environmental defender's office
new south wales

Investigation into the burden of regulation in NSW and improving regulatory efficiency

24th February 2006

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform
- the importance of indigenous involvement in protection of the environment.

Regulation Review
Independent Pricing and Regulatory Tribunal
PO Box Q290
QVB Post Office NSW 1230

Introduction

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the *Investigation into the burden of regulation in NSW and improving regulatory efficiency.*

The EDO specialises in public interest environmental law and policy, and as such, our submission focuses in particular on the principles and rationale for environmental regulation.

As noted in the *Investigation into the burden of regulation in NSW and improving regulatory efficiency: Issues Paper*[1] (Issues Paper), u nder Section 9 of the *Independent Pricing and Regulatory Tribunal Act 1992* the following matter is referred to the Independent Pricing and Regulatory Tribunal:

Review of the burden of existing regulation in New South Wales, identification of priority areas where regulatory reform could provide significant immediate gains to business and the community, and development of recommendations to improve the efficiency of Government regulation.

The purpose of the review is to:

1. identify areas of NSW Government regulation which are imposing a significant, unnecessary regulatory burden on business and the community; and indicate priority areas in which regulatory reforms could provide significant immediate gains to business and the community; and

2. develop recommendations for Government action to significantly improve the efficiency of regulation and reduce unnecessary regulatory burden on business and the community, including consideration of non-regulatory or incentive-based options for achieving this outcome.

In relation to the first point, the EDO has already witnessed an increasing trend of winding back environmental regulation in NSW. Environmental regulation, including processes for public participation, review, and reporting requirements; has been developed over the last three decades. Recently however, industry, farming and business groups have been successful in lobbying for the streamlining of environmental regulation, and

established principles have been eroded as a result. This is discussed below. It is disturbing to note that this trend seems to be gaining momentum, with several of the regulations explicitly identified for review in the Issues Paper (p5) (and indeed the Commonwealth Task Force Issues Paper p3[2]) being environmental regulations. In this context, the EDO submits comment in relation to the following issues:

1. The role of regulation and the public interest
2. Impacts of regulation and regulatory efficiency

2.1 Costs of regulation

2.2 The "stream-lining" trend

Case study: Planning regulation in NSW

2.3 Improving regulatory efficiency

2.4 Uniform regulation

In relation to the second stated purpose of the review, the EDO submits comments regarding:

3. Alternatives to regulation

3.1 Self regulation and voluntary approaches

Case study : Regulation of the nursery industry

3.2 Information disclosure

3.3 Recent proposals: market based schemes and offsets

Case study : Biodiversity banking and biocertification

Case study : Native vegetation offsets

4. Additional Issues

4.1 Transparency and accountability

4.2 Compliance

Case study : The National Packaging Covenant

4.3 Financial assistance and regulation

5. Recommendations

1. The role of regulation and the public interest

We understand that the genesis for this review has in part, resulted from lobbying by the Business Council in Australia, and from business and industry more broadly. The EDO understands the argument that duplication of regulatory requirements can be an unnecessary and resource-consuming imposition on business, especially small businesses, and that there is value in refining some regulatory requirements.

Notwithstanding this argument, the EDO has concerns regarding the presupposition in the Issues Paper that regulation may be "unnecessary." Part 5 and table 5.1 of the issues Paper outline some of the public interest rationales of regulation such as: defining and enforcing property rights; correcting market failure; and preventing environmental degradation, health hazards, excessive prices, and inequity (p10). However, there is a lack of analysis regarding how these benefits can be properly assessed and valued for the purpose of comparison with compliance and administration costs (this is discussed further in 2.1 below).

The EDO submits that the review recommendations need to be underpinned by an approach that actively seeks to properly assess the public interest benefits of regulation. We submit that there has been insufficient consideration of instances where the public interest of regulating an action, such as a licence to pollute, far outweighs the private interest of businesses.

