



ENVIRONMENT AND NATURAL RESOURCES COMMITTEE

Inquiry into the Environment Effects Statement Process in Victoria

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Inquiry into the Environment Effects Statement Process in Victoria

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Committee members – 57th Parliament

This inquiry was completed during the term of the 57th Parliament.

The Members of the Environment and Natural Resources Committee are:

- Mr David Koch, MLC (Chair);
- Hon. John Pandazopoulos, MP (Deputy Chair);
- Mr Tim Bull, MP;
- Ms Joanne Duncan, MP; and
- Ms Lorraine Wreford, MP.

Committee members – 56th Parliament

This inquiry commenced during the term of the 56th Parliament.

The Members of the Environment and Natural Resources Committee were:

- Hon. John Pandazopoulos, MP (Chair);
- Mr Craig Ingram, MP (Deputy Chair);
- Ms Joanne Duncan, MP;
- Mrs Christine Fyffe, MP;
- Ms Tammy Lobato, MP;
- Mr Nathan Murphy, MLC (*from 9 March 2010*);
- Mrs Donna Petrovich, MLC;
- Mr Peter Walsh, MP; and
- Mr Matt Viney, MLC (*until 9 March 2010*).

Staff

For this inquiry, the Committee was supported by a secretariat comprising:

Executive Officer:	Dr Caroline Williams
Office Manager:	Ms Karen Taylor
Research Officer:	Ms Kristin Richardson (<i>February 2010 to October 2010</i>) and (<i>June 2011 to September 2011</i>)
Research Officer:	Mr Tom Holden (<i>September 2010</i>)
Research Assistant:	Ms Carly Godden (<i>July 2010 to August 2010</i>)
Expert Adviser:	Professor Tim Bonyhady Director of the Centre for Environmental Law, Australian National University

Terms of reference

The Legislative Council agreed on 29th July 2009 that pursuant to the *Parliamentary Committees Act 2003*, the Environment and Natural Resources Committee be required to inquire into, consider and report on the following:

The environment effects statement process in Victoria, including the operation of the *Environment Effects Act 1978*, and in particular —

- (a) any weaknesses in the current system including poor environmental outcomes, excessive costs and unnecessary delays encountered through the process and its mechanisms;
- (b) community and industry consultation under the Act;
- (c) the independence of environmental effects examination when government is the proponent; and
- (d) how better environmental outcomes can be achieved more quickly and predictably and with a reduction in unnecessary costs;

and to report by 30 August 2010.

The tabling date for this inquiry was amended to 5 October 2010 by the Legislative Council on 12 August 2010.

The inquiry lapsed in the 56th Parliament. On 4 May 2011, the Legislative Council directed the Environment and Natural Resources Committee, utilising the evidence it gathered in the 56th Parliament, to inquire into, consider and report on the environmental effects statement process in Victoria, including the operation of the *Environment Effects Act 1978* and the terms of reference (a) to (d) outlined above. The Committee was required to report by 1 September 2011.

The tabling date for this inquiry was subsequently amended to 30 September 2011 by the Legislative Council on 2 June 2011.

Chair's foreword

Interestingly, very few environment effects statements are conducted in Victoria each year, yet they generate intense public interest.

The Committee received its reference on the Environment Effects Statement (EES) process in Victoria in the previous 56th Parliament. Although the reference was generated in the Legislative Council, it reflects general consensus across the political spectrum that the EES process in Victoria requires reform. To that end, the Committee received 58 submissions from various sources and travelled to Western Australia to take evidence. Undertaking public hearings allowed many organisations and individuals to participate in the important process of making verbal contributions. These contributions added greatly to the information considered by the Committee in making its final recommendations tabled in the Victorian Parliament on 1 September 2011.

The Committee believes the implementation of the 50 recommendations in this report will substantially improve the transparency and rigour of the process and go some way to address the concerns of industry and the community.

I would like to acknowledge the work of the previous Committee in gathering the evidence for this inquiry. I also extend my thanks and appreciation to the members of the current Committee for rapidly familiarising themselves with the complex EES process and related matters.

Finally, I would like to acknowledge the excellent work of the Committee Secretariat for its assistance to the new Committee members in the transition between the 56th and 57th Parliaments so that this reference could be completed within the extended timeframe given.

My thanks especially to Dr Caroline Williams for her work as our Executive Officer, Ms Kristin Richardson, our Research Officer and Ms Karen Taylor, Office Manager, for their ongoing support and dedication in the production of the final report.

In closing, as this is the last reference Dr Williams will be managing with the Environment and Natural Resources Committee, the Committee wishes her well in her new appointment at the Office of the Victorian Auditor-General.



Mr David Koch, MLC

Chair

Executive summary

Chapter 1: Introduction

It is widely recognised that the *Environment Effects Act 1978* (Vic) and associated Environment Effects Statement (EES) framework in Victoria requires substantial reform.

Victoria's legislation was developed at a time when an integrated approach to the protection of the environment and development was not taken, when there was little understanding about the concept of biodiversity and before concern about greenhouse gas emissions and climate change became widespread. Very few changes have been made to the legislation and the EES framework over the past 30 years.

The key objective of the Victorian EES framework is to provide for a transparent, integrated and timely assessment of the environmental effects of projects capable of having a significant effect on the environment. In conducting this inquiry, it is the Committee's view that this key objective is not being met.

Witnesses and written submissions highlighted a number of key issues regarding the Victorian EES framework, including:

- in the past few developments triggered the EES process in Victoria;
- the lack of detail in the Environment Effects Act and the uncertainty of the status of the associated ministerial guidelines;
- the extent of the discretion and direct involvement of the Minister for Planning in the EES process;
- the perceived conflict of interest associated with the government being both a proponent of a project and having responsibility for administration of the EES process;
- the barriers to public participation at key stages of the EES process;
- the need to develop more robust monitoring and auditing arrangements; and
- the EES process culminating in advice from the Minister for Planning rather than a legally binding decision thereby creating uncertainty for proponents and the community and also limiting the opportunity for judicial review.

Chapter 2: Policy framework

An environmental impact assessment (EIA) sets out an assessment of the environmental effects of a proposed project and typically includes descriptions of the proposed development, the existing environment that may be affected and proposed measures to avoid or minimise adverse environmental impacts.

In Victoria the legislative and policy framework is underpinned by the *Environment Effects Act 1978* (Vic) and by non-binding ministerial guidelines issued under the Act. The legislation is supported and augmented by a number of other pieces of legislation in Victoria and Victorian Government policy. The stages typically involved in conducting an EIA are set out in this chapter.

Three reviews of the Environment Effects Act have been completed over the past two decades. The first review in 1985 did not result in any significant changes being made to the process. In 2002 an Advisory Committee was appointed to receive public submissions on an Issues Paper that was released by the (then) Department of Infrastructure, meet with stakeholders and suggest areas for reform of the Act. One of the key objectives of this review was to ensure that the EIA process provides the opportunity for affected stakeholders to have their concerns considered in a transparent and accountable manner. The 2002 review resulted in minor legislative amendments to the Environment Effects Act and the publication of more detailed ministerial guidelines in 2006. In 2009 a review was completed by the Victorian Competition and Efficiency Commission, which considered weaknesses of the EIA process and environmental regulation in Victoria. The previous government's response to the 2009 review stated that it would consider refining the statutory framework for assessments and identified a number of priority areas for change.

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is the primary piece of Commonwealth environmental legislation. The Environment Protection and Biodiversity Conservation Act focuses on the protection of matters of national environmental significance, which are defined by the Act, and include world heritage properties, national heritage places, Ramsar wetlands of international importance, migratory species and nationally threatened species and communities.

A proposal that triggers assessment under the Commonwealth legislation can be assessed by a state process accredited by the federal environment minister. The EES process is an accredited process under the Commonwealth and Victorian State Government Bilateral Agreement.

Chapter 3: Operating framework

The governance and administration of the EIA framework in Victoria is examined in chapter three. The EIA framework in Western Australia is considered both nationally and internationally as an example of best practice. The Committee drew heavily on this framework in identifying areas where the administration and governance of the Victorian EIA framework could be strengthened and improved.

The Department of Planning and Community Development (DPCD) in Victoria has responsibility for administering procedures under the Environment Effects Act and reports to the Minister for Planning. The majority of the key stages in the EES process are determined at the discretion of the Minister for Planning. Evidence to the Committee indicated that the lack of legislative guidance on the substantive elements of the EES process and reliance on ministerial guidelines and ministerial discretion, is a cause of concern as the process lacks transparency, certainty and leaves the process open to perceptions of political interference.

A strength of the Western Australian framework is that responsibility within that state for EIA legislation is managed by the Environmental Protection Authority (EPA). The independence of the EPA and the advice subsequently prepared and presented to the Minister for Environment, as well as the scientific and technical approach it takes to environmental assessments, were identified as key attributes of the Western Australian EIA framework. The Western Australian framework is however limited to evaluating the potential impacts on the biophysical environment only, whereas the Victorian EIA process also evaluates the social and economic elements of a project. Consequently, the Committee has recommended the EIA process remain in the Planning Portfolio, administered by the DPCD.

The EIA process is currently under-resourced in Victoria, when compared with the 2009-2010 budget for the administration of the process in Western Australia, which is approximately six times the size of that in Victoria. The Committee recognises the importance of robust assessments and has made a recommendation to ensure that the DPCD is adequately resourced to fulfil its EIA functions.

The lack of legislative guidance on clearly identifiable objectives, definitions of concepts essential to the understanding of the EIA framework and an overarching statement of the purpose of the Environment Effects Act were identified as concerns for stakeholders. The guidance, according to the evidence to the inquiry, provided in the non-binding ministerial guidelines, creates uncertainty for proponents and the community. The Committee has recommended that the Act be amended to address these legislative gaps and that guiding principles, including the principles of ecologically sustainable development, be defined.

Chapter 4: Referral process

The process of referring a proposal to the Minister for Planning is discussed in this chapter including pre-referral discussions, the legislative power to refer a project and triggers for referral.

The DPCD advised the Committee that it strongly encourages pre-referral discussions as it allows, amongst other things, for potential environmental issues to be considered early in the proponent's planning process. Despite the benefits associated with pre-referral discussions, the review by the Victorian Competition and Efficiency Commission in 2009 found such discussions are not routinely conducted. The Committee recognised the benefits of pre-referral discussions and noted the proactive and pre-emptive nature of the discussions that are encouraged in Western Australia. Consequently, the Committee has recommended that the importance of such discussions be emphasised in the ministerial guidelines. The Committee also recognises that the DPCD has established memoranda of understanding with key departments and agencies in order to provide a framework for cooperative pre-referral engagement.

Some submissions expressed concern that the current legislation in Victoria does not give any person the right to either formally refer a project for assessment or to appeal a decision as to whether a project should be assessed. In contrast, the Western Australia EIA framework allows for any person to refer or appeal a decision not to assess a project, with details such as the time limit for lodging an appeal, format of appeal, process for investigating an appeal, time to determine the appeal and possible outcomes stipulated. While only a small number of EIAs have been referred by a member of the public in Western Australia, giving a third party such rights is considered an important feature of the EIA framework. The Committee believes that the current EIA framework would be strengthened if third parties have such rights and has made recommendations to this effect.

The ministerial guidelines set out criteria for when a project may be referred for assessment. The legislation simply requires projects that could have a significant effect on the environment should be referred, with no further guidance, particularly as to the definition of 'significant effect'. While the ministerial guidelines provide some guidance for when a project may be referred for assessment, the Committee considers that some ambiguity remains.

The current criteria, regarding the types of proposals required to be referred to the Minister, has been widely criticised by proponents, the non-government sector and community groups as lacking certainty and transparency. Some witnesses also suggested that reliance on the discretion of the

Minister for Planning for referral and assessment decisions is a significant weakness of the current framework. In contrast, both the federal and Western Australian EIA frameworks provide greater guidance on what constitutes a significant impact on the environment. Accordingly, the Committee has recommended the introduction of clear legislative triggers as to when a project might be referred for an EIA and that guidance material should be readily available to proponents, decision-makers and the wider community.

Chapter 5: Levels of environmental impact assessment

Under the Environment Effects Act, the Minister for Planning can use one of three options when a project has been referred.

The first option is to require an EES. Since 1 July 2006, thirteen projects have required an EES. Secondly the Minister could specify that an EES is not required if certain conditions are met. The Committee was advised that a number of referred projects have been required to put in place a combination of environmental management plans or alternative assessment processes. Concerns were raised in submissions regarding this option on the grounds that public opportunities to participate in the process are reduced and there is insufficient guidance as to how the Minister determines whether or not to take this option. The final option available to the Minister is to determine that no EES is required. For these projects, it is most likely they would be subject to other planning and environmental controls. The Committee investigated the environmental assessments that occur under other legislation, particularly the *Planning and Environment Act 1987* (Vic), the *Major Transport Projects Facilitation Act 2009* (Vic) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Evidence to the Committee suggested the planning processes under the Planning and Environment Act have certain safeguards which are absent from the Environment Effects Act, including increased transparency in decision-making, predictable processes, specified community participation and greater scrutiny of decisions made under the Act. The Committee, whilst acknowledging that additional checks and balances are provided under the Planning and Environment Act, concluded it is appropriate for the EIA process to remain a separate piece of legislation, as the Planning and Environment Act does not necessarily provide the appropriate scope for comprehensive environmental assessments.

The Committee was advised that once a major transport project in Victoria has been assessed under the Major Transport Projects Facilitation Act as being of state or regional economic, social or environmental significance the project need not be referred under the Environment Effects Act. Some concern was expressed in relation to assessments under the Major Transport Projects Facilitation Act, in relation to the short time frames for public comment, no requirements for public consultation where major public transport projects are being assessed at lower levels of assessment and limited appeal rights. It is the Committee's view that all major projects, including transport projects, should be subject to a transparent process under the EIA legislation.

The Environment Protection and Biodiversity Conservation Act establishes procedures for the assessment of proposals that may have a significant impact on matters of national environmental significance. The Act provides for bilateral agreements between the Commonwealth and state governments. Critics have expressed some concern about the bilateral agreement between the Commonwealth and Victorian government, on the grounds that assessment of matters of national significance through the state EES process lacks transparency and is not as comprehensive as the Commonwealth assessment process.

The Committee examined the levels of assessment under the Commonwealth and Western Australian frameworks and found that many features of these models reflect good practice.

A number of submissions supported the introduction of a multi-tiered assessment process to the Victorian EIA framework. The Committee has recommended three levels of assessment be formalised under the Victorian EIA legislation and has further recommended clear legislative guidance be provided to outline the types of projects that would be assessed at each level.

A key strength of the Western Australian EIA framework is that once a project has been referred to the EPA, the Authority has responsibility for determining the level of assessment. In contrast, reliance on the discretion of the Minister for Planning to determine whether an EES is required was identified as a significant concern to the Committee. The Victorian EIA framework would be strengthened if responsibility for determining whether an EIA is required and the level of assessment required is delegated to the DPCD.

Chapter 6: The scoping stage and quality of environmental impact assessment documentation

Following a determination by the Minister for Planning that an EES is required, the Minister will define the scope of the matters to be investigated. A key issue for both proponents and community groups was the need to strike the balance in the level of detail and technical information required for an EIA; as broad scoping of an EIA can result in a lengthy investigation, while a narrow scope can result in potential environmental risks not being examined.

A risk-based approach to scoping of an EIA should be adopted in the assessment of environmental effects. The time and cost saving benefits of this approach were highlighted in written submissions to the inquiry, however the Committee was advised that this approach is under-utilised.

The ministerial guidelines outline the scoping process. A number of submissions considered that a lack of legislative guidance on the scoping stage of the EIA process was a weakness of the process. The Committee believes that there would be substantial merit in developing more detailed scoping requirements, in terms of increased certainty for both proponents and the community regarding the risks to be assessed, increased transparency of the process and cost and time savings associated with EIA scoping. Accordingly the Committee has recommended detailed scoping requirements be developed for the three new levels of EIA and the adoption of a risk-based approach to EIAs.

Examining project alternatives constitutes best-practice as it establishes the preferred and most environmentally sound project option. However, the ministerial guidelines state an EES will not normally require alternatives to a project to be documented. Evidence to the inquiry suggests there is a mismatch between community expectations that an EES will routinely examine project alternatives and the requirements set out in the ministerial guidelines. The Committee believes that clearer guidance is required to inform community expectations on how alternatives are to be assessed.

Submissions and evidence to the inquiry highlighted the benefits of Technical Reference Groups' (TRG) involvement in the EES process in identifying key issues in the scoping stage and ensuring EIA documentation meets scoping requirements. To ensure TRG's function more efficiently the Committee has recommended guidelines be developed to detail the role of TRG's.

The absence of statutory time frames for key stages of the EES process, including the scoping stage, was identified as a concern by industry representatives, community groups and academics. The ministerial guidelines state that draft scoping requirements are generally prepared within 20 business days and are subsequently released for public comment for a minimum of 15 business days. However, evidence received suggests these time frames are not always met. The Committee considers that achieving target timelines is an important priority and that adherence to scoping timelines, in particular, would be greatly improved by the introduction of statutory timelines in the EIA legislation.

The quality of an EIA and associated technical studies, particularly the lack of existing databases on ecosystems, species and other ecological processes and the lack of a consistent approach towards ecological impact assessments, was raised as an issue in several submissions to the Committee. The Committee believes that standards and expectations of ecological impact assessments should be defined in the scoping of an EIA.

Concern was raised in submissions regarding the role of expert opinions in the preparation of EES documentation. There is a perception that advice prepared by a consultant engaged by a proponent may be biased in favour of the proponent. Under the Environment Effects Act there are currently no penalties for providing false or misleading information to inquiries or in EES documentation. It is the Committee's view that the Victorian EIA framework may be strengthened with the inclusion of penalties for the provision of false and misleading information.

Chapter 7: Public participation

Public participation in the EIA process has long been recognised as a cornerstone of EIA processes and an essential element of a robust framework.

The Environment Effects Act provides only one direct reference to public participation and there are few references to public participation in the ministerial guidelines. Stakeholders identified this lack of guidance in the ministerial guidelines and the absence of a requirement for public participation as a significant issue. Community groups and individuals expressed their concern about the extent to which their views were considered throughout the process.

A small number of submitters considered it a weakness of the current Victorian framework that there is no formal requirement for early public consultation during the EIA process. There are many benefits associated with early community engagement in the process including ensuring that key community concerns are identified and addressed. In order to increase the transparency in the EIA, the Committee has recommended the EIA legislation be amended to define opportunities for early public participation in the pre-referral, referral and scoping stages of the process. The Committee has also recommended that best practice guidelines for public participation in the EIA process be developed.

The Victorian EIA framework could be considerably enhanced by providing any decision-making authority, proponent or person who disagrees with the level of assessment set for a proposal, with a right to appeal this decision.

Submissions to the inquiry stated that the current length of time for public exhibition of the EIA document is inadequate. It is the Committee's view that public exhibition periods for the EIA document should be proportionate to the complexity, scope and impact of the proposed project and has recommended including statutory time frames in the EIA legislation.

Community groups also stated that the volume of the documentation is often a significant barrier to their participation in the process. The Committee believes that scoping appropriately, public review of the scoping document and early consultation between proponents and local communities may reduce the volume of the EIA documentation.

Under the EIA legislation the Minister for Planning has wide ranging discretion to determine the inquiry panel process, including the appointment of panel members to the inquiry, the length of time for hearings, who can present at an inquiry and who can cross-examine witnesses. Opposition was expressed by submitters at this level of ministerial discretion. The Committee's view is that the perceived lack of transparency in the inquiry panel process is adversely affecting the community's confidence in the process. To improve certainty and transparency in the process the Committee has recommended that the EIA legislation be amended to provide guidance on the role and conduct of inquiry panels.

The Committee also believes the timely release of the inquiry panel report and advice provided by the DPCD to the Minister for Planning would also enhance the transparency of the Victorian EIA process and has recommended the legislation be amended to include statutory time frames for the release of this information.

Chapter 8: The Minister's assessment

Victoria's EIA process is not an approval process. Rather, once the Minister for Planning has made an assessment on a project, this is provided to the relevant decision-maker to inform their decision as to whether a project should proceed or not. Industry and community groups considered that the lack of a legally binding decision on decision-makers is a significant weakness of Victoria's EIA process. In contrast the Commonwealth and Western Australian EIA frameworks provide the relevant Minister with the power to set legally binding conditions on projects and the ability to approve or refuse a project based on the acceptability of risk. The Committee believes that the EIA process would result in a more tangible outcome for both proponents and community groups if the Minister was given the statutory power to make a determination on the environmental acceptability of a project under the Victorian EIA legislation.

The opportunities to appeal provided in the Western Australian EIA framework were identified as a key strength of that state's framework. Under Victoria's EIA framework there are limited opportunities for appeal, because the Minister's advice is not legally binding. The Committee notes its recommendation to give the Minister the statutory power to make determinations would ensure that his/her decision would still be subject to judicial review.

There are currently no legislated criteria to guide the Minister's assessment. Community and environmental groups advised the Committee that when balancing environmental, economic and social considerations of a project, the economic benefits tend to outweigh environmental matters. The Committee believes that conflicting objectives should be balanced in favour of net community benefit and sustainable development, which is currently the case under the Planning Scheme process in Victoria. The Committee believes transparency and public confidence in the process would be enhanced if a statement outlining the Minister's decision is published.

Evidence to the Committee indicated that the absence of statutory time frames during key stages in the EES process is a cause for concern and that the time frames outlined in the ministerial guidelines are not always met. The Committee has recommended that statutory time frames for the release of the Minister's assessment should be introduced into the EIA legislation.

Chapter 9: Monitoring, auditing, enforcement and evaluation

Post-EIA monitoring, auditing, enforcement and evaluation are recognised internationally as principles of best practice environmental impact assessment.

According to evidence received by the Committee, monitoring and auditing are considered important to: determine the accuracy of predictions made in the EIA; improve predictions for future projects; monitor the extent to which impacts are consistent with those assessed through the EIA process; inform future decision-making; and evaluate the effectiveness of EIA documentation and the EIA process in general.

However, there are no provisions for the monitoring of environmental impacts, the auditing of proponent's monitoring programs and compliance with conditions, or evaluation of the EIA process in the Environment Effects Act. As the current EIA process does not result in an approval decision with binding conditions, there are no penalties in the Act for non-compliance. According to the ministerial guidelines, the Minister's assessment can include recommended approaches to environmental monitoring and management, however, the Minister's assessment is not legally binding on decision-makers. This was recognised in several submissions as a significant weakness in the current Victorian EIA framework.

Currently, conditions for the implementation of projects are primarily set outside the EIA framework (with the exception of 'no EES with conditions' referral decisions) under relevant approval legislation, including, but not limited to: the Planning and Environment Act, Environment Protection Act, Coastal Management Act and/or the Mineral Resources (Sustainable Development) Act. This can result in a variety of monitoring approaches, which can vary between projects, and may not pick up every aspect relating to the EIA.

Under the Western Australian and the Commonwealth EIA systems, the Minister responsible for EIA makes a decision to reject or approve a proposal, and if approved, under what conditions. Conditions are legally-binding on the proponent and both jurisdictions have dedicated audit and enforcement teams to ensure compliance with conditions.

Monitoring is primarily the responsibility of the proponent, with a suitable agency responsible for auditing and enforcement. Several submissions supported independent auditors in order to increase transparency. Providing an appropriate independent authority with the responsibility for auditing proponent's monitoring programs and compliance with conditions would address in part, concerns raised when the government is the proponent. An Office of the Environmental Monitor for proposals assessed as level three EIA may provide more rigorous, detailed and high-level audits for projects that pose significant environmental risks.

Ensuring that monitoring and auditing results are publicly accessible was supported in some evidence to the Committee, and the Committee believes that mandatory disclosure of monitoring and auditing information should be included in Victoria's EIA legislation to increase transparency.

Whilst there is much interest in the evaluation of EIAs both in Australia and overseas, there has been minimal evaluation undertaken to date. There has not been a comprehensive examination of the environmental effectiveness of the Victorian environmental impact assessment process, which may be attributed to the absence of a post-EIA monitoring regime in Victoria. The Committee believes that evaluating the effectiveness of environmental impact assessment has many benefits, including ascertaining whether EIA processes are managing environmental risks, and informing future EIAs.

Chapter 10: Strategic environmental assessment

Strategic environmental assessment (subsequently referred to as strategic assessment) comprises consideration of the environmental, and sometimes also the social and economic, implications of policies, plans and programs, rather than individual projects.

Strategic assessment is a relatively new concept in relation to environmental impact assessment. There is considerable debate amongst academics and practitioners worldwide about its nature and scope and there is no internationally agreed definition of the concept.

Legislation explicitly providing for various forms of strategic assessment has been established in three jurisdictions in Australia, including at a Commonwealth level and in Western Australia. In Victoria, neither the *Environment Effects Act 1978* nor the *Planning and Environment Act 1987* explicitly provide for strategic assessment. However, a provision under the *Planning and Environment Act 1987* has been used several times to investigate the merits of strategic proposals, including alternatives in relation to major transport projects. This provision allows the Minister for Planning to appoint an advisory committee to advise on the merits of proposals or planning policies.

Various witnesses were supportive of the greater use of strategic assessment in Victoria and argued that it can achieve better environmental outcomes, increase the efficiency of the environmental assessment process and improve public participation.

Furthermore, the Committee was advised that because strategic assessment occurs earlier in a decision-making process it enables better consideration of project alternatives, and in particular, the alternatives *to* a project as opposed to the alternatives *for* a project. Witnesses also highlighted that strategic assessment may be a useful mechanism to address cumulative impacts.

Witnesses highlighted a number of key challenges associated with strategic assessment. In particular, concerns were raised in relation to the quality of information and level of analysis on the environmental values of the area on which a strategic assessment is based. The Committee was also advised of the risks associated with the often long-term nature of an approval, and received evidence that the low level of detail of strategic assessments may cause problems in setting adequate approval conditions.

The Committee believes that strategic assessment should be formalised in Victoria through the establishment of stand-alone provisions in environmental impact assessment legislation. To safeguard against the risks posed by strategic assessments, the Committee recommended a number of elements that should be included in such legislative provisions (refer to recommendation 10.1).

Recommendations

Chapter 2: Policy framework

Recommendation 2.1

The Victorian environmental impact assessment legislation should be amended to give the Minister for Planning the statutory authority to declare a project as clearly unacceptable. page 12

Chapter 3: Operating framework

Recommendation 3.1

The environmental impact assessment process continue to be administered by the Department of Planning and Community Development. page 40

Recommendation 3.2

The early involvement of the Department of Sustainability and Environment and Environment Protection Authority Victoria in the environmental impact assessment process is formalised with the Department of Planning and Community Development to ensure that a robust scientific and technical approach is taken to evaluating the potential biophysical environmental impacts of a proposal. page 40

Recommendation 3.3

Environmental impact assessment referrals be submitted to the Department of Planning and Community Development. page 41

Recommendation 3.4

The Department of Planning and Community Development determine whether proposals require an environmental impact assessment. page 41

Recommendation 3.5

The Department of Planning and Community Development be adequately resourced to manage the environmental impact assessment process. page 46

Recommendation 3.6

The environmental impact assessment legislation be amended to:

- (a) confirm ecologically sustainable development (ESD) principles as the overarching principles underpinning decision-making under the Act; and
- (b) emphasise that environmental matters are to be considered first when making decisions under the Act – decision-making should integrate long-term and short-term environmental, social, economic and equitable considerations effectively. page 55

Recommendation 3.7

The objects of the Victorian environmental impact assessment legislation be revised to state:

- (a) the primary object of the Act is to protect the environment;
- (b) the primary object is to be achieved by applying the principles of ecologically sustainable development as stated in the Act; and
- (c) the Minister for Planning and all agencies and persons involved in the administration of the Act must have regard to, and seek to further, the primary object of this Act. page 57

Recommendation 3.8

The environmental impact assessment legislation be amended to state that it is applicable to both public and private works. page 58

Chapter 4: Referral process

Recommendation 4.1

The Ministerial guidelines for assessment of environmental effects under the *Environment Effects Act 1978* should be amended to encourage proponents to engage with relevant government departments and agencies prior to referring their proposal for a decision on whether an environmental effects statement is required. page 64

Recommendation 4.2

The environmental impact assessment legislation is amended to enable any person to have the power to refer a project to the Department of Planning and Community Development that may have a significant impact on the environment. page 68

Recommendation 4.3

Any decision-making authority, proponent or other person that disagrees with a decision that a proposal is not to be assessed under the environmental impact assessment legislation should be entitled to appeal the decision to the Victorian Civil and Administrative Tribunal. The time limit for lodging an appeal, format of appeal, process for investigating an appeal, time to determine the appeal and possible outcomes should be stipulated. page 68

Recommendation 4.4

Clear legislative triggers as to when a project must be referred for environmental impact assessment and the term 'significant impact' be defined in the environmental impact assessment legislation. page 74

Recommendation 4.5

Detailed guidance on what constitutes a significant impact should be readily available to proponents, decision-makers and the community. page 75

Recommendation 4.6

An output (if a project is going to have a significant impact on the environment) rather than input based approach (where project types are listed), be taken in deciding as to whether a referral is required. page 75

Recommendation 4.7

Penalties may apply to proponents for failing to refer a proposed project, which could have a significant environmental impact, for assessment under the Victorian environmental impact assessment legislation. page 75

Chapter 5: Levels of environmental impact assessment

Recommendation 5.1

The Department of Planning and Community Development be responsible for determining the appropriate level of environmental impact assessment. page 104

Recommendation 5.2

The environmental impact assessment legislation be amended to include the following levels of assessment:

- (a) Level 1 – Assessment on Preliminary Information;
- (b) Level 2 – Public Environment Report; and
- (c) Level 3 – Environmental Impact Statement.

The criteria for projects that would be assessed under each level should be set out in the environmental impact assessment legislation. page 113

Recommendation 5.3

The Department of Planning and Community Development develop a Planning Practice Note on environmental impact assessment, to strengthen assessment procedures under the Planning and Environment Act. page 11

Chapter 6: The scoping stage and quality of environmental impact assessment documentation

Recommendation 6.1

The scoping requirements of an environmental impact assessment be issued by the Department of Planning and Community Development. page 123

Recommendation 6.2

Scoping guidelines be developed for the three new levels of environmental impact assessment including:

- (a) objectives for the scoping process, consistent with best practice principles;
- (b) implementing a risk-based approach to environmental impact assessment;
- (c) requirements for the assessment of relevant alternatives, including consultation with key stakeholders in the early stages of project planning; and
- (d) specifying the role of departments and agencies in Technical Reference Groups.

page 124

Recommendation 6.3

The scoping guidelines developed for the three new levels of environmental impact assessment define the term 'relevant alternatives' and provide clear requirements for the assessment of both alternatives for and alternatives to a project. page 127

Recommendation 6.4

Statutory time frames be introduced for the environmental impact assessment scoping stage as follows:

- (a) draft scoping requirements for a Public Environment Report and an Environmental Impact Statement to be prepared within 20 business days of receiving the required information from the proponent (preliminary list of issues to be investigated, draft study plan and draft consultation plan);
- (b) draft scoping requirements to be released for comment by interested parties for 20 business days; and
- (c) final scoping requirements to be finalised by the Department of Planning and Community Development within 15 business days of the close of the public comment period.

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Recommendation 6.5

The environmental impact assessment legislation be amended to:

- (a) give the Department of Planning and Community Development the statutory power to call for extra scientific studies if the department considers that it needs extra information, because the information in the environmental impact assessment is deficient;
- (b) the extra information should be released both to the proponent and the public; and
- (c) the proponent should meet the costs of the additional scientific studies.

page 134

Recommendation 6.6

The Department of Planning and Community Development appoint experts to peer review documentation in relation to an environmental impact assessment provided by proponents, where necessary. page 135

Recommendation 6.7

- (a) Standards and expectations of ecological impact assessments are defined in the scoping of individual environmental impact assessments.
- (b) The standards set out in environmental impact assessments for ecological impact assessment, are monitored and audited to ensure compliance. page 138

Recommendation 6.8

The Victorian environmental impact assessment legislation include penalties for the provision of false and misleading information. page 142

Chapter 7: Public participation

Recommendation 7.1

The environmental impact assessment legislation be amended, based on best practice principles, to define opportunities for public participation at key stages of environmental assessment including the referral, scoping, public exhibition and inquiry panel stages; and specify that the Minister for Planning must consider such public comment. page 149

Recommendation 7.2

Best practice guidelines for public participation in the environmental impact assessment process are developed. page 149

Recommendation 7.3

The environmental impact assessment legislation is amended to require:

- (a) the public notification of all referrals, to be displayed on the website of the Department of Planning and Community Development, and
- (b) a public comment period, on whether a project should be assessed and the level of assessment, of 10 business days for all referrals. page 156

Recommendation 7.4

The environmental impact assessment legislation is amended to require:

- (a) proponents to prepare public participation plans for a Public Environment Report (Level 2) and an Environmental Impact Statement (Level 3); and
- (b) public participation plans to be made available on the Department of Planning and Community Development's website. page 157

Recommendation 7.5

Any proponent, decision-making authority, or person that disagrees with the level of environmental impact assessment should be entitled to appeal the decision to the Victorian Civil and Administrative Tribunal, within ten business days of Department of Planning and Community Development's decision. page 158

Recommendation 7.6

The environmental impact assessment legislation require that the environmental impact assessment documentation is written in plain English, where practicable, in order to be accepted by the Department of Planning and Community Development. page 161

Recommendation 7.7

The environment impact assessment legislation is amended to include the following mandatory opportunities for public participation in the environmental impact assessment process:

- (a) the Department of Planning and Community Development's draft report for Level 1 assessment (Assessment on Preliminary Information) be placed on public exhibition for 21 business days; and
- (b) the Level 2 Public Environment Report to be placed on public exhibition for 30 business days; and
- (c) the Level 3 Environmental Impact Statement to be placed on public exhibition for 50 business days. page 161

Recommendation 7.8

The environmental impact assessment legislation should be amended to require that:

- (a) an inquiry panel is established at the discretion of the Department of Planning and Community Development for project proposals that trigger a Public Environment Report (Level 2); and
- (b) an inquiry panel is mandatory for project proposals that trigger an Environmental Impact Statement (Level 3). page 164

Recommendation 7.9

The environmental impact assessment legislation should provide guidance on the role and conduct of inquiry panels and guidance on the opportunities for public participation in the inquiry panel process. page 164

Recommendation 7.10

The environmental impact assessment legislation should be amended to require that the Department of Planning and Community Development establish and issue the terms of reference for an inquiry. page 164

Recommendation 7.11

The environmental impact assessment legislation should be amended to require:

- (a) the inquiry panel's terms of reference be exhibited with the environmental impact assessment documentation for public comment; and
- (b) the Department of Planning and Community Development to consider public comments when issuing the final terms of reference for the inquiry. page 165

Recommendation 7.12

The environmental impact assessment legislation be amended to require:

- (a) the panel report of the inquiry; and
- (b) the Department of Planning and Community Development's advice

be made publicly available on the Department of Planning and Community Development's website, within ten business days of being submitted to the Minister for Planning. page 166

Chapter 8: The Minister's assessment

Recommendation 8.1

- (a) The Minister for Planning have the statutory power to make determinations on the environmental acceptability of projects under the environmental impact assessment legislation.
- (b) The Minister's approval should set specific legally binding conditions for the project. page 175

Recommendation 8.2

- (a) When formulating the Minister's assessment, conflicting objectives should be balanced in favour of net community benefit and sustainable development; and
- (b) The Minister for Planning publish a statement of reasons with each decision. page 182

Recommendation 8.3

The environmental impact assessment legislation be amended to require that the Minister for Planning's approval decision for the three new levels of environmental impact assessment be released in writing to the proponent and made publicly available on the Department of Planning and Community Development's website within 25 business days of receiving the department's advice and the inquiry panel's report. page 184

Chapter 9: Monitoring, auditing, enforcement and evaluation

Recommendation 9.1

The environmental impact assessment legislation be amended to require the monitoring of environmental impacts and compliance with conditions set by the Minister for Planning in the Minister's assessment. Page 192

Recommendation 9.2

The environmental impact assessment legislation be amended to require an appropriate independent authority to randomly audit the proponent's monitoring programs and ensure compliance with conditions set by the Minister for Planning, for projects assessed under Levels 1 and 2. page 199

Recommendation 9.3

The environmental impact assessment legislation be amended to require an Office of the Environmental Monitor, established by the Environment Protection Authority Victoria and funded in-part by the proponent, be responsible for the auditing of environmental impacts and compliance with conditions set by the Minister for Planning for projects assessed under Level 3. page 200

Recommendation 9.4

The appropriate independent authority should be adequately resourced to conduct auditing (for Level 1 and 2 assessments) and enforcement activities for projects that require an environmental impact assessment. page 201

Recommendation 9.5

The environmental impact assessment legislation be amended to require that:

- (a) proponents be required to publish all monitoring information on the internet within five business days.
- (b) the appropriate independent authority publish all auditing reports on the internet within five business days of receipt. page 203

Recommendation 9.6

The environmental impact assessment legislation be amended to provide penalties for non-compliance with environmental impact assessment approval conditions set by the Minister for Planning. page 206

Recommendation 9.7

An independent agency undertake a broad assessment of environmental impact assessment projects post-completion, as a matter of urgency, to determine whether the outcomes are effective. The findings of this assessment be made public. page 211

Chapter 10: Strategic environmental assessment

Recommendation 10.1

- (a) Stand-alone strategic environmental assessment provisions in environmental impact assessment legislation be established and include the following elements:
 - (i) an objective or 'legal test' for strategic assessment;
 - (ii) factors that a decision-maker must consider in deciding whether to approve a policy, plan or program assessed by strategic assessment;
 - (iii) opportunities be made for public participation at key stages of the strategic assessment process, with statutory time frames for the public to comment on a draft strategic assessment report being a minimum of 60 business days;
 - (iv) minimum form and content requirements for strategic assessment reports; and
 - (v) a process for ensuring that new information on the environmental values of the area subject to strategic assessment can be incorporated into future decision-making processes.
- (b) The government establish guidelines that clearly set out the quality of information and level of analysis required to undertake strategic assessment.

