australian network of environmental defender's offices

Submission to the Inquiry into the impacts of native vegetation & biodiversity regulations

July 2003

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Submission on the impacts of native vegetation and biodiversity regulations

Productivity Commission

The EDO will confine this submission to two of the terms of reference only.

TERMS OF REFERENCE:

INQUIRY INTO THE IMPACTS OF NATIVE VEGETATION AND BIODIVERSITY REGULATIONS

PRODUCTIVITY COMMISSION ACT 1998

I, IAN CAMPBELL, Parliamentary Secretary to the Treasurer, pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998*, hereby refer the following to the Commission for inquiry and report within twelve months of receipt of this reference.

Background

2. Regulatory regimes in a number of States and Territories, along with the *Environment Protection and Biodiversity Conservation Act 1999,* form part of an important transition to more sustainable management of Australia's native vegetation and biodiversity. The introduction of these regimes, particularly within the past five years, has raised concerns over possible negative impacts on farming practices, productivity, property values and returns and the investment behaviour of affected landholders. These concerns appear to have been exacerbated, in part, by a lack of information and awareness about the implications of the new regimes.

Scope of the Inquiry

3. The Commission is to report on:

(a) …

(b) …

(c) …

(d) …

(e) …

(f) the degree of transparency and extent of community consultation when developing and implementing the above regimes; and

(g) recommendations (of a regulatory or non-regulatory nature) that governments could consider to minimise the adverse impacts of the above regimes, while achieving the desired environmental outcomes, including measures to clarify the responsibilities and rights of resource users.

4. In assessing the matters in (3), the Commission is to have regard to the legislative and regulatory regimes, and associated implementation measures, in all States, Territories and the Commonwealth whose primary purpose includes the regulation of native vegetation clearance and/or the conservation of biodiversity.

5. In undertaking the inquiry, the Commission is to advertise nationally inviting submissions, hold public hearings, consult with relevant Commonwealth, State and Territory agencies, local government, and other key interest groups and affected parties, and produce a report.

6. The Commonwealth Government will consider the Commission's recommendations, and the Government's response will be announced as soon as possible after the receipt of the Commission's report.

IAN CAMPBELL
14 April 2003

Executive Summary

3(f) "the degree of transparency and extent of community consultation when developing and implementing the above regimes"

This submission argues that having public participation and transparency requirements built into decision-making processes results in better decisions being made, and this is increasingly recognised in environmental law in Australia. The principles of public participation and transparency have generally been incorporated into the relevant legislative frameworks covering native vegetation and biodiversity, with the regimes providing opportunities for both formal and informal public participation. However, the EDO argues that best practice standards have not yet been achieved or implemented across all Australian jurisdictions.

This submission examines the Commonwealth public participation and transparency provisions in the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), and some relevant provisions from the State regimes. With regard to the Commonwealth regime it is concluded that:

- there was sufficient consultation with stakeholders in the lead up to the Act's introduction;
- there has been extensive landholder engagement during the regimes existence;
- the Act contains a number of important improvements vis-à-vis the Act's predecessor, the *Environment Protection (Impact of Proposals) Act1974 (Cth) (EPIP Act)*, including opportunities for formal and informal public participation;
- the Act provides satisfactory provisions requiring transparency in the decision making processes of the Act; and
- notwithstanding these positives, that a number of improvements could be made to the regime with respect to public participation and transparency.

With respect to the state-based regimes, it is argued that participation is generally encouraged. To that end, public participation is allowed at the policy formulation stage, right through to the stage at which, for example, individual applications for clearance are considered. The submission then goes on to examine the participatory access enabled

through the regional vegetation management planning regimes across South Australia, NSW, Queensland and Victoria. From this analysis it is submitted that there exists much inconsistency between the regimes in the type, quality and meaningfulness of the participation and transparency inscribed in these regimes, and that the states have further work to do in achieving best practice standards.

3(g) "recommendations (of a regulatory or non-regulatory nature) that governments could consider to minimise the adverse impacts of the above regimes, while achieving the desired environmental outcomes, including measures to clarify the responsibilities and rights of resource users".

The EDO recommends that a shift of focus is required. Given the extent of resource problems facing Australia currently, the key issue must be achieving the best sustainable environmental outcomes, rather than the financial bottom line of farm businesses. The starting point for this inquiry should not be to what extent have the native vegetation and biodiversity regimes affected the financial bottom line. Rather, the recommendations of the inquiry should be based on the assumption that the current management of native vegetation and biodiversity is unsustainable, and that a new policy mix needs to be developed to effectively remedy this.

In response to 3(g) the submission is divided into four parts:

- Improving the current framework;
- Clarifying rights and responsibilities;
- Cost sharing; and
- Other approaches.

The EDO suggests a number of legislative changes that could be implemented to improve the design of the current legislative framework. It is recommended that specific and binding environmental standards be developed and implemented. Furthermore, it is argued that the statistical and economic verification of the impacts on farmers of native vegetation and biodiversity regulation needs to proceed carefully, and that a more thorough and balanced analysis needs to be conducted on the effects of the regimes than has historically been the case. It is argued that landholder property rights need to be weighed up against the broader community right to a healthy environment, and that it is only through this process that the property rights of landholders can be equitably considered and strengthened where appropriate. Finally, it is suggested that there needs to be an improvement in communication on all sides, that complex structures be reduced, and that farmers be empowered with the science and funding necessary for on ground conservation.

Part 2.2 is a legal analysis of claims for compensation.

Part 2.3 looks at the clarification of rights and responsibilities of landholders, including an analysis the catchment care and duty of care concepts.

Part 2.4 looks at other avenues for cost sharing in the transition from outdated regimes to the more relevant natural resource management laws and policy required today. It is

submitted that a number of forward-looking structural adjustment and cost sharing approaches could be introduced.

Part 2.5 suggests a number of other approaches that could be used in providing a policy mix that equitably achieves sustainable outcomes for the management of native vegetation and biodiversity. These include: better use of mapping, further use of property and conservation agreements, insurance and liability incentives, as well as further taxation measures. Finally, it is submitted that a cautious approach needs to be exercised with respect to transferable rights and the creation of markets, given the risk of entrenching present market distortions and perverse outcomes.

1. 3(f). "The degree of transparency and extent of community consultation when developing and implementing the above regimes"

1.1 Introduction

Over the past 20 years there has been a proliferation of environmental laws incorporating the idea of public participation at both Commonwealth and State levels. These ideals have been incorporated into various legal regimes concerning native vegetation and biodiversity.

Public participation has two main benefits. First, it results in better quality decisions being made and opens the way for fairness and transparency in decision-making processes. In particular, community input improves the information base upon which decisions rest, since public participation involves input from those living in the environment affected. Second, it reduces community suspicion and diffuses hostility to decisions otherwise made without community consultation. As Bates notes, "[I]f governments have learned anything over the years, it is that allowing the public to participate in policy making before decisions are taken can save a lot of political anguish later on".[1] As a result of these twin benefits, public participation is likely to be more resource efficient to involve the public at the outset, rather than reacting to public concerns after the legislation has been passed.

Against this backdrop, a number of state and Commonwealth provisions contain opportunities for both formal and informal public participation. In the legal regimes governing native vegetation and biodiversity. These provisions are an improvement on past regimes, and impose a number of new privileges for landholders and other interested parties.

