

Environment Protection Authority

Review of South Australian Environment Protection Authority regulatory practice – tools and approaches

Published as part of the EPA Change Program to transform the EPA into a sharper, more effective and modern regulator.

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For further information please contact:

Information Officer
Environment Protection Authority
GPO Box 2607
Adelaide SA 5001

Telephone: (08) 8204 2004

Facsimile: (08) 8124 4670

Free call (country): 1800 623 445

Website: <www.epa.sa.gov.au>

Email: <epainfo@epa.sa.gov.au>

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Foreword

The EPA's approach to regulatory practice is based on a balance between the focus on the law and assessment of environmental impacts. This approach can be described as being rooted in the DPSIR (Driving Forces, Pressure, State, Impact and Response) model. While there is a sense generally that we, like other EPAs, have a strong focus and understanding of the legislation and what tools we might use to manage a particular issue, this is currently carried out by the EPA in a somewhat ad hoc and reactive way in SA by picking a tool that addresses an immediate issue without necessarily properly considering the ultimate outcomes.

It is imperative for us to take steps to understand the environmental impacts from actions by industries, and ultimately what the outcomes (good and bad) may be. The proactive and reactive management responses to these impacts and outcomes must be considered in an integrated way to map out an appropriate response plan. At the foundation of this approach is the need for very robust data and information, and the use of this to drive decision making and actions.

At an operational level, the EPA has a sound legislative toolkit, but we need more focus on the way in which the tools are considered and applied. There is scope to reform existing or develop new regulatory tools. Monetary penalties need to be set at the appropriate level, and justified in terms of true costs of avoiding compliance and environmental impacts/damages. There is opportunity to make more use of public accountability, for example informational approaches, 'name and shame' and restorative justice tools.

We need to review our compliance assessment scheme to strengthen the information it holds and the links with our regulatory approach, and there is opportunity to strengthen relationships with other SA government legal and regulatory groups including South Australian Police and Crown Solicitor's Office. There is scope to address some of the institutional complexity around other regulatory areas too, such as aquaculture licensing and regulation.

A handwritten signature in black ink, appearing to read 'Campbell Gemmill', written in a cursive style.

Campbell Gemmill
Chief Executive
Environment Protection Authority

Executive summary

In mid 2012, the EPA Change Program was introduced with the aim to transform the EPA into a sharper, more effective, credible and modern regulator. The first stage of the Change Program involved developing strategies to tackle our weaknesses, build upon our strengths and increase our effectiveness, credibility and expertise. Ten key areas of reform were identified.

This report provides the findings in relation to key reform area 5: Regulatory Practice – tools and approaches. The objectives of the review of our regulatory tools and approaches were to achieve better environmental regulation, improve skills, service and effectiveness, and build capacity, capability, flexibility and resilience within the organisation.

The project team audited current systems, interviewed key staff and staff of other regulatory agencies, and reviewed EPA practice against better practice regulatory theory.

The team made recommendations that fall broadly into three categories: strategy, tools, and supporting systems.

The EPA has a risk-based approach that endeavours to prioritise resource, such that the most significant issues and harms are addressed. Having a harms-based approach is essential to the effective selection and deployment of tools. The nature of issues and harms are such that they will either be amenable to effective regulatory treatment by standard tools, or they will be so complex that a more tailored approach is required. There is no advantage in deploying standard tools on problems that they will not fix, but equally a suite of the right tools and an effective system for assessing and deploying them will constitute a substantial part of the regulator's work.

The EPA has addressed the identification of harms as a separate project. Successful regulatory practice will require both the identification and prioritisation of harms, and the effective selection and deployment of tools.

It was clear that the scope of regulatory approaches requires ongoing cross-EPA oversight. It is recommended that a Regulatory Reform Steering Committee implement the change project and prioritise and coordinate regulatory reform activities across the organisation.

The EPA does not adequately document its regulatory approach, both internally and for the regulated community. An annual compliance plan is required to describe the overarching process to manage harms, as well as the operational level activities to manage ongoing systematic compliance issues and the targeted, tactical activities to manage identified priorities.

Engagement with other regulatory agencies should be expanded. This can benefit the EPA and also build skills and understanding within other agencies.

The tools set out in the report can be categorised with the following objectives:

- Ensuring the responsibility for compliance is fundamentally understood and led by the regulated entity. Shifting onus of responsibility for risk identification, assessment and management to licensees (where appropriate), using certificates of compliance
- Financial incentives for compliance, that also manage the legacy risk from non-compliance.
- Deterrence through broader punitive tools including restorative justice, public accountability (name and shame) and cost recovery.
- Learning from cross-sector experience.
- Recognising and rewarding very good behaviour.
- Regulatory tools and approaches are integral to the way we do business. A harms reduction approach needs to be built into existing systems.
- The state of compliance needs to be measured, reported and used to direct regulatory effort and approaches.
- A quality management system for compliance activities should be considered (though it is acknowledged that this would be a significant undertaking).
- Training of regulators will be a critical success factor in improving the effectiveness of regulation.

Recommendations

Recommendation 1: Implement a quality management system for compliance activities, using the business/quality management systems and approaches arising from the internal Organisational Development Change Project and including documentation of processes/procedures.

Recommendation 2: Establish a Regulatory Reform Steering Committee to implement this change project, and prioritise and coordinate regulatory reform activities across the organisation.

Recommendation 3: Develop and publish an annual compliance plan that reflects the EPA regulatory approach as mentioned in this report. The plan should describe the process to manage harms, operational level activities to manage ongoing systematic compliance issues, and the targeted, tactical activities to manage identified priority sectors or areas.

Recommendation 4: Select a pilot sector and consider whether changing the regulatory model (possibly to a self-regulation model) would provide better outcomes.

Recommendation 5: Pursue the implementation or expanded use of identified compliance tools including:

- certificates of compliance
- financial assurances
- enforceable undertakings and restorative justice tools
- cost recovery
- SA version of the EPA Victoria National Ecosystem Assessment Toolkit (NEAT) model to quantify the economic benefit of being non-compliant
- self regulation
- public accountability (name and shame) tools such as public announcements.