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Glossary

Administrative procedures	A document published by Western Australia's Environmental Protection Authority that describes the principles and practices it applies in the environmental impact assessment of proposals
Advisory committee	A committee appointed by the Minister for Planning under the <i>Planning and Environment Act 1987</i> (Vic) to provide advice on specified matters, such as the merits of a proposed development or a planning policy issue
Approval bilateral	A mechanism under a bilateral agreement that allows the Commonwealth to rely on a state or territory's environmental impact assessment and approval of a proposed development. The Commonwealth does not need to decide whether to approve the development separately under its Environment Protection and Biodiversity Conservation Act
Assessment bilateral	A mechanism under a bilateral agreement that allows the Commonwealth to rely on a state or territory's environment impact assessment when deciding whether to approve a proposed action under its Environment Protection and Biodiversity Conservation Act
Assessment on Preliminary Information	The first level of environmental impact assessment under the multi-level assessment system recommended in this report
Assessment on proponent information	The first level of environmental impact assessment under Western Australia's new environmental impact assessment procedures
Auditing	The process of checking a proponent's monitoring program, procedures, reports and results to ensure that the proponent is complying with conditions of the project approval and environmental standards
Bilateral agreements	In this report, bilateral agreement refers to an agreement between the Commonwealth and a state or territory that aims to reduce duplication arising from overlapping Commonwealth, state and territory environmental impact assessment laws. A bilateral agreement allows the Commonwealth to rely on a state or territory environmental impact assessment when assessing proposed developments under its own Environment Protection and Biodiversity Conservation Act
Biodiversity offsets	Actions taken to counterbalance actions that cause a loss of biodiversity values

Council of Australian Governments (COAG)	Australia's peak intergovernmental forum. The Council comprises the Prime Minister, state premiers, territory chief ministers and a local government representative
Department of Infrastructure	The former Victorian Government department that was responsible for administering the Environment Effects Statement process in Victoria between 1996 and 2002
Department of Planning and Community Development (DPCD)	The Victorian Government department responsible for managing the planning system in Victoria. The department is currently responsible for administering the Environment Effects Statement process in Victoria
Department of Sustainability and Environment (DSE)	The Victorian Government department responsible for sustainable management of water resources, climate change, bushfires, public land, forests and ecosystems in Victoria
Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC)	The Commonwealth Government department responsible for administering the Commonwealth's environmental impact assessment processes
Department of the Environment, Water, Heritage and the Arts (DEWHA)	The former Commonwealth Government department that was responsible for administering the Commonwealth's environmental impact assessment processes. On 14 September 2010, DEWHA was re-named the Department of Sustainability, Environment, Water, Population and Communities
Ecological impact assessment	A document that sets out the impact of a proposed development on an ecosystem. Ecological impact assessments can form part of an environmental impact assessment
Ecologically sustainable development (ESD)	Development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends
Environment Assessment Review	The review of the Environment Effects Act conducted by the Environment Assessment Review Advisory Committee in 2002
Environment Effects Act	The <i>Environment Effects Act 1978</i> (Vic). This Act sets out the legislative framework for the Environment Effects Statement process in Victoria
Environment Effects Statement (EES)	The name given to the type of environmental impact assessment required under Victoria's Environment Effects Act

Environmental impact assessment (EIA)	An environmental impact assessment (EIA) sets out an assessment of the environmental effects of a proposed project and typically includes descriptions of the proposed development, the existing environment that may be affected and proposed measures to avoid or minimise adverse environmental impacts
Environmental Impact Statement	The third level of environmental impact assessment under the multi-level assessment system recommended in this report. Environmental Impact Statement is also the name given to one of the levels of environmental impact assessment under the Commonwealth's environmental impact assessment laws
Environment Protection Act	The <i>Environment Protection Act 1970</i> (Vic). This Act provides the legislative framework for environment protection in Victoria, setting out key environmental protection principles and establishing the Environment Protection Authority Victoria
Environment Protection and Biodiversity Conservation Act (EPBC Act)	The <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth). This Act sets out the Commonwealth's requirements for environmental impact assessments
Environment Protection Authority (EPA) Victoria	The independent statutory authority responsible for reducing and controlling pollution and protecting the environment in Victoria
Environmental Management Plan	A plan that sets out how environmental values will be protected as a project is implemented
Environmental Management System	A system that enables organisations to identify and manage their impact on the environment. An Environmental Management System does not set environmental standards, but rather sets out procedures for meeting environment performance requirements
Environmental Protection Act	The <i>Environmental Protection Act 1986</i> (WA). This Act sets out the requirements for environmental impact assessments in Western Australia
Environmental Protection Authority (EPA)	The authority responsible for administering Western Australia's environmental impact assessment processes
Evaluation	The process of investigating whether predicted impacts on the environment have occurred, whether the methods used to make the predictions were reliable and whether safeguards were effective. Evaluation provides decision-makers with an understanding of the consequences of actions and feedback for improvement
Independent Review of the EPBC Act	The review of the Commonwealth's Environment Protection and Biodiversity Conservation Act conducted by Dr Allan Hawke in 2008-09

Inquiry panel	A panel of persons appointed by the responsible minister under the <i>Environment Effects Act 1978</i> (Vic) to hold an inquiry into the environmental effects of any works or proposed works
Intergovernmental Agreement on the Environment	A 1992 Commonwealth, state and territory agreement that, amongst other things, aims to establish certainty about environmental impact assessment processes, improve consistency across levels of government and avoid duplication and delay
Judicial review	Review of a decision by a court to determine whether the decision was made in accordance with the law
Merits review	Review of the merits of a decision by a court or tribunal. Allows the court or tribunal to make a fresh decision that either affirms, varies or sets aside the original decision
Ministerial guidelines	Guidelines issued by the minister responsible for the Environment Effects Act to supplement the requirements of the Act. Amongst other things, the guidelines set the process for scoping and preparing an Environment Effects Statement, public review of an Environment Effects Statement and the minister's final assessment
Minister's assessment	The responsible minister's assessment of the environmental effects of proposed works covered by the Environment Effects Act
Monitoring	The process of observing, measuring and recording information about the environmental impacts identified in an environmental impact assessment, testing the effectiveness of mitigation measures and detecting any potentially damaging changes in the environment
National Strategy for Ecologically Sustainable Development	A Commonwealth, state and territory strategy adopted by the Council of Australian Governments in 1992 to facilitate a coordinated and cooperative approach to ecologically sustainable development in Australia
Office of the Environmental Monitor	An office established in 2007 to scrutinise, report and advise on the environmental performance of the Channel Deepening Project. This report recommends an Office of Environmental Monitor be established to audit environmental impacts and compliance with conditions for projects subject to a level 3 assessment
Planning and Environment Act	The <i>Planning and Environment Act 1987</i> (Vic). This Act establishes the legal framework for planning in Victoria
Planning authority	A person or body with the power to prepare a planning scheme or amendments to a planning scheme under the Planning and Environment Act

Planning panel	A panel of one or more persons appointed under the Planning and Environment Act to give independent advice to a planning authority or the Minister for Planning about a proposal
Planning Panels Victoria (PPV)	The division of the Department of Planning and Community Development that manages the conduct of planning panels
Planning permit	A permit for use or development of land issued under the Planning and Environment Act
Planning practice note	A document issued by the Department of Planning and Community Development that contains advice or guidance about planning issues
Planning scheme	A document issued under the Planning and Environment Act that sets out the policies and regulations regarding the use and development of land in a particular area
Precautionary principle	The principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason to postpone measures to prevent environmental degradation
Proponent	The person or body who is proposing to carry out works
Public Environment Report (PER)	The second level of environmental impact assessment under the multi-level assessment system recommended in this report. Public Environment Report is also the name given to one of the levels of environmental impact assessment under the Commonwealth's environmental impact assessment laws
Public Environmental Review	The second level of environmental impact assessment under Western Australia's new environmental impact assessment procedures
Referral	The formal referral of a project to a minister or government authority for a decision regarding whether an environmental impact assessment is required
Responsible authority	The body responsible for the administration and enforcement of a planning scheme under the Planning and Environment Act, including issuing planning permits
Scoping	The process for determining the matters to be investigated and documented in an environmental impact assessment

Scoping requirements	The matters to be investigated and documented in an environmental impact assessment
State Environment Protection Policies (SEPPs)	Policies issued by the Environment Protection Authority Victoria under the Environment Protection Act that provide more detailed guidance about the application of the Act
State Significant Major Development/State Significant Projects	A new category of developments that would be created under the draft Planning and Environment Amendment (General) Bill released for public comment in December 2009
Strategic assessment/strategic environmental assessment	An assessment of the environmental, and sometimes also the social and economic, implications of policies, plans and programs rather than individual projects
Supplementary EES (SEES)/Supplementary Statement	A document that sets out any additional information the responsible minister requires to assess the environment effects of a proposed work under the Environment Effects Act
Technical Reference Group (TRG)	A group appointed by the Department of Planning and Community Development to advise and assist the department and a proponent with the scoping and preparation of an Environment Effects Statement
Victoria planning provisions	A set of standard provisions for planning schemes issued by the Minister for Planning under the Planning and Environment Act. The provisions form a template from which planning authorities can source and construct planning schemes
Victorian Civil and Administrative Tribunal	An independent tribunal that deals with a range of legal disputes and appeals from government decisions in Victoria
Works approval	An approval required under the Environment Protection Act for industrial and waste management activities that have the potential for significant environmental impact

Acronyms and abbreviations

AAV	Aboriginal Affairs Victoria
AMEC	Association of Mining and Exploration Companies
ANU	Australian National University
CMPA	Construction Material Processors Association
COAG	Council of Australian Governments
DEC	Department of Environment and Conservation (Western Australia)
DPCD	Department of Planning and Community Development
DPI	Department of Primary Industries
DSE	Department of Sustainability and Environment
DSEWPaC	Department of Sustainability, Environment, Water, Population and Communities
DEWHA	Department of the Environment, Water, Heritage and the Arts
ESD	Ecologically Sustainable Development
EDO	Environment Defenders Office
EES	Environment Effects Statement
EIANZ	Environment Institute of Australia and New Zealand
EP Act	Environment Protection Act 1986 (WA)
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999 (Cth)
EPA	Environment Protection Authority (Victoria) or Environmental Protection Authority (Western Australia)
EIA	Environmental impact assessment
EIS	Environmental Impact Statement

GHG	Greenhouse gases
IAIA	International Association for Impact Assessment
IAP2	International Association of Public Participation
IPR	Integrated Planning Report
MNES	Matters of National Environmental Significance
MoU	Memorandum of Understanding
NGO	Non-Government Organisation
PER	Public Environment Report
PPV	Planning Panels Victoria
SEES	Supplementary Environment Effects Statement
SEPPs	State Environment Protection Policies
TRG	Technical Reference Group
VCAT	Victorian Civil and Administrative Tribunal
VCEC	Victorian Competition and Efficiency Commission
VPELA	Victorian Planning and Environmental Law Association

Chapter 1: Introduction

1.1 Background to the inquiry

On 29 July 2009, the Environment and Natural Resources Committee received a reference from the Legislative Council, pursuant to the *Parliamentary Committees Act 2003*, to investigate the environment effects statement process in Victoria. The Committee was required to inquire into, consider and report on the following:

The environment effects statement process in Victoria, including the operation of the *Environment Effects Act 1978*, and in particular —

- (a) any weaknesses in the current system including poor environmental outcomes, excessive costs and unnecessary delays encountered through the process and its mechanisms;
- (b) community and industry consultation under the Act;
- (c) the independence of environmental effects examination when government is the proponent; and
- (d) how better environmental outcomes can be achieved more quickly and predictably and with a reduction in unnecessary costs;

and to report by 30 August 2010.¹ The reporting date was subsequently amended to 5 October 2010.²

The inquiry lapsed in the 56th Parliament. On 4 May 2011, the Legislative Council directed the Environment and Natural Resources Committee, utilising the evidence it gathered in the 56th Parliament, to inquire into, consider and report on the environmental effects statement process in Victoria, including the operation of the *Environment Effects Act 1978* and the terms of reference (a) to (d) outlined above.³ The Committee is required to report by 30 September 2011.⁴

It is widely recognised that the *Environment Effects Act 1978* and the associated framework in Victoria requires substantial reform. In 2000, the then Minister for Planning, Mr John Thwaites stated that:

*The Environment Effects Act 1978 has not been reviewed in more than a decade ... With only minor changes made to the Act since it was introduced in 1978, in many respects it no longer reflects leading practice ... A more comprehensive and accountable system for environment assessment is needed and better coordination between statutory decision-making bodies.*⁵

¹ Hon. D Davis, MLC, Victorian Legislative Council, Parliamentary Debates *Hansard*, 29 July 2009, p.3604

² Mr M Viney, MLC, Victorian Legislative Council, Parliamentary Debates *Hansard*, 12 August 2010, p.3949

³ Victorian Legislative Council, Parliamentary Debates *Hansard*, Book 6, 4 May 2011, p.1142

⁴ Victorian Legislative Council, Parliamentary Debates *Hansard* Book 8, 2 June 2011, p.1675

⁵ Mr J Thwaites, MP, (the then) Minister for Planning, *Greater transparency and accountability for environmental assessments*, media release, 1 November 2000

More recently the Liberal Member for the Southern Metropolitan Region stated in Parliament that:

... there is a need to significantly improve the environmental effects process. At the moment we have the worst of all worlds in many respects. We have a costly process that is not good at getting the right environmental outcomes and a process that is subject to lengthy delays ... It is an old Act and an Act that needs reforming, and I think that is widely conceded.⁶

Victoria was the first state to introduce environmental impact assessment legislation in Australia. The Act is a sparse piece of legislation and clearly a product of the 1970s. The Act was framed when the environment and development were considered separate issues; prior to the coining of the principles of ecologically sustainable development, before widespread concern about the protection of biodiversity, greenhouse gas emissions and climate change. As the President of Blue Wedges explained to the Committee:

The present Environment Effects Act from 1978 was written when I was trotting around in embroidered cheesecloth caftans and cork wedgies and is really no longer appropriate. Some of us were listening to Roxy Music and dressing a bit more smartly, but I was in cheesecloth.

That Act is really from an era when we really had no understanding of the concept of biodiversity ... we still believed that our resources were endless and that the environment was a mere backdrop to our life.⁷

Very few changes have been made over the past 30 years to the legislation and environment effects statement process. This is despite a comprehensive and authoritative review being conducted by a government appointed advisory committee finding significant shortcomings with the process. The Environment and Natural Resources Committee drew heavily on this excellent report but was disappointed to discover that most of the key shortcomings and issues identified by stakeholders in relation to the Environment Effects Act and framework in 2002 remain just as relevant and problematic today.

The Committee also recognises that many of the shortcomings of the legislative framework are not unique to Victoria. According to Bonyhady the failure of environmental assessment at a state and territory level takes many forms:

It is a story of manifestly inadequate laws remaining in place despite political promises to reform this legislation. It is a story of relatively strong laws being repealed or marginalised because of the commitment of government to short-term growth. It is a story of laws subject to extraordinary exemptions. It is a story of assessment regimes that operate with impressive rigour only to be ignored or overridden by government, often by enacting special legislation. It is a story of processes that all too often look a farce because government appears utterly committed to the project in question regardless of the environmental consequences.⁸

Unfortunately it is not a story in the sense of a tale or yarn. It involves real projects and Victoria's environment. Through conducting this inquiry, the Committee has come to the view that the key objective of the Victorian EES process – to provide for the transparent, integrated and timely assessment of the environmental effects of projects capable of having a significant effect on the environment – is not being adequately met.

⁶ Hon. D Davis, MLC, Victorian Legislative Council, Parliamentary Debates *Hansard*, 24 June 2009, p.3271

⁷ Ms J Warfe, President, Blue Wedges, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.78

⁸ T Bonyhady and A Macintosh, *Mills, mines and other controversies: The environmental assessment of major projects*, 2010, p.6

It should be noted at the outset that in this report the term 'environmental impact assessment' (EIA) rather than the idiosyncratic term 'environment effects statement' (EES) of the Victorian framework, is used in order to be consistent with the terminology universally accepted in other Australian and international jurisdictions.

1.2 Inquiry process

In the 56th Parliament, the Committee advertised the terms of reference in national and state newspapers in January 2010, when funds became available from the Legislative Council to conduct the inquiry. Fifty-eight written submissions were received (see appendix one).

The Committee conducted six public hearings in Melbourne with key stakeholders including the Department of Planning and Community Development. Two public hearings were also held in Perth on 31 May and 1 June 2010 with industry groups, environment groups, government agencies and departments, academics and the Office of the Environmental Protection Authority. Details of the public hearings are set out in appendix two.

In preparing this report, the Committee drew heavily on the information provided by witnesses and in written submissions. The Committee would like to express its sincere gratitude to those individuals who prepared detailed advice on the terms of reference. The Committee would also like to acknowledge the assistance that it received on its visit to Perth, with various people generously sharing their expertise, and in particular the guidance provided by Dr Angus Morrison-Saunders of Murdoch University.

1.3 Key issues raised during the inquiry

The key issues raised in written submissions and at public hearings during the course of the inquiry include:

- the Environment Effects Act is dated, lacks detail and creates ambiguity. The status of the associated ministerial guidelines is unclear and the lack of detail creates uncertainty for proponents and the community alike;
- the need for objects to be defined in the Act, including the principles of ecologically sustainable development;
- very few developments that have the potential to have a significant impact on the environment trigger the EES process in Victoria;
- the extent of the Minister for Planning's direct involvement and discretion in the environmental impact assessment process including at the referral, scoping and inquiry panel stages;
- a perceived or actual conflict of interest when the government is both the proponent and administers the EES process;
- the significant barriers to public participation in the EES process with community groups experiencing difficulties interpreting large volumes of EES documentation and associated time constraints. The Committee identified the community's lack of understanding of the EIA process as an issue;

- third parties, such community groups, do not have the power to refer project proposals for assessment and lack of clarity regarding the triggers for referral and assessment were identified as concerns;
- the current levels of formal assessment are limited and not well defined;
- the need for a risk-based approach to the scoping of EIAs and mechanisms to ensure the sound quality of EIA documentation was emphasised;
- the current EES process culminating in advice from the Minister for Planning rather than a legally binding decision was highlighted as a significant weakness, as well as the delays in the release of the Minister's assessment;
- opportunities for appeals are limited under the Environment Effects Act because the process results in advice rather than a legally binding decision;
- more robust monitoring and auditing arrangements need to be developed to ensure there is a connection between the EIA process and operational phase of a project;
- no research has been conducted evaluating the effectiveness of EES outcomes – the extent to which significant environmental risks are identified and managed; and
- strategic environment assessment may provide some assistance with managing the cumulative impacts of projects and the evaluation of alternatives to projects.

1.4 Inquiry report

The environmental impact assessment framework in Victoria is outlined in chapter two as well as an overview of the key stages of the EES process. The findings of recent reviews of the legislation are described. Other legislation relevant to the EIA process, including the federal regulatory and policy framework, is introduced in this chapter.

In chapter three, the operating framework including current administrative arrangements for the EES legislation is described. The Committee examines how the EIA process is administered, how advice is provided and how decisions are made, drawing extensively on the experience of Western Australia and the Commonwealth. The complex issues that can arise when the government is the proponent are discussed. The purpose and objectives of the Victorian EES legislation and definitions of key terms are examined.

The focus of chapter four is the referral process. The Committee highlights the importance of pre-referral discussions, and the powers to refer project proposals for assessment are discussed in addition to triggers for referral.

In chapter five the levels of environmental impact assessment are investigated. Environmental assessment under other statutory processes, including the *Planning and Environment Act 1987*, is also discussed. The levels of assessment defined under the Commonwealth and Western Australian EIA legislation are examined and the Committee proposes and defines three new levels of EIA assessment for Victoria.

The scoping stage and quality of environmental impact assessment documentation is the subject of chapter six. The importance of a risk-based approach to scoping EIAs is discussed. The assessment of alternatives, role of technical reference groups and scoping time frames are also examined. The second part of the chapter focuses on the quality of EESs including the lack of environmental data

and the need for best practice ecological impact assessment guidelines, role of expert opinion and duty to provide accurate information.

In chapter seven the issue of public participation in the EIA process is investigated. The Committee discusses what has been described as the current 'fragile' basis for public participation in the assessment procedures and sets out recommendations on how public participation in the process can be enhanced, including avenues for appeal.

The current EIA process in Victoria culminates in an assessment by the Minister for Planning. In chapter eight the status of this assessment, considerations in the Minister's assessment, opportunities for appeal and related time frames are discussed.

In chapter nine issues regarding the monitoring of compliance with EIAs and evaluating the effectiveness of the EIA process are examined.

The evolving concept of strategic environment assessment and its relationship with EIA is discussed in chapter ten.

Chapter 2: Policy framework

2.1 Introduction

The concept of environmental impact assessment evolved in the United States in 1970, primarily out of a growing awareness of the need to develop management tools to recognise and limit the harm to the natural environment arising from development projects. Most EIA regimes today have a more holistic focus and incorporate the principles of ecologically sustainable development, which means that EIA takes into consideration social, economic and environmental effects. For example, the Intergovernmental Agreement on the Environment (1992) outlines the commitment of state and territory governments in Australia to assess, where appropriate, 'environmental, cultural, economic, social and health factors' in impact assessment processes.⁹

Typically, EIA legislation will either require or enable a project proponent or the relevant authorised decision-maker to refer a project proposal to the minister or decision-maker administering the legislation. A determination is then made on whether the project needs to undergo an EIA, and if there are multiple levels of EIA available, which level is appropriate. Once an EIA process is completed the decision-maker will either: approve the project, approve with certain conditions in place, or decide that the project will not be implemented.

2.2 Victorian EES framework

2.2.1 *The Environment Effects Act 1978* (Vic)

The *Environment Effects Act 1978* (Vic) requires 'the environmental effects of certain works to be assessed'. No objectives are set out in the Act. In practice, the Act extends to both public and private works which could reasonably be expected to have or are capable of having a significant impact on the environment. The Act establishes a legislative framework for the assessment of the likely environmental effects of proposed work.¹⁰ For example, the Act provides the Minister with the statutory power to: require proposals to be referred to him/her for a decision on the need for an EES; invite public comments; appoint an inquiry; require a supplementary EES; and make guidelines to detail procedures under the Act.¹¹

The legislation does not prescribe the EIA process or the type of project to which it may apply in any detail. However, the ministerial guidelines provide general guidance on the process and criteria for the preparation of an environmental assessment. Unlike other jurisdictions, the EIA process in Victoria under the Environment Effects Act does not provide for final approval of the project. Rather, the Minister for Planning advises the decision-maker responsible for making the final determination whether a development proposal is acceptable and the conditions on which an approval may be granted.

⁹ Department of Sustainability, Environment, Water, Population, and Communities, *Intergovernmental Agreement on the Environment*, May 1992, schedule 3

¹⁰ Victorian Government, submission no.40, p.1

¹¹ *Environment Effects Act 1978* (Vic); Victorian Government, submission no.40, pp.1–2

2.2.2 What is an Environment Effects Statement?

An EES is a document setting out the assessment of the environmental effects of a proposed development. The range of matters to be investigated and documented in an EES is guided by the 'scoping requirements' which are issued for each project by the Minister.¹² Although an environmental impact assessment will be tailored towards assessing the impacts of an individual project, typical features of an environmental impact assessment include:

- a description of the proposed development;
- an outline of public and stakeholder consultation undertaken during investigations and the issues raised;
- a description of the existing environment that may be affected;
- predictions of significant environmental effects of the proposal and relevant alternatives;
- proposed measures to avoid, minimise or manage adverse environmental effects; and
- a proposed program for monitoring and managing environmental effects during project implementation.¹³

2.2.3 Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978 (Vic)

The *Environment Effects Act 1978* (Vic) contains few or no details regarding:

- ecologically sustainable development;
- what constitutes a significant environmental impact or effect;
- the types of projects that should be referred to the Minister;
- the criteria used by the Minister to determine the need for and type of assessment required;
- timelines for scoping;
- public review requirements;
- preparation of documentation;
- requirements for public consultation; and
- criteria for the Minister's final assessment.

The Minister can make guidelines addressing these matters in further detail under section 10 of the Act. However, as guidelines, they are not a legislative instrument and are therefore non-binding. A number of submissions drew attention to this aspect of the Victorian environmental impact assessment regime and argued that it created enforcement and compliance issues. As explained by Mr Brad Jessup, Teaching Fellow, College of Law, Australian National University:

¹² This power is provided for under section 8B(5) of the Environment Effects Act which states that if an EES is required, the Minister for Planning can specify procedures and requirements that are to apply to the EES

¹³ Department of Planning and Community Development, *What is the EES process in Victoria?* www.dpcd.vic.gov.au, accessed 16 August 2011

*Being guidelines they can be amended without oversight. They contain malleable language, which provides opportunities for manipulation. Because they are non-enforceable and non-binding, they are often not complied with.*¹⁴

Similarly, the Australian Conservation Foundation advised that, as much of the detail regarding the environmental impact assessment process is contained in the ministerial guidelines, the substantive aspects of the process do not have a legislative basis:

*All of the substance, whether it be triggers for referral or what an environmental impact assessment process looks like in terms of the process, substantive analysis and factors that decision-makers will take into account when they make decisions, is contained in ministerial guidelines which are not binding. In our view that is just inadequate in a 21st-century environmental impact assessment regime.*¹⁵

The most recent guidelines were published in 2006. In response to the 2002 review, the updated guidelines include objectives of the EES process, as well as definitions of the 'environment' and 'ecologically sustainable development'.¹⁶

2.2.4 The EES process: key stages

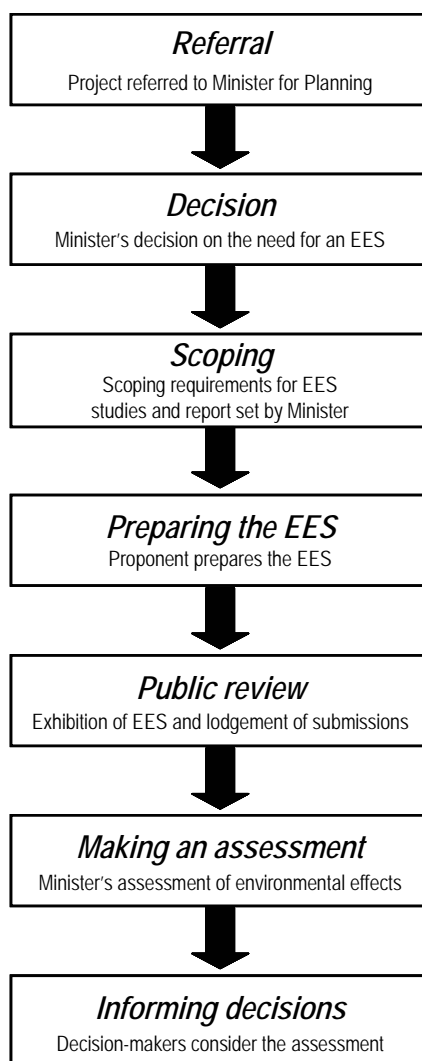
The EES process in Victoria typically has a number of key stages, which are set out in figure 2.1 below.

¹⁴ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, attachment 5, p.2

¹⁵ Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.111

¹⁶ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, pp.2–3

Figure 2.1 **The Victorian Environment Effects Statement Process**



Source: Victorian Government, submission no.40, p.30

2.3 Referral

Under the Environment Effects Act, a proposal that could have a significant effect on the environment should be referred to the Minister for Planning. A project can be referred by:

- a project proponent;¹⁷
- any Minister or statutory body responsible for public works;¹⁸ or

¹⁷ *Environment Effects Act 1978* (Vic) s.8(3)

¹⁸ *ibid.*, s. 3(1); Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.5

- a relevant decision-maker such as another Minister, a government agency, statutory authority or local government.¹⁹

Alternatively, the Minister for Planning can direct a decision-maker to refer a proposal.²⁰ The Act does not impose any penalties or contain enforcement mechanisms for failure to refer. The Act applies to any works declared 'public works' if the Minister is satisfied such works could 'reasonably be considered to have or to be capable of having a significant effect on the environment'.²¹ General referral criteria regarding the types and range of impacts that may be considered as 'significant effects' are listed in the ministerial guidelines.²²

Once a proposal has been referred, there are three referral decisions available to the Minister for Planning:²³

- an Environment Effects Statement (EES) is required;
- an EES is not required if conditions specified by the Minister are met; or
- an EES is not required.

Whilst the Act does not specify the matters the Minister must consider in making this decision, broad criteria are contained in the ministerial guidelines. The guidelines state that the Minister 'must consider the extent to which the project is capable of having a significant effect on the environment', in terms of the following:

- magnitude and geographic extent of effects and duration of change in the values of each asset;
- likelihood of effective avoidance and mitigation measures;
- likelihood of adverse effects and associated uncertainty of available predictions;
- likelihood that the project is not consistent with applicable policy;
- range and complexity of potential adverse effects;
- availability of project alternatives; and
- likely level of public interest in a proposed project.²⁴

¹⁹ *Environment Effects Act 1978* (Vic), s.8(1); Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.5

²⁰ *Environment Effects Act 1978* (Vic), s.8(4)

²¹ *ibid.*, s. 3(1), 3(2)

²² Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, pp.6–7

²³ *Environment Effects Act 1978* (Vic) s. 8B(3)

²⁴ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.10

The Department of Planning and Community Development (DPCD) also identified the following as significant factors in the Minister's decision-making process: the availability of environmental standards that could be applied to manage project effects; and the availability of suitable assessment processes either under relevant legislation or that might be required as a condition in the absence of an EES.²⁵

In addition, the Minister can advise that a project is unlikely to be environmentally acceptable in light of potential environmental effects and existing policy.²⁶ However, there is no clear statutory power for the Minister to give this advice. This contrasts with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) which empowers the federal environment minister to identify an action as 'clearly unacceptable'.²⁷

The Committee believes that the Victorian environmental impact assessment legislation should give the Minister the statutory authority to declare a project as clearly unacceptable if a project has significant environmental effects that could not be modified, or clearly contravenes environmental standards. Accordingly, the Committee recommends that:

RECOMMENDATION 2.1
The Victorian environmental impact assessment legislation should be amended to give the Minister for Planning the statutory authority to declare a project as clearly unacceptable.

A total of 74 projects have been referred to the Minister for Planning for EES purposes for the period 1 July 2006 and 3 August 2011.²⁸ The majority of projects that have been referred during this period have either not required an EES or have not required an EES subject to specific conditions (refer to table 2.1).

²⁵ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, p.3; also refer to: Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.10

²⁶ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.11

²⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss.74B–74D

²⁸ Victorian Government, submission no.40, p.7; Department of Planning and Community Development, correspondence received, 3 August 2011

Table 2.1 **Numbers of EES referrals by sector**
between 1 July 2006 and 3 August 2011

Activity sector	Total number of referral decisions	EES required	No EES required	No EES with conditions required
Coastal development	5	2	3	0
Extractive/quarry	3	0	1	2
Gas project/pipeline	6	0	4	2
Industrial	3	0	3	0
Mining	4	2	1	1
Other	1	0	0	1
Port/dredging	3	0	1	2
Power station	4	2	2	0
Rail	3	0	0	3
Residential	1	0	1	0
Road	13	5	3	5
Solar/wave energy	1	0	1	0
Water project/pipeline	11	1	2	8
Wind energy	16	1	12	3
Total	74	13	34	27

Sources: Victorian Government, submission no.40, attachment 3, p.29; Department of Planning and Community Development, correspondence received, 3 August 2011

2.4 Scoping and preparing an EES

If the Minister determines that the proposal may have a significant effect on the environment, he or she may require that an EES be prepared by the proponent. The scope of an EES is determined by the Minister for Planning. Draft scoping requirements are usually exhibited for public comment for a minimum of 15 business days before final scoping requirements are issued.²⁹

²⁹ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.13

According to the ministerial guidelines, a systems and risk based approach should underpin the scoping requirements and EES documentation.³⁰ A risk based approach means that a suitable method of assessment can be applied to match the level of risk. For example, the ministerial guidelines state that:

*A risk based approach should be adopted in the assessment of environmental effects so that suitable, intensive, best practice methods can be applied to accurately assess those matters that involve relatively high levels of risk of significant adverse effects and to guide the design of strategies to manage these risks. Simpler or less comprehensive methods of investigation may be applied to matters that can be shown to involve lower levels of risk.*³¹

It is also usual practice for the DPCD to appoint a Technical Reference Group with representatives from government agencies, regional authorities and municipal councils that have a statutory or policy interest in the project.³² The Technical Reference Group is specifically appointed to advise and assist both the DPCD and the proponent in the scoping and preparation of the EES, and the coordination of other related statutory processes.³³

If the Minister requires additional information in order to make an assessment, the Minister may direct the proponent to prepare a Supplementary Environment Effects Statement. The proponent may be called on to prepare a Supplementary Statement 'at any time'.³⁴ However, the time period is qualified under the ministerial guidelines as limited to 'any point between the exhibition of the EES and the making of an assessment'.³⁵ There have only been four Supplementary Statements required by the Minister under section five of the Environment Effects Act since 2000 for: the Channel Deepening Project; the Shepparton Bypass – Goulburn Highway; Calder Highway – Kyneton to Faraday section; and Calder Highway – Faraday to Ravenswood section.³⁶

2.4.1 Public review and consultation

The Minister 'may at any time' invite and receive comments on the environmental effect of any proposed works 'from the public in general or from such sections of the public as are determined by him or her'.³⁷ However, under the Environment Effects Act public consultation is not mandatory for all EES referrals or documents, and there are no statutory time frames for public consultation. The ministerial guidelines stipulate that the Minister may give public notice of the EES or exhibit the EES, usually for a period of 20 to 30 business days and call for public comments.³⁸

³⁰ *ibid.*, p.14

³¹ *ibid.*, p.14

³² *ibid.*, p.14

³³ *ibid.*, p.14

³⁴ *Environment Effects Act 1978* (Vic) s. 5(1)

³⁵ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.27

³⁶ Department of Planning and Community Development, correspondence received, 7 September 2010

³⁷ *Environment Effects Act 1978* (Vic) s.9(2)

³⁸ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.23

2.4.2 Inquiry pathways

To assist in the assessment process, the Minister 'may' appoint one or more persons with expertise to conduct an inquiry into the environmental effects of any works to which the Act applies.³⁹

The ministerial guidelines outline the forms of inquiry available to the Minister, namely:

- inquiry by written submissions: the inquiry is conducted on the basis of written submissions to an EES, without presentation of further information by submitters or expert witnesses;⁴⁰
- inquiry by submitter conference: the Minister may invite submitters 'to attend a "submitter conference" or roundtable session to provide an opportunity for them to speak about their submission and for questions of clarification' through an appointed chair;⁴¹ and
- inquiry with a formal hearing: in the course of formal hearings, proponents may be invited to speak about their proposal and submitters may be asked to explain their submissions in depth. Expert witnesses may also make presentations. Usually, an inquiry by public hearing is conducted where a planning panel or advisory committee is also required under the Planning and Environment Act to consider a planning permit or planning scheme amendment.⁴² A joint inquiry panel may proceed in such cases.⁴³

Each process requires an inquiry report to be given to the Minister which will inform the Minister's assessment.

An inquiry by formal hearing is most commonly selected by the Minister, as this enables coordination between the Environment Effects Act and Planning and Environment Act. The Minister has appointed an inquiry under the Environment Effects Act for each EES in the last ten years.⁴⁴ The inquiry is often conducted by a Planning Panel. Planning Panels Victoria, within the Department of Planning and Community Development, manages the conduct of individual panels. The size of the panels usually depend on the complexity or significance of the matter and the type of issues that have been raised. Panel members are appointed by the Minister to give advice to him/her about a proposal and to consider submissions. The report issued by the inquiry will make recommendations for consideration by the Minister. The Minister is not bound to accept any of the recommendations in the inquiry report.

2.4.3 Making an assessment

The final stage in the environmental impact assessment process is the Minister's assessment of the environmental effects of a proposal. The legislation does not detail factors the Minister must take into account when assessing a proposal, or suggesting modifications to the proposal. In other words, the legislation does not stipulate whether and how the Minister should balance environmental

³⁹ With the approval of the Governor in Council; *Environment Effects Act 1978* (Vic) s. 9(1)

⁴⁰ Department of Sustainability and Environment, *Ministerial guidelines for the assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.25

⁴¹ *ibid.*, p.25

⁴² An Advisory Committee may be established by the Minister under s.151 of the Planning and Environment Act to 'advise on any matters which the Minister refers to them'. *Planning and Environment Act 1987* (Vic) s.151

⁴³ Department of Sustainability and Environment, *Ministerial guidelines for the assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.25

⁴⁴ Department of Planning and Community Development, correspondence received, 7 September 2010

impacts against social, economic and equity considerations. However, the ministerial guidelines state that the Minister's assessment will involve consideration of:

- the EES and any Supplementary Statement;
- public submissions;
- any inquiry report;
- at the request of the inquiry panel, the DPCD or the Minister, any other information provided by the proponent; and
- the objectives and principles of ecologically sustainable development and applicable legislation, policy, strategy and guidelines.⁴⁵

The Minister's assessment does not equate to a project approval. It is provided to the decision-maker responsible for any relevant statutory approvals for the project. The Minister's assessment must be considered by the decision-maker in his or her approval decision; however there is no formal legal obligation on the decision-maker to follow the recommendations contained in the assessment.⁴⁶

The Environment Effects Act also does not contain follow-up procedures or legal enforcement mechanisms to ensure environmental monitoring and management procedures are followed during the implementation phases and for the life of the development, although an EES may provide a framework for such procedures. However, ongoing environmental management processes may be required under relevant statutory approvals, such as: conditions of a works approval in accordance with the *Environment Protection Act 1970*, conditions of a planning permit under the *Planning and Environment Act 1987*, or an Environmental Management Plan under other relevant legislation.

2.4.4 Appeals under the Environment Effects Act

If project proponents or third parties are dissatisfied with the Minister's assessment and/or other decisions or conduct undertaken in accordance with the Environment Effects Act, they may wish to seek review of these decisions or conduct. The Act does not expressly provide for an avenue for review. Individuals or groups may apply for judicial review of decisions and/or conduct made under the Act in accordance with the provisions of the *Administrative Law Act 1978* (Vic) or at common law. Judicial review involves a determination by the court of whether the decision by a government authority was made according to law. If a decision is found to be unlawful, the court has the power to refer the decision back to the decision-maker for reconsideration. An applicant for judicial review may seek a declaration that a particular action is unlawful or invalid, or an injunction to prevent conduct from occurring or to stop conduct from continuing. Judicial review may be distinguished from merits review, which allows the court or tribunal to make a fresh decision that either affirms, varies or sets aside the original decision. As discussed in chapter eight, the recent decision of the Supreme Court of Victoria in the *Friends of Mallacoota Inc v Minister of Planning & Minister for Environment*

⁴⁵ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.27

⁴⁶ *ibid.*, p.28

and *Climate Change* case⁴⁷ suggests that such actions have very little chance of success under the existing Act.

2.5 Reviews of the *Environment Effects Act 1978*

Over the past two decades, there have been three reviews of the *Environment Effects Act 1978*.

The first review of the Act in 1985 did not result in any significant changes.⁴⁸

In 1994, the government amended the Act in the following ways:

- Environment Effects Statement (EES) and Environment Protection Authority works approval to be jointly considered by the same inquiry panel for any given project; and
- the Minister to decide which public works require an EES, rather than all public works automatically having to undergo an environmental effects process.⁴⁹

2.5.1 *Report of the Environment Assessment Review Advisory Committee (2002)*

In November 2000, the government announced a review into the Environment Effects Act.

The review was directed by the Department of Infrastructure, the department responsible for administering the EES process at the time. Following consultation, an issues and options paper was released in April 2002.⁵⁰ An advisory committee was subsequently appointed in July 2002 to receive public submissions on the Paper, meet with stakeholder representatives and suggest reforms to the Act. The advisory committee's final report, the *Environment Assessment Review*, dated December 2002, was not publicly released until 2005.

The *Environment Assessment Review* recommended that a number of changes should be introduced to the Victorian EES process, including amendments to the Environment Effects Act. Key reforms proposed by the advisory committee were:

- insertion into the Act of definitions of 'environment' and 'sustainable development', and the identification of clear objectives for the Act, the assessment process and decision-making;
- increasing the transparency of the referral and screening process by establishing a published basis for determining whether a project needs assessment and an opportunity for public input to the screening process;
- the establishment of penalties for failure to refer and the inclusion of statutory or negotiated time frames for all stages of the assessment process;

⁴⁷ *Friends of Mallacoota Inc v Minister of Planning & Minister for Environment and Climate Change* [2010], VSC 222 (27 May 2010)

⁴⁸ B Jessup, 'Victoria and the Channel Deepening Project', T Bonyhady and A Macintosh, *Mills, mines and other controversies: The environmental assessment of major projects*, 2010, p.107

⁴⁹ *ibid.*

⁵⁰ Department of Infrastructure, *Environment Assessment Review: Issues and options, Technical paper*, 2002. The purpose of the issues and options paper was 'to assist and encourage public submissions on the reform of procedures under the Environment Effects Act'. p.4

- early public involvement in the environmental impact assessment process;
- improvements to assist in raising the quality of environmental impact assessment documentation;
- insertion into the Act, of powers enabling the Minister to set environmental management conditions for the approval of projects and provisions for the imposition of penalties for failure to comply; and
- greater integration of decision-making with other statutory approvals, through the introduction of statutory changes and the development of memorandums of understanding.⁵¹

Another important change suggested was the incorporation of multiple levels of assessment under the revised Environment Effects Act. In the Advisory Committee's view, the option of an additional level of assessment could facilitate assessment procedures to be tailored to the degree of environmental risk associated with a project. The levels of assessment recommended were:

- level 1 – Public Environment Report;
- level 2 – Environment Impact Statement; and
- level 3 – Strategic Environment Assessment.⁵²

The level of assessment required for each project would be determined at the screening stage of the process. It was further recommended that scoping requirements and public consultation processes be adjusted between the levels, to reflect the complexity involved in different levels of assessment.⁵³

2.5.2 Environment Effects Act Reforms (2005)

Most of the advisory committee's recommended changes to the Act were not implemented. Rather, in 2005 the government decided that improvements to the EES process could be made by substantially updating the ministerial guidelines.⁵⁴ Only a number of minor amendments were considered necessary to the Act. The amendments primarily related to the referrals process. These changes, some of which were informed by the *Environment Assessment Review*, included the following:

- proponents could refer their project to the Minister;⁵⁵
- the Minister could require the relevant decision-maker to refer a project proposal to the Minister for advice as to whether an EES should be prepared for the works;⁵⁶
- the Minister could direct that a relevant decision on the project not be made until the need for an EES was determined;⁵⁷ and

⁵¹ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, pp.78–95

⁵² *ibid.*, p.82

⁵³ *ibid.*, pp.84–90

⁵⁴ Victorian Government, submission no.40, p.17

⁵⁵ *Environment Effects Act 1978* (Vic) s.8(3)

⁵⁶ *ibid.*, s.8(4)

⁵⁷ *ibid.*, s.8A

- an additional option for the Minister's referral decision: 'an EES is not required for the works if conditions specified by the Minister are met'.⁵⁸

The government also committed to updating the ministerial guidelines, and new, more detailed guidelines were published in 2006.⁵⁹ Key aspects of the 2006 ministerial guidelines included guidance on:

- significance criteria for the referral of projects;
- factors to be considered in determining the need for an EES;
- the general form of 'no EES' conditions that might be set;
- the general matters that may be part of the scope of an EES;
- alternative forms of inquiry that may be appointed; and
- the general content of Ministerial assessments.⁶⁰

The amendments and revised ministerial guidelines were designed by the government to 'improve the workability and effectiveness of the system' and make Victoria's EES process more 'transparent, and accountable' by enshrining 'the best practice approaches currently being applied in Victoria'.⁶¹

2.5.3 *Getting environmental regulation right (2009)*

The Victorian Competition and Efficiency Commission (VCEC) inquiry into environmental regulation and its final report entitled *A Sustainable Future for Victoria: Getting Environmental Regulation Right*, considered the weaknesses in environmental impact assessment and environmental regulation in Victoria and made several recommendations of relevance to this inquiry.

The VCEC recommended a number of changes to the environmental impact assessment process in Victoria that, in its view, would reduce administrative and compliance burdens whilst still meeting or strengthening the government's sustainability objectives.⁶² The VCEC recommended that the Environment Effects Act should be amended in several respects. First, it was suggested that statutory guidance should be provided on matters to be considered in deciding whether proposals are likely to have a significant impact on the environment and should be referred to the Minister.⁶³ Second, the VCEC endorsed the concept of creating different levels for assessment 'to better match environmental risks associated with projects with the form of assessment,' including the introduction of an intermediate tier of assessment (between EES required and no EES, with or without conditions).⁶⁴ Therefore, it was recommended that the Act should be modified to provide guidance on the assessment options available for different levels of impacts, and the processes to be followed in respect of each assessment option. Other suggestions included the introduction of legislation

⁵⁸ *ibid.*, s.8B(3)(b); Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.11

⁵⁹ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006

⁶⁰ Victorian Government, submission no.40, p.17

⁶¹ Hon. R Hulls, MP, Victorian Legislative Assembly *Hansard*, Second Reading Speech, 6 October 2005, pp.1355–1356, 1358

⁶² Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.134

⁶³ *ibid.*

⁶⁴ *ibid.*, p.135

covering state significant projects and the use of strategic assessments for regions with similar projects and common environmental issues.

Amendments to the ministerial guidelines were also proposed including: requiring consultation between proponents and relevant government departments, and provisions for the consideration of other approvals concurrently with the EES.⁶⁵

In January 2010 the previous government released its response to the VCEC final report. It partially supported the recommendations in relation to EES processes, stating that it would consider refining the statutory framework to 'improve the clarity of procedures' and 'further improve the efficiency of the EES process'.⁶⁶ The government response identified the following 'priority aspects for change':⁶⁷

- clearer objectives for the assessment process under the *Environment Effects Act 1978*;
- clearer criteria for requiring an EES;
- clearer criteria for applying conditions rather than requiring an EES;
- strengthening the accountability for achieving target timelines;
- providing best practice advisory notes, including to assist the scoping process, the role of technical reference groups and the conduct of inquiries; and
- ensuring the alignment of other statutory processes with the EES process.⁶⁸

In its response to the VCEC report, the previous government also stated it would:

- establish new administrative arrangements to coordinate and align the EES process with other relevant statutory processes;
- improve the coupling of impact assessment and planning approvals for state significant projects (through its review of the Planning and Environment Act);
- 'consider' introducing a possible intermediate tier of assessment;
- 'consider' investigating changes to achieve greater integration of procedures for major projects (once the review of the Planning and Environment Act was completed); and
- 'consider' the use of strategic assessments.⁶⁹

⁶⁵ *ibid.*, pp.134–136

⁶⁶ Victorian Government response to Victorian Competition and Efficiency Commission's final report, *A sustainable future for Victoria: Getting environmental regulation right*, January 2010, p.5

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ *ibid.*, pp.3–7

2.6 Other Victorian legislation relevant to the EES process

2.6.1 *Planning and Environment Act 1987 (Vic)*

This Act establishes the legal framework for planning in Victoria and provides for the Victoria Planning Provisions. The Planning and Environment Act also sets out some basic mechanisms for the limited environmental assessment of proposals, which will be discussed further in chapter five. Under the Planning and Environment Act, where a project requires both an EES and a planning permit or scheme amendment, the documentation may be exhibited concurrently. An inquiry panel can also be jointly appointed under the Planning and Environment Act and the Environment Effects Act to consider the EES and planning scheme amendment or planning permit documentation and public submissions. The Panel will provide a single report to the Minister.⁷⁰

2.6.2 *Planning and Environment Act 1987 - Proposed Reforms*

The *Planning and Environment Act 1987 (Vic)* has been under review. A draft bill was developed in 2009 and was open for public comment until mid February 2010.⁷¹ The draft bill focuses on the following key areas:⁷²

- the objectives of planning in Victoria;
- the planning scheme amendment process;
- the planning permit process;
- state significant development;⁷³ and
- section 173 agreements.⁷⁴

⁷⁰ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.29

⁷¹ Department of Planning and Community Development, *Draft Planning and Environment Amendment (General) Bill, Modernising Victoria's Planning Act*, www.dpcd.vic.gov.au, accessed 21 July 2010

⁷² Department of Planning and Community Development, *Modernising Victoria's Planning Act*, www.dpcd.vic.gov.au, accessed 21 July 2010

⁷³ It is proposed that a new process for the assessment of state significant developments be included under Part 9A of the Planning and Environment Act. The proposed process includes: a proposal will be submitted to the Secretary of the DPCD 'for review and advice on requirements for the impact report, public information and engagement strategies'. There will be publicly available guidelines for preparation of the impact assessment report; however, requirements can also be tailored to the specific development. Regularly occurring projects, such as wind farms, 'will be simplified through standardised report requirements'. Once the Secretary 'is satisfied the report addresses all relevant issues', a timetable for project assessment is determined, a case manager is assigned and community engagement begins. The Secretary 'may publicly exhibit the impact report requirements and engagement strategy before signing it off, so that all relevant matters have been included'. The report will be assessed by an expert panel (a public hearing may also be held) before the Minister makes a decision. The Minister's decision will be final. (Source: Department of Planning and Community Development, *Response Paper No. 4: State Significant Major Development*, August 2009, pp. 1-4)

⁷⁴ Under s.173(1) and (2) of the Planning and Environment Act, a responsible authority (on its own or jointly with any other person or body) may enter into an agreement with an owner of land in the area covered by a planning scheme for which it is a responsible authority

The draft bill may have implications for the Victorian environmental impact assessment process largely by way of the proposal to introduce an assessment and approvals pathway for state significant developments. In its response to the VCEC Report outlined above, the previous government indicated that if this pathway was adopted, a new intermediate tier of assessment proposed by the VCEC (see above) 'may not be needed'.⁷⁵ The latest advice the Committee received states that: 'the Coalition Government is undertaking a staged reform of the Planning and Environment Act and has indicated its intention to implement reforms to key planning processes this year... Amendments that will improve planning processes and improve the overall operation of the Planning and Environment Act, including amendments proposed in the 2009 draft bill, are under consideration'.⁷⁶ The DPCD also advised the Committee that 'the implementation of a state significant development pathway is under consideration'.⁷⁷

Currently, the DPCD is leading the implementation of a framework for an Integrated Management of Major Projects through the negotiation of memorandum of understanding for Major Project assessment, approval and delivery with key partners (such as, Department of Sustainability and Environment, Department of Primary Industries, Department of Transport, Environment Protection Authority and Department of Business and Innovation).⁷⁸ The aim of this process is to reduce the time frames involved and to effectively coordinate the EES process with planning and other statutory approvals.⁷⁹ This process will not require changes to the legislative or regulative framework, but is designed to better align all relevant agencies in the approvals process.⁸⁰ This will be discussed further in chapter six.

