Environment Defenders Office

Submission

in response to

VCEC Inquiry into Victoria's Regulatory Framework

Part 1 of the Draft Report

prepared by

Environment Defenders Office (Victoria) Ltd

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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:

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SUMMARY OF RECOMMENDATIONS

The EDO recommends that:

- the term 'Victorian regulatory management system' be replaced by 'Victoria's regulatory framework', which was originally used in the Inquiry's Terms of Reference;
- VCEC carefully consider whether lengthy inquiries and added bureaucracy are a good way to reduce the regulatory burden;
- the statement of overall regulatory policy referred to in draft recommendation 2.1 include a reference to the Principles of Ecologically Sustainable Development;
- draft recommendation 3.2 be amended to encourage consideration of *all* regulatory options, not just market mechanisms;
- the Inquiry Report recognise the dangers of an overly collaborative and flexible approach to enforcement; and
- the annual target for reducing the regulatory burden proposed by draft recommendation 7.1 be amended (see section 7, below, for details) to ensure that valuable regulation is not unnecessarily cut.

INTRODUCTION

The EDO has already made a submission to the VCEC Inquiry into Regulation Issues Paper, on 24 September 2010. This submission adopts and reiterates the concerns and recommendations voiced in that earlier submission, and will not repeat them here.

1 NOMENCLATURE

The EDO disagrees with the Inquiry's use of the term 'Victorian regulatory management system'. EDO submits that using this term, rather than adopting the term 'Victoria's regulatory framework' used in the Inquiry's Terms of Reference, sends the wrong message about the purpose and function of Victorian regulation.

Referring to the framework of Victorian laws and regulation as a 'management system' implies that it is a business management system like any other. In the Inquiry's own words, it suggests that regulation is "*a critical 'business' system for government that may be actively managed…*"[1] This misrepresents the nature and function of law and government.

Regulation is about much more than business management, and using the language of corporate managerialism may tend to obscure that. Sound business management and good government both share certain virtues — like efficiency, and accountability. But good government and lawmaking also require certain values and virtues which are not essential to the business world — morality, justice, human rights, public accountability, transparency and environment protection, to name a few. Using the language of business management may marginalise these values, and encourage an undue emphasis on monetary costs and benefits. It implies that regulation and government is about efficient and unobtrusive stewardship, rather than the unapologetic pursuit of policy goals.

The EDO submits that the Inquiry should use language which reflects the fact that regulation is about more than the anodyne practice of management and cost reduction. The original language of the Inquiry's Terms of Reference, 'Victoria's Regulatory Framework', is a better choice.

2 THE BURDEN OF REDUCING THE BURDEN

The EDO is concerned that many of the Inquiry's recommendations for reducing red tape and improving efficiency may impose considerable administrative and cost burdens of their own.

Many of the Inquiry's recommendations suggest new processes or systems for improving regulatory efficiency. For example:

- the creation of a Minister for Regulatory Reform;[2]
- annual reporting on goals, outcomes and progress in reducing the regulatory burden;[3]
- the creating of implementation plans for regulation;[4]
- the creation of guidelines for deciding whether or not to create implementation plans for regulation;[5] and

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[1] Victorian Competition and Efficiency Commission, Inquiry into Victoria's Regulatory Framework: Part 1 – Strengthening Foundations for the Next Decade, Draft Report (2011) (**Draft Report Part 1**) p 5.

[2] Draft Report Part 1, draft recommendation 2.3.

[3] Draft Report Part 1, draft recommendations 2.5, 3.4.

[4] Draft Report Part 1, draft recommendation 4.2.

- promoting (including through training) regulatory reform across government.[6]

EDO is concerned that these processes and systems create *more* red tape and further burden the public service. The proliferation of documentation, reviews, principles, policies, Ministers, agencies and reforms that Part 1 of the Draft Report introduces in the name of 'reducing the burden' has the potential to become a significant burden in itself.

It is encouraging that VCEC seems to recognise this, to an extent, when it acknowledges that regulatory harmonisation between Australian jurisdictions — often considered a key measure in cutting red tape — carries costs of its own.[7] The EDO submits that VCEC should carefully consider the costs and benefits of lengthy reviews and more bureaucracy in the name of reducing red tape.

3 OVERALL REGULATORY POLICY

If the Victorian Government does decide to issue a statement of its overall regulatory policy as recommended in draft recommendation 2.1, then the EDO submits that the statement should include the following.

