



environmental defender's office new south wales

Submission to the NSW Legislative Assembly Standing Committee on Natural Resource Management Inquiry into disincentives for ecologically sustainable land and water use in NSW

19 May 2005

The EDO Mission Statement

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

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

Contact Us

Environmental Defender's Office Ltd

Level 9, 89 York St
SYDNEY NSW 2000

freecall 1800 626 239

tel (02) 9262 6989

fax (02) 9262 6998

email: edonsw@edo.org.au

website: www.edo.org.au

Become a Friend of the EDO and receive *Environmental Defender and Impact*

ABN 72 002 880 864

For inquiries on this matter contact David Jeffery at david.jeffery@edo.org.au

Introduction

Environmental Defender's Office

The Environmental Defender's Office Ltd (EDO) is a not-for-profit community legal centre specialising in public interest environmental law. We help the individuals and community groups who are working to protect the natural and built environment. The EDO is part of a national network of EDOs who help to protect the environment through law in their States.

The EDO's mission is to empower the community to protect the environment through laws recognising:

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

Inquiry

The Standing Committee on Natural Resource Management was established on 8 May 2003 to inquire into issues in the sustainable management of natural resources in NSW, in particular on the following terms of reference:

- a. current disincentives that exist for ecologically sustainable land and water use in NSW;
- b. options for the removal of such disincentives and any consequences in doing so;
- c. approaches to land use management on farms which both reduce salinity and mitigate the effects of drought;
- d. ways of increasing the up-take of such land use management practices;
- e. the effectiveness of management systems for ensuring that sustainability measures for the management of natural resources in NSW are achieved;
- f. the impact of water management arrangements on the management of salinity in NSW.

This submission relates to terms of reference (a) and (b).

The EDO would like to thank the Standing Committee on Natural Resource Management for this opportunity to comment on the sustainable management of natural resources in NSW.

Contents

1. Executive Summary
2. Taxation of land used for conservation
3. Agricultural subsidies
4. Water Management Act regime
 - 4.1 Adaptive management
 - 4.2 Environmental flows
 - 4.3 Overland flows
 - 4.4 Water pricing
5. Drought relief
6. Monitoring and compliance
 - 6.1 Water Management Act
 - 6.2 Native Vegetation Act
7. Accessibility of information
8. Other options for removing disincentives
 - 8.1 Offsets and trading schemes
 - 8.2 Voluntary / non-profit schemes

1. Executive Summary

Taxation of land used for conservation

A range of improvements have been made over the past few years, but there are remaining tax differences in the treatment of land used for primary industry and for conservation. These include tax deductibility of expenditure on managing the land, deductibility of interest and GST differences. These differences should be removed so that differential tax treatments do not penalise landowners for changing land to conservation use where it could be beneficial for the sustainable management of the land.

Agricultural subsidies

NSW still suffers land degradation from a range of past agricultural subsidies, especially the subsidisation of fertilisers and water. Most agricultural subsidies have ended but irrigation water is still heavily subsidised (see *Water Pricing*).

Water Management Act

There are a number of disincentives to sustainable land and water use in the *Water Management Act 2000 (WM Act 2000)* and the water sharing plans made under the Act. These include a failure in the plans to provide for adaptive management; a failure to value environmental flows; and uncontrolled interception of overland flows.

These disincentives could be removed by:

- including provisions in water sharing plans that allow for adaptive management;
- setting environmental flow allocations at a minimum of 66% of natural flows;
- including in plans a methodology for managed environmental releases from stored water and a description the ecological values to be protected by the plan;
- monitoring and capping or charging for extracting overland flows.

Removing these disincentives would assist with ensuring that the WM Act promotes sustainable water management, by being able to adapt to changing conditions, reflecting the economic value of environmental flows and including overland as well as in-river flows.

Water Pricing

It is essential for sustainable water management that water be priced efficiently, to reflect all its costs including environmental costs. Irrigation water is currently heavily subsidised. These subsidies should be removed. The efficient pricing of water will create incentives to use water efficiently and sustainably and will reduce the environmental costs of water extraction.

