Environment Defenders Office

Submission

in response to

A Sustainable Future for Victoria: Getting Environmental Regulation Right

Overview and Recommendations March 2009

Victorian Competition and Efficiency Commission

prepared by

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About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd ('EDO') is a Community Legal Centre specialising in public interest environmental law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice. In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working to protect Australia's environment through environmental law.

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INTRODUCTION

The challenges posed by environmental sustainability and in particular climate change require urgent action including an overhaul of existing regulatory schemes. Recent years have seen a dramatic transformation in the recognition of the reality of climate change and awareness of the need for urgent and significant action. With few exceptions however, the environmental regulatory system in common with regulatory and policy frameworks generally, lags behind community awareness and policy commitments. Climate change and the need for a rapid transition to a low carbon economy do not figure at all in most environmental regulation and there is a need to address this as a matter of urgency. Existing regulation needs to be amended to make sure that it is adequate to not only deal with the threat posed by climate change, but also ensuring that the Victorian economy is well placed to make the rapid and significant changes necessary.

More broadly, the policy objective of environmental sustainability needs to be taken seriously. Environmental regulation needs to ensure that sustainability is actually implemented in practice.

Comments on the review

The interests of the whole of the community (including future generations), not just those with vested economic interests, needs to be fully considered. The voices of those who perceive regulation to be burdensome will almost always be more prominent in inquiries such as the present, particularly where the benefits are diffuse and difficult to quantify.

We have concerns with the way VCEC has analysed 'regulatory burden'. We note that Productivity Commission inquiries considering environmental regulation have adopted a more strategic approach by focusing on *unnecessary* regulatory burdens:

> *Regulation necessarily imposes costs on those affected, including on business. However, where the objectives of regulation are sound, and it is effectively designed and implemented, it could be expected that those costs are outweighed by the benefits, if not for those directly affected then at least for the community as a whole. But unnecessary burdens — that is, where the objective of the regulation could be achieved with lower compliance costs — arise where regulation is poorly designed and implemented. Further, even where benefits outweigh costs, even higher net benefits might well be obtained from better design and more effective implementation.* [1]

It is unfortunate that for this inquiry the Commission simply asked submitters for examples of regulatory burdens. This creates a selection bias in the data collected by the Commission. The methodology also did not provide a basis for identifying priority areas in the form of types of regulation that could be implemented more effectively without undermining policy objectives.

The Terms of Reference required the Commission to inquire and report on the "nature and scope of the benefits from environmental regulation in the modern Victorian economy". Despite the broad nature of this term of reference, the Commission approached this exercise by evaluating existing regulation against stated objectives. This evaluation tended to emphasise the immediate costs of regulation at the expense of the broader public benefits, which are typically difficult to quantify. It

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[1] Productivity Commission (2007) Annual *Review of Regulatory Burdens on Business – Primary Industries* at page 5.

misses the need to consider the possible benefits that the "modern Victorian economy" can derive from environmental regulation including not only regulations as they currently exist but new "best practice" regulation.

Even quantifying the costs of regulation is problematic, particularly where the Commission to a large degree reliant on the reliability of the data provided by submitters.

Examples of benefits that the Commission could have considered include the economic benefits to be derived from new regulation encouraging innovation and early adoption of new sustainable building practices, or regulation encouraging biodiversity protection and restoration that has the potential to encourage investment in rural and regional Victoria. Regrettably the Commission did not emphasise this aspect of its task.

As noted above, climate change and the need for a rapid transition to a low carbon economy do not figure at all in most environmental regulation and there is a need to address this as a matter of urgency. Unfortunately, although one of the terms of reference of the Commission's inquiry was to report on reducing regulatory barriers to adjusting to a low carbon future, the Commission has made very few recommendations in this area. The Commission has interpreted this term of reference narrowly and has not made any substantial recommendations that will assist Victoria in adapting to climate change or transitioning to a low carbon economy. The EDO is currently conducting work in this area and will be releasing a paper on this shortly.

Comments on this submission

We have used the VCEC draft recommendations as the structure for this submission. We have focused our submission on certain recommendations that in our view were a particular cause for concern or deserving of support and therefore we have not commented on all recommendations. Lack of comment on a recommendation does not indicate our support for it.

KEY RECOMMENDATIONS

Environmental assessment

- Require a thorough independent review of the Environment Effects Act with a view to developing a completely new legislative regime that at the very least contains some clear triggers as to when an environmental impact assessment will be required and the process to be followed. The intent would be to remove the discretion available to the Minister as to whether an EES is required and how it should proceed. A tiered assessment process similar to that recommended by the Environment Assessment Review Advisory Committee[2] should be adopted.

Native vegetation

- The Victorian Government should review options for establishing a separate legislative regime for native vegetation removal rather than continuing to try and graft the system on to a planning approvals regime that is increasingly ill suited to dealing with biodiversity issues.

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[2] Report of the Environment Assessment Review Advisory Committee, 2 December 2002, accessed at http://www.dse.vic.gov.au/CA256F310024B628/0/C2BEE4394A4DD233CA257020000A2BFA/$File/Environment+Assessment+Review+AC+Report+.pdf

- A thorough review should be conducted of the "habitat hectares" methodology and the assessment process, aimed at increasing the rigour of the process and evaluating its ability to meet the scheme's objectives.
- Offsets should not be allowed to be provided across bio-regions
- Offsets should not be allowed on public land even with "appropriate transparency arrangements" as is extremely difficult to ensure that such actions are additional to existing public land management obligations
- The Commission's call for better monitoring and enforcement of native vegetation removal and compliance with offset obligations is strongly supported.
- We strongly support any proposal that seeks greater accountability for the implementation and outcomes of current or new regulations.

Environment Protection Act

- Any removal of the requirement to seek a works approval for upgrades should be linked to a high benchmark for environmental improvement.
- Only technology that is current best practice in relation to environmental impacts for that industry should be included on the list of pre-approved technology.
- The EPA should develop better guidance for applicants on the type and amount of information needed to do proper assessments. The guidance should make it clear to applicants that inadequate information will result in delays to the process.
- The EPA should be properly resource to allow it to do non complex/controversial assessments within the statutory time limits.
- The waste hierarchy should be retained and the EPA should introduce stronger incentives to encourage businesses to comply with the hierarchy. The suggested 'net benefit' approach is not an appropriate way of assessing waste impacts.

Institutional and interface arrangements

- Ecologically sustainable development should be included as the primary objective of each environmental, land use and natural resource management Act including the precautionary principle, intergenerational equity and the protection of biodiversity. The Acts should be amended to require decision-making under the Acts to *be consistent with* ESD principles.

