example, strengthen the EPA's role in relation to strategic planning and improve the way decision-makers consider pollution and cumulative impacts in the planning system, identify additional resourcing and provide for cost recovery from industry in accordance with the polluter-pays principle. Also, New South Wales Government environmental priorities should be linked to priorities identified in evidence, such as state of the environment reports, cross-agency environmental data and statewide natural resource management targets. It may assist these aims to establish a separate state of the environment authority or task force directed by an independent chair to coordinate the 2015 State of the Environment report. We hope our analysis and recommendations assist the Committee.

**Dr MEHREEN FARUQI:** Thank you very much for your detailed submission and for all the work that you do on behalf of the community and the environment. My first question is in regards to a reference that has been made to the United States EPA in your submission as well as many others as a good practice environmental regulator. Could you mention a couple of things that the US EPA does that could be done by the New South Wales EPA in terms of strengthening the EPA's role?

**Mr SAHUKAR:** A couple of things. First, the US Clean Air Act requires that the US EPA publish and provide a list of pollutants, prescribe air quality criteria for those pollutants and set ambient air quality standards where those criteria have been issued. Although that would be consistent with the objects in the New South Wales EPA legislation, which refers to adopting standards and setting targets, there is no obligation on the New South Wales EPA to do that, hence it is discretionary. Secondly, the US EPA is also required to list the major sources of almost 200 dangerous pollutants identified by US Congress and to regulate emissions by reference to the cleanest existing facilities that emit those pollutants.

The new and existing plants in the US must then do what they need to do in order to meet those standards. Again, that broadly aligns with the Protection of the Environment Administration Act and EPA objects to build in pollution prevention and to reduce discharges to harmless levels, but the US approach means that those facilities are regulated and expected to adopt those standards and the EPA can be held to account for it in the US.

**Dr MEHREEN FARUQI:** In your submission you also note that "After nearly two decades of operation we submit that positive aspects such as ecologically sustainable development commitments could have been better implemented". Could you give some suggestions on how the EPA could better operationalise ecologically sustainable development [ESD] principles into its work?

**Mr SAHUKAR:** There are some references obviously in the objects of the pollution laws and there are a few areas where the Act specifies that ESD has to be considered as a factor in certain licensing decisions, for example. But what we do not see, and this is an issue both in the pollution sphere as well as in the wider planning sphere, are many specific ways that those ESD principles are set out in the legislation and are required to be taken into account by decision-makers. So we have suggested that the legislation could be amended to specify additional requirements to consider either specific principles that are relevant under ESD, such as the precautionary principle or the polluter-pays principle, as well as general references to those principles in key decision-making points throughout the Act, whether it be licensing, whether it be a strategic planning sort of a phase, whether it be protection of the environment policies, and that could be built into the legislation.

**Dr MEHREEN FARUQI:** Just on the protection of the environment policies, I think we know that there have not really been any developed within the EPA. Why do you think that is the case and what is the advantage of having those policies?

**Mr SMITH:** I am happy to take that one. I am not sure why they have not been developed. It is not really a question that we can do more than speculate on. But I think they provide the opportunity to marry the technical expertise, which the EPA obviously brings to bear on these questions, with a broader remit around getting the community involved, and to me that is the real attraction of these, that you can set appropriate levels around airsheds or watersheds in that more technical sense and then you can have the community involved in that discussion around what works in a particular environment, geographical area and so on. So I think there are real opportunities and they have been used usefully in other jurisdictions. As I understand it, the EPA is contemplating that but, as you say, 20 years on and we have not seen any at this point.

**Dr MEHREEN FARUQI:** In your submission there are also suggestions that the EPA may be under-resourced. What do you base these on and if the EPA is provided more resources what areas do you think those resources should go into?

**Mr SAHUKAR:** One thing that our submission canvassed was looking at other EPAs in Australian States and Territories, not in terms of funding necessarily but in terms of their duties, and we found that the EPA in New South Wales has a significant range of regulatory duties across a number of areas, including pollution, forestry, pesticide use, coal seam gas. A lot of these are growing regulatory areas and the EPA is accruing these obligations. It is important that the ability to regulate those industries keeps up with the expansion of those industries and on that basis we have suggested that additional resources be provided to the EPA.

In terms of where those resources should go, I believe that they should in part go on compliance and enforcement issues as well as integrating the EPA better into strategic planning processes—so an interaction between a pollution and a planning system, which are both key to environmental regulation in New South Wales. The third area would be community engagement and making sure that the community understands what the role of the EPA is, that the community knows that they can have a timely and responsive interaction with the EPA when issues are raised and that the community can participate effectively in policy decision-making and decisions around licences that affect their local area and the pollution levels in their local area.

**Ms WALMSLEY:** If I could just add to that in terms of where the extra resources come from. We would also support exploring costs recovery more to support the regulatory role of the EPA.

**The Hon. GREG DONNELLY:** Thank you for coming along today to speak to your submission. I will start with a general question. In terms of other jurisdictions in Australia, both State and Territory, are there any agencies that appear to be achieving the sorts of outcomes that you are looking for that are worth aspiring to? We are familiar with New South Wales and how that is evolving but are there are other agencies in other States and Territories that you could compare and say they are worth having a look at it and how they go about doing their business?

**Mr SAHUKAR:** I would say there is no one jurisdiction that we would identify as an exemplar. We know that the Victorian EPA has done a recent overhaul and review of air processes but I cannot say I know in detail how that is going. It would be interesting to see. Certainly we are pointing to the US overseas, but I would not say I would identify any particular jurisdictions in Australia—they are all struggling with the same problems, I suppose.

**The Hon. GREG DONNELLY:** When you say they are dealing with the same problems or they are trying to grapple with the same problems, what do you mean by that? What problems are you specifically thinking about?

**Mr SAHUKAR:** I guess the tension between the need to regulate effectively in an environment when the costs of doing so and the challenges in doing so are considerable. Every regulator is going to have problems with resourcing and they need to prioritise where they are going to get the most bang for their buck, so to speak. So I think the limited budgets that are provided for environmental protection and the limited ways that environmental costs are factored into the way we do business are also a factor that affects that. Perhaps I should just add in terms of regulatory areas as well. Throughout the mining boom of the past decade and the general expansion of the economy, the number of businesses that need to be regulated and the size of the projects that need to be regulated have increased exponentially, and that is part of the challenge that regulators face.

**The Hon. GREG DONNELLY:** What are your concerns regarding the EPA's ability to adequately enforce licensing requirements and act on breaches? I know that it is picked up in your submission to some degree but would you like to elucidate that—the concerns about the enforcement of licensing requirements and acting on breaches?

**Ms WALMSLEY:** That is an issue that the EDO gets contacted a lot about. We have got a lot of client groups who are either interested in forestry or particular industries in their area who do call our legal advice line for advice on this. I think one of the challenges for the EPA is more clearly communicating to the community what their role is, what they do regulate and what they do not regulate. For instance, it can be a bit confusing because they enforce breaches in relation to private native forestry but not other native vegetation. They do forestry on Crown lands, they do contaminated lands where it is significant; where it is not significant that is the local council.

So there is a lack of clarity in the community, and the feedback we get in terms of what the EPA actually does. In terms of their effectiveness at detecting breaches and acting on them, I think there is confusion around that. If you look at their compliance and enforcement statistics, I think it was noted in 2012-13 that 72 prosecutions were completed, with 69 convictions. So when they do bring a prosecution they are very successful at doing that, but you have to look at that in the context of the number of breaches, and not all breaches are big and would lead to a prosecution obviously; it is the large body of other breaches that are brought to our attention by the community where there is a sense that the EPA often fails to act.

I think a couple of the case studies that this inquiry is looking at in relation to, for instance, the forestry one and in the Pilliga, community groups have consistently given the EPA information about breaches and there was the sense that the EPA had failed to act in a timely manner on the information provided to them. I think that is a problem. If you read the compliance policy of the EPA, they do have an innovative range of tools available to them and in our law reform work we often identify the regulatory tools in the POEO Act as being best practice, but when they are actually applied there seems to be a preference often for the softer options for compliance and enforcement, rather than the prosecution or some of the stricter options. As I said, we support recent increases of penalties because that will help the deterrence, but the EPA still has to have more of a presence in acting in a timely manner on breaches as they come up.

**The Hon. GREG DONNELLY:** You started off your explanation in terms of clarifying the boundaries around which some of these issues are caught and are dealt with. What is your submission about how the EPA more clearly communicates that to the community at large so that they understand the scope of its responsibilities?

**Ms WALMSLEY:** I am not sure there is a simple answer to that but certainly more community education. I think it would be of great benefit to the EPA to work on that partnership because it is often the community that brings them the information about pollution incidents or breaches. The community is obviously the first person there and can contact the EPA in a timely manner. So if there was a better partnership between local communities and the EPA I think that would have benefits in terms of environmental protection—if the EPA could act quicker on pollution incidents, for example. But part of that, again, is resourcing to allow the EPA to get out to local communities and explain what they do and explain their regulatory role and what they can and cannot do.

**Mr SMITH:** There are clearly a number of points in the system where you could do that. You could do that from the point of the environmental law hotline to start with and also at the council level at the other end when those inquiries are going there. Also I think with things like the compliance policy, seeing that as the start rather than the end of that discussion about where action is taken or not and, of course, what kind of action is taken. So more using those tools and getting out and explaining them more in a community engagement strategy I think would be very useful in clarifying some of those issues.

**Mr SCOT MacDONALD:** Can I go to your point about the EDO recommending more, I think you call it, third party access to taking actions or whatever? I want to be clear in my mind the EDO, as I understand it, was party to the anti-fossil fuel campaign where the strategy is to shut down the fossil fuel industry by legal action. Is that still the case?

**Mr SMITH:** No, it is not the case at all. You used the term that we were party to that. We are a community legal centre that literally every working day of the year attends meetings and provides advice on various documents. We did that for that document. There was a conference in the Blue Mountains—all this is in the public arena at this stage—and we did not present at that meeting but we were in attendance at that because a number of our clients were at that meeting. A couple of weeks afterwards, as I recall, Greenpeace produced a document, the antecedent of that public document, and we provided comments on that document. In particular, there was an aspect of that document in the draft form that talked about legal disruption. We said that that section should be thought of and called litigation and legal advice. Any action you take, whatever arena it is, needs to be based on legitimate prospects of success and it would be improper to do otherwise.

So I would like to clarify that we were not a party to that document any more or any less than any other process that we are involved with. Often we are attending these forums and providing advice. In this forum we did a submission in good faith, and there is toing and froing and it is a bit iterative and so on. At the exact same time the stopping the coal boom export or whatever the document was called came out, I was one of six people who was advising the then Minister for Planning, the Hon. Brad Hazzard, on various iterations of the planning

reform process—the independent review, the green paper and then the white paper. We were given up-front draft versions of that. So that is indicative of the kind of work that we do literally every working day of the year.

**Mr SCOT MacDONALD:** We just spent three minutes looking at that grey area, if you like, but if we took your recommendation on board, how could you say to this Committee and the community that vexatious legal claims, merit or otherwise, would not shut down forestry, extractive industries or an apartment building at Pymble? How can we look at that recommendation seriously?

**Mr SAHUKAR:** There is already a range of rights that the community has in relation to enforcement of environmental offences but also merit appeals under the planning system. The white paper process, the planning review, described those rights in New South Wales as iconic and said that it would retain those rights. In the areas of normal pollution laws and planning laws, communities already have rights to go to court to challenge decisions. Those rights are regulated by a range of professional obligations by the legal teams assisting those community members and by the rules of the court. In relation to forestry, there are no such rights for civil enforcement and that is an historical anachronism that we have suggested should be addressed and the protections that apply in relation to the planning system and the pollution system would equally apply to the forestry sector.

We have not seen development stop in New South Wales as a result of the existing rights that the community uses. In fact, those rights are not only beneficial for the rare opportunities that communities take to use those rights but the very fact that they exist means that decision-makers know that they will be held to account and that companies involved in the practices concerned also know that if the appropriate regulator is unable or unwilling to act, then the community can stand in and take action or the community can make sure that decisions are arrived at in a proper way and that they reflect the community's interests.

**Ms WALMSLEY:** If I can add to that, if you look at matters that are brought before the courts, there is absolutely no evidence that open standing provisions open the floodgates to a great deal of vexatious litigation. That just has not happened. For our clients to bring a case, it is a huge financial undertaking. It is an emotional undertaking. Our clients do not bring cases lightly. Quite often, according to our casework guidelines, we will actually advise them not to bring a case. We will say, "You have no prospects. There is no legal case there." So we actually perform that filtering role so we do not waste the court's time, and there are processes in place whereby the court will throw out any case that does not have proper legal prospects.

**Mr SCOT MacDONALD:** I appreciate what you say, and you might be a good filter, but we have had numerous inquiries in the past where people who literally live in the forest would, if they could—they have said—bring prosecutions. They have no assets to lose, so to speak. So you might be a good filter but with this third party merit thing, how would you stop vexatious, risk-free prosecutions from taking hold?

**Mr SMITH:** That brings up a point that I wanted to address, assuming in that scenario the matter comes to us. Is that the scenario you are talking about? Obviously any person in New South Wales can by-pass us and go straight to the court. We cannot.

**Mr SCOT MacDONALD:** No. I am talking about your recommendation which is more third party. I am not talking about the EDO. I just said I thought the EDO has some filter to say you have not got Buckleys. But we have had people appear at our forest inquiries, national parks inquiries, who would have no assets and no hesitation about bringing prosecutions and do it, I think, in a vexatious manner to grind that industry down, outside your sphere of influence.

**Mr SMITH:** I can answer that in both ways. If it came to us, we have clear internal systems in place and it is in everyone's interests that those systems work appropriately. If there is no reasonable prospect of success we will tell those people that there is none. We do not do that of our own volition either. If there is a significant matter then we will send that to senior counsel. We will do a brief to senior counsel and they play an active part in that filtering process. That protects us in the sense of any suggestion that we have done the wrong thing or got the call wrong. It also allows it to filter back down. We can say to our clients, "We did this. We looked at it in good faith and there is nothing here", and senior counsel has confirmed that is the case. So we have those internal provisions in place. The court also has its own mechanisms around frivolous and vexatious matters. The more broader structural issues around costs implications offer a significant disincentive to taking on those matters where there are no grounds of success. I also think that the literature has shown quite clearly, much of that by judges who have looked into this question, that there is no evidence of the floodgates being opened by those kinds of mechanisms.

**Dr MEHREEN FARUQI:** I understand that the EPA currently does not have the power to immediately suspend licences if pollution levels are exceeded. Do you think that is an important power and, if you do, why do you think it is important?

