

Implementing EES process reform

The Environment Defenders Office (EDO) welcomes the commitment by the Victorian government to proceed with reform of the Environment Effects Statement (EES) process in Victoria.¹

The EDO has been advising on the operation of the EES process under the Environment Effects Act 1978 (EE Act) for almost 20 years. It has long been the EDO's view that the EES process in Victoria is operating in the context of an out-of-date and inadequate legislative framework and that this framework should be overhauled and replaced with a comprehensive EIA system that emphasises rigorous, transparent, accountable, participative and deliberative processes designed to protect the environment from inappropriate development.

From EDO's engagement with stakeholders from all sides of the EES process, the EDO is confident that the commitment by the Government to implement the Environment and Natural Resources Committee (ENRC) recommendations and to 'proceed with reform of Victoria's EIA framework, including necessary legislative changes' will be supported across the board.

The details of the reform have not been released, however the general principles outlined in the government's response to the ENRC recommendations include giving priority to protecting the environment and recognition of the importance of third party rights.

As the EDO understands it, the drafting of a bill is not yet in progress. We look forward to the announcement of a timetable for reform and call on the government to ensure that there is broad ranging consultation in the development of the proposed legislation.

This document outlines nine of the reforms that the Government has committed to in its response, and how they can be implemented through legislation to provide a robust and effective EIA system for Victoria.

1. Comprehensive reform

The Government has committed to 'comprehensive' reform of the EES process (including necessary legislative changes). This cannot be done by simply amending the Act as has been done in the past, but requires new legislation that will provide the best possible framework and will properly integrate with other relevant legislation such as planning laws. 28 recommendations of the ENRC report support the need for a comprehensive overhaul of the system.

A comprehensive new legislative regime should be developed that includes key stages of the assessment process in binding legislative provisions, as recommended by ENRC. New legislation should include a clear statement of objectives, clear legislative triggers for assessment, clear and enforceable criteria, a tiered assessment process, clear process timeframes, monitoring and enforcement provisions, and provisions for public consultation.

The recommendations of the ENRC report which set out the need for legislative reform are:

¹See the Victorian Government response to the inquiry at <http://www.parliament.vic.gov.au/enrc/article/1491>

- Legislative amendments to give the Minister the power to declare a project as clearly unacceptable²
- Legislative amendments to make ecologically sustainable development (ESD) an overarching principle in the Act, and to ensure that environmental matters are to be considered first when making decisions under the Act³
- Legislative amendments to include objects in the Act, including the primary object of protecting the environment⁴
- Legislative amendments to state that the Act is applicable to both public and private works⁵
- Legislative amendments to enable any person to have the power to refer a project under the Act, not just proponents⁶
- Legislative amendments to provide for three levels of assessment of projects, and criteria for projects that will be assessed under each level⁷
- Legislative amendments to allow DPCD to require of a proponent extra scientific studies, if required⁸
- Legislative amendments to provide for penalties for the provision of false and misleading information by a proponent⁹
- Legislative amendments to codify public participation at the referral, scoping, public exhibition and inquiry panel states of the environmental assessment process, and to require the Minister to consider public comments¹⁰
- Legislative amendments to require public notification of all referrals, and a public comment period for all referrals¹¹
- Legislative amendments to require proponents to prepare public participation plans in certain circumstances, and for these to be made publically available¹²
- Legislative amendments to require EIA documentation to be drafted in plain English, in order for it to be accepted by the DPCD¹³
- Legislative amendments to include specific time frames for the exhibition of EIA documentation, the magnitude of which corresponds to the level of assessment the project is allocated¹⁴
- Legislative amendments to require an inquiry panel to be established for all Level 3 projects, and for Level 2 projects, at the discretion of the DPCD¹⁵
- Legislative amendments to define the role and conduct of inquiry panels, and how public participation will be incorporated in to the public inquiry process¹⁶
- Legislative amendments to require the DPCD to establish and issue the terms of reference for an inquiry¹⁷
- Legislative amendments to require the public exhibition of the panel inquiry's terms of reference for public comment, and for the DPCD to consider these public comments when settling on the final terms of reference¹⁸
- Legislative amendments to the panel inquiry report and the DPCD advice to be made publically available¹⁹
- Provision in legislation for statutory force to be given to any determination by the Minister as to the acceptability of a project, and to ensure that any conditions attached to an approval for a project are legally binding²⁰
- Legislative amendments to require that all approval decisions of the Minister be made public within 25 business days of receiving the DPCDs advice and the inquiry panel's report²¹
- Legislative amendments to require the monitoring of the environmental impacts of a project and compliance with the conditions on the approval²²
- Legislative amendments to require an independent authority to perform random audits on proponent compliance with conditions, for projects assessed under Levels 1 and 2²³

² ENRC Inquiry into the Environment Effects Statement Process in Victoria, Recommendation 2.1.

