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PART 1- CONTEXT

1. The complaint

On 24 February 2010 a number of people, who were attending a meeting at the North Head Sanctuary (former North Head School of Artillery) in Manly, encountered what they said were strong sewage odours between 6.30 pm and 8.45 pm. Six attendees reported the offensive odour incident to the former Department of Environment Climate Change and Water (DECCW) environment line. Another resident of the area, who did not attend the meeting, also reported strong sewage odours on the same evening directly to the North Head Wastewater Treatment Plant (NHWWTP), which is located near the North Head Sanctuary.

DECCW commenced an investigation into the alleged odour incident, believed to have originated from the NHWWTP, which is operated by the Sydney Water.

In the course of the investigation the complainants were contacted individually and provided affidavits to DECCW investigators.

Having been under the impression that their complaints could proceed to prosecution or other regulatory action against Sydney Water, the complainants were surprised to receive a letter in January 2011 from DECCW's then Director General, Ms Lisa Corbyn, to the contrary. The complainants were advised that the evidence obtained during the investigation did not establish the cause of the odour or establish beyond reasonable doubt that there had been a breach of the relevant provisions of the legislation administered by DECCW.

Having first sought a review of DECCW's decision not to proceed with regulatory action, the complainants then lodged a complaint with this office in April 2011. The complainants pointed out many concerns about odours emanating from the NHWWTP over the years and questioned the adequacy of DECCW's investigation given their knowledge of the history of complaints against the NHWWTP about odour issues.

After first conducting preliminary inquiries, we decided to formally investigate the complaint.

2. Our investigation

Preliminary inquiries

In accordance with our usual practice, we made preliminary inquiries (pursuant to section 13AA of the *Ombudsman Act 1974)* with the then Office of Environment and Heritage (now the Environmental Protection Authority or EPA) and obtained a number of key documents, in particular:

- a confidential briefing which formed the basis of the agency's decision not to take regulatory action against Sydney Water; and
- a report prepared by the Chief Investigator dated 19 November 2010 (the investigation report).

Why we decided to formally investigate the complaint

An initial review of the confidential briefing and the investigation report raised a number of concerns including:

- The investigation report stated that the investigation had raised a number of serious concerns in relation to the operation of plant and equipment and the management of the NHWWTP, namely:

- the apparent failure of Sydney Water to maintain plant and equipment installed at the plant in a proper and efficient condition,
- the apparent failure of Sydney Water to operate plant and equipment in a proper and efficient manner,
- the making and keeping of adequate records in relation to the maintenance and operation of plant and equipment; and
- the adequacy of training and supervision of staff at the NHWWTP.

The confidential briefing, on the other hand, raised a contrary position that we could not reconcile without obtaining further information.

- The investigation report indicated that in October 2010 the Deputy Director-General (Environmental Protection Group) directed the investigators to cease inquiries and finalise the investigation. It was not clear to us on what basis the direction was made given the investigation appeared to have found indications of serious failures by Sydney Water.
- We also considered the high public interest in examining how one government agency investigates and regulates another and the potential for a perception of preferential treatment and lack of transparency.
- We considered the final letter issued to the complainants failed to include sufficient detail to explain the reasons for the decision not to take action.

Due to these concerns and unanswered questions we decided a formal investigation was warranted. A notice pursuant to s16 of the *Ombudsman Act 1974* was issued to the Director General of the Department of Premier and Cabinet as head of the principal department on 28 November 2011.

Conduct the subject of investigation

The notice specified the conduct to be investigated as follows:

> The actions and inactions of the Department of Premier and Cabinet (Office of Environment and Heritage) (previously Department of Environment, Climate Change and Water) in relation to complaints received on 25 February 2010 concerning an offensive odour incident at North Head Sanctuary alleged to have been caused by the North Head Sewerage Treatment Plant operated by the Sydney Water.

The public authority the subject of the investigation is:

> Department of Premier and Cabinet (Office of the Environment and Heritage).

A word about abbreviations

At the time of the alleged incident the relevant regulatory agency was DECCW. That agency became the Office of Environment and Heritage (OEH) within the Department of Premier and Cabinet after March 2011. Since we commenced our investigation the Environmental Protection Authority (EPA) became a separate statutory authority on 29 February 2012 and the successor of the Office of Environment and Heritage for the purposes of this investigation. For ease of reference the three iterations of the environmental regulator will be referred to in this report as the EPA.

Other abbreviations:

North Head Wastewater Treatment Plant – NHWWTP

Supervisory Control and Data Acquisition – SCADA

Protection of the Environment Operations Act 1997 – POEO Act

Hydrogen Sulfide – H_2S

Sydney Water Corporation – Sydney Water

Memorandum of Understanding – MOU

What we did

We required the EPA to produce a range of documents, including the investigation file, and answer a number of questions.

We required Sydney Water to produce a copy of its voluntary environmental audit of the NHWWTP completed in December 2011.

We interviewed four former and current staff of EPA, including the former Deputy Director General, Mr Greg Sullivan. Most interviews were conducted formally using our Royal Commission powers pursuant to s19 of the *Ombudsman Act 1974*. One interview was conducted informally.

We provided a copy of our preliminary views to the EPA. The EPA's submissions have been considered and where appropriate incorporated into this document.

A copy of our preliminary views was provided to Ms Lisa Corbyn, former Director General and CEO of the OEH. Ms Corbyn has provided a submission and her views have been incorporated in the document where appropriate.

Portions of the preliminary document that directly related to the operations of Sydney Water were also provided to Sydney Water for comment. Where appropriate those comments have been incorporated.

We also consulted the Department of Premier and Cabinet.

On 17 July 2013 we sent a draft report to the Minister for Environment, the Hon. Robyn Parker MP pursuant to s.25 of the *Ombudsman Act*. The Minister did not request a consultation.

Limitations of our investigation

The purpose of this investigation was not to re-investigate the alleged odour incident at the NHWWTP. That is the role of the regulator. The focus of our investigation was to examine the adequacy of the EPA's investigation and decision-making processes given the concerns outlined above.

The EPA ultimately decided there was no prospect of success in prosecuting Sydney Water for an alleged odour offence. The purpose of this office's investigation is not to express a legal opinion on this question but rather to examine how those decisions were made.

While we have required information from Sydney Water, that agency is not the subject of this investigation. Certain comments that may be adverse to Sydney Water appear in this report when quoted or paraphrased from the EPA's documentation. This was unavoidable. We are also mindful of the fact that any evidence collected by the EPA and referred to in this document has not been tested by a court.

Finally, while our investigation was not concerned with the technical aspects of the adequacy of odour monitoring and management at the NHWWTP, some discussion of the odour equipment and actions taken has been necessary in order to put the incident in context, as well as comment on decisions made by the EPA.

Time taken to finalise our investigation

The investigation has taken longer to complete than initially anticipated for a number of reasons including:

- resourcing issues in this office,

- a period of illness experienced by the main investigation officer
- the complexity and volume of the information received about the EPA's investigation
- our decision to conduct a number of hearings pursuant to our royal commission powers under s19 of the *Ombudsman Act 1974*
- the need to consult a variety of stakeholders at different stages of the investigation and report writing.

3. Background

The North Head Wastewater Treatment Plant

The NHWWTP is the second largest of the 29 sewage treatment and recycling plants in greater Sydney. It is located on the North Head Peninsula at the entrance to Sydney Harbour, near Manly. The 15.9 hectare site is bordered by Sydney Harbour National Park and the Tasman Sea.

The NHWWTP was commissioned in 1971 and is the second largest ocean treatment plant in Sydney. It provides high rate primary treatment of sewage to a catchment of approximately 416 square kilometres that extends west to Seven Hills, south to Bankstown and north to Ku-ring-gai and Collaroy.

The plant serves a population of over one million people and treats about 300 million litres of flow a day. Treated effluent is discharged through a deepwater ocean outfall.

Waste water is first treated through a primary sedimentation treatment process after which the solids are transferred to the solids handling process. The treated waste water is discharged into the deep ocean outfall and bio-solids treatment. The solids removed in the primary sedimentation tanks are conditioned and processed in anaerobic digesters and the stabilised bio-solids re-used after processing. Methane gas produced by this digestion process heats the digesters and a cogeneration plant generates electricity for the plant.

Methane gas produced by digesters is stored in digester gas holders to prevent odour.

Surplus gas produced by digestion systems beyond that required for power generation is burned in a waste gas burner. Waste gas burners are designed to flare excess waste gas. If a waste gas burner is not operating properly odorous gas can be emitted into the atmosphere.

Odour management equipment at the NHWWTP

There are six major sources of potential odour and six corresponding major pieces of equipment that manage the odour from these sources at the NHWWTP as follows[1]:

1. Digesters

Digesters are large tanks which use naturally occurring micro-organisms to break down faecal matter and make it suitable for recycling as a soil conditioner. The by-products of the bacterial breakdown include gas which is in the range of 50-75% methane. Methane is used as fuel for a generator which produces electricity for the site and heat for the digesters. To prevent the tanks from damage due to over-pressurising from gas production, they are fitted with pressure relief valves which vent the gas to the atmosphere if the equipment that would normally consume the gas fails.

2. Waste Gas Burner

The waste gas burner burns excess methane not used by the generators. The burner is designed to maintain a gas pressure which is below that of the digester gas system's pressure relief valve settings. The waste gas burner's size allows it to burn all the gas produced by the digesters if needed.

3. Cogeneration Plant

The cogeneration plant produces electricity by using the methane from the digesters as fuel for its engine. If the cogeneration plant fails it is designed to shut itself down and provide an alarm to the site's operators. The gas is then automatically diverted to the waste gas burner.