The EDO has worked with the NSW Government, for example the Department of Environment and Conservation, in identifying regulatory gaps and examining areas where there is value for the community in

introduction of regulation. One example was in relation to the need to regulate the application of fertiliser waste to agricultural land. The consequent introduction of regulations will play an important role in protecting the environment and human health.

2. Impacts of regulation and regulatory efficiency

2.1 Costs of regulation

As noted above, the proper quantification of the public interest benefits of regulation is of concern to the EDO. The Issues Paper summarises the balancing equation in the following way (p12):

"Regulations have benefits and costs, which need to be weighed against each other when considering the merits of a particular approach. The benefits relate to the outcome that the regulation is intended to achieve (ie, improved environmental, health, social and/or economic outcomes). The direct costs of regulation include administrative costs to government and compliance costs to the regulated entities."

While financial and time costs are easy to quantify, it is very difficult to put a dollar figure on the public benefits of a regulation. These benefits may be long-term, or intangible in the short to medium term. The benefit may also, for example, be the absence of an outcome such as severe pollution, and thus assessing the benefit may require somehow valuing of the absence of environmental health problems. This is very difficult to quantify.

The Business Council of Australia recommendation referred to in the Issues Paper (p10) presupposes that the unit of measuring both costs and benefits is financial. EDO submits that this is inadequate for properly measuring public interest benefits.

2.2 *The "stream-lining" trend*

As noted in the Issues Paper (p8), the 2004 OECD *Economic Survey: Australia* found Australia "to have the least market restrictive regulatory environment among member countries, and has cited Australia as a role model for other countries."[3] Despite this favourable international context, there is as noted, a trend in NSW to wind back certain environmental regulatory requirements. While we support the reduction of duplication of regulations, the streamlining trend has gone beyond the mandate of "cutting red tape" and has begun to seriously erode certain public interest processes enshrined in regulation.

Case study : Planning regulation in NSW

The EDO has made various submissions on planning law reforms that have occurred in NSW over the past 18 months. The rationale for these reforms has been to streamline the development application and approval process in response to concerns of developers. The prime regulatory casualties of this process have been: concurrence requirements (in particular regarding threatened species and cultural heritage), environmental assessment requirements (for example, the 8 part test under the *Threatened Species Conservation Act 1995*), and more recently, genuine public consultation (for example, Part 3A *Environmental Planning and Assessment Act 1979*). Certain groups argued for the removal of "stop the clock" provisions on the basis that they cause delay and are thus a regulatory burden. However, the use of such provisions has often been essential for consent authorities to make decisions properly, in circumstances where inadequate information has been available. In this respect, it needs to be remembered that the provision of inadequate information by developers is one reason for the use of such provisions by decision-makers. Maladministration and under-resourcing are likely to be others. Removal of such requirements on the basis that they are simply "red-tape" or examples of inefficiencies in the system that hinder the rapid assessment and approval of development is simplistic in the extreme. Such an approach has the capacity to severely reduce the quality of assessment and is anathema to the public interest. Rather, close analysis should be given to the reasons for delay, and solutions developed accordingly. The EDO submits that the long-term public interest environmental impacts of a stream-lined approach have not been fully considered, and that comprehensive quality assessment must not be sacrificed in the name of short-term investment opportunities.

2.3 *Improving regulatory efficiency*

The EDO supports the Regulatory Impact Statement (RIS) process that applies in NSW, as set out in the Issues Paper (p25). We would support such a process in all jurisdictions providing the process comprehensively requires consideration of all benefits, and does not focus solely on administration and compliance costs. The RIS process must also be a fully independent, public and transparent process.

The "one in, one out" approach outlined on p25 of the Issues Paper is overly simplistic in areas of complex regulation. If clear duplication can be shown, then the approach may be appropriate, but where there is any danger of issues falling through a regulatory 'gap' caused by the supplanting of a regulation, then EDO would

not support such an approach.

