

Submission

in response to

ENRC Inquiry into the Environment Effects Statement process in Victoria

Environment and Natural Resources Committee

prepared by

Environment Defenders Office (Victoria) Ltd

8 April 2010

About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd ('EDO') is a Community Legal Centre specialising in public interest environmental law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice. In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working to protect Australia's environment through environmental law.

For further information on this submission, please contact:

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

T: 03 8341 3100

E: nicola.rivers@edo.org.au

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enrc@parliament.vic.gov.au

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INTRODUCTION

The EDO welcomes the opportunity to provide comment to the Environment and Natural Resources Committee inquiry into the environmental effects statement (“EES”) process in Victoria, including the operation of the *Environment Effects Act 1978* (“EE Act”). If the Committee would like further information on the issues raised in this submission we would be pleased to appear before the Committee.

Our recommendations to this inquiry are based on our extensive research and experience.

The EDO has been advising on the operation of the EES process under the EE Act for almost 20 years. For example, we have advised clients in relation to the environment assessment process for the Victorian Channel Deepening Project, the Sugarloaf Pipeline Project (“north-south-pipeline”), the Bastion Point boat ramp, the Victorian Desalination Project and the Frankston bypass. We have represented several community groups at EES inquiry panel hearings including Save Bastion Point Campaign, Environment Victoria, Victoria National Parks Association and Watershed Victoria Inc. We are currently representing Friends of Mallacoota Inc in a judicial review challenge of a decision made by the Minister for Planning under the EE Act.

The EDO has also commented extensively on the Commonwealth environment assessment and approval process under the *Environment Protection and Biodiversity Conservation Act 1999* (“EPBC Act”) and have been undertaking research into best practice environment impact assessment globally.

EXECUTIVE SUMMARY

The EES process in Victoria is operating in the context of an out-of-date and inadequate legislative framework. The process is framed within the brief and ineffectual EE Act¹. The EE Act is a mere 16 pages long, contains no objectives and provides no credible ministerial assessment framework. The process is highly discretionary and almost entirely dependent on non-binding, unenforceable guidelines. The process gives the Minister for Planning virtually unlimited discretion to decide whether an EES is required for a project, the content of an EES, the form and extent of public review of an EES and the assessment of an EES.

The present system does not reflect leading practice, failing to meet globally understood purposes of a rigorous, transparent, accountable, participative and deliberative assessment of projects.² The EE Act does not require comprehensive and transparent inquiries into proposed developments and does not guarantee opportunities for the public involvement in the process. The current system does not create a binding regime for comparing alternatives and options, integrating environmental, social and economic concerns, and avoiding or minimising any potential adverse effects. There are no offences in the EE Act and no requirement that proponents refer projects. Also, unlike assessment regimes elsewhere, the end result is a recommendation which is not binding on decision-makers, rather than mandatory action.

Furthermore, the high degree of discretion has allowed the Victorian government to interpret environment impact assessment legislation in the context of its own development agenda, which has led to a number of poor environmental decisions.

Victoria's environment effects process is completely inadequate for the task of securing a sustainable future for Victoria.

The environment impact assessment ("EIA") process in Victoria should be overhauled and replaced with a comprehensive EIA system that emphasises rigorous, transparent, accountable, participative and deliberative processes designed to achieve ecologically sustainable development. New legislation should contain a clear trigger for the environment assessment process, remove ministerial discretion on whether an assessment is required and how it will proceed, and establish a tiered assessment approach that aligns the level of assessment with the scale and impacts of the project.

Key recommendations

A comprehensive new legislative regime should be developed that includes key stages of the assessment process in binding legislative provisions, including:

1. Inclusion of a clear statement of objectives of environment assessment, incorporating the objective of ecologically sustainable development.
2. Clear legislative triggers as to when a project will be required to be referred and penalties for non-compliance with referral provisions.
3. Clear and enforceable criteria that set out when an EIA is required and that guide the Minister's assessment of whether the likely environmental effects of a project are acceptable.

¹Although such legislation as the *Planning and Environment Act 1987* (Vic) and the *Environment Protection Act 1970* (Vic) provide for the assessment of certain environmental impacts of proposed development, it is the *Environment Effects Act 1978* (Vic) which purports to allow for the comprehensive environment assessment of public and other works in Victoria.

² For best practice guidelines see the International Association for Impact Assessment, *Principles of Environmental Impact Assessment Best Practice*, 2.4. Accessed at: < <http://www.iaia.org/publications/> >

4. A tiered assessment process similar to that recommended by the Environment Assessment Review Advisory Committee in 2002 which aligns the level of assessment with the scale and likely environmental impacts of the proposed project.
5. Clear process timeframes that are appropriate to each level of assessment.
6. Monitoring and enforcement provisions that require a comprehensive monitoring program, inspection, control of impacts (including unanticipated impacts), enforcement of terms and conditions of approvals, and public reporting of project impacts.
7. Opportunities for community input at key stages of the environmental assessment process, including public comment at the referral of a proposal, and a requirement to consider public submissions when making a decision.
8. Public notification requirements and requirements for mandatory release of assessment reports and the Minister's recommendations.