**Mr SAHUKAR:** In relation to suspension of licensing, it is important that the EPA has the powers to act quickly when there is an emergency and also that where there have been ongoing breaches the EPA is able to act to suspend the licence where that is appropriate. There are various procedural requirements around that, and that is appropriate. But we do not want to see companies being able to challenge the suspension of their licence in order to delay or obfuscate that process, particularly where that will impact on public health or the environment. I understand that there may be provisions in a forthcoming bill to partly address that, if they have not been passed already. So we have recommended, following on from our 2012 recommendations, that that power of the EPA be clarified.

**Dr MEHREEN FARUQI:** Going to those 2012 recommendations, they are the Clearing the Air report recommendations. How many of those recommendations have been implemented by the EPA?

**Mr SAHUKAR:** When we completed the report the EPA invited us to sit down and discuss the recommendations, and they provided us with the attachment to our submission to this inquiry in relation to the various recommendations. As you can see from those, generally the EPA was satisfied that it was pursuing its obligations appropriately and using its powers appropriately. Generally, I would say that those recommendations were not immediately taken up or there was not a great deal of receptiveness to the specific recommendations. However, since then we have seen some legislative and policy changes in the way the EPA does its work. We have seen that in recent penalty increases that have been introduced in the POE regulation. We are seeing it in bills before Parliament to increase the range of offences and remedies that are available under the contaminated lands Act and other Acts to reflect the good range of remedies in the POEO Act. So incrementally we are seeing a few changes here and there but not perhaps the bulk of the recommendations, and that is why we have reiterated those in our submission to this inquiry.

**Ms WALMSLEY:** If it would be of assistance to the inquiry, we can table the full report or provide an electronic copy of that full report.

**CHAIR:** We will take the tabled copy.

**Dr MEHREEN FARUQI:** Since the formation of the new board with the new EPA, the community and local council representative positions are not included on the board any more. I think you have made a recommendation that they should be. Why are you suggesting that that is the case, and why is it negative that they are not on the board at the moment?

**Mr SAHUKAR:** The EPA has acknowledged that community engagement is an important part of where they go next and an important part of how they do their job, including in terms of community trust, to be able to call the EPA and report incidents and to provide input on decisions that affect local communities that might be affected by cumulative pollution. We believe that community representation on the board and also local council representation on the board provide some measure of assurance to the community that community interests are at the heart of what the EPA does and in terms of the way that strategic planning is done within the organisation. That community engagement, community interest and community feedback is strongly valued by the organisation. In terms of the way the EDO contributes to, for example, law reform and proposals that the EPA is putting forward, whether it be a policy change or a legislative change, we are one of few community voices who engage with the detail of those proposals. Often the vast majority of submissions that are received by the EPA on those types of issues are from the industry side of the equation and it is important in terms of the EPA getting a balanced view of community opinion that the community and public interest be put at the centre of how the organisation does its business.

**Dr MEHREEN FARUQI:** Coming back to fines and prosecutions, in its submission the EPA claims to have a 95 per cent success rate in prosecutions. Your submission shows that the value of fines and penalties issued by the EPA in 2013 was at their lowest since 2008, but the number of prosecutions was at an all-time high. I am trying to figure out the analysis of this. Do you have any view on this?

**Mr SAHUKAR:** It is difficult to draw conclusions from prosecution statistics because there is a delay often in the time a prosecution occurs and the penalty is handed out. Obviously in the case of court proceedings

it is up to the court to determine the ultimate sanction. But I guess part of the issue that we have alluded to is that there is a range of penalties under penalty notice infringements, from minor offence provisions that are fairly routinely used in response to incidents, and those fines have been very low both in the forestry case, which is still the case now, as well as, for example, in relation to major pollution, water pollution and those sorts of incidents. The reliance on penalty notices is appropriate in certain circumstances but if a company knows that the only action that will be taken is a \$1,500 fine or a \$300 fine, then that will not provide much of a deterrent to wrongful behaviour.

**The Hon. GREG DONNELLY:** I take you to page 9 of your submission, specifically the second dot point in the recommendations box where you say "legislation should impose a general duty on all facility operators to prevent or minimise environmental harm arising from their activities". This is probably for my benefit more than anyone else. Can you explain how that is different from what is currently provided for in legislation in New South Wales? I thought there was a general duty that operated.

**Mr SAHUKAR:** New South Wales legislation is worded somewhat differently to the bulk of legislation on pollution in other States and Territories, which more specifically impose these types of duties we are talking about. In the New South Wales case it is an offence to pollute waters. Land pollution also is an offence. That is generally taken care of by the licensing regime, but there are no specific duties to prevent or minimise environmental harm in the way that other jurisdictions and other pollution laws provide. Depending on how you phrase that sort of obligation, it may be enforceable or it may be a general obligation that is not necessarily backed up by an offence provision. It could involve, for example, things like if a pollution incident occurs and there is potential for serious harm, the company that is most likely to be responsible or has been identified as potentially the source of that leak should demonstrate that they took the relevant actions and that they had systems in place to avoid that sort of incident occurring and, therefore, they are not responsible for the incident. That could, for example, reverse the burden of proof in the case of a serious incident so the company has to show that they took all reasonable steps to minimise the chance of pollution occurring.

**Ms WALMSLEY:** We provide examples from Queensland, South Australia, Tasmania, the ACT and the Northern Territory. So legislation could more explicitly say, "make it unlawful to carry out an activity likely to cause environmental harm unless all reasonable and practical measures are taken to prevent or minimise that harm." There is a footnote with some references if you are interested in other jurisdictions.

**The Hon. GREG DONNELLY:** The EPA's role is challenging in balancing its function as a regulator and its industry-agency partnership in working with industry. From your organisation's view, is that an achievable balance or is it by its very nature troubled in that you actually cannot strike a balance?

**Ms WALMSLEY:** I think it certainly is difficult and in an agency like the EPA there will always be that tension, but some of the things we mentioned earlier in terms of better community outreach and defining the EPA's role in what they can do and what they cannot do, we certainly would assist if there was more certainty upfront about the purpose of the EPA in the cooperative kind of outreach extension work. They certainly do some innovative things quite well when they partner with industry to do it. There are a lot of examples where things like that can work well with the cooperation of industry. But as we said in relation to the imbalance on the board, if they just increase their stakeholder engagement with the community side of things so it also is a partnership with the community and the EPA, I think some of those tensions could be relieved.

**Mr SMITH:** I think in many respects the idea of an organisation wearing multiple hats is not unique. I sit here as the head of one of those organisations where we will quite constructively engage on issues around law reform and policy with the Government and on the next day we may be challenging a decision of the Government to approve or not approve a particular project. As long as you have the appropriate mechanisms in place and it is done in a transparent and accountable way, I do think that balance certainly can be met.

**The Hon. RICK COLLESS:** Mr Sahukar, from your summary of the EDO's submission I picked up that you have a philosophical approach basically to increase the compliance and regulatory approach with stronger fines and more prosecutorial powers et cetera. From a government philosophical perspective—I am talking about whole of government, not your organisation—are we not better off with industry to embrace an advisory educational program generally to encourage industry to undertake better environmental management rather than just making threats to them about stronger prosecutorial and compliance powers?

**Mr SAHUKAR:** You certainly need a range of tools to both assist industry but also regulate industry. I would not be calling for complete reliance on educational policies in order to effect compliance. I do not think

that is an effective way of regulating an industry. I do think you need to provide appropriate incentives for industry to make it easier to comply with their obligations.

**The Hon. RICK COLLESS:** What do you mean by incentives?

**Mr SAHUKAR:** You need to make sure that the regulatory framework is clear so that people know what their obligations are, and you need to involve all stakeholders in processes of reform when environmental regulation is changing, as it so often does. But at the end of the day you need regulatory tools that can provide for enforcement and those tools need to reflect the gravity of the offence and the evolution of the law as it stands.

**Ms WALMSLEY:** I guess a concrete example of an incentive might be load-based licensing where there is an incentive for the industry to reduce their pollutants within the regulatory scheme.

**Mr SAHUKAR:** I understand the EPA is also embarking on a risk-based licensing approach where the fees of licensing will increase if you have a higher risk.

**The Hon. RICK COLLESS:** It is a good example. Should the compliance regulatory approach be in the front office or the back office?

**Mr SAHUKAR:** What do you mean by that?

**The Hon. RICK COLLESS:** To my way of thinking, the front office should very much be the advisory program where people would feel comfortable coming to an organisation—not necessarily yours, a government organisation, one of the agencies involved in the technical side of that particular business that we might be talking about—and saying, "We want to reduce our load base. Will you work with us in working towards bringing that down?" In other words, reduce the technical aspects of what we are trying to achieve rather than just the prosecutorial aspects?

**Mr SAHUKAR:** Absolutely. My understanding is that the EPA already does those sorts of programs through pollution reduction programs, which are put on licences.

**The Hon. RICK COLLESS:** Yes, but my question was should that be at the front office or the back office?

**Mr SAHUKAR:** I do not quite understand that distinction. I am sorry.

**The Hon. RICK COLLESS:** To me the prosecutorial compliance role should be in the back office; it should be there as a back-up.

**Mr SAHUKAR:** Right. I see what you are saying.

**The Hon. RICK COLLESS:** The main thrust of the organisation should be to help business get on with doing business rather than be threatening business that if they do the wrong thing we are going to prosecute them?

**Ms WALMSLEY:** I think the focus of an agency in an ideal world would be on the productive, cooperative things they could do, and we would strongly support that. But also, where you have communities, if there is a massive pollution incident, they want to see an EPA officer in a HiVis vest out there doing something in a timely manner. So it cannot all be back office. It comes back to multitasking and that balance we were talking about earlier. We are not just talking about prosecutions. We are talking about the compliance spectrum of all the different options that there are.

**The Hon. RICK COLLESS:** The problem we face, and this has happened over the past 20-odd years in government, is with the advisory-type role. Those organisations that have the ability to offer assistance to the business communities basically have been decommissioned in favour of a regulatory approach. Forestry is a good example.

**CHAIR:** Agriculture.

**The Hon. RICK COLLESS:** Agriculture is another good example. We no longer have a soil conservation service or an effective department of agriculture or forestry advisory officers. Those people no longer are available to the community, yet we have a very strong compliance-based model coming through in the EPA, assisted by organisations such as yourselves, yet the advisory-type programs have been decimated. People no longer have anywhere to go where they can say to a person with very high technical skills in that particular field, "How do I actually stop soil erosion on my farm?" There is no-one left in the system who can give that advice.

**Ms WALMSLEY:** We certainly would support advisory functions like that being well resourced within government. Our organisation is non-government; we can only advise on legal issues. As I said in my opening statement, often people who call the EPA line get referred to us and we can help them to some extent on legal issues. But I think you are right that in an ideal world there would be far more advisory work focusing on the positives. Again, that comes back to better resourcing of the organisation.

**The Hon. RICK COLLESS:** But that is what we have lost over the last 20 years because that was the case 20-odd years ago.

**Mr SAHUKAR:** Certainly we have included as an appendix to our submission some targets set by the Natural Resources Commission some years ago on how to achieve environmental targets. That organisation is a good example of that sort of service.

**The Hon. Dr PETER PHELPS:** Mr Smith, you said one day you will be working with the Minister for Planning trying to get law reform through and the next day you will be battling the Government in relation to the approval or non-approval of a project. When has the EDO ever taken on the Government or joined an action where the Government has not approved a project?

**Mr SMITH:** Where the Government has not approved a project?

**CHAIR:** It is a cheeky question.

**Mr SMITH:** We have done a series of enforcement cases where the EPA has not acted, but we are an organisation that was established to assist the community rather than the developers.

**CHAIR:** Yes. Your name may well then be industry—

**Mr SCOT MacDONALD:** Captain.

**CHAIR:** Yes.

**The Hon. RICK COLLESS:** IDO—industry defenders office.

**CHAIR:** I think that may have been a rhetorical question.

**The Hon. Dr PETER PHELPS:** No, I am seeking further elucidation.

**CHAIR:** I think we know where the EDO stands.

**Ms WALMSLEY:** It is not really our role.

**Dr MEHREEN FARUQI:** Earlier you mentioned that the EPA may not have acted in a timely manner on many breaches about which the community might have called it. What recommendations would you make to the EPA to improve that?

**Mr SAHUKAR:** I suppose this does in part come down to a question of resourcing, so ensuring that the EPA has sufficient resources to respond to incidents in a timely manner, and the risk-based licensing approach, which we have not seen in action yet but is one way for an organisation to prioritise its resources and focus on the highest level of risk. Also, some of the regulatory legislative changes we have proposed in relation to increasing the low levels of fines that have existed historically under the Act would enable more effective deterrent powers that the EPA could put into place.



CORRECTED

**CHAIR:** Thank you for giving us your time and the benefit of your expertise. I do not believe any questions were taken on notice, but if there were the secretariat will send them to you. We ask that you respond to them within 21 days.

**(The witnesses withdrew)**

**(Luncheon adjournment)**

**ROSS SALTER**, member, Hillsdale and Eastgardens Resident Action Group,

**HYWEL LEWIS-JONES**, member, Hillsdale and Eastgardens Resident Action Group, and

**STEVE HAIGH**, member, Hillsdale and Eastgardens Resident Action Group, affirmed and examined:

**CHAIR:** I welcome you to this public hearing. Do you want to make an opening statement?

**Mr LEWIS-JONES:** I would certainly like to. Rather than going into a whole lot of detail, because you have a copy of my submission anyway, basically I would like to talk very quickly about how our residents see the EPA and what we think are the things that really matter to us as residents. First of all there is an attitude of what is the truth whether it comes from us or the EPA. It seems to me in our dealings with mercury and all sorts of things that have been happening in the area it is as though—and I am saying it is our perception—there is lots of hiding behind scientific verbiage and there is not a message to the people, the residents, that strikes a chord of truth because of, first, the way it is presented and, second, because we have conflicting opinions. It is as though a highway officer pulls you up and says, "Okay, you are about to get a fine for \$280" and when you ask why it is, "Trust me, I'm a police officer", and yet I know that my speedo was only on 60.

It is that sort of conflict that we are experiencing and we prefer things to be told as they are without being softened for whatever reason. The other thing is that we would require respect from the people in the EPA as we are prepared to give it. I guess there are intelligent people in all levels of society but it is as though we are not treated as that because we are not scientists, and that has to be got over. The thing is truth and the last is trust. We feel that the EPA is supposed to be a body that we can absolutely and completely trust. It has been proven to us over a period of time now that we cannot trust the EPA and we are supposed to be able to. It is that, for us anyway, a complete breakdown between this independent body and us as residents who are experiencing issues.

Perhaps the last thing is that we do not feel that the EPA is actually working for us as people, as residents. It is not always, as I have stated in my submission, but by and large it seems adversarial. I remember during some of the mercury issues it was as though we were doing the wrong thing by questioning, by asking for an independent study. For me it was not what the EPA is supposed to be doing especially when you read its charter about communication with community and involvement et cetera, et cetera. Those are the three issues and I think I have addressed them in my submission. Both Steve and Ross are here. They probably have a little bit more detail to answer any of your questions. I will certainly endeavour to do my best.