2.6.3 Environment Protection Act 1970 (Vic)

The Environment Protection Act is the legislative structure for environmental protection in Victoria and sets out key environmental protection principles. It also provides for the establishment of State Environment Protection Policies and Waste Management Policies. Under the Act, many industrial projects, some mining and some extractive projects require works approval by the Environment Protection Authority Victoria (EPA) before development can take place. Therefore proposals requiring an EES are also often subject to approval under the Environment Protection Act. To minimise duplication, works approval applications required under the Act are usually exhibited in conjunction with the EES. However, the Committee was advised in several submissions that duplication between the technical information required for works approvals and EESs occurs, as the same data is collected but requested in different formats, and tailored to the specific agency's requirements.⁸¹ Under section 33B(1B) of the Environment Protection Act, where the EPA's decision on a works approval is substantially in accordance with the Minister's assessment under the

⁷⁵ Victorian Government response to Victorian Competition and Efficiency Commission's final report, *A sustainable future for Victoria: Getting environmental regulation right*, January 2010, p.5

⁷⁶ Department of Planning and Community Development, correspondence received, 3 August 2011

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ Victorian Government response to Victorian Competition and Efficiency Commission's final report, *A sustainable future for Victoria: Getting environmental regulation right*, January 2010, p.5

⁸⁰ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.259

⁸¹ For example, refer to: Construction Material Processors Association Inc, submission no.44, p.4; Transpacific Industries Group Ltd, submission no.47, p.2; Cement, Concrete and Aggregates Australia, submission no.46, p.2

Environment Effects Act, third parties are not able to seek a review of the decision by the Victorian Civil and Administrative Tribunal.⁸²

2.6.4 *Coastal Management Act 1995 (Vic)*

This Act seeks to manage coastal resources on a sustainable basis and to protect and maintain areas of environmental significance through strategic planning for coastal areas. These objectives are to be achieved primarily through the development of a statewide coastal strategy and through management plans for specific areas. Use and development of coastal Crown land requires the consent of the responsible Minister.⁸³ Coastal or marine development projects that require an EES may also require approval under this Act.

2.6.5 *Aboriginal Heritage Act 2006 (Vic)*

This Act provides for the protection of Aboriginal cultural heritage in Victoria and recognises Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage.⁸⁴ Amendments were introduced in 2007 to 'ensure that cultural heritage issues are considered early in the development planning process, prior to the approval of a use or development'.⁸⁵ Under section 49 of the Act a Cultural Heritage Management Plan must be prepared in respect of any project which requires an EES.⁸⁶

The consideration of Aboriginal cultural heritage is an important aspect of the EES process. If a development project has the potential to significantly impact on Aboriginal cultural heritage, this may trigger the need for a proposal to be referred to the Minister for Planning for a determination on whether an EES is required.⁸⁷ Scoping requirements issued by the Minister may also specify cultural heritage issues to be examined in an EES.

Aboriginal Affairs Victoria commented that the overall process was in their view 'a very good process':

⁸² *Environment Protection Act 1970 (Vic)* s.33B(1B); Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.30

⁸³ *Coastal Management Act 1995 (Vic)* s 37

⁸⁴ Department of Planning and Community Development, *Aboriginal cultural heritage and the environment effects process*, advisory note, August 2007, p.1

⁸⁵ *ibid.*

⁸⁶ Cultural Heritage Management Plans assess an area to determine the conservation requirements for any Aboriginal cultural heritage, and may be evaluated by Registered Aboriginal Parties. The timing of the preparation and approval of Cultural Heritage Management Plans is flexible. There are two possible approval pathways which may be appropriate depending upon the degree of complexity and potential risks to the aboriginal cultural heritage. Department of Planning and Community Development, *Aboriginal cultural heritage and the environment effects process*, advisory note, August 2007, pp.1, 3

⁸⁷ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.7

From our perspective, moving consideration of Aboriginal heritage up front is a win on three counts:

- (a) allowing projects to proceed;*
- (b) preserving Aboriginal heritage where possible, or minimising the damage to it; and*
- (c) allowing works to be reconsidered on how they are rolled out once the Aboriginal heritage is discovered.⁸⁸*

2.6.6 Mineral Resources (Sustainable Development) Act 1990 (Vic)

The Mineral Resources (Sustainable Development) Act regulates the Victorian mining exploration and mineral industry primarily by establishing a permit system for mining and exploration activities. Before mining can begin under a mining licence, an approved work plan⁸⁹ and a work authority must be obtained.⁹⁰ These parts of the Act allow any assessment of the mining project by the relevant Minister pursuant to the Environment Effects Act to be considered as part of the approvals process. A planning permit is not required for mining if an EES has been prepared and a work authority has been approved preceding consideration of the assessment by the Minister for Planning.⁹¹

2.6.7 Major Transport Projects Facilitation Act 2009 (Vic)

The Major Transport Projects Facilitation Act commenced operation on the 1 November 2009. The Act consolidates 'the multiple environmental, planning and heritage approvals required for major transport projects into a single assessment and approval process'.⁹² Major transport projects that are 'declared' under the Act are assessed using one of two assessment streams: either the comprehensive impact statement assessment process or the impact management plan assessment process. Following the assessment process, the Minister for Planning must determine whether to approve the declared project.⁹³ All required approvals are made under this single decision-making power. It is intended that a project declared under the Major Transport Projects Facilitation Act will not need to be referred under the Environment Effects Act.⁹⁴

2.7 Relevant Victorian Government policies

According to the ministerial guidelines the Minister must also consider the extent to which the project is capable of having a significant effect on the environment, including the likelihood that the project is not consistent with applicable policy.⁹⁵

⁸⁸ Mr I Hamm, Executive Director, Aboriginal Affairs Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 21 June 2010, p.306

⁸⁹ *Mineral Resources (Sustainable Development) Act 1990* s.40

⁹⁰ *ibid.*, s.42

⁹¹ *Mineral Resources (Sustainable Development) Act 1990* s.42(7). Section 42A of the Act also establishes a special procedure that may apply to variations to approved work plans for works that have been assessed under the Environment Effects Act. Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.30

⁹² *Major Transport Projects Facilitation Bill, Explanatory Memorandum*, 2009, p.2

⁹³ *Major Transport Projects Facilitation Act 2009* (Vic) s.77

⁹⁴ Victorian Government submission, no.40, p.20

⁹⁵ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.10

2.8 Federal regulatory framework

2.8.1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

Enacted in 1999, the Environment Protection and Biodiversity Conservation Act is the Commonwealth Government's primary piece of environmental legislation. Central to the Act are the Commonwealth environmental impact assessment and approval mechanisms for certain types of development projects. On referral, the federal Minister for Sustainability, Environment, Water, Population and Communities ('federal environment minister') must decide if an 'action'⁹⁶ is likely to have a 'significant impact'⁹⁷ on designated 'matters of National Environmental Significance', and is thus a 'controlled action' which requires approval under the Act. The eight matters of National Environmental Significance are:

- listed threatened species and communities;
- listed migratory species;
- Ramsar wetlands of international importance;
- Commonwealth marine environment;
- world heritage properties;
- national heritage places;
- the Great Barrier Reef Marine Park; and
- nuclear actions.⁹⁸

Penalties can be imposed for failure to refer an action to the Minister that amounts to a controlled action.

If a development proposal is found to be a controlled action, it must be subject to some level of environmental impact assessment to be determined by the federal environment minister. The levels of environmental impact assessment available under the Act include: an assessment on the basis of referral information, assessment on preliminary documentation, an environment report, an Environmental Impact Statement or a public inquiry. Once this assessment has been completed, the federal environment minister must decide whether or not to approve the project and/or if particular conditions are to be attached to any approval. Certain factors must be taken into account in the

⁹⁶ 'Action' is defined broadly in section 523(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). It includes: a project, a development, an undertaking, an activity or a series of activities, or an alteration of any of these things.

⁹⁷ A 'significant impact' is not defined by the EPBC Act. However, the Department of Sustainability, Environment, Water, Population and Communities has issued guidelines to help proponents determine whether assessment and approval is required under the Act. These guidelines state that a 'significant impact' is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts. All of these factors should be considered when determining whether an action is likely to have a significant impact on matters of national environmental significance. Department of the Environment, Water, Heritage and the Arts, *Significant Impact Guidelines 1.1: Matters of national environmental significance*, December 2009, p.3

⁹⁸ Department of the Environment, Water, Heritage and the Arts, *Significant impact guidelines 1.1: Matters of national environmental significance*, December 2009, p.2

Minister's final approval determination, including the assessment report produced from the environmental impact assessment process, economic and social matters, ecologically sustainable development and the precautionary principle. The precautionary principle is defined in the Act as:

*If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*⁹⁹

A precautionary approach underscores the objectives of environmental impact assessment as the overriding aim is to evaluate and mitigate any impacts that may have a significant effect on the environment. Ecologically sustainable development is defined under the National Strategy of Ecologically Sustainable Development as:

*... using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.*¹⁰⁰

A controlled action can be assessed under the Environment Protection and Biodiversity Conservation Act or by a state process accredited by the federal environment minister. A bilateral agreement provides for the accreditation of state or territory processes ('assessment bilateral'), and, in some cases, state or territory approval decisions ('approval bilateral'). The Department of Sustainability, Environment, Water, Population and Communities explains the difference as follows:

*If a proposed action is covered by an 'assessment bilateral', then that action is assessed under the accredited state/territory process. After assessment, the proposed action still requires approval from the Minister under the EPBC Act ... If a proposed action is covered by an 'approval bilateral', then it will be assessed and approved by the state/territory in accordance with an agreed management plan. No further approval is required from the Minister under the EPBC Act.*¹⁰¹

Bilateral agreements aim to reduce duplication of environmental assessment and regulation between the Commonwealth and states/territories.¹⁰²

In June 2009 an *Agreement between the Australian Government and the State of Victoria relating to environmental impact assessment* was established. This agreement is an assessment bilateral. Under the terms of the agreement, actions that would usually be assessed under the Environment Protection and Biodiversity Conservation Act may be assessed through state assessment processes (provided that certain conditions are adhered to), including assessment by Environment Effects Statement under the Environment Effects Act.¹⁰³ However, the final approval powers for development proposals are retained by the federal environment minister, who makes his/her assessment informed by the assessment report prepared by the relevant Victorian Minister.

⁹⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s.3A(b)

¹⁰⁰ Ecologically Sustainable Development Steering Committee, *National Strategy for Ecologically Sustainable Development*, 1992, p.1

¹⁰¹ Department of Sustainability, Environment, Water, Population and Communities, *Bilateral agreements*, www.environment.gov.au, accessed 16 August 2011

¹⁰² *ibid.*

¹⁰³ Department of the Environment, Water, Heritage and the Arts, *Agreement between the Australian Government and the State of Victoria relating to environmental impact assessment*, 20 June 2009, p.14

Victoria does not have an 'approval bilateral' in place under the Environment Protection and Biodiversity Conservation Act.¹⁰⁴

2.8.2 *Independent Review of the Environment Protection and Biodiversity Conservation Act*

In 2008, the federal environment minister commissioned an independent review of the EPBC Act in accordance with section 522A of the Environment Protection and Biodiversity Conservation Act, which requires it to be reviewed every 10 years from its commencement. The final report was publicly released in December 2009.¹⁰⁵ The review found that while 'there are many positive features of the Environment Protection and Biodiversity Conservation Act that should be retained',¹⁰⁶ the Act should ultimately be repealed and replaced with a new Act, the 'Australian Environment Act'. Under this new Act, ecologically sustainable development should be reinforced as the overarching decision-making principle underpinning decision-making under the Act and be reflected in the revised objectives.¹⁰⁷

A cooperative role is envisaged between the state and territories and the Commonwealth Governments with the review recommending that environmental impact assessment processes under the Act be designed to:

*... streamline approvals through earlier engagement in planning processes and provide for more effective use and greater reliance on strategic assessments, bioregional planning and approvals bilateral agreements.*¹⁰⁸

The review further recommended an independent National Environment Commission be established to advise the government on project approvals and other statutory decisions. Other major changes proposed include the creation of a new 'matter of National Environmental Significance' for ecosystems of national significance and the introduction of an interim greenhouse trigger and greater use of strategic assessments and other landscape approaches. Finally, other key recommendations pertaining to environmental impact assessment were made that aimed to improve transparency in decision-making and provide greater access to the courts. These include amending

¹⁰⁴ The only 'approval bilateral' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is in relation to the Sydney Opera House

¹⁰⁵ Australian Government, Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*, www.environment.gov.au, accessed 5 July 2010

¹⁰⁶ Secretariat, Independent review of the EPBC Act 1999, *Fact Sheet 2 The Independent Review – Conclusions and Recommendations*, 2009, p.1; Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.14

¹⁰⁷ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.55

¹⁰⁸ Secretariat of the Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*, *Fact Sheet 2 The Independent Review – Conclusions and Recommendations*, 2009, p.1

the Act to make legal review processes more accessible and affordable for third parties.¹⁰⁹ The federal government's response to the review was released on 24 August 2011.¹¹⁰

2.9 National strategies and approaches

In 1992 the Commonwealth Government formulated the National Strategy for Ecologically Sustainable Development, a policy framework which drew its mandate largely from international elaboration on the concept of sustainable development inspired by the 1987 Report of the Commission on Environment and Development, *Our Common Future*.¹¹¹

The National Strategy for Ecologically Sustainable Development was adopted by all state and territory governments under the Council of Australian Governments. The core objectives of the strategy are to:

- enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations;
- provide for equity within and between generations; and
- protect biological diversity and maintain essential ecological processes and life-support systems.¹¹²

In 1992, the Intergovernmental Agreement on the Environment was adopted by the Commonwealth, state and territory governments, and was established 'to improve the consistency of the approach applied by all levels of government, to avoid duplication of process where more than one government is involved and interested in the subject matter of an assessment and to avoid delays in the process'.¹¹³

For the purposes of 'promoting efficient, effective and nationally harmonised' development assessment processes across Australia, a 'Leading Practice Model' was developed, which could be adapted to suit the needs of different Australian jurisdictions.¹¹⁴ According to the 2005 Development

¹⁰⁹ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, part i, Recommendations

¹¹⁰ Department of Sustainability, Environment, Water, Population and Communities, *Australian Government Response to the report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011

¹¹¹ *Our Common Future* defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. *United Nations Report of the World Commission on Environment and Development: Our Common Future*. A/42/427

¹¹² Ecologically Sustainable Development Steering Committee, *National Strategy for Ecologically Sustainable Development*, December 1992, Part 1

¹¹³ Department of Sustainability, Environment, Water, Population and Communities, *Intergovernmental Agreement on the Environment*, May 1992, paragraph 1

¹¹⁴ Development Assessment Forum, *A Leading Practice Model for Development Assessment in Australia*, March 2005, p 2. The Development Assessment Forum (DAF) was formed in 1998 to recommend ways to streamline development assessment and cut red tape – without sacrificing the quality of the decision-making. The Forum's membership includes the three spheres of government, (the Commonwealth, state/territory and local government); the development industry; and related professional associations. The DAF Plenary meets twice a year in different jurisdictions. The Forum is chaired by Peter Allen, Executive Director, Statutory Planning Systems Reform, Victorian Department of Planning and Community Development. A working group progresses the work of the DAF between Plenary meetings. www.daf.gov.au, accessed 27 September 2010

Assessment Forum Report¹¹⁵, an updated development assessment system is needed as current approaches to assessing new developments are often 'confusing, slow and inefficient', resulting in 'reduced productivity, wasted resources and lengthy, costly delays'.¹¹⁶

In the interests of establishing a national standard for environmental impact assessment processes and to ensure the practical implementation of ecologically sustainable development, in 1991 the Australian and New Zealand Environment and Conservation Council initiated 'A National Approach to Environmental Impact Assessment in Australia'. The document is intended to enhance the credibility of environmental impact assessment processes by providing 'a clear statement of commitment which comprises agreement on a national approach'.¹¹⁷ The key principles outlined for a nationally coordinated approach to environmental impact assessment include: participation of all stakeholders; transparency of the process; certainty and timeliness; accountability of statutory decision-makers; integrity through reliance on the best available information; cost-effectiveness; and a precautionary approach.

2.10 International environmental impact assessment best practice

The mission of the International Association for Impact Assessment (IAIA) is to 'provide the international forum for advancing innovation and communication of best practice in all forms of impact assessment so as to further the development of local, regional, and global capacity in impact assessment'.¹¹⁸

In 1999, the association produced 'Principles of Environmental Impact Assessment Best Practice' which are intended to be applicable to all levels and types of proposals. The document provides a checklist of basic principles which should apply at all stages of environmental impact assessment, whilst recognising the need to adopt a balanced approach to ensure environmental impact assessment fulfils its purpose.

The principles are intended to provide guidance to IAIA members and others involved in applying environmental impact assessment processes, for instance, balancing efficiency and cost-effectiveness goals, with aims of ensuring the process is rigorous, credible, transparent and participative. Under this model a best practice method for environmental impact assessment is advocated involving the application of assessment procedures throughout the lifecycle of a project, from the initial screening of projects to ensuring, wherever possible, that compliance measures are undertaken.¹¹⁹

¹¹⁵ Development Assessment Forum, *A Leading Practice Model for Development Assessment in Australia*, March 2005

¹¹⁶ The DAF leading practice model proposes ten 'leading practices' which a development assessment should exhibit, as well as six 'tracks' that apply the ten leading practices to a range of assessment processes. Development Assessment Forum, *A Leading Practice Model for Development Assessment in Australia*, March 2005, p.7

¹¹⁷ Australian and New Zealand Environment and Conservation Council, *A National Approach to Environmental Impact Assessment in Australia: Background Paper of the Working Group*, October 1991 p.2

¹¹⁸ International Association for Impact Assessment, *Vision, Mission, Values, Professional Code of Conduct, and Ethical Responsibilities*, January 2009, p.1

¹¹⁹ International Association For Impact Assessment, *Principles of Environmental Impact Assessment Best Practice*, 1999, pp.1–4

Chapter 3: Operating framework

Key findings

- 3.1 Concern was expressed in a number of submissions that substantive elements of the environment effects statement process do not have a legislative basis, and much of the detail regarding the process is contained in ministerial guidelines.
- 3.2 Some dissatisfaction with the current administrative arrangements of the Environment Effects Act was expressed in submissions. Some witnesses, including proponents, the non-government sector, academics and community groups, described the degree of ministerial discretion in the administration of the Act as a weakness of the current framework.
- 3.3 In Western Australia, the Environmental Protection Authority (EPA) administers the environmental impact assessment framework, which is held in high regard both nationally and internationally. Witnesses described the EPA as well respected, identifying its independence as a key strength of the Western Australian environmental impact assessment framework. However the EPA is limited to focusing on the biophysical components of the environment.
- 3.4 The environmental impact assessment process is better suited in Victoria to being administered within the planning portfolio, where it has resided for 28 years, rather than being transferred to the Environment Protection Authority Victoria, which would require substantial reform.
- 3.5 The final decision on the assessment of environmental impacts should remain the responsibility of a Minister who is accountable to the Parliament and the public.
- 3.6 Some evidence the Committee received outlined ongoing concerns about the actual or perceived conflict of interest when the Department of Planning and Community Development administers the process for government projects that are undergoing environmental impact assessment. The introduction of a series of checks and balances in the environmental impact assessment process may address this.
- 3.7 The environmental impact assessment process is currently under-resourced in Victoria. The budget of the administration of the environmental impact assessment process in Western Australia is approximately six times the size of that in Victoria.

- 3.8 The absence of legislated objectives, definitions for 'environment' and 'ecologically sustainable development', and an overarching statement of purpose in the Environment Effects Act were identified as a shortcomings of the current legislation. The inclusion of principles of ecologically sustainable development, including the precautionary principle, to guide implementation of the Act were also supported by some submissions. The application of the Environment Effects Act to both public and private works requires clarification.

*The current Environment Effects Act is deficient in purpose, process, definition and objectives. As a consequence, the circumstances in which the Environment Effects Act is or will likely be invoked are uncertain, the process to be undertaken if an EES is required is idiosyncratic, and the outcomes unpredictable.*¹²⁰

– Victorian Planning and Environmental Law Association

3.1 Introduction

This chapter considers the issues arising from the absence of a clear statement of purpose, objectives and definitions of key terms in the *Environment Effects Act 1978* (Vic). This chapter will also examine the governance and administration of the environmental impact assessment framework in Victoria, thereby addressing terms of reference a) and c).

The Committee draws heavily in this chapter on the Western Australian environmental impact assessment framework. Several submissions and evidence provided at hearings highlighted that the framework is held in high regard and considered an example of best practice both nationally and internationally.¹²¹ The Committee held public hearings in Perth on 31 May and 1 June 2010 to gather evidence in this regard. The Western Australian system has also been lauded in the academic literature where a comparative study found that it was the one jurisdiction (of eight jurisdictions world-wide) that satisfied 14 key criteria for environmental impact assessment effectiveness.¹²²

¹²⁰ Victorian Planning and Environmental Law Association, submission no.55, p.2

¹²¹ For example, refer to: Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.56; Dr A Morrison-Saunders, submission no.53, p.2; Dr B Jenkins, Chief Executive Officer, Environment Canterbury New Zealand, Environment and Natural Resources Committee public hearing – Melbourne, 2 June 2010, transcript of evidence, p.237; Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010 transcript of evidence, p.32; Mr I Le Provost, President, Environmental Consultants Association of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.177

¹²² 'The Western Australian EIA system was part of a recent comparative assessment of eight EIA jurisdictions including the United States, Canada, the United Kingdom, the Netherlands and the Australian Commonwealth. This study examined 14 criteria of EIA effectiveness and applied them to each system. Western Australia was the only jurisdiction that satisfied all of the criteria'. N Harvey, *Environmental Impact Assessment: Procedures, Practice and Prospects in Australia*, 1998, p.37. See also, C Wood and J Bailey, 'Predominance and Independence in Environmental Impact Assessment: The Western Australian Model', *Environmental Impact Assessment Review*, 1994, vol.59, pp.37–59, especially p.56

3.2 Administration of environmental impact assessment

The Department of Planning and Community Development (DPCD) currently administers procedures under the Environment Effects Act, reporting to the Minister for Planning.¹²³

As the Environment Effects Act is brief and non-descriptive, relying on guidelines to detail procedures under the Act, the majority of key stages in the Environment Effects Statement (EES) process are determined by the Minister for Planning at his or her discretion.¹²⁴ Submissions to the Committee advised that, as a result of such discretion, the environmental impact assessment process:

- lacks transparency and accountability safeguards;¹²⁵
- lacks certainty, consistency and predictability;¹²⁶
- is liable to interpretation or ‘manipulation’;¹²⁷ and
- is susceptible to political interference.¹²⁸

¹²³ Victorian Government, submission no. 40, p.1

¹²⁴ For example, refer to: Blue Wedges, submission no.31, p.14; Glen Eira Environment Group, submission no.12, pp.4–5; Lawyers for Forests, submission no.14, p.2; Port Phillip Conservation Council, submission no.15 p.3; Environment Defenders Office (Victoria), submission no.27, p.5; Save Bastion Point Campaign, submission no.43, pp.7–8; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.3; Mr J Crockett, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.40; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.110; Watershed Victoria, submission 10, p.4; Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, p.3; Ms E McKinnon, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.34; Mr B Napier, Principal, Coffey Environments, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.22; Australian Conservation Foundation, submission no.36, p.7

¹²⁵ For example: Australian Conservation Foundation, submission no.36, pp.1, 7; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.6; Hume City Council submission no.49, p.3; Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, p.3; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.110; Lawyers for Forests, submission no.14, p.2; Environment Defenders Office (Victoria) submission no.27, p.7

¹²⁶ For example: Ms E McKinnon, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.34; Australian Conservation Foundation, submission no.36, p.3; Victorian Planning and Environmental Law Association submission no.55 p.2; Hume City Council, submission no.49, p.2; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.110; Environment Defenders Office (Victoria), submission no.27, p.7

¹²⁷ For example: Blue Wedges, submission no.31, p.6; Mr J Laverack, submission no.1, p.1; Australian Conservation Foundation, submission no.36, p.7; Environment Defenders Office (Victoria) submission no.27, p.7

¹²⁸ For example: Construction Material Processors Association Inc, submission no. 44 p.4; Cement, Concrete and Aggregates Australia, submission no.46, p.2; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.1; Save Bastion Point Campaign, submission no.43, pp.7–8

The Committee noted that the administrative arrangements for managing environmental impact assessment procedures vary throughout Australia and other jurisdictions. Dr Bryan Jenkins, Chief Executive Officer of Environment Canterbury, New Zealand, identified three fundamental components to consider in relation to the administration of the environmental impact assessment process:

I think there are three components that you should be considering as part of the environmental impact assessment process. One is how the process is administered, the second is how advice is provided and the third is how decisions are made. They can be quite different agencies or departments that look after them.¹²⁹

With Western Australia and the Commonwealth as the basis for comparison, the three distinct elements of the administration of the environmental impact assessment process in Victoria are discussed below.

3.2.1 How the environmental impact assessment process is administered

Western Australia

In Western Australia, under the *Environmental Protection Act 1986*, the Environmental Protection Authority (EPA) is responsible for environmental impact assessment.¹³⁰ The process is administered by the Office of the EPA¹³¹ (OEPA) as follows:

- project proponents commence pre-referral discussions with the OEPA;¹³²
- a referral is submitted to the OEPA;
- after receiving a referral, the OEPA determines the level of assessment;
- the OEPA advises the proponent on its acceptance of the Environmental Scoping Document and proposed Scope of Works (or in some cases, the OEPA prepares the scoping document for the proponent);¹³³
- the OEPA decides on the acceptability of the environmental review document for public release;¹³⁴ and
- after public release, the OEPA prepares an assessment report including recommendations, which takes into consideration: the proponent's assessment documentation, public submissions, and any recommendations from the Inquiry Panel.¹³⁵ The OEPA's assessment report is

¹²⁹ Dr B Jenkins, Chief Executive Officer, Environment Canterbury New Zealand, Environment and Natural Resources Committee public hearing – Melbourne, 2 June 2010, transcript of evidence, p.237

¹³⁰ *Environmental Protection Act 1986* (WA), part IV

¹³¹ In November 2009, the Western Australian Government created a dedicated department to give the EPA greater independence and management of its own resources, www.epa.wa.gov.au, accessed 24 May 2010

¹³² Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.142

¹³³ Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, p.5997

¹³⁴ *ibid.*, p.5999

¹³⁵ Although the legislation provides for an inquiry, to date, there has never been an inquiry held in Western Australia. Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, correspondence received, 27 July 2010

submitted to the EPA's Board. The board provides the final advice to the Minister for Environment.

The Committee was advised that a key strength of the EPA administering the Western Australian environmental impact assessment system was its 'scientific and technical approach' to environmental assessment.¹³⁶ As Dr Angus Morrison-Saunders, Senior Lecturer in Environmental Assessment, Murdoch University, Western Australia, stated:

*The EPA itself has always taken a very scientific and technical approach. It has always grounded its advice to the minister in science. The EPA has been a kind of environmental scientific body, as best it can with limited resources ... it leaves the politics to the minister ... at the decision-making stage, and that is really important.*¹³⁷

The high regard for the Western Australian EPA and its central involvement in the environmental impact assessment process was explained to the Committee by various key stakeholders.¹³⁸ The Committee was advised that the EPA is 'very well respected' by both industry and conservation groups.¹³⁹ The Committee was also advised that confidence in the administration of the Western Australian environmental impact assessment process is high because the EPA acts as an 'environmental watchdog at the policy and assessment area'.¹⁴⁰ Dr Bryan Jenkins, Chief Executive Officer of Environment Canterbury, New Zealand, and former Chief Executive of the former Western Australian Department of Environmental Protection, commented:

*... by having an EPA that is appointed as the environmental watchdog at the policy and assessment area, which is different from where you have your EPA operating, it does give people a lot more confidence ...*¹⁴¹

Commonwealth

At the Commonwealth level, the Department of Sustainability, Environment, Water, Population and Communities provides advice to the Minister in relation to environmental impact assessment. That is, the Secretary of the Commonwealth Department is required to prepare draft recommendation reports in relation to the different levels of environmental assessment under the EPBC Act.¹⁴² These reports include recommendations on whether the action should be approved and, if approval is

¹³⁶ Dr A Morrison- Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.59

¹³⁷ *ibid.*

¹³⁸ For example: Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.56; Dr A Morrison-Saunders, submission no.53, p.2; Dr B Jenkins, Chief Executive Officer, Environment Canterbury New Zealand, Environment and Natural Resources Committee public hearing – Melbourne, 2 June 2010, transcript of evidence, p.237; Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.147; Mr I Leprovost, President, Environmental Consultants Association of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.177; Associate Professor G Middle, Head, Department of Urban and Regional Planning, Curtin University, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.169

¹³⁹ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.59

¹⁴⁰ Dr B Jenkins, Chief Executive Officer, Environment Canterbury New Zealand, Environment and Natural Resources Committee public hearing – Melbourne, 2 June 2010, transcript of evidence, p.248

¹⁴¹ *ibid.*

¹⁴² See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 93, 95C, 100

recommended, any conditions that should be attached to the approval. The Minister is then required to take account of these reports,¹⁴³ but is not required to adopt them. The department is then responsible for enforcement through its dedicated post-approval monitoring and auditing section.

It should also be noted that the independent review of the EPBC Act recognised the importance of an agency or office in relation to environmental impact assessment which was both independent and expert. The review report states: 'The Minister, and the public at large, needs to have confidence in the information provided about ... potential risks and impacts when making decisions whether to approve a proposed development under the Act. The key is that this advice should come from a body that is both independent and expert, and is recognised as such'.¹⁴⁴ The review notes that while the review had 'received no information that would support any inference that there has been political interference in the provision of advice by the Department of Environment, Water, Heritage and the Arts to the Minister', there was 'a case for greater separation between the Minister and the body responsible for providing this type of advice'.¹⁴⁵ The review suggested that this separation be achieved through the establishment of a National Environment Commissioner.¹⁴⁶

The review report stated: 'The primary objective of the Commissioner should be to promote the adoption of environmentally sustainable practices by providing independent scrutiny, reporting and advice'.¹⁴⁷ The review recommended that two of the prime functions of the Commissioner would be:

- 'providing independent expert advice to the Minister for the purpose of evidence-based decision-making for environmental impact assessment and approvals processes under the Act, including decision-making on project assessments, strategic assessment and bioregional plans; and
- monitoring, audit, compliance and enforcement activities under the Act'.¹⁴⁸

Victoria

Machinery of government changes resulted in the planning portfolio being transferred from the Department of Sustainability and Environment to the Department of Planning and Community Development (DPCD) in 2007. The Committee received a range of views regarding the most suitable agency or department to administer the Environment Effects Act and manage the environmental impact assessment process in Victoria.

¹⁴³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 136(2)

¹⁴⁴ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.330

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*, p.333

In Victoria, concerns regarding dependence on the discretion of the Minister during key stages of the EES process, combined with the lack of significant reform to the Environment Effects Act since its enactment in 1978, have resulted in some dissatisfaction with the current administrative arrangements.¹⁴⁹

In Victoria, whilst the DPCD assists the Minister and proponents to ensure EES documentation is adequate, the Minister for Planning is responsible for significant decisions during key stages of the EES process. Under the EES framework, the Minister for Planning and DPCD have the following responsibilities:

- proponents are encouraged to discuss a potential project referral with the DPCD;¹⁵⁰
- the department identifies gaps or unclear aspects in a draft referral which a proponent can voluntarily address before submitting a final referral to the Minister;
- the DPCD verifies referral information with other agencies before the referral is submitted to the Minister;
- the Minister determines whether the project will require an EES, no EES, or no EES with conditions;
- the DPCD appoints and convenes a Technical Reference Group to provide the department and the proponent with advice on the preparation of an EES;
- a time schedule for the preparation and review of the EES may be agreed on by the proponent and the DPCD;
- the DPCD reviews the proponent's draft consultation plan;
- the DPCD prepares the draft scoping requirements, which must be endorsed by the Minister before public release;
- the Minister issues the final scoping requirements setting out matters that need to be investigated and documented in the EES;¹⁵¹
- the Minister may at any time invite and receive comments on the environmental effect of any works or proposed works from the public in general or from such sections of the public as are determined by the Minister;¹⁵²
- when a final draft of the EES is complete, the proponent submits it to the DPCD for review to confirm its suitability for public release. When satisfied, the DPCD briefs the Minister to authorise exhibition of the EES;

¹⁴⁹ For example, refer to: Bendigo Environment Council, submission no.4, pp.2–3; Mr J Crockett, submission no.7, pp.1-2; Mr N Rankine, submission no.9, p.2; Watershed Victoria, submission 10, pp.1–2; Ms P Hunt, submission no.13, p.1; Lawyers for Forests, submission no.14, p.1; Port Phillip Conservation Council, submission no.15, p.3; Swan Bay Environment Association, submission no.21, p.1; Ms K Neave, submission no.30, pp.1-2; Blue Wedges, submission no.31, p.2; Ms A Richards, submission no.33, p.1; Australian Conservation Foundation, submission 36, p.1; Save Bastion Point, submission no.43, p.1; Environment Defenders Office (Victoria) Ltd, submission no.27, p.5; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.3; Environment Victoria, submission no.39, p.1

¹⁵⁰ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.2

¹⁵¹ Victorian Government, submission no.40, p.11

¹⁵² *Environment Effects Act 1978* (Vic) s.9(2)

- the DPCD may (on advice from the Minister) appoint expert peer reviewers to provide advice during the development of critical EES studies;¹⁵³
- the Minister may appoint one or more persons to hold an inquiry into the environmental effects of any works or proposed works;¹⁵⁴
- the Minister may at any time call for a Supplementary Statement containing any additional information that the Minister considers necessary for the making of his or her assessment;¹⁵⁵ and
- once the EES process is complete, the Minister makes an assessment of the environmental effects of the works, which is provided to relevant decision-makers to inform their project approval decisions.

The Committee was also directed to inquire into the 'independence of environmental effects examination when government is the proponent', term of reference (c). The question of who should administer the EIA process, the role of the Minister and independence of the EIA process when the government is the proponent are discussed below.

The Committee received evidence that indicated that independent administration of the environmental impact assessment system would increase confidence in the system.¹⁵⁶ For example, the Australian Conservation Foundation contends that 'the EES process lacks basic accountability and transparency safeguards and is prone to politicisation, manipulation and inconsistent application'.¹⁵⁷ As a result the Australian Conservation Foundation recommends that an 'independent body' be 'charged with overall governance and stewardship of the environmental impact assessment process'.¹⁵⁸

The Environment Defenders Office believes that environmental impact assessment should be conducted by 'an agency that has responsibility for environmental management and is staffed by officers who have environmental training and knowledge'.¹⁵⁹ Transferring primary carriage of the environmental impact assessment process to the Environment Protection Authority Victoria was suggested to the Committee.¹⁶⁰ The Environment Defenders Office stated that the current functions of EPA Victoria 'correlate well with environmental impact assessment'.¹⁶¹

The role of EPA Victoria is to administer the *Environment Protection Act 1970* (Vic) and its regulations. EPA Victoria works with other government agencies, industry and the community to reduce and control air and water pollution, waste and noise.¹⁶² Its role is 'to set environmental standards and then to assess the environment against them, to regulate certain businesses and

¹⁵³ Department of Sustainability and Environment, June 2006, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, pp.13, 14, 21, 22; Victorian Government submission no.40, pp.5, 9, 11

¹⁵⁴ *Environment Effects Act 1978* (Vic) s.9(1) with the approval of the Governor in Council

¹⁵⁵ *ibid.*, s.5(1)

¹⁵⁶ For example, refer to: Australian Conservation Foundation, submission no.36, p.7; Environment Defenders Office (Victoria), submission, no.27, p.20; Watershed Victoria, submission no.10, p.8; Blue Wedges, submission no.31, p.13

¹⁵⁷ Australian Conservation Foundation, submission no.36, p.1

¹⁵⁸ *ibid.*, p.7

¹⁵⁹ Environment Defenders Office (Victoria), submission no.27, p.14

¹⁶⁰ Environment Defenders Office (Victoria), submission no.27, p.14; Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.32

¹⁶¹ Environment Defenders Office (Victoria), submission no. 27, p.14

¹⁶² Environment Protection Authority Victoria, www.epa.vic.gov.au, accessed 5 May 2010

activities against those standards and work with organisations to achieve those'.¹⁶³ Furthermore, EPA Victoria aims to protect 'the quality of Victoria's air, water and land environment', through science-based studies and investigations, monitoring and auditing.¹⁶⁴ EPA Victoria has gained 'world-wide recognition' for its 'innovative' environmental management and scientific expertise.¹⁶⁵

However, Mr Stuart McConnell, Director, Future Focus, EPA Victoria, commented that the EPA in Western Australia is 'quite a different organisation from the EPA in Victoria', describing the differences as follows:

*... the EPA in Victoria is the environmental regulator around pollution and waste issues, you might say, and those functions in WA are held within the Department of Environment. The EPA in WA has a specific role around environmental impact assessment which is, I suppose, different from what we have. They are quite different organisations.*¹⁶⁶

The DPCD advised the Committee that the difficulty of replicating the Western Australian environmental impact assessment framework in Victoria relates to the way 'environment' is defined in Victoria, and the considerations of the Minister in making his or her decision.¹⁶⁷ Mr Trevor Blake, Chief Environment Assessment Officer, from the department stated:

*The difficulty in comparing different Australian or other jurisdictions in any way is that the body that identifies state level impacts and manages processes in terms of the broad planning function differ a lot. For example, in Western Australia the assessment process is part of the EPA function basically. It is based on physical issues as opposed to a broader set of issues, which include social and economic issues more akin to the Minister for Planning's suite of interests.*¹⁶⁸

The Committee understands that the EIA process in Western Australia is predominantly focused upon managing the biophysical components of the environment, whereas the Victorian process also takes in the social and economic elements of sustainable development. For this reason the Committee believes that the EIA process in Victoria is better suited to being administered within the planning portfolio, where it has resided for 28 years, rather than being transferred to the EPA Victoria, which would require substantial reform.

However, the Committee notes that there is significant merit in formalising the early involvement of the Department of Sustainability and Environment and EPA Victoria in the EIA process, to ensure that a robust scientific and technical approach is taken to evaluating the potential biophysical environmental impacts of a proposal. At present DPCD advised that in practice it may seek technical advice from other departments at the referral stage.

¹⁶³ Mr S McConnell, Director, Future Focus, EPA Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.49

¹⁶⁴ Environment Protection Authority Victoria, www.epa.vic.gov.au, accessed 10 August 2010

¹⁶⁵ *ibid.*

¹⁶⁶ Mr S McConnell, Director, Future Focus, EPA Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.51

¹⁶⁷ Mr T Blake, Chief Environment Assessment Officer, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, pp.8–9

¹⁶⁸ *ibid.*

Accordingly, the Committee recommends:

RECOMMENDATION 3.1

The environmental impact assessment process continue to be administered by the Department of Planning and Community Development.

RECOMMENDATION 3.2

The early involvement of the Department of Sustainability and Environment and Environment Protection Authority Victoria in the environmental impact assessment process is formalised with the Department of Planning and Community Development to ensure that a robust scientific and technical approach is taken to evaluating the potential biophysical environmental impacts of a proposal.

Some submissions flagged a greater role for the DPCD at key decision-making stages of the EIA process. Allocating responsibility to the department to determine whether an EIA is required, utilising a robust technical and risk-based approach rather than ministerial discretion, may increase community and industry confidence in the process. The Committee maintains the final assessment of environmental impacts should be the responsibility of the Minister for Planning, who is accountable to the Parliament and the public.

The Environment Institute of Australia and New Zealand (EIANZ) suggested that delegating more decision-making responsibility to the department would also lead to time and cost efficiencies throughout the EIA process. EIANZ considered that significant time delays 'are created during periods where Ministerial sign-off is required'.¹⁶⁹

A significant amount of this time is considered 'dead' time from the perspective of the proponent and consultant, while they wait for government or the Minister to review and sign off on documentation. This is clearly unacceptable from the point of view of process efficiency, cost and public accountability. This included delays associated with government 'signing off' on the:

- *referral (estimated 3-4 months);*
- *the scoping guidelines (1 week - 3 months);*
- *authorisation to exhibit (up to 2 months);*
- *public review (4-6 weeks); and*
- *Minister's final decision (up to 6 months despite the [Ministerial] Guidelines indicating this may only take 20 business days, ref. p 12).*

This does not include time required to present to the panel.¹⁷⁰

¹⁶⁹ Environment Institute of Australia and New Zealand, submission no.42, p.7

¹⁷⁰ *ibid.*, p.6

Accordingly, the Committee recommends:

RECOMMENDATION 3.3

Environmental impact assessment referrals be submitted to the Department of Planning and Community Development.

RECOMMENDATION 3.4

The Department of Planning and Community Development determine whether proposals require an environmental impact assessment.

According to the Victorian Government submission there is no difference between the environmental impact assessment process when the government or private industry is the proponent:

While critical infrastructure projects such as the Victorian Desalination Project have received an appropriate level of resourcing to enable the timely completion of statutory processes, there is no difference in the approach to management of these processes for public and private sector projects. All projects are subject to scrutiny commensurate with the level of environmental risk that they are considered to present.¹⁷¹

Furthermore Mr Jeff Gilmore, Executive Director, Planning Policy and Reform, DPCD, when responding to a question on how the environmental impact assessment process is conducted when the government is the proponent, advised the Committee in May 2010:

That is always a complex issue. It is essentially in the same way that governments around the country do that. In our terms at an administrative level there is a project proponent within government, and their job is to make a referral or not as the case may be based on what they know about their project. With some of that, as indicated in earlier questions, there will have been a much more thorough consideration of alternatives and options and solutions, and that typically can be dealt with in a fairly straightforward and administrative way along the lines that has been outlined.

For more complex projects where the need is less well articulated often the same sorts of requirements will apply as if they were a private proponent. I think the way that the assessment works is that the department continues to provide exactly the same response and exactly the same services to other government departments as proponents as they would to the private sector.

The advice that is formulated to the minister is provided to the minister directly, not through other government processes. Then the minister's judgement is made accordingly. I do not see it as a conflict. It is part of being in the government, part of doing business in the government, part of government's responsibility to the community and to the Parliament.¹⁷²

¹⁷¹ Victorian Government, submission no.40, p.14

¹⁷² Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.8

In June 2010, Mr Gilmore reiterated DPCD's position in relation to independence and the environmental impact assessment process when the government is the proponent:

*I have worked, as I said, under a number of different models trying to overcome the issue that you raise. It happens at all tiers of government, not just state government. Local government can be accused of the same thing. It sits in judgement about planning issues for projects that it undertakes. I do not see that there is a huge notion that that system is broken ...*¹⁷³

The issue of independence when the government is the proponent was also canvassed in the *Independent Review of the Environment Protection and Biodiversity Conservation Act*. The review stated:

*A range of submissions generally supported bilateral agreements, but argued they should not be used to assess state government affiliated projects. The essence of the argument was that a state agency assessing a state government project may be prone to bias, may understate the environmental impacts of a project, overstate the effects of mitigations, offsets and conditions, and be insensitive to public comments... To address the apprehension of bias in these assessments, it is recommended that these projects be assessed by public inquiry or joint-panels involving Commonwealth and state representatives.*¹⁷⁴

The recent Victorian Competition and Efficiency Commission review did not address the issue of the government as proponent and independence in the environmental impact assessment process. The 2002 *Environment Assessment Review* recommended that an Independent Process Director be appointed for some environmental impact assessment processes at the completion of the screening stage to ensure the process is carried out in a manner that is fair and equitable to all parties. This recommendation was made in response to:

*... the desire expressed in submissions from proponents, the public and other key stakeholders for greater confidence in the conduct of the assessment process in a manner that is equitable to all parties. There is a view held by some submitters that the Department of Infrastructure [which had primary carriage of the EES process in 2002] cannot hold this position, based on the fact that the department is in some instances also the proponent of a project that requires assessment, although the proponent would be a different division of the department from that which is charged with overseeing the environment assessment.*¹⁷⁵

The role of the Independent Process Director recommended by the *Environment Assessment Review* is quite limited in the Committee's view as it would be restricted to the environmental impact assessment process from the screening to the public exhibition stage only and unnecessarily add an additional layer of bureaucracy to the EIA process.

¹⁷³ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.269

¹⁷⁴ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.66

¹⁷⁵ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.38

The evidence the Committee received outlined ongoing concerns about the actual or perceived conflict of interest when the DPCD administers the process for government projects that are undergoing environmental impact assessment.¹⁷⁶ Coffey Environments was most forthright on this matter:

The inquiry is asking the right questions. Of these, Question (c) is the one that goes to the major problem and it provides its own answer; of course there can be no 'independence of the EES examination when the government is the proponent'. This conflict of interest only applies to one type of project but it is bringing the system into question for all projects.¹⁷⁷

Coffey Environments suggested that this problem 'can be remedied by little more than a better understanding of what an EES really is and the exercise of already existing ministerial discretion to exclude projects, for which an EES is not suited'.¹⁷⁸ This will be discussed further in chapter seven.