First, the statement must impose limits on regulatory reform, and the extent to which it will go to cut red tape. It must not be forgotten that reducing regulation is not an end in itself. Reducing the regulatory burden is just one of many ways that the Government can create a net benefit to all Victorians, and it must not be allowed to overshadow the many benefits — especially non-monetary and intangible benefits — which existing regulation currently secures. The statement of principles must therefore acknowledge that:

- only unnecessary or disproportionately burdensome regulation should be reduced;
- many regulations create benefits that cannot be measured in dollars and cents;
- imposing certain costs on business is sometimes the intent of certain regulation; and
- reducing the regulatory burden is just one of a wide range of policy goals, and it is not the most important.

Second, the statement should include within its list of "*principles to guide the behaviour of those responsible for achieving the objective*" the Principles of Ecologically Sustainable Development (**ESD Principles**).[8] The ESD Principles are a well-recognised part of international, Australian and Victorian environmental law.[9] They are designed to guide policymakers in making and reforming regulation (and other policy tools) to create economic growth that sustains the natural environment. They include many of the principles supported by VCEC in other parts of Part 1 of the draft Report — for example, "*improved valuation, pricing and incentive mechanisms*" that include environmental factors in the valuation of assets and services.[10] They are sufficiently

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[5] Draft Report Part 1, draft recommendation 4.2.

[6] Draft Report Part 1, draft recommendations 2.7, 2.8, 3.1.

[7] Draft Report Part 1, pp 204-7.

[8] These can be found in section 4 of the *Commissioner for Environmental Sustainability Act 2003* (Vic).

[9] Rio Declaration on Environment and Development, A/CONF.151/26 (Vol I) (1992); Council of Australian Governments, Intergovernmental Agreement on the Environment (1992); Sands P, *Principles of International Environmental Law* (Cambridge University Press, 2003) p 253; *National Environment Protection Council Act 1994* (Cth) Schedule 1; *Environment Protection Act 1970* (Vic) ss 1B-1F; *Protection of the Environment Administration Act 1991* (NSW) s 6(2).

[10] See draft Report Part 1, draft recommendation 3.2.

general in their terms, and universal in their scope, to warrant their inclusion in a broad statement of regulatory policy.

4 MARKET-BASED MEASURES

The EDO does not support draft recommendation 3.2 in its current form. Draft recommendation 3.2 calls for the *Victorian Guide to Regulation* to be amended to require policy makers to "*actively consider the potential role for market-based approaches and, where this is a feasible option, provide an analysis in the resulting business impact assessments or regulatory impact statements.*"[11]

EDO recognises that in some circumstances, market-based mechanisms can be an effective and efficient regulatory tool. However, EDO is concerned that policymakers too often turn to market-based mechanisms without appreciating their weaknesses. This is particularly so in the environmental regulatory space.

Although market-based mechanisms are usually the most efficient way to achieve a regulatory goal, they are not always the most *effective* way to do so.[12] This is particularly so where the policy goal requires an uncompromising approach or an urgent change in behaviour, rather than a gradual price-driven change over time.[13]

Market-based mechanisms usually require a fungible commodity, which is not always suited to the complex environmental resources to which they are applied.[14] This criticism has been made of biodiversity trading schemes in several Australian jurisdictions (including Victoria) to date.

Further, as Gary Banks of the Productivity Commission has recognised, market mechanisms can become overly complex and impose excessive transaction costs.[15] This is a seemingly unavoidable consequence of the considerable complexity inherent in designing an artificial market for an artificial commodity. Finally, market mechanisms can operate regressively, imposing harsher penalties on low-income groups.[16]

EDO therefore recommends that draft recommendation 3.2 be altered, to encourage policymakers to consider *all* available regulatory options. This would include market-based mechanisms which sometimes have a role to play, but would also recognise the considerable benefits of traditional mandatory regulation.

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[11] Draft Report Part 1, draft recommendation 3.2.

[12] See Rosemary Lyster, "The Australian Carbon Pollution Reduction Scheme: What Role for Complementary Emissions Reduction Regulatory Measures?" (2008) 31 *UNSWLJ* 880

[13] Prest J, "A Dangerous Obsession with Least Cost?" in Gumley W and Daya-Winterbottom T (eds), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (Lawbook Co, 2009) p 179; Weston D, "Carbon Trading: Much Ado About Nothing" (2009) 99 *Arena* 19; Kirk J, "Emissions Trading in California" (2008) 26(4) VELJ 547 at 557-564; Profeta T and Daniels B, *Design Principles of a Cap and Trade Scheme for Greenhouse Gases* (Duke University, 2005) p 2; Michael Power, 'Emissions Trading in Australia: Markets, Law and Justice under the CPRS' (2010) 27 *Environment and Planning Law Journal* 131, 136.

[14] James Salzmann and J B Ruhl, 'Currencies and the Commodification of Evironmental Law' (2000) 53(3) *Stanford Law Review* 607.