Environment assessment legislation should be administered by the Minister for Environment, with the EPA or an independent body conducting the assessment process for the Minister. The Minister's decision on whether the environmental impacts are acceptable or not, and therefore whether the proposal can go ahead, should be binding on other decision-makers.

Ministerial discretion in the EIA process should be removed or limited by strict legislative criteria, so that the community and proponents have greater certainty as to when the environment assessment processes will apply and so that assessments proceed in a comprehensive, participative, transparent and accountable manner.

TERM OF REFERENCE (a)

Term of reference (a) – any weaknesses in the current system including poor environmental outcomes, excessive costs and unnecessary delays encountered through the process and its mechanisms

The Victorian environmental effects statement process has been widely criticised.³ Primarily, the system lacks the fundamental attributes of transparency, accountability, certainty and rigour essential for best practice. This has resulted in a number of unsatisfactory assessments that have left the community with serious concerns about the projects and their potential impacts on the environments. The environment assessment processes for the Victorian Desalination Plant, the Channel Deepening Project, the Frankston Bypass, the North-South Pipeline Project and the Bastion Point Boat Ramp all demonstrate the substantial weaknesses in the process and are discussed throughout our submission.

Victoria's environment assessment process is operating in the context of an out-of-date and inadequate legislative framework. Despite its many widely acknowledged weaknesses the EE Act has hardly changed in over 30 years. The few amendments to the EE Act have been to matters of process rather than substance. The promise of reform in 2002 with the special appointment of the Advisory Committee into the Environmental Assessment Review was largely disappointing. The recommendations canvassed by the Committee to reform the environment assessment processes under the EE Act were largely ignored. Rather than pursuing long overdue legislative amendments, the Government merely updated the Ministerial guidelines that support the EE Act.

The environment assessment process EE Act is a highly discretionary process, and, as such, lacks certainty, transparency and accountability and is liable to interpretation and manipulation.

The current system gives the Minister for Planning virtually unlimited discretion to decide whether an EES is required for a project, the content of an EES, the form and extent of public review of an EES and the assessment of an EES.

Below we outline some of the fundamental deficiencies in the current system and suggest essential improvements to ensure that Victoria's environment assessment process reflects leading practice.

Recommendation:

The EE Act should be repealed and replaced with new legislation that sets a comprehensive EIA system which emphasises rigorous, transparent, accountable, participative and deliberative processes designed to achieve ecologically sustainable development.

³See for example Murray Raff, 'The Renewed Prominence of Environmental Impact Assessment: "A Tale of Two Cities"' (1995) August, *Environmental and Planning Law Journal* 241; Rodger Eade, 'Issues in Environmental Impact Assessment in Victoria: What Has Scoresby Taught Us?' (2000) 18(4) *Urban Policy and Research* 515; Robyn Leeson, 'EIA and the Politics of Avoidance' (1994) February, *Environmental and Planning Law Journal* 71; Brad Jessup, 'Victoria and the Channel Deepening Project' (draft copy) in Tim Bonyhady and Andrew Macintosh (eds) *Mills, Mines & Other Controversies: The Environmental Assessment of Major Projects*. (2010).

1. Environment assessment objectives

As recognised by the Environment Assessment Review Advisory Committee, the EE Act does not include a statement of objects or purposes of the legislation.

The EE Act should provide a clear statement of objectives for the environment assessment process in Victoria, incorporating the objective of ecologically sustainable development (“ESD”). While the objectives and principles contained in the supporting guidelines are largely acceptable, the inclusion of up-to-date objectives in the EE Act will provide a clear and transparent framework for decision-making under the EE Act and for the development and implementation of subordinate legislation and other instruments such as guidelines.

It is particularly imperative for the legislation to expressly provide that the principles of ecologically sustainable development underpin the environment assessment process in Victoria. ESD should be the framework within which environment assessment decisions are made. Accordingly, legislation should provide that all decisions made under the EE Act – including EIA scoping, the making of recommendations and the final evaluation of proposals – be consistent with ESD principles.

All other states in Australia and the Commonwealth all have clearly defined objectives in their environment assessment legislation.

Recommendation:

Victoria’s environment assessment legislation should include a clear statement of objectives for the environment assessment process in Victoria, incorporating the objective of ecologically sustainable development. The legislation should provide that the ESD objectives must be considered at all stages of the environment assessment process, including scoping, assessment, the making of recommendations and the Minister’s decision.

2. Referral of projects

There is a great deal of uncertainty regarding the obligations for proponents and decision-makers such as local councils to refer proposed projects to the Minister for determination as to whether an EES is required, and the types of proposals required to be referred to the Minister for assessment.