[1] Adapted from the Odour Management document prepared for the EPA by Sydney Water dated July 2011

Generally speaking, cogeneration systems also have the function of removing fugitive emissions of methane gas from anaerobic digesters.

4. Northside Tunnel Odour Scrubber (NST Scrubber)

In 2000 Sydney Water constructed a 15km tunnel under Sydney Harbour to collect pumping station overflows that would otherwise enter into the harbour during storm events. When sewage enters the tunnel the air that is displaced is treated for odours. The scrubber uses chemicals such as caustic soda and concentrated bleach to treat the odour.

5. Northern Suburbs Ocean Outfall Sewer Odour Scrubber (NSOOS Scrubber)

NSOOS Scrubber serves the carrier through which waste water enters the waste water treatment plant as well as its underground areas. It operates similarly to the NST Scrubber and we understand it is due to be replaced as it is nearing the end of its economic life.

6. Central Odour Control Facility (COCF)

The COCF is the main scrubbing facility for the site and is the newest addition to the odour management equipment.

H_2S is discharged from scrubbers and is measured directly as well as monitored.

Supervisory Control and Data Acquisition - SCADA

The NHWWTP is fully automated using a computer based system known as Supervisory Control and Data Acquisition or SCADA for short. The system uses thousands of sensors to monitor various processes throughout the site. The SCADA system collects electronic data from various sensors at the North Head STP and sends the data to a central computer which manages and controls the data. The systems records 'events' and 'alarms' (eg. when a sensor gets to a high or low point that is preset into the system). Production officers have access to the SCADA computer and monitor the plant and equipment. Alarms can be cleared, accepted or acknowledged but cannot be deleted from the alarm history.

The role of the EPA

The EPA is an independent authority responsible for leading business and the community to improve their environmental performance and for managing waste to deliver a healthy environment through a range of tools such as education, partnerships, licensing and approvals, audit, and enforcement and economic mechanisms.[2]

The EPA has a range of regulatory and enforcement powers under the *Protection of the Environment Operations Act 1997* (POEO Act).

The EPA is the regulatory authority for all of Sydney Water's sewage plants, which operate under conditions of environmental protection licences.

The POEO Act has a range of objectives including:

(a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development,

(b) to provide increased opportunities for public involvement and participation in environment protection,

(c) to ensure that the community has access to relevant and meaningful information about pollution,

(d) to reduce risks to human health and prevent the degradation of the environment by the use of mechanisms that promote the following:

(i) pollution prevention and cleaner production,

[2] Taken from www.epa.nsw.gov.au

(ii) the reduction to harmless levels of the discharge of substances likely to cause harm to the environment,

(iia) the elimination of harmful wastes,

(iii) the reduction in the use of materials and the re-use, recovery or recycling of materials,

(iv) the making of progressive environmental improvements, including the reduction of pollution at source,

(v) the monitoring and reporting of environmental quality on a regular basis,

(e) to rationalise, simplify and strengthen the regulatory framework for environment protection,

(f) to improve the efficiency of administration of the environment protection legislation,

(g) to assist in the achievement of the objectives of the *Waste Avoidance and Resource Recovery Act 2001*.

4. The odour incident

The complaints

On 25 February 2010 the EPA received six complaints via its environment line about an alleged odour incident on 24 February 2010 between 6 and 9pm. The odour incident was believed to have emanated from the NHWWTP, which was operated by the Sydney Water as part of the licensed Northern Suburbs Sewage Treatment System (Environmental Protection Licence EPL378) due to its proximity and there being no other obvious source of odour. All six complainants were in a meeting of the North Head Sanctuary Foundation (NHSF) at the Gatehouse at the former School of Artillery at North Head (approximately 500m west of the NHWWTP). A further complaint was received directly by the NHWWTP from a resident approximately 1.5 km away from the NHWWTP.

What witnesses and others said about the odour

There were 19 people at the NHSF General Meeting on the evening of the odour incident on 24 February 2010. EPA investigators contacted 13 attendees in the course of the investigation and six provided sworn affidavits. Various descriptions of the odour included the following:

- a sewage type odour with a chemical type of smell (possibly chlorine and ammonia)
- a distinct odour of rotten egg gas
- a strong H_2S odour with a pungent smell which smelt as though it had a chemical edge to it
- a terrible stench
- a very strong offensive odour similar to raw sewage
- aged raw sewage type smell, fresh sewage
- gag-inducing type of odour.

An employee of the EPA visited the NHWWTP on the morning of 24 February 2010 to take GPS coordinates of the licensed discharge points at the NHWWTP. When asked to describe his visit in response to our questions pursuant to s18 of the *Ombudsman Act 1974*, he responded as follows:

> I arrived at the North Head Wastewater Treatment Plant mid morning on 24 February 2010 and stopped at the gatehouse at the boundary of the STP premise to speak to the security guard. As soon as I opened the window of the car I detected a strong sewage odour which smelt similar to a bad human fart. I considered the odour to be offensive. I received my pass from the security guard and drove down to the STP main office. The odour was still strong if not a bit stronger in the car park of the STP. I signed in to the site and met with Sydney Water staff in a meeting room in the main building about what I needed to

> do at the site. The odour was strong inside the office we were sitting in. I went around the site with an employee of Sydney Water and the smell was still strong. When I was leaving the office after signing out I noted that the wind was pretty still on that day. After leaving the site, I handed my card back to the security guard. I put down all the windows in the car to get the bad smell out. Later that day I went to the Bondi STP which is located mostly underground. I took a tour with Sydney Water under the plant out to the cliff where the emergency discharge point is located. I remember noting that the smell of the North Head plant was as bad if not worse than the Bondi plant underground.

A letter by the Manager, Treatment Operations Division of Sydney Water, dated 14 April 2010, to the EPA in response to its request for information dated 31 March 2010 stated the following:

> The meteorological data for 24 hours leading up to the multiple complaints around 6 pm on 24 February 2010, were taken from the BOM website. These indicate that there were zero wind conditions for the late part of the morning moving into low velocity easterly source later in the day. These are precisely the conditions that would allow low output odour sources, such as previously mentioned commissioning activities, to concentrate and move towards the SHTF/old artillery school (directly west of STP where the complaints occurred).

What was the effect of the odour on witnesses?

Comments made about how the odour impacted the witnesses ranged from no physical impact to a sinus headache and a burning sensation in the nostrils that lasted for days after the incident. Impacts were described in the following ways:

- watering eyes, dry retched and coughed
- burning sensation in the nose and eyes
- had to take aspirin and a cold pack
- smell inhibited desire to eat
- feeling highly discomforted
- irritated eyes
- raw and irritated feeling in the back of the throat
- a tight discomfort in the lungs with the effects persisting until lunch time the following day.

Due to the descriptions of the odour and its effects, the EPA's preliminary view was that it may have been caused by an emission of hydrogen sulfide gas (H_2S).

Hydrogen sulfide is a colourless gas that has a strong odour of rotten eggs. Hydrogen sulfide gas is a natural product of decaying organic matter. In residential settings it is most commonly the result of decomposition in septic or sewer systems. The inhalation of high concentrations of H_2S (greater than 2000 ppm or 2780 mg/m) can be fatal within seconds or minutes in both humans and animals, suggesting that it is absorbed rapidly through the lungs. Nausea, vomiting, dizziness, eye and nose irritation are common effects of H_2S inhalation[3].

Sources of such emissions are multiple and include sewage treatment plants.

[3] Toxicological Review of Hydrogen Sulfide, US Environmental Protection Agency, Washington DC, June 2003

5. The EPA's investigation of the odour incident

Legislation

The EPA is the regulatory authority under the POEO Act. In this case the relevant sections were s124 of the POEO Act (operation of plant (other than domestic plant)) s129 (emission of odours from premises licensed for scheduled activities) and s64(1) (failure to comply with licence condition). The relevant licence conditions were O1 and O2, being that activities must be carried out in a competent manner (O1) and plant and equipment must be maintained (O2).

See Appendix 1 for a full copy of relevant legislation.

The investigation of the odour incident

The EPA's investigation commenced shortly after the receipt of the complaints on 25 February 2010 and was followed by an initial site inspection of the NHWWTP on 1 March 2010. The investigation was conducted jointly by the Special Investigations Unit (SIU) and the regional office. Ten investigators were assigned to the investigation as well as a case lawyer, with up to seven investigators actively engaged at any one time.

The investigation included some of the following key inquiries and actions:

- obtaining an incident report from Sydney Water
- conducting a voluntary site inspection to record and inspect potential odour emitting plant and equipment
- serving statutory notices on Sydney Water
- conducting a search and seizure operation to obtain information and records, including SCADA records relevant to the odour incident
- engaging an external expert to review the SCADA data
- canvassing potential witnesses present at North Head on 24 February 2010
- interviewing seven Sydney Water employees and two Sydney Water contractors
- obtaining seven sworn affidavits from witnesses and two witness statements from two witnesses not present at the meeting at NHSF; and
- canvassing other potential sewage related odour sources on North Head, including obtaining sewage diagrams for North Head.

Key dates in the investigation

Between 1 March 2010 and the beginning of July 2010 the investigation team inspected the site, obtained incident reports, obtained witness affidavits and issued notices requiring further information.

7 July 2010	The Chief Investigator advised the investigation team to suspend all direct and indirect inquiries with Sydney Water in relation to the investigation until otherwise directed by Greg Sullivan, then Deputy Director-General Environmental Protection Group. This restriction on conducting inquiries included but was not limited to obtaining further records or information such as sewer diagrams. The only inquiries that were authorised were those not directly involving contact with Sydney Water, such as finalising witness affidavits.