Drought relief

There are a number of drought relief measures, both federally and in NSW, that arguably do not encourage self-reliant approaches to managing the risks of climatic variability and instead may encourage inefficient operators and the use of marginal land. The focus of drought policy and drought assistance should be on proactive drought preparedness and risk management rather than reactive drought response and damage control. Drought relief measures should be assessed to see whether they contribute to, or hinder, sustainable land management in the long term.

Monitoring and compliance

Both the native vegetation and water management legislation seek to establish a regime for sustainable water and land management. They include restrictions, incentives and the ability to trade or use offsets. However, to achieve sustainable management, the regimes must have integrity and be enforced. Monitoring and enforcement under both regimes is inadequate and a lack of enforcement can create disincentives to comply with the legislation and thus disincentives to sustainable land management.

We recommend that metering and monitoring should be improved under both regimes. Under the native vegetation legislation, penalty notices should not be used for substantive breaches of the legislation, DIPNR should adopt an effective compliance policy, a public register should be available on Catchment Management Authority websites, and information should be shared between relevant authorities.

Accessibility of information

There are a wide range of incentives for conservation activities on private land, with incentives available from a number of sources through many different programs. In addition to direct incentives, indirect incentives such as tax deductibility and rates and land tax concessions are available. However, it is difficult for landholders to access information on the range of incentive programs available, mainly because they are administered by disparate bodies.

The state government should make this information, as well as simple and reliable scientific information on sustainable land and water management, available through a single website as well as through local council offices, council libraries and regional offices of State government agencies.

Other options for removing disincentives

Offsets and trading schemes have the potential to assist in removing existing disincentives to sustainable land and water management by allowing sustainable outcomes to be achieved with more flexibility and at lower cost. However, individual proposals need to be examined carefully to ensure that they do in fact improve environmental outcomes.

A range of non-profit organisations are working to conserve ecosystems on private lands – such as revolving trusts and bush conservancy organisations. Such organisations should be supported and assisted where possible by government.

2. Taxation of land used for conservation

This is an area that has improved markedly in the past few years at both a State and Federal level. In the 1999 study *Conservation Hindered*,¹ the authors found that State land taxes and local government rates were applied inconsistently between land used for primary production and land used for conservation. There were numerous tax concessions that applied for primary production but not for conservation use so that landowners faced substantial financial disincentives if considering converting land used for primary production to conservation uses.

Recent changes

However, since 1999 a range of concessions for conservation uses of land have been introduced at a State and Federal level:

- The landowner can obtain an income tax deduction for any loss in value of the land as a result of placing a conservation covenant on it.
- The landowner can obtain a concessional capital gains tax treatment for land subject to a conservation covenant.

¹ Binning, Carl and Mike Young (1999), *Conservation Hindered: The impact of local government rates and State land taxes on the conservation of native vegetation*, National R&D Program on Rehabilitation, Management and Conservation of Remnant Vegetation, Research Report 3/99, Environment Australia, Canberra.

- The landowner can obtain an income tax deduction for gifts of land to certain conservation trusts.
- Land tax, stamp duty and local rates are not payable in NSW on land subject to conservation agreements.

Ongoing disincentives

These reforms have served to reduce the financial disparities between using land for primary production versus conservation purposes. However, there are still some remaining disincentives to the use of land for conservation purposes:

- Expenses incurred to manage land used for conservation purposes are not tax deductible (unless the landowner is carrying out a business on that land), while expenses incurred in managing land used for primary production will be tax deductible. In addition, there are specific tax rebates for landcare operations for land used for primary production, but not for land used for conservation.² This provides:
 - a disincentive to convert land to a conservation use from a primary production or other income-generating use, because tax deductibility will be lost; and
 - a disincentive to actively manage land that is used for conservation, because expenses incurred in managing the land will not be tax deductible.
- It would appear the negative gearing of land used for conservation purposes is not allowed (where the land is not being used for a business). In other words, interest repayments are not tax deductible if the land is not being used to carry on a business.³ This provides a disincentive to convert land to a conservation use from a primary production or other income-generating use, because tax deductibility will be lost.
- GST treatment is complicated but, essentially, sale of land used for primary production (or for residential subdivision) will be GST-free while sale of land used for conservation will not be GST-free.⁴ The effect of this will be limited for businesses because they can offset the tax paid through a GST input tax credit. However, there will still be timing issues for businesses and there may be differences in the amount of tax paid for buyers and sellers who are not GST-registered businesses.

