Environment Defenders Office

Submission

in response to

VCEC Inquiry into Victoria's Regulatory Framework Issues Paper

prepared by

Environment Defenders Office (Victoria) Ltd

24 September 2010

Environment Defenders Office (Victoria) Ltd
ABN 74052124375

PO Box 12123
A'Beckett Street PO
Melbourne VIC 8006

The 60L Green Building
Level 3, 60 Leicester St
Carlton VIC 3053

T (03) 8341 3100
F (03) 8341 3111
E edovic@edo.org.au
W www.edo.org.au/edovic

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.

For further information on this submission, please contact:

Nicola Rivers, Law Reform and Policy Director, Environment Defenders Office (Victoria) Ltd

T: 03 8341 3100

E: nicola.rivers@edo.org.au

Submitted to:

regulatoryframework@vcec.vic.gov.au

Cc:

24 September 2010

INTRODUCTION

The EDO made a submission to the VCEC inquiry into environmental regulation in 2009. Our detailed comments on environmental regulation made in that submission are equally relevant for this inquiry. We will not repeat those comments in detail but will highlight particular areas of focus for this inquiry as well as any additional comments.

Although the present inquiry encompasses all Victorian regulation, we have limited our comments in this submission to our particular areas of expertise; that is planning, environment and natural resource management laws.

As stated in our previous submission, the interests of the whole of the community (including future generations), not just those with vested economic interests must be fully considered when assessing the value of regulation, particularly environmental regulation. 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 are encouraged that in this review VCEC has noted the distinction between what it terms the 'cost of regulation' and the 'burden of regulation'[1] (in contrast to the VCEC review of environmental regulation which made no such distinction). However we are concerned that the terminology used by VCEC to distinguish the two is not commonly used and is therefore unlikely to be meaningful to submitters and government. Few people are likely to understand that when VCEC refers to the burden of regulation they mean the *unnecessary* costs of regulation as opposed to all costs. The term *unnecessary burden* (as used by the Productivity Commission) makes it clearer that VCEC is concerned with *unnecessary* costs on business rather than all costs (noting that some people feel that all regulation is a burden).

The terms of reference for this inquiry are incredibly broad and therefore it is difficult to make a meaningful submission which covers the key points in any level of detail. We have therefore kept our submission to high level points with some examples as case studies. The EDO has written numerous submissions in the past two years highlighting problems with environmental laws and suggesting reforms and these could also be reviewed by the Commission if more detail is required on any particular area of law. Of particular relevance are the following EDO submissions:

- Our three submissions on the review of the *Planning and Environment Act 1978* available here - http://www.edo.org.au/edovic/policy.html#pe
- Our submission to the ENRC review of the Environment Effects Statement process available here - http://www.edo.org.au/edovic/policy/edo_vic_ees_review_submission.pdf
- Our submission to the ENRC Renewable Energy projects approval process review available here - http://www.edo.org.au/edovic/policy/edo_vic_renewable_energy_approvals_submission.pdf
- Our submission to the VCEC inquiry into environmental regulation available here - http://www.edo.org.au/edovic/policy/edo_vic_vcec2009_submission.pdf

[1] See box 2.1 of the VCEC *Inquiry into Victoria's Regulatory Framework* Issues Paper 2010

Environmental regulation

Strong environmental regulation is a necessary and beneficial part of any regulatory regime. Benefits of environmental regulation include protecting the community from the health impacts of pollution and inappropriate waste disposal; protecting the biodiverse species and communities which provide ecosystem services to the natural and human environment; preventing natural resources such as water from being degraded, and protecting the natural environment from irreversible harm. Best practice environmental regulation can also benefit the "modern Victorian economy" by encouraging innovation and early adoption of new sustainable practices (such as will occur with the new greenhouse gas emission intensity standard on power stations), and promoting investment (such as through biodiversity protection and restoration in rural and regional Victoria).

While some Victorian environmental regulation provides some of these benefits there is much that can be improved. In our view any unnecessary burden stemming from Victorian environmental regulation is primarily the result of one of the following two issues:

1) Regulation is ambiguous, allows significant Ministerial discretion and is largely unenforceable, all of which lend it to being administered inconsistently. Legislation that falls into this category includes the *Environment Effects Act 1978* and key parts of the *Planning and Environment Act 1987* such as the native vegetation framework;

2) Regulation contains important elements designed to improve environmental protection but they are not implemented and/or enforced by government. Legislation that falls into this category includes the *Flora and Fauna Guarantee Act 1988* and the *Environment Protection Act 1970*.