23 July 2010	The Chief Investigator advised the investigation team in an email that he and the Manager Litigation had spoken to the Deputy Director-General and were advised that the status of the investigation remained the same, that is the investigators were not to contact Sydney Water or its staff in relation to the investigation.
10 August 2010	Permission was given for limited inquiries to be continued with Sydney Water.
8 September 2010	The Chief Investigator emailed the Manager Litigation recommending up to 14 staff of Sydney Water be interviewed. Interviews were conducted with Sydney Water staff and contractors in early October 2010 although not to the full extent recommended by the investigators.
12 October 2010	A meeting between the Chief Investigator and the legal team occurred. During this meeting it was agreed that the outstanding records would be obtained, further staff interviewed, key staff re-interviewed, and a briefing note prepared recommending a mandatory environmental audit of the NHWWTP. The investigation team agreed that a mandatory audit was a satisfactory environmental outcome and wanted these inquiries finalised in order to strengthen its argument for a mandatory environmental audit. A draft letter addressed to Sydney Water dated 12 October 2010 requesting the outstanding documents was prepared but not sent.
26 October 2010	A decision was made to terminate the investigation. It appears the investigation was terminated because EPA was of the view there was insufficient evidence to commence proceedings as investigators could not identify specifically what part of the plant malfunctioned or was not properly maintained and so caused the odour incident. It was also determined that whatever further inquiries were needed to get to the root cause of the incident would not be finished in time to commence action before the statute of limitations expired on 24 February 2011.
19 November 2010	An investigation report was prepared by the Chief Investigator. In this report the Chief Investigator recommended a mandatory environmental audit under section 174 of the POEO Act be conducted as an alternative to prosecution in order to achieve acceptable environmental outcomes for odour management at the NHWWTP.
18 January 2011	A confidential briefing was prepared and given to the Director-General.
25 January 2011	The EPA wrote to Sydney Water advising that the investigation was finished and encouraging Sydney Water to review its practices.

Further voluntary negotiations with Sydney Water about improving the odour management at the NHWWTP continued and are ongoing at the time of preparing this document.

What did the investigation conclude and recommend?

The investigators were directed to cease further inquiries and terminate the investigation on 26 October 2010. Based on the evidence collected and analysed to that point, the investigation report stated that evidence indicated that the following incidents contributed to or caused the odour incident on 24 February 2010:

- odour from the sedimentation tanks which were being repaired and commissioned and/or the bridge scrapers which were offline causing rafting, and
- odour venting to atmosphere from the digesters due to problems with or modification to the waste gas burner and co-generation plant.

The EPA investigation report raised a number of serious concerns in relation to the operation of plant and equipment and the management of the NHWWTP as follows:

- failure of Sydney Water to maintain plant and equipment installed at the plant in a proper and efficient condition
- failure of Sydney Water to operate plant and equipment in a proper and efficient manner
- the failure to make and keep adequate records in relation to the maintenance and operation of plant and equipment
- the adequacy of training and supervision of staff at the North Head STP.

The Chief Investigator was of the opinion that reasons existed to recommend a mandatory environmental audit of the NHWWTP. Section 175 of the POEO Act provides that a mandatory environmental audit may be imposed if the regulatory authority reasonably suspects that the holder of a licence has on one or more occasions contravened the Act, the regulations or the conditions of the licence, and that the contravention(s) have caused, are causing or are likely to cause harm to the environment. Section 174 provides the conditions which may apply to mandatory audits. See Appendix 1 for copies of the legislation.

The Chief Investigator recommended that the mandatory audit examine the following issues:

- the condition of all plant and equipment at the STP that may produce or contribute to odour emissions
- the operation of all plant and equipment, including odour controls and systems used to prevent or monitor odour emissions
- the management of the NHWWTP to prevent or minimise harm to the environment and public health
- the adequacy of the licence and conditions
- the adequacy of systems and records to monitor, record and report odour and other pollution incidents.

While the investigation was terminated in October 2010, the investigators were of the opinion that additional inquiries were required, including additional interviews, and obtaining copies of outstanding records from Sydney Water.

What did the EPA decide?

The EPA concluded that although a considerable amount of evidence was obtained, it was unable to establish what the source of the odour was within the NHWWTP and what plant and equipment was involved partly because many potential sources of odour, such as the scrubbers, the waste gas burner, the digesters, the digester gas holders and the cogeneration plant were not monitored for odour levels or air emissions. The EPA was of the view that no obvious failures in the manner in which Sydney Water operated its plant and equipment could be determined. The EPA was of the view that the document maintenance at the NHWWTP was inadequate and as a result a review of the documents produced by Sydney Water could not determine the source of the odour or which plant or equipment was involved.

Ultimately the EPA identified two main issues of concern as follows:

- That the current licence did not include all new plant and equipment and needed to be updated accordingly.
- That improvements could be made to the systems for dealing with, keeping and interpreting information and data generated in respect of the NHWWTP, particularly in relation to the maintenance and operation of plant and equipment.

What action was taken?

Voluntary negotiations with Sydney Water have been undertaken. The negotiations have resulted in a voluntary environmental audit proposed Sydney Water and the improvement of a number of areas of concern in relation to odour management at the NHWWTP.

PART 2 – DISCUSSION OF MAJOR ISSUES

6. Conduct of the EPA's investigation

Personnel

The investigation was run jointly by the Specialist Investigation Unit (SIU) and the Regional Operations Office, Metropolitan Branch, headed by the Chief Investigator, SIU. The team was comprised of an equal number of investigators from the SIU and the regional office. The SIU generally supports regional officers in conducting high profile, sensitive and complex investigations, where specialist skills are required.

In the EPA's investigation model, litigation/prosecution solicitors are allocated to assist with and advise on investigations early on in the investigation if it is anticipated the investigation may result in a prosecution.

Concerns

Based on the evidence we have, the investigation was thorough and appeared to progress smoothly until it was decided to suspend inquiries in July 2010.

Having reviewed the available documentation and interviewed key staff, we believe this case has highlighted a number of issues in relation to the decision-making practices of the EPA that may or may not be unique to this investigation. We identified concerns about:

- the way the investigation was suspended
- communication with Sydney Water about the investigation
- the lack of clear guidelines on investigating another government agency
- the lack of a way to resolve internal disagreements that can arise during an investigation.

While we looked into the issue of who made certain decisions, we decided that the primary issue and the broader public interest lay in examining the EPA's processes and how one government agency investigates and takes enforcement action against another. It appeared to us from the evidence that there were valid arguments for and against the decision that was made. In support of the decision to terminate the investigation into Sydney Water was the fact that this was a very resource intensive investigation that needed to address certain highly technical issues if a prosecution was to be successful, in circumstances where the actual impact on the environment from the alleged offence was relatively short-term. For these reasons we did not interview Ms Corbyn (as well as the fact she was no longer the head of EPA), however, she was provided with the opportunity to comment on my preliminary views. The focus of our investigation therefore was not on who made the decision to terminate inquiries into Sydney Water or why it was made, but rather exploring whether the agency's processes and policies were adequate.

Decisions to suspend and terminate the investigation

As can be seen from the brief chronology of the investigation in section 5, inquiries with Sydney Water and the NHWWTP were suspended from 7 July 2010 till mid-August 2010, after which time inquiries were resumed, albeit in a narrowed fashion, until late October 2010 when the investigation was terminated.

On 7 July 2010 the Chief Investigator instructed the investigation team to suspend all direct and indirect inquiries with Sydney Water in relation to the investigation until otherwise directed by Greg Sullivan (then Deputy Director-General). This included but was not limited

to obtaining further records or information such as sewer diagrams. The only inquiries that were authorised were those not related to Sydney Water, such as finalising witness affidavits.

In our hearings we asked both the Chief Investigator and the former Deputy Director-General why inquiries were suspended and who made the decision. Both advised that the ultimate decision-maker on the investigation and actions taken was the former Director-General of the EPA, Lisa Corbyn. Specifically in relation to the decision to suspend the investigation Mr Sullivan said:

> The upshot of it really was that when the Director-General returned from leave and asked for a briefing about this case, she had evidently been contacted by the Head of Sydney Water, the then head, Dr Schott, who had expressed concern about what was, in her view, heavy-handed tactics by the staff who attended the North Head Wastewater Treatment Plant. And as a result the Director-General called a meeting which myself and Steve and Gordon attended, and she put to us that the reaction of the Department was out of proportion to the significance of the issue; that too many staff had been sent; that it was an odour complaint; and that, essentially, we had more serious things to be looking at; that there was a good deal of unhappiness at the senior levels of Sydney Water; that the relationship with Sydney Water might be impacted upon and could slip back towards what was described as "the bad old days" some many years ago, where apparently relations were strained between the EPA and Sydney Water. The Director-General was very keen that we not end up back in that scenario, and felt that we had over expended resources on the investigation, and should have to clearly justify to her why further effort should be put into it.

The investigation file confirms the decision to suspend the investigation was preceded by a discussion between the Director-General of EPA and the Managing Director of Sydney Water. In an email to the Deputy Director-General and Manager Litigation on 30 June 2010, the Director-General described the discussion with Sydney Water's Managing Director as follows:

> North Head investigation – Kerry's perspective is that some odour event did happen but they have not yet been able to identify the cause but that the way we are approaching this is not understandable to them, over the top (we have been given 750 pages of data; they are going through an elimination process and they are not trying to keep information from us). They have been doing major works there; things are changing and they have only had 16 odour complaints this year and the 5 that have come in are all from a group of people who were at the same meeting (and discussed it). I explained that it appeared to us, on a preliminary look, that they are not providing us all available information and have inconsistencies; she said it would be helpful if we could talk to them about inconsistencies. I explained we are still in investigation stage which does inhibit some of our communication but that I would ask Greg S to go through our approach and come back to me and I would then contact her again. She did raise the unannounced visit by 8 staff etc. From our discussion it does sound like we are going over the top so Greg I would like to discuss with you.