Options for removing disincentives

- Expenses incurred in managing land for conservation purposes, whether by a conservation trust or private landowner, should be tax deductible and eligible for Landcare rebates, whether or not the expenses are incurred in the course of earning income.

² *Income Tax Assessment Act 1997* (Cth), Subdivision 387-A.

³ Ian Potter Foundation (1999) *Philanthropy: Sustaining the Land*, Melbourne, pages 11-12.

⁴ See Productivity Commission (2001), *Constraints on Private Conservation of Biodiversity*, Research Paper, AusInfo, Canberra, pages 73-75.

- Interest repayments for land used for conservation purposes could be tax deductible.
- GST treatment of land used solely for conservation purposes could be made GST-free.
- ‘Stewardship payments’ could be made to landholders for the costs of conservation management for land under a conservation agreement. (This is already done in some cases with voluntary conservation agreements and ‘incentive payments’ are proposed for some conservation and revegetation activities undertaken pursuant to a property vegetation plan under the new *Native Vegetation Act 2003*. Such payments should be recognised as assessable income and thus any costs associated with earning that income (ie, in managing the land for conservation) would be tax deductible.⁵

Consequences of removing disincentives

The removal of these disincentives would mean that where it was sensible from a natural resource management perspective to convert land from agricultural uses to conservation uses, the taxation treatment would not present a barrier to that change.

In particular, allowing tax deductibility of expenses and Landcare rebates for managing land used for conservation purposes, would allow decisions about how much land a landowner could devote to conservation purposes and how that land would be managed – without having such decisions clouded by inconsistent tax treatments.

These changes will also support the work of the range of non-profit organisations that are working to conserve ecosystems on private lands – such as revolving trusts and bush conservancy organisations. These organisations are restoring ecosystems and managing land sustainably to preserve and enhance biodiversity at no cost to the community.

3. Agricultural subsidies

Historically, policies relating to agriculture and land settlement in Australia were designed to encourage economic and agricultural development. State settlement policies generally required clearing of a certain amount of land within a certain period. Many farms were not large enough to be operated profitably or sustainably and many were established on marginal land.⁶

Agricultural subsidies were generally indirect, through state and national commodity marketing boards and subsidies of farm inputs, especially irrigation water and fertilisers. The subsidies lowered the costs of these inputs relative to other inputs (such as land and labour) and thus increased their use. This had an impact on agricultural practices and had impacts on hydrology and soils. For example, an increased use of water has contributed to salinity problems and high use of phosphate and nitrogen fertilisers has contributed to soil acidification.⁷

⁵ See Industry Commission (1998), *Charitable Organisations in Australia*, Report No 45, AGPS, Melbourne, page 348.

⁶ Hyberg, Bendt (1991), Australia’s environmental degradation from agriculture: lingering effects and greater visibility, *World Agriculture*, June 1991.

⁷ Ibid.

Subsidies for most inputs have ended, but subsidies for irrigation water remain. These are dealt with in section 4.4 below, **Water Pricing**.

4. Water Management Act regime

There are a number of disincentives to sustainable water management in the *Water Management Act 2000* and the Water Sharing Plans (WSPs) made under the Act. These include:

- A failure in the plans to provide for adaptive management;
- A failure to value environmental flows;
- A failure to implement water management plans.

Other issues relating to water management, discussed separately below, are the underpricing of bulk water and a lack of monitoring and enforcement of the water management rules.

4.1 Adaptive management

Rivers in NSW, particularly inland, have often highly variable and unpredictable flows. Changes to flow patterns can have significant ecological effects that may not be noticed for many years or even decades. Water management needs to be able to adapt, in real time, to natural and human-induced changes to maintain healthy rivers.

A number of factors may require that the allocations made under WSPs need to be revised in the future. These include climate change and changes in catchment and landuse practices (which may affect both the supply and demand for water), better scientific information about environmental flows and major water quality incidents (such as contamination, pesticide spill, algal blooms or saline intrusions).