Notwithstanding this largely positive shift that has taken place in Australian environmental law, much more could be achieved. The EDO submits that there are best practice standards which Governments should be working towards. In striving for these benchmarks it is important to remember that an appropriate balance needs to be struck between 'bottom up' and 'top down' approaches.

The following analysis of the transparency and public participation provisions is divided into:

- Commonwealth laws (in particular, the *EPBC Act*); and
- State laws (in particular, the regimes in place in NSW, Queensland, South Australia and Victoria).

Given the high correlation between native vegetation clearance and biodiversity loss, the provisions relating to native vegetation will be concentrated on.

[1] Bates. G, "Managing Australia's Environment", (Chatswood: LexisNexis Butterworths, 2002) p. 272.

1.2 Commonwealth laws

The *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act)* is the major Commonwealth Act dealing with the environment and, by extension, native vegetation and biodiversity. It contains a broad range of public participation mechanisms.

The *EPBC Act* provides for much greater transparency than its predecessor, the *Environment Protection (Impact of Proposals) Act 1974 (Cth).* Consistent with the trends towards increasing public participation and ensuring transparent decision making processes, extensive public consultation was given in the lead up to the Acts introduction. The Act seemingly acknowledges the importance of public participation, and allows formal and informal participation at the referral and assessment stages of the process for both landholders and other interested parties. [2]

The need for public participation throughout the development process is highlighted by the fact that Governments of all types have often been reluctant to enforce their own legislation. Recent practice bears this out. In the first two years of operation, the Commonwealth has also only recently brought its first enforcement proceedings under the *EPBC Act* , whilst the Queensland EDO has brought two sets of proceedings on behalf of both a concerned individual and a conservation group.[3] Only three other actions have been commenced under the *EPBC Act* in the three years following the Act's introduction.[4]

The EDO and conservation groups have long been active in lobbying for comprehensive public participation provisions to be adopted into environmental legislation. These provisions must not be retreated from. At the same time, consideration needs to be given to using such public participation effectively. More specifically, there is a need to actively ensure proper public participation in environmental decision-making beyond simply meeting the formal requirements of the legislation. Such an approach recognises the complexities of public participation in an increasingly technical, difficult and time-consuming operating environment. Recent practice has demonstrated that mechanisms for public participation need to be managed to ensure the best possible environmental outcomes.

1.2.1. Listings

The Act contains provisions for people to recommend and nominate threatened species, ecological communities and critical habitats for listing. The EA website also contains a list of threatened species and ecological communities.

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[2] For an analysis of the specific public participation provisions at these stages see: EDO, "Planting the Seed: Public Participation and the Environment protection and Biodiversity Conservation Act". Se also, WWF and HSI "Public Participation under the EPBC Act (Canberra: WWF, September 2000) at <www.wwf.org.au/content/fact_sheets.htm>

[3] *Booth v Bosworth* [2001] FCA 1453 (17 October 2001) and *Humane Society International Inc v Minister for the Environment & Heritage* [2003] FCA 64 (12 February 2003).

[4] For a fuller analysis, see below under question 6.

In deciding whether or not to list, the Minister must only have regard to matters that relate to the survival of the relevant species or ecological community.

Notwithstanding this, Minister Kemp introduced a public consultation procedure for all proposed listings. Indeed, the public now has the opportunity to make submissions on whether the species or ecological community satisfies the listing criteria and the likely social and economic impacts if the threatened species or ecological community is listed.

These procedures have resulted from the lobbying of the agricultural sector. Indeed, the past three years have seen increased opposition from agricultural lobby groups to the *EPBC Act*. Amongst other things, this stems from a decision made by the previous environment Minister Robert Hill, to list Bluegrass dominant grasslands of the Brigalow belt as endangered ecological communities.

It is submitted that consultation at the point of listing is inappropriate and potentially in breach of the Minister's statutory duties contained in the Act.

1.2.2 Assessment and Approvals

At the referral stage, public comments are invited on referrals and assessment documentation. The Minister is required to publish the referral on the EA website and invite the public to give comments as to whether the action is a controlled action within ten business days. Further, the Minister must give notice and reasons for the decision if requested by any person who has the right to bring an action, with this decision also being displayed on EA's website.

In addition to this public consultation, Environment Australia (EA) has released guidelines relating to the impacts of listing a number of species and ecological communities on relevant stakeholders. Importantly, these guidelines were developed in consultation with a number of rural stakeholders in helping them to adjust to the *EPBC Act* requirements. Finally, a NFF *EPBC Act* project has been launched by the Commonwealth to provide information to rural landholders and other regional stakeholders about the Act, with a full time EA staff member being dedicated to the project.

At the assessment stage, apart from assessment by accreditation or assessment through bilateral agreement, the different types of assessment all provide a degree of participatory rights for members of the public. In particular the assessments provide for:

- the public to have access to information about the proposed action;
- the opportunity to comment on the proposed action; and
- public comments to be attached or incorporated in the final report to the Minister.

1.2.3 Enforcement and Access to Justice

The Act provides that 'interested persons' can apply for Federal Court injunctions and judicial review. This stands in contrast to the narrow test under the EPIP Act which used the more narrow 'aggrieved persons' test as a criterion for standing.

This increased scope for public litigation has started to gain momentum with four cases having been brought under the *EPBC Act* during the first three years of its operation (with varying degrees of success).[5] From these cases, the Act can be observed to have generally increased the opportunities for public legal action. In short, the Act assists public litigants in overcoming many of the procedural common law hurdles public litigants historically faced in seeking to enforce environmental regulation, such as the standing requirements, and undertakings as to damages. In particular, s 475 allows 'interested persons' to apply to the Federal Court for an injunction to enforce the Act. As indicated by the *Schneiders* case[6], standing was not even an issue at trial and therefore this would indicate that standing for public interest litigants seems to be becoming increasingly accepted in environmental litigation. Given that only 4 actions have been commenced in the three years, and the lack of enforcement by EA, it is possible that opening the standing requirements may allow for more effective enforcement of the legislation.

The EDO submits that the Act should be amended to allow for open standing. It has been the experience in other jurisdictions (such as NSW) that allowing open standing does not "open the floodgates" to large numbers of litigants with spurious claims. Procedural checks and balances exist, combined with the disincentives of time and financial commitment, to deter frivolous litigants.

Furthermore, it seems that another challenge now facing public interest litigants is demonstrating to the Courts the sufficient factual basis for the grant of the injunction. Various procedural difficulties continue to stymie the success of public interest litigation in applications for injunctive relief, as the *Schneiders* case demonstrates.