Future regulatory principles

- The Commissioner for Environmental Sustainability should be given statutory responsibility for reviewing all departmental and agency ESD guidelines and examining the progress of departments and agencies in meeting ESD objectives in their decision-making and policy making.
- Departments and agencies involved in the development and implementation of environmental regulation should undertake a detailed consideration of what ESD actually means in the context of their work and how the ESD principles will be applied. Guidance statements should be published.
- The *Victorian guide to regulation* should include specific reference to ESD objectives and principles and the requirement for a regulatory impact statement where a proposed measure has significant ESD impacts.

ENVIRONMENTAL ASSESSMENT

General comments

Environmental impact assessment in Victoria is hopelessly politicised and lacking in credibility. It is completely inadequate for the task of securing a sustainable future for Victoria. Victoria is well behind the world and other Australian jurisdictions in modern approaches to effective environmental impact assessment.[3]

At the time of the Commission's review of the impact of regulation in rural and regional Victoria, hope was expressed that a review undertaken by the specially appointed Environment Assessment Review Advisory Committee (completed but not released at the time) would lead to some significant improvements. The Advisory Committee's report was eventually released and almost completely ignored.[4] Rather than pursuing long overdue legislative amendments to the *Environment Effects Act 1978*, the Government chose to implement changes in the form of new guidelines.

Our criticisms of this process and the guidelines that resulted are outlined in submissions we made to the Government at the time, copies of which are enclosed with this submission.

At present the only public environmental impact assessment that occurs in Victoria is with respect to a handful of major projects where an EES is usually required (mining proposals and certain wind farms) or where the Minister chooses to require an EES, often because it would be politically untenable not to do so or because such a process is insisted upon by the Commonwealth. A thorough approach to implementing our commitment to ecologically sustainable development should in fact mean that for all proposals of significance the question asked should be what form or level of environmental impact assessment is required, rather than whether an assessment is required at all. Recommendations such as those from the Environment Assessment Review Advisory Committee[5] about different levels of assessment would be a good starting point.

With some important exceptions, we do not oppose those of the Commission's recommendations that are intended to provide greater clarity around the environmental impact assessment process, however in so far as these focus on procedural matters such as timeframes for steps in the process the Commission has missed some of the fundamental problems with the system.

Our concern comes from the perspective of representing numerous community and environment groups with respect to matters where environmental impact assessment is or should be required. It would be accurate to say that the cynicism and frustration with environmental impact assessment by business interests in their submissions to the Commission is widely shared by members of the Victorian public, although for different reasons. This needs to be fixed. The Commission should start by recommending the following:

- Require a thorough independent review of the Environment Effects Act with a view to developing a completely new legislative regime that at the very least contains some clear triggers as to when an environmental impact assessment will be required and the process to be followed. The intent would be to remove the discretion available to the Minister as to

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[3] For example at the Federal level and in many states such as WA, environmental impact assessment is triggered by an objective legislative test that is based on the likely level of impact of the proposal on the environment, and failure by a proponent to submit a proposal for assessment is an offence.

[4] Report of the Environment Assessment Review Advisory Committee, 2 December 2002, accessed at http://www.dse.vic.gov.au/CA256F310024B628/0/C2BEE4394A4DD233CA257020000A2BFA/$File/Environment+Assessment+Review+AC+Report+.pdf

[5] Report of the Environment Assessment Review Advisory Committee, 2 December 2002, accessed at http://www.dse.vic.gov.au/CA256F310024B628/0/C2BEE4394A4DD233CA257020000A2BFA/$File/Environment+Assessment+Review+AC+Report+.pdf

whether an EES is required and how it should proceed. This would have the benefit of greatly increasing public confidence in the system as well as providing far greater certainty to proponents of new projects as to what is required of them.

- Adoption of a legislated tiered assessment process like that recommended by the Environment Assessment Review Advisory Committee[6] which provides certainty as to when an assessment will be required, clear process timeframes, set opportunities for community input, and an open and transparent assessment including mandatory release of assessment reports.

- Ministerial discretion should be removed or reduced wherever possible. The present system gives rise to fundamental conflict of interest as the government of the day is often either the proponent or a strong political backer of a project. The evidence is clear, for instance, that no environmental impact assessment would have been carried out at all with respect to the North-South pipeline or the desalination plant if there had not been insistence by the Commonwealth pursuant to the EPBC Ac that an assessment occur.

Draft recommendation 6.1

That the Victorian Government streamline the environment assessment process by introducing two complementary assessment pathways. The first pathway would build on the current assessment process by:

- **applying time limits to each stage, of which some would be statutory and others negotiated at the start of the process. Opportunities for parallel processing of approvals would be identified. As now, protocols could exist to give advance notice of delays and revisions to the agreed schedule.**
- **encouraging compliance with the timelines by reporting publicly the time taken for each stage of the process and also reasons for any delays, and by requiring an independent agency (such as the Victorian Auditor-General) to regularly assess performance against these timelines**
- **improving the scoping process by making the current 'indicative' 50 business days enforceable, assigning responsibility to the proponent for developing the scope (but subject to guidelines and government approval), and permitting the Environmental Effects Statement to include issues outside the scope only with the approval of the relevant department Secretary.**
- **improving the functioning of technical reference groups, by requiring that group members have the authority to express the views of their department or agency. Meetings of a technical reference group would coincide with key check points in the Environmental Effects Statement process. The purpose and timing of the check points would be negotiated at the start of the process, but would include checking whether the Environmental Effects Statement scope could be narrowed and identifying key decisions to be made to avoid delays. Members of the technical reference group would not be allowed to raise issues outside the agreed scope of the Environmental Effects Statement, except with the permission of the responsible departmental Secretary.**

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[6] Report of the Environment Assessment Review Advisory Committee, 2 December 2002, accessed at http://www.dse.vic.gov.au/CA256F310024B628/0/C2BEE4394A4DD233CA257020000A2BFA/$File/Environment+Assessment+Review+AC+Report+.pdf

- **negotiating memoranda of understanding among the key departments involved in approvals, to provide a template for how the technical reference group would handle issues**
- **re-assigning responsibility for releasing the Environmental Effects Statement for public review from the Minister for Planning to the proponent**

We do not support this proposal. It would create a situation where a proponent can effectively hold the process to ransom by insisting on pushing a proposal through without having undertaken the thorough assessment required. The criticisms by Panels of the adequacy of EES in projects including Channel Deepening and the Desalination Plant demonstrate that even with the current requirement for Ministerial approval, EES can be released before they have covered everything they should.

Consistent with our comments about reducing Ministerial discretion we recommend that an independent body be given responsibility for governing the process of the development of the EES. This is something that should be considered as part of the broad ranging legislative reform we have recommended above.

- **providing the Minister for Planning with the power to call in decisions when the matter raises a major issue of policy and the decision has been unreasonably delayed. The second pathway includes all elements of the first pathway except the call-in power. Instead of this power, it integrates environmental assessment and project approvals, with a single minister responsible for both. This process would be available to projects that the minister determines are strategically significant to Victoria and for which unreasonable delays could seriously reduce the project's benefits for Victorians. The minister would be required to publish the reasons for this determination.**

The EDO is strongly opposed to this idea. It will further politicise the process and encourage proponents to devote their energy to lobbying the Minister to call the process in rather than responding to criticisms of the EES. As submitted above, a better approach would be to reinforce rather than undermine the credibility of the process by putting in place an independent umpire who could arbitrate on matters such as whether requests for further information are reasonable. If haste is really necessary, this independent umpire could take that into account while also ensuring that shortcuts in the process do not undermine good decision making.