Currently, the scope of EE Act is such that it applies if the Minister for Planning declares a project to be ‘public works’ if he considers that the works will have a significant effect on the environment.⁴ This is at the Minister’s discretion. The EE Act can also apply where the Minister calls in a project for an EES or where a decision-maker or proponent asks the advice of the Minister regarding the need for an environment assessment.⁵ General guidance as to the types of projects that should be referred to the Minister for assessment is left to the supporting guidelines, which are not binding.⁶

The environment assessment process for the Victorian Desalination Plant at Wonthaggi is one example demonstrating the lack of assurance regarding referral of projects and the obligations of proponents. Despite the enormous scale and significant environmental impacts of that proposal, the absence of requirements in the EE Act compelling referral of such projects meant that the Minister for Planning was able to use his discretion to decide that an assessment of the Government backed project was not

⁴ *Environmental Effects Act 1978* (EE Act), s3.

⁵ EE Act, ss6, 8(1), 8(3), 8(4).

⁶ Ministerial Guidelines for assessment of environmental effects under the Environmental Effects Act 1978, pp 5-12.

required. The Victorian Government only agreed to an assessment once the Commonwealth Government had decided that an EPBC Act assessment would be required, triggering the bilateral approval process.

Clarity and certainty regarding which projects must be referred to the Minister for a decision as to whether an assessment will be required are central to the effective operation of Victoria's environment assessment process. Clarity and certainty are important not only to ensure community confidence in the transparency and accountability of the environment assessment process, but also to ensure that the system operates efficiently for development proponents and the departments and statutory authorities involved in the process.

Objective criteria, or 'triggers' for determining matters that must be referred for determination as to whether an EIA is required should be included in the new EIA legislation. These can be supplemented by guidance material in addition to the legislation if required.

Furthermore, the current legislation makes no provision for sanctions and enforcement mechanisms to address situations where referral and assessment are required but not undertaken. Penalties for non-compliance/non-referral are important to ensure accountability. Proponents should be held accountable in circumstances where the proponent should have referred a particular proposal but failed to do so. This will only be effective if clear and transparent triggers are introduced.

The environment assessment process at the Commonwealth level, and in many states such as Western Australia, is triggered by an objective legislative test that is based on the likely level of impact of the proposal on the environment. Failure by a proponent to refer a proposal for assessment is an offence.⁷

Recommendation:

The legislation should contain clear triggers as to when a project must be referred to the Minister for determination of whether an EES is required, and penalties for non-compliance with referral requirements.

3. Screening, scoping and Minister's assessment of projects

The circumstances in which an EES might be required, the content and extent of the matters to be covered by the EES, and the Minister for Planning's determination of whether the likely environmental effects of a project are acceptable, are all at the discretion of the Minister. The EE Act does not require the Minister to take into account any particular considerations in determining these matters. While the EE Act allows the Minister to request information to make a decision on whether an EES is required⁸, it is left to the guidelines to detail the types of projects that should be subject to assessment and the matters the Minister should consider when deciding whether to require a proponent to prepare an EES.⁹ The Minister's discretion cannot be limited by the guidelines. Therefore it is possible for the Minister to require an EES, decide on the content and extent of the EES, and make an assessment of the EES in the absence of any consistent objective criteria and therefore any real accountability.

The environment assessment process for the Victorian desalination plant clearly demonstrates the lack of accountability resulting from the broad discretion afforded to the Minister. The desalination plant is predicted to use power that would generate one million tonnes of carbon dioxide, a significant greenhouse gas. Extraordinarily, however, under the terms of reference for the inquiry panel the Minister for Planning limited the scope of the assessment process by constraining consideration of greenhouse gases,

⁷ For example see *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s11 and *Environmental Protection Act 1986* (WA) pt IV, div 1. Under the EPBC Act there are substantial penalties for taking action that have, will have or is likely to have a significant impact on any matters of national environmental significance without approval from the Australian Government Minister for Environment.

⁸ EE Act, s5.

⁹ EE Act, ss8(2), 10(1)(a).

completely undermining the rigour of the assessment process and the independent role of the inquiry panel.

Decisions as to whether an EES is required should be triggered by statutory processes, not Ministerial discretion, and decisions regarding the scope of the ESS and whether the likely environmental effects of a project are acceptable should be based on clear and enforceable legislative criteria.

Recommendation:

The decision as to whether an EIA is required, the scope of the EIA, and whether the likely environmental effects of a project are acceptable should be based on clear and enforceable legislative criteria.

4. Level of assessment

As identified by the Environment Assessment Review Advisory Committee in 2002, the current system provides little or no flexibility for matching the assessment process to the scale or level of complexity and the environmental impacts presented by the proposal to be assessed.¹⁰ The existing processes provide for the assessment of major project proposals, and do not cater for smaller projects or projects with a moderate or limited level of environmental effects, which may benefit from a less rigorous or wide-ranging form of assessment.

To redress this issue, the Environment Assessment Committee proposed tiered levels of assessment intended to provide for a robust assessment of environmental impacts aligned to the environmental impact presented by the project and, therefore, the likely complexity of the assessment process.

The EDO is supportive of the introduction of levels of assessment similar to that proposed by the Advisory Committee to allow for the appropriate assessment of a broader range of proposals.