³ ENRC Inquiry report, recommendation 3.6.

⁴ ENRC Inquiry report, recommendation 3.7.

⁵ ENRC Inquiry report, recommendation 3.8.

⁶ ENRC Inquiry report, recommendation 4.1.

⁷ ENRC Inquiry report, recommendation 5.2.

⁸ ENRC Inquiry report, recommendation 6.5.

⁹ ENRC Inquiry report, recommendation 6.8.

¹⁰ ENRC Inquiry report, recommendation 7.1.

¹¹ ENRC Inquiry report, recommendation 7.3.

¹² ENRC Inquiry report, recommendation 7.4.

¹³ ENRC Inquiry report, recommendation 7.6.

¹⁴ ENRC Inquiry report, recommendation 7.7.

¹⁵ ENRC Inquiry report, recommendation 7.8.

¹⁶ ENRC Inquiry report, recommendation 7.9.

¹⁷ ENRC Inquiry report, recommendation 7.10.

¹⁸ ENRC Inquiry report, recommendation 7.11.

¹⁹ ENRC Inquiry report, recommendation 7.12.

²⁰ ENRC Inquiry report, recommendation 8.1.

²¹ ENRC Inquiry report, recommendation 8.3.

²² ENRC Inquiry report, recommendation 9.1.

²³ ENRC Inquiry report, recommendation 9.2.

- Legislative amendments to provide for an Office of Environmental Monitor to have responsibility for these independent audits and compliance with approval conditions²⁴
- Legislative amendments to require proponents to make publically available all monitoring information within five business days of it being obtained, and for the independent authority to publish all auditing reports within the same time frame²⁵
- Legislative amendments to require penalties for non-compliance with approval conditions²⁶
- Provision in legislation to allow for strategic environmental assessment in certain circumstances²⁷

This list is extensive and requires a brand new Act.

2. Protection of the environment

The Government has committed to protection of Victoria's environment being the main priority of the reform.

The outcome of the reform process should be legislation that is designed to achieve ecologically sustainable development, with an emphasis on environmental protection.

Specifically, this commitment can be achieved by:

1. Stating in the objectives of the Act that the primary objective is protection of the environment
2. Include achieving ESD principles in the objectives of the Act
3. The Act containing the requirement that the proponent, in preparing the EIA documentation for assessment, must demonstrate whether the project will meet ESD principles
4. The Act containing the requirements that the Minister must apply the ESD principles when making his or her decision, and must be satisfied that a project meets ESD principles before it is approved.

The legislative regimes for EIA at the Commonwealth level and in Western Australia are examples of those that clearly prioritise protection of the environment.²⁸ The objects clause of the *Environmental Protection Act 1986 (WA)* says:

The object of this Act is to protect the environment of the State, having regard to the following principles —

1. *The precautionary principle*
2. *The principle of intergenerational equity*
3. *The principle of the conservation of biological diversity and ecological integrity*
4. *Principles relating to improved valuation, pricing and incentive mechanisms*
5. *The principle of waste minimisation*²⁹

The ENRC specifically addresses the importance of having a clear purpose in any new EIA legislation in Chapter 3 of its report, where it recommends that '[t]he principles of ecologically sustainable development should ... be the guiding principles for administering the Act' and that 'environmental matters are to be considered first when making decisions under the Act.'³⁰

²⁴ ENRC Inquiry report, Recommendation 9.3.

²⁵ ENRC Inquiry report, Recommendation 9.5.

²⁶ ENRC Inquiry report, Recommendation 9.6..

²⁷ ENRC Inquiry report, Recommendation 10.1

²⁸ For example see *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* s3 and *Environmental Protection Act 1986 (WA)* s4A.

²⁹ *Environmental Protection Act 1986 (WA)* s4A.

³⁰ ENRC Inquiry report, p 55.

ENRC goes on to recommend definitively that environmental protection should be the primary object of the Act,³¹ and that when there are conflicting objectives in the formulation of the Minister's assessment, these objectives should be balanced in favour of net community benefit and sustainable development.³²

3. Efficiency, timeliness and certainty

The Government has committed to a priority of the reform being strengthened efficiency, timelines and certainty of the EIA process.

The uncertainty experienced in the operation of the current process can essentially be distilled down to one problem: the current legislative scheme is very brief and very ambiguous which allows a significant degree of latitude in the interpretation and application of the legislation. This leads to uncertainty and significant Ministerial discretion in the process. Once the legislation contains the essential elements of the EIA process, and the procedural decisions of the Minister are codified in the legislation, the system will become predictable to proponents and the community, and uncertainty will be reduced dramatically.