**CHAIR:** Your experience with the EPA has been going on for some time obviously. Have you had much to do with it in the recent couple of years?

**Mr LEWIS-JONES:** Yes, for me my interaction with the EPA is basically a 3½ year period.

**Dr MEHREEN FARUQI:** A number of submissions to this inquiry have made the point that the EPA is perceived to be too close to industry. What has been your experience? How can this be changed in your view?

**Mr LEWIS-JONES:** May I ask a question of the Chair before I answer you?

**Dr MEHREEN FARUQI:** Yes.

**Mr LEWIS-JONES:** Is it appropriate for me to ask somebody else to answer a particular question that might be addressed to me? Is that too rude?

**CHAIR:** Yes, we will regard you as the boss.

**Mr LEWIS-JONES:** Thank you so much. From my limited experience—3½ years is not a long time—it does appear to be that. I say the perception is that. I do not have a smoking gun and that is one of the issues that we have. It just appears that way. But how can you say that when we know this? Are you on the side of industry? Although I will say that in my joining the CLC committee at Orica and dealing with the EPA there, it has been perhaps the opposite. Even though they work well with Orica the feeling I get from being at those

meetings is that everything is on the up and up. Would any of you guys like to say something about industry perception or the perception that they are behind industry?

**Mr SALTER:** It would probably come across in the lack of responsiveness to concerns about things that are against industry where we are not in possession of any conclusive evidence demonstrating collaboration but there are certain subjects which do not get acted on, particularly in the Botany Hillsdale area ground contamination and long-term emissions. Definitely struggling to find that the EPA is facilitating release of information and good communication and we are struggling. Why?

**Dr MEHREEN FARUQI:** What do you think can be done to change this perception? What will be your recommendations to this Committee?

**Mr LEWIS-JONES:** For me a complete commitment to transparency. I, particularly—in fact, I sent the email—asked the EPA for the raw data from the contamination of a site for which there was a DA approval because there was talk that it was contaminated. After numerous face-to-faces, after an interview within the EPA itself where we made the trip into town, and then corresponding emails, and even after being promised the data, we still have not got it and that has been from over October last year.

**Mr SALTER:** Almost 1½ years.

**Mr LEWIS-JONES:** One year and a half, and it is asking for the raw data on which they made their decisions that we thought that the decisions were incorrect having had an independent analysis. We were refused that raw data and it was of no consequence. It was not as though it was some sort of secret business thing. I do not know. I suppose there is supposed to be mandatory honesty but it does not appear that way.

**Dr MEHREEN FARUQI:** You also mentioned in your submission that you believe your concerns about mercury contamination around the Hillsdale Botany area were downplayed by the EPA. Will you elaborate on that a little bit?

**Mr LEWIS-JONES:** I will probably flick to you Ross on that if you do not mind. I can say something generally but I think that you have got a little bit more data on that than I.

**Mr SALTER:** I am guessing you are familiar with the history of the Hillsdale site and the Sydney Water land?

**Dr MEHREEN FARUQI:** Yes, I am.

**Mr SALTER:** There has been community sampling of soil samples and also air samples. The result of the soil sampling was not taken on board very willingly. The results of the air sampling in the area were completely dismissed even though it would appear they align with the previous Orica report because this is pertaining to mercury emissions from the ground in air. Just the struggle that we went to and then this became a bit off beam I think for the EPA but what we could not understand was a number of community members were able to talk to the media and that then ended up in Media Watch when a particular community member was directly attacked—

**Mr LEWIS-JONES:** Vilified—

**Mr SALTER:** And made to look a bit silly. It is hard to see how the EPA is encouraging community interaction when somebody does actually speak up and say, "I would like to know more about this information. I've got concerns." We can see from the data that certain HILs were breached and it was a question of which one you should use in that, (a) or (c). It came down to quite a technical argument and we definitely were not helped through that process—quite the opposite.

**Dr MEHREEN FARUQI:** You mentioned that one of the ways the EPA could change that perception in the community is through transparency but, in particular, how could the EPA communicate better and engage more effectively with the community so it is more like a partnership relationship?

**Mr SALTER:** Can I comment about that?

**Mr LEWIS-JONES:** Yes, you comment first and I will go second.

**Mr SALTER:** Particularly in regards to having third party site auditors sign off on the suitability of sites provides a commercial conflict for access to the data. The developer will pay a site auditor to carry out all the works. At no point in time does the information involved become the property of the EPA it would seem. Were that to be the case the EPA could publish all of that data and I think that would help tremendously. In some ways it is a very simple step—bore logs, all the appropriate things of going on-site and doing the sampling, testing and all the chain of custody material that normally goes with a site audit report—and if that was all publicly available that would be beautiful.

There is a particular site in the Botany region where details around the remediation were subject to legal action and so to our knowledge they will never be released. There was an out-of-court agreement reached between the polluter and the EPA and that is all we know. We are not allowed to know any more. Yes, if we could get beyond that sort of culture and encourage a culture of "It's on the website, just download it and have a look for yourself" it would be lovely.

**Mr LEWIS-JONES:** In the middle of the mercury hullabaloo, which is what it ended up being, which is certainly not what we were after, there was a meeting in a park put on by local council with jumping castles and all sorts of things. The EPA sent two talking heads. That is not the way to deal with the public. It might be okay for one of their scientists to be talking to one of our scientists, and have a conversation where the language is not exclusive. No-one was prepared to actually talk in ordinary, everyday terms that we could all understand. Talking heads is no good; it has to be much better than that and much more thought out. It seemed as though they had sent a very small bushfire crew to put out a blaze. It was a case of "We'll send two people in there and they'll sort the people out—they are scientists". That is completely the wrong attitude. It may be okay for them, and they may well have been talking some truth but that certainly is not what came across; and that is just one example.

**The Hon. GREG DONNELLY:** Mr Lewis-Jones, in your opening statement, and I think I am quoting you correctly, you made the comment that the EPA in your eyes cannot be trusted—I think those are the words you used.

**Mr LEWIS-JONES:** Yes.

**The Hon. GREG DONNELLY:** To give some explanation of the meaning of that in your eyes, what specific examples do you want to put forward for your assertion in that statement that they cannot be trusted? It is quite a strong statement. Are there particular examples that you want to put on the record which for you give truth to the statement that they cannot be trusted?

**Mr LEWIS-JONES:** The first thing I point out is that I have made an affirmation today that I am telling the truth. That is the first point to make.

**The Hon. GREG DONNELLY:** And I do not doubt that.

**Mr LEWIS-JONES:** No, I understand that; but I want to make it clear. Secondly, the statement was that the EPA cannot be trusted verbatim. The perception is that the EPA cannot be trusted in certain circumstances. I made a very positive comment about the EPA's work at the Orica site. But there are specific instances, for example, the levels at Grace Campbell Reserve, that were bandied about in the newspapers. The fact is that they got the samples wrong and then tried to cover that up with bluster and the vilification of some people. That is a prime example of where the scientific experts have fallen. They have not fallen on their own swords; but they have fallen.

**The Hon. GREG DONNELLY:** Let us take that example and use it as a primary example. For the benefit of the Committee, can you just explain what specifically the EPA did in that instance which led to your statement that they cannot be trusted? To use that as a case study, what did the EPA do specifically?

**Mr LEWIS-JONES:** First of all, they gave the wrong information; and then they tried to stand by it.

**Mr SALTER:** The choice of Health Investigation Level [HIL] in that particular case was an issue. There are a series of HILs. They pertain to residential or commercial sites. It depends on whether you are sleeping there at night, eating the veggies out of the ground and those sorts of pertinent things. The land tested was immediately adjacent to residences yet there was a very strong unwillingness of the EPA, as demonstrated

in internal emails received under the Government Information (Public Access) Act, to use residential levels. It would appear that there was originally some expectation that testing was going to be done under the residential levels. When the results actually breached the residential levels there was some ambiguity. They were saying, "Which one should we have used? Oh, we should have used C. Will that clear us? Yes. Then we will use C."

**The Hon. GREG DONNELLY:** Is that because it is a different threshold?

**Mr SALTER:** It is a much higher threshold for a recreational area—where basically you turn up, you play baseball and then you go home. Naturally a higher level is allowed there. When it came out that there was that kind of discussion internally and not a sort of "fair go approach" to which HIL should apply that was quite damaging.

**The Hon. GREG DONNELLY:** In that instance specifically, from your point of view there has been no attempt by the EPA, and these are my words, to "come clean" on this and explain what happened from their point of view? You received information under the Government Information (Public Access) Act and you tried to join the dots. What did the EPA say about this?

**Mr LEWIS-JONES:** They tried to explain.

**Mr SALTER:** I felt that they tried to explain; I just think there was not a level of confidence from the community that they felt the explanation was wholly honest and truthful. So the explanation given was that it is not in a residence therefore it is recreation because it is outside. We are talking about very small distances. Technically they were accurate in what they were saying.

**Mr LEWIS-JONES:** Within that there is the element of trust; there is also the element that they understand. I know that might sound a little bit iffy but I will just paint a picture. A number of residents were desperate about this issue. They were saying, "There is mercury in my front yard. This is what I have read. This is what I have heard. Orica is over there. Oh my god what is happening to my kids?" There appeared to be no understanding of that level of semi-panic and worry. It was just flat. There was no meeting called by the EPA where the residents sat down and talked it all through. I think that is part of their job. There were no feathers smoothed. There was nothing. That is not good enough. For a while there we had some quite volatile and angry residents. This is quite a small area, and this could have been sorted out so easily.

**Mr SALTER:** The site in question did actually require remediation and there was not a lot of consultation around the remediation process. A section of grass was basically fenced off, and part of the remediation action plan was to "let the grass grow long therefore kids will not play in that spot". The community does not accept that.

**Mr LEWIS-JONES:** And those are not our words.

**The Hon. GREG DONNELLY:** On the question of the release of information, you used a specific example earlier in your evidence. You made a request to the EPA. I think I understood you correctly as saying that they said they would provide that information. Who said that to you? Do you recall who said that that information was something that could be made available?

**Mr LEWIS-JONES:** I certainly remember the person I spoke to and had interviews with at the EPA.

**The Hon. GREG DONNELLY:** Who is that person?

**Mr LEWIS-JONES:** Niall Johnson.

**The Hon. GREG DONNELLY:** So in discussions with him over this matter—

**Mr LEWIS-JONES:** And another scientist—

**The Hon. GREG DONNELLY:** —that was put to them, and the gentleman you have just mentioned said, "Yes, that is something that could be done; information could be provided."

**Mr LEWIS-JONES:** His actual words were "We can sort that out with the push of a button". Numerous emails later, there was nothing.

**The Hon. GREG DONNELLY:** Was there any explanation for the lack of follow-up?

**Mr LEWIS-JONES:** Yes, there was. There was an email sent to me saying, "Sorted all the stuff out. Here is the website or URL link." When I went to the link, it would not work. I sent him an email back saying X. He sent back an email saying, "I think it might be something to do with your filters or whatever." I said, "Well, at the moment I am on holidays. Could you send it to Mr Salter, who can then check it? If it is a URL issue then we will deal with that." And that was it. I have copies of those emails if you want to look at them.

**CHAIR:** As a point of clarification, how long ago are we talking about now?

**Mr LEWIS-JONES:** We are talking a period of about 18 months. It is not a one-off.

**The Hon. RICK COLLESS:** In your submission you have a quote I think from the *Sydney Morning Herald*. It says:

Controversy flared earlier this year when concerned residents engaged their own expert, Andrew Helps, from Hg Recoveries ...

Were the concerned residents from your group? Did you engage Mr Helps?

**Mr LEWIS-JONES:** No, it was a number of groups. There are a number of residents groups in that area.

**The Hon. RICK COLLESS:** Was your group part of that?

**Mr LEWIS-JONES:** No, we were not.

**The Hon. RICK COLLESS:** So who engaged Mr Helps to do this work?

**Mr SALTER:** I am just trying to think that far back of that particular example.

**The Hon. RICK COLLESS:** It is in your submission as a quote from the *Sydney Morning Herald*.

**Mr LEWIS-JONES:** Yes, it was. Residents certainly did that.

**Mr SALTER:** I would imagine it was members of the community liaison committee [CLC] of the Orica community group.

**Mr LEWIS-JONES:** When I say my group was not involved in that, it was not. I was because I was part of the CLC.

**The Hon. RICK COLLESS:** Do you recall the engagement of Mr Helps? Were you involved in that?

**Mr LEWIS-JONES:** I am aware of discussion. I did not actually make the phone calls and that sort of thing. It is a committee.

**The Hon. RICK COLLESS:** But you were there when it was discussed?

**Mr LEWIS-JONES:** Yes.

**The Hon. RICK COLLESS:** The submission goes on to talk about Mr Helps. It does not talk about his qualifications but says that he is from a company called HG Recoveries which is:

... a company that is part of the United Nations Environment Programme's Global Mercury Partnership ...

And he reported significant levels of heavy metals et cetera.

**Mr LEWIS-JONES:** Yes.

**The Hon. RICK COLLESS:** What I am a bit confused about is that there is a letter from Emeritus Professor Chris Fell on the Parliament's website which states, and I quote:

With regard to the comments and criticisms made by Mr Helps, I have formed the view that these have originated from strongly held, but scientifically unproven personal views of Mr Helps or from misinterpretation by him ...

Does that quote not bring into question the qualifications of Mr Helps to be making those sorts of statements? There is some sort of conflict here.

**Mr LEWIS-JONES:** No, I happen to work a bit for a university and have worked in a number of those institutions. Numerous academics have different points of view, and one would have to be pretty far out on a limb to be completely sent to Coventry over their scientific views. Just because two people disagree does not mean that either one is incorrect or correct; it just means it is a point of view or a point of interpretation. Therefore, the views of Dr Helps are completely valid; as are those of the person you have quoted. First of all, I do not have a scientific background—my background is in economics and education. Here are two people with some standing in the scientific community with opposing views. I can point you also to the issue of climate change.

**The Hon. RICK COLLESS:** Indeed, but surely that tells us there is a point of discussion about this whole issue rather than it all being one-sided. If Professor Fell has a different view of this whole issue compared to Mr Helps then do we not need to dig a little deeper to find out what is the scientific truth behind all of this rather than just taking one side or the other?

**Mr LEWIS-JONES:** First of all, I suppose it depends on how much time you have. At the moment, for example, in the climate change debate there are so many points of view. The arguments run incredibly deep and cost a lot of money. When you are a group of residents worried about pollutant X at a site and one scientist says there is none and another says there is lots, and you have limited funds, then you probably lean slightly towards the one concurring with your point of view. That does not stretch its validity, even though I accept your point—all it means is that there is a counter argument. Then, of course, you can look at Dr Helps and Dr Helps' background and why is he giving that point of view and you can then look at your scientists and why they have their point of view. Is it the *Herald* or is it the *Telegraph*? I mean, there are so many nuances in that, so you take a stand. I completely agree with you that there are points of view.