Environment assessment processes in other states and the Commonwealth allow for varied levels of assessment based on the scale and likely level of environmental impact. The number of levels available differs in each jurisdiction.

Recommendation:

A legislated tiered assessment process should be adopted, similar to that recommended by the Environment Assessment Review Advisory Committee in 2002 which aligns the level of assessment with the scale and likely environmental impact of the proposed project.

5. Timeframes

The EE Act does not contain clear timeframes for the environment assessment process, resulting in great uncertainty for both proponents and the community. The supporting guidelines indicate some process timeframes, however these can be departed from.¹¹

The EIA legislation should include clear timeframes that must be adhered to for each stage of the assessment process. For example, there should be an obligation on the Minister to make a decision within

¹⁰Report of the Environment Assessment Review Advisory Committee, 2 December 2002, p29. Accessed at: [http://www.dse.vic.gov.au/CA256F310024B628/0/C2BEE4394A4DD233CA257020000A2BFA/\\$File/Environment+Assessment+Review+AC+Report+.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/C2BEE4394A4DD233CA257020000A2BFA/$File/Environment+Assessment+Review+AC+Report+.pdf)

¹¹ For example, the guidelines state that the EES will be exhibited for a period of 20 to 30 business days. In exceptional circumstances the Minister may decide that a longer period is warranted. The guidelines also state that the Minister's assessment is normally provided to decision makers and the proponent within 25 business days of receiving the report of an inquiry or within 50 days from the close of the exhibition period of an EES if an inquiry is not appointed. See pages 23 and 28 of the guidelines

a certain period following the conclusion of a panel process. Timeframes should reflect the complexity of the type of project being assessed, the capacity of the assessing authorities and take into account meaningful opportunities for community participation so that robust assessments can be completed within the timeframe.

In the absence of legislative provisions, process timeframes are at the Minister's discretion. Under the current system, timeframes can be unreasonably short or unreasonably long and used to achieve political goals.

For example, in the environment assessment process for the Bastion Point boat ramp, the Minister for Planning did not release the Inquiry Panel's report of recommendations until 8 months after it was received by him.¹²

There are also numerous occasions when inadequate timeframes have limited constructive public participation in the assessment process and compromised the rigour of assessments. For example, due to the Government's decision to approve and build the Victorian desalination plant quickly, the Minister for Planning fast-tracked the environment assessment process for the plant. This had severe consequences for community participation and the rigour of the Inquiry Panel's recommendations. The EES documentation (over 1800 pages of highly complex, technical material plus works approvals of about 430 pages and 84 appendices which averaged approximately 90-100 pages each) was exhibited on 20 August 2008, with public submissions due on 30 September, 2008. The Inquiry Panel hearing was held just two weeks after this, on 14 October, 2008.

The timing available to the community to review and digest material of such length and complexity, and to engage experts to prepare reports and give evidence at the hearing was completely unreasonable and inadequate. Furthermore, the Inquiry Panel hearing itself was also rushed, with the Minister limiting the Inquiry Panel hearing to just under 3 weeks (14 October 2008 to 7 November 2008) and assigning a date for completion of their report. The Panel itself was critical of the limited timeframes, openly citing this as the reason for limiting the number and extent of oral presentations before the Panel.

The environmental assessment process for the Channel Deepening Project occurred in a similar manner.¹³

Essentially, the absence of an adequate legislative structure surrounding the assessment process allows the Minister to direct the process for political purposes. In this instance, the condensed timeframes effectively precluded the community from participating constructively in the environment assessment process and compromised the rigour of the assessment process.

Legislation should provide clear process timeframes, with some Ministerial discretion to extend periods if necessary. Greater clarity around timeframes would contribute significantly to creating greater certainty and confidence in the process.

Recommendation:

Environment assessment legislation should include clear process timeframes.

¹² Panel hearing concluded on 7 August 2008. Panel provided their report of recommendations (200 pages) to the Minister for Planning in October 2008. The Minister did not provide his assessment until June 2009.

¹³ For details see Brad Jessup, 'Victoria and the Channel Deepening Project' (draft copy) in Tim Bonyhady and Andrew Macintosh (eds) *Mills, Mines & Other Controversies: The Environmental Assessment of Major Projects*. (2010).

6. Monitoring and enforcement

The EE Act does not require follow-up of any impacts of a project as part of the environment assessment process. Moreover, little attention is given to follow-up in the non-binding, unenforceable Ministerial guidelines.

Follow-up is a key part of a functional environmental impact assessment process. Follow-up can be defined as:

“monitoring and evaluation of the impacts of a project or plan (that has been subject to EIA) for management of, and communication about, the environmental performance of that project.”¹⁴

Thus follow-up comprises four elements: monitoring, evaluation, management and communication.