Draft recommendation 6.2

That the Victorian Government assesses the potential to use strategic assessments for regions with common environmental issues.

This is a good idea in principle however it is largely untested in practice, with approaches such as native vegetation precinct planning and strategic assessment under the *Environment Protection Biodiversity Act 1999* (EPBC Act) still in their infancy.

Done well, strategic assessments are particularly suited to dealing with the cumulative impacts of development that are typically not taken into account thoroughly or at all in dealing with proposals in an ad hoc, case by case fashion.

There are, however, a number of preconditions that we believe need to be satisfied for strategic assessment to work:

- decisions must be based on a very thorough investigation of environmental values. Environmental decision making is highly dependant on the quality of information available, and this is particularly the case when decisions cover matters of the temporal and spatial scale of strategic assessments.
- The process should be transparent and public with a clear assessment framework, mandatory opportunities for public comment, and a clear explanation of the implications of the strategic assessment.
- Sufficient flexibility should be provided to deal with new information if it comes to hand in the future. Typically strategic assessment provides for some flexibility for changes in development plans, but no ability to vary a regional plan based on new information that comes to light after the assessment.

The current environmental impact assessment process in Victoria is at present in no way capable of dealing with a robust strategic assessment process. The fundamental flaws in the EES process must be addressed before Victoria contemplates strategic environmental assessment.

Information Request: Chapter 6
The Commission would welcome submissions about the reasons for differences [in the coordination mechanisms between the assessment process under the Environment Effects Act and other Acts requiring approvals], any issues arising from these differences and whether there is scope for improved alignment.
The Commission invites comments on the size of potential cost savings from more streamlined assessment processes.

Different legislative regimes tend to develop in a piecemeal and uncoordinated fashion. Governments do not want to commit to a thoroughgoing environmental impact assessment system for fear that this will fetter their discretion. As discussed above, the whole system should be overhauled and replaced with a comprehensive system that emphasises independence and transparent processes designed to achieve ecologically sustainable development. It should include a tiered model of assessments where the relevant question is what form or level of assessment is required rather than is assessment required at all. Such a system is emphatically not "major projects facilitation" legislation, although this appears to be the course that the present government is pursuing.

Other comments

The report refers to the bilateral agreement process between the Commonwealth under the EPBC Act and Victoria in relation to environmental impact assessment, however no formal recommendation has been made by VCEC regarding this. The EDO supports development of a bilateral agreement in principle as it is preferable to the current ad hoc approach. However it must be consistent with the original intent of Commonwealth bilateral agreements which is to lift State based assessments up to a higher standard. The present draft bilateral just endorses the existing inadequate State processes. The EDO provided a submission to the Commonwealth Government outlining our concerns with the bilateral. Our submission is attached.

NATIVE VEGETATION

Draft recommendation 7.1

That the Victorian Government simplify the guidance for assessing the quantity and quality of native vegetation. The process of simplification should involve extensive consultation with a wide range of stakeholders.

It would be timely for a thorough review of the "habitat hectares" methodology and the assessment process. However this review should be aimed at increasing the rigour of the process and evaluating its ability to meet the scheme's objectives rather than simplification per se.

In general we submit that the Commission needs to understand that the assessment methodology aims to be the basis for a sophisticated approach to the implementation of native vegetation assessment that responds to the fact that native vegetation, the conservation status and the condition of vegetation is subject to significant variation.

While a process based on a simple measure such as solely the extent of vegetation would greatly simplify the process, it would be at the expense of the ecological appropriateness and prioritisation that the present approach attempts to incorporate.

Draft recommendation 7.2

That the Victorian Government provide improved guidance on the factors to consider in applying the three-step approach. The aim should be to require regulators to assess the economic, environmental and social impacts of clearing, so they do not proceed straight to the offset step in the three-step process. When formulating the guidance, the government should have regard for the principles of ecologically sustainable development.

We support this recommendation which is consistent with calls that we and others have made since the introduction of the Native Vegetation Framework that there needs to be greater clarity about what is meant by "avoid" and how this differs from "minimise". The fact that decision makers including VCAT and Planning Panels still tend to endorse an approach that favours offsetting as a first option also needs to be addressed by including some very clear guidance to the effect that the three step approach is a sequential process – that is that offsetting is only a satisfactory response once options for avoidance and minimisation have been exhausted.

The assessment approach needs to thoroughly incorporate the principles of ecologically sustainable development, including the precautionary principle. A precautionary approach is especially necessary in the context of the irreversible loss that arises when native vegetation is removed.

We point out that the current system of dealing with permit applications does not facilitate the approach that the Commission recommends, in that Responsible Authorities deal with permit applications but in most cases of any significance refer the native vegetation removal issue to DSE. This raises significant questions about the resources and capacity of both Councils and DSE to undertake the integrated decision making process that the Commission has recommended. In our view, serious consideration needs to be given to establishing a separate legislative regime for native vegetation removal rather than continuing to try and graft the system on to a planning approvals regime that is increasingly ill suited to dealing with biodiversity issues.

Draft recommendation 7.3

That the Department of Sustainability and Environment (DSE), to improve consistency and address the impact of skill shortages, should develop a system for peer review of decisions on permit applications. Such a system should complement training, information and other support that the DSE provides to councils.

The EDO supports this recommendation.

Draft recommendation 7.4

That the Victorian Government, to increase flexibility in the rules for determining offsets, simplify the rules by:

- **enabling offsets to be provided in any bio-region**
- **limiting the capacity for councils to impose additional conditions on offsets when the Department of Sustainability and Environment has already specified the offsets to be provided**
- **increasing flexibility for landholders by permitting offsets on public land, subject to appropriate transparency arrangements**
- **clarifying the offset rules relating to the rehabilitation of mines and quarries.**

We strongly disagree with these proposals which would undermine the already heavily compromised policy position with respect to native vegetation protection in Victoria.

- The ability to locate offsets in a distant area in the same bioregion is already a significant compromise that fails to recognise the important in situ benefits of vegetation. Further weakening the Framework requirements here will compromise the system even further.

- If councils were to impose additional conditions this would not be inconsistent with their overriding obligations as Responsible Authority under the planning scheme. However we are not aware of this practice and question the Commissions evidence that this is even an issue.

- Offsets on public land are highly problematic in that even with "appropriate transparency arrangements" it is extremely difficult to ensure that such actions are additional to existing public land management obligations. Such an arrangement simply encourages state and local government to treat offsetting as a source of funding of their obligations for managing public land. The City of Brimbank, for instance, has accepted very large payments from developers to contribute to management of Council owned land as "offsets". Offsets should be additional to what would have occurred anyway.