In her submission, Ms Corbyn said it was not accurate to say that she suspended the investigation in July 2010. She explained:

> I had received a verbal complaint, followed up by a written complaint, from the Managing Director of Sydney Water and I asked the Deputy DG, as the appropriate senior executive responsible for regulatory matters, to review the circumstances and make sure the allocation of resources was warranted.
>
> The information I had available to me at that time was that this was an odour incident, reported as 5 to 6 complaints from people in the same meeting that there were not corresponding complaints from surrounding residents, and that significant resources were being applied to investigate the incident.
>
> I noted that this could be a potentially excessive use of our limited regulatory resources. Odour matters are notoriously difficult to determine.

During our hearings we explored the question of whether the investigation was excessive. While it is not surprising that the Chief Investigator and his team thought the nature and scope of the investigation was appropriate, we note the former Deputy Director-General had the following to say about this issue:

> Well, from my own experience based on regulatory - senior regulatory roles at Brisbane City Council and in the Queensland Government, my view was that it had been conducted in accordance with what I would describe as a standard operating procedure, and was not unusual by comparison with other investigations that I had seen. I didn't consider it to be heavy-handed. In fact, my recollection was that the officers, when they got to the North Head Wastewater Treatment Plant, actually asked for permission to enter and speak to people, and I think they actually entered with consent. And they didn't actually need to exercise their powers. Now, I would have to check that, but that was certainly a recollection I have. So, no, I didn't think it had been heavy-handed. I thought that there was an element of oversensitivity from Sydney Water. My assessment of that was that that's not uncommon in, you know, government agencies - whether they be line departments or government-owned agencies; that they are particularly sensitive to anything involving regulatory investigations, and that this was an example of that. I didn't regard it as terribly surprising, but nor did I think the investigation was heavy-handed.

On 9 July 2010 the EPA received a letter from the Managing Director of Sydney Water formally complaining about the conduct of the investigation. The letter expressed dissatisfaction with the level of intensity of the investigation and directed that all future requests for information, records or persons to be interviewed should be made directly to the Managing Director.

According to an email dated 10 August 2010 from one of the investigators to her team, Sydney Water and the EPA met on 9 August 2010. The email said that Greg Sullivan rang and said the meeting with Sydney Water the previous night went well. No minutes were recorded. The team was subsequently given the go-ahead to interview Sydney Water staff in the following week or so. In practice, further interviews took a while to organise and did not occur until October 2010 as there was internal disagreement about who and how many individuals should be interviewed, which also delayed the progress of the investigation.

For example on 8 September 2010 the Chief Investigator emailed the Manager Litigation recommending a number of further interviews with Sydney Water staff. In response, the Manager Litigation said he needed to understand why those people needed to be interviewed as he was required to update the Director General on all steps in the investigation and why.

In her submission, Ms Corbyn pointed out that like any other body Sydney Water was able to register a complaint about the investigation and the EPA was under an obligation to consider any such complaint. Ms Corbyn said that such complaints should not be an avenue to influence a regulatory investigation, but regulators must be able to tailor their investigations and resources to the severity of the incident and prospects of an outcome through the courts.

The view of a number of senior EPA staff was that the investigation was not excessive and evidence was found that pointed to potential sources of the offensive odour. While it was not wrong for the EPA to consider Sydney Water's complaint about the conduct of the investigation and re-evaluate the resources committed to it, to an outside observer the sequence of events could be perceived as evidence that the EPA allowed Sydney Water to influence the terms and manner of the investigation, including who could be interviewed, when and in what manner.

Inability to effectively resolve internal differences and move forward

There was internal disagreement about the significance and seriousness of the odour incident itself as is evident from the investigation file. For example in an email to the Chief Investigator the Manager Litigation stated the following:

> I think it is important to keep the incident in perspective. It is an odour incident, not a toxic gas incident but odours. Also, it is unlike a lot of past odour cases we've prosecuted. Those past matters involved residential areas and residents being impacted night after night or something similar. With this matter it involves a group of people in an otherwise unpopulated area being impacted once.

In December 2010 a draft letter to be signed by the Director General advising Sydney Water that the investigation was finalised was circulated among relevant staff for comment. From suggested amendments to this letter, it was evident that investigative staff had concerns about the ultimate conclusions being reached. For example, the draft letter made the following comment:

> After carefully considering the information which has been collected to date I have decided not to pursue a prosecution in association with this incident. It is my view that the costs to Government which would be required to secure the necessary evidence outweigh the environmental significance of the incident.

The Chief Investigator also considered the incident warranted considerable attention and thorough investigation. The incident had the potential to have effect on human health and the fact the licensee was another government agency heightened the public interest.

The Chief Investigator's comments in a draft amendment circulated by email were as follows:

> I do not support this statement because I believe that the potential environmental harm is significant. The odour did cause discomfort and illness to some and as I understand it H_2S gas, which was reported by some witnesses (i.e. rotten egg gas), is lethal in high concentrations (I am told that it is odourless when in lethal concentrations). I also consider that the public interest is very high in this case. These factors, in my opinion, justify a thorough investigation, (but I doubt all would agree with me).

There was also disagreement on whether the cause of the odour incident could be established, with the draft letter expressing concern that despite large amounts of technical information collected, numerous interviews conducted and the involvement of a specialist expert, no agreed cause could be established. The investigators, on the other hand, were of the view that there was reasonable suspicion of contravention of s 124 of the POEO Act.

The former Deputy Director-General's view about this issue was expressed to us as follows in the hearing:

> Well, my assessment had been from the start that we had some eight or nine people reporting some level of effect. And odour is always difficult because its impact on individuals is always different - it's peculiar to the individual. Within that group of complainants there were people who were reporting virtually no impact, and there were people who were reporting that they had a gagging sensation and may even have been sick or certainly felt like being sick. There was some history of similar events from that North Head Wastewater Treatment Plant, and whilst I would not have considered it to have been in the serious category in the sense that, say, for example, if you compared it to a chemical release, where people were in immediate danger in terms of life or health - it certainly wasn't in that category, but nevertheless it had had a substantial impact on a group of individuals. I thought that the group of individuals were credible in the sense that they had a variety of backgrounds, they had some quite prominent individuals. I had no reason to believe that they were concocting the story. And, as a consequence, my view would be that it should have been fully and thoroughly investigated.

A spectrum of views as to the public interest in relation to this case as well as differing judgements on both the seriousness of an incident and what the appropriate response and level of resources should be applied, is neither unexpected nor wrong in itself. Robust debates by staff about the terms of reference of an investigation should be welcomed and serve as a tool to refine an investigation. However, without an established way to effectively resolve these differences and lack of clear leadership, the polarisation of views, as in this case, can have a serious negative impact on the ability of investigators to do their jobs, lead to disaffection among staff and a perception of bias by complainants, who are not privy to the debate but only see the end result.

Roles of those involved in the investigation

We believe the situation of unresolved internal differences was caused at least in part by lack of clarity about the respective roles of those involved in the investigation.

It was unclear to us who had what decision-making power in the investigation. The team was comprised of SIU investigators and regional staff, each reporting through different channels. For example, the exchange between the Chief Investigator and the Manager Litigation about whom and how many individuals should be interviewed indicates a lack of clarity around respective roles and decision-making delegation in the investigation.

The investigation team had prepared an investigation management plan. The plan included a list of team members and their roles, avenues of inquiry and a resource spread sheet. The plan had space for signatures by the Regional Manager and the Chief Investigator and a statement saying they supported the investigation management plan. The plan stated that the purpose of the investigation was to investigate the alleged offences and establish the true reasons for the odour incident as well as provide a briefing note to the Director General with recommendations including appropriate compliance responses. However, the plan did not clearly assign decision-making roles to either the Regional Manager or the Chief Investigator and did not include any discussion as to the level of resources to be committed to the investigation. It seems to us that this created leadership confusion and as time went on there was less clarity as to what the objectives of the investigation were and what and how much action was appropriate in the circumstances. A situation such as this leaves an agency open to possible criticism of taking irrelevant considerations into account, as decision-making processes can appear arbitrary and not supported by clear procedures and guidelines.

Generally speaking regulatory investigations, including those involving criminal offences, are governed by principles of administrative law. Relevant issues here include:

- identifying the issues that are relevant to the investigation and the parameters of the investigation
- confining the investigation to relevant matters (filtering out and not seeking out irrelevant material)
- realising when procedural fairness issues arise and knowing how to address them
- interpreting the empowering legislation
- understanding the legal framework.[4]

The EPA has advised that the roles and processes for investigation have been in place for a number of years and have generally been found to be effective. The EPA has advised it will however review the processes and where necessary make enhancements.

Resources and priorities

The question of how many resources should be committed to an investigation is a difficult, albeit important one. Agencies have limited resources, which means that not every breach can be investigated or may not be investigated as thoroughly as it could be were resources unlimited. In a situation such as this it becomes all the more important to make regulatory prioritisation decisions transparent and publicly available.