Recommendation 6: Establish a documented process for regulatory action, setting out the key steps to follow in the identification and deployment of the most appropriate tool as reflected in Internal Operating Procedure 43A (IOP43A).

Recommendation 7: Integrate the harms approach into existing systems by changing business planning templates to explicitly express the treatment of harms and set out the pressures, impacts and responses.

Recommendation 8: Develop and use tools currently in place for the environment sector to the radiation sector (eg expiations and orders can be used for both sectors).

Recommendation 9: Seek opportunities to educate and engage other regulatory agencies eg SA Police (SAPOL) and Crown Solicitor's Office (CSO), to build skill base, authority and coverage of law enforcement officers as well as an understanding of complexity and 'value' of environmental crime.

Recommendation 10: At the portfolio, state, national and international level, the EPA should continue to pursue opportunities to lead and collaborate with other regulators and sectors to build the profile of the craft of regulation, as well as to learn and share good regulatory practice and its application within the EPA.

Options

The broad-ranging nature of the project meant that a straightforward series of specific options with recommendations will not be beneficial. In general, the recommendations require project teams to be established to progress work in the key improvement areas.

As such, there are options in two areas only:

- the level of resource allocated to the development of these recommendations to the point where specific proposals can be presented
- the governance of the implementation and whether to establish the recommended Regulatory Reform Steering Committee.

1 Background

The methodology employed by the project team involved a standard approach to research and project management. This entailed:

- understanding and agreeing on the scope, objectives and approach for the project
- undertaking desktop and face-to-face research to collect information about the current state of regulatory practice in SA, Australia and internationally
- comparing the current state and agreed leading practices of others with the EPA
- determining recommendations for ongoing focus in this area.

The objectives for the project reached across most aspects of EPA's business and functions. The inter-relationships between the different parts of the business, and the different aspects of assessing, choosing and applying regulatory tools, are key to the objectives. Therefore the project could not look at tools in isolation. Rather it had to consider how tools are placed in the overall approach of identifying and treating harms, and at the systems and processes that allow tools to be effectively deployed.

Given its broad reach and layered coverage, this report is focused at two levels: the strategic regulatory approach and the operational regulatory tools and systems. The report describes how the two levels integrate.

The project was undertaken in the context of a strong foundation of thinking, application and practice on regulatory approaches in the EPA. The project team had representation from management, licence coordinators and the business reform team who have been involved in EPA work in this area.

The project used specific documents as the foundation of the project:

- EPA Compliance and enforcement statement
- EPA Compliance and enforcement regulatory options and tools
- IOP43 on breach management

The project was also undertaken in the context of the commitment to the Council of Australian Governments' (COAG) best practice regulation principles:

- 1 Establishing a case for action before addressing a problem.
- 2 A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed
- 3 Adopting the option that generates the greatest net benefit for the community

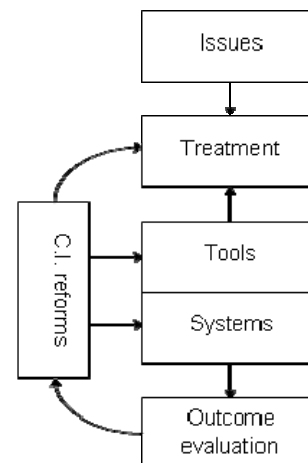
in accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs
- the objectives of the regulation can only be achieved by restricting competition.
- providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear
- ensuring that regulation remains relevant and effective over time
- consulting effectively with affected key stakeholders at all stages of the regulatory cycle
- government action should be effective and proportional to the issue being addressed.

2 Strategic regulatory approach

A number of factors that affected the regulatory approach were identified:

- nature of the issue
- effectiveness of existing system-based regulatory approach
- regulatory model (prescriptive, performance based, self regulation)
- attitude of regulated entity (criminal, chancer, confused, compliant, champion)
- objectives of regulatory action (punish, enforce, educate, enable, reward)
- available toolkit
- outcomes to date.



A single multi-dimensional matrix (see diagram) placing specific regulatory tools against these categories is not possible. A systematic approach is required to enable the EPA officer to run through the process and provide the data to enable a decision to be made on the most appropriate regulatory tool.

The key steps in the process are set out in a later section (issue identification and scoping).

Systems to support tools and tool deployment are crucial to the success of the process. Also, it is important that procedures are appropriately documented, outcomes are evaluated against objectives, and that there is a process for continuous improvement (CI). An EPA business/quality management system is being addressed as part of the Organisational Development Change Project and was not considered further under this project.

Recommendation 1: Implement a quality management system for compliance activities, using the business/quality management systems and approaches arising from the Organisational Development Change Project and including documentation of processes/procedures.

Another important aspect identified was data collection and analysis. While crucial to effective issue identification and analysis, this was outside the project scope.

In the past, the majority of regulatory reform had been led by the former Business and Reform Branch in consultation with regulatory areas. This has resulted in significant reform work being progressed, but not necessarily in a fully integrated and prioritised way. An overarching Regulatory Reform Steering Committee should be established with representatives from key regulatory/policy areas, Investigations, and Business and Reform to oversee the implementation of this project and provide ongoing consideration and guidance to the EPA regulatory approach.

Recommendation 2: Establish a Regulatory Reform Steering Committee to implement this change project, and prioritise and coordinate regulatory reform activities across the organisation.

Harms/issues

Through the EPA's Change Program, the EPA has progressed the development of a harms-based regulatory approach to enhance the risk-based and responsive approach depicted in Figure 2. The harms approach is being built on the concept developed by Professor Malcolm Sparrow¹, and focuses effort and resources towards the identified biggest environmental harms (shown in Figure 1).

The lower right hand box in Figure 1 represents the harms faced by a regulator. The anticlockwise pathway passes through the normal regulatory systems that are employed to suppress these harms, leading to regulatory actions in the top left hand box. This is the system-based approach for dealing with harms.