**The Hon. RICK COLLESS:** It makes it hard for this Committee to come down on one side of the argument or the other when there are opposing views from two qualified scientists.

**Mr LEWIS-JONES:** I think the world is doing that right now.

**The Hon. RICK COLLESS:** Indeed.

**Mr LEWIS-JONES:** But if you are talking from a resident's point of view, we have already had issues with the authority being wrong, and the authority—EPA—having issues of trust. Why would we as a group lean towards a scientist who is clearly aligned to the status quo?

**The Hon. RICK COLLESS:** Are you suggesting that Professor Fell's letter was written in that manner purely to agree with the EPA's perspective of it?

**Mr LEWIS-JONES:** No, I am not saying that for one moment, but I am saying there is a possibility as there is a possibility that Dr Phelps is equally biased.

**The Hon. Dr PETER PHELPS:** Mr Lewis-Jones, I am sorry about missing your original presentation. Can I just go back to the actions of the EPA in terms of their soil sampling to which you alluded? They took samples from the recreational area. Is that correct? Did they then take soil samples from the adjoining residential properties as well, or did they just hypothecate out?

**Mr SALTER:** My understanding is that they did neither; that they did not acknowledge the proximity to residential. The soil testing was purely from non-residential reports. I did not see in the material that came out any reference to the proximity to residential.

**The Hon. Dr PETER PHELPS:** Okay. So they only took from non-residential.

**Mr SALTER:** So it would seem, yes.

**Mr LEWIS-JONES:** That is certainly our understanding.

**The Hon. Dr PETER PHELPS:** Was any input given by residents' groups to the EPA requesting sampling of private properties?

**Mr SALTER:** Not to our knowledge but it does—

**The Hon. Dr PETER PHELPS:** Okay. I will throw a hypothetical to you.

**Mr SALTER:** The problem—

**The Hon. Dr PETER PHELPS:** The EPA did not feel comfortable about going onto private property and saying, "We want to do it."

**Mr SALTER:** Absolutely.

**Mr LEWIS-JONES:** That is perfectly understandable.

**The Hon. Dr PETER PHELPS:** The EPA might not have been deliberately trying to avoid finding stuff. They might just have felt reticent about saying, "Hi, we would like to sample your property."

**Mr LEWIS-JONES:** I think to answer you just from a more philosophical perspective, there is reticence and there is reticence.

**Mr SALTER:** Speaking with community groups in the area, there is a very strong concern about who is liable, were the EPA or any body to find contamination in a residential site. One of the very controversial cases in the area at the moment is 32 Page Street, referred to locally as the Electrolux site. It is on the contaminated land management listing of contaminated sites being significantly contaminated. They used to make hot water heaters and the degreasing stuff there is in the ground. Significant contamination has travelled off-site. The challenge is—that is the one I was referring to earlier—where the EPA and the contaminator had reached an out-of-court settlement. It did not address, to our knowledge, or there is nothing being done about the contamination that has travelled underneath adjoining residences. The obvious challenge for them is: What do they do?

If they turn to the EPA and say, "Would you please come and test for trichloroethene and tetrachloroethene in my house?", if it is found you either have the landowner or the contaminator, and the contaminator effectively has already got a resolution with the EPA. It only leaves the landowner holding the can. It could be that a complete excavation is required or there is massive soil contamination. The community very much understands the two-edge sword of "Come and test my land, but don't tell anybody else the results."

**Mr LEWIS-JONES:** "Because I would like to sell it."

**The Hon. Dr PETER PHELPS:** Okay. I see the point you are getting at.

**Dr MEHREEN FARUQI:** Could you very briefly explain why the residents initially sought assistance from Dr Helps in terms of sampling?

**Mr LEWIS-JONES:** Yes. Because we wanted the truth, or we wanted what we thought was the truth. We wanted something so that you could look at the EPA's results and look at the other results and match them. If they were the same, you go "Right, fine. We trust you."

**Mr SALTER:** Get a second opinion.

**Mr LEWIS-JONES:** Yes, a second opinion.

**Dr MEHREEN FARUQI:** You also mentioned earlier that the Hillsdale and Eastgarden Residents Action Group was represented on the community liaison committee [CLC] and on the community participation and review committee.

**Mr LEWIS-JONES:** That is right.



**Dr MEHREEN FARUQI:** They have now combined.

**Mr LEWIS-JONES:** Yes.

**Dr MEHREEN FARUQI:** Within that committee I guess your view was that the relationship with the EPA was both respectful and trusting. Is that what you said? Could you clarify that?

**Mr LEWIS-JONES:** I absolutely say that, yes.

**Dr MEHREEN FARUQI:** What explains the disparity between having a good relationship there and this particular incident?

**Mr LEWIS-JONES:** Because those committees, they are a closed shop. The EPA has a whole range of deals with Orica and submissions and provisions and all the rest of it. It is all very carefully outlined. Orica appears, to my understanding—and I am not a scientist—to be coming to the table. There have been a number of review meetings where external world scientists have come and made declarations about the Orica clean-up; i.e., the groundwater being the best in the world—all that sort of stuff. It is not really combative at all. It might be between some residents and Orica but certainly not the EPA. The EPA has always had a very clear and concise message and the people who turn up, including Neil Patterson, are right on the top of their game there, or it appears to me, whereas when we are talking about how much mercury is sliding around hidden in Eastgardens or Hillsdale, where the potential is for something quite dramatic to occur and which has all sorts of other overtones—indeed, I might say political—it does not appear that we get the same reaction from the EPA.

**Dr MEHREEN FARUQI:** A number of submissions have called quite strongly for a more well-funded, well-resourced and independent EPA with greater regulatory powers, which can really protect the environment and the communities. Would you agree with that call?

**Mr LEWIS-JONES:** My understanding—please correct me if I am wrong—was that the EPA is a statutory body that answers to Parliament and is completely free of all sorts of influence. Somebody was trying to tell me today that that is absolutely not true. I do not know how you can make it more independent than that. Better funded? I think everybody needs more funding nowadays in order to do a better job. I am in a quandary about an answer for that. Generally better funding and more independence give a better result but I think there are all sorts of things surrounding that.

**Dr MEHREEN FARUQI:** From your point of view, what issues require urgent attention in the Hillsdale-Eastgardens area with respect to contamination?

**Mr LEWIS-JONES:** Trust, respect and truth, in a nutshell. I can go on about they should do this and they should do that.

**Dr MEHREEN FARUQI:** But specifically, within that framework, what could be done to improve that?

**Mr LEWIS-JONES:** Well, a full, comprehensive study.

**Mr SALTER:** Release the information.

**Mr LEWIS-JONES:** Release the information up front that other people can look at, make decisions about and form opinions about, not—with respect to you, sir—from some sort of higher base where they can write a letter and disown it, but where it can be down on the ground and practical. There are other things too. I have read what the EPA's structures are and what it is supposed to do but it appears certainly in our area it does not go quite far enough. For example, in our area specifically there is a street called Denison Street, which is a dangerous goods route with all sorts of developments along that road through the Botany Industrial Park and through other things and Veolia and all sorts of other people. That road is getting even more and more and more use, and if you include next year 40,000 more trucks on it per annum from Veolia for the waste transfer station and a lot of other things, we have got a serious issue with human health—with life, with risk to people.

If you consider that things like chlorine and whatever are transported up and down that road and the issues that might come with that, I do not think it is enough for that sort of decision to be taken by, say, New South Wales Planning or Roads and Maritime Services or anything like that, or by applying some local

council ordinance. I think for a group like the Environment Protection Authority, environment protection should be part of that decision-making process. Of course they have not been. I think that is a part that they should play. Can Steve Haigh talk to that for a little bit?

**CHAIR:** I am sorry, I am afraid we are out of time for that particular questioning.

**The Hon. GREG DONNELLY:** In relation to the point raised earlier about better communication with the community and residents, could you describe to us what you believe is an example of how that would be done? What would be the features of an effective way of communicating to the community at large that you would consider satisfactory on a matter?

**Mr LEWIS-JONES:** Okay. I will tell you a way that is not.

**The Hon. GREG DONNELLY:** I think we could probably guess that from your submission. I think you spoke in reasonably disparaging terms about meeting in the park.

**Mr LEWIS-JONES:** And the parliamentary estimates committee with Mr Buffier.

**The Hon. GREG DONNELLY:** I think we can read that.

**Mr LEWIS-JONES:** Okay.

**The Hon. GREG DONNELLY:** Let us hear what you say.

**Mr LEWIS-JONES:** If you have taken that into account already, I have gone through three, so I will pass to Ross Salter.

**Mr SALTER:** Easily, site audit statements and site audit reports and all supporting material published on the website. It is as simple as that. The challenge is at the moment, I believe, that it is commercial in confidence.

**Mr LEWIS-JONES:** And from a resident's perspective, not somebody who is checking on things like we are, it would be for the EPA to somehow gain its acceptability back, and what we used to think was scientific rigour and what we used to think was honesty. I do not know whether it is the revamp of the EPA, but something needs to come back to the public to give it confidence so that when somebody at the EPA says X, we all know it is X. Currently we do not have that confidence. Communication has to start with confidence. I came here today because I was confident that people were going to listen. Whether you take note or not, that is another issue but I am confident that you are listening to me. The same thing applies to the EPA. Again, I go back to trust, truth and that sort of due diligence.

**The Hon. GREG DONNELLY:** You raised the transportation of hazardous goods as an issue. Does the organisation you represent have a view about how this needs to be progressed? If you have a position, would you mind putting that on the record?

**Mr LEWIS-JONES:** Not at all.

**Mr HAIGH:** In 2001 the department published a Botany-Randwick industrial land use safety study and they did not identify the full extent—

**The Hon. GREG DONNELLY:** They did not, or did?

**Mr HAIGH:** They did not. They only used risks from fixed installations, which are in the Botany Industrial Park, and made a strong recommendation that transport risks along Denison Street, which is what has been talked about here today, should be considered in any development application. What has happened since that period of time is that there has been no upgrade. There has not been inclusion of transport risks in a study and basically we are not getting public knowledge of the actual transport risks. In our statements we provided a transport risk map. This is the first time that the Department of Planning has released this publicly. It was basically an application for a Bunnings site. In that risk map there are areas where planning controls, in terms of the 2001 study, must apply.

We are talking about many residential areas in Denison Street and residents have not been told that this risk applies to their homes. If these controls were placed on their homes, there would be no more residential intensification on their site. It will result in a massive depreciation in value of their property. We are saying that these risks should be fully identified and made publicly available and these controls that apply have to be considered in the consent process. The other thing about the 2001 study is that the planning controls are more stringent in the small identified risk area than what the housing industry planning papers actually recommend. It would appear that the full amount of risk that is known to the department is greater than what is generally considered under the planning criteria that has been published.

**Mr LEWIS-JONES:** We understand that there are other groups that look after things, such as Roads and Maritime Services, Planning and the rest of it. However, it is clear for us, because of the issue of the dangerous goods and things like chlorine, et cetera, that the EPA needs to have a hand in that as well, purely because it is really about health risk.

**Mr SALTER:** Human health.

**Mr HAIGH:** I can add to that, State Environmental Planning Policy No 55 is contaminated land. When you are going through the development consent process, if contamination is suspected—in the 2001 study, it is said that Denison Street is a dangerous goods route. The transport route goes into other roads and these are not noted as dangerous goods routes, but people are not told that these types of planning controls can be applied because they are routes that carry significant amounts of dangerous goods transport.

**Mr SCOT MacDONALD:** If you want to take this question on notice and come back with an answer that is fine. Have you got any records or data on the health impacts, as you call it? Are we looking at clusters of health issues such as cancer, hormonal or birth defects? Those sites have been there for 70 years or so. Has anything shown up in the health records, or is anything changing?

**Mr SALTER:** Anecdotally, not that we have seen. We are trying to understand that. One of the reasons is that a lot of the chemicals we are dealing with do not result in the sorts of things that you could trace, such as cancer clusters. Chlorine in the air reacts with moisture, which turns into acid, and so it affects the eyes and the respiratory tracts. It does not present as cancer and that is true of a lot of the chemicals in the area.

**Mr SCOT MacDONALD:** It would be interesting to hear about any of those other indicators.

**CHAIR:** We are unfortunately out of time. Gentlemen, thank you very much for coming here today and agreeing to give evidence.

**Mr SALTER:** Chair, I have just realised I have not answered one of Dr Faruqi's questions.

**CHAIR:** I am sorry, we are out of time. The secretariat will advise you of any questions that you have taken on notice. We would appreciate an answer to those within 21 days. The answer that you did not give to Dr Faruqi may be included as a question on notice. Thank you very much for your time today. We appreciate your evidence.

**Mr LEWIS-JONES:** Thank you very much for giving us a chance. We appreciate it.

**(The witnesses withdrew)**

**DONALD OLIVER WHITE**, Chair, Executive Committee, Nature Conservation Council,

**KATE MARIE SMOLSKI**, Chief Executive, Nature Conservation Council, and

**CERIN LOUISE LOANE**, Policy and Research Coordinator, Nature Conservation Council, affirmed and examined:

**CHAIR:** Before we proceed to questions from the Committee, would the Nature Conservation Council [NCC] like to make an opening statement?

**Ms SMOLSKI:** A brief one, yes. The Nature Conservation Council welcomes this inquiry and we thank the panel for hearing our testimony today. We believe that New South Wales needs a fearless and independent environmental watchdog in the Environment Protection Authority that puts the interests of the community and natural environment first, above polluters. Most importantly, it must be adequately resourced so it can effectively meet its objectives and enforce compliance with conditions of licence or approval, defend regulatory policies and actions to law when required or prosecute offenders. We are very supportive of an independent EPA and welcomed that move by the Government earlier in its term to have an independent EPA following the Orca incident.

The Nature Conservation Council is the peak environment body for New South Wales. We represent more than 130 member societies across the State that work on environmental, sustainable and conservation issues. We surveyed our member groups before putting together our submission to this panel. There is a general view amongst NCC members and supporters that recently the EPA has not been meeting its objectives. I would like to lay out four issues that are included in our submission but I will highlight them here. We think there is a lack of sufficient resources and capacity to effectively carry out its duties, a strong perception that the EPA has been captured by industry and does not act in the public interest as much as it should, a reduction in community involvement in or access to the EPA, and failure to effectively monitor and enforce environmental breaches. We fear and have significant concerns that the EPA is no longer trusted by communities in New South Wales and that is feedback that we have been getting from our member groups. We look to this inquiry to address the specific concerns raised by the community and to create an EPA capable of putting the environment and healthy communities first.

We have laid out key recommendations, which I will not take the time to point out here because they are included in our submission, including two documents that we have put together entitled "Clearing the Air" and "If a Tree Falls". Both reports have been prepared by the Environmental Defenders Office New South Wales on behalf of the Nature Conservation Council and detail specific things that we would like to see changed. I can leave it there and we can proceed to questions.