We discuss the first issue under 2.1.4 and second issue under 2.1.5 below.

RESPONSE TO ISSUES RAISED IN THE VCEC PAPER

2.1.4 Scope for reducing existing burdens

A cautionary note

In relation to environmental protection, there is no substitute for direct regulation. As the cost of environmental harm such as pollution or land degradation from clearing of native vegetation is largely born by the community at large, the financial benefit of environmental harm is likely to outweigh any negative consequences. The core incentive to refrain from causing environmental harm is therefore environmental regulation and the threat of penalties. Weaker regulation, self regulation and market mechanisms are unlikely to achieve the desired outcomes of environmental protection. Market mechanisms can be used when trying to encourage 'beyond compliance' activity such as the use of best practice technology, or aspirational environmental goals such as high levels of water efficiency, but they are ineffective when trying to prevent pollution or other forms of direct harm in the face of profits.

As an example, over the last two decades the EPA had shifted away from strict regulatory controls for pollution control towards industry self regulation and industry negotiated outcomes. The 2009 Ombudsman report on the EPA's mismanagement of the Brookland Greens Estate and the 2010 Auditor-General's report on the EPA's hazardous waste management practices clearly highlight the harm and cost to the community that can occur when environmental regulation is weak and/or not

enforced. [2] The two reports demonstrate the need for strong, clear and enforceable environmental regulation combined with a willingness by government to fulfil its role as an environmental regulator.

The EPA has recognised that its move away from being a strong regulator put the environment at risk and did in fact cause environmental harm. It acknowledges that strong regulation and enforcement is essential in environmental protection.[3] The EPA has committed to improving their regulation and enforcement of industry and has made many positive steps in this direction over the past twelve months.

The community expects the government to regulate businesses and individuals for the benefit of the whole community. In particular the community expects that government will properly protect the environment from the varied interests who gain private benefit by causing harm to the environment at the expense of the community.

When attempting to reduce the 'unnecessary burden' from regulation, care must be taken to ensure that the desire to reduce compliance costs does not become the focus of reform of the regulation at the expense of achieving high environmental standards. As noted by the Ombudsman in the Brookland Greens Estate report, when it comes to environment protection legislation economic considerations should not override environmental objectives.[4]

Which regulations are the most burdensome, complex, redundant or duplicative?

As noted in our introduction above, some key pieces of Victorian environmental regulation are imprecise and allow a high level of discretion by the Minister or decision-maker, leading to unpredictable and inconsistent application.

Ambiguous and discretionary environmental laws such as the Environment Effects Act should be replaced with modern environmental legislation. Legislation should contain clear objectives, allow for consistent processes, give adequate opportunity for public comment, require a high level of rigour in assessment and decision-making, and include requirements for transparency such as public disclosure of reports and data. Most importantly it should be based on sound legislated processes rather than ad hoc ministerial discretion.

Best practice environmental regulation not only improves environmental protection but would reduce unnecessary burden on proponents and industry by providing clear process and timeframes, and consistent outcomes.

Case study - environmental impact assessment regulation in Victoria

As stated in our submission to the Victorian Parliament Environment and Natural Resources Committee (ENRC) review of the Environmental Effects Statement process, the EES process in Victoria is operating in the context of an out-of-date and inadequate legislative framework. The process is framed within the brief and ineffectual EE Act. The EE Act is a mere 16 pages long, contains no objectives and provides no credible ministerial assessment framework. The process is

---

[2] Ombudsman Victoria, *Brookland Greens Estate – Investigation in methane gas leaks*, October 2009 accessed at http://www.ombudsman.vic.gov.au/resources/documents/Brookland_Greens_Estate1.pdf and Victorian Auditor-General, *Hazardous Waste Management*, June 2010 accessed at http://download.audit.vic.gov.au/files/09062010_Haz_Waste_Full_Report.pdf

[3] See for example the EPA's response to the Auditor-General's Report in Appendix A to the Auditor-General's report above n 2.