[15] Gary Banks, *Promoting Better Environmental Outcomes Roundtable Discussion* (2008) Chapter 1, available at http://www.pc.gov.au/__data/assets/pdf_file/0004/86737/02-chapter1.pdf, pp 5-6.

[16] Rosemary Lyster , "(De)regulating the Rural Environment" (2002) 19(1) EPLJ 34; Australian Conservation Foundation (ACF), Australian Council of Social Services and Choice, *Energy and Equity: Preparing Households for Climate Change: Efficiency, Equity, Immediacy* (ACF, ACOSS, Choice, 2008) pp 5, 9; Ross Garnaut, *The Garnaut Climate Change Review* (Cambridge University Press, 2008) pp 387-390.

5 OVERLAPPING REGULATION

In response to the Information Request on page 123 for "*examples where general and specific regulations overlap and contain similar provisions designed to address the same problem*", EDO reiterates the comments about environmental impact assessment in Victoria made in our earlier submission (page 5).

6 ENFORCEMENT

EDO welcomes the draft Report's recognition of the importance of effective enforcement, and the challenges faced by regulators with insufficient time and resources. We support the recommendation that various regulators collaborate with each other to improve their enforcement capacity.

However, EDO has some concerns about the draft Report's suggestion that regulators should be more flexible and build more 'collaborative relationships' with those they regulate.[17] The failure of the EPA to investigate and prevent the gas leaks at the Stevensons Road landfill in Cranbourne, as exposed by the Ombudsman in 2009, is just one instance of such 'collaborative' relationships proving problematic. More recently, the Report of the Commission of Inquiry into the Montara oil spill found that the relevant regulator – the Director of Energy of the Northern Territory Department of Resources – had become far too close to the industries it regulated, and lacked the resources or the will to enforce offshore petroleum safety and environmental standards.[18]

Having regulators who are in touch with the industry they regulate is a positive thing, but sometimes it is better for regulators to inflexibly and strictly apply the regulations they enforce. A strict and inflexible enforcement policy can provide more certainty to business, as well as improving regulatory outcomes (in the two examples provided, human health and environment protection).

A useful example of the drawbacks of 'collaborative' enforcement is in the findings of the EPA *Compliance and Enforcement Review* prepared by Stan Krpac. The Review found that EPA's focus on 'client relationships', corporate 'partners' and compliance 'services' with respect to regulated businesses entrenched a perception that the EPA was more focussed on business than the community.[19] The Review found that the EPA's focus on working with regulated entities to take them 'beyond compliance' was a good idea in principle, but that the consequent focus on 'client services' sent a message to the regulated community that the regulator was less willing to enforce the law.[20] This contributed to what the Ombudsman, the Auditor-General and the Krpac Review found to be "a *genuine concern that EPA had been too close to industry and was not effectively or independently discharging its statutory duties*", and "*a neglect of its role as a regulator and its responsibility for enforcement of the law.*"[21]

7 REGULATORY BURDEN REDUCTION TARGETS

The EDO is not opposed in principle to the Victorian Government setting an annual target for reducing the regulatory burden (draft recommendation 7.1). However, EDO is concerned about the risks that the inflexible administration of such a target might impose.

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[17] Draft Report Part 1, pp 127-9.

[18] Montara Commission of Inquiry, *Report of the Montara Commission of Inquiry* (2010) (**Inquiry Report**) pp 213-7.

[19] S Krpac, *Compliance and Enforcement Review* (2011) 14-17.

[20] S Krpac, *Compliance and Enforcement Review* (2011) 14-17.

[21] S Krpac, *Compliance and Enforcement Review* (2011) vi.

The requirement that new regulation be offset by reductions in the costs of regulation in similar or related areas is particularly concerning. If this aspect of the target is pursued single-mindedly or dogmatically, there is a risk that the Government will be dissuaded from introducing positive and much-needed regulation, for fear of failing to meet this target. EDO acknowledges that draft recommendation 7.1 contains a facility for Cabinet to grant exemptions from this requirement, but considers that the incentives for Government to neglect its regulatory responsibilities are still too high. There is also a risk that the target for reducing the *costs* of regulation will be construed or applied by Government as a target for reducing the *amount* of regulation. That would be a grave mistake.

EDO therefore recommends that this draft recommendation be amended to:

- remove the requirement that the costs of new regulation be offset by reductions in the costs of regulation elsewhere (whilst maintaining a net reduction in costs as an overall goal);
- stress that this target should not be used as an excuse for Government to avoid its regulatory responsibilities, and explicitly state that there are some policy priorities that are more important than reducing red tape and regulatory costs;
- stress that increases or reductions in the *cost* of regulation do not equate to changes in the *amount* of regulation, and Government should not be dissuaded from introducing cost-effective regulation where there is a genuine need for it; and
- stress that only *unnecessary* costs should be reduced.