The former Deputy Director-General's view on this issue was expressed as follows:

> So the question was how did you - how do you apply your resources. And I think the mechanism around which prioritisation occurs should be made very transparent and signed off at political level, such that the task that is regulated then is to make sure they are properly following the policy for allocating resources, and can demonstrate why they applied resources and did a particular job as opposed to not doing another job. There will always be debates as to whether these are arbitrary or whether you got it wrong in any particular case, but better to have that debate than have obscurity as to

[4]Based on Administrative Power and the Law, Fiona McKenzie, Australian Law in Practice 2006, p17

> why did they not do this job, but they started investigating that, and how come this job is rated as more important than that one.
>
> So I would make very clear the mechanism by which prioritisation decisions are being made. Now, this is where views often differed as to whether it was in the public interest. Every case is different and it's got to be judged on its own merits. I've seen lots of cases where prosecution of government entities I consider to be in the public interest. I've seen some where you say that a negotiated settlement might be a better use of public funds and get a better outcome for the public. Views are going to differ on that. There's no way I don't think you can end up with anyone having a unanimous view about that sort of circumstance. It will depend very much on your personal level of risk aversion, I suspect, as to what outcome you might choose in any particular case.

Over-emphasis on maintaining a positive relationship

A conciliatory letter by the Director General was sent to Sydney Water on 25 January 2011 advising the investigation was finalised but pointing out it was likely that the odour may have emanated from the NHWWTP. It encouraged Sydney Water to take the opportunity to review existing processes and controls. The letter also highlighted gaps in the licence and the need to improve record keeping practices. This correspondence led to a strong reaction from Sydney Water in its response of 17 February 2011. The Managing Director of Sydney Water responded by expressing dissatisfaction with how the investigation was conducted and noted that the investigation was trying to all involved at Sydney Water.

The Managing Director said:

> Sydney Water and its contractors have spent over a thousand man-hours replying to information requests, attending interviews, collecting data etc. The cost to Sydney Water is estimated to be over $0.5 million.
>
> I believe the huge commitment of time and resources the Department and Sydney Water have expended on this issue would have been significantly reduced if there had been better two-way communication on a basis of openness and trust. Further, we should not underestimate the personal toll that an investigation carried out in this manner has had on our staff members.

We have no evidence that the allegations of excess requirements and heavy-handedness were in any way refuted by the EPA. The EPA Director General's reaction to Sydney Water's letter (in a hand-written note on top of a briefing page dated 22 February 2011) was that a positive meeting with Sydney Water should be arranged to reset the relationship which she noted had clearly been negatively affected.

On 6 June 2011 a relationship and communication workshop between the two agencies was held. The purpose of the workshop was to understand the communications and relationship issues and identify actions to work toward a constructive and open relationship.

We acknowledge that a good working relationship between regulators and their regulated entities can be conducive to achieving positive outcomes, in this case the objective being adequate protection of the environment. However, for such a relationship to function it must presuppose a cooperative attitude by the regulated entity and that it is a model complier. The regulator on the other hand must recognise when cooperation no longer works and must be willing to then use whatever coercive powers are necessary to establish the facts.

It is open to question whether the value placed on a positive working relationship in this case was too high. As already pointed out, the EPA appeared to allow Sydney Water, the regulated entity, to dictate the terms of its investigation. The investigation was suspended at the time Sydney Water started complaining that the investigation was excessive in July 2010. No attempts were made to explain to Sydney Water why the investigation was appropriate in the circumstances. On the contrary, gradually all considerations of stronger enforcement action were dropped. For example, the region and investigators were initially advocating that Sydney

Water be required to conduct a mandatory environmental audit of the NHWWTP. This was abandoned in favour of voluntary negotiations. This issue is discussed in detail below.

Delay

Another consequence of suspending the investigation in July 2010 was the loss of time. The statutory limitation for mounting a prosecution under the POEO *Act* is 12 months, which is a short period of time, especially taking into account the requirement to consult with the other party prior to taking the matter to court. Because Sydney Water was another Government entity, under the Premier's Memorandum[5] on litigation between government agencies, the Director General was required to consult with Sydney Water prior to deciding whether to prosecute.

The investigation team agreed that by October 2010 further inquiries would not have been able to uncover the cause of the incident in time to mount a successful prosecution. The investigation was therefore terminated in late October 2010. The EPA gave the following response to our question about this issue:

> The direction to wind-up the investigation was given because by late October 2010 a large amount of time, effort and resources had gone into the investigation, resulting in the production of a large number of documents (both paper documents and electronic documents). Many interviews had been conducted with Sydney Water employees and contractors in an attempt to determine the specific cause of the alleged odour incident. Despite the volume of evidence obtained, neither Sydney Water nor OEH could discern what the specific cause of the alleged odour incident was. This was partly due to the inability of Sydney Water and OEH's expert to understand and interpret the SCADA data, which was extremely voluminous given the complexity of the plant.
>
> At this stage of the investigation it was considered very unlikely that the further interviews and investigative steps proposed by the investigators would assist in determining the specific cause of the alleged odour incident. It was therefore considered appropriate to discontinue the investigation at this stage.
>
> It is noted that if the specific cause of the incident had been established beyond a reasonable doubt, this would not have been the end of the investigation. An expert would then need to have been engaged to assess whether the specific cause of the investigation was due to a failure by Sydney Water or due to some other cause.

The Chief Investigator agreed that a successful prosecution was unlikely and that prosecution was only one of the regulatory options available. However, he disagreed with the statement that it was very unlikely that further inquiries would not assist with determining the specific cause of the odour incident, given the investigators strongly suspected the odour came from the digesters.

When questioned about the continuation of the investigation post-July 2010 the former Deputy Director-General said:

> It was made clear that we needed to have more evidence to support any continuation of the investigation, and there were subsequent meetings that we had with the Director-General, and what we were ultimately able to do was to persuade the Director-General that there was value and importance in continuing the investigation, albeit in a very controlled and somewhat narrow fashion. So the investigation did continue; and, for example, we did more work around the SCADA documentation that was obtained. There was a vast amount of information obtained from the SCADA records, a printout of records. Now this, in fact, was one of the issues which caused Sydney Water some concern, because getting a printout of the SCADA records involved hundreds, if not thousands, of pages, and that was presented as being onerous. Unfortunately, that's just the reality of printing out vast computer systems when you're trying to track down bits of information. As a result of that additional information, there were further questions that we then wanted to ask of particular individuals. And so we are able to persuade the Director-General that there should be some further interviews of key staff about the sort of

[5] M1997-26 Litigation Involving Government Authorities, Premier & Cabinet, 8 October 1997

> - the SCADA analysis, and what we identified. So it did progress a bit further, but in the end we still got to this point ultimately where having done, perhaps, 10 or so formal interviews, and looked at the SCADA analysis and got an expert report, we were still no closer really to knowing what the specific cause of the odour release was, and it became apparent to me that Sydney Water didn't know either.

We are not convinced that a statute of limitation of 12 months is sufficient to investigate and mount a prosecution in response to an incident such as this, given the requirement to pin-point the exact source of the odour and the complexity of the equipment for monitoring odours. We explored this issue during our hearings and while we were told that it is possible to finalise an investigation and commence a prosecution within a 12 month period, it is difficult in ordinary circumstances. We were given the example of the EPA's investigation of the Orica incident in 2011 as one instance of a successfully completed investigation and prosecution within the statute of limitation period. However, we note this was in response to a highly publicised incident and that resources were made available to achieve this.

Decision not to conduct a mandatory environmental audit

We asked the EPA both in writing and during hearings how and why a decision was made not to conduct a mandatory environmental audit as recommended by both investigators and the region.

In its response to our questions in a request pursuant to s18 of the *Ombudsman Act 1974* the EPA said:

> Whether or not the EPA should consider issuing a mandatory audit is not within the scope of the Chief Investigator's responsibilities. Licensing issues and other regulatory issues are the responsibility of EPA and the relevant regional officers. Furthermore, during the many conversations between the case solicitor, the regional officers, ML (Manager Litigation) and the Chief Investigator about the incident, many options were discussed including a mandatory audit.
>
> It is noted that a mandatory audit is just one of a wide range of regulatory tools available to the EPA in regulating licence holders. It is for the EPA to consider and determine which tool is appropriate on a case by case basis.
>
> EPA considered a range of regulatory tools to deal with the concerns raised during the investigation, including the option of a mandatory audit. However this option was not considered appropriate.

The EPA did not explain in its response why the option of a mandatory audit was not considered appropriate or what other regulatory tools were considered. Having reviewed all the investigation paperwork, we could find no documents recording discussions about whether a mandatory audit should or should not be required. On the contrary, we found evidence of strong support for a mandatory environmental audit by regional officers of the EPA.

On 3 March 2011 a Follow up Actions briefing note was prepared by the Regional Unit Head, Metropolitan Infrastructure (Water). The briefing recorded the view that further work was imperative at the NHWWTP to review the current operation and monitoring of odour control equipment. The briefing stated the following:

> Although the investigation did not support a prosecution, the evidence collected indicates that further action is required to ensure that a thorough review of Sydney Water's odour monitoring equipment at the STP be undertaken in order to assure DECCW and the community that the emission control systems and associated monitoring at the STP are best practice in relation to preventing odour and, in the event of an odour emission, capable of identifying the odour source so that any issues can be remedied.

The briefing proposed organising a meeting with Sydney Water executives to seek their commitment to undertake a joint review of the NHWWTP odour emission management system and associated monitoring. The proposed review was to assess whether the odour management practices at the NHWWTP are best practice by delivering information in relation to:

- the functioning and links between identified components of the odour control equipment
- the adequacy of the points of connection between the identified equipment and the SCADA system
- identifying improvements required to equipment functioning, interrelationships and monitoring in order to improve capacity to detect actual and potential odour emissions
- outlining improvements to response procedures
- whether recommendations for North Head are transferable to other similar STPs.