Draft recommendation 7.5

That the Department of Sustainability and Environment (DSE) develop a strategy to monitor and enforce compliance with the native vegetation regulations and offset agreements. If councils retain responsibility for implementing the regulations, the Victorian Government should require councils to develop and implement enforcement strategies, with the DSE providing oversight.

We strongly support the Commission's call for better monitoring and enforcement of native vegetation removal and compliance with offset obligations. There is a very significant equity and competitiveness issue that arises from the almost complete lack of attention to these issues at the moment, in that those who do comply and do the right thing are disadvantaged compared to the very large number who do not.

As many of the problems here reflect the inadequacies of the current approach of implementing clearing controls through the planning system, we think the best solution would be to develop a new independent legislative regime with a clear responsibility on the part of the Department or Authority responsible for its implementation to monitor and enforce compliance. This could also include a responsibility to develop and implement a compliance strategy.

Draft recommendation 7.6

That the Victorian Government make greater use of strategic planning tools to improve information for businesses about the locations and types of native vegetation to be protected, and particularly areas of private land containing high value native vegetation where clearing would not be permitted. These areas should become priorities for support under incentive schemes such as BushTender. Detailed mapping of native vegetation of all areas of Victoria should occur as rapidly as resources permit.

We strongly support the greater use of strategic planning tools in the context of native vegetation protection subject to the following strong provisos:

- The accuracy and completeness of the ecological information that informs such strategic planning is critical. Without such information, the ecological credibility of the system is completely undermined.

- Any plan needs to deliver certainty as to what is to be protected and the nature of the protection afforded. As presently implemented in the Victoria Planning Provisions, Native Vegetation Precinct Planning does not provide for any certainty that areas designated for retention will not be the subject of permit applications in the future.

- There needs to be some flexibility to respond to new ecological information not available at the time of the initial assessment. It seems that typically this ability is provided to landowners and developers in the name of flexibility whereas the requirement for certainty prevails over any ability to respond to new ecological information. If circumstances change, such as the location of a new species or new information about matters that go to the management of native vegetation in an area then there should be capacity to respond to such information in limited circumstances.

Draft recommendation 7.7

That the Victorian Government seek expressions of interest from the business and not-for-profit sectors to provide BushBroker in its current form.

We do not oppose this and in fact support anything that breaks the current conflict of interest inherent in DSE being responsible for implementation of the native vegetation controls on the one hand and promoting BushBroker on the other. The increased transparency that this should promote should be accompanied by a review of BushBroker to ensure that it actually delivers meaningful offsets, preferably based on prior verified permanent credits rather than benefits to accrue in the future that are of uncertain duration.

Draft recommendation 7.8

That the Victorian Government clarify the outcome that native vegetation regulations are intended to achieve, by specifying that the objective is to ensure no net loss of environmental benefits as a result of clearing.

This is not a clarification at all, but an abandonment of current albeit vague policy objectives for an earlier superseded objective. As such it is well outside the ambit of the Commission's review which we understand to be restricted to improving the implementation of current policy objectives rather than recommending the relaxation of existing policies. This recommendation is not supported.

Draft recommendation 7.9

That the Victorian Government develop and publish performance monitoring and evaluation strategies to assess the impact of the current regulations and any changes implemented.

We strongly support any proposal that seeks greater accountability for the implementation and outcomes of current or new regulations.

Draft recommendation 7.10

That the Victorian Government address the potential for additional overlap between Victorian native vegetation regulations and the Commonwealth's Environment Protection and Biodiversity Conservation Act by consulting the Commonwealth Government on any changes to the native vegetation regulations resulting from this inquiry.

There is no overlap from a legal perspective – the two systems operate concurrently and the EPBC Act explicitly states that it is not intended to displace or limit the operation of State laws. More fundamentally complaints as to overlap fail to recognise the far more restricted application of the Commonwealth legislation which is limited to "matters of national environmental significance". Those with complaints about State and Commonwealth regulation in the same general field of biodiversity need to be aware that this concurrent operation is an inbuilt feature of the division of responsibilities agreed to by the States and the Commonwealth. Energy would be far better directed to ensuring that there is a coordination of processes at each level of responsibility – see our comments about the proposed bilaterial assessment agreement between Victoria and the Commonwealth above.

***Information Request*: Chapter 7**

The Commission invites input from interested parties on the best way of improving accountability and administrative arrangements for implementing native vegetation regulations.

This has largely been covered above. We think that a separate legislative regime has considerable merit in terms of creating greater accountability and a better vehicle for "best practice regulation" than the long standing preference to implement native vegetation protection through planning controls developed under the Planning & Environment Act.

We also believe that the separation of policy and implementation functions has considerable merit, while recognising that the current system has been in place for a long time and there is no obvious department or authority to fill this role. The EPA is a possibility, however we would question whether they have the necessary expertise and commitment to enforcement to fulfil this role.

Finally, the Commission would be remiss if it did not make very strong recommendations for significantly increased resourcing for the Department of Sustainability and Environment to implement native vegetation regulation. Many of the problems identified are a result of the Department not having sufficient resources to adequately implement and monitor the system. This creates obstacles to actually implementing the current scheme, to provide information and resources about its operation and to undertaking the monitoring and evaluation and enforcement essential to its success. It also encourages an overreliance on other bodies and systems (local government and the planning system) to achieve core policy objectives - a much tighter link between responsibilities and functions and resources for implementation would be a significant improvement.

The Commission seeks feedback from participants on the potential savings and additional costs to business arising from the Commission's recommendations.

Many of the initiatives we have supported would have the benefit of delivering increased certainty and would encourage the due diligence that leads to accurate valuation of a site taking into account vegetation constraints prior to purchase. This not only benefits those subject to the regulations but the native vegetation intended to be protected.

On a separate matter, we express our scepticism about the supposed cost of native vegetation regulation adopted by the Commission in its draft report. While we are not in a position to provide a detailed critique, the offset costs figures used, the assumptions upon which the costing methodology is based together with the reliance on costings supplied by those burdened by the regulations (and therefore with the most incentive to see them relaxed) means that some of the costs claimed are likely to be exaggerated.

ENVIRONMENT PROTECTION

General comments

The EDO supports VCEC's focus on identifying options which offer significant cost savings to business without compromising the Government's environmental objectives and/or offer additional environmental or other benefits to business government and the community[7]. However the primary objectives of environmental regulation must be borne in mind when discussing streamlining and cost savings. The primary aim of the *Environment Protection Act 1970* (EP Act) is to protect the environment. This is stated in section 1A of the Act:

> "The purpose of this Act is to create a legislative framework for the protection of the environment in Victoria having regard to the principles of environment protection."