The clockwise pathway represents the harms problem-solving approach which involves splitting harmful things into precisely defined harms and tailoring the regulatory response to suit. This approach provides an alternative way to solve harms when the existing systems-based approaches are not working. It is a disciplined data driven, project management

¹ *The Character of Harms: Operational Challenges in Control*, 2008

approach that first requires an understanding of the harm/problem and then address the harm in a tailored way. Current internal change projects are focused on developing a harms register for the EPA and the supporting processes, systems, training and templates to implement the harms-based approach.

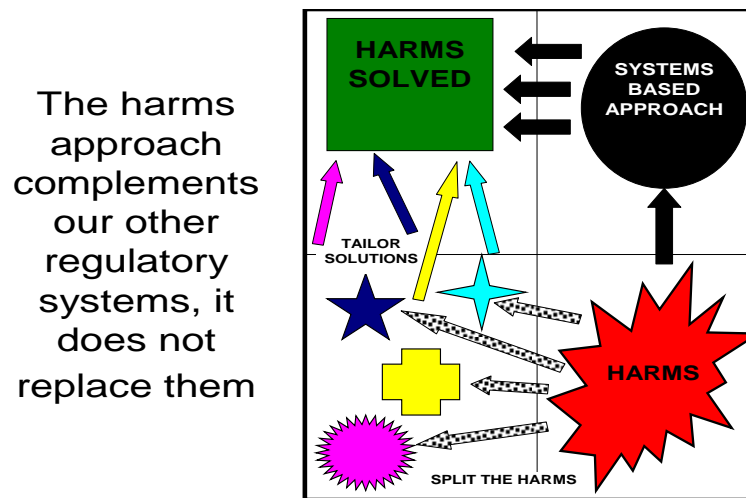


Figure 1: Applying the right tool to the right problem (Sparrow, 2000)

Assessment of harms requires rigorous issue identification and scoping, assessment of the pressures, data and desired outcomes. The process needs to include a step to consider whether existing regulatory systems offer the most effective approach, that is, whether the clockwise or anti-clockwise path is taken. A more structured approach to this is required in the EPA, in order that the most appropriate tools can be chosen.

Both the Policy and Better Regulation Branch, and the Operations Directorate have been developing a more outcome-focused regulatory approach and recent initiatives include:

- previous Policy and Better Regulation harms work
- the regulatory practice workshop by Malcolm Sparrow
- Compliance Branch smart objectives that are designed to reduce harms
- harm reduction measures reported as a performance indicator
- Regulatory Decision Notes
- compliance roadmapping, with ultimate objectives identified and communicated to staff and licensees.

Regulatory models

The EPA has been proactive among Australian government regulators in understanding and working towards better regulatory practice. That is, to ensure that practices are effective in delivering policy objectives without creating unnecessary burdens to the regulated community. Since the inception of the EPA and the *Environment Protection Act 1993*, and the movement of radiation regulation to the EPA, the organisation has had a significant suite of regulatory tools at its disposal. These tools have been built upon and improved over time, through the development of new legislation such as Environment Protection Policies and other policy initiatives. In parallel with the development and refinement of the legislation, the EPA has developed a range of frameworks, principles, tools, systems and processes to support and enhance its regulatory toolkit.

Figure 2 (Gemmell and Scott 2013) shows a conceptual model of the EPA's regulatory approach which has been adapted from the Scottish Environment Protection Agency (SEPA) from an approach developed by the UK Tax Office (HMRC). This approach has been approved by the EPA Board and used widely to describe, at a strategic level, the EPA approach and positioning as an environmental regulator.

The key messages captured in the diagram are:

The EPA is a risk-based and responsive regulator. The programs and actions we take are tailored to risks posed by individuals, industries and sectors as well as the compliance attitude and behaviour of these groups.

The EPA's regulatory approach deals with the range of regulated entities in different ways. It starts from the position that the significant majority of entities want to comply. A small proportion of them do so willingly and with limited support/direction from the EPA—these groups should be recognised and rewarded. A large proportion of entities need help to comply—the EPA must provide the support and guidance to assist these groups. A small proportion of entities will wilfully flout the law—the EPA must use the full force of the law to deal with these groups.

The EPA takes a risk-based and responsive approach to regulation. Predominantly, this refers performance-based regulation, where operators are required to protect the environment from specified risks. There are some prescriptive requirements placed on licensed entities in particular, and in areas where the EPA is not expert (eg complex processing plants), there is some self regulation.

Professor Sparrow's take on the categorisation of different regulatory models is given in Table 1. The foundation of the performance-based model is based on the regulator being responsible for risk identification and the regulated industry being responsible for analysis and design, and implementation of risk controls.

This model is appropriate for EPA business, and it is also commonly applied within almost all environmental regulatory agencies. However, it does require significant resources within the regulator to ensure risk identification and assessment is an ongoing priority. It also requires the regulator to collect and/or gather the data and information required to undertake risk identification and assessment. Beyond the responsive model, the final two models—self regulation and industry self regulation—shift the onus of responsibility and risk management to the regulated entity.

The majority of organisations reviewed through this project fell within Models 1 and 2 (Sparrow 2000), prescriptive and responsive regulators. Examples where a self-regulation model is applied (at least in part) is within the mining and petroleum sectors. In these sectors the operators hold the expertise in identifying highly technical, complex and process dependent risks.

Sparrow's Model 3 on self-regulation (Sparrow 2000) is attractive, in that it places more accountability on the licensee and can reduce the EPA's resource requirements. It is appropriate for situations where the EPA does not have the expertise to assess the risks to the same degree as the operator. It should only be used more widely when either industry does not have strong drivers to hide risks from the regulator, or when regulator auditing can readily identify undisclosed risks. A higher degree of trust is required.