With respect to the issue of costs, the Court has been given broad powers in this area. Although the general rule is that costs follow the event, and although security for costs can be required at the beginning of proceedings, the Court may depart from this rule in

[5] The first case *Carol Jeanette Booth v Rohan Brien Bosworth [2000] FCA 1878* was brought in December 2000 and related to an injunction being sought to restrain the electrocution of large numbers of spectacled flying foxes, which roosted in the wet tropics World heritage Area adjacent from the respondents farm. Although an injunction was not granted, the case showed the benefits of the new standing provisions, and is significant for its consideration of the fact that actions outside World Heritage Areas can have significant affects on World Heritage values. The second case, *Schneiders v State of Queensland* [2001] FCA 553, also related to an injunction, although this time for the restraint of a dingo cull on the Fraser Island World Heritage Area. While standing was not challenged, the success of the application for the injunction was stymied by various other procedural difficulties, such as the fact that the State government had already retained the relevant experts, and secondly, the fact that most of the cull had been completed. The third case, *Humane Society International Inc. v Commonwealth Minister for the Environment and Heritage [2003] FCA 64,* also had a varying degree of success, in that although it was found that the Commonwealth's guidelines made under the *EPBC Act* purported to give exemptions to the Act not authorised by law, Her Honour found that the Minister had not refused to undertake his duty to consider referrals properly, and that the guidelines were not reviewable by administrative law. The most recent case, *Mees v Roads Corporation [2003] FCA 410,* involved a similar pattern of success: while His Honour found that the referral to construct the northern section of the Scoresby Freeway (Victoria) was misleading, an injunction was not issued since it was held that an injunction can only be issued under the Act to stop the commission of an offence. This evidentiary difficulty of showing recklessness or negligence in the creation of the referral was underscored by the respondents crown immunity.

[6] *Schneiders v State of Queensland* [2001] FCA 553.

exceptional circumstances such as where a matter is brought in the public interest.[7] Also significant is that the applicants for an injunction are not required to give an undertaking as to damages as a condition of granting an interim injunction.[8]

1.2.4 Informal Opportunities

The *EPBC Act* also contains a number of informal opportunities for public participation. In particular, although members of the public cannot formally refer a project, members of the public can report activities that may require referral and approval to EA under the regime. Moreover, the public can write to the Minister to obtain reasons for decisions. One such example relates to a letter written to Senator Hill regarding proposed sand extraction near Moreton Bay Queensland, and the potential impact the project posed to the Moreton Bay Ramsar listed wetland, listed migratory species and threatened species. Subsequently, EA wrote to the proponent suggesting referral, which was followed, leading to the action being declared a controlled action.[9] In addition, the listing of referrals and notices of proposals going through the referral and assessment process, combined with the invitations for public comment on EA's website, show a commitment to the importance of public participation.

In addition to these processes, it is possible for people to recommend and nominate threatened species, ecological communities and critical habitats for listing. The EA website also contains a list of threatened species and ecological communities. The Act also requires the Minister to maintain a public register for critical habitat, which is also found on EA's website.

1.2.5 Opportunities for Improvement

It is submitted that there are a number of further improvements that could be made to the *EPBC Act* to facilitate public participation and improve the quality of decision making. Firstly, although the Act creates important opportunities for public comments on referrals, the EDO submits that the choice of assessment could be opened up to public comment. Public participation can sometimes devalued and undermined by broad Ministerial discretion, given that the degree of transparency and opportunities available for public participation vary widely according to the type of assessment chosen.

Moreover, given that so many controlled actions are being assessed by preliminary documentation, and that only 6 public assessments (with their more rigorous mechanisms for transparency), have occurred under the *EPBC Act*, a strong argument can be made out for opening the choice of assessment up to public scrutiny. To that end, much more needs to be done than merely listing on the website the types of assessments being conducted. Although EA has noted that assessments by bilateral agreement need to be notified on the website alongside the assessments being conducted by EA,[10] the EDO submits that the type of assessment chosen needs to be opened up to public comment.

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[7] *Oshlack v Richmond River Council* [1998] HCA 11

[8] s. 478.

[9] See Environment Australia (EA) reference No. 2001/329.This took place on the 27 July 2001.

[10] Australian National Audit Office (ANAO) "Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999", Audit Report No. 38 2002-03, at para 3.27.

Second, as the recent Australia National Audit Office (ANAO) report indicates,[11] the EPBC database of statistics on EA's website needs to be kept up to date. The report states that there have been occasions where the timeliness of statistics has been hampered by user error in updating the database when milestones are achieved, which in turn have the capacity to distort the statistics reported.[12]

Third, although the ANAO report found that decision making process were overall "satisfactory",[13] a number of improvements could be made. In particular, the ambiguity surrounding the interpretation of the word "significance", and therefore the uncertainty in determining whether or not an action triggers the Act, needs to be overcome. The EDO suggests that a more transparent way would be for the guidelines to be given legal force by transferring them into regulation. Additionally, the word "significance" could be defined more specifically. A further improvement that could be made to the decision making process is by providing a more detailed explanation of the reason for decisions on whether to designate an action a controlled action or not. As the ANAO notes, "greater attention to reasons for decision in all cases would engender greater confidence in a system of open and transparent decision-making, as part of a sound framework of public accountability".[14]

Fourth, despite the extensive use of the internet by EA in opening the *EPBC Act* processes to the public, unfortunately the opportunities for public participation are yet to be fully realised. This is indicated by the low level of public comments on referrals in the three years following the Acts introduction. Reasons for this may relate to factors such as:

1. insufficient time and resources to respond given that there are only 10 days for the public to comment on whether the project is likely to have a significant impact on a matter of national environmental significance;
2. lack of internet access especially for people in rural areas;
3. lack of awareness since referrals are only advertised on the EA website.

To that end, it is suggested that a long time frame for assessment, in conjunction with more extensive advertising requirements, would be beneficial. Complementing this, EA should be playing a more educative role to the community in outlining the opportunities for public participation. Within only three years there have already been a number of cases highlighting the importance of this opportunity for public comment. In particular, the Conservation Council of South Australia's (CCSA) comments on a proposed magnesium smelter in South Australia is an important example, as the referral by the proponent stated that there had been no internationally protected species detected in the vicinity of the site.[15] This was contradicted by CCSA, with their comment listing six listed migratory species, which could have been impacted on by the development. Subsequently, the proposal was held to be a controlled action due to the potential significant impact on listed migratory species.

1.3. State laws

[11] Australian National Audit Office (ANAO) "Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999", Audit Report No. 38 2002-03.
[12] Ibid., at para 4.22 and 4.24.
[13] Ibid., at para 23.
[14] Ibid., at para 2.57.
[15] See EA reference No. 2000/29.

Most legislation regulating native vegetation (and natural resource management more generally) occurs at the state level,[16] and public participation can occur at many stages during the process of planning for the management of biodiversity and native vegetation. Participatory access exists for both landholders and members of the general public. With respect to landholders, administrative law affords applicants for licence or permit approval the opportunity to put their case and to have it carefully considered by the decision-maker.

However, participatory provisions also extend much further. It seems well accepted in most jurisdictions that where guidelines, plans, or policies are introduced, the public is entitled to make submissions on those documents. Further, public access is also accepted to the final plans and policies. Generally, participation is allowed at various stages ranging from policy formulation, right through to the stage at which individual applications for clearance are considered, which may involve the following:

- the right to access information about applications to clear;
- the right to make representations or submissions on applications; and
- the right to appeal decisions on the merits.

A plethora of laws exist throughout the states and territories affecting biodiversity. These may include laws relating to national parks, environmental impact assessment, fisheries, and threatened species. The law relating to biodiversity has as its purpose the conservation of genetic variety within and among species, although much of the above laws serve this purpose incidentally. As with native vegetation conservation, opportunities are increasingly being given to the community to participate in the protection of biodiversity. For example, many states allow a process for the public in the nomination of threatened species and of threatening processes, although for various states this is an informal process. In some circumstances, private prosecutions may even be undertaken, although traditionally these have proved difficult outside NSW with its more generous procedural laws.