Many of the WSPs do not contain adequate provisions allowing allocations to be revised and stating how such revisions will be accommodated. This may have the practical effect of 'locking in' unsustainable allocations, despite better knowledge or changed circumstances in the future.

Options for removing the disincentive

To remove this incentive, all WSPs should have adaptive management clauses under section 45(1)(b) of the *WM Act 2000* built into them to accommodate changes required due to better ecological knowledge or changed ecological conditions.

Consequences of removing the disincentive

This change would to some extent reduce the certainty that water users have about future water allocations, however it also reduces the risk that water allocations will have to be reduced substantially at a later stage because of over-allocation and associated water problems and environmental damage.

It would also improve certainty in some respects because water users would know how future changes in allocations, if needed, would be accommodated in that plans.

The change will remove a major disincentive to changing water plans when it becomes necessary to do so because of improved knowledge or changed ecological conditions and that is important for the long-term sustainability of regional water management.

4.2 Value of 'environmental' flows

There appears to be a perception that environmental flows are something that should be provided to help 'the environment' after economic extractive uses are provided for. In fact, healthy flows in rivers are vital to maintain healthy rivers on which economic uses depend. Providing inadequate flows does not just damage 'the environment', it undermines all productive river uses.

Adequate flows enable proper functioning of ecosystems, which have a critical impact on water quality. Adequate flows also dilute toxicants such as salt and blue-green algae.

Many rules in WSPs provide for the provision of environmental water that is in some way contingent on, or determined by reference to, supplies to water users. That is, other than for maintenance of minimum flows, there is often no water committed for river health that may not be taken or used for other purposes. Environmental flow amounts are generally tied to the availability of water for water users, rather than by reference to environmental needs or environmental objectives. This is despite the water management principles in the *WM Act 2000* (section 5) that the extraction of water must not prejudice the protection of the water source and its dependent ecosystems.

The Co-operative Research Centre for Freshwater Ecology estimates that in rivers where the flow has been reduced to less than half the natural flow, the probability of having a healthy working river is low. A greater than two-thirds allocation to environmental flows is required to have a high probability of a healthy river. Nevertheless, the water sharing plans have reduced the flow to less than half in many rivers.

In particular, in some WSPs (eg, the Murrumbidgee Regulated River Water Source WSP):

- Environmental water flows are determined as a proportion of allocation requirements (which prejudices the protection of the river's ecological processes and dependent ecosystems);
- There is no secure environmental water (other than for the maintenance of minimum flows);
- There is no methodology for managed environmental releases from stored water;
- There is no identification of the ecological values to be protected by the WSP.

The 2004 *National Competition Policy Assessment*⁸ found that "there is insufficient evidence to enable it to conclude that New South Wales has met its CoAG obligation to provide

⁸ National Competition Council (2004), *Assessment of governments' progress in implementing the National Competition Policy and Related Reforms: 2004*, Melbourne.

appropriate allocations of water to the environment in stressed and/or overallocated rivers and groundwater systems”.

Options for removing the disincentive

- Priority environmental flows must be secured in all WSPs.
- Environmental flow allocations should be set by reference to natural flows rather than total allocations and should be set at 66% of the natural flow at a minimum.
- WSPs should include a methodology for managed environmental releases from stored water and state the ecological values to be protected by the WSP.

Consequences of removing the disincentive

- Removing this disincentive would reduce the risk that the health of rivers is seriously degraded, which will benefit all water users. It would help protect rivers’ ecological processes and dependent ecosystems, dilute in-river toxicants and reduce the risk of critical water quality events.

4.3 Uncontrolled interception of overland flows

Under the *WM Act 2000*, landowners can harvest at least 10% of overland flow without a licence.⁹ This uncontrolled extraction is a serious problem for a number of reasons:

- The lack of monitoring makes it extremely difficult to determine how much water is being taken and therefore its impact on other users and on the environment.
- It contributes to a danger that water for river systems will be overallocated.
- Since overland water is effectively free (except for storage costs), it will encourage overland flows to be stored onsite and thus diverted from river systems, reducing in-system flows.
- Since overland water is effectively free, it will tend to be overused and misallocated, unless allocations are limited or charged for.

These are all significant disincentives to sustainable water management as well as to efficient water use.