The region was in full support of the investigators making a recommendation for a mandatory environmental audit to be conducted as seen from the following email dated 26 October 2010 by the Unit Head Metropolitan Infrastructure (Water) to the Chief Investigator and others:

> I'm wondering if there has been any further discussion of the proposal for a Mandatory Audit which we discussed last week.
>
> Perhaps this is something which we need to propose from Metro but I would appreciate your advice about whether it has been discussed at all so we know how to pitch the proposal,
>
> In short, we are of the view that given:
>
> - that there is still a lack of clarity around what caused the incident
> - the information collected shows that the licence conditions re the odour management system are inadequate
> - the addition of the cogen facility into the odour management system has been ad hoc at best; and
> - there is the potential to gain information capable of improving the odour management conditions on all the major coastal systems (and maybe other systems too).
>
> There are very good reasons to support a mandatory audit.

On 8 November 2010 the Unit Head sent the following email to the Chief Investigator about the same subject:

> Every so often I remember that we have not taken any specific action to promote the Mandatory Audit on North Head. I would not like to miss the boat on getting this considered/approved just because the urgency has dropped out of the investigation.
>
> As I know you appreciate, it will make a big difference for us to get this audit agreed completed and the licences improved for odour.
>
> Yet I fear the longer we take to get it together the less likely it is to happen given all the angst so far.

An unsent letter to Sydney Water drafted by the Unit Head on 10 December 2010 included the following proposed comments:

> My review of the report of the investigation to date leaves me with a clear view that the air emissions management equipment (including the SCADA monitoring system) as well as procedures associated with its maintenance and operation require a thorough review as a first step to identifying necessary improvements. Such a review will not only provide Sydney Water with much needed confidence concerning the robustness of its odour management equipment and operational procedures but will provide the community with confidence that the potential for odour emissions is minimal. Once the review is complete I anticipate that Environmental Protection Licence 378 will require variation to ensure improved requirements in relation to odour control procedures, monitoring and reporting.

The Unit Head also prepared a summary of the main aspects of the emissions management system which should have been the subject of a review.

In a hearing we asked the Unit Head what happened to the proposal for a mandatory environmental audit. The Unit Head told us that she was in favour of the mandatory audit as an option. The Unit Head explained that when a voluntary audit is carried out, the licensee does not have to report to the regulator. For this reason she initially thought a voluntary audit

would not be an effective tool and she was concerned that the EPA may not find out the outcome. The Unit Head was unable to explain why the mandatory audit was not pursued other than to say it was decided to achieve the outcomes by negotiation. The Unit Head said that there was '*more than one way to skin a cat*' and the same terms of reference that were prepared for the mandatory audit would have been negotiated with Sydney Water. The Unit Head was unable to confirm what outcomes were achieved through negotiation.

We asked the former Deputy-Director General, why a decision was made not to pursue a mandatory environmental audit. He said:

> The Director-General felt that a letter expressing concern about Sydney Water's failure to understand what caused this odour, and encouraging them to look more closely at their processes would be sufficient, and that there wasn't sufficient grounds for a mandatory environmental audit. That particular tool, that mandatory environmental tool, mandatory order tool, has only been used about nine or 10 occasions. In fact, we used it in the Orica incident, and I think that was about the ninth or 10th occasion in its history that it had been utilised. So the actual standard for a mandatory environmental audit was pretty high. You are looking at a series of events, serious impacts, high risk - that type of criteria, which isn't going to be satisfied on every occasion. You know, you could plausibly argue that an odour complaint wouldn't satisfy the requirement to use such a significant tool.

We asked the former Deputy Director-General what his opinion was on the high threshold for mandatory environmental audits. He said:

> Well, my overall view would be that in general you should follow up requests with notices to require action, irrespective of the entity that you are dealing with, i.e. that it's better to confirm in writing and require in writing the thing that they may have agreed to verbally.

We contacted the EPA's Manager Infrastructure and Biodiversity, who has current responsibility for the ongoing regulation of the NHWWTP. The Manager advised us that he is very satisfied with the outcome of actions taken by Sydney Water and the outcomes of the voluntary environmental audit.

In its submission to our preliminary views the EPA advised that decisions about the most appropriate regulatory tool to use are the responsibility of the relevant EPA operational area, not the Specialist Investigations Unit. The EPA further advised that:

> A number of factors are considered including the willingness of the licensee to address an issue. In Sydney Water matter it was determined that there was no need to apply a mandatory audit as the licensee agreed to undertake a voluntary audit under the *Protection of the Environment Operations Act 1997* (POEO *Act*). This resulted in a similar outcome.
>
> While the Chief Investigator and his team made a vital contribution to Sydney Water investigation, decision about investigative outcomes and operational regulatory responses are matters for the EPA.

The EPA expressed the view that our preliminary views gave an over emphasis to the recommendations and views expressed by the Chief Investigator.

Given our lack of expertise in the subject matter of odour management, we accept the EPA's assessment and advice that the environmental outcomes achieved through the voluntary audit for the NHWWTP are satisfactory.

However, we remain concerned about the way the decision not to conduct the mandatory environmental audit was made. There are no documented reasons about why the recommendation, which was supported by both the investigators and the region, was not pursued. There appeared to be no guidelines on which regulatory tools should be used in what circumstances at the time. Furthermore, there are no reporting requirements arising out of voluntary audits to either the EPA or publicly. While acceptable environmental outcomes may be reached through voluntary negotiations they remain closed to public scrutiny, which is not a satisfactory situation. We also see no harm in allowing investigators to put their views

forward in the form of recommendations. The investigators are trained and highly experienced in conducting environmental investigation and their views should be freely given and duly considered. If management decides not to adopt investigators' recommendations, those decisions and the reasons should be properly recorded.

7. Government regulating government

The issue of one government agency regulating another

We consider that some of the issues highlighted by this investigation stem partly from the lack of guidance and clarity about how one government agency should investigate and regulate another government agency. This can be problematic. We have found a great deal of confusion about what should occur when the investigated entity is another government agency and what occurs in reality. Actions appear to be guided by unspoken cultural values rather than policy and clear guidelines.

What guidance is available to EPA staff on regulating government agencies?

The EPA investigation procedures manual only has the following guidance on operations involving other government entities:

> The Operations Commander, Case Officer and search team members will familiarise themselves and comply with any policies that relate to dealing with other government entities, including:
>
> - Any Memorandums of Understanding (MOUs), and
> - NSW Department of Premier and Cabinet policies and guidelines.

The EPA Prosecution Guidelines give the following guidance on prosecuting public authorities in section 3.6:

> **Background**
>
> As noted at 1.3, Parliament has specifically precluded Ministerial control or direction in relation to prosecutions, including prosecutions of public authorities, by the EPA.
>
> The EPA recognises that the issue of deciding in what circumstances public authorities should be prosecuted is a specific instance of determining whether prosecution is in the public interest and acknowledges that there are two competing public interests in relation to the prosecution of public authorities. These are:
>
> (a) The public has an interest in *Government* authorities abiding by the law. The law should apply equally to the private and public sectors, and
>
> (b) It is the taxpayer that bears the cost of any prosecution of public authorities.
>
> Since any fines imposed as a result of criminal proceedings go to Consolidated Revenue, it could be argued that public funds are not expended, simply recycled. However, the use of Crown legal resources, the briefing of private legal firms and the use of Court time are not recoverable and such expenditure needs to be justified as being in the public interest.
>
> The EPA recognises that the ultimate aim of any prosecution action is to ensure compliance with the environment protection legislation. Public authorities are usually under the control and direction of a Minister who can direct compliance with the relevant legislation. However, experience indicates that sole reliance on that avenue does not make for the same rigid adherence as the requirements of the Court process. Moreover, in the interests of general deterrence, there will be instances where it is important that compliance not only be achieved but be seen to be achieved, with independent scrutiny.
>
> **Consultation**
>
> While the EPA is not subject to Ministerial control or direction in respect of prosecutions, it is guided by the *Premier's Memorandum No. 97-26 Litigation Involving Government Authorities.* The EPA recognises that the consultative steps set out in the Memorandum may facilitate remedial action and may expedite any Court hearing by better defining the facts in issue. Consultation can also focus on

> longer term strategies and directions. Indeed, the consultative process, as an adjunct and not necessarily an alternative to prosecution, will not be restricted to public authorities but can be applied to the private sector as well.
>
> It would be inappropriate to enter consultations with government departments solely to achieve a 'by consent' prosecution wherein the charges laid do not reflect the gravity of the alleged offence. However, it is in the public interest that Court proceedings involving public authorities are concluded quickly. The EPA will attempt, therefore, to define the facts in issue and, with the concurrence of the other authority, will prepare and tender to the Court an agreed statement of facts.

The role of the Premier's Memorandum on Litigation

The memorandum was issued on 8 October 1997, is current and applies to all government authorities. The guidelines apply both to civil and criminal proceedings. They are based on the principle that litigation between government authorities is undesirable and should be avoided whenever possible. Where such litigation is contemplated government authorities are told to take steps, as set out in the guidelines, to consult with the authority against which litigation may be commenced and attempt to reach agreement on as many factual and legal issues as possible, to ensure only matters which need to be resolved by the Court are left in issue. However, the guidelines also recognise that, in some circumstances, the only appropriate course of action is to commence prosecutions against government authorities, particularly as a way of enforcing compliance with environmental, safety and other standards. The guidelines state that they are not intended to interfere with the normal prosecution discretion of government authorities. The guidelines recognise that prosecution action may be necessary to ensure the acceptance of an appropriate sense of responsibility for the consequences of the breach of such standards or because it is otherwise in the public interest for proceedings to be commenced.

The full text of the memorandum can be found in Appendix 5.