Concerns were raised about government projects¹⁷⁹ not being subject to the same level of scrutiny that would ordinarily be applied to private industry projects. The Victorian Planning and Environmental Law Association provided the following examples to highlight this issue:

- a special Act of Parliament facilitating the Commonwealth Games Village;
- HRL Dual Gas demonstration project (no requirement for an EES); and
- Port of Melbourne Channel Deepening Project (Part 2) - the terms of reference prohibited cross examination.¹⁸⁰

The Environment Defenders Office described 'the conflict of interest that arises when the government is the proponent' as one of the 'fundamental problems with the current environment assessment process':

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.¹⁸¹

The Committee found that the concerns raised during the *Environment Assessment Review* - conducted nine years ago - regarding actual or perceived conflicts of interest when the government is the proponent, remain today. The Committee believes that the credibility and ultimately the effectiveness of the EIA process, whether the government is the proponent or not, would be

¹⁷⁶ For example refer to Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, pp.2, 6–7; Colac Otway Shire submission no.35, p.3; Watershed Victoria submission no.10, pp.2, 8–9; Environment Defenders Office (Victoria), submission no.27, p.20; Australian Conservation Foundation, submission no.36, p.7; Ms A Bolch, submission no.45, p.14

¹⁷⁷ Coffey Environments, submission no.19, p.1

¹⁷⁸ *ibid.*, p.6

¹⁷⁹ or, according to the Victorian Planning and Environmental Law Association, 'private projects with the political backing of the government'. Victorian Planning and Environmental Law Association, submission no.55, p.2

¹⁸⁰ Victorian Planning and Environmental Law Association, submission no.55, p.2

¹⁸¹ Environment Defenders Office (Victoria), submission no.27, p.20

considerably strengthened with the adoption of the checks and balances in the process, recommended in this report, including:

- the legislation being revised to state that the primary object of EIA is to protect the environment (recommendation 3.7);
- any person having the power to refer a project (recommendation 4.2);
- appeals mechanisms - whether to assess a project or not and the level of assessment (recommendations 4.3 and 7.5);
- clear legislative triggers for EIA referral (recommendation 4.4);
- statutory time frames for key stages of the EIA process (recommendations 6.4, 7.7, 7.12, 8.3);
- DPCD appointment of experts to peer review EIA documentation (recommendation 6.6);
- opportunities for public participation defined in the EIA legislation (recommendation 7.1);
- EIA documentation being made less technical and more accessible to the community (recommendation 7.6);
- greater transparency arising from stipulated public notification and exhibition periods (recommendations 7.3, 7.7);
- timely release of inquiry reports and Minister's approval decisions with legally binding conditions (recommendations 7.12, 8.3); and
- strengthened monitoring, auditing, enforcement and evaluation arrangements (recommendations 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7).

Resources for administering environmental impact assessment

In order to ensure thorough, robust assessments are conducted, the Committee noted that the DPCD needs to be adequately resourced. The Construction Material Processors Association identified that a current weakness of the EES process relates to the under-resourcing of agencies and a turnover of competent staff.¹⁸² It advised the Committee that 'delayed or poor decisions are often made due to this lack of resources'.¹⁸³

According to advice the Committee received from the Office of the EPA in Western Australia, the budget for the environmental impact assessment and compliance division of the EPA is approximately \$5.4 million per annum.¹⁸⁴

¹⁸² Construction Material Processors Association, submission no. 44, p.5

¹⁸³ *ibid.*

¹⁸⁴ Mr C Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.145

In comparison, the total 2009-10 salary and operating budget for the Victorian DPCD team administering the Environment Effects Act was in the order of \$850,000, not including the costs of inquiries.¹⁸⁵

Associate Professor Ian Thomas, Discipline Head of Environment and Planning at RMIT, advised the Committee:

*In terms of the direct costs to the Victorian Government for running the EES process, this has been done on the cheap for years. If we look at the extent of economic activity, and the related number and range of project proposals, the departmental resources expended to assess environmental impacts will be tiny.*¹⁸⁶

In regards to human resources, the Western Australian Office of the EPA advised the Committee that there are approximately 50 staff 'doing project assessments,' working on projects that are undergoing environmental impact assessment.¹⁸⁷ Within 'that team there are some specialists that support the EIA process', such as marine and terrestrial specialists.¹⁸⁸

In comparison, the DPCD advised the Committee that there are currently nine core staff working specifically on EESs and the administration of other accredited processes, such as the commonwealth process under the EPBC Act.¹⁸⁹ This core staff are supported by regional offices of the department, as well as experts from other departments as necessary, or consultants.¹⁹⁰ Mr Jeff Gilmore, Executive Director, Planning Policy and Reform, DPCD, stated:

¹⁸⁵ Department of Planning and Community Development, correspondence received, 26 July 2010. The Committee was advised on 3 August 2011 that there is now a total of 13 staff in the DPCD Environment Assessment Unit (a net increase of 4) managing impact assessment processes and their coordination with approvals processes for projects. The Unit now manages impact assessment and approval processes under the Major Transport Projects Facilitation Act. The DPCD stated: 'in relation to resourcing, an important change in 2010-11 has been a transfer of funds from the Department of Transport to DPCD for a three-year program to support DPCD's responsibilities with respect to assessment and approvals processes for state priority transport projects, such as Regional Rail Link'. The Committee was advised that the total 2011-12 budget for salaries and associated recurrent costs for the 13 staff in the Environment Assessment Unit is \$1.52 million. (Source: Department of Planning and Community Development, correspondence received, 3 August 2011)

¹⁸⁶ Associate Professor I Thomas, submission no.20, p.3

¹⁸⁷ Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.144

¹⁸⁸ *ibid.*

¹⁸⁹ Mr T Blake, Chief Environment Assessment Officer, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.8

¹⁹⁰ Mr T Blake, Chief Environment Assessment Officer, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.8, Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.9

As you can appreciate, the workload is quite variable — major projects coming through with short time frames. A lot of investment in people has to be brought in, whether we bring in those people from within the department or use experts from other departments. Obviously we can also bring in consultants. The department obviously has a commitment to providing the requisite number of resources, and currently we are going through a planning process to identify both the projects and the resourcing needed over the next three or four years.

The ability to access resources from other departments to support particular parts of the process is also recognised — in a sense, them paying for the services they get. There is a whole range of those things, but internally within DPCD there is a recognition that there needs to be a core, stable and professional workforce that understands the process, and then we need to have identified those resources in advance so we can have them on board when a project is under way rather than waiting until a project hits our front door before we start employing people.¹⁹¹

The Committee is of the view that the agency administering Victoria's environmental impact assessment process should be adequately resourced in order to administer the process effectively.

Accordingly, the Committee recommends that:

RECOMMENDATION 3.5

The Department of Planning and Community Development be adequately resourced to manage the environmental impact assessment process.

3.2.2 How advice is provided

In Western Australia, once the environmental impact assessment is completed by the Office of the EPA, it is presented to the independent EPA Board who submits the final advice to the Minister for Environment.¹⁹² The Board comprises five members appointed by the Governor on the recommendation of the Minister.¹⁹³ The *Environment Protection Act 1986* (WA) provides for the independence of the authority, which states: 'subject to the Act, neither the Authority nor the Chairman, shall be subject to the direction of the Minister'.¹⁹⁴ The EPA Board's advice is published on the EPA's website within four days of being presented to the Minister.¹⁹⁵ This means that the EPA's advice and recommendations are publicly available before the Minister makes a decision.¹⁹⁶

¹⁹¹ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.9

¹⁹² Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.149

¹⁹³ *Environment Protection Act 1986* (WA) s.7

¹⁹⁴ *ibid.*, s.8

¹⁹⁵ Mr C Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.148

¹⁹⁶ Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.147

Mr Ian Leprovost, a Western Australian practising consultant, and former EPA Board Member, advised the Committee that the independence of the Board is 'seen as the greatest strength of the EPA' and was 'something which very few jurisdictions anywhere around the world have'.¹⁹⁷

Dr Bryan Jenkins, Chief Executive Officer of Environment Canterbury, New Zealand, advised the Committee that the independence of the EPA Board results in a higher level of public confidence in the environmental impact assessment process:

*Having that independent group — they are appointed by government, so they are not totally hands off, but they are at that one-step removed — has certainly enhanced public confidence in the environmental assessment process in Western Australia, more so than in most of the other states, and I have worked as a consultant in most of the states in Australia.*¹⁹⁸

The Committee received evidence that the level of confidence in environmental impact assessment outcomes and the independence of the EPA in Western Australia is generally high. Ms Michelle Andrews, Acting General Manager, Office of the EPA, advised the Committee:

*I think the process we have in this state has worked well. Any question around the independence of the board, how it has operated and the process for appointing it has not been an issue that has dominated concerns with any of the parties, whether it is the environmental non-government organisations or industry. It has broadly been one that people accept, support and feel confident about.*¹⁹⁹

*I do not need to explain that from the community and the environmental NGOs point of view the independence of the EPA is paramount. They will defend that in any sort of way. They see the importance of not only the way in which the board operates — the independence of the members... the publishing of the EPA's advice is seen... as a very critical aspect of the independence of the EPA.*²⁰⁰

The Conservation Council of Western Australia advised the Committee that 'from the public interest perspective, the most important element of our Environmental Protection Act is the fact that an independent authority gives transparent advice to a Minister'.²⁰¹ WWF also described the independence of the EPA as a key strength of Western Australia's environmental impact assessment system:

*An independent and adequately resourced body like the EPA is very important as well so that advice can be provided publicly and in an unfettered manner to government so the community can see what the advice is and then can make a judgement according to their assessment of that advice. That is an absolute fundamental and something that is very important in Western Australia.*²⁰²

¹⁹⁷ Mr I Leprovost, President, Environmental Consultants Association of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.177

¹⁹⁸ Dr B Jenkins, Chief Executive Officer, Environment Canterbury New Zealand, Environment and Natural Resources Committee public hearing – Melbourne, 2 June 2010, transcript of evidence, p.248

¹⁹⁹ Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.146

²⁰⁰ *ibid.*, p.147

²⁰¹ Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.184

²⁰² Mr P Gamblin, Program Leader – West, WWF – Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.221

The independence of advice given by the Western Australian EPA Board was noted by the Environment Defenders Office:

*...it is one of the benefits of the fact that in WA assessments are done by the EPA, which in WA is actually a statutory board. There is an EPA chair, who is a statutory person, and then a statutory board with support from the department, but no political influence and no ability for a minister to direct how that board operates. Even though at the end the minister will make a decision and the minister will factor-in social, economic and all other considerations, which is really appropriate at that stage, the community at least knows that the assessment was a thorough assessment by an independent body. The assessment itself is not questioned as much ...*²⁰³

The Committee was advised by a range of stakeholders that the Minister rarely makes a decision that is contrary to the Western Australian EPA's advice. Dr Jenkins commented that 'it is usually a brave minister who will go against an EPA recommendation'.²⁰⁴ The Office of the EPA confirmed that over the past five years, the Minister has only twice made an approval decision contrary to the EPA's approval advice.²⁰⁵ These were the Gorgon Gas Development project (the EPA recommended against approval while the government approved the project) and South West Yarragadee Water Resource Development (the EPA recommended highly conditional approval and the government refused approval). This represents less than one per cent of assessed projects over that period.²⁰⁶

Inquiry panel process

In Victoria, there is provision under the Environment Effects Act for the Minister to appoint one or more persons with expertise to conduct an inquiry into the environmental effects of any works to which the Act applies, however, it is not mandatory.²⁰⁷ It is common practice for an inquiry to take the form of a formal hearing in which stakeholders present a submission to a Planning Panel selected by the Minister for Planning. An inquiry provides an investigation of the key issues, identified from both the EES document and public submissions, for the Minister to consider in his or her assessment report.

Concern was expressed to the Committee regarding ministerial discretion in the inquiry process. The following issues were raised:

- the Minister appoints the members from Planning Panels Victoria for the inquiry;²⁰⁸
- the Minister determines the inquiry's terms of reference, which means that issues can be excluded from the inquiry's consideration.²⁰⁹ For example, just as the 2003 EES into the Hazelwood Extension Project was limited to the greenhouse gas emissions resulting directly

²⁰³ Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.35

²⁰⁴ Dr B Jenkins, Chief Executive Officer, Environment Canterbury New Zealand, Environment and Natural Resources Committee public hearing – Melbourne, 2 June 2010, transcript of evidence, p.248

²⁰⁵ Office of the EPA, correspondence received, 20 July 2010

²⁰⁶ *ibid.*

²⁰⁷ *Environment Effects Act 1978* (Vic) s.9(1)

²⁰⁸ For example, refer to: Watershed Victoria, submission no.10, p.2, Blue Wedges submission no.31, p.14; Port Phillip Conservation Council, submission no.15, p.3; Ms P Hunt, submission no.13, p.1

²⁰⁹ For example, refer to: Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.3; Blue Wedges submission no.31 p.14; Mordialloc Beaumaris Conservation League, submission no.11, p.1; Australian Marine Ecology, submission no.29, p.21

from the coal mining and explicitly excluded emissions resulting from the combustion of that coal in the Hazelwood power plant, so did the terms of reference for the 2004 inquiry which saw the panel instructed 'not to consider matters relating to greenhouse emissions from the Hazelwood Power Station';²¹⁰

- the Minister determines the length of time for the inquiry, whether the public can participate²¹¹ and whether witnesses can be cross-examined. This was a concern for community groups in the Channel Deepening Project Supplementary EES in 2007, during which the Minister prohibited cross-examination of witnesses and hearing days were 'limited'.²¹² In its inquiry report, the panel stated that the prohibition on cross-examination 'did not overly assist the inquiry' as it was 'cumbersome and less than helpful to have questions in writing only' and 'on some occasions, responses were unable to be fully explored'. The panel also stated:

*The opportunity to have open cross examination generally enhances the overall process and usually results in key issues being explored fully. The inquiry does not encourage the use of this practice in the future, but notes that the lack of open and rigorous cross examination ensured a shorter time frame for the hearing process.*²¹³

- the inquiry's advice and recommendations are not binding on the Minister, which was a concern for the community in the Bastion Point Boat Ramp project assessment process in 2009, in which the Minister's assessment was contrary to the recommendations presented in the inquiry report;²¹⁴ and
- there are no statutory time frames for release of the inquiry report.²¹⁵ For example, the Bastion Point Boat Ramp project inquiry report was released in June 2009, the same day as the Minister's assessment. This was eight months after the inquiry submitted its report to the Minister.²¹⁶

Evidence was also provided to the Committee regarding public participation during inquiries, which will be discussed further in chapter seven.

The Committee believes that the inquiry process is an important component of the environmental impact assessment framework in Victoria, and there is scope to enhance transparency and increase stakeholder confidence in the inquiry panel's advice. The Committee therefore recommends that the DPCD issue the terms of reference for inquiries. Inquiry reports should also be made publicly available within ten business days of the Minister receiving the inquiry panel's report. These recommendations will be discussed further in chapter seven.

²¹⁰ C Berger, 'Hazelwood: A new lease on life for a greenhouse dinosaur', T Bonyhady and P Christoff (eds), *Climate Law in Australia*, 2007, pp.164–165. Note that this exclusion was struck down by Justice Stuart Morris in *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029. See, further, Berger, pp.166–167

²¹¹ Mr J Crockett, submission no.7, p.8

²¹² Blue Wedges submission no.31, p.7

²¹³ A Hawke, K Mitchell, and M Lisle-Williams, *Port Phillip Bay Channel Deepening Supplementary Environment Effects Statement Report of the Inquiry*, Government of Victoria, Melbourne, Victoria, 1 October 2007, Appendix, pp.17–18

²¹⁴ For example, refer to: Save Bastion Point Campaign, submission no.43, p.7; Watershed Victoria, submission no.10, p.2

²¹⁵ For example, refer to: Lawyers for Forests, submission no.14, p.2; Glen Eira Environment Group, submission no.12, p.5; Save Bastion Point Campaign, submission no.43, p.7

²¹⁶ Save Bastion Point Campaign, submission no.43, p.7

3.2.3 How decisions are made

Currently in Victoria, after considering the EES, public submissions and the inquiry report, the Minister for Planning makes an assessment of the environmental effects of a project. The Minister's assessment report is provided to statutory decision-makers to consider, however the recommendations are not binding on decision-makers.²¹⁷ Concerns regarding the absence of a binding approval decision by the Minister for Planning at the conclusion of the environmental impact assessment process were expressed to the Committee in some submissions²¹⁸ and will be discussed in chapter eight.

In Western Australia, after receiving the EPA Board's advice, the Minister for Environment makes the final assessment decision on an environmental impact assessment. There is a two-week period where the EPA's report and recommendations can be appealed to the Appeals Convenor²¹⁹ by any person. During the final approval stage, the Minister for Environment takes into account social, economic and any other relevant considerations.

Ministerial responsibility for the assessment of environmental impacts was discussed in several submissions. The Committee received evidence favouring environmental impact assessment being the responsibility of the Minister for Environment, rather than the Minister for Planning.²²⁰ The Environment Defenders Office advised the Committee:

*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.*²²¹

Hume City Council considered that it did not make a difference which Minister completed the assessment as long as the advice being provided to the Minister was robust. Mr Nick Walker, Manager – Sustainable Environment, Hume City Council, observed:

*... given that it is an environmental effects statement, it would seem that the environment minister should be the minister responsible. However, so long as the minister making the decision is getting all the right advice that he needs to have, I am not sure it makes a huge difference, and in some ways, having the planning minister involved in this process — I mean, our submission is from a planning point of view, for the most part — there is a lot of benefit in doing that, having an understanding of those processes ...*²²²

²¹⁷ Victorian Government, submission no.40, p.11

²¹⁸ For example, refer to: Victorian Planning and Environmental Law Association Submission no.55, p.4; Environment Defenders Office (Victoria), submission no.27, p.15; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.6

²¹⁹ The Appeals Convenor investigates and provides advice to the Minister for Environment in respect to appeals made under the *Environmental Protection Act 1986*. This includes appeals on a large range of environmental decisions, including environmental impact assessment. Office of the Appeals Convenor (WA), www.appealsconvenor.wa.gov.au, accessed August 2011

²²⁰ For example, refer to: Ms A Bolch, submission no.45, p.5; Environment Defenders Office (Victoria), Submission 27, p.14; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.112

²²¹ Environment Defenders Office (Victoria), submission no.27, p.14

²²² Mr N Walker, Manager – Sustainable Environment, Hume City Council, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.76

The Australian Conservation Foundation suggested that responsibility for environmental impact assessment remain with the most appropriate Minister, in 'a portfolio that has a responsibility for environmental outcomes', however the Minister's assessment should be transparent and informed by independent advice:

*... I have two recommendations: one is that responsibility for oversight of the environmental impact assessment should sit with the most appropriate portfolio, thereby achieving some measure of independence; the second is to introduce independent advisory bodies in the process to make the process more transparent and make sure that the minister is getting independent advice.*²²³

The Committee is of the view that the final assessment of environmental impacts should be the responsibility of a Minister, who is accountable to the Parliament and the public. The Committee believes that the Minister's assessment should be informed by the advice of an inquiry panel and the advice of the DPCD. The Committee considers the Minister for Planning to be the most appropriate person to retain responsibility for its administration. In the Victorian context, and under the accepted definition of 'environment', this portfolio encompasses the social and economic impacts of proposals balanced with the biophysical implications of any development.

3.3 Statement of purpose and objectives

The Australian Conservation Foundation advised the Committee that 'unusually for a key piece of legislation regulating major infrastructure projects, the Environment Effects Act contains no explicit overarching objectives or purposes'.²²⁴

The need for a set of clearly identifiable objectives for the Environment Effects Act was supported in the *Environment Assessment Review* in 2002.²²⁵ However, objectives were not incorporated into the Act when it was amended in 2005. Rather, the government revised the ministerial guidelines accordingly in 2006. The guidelines state that 'the general objective of the assessment process is to provide for the transparent, integrated and timely assessment of the environmental effects of projects capable of having a significant effect on the environment'.²²⁶ A series of specific objectives are also set out in the ministerial guidelines. The objectives emphasise the need for:

- transparency in the process of assessment in the context of applicable legislation and policy including the principles and objectives of ecologically sustainable development;
- timely and integrated assessments;
- proponents being held accountable for investigating potential environmental and related effects of proposed projects and for implementing the effective environmental management measures;
- public access to information as well as fair opportunities for participation in assessment processes; and

²²³ Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.113

²²⁴ Australian Conservation Foundation, submission no.36, p.2

²²⁵ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.14

²²⁶ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.3

- providing a basis for monitoring and evaluating the effects of works to inform environmental management of the works and improve environmental knowledge.²²⁷

A definition of ecologically sustainable development consistent with the National Strategy for Ecologically Sustainable Development is included in the ministerial guidelines: 'development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends'.²²⁸ The objectives of ecologically sustainable development and guiding principles are also set out in the ministerial guidelines.

However, including environmental impact assessment objectives in non-binding guidelines, rather than in the legislation, was a concern for some stakeholders, and results in uncertainty for proponents and the community and a lack of transparency for assessments completed under the Act.²²⁹ As the Environment Defenders Office stated:

*... the inclusion of up-to-date objectives in the [Environment Effects] Act will provide a clear and transparent framework for decision-making under the Act and for the development and implementation of subordinate legislation and other instruments such as guidelines.*²³⁰

Environmental impact assessment has been considered a key technique for incorporating concepts central to the achievement of sustainable development, such as the precautionary principle, into decision-making, because the purpose of the environmental impact assessment is to mitigate environmental threats or abandon environmentally unacceptable actions.²³¹

The Committee was also advised by Professor Lee Godden and Associate Professor Jacqueline Peel from the University of Melbourne that the principles of ecologically sustainable development have broad support within international law and inform much environmental legislation within Australia.²³² The precautionary principle is increasingly referenced in environmental and planning legislation and regulations across Australia. For example, Victoria's *Environment Protection Act 1970* contains legislated principles of environment protection and ecologically sustainable development. The purpose of the *Environment Protection Act 1970* is 'to create a legislative framework for the protection of the environment in Victoria having regard to the principles of environment protection',²³³ which include the precautionary principle²³⁴ and the principle of integration of economic, social and environmental considerations.²³⁵ Importantly, the *Environment Protection Act* also states that 'regard should be given' to these principles of environment protection in administration of the Act.²³⁶

²²⁷ *ibid.*

²²⁸ Ecologically Sustainable Development Steering Committee, *National Strategy for Ecologically Sustainable Development*, 1992, p.8; Department of Sustainability and Environment, *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.3

²²⁹ For example: Energy Supply Association of Australia, submission no.32, p.2; Australian Conservation Foundation, submission no.36, p.2; Environment Defenders Office (Victoria), submission no.27, p.8, Victorian Planning and Environmental Law Association, submission no.55, p.2; Lawyers For Forests submission no. 14, p.2

²³⁰ Environment Defenders Office (Victoria), submission no.27, p.8

²³¹ C Wood, *Environmental Impact Assessment: A Comparative Review*, 2nd ed., 2003, p.1

²³² Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, p.1

²³³ *Environment Protection Act 1970* (Vic) s.1A

²³⁴ *ibid.*, s.1L

²³⁵ *Environment Protection Act 1970* (Vic) s.1B(1) The principle of integration of economic, social and environmental considerations further states: 'sound environmental practices and procedures should be adopted as a basis for ecologically sustainable development for the benefit of all human beings and the environment'.

²³⁶ *Environment Protection Act 1970* (Vic) s 1A(3)

Similarly, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') aims 'to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources'.²³⁷ The EPBC Act also outlines the principles of ecologically sustainable development, which includes the precautionary principle.²³⁸

In Western Australia, environmental impact assessment is conducted under Part IV of the *Environmental Protection Act 1986* (WA), which has clearly defined objectives and principles, including the precautionary principle, outlined in the legislation. The Act states: 'the object of this Act is to protect the environment of the state, having regard to the following principles: the precautionary principle, the principle of intergenerational equity, the principle of the conservation of biological diversity and ecological integrity, principles relating to improved valuation, pricing and incentive mechanisms, [for example, 'Environmental factors should be included in the valuation of assets and services' and 'the polluter pays principle'], and the principle of waste minimisation'.²³⁹

The Committee notes that, in Victoria, advisory committees established under the Planning and Environment Act, and inquiries appointed under the Environment Effects Act, routinely consider the precautionary principle in inquiry reports.²⁴⁰ However, an inquiry's recommendations are not binding on the Minister. Therefore, the Committee has concerns regarding the absence of the precautionary principle in the Environment Effects Act and notes there are several benefits to including it in the legislation, such as increased certainty for the consistent application of the principle in the environmental impact assessment process and application of best practice principles.

Whilst the ministerial guidelines reflect the concept of ecologically sustainable development, they do not provide clear guidance on how ecologically sustainable development can be applied in the environmental impact assessment process.²⁴¹ For example, in the EPBC Act, the precautionary principle is established as a mandatory consideration for decision-makers.²⁴² Furthermore, under the Environment Protection Act, the precautionary principle is one of the principles of environment protection to which 'regard should be given' in administering the legislation.²⁴³

In its submission to the Committee, the Environment Defenders Office Victoria stated that:

*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 Environment Effects Act ... be consistent with ESD principles.*²⁴⁴

²³⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.3(1)(b)

²³⁸ *ibid.*, s.3A (b)

²³⁹ *Environmental Protection Act 1986* (WA) s.4A

²⁴⁰ For example, see Panel Inquiry Reports for the Channel Deepening Project, the Sugarloaf Interconnector Pipeline project, the Portland Wind Farm and the Stocklands Development at Point Lonsdale

²⁴¹ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.66

²⁴² *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391; L Godden and J Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions*, 2009, p.243

²⁴³ L Godden and J Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions*, 2009, p.242

²⁴⁴ Environment Defenders Office (Victoria), submission no.27, p.8

The International Association for Impact Assessment's (IAIA) 'Principles of Environmental Impact Assessment Best Practice' guidelines supports the EIA objective to: 'promote development that is sustainable'.²⁴⁵ However, bridging the potentially competing interests of economic development and environmental sustainability is not easy.²⁴⁶ Accordingly, the IAIA guidelines endorse the basic principle that environmental impact assessment be 'credible', which means that 'the process should be carried out with professionalism, rigour, fairness, objectivity, impartiality and balance'.²⁴⁷

In this context, the Victorian Planning and Environmental Law Association state that it is 'critically important that the Act identify the way in which social, environmental and economic considerations are to be taken into account in decision-making'.²⁴⁸ The *Environment Assessment Review* also supported guidance for the Minister's assessment regarding how his or her assessment applied and balanced sustainability principles.²⁴⁹ This will be discussed further in chapter eight.

Mr Jeff Gilmore, Executive Director, Planning Policy and Reform, from the DPCD stated at a public hearing:

In January 2010 the government released its response to the Victorian Competition and Efficiency Commission's report on environmental regulation. Key actions include changes to the Environment Effects Act or the ministerial guidelines to clarify the objectives of the assessment process under that Act...²⁵⁰

Mr Trevor Blake, Chief Environment Assessment Officer at the DPCD, further advised the Committee that:

The government has also announced an intent to amend the Act and/or the guidelines – some combination of that – to introduce objectives under the Act.²⁵¹

The Committee notes that the *Independent Review of the Environment Protection and Biodiversity Conservation Act* grappled with similar issues. The review highlighted the difficulties associated with implementing guiding principles including ecologically sustainable development:

Using ESD principles as guiding principles for the Act poses significant challenges. For example, it is difficult to determine how the principles can be operationalised at the individual decision level, particularly when attempting to consider inter-generational equity and other long-term environmental, social and economic considerations. Defining success in achieving ESD, given the inherent ambiguity of the ESD principles is another challenge ...

²⁴⁵ International Association for Impact Assessment (IAIA), *Principles of Environmental Impact Assessment Best Practice*, 1996, p.2

²⁴⁶ K S Hanna (ed), *Environmental Impact Assessment*, 2nd ed., 2009, p.281

²⁴⁷ International Association for Impact Assessment (IAIA), *Principles of Environmental Impact Assessment Best Practice*, 1996, p.2

²⁴⁸ Victorian Planning and Environmental Law Association, submission no.55, p.4

²⁴⁹ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.66

²⁵⁰ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.5

²⁵¹ Mr T Blake, Chief Environment Assessment Officer, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, p.263

An inherent tension arises from weighing the competing principles of ESD. Decision-making outcomes will often differ depending on the proportionate weighting afforded to environmental, social or economic considerations in each case. As much of the decision-making under the Act involves weighting of these considerations and value judgements, a high degree of transparency is needed if the public and proponents are to have trust in the system.²⁵²

The review recommended that the federal legislation confirm ecologically sustainable development principles as the overarching principles underpinning decision-making under the Act; and emphasise that environmental considerations are to be considered first when making decisions under the Act, that is, decision-making should integrate long-term and short-term environmental, social, economic and equitable considerations effectively.

The Committee believes that the Victorian Act would be considerably strengthened with the implementation of such recommendations. The principles of ecologically sustainable development should be defined in the legislation, and be the guiding principles for administering the Act.²⁵³

Accordingly, the Committee recommends that:

RECOMMENDATION 3.6

The environmental impact assessment legislation be amended to:

- (a) confirm ecologically sustainable development (ESD) principles as the overarching principles underpinning decision-making under the Act; and
- (b) emphasise that environmental matters are to be considered first when making decisions under the Act – decision-making should integrate long-term and short-term environmental, social, economic and equitable considerations effectively.

3.4 Definitions

In order to ensure that there is no ambiguity, the inclusion of definitions are essential to the understanding of the environmental impact assessment framework.

²⁵² Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.53

²⁵³ This was noted in: Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, in relation to the administration of the *Environment Protection and Biodiversity Conservation Act 1999*

3.4.1 Definition of 'environment'

'Environment' is not defined in the Environment Effects Act. It is however defined in the ministerial guidelines as including: 'the physical, biological, heritage, cultural, social, health, safety and economic aspects of human surroundings, including the wider ecological and physical systems within which humans live'.²⁵⁴ The Committee is satisfied with the definition of environment contained in the ministerial guidelines. However, the Committee was advised that the definition should be included in the legislation.²⁵⁵

The absence of a legally-binding definition of 'environment' was a matter discussed in the 2010 Supreme Court challenge by Friends of Mallacoota versus the Minister for Planning and the Minister for Environment and Climate Change, in relation to the EES of a boat ramp at Bastion Point, Mallacoota.²⁵⁶ In his judgement, Justice Osborn commented on the absence of a legislated definition of 'environment';²⁵⁷ and whilst he noted that the inclusion of a definition in the ministerial guidelines ('a subordinate instrument') cannot alter the scope of the Act, the 'longstanding implementation of the Act has nevertheless taken a broader rather than a narrower view of its ambit'.²⁵⁸ Justice Osborn explained that the choice not to define 'environment' in the Environment Effects Act should be understood as one 'which embraced a flexible concept facilitating the assessment of potential harm to the environment in a broad sense'.²⁵⁹ Justice Osborn explained in his judgement that a broader understanding of environment increases 'potential utility of the Act' and assesses impacts that may not be assessed under other legislation.²⁶⁰

The Committee believes that a legislated definition of environment would contribute to a more transparent environmental impact assessment framework in Victoria. As the term 'environment' encompasses such a wide range of elements – physical, social and economic – it is important that the stakeholders involved have a clear and unambiguous definition with which to contextualise what is being considered by the environmental impact assessment, and ultimately decided by the Minister.

²⁵⁴ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.2

²⁵⁵ In its submission, the Victorian Planning and Environmental Law Association highlighted the absence of a legislated definition of 'environment' and it supported the Environment Assessment Review's recommendation that the Act be amended to include a definition of 'environment'; Ms J Forsyth, barrister and representative, Victorian Planning and Environmental Law Association; Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.298; Victorian Planning and Environmental Law Association, submission no.55, pp.4–5. Absence of a legislated definition was also a concern for the Glen Eira Environment Group, submission no.12, p.5 and Environment Defenders Office (Victoria), submission no.27, p.8

²⁵⁶ *Friends of Mallacoota Inc v Minister of Planning & Minister for Environment and Climate Change* [2010], VSC 222 (27 May 2010)

²⁵⁷ *ibid.*, para.79

²⁵⁸ *ibid.*

²⁵⁹ 'As evidenced in the Act's second reading speech to Parliament which 'confirms the intent to adopt a "flexible approach". Victoria, Second Reading Speech Environmental Effects Bill, Legislative Assembly, 5 April 1978, 1018–1021, 1018 (Mr Borthwick) in *Friends of Mallacoota Inc v Minister of Planning & Minister for Environment and Climate Change* [2010], VSC 222 (27 May 2010) [66]

²⁶⁰ *Friends of Mallacoota Inc v Minister of Planning & Minister for Environment and Climate Change* [2010], VSC 222 (27 May 2010) [76]

The Committee is of the view that the definition of 'environment' should be considered broadly in environmental impact assessment legislation, with consideration of all relevant impacts. This would contribute to uniform assessment of the environmental, social and economic impacts of a proposal, within the EIA process.

Accordingly, the Committee recommends that the objects of the Act should be drafted in line with the recommendations of the *Independent Review of the Environment Protection and Biodiversity Conservation Act*.²⁶¹

RECOMMENDATION 3.7

The objects of the Victorian environmental impact assessment legislation be revised to state:

- (a) the primary object of the Act is to protect the environment;
- (b) the primary object is to be achieved by applying the principles of ecologically sustainable development as stated in the Act; and
- (c) the Minister for Planning and all agencies and persons involved in the administration of the Act must have regard to, and seek to further, the primary object of this Act.

3.4.2 Definition of 'significant effect'

The Environment Effects Act does not contain a definition of 'significant effect'. The ministerial guidelines include some examples of what might constitute a significant effect on the environment, however these are neither comprehensive, nor legally binding.²⁶² The Committee was advised that this can create uncertainty for proponents and the community regarding which projects should be referred and assessed. This issue will be discussed further in chapter four.

3.4.3 Public and private works

The Environment Effects Act applies to projects that are declared by the Minister for Planning to be 'public works'.²⁶³ Historically, this reflects a time when most public works were excluded from control under the then *Town and Country Planning Act 1961*.²⁶⁴ However, when the Planning and Environment Act was enacted in 1987, most public works became subject to planning control under this Act.²⁶⁵

²⁶¹ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.59

²⁶² Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.6

²⁶³ *Environment Effects Act 1978* (Vic)

²⁶⁴ Department of Infrastructure, *Environment Assessment Review: Issues and Options, Technical Paper*, 2002, p.1

²⁶⁵ *ibid.*, p.2

Section three of the Environment Effects Act refers to 'works to which this Act applies'.²⁶⁶ However section three does not specifically refer to private works. The Committee has received evidence that indicates that the Act's reference to public works is confusing²⁶⁷ and ambiguous.²⁶⁸ The Mornington Peninsula Shire advised the Committee that:

*... it would also be appropriate to remove the ambiguity regarding the scope of the Act. Section 3, which explicitly defines the works to which the Act applies, refers only to public works, whereas section 8 provides for referrals of any (private) works which may have a significant environment impact where a decision under any Act is required. Section 3 should be clarified to clearly indicate the application of the Act to private works proposals.*²⁶⁹

The Committee believes that, in order to remove uncertainty and ambiguity, the scope of works to which the Act applies should be clearly stated in the legislation. Accordingly, the Committee recommends that the environmental impact assessment legislation be amended to clearly indicate its application to both public and private works.

RECOMMENDATION 3.8

The environmental impact assessment legislation be amended to state that it is applicable to both public and private works.

²⁶⁶ *Environment Effects Act 1978* (Vic) s.3(1)

²⁶⁷ Mr J Crockett, submission no.7, p.7

²⁶⁸ Mornington Peninsula Shire, submission no.56, p.2

²⁶⁹ *ibid.*

Chapter 4: Referral process

Key findings

- 4.1 Pre-referral discussions between proponents and government departments are encouraged but according to the Victorian Competition and Efficiency Commission Report, are not being routinely conducted. The benefits of pre-referral discussions are well understood and allow protection of the environment to be considered early in the proponent's planning process. The importance of such discussions should be emphasised in the ministerial guidelines for assessment of environmental effects.
- 4.2 The limitations associated with any person not being able to refer projects for environmental impact assessment were highlighted in some submissions to the inquiry.
- 4.3 The introduction of the right of any person to refer or appeal a decision whether a project should be assessed, would considerably strengthen the Victorian environmental impact assessment framework. Currently, any person has such rights in Western Australia with the time limit for lodging an appeal, format of appeal, process for investigating an appeal, time to determine the appeal and possible outcomes stipulated.
- 4.4 The referral criteria which 'might' trigger an environmental effects statement in Victoria have been widely criticised by proponents, the non-government sector, academics and community groups. There is uncertainty regarding the obligation for proponents and decision-makers to refer proposed projects, including the types of proposals, required to be referred to the Minister. Some witnesses identified the dependence on the Minister's discretion rather than transparent criteria set out in legislation, as a significant weakness of the current framework.
- 4.5 The guidance provided to decision-makers, proponents and the community as to how the critical term 'significant effect' should be interpreted is very limited. This is in contrast to both the federal and Western Australian environmental impact assessment framework documentation which includes detailed guidance on what constitutes a significant impact on the environment as well as penalties for non-referral or environmental harm clauses.

*... in practical terms the ability to provide conditions on approvals to avoid an EES having to be done is one of those changes that came about after the [Department of Infrastructure Environment Assessment Review] review that took place in the early 2000s. That has provided an administrative ability to ease the burden on environmental effects particularly when a fair bit was known about those environmental effects ... I think there is an administrative recognition that not all projects need to have an EES, that you can identify those that will need EESs – typically there are a fairly standard range of effects created by construction and movement of vehicles and so forth ...*²⁷⁰

*– Mr Jeff Gilmore, Executive Director, Planning Policy and Reform,
Department of Planning and Community Development*

*Very few projects trigger the EES process in Victoria, unlike many other states and countries e.g. New South Wales and the United Kingdom. This is of concern to the Environment Institute of Australia and New Zealand. Other regulatory processes that cover these developments, such as the Planning and Environment Act 1987 ... or the Environment Protection Act 1970 ... don't necessarily provide the appropriate scope for a comprehensive environmental assessment due to their restricted scope ...*²⁷¹

– Environment Institute of Australia and New Zealand

4.1 Introduction

Under the current Victorian ministerial guidelines, referral involves either a proponent or a decision-maker completing a referral form and sending it to the Minister for Planning with supporting documentation. The details of the proponents, a description of the project and its location are required. The potentially significant environmental effects of the project must also be set out. Information is required on native vegetation, flora and fauna; water environments; landscape and soils; social environments; energy, wastes and greenhouse gas emissions and other environmental issues.

This chapter focuses on three aspects of the referral stage – pre-referral discussions, the power to refer a project and triggers for referral. The chapter addresses, in part, term of reference a) which required the Committee to investigate ‘any *weaknesses in the current system* including poor environmental outcomes, excessive costs and unnecessary delays encountered through the process and its mechanisms’ and d) ‘how better environmental outcomes can be achieved more quickly and *predictably* and with a reduction in unnecessary costs’ (added emphasis).

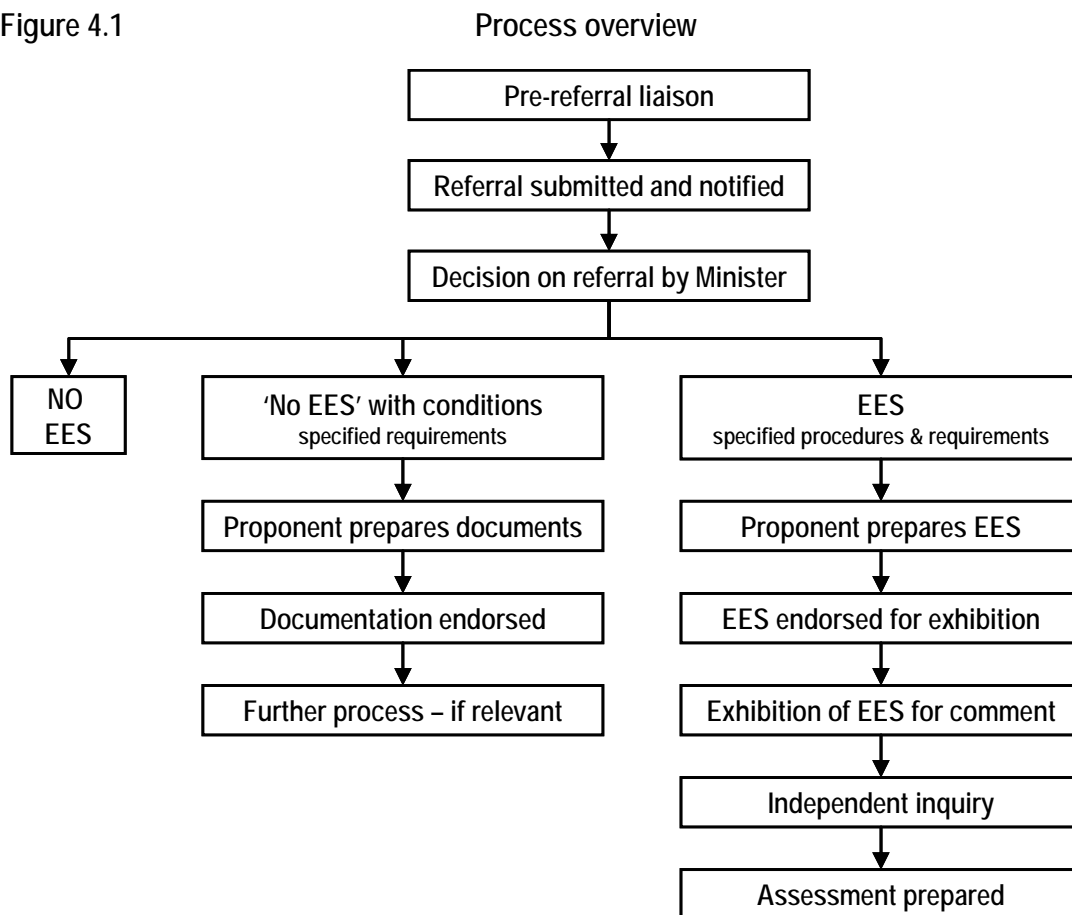
²⁷⁰ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, pp.6–7

²⁷¹ Environment Institute of Australia and New Zealand, submission no. 42, p.2

4.2 Pre-referral discussions

According to advice the Committee received from the Department of Planning and Community Development (DPCD), 'Proponents are strongly encouraged to liaise with DPCD to discuss the need for a referral, the elements of a project that should be included, the issues that may be relevant and the level of documentation that may be appropriate'.²⁷² Pre-referral liaison was identified by DPCD at a Committee hearing as the first step of the environment effects statement (EES) process, as illustrated in figure 4.1.

Figure 4.1



Source: Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010

²⁷² Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.2

The ministerial guidelines do not address the issue of pre-referral discussion.²⁷³ Both the Environment Assessment Review Advisory Committee (2002)²⁷⁴ and the Victorian Competition and Efficiency Commission (VCEC) made recommendations in relation to this matter. According to the VCEC:

*Pre-referral discussions were viewed by some participants as useful for identifying critical issues and setting the expectations of proponents and agencies. However input from participants suggests that such discussions are not happening systematically, resulting in uncertainty about the scope and possible duration of EESs, particularly for those proponents who are unfamiliar with the Victorian process.*²⁷⁵

This is in contrast to the advice provided by the DPCD that, since the June 2006 reforms, a very high proportion of the proponents that referred projects under the Act have engaged in pre-referral discussions - only about five referrals from a total of 64 in this period have been received without pre-referral engagement.²⁷⁶

The new mechanism by which the department will encourage proponents to consult was described to the Committee by DPCD as follows:

The new inter-departmental Memoranda of Understanding (MoUs) now provide a strong framework for cooperative pre-referral engagement, including for departments to advise one another:

- (a) of projects arising from their own capital works programs; and*
- (b) when they become aware of a private-sector project, that may warrant an EES referral and a coordinated response.*

*The level of inter-departmental engagement varies, depending on the interest of the proponent and the sensitivity of the proposal. Some proponents choose to engage separately with relevant departments and agencies; this is often appropriate, though DPCD endeavours to ensure at least a minimum necessary information flow between the relevant departments and agencies. Protocols for inter-departmental communication and engagement at the pre-referral stage are currently being refined, in the context of the MoUs.*²⁷⁷

The benefits of pre-referral discussion between proponents and government departments highlighted in the VCEC report include:

- identifying the key environmental issues to be addressed and how they intersect with the project plan to achieve the proponent's commercial objectives;
- establishing whether the project is viable from an environmental perspective;

²⁷³ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006. The referral form states that 'It will generally be useful for a proponent to discuss the preparation of a Referral with the Department of Planning and Community Development (DPCD) before submitting the Referral'

²⁷⁴ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.25

²⁷⁵ Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.125

²⁷⁶ Department of Planning and Community Development, correspondence received, 27 July 2010

²⁷⁷ *ibid.*, 3 August 2011

- increasing the probability that all parties in any subsequent EES process share from an early stage a common understanding of the government's policy requirements and the project's physical and financial imperatives;
- the proponent forming realistic expectations about the time frames for obtaining relevant approvals;
- facilitating a quicker decision by the assessment manager about the level of assessment required; and
- understanding on the proponent's part of issues of concern to the Victorian Government and policy that might guide or influence the environmental impact assessment.²⁷⁸

The VCEC noted that the value of such discussions was dependent on the extent of the definition of a project, for example whether a proponent's project was at a concept stage or at a full feasibility stage.