Perhaps the biggest state based process used for the protection of biodiversity and native vegetation relates to the Regional Vegetation Management planning process, which now falls to be considered.

1.3.1 Regional Vegetation Management Plans

One of the largest areas existing for participatory access relates to regional vegetation management planning.[17] NSW, Queensland, South Australia and Victoria all provide a process whereby regional vegetation management plans (RVMPs) can be created, although NSW and Victoria leave their creation to the discretion of the relevant parties. Where they are created, all states provide minimum content standards and consent requirements, although within NSW the minimum content is fairly broadly specified.

[16] The analysis here is limited to NSW, Queensland, South Australia and Victoria.

[17] It should be noted that under the propose Wentworth Group Model for Landscape Conservation, vegetation planning would be reformed. See pp 6-7 of the Wentworth Group of Concerned Scientists Report to Premier Carr, "A new Model For Landscape Conservation in New South Wales", February 2003, <[http://www.clw.csiro.au/publications/consultancy/2003/Wentworth2_NSW_Land_Clearing_Report_Public_Document.pdf>

As the name indicates, the process generally occurs at the regional scale, providing a bottom up rather than top down approach. Across the states, the region to which these plans apply is the Catchment area in Victoria, and within NSW must be at least the size of one local government area, while Queensland has left the definition of region unclear. In NSW, this type of planning occurs at the regional level through a Regional Vegetation Committee or the Director General of the Department of Infrastructure, Planning and Natural Resources with the resulting draft plan being then required to be approved by the Minister who is able to 'make such alterations as the Minister thinks fit'. Similarly, Victoria requires Catchment Management Authorities to produce RVMPs under their catchment strategies. In Queensland, RVMPs are mandatory although no time limits have been imposed on their development, with the Minister being responsible for their preparation. Where such plans are absent in Queensland, a state policy for vegetation management applies. However, Broadscale Tree Clearing Policy's (BTCPs)[18] and Local Tree Clearing Guidelines (LTCGs)[19] are discretionary.

The various legislation covering RVMPs also allows opportunities for public comment on these plans. In NSW extensive consultation and notification provisions apply, and there must be public exhibition of the draft plan. Additionally, the *Native Vegetation Conservation Act 1997* (NSW) (NVC Act) allows people to make submissions on draft RVMPs. In Queensland, public submissions must be invited on draft RVMPs and landholders must be informed of their right to make submissions in relation to the draft RVMP. However, whilst there is a requirement that public submissions be sought and considered in relation to LTCGs, there is no provision for public participation in relation to the development of the BTCP. Within Victoria, the Catchment Management Authority must consult with the Minister, relevant public authorities and landholders.

Across-government consultation has also become commonplace amongst the different states. For example, within NSW the initiator of the plan is required to consult with the Director General of NPWS prior to the preparation of the draft RVMP. In addition to the general public notification, specified bodies are required to be directly notified and given the opportunity to make submissions. Finally, the Minister is required to consult with the Minister for the Environment, and where the Minister of the Environment makes recommendations that are not followed, these must be reported upon. In Queensland, under the *Vegetation Management Act (1999) (Qld)* (*VM Act)*, the Minister is required to consult with the relevant vegetation management committee as well as the local government whose area is affected by the plan. There is no concurrence or consultation role with respect to the development of LTCGs.

Despite the resources that go in to the development of RVMPs, only in NSW are they enforceable, and only NSW allows actions for third parties to restrain breaches. Despite the success of open standing in NSW, Queensland and Victoria continue to maintain formal common law standing requirements. In NSW, RVMPs are considered to be an environmental planning instrument as per Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) which opens them up for challenge. Any person is able to bring proceedings for a court order to remedy or restrain a breach of the Act, including a RVMP,[20] a native vegetation code of practice, or a development consent or order under the Act. In

[18] These are approved by the Governor in Council.
[19] The Minister is responsible for their approval.
[20] It should be noted, however, that not necessarily all the provisions of the RVMP will be enforceable.

Queensland under both the *Land Act (1994)* (Qld) and *VM Act*, BTCPs, LTCGs and RVMPs are considered to be 'not subordinate legislation' and hence are unenforceable. Similarly, in Victoria, RVMPs are considered to be mere policy documents.

Although Queensland and Victoria restrain third parties from bring an action against breaches of RVMPs and similar documents, judicial review is available where the correct process has not been followed in all jurisdictions.

A final aspect within the various Acts showing transparency and a commitment to public participation relates to the process for evaluation of RVMPs. Within NSW, RVMPs as well as the *NVC Act* has a review requirement. The *NVC Act* is required to be reviewed after 5 years from commencement to assess whether it is meeting its objectives,[21] while RVMPs are monitored and reviewed by the regional vegetation Committees. With respect to Victoria, the *Conservation and Land Management Act* 1984 (Qld) is required to provide a review of the strategy. In Queensland, there are no review requirements in both the *VM Act*, and the *Land Act*.

[21] See s. 71.

2. 3(g) Recommendations (of a regulatory or non-regulatory nature) that governments could consider to minimise the adverse impacts of the above regimes, while achieving the desired environmental outcomes, including measures to clarify the responsibilities and rights of resource users.

2.1 Improving the Current Framework

2.1.1 Assessing the Current Legal Framework

Whilst it is possible to suggest a range of mechanisms that can minimise the adverse affects on farmers from the native vegetation and biodiversity regimes, it is submitted that - consistent with the term of reference - these mechanisms must be developed in accordance with, the principles of sustainability. The essential issue is what state of the environment is desirable and sustainable, and secondarily, how a policy mix can be blended to achieve that state. This need is particularly acute in an era where high vegetation loss in Australia has been a crucial factor in salinity, soil erosion, waterway degradation, greenhouse emissions, and the decline and loss of biodiversity.

Farm businesses are not the only businesses that have costs imposed on their operations. Clearly, all kinds of costs are borne by businesses. For example, urban small businesses have to pay people according to wage labour standards and provide a safe working environment according to occupational health and safety standards. The trucking industry has also been heavily regulated to allow for both the health and safety of drivers and the safety of public users of roads. Urban premises – both commercial and residential – are subject to increasingly stringent controls over the use and conditions to which their land can be put. In short, regulation is a fact of life.

Thus, the starting point should not be to what extent the native vegetation and biodiversity regimes have affected the financial bottom line, as indirect and direct costs are inevitable for businesses and communities functioning in the current Australian market. Correspondingly, a policy mix is needed based on the premise that unsustainable practices need to stop. At present, this requires some major changes to farm practices. This submission supports an equity approach to this primary need. However, it is submitted that the likely costs in implementing new environmental standards are not as disproportionate as perceived by some stakeholders, and that a more balanced approach to cost sharing (than has been traditionally advocated by landholder groups) is necessary.

Accordingly, this submission holds that government regulation has far from overstepped the mark with respect to the level of regulation for native vegetation and biodiversity. Indeed, the current state of environmental degradation and deterioration, is a sign that the current legal and policy framework is significantly under-powered. Consequently, it is submitted that Government could more clearly define responsibilities and the imperative outcomes.