We note in relation to the role of the NSW Legislation Review Committee (as noted on page 24), that while such a body is theoretically of value, in practice their impact is limited. Often the time frames of the passage of legislation or gazettal of regulations is short, and the advice of the Committee is advisory rather than binding.[4]

2.4 *Uniform regulation*

The EDO generally supports the principle of establishing uniform regulation across Australian States and Territories, especially in relation to the regulation of transboundary issues. The need to harmonise the often complex, disparate and inconsistent body of laws across all States and Territories has long been recognized in Australia. However, this issue is essentially an outgrowth of federalism, and needs to be balanced against the set of social, economic and political imperatives that flow from it (an exercise beyond the remit of IPART). Furthermore, the process of harmonization always carries with it the danger of opting for a "lowest common denominator" approach to regulation in order to obtain the agreement of all jurisdictions. This is counter-productive if it results in the lowering of the regulatory bar in a jurisdiction that is achieving good environmental outcomes. Uniform regulatory reform therefore must aim to achieve best practice and improved environmental outcomes.

3. Alternatives to regulation

The Issues Paper canvasses a number of "light-handed" regulatory options (pp 18-24) including: co-regulation, quasi-regulation, incentives-based regulation, market-based regulation, and information disclosure. The EDO supports the adoption of innovative measures to achieve best practice environmental outcomes. However, there are some areas of such public interest significance that regulatory restrictions need to be maintained. Some pros and cons of alternative measures are discussed below.

3.1 Self regulation and voluntary approaches

The EDO has serious concerns regarding the option of self regulation, and the self-regulation aspects of "co-regulation", "quasi-regulation" discussed on pages 19-21. There are numerous case studies of where voluntary measures have simply failed to effectively engage business and industry, and ensure appropriate outcomes. The EDO recommend that voluntary measures should not be considered as an alternative to binding legislation requiring companies to act consistently with principles of sustainable development and social responsibility, but should form part of a range of mechanisms to promote corporate social responsibility.

The EDO has previously made comment on the use of alternative mechanisms, including voluntary measures that may enhance consideration of stakeholder interests, in the context of corporate social responsibility more broadly.[5] We note that notions of corporate social responsibility have developed substantially in the past 30 years, beyond the premise that the only 'social responsibility of business is to increase its profits'.[6] In this context we examined the role of voluntary codes. Voluntary codes have an important part to play - as a supplement to other measures - in promoting compliance with broader environmental and social responsibilities.[7] Nevertheless, voluntary codes are no substitute for mandatory and enforceable legislative requirements.

While corporate approval of voluntary codes of conduct may be considered a positive step toward corporate responsibility, there are at least three fundamental flaws with such codes. First, as these codes have no binding force, compliance tends to be subordinated to the short-term interests of the company, thereby having little real impact on corporate behaviour. Second, the driving forces behind the establishment of voluntary codes mean that they have been concentrated in large corporations in certain industries, leaving all others unregulated.[8] As such, there is currently no universality to corporate codes, which undermines the existence of a level playing field and the ability of such codes to drive corporate change on all levels. Third, there is significant concern regarding the failure to actually implement such codes and the reluctance of many companies to permit independent monitoring of implementation. Given the flaws inherently associated with voluntary initiatives, they cannot be considered a replacement for a mandatory regime requiring organisational decision makers to have regard for the interests of stakeholders other than shareholders.

The OECD has identified various short-comings of voluntary approaches more broadly. These refer to the fact that voluntary approaches often lack: clearly-defined targets, credible regulatory threats, c redible and reliable monitoring, t hird party participation, p enalties for non-compliance, and i nformation - oriented provisions in order to maximise the operational soft effects of voluntary approaches.[9] Similarly, the Australian Government's Industry Taskforce on Self-Regulation has acknowledged deficiencies of voluntary schemes in terms of achieving sufficient industry coverage and publicity, being appropriate administrated; and incorporating monitoring and review.[10]

An 2003 OECD report *Voluntary Approaches for Environmental Policy: Effectiveness, efficiency and usage in policy mixes* concluded that:

[t]here is limited evidence as to the environmental effectiveness of Vas [voluntary approaches] which seem to provide little incentive to innovate and can be weakened by a lack of credibility, especially vis-à-vis public opinion. Yet VAs are likely to generate significant 'soft effects' in terms of dissemination of information and awareness-raising. On the other hand, their ability to reduce administrative costs remains an open question; transaction costs should also be evaluated. Finally free-riding and regulatory capture can seriously effect the effectiveness of VAs (OECD, 2003).