**CHAIR:** Before we proceed, we have taken "Clearing the Air" as a tabled document. Could we have the other document as a tabled document, please?

**Document tabled.**

**CHAIR:** We will now proceed with questions from the Committee.

**Dr MEHREEN FARUQI:** In your submission you have stated that the inquiry was set up because the EPA is no longer trusted by communities in New South Wales. That is certainly the view of your members as well. What do you think are the most important steps in re-establishing that trust?

**Ms SMOLSKI:** I can answer that first and then turn to my colleagues to see if they have more they would like to add. There are several things. I will start with community consultation and community involvement. I will refer to our submission. We definitely are concerned that the community representatives on the EPA board have since been removed. We think that genuine community consultation and hearing from the community as to what they need to see out of an EPA is critically important. There are some recommendations included in our submission but we are particularly concerned about such as the removal of community representatives, including the NCC representative. We think that it is also contradictory to the recommendations of the O'Reilly report, which recommended that the membership of the EPA board include representatives from community interests, so re-establishing these positions would be important.

The other key thing is that we actually need to see prosecutions for pollution breaches that we are seeing across the State. There are some pollution licences that are granted for which there are no safe levels of pollution for communities that are dealing with them. There are certain communities across the State that are dealing with higher levels of pollution than others, if you look at rail corridors where there are coal trains, like in Newcastle, which is clearly one of the issues this hearing is looking into. While we recognise there has been an increase in the total amount that companies can be held liable for if they breach their pollution licences, one of the things that we are not seeing is action and it is substantial action by the EPA to prosecute polluters.

**Dr MEHREEN FARUQI:** Professor White, Ms Smolski mentioned community representation on the EPA board before 2012. I understand that you were on the board, so will you share some of your views on how community participation on the board helped with establishing trust, but also more community engagement?

**Professor WHITE:** You are right, I was one of two reps. I think it helped to keep the board proceedings more public. I do not really know what the board is doing now. The other thing is that I think there is a perception that the EPA has been captured by industry to a fairly large degree and, sure, they have to work with industry and work alongside them, but there needs to be a point where they can enforce rigidly the laws that apply to waste and to forestry. We have recently withdrawn from an integrated forestry operations approvals [IFOA] consultation process because we felt that we were being brought into the committee at a very late stage when decisions had already been made. There was not actually a genuine desire to consult at an early stage. We withdrew from that because we felt we were being painted into the position of tick-boxing decisions that had already been made.

**Dr MEHREEN FARUQI:** Has the EPA responded in any way to your withdrawal by changing their processes or the way these processes are run?

**Professor WHITE:** It is quite recent that we have withdrawn. I think it is too early to see any response.

**Ms SMOLSKI:** Yes. The EPA has asked and requested that the Nature Conservation Council put up an independent expert, which we had done, to be part of that process. The reason we withdrew is because we felt the IFOA deal was being stitched up behind closed doors and the independent expert that we had put forward was not being consulted in a way that they would be able to influence the outcome, so that is why we decided to withdraw. They have said that they would continue to consult with us but we do not feel as though we are being fully heard in this process and have concerns that there is an uneven balance of the industry and the Forestry Corporation on the non-conservation side of things.

**Dr MEHREEN FARUQI:** Just keeping with the theme of community consultation, you mention the Newcastle Community Consultative Committee on the Environment in your submission as well and that it has been generally unsuccessful as a community engagement mechanism. Could you elaborate a little bit on that? Why do you think that is the case and what can be done to improve that particular process?

**Ms LOANE:** The feedback we got from some of our members up in Newcastle was that they felt that even though they had that consultative committee they still felt there was a disconnect between them as community members and the EPA and they felt that they were not able to get involved in decision-making processes through that committee or there was not reporting back from the community representations on that committee back to the community.

In terms of the second half of your question about what more can be done, my understanding is that the O'Reilly report recommended that those types of committees be set up throughout the State and I think that the Newcastle one was meant to be a pilot and the first study. I do not think there has been an evaluation or a review done by the EPA as to how that committee has been working, what could be improved and then any plans to roll that out in other areas of the State, so it might be useful to have the evaluation of that committee done and a review and then to find out what is working and what is not working and then see if that similar type of project can be rolled out in other areas as well.

I think each community group is different. The concerns that the community has in Newcastle will be different from other areas of the State so it might be useful to run a similar type of committee in other areas of the State to see if there are other ways that those committees can be run and whether lessons can be learnt from the way the Newcastle consultation committee has been working.

**Dr MEHREEN FARUQI:** In your submission you also mention that removing the EPA from the broader Office of Environment and Heritage system may have compromised its operational capabilities by maybe them not having access to environmental and scientific expertise. Could you explain that and elaborate on that a little more?

**Ms SMOLSKI:** As I mentioned at the start, we are definitely supportive and it was broadly welcomed when the EPA was made an independent entity but that there are concerns that it does not have the level of support that it would need. When it was within the former Department of Environment and Conservation it had access to the legal, technical and policy advice within that department, but once it became independent it really is just unclear to what extent the EPA does have access to those bodies and their expertise in order to effectively do its job. One of the key things that we heard in the feedback from our member groups from the survey was that they really felt as though on the ground the EPA was just under-resourced and that they did not have the capacity needed to deal with the various different concerns or complaints that had gone in.

I am sort of bridging two issues here: one is not having access to that level of expertise, which may or may not be the case but that is the perception or one of the concerns that we might have, so I think that is something that this Committee could certainly look at. The other thing that I am alluding to is the concern that we have in terms of lack of resources. There has been the removal of different compliance officers over the past years and so that is some of the feedback that we have been getting, that they do not have the capacity that they need to be able to really prosecute and investigate the different pollution breaches that we have seen across the State.

**The Hon. GREG DONNELLY:** The EPA's role as it currently exists is as a regulator but also there is this partner—if I could use that word—with industry to deal with matters to do with pollution. There is an inherent tension there. Would you care to comment about whether that tension is something that realistically can be managed or whether it would be your submission that that model has a fundamental problem with it per se?

**Professor WHITE:** It is a tension, you are quite right. It is a tension that almost every regulatory authority of this nature has around the world and I think it can be dealt with. What we look for is a fearless and independent regulator and that is indeed what industry wants as well. What has tended to be the perception in the public eye has been that the EPA has got a bit close, and that came out in the aftermath of the Orica incident, but it is also seen in the forest industry where the regulator lacks or is captured by industry to the point that it is not prepared to enforce forest regulations to the degree that we would like to see. I think it can balance it, but it does need to be adequately resourced. If we go back to resourcing, another case of that was in the recent CLM Act review that the EPA did.

**CHAIR:** Can you elucidate the acronym CLM?

**Professor WHITE:** The Contaminated Land Management Act. We refer to this in our submission as well. It looked at the way the EPA was operating in that area of its business, and that was an audit by the NSW Audit Office, and it found that it was under-resourced basically, in a nutshell, and it has got such a large backlog of cases that it is never going to catch up unless it has extra staff. So I think it has been struggling for many years with its workload, and if that was addressed that would go a long way to assisting the difficulty.

**The Hon. GREG DONNELLY:** Is the submission essentially that there is a resourcing matter that needs to be addressed? It is not a philosophical matter inside the EPA per se but rather that you believe part of the organisation's role needs to be enhanced and if that was done the tension would be better managed. Is that essentially what your submission is?

**Professor WHITE:** There are four planks to our submission: one is the one you are talking about; the other is not being captured by industry; the other is community engagement and involvement in a true way, not just token; and the ability to monitor and enforce environmental breaches. So it is across.

**Ms SMOLSKI:** If I may just add one thing on that. I think that while there is a tension it is a tension that could potentially be managed, but currently there is a culture within the EPA that it leans much more towards working with industry as opposed to being that independent environmental watchdog that we need. So it is not just the structure but it is also the culture.

**The Hon. GREG DONNELLY:** That is what I was getting at. From your point of view it is not functioning as you would like it to function so therefore what is the cause of that? It is your submission that it is a cultural matter inside the organisation.

**Ms SMOLSKI:** Exactly. So there probably need to be clearer lines of delineation. It is not to say that we do not think the EPA should work with industry in order to effectively reduce pollution breaches—we think that is the case—but it is a cultural issue within the EPA and there needs to be much more emphasis on the watchdog side of things; that the role of the EPA is to be able to identify where there are breaches and then move ahead and investigate and prosecute if needed.

**The Hon. GREG DONNELLY:** It is that part of the EPA's role where you think there needs to be some additional resourcing very clearly to get them on the front foot quicker in terms of dealing with issues?

**Ms SMOLSKI:** Yes.

**The Hon. GREG DONNELLY:** I turn to page 10 of your submission—we are specifically talking about the coal dust pollution matter in the Hunter—five dot points from the top. Is it your opinion, from your reading and understanding, that a breach has likely taken place by the ARTC in terms of its failure? It is the fifth dot point: "Recommend that the EPA initiate action". Is it your assessment that there may well be a breach that has taken place there with respect to the licence?

**Ms LOANE:** In terms of this specific point that you are raising, we have been relying on the work of our member group, the Hunter Community Environment Centre, and it is definitely their view that there has been some kind of breach, and we would suggest that the EPA should look into that and, if necessary, should then take the action against the ARTC for that failure.

**Professor WHITE:** For the record, the ARTC are the people that run the railways.

**The Hon. GREG DONNELLY:** Is the opinion they have developed based on some examination of the licence that is held between ARTC and the firms that run the trains on the track with the coal?

**Ms LOANE:** That is my understanding, that the Hunter Community Environment Centre has looked into that. My understanding is that they will be giving evidence to this inquiry in the Hunter, so they might be able to answer your question a bit more closely.

**The Hon. Dr PETER PHELPS:** You indicated that there are concerns that the EPA had been captured by industry. Do you think there would be better outcomes, broadly speaking, if the appearance was that the EPA had been captured by environmental NGOs?

**Ms SMOLSKI:** I think what is important is that we have an independent EPA that addresses the objectives under the Act that it is meant to be adhering to. Environmental NGOs, including our own, work towards the protection of the environment, but we are not suggesting that the EPA should adopt a culture of NCC, nor should they be adopting a culture of industry. We think that they should have a culture that puts them squarely in the role which they are meant to play, which is a watchdog for pollution breaches that impact on the environment and communities across New South Wales.

**The Hon. Dr PETER PHELPS:** You spoke about your perception of a lack of prosecution of polluters but we have heard evidence today that the level of prosecutions in terms of the quantum of prosecution is higher than it has ever been. How do you reconcile your view of the limited prosecutorial powers versus the evidence which we have heard of unprecedented levels of prosecutions?

**The Hon. GREG DONNELLY:** Point of order: I think it is important that the people giving evidence know precisely how much. It is a bit of a leading question. We do not know. A statement was made earlier today—

**CHAIR:** I uphold the point of order. You might care to expand upon the evidence that was given earlier. I do not think the Nature Conservation Council were in the room this morning. It appeared to be that the evidence given indicated an increase in the numbers of prosecutions but a decline in the amount of dollars—

**The Hon. Dr PETER PHELPS:** For successful prosecutions.

**Ms SMOLSKI:** There is an increase in successful prosecutions but a decrease in the amount—

**The Hon. Dr PETER PHELPS:** There was an increase in the total quantum of prosecutions initiated.

**CHAIR:** Perhaps rather than wasting your own time here would you like to take that question on notice? The question was what data are you relying on in making your assertion?

**Professor WHITE:** I think part of the answer can be given quite briefly. We are not just talking about prosecutions, we are talking about a whole range of enforcement measures, particularly around the forest area; the degree of forest enforcement is quite low. So it is not just prosecutions we are talking about, it is a whole range of enforcement.

**CHAIR:** By "enforcement" you mean the issuing of penalty notices?

**Professor WHITE:** Penalty notices—

**CHAIR:** Cautions et cetera, et cetera?

**Professor WHITE:** Cautions et cetera, et cetera, yes.

**The Hon. Dr PETER PHELPS:** In relation to Newcastle and coal dust, what measures do you see would be necessary to mitigate coal dust during transportation?

**Ms SMOLSKI:** Covering of coal wagons.

**The Hon. Dr PETER PHELPS:** Would it be fair to say the NCC is not a fan of the coal industry?

**Ms SMOLSKI:** We think that there is inappropriate mining happening across the State that is impacting on endangered ecological communities, threatened species and human communities all across the State. So it is not about whether or not we are a fan of the coal industry; the purpose of our organisation is to protect nature and conserve nature across New South Wales and we do definitely think that the coal industry has been given far too much reach. Again, this is initially not just for the EPA but for the planning department et cetera, that there is inappropriate coalmining happening in several places across the State that is impacting on those areas. So it is not whether or not we are a fan; it is about protecting the environment and the role that we play in wanting to do that.

**The Hon. Dr PETER PHELPS:** Are there any best-model exemplars which you would cite in relation to coalmining activities and transportation?

**Ms SMOLSKI:** Not in terms of transportation or coalmining activities.

**The Hon. Dr PETER PHELPS:** So there is not a single mine in New South Wales which you think is of a good environmental standard.

**Ms SMOLSKI:** I said not in terms of transportation because we do not think that there is any transportation happening across the State when it comes to coalmining that actually meets world's best practice because they do not cover the coal wagons and it is impacting on communities like the Hunter and other areas. I could take the question on notice. I am not an expert in terms of every coalmine in New South Wales. There are many of them. In terms of how long I have been in this role, the different projects that I have seen moving through the planning process, we have significant concerns with many of them and they are detailed in several submissions that we have put in to those individual projects.

**The Hon. Dr PETER PHELPS:** Do you believe that there is a level of regulation which can be entered into which would be deleterious to individual companies and industries, or do you believe that there is no limit to the level of regulation you can have which industry cannot accommodate?

**Professor WHITE:** There has to be a balance.



**The Hon. Dr PETER PHELPS:** Can you think of an industry in Australia which has been badly affected by excessive regulation?

**Professor WHITE:** Is that a hypothetical question?

**CHAIR:** No.

**The Hon. Dr PETER PHELPS:** No, it is asking for a practical example of—

**The Hon. GREG DONNELLY:** You can take it on notice.

**The Hon. Dr PETER PHELPS:** —where over-regulation has had a deleterious effect on industry.

**CHAIR:** I suggest that if you wish to answer the question you take it on notice. We have to be careful that we do not drift outside the terms of reference of this inquiry. We are discussing the role of the EPA in all of this.

**The Hon. Dr PETER PHELPS:** And part of the EPA's role is the regulatory burden which is placed on individual companies, and if there is an example—it may well be the case that more and more regulation does have excellent outcomes not only for the environment but also for business, and if there is then let us have a look. In relation to the use of prosecutorial powers, to what extent would the NCC like exemplary cases, cases which serve as standards, public warnings to other industry players? Is that what you are looking for—a greater emphasis on the high-profile cases with large damages awarded, or would you prefer to see a situation where industries do not need that situation happening?