2.1.2 Improving the Design of the Current Framework

The recommendations suggested in this submission support the primary need to curb unsustainable practices. The EDO submits that improvements within Commonwealth legal framework should be made including the following list.[22]

1. Expand the ambit of the Act by expanding the definition of "action" and removing key exemptions that apply to, for example, Regional Forestry Agreements and bodies such as the Export Finance and Insurance Corporation.

2. Listings should be made according to advice received by the Scientific Committee (rather than at the discretion of the Minister), as in NSW.

3. Once an action has been triggered as a matter of National Environmental Significance, assessment should be in relation to all environmental aspects of the project, not just the trigger.

4. Provide an integrated approach to abiding environmental issues such as land clearing and greenhouse gas emissions through the use of existing mechanisms under the Act (such as where relevant, triggers, key threatening processes and threat abatement plans).

5. Provide an extra level of protection for native vegetation and biodiversity in areas designated as hotspots (for example, analogous protection to that afforded to critical habitat in NSW.

6. Provide a further level of protection (than currently provided) for native vegetation and biodiversity in areas designated as vulnerable communities (so as to avoid the triage approach of much threatened species legislation).

7. Allow any person to bring an application regarding civil enforcement or for judicial review.

8. Criminal proceedings should be an alternative to civil penalties, regarding those offences where only civil proceedings are currently prescribed.

9. Review and strengthen the guidelines for "significance", and elevate them into regulations so as to give them legal effect and efficacy.

10. To complement the legal framework, Commonwealth legal aid should be made available.

2.1.3 Resolving the Uncertainty of the Current Framework

(a) Statistical and economic analysis

Conclusions of existing studies on the impacts of native vegetation and biodiversity laws have been diverse. One way of creating more certainty for the farming community is by providing thorough and balanced economic analysis regarding the impacts of native vegetation and biodiversity regimes. However, in order for economic and statistical

[22] For further detail, also see ACF, "Controlling Land Clearing in Australia: A Framework for Federal leadership and Shared Responsibility", (Victoria: ACF, September 2001).

analysis to properly account for any disproportionate and negative impacts on farmers, it is submitted that a balanced and holistic analysis needs to be conducted which is accurately representative of the different types of farm operations.[23] Clearly, many of the benefits of native vegetation and biodiversity conservation have no market and, hence, no exact dollar value. Put another way, the value of biodiversity and native vegetation conservation is often assumed to be zero.

This type of market failure led an influential study by Sinden to conclude that native vegetation laws disproportionately impact farmers vis-à-vis the urban community.[24] Indeed, his study has been used by some stakeholders as 'proof' that landholders shoulder a disproportionate share of the costs in implementing these environmental regulations, while the urban communities benefit from farm production. Unfortunately, not only have other surveys been omitted from this debate which report different conclusions,[25] but a number of methodological flaws have subsequently been observed in Sinden's paper.

In order for the pitfalls of studies like Sinden's to be avoided, there are a number of principles that should be adopted. These include:[26]

- A random sample method should be used in finding respondents to surveys, so as to eliminate survey bias;
- A process should be developed to more fully determine costs and benefits of environmental regulations. To that end, proper calculation of the private benefits of land clearance with the private costs needs to be included in these studies;
- Average years, rather than good years, should be used to demonstrate equity and income losses. This stems from the fact that using a good year ignores the variability of risk throughout the agricultural categories;
- In determining the relative costs of farm and urban households, a proper definition needs to be outlined of the basis for comparison between farm and urban households;
- Survey information needs to be "ground truthed" to see whether percentages accord with figures of the overall statistical area covered in the survey;
- Statistical studies need to be transparent in outlining the rationale for assumptions being made, and show sensitivity of results to these assumptions;
- Statistical information needs to be reported in a way that shows how particular regression pitfalls have been avoided. Alternatively, models should be chosen without those pitfalls;

[23] An example of a methodologically sound study has been produced by Hassall and Associates (2002), "Western Riverina Draft Regional Vegetation Management Plan: Socio-Economic Assessment", Final Report prepared for the Western Riverina Regional Vegetation Committee and the NSW Department of Land and Water Conservation.

[24] See Sinden. J.A, "Who pays to protect native vegetation?: Costs to farmers in Moree Plains Shire, New South Wales", paper presented to the 46th Annual Conference of the Australian Agricultural and Resource Economics Society, Canberra, 12-15/2/2002.

[25] See for example the reports by Hassall and Associates prepared on various Draft Regional Vegetation Management Plans, including the executive summary of the socio-economic Assessment of the Inverell Yallaroi RVMP, accessed at <http://www.dlwc.nsw.gov.au/care/veg/vegact/inverell_pdfs/socioeconomicsummary.pdf>

[26] See Moss. W, "Costs to Farmers of Protecting Native Vegetation in the Moree Plains: A Critique of Sinden, J.A (2002)" (Canberra: WWF, 2002).

- A balance of respondents should be reported in any surveys undertaken, including those who favour clearing and those who do not; and
- Finally, caution needs to be exercised when extrapolating conclusions from one study area to another area.

By following these suggestions, a more holistic analysis of the impacts on landholders could be achieved, thus generating more useful and accurate data for all stakeholders.[27] Before drawing conclusions that native vegetation and biodiversity laws impact landholders disproportionately, it is necessary to assess given the number of private benefits that retention of native vegetation has. These have been traditionally ignored, and if reviewed it is likely that the proportion of private benefits from native vegetation retention would outweigh the costs.

(b) Specific environmental standards

As part of the necessary refocus from the financial bottom line to sustainable environmental outcomes, specific standards need to be developed and implemented. The Wentworth Group of Concerned Scientists have recently been working on a new Model for Landscape Conservation, and have recommended four standards[28]. These relate directly and indirectly to native vegetation and biodiversity and have been confirmed as essential for environmental health. These standards are:

- Water quality – conserving and restoring riparian vegetation 50m to 100m either side of major rivers and wetlands; 20m to 50m either side of creeks and 10m to 20m either side of streams;
- Salinity – recharge areas and areas prone to rising water tables;
- Biodiversity – conservation and restoration of threatened ecological communities and the conservation and restoration of critical habitat of threatened species;
- Soil conservation – windbreaks and conserving vegetation on slopes.

The Wentworth Group also argues that Water Catchment Plans become the basic planning unit,[29] which would contain the standards and practical rules necessary for the landscapes of the particular catchment. In particular, areas of protected vegetation would be listed, and the plans would calculate the amount of vegetation cover required in order to meet the catchment care principle (discussed below). These catchment plans would be buttressed by scientific expertise, while being regionally based, with community support and local knowledge. The proposed Property Vegetation Plans (PVPs), would stipulate the way different zones of the property are to be managed.[30] To that end, they provide an adaptable provision for the differing needs of different environments, and should be supported.

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[27] Interestingly, Moss submits that it is likely that the revised mounts of Sinden's study would actually resemble a loss within the duty of care requirements of states like South Australia, and that the experience observed within South Australia has been one where the losses associated with native vegetation legislation are frequently within the expected 'duty of care' figure (Ibid., p. 7).

[28] Wentworth Group Model for Landscape Conservation, vegetation planning would be reformed. Report to Premier Carr, "A new Model For Landscape Conservation in New South Wales", February 2003, <[http://www.clw.csiro.au/publications/consultancy/2003/Wentworth2_NSW_Land_Clearing_Report_Public_Document.pdf>

[29] The Wentworth Group, op.cit., p. 8.