In the context of these deficiencies and uncertainties, the EDO submits that voluntary approaches are not an appropriate substitute for regulation, particularly where potentially significant social and environmental impacts are involved.

Case study : regulation of the nursery industry[11]

An interesting case study of the failure of a voluntary approach is in relation to the regulation of sale of invasive species of plants by nurseries. An extensive survey in Australia and New Zealand has shown that voluntary measures to encourage the withdrawal of certain plants from sale have failed and necessitated the introduction of regulatory requirements to properly achieve a prohibition, due to the serious risk to agriculture, human health and the environment posed by invasive plant species.

It is apparent from experiences in Australia and New Zealand, that sole reliance on voluntary schemes will never be an effective national and Commonwealth policy response to control the continued sale and wide distribution of high-risk invasive garden plants. Many factors contribute to this failure including: the structure of the garden industry, which impedes implementation and monitoring of voluntary measures across the whole industry; limited coverage of the national industry body, which will lead to industry leaders being commercially disadvantaged by free-riding garden plant growers and outlets outside of the NGIA; and the size of the industry body that mitigates against it being able to run and administer a self-regulatory scheme. The evidence shows that those voluntary schemes that have had some success have been localized, but at bigger scales have generally failed to engage many of the larger retailers who dominate a significant percent of the garden plant market.

3.2 Information Disclosure

The alternative option of information disclosure is discussed on p 20 of the Issues Paper. EDO submits that information dissemination and education is an appropriate and useful tool for many issues. For example, we strongly support product labeling for the benefit of consumers. However, information disclosure is not a substitute for regulation *per se,* but rather a supplementary tool.

3.3 Recent proposals: market based schemes and offsets

The DEC has achieved some success in establishing innovative measures to regulate pollution, such as the Hunter Salinity Trading Scheme, and the South Creek Nutrient Trading Scheme. These, and schemes such as the DEC Load Based Licensing Scheme, provide alternatives to traditional "heavy handed" regulation, and are supported by the EDO. However, the recent moves toward applying similar approaches to biodiversity and native vegetation are more problematic.[12]

The EDO supports, in principle, exploring alternative and/or non-regulatory means of protecting the environment in addition to regulation, providing there are appropriate safeguards and outcomes. In other words, the EDO supports the use of a suite of tools to protect the environment, providing the environment is not compromised and the tools are not in conflict. Furthermore, any such options must involve an evidence-based approach with comprehensive scientific evaluation of pilot studies. A crucial aspect of such schemes is that there must be public consultation and independent auditing of a comprehensive pilot scheme undertaken before the approach is officially adopted, or replaces existing regulation.

Given the diversity and complexity of environmental problems, it is clear that regulatory solutions require a tailored approach. For example, there are vastly different considerations that attach to offset schemes where a relevant "catchment" might be involved (such as air or water pollution) as opposed to where native vegetation or threatened species are at issue. These case studies are discussed below.

Case study : Biodiversity banking and bio-certification

The EDO is currently involved in consultation on the proposed Biodiversity Banking Scheme being developed by DEC. This scheme is part of a broader context of biodiversity certification, and the reduction of regulatory

requirements for assessing biodiversity at the stage of individual development applications. The framework for biodiversity certification of environmental planning instruments has been passed, and in certified areas, developers will not have to undertake the existing "8 part test" for threatened species assessment. The rationale is that up-front planning and identification of biodiversity issues will streamline the individual development application process.