The VCEC recommended that the EES ministerial guidelines should be amended to specify that proponents who believe that their project may require an EES should consult with government departments and agencies on their project prior to referral for a decision on whether an EES is required. Such consultation should establish the key environmental risks of the project and the potential of mitigation options, as well as the approvals required for the project.²⁷⁹

The government, in its response to the VCEC review, stated that proponents will be encouraged to consult with departments and agencies before formally referring a project for a decision on the need for an EES.²⁸⁰ The DPCD further explained to the Committee that DPCD may seek input from other departments and agencies during pre-referral discussions, depending on the nature of environmental risks and issues. Depending on the proponent and their capabilities and approach, DPCD may either encourage or convene pre-referral consultation with other government departments or agencies. Sometimes DPCD will facilitate cross government consultation. However, the Department of Business and Innovation, and other parts of government (e.g. Department of Primary Industries, Mining Facilitation), usually lead this latter facilitation role during the preliminary stage of projects, including convening pre-referral discussions with DPCD, Department of Sustainability and Environment, Environment Protection Authority (EPA) and other key agencies. The DPCD advised that there are well established networks and collaborative practices employed by these agencies together with DPCD. These coordination arrangements are currently being formalised through the development of partnership agreements and aligned business processes, such as the memoranda of understanding (discussed further in chapter six).²⁸¹

²⁷⁸ Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, pp.114,115,125,126,135

²⁷⁹ Via the proposed Co-ordinator General of Major Projects; Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.135

²⁸⁰ Victorian Government response to Victorian Competition and Efficiency Commission's final report, *A sustainable future for Victoria: Getting environmental regulation right*, January 2010, p.5

²⁸¹ Department of Planning and Community Development, correspondence received, 27 July 2010

The Committee noted that in Western Australia proponents are encouraged to engage with the Environmental Protection Authority (EPA), relevant government agencies and decision-making authorities prior to referring their proposals, to allow protection of the environment to be considered as part of the proponent's planning process.²⁸² The administrative procedures state that early consideration of the environment generally means a proposal can be designed to avoid or minimise many adverse environmental impacts, and reduce ongoing costs of environmental management.²⁸³ The Committee believes that the discussions in Western Australia are designed to be more proactive and pre-emptive than those recommended by the VCEC. Ms Michelle Andrews, Acting General Manager of the OEPA WA explained to the Committee that:

Some of the key elements or characteristics of our process that are worth highlighting are that it is very much a collaborative negotiation process that operates from even before a proposal is even referred — from the time a proponent is talking to the Office of the Environmental Protection Authority. We will work with proponents to take what might be either a completely inadequate proposal or a barely adequate proposal into something that is actually going to deliver a lot better environmental outcomes, so we are actively working with proponents through that process. It is not a hands-off, judging, publishing report, prescribing something from on high process, but rather a process of continually working with proponents to drive a better project and better environmental outcomes at the other end. Often they can be better environmental outcomes but they can also deliver greater efficiencies and economies and so on for proponents. That is how we run the process and how we look to administer the legislation.²⁸⁴

The Committee believes that pre-referral discussions are logical and should be promoted as best practice, as is the case in Western Australia, and reflected in the ministerial guidelines. The Committee also believes that many benefits would stem from a collaborative negotiation process commenced as early as possible in planning a project. Accordingly the Committee recommends that:

RECOMMENDATION 4.1

The Ministerial guidelines for assessment of environmental effects under the *Environment Effects Act 1978* should be amended to encourage proponents to engage with relevant government departments and agencies prior to referring their proposal for a decision on whether an environmental effects statement is required.

4.3 Powers to refer

Proponents are not compelled to refer projects for assessment under the current legislative arrangements. Furthermore, there are no sanctions and enforcement mechanisms to address situations where referral and assessment are required but not undertaken.²⁸⁵

²⁸² Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, p.5986

²⁸³ *ibid.*

²⁸⁴ Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.142

²⁸⁵ Environment Defenders Office Ltd (Victoria) Ltd, submission no.27, p.9

Under the *Environment Effects Act 1978*, projects can be referred to the Minister by:

- a project proponent;²⁸⁶
- any Minister or statutory body responsible for public works;²⁸⁷ and
- a relevant decision-maker such as another Minister, a government agency, statutory authority or local government.²⁸⁸

The Minister administering the *Environment Effects Act 1978*, or a Minister administering relevant approvals legislation, can also direct a decision-maker to refer a project for advice as to whether an EES should be prepared for the works.²⁸⁹ Any person cannot make a formal referral to the Minister under the Victorian legislation. A number of submissions to the inquiry raised concerns about not having this ability to refer.²⁹⁰

In Western Australia any person has the right to refer a proposal to the EPA.²⁹¹ Commentators, agencies and practitioners similarly advised the Committee that this was an important feature and strength, albeit a largely symbolic one, of the Western Australian environmental impact assessment framework.²⁹² Very few projects have actually been referred by third parties – since the introduction of the legislation in 1986 only two or three projects have been referred by the public of the 1,200 – 1,500 environmental impact assessments that have been conducted.²⁹³ However what has been described as ‘the third party referral’ option is regarded as an important facet of the environmental impact assessment framework, as Dr Angus Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University explained to the Committee:

In that time [since 1986], as far as I am aware, there have only been about two or three projects referred by the public, because proponents automatically refer. They know they are going to be subject to EIA. There is a culture of EIA. There is a culture of environmental management. They know they are going to go through EIA, so they refer. Decision-making authorities, other government agencies with a responsibility for signing off on projects, are also required to refer, and they refer. We have third-party referral, but it is kind of there as a goodwill thing more than as something that is used a lot. But I think its presence is important. Its presence symbolically is very important because it means that there is a sense of openness about the process and there

²⁸⁶ *Environment Effects Act 1978* (Vic), s.8(3)

²⁸⁷ *ibid.*, s.3(1)

²⁸⁸ *ibid.*, s.8(1)

²⁸⁹ *ibid.*, s.8(4)

²⁹⁰ For example, refer to: Merri Wetlands Protection Group, submission no.8, pp.1–2 and Port Campbell Community Group, submission no.51, p.1

²⁹¹ *Environmental Protection Act 1986* (WA), section 38(1)

²⁹² Dr A Morrison-Saunders, submission no.53, p.3; Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.188; and Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority, Western Australian, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.151

²⁹³ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, pp.58, 61. Dr Morrison-Saunders further advised that:

If you look at the number of referrals, in Western Australia we get between 450 and 550 referrals to the EPA each year. The EPA on average assesses 40. That is 40 assessments, so 10 per cent or less of what is referred to them gets formally assessed, and that 10 per cent attracts a heck of a lot of attention. ‘EIA is slowing down development’ and so on. But of the 400-odd and the ones that they do not assess, anywhere between 150 and 200 of those, the EPA gives informal advice on. In many cases that informal advice is taken up by other decision-makers and put into their approval systems, particularly land-use planning. It goes into planning schemes and so on.

*is nothing that can slip through the net. It does not get used much, but it is there, and it is important.*²⁹⁴

In Western Australia, any person also has the right to appeal the EPA's decision not to assess a project.²⁹⁵ Appeals must be lodged within 14 days of the date the EPA's decision is placed on the public record. Appeals must be in writing and to be considered, clear grounds of appeal must be stated which contain reasons as to why the person believes the decision should be changed. The Appeals Convenor investigates appeals on behalf of the Minister and most appeals will be assessed and referred to the Minister for decision within six weeks of the closing date for appeals. In determining an appeal against a decision of the EPA not to assess a proposal, the Minister may:

- dismiss the appeal;
- remit the proposal to the EPA for reconsideration as to whether it should be assessed; or
- remit the proposal to the EPA with a direction that it be assessed.²⁹⁶

Until recent reforms, any person could also appeal the EPA's decision as to the level of assessment. The reforms were part of a wider state government agenda to attract investment to the state and streamline approvals processes. However, a recent Western Australian parliamentary committee inquiry was unable to conclude that the deletion of this particular right of appeal would have the practical effect of a significant reduction in time taken to assess any significant number of proposals and may in fact result in other appeal avenues being sought and result in greater uncertainty, lengthier approval times and more cost.²⁹⁷

The right to appeal is an integral feature of the Western Australian EIA framework.²⁹⁸ Associate Professor Sharon Mascher, Centre for Mining, Energy and Resources Law, University of Western Australia advised the Committee that:

In our EIA process the decision of the minister is final, although, of course, open still to common-law rights of judicial review in relation to administrative procedures ...

For that reason, the provision in the Act from a public participation perspective to allow any person, including those interested third party members of the public, to appeal those various decisions throughout the EIA process is very important. The ability in the West Australian processes for any person to refer a significant proposal to the EPA for consideration as to whether or not an assessment is required, and the provision built in to ensure that there is the opportunity for the public to have input or in a full public review to participate in the EIA process — those features together are very significant to ensure that there are appropriate levels of public participation in the process. I think that public participation is a cornerstone of

²⁹⁴ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.58

²⁹⁵ *Environmental Protection Act 1986* (WA), section 101(1)(a)

²⁹⁶ This paragraph is sourced from: Office of the Appeals Convenor (WA), www.appealsconvenor.wa.gov.au, accessed 13 August 2010

²⁹⁷ Standing Committee on Uniform Legislation and Statutes Review, April 2010, *Approvals and related reforms (no. 1) (Environment) Bill 2009*, findings 20 and 23

²⁹⁸ Mr A Sutton, Appeals Convenor, Office of the Appeals Convenor, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.156; Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, pp.185, 187

effective environmental impact assessment and I think that has been recognised from its outset.²⁹⁹

In contrast the Victorian EES framework does not allow for any person to refer or appeal the decision made by the Minister for Planning, as to whether or not a project is assessed. Mr Trevor Blake, Chief Environment Assessment Officer, Department of Planning and Community Development explained the current arrangements as follows:

In terms of third-party referrals, that does not apply at the moment ... What can happen is that a third-party writes to the minister and asks the minister to direct that the proposal be referred. It is an indirect route, if you like. At the moment there is public notification as soon as referrals are accepted, so oftentimes we do receive correspondence, and useful correspondence, with people raising issues that could be taken into account and informally affect the minister. There is not a formal public comment process, which is a situation that has been deemed to be appropriate, given that the public has other options to comment at the scoping stage, in response to an EES and at the inquiry stage.³⁰⁰

The experience of third parties attempting to informally refer projects for assessment through the Victorian Minister for Planning has not been wholly satisfactory according to the evidence received by the Committee. The Committee believes that the current EES framework in Victoria would be considerably strengthened with the introduction of the right of any person to refer a project or appeal the decision as to whether or not a project is assessed, based on the well established practices in Western Australia. The time limit for lodging an appeal, format of appeal, process for investigating an appeal, time to determine the appeal and possible outcomes should be stipulated. The 'culture of EIA' and referral in Western Australia and associated benefits that extend from such an approach in terms of comprehensive environmental assessments and environmental assessment of vastly more projects, is currently absent in Victoria. As the Environment Defenders Office advised the Committee:

In Western Australia it is very well accepted that if you are going to have any impact on the environment, you are probably going to need to refer it to the EPA and have some level of assessment. It is not really a controversial process to be required to have an assessment. A lot of proponents do a lot of work up-front before the referral stage to try to ensure that they can convince the EPA that, 'We have thought about the impacts, we have already put procedures in place to minimise them; therefore, you can give us a lower level of assessment'. It puts the onus on proponents much, much earlier, and they factor it into their project planning at a much earlier stage.³⁰¹

²⁹⁹ Associate Professor S Mascher, Centre for Mining, Energy and Resources Law, University of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, pp.194–195

³⁰⁰ Mr T Blake, Chief Environment Assessment Officer, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, p.263

³⁰¹ Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.34

Accordingly the Committee recommends that:

RECOMMENDATION 4.2

The environmental impact assessment legislation is amended to enable any person to have the power to refer a project to the Department of Planning and Community Development that may have a significant impact on the environment.

RECOMMENDATION 4.3

Any decision-making authority, proponent or other person that disagrees with a decision that a proposal is not to be assessed under the environmental impact assessment legislation should be entitled to appeal the decision to the Victorian Civil and Administrative Tribunal. The time limit for lodging an appeal, format of appeal, process for investigating an appeal, time to determine the appeal and possible outcomes should be stipulated.

4.4 Referral 'triggers'

I will outline just a few of the key elements that we consider to be best practice for Victoria, none of which we believe are currently in the system. Firstly, we need a clear statement of when an EIA is required – a trigger or a test ... For example, in the Commonwealth EIA system it is simply if an action is likely to have an impact on a matter of national environmental significance. It is a similar test in WA ...

The EU one is similar ... There is no such legislative test in Victoria; there are criteria and guidelines but they are not enforceable and can be got around easily. It is really a ministerial discretion as to when an EIA is required. Sometimes what happens in Victoria is that, instead of asking the question 'Are there likely to be significant impacts from these projects, and, if so, how best can we assess them?' What often appears to be the question is 'Can we get away without assessing this project?'³⁰²

– Ms Nicola Rivers, Policy and Law Reform Director, Environment Defenders Office

The concept of 'significant effect' is central to the *Environment Effects Act 1978* as the Act refers to the need for works to be referred for assessment that 'could have a significant effect on the environment'. However, as noted earlier in this report the term 'significant effect' is not defined. The ministerial guidelines state that:

A proponent or decision-maker should ask the Minister administering the Environment Effects Act about whether an EES is required for projects or amended projects that could have a significant effect on the environment.

A project with potential adverse environmental effects that, individually or in combination, could be significant in a regional or state context should be referred.³⁰³

³⁰² *ibid.*, p.31

³⁰³ Department of Sustainability and Environment, 2006, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.5

The criteria for referral are contained in the ministerial guidelines and set out in figure 4.2.

Figure 4.2 Referral criteria

Referral criteria: individual potential environmental effects	Referral criteria: a combination of potential environmental effects
<p>Individual types of potential effects on the environment that might be of regional or state significance, and therefore warrant referral of a project, are:</p> <ul style="list-style-type: none"> • potential clearing of 10 hectares or more of native vegetation from an area that: <ul style="list-style-type: none"> – is of an Ecological Vegetation Class identified as endangered by the Department of Sustainability and Environment (in accordance with Appendix 2 of Victoria's Native Vegetation Management Framework); or – is, or is likely to be, of very high conservation significance (as defined in accordance with Appendix 3 of Victoria's Native Vegetation Management Framework); and – is not authorised under an approved Forest Management Plan or Fire Protection Plan • potential long-term loss of a significant proportion (eg, one to five per cent depending on the conservation status of the species) of known remaining habitat or population of a threatened species within Victoria • potential long-term change to the ecological character of a wetland listed under the Ramsar Convention or in 'A Directory of Important Wetlands in Australia' • potential extensive or major effects on the health or biodiversity of aquatic, estuarine or marine ecosystems, over the long-term • potential extensive or major effects on the health, safety or well-being of a human community, due to emissions to air or water or chemical hazards or displacement of residences • potential greenhouse gas emissions exceeding 200,000 tonnes of carbon dioxide equivalent per annum, directly attributable to the operation of the facility 	<p>A combination of <i>two or more</i> of the following types of potential effects on the environment that might be of regional or state significance, and therefore warrant referral of a project, are:</p> <ul style="list-style-type: none"> • potential clearing of 10 hectares or more of native vegetation, unless authorised under an approved Forest Management Plan or Fire Protection Plan • Matters listed under the Flora and Fauna Guarantee Act 1988: <ul style="list-style-type: none"> – potential loss of a significant area of a listed ecological community; or – potential loss of a genetically important population of an endangered or threatened species (listed or nominated for listing), including as a result of loss or fragmentation of habitats; or – potential loss of critical habitat; or – potential significant effects on habitat values of a wetland supporting migratory bird species • potential extensive or major effects on landscape values of regional importance, especially where recognised by a planning scheme overlay or within or adjoining land reserved under the <i>National Parks Act 1975</i> • potential extensive or major effects on land stability, acid sulphate soils or highly erodible soils over the short or long-term • potential extensive or major effects on beneficial uses of waterbodies over the long-term due to changes in water quality, streamflows or regional groundwater levels • potential extensive or major effects on social or economic well-being due to direct or indirect displacement of non-residential land use activities • potential for extensive displacement of residences or severance of residential access to community resources due to infrastructure development • potential significant effects on the amenity of a substantial number of residents, due to extensive or major, long-term changes in visual, noise and traffic conditions • potential exposure of a human community to severe or chronic health or safety hazards over the short or long-term, due to emissions to air or water or noise or chemical hazards or associated transport • potential extensive or major effects on Aboriginal cultural heritage • potential extensive or major effects on cultural heritage places listed on the Heritage Register or the Archaeological Inventory under the <i>Heritage Act 1995</i>

Source: Department of Sustainability and Environment, 2006, Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978, 7th ed., June 2006, p.7

According to the guidelines, under the heading *‘What might a “significant effect on the environment” be?’* The potential for a significant effect on the environment will reflect the following factors:

- the significance of the environmental assets affected;
- potential magnitude, extent and duration of adverse effects on environmental assets; and
- potential for more extended adverse effects in space and time.³⁰⁴

However:

*The identification of potential significant effects does not indicate that an EES will necessarily be required. Other factors including the likelihood of such effects, will be taken into account in the Minister’s decision in response to a referral.*³⁰⁵

In the Committee’s view this additional caveat and use of the word ‘might’ in the heading adds further ambiguity and therefore uncertainty to the triggering of the Victorian EES process.

The current referral criteria that ‘might’ trigger an EES in Victoria have been widely criticised by proponents, the non-government sector, academics and community groups. The main criticisms include:

- the trigger for referral and assessment is heavily dependent on the discretion of the Minister for Planning rather than transparent criteria defined in legislation.³⁰⁶ A number of submissions highlighted for example the disconnect between the greenhouse gas emissions trigger for a Victorian EES³⁰⁷ and decisions made by the Minister for Planning on the Longford gas conditioning plant and desalination plant projects;³⁰⁸

³⁰⁴ Department of Sustainability and Environment, June 2006, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.6

³⁰⁵ *ibid.*

³⁰⁶ For example, refer to: Professor L Godden and Assoc. Professor J Peel, Faculty of Law, University of Melbourne, submission no.54, p.2; Environment Defenders Office (Victoria) submission no.27, p.5; Glen Eira Environment Group, submission no. 12, p.4; Mornington Peninsula Shire, submission no. 56, p.2; Australian Conservation Foundation, submission no. 36, p.3; Mr N Walker, Manager, Sustainable Environment, Hume City Council, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, pp.74, 76

³⁰⁷ Potential greenhouse gas emissions exceeding 200,000 tonnes of carbon dioxide equivalent per annum directly attributable to the operation of the facility

³⁰⁸ For example, refer to: Ms A Bolch, submission no. 45, pp.8–9; Watershed Victoria, submission no. 10, pp.5–6, Environment Victoria, submission no. 30, p.1

- the absence of clear triggers creates substantial uncertainty, including for the wider community. There is uncertainty regarding the obligation of proponents and decision-makers 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;³⁰⁹
- the lack of details in the ministerial guidelines and over-reliance on the Minister to determine whether a project may require an EES also translates into significant risk in terms of cost and time (delays) for proponents;³¹⁰ and
- the decision of the Minister can be perceived to be politically driven rather than based on significant environmental risk.³¹¹

Similar issues were raised and addressed by the Environment Assessment Review³¹² in 2002 and more recently by the Victorian Competition and Efficiency Commission in 2009.³¹³

There is very limited guidance provided to decision-makers, proponents and the community as to how the critical term 'significant effect' should be interpreted. The Committee noted that this is, to some extent, in contrast to the federal EPBC Act framework. Under the federal framework a 'significant impact' is defined as:

*... an impact which is important, notable or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends on the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.*³¹⁴

The federal legislation is accompanied by two sets of *Significant impact guidelines* regarding matters of national environmental significance. The guidelines, including detailed criteria, are designed to assist people in making a decision as to whether an action³¹⁵ should be referred and also to assist the public and interest groups who may wish to comment on actions that have been referred. The guidelines set out significant impact criteria by matters of national environmental significance including listed migratory species, wetlands of international importance and national heritage places.

³⁰⁹ For example, refer to: Environment Defenders Office (Victoria) submission no.27, p.8; Victorian Planning and Environmental Law Association, submission no.55, p.2; Lawyers for Forests, submission no. 14, p.1; GHD, submission no. 17, p.2; Transpacific Industries Group Ltd, submission no. 47, p.2; Mr J Crockett, retired Consulting Engineer and former Environment Auditor, Environment and Natural Resources public hearing – Melbourne, transcript of evidence, 3 May 2010, p.39; Mr P White, Director, Network Planning and Policy, VicRoads, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, p.95; Mr B Nicholson, Chairman, Victorian State Committee, Cement, Concrete and Aggregates Australia, Environment and Natural Resources Committee public hearing – Melbourne, transcript of evidence, 24 May 2010, p.105; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing, 7 June 2010, transcript of evidence, p.5

³¹⁰ Environment Institute of Australia and New Zealand, submission no.42, p.2

³¹¹ *ibid.*

³¹² Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, pp.21–27

³¹³ Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, pp.93–136

³¹⁴ Department of Sustainability, Environment, Water, Population and Communities, www.environment.gov.au, accessed 6 July 2010

³¹⁵ An action includes a project, a development, an undertaking, an activity or a series of activities, or an alteration of any of these things

The recent review of the Act identified shortcomings associated with the framework.³¹⁶ The review reported that all sides of the debate were concerned that the concept of 'significant impact' is inexact and therefore makes application of the Act uncertain. The review concluded that unfortunately no better test is available for determining when an impact moves from the realm of a local or state or territory issue to one that demands national intervention. It recommended that further work was needed to interpret the concept for the different matters of national environmental significance and that investment in better policy advice and guidance would greatly increase the efficiency in decision-making and certainty for developers, result in better environmental outcomes and less non-compliance.³¹⁷

Under the federal legislation, substantial penalties apply if a person takes action that has, will have or is likely to have a significant impact on any matters of national environmental significance without approval from the federal environment minister.³¹⁸ There has been one criminal prosecution in relation to Mission Beach in Queensland, for a proponent taking action before approval had been granted – a strict liability offence and hence relatively easy to prove. There are no such penalties for non-compliance with referral requirements under the existing Victorian EES legislation.

Despite the current limitations associated with the federal framework, the Committee believes that it provides substantially greater clarity and guidance to all parties involved in the EIA process, than the current limited documentation associated with the Victorian process.

A different more 'flexible and discretionary' approach³¹⁹ to the interpretation of 'significance' is taken in Western Australia. The administrative procedures and EPA guidance notes³²⁰ discuss the concept of 'significance', however there are no quantified lists of what projects need to be subject to an EIA or not. The trigger is environment-centred (based on determining whether a proposal is likely to have a significant effect on the environment) and is conducted on a project by project basis.³²¹ However the discretion rests with the EPA in Western Australia, rather than in Victoria with the Minister for Planning, and the decision is based on the extensive experience and scientific knowledge of that authority which has conducted over one thousand EIAs since the mid 1980s.

Guidance statements are also issued by the EPA in Western Australia to assist proponents and the public to understand the minimum requirements to be met for protection of the environment that the authority expects during the assessment process with proponents encouraged to do better than the minimum.³²² A range of guidance statements have been prepared on specific issues such as environmental offsets, minimising greenhouse gases and terrestrial flora and vegetation surveys for EIA in Western Australia. Sensitive geographical areas are also the subject of such guidance. Dr Bryan Jenkins, former Chief Executive Officer of the then Department of Environmental Protection, explained that the development of guidance statements has taken some uncertainty out of the

³¹⁶ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.15

³¹⁷ *ibid.*

³¹⁸ Civil penalties up to \$5.5 million or criminal penalties up to seven years imprisonment may apply. Australian Government, Department of the Environment, Water, Heritage and the Arts, 2010, *Environment Protection and Biodiversity Conservation Act 1999*. Guide to the EPBC Act, p.3

³¹⁹ Dr A Morrison-Saunders, submission no.53, p.3

³²⁰ Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, p.5986; EPA (WA), May 2008, Guidance Statement no. 33, *Environmental Guidance for Planning and Development*, Chapter A2, pp.1–2

³²¹ Dr A Morrison-Saunders, submission no.53, p.4

³²² Office of the Environment Protection Authority, *Guidance Statements*, www.epa.wa.gov.au, accessed 7 July 2010

process.³²³ In addition, there are appeal provisions against the decision of the EPA as discussed above and environmental harm clauses in the legislation.³²⁴

Dr Angus Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University was critical of prescribed lists of development types that require assessment, as is the case in some overseas jurisdictions.³²⁵ Dr Morrison-Saunders advised that such arrangements typically encounter problems either with too many or too few proposals being assessed. EIA legislation in NSW³²⁶ and the ACT³²⁷ list such classes of development subject to assessment.

Other witnesses supported an activity or input based approach to EIA triggers.³²⁸ In New South Wales for example, classes of development are set out in a State Environmental Planning Policy (SEPP), which is a legal document.³²⁹ Classes are grouped and include agriculture, timber, food and related industries; mining, petroleum production, extractive industries and related industries; and chemical, mineral or extractive material processing. Mr Andrew Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University explained that:

... I also prefer a designated project approach whereby you actually list project types. An example would be in Tasmania, if you are looking for jurisdictional examples, where they actually describe the types of projects that will trigger an EIA. It is very clear about what projects are going to be caught and what sorts of things you can apply to them. Contrast that with the commonwealth model where, rather than looking at the types of project — so an input-based approach — it takes an output-based approach whereby it says if your project is going to have a significant impact on the environment or whatever, then you might have to go through an EIA process. I think the output-based approach is just as uncertain as any other, and it creates all

³²³ Dr B Jenkins, Chief Executive Officer, Environment Canterbury, New Zealand, Environment and Natural Resources Committee public hearing, Melbourne, 2 June 2010, p.234

³²⁴ Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia explained to the Committee that '... we do not have sanctions in this state for non-referral, but we do have environmental harm clauses in our legislation, which means that if anyone carries out an action or operation which causes environmental harm and does so in the absence of any authorisation for that activity, then they can potentially face significant prosecution action'. Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, pp.184–185

³²⁵ Dr A Morrison-Saunders, submission no.53, p.4

³²⁶ For example refer to: Schedule 1 of the State Environmental Planning Policy (Major Development) 2005 relating to Part 3A projects under the *Environmental Planning and Assessment Act (NSW) 1979* and Schedule 3 of the Environmental Planning and Assessment Regulations (NSW) 2000 for designated developments under part 4 of the NSW Act

³²⁷ For example, refer to: Schedule 4, Part 4.2 of the *Planning and Development Act (ACT) 2007*

³²⁸ For example, refer to: Environment Institute of Australia and New Zealand, submission no. 42, p.3; Associate Professor S Mascher, Centre for Mining and Energy and Resources Law, University of Western Australia, Environment and Natural Resources public hearing – Perth, 1 June 2010, transcript of evidence, p.196, in reference to most Canadian provinces

³²⁹ The New South Wales Government has introduced the *Environmental Planning and Assessment Amendment (Part 3A Repeal) Bill 2011* which proposes to repeal Part 3A of the *Environmental Planning and Assessment Act 1979* and replace it with an alternative system for the assessment of projects of genuine state significance. (Source: Department of Planning and Infrastructure, Policy Statement: *State significant development – procedures*, June 2011, p.1). It is proposed that the new system will identify types of projects, as well as the ability to identify specific sites as being of state significance. When compared to the previous Part 3A system, there has been a reduction in the number of classes of development and number of sites. The thresholds in some of the classes have been raised. However, it is proposed that the *State Environmental Planning Policy (Major Development) Amendment 2011* will contain detail on the classes and thresholds for development to be considered as state significant (Source: Department of Planning and Infrastructure, Fact Sheet, *Environmental Planning and Assessment Amendment (Part 3A Repeal) Bill 2011: an overview*, June 2011)

*sorts of problems with the way that the process applies and the way it ties into other processes. If I was advising you, I would be suggesting that you apply an input-based approach where you actually outline the types of projects that are going to trigger the system and also give an indication of the types of informational requirements that will follow, triggered off in an EIA process.*³³⁰

The Victorian Government, in its response to the VCEC report stated that one of the priority aspects for change in relation to the EES process is 'clearer criteria for requiring an EES'.³³¹ Mr Trevor Blake advised the Committee at a public hearing that:

... In terms of referrals we are keen to see in a practical sense what way we can give proponents a better idea of how projects in their sector might relate to the various factors, like the potential for significant effects. This is a key thing.

We have had some input from people saying there should be a list of activities, as there is in some jurisdictions. That is going to be considered, but if you have a list of activities sometimes they will be relatively benign and having limited and localised effects. We do not want to get that broad capture, as was an issue in New South Wales. They were capturing a great deal, so they have had the problem of winding back that capture.

*Rather we have followed, if you like, the commonwealth and West Australian model of focusing on the potential for a significant impact and giving an interpretation of that in a regional and state context. We are keen to find practical ways to relate that to sectoral context and maybe to regional context, but it is a matter of what is practically possible and useful to do in that regard — certainly in terms of the minister's decision criteria.*³³²

The Committee has been advised of both the strengths and weaknesses associated with the input and output based approaches to referral triggers. The Committee believes that based on the evidence it has received there is a pressing need for clear legislated triggers, whether they be input or output based, to be developed for the EIA process and the development of a culture of EIA referral, as is the case in Western Australia. However the Committee also cautions that DPCD's examination of triggers for EIAs in isolation, could be a flawed process. The evidence the Committee has received highlights the series of connections between the essential features of progressive EIA systems with clear triggers comprising one component only.

Accordingly, the Committee recommends that:

RECOMMENDATION 4.4

Clear legislative triggers as to when a project must be referred for environmental impact assessment and the term 'significant impact' be defined in the environmental impact assessment legislation.

³³⁰ Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources public hearing – Melbourne, 7 June 2010, transcript of evidence, p.254

³³¹ Victorian Government response to Victorian Competition and Efficiency Commission's final report, *A sustainable future for Victoria: Getting environmental regulation right*, January 2010, p.5

³³² Mr T Blake, Chief Environment Assessment Officer, Department of Planning and Community Development, Environment and Natural Resources public hearing – Melbourne, 7 June 2010, transcript of evidence, p.264

RECOMMENDATION 4.5

Detailed guidance on what constitutes a significant impact should be readily available to proponents, decision-makers and the community.

RECOMMENDATION 4.6

An output (if a project is going to have a significant impact on the environment) rather than input based approach (where project types are listed), be taken in deciding as to whether a referral is required.

RECOMMENDATION 4.7

Penalties may apply to proponents for failing to refer a proposed project, which could have a significant environmental impact, for assessment under the Victorian environmental impact assessment legislation.

4.5 Public notification and screening of referrals

According to the ministerial guidelines, all projects referred to the Minister for a decision about the need for an environment effects statement are listed on the DPCD website. The website contains details of projects that have been referred since July 2006 including the referral forms and associated documentation, before a decision is made. However there is no legislative requirement for the minister or department to notify the public of an EES referral before a referral decision is made by the Minister, which the Committee believes is a weakness of the current arrangements. This issue will be discussed in further detail in chapter seven.

In Victoria there is also no formal opportunity for public comment on the referral documentation lodged with the Minister for Planning. In other jurisdictions including Western Australia and the Commonwealth, a short public comment period 'allows the community to know up front there is going to be a referral, and it allows them to put in their own information about what the impacts are going to be'.³³³ This issue will also be explored further in chapter seven.

³³³ Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.33

Chapter 5: Levels of environmental impact assessment

Key findings

- 5.1 Concerns were raised in some submissions regarding the 'no EES with conditions' referral decision. The reduced opportunities for public participation and the lack of criteria used by the Minister for Planning to determine the appropriateness of the 'no EES with conditions' option, were identified as issues.
- 5.2 There are several benefits associated with conducting environmental assessment under the Planning and Environment Act rather than the Environment Effects Act including: increased transparency and more predictable processes, fixed timelines and the assessment regime being linked with approval. However the Planning and Environment Act does not necessarily provide the appropriate scope for comprehensive environmental assessment with many of the conditions of a planning permit being formulated too late to be incorporated into the final design of a project.
- 5.3 The Department of Planning and Community Development advised the Committee that it is intended that a project declared under the Major Transport Projects Facilitation Act will not need to be referred under the Environment Effects Act. All major projects, including major transport projects, should be subject to a transparent environmental impact assessment process under the environmental impact assessment legislation.
- 5.4 Critics of the 2009 bilateral agreement between the Commonwealth and the Victorian governments on environmental impact assessment advised that the assessment of matters of national significance through the state environment effects statement process is neither comprehensive nor transparent.
- 5.5 The Committee reviewed the levels of assessment under the Western Australian and Commonwealth environmental impact assessment frameworks. Some of the features that reflect good practice include:
- a range of assessment levels that allows for the broader capture of projects;
 - clear demarcation between the different levels of assessment; and
 - detailed guidance on the environmental impact assessment documentation required for the assessment of projects at the different levels.

5.6 Three levels of assessment should be formalised under the Victorian environmental impact assessment legislation:

- Assessment on Preliminary Information: for project proposals with the potential for adverse environmental impacts of local significance;
- Public Environment Report: for project proposals that may have regional environmental impacts; have several significant environmental issues or factors; or when there is a high level of public interest in the proposal; and
- Environmental Impact Statement: to be applied to proposals where there is potential for adverse environmental impacts of state significance.

5.7 A key strength of the Western Australian environmental impact assessment framework is that once a project is referred, the Environmental Protection Authority determines whether an assessment is required and the appropriate level of assessment, rather than the minister, as is the case in Victoria.

5.1 Introduction

Once a project proposal has been referred to the Minister for Planning under the Environment Effects Act, a decision must be made regarding an appropriate form of assessment. This chapter examines the current environmental impact assessment levels in Victoria, including the referral decisions available to the Minister for Planning under the Environment Effects Act, as well as assessment of environmental impacts under other legislation, such as the Planning and Environment Act.

This chapter also discusses assessment levels under the Western Australian *Environmental Protection Act 1986* and federal *Environment Protection and Biodiversity Conservation Act 1999*, including the strengths and weaknesses of the bilateral agreement with Victoria under the Environment Protection and Biodiversity Conservation Act.

5.2 Current forms of environmental impact assessment

Currently, under the Environment Effects Act, once a proposal has been referred, the following decisions are available to the Minister for Planning:

- an Environment Effects Statement (EES) is required;³³⁴
- an EES is not required if conditions specified by the Minister are met;³³⁵ or
- an EES is not required.³³⁶

³³⁴ *Environment Effects Act 1978* (Vic) s.8B(3)(a)

³³⁵ *ibid.*, s.8B(3)(b)

³³⁶ *ibid.*, s.8B(3)(c)

5.2.1 *An Environment Effects Statement is required*

The Environment Effects Act provides for the Minister for Planning to require a proponent to prepare an EES if a project proposal may have a 'significant' effect on the environment.

The ministerial guidelines state that the Minister may typically require a proponent to prepare an EES when:

- *there is a likelihood of regional or state significant adverse effects on the environment;*
- *there is a need for integrated assessment of potential environmental effects (including economic and social effects) of a project and relative alternatives; and*
- *normal statutory processes would not provide a sufficiently comprehensive, integrated and transparent assessment.*³³⁷

Thirteen projects have required an EES since 1 July 2006.³³⁸ In 2005, the Environment Effects Act was amended so that the Minister could determine that a project did not require an EES, provided certain conditions were met. Fewer referred projects have required an EES since the 2005 reforms.³³⁹

5.2.2 *An Environment Effects Statement is not required, subject to conditions*

Under the Environment Effects Act, the Minister may determine that a referred project proposal does not require an EES provided certain conditions set by the Minister are complied with ('No EES with conditions').³⁴⁰ The ministerial guidelines state that this option:

*... establishes a practical alternative to an EES and provides additional safeguards when an EES has not been required. The conditions might relate to a particular form, scale and location of development, with specific impact mitigation measures. Another form of condition could be to require that a particular process or specific investigations and/or consultations be carried out before a project is able to commence.*³⁴¹

The Department of Planning and Community Development (DPCD) advised the Committee that a number of referred projects have been required to meet conditions involving some combination of environmental management plans and/or alternative assessment process.³⁴² The Sugarloaf Interconnector Pipeline is an example of a large scale infrastructure project that was determined by the Minister not to require an EES but was subject to a number of conditions. A case study of the Sugarloaf Interconnector Pipeline Project Impact Assessment process is detailed below.

³³⁷ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.2

³³⁸ Victorian Government, submission no.40, Attachment 2, p.28; and Department of Planning and Community Development, www.dpcd.vic.gov.au, accessed 25 July 2011

³³⁹ Since the 2005 amendments, there has been 1 or 2 EESs and between 5 and 7 'No EES with conditions' referral decisions each year. Victorian Government, submission no.40, Attachment 2, p.28; In comparison, twenty-eight projects required an EES between July 2001 and June 2006, an average of five EESs each year. Victorian Government, submission no.40, p.14

³⁴⁰ *Environment Effects Act 1978* (Vic) s.8B(3)(b)

³⁴¹ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.12

³⁴² Victorian Government, submission no.40, p.10

With regards to the assessment process for the Sugarloaf Interconnector Pipeline Project, the DPCD commented that it had enabled a more timely completion of assessment as it was completed in six months, allowing the Minister to consider the report of the advisory committee before making a decision about the project under the Planning and Environment Act.³⁴³ On the 'No EES with conditions' pathway more generally, the DPCD stated that:

As we have seen with a number of major projects recently, the need to go through a full EES process sometimes is avoided just by the amount of information that is provided up the front of the project — for instance, most of the impacts are through the construction phases rather than through the operational phase, and can be managed through different ways.³⁴⁴

Mr Trevor Blake, Chief Environmental Assessment Officer at the DPCD, advised the Committee that if impacts are identified at a local-to-regional scale and do not involve particularly complex investigation, the project may only require 'some focused investigations and consultation'.³⁴⁵ The extent to which pre-feasibility studies have been undertaken and completed is also a consideration.³⁴⁶

Mr Blake further advised the Committee that an advantage of the 'No EES with conditions' decision is that conditions can be set on project implementation:

They close the loop on the investigation of effects and the implementation of a project. They involve arrangements — to use some language of other submitters — of user pays and monitoring with an external auditing arrangement to ensure the accountability of what has happened in practice.³⁴⁷

Mr Blake commented that there is no direct capacity under the Environment Effects Act for post-EES monitoring and enforcement except in cases 'where no EES with conditions require that'.³⁴⁸ The Committee regards this limitation as a significant oversight in the design of the legislation and will discuss this issue further in chapter nine.

The method of assessment varies for projects subject to ministerial conditions, that do not require an EES. The Committee noted that there is no legislated guidance for the scoping or preparation of these assessments. The Committee received evidence expressing a range of views regarding the assessment of environmental impacts of projects that the Minister has determined do not require an EES, subject to conditions, including the following key issues:

³⁴³ *ibid.*

³⁴⁴ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.260

³⁴⁵ Mr T Blake, Chief Environmental Assessment Officer, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, pp.264–265

³⁴⁶ *ibid.*, p.264

³⁴⁷ *ibid.*, p.265

³⁴⁸ *ibid.*, p.266

- public participation opportunities are reduced;³⁴⁹
- there are no mandatory public participation provisions or independent review;³⁵⁰ and
- there is insufficient criteria for requiring 'no EES with conditions', rather than requiring an EES.³⁵¹

The Committee was advised by Mr Brad Jessup, Teaching Fellow, College of Law, Australian National University, that the addition of the 'No EES with conditions' option, 'lessened, rather than increased transparency, independence and rigour' of Victoria's environmental impact assessment process.³⁵² Mr Jessup describes the 'No EES with conditions' assessment process as 'pseudo-environmental assessments' which are conducted by government 'outside the Act'.³⁵³

Reduced opportunities for public involvement was also identified as a concern by the Victorian Commissioner for Environmental Sustainability, Dr Kate Auty.³⁵⁴ In her submission, Dr Auty stated:

*Ministerial conditions provide some certainty for proponents and reduce the time frames and costs associated with the EES process. However, the decision not to require an EES reduces opportunities for public involvement. Public involvement has not only an informative function, but also provides an opportunity to test the adequacy of the environmental impact assessment process or ministerial conditions.*³⁵⁵

Dr Auty suggests that 'stakeholder consultation designed for the specific circumstances of the project' should be applied as a ministerial condition to ensure community participation is incorporated into assessment processes.³⁵⁶ She suggests that this engagement could be required to continue through various stages of the process and not simply be confined to the pre-commencement phase of the work.³⁵⁷ Dr Auty also proposes that it would be desirable for ministerial conditions 'to be set in such a manner as facilitates the development of procedures to collect information that will show that conditions are being met', including the adoption of a recognised environmental management system.³⁵⁸

³⁴⁹ For example, refer to: Commissioner for Environmental Sustainability, submission no.34, p.5; Glen Eira Environment Group, submission no.12, p.4; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.5

³⁵⁰ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, attachment 1, p.2

³⁵¹ Energy Supply Association of Australia, submission no.32, p.3

³⁵² Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.2

³⁵³ *ibid.*, p.5

³⁵⁴ Commissioner for Environmental Sustainability, submission no.34, p.5

³⁵⁵ *ibid.*

³⁵⁶ *ibid.*

³⁵⁷ *ibid.*

³⁵⁸ *ibid.*

Case study 1 Sugarloaf Interconnector Pipeline Project

The Sugarloaf Interconnector is a 70 kilometre pipeline built to transfer water from the Goulburn River to the Melbourne Water distribution system. The pipeline extends from the Goulburn River north of Yea to the Sugarloaf Reservoir in the Yarra Ranges.³⁵⁹ The project was completed in February 2010.