[30] See ibid., p. 10 for a description of the workings of PMPs.

These steps provide a practical way forward for developing specific environmental standards which are, adaptable to the specific needs of different landscapes. To that end, the approach provides certainty for farmers, and conservation for environmental health. Moreover, the group's approach strikes a pragmatic balance between the competing interests of landholders and conservationists. Whilst acknowledging the constitutional difficulties the Commonwealth would have in achieving such a uniform system, the Wentworth Group considers that within NSW the above mechanisms are absolutely essential for environmental health.

2.1.4 Administration – Reducing Inconsistency

In NSW, the Wentworth Group critiqued the way native vegetation clearance is managed in the state. In short, the group argues that too much money is caught up in government bureaucracies, and that too little money is granted to where it is really needed - on the ground. Consequently, a number of recommendations were made that were aimed at cutting through the government red tape, and for there to be delivery of resources and expertise to the farm. The tenor of this approach is supported by this submission with respect to the Commonwealth.

Stakeholder communication needs to be improved, complex regulatory structures need to be decreased, and farms need to be empowered with the science and funding necessary for on ground solutions. Finally, there needs to be further institutional restructure so that:

- administration is regionalised, since this is the scale that natural resources need to be managed;
- science is better diffused into policy;
- better information systems are provided, such as mapping, given the information shortage present in many parts of the country.

Through the above measures, decisions will be taken at the appropriate level and by the appropriate people. At present, however, different states have different administrative arrangements. This submission argues, that the environment would be much better served by reducing the inconsistency between the jurisdictions, and by streamlining the superstructures that exist over landholders.

2. 2 Legal Analysis Of Claims For Compensation

This section considers the legal basis for the claim that farmers both possess property rights in relation to their use of natural resources and that compensation should be paid should such rights be infringed.

2.2.1 What are Property Rights?

A property right arises where the community recognises a person's exclusive use and enjoyment of an entitlement, allowing that entitlement to be traded or passed to others.[31] The notion of property rights has changed over time, which reflects the fact that it is socially constructed.

Property rights arise through both the common law and legislation. Even where property rights arise through the common law, such rights are generally substantially modified by legislation, which may control the way in which rights are exercised.

2.2.2 Common Law Rights

(a) Land

Ownership of land in Australia at settlement originally depended upon the common law of England, which was introduced into the colony of New South Wales and invested the Crown with radical title to all land in the colony. Even today, at least formally, all land is held directly of the Crown (except native title rights and interests in land).[32]

The common law conception of land included all substances attached to the land, which would include native vegetation, and minerals (except royal minerals) underlying the surface of the land. Ownership was said to be of everything reaching up to the very heavens and down to the depths of the earth.[33]

The position of Crown ownership was altered where the Crown alienated land from itself creating an estate in fee simple, as freehold land. With the exception of any reservations concerning Crown rights to natural resources, [34] the freehold land owner was said to own all things growing on or affixed to the soil including buildings, trees, plants, crops (including cultivated and uncultivated growing crops) and minerals (except royal minerals). These things were treated as part of the land until severed.[35]

In relation to leasehold land, the right of property in native vegetation is ordinarily vested in the Crown. The lease operates as a personal right and whether the holder of leasehold land may take any action in relation to the vegetation on the land depends upon the terms of the lease. It is important to note that most land in Australia used for rural production is leasehold rather than freehold.

Nevertheless, even putting aside the title vested in the Crown, property rights at common law have never been absolute. The common law has long recognised that the basis of ownership to land is not absolute, but relative, titles.[36] This has found expression under

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[31] See, for example, Becker. L.C, "Property Rights: Philosophical Foundations" (London: Routledge and Kegan Paul, 1977).
[32] *Mabo v The State of Queensland* (1992) 175 CLR 1 at 80 per Deane and Gaudron JJ.
[33] *Bury v Pope* (1586) Cr Eliz 118; 78 ER 375.
[34] For example, the Crown may grant freehold title over land but retain rights to harvest timber.
[35] (*Re: Ainslie; Swinbourne v Ainslie* (1885) 30 Ch D 485; *Corporate Affairs Commission v Australian Softwood Forest* [1978] 1 NSWLR 150).
[36] *Asher v Whitlock (1865)* LR 1 QB 1, 5.

property law as the idea of a "bundle of rights" or "rights less than the rights of full beneficial, or absolute, ownership".[37]

2.2.3 Modification of Property Rights by Legislation

Regardless of this common law context, property rights in Australia have long been created and derived from extensive legislative regimes and are regulated under such legislation.

The issue of whether property rights adhere to entitlements conferred under legislation has been considered in a number of cases. The High Court has taken an expansive view of the definition of property in cases which considered section 51(xxxi) of the Constitution. In *Minister of State for the Army v Dalziel* (which concerned the Commonwealth taking possession of a vacant lot used as a commercial car park for an indefinite period of time), McTiernan said:

> The word "property" in s 51(xxxi) is a general term. It means any tangible or intangible thing which the law protects under the name of property.[38]

Furthermore, as Rich J stated:

> Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle.[39]

More recently, in *Mutual Pools & Staff Pty Ltd v Commonwealth* Deane and Gaudron JJ noted that:

> Once it is appreciated that "property" in s 51(xxxi) extends to all types of "innominate and anomalous interests" (*Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349), it is apparent that the meaning of the phrase "acquisition of property" is not to be confined by reference to traditional conveyancing principles and procedures.[40]

Rather, as noted in *Yanner v Eaton*,[41] property is best conceptualised as a description of a legal relationship with a thing or as constituting a relationship between a person and a subject-matter.

Not all entitlements created by legislation, however, will be considered to create property rights. In *Roy F Griffith v Civil Aviation Authority*[42], the Federal Court noted that two principles are relevant to the characterisation of an entitlement such as a licence as creating property rights. First, the context of the legislation, and second, whether the licence is freely assignable. Based on these principles, the courts have classified licences such as liquor

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[37] *Yanner v Eaton* [1999] HCA 53 at [30]. Although, as Poh-Ling Tan has noted, the Court in this case cast doubt on the usefulness of the bundle of rights analogy: see Tan. P-L, (2002) "Changing Concepts of Property in Surface Water Resources", a paper presented to the Nature Conservation Council Futurescapes Conference Sydney 2002.
[38] (1944) 68 CLR 261 at 295.
[39] Ibid at 285.
[40] (1994) 179 CLR 155 at 184-5.
[41] [1999] HCA 53 at [17-21].
[42] (1996) 41 ALR 50.

licences and taxi licences (which are freely assignable) as property, while commercial pilots licences (which are not assignable) are not property[43].