[4] See for example at page 63 of the Ombudsman's report above n 2

highly discretionary and almost entirely dependent on non-binding, unenforceable guidelines. The process gives the Minister for Planning virtually unlimited discretion to decide whether an EES is required for a project, the content of an EES, the form and extent of public review of an EES and the assessment of an EES.

The Victorian Government, in its response to VCEC's report on environmental regulation and its response to the ENRC's report on approvals for renewable energy projects, stated that it would further amend the EE Act and refine Ministerial guidelines to improve the EES process, mainly to improve timeliness and efficiency. In our view this is unlikely to be of any benefit in reducing complexity and confusion around the EES process, and will not improve environmental outcomes. It is essential for good environmental impact assessment that a clear legislative structure is in place that sets out the rights and responsibilities of the proponent, the assessing body and the community. This will not occur through further amendment of an inadequate Act and guidelines. The EE Act must be repealed and replaced with modern environmental impact assessment legislation to bring Victoria in line with the rest of Australia and the developed world.

At present, the Government's policy for reforming environmental impact assessment regulation is making the system more complex, not less complex. Environmental impact assessment can now occur under three separate legislative schemes - the planning scheme if the impacts are not considered to be very large, the EE Act if the impacts are considered to be very large, or the *Major Transport Projects Facilitation Act 2009* if the project is a transport project that the Government has decided to fast track. In addition, the 'Ministerial call in' power under the Planning and Environment Act in effect leads to an alternative path for environmental impact assessment. The Government intends to shortly introduce a further separate assessment process for 'state significant' projects under the Planning and Environment Act. Victoria would therefore have four entirely different impact assessment processes under separate legislation.

In our view, the need to create a 'fast track' or 'streamlined' approval processes demonstrates that the current assessment regime is failing. Introducing more assessment regimes will not improve this situation but will add to the complexity of regulation in Victoria and increase confusion amongst proponents and the community. Rather than developing yet another assessment process through the 'state significance' process the Government should focus instead on having a single clear, defined impact assessment Act for all projects likely to have a significant impact on the environment, that allows projects to be assessed properly and efficiently.

For example in Western Australia there is a single environmental impact assessment regime under the Environment Protection Act that allows for different levels or tiers of assessment commensurate with the likely impacts of the proposal. The elements that remain the same across the assessment levels are the objectives of the assessment, the triggers for assessment, the assessment process, the right to public consultation, the independent assessing body, and the Ministerial decision-making process. This means that a clear and consistent methodology has developed around environmental impact assessment in WA giving proponents and the community certainty as to process and likely outcomes. Elements of the process that change with the different levels of assessment are the time allowed for the assessment, the level of environmental studies required, and the time for public comment. This means that greater scrutiny can be applied to projects with a higher level of risk and environmental impacts while projects with lower impacts can be assessed quickly but in an appropriate way.

The federal environmental impact assessment regime under the *Environment Protection Biodiversity Conservation Act 1999* uses a similar clearly defined and legislated process with a single trigger for assessment, levels of assessment commensurate with impacts, time limits for different stages of the assessment process and a legislated decision-making process.

Having a single clear legislated system and appropriate resources dedicated to it means that *all* assessments can be completed more efficiently, reducing the need for Ministerial intervention or optional fast tracking. Imposition of yet another environmental impact assessment option through the state significant planning process will add to the confusion and complexity and should be resisted.

2.1.5 Improving Victoria's regulatory framework

Do businesses and other interested parties have enough input into the regulatory process?

It is an accepted convention that significant regulation that impacts on the community should be released in draft form for public comment. However, at present the community is often left out of deliberations on regulatory reform. In particular, key legislation that is likely to be controversial and have a great impact on the community has not been released for public consultation. For example, the 2009 Major Transport Project Facilitation Bill was introduced into Parliament with no public consultation or even targeted community or NGO consultation on either the Bill or the policy behind it. Similarly the Climate Change Bill was introduced into Parliament in 2010 with no public consultation on the draft Bill. Both Bills were highly controversial and had a direct impact on the community. The Government has indicated that consultation on the Climate Change Bill was not required as consultation had already been conducted on the Climate Change Green Paper a year earlier. However consultation on a policy document that contained almost no indication of what the Bill would contain was not an adequate substitute to consultation on the Bill. In contrast, the Government conducted extensive consultation on less controversial regulation such as the Transport Integration Bill and even on minor regulation such as the Forests (Recreation) Regulations.