The role of the Memorandum of Understanding between Sydney Water and the EPA

An MOU was signed by Sydney Water and the then Department of Environment and Conservation in June 2006. Section 35 of Sydney Water *Act 1994* requires Sydney Water to enter into a separate memorandum of understanding with each of the regulatory agencies. The Act says that if the Corporation and a regulatory agency are not able to agree on a term of a memorandum of understanding, the view of the regulatory agency is to prevail.

Both the EPA and Sydney Water made references throughout the EPA's investigation to the fact that information was being sought under and being provided cooperatively in accordance with the MOU.

The MOU provides the foundations for a co-operative relationship between the two agencies, outlines the roles of each and sets up the Strategic Liaison Group, the Operational Policy Committee and other mechanisms to achieve the objectives of both organisations. The MOU states that the EPA expects Sydney Water to meet environmental requirements and will regulate Sydney Water in a manner consistent with its regulation of other organisations.

In relation to exchange of information and data the MOU provides:

> In recognition of the spirit of co-operation embodied in the MOU and to enable both parties to more effectively carry out their statutory functions given in 2.1 and 2.4 of this MOU, each party will share and supply relevant data and information and provide updated information where necessary. The information and data held by each party shall generally be available, within reason or according to policy, on request from the other party, subject to relevant statutes. Such information will be supplied in a reasonable timeframe, given the level of complexity of the requested information and in form requested, as far as possible.

The above is the extent of the guidance provided by the MOU about what is expected to occur if and when the EPA exercises its regulatory functions, including taking enforcement action.

Sydney Water commented that this section of the MOU is not intended to provide guidance as to what is expected to occur during regulatory action. Rather, it outlines the agreement for exchange of information and data sharing between the two agencies. For this reason Sydney Water could see no value in including comment about the MOU in this document.

We agree with Sydney Water and consider the MOU does not adequately address the regulatory aspect of the relationship between the two agencies. However, the MOU was relied on throughout the investigation to both request and provide information. In an investigation of this type the MOU should either not be referred to or it should be amended to include the regulatory aspect of the relationship in a clear manner.

While the MOU states that the EPA will regulate Sydney Water in a manner consistent with its regulation of other organisations this is not sufficient to clarify expectations on both sides.

What do EPA staff think about regulating other government agencies?

We heard a range of opinions on this question during our interviews ranging from the view that the playing field should be equal, to the view that it may be a waste public funds to prosecute another government agency when the same funds could be used to rectify the deficiencies.

We asked the former Deputy Director-General his opinion about the regulation of other government agencies. Here is what he said:

> It's a very contentious at times and delicate area. It comes up repeatedly. I've seen it in multiple jurisdictions - both local and State levels. And, of course, the difficulty is that we're dealing with sort of competing public interests on the one hand. An investigation using public resources into an organisation which is publicly funded, is going to consume a level of public resource and if, for example, there was regulatory action taken - say in the form of a prosecution - you could potentially end up with a scenario where the public is funding a penalty, which it's had to investigate itself, and which it funds the very organisation that's committed the breach. But set against that is the other very important public interest that effectively the rule of law; in that the government has to be accountable and/or its agencies, to the parliament, and to the laws of the parliament, and to the people. And so if they are not going to be accountable - well, then, we run into very serious risks in terms of public accountability, transparency, and ultimately confidence in government. So it's a very difficult question, but it's an important one. My view is that historically, regulators in Australia have been very gentle with government agencies in particular - and, indeed, gentle full stop.
>
> And so I think one of the challenges has been that there hasn't necessarily been a good understanding of the role of the executive by comparison with the Parliament, and that there had been politicians at a variety of levels, and bureaucrats, who haven't had a really solid grasp of the fact that the executive can't choose to not obey - can't choose to sort of not obey the law, essentially. And that's put at its highest extent. But if you work down from there, then there would be a whole series of subtleties of around the way in which influence occurs; the dynamic of power within an executive, and between the executive and the parliamentary arms of government.
>
> I think another factor, separate from this, but which is also very important in terms of your investigation, is this concept of risk aversion. Now, I have seen, sort of over almost 20 years now, risk aversion is everywhere in the public sector. And I don't say that as a criticism, because for a starting point I can understand why public officials would be risk averse, and that wouldn't matter whether they were dealing with regulation or some other aspect of government relations or government responsibilities. They tend to be risk averse, they tend to look for ways to minimise risk. Unfortunately, in the regulatory setting, what can happen is that if you are too busy being regulatory averse - sorry, risk averse, you can miss the fact that you're actually creating risk because by not carrying out regulatory responsibilities in a robust fashion, other risks emerge - namely the regulated community not following the laws.

Is the playing field level?

The principle

The concept of a 'level playing field' is an important legal principle. Government agencies are obliged to comply with the same laws, such as environmental laws, as the private sector. However, the current blanket environment enforcement mechanisms, anchored as they are on prosecution for offences, are inflexible and impact differently on public and private entities. In this context, the level playing field concept applies to the issue of compliance with the law, not to the means to achieve that compliance.

The level playing field question has been considered by other jurisdictions. For example, Worksafe Victoria's prosecution policy (Worksafe Victoria 2006a) which states that government departments have the duty to comply with the law and will be subject to prosecution and other punitive action for breaches of the law in the same manner as any other regulatee. They will not be treated any more or less favourably than any other person or organisation (Worksafe Victoria 2006a:2). The policy also states that procedures will be transparent and accountable and government agencies are encouraged to act as 'exemplars' of work health and safety standards (Worksafe Victoria 2006a: 2).[1]

Further afield, the Dutch National Strategy for Environmental Legislation Enforcement states that the enforcement of compliance on the part of another government authority is no different to that applying to other parties and that it is even more important to ensure that the objectives of maintaining the general sense of standards and the credibility of the legislative apparatus are upheld.

The current approach to enforcement

In the 1980s and 1990s this office raised the issue of failure by government to prosecute government entities for breaches of the law. In our 1985 Annual Report we identified a long standing Cabinet direction that there was to be no litigation between government departments. The then Ombudsman made it clear that legislative requirements that bind the Crown should be consistently enforced by the appropriate regulatory body and no government body should be able to circumvent the law. In our 1990 Annual Report we were pleased to report that the practice of not prosecuting government bodies for breaches of the law had ceased.

While we still believe government should prosecute government in appropriate circumstances, particularly when prosecution is against individual public officials who have committed offences, we have reconsidered our position on the general issue of government prosecuting government.

The problems

There are a number of potential issues of concern arising in the prosecution of government entities for non-compliance with legal obligations:

- When a government department is responsible for a breach, as it is not a 'legal person' it cannot be prosecuted as such but only as the Crown.
- When one agency representing the Crown prosecutes another, an objection has been raised in some legal contexts that effectively the same client appears on both sides of the bar table.[7] We note this is not an issue with statutory bodies which do not represent the Crown.

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[1] Cited in: The Tools of Regulation, Arie Frieberg, The Federation Press 2010, page 65

[7] For an example of how this operates in practice see *Environmental Protection Authority v The Crown in the right of New South Wales [2002] NSWLEC 52 (19 April 2002)* a prosecution of the National Parks and Wildlife Service by the EPA. In that matter Talbot J, in his reasons for judgement held that s 315 of the *Protection of the*

- The concept of the Crown being unitary in nature means that client legal privilege could not be relied on where both bodies to proceedings represent the Crown (i.e. in the legal context there being only one client but potentially numerous instructors).[8] Put simply, when government prosecute government, public funds are being shifted from one government pocket to another, as well as covering the significant costs of legal representation, rather than being directed towards fixing the problem.
- Any monetary penalty will ultimately be paid out of public funds and has no personal financial or business profit type impact on the individual or entities responsible for the breach.
- As the burden of proving an environmental[9] breach to a criminal standard is onerous and many cases are too complex to proceed to prosecution, in my view if there is a viable administrative alternative available then the response to an environmental breach by a government agency should not come down to narrow legalistic arguments of whether a breach of licence conditions can be proven beyond reasonable doubt.

For agencies to have to resort to the courts to address a problem seems to me to be a demonstration of a failure of public administration or of inadequacies in the law. If government 'takes itself to court' this may also tend to indicate deficiencies in the will or powers of Ministers to intervene and direct compliance.

In the context of compliance by government agencies with environmental legislation, there is a need to return to first principles and ask the question: what is the objective to be achieved through prosecution? Firstly, prosecution is a deterrent against further or similar offences by that or any other party. Secondly, it is aimed to punish the offender and thirdly its objective might be to impose a financial penalty or possible imprisonment. The next question is: whether other effective compliance tools were available that are simpler and cheaper than prosecution? If prosecution is the only mechanism that is effective to achieve compliance by government agencies, indications are there is something seriously wrong with the control and management of that agency. In my view, legislation should explicitly address the practical differences involved in regulating government agencies and incorporate a range of administrative tools to achieve compliance with the law.

Is there an alternative?

There is a need to consider whether other effective compliance tools are available that are simpler and cheaper than prosecution. A situation where prosecution is the only mechanism to achieve compliance with the law by a government agency suggests there are failings with the control and management of that agency.

If the objective of regulation is to achieve compliance, prevent reoffending, achieve rectification, there are a range of administrative oversight and regulatory options that could reasonably be available within government that would not so easily be available between government and the private sector.

Environment Operations Act 1997 binds the Crown, in so far as the legislative power of the Parliament permits and s315 overcomes the otherwise prevailing presumption that the Crown cannot be liable for prosecution of a criminal offence.

8 For a discussion on the unitary nature of the Crown see *Bropho v Western Australia [1990] HCA 24; (1990) 171 CLR 1 (20 June 1990)*

9 An exception should be where a public officer, as opposed to a public authority, has intentionally broken the law and needs to be prosecuted.