Melbourne Water, as the project proponent, submitted an EES referral to the Minister for Planning. In December 2007, the Minister determined that an EES was not required for the proposed Sugarloaf Interconnector Pipeline Project, subject to a number of conditions, including the preparation of a Project Impact Assessment (PIA) Report, exhibition of the Project Impact Assessment Report for public comment and review of the report and public submissions by an expert Advisory Committee.³⁶⁰ Melbourne Water described the Project Impact Assessment to the Committee as ‘a new process’.³⁶¹

As outlined in the ‘Minister’s Referral Decision’, an EES was not warranted for the following reasons:

- i. The effects of the project on land uses, human communities and cultural heritage are unlikely to be significant at a state or regional level ...
- ii. The diversion of 75 gigalitres per year water ... is unlikely to have a significant effect on aquatic ecology and downstream users ...
- iii. Potential effects on biodiversity, landscape, waterways and other matters are not likely to be so complex or significant as to warrant detailed scoping or major new studies;
- iv. The suite of Project Impact Assessment studies being prepared by the proponent ... can provide a suitable body of technical investigations to inform decision-making to determine the final pipeline alignment;
- iv. An opportunity for public comment on the proposed pipeline route and supporting Project Impact Assessment studies, followed by consideration of the studies and public submissions by an expert advisory committee, can provide a sufficient form of consultation and review.³⁶²

The Sugarloaf Pipeline Alliance (which consisted of: Melbourne Water, Sinclair Knight Merz, GHD and John Holland Group) prepared the Project Impact Assessment. The scope of the Project Impact Assessment was determined by the Minister, and contained:

- ‘studies on the potential environmental effects and environmental management of the project, including with respect to flora and fauna, cultural heritage, land stability, landscape values, waterway environments, land use, social amenity’; and
- ‘a study assessing the environmental implications of transferring water savings from the Goulburn River, through an off-take via the Sugarloaf Interconnector’.³⁶³

The Project Impact Assessment was placed on public exhibition for 20 business days.³⁶⁴ The Minister for Planning appointed an Advisory Committee under the *Planning and Environment Act 1987* to consider the Project Impact Assessment documentation and public submissions, and investigate and provide advice in relation to the environmental impacts of the Sugarloaf Interconnector Pipeline Project.³⁶⁵

³⁵⁹ Department of Planning and Community Development, www.dpcd.vic.gov.au, accessed 22 August 2011

³⁶⁰ *ibid.*

³⁶¹ Mr R Clifford, Regional Delivery Manager, Waterways, Melbourne Water, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.272

³⁶² Minister for Planning, *Reasons For Decision Under Environment Effects Act 1978: Sugarloaf Interconnector*, December 2007, p.2

³⁶³ *ibid.*, p.1

³⁶⁴ From 19 February 2008 until 18 March 2008; Department of Planning and Community Development, www.dpcd.vic.gov.au, accessed 18 August 2011

³⁶⁵ Department of Planning and Community Development, www.dpcd.vic.gov.au, accessed 18 August 2011

The Advisory Committee held public hearings over seven days in April 2008, and subsequently, prepared a report for the Minister recommending 45 conditions be applied to the project. According to Melbourne Water, most of the recommendations were supported by the Minister, a small number either did not proceed or proceeded in a modified form and some others were directed to be handled by the project Alliance as part of its more detailed environmental documentation (sometimes as a direction by the Minister and sometimes as a recommendation).³⁶⁶

Melbourne Water also referred the project to the federal environment minister under the Environment Protection and Biodiversity Conservation Act. The federal environment minister determined that the project was a 'controlled action' and required approval under the federal legislation. The Department of the Environment, Water, Heritage and the Arts accepted the Victorian Government's Project Impact Assessment process as an accredited process.³⁶⁷

Mr Brad Jessup, Teaching Fellow, College of Law, Australian National University, stated that the Minister's decision not to require an EES was 'perplexing', as the assessment process for the Sugarloaf pipeline 'mimicked parts of the EES process' – in particular the development of an assessment report, public submissions and a public hearing – however each aspect was 'constrained'.³⁶⁸ For example, scoping requirements were determined by the Minister without public consultation and were not publicly exhibited; terms of reference for the inquiry panel were 'narrow' and excluded economic matters and 'did not adequately cover social matters'; expert evidence to be presented to the panel had to be provided in the written submissions, however the public was given 20 business days to read the Project Impact Assessment Report, prepare their submission and 'identify, engage and seek a rigorous report from an expert'.³⁶⁹ Mr Jessup believes that this time limit 'reduced the capacity for project opponents to present their strongest case'.³⁷⁰

5.2.3 *An Environment Effects Statement is not required*

Under the Environment Effects Act, the Minister may determine that a referred proposal does not require an EES, and will not be subject to conditions. Some examples of project proposals referred since 1 July 2006 that have not required an EES include:³⁷¹

- eight wind farms;³⁷²
- Dingley Arterial;³⁷³

³⁶⁶ Melbourne Water, correspondence received, 9 August 2010

³⁶⁷ Mr R Clifford, Regional Delivery Manager, Waterways, Melbourne Water, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.272

³⁶⁸ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, correspondence received, 14 August 2010

³⁶⁹ *ibid.*

³⁷⁰ *ibid.*

³⁷¹ Victorian Government, submission no.40, pp.26–27

³⁷² For example: The Minister determined that the Ararat Wind Farm, which is the development of a 75 turbine Wind Energy Facility on land in Bulgana and surrounding areas, did not require an EES because, for example 'the potential environmental effects of the project can be adequately assessed through the planning permit process under the *Planning and Environment Act 1987* and potential effects on landscape values and residential amenity are 'likely to be of local significance only'. (Source: Minister for Planning, *Reasons for Decision under Environment Effects Act 1978: Ararat Wind Farm*, November 2008, p.1). The panel hearing, appointed to examine documentation and submissions relating to planning permits for the project, finished on 14 July 2010. The project was approved by the Minister for Planning in October 2010

³⁷³ The Dingley Arterial Project will create a new dual carriageway arterial road, connecting Westall Rd to the Dandenong Bypass. The Minister determined that an EES was not required because 'the reservation for this section of the Dingley Arterial Project has been long-established and has informed the development of adjoining land uses', consequently, there is 'no realistic alternative alignment available that would warrant investigation, having regard to its potential environmental effects...; the project is unlikely to have significant effects on biodiversity values, local amenity and aboriginal cultural heritage...' (Source: Minister for Planning, *Reasons for Decision under Environment*

- Heywood Pulp Mill Site Extension; and³⁷⁴
- HRL Dual Gas Demonstration Project.³⁷⁵

Although not required to undergo the assessment provisions under the Environment Effects Act, these projects will most likely be or have been subject to other planning and environmental statutory controls to assess environmental impacts, such as planning permits, planning scheme amendments, or works approvals.

For example, the Minister determined that the HRL Dual Gas Demonstration Project, which is a proposal for a power station using a combination of brown coal and natural gas, did not require an EES for the following reasons:³⁷⁶

- potential environmental effects of operating the power station, including 'opportunities to minimise greenhouse gas emissions,' 'can be adequately assessed under the Environment Protection Act';
- the power station will be located on an existing industrial site which has no significant biodiversity, cultural heritage, waterway or landscape features;
- the proposed site is already zoned under the local planning scheme to provide for brown coal mining, electricity generation and associated uses; and
- the proposed technology for power generation, 'if commercially viable', 'is likely to significantly reduce the greenhouse gas intensity of power generation relative to brown coal-based power technologies currently in use in the Latrobe Valley'. The proposed technology 'will also facilitate the implementation of pre-combustion capture of carbon dioxide when infrastructure for its transport and storage is commercially viable'.³⁷⁷

However, some environmental groups were critical of the environmental merits of the project claiming that, if it proceeds, it will 'produce greenhouse gas emissions at a similar scale to that of a standard black coal fired power station', and will 'increase the state's emissions' making it more difficult to reach the state government's target.³⁷⁸

Effects Act 1978: Dingley Arterial Project, December 2009, p.1) Construction of the arterial began in January 2011. The proponents, VicRoads, state: 'All works are undertaken in line with strict guidelines to minimise environmental impacts, and in consultation with Greater Dandenong and Kingston Councils, and the Department of Sustainability and Environment'. (Source: VicRoads, www.vicroads.vic.gov.au, accessed 26 July 2011)

³⁷⁴ The Minister determined that the Heywood Pulpmill extension did not require an EES because the original project had been 'extensively assessed through an EES process', and potential effects on landscape values are likely to be 'of local significance only and can be managed through the provisions of the Schedule to Special Use Zone 5 of the local planning scheme'. (Source: Minister for Planning, *Reasons for Decision under the Environment Effects Act 1978: Heywood Pulpmill Relocation*, April 2007, p.1) The proponents have since decided that the proposed Heywood Pulpmill will not go ahead. Heywood Pulp Mill, www.heywoodpulpmill.com.au

³⁷⁵ Proponent Dual Gas Pty Ltd proposed in 2009 to develop a 550 megawatt base-load power station which will use the Integrated Drying Gasification Combined Cycle technology, which utilises combustion of hydrogen-containing synthetic gas produced from brown coal, as well as natural gas. Minister for Planning, *Decision under the Environment Effects Act and reasons for decision: Dual Gas Demonstration Project*, November 2009, pp.1–2

³⁷⁶ Minister for Planning, *Decision under the Environment Effects Act and reasons for decision: Dual Gas Demonstration Project*, November 2009, pp.1–2

³⁷⁷ *ibid.*

³⁷⁸ For example, refer to: Friends of the Earth, *The HRL coal fired power station*, www.melbourne.foe.org.au, accessed 10 September 2010; also refer to: *\$100m for 'clean coal' plant*, www.news.com.au, 12 March 2007, accessed 10 September 2010; the Australian Climate Justice Program, *HRL challenged over 'clean coal' claims*, media release,

In May 2011 the EPA issued HRL with part approval for the project.³⁷⁹ A works approval was granted to construct a 300 megawatt plant.³⁸⁰ HRL's project proposal featured a 600 megawatt plant with two gasifiers and turbines, however, the EPA has not granted approval for the second gasifier and turbine.³⁸¹ This will be reviewed when the proponent is able to 'demonstrate the successful operation of the first phase of the demonstration project'.³⁸²

The Environment Defenders Office launched an appeal against the EPA's approval decision at VCAT on 10 June 2011³⁸³, arguing that 'the plant does not meet best-practice standards for electricity generation because it was compared with other coal-fired power stations, rather than cleaner technologies' and 'approval of the plant is inconsistent with state and federal environmental policies, including a Victorian Government target to reduce emissions by 20 per cent by 2020'.³⁸⁴

5.3 Environmental impact assessment under other statutory processes

The Committee recognises that many projects will have localised effects that can be assessed through other processes.

When a project is determined by the Minister not to require an EES, an assessment of a project's environmental impact can occur through other routine regulatory processes.³⁸⁵ Some level of environment assessment occurs under the following legislation:

- *Planning and Environment Act 1987* (Vic);
- *Major Transport Projects Facilitation Act 2009* (Vic);
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth); and
- *Environment Protection Act 1970* (Vic).

Environmental assessment processes under these Acts are discussed below.

Environmental impacts may also be assessed under the works approval process under the Environment Protection Act, as outlined in chapter two.

20 July 2007, www.climatelaw.org/media/2007July20, accessed 6 September 2010; Environment Victoria, *Coal power station rebrand is last gasp of a polluting project*, Friday 25 September 2009, www.environmentvictoria.org.au, accessed 10 September 2010; also refer to: Friends of the Earth, *Corporate Watch Australia: HRL Limited: Burning Coal at Three Minutes to Midnight*, 2008

³⁷⁹ Environment Protection Authority Victoria, www.epa.vic.gov.au, accessed 8 July 2011

³⁸⁰ Environment Protection Authority Victoria, *EPA Grants Part Approval for Dual Gas Demonstration Project*, media release, 20 May 2011

³⁸¹ *ibid.*

³⁸² *ibid.*

³⁸³ The VCAT hearing is expected to commence on 24 October 2011, Environment Protection Authority Victoria, www.epa.vic.gov.au, accessed 22 August 2010)

³⁸⁴ The appeal is on the behalf of Environment Victoria and climate action group – Locals into Victoria's Environment; Ms B Merhab, 'Court action clouds new power plant', *Herald Sun* newspaper, 11 June 2011, p.30; also refer to: Environment Defenders Office (Victoria), www.edo.org.au/edovic/hrl, accessed 22 August 2011

³⁸⁵ Victorian Government, submission no.40, pp.19–21

5.3.1 Planning and Environment Act 1987

There are three mechanisms under the Planning and Environment Act that are designed to assess and consider environmental effects. These include:

- planning permits;
- planning scheme amendments; and
- advisory committees.

Under the Planning and Environment Act, responsible authorities must consider any significant effects that the use (operation of the project) or development (construction of the project) may have on the environment when assessing planning permits.³⁸⁶ The responsible authority may consider any significant social and economic effects of the use or development.³⁸⁷

In addition, in preparing a planning scheme or planning scheme amendment, a planning authority 'must take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or development'.³⁸⁸ A planning authority 'may take into account its social effects and economic effects'.³⁸⁹

Further, the Victoria Planning Provisions, including the State Planning Policy Framework, must be considered when applications are prepared and assessed. Clause 15 of the Victoria Planning Provisions provides the state planning policy for the environment. The purpose of state policy in planning schemes is to:

*... inform planning authorities and responsible authorities of those aspects of state level planning policy which they are to take into account and give effect to in planning and administering their respective areas. It is the State Government's expectation that planning and responsible authorities will endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.*³⁹⁰

Under the Planning and Environment Act, the Minister can also appoint an advisory committee to advise him or her on 'any matter' which the Minister refers³⁹¹, such as the merits of a particular development proposal or planning policy issue.³⁹² Terms of Reference established by the Minister will identify specific matters to be examined by the advisory committee and the means of inquiry, such as a public hearing.³⁹³ Advisory committees can examine alternatives to a project, in contrast to the 'routine' planning permit or scheme amendment process which does not require investigation of alternatives to a proposal.³⁹⁴

³⁸⁶ *Planning and Environment Act 1987* (Vic) s.60(1)(e)

³⁸⁷ *ibid.*, s.60(1A)(a)

³⁸⁸ *ibid.*, s.12(2)(b)

³⁸⁹ *ibid.*, s.12(2)(c)

³⁹⁰ *Victoria Planning Provisions*, Clause 11, p.1

³⁹¹ *Planning and Environment Act 1987* (Vic) s.151

³⁹² Department of Infrastructure, *Environment Assessment Review: Issues and options, Technical paper*, 2002, p.103

³⁹³ *ibid.*

³⁹⁴ *ibid.*

A key issue identified in the issues and options paper for the *Environment Assessment Review* (2002) in regards to the advisory committee process was that, whilst there are internal protocols for the operation of advisory committees formed by Planning Panels Victoria, there is no formal, routine process that an advisory committee must follow.³⁹⁵ The Committee believes that there would be merit in the development of guidelines that is publicly available on these matters.

In relation to a proposed development on the Port Campbell foreshore, the Port Campbell Community Group advised the Committee that 'there appears to be no appropriate planning or policy frameworks which will consider or manage potential impacts' of a proposed development they are concerned about on the coastal headland.³⁹⁶ For example, advice that the Port Campbell Community Group received from the Victorian Civil and Administrative Tribunal stated: 'geotechnical issues are "not a matter that we need to resolve in this planning permit process"'.³⁹⁷ The group is also concerned that the local council, as the responsible authority, 'does not have the expertise to consider the impact of the development on the environment'.³⁹⁸

On the other hand, the Committee was advised by Mr Brad Jessup, Teaching Fellow, College of Law, Australian National University, that planning processes under the Planning and Environment Act have certain safeguards that are absent from the Environment Effects Act. Mr Jessup identified the following advantages of assessment under the Planning and Environment Act compared to the Environment Effects Act:³⁹⁹

- there is increased transparency and more predictable processes;
- there are fixed timelines;
- the assessment regime is linked with approval;
- community participation is specified in the planning scheme or the Act; and
- there is greater scrutiny of decisions, including by both houses of Parliament.⁴⁰⁰

As a result of these additional safeguards, Mr Jessup proposed that the environmental assessment process be incorporated into the Planning and Environment Act.⁴⁰¹ This was also suggested in the submission from the Environment Institute of Australia and New Zealand, in which a member of the Institute supported an 'expansion' of the Planning and Environment Act to include 'environmentally significant projects'.⁴⁰²

³⁹⁵ *ibid.*, p.104

³⁹⁶ Port Campbell Community Group, submission no.51, p.3

³⁹⁷ *ibid.*

³⁹⁸ *ibid.*, pp.3, 6

³⁹⁹ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission 37, attachment 5, pp.4–5

⁴⁰⁰ For example, under Part 3AA, Division 3, *Planning and Environment Act 1987* (Vic), the following amendments require ratification after they are approved by the Minister: an amendment to a metropolitan fringe planning scheme that amends or inserts an urban growth boundary; or an amendment that has the effect of altering or removing the controls over the subdivision of any green wedge land to allow for the land to be subdivided into more lots or into smaller lots than allowed for in the scheme. (Source: Department of Sustainability and Environment, *Planning Provisions for Melbourne's Green Wedges*, November 2003, p.1)

⁴⁰¹ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission 37, p.2 and attachment 5, p.4

⁴⁰² Environment Institute of Australia and New Zealand, submission no. 42, survey response, p.21

Associate Professor Ian Thomas, Discipline Head of Environment and Planning at RMIT suggested that 'responsibility for environmental (and social) assessment be explicitly included in the current suite of "development" Acts', such as the Planning and Environment Act.⁴⁰³ Associate Professor Thomas was concerned that, EESs have become more about planning the environmental management of the construction and operation of projects, rather than the examination of significant issues and alternatives.⁴⁰⁴

In order to illustrate that planning processes under the Planning and Environment Act have the capacity to provide a transparent examination of the environmental impacts of a project, Mr Jessup highlighted the Hazelwood Mine Extension Project as an example. Mr Jessup advised the Committee that the consideration of greenhouse gas emissions resulting from the combustion of the coal in the Hazelwood power station was excluded from the assessment and inquiry by the Minister for Planning and the DPCD for this project, even though it was 'a matter of principle concern to the community'.⁴⁰⁵ It was only after an appeal to the Victorian Civil and Administrative Tribunal (VCAT) under the Planning and Environment Act, that the issue of greenhouse gas emissions was able to be considered.⁴⁰⁶ The opportunity to appeal to VCAT was available because there was a joint inquiry panel established to investigate both the EES and the Planning Scheme Amendment. VCAT concluded that assessment of greenhouse gas matters could not be excluded from consideration under the Planning and Environment Act process, and therefore, the panel must 'provide a reasonable opportunity to be heard to any party who wishes to make a submission in relation to the environmental impacts of greenhouse gas emissions from the Hazelwood Power Station'.⁴⁰⁷ As Mr Jessup advised the Committee:

*The Hazelwood Extension Project displayed a fundamental flaw with the EES process: that the matters for consideration and assessment are determined solely by the Minister for Planning. There are no mandatory considerations in the Act, compared to the Planning and Environment Act 1987 (Vic). Rather, each project is assessed against terms of reference designed within the Department of Planning and Community Development, and the inquiry panel can ignore any submissions falling outside any limited terms of reference. While this is not necessarily problematic, and I have argued that assessments should be focused on limited and crucial rather than wide-ranging and inconsequential matters, it is very problematic when the terms of reference exclude the most important concerns of the community.*⁴⁰⁸

The Committee agrees that there are additional checks and balances that exist under the Planning and Environment Act. However, the Committee is of the view that the implementation of environmental impact assessment should remain a separate piece of legislation and a stand-alone process, as the Planning and Environment Act does not necessarily provide the appropriate scope for a comprehensive environmental assessment. Furthermore, as the Environment Institute of Australia and New Zealand explained, the planning process can rely too heavily on local authority

⁴⁰³ Associate Professor I Thomas, correspondence received, 21 April 2010; Associate Professor I Thomas, submission no.20, p.2

⁴⁰⁴ Associate Professor I Thomas, submission no.20, p.2

⁴⁰⁵ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission 37, p.3; C Berger, 'Hazelwood: A new lease on life for a greenhouse dinosaur', T Bonyhady and P Christoff (eds), *Climate Law in Australia*, 2007, pp.164–165. Note that this exclusion was struck down by Justice Stuart Morris in *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029. See, further, Berger, pp.166–167

⁴⁰⁶ *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029 (29 October 2004)

⁴⁰⁷ *ibid.*, [1(b)(i)]

⁴⁰⁸ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission 37, p.3

planners who do not have the expertise in environmental assessment. In this case in particular, many of the environmental assessment requirements are carried out as a condition of the planning permit, which can be too late in the process to incorporate environmental issues into the final design of the project.⁴⁰⁹

5.3.2 Major Transport Projects Facilitation Act 2009

The *Major Transport Facilitation Projects Act 2009* provides for the assessment and approval of major transport projects in Victoria.⁴¹⁰ The DPCD advised the Committee that 'it is intended that a project declared under the Major Transport Projects Facilitation Act will not need to be referred under the Environment Effects Act'.⁴¹¹

A major transport project 'is 'declared' by the Governor in Council on the recommendation of the Premier after being assessed as being of state or regional economic, social or environmental significance'.⁴¹² Declared projects are assessed using one of two assessment pathways, which include: an Impact Management Plan which can be applied 'where the land is wholly owned by a public authority or reserved for a public purpose' and in cases where 'only a limited number of approvals are required';⁴¹³ or a Comprehensive Impact Statement which can be applied if the project does not meet the criteria for an Impact Management Plan.⁴¹⁴

The Act aims to create a 'one-stop-shop' for assessment approvals and delivery of major transport projects in Victoria.⁴¹⁵

The Environment Defenders Office has expressed the following concerns in relation to the Major Transport Projects Facilitation Act:

- the Minister for Planning becomes the decision-maker under all relevant legislation, including the *Coastal Management Act 1995*, *Environment Protection Act 1970*, *Water Act 1989*, and the *Wildlife Act 1975*;
- criteria that are mandatory considerations under the above acts become non-mandatory when the Minister for Planning is making those decisions under the Major Transport Projects Facilitation Act;
- assessment requirements are largely left to guidelines;

⁴⁰⁹ Environment Institute of Australia and New Zealand, submission no. 42, p.2

⁴¹⁰ Department of Planning and Community Development, www.dpcd.vic.gov.au, accessed 14 July 2010

⁴¹¹ Victorian Government, submission no.40, p.20

⁴¹² Explanatory Memorandum, *Major Transport Projects Facilitation Bill 2009*, p.2; Department of Planning and Community Development, www.dpcd.vic.gov.au, accessed 25 August 2011

⁴¹³ Department of Planning and Community Development, Explanatory memorandum, *Major Transport Projects Facilitation Bill 2009*, p.2, www.dpcd.vic.gov.au, accessed 14 July 2011

⁴¹⁴ *ibid.*

⁴¹⁵ Department of Planning and Community Development, www.dpcd.vic.gov.au, accessed 3 August 2011

- there are short time frames for public comment, and the Minister can exclude cross examination in an assessment committee hearing;
- there are no requirements for public consultation for major transport projects being assessed on the lower level of assessment (impact management plans); and
- there are limited appeal rights.⁴¹⁶

The Committee believes that all major projects, including major transport projects, should be subject to a transparent environmental impact assessment process under the EIA legislation.

5.3.3 Environment Protection and Biodiversity Conservation Act 1999 (Cth)

As outlined in chapter two, under the Environment Protection and Biodiversity Conservation Act proposals that may have a significant impact on Matters of National Environmental Significance (MNES) are assessed. An 'action' that may have an impact on a MNES is prohibited under the federal legislation unless it has been approved by the federal environment minister.

The Environment Protection and Biodiversity Conservation Act provides opportunities for bilateral agreements between Commonwealth and state governments. The 'assessment by Environment Effects Statement under the Victorian *Environment Effects Act 1978*' has been accredited under the bilateral agreement, *Agreement between the Australian Government and the State of Victoria relating to environmental impact assessment*.⁴¹⁷ Other accredited Victorian assessment processes include:

- assessment by an Advisory Committee or a joint Advisory Committee/Panel under the *Planning and Environment Act 1987*;
- assessment by permit application under the *Planning and Environment Act 1987*;
- assessment under the *Environment Protection Act 1970* (i.e. works approval); and
- assessment by a Panel under the *Water Act 1989*.⁴¹⁸

The bilateral agreement came into operation on 20 June 2009. The DPCD advised the Committee that the purpose of the bilateral agreement 'is to remove duplication of assessment processes for projects which require approval under both state and Commonwealth legislation'.⁴¹⁹

⁴¹⁶ Environment Defenders Office (Victoria), Issues paper, *Major Transport Facilitation Bill 2009: Issues and concerns*, Environment Defenders Office (Victoria), correspondence received, 10 August 2010

⁴¹⁷ Department of the Environment, Water, Heritage and the Arts, *Agreement between the Australian Government and the State of Victoria relating to environmental impact assessment*, 20 June 2009, p.14

⁴¹⁸ Department of the Environment, Water, Heritage and the Arts, *Agreement between the Australian Government and the State of Victoria relating to environmental impact assessment*, 20 June 2009

⁴¹⁹ Victorian Government, submission no.40, p.16

The Committee received some evidence expressing concern about the bilateral agreement.⁴²⁰ The Environment Defenders Office believes that the state EES process is 'inadequate', and therefore assessment of matters of national significance through the state process will 'not be comprehensively and transparently assessed'.⁴²¹ As the Environment Defenders Office stated to the Committee:

*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. These matters are therefore not guaranteed to be comprehensively and transparently assessed.*⁴²²

Mr Andrew Macintosh, Associate Director at the Centre for Climate Law and Policy, Australian National University, was disappointed that the Commonwealth did not demand higher standards from Victoria's assessment regime before entering into the bilateral agreement and as a result, it has 'fallen short of what the expectations were for the bilateral agreement process'.⁴²³ The Committee was advised that this has consequently 'delayed much needed reform'.⁴²⁴

The Minerals Council of Australia supported the accreditation of the EES process under the Environment Protection and Biodiversity Conservation Act as an approval bilateral, rather than just an agreement bilateral. If a proposed action is covered by an approval bilateral it will be assessed and approved by the state or territory in accordance with an agreed management plan and no further approval is required from the federal environment minister under the Environment Protection and Biodiversity Conservation Act.⁴²⁵ The Minerals Council of Australia advised the Committee that 'the achievement of an approval bilateral agreement would remove the duplication of effort and the potential avenue for conflict and delay from the regulatory landscape'.⁴²⁶ However, the Committee would be opposed to this course while the EES process remains in its current form.

5.4 Assessment methods

Several submissions received by the Committee were of the opinion that the current referral decisions available to the Minister for Planning under the Environment Effects Act do not provide sufficient flexibility for matching the assessment process to the scale of environmental risk or level of complexity.⁴²⁷ According to the Victorian Planning and Environmental Law Association:

⁴²⁰ For example, refer to: Environment Defenders Office (Victoria), submission no.27, p.16; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, June 7 2010, transcript of evidence, p.255

⁴²¹ Environment Defenders Office (Victoria), submission no.27, p.16

⁴²² *ibid.*

⁴²³ Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.255

⁴²⁴ Environment Defenders Office (Victoria), submission no.27, p.16

⁴²⁵ Department of Sustainability, Environment, Water, Population and Communities, *Bilateral agreements*, www.environment.gov.au, accessed 16 August 2011

⁴²⁶ Minerals Council of Australia, Victorian Division, submission no. 28, p.11

⁴²⁷ For example, refer to: Environment Defenders Office (Victoria), submission no. 27, p.10; Victorian Planning and Environmental Law Association, submission no. 55, p.5; Colac Otway Shire, submission no. 35, p.3

Any Act should contain sufficient flexibility to ensure that the size of the task of environmental investigation is proportionate to the size of the project. A 'one size fits all' approach would not be appropriate. Different levels of assessment - from assessment on the preliminary documentation to an EES or to a full inquiry - would provide the necessary range and flexibility. Clearly articulated criteria matching project size to a particular level of assessment should also be considered.⁴²⁸

Colac Otway Shire was in favour of the addition of an intermediate tier of assessment:

At present the levels of environmental assessment in Victoria vary widely with some projects subjected to a detailed, costly and lengthy assessment process under the Environment Effects Act while other projects are merely assessed under the Planning and Environment Act as part of the planning permit application process. There is a need for a middle tier of environmental assessment particularly for those forms of environmental impacts which are regional in nature where the effects are not of state significance but which are greater than local significance.⁴²⁹

The Council drew on its own experience of processing Amendment C29 (over the period of 2003-2008) to the Colac Otway Planning Scheme to facilitate a golf course and residential development at Apollo Bay, a development that was ultimately not approved by the Minister for Planning.⁴³⁰ The Council advised that the proposal was a prime example of the type of project appropriate for a middle tier assessment process as it raised wide-ranging environmental issues that could have been assessed up-front through an environmental assessment process.⁴³¹ The Council stated that an EES process for that project 'may have had potential' to 'avoid much of the time and resources that were collectively spent by all parties' during the subsequent amendment process.⁴³²

The Committee notes a tiered assessment system is utilised under Commonwealth and Western Australian environmental impact assessment legislation, which will be examined below.

5.4.1 Assessment under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Under the Environment Protection and Biodiversity Conservation Act, proposed actions that are determined by the federal environment minister to be a 'controlled action',⁴³³ can be assessed using different methods, depending on a range of considerations including the complexity of the proposed action.⁴³⁴ Actions can be assessed using one of the following assessment approaches:⁴³⁵

- assessment on referral information;
- assessment on preliminary documentation;
- assessment by public environment report;

⁴²⁸ Victorian Planning and Environmental Law Association, submission no. 55, p.5

⁴²⁹ Colac Otway Shire, submission no. 35, p.3

⁴³⁰ *ibid.*

⁴³¹ *ibid.*

⁴³² *ibid.*

⁴³³ The proposed action is likely to have a significant impact on one or more matters protected by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

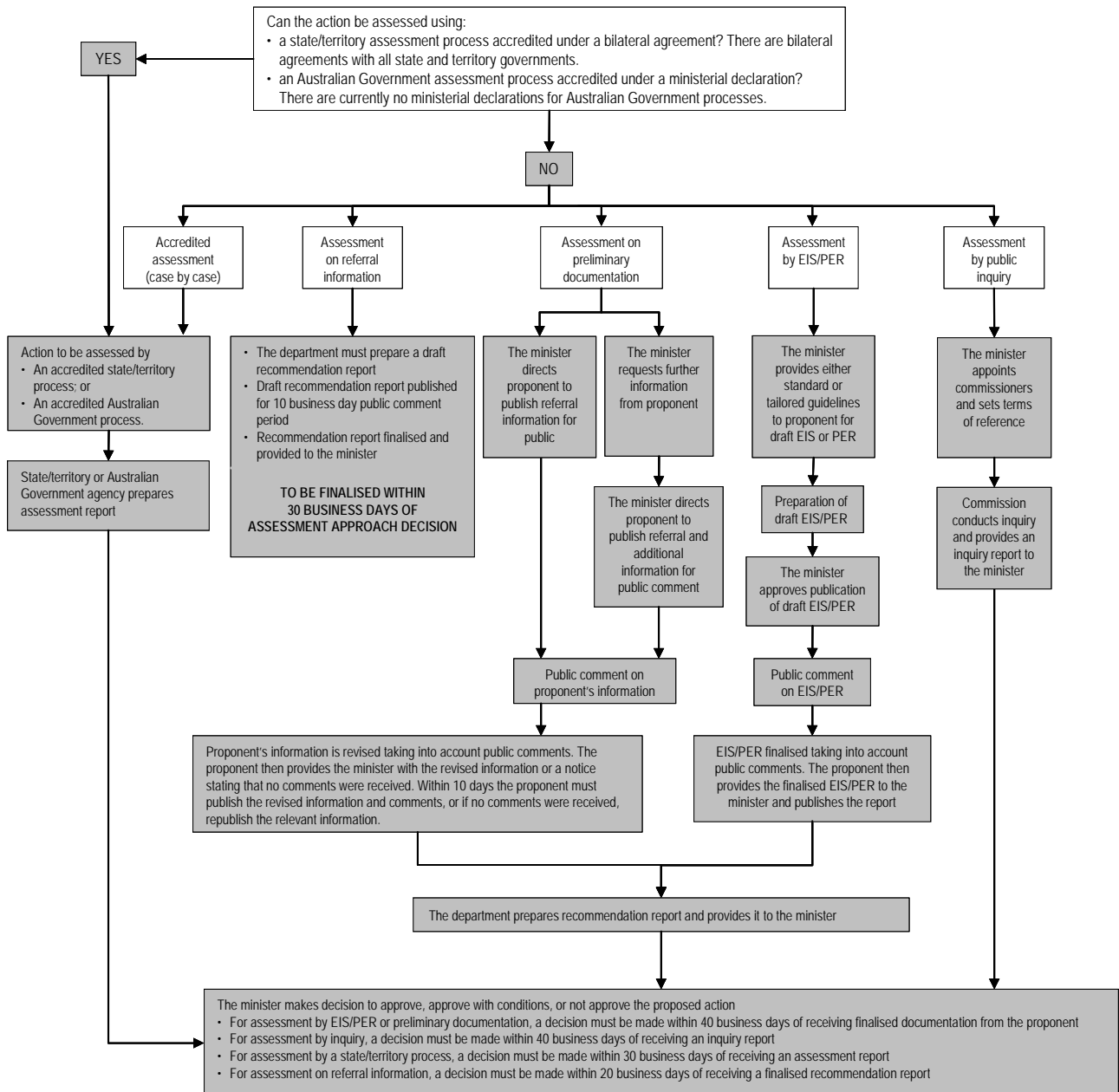
⁴³⁴ Department of Sustainability, Environment, Water, Population and Communities, www.environment.gov.au, accessed 2 August 2010

⁴³⁵ A proposal can also be assessed using an accredited assessment process, such as a bilateral agreement between a state government and the Commonwealth government

- assessment by environmental impact statement; and
- assessment by public inquiry.⁴³⁶

As illustrated in figure 5.1:

Figure 5.1 EPBC Act environment assessment process



Source: Department of the Environment, Water, Heritage and the Arts, *EPBC Act – Environment Assessment Process*, 2010 p.5

⁴³⁶ Department of the Environment, Water, Heritage and the Arts, *EPBC Act –Environment Assessment Process*, 2010, p.4

A referral is displayed on the Department of Sustainability, Environment, Water, Population and Communities' website and public comments are invited for a period of 10 business days.⁴³⁷ The Minister's referral decision is also made publicly available on the department's website, which includes the affected matters of national environmental significance.⁴³⁸

Assessment on referral information is undertaken solely on the information provided in the referral form. The department prepares a draft recommendation report, which is made available for public comment for 10 business days. A recommendation report is finalised and provided to the federal environment minister. The assessment process is to be completed within 30 business days of the referral decision. A decision must be made by the Minister within 20 business days of receiving the final recommendation report.⁴³⁹

Assessment on preliminary documentation is undertaken utilising the referral form and any other relevant material identified by the federal environment minister as being necessary to adequately assess a proposed action.⁴⁴⁰ The Minister directs the proponent to publish referral information and any additional information requested by the Minister for public comment. If public comments are received, the proponent provides the Minister with revised information in response to comments. The proponent must publish the revised information and public comments within 10 business days. The department prepares a recommendation report which is provided to the Minister. The Minister then makes an approval decision, with or without conditions. A decision must be made within 40 business days of receiving the finalised documentation from the proponent.⁴⁴¹

Assessments by public environment report and assessment by environmental impact statement are very similar processes, which both involve the federal environment minister providing either standard or tailored guidelines to the project proponent for the preparation of a draft public environment report or environmental impact statement. The proponent prepares the public environment report or environmental impact statement, which the Minister must approve for public exhibition. The level of documentation required for an environmental impact statement is the most extensive.⁴⁴² Public comments are invited, and the comments must be taken into account when the proponent prepares its final public environment report or environmental impact statement. The final public environment report or environmental impact statement is provided to the Minister and published. The department prepares a recommendation report which is provided to the Minister, who makes the approval decision. A decision must be made within 40 business days of receiving finalised documentation from the proponent.⁴⁴³

For assessment by public inquiry, the Environment Protection and Biodiversity Conservation Act provides for the Minister to appoint commissioners to undertake a public inquiry into the environmental and other impacts of a proposed action. On completion of the inquiry, the Commissioner must report to the Minister. A public inquiry has the potential to provide the most thorough process of environmental impact assessment, allowing the greatest scrutiny of the relevant

⁴³⁷ *ibid.*, p.2

⁴³⁸ Department of Sustainability, Environment, Water, Population and Communities, www.environment.gov.au, accessed 11 August 2010

⁴³⁹ Department of the Environment, Water, Heritage and the Arts, *EPBC Act –Environment Assessment Process*, 2010, p.5

⁴⁴⁰ *ibid.*

⁴⁴¹ *ibid.*

⁴⁴² Law Handbook Online, www.lawhandbook.sa.gov.au, accessed 11 August 2010

⁴⁴³ Department of the Environment, Water, Heritage and the Arts, *EPBC Act –Environment Assessment Process*, 2010, p.2

science and the greatest public participation. While public inquiries were held under the Commonwealth's original *Environment Protection (Impact of Proposals) Act 1974* - with particular effect in relation to sand mining on Queensland's Fraser Island - none have been held under the Environment Protection and Biodiversity Conservation Act. However, the recent independent review of the Act identified public inquiries as an underused method of investigation and suggested they be used more frequently.⁴⁴⁴

There has been provision, since February 2007, for the Minister to reject a referral where 'it is clear that the action would have unacceptable impacts'.⁴⁴⁵ In this instance, the Minister must give notice of the decision and reasons for it, after which the proponent may resubmit the proposal in modified form or ask for the decision to be reconsidered.

The 2009 review of the Environment Protection and Biodiversity Conservation Act recommended that the methods of assessment be streamlined, as there is some duplication between the forms of assessment. The review recommended that the number of assessment options under the Act be reduced to the following:

- assessment by preliminary documentation: this would combine assessment by referral information and assessment by preliminary documentation by expanding the definition of preliminary documentation to include information provided in the referral;
- assessment by environmental impact statement: the review recommended removing assessment by public environment report because of its similarities to an environmental impact statement; and
- assessment by public inquiry.⁴⁴⁶

Although there are detailed guidelines to describe what constitutes a significant impact, there is little guidance regarding how and when the different assessment methods apply. The Committee noted the Environment Protection and Biodiversity Conservation Act review supported the introduction of specific criteria and clear guidance to clarify when assessment by each method should apply, in order to meet the Australian Government's obligations under the Intergovernmental Agreement on the Environment (1992), which states:

(iii) *assessing authorities will provide all participants in the process with guidance on the criteria for environmental acceptability of potential impacts including the concept of ecologically sustainable development, maintenance of human health, relevant local and national standards and guidelines, protocols, codes of practice and regulations;*⁴⁴⁷

(vii) *levels of assessment will be appropriate to the degree of environmental significance and potential public interest.*⁴⁴⁸

⁴⁴⁴ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.70

⁴⁴⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s. 74B

⁴⁴⁶ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.70

⁴⁴⁷ Department of Sustainability, Environment, Water, Population, and Communities, *Intergovernmental agreement on the environment*, May 1992, schedule 3, 3(iii)

⁴⁴⁸ *ibid.*, schedule 3, 3(vii)

5.4.2 Assessment under the Environmental Protection Act 1986 (Western Australia)

Western Australia's culture of referral, which was discussed in chapter four, results in the 'automatic' referral of many proposed major developments.⁴⁴⁹ In Western Australia, the decision on whether a proposal should be assessed is made by the Environmental Protection Authority (EPA). Although the Act does not specify the types of proposals that require assessment, the administrative procedures set out a number of factors that the EPA may have regard to in determining whether a proposal is likely to have significant effect on the environment.⁴⁵⁰

Where the EPA decides not to assess a proposal, it may instead give 'public advice' to the proponent and any relevant decision-making authority, on the environmental aspects of the proposal.⁴⁵¹

Where the EPA decides to assess a proposal, it will determine which of the following levels of formal assessment will apply:⁴⁵²

- assessment on proponent information; or
- public environment review.

With the approval of the Minister for Environment, a public inquiry may be held for the purposes of assessing a proposal.⁴⁵³

The *Environmental Protection Act 1986* (WA) also provides the basis for the EPA to assess a strategic proposal,⁴⁵⁴ which can be a policy, plan, program or development. Western Australia's experience with strategic environment assessment is discussed in chapter ten.

For all levels of formal assessment, once the documentation and public review procedures have been completed, the EPA prepares a report for the Minister. The Minister then determines whether the project can be implemented, and under what conditions. The Ministerial approval conditions are legally binding on proponents⁴⁵⁵ and the Act provides for monitoring,⁴⁵⁶ enforcement⁴⁵⁷ and penalties⁴⁵⁸ to ensure conditions are complied with.

⁴⁴⁹ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.58

⁴⁵⁰ Western Australian Government Gazette, *Environmental impact assessment administrative procedures 2010*, p.5985

⁴⁵¹ *ibid.*, p.5986

⁴⁵² *ibid.*, p.5987

⁴⁵³ *ibid.*, p.5989

⁴⁵⁴ *Environmental Protection Act 1986* (WA) s.40B

⁴⁵⁵ *ibid.*, s.47

⁴⁵⁶ *ibid.*, s.48(1)

⁴⁵⁷ *ibid.*, s.48(1a); Part VI

⁴⁵⁸ *Environmental Protection Act 1986* (WA) Schedule 1. If a proponent does not comply with s.48(6) of the Act, which stated that an order can be served on a proponent to stop implementation of the proposal within 24 hours if a breach of conditions is found to have occurred, an individual may be fined up to \$162,500 and a body corporate may be fined up to \$325,000

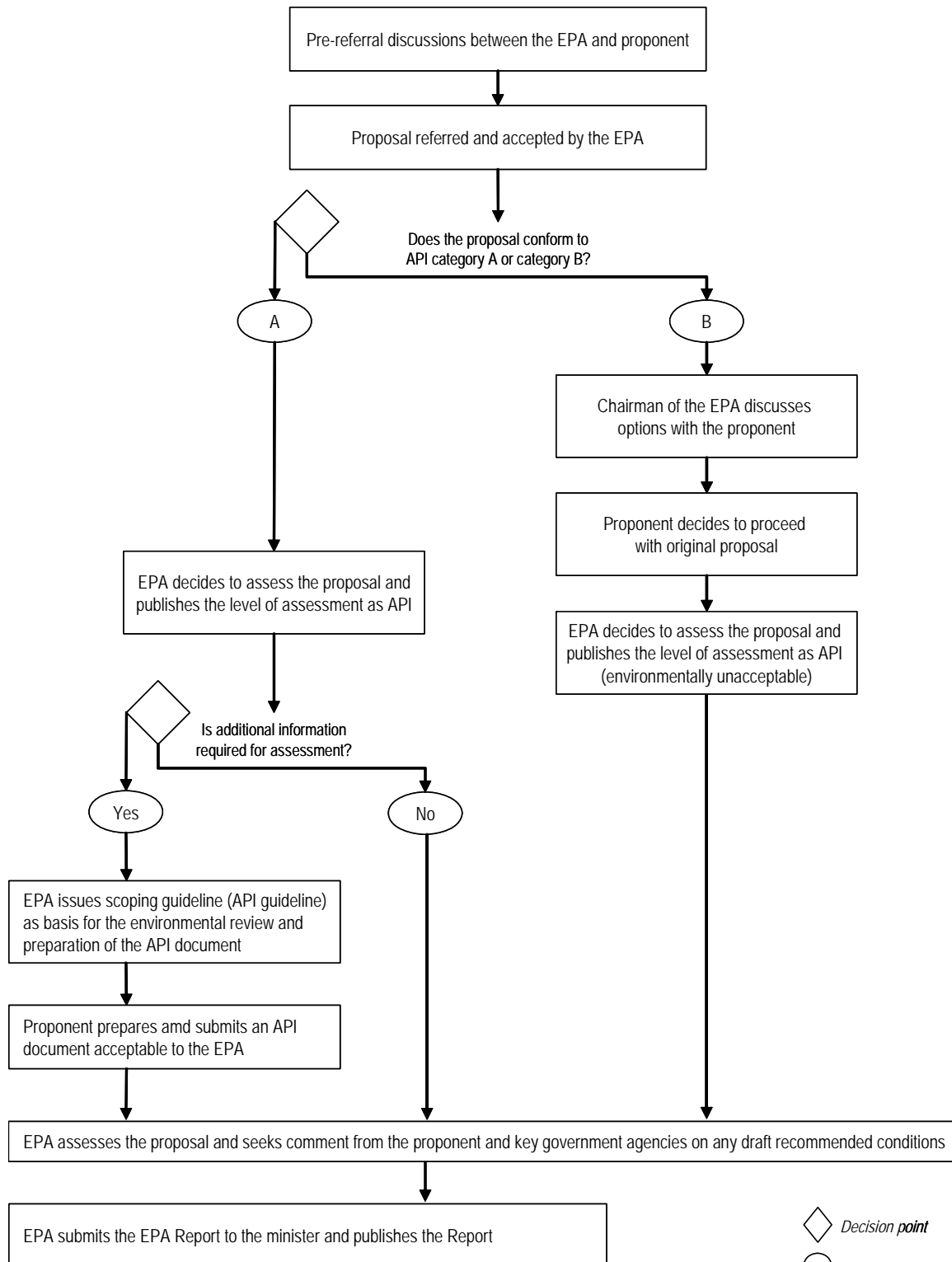
Recent amendments to the Administrative Procedures in November 2010 reduced the levels of assessment in Western Australia from five to two, to make the assessment process 'simpler and less confusing to communicate'.⁴⁵⁹ The two formal levels of assessment that currently exist in Western Australia are described below:

Assessment on proponent information

Assessment on proponent information has two categories of assessment as outlined in figure 5.2:

⁴⁵⁹ Environmental Protection Authority, Western Australia, *Review of the environmental impact assessment process in Western Australia*, March 2009, p.27

**Figure 5.2 Process for assessment on proponent information (API)
(Western Australia)**



Source: *Western Australian Government Gazette, Environmental Impact Assessment Administrative Procedures 2010, p.5993*

Category A applies to proposals meeting the following criteria:

- the proposal raises a limited number of significant environmental factors that could be readily managed, and for which there is an established condition-setting framework;
- the proposal is consistent with established environmental policy frameworks and standards;
- demonstrated appropriate and effective stakeholder consultation; and
- there is limited or local interest in the proposal.⁴⁶⁰

Assessment on proponent information provides for the assessment of a proposal where the acceptability or unacceptability of a proposal is apparent at the referral stage, including the environmental impact of the proposal and proposed environmental management.⁴⁶¹ A public review is not considered necessary if the proponent has appropriately and effectively consulted with affected stakeholders during the preparation of the proposal or if public review is unlikely to identify any further environmental issues.⁴⁶²

If sufficient information is provided in the referral documentation, the EPA assesses the proposal, seeks comments from key government agencies and submits its report to the Minister. Information requirements are outlined in the Administrative Procedures.⁴⁶³

If additional information is required for assessment, the EPA issues a scoping guideline to the proponent, and the proponent must prepare an environmental review document acceptable to the EPA and consult with stakeholders. A document will be considered adequate for review if it meets certain criteria outlined in the Administrative Procedures.⁴⁶⁴ The EPA assesses the proponent's documentation and submits its report to the Minister.