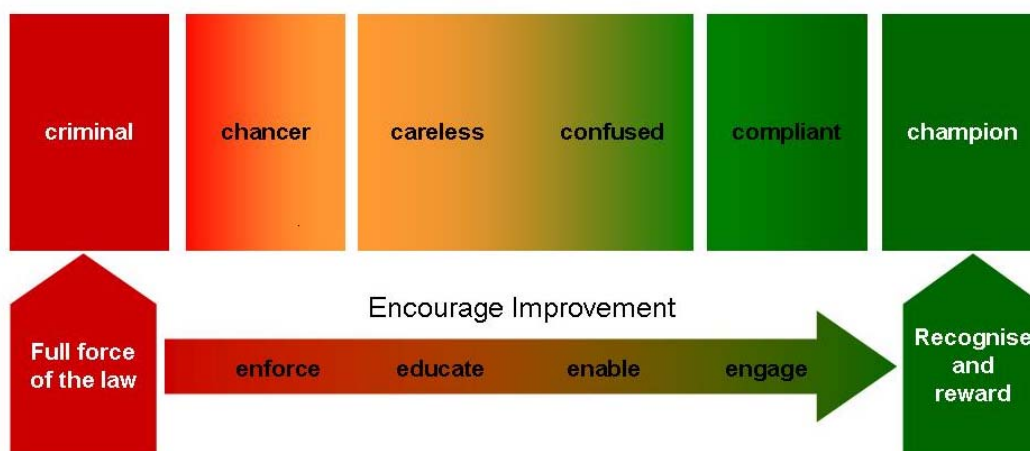


Figure 2 EPA's regulatory approach

Table 1 Regulatory structures to manage regulatory risks

Model	Regulator	Regulated Industry
1 Prescriptive		
2 Responsive/ Performance Based		
3 Self Regulation		
4 Industry Self Regulation		<p>Industry Association</p>

Source: Malcolm Sparrow 2000, *The Regulatory Craft*

Issue identification and scoping

The process as outlined in Figure 3 has been developed to allow our conceptual regulatory approach to be implemented in a consistent and systematic manner so it is effective at an operational level. The process also integrates with the harms approach.

Problem identification

The key to this regulatory process is the identification of the regulatory issue or environmental pressures that are facing the EPA.

The issues need to be defined so as to clearly identify the reason for the issue and the components or risks that make up the issue. It is anticipated that the process developed by the harms project for defining a harm could be used to define both a regulatory issue or environmental pressure.

Data relating to the state of the environment is crucial. There needs to be strong scientific and data driven support to regulatory decision making.

The 'DPSIR' approach (Drivers, Pressures, State, Impacts and Responses) (P. Kristensen 2004), an extension of the Organisation for Economic Cooperation and Development (OECD) pressures–state–response (PSR) model, indicates the aspects that need to be identified and understood to scope the harm. The DPSI part describes the harm, and the Responses can address any or all of the aspects of the harm to most effectively reduce the impact. This approach is a means of pulling apart an issue such that the causes and effects are better understood, assisting the development of performance measures and the formulation of responses.

As described earlier, regulatory issues can be divided into two categories:

- complex harms requiring risk parsing (analysis to identify components) and a tailored approach
- operational issues amenable to standards regulatory tool deployment.

While the latter is sometimes referred to as a ‘systems-based approach’, it still must be addressed in a systematic harms orientated manner. Part of the analysis is to determine whether the issue or pressure is best addressed through a problems-based approach or systems-based approach.