It is very difficult to analyse the economic benefit to business, government and the community of regulation that protects the environment. This would require an assessment of factors such as the ecosystem services that are protected, the avoided costs of clean up of environmental pollution, the avoided costs of negative health impacts on the community, as well as factors that are almost impossible to measure such as the protection of native species or the amenity that the environment provides to the community. Therefore while a cost benefit analysis of environmental regulation may be able to estimate the cost of the regulation, it is likely to vastly underestimate the benefit of that regulation - or not calculate it at all.

The VCEC draft report noted the lack of evaluation in the past of the economic benefits and effectiveness of Victorian regulation[8], however the review does not appear to have made an attempt to assess these factors. In contrast, it has gone to great lengths to assess the costs to business of environmental regulation. This is a serious omission and results in an assessment which is highly unbalanced.

In seeking to streamline or reduce costs the Government must not lose sight of the primary object of the legislation which is a valid, legitimate and indeed highly desirable objective. Cost reduction should not be seen as a goal in itself.

Good environmental performance should be encouraged and rewarded through streamlined approval processes and other accreditation mechanisms, however measures adopted to reward the

[7] VCEC draft report page 181
[8] See for example the discussion on page XXXIII of the VCEC draft report

good behaviour of leaders should not compromise the ability to hold laggards accountable for meeting basic standards.

Enforcement and monitoring of compliance is also important in the context of ensuring that there is a level playing field and that "good corporate citizens" are not put at a financial disadvantage as a result of non-compliance by others. Particular attention should be paid to circumstances where failures to ensure the internalisation of environmental harms or to meet standards by laggards disadvantages those who wish to pursue new opportunities and innovation.

Regulation requiring new environmental standards can create opportunities for innovation and entrepreneurialism. However early action is required to secure these advantages. Recent history has shown that the intervention through regulation or other policy instruments is critical in promoting the first mover advantage necessary to realising these opportunities.

Draft recommendation 8.1

That the Victorian Government redraft the triggers for works approvals in the *Environment Protection Act 1970* so works approvals are not required for premises upgrades that will result in the same or less environmental harm (to be defined as either the same or lower level of waste discharged, or the same level of discharge, but less toxic). Where appropriate, licences should be amended to reflect the new operating conditions.

The purpose of section 19A of the EP Act is to ensure that the impacts from changes in production are properly assessed as being within environmental standards. If the requirement to seek a works approval for a premises upgrade that resulted in the same or less environmental impact was removed, there would still need to be an independent assessment of the likely impact of the alterations before works commenced. Potentially this could be done through a method less onerous than the works approval process, provided it were an independent rigorous process.

The EDO agrees that businesses should be encouraged to improve their environmental performance through upgrades to their operations. Therefore any removal of the requirement to seek a works approval for upgrades should be linked to a high benchmark for environmental improvement. For example, any upgrade that is likely to result in at least a 20% improvement in environmental performance (eg 20% less waste produced, 20% less toxicity of effluent, 20% less CO2 emissions etc) could go through the licence amendment process rather than a full works approval. Any other upgrade should still go through the full works approval process. This will encourage businesses to make significant environmental improvements when considering upgrades.

Draft recommendation 8.2

That the *Environment Protection Act 1970* be amended to enable EPA Victoria to develop and maintain a list of pre-approved technologies that are exempt from the works approval process. For a technology to be included on the list, EPA Victoria must assess it to have demonstrated and predictable environmental impacts. The lists should be posted on the EPA Victoria website.

The use of pre-approved technology lists has great potential for providing a strong incentive to businesses to improve environmental performance. Only technology that is current best practice in relation to environmental impacts for that industry should be included on the list of pre-approved technology. As with our suggestion above, this will encourage businesses to make environmental improvements when considering new technologies. Pre-approving technologies that have lower

environmental standards than other available technologies will provide a perverse incentive to invest in environmentally inferior products.

As noted in the discussion paper (pg 191) this approach should only be adopted in conjunction with a case by case assessment of whether the use of the technology is appropriate in the particular location and will not result in local undesirable environmental impacts (such as noise and odour). In addition there should be an assessment of whether the technology will be used in the standard way and will therefore result in the expected environment impacts. This assessment could be done through the exemption process.

Draft recommendation 8.3

That the *Environment Protection Act 1970* be amended to:

- **establish a two-month maximum limit on the time taken by EPA Victoria to assess works approval applications (excluding the time it waits for further information from the applicant beyond the specified due date)**
- **allow time extensions beyond the two-month statutory time limit in exceptional circumstances only**
- **establish a 30-day maximum time limit for responsible authorities to support or object to applications or to request specified conditions be included in works approvals.**

It is very unclear how VCEC came to this recommendation based on the evidence that was provided in the discussion paper. The need for such an amendment is not supported by VCEC's own investigation. The draft report states that[9]:

1) Responsible authorities generally provide comments back to the EPA well before the 45 day limit
2) The vast majority of applications that have longer times associated with them involve requests for further information from the EPA
3) In most cases applicants took longer than the due date to respond to requests for more information
4) One in six applicants had to be asked for more information multiple times

The evidence presented by VCEC clearly shows that the main reason applications are delayed is because applicants do not provide enough information at first instance for the EPA to assess the application, and then do not respond by the due date when asked for more information. Referrals to responsible authorities do not seem to be a significant factor in delays at all.

Shortening the time limits for EPA to assess these applications and for referral authorities to respond will therefore have no impact whatsoever on improving time limits. The result is more likely to be an increased incidence of missed deadlines by the EPA as applicants continue to provide inadequate or untimely information. A better recommendation would be for the EPA to provide more or better guidance up front to applicants as to the type and amount of information that is needed to do an adequate assessment and make it clear to applicants that lack of appropriate information will only lead to increased delays for the applicant.

The Act should include a provision that allows the EPA to refuse to accept applications that it immediately realises do not contain enough information.

The discussion paper states that section 67 agreements have been used 'frequently rather than occasionally', but makes no assessment of why these agreements were used. It notes that these agreements can be used for complex or controversial projects. It is possible that in fact there are a

[9] These conclusions can be found in the VCEC draft report in pages 191-194

large number of complex or controversial projects that merit longer assessments. Requiring section 67 to only be used in exceptional circumstances does not seek to address the cause of the use of these agreements.