EDO believes that the follow-up stage of the environment assessment process is as significant as the assessment stage and should be appropriately emphasised. It is important for determining the outcomes of environment assessment. In the absence of follow-up, an EIA effectively represents a best guess about what will occur. It is only through follow-up that the accuracy of the predictions made in the EIA process may be understood. Follow-up serves many important purposes such as:

- enforcing the conditions and standards associated with approvals
- preventing environmental problems arising from inaccurate predictions, inadequate mitigation or unforeseen factors
- minimising errors in future assessments and impact predictions
- making future assessments more efficient, cost-effective and timely
- providing ongoing management information about the project and its environmental effects.¹⁵

With respect to monitoring, best practice could involve the creation of an independent monitoring entity with representation by a number of stakeholders, including government, business and members of the public. See, for example, the Independent Environmental Monitoring Agency created to oversee the impact of the Ekati Diamond Mine in Canada.¹⁶

The EDO also believes strongly in the importance of public involvement in any monitoring and auditing processes. For example, in Hong Kong, information on the environmental impacts of projects is made available electronically.¹⁷ This enables interested persons to review and comment on the data themselves, allowing for a ‘crowd-sourced’ approach to environmental impact detection that may mean that adverse environmental consequences are detected when otherwise they would have been overlooked. Again, the information could be made available through an independent environmental monitor.

As discussed above, the importance of a proper follow-up regime is paramount. Accordingly, environmental impact monitoring should be formally built into impact assessment processes in legislation,

¹⁴ Morrison-Saunders, A. and J. Arts (eds) *Assessing Impact: Handbook of EIA and SEA Follow-up* (2006).

¹⁵ A Martyn, M Morris and F Downing, *Environment Impact Assessment Process in Australia* (1990). See also Barry Sadler, *International Study of the Effectiveness of Environmental Assessment* (1996), Chapter 5.

¹⁶ See William A. Ross, ‘The Independent Environmental Watchdog: A Canadian Experiment in EIA Follow-up’ in Morrison – Saunders and Arts (eds.), *Assessing Impact: Handbook of EIA and SEA Follow Up* (2006), Chapter 8. See also the IEMA website: < <http://www.monitoringagency.net/> > at 23 March 2009.

¹⁷ See Elvis Au and Simon Hui, ‘Learning by Doing: EIA follow-up in Hong Kong’ in Morrison-Saunders and Arts (eds.), *Assessing Impact: Handbook of EIA and SEA Follow-Up* (2006), Chapter 9.

providing for the development of a comprehensive monitoring program, inspection, enforcement of terms and conditions of approvals, monitoring and control of impacts (including unanticipated impacts), and public reporting of projects and their impacts.

Precedent for both the creation of an independent monitor and the use of a dedicated website for the reporting of environmental impact data in a timely fashion already exists. As part of the conditions imposed on the Port Phillip Bay dredging, the Commonwealth required the creation of an independent monitoring agency, subsequently named the Office of the Environmental Monitor ("OEM").¹⁸ The OEM publishes monthly reports on a number of monitoring programs and weekly updates on the dredging process as well as a number of irregular reports.

Although the OEM represents a good model, there is scope for improvement. Greater separation between the monitor and government would be desirable, instead of the heavy reliance placed by the OEM staff on the EPA. A more democratic governance structure and greater public involvement would also be more desirable. Public involvement in the monitoring process ensures that both developers and government can be held accountable for the impacts of their decisions and would assist to further the perception of independence.¹⁹

The EE Act must contain substantial penalties for non-compliance. These should include penalties for not referring a project that should have been referred, providing misleading or deceptive information as part of the EIA, non-compliance with the project decision and non-compliance with approval conditions.

Recommendation:

Environmental impact assessment legislation should contain monitoring and enforcement provisions that require a comprehensive monitoring program, inspection, control of impacts (including unanticipated impacts), enforcement of terms and conditions of approvals, and public reporting of project impacts.

7. Politicisation of the process

The degree of discretion and flexibility provided to the Minister under the EE Act allows the government to ignore or alter procedures. The current system allows political interest to override environmental concerns. Indeed, the Victorian Government, which is openly committed to the promotion of investment in major projects, has been prepared to interpret the environment assessment legislation in the context of its own development agenda. In fact, the environment assessment process in Victoria has been criticised as being "subject to political bargaining behind closed doors."²⁰ As one academic pointed out, what is the real purpose of environmental effects legislation, if it does not apply when the Minister decides so?²¹

The degree of latitude allowed in the interpretation of the legislation is of great concern. Increasingly, the Victorian Government appears to be treating the process either as optional or as a rubber stamp, rather than a proper and detailed environment assessment process. This has left many with grave concerns for the environment. Within the EDO's own recent experience, the Victorian Government determined that major developments, such as channel deepening and the north-south pipeline, would proceed quite some time before an EES was considered. The Government also stated that an EES was not required for the

¹⁸ The website of the Office of the Environmental Monitor may be found here: < <http://oem.vic.gov.au> > at 26 March 2010.

¹⁹ See Jos Arts and Angus Morrison-Saunders, 'Lessons for EIA Follow-up' in Morrison-Saunders and Arts (eds.), *Assessing Impact: Handbook of EIA and SEA Follow-Up* (2006), 298.