According to DEC, the Biodiversity Banking Scheme "seeks market recognition for biodiversity values and avenues to create new opportunities for private sector conservation management of land."[13] It is yet to be seen how biodiversity credits will be measured and traded, and EDO has serious concerns as to the viability of quantifying a fungible unit of biodiversity. Similar schemes in the US, such as those regarding wetlands mitigation, have survived financially but have not achieved 'no net loss' environmentally.[14]

Case study : native vegetation offsets

The *Native Vegetation Act 2003* and *Native Vegetation Regulation 2005* are based on the legal requirement that broadscale clearing of native vegetation is not permitted unless it maintains or improves environmental outcomes. Under the Regulation, offsets may be used to ensure the environmental outcome is improved or maintained. The impacts of the clearing and the proposed offset are assessed by a tool called the PVP Developer. If a landholder obtains a property vegetation plan (PVP) including an offset which is deemed to maintain or improve environmental outcomes, then the PVP is approved an in place for up to 15 years. In effect this mean that the landholder is not subject to other regulatory requirements (such as threatened species assessment) for that period.

The rationale for this approach was to alleviate the burden on farmers from continual requirements for assessment and clearing applications. It should be noted that in order to obtain the benefit of 15 regulation-free years that there are time and administrative burdens in developing the PVP, although financial and other assistance (for example, aerial photos, mapping, advice) is provided by the CMA. Similar to biocertification, it is yet to be seen whether this initiative designed to ease the regulatory burden on farmers (and developers in respect to biocertification) will actually result in improved environmental outcomes.

4. Additional issues

4.1 Transparency and Accountability

The EDO submits that reporting is a fundamental regulatory requirement and not something that can be jettisoned due to a perception of report writing being a burden. It is particularly important in light of the development of innovative non-regulatory tools, that businesses remain transparent and accountable.

At present, most reporting requirements relate almost exclusively to the financial performance of companies while reporting of environmental or social performance takes place in limited circumstances. Incorporated entities are required to report annually on their financial dealings. Section 299(1)(f) of the *Corporations Act* requires the directors' report for a financial year to give details of the entity's performance in relation to environmental regulation if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory.[15] Listed companies must also immediately disclose all events that would have a material effect on the price or value of its securities.[16] This could extend to environmental or social matters that have a material effect on the price or value of securities. In addition, listed companies are required to provide a statement in their annual report disclosing the extent to which they have followed the ASX's *Principles of Good Corporate Governance and Best Practice Recommendations.*[17] Where companies have not followed all the recommendations, they must identify the recommendations that have not been followed and give reasons for not following them. The Recommendations do not contain a recommendation or principle that would cause the company to report on the extent to which its activities have impacted on the environment or the community. Indeed, apart from the specific requirements and recommendations referred to above, there is no general obligation for companies to report on their activities which have a social or environmental impact.

Comprehensive reporting requirements will become even more crucial where alternative schemes to regulation are employed or piloted. The EDO recommend that triple bottom line reporting requirements accompany any proposed schemes, and apply to businesses currently subject to environmental regulation and reporting requirements. The administrative burden of report writing on businesses is outweighed by the public interest value in being able to obtain clear and accurate information on the social and environmental as well as economic impacts of a business.

4.2 Compliance

Our concerns in relation to compliance and enforcement of voluntary codes are noted above. Compliance and enforcement have always been the fundamental component of traditional regulation, and any streamlining or minimising of regulation must not erode this foundation.

We note the reservation on p 20 of the Issues Paper that an unintended consequence of incentive based schemes which focus on encouraging innovation rather than prescribing and penalising, may be a reduction in monitoring and enforcement. Schemes with no deterrent provide less incentive to comply, as non-compliance is less likely to be detected. The EDO submits that the more innovative regulatory alternatives still need to be backed up by comprehensive compliance and enforcement policy which is supported by adequate resources for implementation. We note that it is insufficient to simply legislate large penalties for non-compliance, and that there is also the need for political will to bring prosecutions. Criminological research points clearly to the fact that certainty of being caught is a more important factor in deterrence than the penalty. Therefore, increased penalties without increased resources being put into enforcement, are of limited value. As noted by Jacobs J of the High Court (*Griffiths* (1977) 137 CLR 293, 327):

" The deterrent to an increased volume of serious crime is not so much heavier sentences as the impression on the minds of those who are persisting in a course of crime that detection is likely and punishment will be certain... Consistency and certainty of sentence must be the aim. Certainty of punishment is more important than increasingly heavy punishment."