Options for removing the disincentive

The major problems above stem from the fact that the use of this water – unlike other water in river systems - is free and is unmonitored. Thus the main options for removing this disincentive would involve monitoring the use of this water and limiting or possibly charging for its use.

⁹ *Water Management Act 2000*, sections 53 and 54.

We recommend:

- Converting unregulated overland harvesting to licences.
- Setting a lower limit on overland harvesting licences in catchments where this is necessary to ensure extraction levels are sustainable, or charging for water extraction above these limits.
- Commissioning an audit to determine the impact of overland harvesting on environmental flows and the availability of water to licensed water users.

Consequences of removal

Removing this disincentive would reduce the risk of over-allocation and environmental damage and also help ensure that water is allocated to its most productive uses rather than diverted. It would also assist with improving in-river flows.

It would involve some cost in that currently unmonitored flows would need to be monitored, but this would also improve knowledge about the impact of overland harvesting on environmental flows and on the availability of water to licensed water users.

4.4 Water Pricing

It is essential for sustainable land and water management that water be priced efficiently. That is, it must be priced such that it reflects its proper costs, including costs of providing and replacing infrastructure, delivery costs and external costs on downstream users, river systems and ecosystems. Underpricing water creates a disincentive to sustainable water use, because it encourages more water to be consumed than is efficient or sustainable and also encourages investment in land uses that will not be sustainable in the long term because they do not reflect the true costs that water use imposes on others.

Prices should be set to recover the full environmental costs of extracting water, including the costs of remediating environmental degradation attributable to water extraction.

It is clear that, even ignoring environmental costs of extracting water, current rural water prices do not cover the costs of providing and delivering the water. In 2003-2004, 26% of costs of water delivery were not recovered from users, representing a large subsidy.¹⁰ For unregulated rivers and groundwater sources, only 30% of costs were recovered (ie, prices are subsidised by 70%).¹¹

Further, the costs of the government's responses to damage to river systems caused by water extraction are not passed on to water users through water prices. These costs include, for example, the costs of catchment management planning, managing river

¹⁰ National Competition Council (2004), *Assessment of governments' progress in implementing the National Competition Policy and Related Reforms: 2004*, Melbourne, page 2.9.

¹¹ National Competition Council (2004), *Assessment of governments' progress in implementing the National Competition Policy and Related Reforms: 2004*, Melbourne, page 2.3.

health, expenditure on problems such as salinity and blue-green algal blooms, wetland strategies and a range of other expenditures.¹²

Water prices also do not reflect the enormous costs of land degradation impacts from water extraction such as – for example - salinity, erosion and floodplain degradation.

Options for removing the disincentive

- IPART should price water at full cost-recovery for bulk water.
- Full cost-recovery should include all costs of environmental degradation attributable to water extraction, most of which are not currently included.

Consequences of removing the disincentive

Pricing water to reflect its true costs will create an incentive to use water sustainably. It will direct water to its most productive uses and encourage investment in only those land uses that will be sustainable in the long term (because they reflect the true costs that water use imposes on others). It will ensure that water is used and managed more efficiently and will reduce the costs on water users and the environment from over-extraction of water.

5. Drought relief

The objectives of Australia's National Drought Policy, agreed to by Commonwealth, State and Territory Ministers in 1992, are to:

- encourage primary producers and other sections of rural Australia to adopt self-reliant approaches to managing the risks stemming from climatic variability;
- maintain and protect Australia's agricultural and environmental resource base during periods of extreme climate stress; and
- ensure early recovery of agricultural and rural industries consistent with long-term sustainable levels.

The EDO believes that the focus of drought policy and drought assistance should be on proactive drought preparedness and risk management rather than reactive drought response and damage control.

There are a number of drought relief measures, both federally and in NSW, that arguably do not encourage self-reliant approaches to managing the risks of climatic variability and instead may encourage inefficient operators and the use of marginal land. These include federal interest rate subsidies and relief payments and, in NSW:

- a 50% subsidy on the transport of water, stock and fodder in drought affected areas;
- payroll tax exemptions for rural business in drought affected areas; and

¹² *Combined Environment Groups Submission to the Independent Pricing and Regulatory Tribunal Bulk Water Pricing Determination 2001-2004*, page 5.