The EDO does not support draft recommendation 8.3, but instead recommends the measures below:

- the EPA develop better guidance for applicants on the type and amount of information needed to do a proper assessments
- the guidance makes it clear to applicants that inadequate information will result in delays to the process
- the Act be amended to allow the EPA to refuse to accept applications that do not contain enough information for a full assessment (noting that accepting an application initially does not preclude the EPA from seeking further information at a later date)
- The EPA be properly resourced to allow it to do non complex/controversial assessments within the statutory time limits

Draft recommendation 8.4

That the Victorian Government amend the *Environment Protection Act 1970* to require EPA Victoria to report on its performance against the statutory and target time limits in its annual report, including:

- **the elapsed time to assess works approval applications**
- **the time taken by EPA Victoria to assess applications (excluding the time it waits for further information from the applicant beyond the specified due date) compared with the statutory and target time limits**
- **the percentage of applications assessed within the statutory and target time limits**
- **the number of information requests made under s22 of the Act and the length of any time extensions**
- **the number of time extensions made under s67A of the Act, and the length of these extensions. EPA Victoria should incorporate statutory and target time limits in its annual plan of key deliverables. An independent entity such as the Victorian Auditor-General should periodically audit the organisation's performance reporting on approval times (for example, once every five years).**

The EDO supports increased public reporting for all aspects of environmental regulation including assessment timeframes, frequency and results of monitoring, nature and frequency of complaints received and responded to and frequency and results of enforcement action.

Draft recommendation 8.5

That EPA Victoria adopt a more strategic approach to works approval applications. It should:

- **apply a risk-based approach to assessing works approval applications**
- **wherever appropriate, develop outcome-based conditions for works approvals**
- **prepare templates for works approval applications**
- **offer the option of holding pre-application meetings for complex works.**

Adopting a risk based approach to assessing applications and outcome based conditions for approvals are useful if they are developed and applied appropriately. The criteria on which the risk assessment is based must be very robust in order to be effective. Outcome based conditions must contain benchmarks that are set at the appropriate level for environmental protection and must be written in a way which is clear and enforceable. Because the only measureable element for compliance with outcome based conditions is the outcome itself (as opposed to building design or technology used) it is important that there be regular monitoring of outcomes and requirements for strict compliance followed by prompt enforcement action if they are not complied with.

If these methods are adopted the risk based assessment criteria and the outcomes based conditions should be reviewed regularly at a systems level to ensure they are not being watered down over time or applied inappropriately.

Draft recommendation 8.6

That EPA Victoria, in addition to simplifying compliance and reporting requirements in corporate licences, should aim to incorporate performance-based conditions wherever appropriate. To deliver the benefits of corporate licensing as soon as is practicable, EPA Victoria should establish targets in its annual plan of key deliverables to achieve 25 per cent of the total potential rollout of corporate licences by June 2010, 50 per cent by June 2011 and 75 per cent by June 2012.

As noted above, performance based or outcome based conditions are valuable provided they contain benchmarks that are set at the appropriate level for environmental protection and must be written in a way which is clear and enforceable. Corporate licences that cover multiple sites must still adequately address site specific impacts and not be watered down or standardised across sites to simplify the licence.

Draft recommendation 8.7

That EPA Victoria conduct a rolling review of standard licences on issue. The review should:

- **examine the conditions of standard licences and, where appropriate, replace prescriptive conditions with performance-based conditions**
- **simplify licence conditions and reporting requirements. EPA Victoria should establish targets in its annual plan of key deliverables to review 25 per cent of standard licences by June 2010, 50 per cent by June 2011 and 75 per cent by June 2012.**

The EDO supports a requirement for regular review of licence conditions. In particular the EPA should regularly review the enforceability of conditions.

Draft recommendation 8.10

That the Victorian Government redraft principle 1I of the *Environment Protection Act 1970* to state that waste should be managed according to the net benefit criterion—that is, waste management strategies should be based on actions which deliver the largest net benefits. This may involve considering the costs and benefits of actions such as avoidance, reuse, recycling, recovery of energy, treatment, containment, disposal and any other relevant options. Relevant state environment protection policies, waste management policies and industrial waste management policies should reflect this change.

Australia is drowning in waste. The 2008 Victorian State of the Environment Report states:

> "On a per capita basis, the level of material intensity of Victoria at the waste and recycling stage of the economy has doubled in 13 years. At two tonnes per person in 2007, each Victorian is now, on average, responsible for twice as much material output as in 1993."[10]

The draft report does not explain what is meant by net benefit in this context or how the net benefit is to be calculated. It is not clear who the net benefit is for or over what time period it is calculated. A key question is whether the environmental externalities of waste production and waste to landfill can even be properly costed to ensure the 'net benefit' is fully calculated.

One of the purposes of the waste hierarchy is to encourage businesses and the community to produce less waste, move to products that produce lower volumes of waste or lower toxicity waste, and find productive uses for waste. Reducing the amount of waste Australia produces is critical for long term environmental health, even where the initial cost to business may be more in the short term than disposing of waste to landfill.

> "Studies indicate that there is almost always a net environmental benefit when material wastes are recycled compared to when sent to landfill, even when the energy used to transport and remanufacture the material is taken into account."[11]

Managing waste according to the desire to deliver the 'largest net benefit' is a short sighted goal that does not recognise the long term desirability of moving towards being a society that efficiently uses and reuses materials and produces zero waste. Draft recommendation 8.10 is not supported by the analysis in the State of the Environment report of the desirability to avoid, reuse and recycle.

The State of the Environment Report recognised the transition to zero waste as a key goal for the future of Victoria. In its chapter on "living well within the environment" it states the following as a desired vision for Victoria in 2050:

> "The internalisation of environmental costs has meant that the disposal of wastes to the environment is seen as unacceptable both because of the threat to ecosystem services and for the opportunity cost implied. Disposal of solid waste to landfill and liquid waste to the sea has reduced to zero. Manufacturers, packagers, distributors, enterprises and households all play a role in a system that contains major incentives for recycling and cost penalties for waste generation. For materials, these systems now take the form of sophisticated regimes of package minimisation and producer responsibility, including 'smart' production, full resource recovery, and re-use.''[12]

If, as the Victorian Waste Management Association states '...landfill is the one viable method for some wastes...'[13] then businesses should be working harder to find and use alternative products that will not end up in landfill.

Assessing waste according to the waste hierarchy provides a clearer path to this goal than the 'net benefit' test.

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[10] State of the Environment report – Victoria 2008 pg 153
[11] State of the Environment report – Victoria 2008pg 162
[12] State of the Environment report – Victoria 2008 pg 503
[13] VCEC draft report pg 213

The EDO does not support draft recommendation 8.10. The waste hierarchy should be retained and the EPA should introduce stronger incentives to encourage businesses to comply with the hierarchy.

MINING REGULATION

Draft recommendation 10.5

That the Department of Primary Industries, with input from the Department of Sustainability and Environment, review the definition of 'low impact exploration' in the *Mineral Resources (Sustainable Development) Act 1990* and propose a legislative amendment to the definition based on environmental impact rather than on the use of mechanical equipment.

We support the proposal to amend the definition of 'low impact exploration' in the *Mineral Resources (Sustainable Development) Act 1990* to be based on the impact of exploration on the environment rather than the equipment used for exploration or the exploration process. This should be included in the proposed review of the MRSD Act which DPI has commenced.