An appealing option to many policy makers is to have a voluntary option backed up by a regulatory requirement/penalty where there is a failure to comply. This model is yet to be perfected.

***Case study* : National Packaging Covenant and the NEPM**

The National Packaging Covenant (NPC) was established on a voluntary basis. The incentive for business and industry to sign on and participate in the NPC was that they would otherwise in theory be regulated more harshly under the relevant National Environment Protection measure (NEPM). The NEPM was to be more onerous and prescriptive. Despite this incentive, it is arguable that the NPC goals are weak and it has failed to adequately achieve industry coverage and innovative reform.[18]

4.3 Financial assistance and regulation

The Issues Paper (p14) discusses the potential compensation cost involved in regulating:

"Appropriate transitional arrangements may also be required where a change in regulatory requirements impacts upon the property rights of individuals. These arrangements could take the form of financial compensation for loss of assets or asset value as a result of the introduction of new regulation. Such compensation would be a financial cost to government, which may need to be considered in reviewing any proposed regulatory change that has the potential to affect the property rights of individuals."

In Australia there are fundamental legal and policy reasons why regulation should not give rise to compensation. To lawyers, the position is clear and settled. Compensation is only payable when the government acquires property - such as land, a licence or a permit, or "sterilises" a right. Put another way, the law has not (with rare exception) recognised the right to compensation where governments merely regulate or otherwise change people's rights. The Australian Constitution, state and territory legislation and High Court judgements all reflect this position.

The EDO has previously commented on the perspective held by organisations such as the National Farmers Federation that regulation should give rise to compensation.[19] We submit that compensation for regulation would potentially have a number of drawbacks, however other financial incentives and mechanism should be considered to assist individuals and businesses to meet regulatory requirements in certain cases of public interest.

The drawbacks of compensating for regulation include that it may:

- create precedents for other sectors (such as where industries seek compensation for the regulation of pollution);
- result in an inefficient use of the limited resources devoted to the protection of the environment (as compared to, say, financial assistance or incentives for the performance of certain duties);
- create a climate whereby Governments are hesitant to regulate properly and effectively for fear of the financial repercussions, as has been the case where such schemes have existed in South Australia and Victoria ;[20]
- involve Australia in complex and costly litigation over what regulations require compensation (as has happened in the USA); [21] and
- practical and legal difficulties in distinguishing between the public and private elements of any regulation

(as a basis for compensation).

T here are difficulties associated with dividing restrictions into public and private elements. The National Farmers' Federation has proposed that compensation be linked to "public-good environmental benefits".[22] In a similar vein, other commentators have advocated models that seek to distinguish between private and public good in terms of conservation management.[23] These approaches are an attempt to delineate more precisely the circumstances where the community should pay compensation. Their attraction is their recognition of the dualistic nature of property - rights and responsibilities go with ownership.[24] However, the divide is conceptually problematic. Is it not the *raison d'être* of government to regulate in the public interest? Is it illegitimate for governments' to regulate in anything but the public interest?