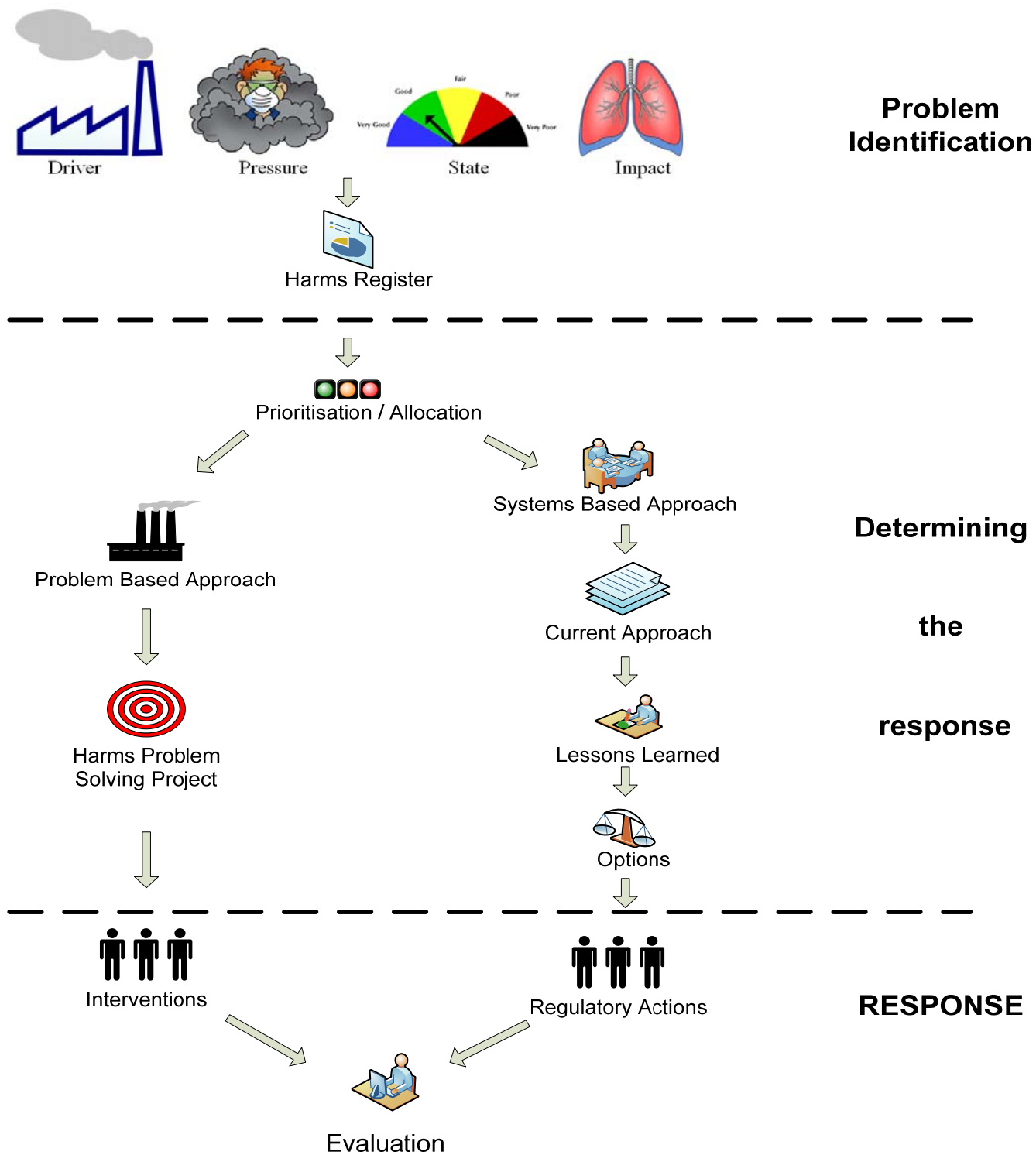


Figure 3 Conceptual harms identification process

Current regulatory approach

Once the issue has been defined, an analysis of the EPA's current regulatory approach and its success against objectives should be undertaken. Based on the knowledge of the issue and our current regulatory approach towards it, the advantages and disadvantages of this approach can then be established and used as data to inform the next regulatory decision.

Lessons learned from other agencies

If the issue or harm is defined and the current regulatory approach established, a gap analysis can be undertaken to compare our existing approach, the positive and negatives of this approach, with the lessons learnt from our past performance and from other regulators.

As part of this project a review of other regulators has been undertaken. This review, along with other reviews of a similar nature eg Australasian Environmental Law Enforcement and Regulators Network or AELERT, will provide a useful reference for staff.

Option analysis and recommendation

The EPA should be using its regulatory tools to change behaviour to ensure the ultimate protection of the environment and to promote the principles of ecologically sustainable development (environment, social and economic). Each tool focuses on the objective or behaviour change sought, from punishment and deterrence through education, incentivisation and reward. The best tools are selected to address a particular regulatory issue in order to achieve the most effective regulatory outcome.

At the completion of this process there should be a set of options to address the defined issue. These options should include the Sparrow model(s) that the chosen option will follow and the deployment of either existing tools or the establishment of a new tool. Recommendations can then be developed and the way forward at the operational level established.

Implementation and evaluation of approach

It needs to be recognised that despite using a systematic process, the implementation of options to address an issue will vary in their effectiveness. Hence, the evaluations of the options selected during implementation should be undertaken and reassessed where necessary, in line with the conceptual model in Figure 4.

Integration into business processes

For the system to be effective it has to be integral to the way that EPA staff work. Use of established business planning processes should be maximised including business plans and project management.

Data gathering and data analysis are currently not undertaken rigorously under an organisation-wide system. This is an important issue, which is outside the scope of the project that needs to be integrated with any systems recommended by this project.

For systematic, harms-based approaches to become part of the way we work, there are two prerequisites: staff need to understand the principles and the systems need to require it: there will need to be training in the recommended IOP43A, and incorporation of the principles into the Authorised Officer training and eBook.

Rather than a new or an added overlay to the business planning process, current processes should be changed to reflect this system. Work in the EPA will either be work on the system, or in the system. That is, work will be one of the following: data gathering and analysis, deployment of regulatory tools, or system improvements.

Data gathering/analysis and deployment of regulatory tools should be expressed in the form of pressures, impacts and responses. Implementation should be under standard project management processes.

Project management approaches are not uniformly employed and existing EPA project management systems are not always used. Project management use and tracking will be important in achieving outcomes.

EPA regulatory toolkit

As part of this project, a list of EPA regulatory tools has been collated. Each tool has been classified under the most appropriate category of the EPA regulatory spectrum to reflect the objective of the tool, as discussed above. The result of this work has demonstrated that the EPA has a good spread of tools across all areas of the regulatory spectrum.

The team believed that documenting the systems that support these tools, eg Authorised Officer training, Licensing Administration Modernisation Project (LAMP) and Internal Operating Procedures (IOPs) would be beneficial to optimise the support and manage risks. This forms one of the recommendations.

Although the EPA has a broad suite of tools, their selection to address regulatory issues is done in an ad-hoc manner based on the experience of EPA staff. The need for the development of a model that will provide guidance on the selection of an integrated and effective regulatory approach, along with the best regulatory tools to support the chosen approach is recognised.

The model also provides the link, at an intermediate level, between the higher level regulatory approach and the specific operational processes that are applied in particular circumstances. The model depicted in Figure 3 has been developed to connect our approved regulatory approach with operational policies and guidance.

Two good examples of the need for this intermediate step are IOP43 which provides detailed guidance on making appropriate decisions to manage breaches and the Compliance and enforcement regulatory options and tools guideline which lists the range of tools available to deal with breaches. However, the guideline is too high level, and IOP43 starts from the premise of a breach and does not set out the regulatory map to managing risks and compliance and non-compliance based on good data and information.

The consequence of a lack of effective support for staff is protracted and slow progress to resolve risks and compliance issues that are resource intensive and not necessarily based on the most effective and efficient outcomes for the regulated entity, EPA or the environment.

A key element of the model is the need for it to be underpinned by good information and data, and provide balance between setting a standardised approach that gives staff adequate guidance, while providing flexibility and discretion.