INSTITUTIONAL AND INTERFACE ARRANGEMENTS

General comments

The draft report states that Victoria has an extensive and complex set of regulatory arrangements for environmental regulation including 43 Acts and over 9000 pages. It states this as a reason for simplification and streamlining. While environmental regulation could not doubt be improved, the analysis is overly simplistic. Very few pages of those 43 Acts are actually aimed at protecting the environment and many are in fact devoted to land use and resource extraction. In addition the draft report does not recognise the primary reason that environmental regulation is complex and extensive, which is because the nature of environmental protection itself is complex and extensive. This is particularly so as attempts are made to balance environmental protection with development and resource use objectives.

The EDO supports better integration of environmental regulation but this must not be at the expense of the primary aims of environmental regulation which is protection of the environment for the benefit of all Victorians now and in the future.

Draft recommendation 11.1

That the Victorian Government review the objectives of environmental regulation to ensure that all environmental legislation and supporting guidance contain clearly stated and specific objectives. Priority areas for attention are:

- ***Environment Effects Act 1978***
- **native vegetation regulations (under the *Planning and Environment Act 1987*)**
- ***Environment Protection Act 1970***
- ***Flora and Fauna Guarantee Act 1988***
- ***Wildlife Act 1975***
- ***Sustainable Forests (Timber) Act 2004*.**

The EDO supports the recommendation to review the objectives of all environmental regulation to ensure clear specific consistent objectives. In particular, a clear statement of the primacy of ecologically sustainable development (ESD) principles should be included in each Act. As noted in

the EDO's recent submission to the review of the Planning and Environment Act, the principles of ESD are now widely recognised in Australia and overseas to be core components of government decision-making. The Victorian Government formally committed to incorporating ESD principles in land use regulation and decision-making in 1992 in the *Intergovernmental Agreement on the Environment.*

The elements of ESD should be clearly set out in each Act including the precautionary principle, intergenerational equity and the protection of biodiversity. In addition, the Acts should be amended to require decision-making under the Acts to *be consistent with* ESD principles.

We have discussed ESD principles further under *Principles for Future Regulation* below.

Draft recommendation 11.3

That the Victorian Government develop performance reporting frameworks for environmental regulations to be implemented by the relevant department or agency. The frameworks should:

- **specify regulatory objectives, including the outcomes that regulation is intended to achieve**
- **specify the types of indicators (outcome, output and input) and the frequency of reporting**
- **specify how the results are to be used (for example, the frequency of public reporting and the use of the information to review the regulations). The development and implementation of performance reporting frameworks should be subject to oversight by an independent body such as Victoria's Office of the Commissioner for Environmental Sustainability or the Victorian Auditor-General's Office, which would report periodically on implementation.**

The EDO supports the recommendation to develop performance reporting frameworks for environmental regulation. This will help to ensure environmental regulation is being effectively and appropriately implemented and enforced. Reporting should be public and should be overseen by the Auditor General or the Sustainability Commissioner.

***Information Request*: Chapter 11**

The Commission invites views on the adequacy of existing language and guidance to define and resolve conflicts between economic, environmental and social objectives.

The Commission invites comment on the reasons for combining policy and regulatory functions in relation to native vegetation, environmental protection and forestry, and the advantages and disadvantages of options for achieving a clearer separation of the functions.

The Commission seeks comment on options for simplifying and improving Victoria's environmental legislation and the corresponding organisational framework.

There is currently insufficient guidance in Victoria on how ESD principles should be interpreted and applied under various environmental Acts. The inclusion of ESD and other environmental objectives and principles are very inconsistent across Acts. In some environmental or land use regulation ESD is not mentioned at all. In others where it is mentioned the language varies. As noted above, ESD should be included as an objective of all environmental, land use and natural resource management Acts in Victoria.

Best practice guidance should be developed on how ESD is to be used and integrated into decision-making across all environmental and land use regulation in Victoria. This is discussed further under *Principles for Future Regulation* below.

There is merit to the argument that regulatory and policy functions should not be conducted by the same agency. The Government should undertake a substantial review of the benefits and drawbacks of separating the regulatory and policy functions in key environment agencies. A single regulatory agency could be established to implement, enforce and report on all environmental and land use regulation.

PRINCIPLES FOR FUTURE REGULATION

General comments

As noted above, ESD principles should be included as a primary object of all future and existing land use, natural resource management and environmental regulation. The Acts should require decisions under the Act to *be consistent with* ESD principles. This will of course require some significant guidance as to how agencies make decisions that accord with best practice integration of ESD. As noted in the draft report, ESD is not another factor to be weighed up against other economic or social factors to achieve some form of trade-off, as ESD already specifically incorporates those factors. ESD should therefore be the framework within which all environmental, land use and natural resource management decisions are made. Environmental, economic and social factors must be properly considered for short-term and long-term impacts and benefits.

Draft recommendation 13.1

That because there will be variations in how ecologically sustainable development (ESD) principles are applied generally to environmental regulation:

- **departments and agencies involved in the development and implementation of environmental regulation publish how they apply or intend to apply ESD principles to particular sectors and regulations, and that this be supported by practical examples of good decision-making**
- **the Commissioner for Environmental Sustainability oversight the development of a community of practice to exchange ESD implementation skill and best practice.**

As the Commission's report recognises, despite high-level/formal recognition of ecologically sustainable development (ESD) in environmental law and policy in Victoria[14], the continuing challenge is to translate the ESD objectives and guiding principles into specific actions and outcomes for a range of decisions, environmental issues or sectors. As has been noted by a number of commentators:

> "there is still little guidance as to how ESD should be applied in the range of environmental and resource management scenarios that confront decision makers."[15]

[14] Victoria is a party to the 1992 *Intergovernmental Agreement on the Environment* (IGAE) and the National Strategy on Ecologically Sustainable Development, both of which refer to ESD and its core objectives and principles. Under the IGAE, The Victorian Government has agreed that the development and implementation of environmental policy and programmes by all levels of government should be guided by the principles of ESD (See section 3).

[15] Peel, J., Ecologically Sustainable Development: More than Mere Lip Service?, The Australian Journal of Natural Resources Law and Policy, Vol 12, No. 1, 2008, p11.

It is not satisfactory to reference ESD terminology in governmental policy and legislation without defining what it means in practice or putting in place frameworks to ensure it can be robustly incorporated into government decision making and policy making.

Recognising that implementing ESD represents a broad policy agenda and will vary depending on a department's or agency's core activities, we support the Commission's recommendation that departments and agencies involved in the development and implementation of environmental regulation undertake a detailed consideration of what ESD actually means as a matter of implementation in the context of particular environmental sectors, policy areas or scenarios, and how the ESD principles will be applied. We also agree with the Commission's recommendation that the guidance provided should be supported by practical examples or cases studies of decisions and measures that might be appropriate and adequate for achieving ESD objectives. Publication of this type of sector-specific guidance as to implementation will assist departments and agencies to translate ESD 'from a general policy goal into an operational concept'[16] in departmental and agency decision-making and regulatory initiatives, and will support more meaningful and effective integration of environmental, economical and social considerations at the level of management and practice.