There are clearly practical differences between regulating government agencies and the private sector, and these should be reflected in legislation. This could incorporate a range of administrative tools or options to achieve compliance with the law. In my view it would be a useful exercise for government to review alternatives to criminal penalties with a view to simplifying the system and making it more effective.

While government agencies are not above the law and should not be given carte blanche to pollute, in our view prosecution should be an avenue of last resort. However, for such a policy position to function effectively there must be a greater range of administrative tools available and utilised to achieve compliance, address and rectify environmental breaches and damage and ensure there are no further breaches of conditions that have led to the environmental damage. Such a position on regulating government agencies would need to be counterbalanced with increased requirements for transparency and public reporting on both breaches and rectification measures and a public statement that government will be a model complier. When decisions are made by a regulator not to take enforcement action after the investigation of a breach, the reasons for these should be made publicly available.

Administrative enforcement options

A review of current enforcement options could consider options including Ministerial direction, mandatory publication of information about breaches and how they have been addressed, administrative orders and other legislative instruments. Government regulatory bodies have, or could appropriately be given, the capacity to have far greater control over other government bodies directly or through relevant ministers and/or Cabinet. For example:

- A Premier's Memorandum could be issued requiring all government entities to be 'model compliers' with environmental and other legal obligations.
- Legislation could include a provision authorising the regulator to issue mandatory directions to CEOs to rectify environmental harm that could be enforceable against the CEO (for example through a standard provision in their contract of employment – a precedent being the obligation on CEOs and General Managers of councils to ensure compliance with the *Public Interest Disclosures Act*).
- The regulator is authorised to make a recommendation to the relevant Minister to require rectification action to be taken on a breach, which could be required to be publicly reported. Alternatively, an external arbitrator, such as a tribunal, which could be approved to issue rectification orders if it could be shown on the balance of probabilities that there has been a breach.
- There could be a greater and better use of enforceable undertakings, i.e. promises enforceable in a court but given to the regulatory authority (it has been shown that enforceable undertakings are, flexible, timely and cost-effective, powerful, responsive, effective and less stigmatising than prosecution.[10]
- Such a system would need to be accompanied by increased requirements for transparency and public reporting on both breaches and rectification measures. For example, the public register under s308 of the POEO Act could be further enhanced to require publication of both directions and action taken in response. We note the register has recently been expanded to include any mandatory audits required to be undertaken in relation to a licence each pollution study required by a condition of a licence, each pollution reduction program required by a condition of a licence and each penalty notice issued in relation to a

[10] Based on The Tools of Regulation, Arie Freiberg, The Federation Press 2010, pages 254, 255

premises. When decisions are made by a regulator not to take enforcement action after the investigation of a breach, the reasons for these should also be made publicly available.

These options may prove easier, quicker, more effective and less expensive than prosecution. It would be possible to avoid the cost of legal representation, delays involved in the court process, and similar impediments.

There may still be situations where these alternative approaches are either not appropriate or are unsuccessful. In these hopefully rare instances, there must still be the option of pursuing criminal proceedings for breaches. This should only be an option of last resort.

Some of these options and tools may well also be applicable to private sector organisations and individuals, and this should be considered as part of the review.

8. Recommendations

I make no finding in relation to the conduct of the EPA in deciding not to prosecute the alleged odour offence (given the lack of conclusive evidence and the high evidentiary requirements of proof beyond reasonable doubt).However, I believe that the practices, laws and policies currently available to achieve environmental compliance may be unreasonable to address circumstance the subject of EPA's investigation. In my view there should be a range of options and tools available and utilised to achieve compliance by Sydney Water and other government entities with environmental conditions that do not require prosecution.

I **recommend** that:

1. in every investigation leadership and other roles be formally assigned at the outset, with clear delineation of responsibilities and reporting lines

   The EPA accepted this recommendation in part, advising that it has existing Guidelines for Investigations and Prosecutions that assign clear roles and responsibilities for regional investigators, legal officers and Specialist Investigations Unit assistance in prosecutions. The Guidelines also identify the need for an Investigations Management Plan for investigations. The EPA has also advised that it implemented a formal debrief where investigations do not go to plan or where prosecutions are unsuccessful. However, in light of our recommendations the EPA has agreed to review its investigative procedures and practices to ensure that roles and responsibilities are clearly defined and understood.

2. investigation plans be formally signed off by an appropriate executive sponsor. As investigations progress plans should be adjusted accordingly and any departures from the agreed course of action should be documented and explained

   The EPA accepted this recommendation in part and advised that in accordance with the EPA's Guidelines investigation plans are signed off at the appropriate senior level. The EPA has agreed to review the procedures and practices and ensure that the process, including the documentation of any departures, is formalised.

3. clear guidelines on the EPA's enforcement priorities be developed and published on the EPA's website

   This recommendation has been accepted. The EPA advised that it is currently developing a formal process to identify and communicate its compliance and enforcement priorities.

4. the adequacy of the 12 month statute of limitation be reviewed and if warranted action taken to recommend to Government to have the POEO Act amended to extend the period

   This recommendation has been accepted. The EPA also advised that while the EPA is generally able to complete matters within the current statute limitation period of 12

months, a review of the statute of limitation is supported. It also advised that the EPA Board recently approved guidelines to facilitate timely investigation of breaches.

5. clear guidelines be developed to guide the exercise of discretion concerning which regulatory tools should be used in what circumstances and what the purpose of each regulatory tool is. Publicly available guidelines would alleviate concerns about arbitrary decision-making and provide information to the public about how and when various regulatory tools are used

   This recommendation has been accepted. The EPA has advised that it has developed a Compliance Policy to guide the EPA's regulatory decisions and explain its regulatory approach to external stakeholders. The policy will shortly be made available on the EPA's website.

6. the EPA develop and publish a policy on how it will regulate, enforce compliance by and prosecute government entities, including local councils

   This recommendation has been accepted in part. The EPA has agreed to review its Prosecution Guidelines and where necessary make changes to ensure that it adequately documents how it enforces compliance and prosecutes government entities, including local councils. The EPA pointed out that the guidelines must reflect the current Premier's Memorandum.

7. such a policy be made publicly available on EPA's website and promulgated among government entities regulated by the EPA

   This recommendation has been accepted.

8. the policy should include references to any other guidance, MOUs and protocols to be followed in regulating other government agencies

   This recommendation has been accepted.

9. the EPA develop a policy on the use of enforceable undertakings and to guide its staff on discretionary decision making

   The EPA has advised that it already has a policy on the use of enforceable undertakings.

10. the EPA explore ways to increase the information publicly available about environmental breaches and their rectification in the absence of a prosecution

    This recommendation has been accepted. The EPA advised that its Compliance Policy will provide additional information about the EPA's regulatory approach, including factors it considers in making its regulatory decisions and regulatory tools used to address and rectify environmental breaches. Enhancements to the EPA's Public Register has also been identified to make it easier for the community and other stakeholders to access information.

11. the EPA explore ways to increase transparency in communicating its decisions not to take enforcement action in particular circumstances

    This recommendation has been accepted.

12. the EPA review and amend its MOU with Sydney Water to include a clear statement of what will occur when the EPA exercises its regulatory functions in relation to Sydney Water, including but not limited to a statement about:
    - how Sydney Water will be investigated for alleged breaches of environmental legislation
    - how information will be obtained by the EPA from Sydney Water

- what may occur in the event of lack of cooperation between the two agencies

  any applicable procedures and legislation.

This recommendation has been accepted.

13. We also recommend that a meeting be organised with the complainants to explain both the basis of the decision not to take action against Sydney Water and what the EPA has done to ensure improved compliance by the STP with the EPL.

Appendices

Appendix 1 - Legislation

Protection of the Environment Operations Act 1997 No 156

124 Operation of plant (other than domestic plant)

The occupier of any premises who operates any plant in or on those premises in such a manner as to cause air pollution from those premises is guilty of an offence if the air pollution so caused, or any part of the air pollution so caused, is caused by the occupier's failure:
(a) to maintain the plant in an efficient condition, or
(b) to operate the plant in a proper and efficient manner.

129 Emission of odours from premises licensed for scheduled activities

(1) The occupier of any premises at which scheduled activities are carried on under the authority conferred by a licence must not cause or permit the emission of any offensive odour from the premises to which the licence applies.
(2) It is a defence in proceedings against a person for an offence against this section if the person establishes that:
(a) the emission is identified in the relevant environment protection licence as a potentially offensive odour and the odour was emitted in accordance with the conditions of the licence directed at minimising the odour, or
(b) the only persons affected by the odour were persons engaged in the management or operation of the premises.
(3) A person who contravenes this section is guilty of an offence.

64 Failure to comply with condition

(1) **Offence**
If any condition of a licence is contravened by any person, each holder of the licence is guilty of an offence.

Maximum penalty:

(a) in the case of a corporation—$1,000,000 and, in the case of a continuing offence, a further penalty of $120,000 for each day the offence continues, or
(b) in the case of an individual—$250,000 and, in the case of a continuing offence, a further penalty of $60,000 for each day the offence continues.

174 Conditions for mandatory environmental audits

(1) The conditions of a licence may require a mandatory environmental audit to be undertaken to the satisfaction of the appropriate regulatory authority.
(2) Such a condition must specify the purpose of the audit.
(3) Such a condition may require:
(a) appointment of an environmental auditor to undertake the audit, and

(b) approval by the appropriate regulatory authority of the environmental auditor before being appointed, and
(c) preparation of written documentation during the course of the audit, and
(d) preparation of an audit report, and
(e) production to the appropriate regulatory authority of the audit report.
(4) Such a condition may:
(a) specify the format and level of detail required for the audit, or
(b) require the environmental auditor to submit the proposed format and level of detail to the appropriate regulatory authority for approval.