²⁰ Wescott, G., *The Review of EIA Legislation in Victoria, Australia, 1984-1988*, Paper presented to the Annual Meeting of the International Association for Impact Assessment, Griffith University, Brisbane, 5-9 July 1988 in Leeson, R., EIA and the Politics of Avoidance (1994) *Environmental and Planning Law Journal* 71 at 74.

²¹ Robyn Leeson, EIA and the Politics of Avoidance (1994) *Environmental and Planning Law Journal* 71 at 83.

desalination plant at Wonthaggi but agreed to one after Commonwealth Government determined that an assessment would be required under the EPBC Act (thus triggering the bilateral agreement). As discussed above, it then undermined the process through haste to approve and build the plant. The Frankston Bypass EES was conducted in a similar manner, in that the project was a foregone conclusion before the assessment process even began. Alternatives to the bypass and to the route of the bypass were not genuinely considered, and the environmental effects of different options not weighed up and compared.

The absence of an adequate legislative structure has enabled the EES process to evolve into a process of ascertaining *how* a project will proceed rather than *if* it should proceed or not. The question has been: “what are the environmental impacts and how will we manage these impacts?”, rather than “what are the environment impacts and are these impacts acceptable to us?”²².

The Bastion Point decision is the most recent example of the politicisation inherent in the Victorian EES process. In this case, the Minister for Planning approved the East Gippsland Shire Council’s ocean access ramp, breakwater and beach road for Mallacoota, despite his own expert Inquiry Panel recommending strongly against it. After a long, comprehensive and expensive investigation the panel concluded that the development could not be justified on environmental, social and economic grounds. Nevertheless, the Minister for Planning approved the development: with the safety and separation of boat users his prime stated reason. This conflicted with the panel’s explicit assessment that the proposed development itself raised significant safety concerns that far outweigh the safety concerns of the current situation. This decision is now the subject of a judicial review challenge by the local residents’ group Friends of Mallacoota Inc.

In order to achieve more accountable decision-making in environmental impact assessment processes there needs to be much greater structure around the exercise of the Minister’s discretion.

Recommendation:

Ministerial discretion in the EIA process should be removed or limited by strict legislative criteria, so that the community and proponents have greater certainty as to when the environment assessment processes will apply and so that assessments proceed in a comprehensive, participative, transparent and accountable manner.

8. Governance of the environment assessment process

Under the current system in Victoria, the Minister responsible for administering the EE Act is the Minister for Planning. Therefore it is the Minister for Planning that governs the environment assessment process and determines whether environmental impacts are acceptable.

Decisions relating to the environmental impacts of proposals are environmental decisions and not planning decisions and thus should be governed by the Minister for Environment, not the Minister for Planning. Accordingly, it is appropriate that environment assessment legislation be administered by the Minister for Environment, not the Minister for Planning.

In addition, environmental impact assessments should be conducted by an agency that has responsibility for environmental management and is staffed by officers who have environmental training and knowledge. Environmental impact assessments should be conducted by the Environment Protection Authority (EPA) with final approval to go to the Environment Minister. The current functions of EPA Victoria include assessing and issuing works approvals and environmental licences. These functions correlate well with environmental impact assessment.

²² Robyn Leeson, EIA and the Politics of Avoidance (1994) *Environmental and Planning Law Journal* 71 at 83.

Alternatively, a separate independent body with sole responsibility for administration of the environment assessment process could be established. This is the case in Western Australia where the EPA (an independent board) is responsible for conducting environmental impact assessments and making recommendations to the Environment Minister on whether projects should be approved or not. Similarly in Canada the Canadian Environmental Assessment Agency is responsible for administering the federal environment assessment process.²³ A similar agency could be established in Victoria.

The EPA or an independent body should be responsible for assessing and reporting to the Minister for Environment on the environmental factors relevant to a proposal, and recommending whether a project should go ahead or not and whether any conditions should be applied. The Minister would then make an assessment as to whether the environmental effects of the proposal are acceptable, and therefore whether the proposal can go ahead, on the basis of the body's recommendations. This decision should be binding on decision-makers.

A system such as this would also go some way towards reducing the conflict of interest that arises when the Government is the proponent. As noted above there is great potential for environmental considerations to be set aside in favour of political interests. This is discussed in more detail at Term of Reference (c) below.

Recommendations:

- Environment assessment legislation should be administered by the Minister for Environment.
- The EPA or an independent body should be given the responsibility for governing the process and conducting environmental impact assessments.
- The Minister's decision as to whether the environmental effects of a proposal are acceptable should be binding on decision-makers.

9. Strategic environmental assessment/early assessment

A reformed environment assessment process in Victoria could consider earlier strategic environment assessment (SEA) of strategies, policies, plans and programs that will initiate projects.

The aim of SEA is to ensure that environmental aspects are addressed and incorporated at decision-making levels prior to project level announcement.²⁴

Under the current system in Victoria, environment assessment applies after a decision has been taken for a development, and the project level EIA serves as a process to clean up the operational detail of the project. It is at this stage that the community is first given an opportunity to comment. Further, project-level EIA does not canvass the high-level strategic alternatives that might have been possible or estimate the cumulative impacts over a period of development.