⁴⁶⁰ Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, p.5988

⁴⁶¹ *ibid.*, p.5987

⁴⁶² *ibid.*, p.5987

⁴⁶³ In order for the EPA to assess the proposal under Assessment on Proponent Information, referrals should contain the following information:

- description of proposal and alternatives considered;
- description of the receiving environment;
- identification of key issues;
- analysis of direct and indirect impacts of the proposal, including cumulative impacts;
- findings of the surveys and investigations undertaken;
- identification of management measures to mitigate significant adverse impacts; and/or offsets;
- spatial datasets, information products and databases required;
- demonstration that the expectations for EIA identified in the Administrative Procedures were addressed;
- demonstration that proposal conforms with relevant environmental policies and standards;
- details of stakeholder consultation.

Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, pp.5994–5995

⁴⁶⁴ For example: it addresses the matters identified in the scoping guideline; it is readable, understandable, accurate, concise, complete and technically sound; it addresses relevant environmental policies and standards; quality assurance is ensured; it does not include statements purported to be the views of others without references. Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, p.5992

Category B applies to proposals unlikely to be environmentally acceptable. A proposal will be considered environmentally unacceptable if it meets the following criteria:

- the proposal is inconsistent with established environmental policy frameworks, guidelines or standards; or
- the proposal is likely to have a significant impact on a critical asset; or
- the proposal raises one or more significant environmental factors or issues that do not meet the EPA's environmental objectives; and
- the proposal could not be reasonably modified to meet the EPA's environmental objectives.⁴⁶⁵

If the EPA considers that there is adequate information in the referral documentation to demonstrate that the proposal is environmentally unacceptable, the Chair of the EPA will advise the proponent on the likely outcome of the assessment and encourage the proponent to either:

- no longer proceed with the proposal; and/or
- submit a new, significantly modified proposal (in terms of project design and/or location).⁴⁶⁶

If the proponent decides to proceed with the original proposal, the EPA publishes the level of assessment as assessment on proponent information (environmentally unacceptable), assesses the proposal and submits the EPA Report to the Minister.⁴⁶⁷

Public environmental review

A public environmental review provides for the assessment of proposals with more significant environmental impacts, which meet any one of the following criteria:

- the proposal is of regional and/or statewide significance;
- the proposal has several significant environmental issues or factors, some of which are considered to be complex or of a strategic nature;
- substantial and detailed assessment of the proposal is required to determine whether, and if so how, the environmental issues could be managed; or
- the level of interest in the proposal warrants a public review period.⁴⁶⁸

⁴⁶⁵ Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, p.5988

⁴⁶⁶ *ibid.*, p.5995

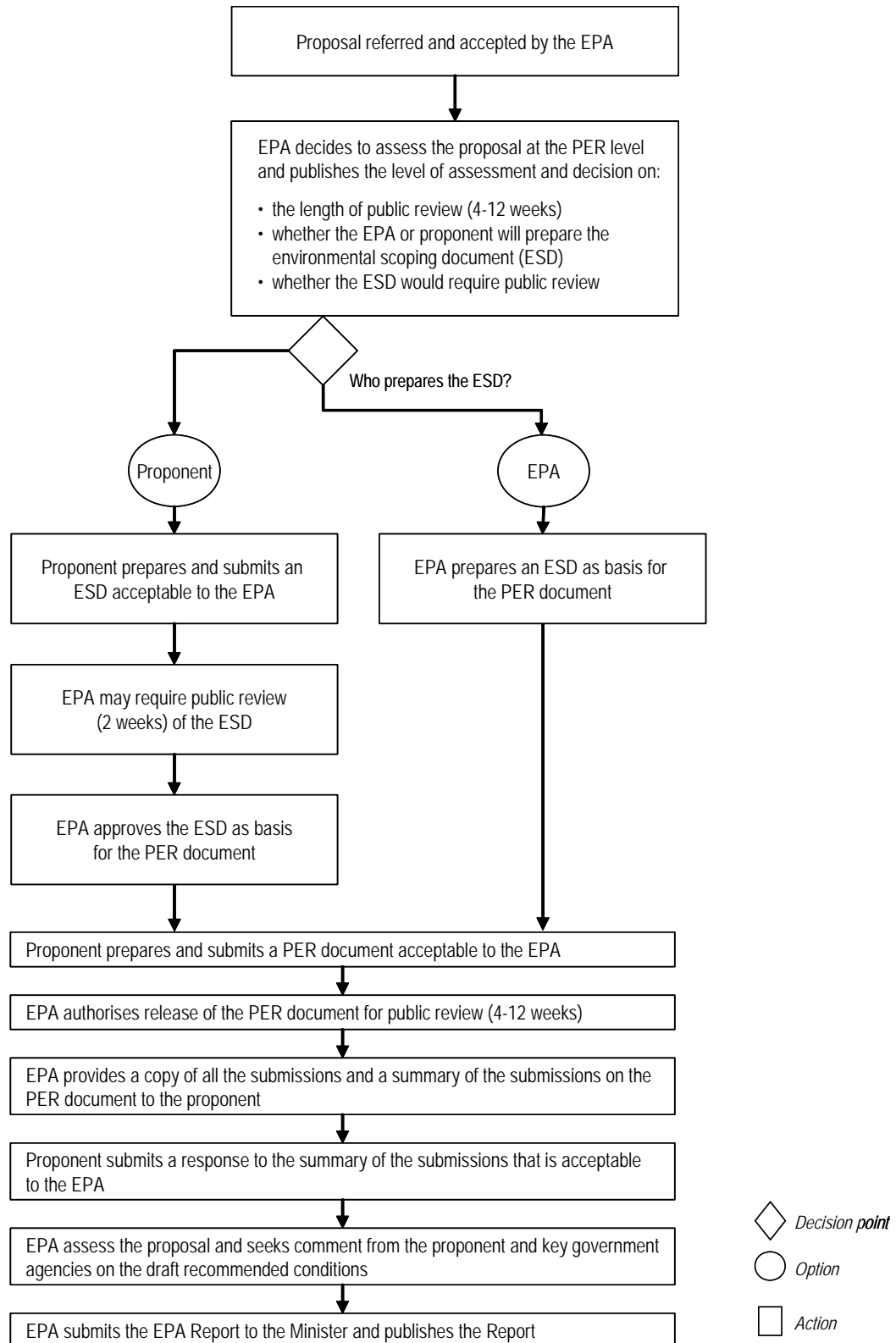
⁴⁶⁷ *ibid.*, p.5995

⁴⁶⁸ *ibid.*, p.5988

The assessment process for public environmental review is outlined in figure 5.3.

Figure 5.3

**Process for public environmental review
(Western Australia)**



Source: Western Australian Government Gazette, Environmental Impact Assessment Administrative Procedures 2010, p.5996

The EPA determines whether the proponent or the EPA will prepare the environmental scoping document, whether the scoping document requires a public review, and the length of the review period.⁴⁶⁹ If the proponent is to prepare the environmental scoping document, the EPA may require the proponent to publicly exhibit the document for two weeks.⁴⁷⁰

The proponent then prepares a public environmental review document, in accordance with the environmental scoping document and the general requirements outlined in the Administrative Procedures.⁴⁷¹ Once approved by the EPA, the public environmental review document is publicly displayed for between 4 and 12 weeks. The length of the public review will be determined by the EPA on a case-by-case basis.⁴⁷²

After public review, the EPA summarises the pertinent issues raised in submissions and provides these to the proponent who is required to provide a written response to the issues.⁴⁷³ Once satisfied with the proponent's response, the EPA assesses the proposal, including all documentation, obtains advice from any other person/s it considers appropriate, and submits its report to the Minister.⁴⁷⁴

Based on the Committee's review of the levels of assessment under the Western Australian and Commonwealth environmental impact assessment frameworks, some of the features that reflect good practice include:

- a range of assessment levels that allows for the broader capture of projects;
- clear demarcation between the different levels of assessment; and
- detailed guidance on the environmental impact assessment documentation required for the assessment of projects at the different levels.

⁴⁶⁹ Office of the Environmental Protection Authority, *Fact Sheet: Public Environmental Review*, p.2

⁴⁷⁰ Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, p.5997

⁴⁷¹ The public environmental review document should contain the following information:

- description of proposal and alternatives considered;
- description of the receiving environment;
- identification of key issues;
- analysis of direct and indirect impacts of the proposal, including cumulative impacts;
- findings of the surveys and investigations undertaken;
- identification of measures to mitigate significant adverse impacts; and/or offsets;
- environmental management program;
- demonstration that the expectations for EIA identified in the Administrative Procedures were addressed;
- demonstration that proposal conforms with relevant environmental policies and standards; and
- details of stakeholder consultation.

Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, p.5998

⁴⁷² Western Australian Government Gazette, *Environmental Impact Assessment Administrative Procedures 2010*, p.5999

⁴⁷³ *ibid.*, p.6000

⁴⁷⁴ *ibid.*, p.5996

5.5 Responsibility for determining the level of assessment

The Committee noted that a key strength of the Western Australian environmental impact assessment framework is that once a project is referred, the EPA determines the level of assessment. Further, the referral is displayed for public comment and the EPA's decision not to assess a proposal is subject to appeal by any person.

In Victoria, the Minister for Planning makes a decision regarding the referral of proposals. As discussed earlier, the Minister determines whether a project will require an EES or not, with or without conditions. The Committee was advised in several submissions that the discretion involved in this step of the EES process is a significant concern.⁴⁷⁵ According to Mr Jessup, 'decisions about what projects require assessment are not made transparently'.⁴⁷⁶ Mr Barton Napier, Principal, Coffey Environments was also critical of the current arrangements and advised the Committee:

*We believe that the problems that arise throughout the conduct of the process really relate to the discretionary powers of the Minister for Planning and the application of those powers, and particularly how political objectives, imperatives and other things influence the decision-making about whether or not an EES is required.*⁴⁷⁷

Chapter four outlined the benefits of having clear criteria for the term 'significant impact', which the Committee believes will contribute to increased transparency in referrals and referral decisions under the Environment Effects Act. However, the Committee is of the view that this stage in the EES process can be further strengthened by transferring responsibility for the referral decision to the Department of Planning and Community Development (DPCD), rather than the Minister for Planning.

Allocating responsibility to the DPCD to determine the level of assessment required, utilising a robust technical and risk-based approach rather than ministerial discretion, may increase transparency, as outlined in chapter three.

Furthermore, a public comment period once a referral is received, which is a feature of the Western Australian and Commonwealth environmental impact assessment systems, will also contribute to a more transparent and open process. This will be further explored in chapter seven.

⁴⁷⁵ For example, refer to: Professor L Godden and Associate Professor J Peel, submission no.54, p.3; Lawyers For Forests, submission no.14, p.2; Glen Eira Environmental Group, submission no.12, p.4; Environment Defenders Office (Victoria), submission no.27, p.9; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission 37, p.4; Mr J Crockett, submission no.7, p.8; Mr B Napier, Principal, Coffey Environments, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.22

⁴⁷⁶ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission 37, p.4

⁴⁷⁷ Mr B Napier, Principal, Coffey Environments, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.22

Accordingly, the Committee recommends:

RECOMMENDATION 5.1

The Department of Planning and Community Development be responsible for determining the appropriate level of environmental impact assessment.

5.6 Proposed levels of environmental impact assessment for Victoria

The introduction of a multi-tiered assessment process in Victoria, to match the assessment method with the level of environmental risk of a proposal, has been discussed in a number of reviews, including the *Environment Assessment Review* (2002)⁴⁷⁸ and the more recent VCEC Report (2009).⁴⁷⁹ As outlined above, the Committee received a number of submissions that supported the recommendations in the *Environment Assessment Review* and the introduction of a multi-tiered assessment process.⁴⁸⁰

In the issues and options paper for the *Environment Assessment Review* (2002), the Department of Infrastructure⁴⁸¹ outlined the options for a suite of assessment processes under the Environment Effects Act.⁴⁸² The levels of assessment recommended by *Environment Assessment Review* were:

- Level 1: Public Environment Report: applies to proposals with potential impacts of regional significance that warrant a more rigorous assessment process than procedures allowable under the Planning and Environment Act.
- Level 2: Environment Impact Statement: directed at projects with complex site-related impacts and/or associated strategic issues of state significance.
- Level 3: Strategic Environment Assessment: designed to deal with strategic proposals or the cumulative impacts of different activities with major environmental, social and/or economic implications.⁴⁸³

It was further suggested that the scoping requirements and public consultation processes should be tailored to each tier of assessment, reflecting the appropriate level of rigour and public scrutiny for the category of assessment and environmental risk of the project.

⁴⁷⁸ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002

⁴⁷⁹ Victorian Competition and Efficiency Commission, *A Sustainable Future for Victoria: Getting Environmental Regulation Right*, final report, July 2009

⁴⁸⁰ For example, refer to: Victorian Planning and Environmental Law Association, submission no.55, p.5; Environment Defenders Office (Victoria), submission no. 27, p.10; Colac Otway Shire, submission no.35 p.3; Lawyers For Forests, submission no.14, pp.1–2; Australian Conservation Foundation, submission no.36, p.1; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.13

⁴⁸¹ The Environment Effects Act was administered by the Department of Infrastructure from 1996 to December 2002, while the planning function was assigned to that department

⁴⁸² Department of Infrastructure, *Environment assessment review: Issues and options, Technical paper*, 2002, pp.30–35

⁴⁸³ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, pp.36–39

The Committee notes that, rather than introducing a tiered system as recommended in the *Environment Assessment Review*, the government simply amended the Environment Effects Act to enable conditions to be set if an EES is not required.⁴⁸⁴

Presenting a slightly different model, the VCEC report (2009) recommended that an additional tier of assessment, between EES and No EES (with or without conditions), should be added to the assessment options available to the Minister under the Environment Effects Act.⁴⁸⁵ The VCEC report stated that this level of assessment should be available to assess projects with lesser environment effects, whilst the EES process should be reserved for projects with higher risks.⁴⁸⁶ However, it was recommended that the no EES option (including no EES with conditions) should be retained.⁴⁸⁷

In response to the VCEC recommendation outlined above, the previous government stated:

*VCEC's recommendation of an 'intermediate tier of assessment ...' has merit. However, this will need to be further considered in light of the current proposal before the government to introduce an impact assessment pathway as part of the reform of the Planning and Environment Act 1987. If this latter pathway is adopted, it is possible that a new 'intermediate' process under the Environment Effects Act 1978 may not be needed.*⁴⁸⁸

This 'impact assessment pathway' refers to proposed reforms to the Planning and Environment Act, which were outlined in the *Draft Planning and Environment Amendment (General) Bill* in 2009. The proposed reforms introduce a new process for the assessment of state significant major developments to be included in Part 9A of the Act.⁴⁸⁹ At present, the Minister for Planning makes decisions on state significant projects by 'calling-in' the project, resulting in the Minister for Planning becoming the responsible authority and therefore, determining the planning approval.⁴⁹⁰ Draft criteria were proposed in a response paper released by DPCD in August 2009.⁴⁹¹ However, the most recent advice received by the Committee is that 'this paper may not reflect current government policy'.⁴⁹²

The aim of the reforms, according to the DPCD's 2009 response paper, is to 'implement a more proactive and transparent process for managing state significant development projects, including who should be responsible for making the decision'.⁴⁹³

The Committee was advised that if the government proceeds with this pathway, the 'Secretary of DPCD would set requirements for project documentation (which would be based on publicly available guidelines or standardised requirements and could take the form of an impact report), as well as for public information and engagement strategies'.⁴⁹⁴ DPCD advised that public comment

⁴⁸⁴ Victorian Government, submission no.40, p.17

⁴⁸⁵ Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.135

⁴⁸⁶ *ibid.*, p.124

⁴⁸⁷ *ibid.*

⁴⁸⁸ Victorian Government response to Victorian Competition and Efficiency Commission's final report, *A sustainable future for Victoria: Getting environmental regulation right*, January 2010, p.5

⁴⁸⁹ Department of Planning and Community Development, *Modernising Victoria's Planning Act, Response paper 4: state significant major development*, August 2009, p.2

⁴⁹⁰ *ibid.*, p.1

⁴⁹¹ *ibid.*, pp.5–6

⁴⁹² Department of Planning and Community Development, correspondence received, 3 August 2011

⁴⁹³ Department of Planning and Community Development, *Modernising Victoria's Planning Act, Response paper 4: state significant major development*, August 2009, p.1

⁴⁹⁴ Department of Planning and Community Development, correspondence received, 3 August 2011

might be sought in relevant circumstances as part of setting these requirements.⁴⁹⁵ In relation to public participation in the process, the Committee was advised by DPCD:

Following implementation of the public information and engagement strategy, which would include the invitation of public comment, an expert panel would consider the project documentation and submissions and hold a public hearing before providing a report to the Minister.

Transparency and accountability would therefore be established through the setting of documentation requirements within a guidance framework, as well as legislated opportunities for public comment and review by an expert panel.⁴⁹⁶

The Minister's decision would be final.⁴⁹⁷ No third party would be able to appeal the decision.

The Committee notes that the process is currently outlined in the *Modernising Victoria's Planning Act: Commentary on the Draft Bill*.⁴⁹⁸ The Committee was advised by DPCD that a detailed description of the 'impact assessment' process under the Planning and Environment Act is not yet available.⁴⁹⁹

This proposed assessment process is not intended to replace the Environment Effects Act. The DPCD describes the relationship with the EES process as follows:

This process does not substitute for an EES. Where the Minister decides an EES is needed it will still be required. The EES process will be integrated with the Part 9A assessment process including the consultation, submission and review panel steps. The Minister's assessment of the EES will inform the decision under Part 9A.⁵⁰⁰

However, a project that does not require an EES, but meets the criteria for 'state significant development', may be subject to the proposed 'impact assessment' process under the Planning and Environment Act.⁵⁰¹ The assessment would then inform the Minister for Planning's decision regarding the approval of proposals under the Planning and Environment Act.

The Committee received a range of views regarding the role of the Minister for Planning in state significant development. Aventus Consulting supports the model of the Minister for Planning as the planning authority for projects that required an EES.⁵⁰² Aventus Consulting described the 'confusion and delays' that were encountered during the process of requesting that the Minister for Planning become the planning authority for a proposed amendment to a planning scheme.⁵⁰³

⁴⁹⁵ *ibid.*

⁴⁹⁶ *ibid.*

⁴⁹⁷ Department of Planning and Community Development, correspondence received, 26 July 2010; and Department of Planning and Community Development, *Modernising Victoria's Planning Act, Response paper 4: state significant major development*, August 2009 p.3

⁴⁹⁸ Department of Planning and Community Development, *Modernising Victoria's Planning Act: Commentary on the Draft Bill*, December 2009

⁴⁹⁹ Department of Planning and Community Development, correspondence received, 26 July 2010

⁵⁰⁰ Department of Planning and Community Development, *Modernising Victoria's Planning Act, Response Paper 4: State Significant Major Development*, August 2009, p.4

⁵⁰¹ Department of Planning and Community Development, correspondence received, 26 July 2010

⁵⁰² Aventus Consulting, submission no.58, p.6

⁵⁰³ *ibid.*

Colac Otway Shire stated that the state significant major development assessment process proposed under the Planning and Environment Act 'may assist in setting up an intermediary process of environmental assessment which is sufficiently transparent and rigorous yet avoids the full commissioning of the process required under the Environment Effects Act'.⁵⁰⁴ The Shire did however recommend the development of criteria for state significant major developments to ascertain what level of assessment may be required.⁵⁰⁵

The Energy Supply Association of Australia also endorsed the proposed reforms to the Planning and Environment Act to develop clear criteria for determining state significant developments.⁵⁰⁶

In contrast, in some submissions received, concern was expressed regarding the ministerial discretion involved in categorising projects as of state significance.⁵⁰⁷ The Mornington Peninsula Shire advised in its submission:

*The thrust of the Victorian government response to the VCEC report and the proposed changes to the Planning and Environment Act is to 'internalise' and 'centralise' decision-making on major projects of state significance, including the government's own major projects. While this is often justified in terms of 'rationalising' the processes, it also raises risks of reduced transparency and reduced checks and balances in the exercise of Ministerial discretion.*⁵⁰⁸

As outlined in chapter four, the Committee is of the view that criteria must be clear for projects that require assessment under the Environment Effects Act, to ensure that referral decisions are based on transparent decision-making. Whilst the Committee understands the objective for the alternative assessment pathway proposed under the Planning and Environment Act reforms, the Committee believes that environmental assessment should be formalised under Victorian environmental impact assessment legislation to ensure the consistency and uniformity of assessment processes.

The Committee received evidence suggesting that too few projects trigger assessment under the Environment Effects Act, outlined in chapter four. A broader capture of projects for assessment under the Environment Effects Act was supported in a range of submissions.⁵⁰⁹ The Committee believes that this may be addressed by introducing a lower level of formal assessment under the Environment Effects Act (Level 1) for the assessment of proposals that raise a limited number of significant environmental issues, or impacts of local significance only; and a second level of assessment for proposals with several environmental impacts that require focused investigation, or impacts with regional environmental significance. The highest level of assessment (Level 3) should be required for projects of state significance or very complex environmental issues.

⁵⁰⁴ Colac Otway Shire, submission no.35, p.2

⁵⁰⁵ *ibid.*

⁵⁰⁶ Energy Supply Association of Australian, submission no.32, p.2

⁵⁰⁷ For example, refer to: Glen Eira Environment Group, submission no.12, p.5; Mornington Peninsula Shire, submission no.56, p.4; Blue Wedges, submission no.31, p.14; Environment Institute of Australia and New Zealand, submission no.42, p.16

⁵⁰⁸ Mornington Peninsula Shire, submission no.56, p.4

⁵⁰⁹ Environment Institute of Australia and New Zealand, submission no.42, pp.4–5; Ms N Rivers, Environment Defenders Office, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, pp.31–32; Mr J Crockett, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.39; Mr N Walker, manager, sustainable environment, Hume City Council, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.74

The Committee noted that a lower level of assessment is utilised in Western Australia to assess proposals with potential for adverse environmental impacts of local significance that 'affect a small number of people'.⁵¹⁰ Dr Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University advised the Committee that this assessment method places the onus on proponents to consult with all affected stakeholders early in the process:

*There are lower levels of assessment ... if the proponent gives enough information in their referral they can get an approval straight away without a public review process and they have legally binding conditions attached on their approval. We call it the 'quick yes'. The idea is that the proponent has to demonstrate they have consulted with affected stakeholders, so you only get that level of assessment for things that affect a small number of people — so local interests — and the proponent has to demonstrate that they have consulted. The onus is very much on the proponent to go out there and do that consultation on that issue.*⁵¹¹

The Environment Defenders Office agreed that a lower level of assessment may encourage proponents to consider environmental impacts of their proposals up-front:

*A basic level of assessment — for example, assessment on referral information or assessment on initial information — can be appropriate; it means that proponents will do more work up-front to be able to get into that process and will put more effort into their environmental studies to be able to do that.*⁵¹²

The Committee was advised that a tiered system of assessment may increase efficiencies in the EIA process, as well as ensuring that a broader range of proposals are formally assessed. The Environment Defenders Office stated:

*We believe that all projects that are likely to have a significant impact need to be assessed, not just those major projects that are going to have a significant impact. Having only one level of assessment in Victoria seems to lead to only the most major projects being assessed. If you had a lower level of assessment or two lower levels of assessment, you could have projects that had lesser impacts being assessed at a lower level, with less rigorous requirements for their assessment.*⁵¹³

*... At the federal level and in WA, using those as the examples, a much broader range of projects gets assessed — they just get assessed at a lower level. You do not have an 18-month process to do that; there is quite a clear process; some of them may only take three months. But the importance of having that assessment is that you know the proponent is aware of its environmental impacts.*⁵¹⁴

*... you can have one or two medium-level assessments that have wider public consultation periods, but not necessarily a public hearing, and then a higher level of assessment that does have an actual public hearing where the public can bring evidence. I think three or four levels works well. It means that impacts that can clearly be managed well can still be assessed but assessed quite quickly without having to go through these very long time frames.*⁵¹⁵

⁵¹⁰ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.57

⁵¹¹ *ibid.*

⁵¹² Ms N Rivers, Environment Defenders Office, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.35

⁵¹³ *ibid.*, pp.31–32

⁵¹⁴ *ibid.*, p.34

⁵¹⁵ *ibid.*, p.35

The Committee believes that the introduction of formal levels of assessment, matched to the level of environmental risk of a project proposal, will ensure that a range of proposals undergo formal environmental impact assessment, and could be expected to result in time and cost efficiencies in the EIA process.

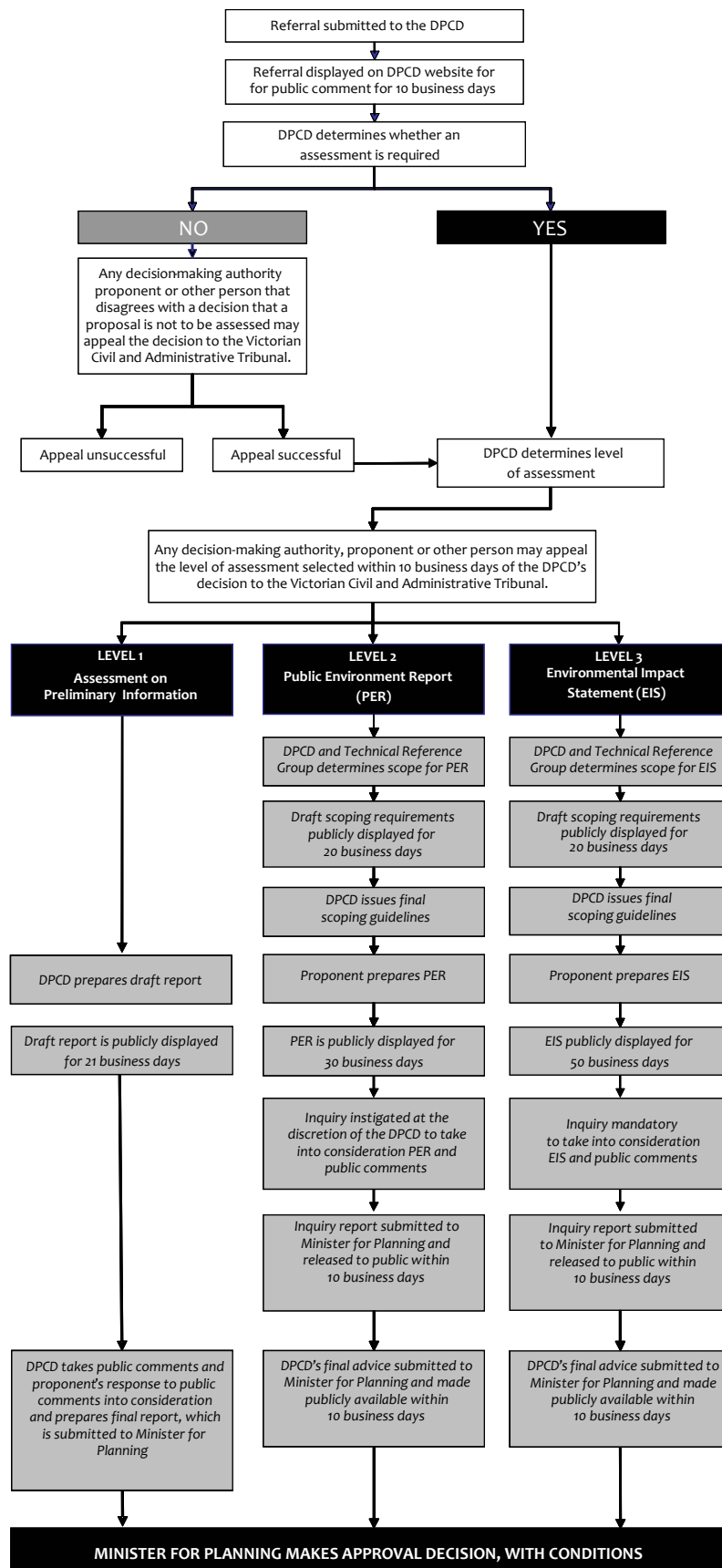
The Committee is of the view that the following levels of assessment should be formalised under Victorian environmental impact assessment legislation:

- Level 1 – Assessment on Preliminary Information;
- Level 2 – Public Environment Report; and
- Level 3 – Environmental Impact Statement.

The Committee recommends that clear legislative guidance be provided regarding the types of projects that would be assessed under each level to provide certainty and transparency for proponents and the community. The methods of assessment, and the types of proposals to which each level would apply, are discussed below and illustrated in figure 5.4.

Figure 5.4

The three proposed levels of environmental impact assessment in Victoria



5.6.1 Level 1 – Assessment on Preliminary Information

The Committee proposes that Level 1, Assessment on Preliminary Information, should apply to proposals with the potential for adverse environmental impacts of local significance. The Committee proposes that this level of assessment apply in the following circumstances:

- the proposal raises a limited number of significant environmental factors, or environmental impacts of local significance, that could be readily managed;
- the proposal is consistent with established environmental policies, guidelines and standards; and
- there is limited or only local interest in the proposal.

The Committee proposes that Assessment on Preliminary Information involve the DPCD preparing a draft report based on the referral information, and any other relevant information requested by the department in order to assess the proposal. This would include providing information that illustrates the proponent has consulted with local and affected stakeholders. The draft report would be placed on public exhibition for 21 business days. The DPCD would consider public comments and submit a final report to the Minister for Planning. The Minister would determine whether the project would proceed or not, and the conditions for its implementation.

The Committee believes that this level of assessment will provide for the assessment of specific environmental impacts, while ensuring that early consultation occurs with the local community. This level of assessment may provide a more timely and efficient environmental impact assessment process for proposals with a low level of environmental risk, as an inquiry may not be required. If the DPCD considers the environmental issues significant enough to warrant an inquiry, the level of assessment would be determined as Level 2 or 3 (as detailed below).

5.6.2 Level two – Public Environment Report

The Committee proposes that Level 2, Public Environment Report, should apply to proposals which meet any of the following criteria:

- the proposal has regional environmental impacts;
- the proposal has several significant environmental issues or factors, some of which are considered to be of a complex or technical nature; or
- there is a high level of public interest in the proposal.

The Committee proposes that assessment under Level 2 would involve the preparation of a Public Environment Report. The DPCD, with the assistance of a Technical Reference Group, would determine the scoping requirements for the Public Environment Report. The draft scoping requirements will be publicly displayed for 20 business days. The DPCD would then issue the final scoping requirements, taking public comments into consideration.

The proponent would be responsible for preparing the Public Environment Report. The draft Public Environment Report, with the DPCD's approval, would be publicly displayed for 30 business days. An inquiry instigated at the discretion of the DPCD would take into consideration the Public Environment Report and public comments. The inquiry report would be submitted to the DPCD. The

department would provide the advice and inquiry report to the Minister for Planning. The Minister would determine whether the project is acceptable or not, and the conditions for its implementation.

5.6.3 Level 3 – Environmental Impact Statement

The Committee proposes that Level 3, Environmental Impact Statement, should apply to proposals where potential exists for adverse environmental impacts of state significance, for example:

- at least one issue of major, or statewide, significance;
- the proposed project affects a broad geographical area;
- very complex or technical issues are raised by the proposed project;
- a high number of statutory approvals under a variety of different legislation are required; or
- there is a very high level of public interest in the proposal.

This level of assessment should ensure that a range of alternatives to and for proposals are considered and assessed, and that coordination between assessment and approvals is considered and integrated where possible, such as public exhibition opportunities.

The Committee proposes that assessment under Level 3 would involve the preparation of an Environmental Impact Statement. The assessment process would include the following stages:

- The DPCD, with the assistance of a Technical Reference Group, would determine the scoping guidelines for the Environmental Impact Statement;
- Draft scoping requirements would be publicly displayed for 20 business days;
- The DPCD would then issue the final scoping requirements, taking into consideration public comments;
- The proponent would then be responsible for preparing the Environmental Impact Statement;
- The Environmental Impact Statement, with the DPCD's approval, would be publicly displayed for 50 business days;
- A mandatory public inquiry would take into consideration the Environmental Impact Statement and public comments;
- The inquiry report and advice from the DPCD would be submitted to the Minister for Planning; and
- The Minister would determine whether the project will proceed or not, and the conditions for its implementation.

The procedural differences between Levels 2 and 3 are:

- Level 3 has a longer public exhibition period (50 business days, compared to 30 business days for Level 2); and
- Level 3 has a mandatory public inquiry (an inquiry is discretionary for Level 2).

Accordingly, the Committee recommends that:

RECOMMENDATION 5.2

The environmental impact assessment legislation be amended to include the following levels of assessment:

- (a) Level 1 – Assessment on Preliminary Information;
- (b) Level 2 – Public Environment Report; and
- (c) Level 3 – Environmental Impact Statement.

The criteria for projects that would be assessed under each level should be set out in the environmental impact assessment legislation.

5.6.4 Assessment under the Planning and Environment Act

The issues and options paper for the *Environment Assessment Review* (2002) proposed the introduction of an Integrated Planning Report (IPR), which could be utilised to assess proposals with local significance.⁵¹⁶ It was suggested in the issues and options paper that this level could be assessed by the local council, rather than the Minister, and guidelines could be developed for integrated assessment within the framework of normal processes under the Planning and Environment Act to guide the local council in the assessment of environmental impacts.⁵¹⁷

In the *Environment Assessment Review*, the advisory committee determined that the Integrated Planning Report did not need to be introduced through the Environment Effects Act. Rather, a more robust application of the existing obligations under the Planning and Environment Act could manage developments that were proposed under this form of assessment.⁵¹⁸ In order to ensure improved operation of these environmental impact assessment procedures under the Planning and Environment Act, the *Environment Assessment Review* supported the development of a Planning Practice Note or a Direction under the Planning and Environment Act.⁵¹⁹

The Committee also supports strengthening existing assessment procedures under the Planning and Environment Act for projects that do not trigger assessment under the environmental impact assessment legislation and accordingly recommends that:

RECOMMENDATION 5.3

The Department of Planning and Community Development develop a Planning Practice Note on environmental impact assessment, to strengthen assessment procedures under the Planning and Environment Act.

⁵¹⁶ Department of Infrastructure, *Environment assessment review: Issues and options, Technical paper*, 2002, p.37

⁵¹⁷ *ibid.*

⁵¹⁸ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.36

⁵¹⁹ *ibid.*

Chapter 6: The scoping stage and quality of environmental impact assessment documentation

Key findings

- 6.1 The scoping of an environmental impact assessment is an important stage in the EIA process as it defines the focus and ultimately the content of the assessment. The broad scoping of an EIA can result in lengthy EIA reports and additional costs and delays. However, a narrow focus can result in important issues being excluded from scrutiny.
- 6.2 A risk-based approach should be taken to EIA scoping however it is under-utilised in Victoria.
- 6.3 There is a lack of clear guidance on the EIA scoping process and implementation of a risk-based approach to environmental impact assessment. Comprehensive guidelines on the scoping process may provide proponents and the community with increased certainty regarding the risks to be assessed; increase the transparency of the process; shape community expectations and substantially reduce the costs and improve the timelines associated with EIA scoping.
- 6.4 There is a mismatch between the expectations of some community groups, that alternatives to a project will routinely be examined, and the requirements set out in the ministerial guidelines. Clearer guidance is required to inform community expectations on how alternatives are assessed.
- 6.5 Technical Reference Groups (TRGs) play an important role in identifying key issues in the scoping stage and ensuring environmental impact assessment documentation meets scoping requirements. However there is a need for detailed guidance on the role and responsibility of agency and departmental representatives on a TRG to address concerns regarding the quality and timeliness of advice provided by TRGs.
- 6.6 Statutory time frames for the scoping stage of an environmental impact assessment may increase certainty for stakeholders and reduce delays for proponents. The previous government identified strengthening the accountability for achieving target timelines, including a 50 business day limit for developing Environment Effects Statement (EES) scoping requirements, as a key priority.
- 6.7 There is currently a lack of existing databases on ecosystems, species and other ecological processes underpinning the EIA process. There is also a lack of a consistent approach towards ecological impact assessments.

- 6.8 There is a perception that the advice prepared by consultants who are contracted by the proponent may be biased in favour of the proponent. The credibility of the environmental impact assessment process can be affected by this perception. The Victorian environmental impact assessment legislation may be enhanced with the inclusion of penalties for the provision of false and misleading information.

6.1 Introduction

The scope of an Environment Effects Statement (EES) is the set of matters to be investigated and documented in an EES. Once the Minister for Planning determines that an EES is required, he or she issues scoping requirements for the project proposal.⁵²⁰

The scoping of an EES is a critical stage of the process. As stated in the *Environment Assessment Review* (2002):

*... because it results in the production of guidelines for the focus of studies and the content of the environmental impact statement. It is very important that scoping is undertaken in a rigorous and consultative manner so that all relevant issues are identified, and that these issues are ranked in terms of their potential to result in significant environmental impacts. If scoping is not undertaken in a proper manner, the remainder of the environment assessment process will be adversely affected, particularly if key issues to be addressed in the studies and documentation have not been adequately identified.*⁵²¹

The Committee was advised of a range of views regarding the scoping requirements of the current EES process. Striking a balance between the level of detail and technical information required for EIA documentation was a key issue for both proponents and community groups involved in the process. The Committee was advised that the broad scoping of an EIA can result in lengthy EIA reports and additional costs and delays.⁵²² Other submissions indicated that a narrow focus can result in important issues being excluded from formal scrutiny.⁵²³

This chapter will examine the current scoping process under the Environment Effects Act, including: the risk-based approach, assessment of alternatives, the role of the Technical Reference Groups, and the lack of statutory time frames. This chapter also examines issues regarding the quality of the EES documentation.

⁵²⁰ Department of Sustainability and Environment, *Ministerial Guidelines for assessment of environmental effects under the Environment Effects Act 1978*, June 2006, p.13

⁵²¹ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.43

⁵²² For example, refer to: Environment Institute of Australia and New Zealand, submission no.42, p.5; Coffey Environments, submission no.19, p.8; GHD, submission no.17, p.1; Transpacific Industries Group Ltd, submission no.47, p.2; Aventus Consulting, submission no.58, pp.2–3; Cement, Concrete and Aggregates Australia, submission no.46, pp.2, 9; Energy Supply Association of Australia, submission no.32, p.2; Mr J Crockett, submission no.7, pp.13–14

⁵²³ For example, refer to: Municipal Association of Victoria, submission no.5, p.1; Mr N Rankine, submission no.9, pp.1–2; Environment Defenders Office (Victoria), submission no.27, pp.9–10; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission 37, p.3; Port Phillip Conservation Council, submission no.15, p.9; Blue Wedges, submission no.31, pp.9, 12; Watershed Victoria, submission no.10, p.2

The chapter addresses, in part, term of reference a) which requires the Committee to investigate 'any weaknesses in the current system including poor environmental outcomes, excessive costs and unnecessary delays encountered through the process and its mechanisms'; b) 'community and industry consultation under the Act'; and d) 'how better environmental outcomes can be achieved more quickly and predictably and with a reduction in unnecessary costs'.

6.2 The scoping stage

The ministerial guidelines outline the scoping process as follows:

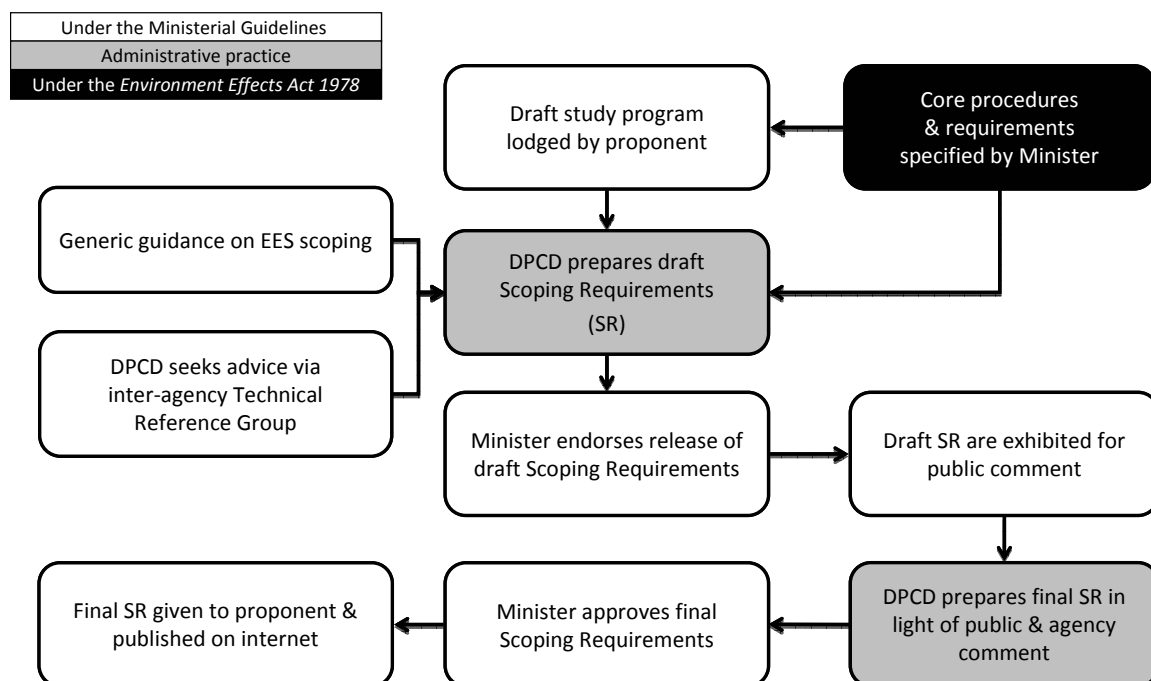
- the proponent should provide a preliminary list of issues to be investigated and a draft study program to inform the scoping of the EES;⁵²⁴
- a Technical Reference Group is established to advise the Department of Planning and Community Development (DPCD) on matters that should be included in the scoping requirements for an EES;
- the Minister will consider the draft study program, as well as advice from relevant agencies and authorities, and issue draft scoping requirements;
- the draft scoping requirements are released for public comment for a minimum of 15 business days; and
- scoping requirements will normally be finalised by the Minister for Planning within 15 business days of the close of the public comment period and made available on the DPCD's website.⁵²⁵

The DPCD described the scoping stage in figure 6.1 below.