There are a wide range of alternative financial devices that need to be considered as part of any cost-benefit analysis of the problem. Compensation results in the inefficient use of limited resources devoted to the protection of the environment, and undermines innovation, for example, compensation payments remove any incentive for farmers to alter unsustainable practices. Structural adjustment packages have been used effectively for both the fishing and timber industries. Generally, they are comprised of assistance packages targeted to workers and industries, with additional help for those who wish to exit the activity.[25] Furthermore, consideration should be given to utilising financial incentives to support regulatory schemes, rather than the simplistic options of paying compensation or reducing regulation. These incentives include property agreements and covenants, grants for restorative works, competitive auctions, tax and rate relief and trading schemes, that are forward-looking and provide an ongoing commitment to the protection of the environment.[26]

As noted, there is a very narrow right to compensation in law and this should not be broadened. Regulation is a fact of life across all industries, and where there is very strong argument for financial assistance, this would be better done by structural adjustment, rather than a specific legal right.

5. Recommendations

In summary, the EDO submits the following recommendations:

- The EDO submits that the review recommendations need to be underpinned by an approach that actively seeks to properly assess the public interest benefits of regulation.
- The EDO supports the application of the RIS process in all jurisdictions providing the process comprehensively requires consideration of all benefits, and does not focus solely on administration and compliance costs. The RIS process must also be a fully independent, public and transparent process.
- The EDO supports the use of a suite of tools to protect the environment, however any alternative mechanisms (such as offset schemes) must involve an evidence-based approach with comprehensive scientific evaluation of pilot studies and broad public consultation.
- Uniform regulatory reform must aim to achieve best practice to achieve environmental outcomes rather than opting for a "lowest common denominator" approach of consensus across jurisdictions.
- The EDO recommend that voluntary measures should not be considered as an alternative to binding legislation requiring companies to act consistently with principles of sustainable development and social responsibility, but should form part of a range of mechanisms to promote corporate social responsibility.
- The EDO submits that information disclosure is not a substitute for regulation *per se,* but rather a supplementary tool.
- The EDO recommend that triple bottom line reporting requirements accompany any proposed schemes, and apply to businesses currently subject to environmental regulation and reporting requirements.
- Compliance and enforcement have always been the fundamental component of traditional regulation, and any streamlining or minimising of regulation must not erode this foundation. Alternative/voluntary schemes must be backed up by a compliance option where scheme participants fail to achieve required outcomes.
- The EDO submits that compensation for regulation would have a number of drawbacks, however other financial incentives and mechanism should be considered to assist individuals and businesses to meet regulatory requirements in certain cases of public interest.

If you require further information, please contact Rachel Walmsley on 02 9262 6989.

Yours sincerely,

Environmental Defender's Office

[signed]

Jeff Smith
Director

[1] IPART, January 2006.

[2] Australian Government Regulation Taskforce: Taskforce Issues Paper, 2005, Attachment B, p3.

[3] Organisation for Economic Cooperation and Development, 2004, *Economic Survey: Australia,* OECD, Paris.

[4] For example, recent comments on amendments to the *Environmental Planning and Assessment Act 1979* - Part 3A were made by the Legislation Review Committee and had no impact on the process.

[5] EDO submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Corporate Social Responsibility - 28 September 2005: www.edo.org.au/edonsw/site/policy.asp.

[6] Milton Friedman, *Capitalism and Freedom* (1962), 133, 133; see also Elaine Sternberg, 'Stakeholder Theory Exposed' (1996) 2 *Corporate Governance Quarterly* 4.

[7] Anne-Christine Habbard, 'The Integration of Human Rights in Corporate Principles' in *OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility - Annual Report 2001* (2001), 100.

[8] Corporate codes of conduct incorporating human rights standards have tended to be concentrated in sectors such as mining, apparel, footwear, sporting goods, toys and retailing: OECD Working Party of the Trade Committee, *Codes of Conduct - An Expanded Review of Their Contents,* TD/TC/WP(99)56?FINAL, Paris (2000) ; Rhys Jenkins, *Self-Regulation in a Global Economy* (2001), 19. Similarly, environmental codes have been adopted by large forestry, mining and oil extraction companies that have been the subject of NGO scrutiny (such as Amnesty International's concentration on Shell's activities in Nigeria and BP's activities in Colombia : Amnesty International, *Human Rights: Is it Any of Your Business?* (2000) Amnesty International <www.amnesty.org.uk/business>). In contrast, sectors that service businesses or consumers in developing nations, have not generally adopted codes of conduct as they tend to be less affected by consumer activism: Jenkins, op cit, 14-15.