²³ See ss5(1)(a) and 61-70 of the *Canadian Environmental Assessment Act 1992*. Accessed at <http://laws.justice.gc.ca/PDF/Statute/C/C-15.2.pdf> on 30 March 2010.

²⁴ Barry Dalal-Clayton and Barry Sadler, *Strategic Environment Assessment: A Rapidly Evolving Approach*. Accessed at <www.nssd.net/pdf/IIED02.pdf>

Globally, there is a move towards higher level environmental assessment prior to detailed project level assessment. Indeed, Canada²⁵ and the Netherlands²⁶ have introduced a higher level of assessment, that of Strategic Environmental Assessment, to consider and integrate environmental aspects into the review process of policies, plans and programs, rather than relying on project proposals to drive consideration of the environment. This gives the community an opportunity to comment on the strategic basis of projects and strengthens the quality and credibility of policies, plans and programs in terms of the environment.

Strategic impact assessment is also available under the EPBC Act in certain circumstances.

The Victorian EE Act does not specifically preclude the use of SEA, however there is little evidence in Victoria of its application early in planning processes. Approaches such as the native vegetation precinct planning are still in its infancy.

A reformed environment assessment process in Victoria should consider earlier strategic impact assessment; however, before building SEA into the process, we urge that the fundamental flaws in the current process be addressed. In particular, EDO believes there are a number of preconditions that need to be satisfied for strategic assessment to operate successfully:

- Decisions must be based on a very thorough investigation of environmental values. Environmental decision-making is highly dependant on the quality of information available, and this is particularly the case when decisions cover matters of the temporal and spatial scale of strategic assessments.
- The process should be transparent and public with a clear assessment framework, mandatory opportunities for public comment, and a clear explanation of the implications of strategic assessment.
- Sufficient flexibility should be provided to deal with new information if it comes to hand in the future. Best practice strategic assessment provides for some flexibility for changes in development plans based on new information that comes to light after the assessment.

The current environment assessment process in Victoria is in no way capable of dealing with a robust strategic assessment process. The fundamental flaws in the process must be addressed before Victoria can contemplate strategic assessments.

10. Implications for the Commonwealth environment assessment process

The Victorian environment assessment process is accredited for the purposes of the Commonwealth EPBC Act regime under the Agreement between the Australian Government and Victoria relating to environmental impact assessment.²⁷ The bilateral agreement removes the requirement for Commonwealth assessment of proposals that trigger the EPBC Act, where there is an assessment of the same proposal under Victorian law.²⁸

The development of bilateral agreements was partly intended to raise the standard of State environment assessment processes. To the contrary, however, the Commonwealth-Victoria bilateral agreement has been used as an endorsement of the Victorian Government's existing assessment approach.

²⁵ Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals. Accessed at <<http://www.ceaa.gc.ca/default.asp?lang=En&n=B3186435-1>>

²⁶ *Environmental Management Act 2004*, *Environmental Impact Assessment Decree 1994*, and *EU Strategic Environmental Assessment Directive (Directive 2001/42/EC)*. See also the Ministry for Housing, Spatial Planning and the Environment website: <<http://international.vrom.nl/pagina.html?id=37573>> at 31 March 2010.

²⁷ Accessed 29 March 2010, <<http://www.environment.gov.au/epbc/assessments/bilateral/vic.html>>

²⁸ Under the current bilateral agreement the Minister is still required to make a separate decision under the EPBC Act on whether to approve the project or not following the assessment.

The consequence of the Commonwealth accrediting Victoria's existing assessment approach is that Victoria's inadequate process is applied to assess and regulate the environmental impacts of Victorian projects on matters of highest concern to the Commonwealth.²⁹ These matters are therefore not guaranteed to be comprehensively and transparently assessed.

Furthermore, endorsement of Victoria's existing process has likely delayed much needed reform. Disappointingly, the Commonwealth did not demand higher standards from Victoria's assessment regime before entering into a bilateral agreement.

²⁹ It is unlikely that any sort of major environmental impact assessment of Victorian projects will occur separately at the Federal level (apart from a small number of strategic assessments) and therefore the inadequate Victorian process will apply for both Federal and State assessments.

TERM OF REFERENCE (b)

Term of reference (b) – community and industry participation under the Act

Best practice requires that environment assessment processes are participative.

Effective and timely community engagement informs the public about proposals that may affect community interests, allows identification of matters of public concern and interest and input of local expertise, and may result in resolution of public concerns. It ensures that decision-making occurs in an informed, transparent and accountable manner.

Under the current process, public involvement in the environment assessment process is at the discretion of the Minister for Planning, rather than guaranteed in legislation. The Minister for Planning decides whether to invite comments on any works or proposed works, whom participation is to be invited from, and whether to appoint a panel to conduct public hearings.³⁰ While public involvement is outlined in the supporting guidelines to the EE Act and is ordinarily undertaken, lack of statutory force leaves such involvement unenforceable. Further, the legislation does not require other elements essential for public participation such as requirements for public notification of projects referred, public exhibition of the environmental effects statement, release of EES panel reports or of the Minister's own recommendation to the proponent or the public.³¹

Effective public participation is an important element in achieving transparency, credibility and efficiency in the assessment process. It is therefore imperative that legislation guarantee adequate opportunity for informing and consulting the public at key stages of the assessment process such as screening, scoping, public exhibition and public hearing phases, and ensure that public input and concern is then considered in decision-making.