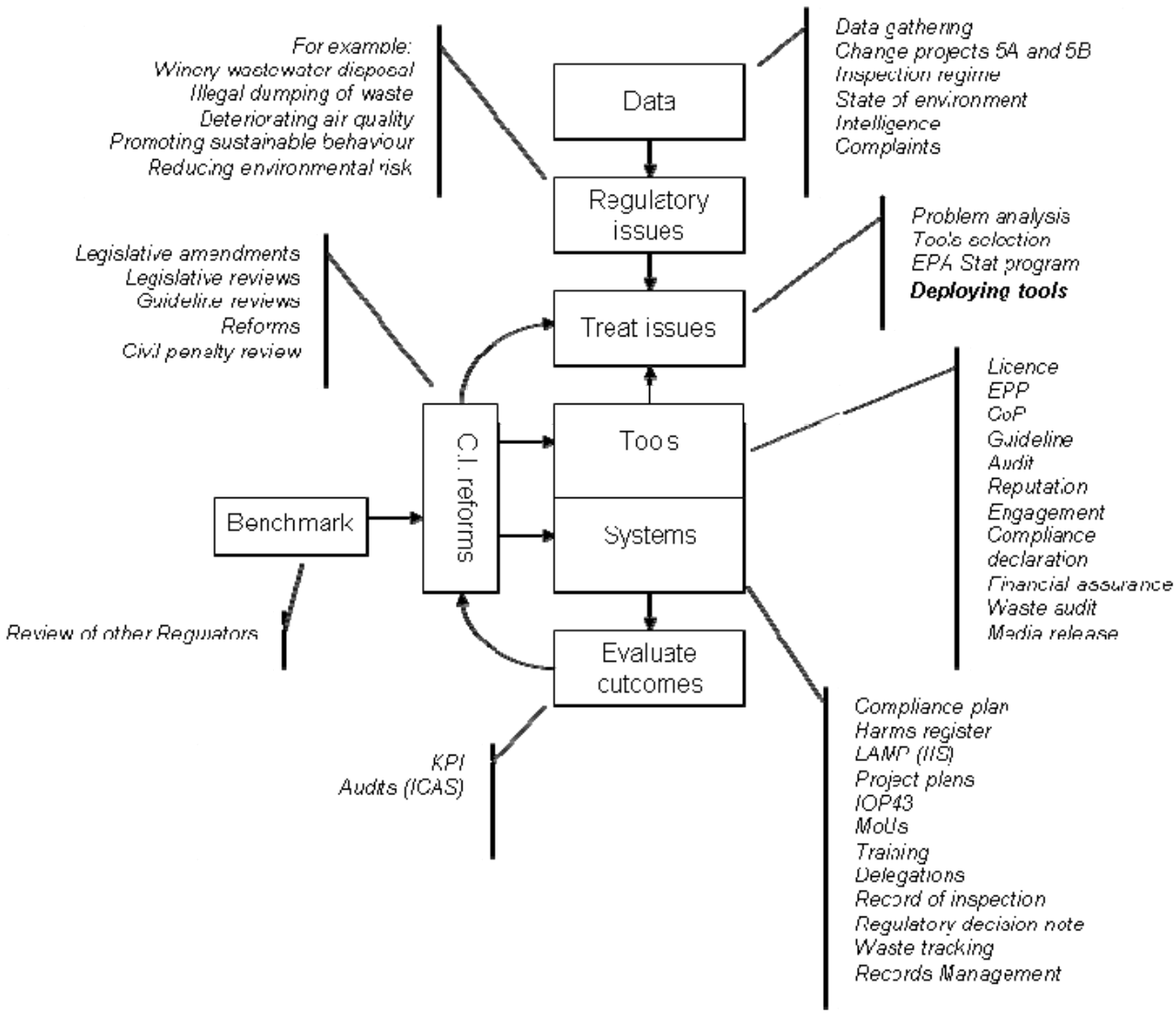


Figure 4 Conceptual regulatory model

3 Action plan

Supporting systems

A key aspect to progress implementation of an integrated risk-based and harms-based regulatory approach is to determine the resource allocation and focus that will be portioned to each aspect of the approach. In order to formalise this approach, and provide a transparent and targeted position it is recommended that an annual compliance plan be developed and published to communicate the EPA's integrated regulatory priorities for the each financial year. This approach will provide a much clearer picture to staff and the regulated and broader communities. As many regulatory organisations have annual plans of this nature (eg EPA Victoria, Queensland Department of Environment, Australian Taxation Office), there are templates readily available for the EPA to base its plan on.

Some work has been undertaken to set the framework for a compliance plan. The team considered that the Victorian EPA 2012–13 *Compliance Plan* is a reasonable model to start the work from.

Recommendation 3: Develop and publish an annual compliance plan that reflects EPA's regulatory approach as described in this report. The plan should describe the process to manage harms, operational level activities to manage ongoing systematic compliance issues and the targeted, tactical activities to manage identified priority sectors or areas.

This compliance plan should form the basis of a strengthened internal and external communication process regarding the EPA regulatory approach and objectives. This should be done through a range of communication activities (publications, webpages, presentations, etc). It is particularly important to ensure the messaging is also relevant and covers radiation regulatory approach and tools.

There are sectors within EPA's regulatory responsibilities where self regulation could be applied. For example the winery sector has received a significant amount of attention from the EPA five years ago which shifted the whole sector to a new compliance position. The sector is generally very proactive in managing compliance issues, investigating modern processes and technologies, and has a range of external drivers that support best practice compliance cultures. This sector could be identified as a pilot where a more self-regulatory model could be applied. The composting sector is also in a similar position and the EPA recently released a detailed guideline for the sector and is about to embark on a compliance audit of the sector. The results of this may enable the EPA to consider the type of regulatory model that can be applied to the sector in the future.

Recommendation 4: Select a pilot sector and consider whether changing the regulatory model (possibly to self regulation) would provide better outcomes.

Opportunity for new and reformed tools

Through research and discussions with other regulatory agencies, further tools have been identified that would strengthen the EPA's current toolkit. These particularly focus on developing tools in a number of key areas:

- Ensuring the responsibility for compliance is fundamentally understood and led by the regulated entity. Tools to complement this area include shifting onus of responsibility for risk identification, assessment and management to licensees (where appropriate), and use of certificates of compliance requiring highest level sign-off by companies of compliance position.
- Developing financial incentives for compliance, that also manage the legacy risk from non-compliance, such as financial assurances.
- Considering use of broader punitive tools including restorative justice tools, public accountability (name and shame) tools and cost-recovery tools.
- Considering the use of tools currently used in the radiation sector (eg third party audits) that could be applied to the environment sector (and vice versa).
- Consider how best to progress tools that recognise and reward very good behaviour.