If government does in fact want to strengthen support for regulatory reform then an open and transparent public consultation process on new and amending legislation is required. All regulation that is likely to be controversial, directly impact on the community or business, or raise a high level of community interest should be released for public comment before being introduced into Parliament.

How well are regulators performing their functions?

As stated in the VCEC discussion paper 'regulators that enforce regulation consistently and transparently build respect for the regulations themselves and by doing so encourage compliance[5].'

However as noted in the introduction above, some key pieces of Victorian environmental regulation are not properly implemented and/or enforced. This completely undermines the intent of the regulation and indicates to the community and those being regulated that the subject of the Act is not, or should not be, a government or community priority.

Case study – Flora and Fauna Guarantee Act.

As an example, the Flora and Fauna Guarantee Act (FFG Act) has a number of useful provisions that would lead to greater protection of flora and fauna (as is the primary purpose of the Act), but they are not implemented or enforced by the Department of Sustainability and Environment (DSE).

[5] VCEC *Inquiry into Victoria's Regulatory Framework* Issues Paper p12

The primary aim of the FFG Act is aims to guarantee that all taxa of Victoria's flora and fauna can survive, flourish and retain their potential for evolutionary development in the wild, and to ensure that the genetic diversity of flora and fauna is maintained.[6]

The Act contains a number of management processes and conservation and control measures to conserve and protect flora and fauna. However DSE has failed to use many of these to achieve the objectives of the Act.

In April 2009, the Victorian Auditor-General released a performance audit of the Administration of the Flora and Fauna Guarantee Act 1988. The audit reviewed 'how effective the Department of Sustainability and Environment's administration of the Act has been in preserving Victoria's native flora and fauna.' [7] The Auditor-General found that aside from management processes mandated by the Act (the Flora and Fauna Guarantee Strategy and action statements), the various other management processes and conservation and control measures available to conserve and protect flora and fauna are not being used, largely because of their perceived complexity and the difficulty of administering these provisions. For example, the Auditor-General reported that no management plans have been prepared to date; the only critical habitat determination made was subsequently revoked at the time of his report; and no interim conservation orders have been issued.

The Auditor-General highlights that listing of threatened species under the Act is of value only if the conservation and management actions that follow from the listing process are implemented and their impacts evaluated.

In our view, the lack of political and Departmental will to fully implement and enforce the FFG Act, combined with a lack of resources provided to DSE for implementation of the Act has resulted in its weak implementation. There is no doubt that amendment of the Act, or development of new biodiversity conservation legislation would assist DSE to strengthen their efforts to improve biodiversity protection. However, proper utilisation of the conservation measures available in the present Act would make a real difference to biodiversity conservation in Victoria.

Environment protection Act

As noted above, the EPA moved away from strong enforcement of their regulation over the past two decades. However the EPA, the Government, and the community has recognised that this weakening of implementation and enforcement of environmental laws contributed to lower standards of environmental protection in Victoria, resulting in environmental harm and costs to the community and government. The EPA is currently conducting a review of their compliance and enforcement policy which is likely to result in improved enforcement.

The EPA is to be commended for their acknowledgement of past failures in relation to implementation, compliance and enforcement of the Environment Protection Act and their renewed focus on strong regulatory implementation in order to improve environmental protection standards in Victoria.

Assessing the performance of regulators

It is very difficult for the community to assess the performance of regulators in their implementation and enforcement of environmental laws in the absence of a formal government review such as those conducted by the Auditor-General, Ombudsman or Parliamentary committees.

---

[6] FFG Act, s4

[7] Victorian Auditor-General, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009 (Victorian Auditor-General's Report), p14.

Government departments and regulators release very little data on their implementation, monitoring and enforcement activities. Annual reports do not provide enough information to properly assess the performance of agencies. The EDO is currently reviewing the implementation and enforcement of five key Victorian environmental laws and has had significant difficulties in accessing complete and comprehensive data.

Every department or agency who is responsible for the implementation, monitoring or enforcement of environmental regulation should be required to publicly report annually on a consistent set of comprehensive data that allows the community to the monitor their effectiveness in administering regulation.