As discussed above, the experience with the Victorian desalination plant demonstrates that the length and complexity of EES documents can necessitate a longer period of exhibition than 30 business days to ensure that the public are able to constructively participate in the assessment process.

Furthermore, in order for the public to participate properly in the environment assessment process, they must be made aware of a particular proposal, its referral and the level of assessment to be applied, if any. If the public is not given adequate notification about such issues, this not only immediately limits the level of public consultation and involvement but also creates a feeling of mistrust and suspicion in the community, should they subsequently be made aware of that proposal. Therefore legislation should include provision for informing the public of project referrals and public review of environmental review documents, including exhibition of the EES, and mandatory release of both a panel's report and the Minister's recommendation.

Best practice requires consultation with key stakeholders as early as possible.³² Therefore legislation should provide an opportunity for the public to provide comment at the project referral stage – that is, on whether a project could have a significant effect on the environment - as is the case under the Commonwealth EPBC Act and in other states such as Western Australia.

Furthermore, the broader concept of greater public involvement would require the opportunity for third parties, such as a local community, to enforce any proposed legislation as currently occurs under the

³⁰ EE Act, s9(1), 9(2).

³¹ Section 6(3) of the EE Act merely provides that the Minister shall provide the assessment as soon as reasonably practicable in the circumstances of the case.

³² International Association for Impact Assessment, *Principles of Environmental Impact Assessment Best Practice*, 2.4. Accessed at: < <http://www.iaia.org/publications/> >

Commonwealth EPBC Act. Such provisions would certainly enshrine the transparency and accountability in the legislation.

Statutory requirements for consultation during the assessment process should correspond with the level of assessment and stage of assessment process.

Recommendations:

- A reformed environment assessment regime should include legislated opportunities for public involvement at key stages of environmental assessment, including public comment at the referral of a proposal, and consideration of public input in decision-making;
- The legislation should provide for public review of environmental impact assessment documents including exhibition of the EES and mandatory release of the reviewing body's recommendations and the Minister's assessment of the impacts.

TERM OF REFERENCE (c)

Term of reference (c) – the independence of environmental effects examination when government is the proponent

As noted above, one of the fundamental problems with the current environment assessment process is the conflict of interest that arises when the government is the proponent.

A look at recent matters that have been referred to the Minister for Planning for a decision on whether an EES is required shows that increasingly large projects are either Government sponsored or often public-private partnerships. Examples include the desalination plant, the north-south pipeline and the Frankston bypass. These projects – large and likely to have the significant impacts on the environment – were all strongly backed by the Government, yet it was the Government as proponent who was also deciding whether or not the projects needed an EES and how the process would proceed. This lack of independence seriously undermines good decision-making and is a matter of great community concern.

Decisions regarding protection of the environment should be made by a person separate from the person who is proposing a particular use of the environment. As discussed above we recommend the EPA or an independent body be given the responsibility for governing the process of the development of the EES, thereby reducing political influences. An independent body would enhance the rigour of assessments and the credibility of the process. In addition, where the Government is the proponent, greater independence could be achieved by requiring an independent reviewer to review the accuracy and comprehensiveness of the assessment. This would bring an added layer of scrutiny to the process.

Recommendation:

- The EPA or an independent body should be given the responsibility for governing the process of the development of the EES.
- Where the Victorian Government is the proponent, an independent reviewer should be required to review the accuracy and comprehensiveness of the assessment.

TERM OF REFERENCE (d)

Term of reference (d) – how better environmental outcomes can be achieved more quickly and predictably and with a reduction in unnecessary costs.

In order to achieve better environmental outcomes more quickly and predictably, and with a reduction in unnecessary costs, a major overhaul of the current system is needed so that environment assessment processes in Victoria can meet globally understood purposes of transparent, accountable, rigorous, participative and deliberative assessment of projects.

As our discussion of terms of reference (a) – (c) demonstrates these objectives are best achieved by reform of the environment assessment process in Victoria to:

- remove or limit Ministerial discretion wherever possible;
- give statutory effect to the objectives of environment assessment (in particular, ecologically sustainable development);
- set triggers as to when an EES will be required;
- establish tiered levels of assessment and clear process timeframes;
- include specific opportunities for public involvement including opportunities for public review of EES documents.

We also suggest that these objectives are more likely to be achieved if responsibility for the administration of environment assessment legislation is transferred to the Minister for Environment, with the EPA or an independent body appointed to govern the process of development of the EES and the Minister's assessment resulting in a binding decision.

These changes would provide greater certainty and clarity in the environment assessment process to the community, development proponents, and the departments and statutory authorities involved in the process.