[9] See OECD (2003) *"Voluntary Approaches for Environmental Policy: Effectiveness, efficiency and usage in policy mixes"* Working Party on National Environmental Policies, OECD Environmental Policy Committee.

[10] Industry Taskforce on Self-Regulation, chapter 6, pp 59-86.

[11] From: *Controlling the Sale of Invasive Garden Plants: Why Voluntary Measures Alone Fail* WWF-Australia 2005

[12] The EDO has previously made comments on proposed offset schemes generally. For further detail on our response to the DEC Green Offsets Discussion Paper and Biodiversity Banking, please see www.edo.org.au/edonsw/site/policy.asp.

[13] *BioBanking - A biodiversity offsets and banking scheme. Conserving and restoring biodiversity in NSW. Working paper.* Department of Environment and Conservation 2006, p1.

[14] For a summary of these schemes please see *Biodiversity Certification and Banking in Coastal and Growth Areas* - EDO submission to DEC 13 September 2005, www.edo.org.au/edonsw/site/policy.asp

[15] It must be noted that in 2002, the *Corporations Amendment Bill 2002,* an Exposure Draft Bill proposed to amend the *Corporations Act 2001* so as to repeal this section.

[16] *ASX Listing Rules* (2004) at <http://www.asx.com.au/supervision/rules/listing/index.htm> at 30 August 2005.

[17] *ASX Listing Rule* 4.10.

[18] See http://www.tec.org.au/index.php?option=com_content&task=view&id=415&Itemid=278.

[19] For example, see: National Farmers Federation (2002) *Property Rights Position Paper* (May 2002); and *"Submission in response to the Productivity Commission Draft Report into the impacts of native vegetation & biodiversity regulations"* January 2004.

[20] See Bonyhady T (1992) "Property Rights" in Bonyhady T *Environmental Protection and Legal Change* Federation Press (South Australia) and Raff M (1998) "Environmental Obligations and the Western Liberal Property Concept" 22 *Melbourne University Law Review* 657 at p 659 (Victoria). For a concise overview of these issues see also Bates G (2002) *Environmental Law in Australia* Butterworths at pp 33-38.

[21] In the USA case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* Justice Stevens echoed a similar concern in relation to "reluctant regulation", noting that land use regulations are ubiquitous and most of them impact upon property values in some tangential way -- often in completely unanticipated ways. Treating them all as *per se* takings (restrictions requiring compensation) would transform government regulation into a "luxury few governments could afford."

[22] National Farmers Federation (2002) *Property Rights Position Paper* May 2002.

[23] For instance, Fensham and Sattler have devised a methodology for providing compensation to landholders "who shoulder a disproportionate share of the financial burden for biodiversity conservation" based on the notion of a duty of care (although not a duty as lawyers would understand it): Fensham RJ and Sattler PS "A Proposal for Financial Assistance and a Duty of Care to Accompany Legislation Controlling Remnant Native Vegetation Clearing on Freehold Land in Queensland." The idea of a duty of care - as used by Binning and Young - is to require sustainable land management of landholders. Binning C and Young M (1997) *Motivating People - Using Management Agreements to Conserve Remnant Vegetation* CSIRO, Canberra. Restrictions that demand more than this - what Binning and Young term "public conservation services" - should be paid for by the community.

[24] See generally Raff M (2000) "We Need a New Wave of Environmental Law" Architect Victoria at pp 22-25.

[25] See Crosthwaite J (2002) "Vegetation Clearance - Is Compensation or Adjustment the Issue?" 1 *Ecological Management and Restoration* 2.

[26] See Crosthwaite J (2001) "Policy Formulation - the Duty of Care and Putting the Farm First", a paper presented to the Australian Agricultural and Resource Economics 45 th Annual Conference, South Australia 22-25 January 2001.