A properly managed process would be required to consider and prioritise development of these types of tools. There are a number of preparatory steps required before a new tool could be considered and implemented (eg use of certificates of compliance would require licences to be upgraded to ensure they clearly set out compliance requirements).

Recommendation 5: Pursue the implementation or expanded use of these compliance tools.

Implementation and evaluation of approach

A documented process for this regulatory process is required, setting out the key steps to follow in the identification and deployment of the most appropriate tool. This IOP43A would be an extension of the breach management IOP and can be thought of as an extension of the Regulatory Decision Note process currently used to document the rationale for regulatory decisions. Ideally this would be fully integrated with LAMP.

Recommendation 6: Establish a documented process for regulatory action, setting out the key steps to follow in the identification and deployment of the most appropriate tool (IOP43A).

Integration into business processes

It is important that these processes are fundamental to the way that work is undertaken. The most efficient way of building them in to work practices is to use where appropriate existing systems (such as yearly business planning), but to change those systems in such a way that the new approach has to be undertaken.

Recommendation 7: Integrate the harms approach into existing systems by changing business planning templates to explicitly express the treatment of harms and set out the pressures, impacts and responses.

4 Assessment

Lessons learnt from other agencies and internal review

A review of state and national regulators was undertaken with a view to identifying the regulatory objective and model used across different organisations and jurisdictions. The review and responses below are a summary of interviews with South Australian government agencies involved in regulation and law enforcement, and interstate environmental and radiation regulators.

General observations

Most regulatory organisations, particularly in the environmental sector are working hard to develop and improve their regulatory approaches and toolkits. The drivers for this are varied, but some are common to all including the need to demonstrate effective regulatory regimes, the ongoing loss of resources and funding, the continued interest from the public and specific communities that is driving focus on transparency and accountability, and the need to ensure regulatory frameworks and practice are modern, appropriate and focused on managing the regulatory issues at hand.

Most regulatory agencies we researched have common and relatively standard legislative tools for compliance and enforcement that cover the regulatory process starting from assessment and approvals, through to support and guidance, and reactive tools including warnings, fines, sanctions and prosecution. Very few regulators appeared to have a diverse (if any) toolkit for recognising very good performers.

Given the situation where almost all regulators are managing diminishing budgets and resources, many are seeking opportunities for cost savings and collaborative work across government, in areas such as shared regulation of particular sectors, shared information and intelligence, and joint audits or campaigns.

While some regulators have gone back to basics to ensure the fundamental aspects of their regulatory frameworks are robust, in parallel they and others are considering new and more sophisticated tools such as administrative and civil tools including orders, agreements, contracts and undertakings as well as restorative justice models, that all focus on changing behaviour and culture, and beneficial community outcomes beyond punishment.

Public Information is also being used to drive education, deterrence and accountability by creating heightened awareness, risk of detection and transparency of public image.

Given the tight fiscal situation, regulatory agencies are also focusing more on recovering the costs of their business through financial instruments, such as proceeds of crime including unexplained wealth and economic benefit, true costs of environmental impacts and avoided costs.

The following tools have been considered worth pursuing further and have been taken up in Recommendation 5:

- deterrence through recovering economics benefits on non-compliance
- enforceable undertakings
- certificates of compliance
- third-party/independent inspections.

Some agencies make more use of self-regulation models, and this should be considered (as noted in Recommendation 4).

There are some tools effectively used by the EPA that could be extended to other acts administered, in particular the *Radiation Protection and Control Act 1982*, for example expiations and orders.

Recommendation 8: Develop and use tools currently in place in the environment sector to the radiation sector (eg expiations and orders).

It was clear that communication as part of this project was in two directions. The EPA can achieve better outcomes if other agencies understand their contribution to environmental outcomes. During discussions with South Australian agencies it was clear that education and briefing of these agencies would be both welcomed and would be likely to have positive outcomes for the environment protection agenda.

Recommendation 9: Seek opportunities to educate and engage other SA regulatory agencies to build skill base, authority and coverage of law enforcement officers as well as build understanding of complexity and ‘value’ of environmental crime.

The EPA is small enough to be flexible, but needs to make full use of the expertise and experience within Australia and worldwide, and to engage and collaborate with other regulators. Discussions undertaken as part of this project have supported previous and ongoing liaison with other agencies, our national counterparts and with networks such as Australasian Environmental Law Enforcement and Regulators Network (AELERT). Valuable insights can be gained.

Recommendation 10: At the portfolio, state, national and international level the EPA should continue to pursue opportunities to lead and collaborate with other regulators and sectors to build the profile of the craft of regulation, as well as to learn and share good regulatory practice and its application within the EPA.

Detailed observations

The nature of work for some agencies results in more rule-based regulation, with a prescriptive, standardised, structured approach focused on sanctions, punishment and deterrence when dealing with high-risk impacts. There is more flexibility and discretion when it comes to lower-risk issues with harm minimisation the priority.

Some agencies make more use of education and campaigns in addition to compliance work. This in the past was more of a feature of the EPA's work, but prioritisation of limited resources has resulted in many of the broader programs being dropped. It is possible that an EPA harms based approach will highlight the value of targeted campaigns to address specific harms.

Some agencies have a broader and stronger range of enforcement tools, not surprisingly including the law enforcement agencies. Forfeiture or confiscation of assets and targeting economic benefit are used as deterrents. However the EPA does consider that the *Environment Protection Act 1993* contains sufficient powers for the EPA to effectively do its job, though it is recommended that the EPA makes more use of financial deterrents (recommendation 5).

Certificates of compliance were a feature of several regulators' tool kits in varied sectors.

Other jurisdictions have some stronger radiation protection enforcement options than South Australia, including infringement/penalty notices and sanctions for offences such as not reporting an incident. The proposed revisions to the *Radiation Protection and Control Act 1982* include more enforcement options.