- Rural Assistance Authority loan repayment deferrals.

Where drought assistance is provided, the focus should be on programs to assist farmers in preparing for, and dealing with, drought. Unconditional financial assistance (eg, income support and interest rate subsidies) to farmers in drought-affected areas is likely to have the opposite effect. It may encourage poor farming practices and the use of marginal land, because the benefits of these practices accrue to the farmer, while the risks are borne by the community. Income support (ie, welfare policy) should not be conflated with drought policy.

Farm business support should be targeted toward drought preparedness, risk management, and providing mechanisms to assist farm businesses in building and maintaining reserves in wet times to be drawn upon when precipitation fails. In short, farm business support should support sustainable farm businesses that are viable when drought is factored in over time.

Retrospective support risks providing a disincentive to sustainable land management. It can prop up inefficient operators, delay the exit of non-viable farm businesses, and by artificially inflating land price, may harm potential purchasers' ability to finance land purchases at a price that truly reflects the land's productive capacity with droughts factored in.

Where support for farm businesses is provided, eligibility criteria should relate to existing demonstrated risk management and drought preparedness, viability of the farm and business and a recovery plan.

Options for removing the disincentive

- Much drought support is provided at a federal level. In brief, interest rate subsidies and relief payments should be closely examined to see whether they are environmentally and economically damaging in the long term.
- Reactive and untargeted NSW government assistance, such as:
 - 50% subsidy on the transport of water, stock and fodder;
 - payroll tax exemptions for rural business in drought affected areas; and
 - Rural Assistance Authority loan repayment deferrals,

should be closely examined to see whether they are in fact environmentally and economically damaging in the long term.

Consequences of removing the disincentive

Removing retrospective drought support that promotes economically and ecologically unsustainable farm enterprises will, in the long term, assist sustainable land and water management. It will also assist the long-term economic viability of the farming sector.

In the short term, it does have the risk of increasing difficulties faced by farms in drought affected areas. The EDO believes, however, that these difficulties are better dealt with through structural adjustment and general welfare measures than through drought relief measures. Drought relief measures should be directed towards assisting farmers with drought preparedness and improving the sustainability of their land and water management practices.

6. Monitoring and compliance

In several areas of land and water management in NSW, efficient operation of legislation is undermined by a lack of monitoring and enforcement. Two notable examples have been water sharing under the *WM Act 2000* (and its predecessors) and clearing of native vegetation under the *Native Vegetation Conservation Act 1997 (NVC Act 1997)* and the proposed compliance regime under the *Native Vegetation Act 2003 (NV Act 2003)*.

The water management and native vegetation legislative schemes essentially establish property rights in water and define property rights in land with respect to clearing. If property rights schemes are to provide proper incentives to sustainable land and water use, they must be enforceable and enforced.

The failure to monitor and penalise illegal water taking and illegal clearing under these schemes has and continues to provide a disincentive to sustainable land and water management.

Enforcement Actions and monitoring

The Regulatory Impact Statement for the Draft *Native Vegetation Regulation 2004* states: “It is anticipated that the number of compliance actions which proceed to court with and without settlement will approximate two a year, with the number of small offences (ie, those settled out of court) totalling five.”¹³ Under the *NVC Act 1997* from 2002 – 2004 there were 330 compliance actions initiated by the Department of Infrastructure Planning and Natural Resources (DIPNR), representing an average of 132 per year. A predicted decrease in the number of compliance actions from 132 to 7 is of serious concern, even with the addition of penalty notices for minor offences.

DIPNR has use of satellite imagery to obtain “a complete picture of the state” in terms of vegetation cover. We understand there will be a satellite imagery sweep of the state once a year with more frequent inspection for hotspots. It is critical that this is the bare minimum and that inspection is regular. If accurate data is not available for each year, then effective enforcement will be hindered. Similarly, for the WM Act, metering of licensed water extraction installations is necessary for monitoring and enforcement of the Act.

DIPNR is currently developing a compliance policy for all its legislation, including native vegetation and water management. The policy adopted should be consistent, strategic, targeted and effective.

¹³ *Regulatory Impact Statement*, p 6.