**Ms SMOLSKI:** I think I am clear on your question. Our preference is that we do not see pollution breaches and incidents where the EPA would have to prosecute. Our purpose is protection of the environment in New South Wales, so clearly our preference is for those breaches and incidents not to happen in the first instance. If there is an unfortunate case, like with Orica, where they do happen then we think it is critically important that the EPA is playing the role it is meant to play and making sure that companies understand that it is a luxury to pollute the environment in New South Wales; that they are given licences to do so and if they breach those licences then they need to pay for it because it would be a very bad precedent to set if we had a terrible pollution incident here in New South Wales and the company was not prosecuted for it or not even investigated for it, and that is something that we see often.

Not to answer your past question in any level of detail, but we think that the EPA has a number of tools in the toolbox that they can use to make sure that we are not seeing pollution breaches and different incidents. It is not that the legislation is not there. It is not that the policies are not there. The concern is that they are not being used to the level that they should be in order to protect the environment in New South Wales.

**The Hon. Dr PETER PHELPS:** Or that you think they should be.

**Ms SMOLSKI:** Yes. That is my opinion.

**Dr MEHREEN FARUQI:** Going back to the issue of resources, in your submission—many others have talked about the EPA having more resources—you especially mention more resources into prosecutions and investigations and looking at those pollution incidents. I am interested in your view of the other end of the spectrum, which is actually preventing pollution. I had a chat with the EDO this morning about protection of environment policies, so instruments that the EPA has but has not used so we can avoid pollution incidents. What is your view about the EPA being resourced in that area and should more resources be provided to prevent and use the precautionary principle?

**Ms LOANE:** That is an interesting question, and I think it is reflected in some of the responses from our member groups. When we asked them about whether they thought the EPA was meeting its objectives, the feedback we got was "Well, I didn't even know that the EPA did this", in terms of education about waste, in terms of education about pollution. To me, that provides a sense that the community is not aware that the EPA is doing the types of programs that you are suggesting, which gives the idea that perhaps they could be doing more. Maybe it is an issue of resourcing. Is there an environmental education campaign that could be rolled out if the EPA had adequate resourcing, and why does the community not know that the EPA has these specific roles? Is it because they do not have the resourcing sufficient enough to take on those roles?

**Dr MEHREEN FARUQI:** That is an interesting question as well about the community knowing what the EPA does. What do you think in your view the EPA can improve to educate or inform the community better of the roles so the community can also engage better with the EPA on different areas?

**Ms LOANE:** I will go back to the objectives of the—

**Dr MEHREEN FARUQI:** Or you could take that on notice if you like.

**Ms LOANE:** I am looking at some of the objectives here. One of the objectives is encouraging the reduction of waste, reducing materials, encouraging the reuse and recycling of materials, et cetera, promoting community involvement in decision-making, ensuring the community has access to relevant information. The feedback we were getting from our members is that they did not even know that the EPA was doing that. So perhaps there are new programs that the EPA could roll out in those specific areas that sit under its objectives that would address some of these issues.

**Dr MEHREEN FARUQI:** You also noted—I think you mentioned this in your opening statement as well—that there seems to be a reduction in access to the EPA. Some of the community submissions mentioned that as well. How could this be improved? Perhaps you could provide firstly an example of why you think that access has reduced?

**Ms SMOLSKI:** I think the clear instance that the EPA board no longer has community representatives on it, so that is probably the key example that we can provide. Ms Loane has already provided some input in thinking around how there could be an evaluation and improvement of the Newcastle—

**Dr MEHREEN FARUQI:** Consultation committee.

**Ms SMOLSKI:** Yes, thank you—consultation committee and potentially improve upon it. We do encourage the Committee to question the people who sit on that panel when in Newcastle because they will have more expertise in that area than we do about how that could be rolled out in other areas around the State.

**The Hon. GREG DONNELLY:** I take you to page 8 of your submission. It is on the same theme of community involvement. At the bottom of page 8 you have recommendations about enhancing community consultation and participation. With respect to the second point, that the EPA reinstate the program for regular meetings with peak environment groups, is there any ongoing consultation with peak groups, or is there not? I am asking because I am not sure.

**Ms SMOLSKI:** As we alluded to before, we were having regular quarterly meetings with the EPA around the IFOA process, but because we felt as though our input was not being taken into account we are no longer having those meetings. But it is something that the EPA has indicated they are happy to do so moving forward. We have met with them—it would be on the record—on several occasions over the past years, but there is nothing set up that is regular.

**Ms LOANE:** If I can clarify, we were meeting with the forestry division of the EPA, and this point alludes to the fact that prior the EPA had a practice of meeting with peak environment groups on a regular basis more broadly as well and not just with the Nature Conservation Council. So reinstating that type of practice would go a long way towards re-establishing their engagement with the community.

**The Hon. GREG DONNELLY:** Picking up Professor White's comments earlier about what appears to be in your view a relative opaqueness about the EPA board proceedings and what is dealt with by way of business and the transaction of that business, are those minutes published on the website?

**Professor WHITE:** No. I do not think so.

**The Hon. GREG DONNELLY:** Obviously you have an interest to know what is being transacted. Is there a source where you can find out what matters are being dealt with at these meetings on an ongoing basis?

**Professor WHITE:** I do not think so, no.

**The Hon. GREG DONNELLY:** No, to the best of your knowledge.

**Professor WHITE:** Yes.

**The Hon. GREG DONNELLY:** Would it be your view that those board meeting minutes should be a matter for public display on something like a website?

**Mr SCOT MacDONALD:** Can I take a point of order?

**CHAIR:** No, but you can ask for a clarification.

**Mr SCOT MacDONALD:** Just a clarification: I thought we were told earlier in the EPA evidence that they were. Have you just remembered that?

**Professor WHITE:** I stand to be corrected; if the data is wrong, then the data is wrong.

**CHAIR:** We can check the record on that.

**The Hon. GREG DONNELLY:** It is a matter of fact whether or not those minutes are being published.

**Professor WHITE:** The whole business of putting stuff on a website is tricky because you do not want to stifle debate and conversation, so there is a balance to be sought in all these things.

**The Hon. Dr PETER PHELPS:** In terms of what you perceive as the lack of action on forestry issues by the EPA, is it correct that you do not believe that there is enough action being taken on forestry issues? Would you consider that that is part of Premier Baird's war on trees?

**Ms SMOLSKI:** Yes.

**The Hon. Dr PETER PHELPS:** Thank you.

**Ms SMOLSKI:** I am happy to expand but if you look at three different issues you have the 10:50 land clearing rule, the remake of the coastal IFOAs and the potential for opening up Brigalow and Nandewar State conservation areas for commercial logging. Those are three issues that we think indicate that there is a war on trees in New South Wales.

**The Hon. Dr PETER PHELPS:** The NCC's position is that there is a war on trees initiated by the Baird Government.

**The Hon. GREG DONNELLY:** Point of order: We are not interested in getting some cheap quote for a media release. If you have a question—

**The Hon. Dr PETER PHELPS:** I am simply quoting from the NCC's website, "Premier Baird's war on trees". I was just trying to see whether they believe that the EPA's lack of action on what they perceive to be minimal prosecutions in forestry is in fact part of the war on trees.

**CHAIR:** Order! I uphold the point of order, only in so far as if you wish to re-ask the question related to this inquiry into the EPA, then go ahead.

**The Hon. Dr PETER PHELPS:** I will leave it.

**The Hon. RICK COLLESS:** I have a question that relates to this and your comments about the IFOA process. Now that you have withdrawn from that process, what is your modus operandi from here on in relation to that?

**Ms SMOLSKI:** To quickly speak to the previous question and I will get to your question—

**CHAIR:** No, that question was ruled out of order.

**Ms SMOLSKI:** Okay. Then we will not go back to that.

**Professor WHITE:** We will need to have discussions with the Minister and the forest section of the EPA about exactly that. It was a decision we did not take lightly because we prefer to be at the table and involved in negotiations—that is our style of operation—rather than being outside.

**The Hon. RICK COLLESS:** But being outside now, surely you have put yourself in a situation where if the IFOA is agreed to, and it does not meet with your specific approval, you will sit back and say, "We weren't part of the process. Therefore we can criticise it all we like."

**Professor WHITE:** We reserve—

**The Hon. RICK COLLESS:** Because you will criticise it, I am sure, given your comments so far today.

**Professor WHITE:** We will make a judgement on that when we see the evidence, but we felt that we were getting painted into a position where decisions were being taken and we were not being consulted so what was the point of being involved?

**CHAIR:** So you were not being consulted as part of the process?

**Professor WHITE:** Decisions were being taken behind closed doors. The industry and the regulator were deciding what would happen and then telling us without there being genuine consultation.

**Mr SCOT MacDONALD:** Earlier I had a discussion with EPA and EDO representatives about what I fear is tabloid environmentalism. I think your submission is a classic case of that. We have important issues, but in terms of the state of the environment, threats to the environment, they are nowhere near the top of the tree. The top of the tree is waste, vegetation and all those sorts of things, but I think we go for, by most people's admission—very low impact on the environment in the Pilliga et cetera. That is evidence, not my opinion. I think the Chief Scientist is reasonably in that space.

**CHAIR:** Do you have a question, Mr MacDonald?

**Mr SCOT MacDONALD:** How can we assist the EPA to be efficient when your group and other groups push tabloid-sort of environmentalism, if you like?

**Ms LOANE:** Just in terms of the statement about the Pilliga, we were addressing the six issues that were part of this inquiry. So I think it was quite right of us to use that as an example and we were trying to stay within the terms of reference by using the case studies that were part of the terms of reference.

**CHAIR:** I conclude this session of the inquiry. Thank you for your submission and thank you very much for sticking to the terms of reference. If you have taken any questions on notice, the secretariat will notify you. We ask that you provide replies to those questions on notice within 21 days. Thank you very much for agreeing to come to talk to us today. We appreciate the effort.

**Professor WHITE:** Thank you.

**(The witnesses withdrew)**

**(Short adjournment)**

**ANDREW GEORGE HELPS**, Managing Director, HG Recoveries Pty Ltd, affirmed and examined:

**CHAIR:** In what capacity are you appearing before the Committee?

**Mr HELPS:** I am here in two capacities. I am here as the Managing Director of HG Recoveries and I am also representing the United Nations mercury group.

**CHAIR:** Would you like to make an opening statement?

**Mr HELPS:** Yes. I will make this as brief as I can. Thank you for providing me with the opportunity to speak to your inquiry today. The NSW Environment Protection Authority management of the ICI/Orica Botany supposed remediation of the heavy metal and chemical pollution on and around the Botany site has created without doubt the largest intergenerational legacy issue in New South Wales. HG Recoveries became involved in the Orica Botany toxic metal chemicals saga in late 2012 at the request of the international Persistent Organic Pollutants [POPs] network.

The ICI/Orica mercury-based chlor-alkali plant at Botany is typical of these prewar-designed plants in that the use of mercury in the process was very loosely controlled and in the period up to environmental controls being introduced mercury-contaminated waste was just dumped or allowed to run into the environment. The Botany site is unique amongst large scale chlor-alkali plants globally in that there were in fact five facilities on the site that either used or stored mercury.

This Botany chlor-alkali plant had three mercury cell lines—most of these plants only had two. Because of the electricity demand of this plant there was a co-located power station that burned mercury-saturated hydrogen as part of its fuel and consequently added to the mercury pollution load in the area. Also on the Botany site was a vinyl chloride monomer [VCM] plant that was mercury based, a mercury-based pesticide fungicide plant and a mercury repackaging plant. To date the so called clean-up of the chlor-alkali plant—and not the other four sites—is the only activity to remediate mercury pollution on site. This single-site remediation has been flawed from day one and the critical document, the Human Health and Environmental Risk Assessment [HHERA], relied on by NSW EPA and first delivered in 2008 was deeply conflicted and flawed in that Orica retained the consultants, wrote the scope of work for the consultants and provided the critical gaseous mercury monitor, which Orica also calibrated.

During the investigations to inform the HHERA, five locations on the chlor-alkali plant site were discovered emitting gaseous mercury in excess of the ability of the Orica-supplied machine to measure, which was 2000 micrograms per cubic metre [ug/m3] or 1,111 times the NSW EPA ground level criteria for one hour of mercury emissions. Victoria, for instance, has a three-minute limit of 3.3 ug/m3. Instead of spending \$650 a day to rent a more suitable machine, the Orica consultant compiled a report in total ignorance of what the upper limit of emissions actually were. Following peer review data from ourselves and others, Orica produced a later version of the HHERA in 2013. Orica still failed to identify the upper limit of the emissions of gaseous mercury. The author of this report had so much confidence in the document that they refused to sign the document. It later emerged that NSW EPA had given Orica permission to measure gaseous mercury emissions at their boundary at a point about 1.8 metres above the ground claiming compliance with an Australian standard that actually applies to dust and light gas emissions—for example, automotive emissions—not mercury which is at least 6.9 times heavier than air.

At all times the NSW EPA could have availed themselves of the services of an internationally recognised expert to advise them on the correct way to respond to the multimetal/multichemical pollution that was being found off site. NSW EPA chose to rely on the advice of a longstanding expert that had been involved in the ICI/Orica saga for a significant time. The final insult to the community was the statement by the Chief Environmental Regulator at a public meeting in Hillsdale in February this year that he did not believe there was any offsite pollution from the Orica site, despite the EPA's own sampling indicating this was the case, and that as such any pollution found on private properties would be the responsibility of the home owners and not Orica.

So much for the Protection of the Environment Operations Act [POEO] mantra that the polluter pays, and so much for the Chief Environmental Regulator's primary duty to the community and the environment under part 3 of the Protection of the Environment Operations Act. The ICI/Orica Botany site has been marked for sale by Orica on the international chemicals market. The New South Wales Parliament needs to understand that this site in Botany has become an intergenerational legacy issue for the New South Wales Government and any

major clean-up of the site, which may well run into billions of dollars, will no doubt be at the expense of New South Wales taxpayers.

**CHAIR:** Would we be able to have a copy of your initial statement just for Hansard?

**Mr HELPS:** Yes, for Hansard.

**CHAIR:** The clerks will take that into their custody. We will now proceed with questions.

**Dr MEHREEN FARUQI:** Thank you for your submission and for attending today. You note in your submission that in November 2012 the community was informed by the EPA that it could actually obtain quotes for offsite testing and seek to access some funding in a suspense account. Is that usual practice for the EPA or would usual practice be to just do its own sampling? I am a little confused as to why that happened.

**Mr HELPS:** That makes two of us. I was at the meeting when that happened. I normally advise EPAs in Asia. It is only in the last couple of years as I have got into advanced age that I have started to do bits of work again as pro bono in Australia. I had a pre-meeting meeting with a number of EPA staff and they made the point that there was some money in some sort of suspense account there for the community to do various things. It was certainly well canvassed at the meeting and the comment was made that if the community wanted testing done they could put up a proposal to do it.