Sector-specific guidance will also encourage more consistency in decision-making and regulation in particular environmental areas. It will also increase the accountability and transparency of decision-making.

However, we note that there is confusion and variation within government agencies as to how ESD should be applied in practice and that departments are unlikely to have the expertise to develop this guidance in accordance with best practice. Therefore, the Commissioner for Environmental Sustainability should be given statutory responsibility for reviewing all departmental and agency ESD guidelines and examining the progress of departments and agencies in meeting ESD objectives in their decision-making and policy making. This will ensure the Victorian Government is implementing best practice ESD policy and that ESD principles are applied consistently across agencies and decision makers.

We also support the development of a 'community of practice' between departments and agencies to exchange ESD implementation skill and best practice. We see great benefit in the opportunity for the exchange of information and for departments and agencies to learn from the experiences of other departments and agencies dealing with similar issues and concerns, better facilitating implementation of ESD in Victoria.

Draft recommendation 13.2

That the Victorian Government amend the *Victorian guide to regulation* to ensure that policy makers and regulators have proper regard to the principles of ecologically sustainable development (ESD) by:

- **referring to the objectives and principles of ESD**
- **requiring, where a proposed measure has significant ESD impacts, the consideration of the objectives and principles of ESD in the development and implementation of regulation as part of the regulatory impact statement (RIS) process**
- **providing guidance on how to comply with the RIS adequacy requirements given the above changes.**

[16] Ibid, p3.

The Victorian Government's commitment to ESD implementation under the 1992 Intergovernmental Agreement on the Environment[17] (IGAE) means that all departments and agencies are expected to incorporate ESD principles in their decision-making processes.

We see great benefit in the Commission's recommendation to amend the *Victorian guide to regulation* to include specific reference to ESD objectives and principles and the requirement for a regulatory impact statement where a proposed measure has significant ESD impacts. We emphasise, however, that ESD principles and objectives should be considered routinely as part of best practice regulation in policy, program and legislation making, regardless of whether a regulatory impact statement is formally required.

Acknowledging ESD and incorporating ESD objectives and principles within the context of best practice regulatory principles and processes is an efficient means of ensuring new and continuing regulation that is cognisant of ESD principles and can effectively meet ongoing issues and respond to emerging challenges, such as climate change and other emerging sustainability challenges.

The adoption of ESD objectives and principles in best practice regulation making processes will also promote transparent, accountable and consistent judgments regarding the integration of economic, environmental and social considerations in the development and implementation of future environmental regulation.

However, while we consider that articulating ESD objectives and principles within best practice regulatory principles is useful in directing attention to the importance of ESD in developing and implementing regulations in *all* policy areas (not only environmental regulation), in our view, to give proper effect to these principles, reform must go beyond this and require ESD and its constituent elements to be directly written into all future environmental legislation. Without a legal framework, it is too easy for lip service to be paid to ESD.

In addition, as noted above, we consider that all *existing* Victorian environmental regulation should be reviewed with a view to incorporating ESD and its constituent elements. While some pieces of environmental legislation make reference to notions of sustainability and more recent legislation incorporates a version of ESD principles (based on those enunciated under the National Strategy for Ecologically Sustainable Development and IGAE), many pieces of Victorian legislation relating to the environment have not been reviewed or updated to reflect up-to-date ESD objectives and principles that have formed an integral part of State and Commonwealth policy since 1992. In part, this may be due to the fact that most Victorian environmental legislation was drafted prior to the 1992 NSESD and the IGAE. The *Flora and Fauna Guarantee Act 1988* and the *Planning and Environment Act 1987* are two examples. It is time however for such legislation to catch up with these developments.

Furthermore, even where ESD and its constituent principles have been incorporated into recent environmental legislation, they are often contained in the objectives, merely requiring decision-makers to 'consider' or 'have regard to' the principles in the administration of the Act.[18] To ensure that ESD has a meaningful place within Victorian environmental legislation, it is critical that ESD principles are also included in the operational provisions of environmental legislation. Legislation must require all decisions under an Act to *be consistent with* ESD principles. This will ensure that ESD is enforceable as a matter of law and that decisions that are unsustainable are avoided.

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[17] Under the *Intergovernmental Agreement on the Environment* (1 May, 1992) the Victorian Government agreed that "the development and implementation of environmental policy and programmes by all levels of government should be guided by the principles of ESD" (Section 3).

[18] For example, *Sustainable Forest (Timber) Act 2006*, section 5(1); *Pipelines Act 2005*, section 4(1); and *Mineral Resources (Sustainable Development) Act 1990*, section 2A(1).

Guidance on implementation of ESD

As noted at 13.1 above, while endorsement of ESD in formal mechanisms is useful, the real problem appears to be related to the implementation of ESD and its principles in practice. Overarching principles and regulations are themselves ineffective to achieve the goal of ESD unless they are actually implemented in practice.

Paul Stein (writing while a Judge of the Land and Environment Court) has commented that

> "the inclusion of the principles of ESD in Australian legislation has been largely confined to objectives of statutes or agencies without any real guidance to decision-makers as to whether and how to apply the core principles or what weight to give them. Moreover, some of the principles contain vague statements, some might call them aspirations, as well as ambiguities, inconsistencies and uncertainties. Difficulties of interpretation and application are manifest."

Policy, program, and regulatory proposals would be improved by complementing best practice regulation development guidelines with supporting guidance as to implementation.

Therefore, in addition to the Commission's current recommendations, in our view the following reforms are also necessary:

- That ESD objectives and principles be written directly into relevant future environmental legislation and that all decisions made must *be consistent with* ESD;
- That all existing environmental legislation should be updated to reflect ESD objectives and principles as above; and
- That guidance setting out current best practice approach to applying ESD principles is provided to decision-makers.

Draft recommendation 13.3

That the Victorian Government amend the *Victorian guide to regulation* to provide further guidance and tools for dealing with uncertainty in the development and implementation of environmental regulation, including measures that might invoke the precautionary principle. The government should also build the capacity of agents to apply these techniques in developing and implementing environmental regulation.

We agree with the Commission's comments that the implementation of the precautionary principle in practice could be improved by providing decision-analysis frameworks, tools and methodologies to guide discretionary decision-making under uncertainty.

As with the incorporation of ESD objectives and principles within best practice regulatory principles, further guidance for dealing with uncertainty in the *Victorian guide to regulation* will promote greater consistency and accountability in the application of the precautionary principle.

Recent case law may be able to contribute to best practice guidance. For example, Preston CJ in *Telstra Corporation Limited v Hornsby Shire Council*[19] provides one of the most detailed and

[19] *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10 and discussed in *Ecologically Sustainable development in the Context of Contaminated Land*, Preston B, (2008) 164 25 EPLJ 164.

comprehensive elaborations of the precautionary principle. The method set out in that case provides practical steps to assist decision-makers to use the precautionary principle in their decision-making.