Monitoring of water extraction should be improved: the extraction of overland flows should be monitored and all licensed installations for the extraction of surface or ground water should be metered within 12 months.

Penalty notices

Section 43(1) of the *NV Act 2003* provides authorised officers with a discretion to issue a penalty notice for offences committed under the Act or Regulations. Clause 34 and Schedule 1 of the Draft Regulation extends the giving of penalty notices to all offences under the *NV Act 2003*. This has the potential to undermine the effective working of the scheme. Penalty notices should be reserved for technical breaches and are inappropriate for circumstances governing illegal land clearing,¹⁴ obstructing an investigation,¹⁵ or non-compliance with notices, stop work or remedial orders issued by the Director-General.¹⁶

Community monitoring and enforcement

The *NV Act 2003* provides that the regulations may make provision for the keeping of various public registers. This is a vital component of a transparent and accountable regulatory scheme. The relevant provisions contemplate a register of development consents and applications under section 15(1)(e) of the *NV Act* and a register of Property Vegetation Plans (PVPs) under section 32(e) of that Act.

Under clause 11 of the current Draft Regulation, Catchment Management Authorities (CMAs) will only be permitted to provide information about PVPs to genuine prospective purchasers of the land to which the PVP relates.

The restriction of information to prospective purchasers has the capacity to undermine the proper enforcement of the *NV Act 2003*. Members of the public – an important component in any effective evidence gathering and enforcement regime - will not be in a position to assess whether the *NV Act 2003* is being properly complied with. In practice this would largely negate the open standing rights in section 41 of the *NV Act 2003*.

A genuine public register would have the additional benefit of easing the administrative burden of the CMAs which are responsible for administering consents and PVPs (for example, by addressing inquiries as to whether observed clearing is authorised).

A public register pertaining to development consent and PVPs would greatly improve the enforceability of the scheme. It is also important that information held by the CMAs on clearing undertaken pursuant to PVPs be given to the Natural Resources Commission and the Department of Environment and Conservation (DEC), so that databases can be kept up to date.

Options for removing the disincentives

- DIPNR should be provided with adequate resources to monitor and enforce compliance with the *NV Act* and *WM Act*, reinforced by an effective compliance policy.

¹⁴ Section 12.

¹⁵ Section 35(5).

¹⁶ Sections 36(4), 37(5) and 38(4).

- All licensed installations for the extraction of surface or ground water should be metered within 12 months.
- Penalty notices should not be used for substantive breaches of the legislation.
- A genuine public register of PVPs should be available on CMA websites, rather than a register available only to prospective purchasers.
- Information should be shared between CMAs, NRC and DEC.

Consequences of removing the disincentives

- The *NV Act 2003* establishes a regime that attempts to provide for sustainable management of native vegetation. It provides incentives for landholders to maintain or improve environmental outcomes with respect to native vegetation. Adequately monitoring and enforcing the Act is essential for the regime to be effective.
- Adequately enforcing the *WM Act 2000* and *NV Act 2003* by providing adequate resources for monitoring and enforcement, using penalty notices only for technical breaches and adopting an effective compliance policy will ensure that the regime established by the Acts has integrity and operates effectively.
- The sharing of information between CMAs, the NRC, DEC and the public – through a genuine public register – will increase compliance while also reducing enforcement costs.

7. Accessibility of information

There are a wide range of incentives for conservation activities on private land, with incentives available from a number of sources through many different programs. In addition to direct incentives, indirect incentives such as tax deductibility and rates and land tax concessions are available.

However, it is difficult for landholders to access information on the range of incentive programs available, mainly because they are administered by disparate bodies including, for example, the federal Department of Environment and Heritage (National Heritage Trust), Greening Australia, Landcare, the NSW DEC (Voluntary Conservation Agreements) and local CMAs (incentives under the *Native Vegetation Act 2003*). In addition, the tax concessions available are administered by separate agencies, such as the Australian Tax Office (income and capital gains tax), Office of State Revenue (land tax) and local councils (rates rebates).

The NSW Government has a role in collating this information and making it easily available to landholders. Such information should be available through a single website as well as through local council offices, council libraries and regional offices of State government agencies.