**Dr MEHREEN FARUQI:** Do you know of any recent examples where this has happened?

**Mr HELPS:** No I do not.

**Dr MEHREEN FARUQI:** I get the impression from your submission that you think the EPA and Orica were a bit too close in making decisions. Is that correct? Why do you think that is the case?

**Mr HELPS:** I have seen similar incidents in China. I hate to use the word, but I think it is called regulatory capture. Certainly my colleagues in the US EPA keep running the mantra of regulatory capture. There were just too many things going on that the EPA as a matter of course should have been doing: some public health testing and perhaps getting health records checked because mercury is an insidious poison. That is why there is now a complete international convention—the Minamata Convention—controlling it. It was pretty clear that there were a whole range of things that in their regulatory role the EPA should have been doing to ensure public health and safety and the safety of the environment.

I immediately at that first meeting had some alarm bells ringing about exactly what the EPA knew about the risks of this type of plant. That concerned me because right here in New South Wales on the other side of the harbour is a highly experienced expert who has worked for the EPA as a consultant in the past and who understood that plant—was co-author of a key report in 1990 that has never been released; the EPA will not release it—and they could have got really good advice from this person. For some reason they will not engage him.

**Dr MEHREEN FARUQI:** You just mentioned that the EPA could have been doing things, one of which perhaps was liaising with some independent expert. What other things do you think the EPA could have been doing?

**Mr HELPS:** My core competency is disaster management. I am an environmental disaster manager. I have been so since 1966. When you have a site like this—I am involved in a project in China now with about 100-odd similar sites—there is a standard code of practice. The first thing you do is a risk assessment. They did not have one. You walk in the door, you say, "Okay, we've got a problem with this plant." You do a risk assessment. That is well understood technology. World Bank projects, IFC projects, China does them right now, the Vietnamese are very good, the Japanese—everybody does them. There was not one. When I walk in the door I want to see a risk matrix.

**The Hon. RICK COLLESS:** Are you talking about ICI?

**Mr HELPS:** ICI Orica, yes.

**The Hon. RICK COLLESS:** They did not have a disaster plan?

**Mr HELPS:** No. It is called a risk matrix.

**The Hon. RICK COLLESS:** Sorry, risk matrix.

**Mr HELPS:** You go through everything that went on on the site. What are the toxics that it makes and you scope them all out. One of the first things I did for this site was do a risk matrix so that at least the residents, myself and my fellow director who is the chemist in the organisation understood because we do understand chlor-alkali plants pretty well. We understand what the risks were. You need to do studies of the community to see whether women are having spontaneous abortions, whether you are getting lots of kids being born with attention deficit hyperactive disorder [ADHD] or autism, all the typical signs of inhalation of mercury. Everything I saw the EPA doing was avoiding the question of gaseous mercury: everything that was said about mercury, "Oh, it's only a tiny amount of mercury. It's only 2 milligrams to the kilogram"—two milligrams to the kilogram is parts per million—but their own regulations measure gaseous mercury at parts per billion. Some of the fundamental knowledge that should have been coming out of the Chief Environmental Regulator and some of the senior staff just was not there or if they knew it they were not talking about it.

**Dr MEHREEN FARUQI:** In your view, why were they not talking about it? What is your analysis of that?

**Mr HELPS:** I do not know whether they were in beyond their skill set, whether they did not want to trigger a massive clean-up of the area, which the Government might wind up to be responsible for, but certainly by March last year I got to the point where I said to residents, "I'm going to come up for a day and we're going to take some spot samples around the site", which should be the first thing you did after you did the risk matrix. You would walk in and you would go round the place and you would take some very careful spot samples. I have a Commonwealth permit to do that, or the company has got one, and you initially do XRF—X-ray fluorescent spectrometer—analysis, which is the parts per million. You would do that sampling because it gives you 32 metals in one hit. I just spent a day here. I took 16 samples and one of the samples had a massive chlorine hit in it, off site. I did not go onto the Orica site. I just did everything off site. I wrote to the EPA and said, "You've got some problems. In the spirit of cooperation, here are the results", and all I got was canned.

**Dr MEHREEN FARUQI:** The community around that area also has raised concerns about effective communication from the EPA and effective engagement. How do you think communication and engagement can be improved?

**Mr HELPS:** I think there is a lot of work to be done. I think probably a number of senior people in the EPA are unsuited to their jobs. I am not being unkind there; I just think we need a different type of person there. In fact, there is a similar problem arising in Victoria at the moment in which I am also involved. Within an organisation like EPA you need a hard-core professional disaster manager. You can have all the environmental scientists you like, but you need somebody there who stands up at the meetings and says, "Okay, what are the hard-core disaster management issues?" You have a lot of them at Botany. You have problems with dangerous goods on the road. We still do not know what is out in the open areas. We have tested only two houses in the whole area. One of them was clean. The other one in Denison Street is absolutely horrible.

You need a hard-core disaster manager embedded in the upper echelons of the EPA purely and simply to get up and ask the hard questions the scientists do not ask. We have done that successfully in China over the last 20 years. We have changed the whole process in China now. The big polluters are not allowed to choose consultants and hire them in to write reports. If there has to be a report written on XYZ chemical company in Beijing, then in the university down at Guang Xiao or somewhere names are pulled out of a hat and they get sent there to do the reports because we then get reports that are totally independent. If we had a totally independent HHERA for Botany, we would not have the problems we have now.

**The Hon. GREG DONNELLY:** I take you to your submission. Do you have the full submission in front of you?

**Mr HELPS:** Yes, I do not know that I have got the full document but anyway ask me the question, I can probably answer it.

**The Hon. GREG DONNELLY:** I refer specifically to the statement of response.

**Mr HELPS:** I do not know that I have got the statement of response.

**The Hon. GREG DONNELLY:** No, I have just had a matter clarified for me. Just looking at the whole Botany area as it currently stands, you obviously have a number of concerns about environmental matters there. What do you submit should be the approach by the EPA in taking on, if I can use that phrase, the manifest issues at Botany? Your submission suggests that you are not pleased. In fact, you think they have pulled up short in terms of its management. If we look ahead how do you believe the EPA should be tackling it?

**Mr HELPS:** The first thing you do is a complete independent—I stress that—environmental audit of the Botany site because it had a mercury-based pesticide fungicide plant on site. I have had experience with them in China. Chlor-alkali plants are bad, but those plants are horrible and we do not even have a record of where it was, although I have had a number of staff saying that when they went on Christmas holidays it was there and when they came back it was not.

**The Hon. GREG DONNELLY:** Which Christmas holidays are you talking about?

**Mr HELPS:** I am talking about when mercury-based fungicide pesticides were banned under the Basel Convention, I think it was or Stockholm convention—one of the two. I cannot remember which one now.

**The Hon. GREG DONNELLY:** Some time ago.

**Mr HELPS:** That plant has disappeared. There was a vinyl chloride plant there that used mercury. We need to get somebody independent from Orica in there under the powers of the EPA to do a proper survey of the site so that we understand what the toxics are on the site because nobody has that data. There are 12,000 or 14,000 tonnes of hexachlorobenzene [HCB] still on site. The first thing is a risk matrix. I have got one. I am happy to give it to the EPA but it probably would not want it. But then you need to examine the site and then you need to do really detailed examination in what we call a halo. It is called halo sampling and you go out on a halo from around the site. Experience overseas in America and certainly in China and Japan is you are probably looking at a halo that could run for 15 kilometres.

**CHAIR:** Radius?

**Mr SCOT MacDONALD:** A plume?

**Mr HELPS:** Well yes, a deposition of other chemicals, especially mercury.

**CHAIR:** Fifteen kilometres radius.

**Mr HELPS:** Yes, radius of the site. Certainly I did some gaseous mercury testing north of the harbour in February this year and we were getting gaseous mercury in one of the creeks running down into the harbour so it is obviously a wider spread. Now I am not for one moment saying that is Orica mercury. There could be somebody up there pulling ABS brake units to bits to see what is in them or something. But there is a wider problem here and that wider problem is the understanding of the EPA in New South Wales of elemental mercury and how it becomes gaseous because in the little bit of testing the EPA has done it has totally ignored the ability of mercury to become gaseous. It keeps relying on the National Environment Pollution measure HILs and they specifically exclude gaseous mercury and most other gaseous chemicals. Remember you have got chlorine on site.

**CHAIR:** What is HIL?

**Mr HELPS:** Health investigation levels under the National Environment Pollution measures. The other thing the EPA does not understand is the hazard index. It is ranking the few things that it has recognised that are off-site PCBs, DDT and all these sorts of things against the HILs and in actual fact you have got to rate them against the hazard index. This was an issue that Professor Fell did not go near and I just brought a document here that I would like to table which is from an eminent global scientist out of New Zealand, Dr Ron McDowall, IBE, ONZM. He is an international consultant, scientist, engineer for UN-FAO.

**Document tabled.**

**The Hon. GREG DONNELLY:** What does that document say?



**Mr HELPS:** It talks about how the EPA should have rated the chemicals in the little bit of testing it did in the Sydney Water easement against the hazard index methodology which we all use, we all understand but it is not used in New South Wales. There is just this, "Oh, we average all the samples out, and on average the samples are below the health investigation level." I have tabled that today so that the Committee can understand this gentleman, Professor Ron McDowall—I do not know him—but FAO tell me he is one of the best around. He has written this document to clear up that matter.

**The Hon. GREG DONNELLY:** What do you understand has been the work done thus far by the EPA in regard to what is colloquially called the Botany area? What work have they been doing over what period of time?

**Mr HELPS:** I am limited because I am doing this pro bono for the community. There is a very long history of reports and reports being approved by the EPA and then having to be amended. At the end of the day I have a view—and it certainly would not be countenanced most anywhere else in the world now—that you cannot have the polluter choosing its own consultants, writing the scope of work and then providing that scope of work to the regulator who then reads it and says, "Yes, that is a pretty good document." That is why it was stopped in China, it is not done in Japan and it is certainly not done in America. We need to change a culture in the EPA which says, "Yes, okay."

There is a provision under the Protection of the Environment Operations Act called section 295ZD where the Minister can say, "Okay, Orica Botany, you have got to do a report on this." They go out, the Ministry goes out and hires the most capable team that it can. They do the investigations. They write the work and they sign it off—and remember the whole Botany thing now is on an unsigned HHERA because the consultant would not sign it—and then they bill Orica. Then the community and the public in general in New South Wales can say, "This is a truly independent report."

**The Hon. GREG DONNELLY:** And it is published into the public domain?

**Mr HELPS:** And it gets published into the public domain. We have got the situation now where there are some critical reports and it will not release them. The EPA will not release them although it has got them, especially the report from 1990 on mercury in the Botany site, the Davis, whatever it was, report. We need transparency. This business of consultants being allowed to be hired in, they go around and they choose the consultant they want. They write the report and in this case provided the gaseous monitoring equipment and we got a report and the EPA signed off on it. The EPA is looking at these reports and it signs off on them. I have to tell all Committee members today I am horrified with that process. Yes, I get condemned and I get accused by especially the chairman of being all sorts of things but I am horrified with that process.

**CHAIR:** Just for the record, you are not referring to the Chair of this Committee, are you?

**Mr HELPS:** No, I am not.

**Mr SCOT MacDONALD:** Is it Dr or Mr?

**Mr HELPS:** Mr Helps, thank you.

**Mr SCOT MacDONALD:** Are you aware of any human health indicators that are showing causes of concern? It has been there for so many years—and I am not downplaying it at all—but what are we dealing with in terms of human health impacts?

**Mr HELPS:** We do not know because the work has not been done. I just make the point to you with the big mine, the antimony mine at Costerfield, which has ongoing horrible pollution problems, what happened was the residents up there, the farmers up there got together and they did the human health testing via the local doctor. So they started testing everybody that came in for their urinary antimony. We got to 360 urinary antimony samples that were all over the US Government limit. Finally the health department and the Victorian Government went "Oh wow, we have got a problem we had better do something" so they set up a 42-person committee.

There are fundamental things that any disaster manager would do at Botany. The first thing is urine and blood analysis for all the residents within about five kilometres so you can say, "Yes, they are getting a

problem" or "No, they are not." You would do that on a graduated basis. You do all the children under five first and then you go five to 10, and then you do the teenagers because they are the most at-risk groups and then you do the adults. You do them via the doctor service, the specimens go to Royal Prince Alfred Hospital and you get that data set so that you know if you have got a problem with the people. There are not a lot of chooks up there so you cannot test the chooks because the chooks eat the dirt and would probably die so you would not want to do that.

Then you have got a real problem with Port Botany because in the latest HHERA the consultant said the mercury level in Port Botany that would be protective of human health is 6,700 milligrams to the kilogram. And that is protective of human health—there would not be any fish alive in the bay if it got to that level so you would not be able to eat them. We have got these things that should have set alarm bells ringing in the EPA and they have not.

**Mr SCOT MacDONALD:** Can you enlighten us about your point 19 about undisclosed conflict of interest with Professor Fell?<sup>1</sup>

**CHAIR:** Just be careful.

**The Hon. Dr PETER PHELPS:** Can I ask a couple of quick questions?

**CHAIR:** Yes, while we are waiting.

**The Hon. Dr PETER PHELPS:** You mentioned a North Shore expert in your testimony. Are you at liberty to say who that person is?

**Mr HELPS:** Yes, Dr Wayne Davies.

**The Hon. Dr PETER PHELPS:** You mentioned a 1990 report?

**Mr HELPS:** Yes, the Davies-Prince report, I think it is, from 1990.

**The Hon. Dr PETER PHELPS:** The same person?

**Mr HELPS:** The same person, still there.

**The Hon. Dr PETER PHELPS:** Are you aware of the content of that report?

**Mr HELPS:** No, I have not because the EPA will not release it. Dr Davies has got a report, but it is not his report. I have not seen it but he would be happy to produce it under subpoena to this Committee. He cannot hand it out into the public because it is not his report.

**The Hon. Dr PETER PHELPS:** What did that relate to specifically?

**Mr HELPS:** Mercury.

**The Hon. Dr PETER PHELPS:** Air-borne mercury?

**Mr HELPS:** No, it was just mercury going into the drains and sewers but apparently, I am told, it is a pretty seminal report and it must be pretty seminal because Orica will not allow the EPA to release it.

**Mr SCOT MacDONALD:** I will take back the name I mentioned earlier. In point 19 you talk about an undisclosed conflict of interest.

**Mr HELPS:** That particular person worked at the Orica Botany site during his early years and had good knowledge of what was going on there. There was a whole lot of toing and froing about getting an independent expert to review what we had been saying. Originally the EPA board wanted to use CRC Care in

---

<sup>1</sup> In correspondence to the committee (dated 16 October 2014) Emeritus Professor Chris Fell responded to comments made about him during the hearing:  
<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/4C044392AF2977FACA257D79007F80A6>

Adelaide which just happened to be chaired by the chairman-elect of Orica. So there was what I would describe as a robust discussion about that issue and then went looking for somebody else and they said, "We found Professor Fell"—sorry expunge that from the record.