Having 'tiers' (or levels) of assessment is an important element of a new scheme that will help improve certainty in the process. This will mean that at the outset, a project will be allocated a level of assessment that corresponds with the likely degree of the environmental impacts of the project. From this stage onwards, the proponent and the community will have certainty around what and how much information will be required in the assessment documentation, what and how much consultation will be done, and whether a public panel inquiry is likely to be required.

There must also be clarity and certainty around when a project must be referred in the first place. This requires clear triggers to be drafted into the legislation for when an assessment is likely to be required. This will significantly reduce confusion as to whether a project requires assessment and will increase acceptance of the need for assessment of all projects that are likely to have a significant impact on the environment. This will result in a 'culture' of referral being established, as is seen in the Western Australia jurisdiction.

These elements will also serve to provide a more efficient and timely scheme for proponents, the Department of Planning and Community Development (DPCD), and any other statutory bodies involved in the process.

Many of the elements recommended by ENRC will help to improve certainty, timeliness and efficiency in the system.³³ All of these elements must be included in the new legislation if these features are to be achieved.

4. Transparency, accountability and fairness

The Government has committed to ensuring that transparency, accountability and fairness in the process is a priority in driving reform of the EIA process, and that these three things will feature as elements of the reform.

Transparency, accountability and fairness in the process requires that the EIA system is participative. Community engagement must be effective and timely and must inform the public about proposals that may

³¹ ENRC Inquiry report, recommendation 3.7.

³² ENRC Inquiry report, recommendation 8.2(a).

³³ Recommendation 2.1 (early determination if a project is unacceptable), Recommendation 3.2 (early involvement of relevant departments and agencies), Recommendation 3.5 (better resourcing of the DPCD), Recommendation 4.1 (early engagement with government departments and agencies by proponent), Recommendation 4.4 (clear legislative triggers), Recommendation 4.5 (guidance on what constitutes a 'significant impact' on the environment), Recommendation 5.2 (levels of assessment), Recommendation 6.2 (scoping guidelines for all three levels of assessment), Recommendation 6.3 (clarity around requirements for proponents to provide information on alternatives to a project), Recommendation 6.4 (statutory timeframes for the scoping stage), Recommendation 6.7 (standards for ecological impact assessment to be including in scoping documentation), Recommendations 7.1, 7.2, 7.7 and 7.9 (definition around when and to what extent public participation will be required), Recommendations 7.8 and 7.9 (when an inquiry panel will be established and what its role will be) and Recommendation 8.1 (the legal nature of the Minister's assessment decision, and conditions).

affect community interests, allow identification of matters of public concern and interest and input of local expertise, and should endeavour to result in resolution of public concerns.

Specifically, for transparency, accountability and fairness to be achieved in an EIA system the following elements must be enshrined in legislation:

- 1) Meaningful consultation of the public at referral, scoping, public exhibition and public hearing stages of the assessment process.³⁴ The time allowed for consultation at each stage should reflect what is appropriate at that stage. For example, shorter time frames can be provided at the referral and scoping stages, and longer timeframes provided at the public exhibition stage so that lay people can read and digest large volumes of technical assessment documentation, if necessary. Proper community engagement throughout the process often leads to a shorter process overall, as significant issues and concerns are dealt with along the way rather than becoming a road block at the end. Notably, consultation as proposed by ENRC will commence at a very early stage in the process, at referral stage, as opposed to what is currently practiced in the EES system.³⁵
- 2) Access to full information on a particular proposal at all stages in the process, and adequate notification to the public that this information is available. This must also include information on monitoring and compliance with approvals and conditions after the assessment has been completed. ENRC proposes many more mandatory obligations for the provision of information publically throughout the process (by both the proponent and the DPCD) than what is currently required in the EES process.³⁶ Having information easily accessible to the public decreases the workload for DPCD in responding to requests for information and increases community satisfaction with the process.
- 3) Importantly, these information and consultation requirements must be binding and enforceable. The ENRC correctly proposes that requirements be contained in the legislation so they are *guaranteed* for each project and can not be departed from at will by the Minister or proponent (as is possible in the current system).
- 4) Monitoring of compliance with approvals and conditions imposed by the Minister, including the establishment of an independent monitoring body, random audits, enforcement activities and penalties for non-compliance. This is of significant importance for accountability in the system. Fortunately ENRC devoted a chapter of its report to compliance and enforcement,³⁷ and the system proposed by them contains these elements.³⁸
- 5) The inclusion of third party rights in the legislation, to enforce, if necessary, the requirements of the regime. Such provisions are required for transparency and accountability to be enshrined in the system. They also help achieve the desired outcome of increased compliance with the system.

5. Levels of assessment

The Government has committed to developing a tiered suite of EIA processes to enable assessment of project proposals with variable potential for significant environmental impacts.