Compliance for some agencies is centred on audit campaigns targetting high-risk sectors chosen on analysis of statistics. The Australian Taxation Office for example chooses targets based on data analysis, then publicises and undertakes targeted campaigns, and other agencies interviewed also take this approach.

Some agencies use specific tools, such as enforceable undertakings, as an alternative to prosecutions that the EPA will consider as part of recommendation 5. An undertaking is a legally binding agreement in which a person or organisation agrees to carry out specific activities to rectify a contravention or alleged contravention.

Several environmental regulators clearly set out their compliance and enforcement policy. This is less so with radiation regulation, though a notable exception being the Commonwealth regulator jurisdiction, which encourages peer review and publishes its compliance approaches.

Proactive compliance tools that are increasingly being used in the radiation field are accreditation of third-party persons to carry out compliance audits, and provision of compliance statement by licensees.

More mature regulators that are well resourced are best placed to take the approach of making it easy for those that want to comply, moving attitudes towards wanting to comply, and heavy punishment for avoiding compliance.

Some regulators take a very collaborative approach to regulation, whereby both the regulated entity and the agency work towards viable and compliant industry. Use of sanctions is considered as a last resort and self regulation is the preferred model. This approach works most effectively on mature sectors where non-compliance does not confer significant financial advantage. The tools that support this approach are licensee developed risk assessments that generate environmental (compliance) obligations which are then approved by the regulator. Compliance is supported by audit programs and annual reporting (certificates of compliance).

Some jurisdictions have undertaken regulatory review initiatives, and review of these has formed part of this EPA Change Program project. Initiatives have included changing organisational restructure to complement regulatory models, clearly documenting regulatory approaches in a public document, and going 'back to basics' to ensure all compliance officers are adequately trained, their systems provide adequate support for their regulatory business and they focus their resources in targeted areas to ensure they demonstrate adequate on-the-ground regulatory presence.

Key initiatives, tools and supporting systems include:

- Development of an annual compliance plan which includes strategic (harms-based) programs and existing system-based operational programs
- Annual performance statements (certificates of compliance)
- Standardised outcome-based conditions.
- Development of a renewed, mandatory (ie prescribed in legislation) and transparent risk-based approach.
- Review of monetary penalties.
- Review of licence conditions.
- Review of licence fee models.

The EPA should definitely look for opportunities to work more closely with those agencies with compliance enforcement expertise. There is a range of areas in which this would be beneficial on both sides including collaboration on specific operations, sharing of intelligence, use of regional presence and shared training. Exchange of experience and other learning opportunities should form part of an ongoing engagement program with, in particular, the environmental regulators.

There is good anecdotal evidence that businesses looking to cut corners in one regulatory area carry the same attitude toward environmental and others laws. In the radiation protection field the EPA already works with industry professional registration bodies to share information and to coordinate approaches, as those in breach of the *Radiation Protection and Control Act 1982* requirements are often found to not meet professional requirements in other areas.

SA government regulatory approaches

While the SA government does not have a centralised 'school' of regulatory practice (such as in the case of groups like Office of Best Practice Regulation), the Competitiveness Council supported by the Department for the Premier and Cabinet (DPC) and a sub-committee of the Economic Development Board was charged with understanding the regulatory regimes and practices in place across government and ensuring they are robust, effective and efficient in delivering good regulation.

The focus of the Competitiveness Council was largely on red tape reduction and legislative review, rather than regulatory frameworks and application.

Through a range of opportunities, the EPA has led or supported input regarding best practice regulatory approaches and tools from an SA perspective, into a range of national initiatives under the COAG harmonisation agenda. It has also continued to look for opportunities to raise the profile and importance of best regulatory practice to deliver significant value for governments across many areas. Recent examples of this was the collaboration with DPC to bring Professor Sparrow to Adelaide to deliver a course on regulatory practice, and the proposal to highlight regulatory practice as part of the government's priorities over the next two years or so.

At a more local level, EPA engages with portfolio and aligned regulators (Department of Environment, Water and Natural Resources, SafeWork SA, Department for Manufacturing, Innovation, Trade, Resources and Energy, Attorney General's Department and Department of Primary Industries and Resources of South Australia) to pursue collaborative regulatory reform and improvement.

5 Conclusion

Having a harms-based approach is essential to the effective selection and deployment of tools. The nature of issues and harms are such that they will either be amenable to effective regulatory treatment by standard tools, or they will be so complex that a more tailored approach is required. Deploying standard tools will not fix complex problems, but equally a suite of the right tools and an effective system for assessing and deploying them will constitute a substantial part of the regulator's work. Successful regulatory practice will require both the identification and prioritisation of harms, and the effective selection and deployment of tools.

The scope of regulatory approaches requires ongoing cross-EPA oversight. A Regulatory Reform Steering Committee is recommended to implement the change project and prioritise and coordinate regulatory reform activities across the organisation.

The EPA does not adequately document its regulatory approach, and this is essential both internally and for the regulated community. An annual compliance plan is required that describes the overarching process to manage harms, as well as the operational level activities to manage ongoing systematic compliance issues and the targeted, tactical activities to manage identified priorities.

Engagement with other regulatory agencies should be expanded. This can benefit the EPA and also build skills and understanding within other agencies.

The tools set out in the report can be categorised with the following objectives:

- Ensuring the responsibility for compliance is fundamentally understood and led by the regulated entity. Shifting onus of responsibility for risk identification, assessment and management to licensees (where appropriate), and using certificates of compliance
- Financial incentives for compliance, that also manage the legacy risk from non-compliance
- Deterrence through broader punitive tools including restorative justice, public accountability (name and shame) and cost recovery
- Learning from cross-sector experience
- Recognising and rewarding very good behaviour.
- Regulatory tools and approaches are integral to the way we do business. A harms reduction approach needs to be built into existing systems.
- The state of compliance needs to be measured, reported and used to direct regulatory effort and approaches.
- A quality management system for compliance activities should be considered (though it is acknowledged that this would be a significant undertaking).
- Training of regulators will be a critical success factor in improving the effectiveness of regulation.

6 References

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