(a) Land

A permit or consent to clear land generally has the character of a property right. For example, they attach to and pass with the title to the land: see *Park Street Properties v City of South Melbourne*)[44]; *Health Insurance Commission v Peverill*[45]; and *Commonwealth v WMC Resources Pty Ltd.*[46]

For this reason, such permits fall within the terms of this expansive definition of property that extends to "every species of valuable right and interest including…choses in action".[47] In summary, it is generally true that where a permit or consent to clear has been granted, this can be said to be a proprietary right.[48]

2.2.4 Legal Analysis of When Compensation Must Be Paid?

The preceding section analysed the nature of property rights in natural resources and the circumstances in which such rights might arise. This section examines the interrelationship between property rights and compensation.[49]

a) The Commonwealth Constitutional position

Section 51(xxxi) of the Commonwealth Constitution gives the Commonwealth the power to acquire property from any State or person for any purpose for which Parliament has the power to make laws. Such acquisition must be on just terms. "Acquisition" has been found in two circumstances. First, where there has been a formal *acquisition* of some interest in the land. Second, where there has been an indirect (or de facto) acquisition – that is, where the land has been "sterilised". Mere regulation does not entitle a person to compensation.

b) The State Constitutional position

The Constitutions of NSW, Queensland and South Australia do not contain any provisions requiring compensation for acquisition of property or any lesser modification of any property right. Therefore, State legislation may modify the common law position without

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[43] See Poh-Ling Tan, "Water Licences and Property Rights: the Legal Principles for Compensation in Queensland" 16 *EPLJ* 284.

[44] [1990] VR 545 at 553 per the Full Court.

[45] (1994) 179 CLR 226 at 243 per Brennan J.

[46] [1998] HCA 8 at [9] per Brennan J.

[47] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290). An example of this is section 29(10) of the *Native Vegetation Act (SA)* in South Australia. It provides:

> "A consent under this Division is subject to such conditions (if any) as the Council thinks fit to impose, and any such conditions are binding on, and enforceable against, the person by whom the clearance is undertaken, all subsequent owners of the land and any other person who acquires the benefit of the consent".

[48] It is, of course, possible that a permit or consent may - under the general legislative scheme or specifically in its terms – be limited in such a way as to raise issues as to its proprietary nature.

[49] For further detail please refer to EDO Submission on Water Property Rights In Response to the Draft Report of the CEOs Group on Water of the Natural Resources Ministerial Council, February 2003; and Jeff Smith, "Property Rights and Compensation" 'I can see clearly now… land clearing and law reform' EDO Network Conference, 5 July 2002.

requiring the payment of compensation. Indeed, unless they have legislation in place to the contrary, States can acquire on any terms they choose, even though the terms are unjust.

It is noted that, in 1988, the Federal Labor Government sought to make acquisitions of property by State Governments' subject to a provision similar to the Commonwealth's obligations under s 51(xxxi). The proposed constitutional amendment was rejected by every State.

c) Compensation under legislation

A distinction has long been made, dating back to the Magna Carta, between compensation for acquisition of land and no compensation where mere restrictions were imposed. Legislation protecting amenity in the 12th Century imposed losses on landholders without compensation. For instance, the native vegetation legislative regimes in New South Wales, Queensland and South Australia do not provide for compensation where land clearing is merely regulated. Put another way, there is no right to compensation where an application to clear land is refused.

Where a permit *is already granted*, limited rights to compensation exist where the permit is revoked. Such compensation are only for "sunk costs" and do not extend to future losses.

2.2.5 Policy Perspectives Regarding Compensation

It has been noted that the right to compensation under law is narrow, in contradiction to the terms sought by such proponents of broad-based compensation as the Deputy Prime Minister, the Honourable John Anderson, or the National Farmers Federation.[50] Nevertheless, it is certainly open for Governments to compensate farmers in this way. Furthermore, as Bates[51] and others have argued, there are political and moral arguments as to why Governments may feel compelled to offer compensation in such circumstances. However, compensation for regulation would potentially have a number of drawbacks. These include that compensation for native vegetation regulation would:

- 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;[52]
- involve Australia in complex and costly litigation over what regulations require compensation (as has happened in the USA[53]); and

[50] See the Honourable John Anderson opening the third day of the 2002 Outlook Conference in Canberra and the National Farmers Federation (2002) *Property Rights Position Paper* (May 2002).
[51] See, for example, Bates G (2002) *Environmental Law in Australia* 5th Edition at p 34.
[52] For example see existing schemes in South Australia and Victoria: See Bonyhady. T, op.cit., 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 "Environmental Law in Australi*a*" (Sydney: Butterworths, 2002) at pp 33-38.

- create practical and legal difficulties in distinguishing between the public and private elements of any regulation (as a basis for compensation). [54]

As noted, there is a very narrow right to compensation in legislation 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. Reversing environmental decline will require fundamental change: industrial, cultural and institutional and financial assistance, including financial adjustment packages based on equitable principles that address real hardships. However, such financial assistance should be linked to the protection of the environment, and should provide real incentives for rural producers to alter unsustainable practices.

2.3. Clarifying Rights And Responsibilities

2.3.1 Land Holder Responsibilities

Australia faces a number of serious challenges as the ecological limits of sustainable development begin to be reached and exceeded. Given the current failure of land management policies and laws to effectively curb unsustainable resource management, new policy and law needs to be developed which properly addresses the growing problems. This cannot be done without addressing the rights and responsibilities of landholders. In the present context therefore, landholders should be expected to operate according to principles of sustainable management.

One approach of defining landholder responsibilities is delineated in the catchment care and duty of care concepts.

2.3.2 Catchment care and duty of care concepts

One way for rights and responsibilities to be clarified equitably is through either the catchment care principle as recommended by the Wentworth Group, or the duty of care concept as used in South Australia, which both work in a similar way. Although the Wentworth Group prefers the catchment care concept, they both involve a similar process, and would establish a standard of sustainable landholder management practices, and distinguish where society should contribute to conserving the additional public benefit on private land. To that end, both concepts provide a useful and equitable tool in clarifying responsibility.

The essential logic underpinning both concepts is that farmers have a responsibility to sustainably manage land, and that the community should pay for any additional public conservation processes advanced by landholders on their behalf. For the Wentworth Group

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[53] See *Pennsylvania Central Transport Company v. New York City* 438 U.S. 104. For a comprehensive bibliography in relation to the takings cases and debates see Dorsett. M.H, (1999) *Shifting Terrains: Upsetting the Balance Between Public and Private in the Takings Debate (*Southwest Missouri State University), which can also be found at http://208.13.158.54/departments/plan/issue/linkpgs/takings.html. For a sense of the complexities at work, see Raff. M, (1998) "Environmental Obligations and the Western Liberal Property Concept" 22 *Melbourne University Law Review* 657 at pp 681-683.

[54] For instance "public good environmental benefits" as advocated by the NFF: National Farmers Federation (2002) *Property Rights Position Paper* (May 2002).

this means that where environmental standards exceed the catchment care principle as defined by 'best available science',[55] the community would be required to pay for the costs of providing this additional service. This would mean, for instance, that where remnant vegetation is considered as having value for the public good in terms of biodiversity, or say prevention of salinity, then the financial disadvantage for landowners retaining that vegetation in the productive parts of the landscape would be offset. It would also mean not paying landholders where an application to clear is considered to cause or contribute to land degradation or a loss of biodiversity.

For landholders and policy makers, however, the following question is raised: above what threshold should society be required to pay for the additional conservation benefit provided by landholders? According to the Wentworth Group, it is simply any conservation actions/inactions exceeding the catchment care standard that is determined by scientists on a regional basis.