The current EES process in Victoria provides little or no flexibility for matching the assessment process to the scale, level of complexity and potential environmental impacts of a project. It provides for the assessment of major project proposals, and does not cater for smaller projects that have environmental impacts and which may benefit from a less rigorous or wide-ranging form of assessment. ENRC proposes an EIA system that

³⁴ ENRC Inquiry report, recommendations 7.1, 7.3, 7.4, 7.7, 7.9, 7.11.

³⁵ ENRC Inquiry report, see in particular recommendation 7.3.

³⁶ ENRC Inquiry report, see for example, recommendations 7.3, 7.11, 7.12, 8.3.

³⁷ ENRC Inquiry report, chapter 9.

³⁸ ENRC Inquiry report, recommendations 9.1 – 9.7.

allows for tiered levels of assessment,³⁹ which adequately addresses this issue and allows for appropriate assessment of a broad range of proposals. This is in line with leading EIA processes in other jurisdictions.

6. Fairness and third party rights

The Government has committed to reforms embodying principles of fairness, including third party rights and the ability to review certain procedural decisions.

As discussed above, fairness in the process requires that the EIA system is participative. An important element of this is providing the opportunity for third parties to seek independent review of procedural decisions made throughout the process, if they are not made in accordance with the requirements in the Act.

The ENRC recommends that third party rights to appeal to the VCAT are provided in relation to

1. the referral: the decision that a proposal is not to be assessed under the EIA process;⁴⁰ and
2. the level of assessment: the decision on what level of assessment that a project is allocated to.⁴¹

In addition to this, it is important that third parties, such as communities, are able to seek enforcement of the requirements of the Act if these are not adhered to by proponents or government bodies or agencies. This includes requirements such as those regarding timeframes, public consultation and information and compliance with approval conditions.

To fully implement this commitment, third party rights should also be available with regard to the final approval decision under the legislation, especially in the case of projects that have progressed through the highest level of assessment.

7. EIA process outcomes and decisions under other applicable laws

The Government has committed to establishing clear links between the outcomes of the EIA process and decision under other applicable laws.

Decisions that are subsequent to an EIA approval decision should be consistent with the EIA decision and with the conditions attached to that decision.

8. Compliance oversight

The Government has committed to ensuring compliance oversight by relevant bodies in a new EIA system.

This commitment acknowledges that there is a significant problem with the integrity of the current EES process due to the lack of monitoring and evaluation of a project once an assessment has been completed. The new assessment process should build in a mandatory 'follow-up' regime that includes monitoring, evaluation, management and communication. This regime should guarantee enforcement of and compliance with any approval given as an outcome of an assessment process, and all conditions attached to this approval.

Specifically, it should contain the following elements:

1. The creation of an independent environmental monitor with responsibility for compliance oversight;

³⁹ ENRC Inquiry report, recommendations 5.1-5.3.

⁴⁰ ENRC Inquiry report, recommendation 4.3.

⁴¹ ENRC Inquiry report, recommendation 7.5.

2. A defined role for public involvement in the monitoring and auditing process;
3. The use of a dedicated website for the reporting of environmental impact data to the public;
4. Penalties for non-compliance with the Act, an approval or approval conditions.

The ENRC proposes a detailed monitoring and enforcement scheme to be codified in legislation, in Chapter 9 of its report.⁴² This will serve as a valuable guide to the Government in upholding its commitment with regard to enforcement and compliance.

9. Strategic Impact Assessment

The Government has committed to the option of strategic impact assessment (SIA) for projects, in certain circumstances.

Incorporating SIA into an EIA scheme should be approached with caution. Only when a robust EIA system is in place can a SIA process function as best practice. A number of preconditions need to be satisfied for strategic assessment to operate successfully:

1. Decisions must be based on a thorough investigation of environmental values, and must be based on high quality environmental information. If this information and data is not available in particular circumstances, a SIA is not appropriate.
2. The process must be transparent and public with a clear assessment framework and mandatory opportunities for public participation. For SIA, the opportunities for public comment must be even greater and over a longer period of time than for a single project traversing a standard EIA process.
3. Flexibility should be built in to the process to deal with new information if it becomes available in the future. Best practice SIA provides for some flexibility for changes in development plans based on new information that comes to light after the assessment has been completed.
4. An SIA process should be carefully designed so that it does not act as a 'blanket' approval for projects in to the future. There is a danger this will result in sub-standard environmental outcomes.

The ENRC proposes that strategic impact assessment provisions be incorporated in to new EIA legislation.⁴³ This is a good skeleton structure for the detail of a robust SIA process to be built on.

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⁴² ENRC Inquiry report, recommendations 9.1-9.7

⁴³ ENRC Inquiry report, recommendation 10.1