The same issue arises in relation to the availability of simple and reliable scientific information for good decision-making in relation to sustainable land and water management.

Options for removing the disincentive

- The NSW Government should collate:
 - information about direct and indirect incentives available to landholders for sustainable land and water management; and
 - scientific information and tools for sustainable land management,

and make this information easily accessible to landholders through a single website as well as through local council offices, council libraries and regional offices of State government agencies.

8. Other options for removing disincentives

8.1 Offsets and trading schemes

The new native vegetation regime will allow for clearing of native vegetation under a property vegetation plan if the clearing is offset by other revegetation or management activities that maintain or improve overall environmental outcomes. This allows for some flexibility in achieving the sustainable land and biodiversity management outcomes that the legislation aims for. Similarly, the water management legislation allows for trading of water entitlements, with the aim of achieving sustainable water use at a lower overall cost to water users.

Offsets and trading schemes have been successfully implemented in Australia and overseas, generally in relation to diffuse source pollutants that have the same effect regardless of the location of their emission. This applies to many airborne pollutants and to effluent emissions within a single catchment.¹⁷

There have been proposals to extend the concept of offsets to biodiversity outcomes from development and more generally to environmental outcomes from development. Offsets have the potential to improve the sustainability of land and water management by countering the cumulative effects of individual developments. However, where impacts are not equivalent between different locations, great care needs to be taken in how offsets are applied in practice. It is extremely difficult, for example, to say that two stands of vegetation in different locations are of equivalent ecological value.

The EDO supports, in principle, exploring alternative means of protecting the environment in addition to regulation, providing there are appropriate safeguards and outcomes.

The offsetting of many environmental impacts – including impacts on biodiversity – raises a number of questions around transferability and equivalence. For example, if a

¹⁷ It is also worth noting that there have also been offsets and trading schemes that have been unsuccessful.

developer is required as a condition of clearing consent for subdivision to revegetate another area, three risks arise. First, revegetation might not be successful. A bad weather season, or other environmental factors, may prevent the replantings from growing. This raises numerous questions. Would the developer be required to replant? Is the obligation ongoing? Would the consent condition be input oriented or outcome oriented? An input-oriented condition may not achieve a net environmental improvement as an outcome, but an outcome oriented condition would be difficult to enforce, given its inherent uncertainty and open-endedness. An offsets scheme thus introduces uncertainty for native vegetation and biodiversity, particularly when trying to offset the loss of a functioning and effective ecosystem with future regeneration which is uncertain.

Second, there will inevitably be timing issues. The upfront removal of vegetation in exchange for the possibility of new habitat in the future leaves a gap of time in which there will be a net loss of vegetation, with impacts flowing through to biodiversity and other environmental values in that time.

Third, there is the question as to whether there is scientific evidence to support the concept of 'equivalence'. That is, can vegetation be transferred from one location to another, without causing any net loss to the environment? One example would be territoriality of fauna – that is, fauna that will not migrate to the new location. A precautionary approach is needed. Amongst other things, it should be shown on the scientific evidence that there will be a guaranteed net benefit before native vegetation offsets are permitted.

Given the innovative nature of such schemes, the EDO supports the development of an evidence-based approach. Proposed schemes should be evaluated according to scientific principles, using pilot studies or reviews – before being implemented.

Consequences of removing the disincentive

In summary, offsets and trading schemes have the potential to assist in removing existing disincentives to sustainable land and water management by allowing sustainable outcomes to be achieved with more flexibility and at lower cost. However individual proposals need to be examined carefully to ensure that they do in fact improve environmental outcomes.

8.2 Supporting voluntary / non-profit schemes

A range of non-profit organisations are working to conserve ecosystems on private lands – such as revolving trusts and bush conservancy organisations. These organisations are restoring ecosystems and managing land sustainably to preserve and enhance biodiversity at no cost to the community.

Such organisations should be supported and assisted where possible by government. One method of doing so is by removing discriminatory and inconsistent tax treatments for conservation uses of land, as discussed in section 2 above.

Should you require further information, please contact EDO Solicitor, David Jeffery on 9262 6989 or david.jeffery@edo.org.au.

Yours sincerely,
Environmental Defender's Office

Jeff Smith
Director