With respect to the duty of care concept, the benchmark has been more difficult to decide. The 12.5% duty of care figure introduced into South Australia seems to be a workable precedent in establishing a threshold. Under the South Australian system, eligible payments are reduced to an amount equivalent to 12.5% of the area of the property. Furthermore, no payment can be made for the retaining of shadelines and windbreaks totaling less than 12.5% of the property, as these were considered a minimum requirement, and are a private benefit. In other jurisdictions, the Environmental Protection Agency in Western Australia has a policy of rejecting applications to clear where the retention of native vegetation is less than 20%.[56] Other commentators have proposed a 30% level of retention of native vegetation within properties to retain basic ecosystem services serving to sustain production.[57] Correspondingly, there would appear to be reasonable justification in elevating the 12.5% benchmark to a new level commensurate with national, state or general community standards, and current knowledge of what is ecologically sustainable.

Alternatively, if the catchment care concept is to be used, the benchmark is decided by the 'best available science' for the particular area which is more sensible given the different environmental requirements for the different landscapes of different farms. Funding would be provided where farmers are required to protect an above 'average amount' of native vegetation. In this way, landholders would only be expected to bear the costs associated with sustainably managing their land, as defined by best available science, rather than community standards.

2.4 Cost Sharing

[55] This is in contrast to the duty of care concept, which decides what environmental standards are to be by looking at community expectations.

[56] See Fensham. R, et.al., op.cit., p. 8, quoting the Native Vegetation Working Group, 2000.

[57] See ibid., p. 8, quoting McIntyre et.al., "Principles for Sustainable Grazing in Eucalypt Woodlands: Landscape-scale Indicators and the Search for Thresholds", in Hale. P, et.al., "Management for Sustainable Ecosystem" (Brisbane: Centre for Sustainable Conservation, University of Queensland, 2000). See also Walpole who found that "economic returns for pastoralism could be impacted where vegetation falls below 34% in eucalypt woodlands in NSW", quoted in Fensham. R, et.al., op.cit., p. 8.

In 2001-02, Australian farmers had their most profitable season in years. From a recent average of $5.1 billion a year, farm income almost doubled to $9.8 billion during 2001-02.[58] While the latest estimates suggest a slump during 2002-03,[59] this is an inappropriate reason for society to have the losses diffused in such a direct way as has historically been the case. Clearly, city businesses are not afforded this luxury when their mismanagement causes losses.

This submission supports an equity approach in funding the short term costs associated with improved environmental standards. Thus, in addition to payments being made where land management exceeds a catchment care benchmark, a number of other cost sharing mechanisms can be looked at as part of providing an equitable solution. This will require incorporating, where possible, the user/impactor/benefactor pays principles into currently subsidised areas. Where government funding is provided it is submitted that this should not be sourced from other funding programs.

2.4.1. Funding Options

While it is largely beyond the scope of the EDO to comment on the large possible range of funding options, which have been reported elsewhere,[60] a number of tentative thematic suggestions can be made.

First, this submission supports the incorporation of the costs of native vegetation clearance and biodiversity loss into the costs of production. Increased use of user/beneficiary/impactor pays principles would reduce the expenditure of governments in funding cost sharing and structural adjustment. The EDO supports approaches that reduce the need for the financing of these 'costs'.

Second, this submission emphasises the importance of looking at the problems associated with land clearance and biodiversity loss in an integrated way, and to this end, suggests caution be exercised in the hypothecation of funding from other environmental programs.

Third, voluntary mechanisms could be created whereby community members contribute to the above types of structural adjustment and cost sharing, without government expense.

Fourth, financing could be achieved through savings created by ensuring moneys are spent efficiently and with maximum utility. Accordingly, public monies should be tied to the achievement of multiple conservation outcomes, such as related to soil, water, biodiversity, and carbon.

Once again, balanced economic analysis needs to be used so that the real long term costs to society from unsustainable practices can be compared to the one off short term costs of instituting an environmentally sustainable legal and policy framework. For too long have the costs of conservation been overemphasised compared to the long-term costs to society these practices have.

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58 Gittins. R, "Farmers who fail don't deserve pity", SMH, October 16 2002.

59 Ibid.

60 In particular, see Young. M, et.al., "Reimbursing the Future: An Evaluation of Motivational, Voluntary, Price-based, Property-right, and regulatory incentives for the Conservation of Biodiversity", *CSIRO Division of Wildlife and Ecology; Australian Centre for Environmental Law, and Community Solutions / Biodiversity Group, Environment Australia , 1996* <http://www.eldis.org/static/DOC4930.htm>.

2.5. Other Approaches

A number of commentators have already provided analysis on other approaches that could be used to conserve native vegetation and biodiversity.[61] The following approaches summarise be the most relevant.

First, further usage of aerial (satellite, and aeroplane) mapping in all states is necessary in providing the best data for developing the minimum environmental standards contained in legislation. Aerial mapping provides a fair and transparent means of assessing conservation value, and provides the best check in ensuring landholders conform to essential environmental standards. A Commonwealth approach would allow for more unified and consistent information on the current state of the environment irrespective of the state or territory.

Second, conservation agreements have been particularly effective in protecting remnant vegetation and ensuring that the benefits of conservation accrue inter-generationally. Correspondingly, the use of conservation and property agreements needs to be further encouraged. One possible approach would be to employ a limited form of the debt for nature swap whereby a market is created by banks wishing to on-sell the income streams generated by farm mortgages to NGOs in return for the placement of a conservation covenant on the debtor landholding. In this way, conservation groups would be able to help out farms with serious repayment problems and choose areas of significance for the conservation of native vegetation and biodiversity. From the point of view of the banks, they would be off-loading their high risk debt, in return for NGOs picking up farm debt at discount prices for the establishment of conservation covenants.

A **third** mechanism that could be used involves liability incentives, which operate to encourage compliance in order to prevent legal action. Liability insurance could be provided so that premiums reflect a landholders environmental performance. This would provide an incentive to avoid damage so as to obtain the lowest premium.[62] Similarly, individual director liability is another option that could be extended where there has been contravention of native vegetation and biodiversity regulations, and environmental performance bonds could be established requiring landholders to post security in the form of a bond prior to the undertaking of threatening works.

Fourth, a number of taxation measures could be introduced to reduce current perverse incentives existing for unsustainable behaviour.

2.5.1. Transferable Rights/Markets

Caution needs to be exercised in considering market based approaches. At present, there is too much environmental risk associated in the establishment of market based schemes for

[61] In particular, see Ibid.; and Skitch. R, "Encouraging Conservation through valuation", volume 1, (Brisbane: Department of Natural Resources, 2000) <http://www.nrm.qld.gov.au/land/planning/pdf/ectv/cover_prelims.pdf>.

[62] Young. M, et.al., op.cit., at 2.4.3 quoting Panayotou, T. "Economic Instruments for Environmental Management and Sustainable Development", International Environment Program, Harvard Institute for International Development (Massachusetts: Harvard University, 1994).

native vegetation and biodiversity due to the risk of entrenching the present market distortions and perverse outcomes. Economic analysis continues to ignore the externalities, and it would seem wise not entrench these externalities further through certain types of market based mechanisms. Accordingly, it is submitted that establishing a market based scheme for native vegetation and biodiversity needs to be put off until the systems can be managed adequately.[63]

[63] For an example of the failure of water markets to ensure that environmental, as well as economic, benefits flow see http://www.brisinst.org.au/resources/brisbane_institute_isaac_water.html