**CHAIR:** No, that is all right. Professor Fell's name has been put forward as a technical person.

**Mr HELPS:** I met with Professor Fell and he was a nice guy and I thought he would approach it but then he put out this huge report and he only actually wrote 2½ pages of it. The rest of it was written by a ghost writer. We responded to the Minister at the time about that report in detail and they have not responded to us.

**The Hon. RICK COLLESS:** What evidence do you have for that statement?

**CHAIR:** I think we are getting into areas where we perhaps should not go. I think we will leave it at that.

**Mr SCOT MacDONALD:** The report was copied to the Chief Scientist and Engineer, Professor Mary O'Kane. Did she express any concerns about the integrity of the report?

**Mr HELPS:** I have not been privy to what she expressed.

**Mr SCOT MacDONALD:** I will leave the specifics, if you like, of Botany. You have already talked about independent testing and that sort of thing. What about communication with residents of Port Botany? You and others have put in a lot of work. What sort of format can the likes of the EPA present to someone who has very limited scientific knowledge, does not have a lot of time to put into it? Is it a Town Hall meeting? Is it something on social media? Is it on a website where people can either have confidence or look for more information and hopefully not politicise something?

**Mr HELPS:** I do work all over the world. I sit on United Nations committees and one of the things that we are talking about within the Minamata Convention is the appointment of what we would call environmental ombudsmen. We create a situation—and we certainly need one in Victoria—where we have an ombudsman who just handles environmental matters. That is probably an elder statesman of scientific and disaster management background—and there are a number of them around—who interfaces with the regulator. The problem with the regulator is that they have got to be friend and foe at the same time. They are out there prosecuting the polluters and they have to have relationships with the polluters.

I was the poor little guy who wrote the first draft of the Victorian Environment Protection Act in 1967. They have to have that relationship, but they need a circuit breaker; and that circuit breaker would be an environmental ombudsman who worked between the community and the regulator. So you would have a circuit breaker—someone to go out and say, "Look I have spoken to the regulator and we are going to X, Y and Z." I realise it is another level of bureaucracy and some staff. Ideally it would be somebody who might have retired from the police force as a senior sergeant or something—someone used to working cohesively at a community level, someone who has a lot of environmental knowledge and someone the community can actually trust. When you go to public meetings and communities get told things like, "Well, if you are polluted, you are on your own", then they get pretty upset. So we need to break that circuit.

**Mr SCOT MacDONALD:** To get it out of the politics, if you like.

**Mr HELPS:** Yes. The Victorian ombudsman, the one we used to have, used to go out and do what he called playing touchy-feely with the community. That worked really well. When we had the landfill gas issue out at Cranbourne they turned that into a disaster management exercise. We have now changed the Emergency Management Act in Victoria so that incidents of contamination are declarable emergencies. I would strongly suggest that this Committee recommend changing the equivalent emergency management Act in New South Wales to make contamination incidents declarable emergencies. Then you would probably declare the Botany situation an emergency, and de-stress the EPA and get somebody else in to manage the situation.

**Dr MEHREEN FARUQI:** Mr Helps, there seems to be significant conflict between your organisation and the EPA on the veracity of each other's testing results. Can this be resolved? If so, how do you move forward on this?

**Mr HELPS:** Dr Faruqi, I think we have done that today—when you read that document and you look at what we said at the time. You cannot have a whole lot of chemicals—pesticides, polycyclic aromatic hydrocarbons [PAHs], mercury, cadmium and lead—in the soil and say, "We've taken 16 samples and when you average them out they are okay." I am sorry but a toddler who is crawling around there having a pica event, which is eating dirt, does not go and take 16 samples across the park, crawl back and put them in a pile and then eat a mouthful of them; they take the one that is right there. I have never been able to get that message across to the EPA. I have been crucified because it is claimed that that land is suitable to build an industrial building on.

I have been to chlor-alkali plants in China where they are putting bodies in bags. I know how quickly things can go bad. The EPA needs to accept the fact that the National Environment Protection pollution measures are not right. The level of mercury you can have in the soil for some miraculous reason has moved from 70-something parts per million to 720 parts per million in the latest update. America is on 2.6 parts per million and they are forcibly cleaning up sites at 10 parts per million. We are now going to get the Orica Botany chlor-alkali plant remediated to 720 parts per million. I am sorry but within four years they are going to have to dig it up and do it again.

**Dr MEHREEN FARUQI:** Many of the submissions the Committee has received have called for the EPA to have more resources and more funding, and for it to be more independent and to have stronger regulatory powers. Do you think, apart from the suggestions you have made, that is something you would support?

**Mr HELPS:** Of course. If you go into where the middle management of the organisation are working, you will see that they are horrible offices—they must be class E offices. You see better stuff in Vietnam these days. They need more money. They need a better range of staff. They need more facilities, and they need to be separated from this aura of regulatory capture. The first thing that this Committee should recommend is that we should stop this practice of the polluters being able to hire in consultants of their choice to write reports. We should create a system, which is provided for under the Act in section 295ZD, where the Minister designates somebody to do the report.

**Dr MEHREEN FARUQI:** You have international experience. Given your experiences with the United States Environmental Protection Authority and other international organisations, are there any other recommendations that you think are critical for this Committee to make?

**Mr HELPS:** The EPA needs the budget so that its people can go to international conferences. I would respectfully suggest that, because of the mercury problems in New South Wales, they should become involved in the United Nations Environment Program [UNEP] process and start going to some of the UNEP meetings where we are doing significant work on mercury clean-up handbooks, which I am leading. They need to get international experience and meet with their peers at the United States Environmental Protection Authority and the United States Geological Survey. They need to meet the Canadian and the Japanese services. The Japanese environment ministry is a truly high-class professional organisation. They are so good. Even in China now it is good. Vietnam is good. Then there are all the European Union processes. Because New South Wales is the biggest State it should be the leader in environmental management not the follower.

**The Hon. GREG DONNELLY:** Mr Helps, you may not know the answer to this, so if you do not then feel free to say so. Does this Botany area as we have been describing it fall exclusively within the domain of the New South Wales Government or is there some overlap with Commonwealth regulation in this area with respect to the environment?

**Mr HELPS:** There is some overlap. There is a Ramsar wetland on the other side of Botany Bay. I forget what it is called now but it is a registered Ramsar wetland and it is not very far away. It certainly needs a whole lot of work. I have been unable to get the Environment Protection and Biodiversity Conservation department interested in that. The Environment Protection and Biodiversity Conservation [EPBC] Act is the Federal legislation which also covers impacts on Ramsar wetlands. Mind you I have also been able unable to get them to consider all the mercury flowing out of Victoria into the Murray River re the seven Ramsar wetlands in the Murray so they are not on their own there. There is some Commonwealth overlap there.

What scares me is that I have seen people gathering periwinkles and seaweed in the Botany area and eating them. Certainly where the main drain runs out there at the Malabar headland or whatever it is called I was getting big hits of gaseous mercury on the rocks near where children were playing in the rock pools. I got pooh-poohed by the EPA but I accept that I am always going to get pooh-poohed by the EPA. They want to measure

mercury 1.8 metres off the ground. Certainly there are Commonwealth implications there. The rifle range site is horribly polluted and the Commonwealth is passing that back to the State. I would suggest that the Committee needs to have a serious look at exactly what that involves.

**CHAIR:** It is a case of OMD on that one—that is, over my dead body.

**Mr HELPS:** Thank you, Mr Chair. We agree. I have raised that on a number of occasions.

**The Hon. GREG DONNELLY:** The Chair is the member representing the Shooters and Fishers Party in the Legislative Council of New South Wales.

**Mr HELPS:** I raised that with a Senate committee last year. That rifle range site is horrible. When you talk to old people living in the area, they said that the trucks were coming up there out of the ICI site and dumping grey sludge every day. They had a consultant come in and test it. They tested the gas coming out of the ground for methane but they did not test it for mercury.

**CHAIR:** And people lie on the ground.

**Mr HELPS:** Yes, and probably 1,000 tonnes of stuff went in underneath the pistol club, which is all fenced off. We were getting big mercury hits in Pioneer Park next door.

**The Hon. RICK COLLESS:** Mr Helps, going back to the issue of the gaseous mercury, what is the chemical process that creates the vaporised version of the mercury?

**Mr HELPS:** Chlor-alkali plants use elemental mercury, which is the silvery stuff that is in your thermometer. When that is dropped it splatters into thousands of little beads. Those little beads start to turn to gas at 10 degrees centigrade.

**The Hon. RICK COLLESS:** So it is volatile?

**Mr HELPS:** Yes, it is highly volatile. It turns into a gas. It might wind up in Antarctica, where a whole lot of the gold mining mercury from Australia has wound up. Around chlor-alkali plants it tends to go close in and then turn to gas on another day and move a bit further in a leapfrog fashion.

**The Hon. RICK COLLESS:** So it condenses again overnight?

**Mr HELPS:** Yes, when conditions cool it goes back to being a metal again.

**The Hon. RICK COLLESS:** Are you aware of what form the gaseous form is in? Is it elemental mercury?

**Mr HELPS:** Yes, it is gaseous elemental mercury. It is what we call Hgo. It is about the most toxic thing you can get, and it is highly toxic at incredibly low levels. Its biggest impact is on pregnant women and children up to about the age of 15.

**The Hon. RICK COLLESS:** Have you got any figures for the actual toxicity of it?

**Mr HELPS:** I can provide those if you put it as a question of notice. I can give you all of that data.

**The Hon. RICK COLLESS:** The other thing I am interested in is its relative weight compared to air.

**Mr HELPS:** It is 6.9 times.

**The Hon. RICK COLLESS:** And that is the relative weight of the gas?

**Mr HELPS:** Yes, it can be a bit heavier because sometimes it will pick up other things but on an international level we work on 6.9. It is highly conservative but that is the figure we work on.

**The Hon. RICK COLLESS:** So in a still environment on a hot day it will vaporise and stay close to the ground.

**Mr HELPS:** Yes, it will stay close to the ground.

**The Hon. RICK COLLESS:** Then when it cools below 10 degrees it will condense again.

**Mr HELPS:** Yes, it gets blown by the wind and it hits things like trees or fences and drops down there. When you look at the testing the EPA did on the Sydney Water easement, you see that the highest levels were up against the fence line. So it has come out from the Orica site, been blown up against the fence line and then dropped. We did some work last year in bushfire areas in Victoria. If you get a bushfire and you go in three days later when it has all cooled off then there is no mercury in the ground. Inside 12 months it is back to two parts per million—just like that.

**The Hon. Dr PETER PHELPS:** Just one thing in relation to what I call the catch 22 of independent assessment, the level of knowledge required to be an independent expert in an area often means that you will have worked at some point in your life in that particular field. Does that not immediately cruel the pitch for any possible independent assessment, because if it does not come down the way that a community group wants it to then it can always say, "But 20 years ago you worked for ICI" or something like that? Is not the real problem that people might be independent but to be an independent expert requires you to have worked in the field somewhere along the line?

**Mr HELPS:** That is an issue but it is surmountable. One of the reasons why particularly in China the system was changed to a university model is that the good experts then go back to universities and work under the strictures and protocols they have. You are always going to have that problem. It is getting easier in Australia because all the big environmental consultancies have been dumping people like mad this year, because Tony Abbott has wound back environmental controls. The big Environment Protection and Biodiversity Conservation Act projects for mining companies and everything are no longer there. A lot of those guys are going out on their own. As long as you write the employment contract in the right way, I believe you can get over that. We are seeing cases in Victoria where miners have deliberately gone out and got reports from every consultant they can lay their hands on purely and simply to conflict them out.

**The Hon. Dr PETER PHELPS:** I am thinking about a problem we faced in an earlier Committee inquiry in relation to coal seam gas. The experts in the field were all tainted in the eyes of the community because at one stage or another almost every one of them had worked on some sort of drilling operation. Let us face it, and I do not think you would disagree, this is a fairly specialised field. You are going to find that in most cases people have worked in the industry at some point. Other than saying, "Well, that was in the past," do you ever overcome this appearance of being tainted?

**Mr HELPS:** The coal seam thing is easily overcome because you bring in some people out of the American Soil Science Society, which has several committees there. There is plenty of talent in America that will come out here and do that. But it is a management issue that has to be managed. We continually see big mine development in Victoria, and the owners went out and deliberately conflicted all the consultants. It goes both ways.

**CHAIR:** We are just about out of time so we just have time for one question from the Chairman. Are there any other industries we should be looking to where there may be similar use of elemental mercury? For example, the same Committee did an inquiry into the radium factory at Hunters Hill and the radioactive contamination of that site. Would mercury have been used in that process, for example?

**Mr HELPS:** It is hard to know.

**CHAIR:** In other words, when a body like the EPA goes to sort out a problem, are they looking at the wrong problems, for instance? Among all the industrial toxins we have around a city like Sydney, for example, how dangerous is mercury? How far up the scale would mercury go?

**Mr HELPS:** Right up the top. The other problem you have got in New South Wales, like Victoria, is that there will be vast amounts of mercury in all the historical goldmines.

**CHAIR:** Yes, exactly.

**Mr HELPS:** I have just written a report for the Commonwealth on the ratification of the Minamata protocol. The big issue with mercury in Australia is not the chlor-alkali plant because we only had five of them.

**CHAIR:** It is goldmines.

**Mr HELPS:** The real issue is now with the Minamata Convention all the historical goldmines in New South Wales will have to be done over and checked because you are going to get export controls into the European Union probably starting in July next year where things like canola are going to be tested for their mercury content. There is a massive issue. The other issue is motor car wreckers because all the modern motor cars have up to six mercury switches in them. Antilock brake [ABS] units can commonly have 100 grams. They put them through the shredders and smash all the switches. In America they have a complete system run by the United States Environmental Protection Authority where they take all those switches out of motor cars before they wreck them and they get recycled through a single point in America. The other problem we have got is that we need to educate the fire brigades that when they have modern cars cooking in a fire after an accident, they need to be wearing breathing apparatus. I am having trouble selling that as a message. Those things cook off. You have got 100 grams of mercury and, you know, that is a lot of mercury and it can do a lot of damage.

**CHAIR:** Thank you, Mr Helps. We appreciate your coming in to talk to us today. I think there was one question on notice. The secretariat will write to you. If we could have an answer to that question or those questions within 21 days, we would appreciate it. Thank you very much. Ladies and gentlemen, this concludes today's open hearing. We have other hearings around the State and further hearings here in Sydney. They will be advertised on the parliamentary website.

**(The witness withdrew)**

**(The Committee adjourned at 4.33 p.m.)**

---