⁵²⁴ No further detail is provided in the ministerial guidelines as to the content of the draft study program. At the public hearing on 3 May 2010, Mr Jeff Gilmore advised the Committee that a draft study program sets out the proponent's intended investigations of relevant issues. Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.3

⁵²⁵ Victorian Government, submission no.40, pp.10–11; Department of Sustainability and Environment, *Ministerial Guidelines for assessment of environmental effects under the Environment Effects Act 1978*, June 2006, pp.13–14

Figure 6.1 Current process – EES scoping stage



Source: Department of Planning and Community Development, briefing to the Environment and Natural Resources Committee – Melbourne, 27 June 2011

The ministerial guidelines state that scoping requirements can be amended during the preparation of an EES if substantive technical clarifications are needed, significant changes to a project proposal occur or unforeseen and significant issues are identified.⁵²⁶ The proponent will be consulted before the changes are made.⁵²⁷

6.2.1 A risk-based approach

In relation to the contents of an EES, the ministerial guidelines state that the content of an EES will be guided by the scoping requirements set for each project by the Minister, following advice from the department.⁵²⁸ The guidelines indicate that scoping requirements and EES documentation should be prepared with regard to the principles of a systems approach and proportionality to risk.⁵²⁹ A systems approach:

*... involves the consideration of potentially affected environmental systems and interacting environmental elements and processes. This will enable potential interdependencies to be identified, helping to focus relevant investigations and identify opportunities to avoid, mitigate or manage adverse effects.*⁵³⁰

⁵²⁶ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.13

⁵²⁷ *ibid.*

⁵²⁸ *ibid.*, p.14

⁵²⁹ *ibid.*

⁵³⁰ *ibid.*

A risk-based approach should be adopted in the assessment of environmental effects so that suitable, intensive, best practice methods can be applied to accurately assess those matters that involve relatively high levels of risk of significant adverse effects and to guide the design of strategies to manage these risks.⁵³¹ Simpler or less comprehensive methods of investigation may be applied to matters that can be shown to involve lower levels of risk.⁵³²

The Committee was advised by DPCD that consultant reports on best practice approaches to implementing risk- and outcome-based approaches to environmental assessment have been prepared.⁵³³

The Committee notes that in Western Australia, the EPA is increasingly adopting a risk-based approach to scoping and preparing environmental impact assessments. Dr Angus Morrison-Saunders, Senior Lecturer in Environmental Assessment, Murdoch University, advised the Committee that the EPA's move to a risk-based approach to assessment has resulted in the scoping process being 'greatly enhanced'.⁵³⁴ Mr Doug Koontz, Chairman, Environment and Water Policy Committee, Association of Mining and Exploration Companies Inc, advised the Committee that in Western Australia:

*The process allows that once a proponent puts forward a proposal there is a certain amount of stakeholder consultation — stakeholders including government agencies — that goes on. You go through what is becoming more and more the risk-based approach to decide what the key issues are to a project and how you are going to address those issues. You go into a scoping exercise, which again is becoming more and more risk based, to determine the key factors that are going to be important to address. With any proposal, particularly the mining proposals, you probably have three or four factors that are of medium and high environmental significance.*⁵³⁵

The benefits of risk-based scoping of environmental impact assessments and avoidance of what is described as 'scope-creep' were common themes in written submissions from industry. Industry explained that targeted and focused environmental impact assessments resulted in time and cost saving benefits.⁵³⁶

The Environment Institute of Australia and New Zealand (EIANZ) supports a risk-based approach to scoping, however, advised that it is under-utilised:

⁵³¹ *ibid.*

⁵³² *ibid.*

⁵³³ Department of Planning and Community Development, correspondence received, 3 August 2011

⁵³⁴ The EPA announced in March 2009 that it was going to move to a risk-based assessment and it started to trial processes with two large projects in Western Australia. Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.64

⁵³⁵ Mr D Koontz, Chairman, Environment and Water Policy Committee, Association of Mining and Exploration Companies Inc, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.214

⁵³⁶ For example refer to: GHD, submission no.17, p.1; Transpacific Industries Group Ltd, submission no.47, p.2; Cement, Concrete and Aggregates Australia, submission no.46, p.2 and Energy Supply Association of Australia, submission no.32, p.2

This approach should ideally require the proponent to undertake a detailed risk assessment for the project, which should then be used as the basis for decisions about the scope of the EES i.e. only significant risks are addressed in the subsequent scope agreed to by the Panel and the Minister. The Environment Institute of Australia and New Zealand notes a tendency on behalf of the government to err on the side of caution such that the Terms of Reference are often stretched out in scope to include all possible issues rather than focussing the assessment on significant risks.⁵³⁷

Further, the EIANZ believes that it is important to undertake a risk-based approach early in the EES process and in a transparent manner:

The current process lacks adequate guidance to a uniform approach to undertaking a project risk assessment. Beginning the risk assessment early in the process ensures appropriate scoping of the EES document and provides assurance that contentious issues (such as downstream or indirect impacts such as greenhouse gas emissions) are addressed in a transparent and consistent manner. Public availability of this information is also likely to impact positively on the public's perception of a project, particularly in regard to transparency of the scoping and assessment process.⁵³⁸

Coffey Environments, a consulting firm that prepares EES documentation on behalf of proponents, advised the Committee that a weakness in the current EES process is 'scope-creep', which refers to scoping requirements that are too broad.⁵³⁹ Coffey Environments advised that:

Not one of the 80 or so impact statements (as EESs or under other names) in our experience has ever raised more than five or six important issues — and most a lot less than that. The explicit prioritisation of the EES scope to focus on the important issues would be a worthwhile inclusion in an EES scope.⁵⁴⁰

Coffey Environments provided some examples of project proposals that highlight this point (table 6.1).

⁵³⁷ Environment Institute of Australia and New Zealand, submission no.42, p.5

⁵³⁸ *ibid.*

⁵³⁹ Coffey Environments, submission no.19, p.8

⁵⁴⁰ *ibid.*

Table 6.1 The small number of big issues: Coffey Environments

Basslink	<ul style="list-style-type: none"> • Power line routing: protect trees or protect views? • Shore crossing design • Marine corrosion of offshore infrastructure
Hazelwood West Field	<ul style="list-style-type: none"> • Road and river diversions • Health and amenity impacts during construction • Regional groundwater • Rehabilitation and closure
Channel Deepening	<ul style="list-style-type: none"> • Post-dredging bay habitat and ecological processes recovery • Short-term impacts on commercial interests and recreation • Contaminated spoil management
Murray Basin Mineral Sands	<ul style="list-style-type: none"> • End use of the land and the integration of progressive rehabilitation into the mining sequence to achieve the end use • Water management • Mallee fowl conservation • Employment and business development • Road traffic and safety
Shaw River Power Station	<ul style="list-style-type: none"> • Location, pipeline routes and river crossings • Air quality and noise • Tie-in to existing water infrastructure • Road traffic and safety • Competition for workers and housing

Note: Plus the project substantiation in every case

Source: Coffey Environments, submission no. 19, p.9

Aventus Consulting advised the Committee that an additional specialist study had to be prepared for their client's project proposal based on a single submission received on the draft scoping requirements. Aventus Consulting stated:

Although the project's lead environmental consultant had discussed the technical and environmental merits of this issue at length with the relevant government personnel prior to its inclusion in the Final Scoping Requirements, outlining why it was not an issue of materiality, the DPCD included the issue in the Final Scoping requirements anyway. As a result, an additional specialist study was commissioned, with the results concluding that the issue had no material environmental or social impacts. This was more time and expense incurred by the project for an issue that basic science dictated was not worthy of assessment (the EPA also informally concluded as much prior, to the study being commissioned).⁵⁴¹

⁵⁴¹ Aventus Consulting, submission no.58, p.2

Whilst Aventus Consulting believed that 'the concerned citizen had every right to raise the issue in his submission,' Aventus Consulting stated that it should be the role of the DPCD to 'guide the process' based on 'scientific reasoning'.⁵⁴²

In contrast, several submissions, including from the Municipal Association of Victoria and community groups, advised that sometimes scoping requirements are too narrow and, as a result, do not reflect all the potential environmental risks.⁵⁴³ For example, the Environment Defenders Office discussed the limited scope of the EES for the Victorian Desalination Project:

*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, completely undermining the rigour of the assessment process and the independent role of the inquiry panel.*⁵⁴⁴

Mr Brad Jessup, Teaching Fellow, College of Law, Australian National University, advised the Committee that the scoping requirements for the Hazelwood Mine Extension Project were limited by the Minister for Planning to exclude emissions resulting from the combustion of the coal from the Hazelwood power plant, even though it was a significant concern to the community, as outlined in chapter five.⁵⁴⁵

The Committee believes that the scoping requirements for the three different levels of EIA recommended by the Committee – Assessment on Preliminary Information (Level 1), Public Environment Report (Level 2) and Environmental Impact Statement (Level 3) should be determined by the DPCD, as administrators of the EIA legislation, in consultation with proponents and other key stakeholders. A risk-based approach should be adopted.

The Committee is of the view that final scoping requirements should be issued by the DPCD, rather than the Minister for Planning, in order to address concerns relating to ministerial discretion in the scoping stage, outlined above. The Committee believes that scoping requirements should be determined utilising a robust technical and risk-based approach rather than ministerial discretion.

According to the EIANZ, 'the most significant delays to the EES process are created during periods where Ministerial sign-off is required'.⁵⁴⁶ The EIANZ believe the process could be streamlined by delegating some of this responsibility to the DPCD.⁵⁴⁷ Therefore, in addition to reducing discretion in the scoping stage, providing the DPCD with the authority to issue scoping requirements may also increase efficiency.

⁵⁴² *ibid.*, pp.2–3

⁵⁴³ For example, refer to: Municipal Association of Victoria, submission no.5, p.1; Mr N Rankine, submission no.9, pp.1–2; Environment Defenders Office (Victoria) Ltd, submission no.27, pp.9–10; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.3; Blue Wedges, submission no.31, p.9,12; Colac Otway Shire, submission no.35, p.3; Watershed Victoria, submission no.10, p.2

⁵⁴⁴ Environment Defenders Office (Victoria) Ltd, submission no.27, pp.9–10

⁵⁴⁵ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.3

⁵⁴⁶ Environment Institute of Australia and New Zealand, submission no.42, p.7

⁵⁴⁷ *ibid.*

Accordingly, the Committee recommends that:

RECOMMENDATION 6.1

The scoping requirements of an environmental impact assessment be issued by the Department of Planning and Community Development.

The *Environment Assessment Review* made a number of recommendations on the scoping stage of the environmental impact assessment process including that scoping should be informed by general guidelines, but the scoping requirements should be customised for individual projects.⁵⁴⁸

Improved guidance on the EES scoping process was recommended by a number of submissions to this inquiry. The Committee notes that the absence of legislated guidance for the scoping stage of the EES process was also raised as a weakness of the environmental impact assessment framework.⁵⁴⁹

According to the Victorian Government's submission, the government plans to provide best practice advisory notes, to assist the scoping process, the role of technical reference groups and the conduct of inquiries.⁵⁵⁰ The most recent advice received from the DPCD states:

*While some new advisory notes have been drafted, their release has been deferred in light of the policy uncertainty arising from the current ENRC inquiry. Draft advisory notes on consultation by proponents during EES preparation, risk-based EES scoping, technical reference groups, assessment of cultural heritage, and environmental management frameworks have been prepared. Others are planned.*⁵⁵¹

The Committee believes that based on the evidence it has received, there would be significant merit in the timely development of scoping guidelines for the three levels of EIA recommended in this report. Comprehensive guidelines for the scoping process could:

- provide proponents and the community with increased certainty regarding the risks to be assessed as part of the EIA process;
- increase access to and the transparency of the environmental impact assessment process;
- shape community expectations of the EIA process; and
- substantially reduce the costs and improve the timelines associated with EIA scoping.

⁵⁴⁸ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.43

⁵⁴⁹ For example, refer to: Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, attachment 4, p.3; Glen Eira Environment Group, submission no.12, p.5; Environment Defenders Office (Victoria) Ltd, submission no.27, p.10; Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, p.3

⁵⁵⁰ Victorian Government, submission no.40, p.22

⁵⁵¹ Department of Planning and Community Development, correspondence received, 3 August 2011

Accordingly, the Committee recommends that:

RECOMMENDATION 6.2

Scoping guidelines be developed for the three new levels of environmental impact assessment including:

- (a) objectives for the scoping process, consistent with best practice principles;
- (b) implementing a risk-based approach to environmental impact assessment;
- (c) requirements for the assessment of relevant alternatives, including consultation with key stakeholders in the early stages of project planning; and
- (d) specifying the role of departments and agencies in Technical Reference Groups.

6.2.2 Assessment of alternatives

The United States Council of Environmental Quality has identified alternatives as the 'heart' of environmental impact assessment and according to Steinemann, the quality of a decision depends on the quality of alternatives from which to choose.⁵⁵² A first step in the EIA process is 'alternatives development': the creation, identification and selection of alternatives that will be considered for detailed analysis in EIA.⁵⁵³

The International Association for Impact Assessment regards the examination of alternatives as part of an environmental impact assessment process, as constituting best practice.⁵⁵⁴ An examination of alternatives will establish the preferred or most environmentally sound and benign option for achieving proposal objectives.⁵⁵⁵ Similarly, the Environment Institute of Australia and New Zealand advised the Committee:

It is an acknowledged principle of good environmental impact assessment that the proposed project be considered in comparison to alternatives. The extent of this consideration is not fixed, neither in principle nor in legislation. Alternatives which offer only a partial solution to the problem must be addressed, and the assessment must contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences of all alternatives, including consideration of the 'no project' alternative. This no-project scenario should be considered as part of the strategic risk assessment process.⁵⁵⁶

⁵⁵² A Steinemann, 'Improving alternatives for environmental impact assessment', *Environmental Impact Assessment Review*, 2001, vol.21, pp.3–4

⁵⁵³ *ibid.*

⁵⁵⁴ International Association for Impact Assessment (IAIA) *Principles of Environmental Impact Assessment Best Practice*, 1996, p.4

⁵⁵⁵ *ibid.*

⁵⁵⁶ Environment Institute of Australia and New Zealand, submission no.42, p.10

The ministerial guidelines describe assessment of relevant alternatives as a matter commonly investigated and documented in an EES.⁵⁵⁷ The ministerial guidelines state that 'an EES will not normally be required to document alternatives *to* a project proposal, as opposed to alternatives *for* a project'.⁵⁵⁸ According to Steinemann:

*Alternatives should, ideally, consider a range of 'alternative approaches' to accomplish the objectives of the action, not only 'alternative designs'. An alternative approach is a functionally different way to achieve the objectives; an alternative design is a functionally similar way. For example, an alternative approach to the construction of a highway would be the expansion of public transit. An alternative design would be a different alignment of the highway. As another example, an alternative approach to the spraying of pesticides to control weeds would be an integrated pest management program. An alternative design would be a different type of pesticide ... alternative designs, rather than alternative approaches usually dominate the set of alternatives that are considered for the environmental impact statement.*⁵⁵⁹

However, in Victoria according to the ministerial guidelines an EES should include an investigation of the environmental effects of relevant alternatives for a project, such as:

- siting and layout alternatives, where some flexibility is available in terms of site suitability and availability;
- design or process alternatives where one of several approaches could be applied;
- scale of the project, where a project's magnitude might be varied in response to demand or constraint factors;
- timing of project activities; and
- staging of project development, where construction, operational or other factors might necessitate or provide an option for staged implementation.⁵⁶⁰

Mr Trevor Blake, Chief Environment Assessment Officer, DPCD, advised the Committee that:

*There may be quite extensive examination of alternatives prior to referral of a project to determine the need for an EES. So the scope and robustness of those investigations of alternatives can be important considerations as to whether an EES is needed.*⁵⁶¹

Evidence to the inquiry and submissions received set out a number of concerns regarding the consideration of alternatives as part of the environmental impact assessment process. The Committee believes that there is a disparity between the expectations of some community groups, that alternatives to a project will routinely be examined, and the requirements set out in the ministerial guidelines. This is discussed further in chapter seven. For example, Mr Neil Rankine advised the Committee that the exclusion of alternative water supply options from the scope of the

⁵⁵⁷ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.15

⁵⁵⁸ *ibid.*

⁵⁵⁹ A Steinemann, 'Improving alternatives for environmental impact assessment', *Environmental Impact Assessment Review*, 2001, vol.21, pp.3–4

⁵⁶⁰ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.15

⁵⁶¹ Mr T Blake, Chief Environment Assessment Officer, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.7

Victorian Desalination Plant project assessment, 'very much lowered the communities' expectations for best outcomes'.⁵⁶² Also referring to the Victorian Desalination Plant project EES, Watershed Victoria stated:

*... the current EES process provided no opportunity for independent assessment of alternative methods to supply water to Melbourne. The Minister ensured that the EES was only able to assess the effects of the proposed Victorian Desalination Plant in its proposed form; within the limited terms of reference which precluded assessments including alternative supply options.*⁵⁶³

Mr Jonathon Crockett, consulting engineer, believes that one of the reasons the EES process in Victoria has 'failed to deliver' environmental improvements is the 'inadequate' scope of EESs, and in particular the 'lack of real investigation of alternatives to proposals'.⁵⁶⁴ Blue Wedges recommended in its submission that at least one feasible alternative to a proposal be fully investigated.⁵⁶⁵ The ministerial guidelines state that the only alternative to a project proposal that will routinely be described in detail in an EES is the no project scenario.⁵⁶⁶ However, Blue Wedges and Glen Eira Environment Group recommended that an assessment of the do nothing option should be mandatory under the environment impact assessment legislation.⁵⁶⁷

The process of considering alternatives is regarded as divisive by Coffey Environments. The submission cited several examples where advice on route and location alternatives 'splits communities and makes enemies of friends'.⁵⁶⁸ Coffey Environments stated:

*Public debate over tactical project alternatives, where the ultimate decision creates winners and losers in the community, has a social impact way beyond any theoretical justification. The requirement should be dropped from EES scopes of work.*⁵⁶⁹

Other commentators highlighted that alternatives are considered too late in the environmental impact assessment process. For example, Associate Professor Ian Thomas, Discipline Head of Environment and Planning at RMIT commented that the EES process is no longer 'given the chance to ensure examination of the significant issues and alternatives' because environmental impact assessment is 'increasingly added into the decision processes once a decision to build something has been made'.⁵⁷⁰

The *Environment Assessment Review* (2002) suggested that advice regarding the investigation of feasible alternatives should be provided during the referral stage of the environmental impact assessment process. Subsequently, it was recommended that:

⁵⁶² Mr N Rankine, submission no.9. p.2

⁵⁶³ Watershed Victoria, submission no.10, p.3

⁵⁶⁴ Mr J Crockett, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.39

⁵⁶⁵ Blue Wedges, submission no.31, p.8

⁵⁶⁶ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, pp.13, 15

⁵⁶⁷ Blue Wedges, submission no.31, p.8; Glen Eira Environment Group, submission no.12, p.5

⁵⁶⁸ Coffey Environments, submission no.19, p.9

⁵⁶⁹ *ibid.*, p.3

⁵⁷⁰ Associate Professor I Thomas, RMIT, submission no.20, p.2

*Proponents should either refer or discuss the referral of their project with key stakeholders in the early stages of project planning and decision [making] so as to enable key environmental issues and potential alternatives to be taken into account prior to project design and location being finalised.*⁵⁷¹

The Committee endorses this recommendation. The Committee also recommends that guidelines better define what is meant by the term 'relevant alternatives' and provide clear requirements for the assessment of alternatives.

RECOMMENDATION 6.3

The scoping guidelines developed for the three new levels of environmental impact assessment define the term 'relevant alternatives' and provide clear requirements for the assessment of both alternatives for and alternatives to a project.

The Committee believes that alternatives *to* a project, in some instances, could be more appropriately assessed through strategic environmental assessment, which will be further discussed in chapter ten.

6.2.3 Technical Reference Groups

The appointment of a Technical Reference Group (TRG), by the Department of Planning and Community Development (DPCD) to provide advice to the proponent and the department on the preparation of the EES was introduced as part of reforms to the EES process in 2006. A TRG's membership is drawn from representatives of government agencies, regional authorities and local councils, that have a statutory or policy interest in the project.⁵⁷²

The primary role of a TRG, according to the ministerial guidelines is to advise:

- the department on matters that should be included in the scoping requirements for an EES;
- the proponent on the need for and adequacy of technical EES studies in terms of their consistency with good practice standards of methodology and analysis; and
- the department on the technical adequacy of the proposed EES, as well as the adequacy of the response to relevant matters.⁵⁷³

The TRG provides advice and assistance to the proponent on:

- required statutory approvals;
- relevant policy provisions and related information;
- study briefs and methodologies for key studies;
- availability of relevant data sets and research;

⁵⁷¹ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.80

⁵⁷² Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.14

⁵⁷³ *ibid.*

- conformity of the proposal and EES studies with policy and statutory requirements;
- design and implementation of the proponent's consultation plan; and
- adequacy of EES specialist study reports.⁵⁷⁴

Submissions and evidence received by the Committee highlighted the benefits of TRG involvement in the EES process. For example, Colac Otway Shire stated in its submission that the introduction of the TRG has improved objectivity in the scoping process. The Council advised the Committee that there has been less criticism of the EES process since the establishment of TRGs.⁵⁷⁵ In addition, Mr Clive Mottram, Manager, Planning Investigations, VicRoads advised the Committee that the involvement of government agency staff and council officers in a TRG is important because there is a great deal of local knowledge that such officers have, and a proponent is able to learn from that knowledge.⁵⁷⁶

However, the Committee also received evidence suggesting that TRGs can cause delays and 'frustration' for proponents.⁵⁷⁷ The concerns expressed to the Committee relate to:

- the failure of regulatory agencies to adequately specify the issues and standards that must be achieved at the scoping stage;⁵⁷⁸
- the failure of regulatory agencies to provide consistent representation of officers able to make decisions at the TRG meetings;⁵⁷⁹ and
- important issues not being raised early enough by the TRGs, and advice being provided too late, leading to cost increases and time delays for the proponent.⁵⁸⁰

Mr Chris Fraser, Executive Officer, Minerals Council of Australia, Victorian Division, advised the Committee that 'junior officers' are sent to TRG meetings, or 'whoever is available on the day', which results in advice being changed later.⁵⁸¹ Mr Fraser stated:

Often you will get a different person at every different hearing... The company has gone and done its EES, presented the EES to the independent panel and at the public hearings senior officials come in and change the advice that was given by the junior officials, which is terribly frustrating and a waste of time and a waste of everyone's money.⁵⁸²

⁵⁷⁴ *ibid.*

⁵⁷⁵ Colac Otway Shire, submission no.35, pp.1–2

⁵⁷⁶ Mr C Mottram, Manager, Planning Investigations, VicRoads, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.91

⁵⁷⁷ For example, refer to: AGL submission no.16, p.1; Minerals Council of Australia, Victorian Division, submission no.28, p.9; Environment Institute of Australia and New Zealand, submission no.42, p.21; Aventus Consulting, submission no.58, p.3

⁵⁷⁸ Minerals Council of Australia, Victorian Division, submission no.28, p.9

⁵⁷⁹ *ibid.*

⁵⁸⁰ Environment Institute of Australia and New Zealand, submission no.42, p.21; Aventus Consulting, submission no.58, p.3

⁵⁸¹ Mr C Fraser, Executive Director, Minerals Council of Australia, Victorian division, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.280

⁵⁸² *ibid.*

The Construction Material Processors Association also emphasised the importance of proponent's receiving authoritative and consistent advice from TRGs:

*Authoritative advice is required from the EES TRG. The TRG is a key instrument in ensuring early and authoritative advice is provided to the proponent. Senior members of government agencies, supported by technical experts, should attend TRG meetings to ensure consistent, appropriate advice is actually provided. This should avoid last minute policy reversals by government agencies and continually shifting objectives that could potentially significantly impact on the project.*⁵⁸³

The Construction Material Processors Association recommended that the TRGs should only consider items included in the original EES scope, to ensure new investigations cannot be easily introduced once the scoping requirements have been finalised.⁵⁸⁴ Cement, Concrete and Aggregates Australia agreed that once the scope has been set for the EES, only the defined studies in the scoping requirements should be considered by the TRG, and that any 'requests for expansion of the scope must be accompanied by factual evidence warranting additional studies'.⁵⁸⁵

While Aventus Consulting described the verbal advice provided by the TRG as useful during an EES process in trying to coordinate and streamline the approvals process required of the various departments, it expressed concern that, in its experience, the TRG process created delays that resulted in significant costs and stress for the project's environment team.⁵⁸⁶ Aventus Consulting advised the Committee that, in its experience, comments were not provided by the TRG in a timely fashion, with several agencies providing them late and insisting on comments being addressed in the Draft EES.⁵⁸⁷ Consequently, Aventus Consulting questioned the need for TRGs, suggesting that input into scoping and advice on technical studies may be better coordinated by a central agency, such as DPCD, on behalf of the proponent, especially if the project was deemed to be of 'state significance'.⁵⁸⁸

The Victorian Competition and Efficiency Commission (VCEC) Report *Getting Environmental Regulation Right* (2009) proposed several reforms to the Environment Effects Act and its processes to reduce uncertainty, delays and costs to business, including ensuring that TRGs function more efficiently.⁵⁸⁹ Mr Jeff Gilmore, Executive Director, Planning Policy and Reform, DPCD advised the Committee that:

*Essentially the department is now in the process of establishing formal memorandums of understanding with each of the other departments and regulatory bodies to ensure that those decision-making processes are all aligned and are indeed aligned with other pieces of legislation and regulation.*⁵⁹⁰

⁵⁸³ Construction Material Processors Association Inc, submission no.44, p.4

⁵⁸⁴ *ibid.*, p.6

⁵⁸⁵ Cement, Concrete and Aggregates Australia, submission no.46, p.3

⁵⁸⁶ Aventus Consulting, submission no.58, p.3

⁵⁸⁷ *ibid.*

⁵⁸⁸ *ibid.*

⁵⁸⁹ Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.XL, pp.134–136

⁵⁹⁰ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.259

The DPCD advised the Committee that 'the new administrative arrangements are intended to drive, in part, more timely and authoritative advice from agencies on key assessment issues'.⁵⁹¹

The Committee was advised in June 2011 that the DPCD has established a Memorandum of Understanding (MoU) with the Department of Sustainability and Environment, Department of Primary Industries, Department of Transport, and the EPA,⁵⁹² in relation to 'coordination of roles and responsibilities for assessment, approval and delivery of major projects'.⁵⁹³ The scope of the MoU is restricted to major projects that are 'deemed to be of state priority on the basis that they are or are likely to be subject to impact assessment processes for which the Minister for Planning is responsible under the Environment Effects Act, the Planning and Environment Act or the Major Transport Projects Facilitation Act'.⁵⁹⁴

Under the MoU, 'parties agree to cooperate in relation to the planning, assessment, approval and facilitation of projects, in order to achieve improved efficiencies and better environmental, social and economic outcomes'.⁵⁹⁵ The MoU facilitates the development of coordination arrangements for identified milestones during the preparation of assessment documentation at which TRG representatives obtain their department's executive authority for key advice, as well as expected time frames. Under the MoU, parties also agree to nominate a senior officer to coordinate and represent their respective inputs to the TRG during the preparation of assessment documentation, including to:

- provide consistent representation and timely, authoritative inputs, in order to avoid the later emergence of new issues or perspectives other than when relevant new information subsequently becomes available; and
- integrate input from all relevant groups within their organisation through appropriate coordination and endorsement, to the extent practicable.⁵⁹⁶

The MoU's also establish a Process Coordinator. Its role is to:

- lead the development of an agreed timeline for the assessment and approval process for the project;
- monitor adherence to the timeline and liaise with the proponent and relevant departments and agencies to ensure the timeline is met, and negotiate and communicate any amendment to both Parties and other relevant departments and agencies; and
- convene a TRG (or equivalent) to coordinate the advice-giving and statutory roles of the Parties as well as other relevant departments, agencies and local governments.⁵⁹⁷

⁵⁹¹ Department of Planning and Community Development, correspondence received, 23 August 2010

⁵⁹² An MoU between DPCD and the Department of Business and Innovation is to be signed shortly

⁵⁹³ Department of Planning and Community Development, *Memorandum of Understanding between the Department of Planning and Community Development and the Department of Primary Industries in relation to Coordination of Roles and Responsibilities for Assessment, Approval and Delivery of Major Projects*, 2011

⁵⁹⁴ *ibid.*, p.2

⁵⁹⁵ *ibid.*

⁵⁹⁶ *ibid.*, p.7

⁵⁹⁷ *ibid.*, pp 6–7

The Committee is of the view that TRGs play an important role in identifying key issues in the scoping stage and ensuring environmental impact assessment documentation meets scoping requirements. The Committee has recommended that guidelines be developed that detail the role of TRGs (recommendation 6.2) and looks forward to their timely development and implementation.

6.2.4 Scoping time frames

The VCEC also recommended establishing negotiated, project-specific time limits for each stage of the EES process, which will be discussed further below.⁵⁹⁸

Industry representatives, community groups and academics expressed concern regarding the absence of statutory time frames for key stages of the EES process, including scoping.⁵⁹⁹ The ministerial guidelines state:

The draft scoping requirements for a project are generally prepared within 20 business days of receiving the required information from the proponent. The draft scoping requirements will then be released for comment by interested parties for a minimum of 15 business days ... Scoping requirements will normally be finalised within 15 business days of the close of the public comment period and made publicly available on the department's website.⁶⁰⁰

The Committee received evidence to suggest that these time frames are not always met.⁶⁰¹ For example the exhibition of draft scoping directions was delayed for the Frankston Bypass Project by the need to wait for accreditation of the EES process under the Commonwealth Environment Protection and Biodiversity Conservation Act. Similarly the exhibition and finalisation of the scoping requirements for the Shaw River Power Station Project was delayed pending the proponent's decision as to whether to refer the project under the Environment Protection and Biodiversity Conservation Act and seek accreditation of the EES process.⁶⁰² These examples provided by the department highlight that the timeliness of the scoping stage is also dependent on external factors such as the federal EIA process.

Some submissions from industry indicated that the lack of statutory time frames creates time delays and increases costs.⁶⁰³ AGL Energy advised the Committee:

We are concerned about the potential time frames and costs associated with the EES process ... There are a number of steps in the process without statutory time periods, including scoping requirements, input from the Technical Reference Group and the inquiry process.⁶⁰⁴

⁵⁹⁸ Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.135

⁵⁹⁹ For example, refer to: Environment Defenders Office (Victoria) Ltd, submission no.27, p.11; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.3; AGL submission no.16, p.1; GHD, submission no.17, p.2; Cement, Concrete and Aggregates Australia, submission no.46, p.2; Construction Material Processors Association Inc, submission no.44, p.5; Transpacific Industries Group Ltd, submission no.47, p.1

⁶⁰⁰ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.13

⁶⁰¹ For example, refer to: Aventus Consulting, submission no.58, p.2; Victorian Government, submission no.40, pp.12, 14

⁶⁰² Victorian Government, submission no.40, pp.12, 14

⁶⁰³ For example, refer to: AGL submission no.16, p.1; Cement, Concrete and Aggregates Australia, submission no.46, p.2; Construction Materials Processors Association, submission no.44, pp.3–5 Transpacific Industries Group Ltd, submission no.47, p.1

Aventus Consulting advised the Committee that the draft scoping requirements for one client's EES were not released for public exhibition for six months.⁶⁰⁵

The Committee acknowledges that the previous government identified strengthening the accountability for achieving target timelines, including a 50 business day limit for developing EES scoping requirements, as a key priority in its response to the VCEC Report.⁶⁰⁶ The previous government indicated that it would evaluate this issue in more depth and introduce changes in 2010.⁶⁰⁷ The Committee agrees that this is an important priority.

The Committee believes that, after receiving the required information from the proponent, 20 business days is appropriate for the preparation of draft scoping requirements, as outlined in the ministerial guidelines. However, the Committee is of the view that scoping requirements for a Public Environment Report and an Environmental Impact Statement should be publicly exhibited for 20 business days (rather than 15 business days) to ensure that stakeholders have an opportunity to review and provide feedback on the scoping documentation. After public review, the Committee agrees that 15 business days is satisfactory to finalise the scoping guidelines. The Committee believes that adherence to the scoping timelines would be considerably improved with their inclusion in EIA legislation.

Accordingly, the Committee recommends:

RECOMMENDATION 6.4

Statutory time frames be introduced for the environmental impact assessment scoping stage as follows:

- (a) draft scoping requirements for a Public Environment Report and an Environmental Impact Statement to be prepared within 20 business days of receiving the required information from the proponent (preliminary list of issues to be investigated, draft study plan and draft consultation plan);
- (b) draft scoping requirements to be released for comment by interested parties for 20 business days; and
- (c) final scoping requirements to be finalised by the Department of Planning and Community Development within 15 business days of the close of the public comment period.

⁶⁰⁴ AGL submission no.16, p.1

⁶⁰⁵ Aventus Consulting, submission no.58, p.2

⁶⁰⁶ Victorian Government response to Victorian Competition and Efficiency Commission's final report, *A sustainable future for Victoria: Getting environmental regulation right*, January 2010, p.5; Victorian Government, submission no.40, p.22

⁶⁰⁷ Victorian Government response to Victorian Competition and Efficiency Commission's final report, *A sustainable future for Victoria: Getting environmental regulation right*, January 2010, p.5; Government of Victoria, submission no.40, p.22

6.3 The quality of Environment Effects Statements

In 2002, the *Environment Assessment Review* noted that there was no formal system of ensuring the quality of environmental impact assessment documentation.⁶⁰⁸ The *Environment Assessment Review* stated that informally, the role of ensuring quality was undertaken by the Department of Infrastructure, with some use of independent peer reviewers, technical advisory groups, or consultative committees.⁶⁰⁹ Many submissions to the 2002 review supported the use of independent peer reviewers to aid stakeholders and decision-makers in appraising environmentally sensitive proposals and providing a second independent technical opinion on complex matters. Some submissions supported the view that the assessing agency (administering the environmental impact assessment process) should be responsible for the preparation of the environmental assessment documentation through the appointment of independent consultants. The review stated that:

*Based on the submissions, there appears to be a perception that, because the consultants preparing an EES are appointed and paid for by the proponent, the advice they prepare will be biased in favour of the proponent. That is, the credibility of studies and therefore of the proposal and the proponent is questioned.*⁶¹⁰

The *Environment Assessment Review* recommended the following:

- the appointment of independent peer reviewers should be considered to review documentation prepared by proponents in relation to contentious issues;
- if the assessing agency determines that the environmental impact assessment document does not adequately address either the scoping guidelines or the findings of the peer review, the documentation should not be publicly exhibited until all deficiencies are addressed; and
- the assessing agency should consider approaching relevant professional organisations to explore the issue of accreditation of practitioners in environmental impact assessment.⁶¹¹

The following procedure is set out in the 2006 ministerial guidelines for ensuring the quality of environmental impact assessment documentation:

- the proponent and its consultants should adopt internal quality assurance procedures. The Minister can specify the quality assurance procedures to be adopted, including the need for expert peer review of any particular matters;
- a Technical Reference Group will review the draft technical studies and draft EES and provide advice to the proponent; and

⁶⁰⁸ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.47

⁶⁰⁹ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.47. Prior to the 2005-06 reforms of the EES process, some EESs had a combined Technical and Community Reference Group established to assist with scoping. Included in this group were members of the community affected by a proposal. The Committee did not receive evidence to support the reinstatement of this group

⁶¹⁰ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.48

⁶¹¹ *ibid.* p.49

- the proponent should seek advice from the Secretary of the DPCD as to the adequacy of the proposed final EES before it is exhibited.⁶¹²

The DPCD advised the Committee that the department will determine whether the EES provides a sufficiently robust assessment of key issues before making a recommendation to the Minister for its exhibition.⁶¹³ Close liaison with key relevant agencies is sometimes appropriate, and, when circumstances have warranted it, the DPCD has occasionally engaged consultant assistance to review particular studies.⁶¹⁴ Written advice may also be given to the proponent identifying any residual concerns that may warrant further attention prior to the inquiry panel.⁶¹⁵

The Committee notes that the commissioning of such extra reports from independent consultants not chosen by the proponent was integral to the outcome of the Traveston Dam proposal in Queensland where the federal environment minister rejected the project.⁶¹⁶ The Committee believes that the agency administering the EIA process should explicitly be given the power to call for extra scientific studies, funded by the proponent. This power could be exercised where the agency concluded that it needed extra information because the information in the EIA was deficient. A statutory provision to this effect should also include that the extra information be released both to the proponent and to the public.

The Committee recommends that:

RECOMMENDATION 6.5

The environmental impact assessment legislation be amended to:

- (a) give the Department of Planning and Community Development the statutory power to call for extra scientific studies if the department considers that it needs extra information, because the information in the environmental impact assessment is deficient;
- (b) the extra information should be released both to the proponent and the public; and
- (c) the proponent should meet the costs of the additional scientific studies.

The ministerial guidelines state that it may be prudent for a proponent to initiate expert peer reviews of EES studies on technically or scientifically complex matters where there may be a range of expert views.⁶¹⁷ The DPCD advised the Committee that proponents are encouraged to follow this guideline.⁶¹⁸ For example, this approach was undertaken in the Hazelwood EES and the Channel Deepening Supplementary EES.⁶¹⁹ In some circumstances, additional steps can be taken by the Minister to address quality issues, such as the appointment of expert peer reviewers by the DPCD,

⁶¹² Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, pp.11, 21

⁶¹³ Department of Planning and Community Development, correspondence received, 23 August 2010

⁶¹⁴ *ibid.*

⁶¹⁵ *ibid.*

⁶¹⁶ T Bonyhady and A McIntosh (eds), *Mills, mines and other controversies: The environmental assessment of major projects*, 2010, pp.273–283

⁶¹⁷ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.21

⁶¹⁸ Department of Planning and Community Development, correspondence received, 23 August 2010

⁶¹⁹ *ibid.*

or if the EES provided has been 'significantly deficient' in some respect, the proponent may be asked to provide supplementary documentation, or a Supplementary EES.⁶²⁰

The DPCD advised the Committee that, further to the above:

*... during the next 12 months DPCD intends to review and refine its quality management systems for its impact assessment function under the Environment Effects Act 1978 and the Major Transport Projects Facilitation Act 2009.*⁶²¹

The Committee notes that peer review by experts chosen by the proponent raises many of the same issues of perceived or real bias that arise in relation to the original EIA prepared by the consultants. As a result, it does not offer much of a protection or solution. However, the Committee believes that peer reviewers chosen by the DPCD would address the issue of any perceived or real conflict of interest.

Accordingly, the Committee recommends that:

RECOMMENDATION 6.6

The Department of Planning and Community Development appoint experts to peer review documentation in relation to an environmental impact assessment provided by proponents, where necessary.

The quality of environment effects statements and associated technical studies was raised as an issue in several submissions to the Committee.⁶²² The following key issues were identified in evidence:

- there is a lack of existing databases on ecosystems, species and other ecological processes;⁶²³
- there is a lack of defined standards for ecological data collection and best practice guidance for ecological impact assessment;⁶²⁴
- there is insufficient weight accorded to local knowledge in determining the environmental impacts of proposed projects;⁶²⁵
- the use of peer-reviewed studies and information and studies that have not been peer-reviewed;⁶²⁶ and

⁶²⁰ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.21

⁶²¹ Department of Planning and Community Development, correspondence received, 23 August 2010

⁶²² For example, refer to: Australian Marine Ecology, submission no.29, p.26; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.251; Watershed Victoria, submission no.10, p.2; Birds Australia, submission no.38, p.2

⁶²³ For example, refer to: Australian Marine Ecology, submission no.29, pp.7–9; Friends of Wonthaggi Heathland & Coastal Reserve, submission no.48, p.7; Dr M Edmunds, Director, Australian Marine Ecology, Environment and Natural Resources Committee public hearing – Melbourne, transcript of evidence, – Melbourne, 17 May 2010, transcript of evidence, p.68

⁶²⁴ For example refer to: Australian Marine Ecology, submission no.29, p.6; Birds Australia, submission no.38, p.2

⁶²⁵ For example, refer to: Ms P Hunt, submission no.13, p.12; Friends of Wonthaggi Heathland & Coastal Reserve, submission no.48, p.6

- there are no penalties for the provision of false or misleading information.⁶²⁷

These issues will be examined in detail below.

6.3.1 Lack of environmental data and the need for best practice ecological impact assessment guidelines

The lack of existing databases on ecosystems, species and other ecological processes and the lack of a consistent approach towards ecological impact assessments were highlighted as issues in submissions to the inquiry. Ecological impact assessment forms an integral component of environmental impact assessment and is the process of identifying, quantifying and evaluating the potential impacts of defined actions on ecosystems or their components; and providing a scientifically defensible approach to ecosystem management.⁶²⁸

Dr Matt Edmunds, Director of Australian Marine Ecology, highlighted the paucity of information regarding marine ecosystems, habitats and communities in Victoria.⁶²⁹ Coupled with a lack of case studies on marine ecological responses to disturbances, these gaps in knowledge according to Dr Edmunds, make it difficult to accurately predict or confirm the environmental impacts of future dredging and other marine developments. In Dr Edmunds experience:

*The information used for EESs tends to be disparate pieces of information cobbled together with assumptions it reflects the systems being predicted. In some cases, any attempt at modelling processes is dropped altogether and replaced with expert opinion or gut feelings without any information on linking processes.*⁶³⁰

Dr Edmunds also advised the Committee that the absence of expectations regarding marine ecological impact assessment was a weakness in the current environmental impact assessment process in Victoria:

*The approaches and quality of marine ecological impact assessments in Victoria are inconsistent, with some having very little rigour. This is partly because there has not been any expectation of best practices or enforcement of expectations.*⁶³¹

Dr Edmunds advised that having standards and directions to comply with these standards is not enough and that there has to be assessments or audits against the standards to ensure compliance.⁶³² Dr Edmunds stated that, for example, the general principles of best practice environmental monitoring have been established for decades but rarely implemented. This issue will be examined further in chapter nine.

⁶²⁶ For example, refer to: Dr D Provis, c/- Cardno Lawson Trearlor, submission no.18, p.1; Mr N Easy, Executive General Manager, Channel Deepening Project, Port of Melbourne Corporation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.126

⁶²⁷ Australian Marine Ecology, submission no.29, p.22

⁶²⁸ J Treweek, *Ecological impact assessment*, 1999, in Australian Marine Ecology, submission no.29, p.3

⁶²⁹ Australian Marine Ecology, submission no.29, pp.7–9

⁶³⁰ *ibid.*, p.9

⁶³¹ *ibid.*, p.6

⁶³² *ibid.*

Dr Edmunds recommended that investing in the development of impact assessment tools and models will require less research and development during an impact assessment.⁶³³ He further advised the Committee:

I think the main priority is in terms of investing in strategic information. There are common threads to nearly every marine EES. There are common ecological components — understanding how they work, what are the limits to them, what are the key values of those components, are these sponge gardens old age, do we value them because they are really old ... We really need that strategic information across the state. I think that is a priority and it comes back to the previous witness on developing strategic information first.

That is going to take a while to develop. EESs are still going to come and go in the meantime. I think there needs to be a focus on key ecosystem processes and values and to come up with some key criteria that each EES has to provide information on so that further EESs can build on so that EESs have to have a legacy component to the information they provide.⁶³⁴

Birds Australia also identified the need for clearly defined standards involving data collection of fauna to be used for biodiversity assessment in EESs. Birds Australia suggested that a register of baseline data could be established to facilitate a more standardised and best practice approach to assessing the impacts of developments on biodiversity.⁶³⁵

Discussing their involvement with the preparation of the Victorian Desalination Plant EES, Friends of Wonthaggi Heathland and Coastal Reserve argued that flora and fauna records for the region were insufficient for the purposes of biodiversity assessment and needed to be supplemented by comprehensive surveys.⁶³⁶ The Friends Group related its experience with whale sightings in the near shore Wonthaggi marine area. The group suggested that the technical studies of protected whale species undertaken by the proponent relied on existing data and did not take into account recent sightings of whales. The group also believed that the terms of reference for the assessment were overly narrow, restricted to a consideration of the presence of whales in the study area which did not take into account the wider migratory and behavioural patterns of the animals.⁶³⁷

A concern was also raised by community groups that insufficient time was provided for comprehensive and quantitative scientific studies.⁶³⁸ In its submission, Friends of the Koalas stated:

... in the instance of the Victorian Desalination Project the EES process was rushed and inadequate. An EES should have been conducted for all seasons to ensure a true picture of the status of flora and fauna is obtained. In the instance of the Victorian Desalination Project EES surveys were conducted for a matter of days, and some surveys were completed after the hearing.⁶³⁹

⁶³³ *ibid.*, p.27

⁶³⁴ Dr M Edmunds, Director, Australian Marine Ecology, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.71

⁶³⁵ Birds Australia, submission no.38, p.2

⁶³⁶ Friends of Wonthaggi Heathland & Coastal Reserve, submission no.48, p.7

⁶³⁷ *ibid.*, pp.8–10

⁶³⁸ For example, refer to: Friends of the Koalas, submission no.26, p.1; Watershed Victoria, submission no.10, pp.5–6; Ms P Hunt, submission no.13, p.1

⁶³⁹ Friends of the Koalas, submission no.26, p.1

Watershed Victoria expressed concern regarding 'the apparent lack of due diligence in environmental investigations'.⁶⁴⁰ In relation to the Victorian Desalination Plant project, Watershed Victoria stated that:

*Numerous references are made by consultants referring to 'lack of time' to complete adequate ecological surveys from which to make recommendations. With surveys often incomplete, evidence based decisions and recommendations could not be made.*⁶⁴¹

The Committee notes that the Environment Institute of Australia and New Zealand is developing Ecological Impact Assessment Guidelines.⁶⁴² The guidelines are now a working draft and have been designed to provide a reference on what ecological impact assessment is and how it should be conducted. The Committee believes that the development of such guidelines is important and should translate into many benefits including guiding the development of statutory policy and defining and promoting best practice including the description of existing conditions. However, the Committee also believes that the guidance should be more formally embedded in the environmental impact assessment process.

Accordingly, the Committee recommends that:

RECOMMENDATION 6.7
(a) Standards and expectations of ecological impact assessments are defined in the scoping of individual environmental impact assessments.
(b) The standards set out in environmental impact assessments for ecological impact assessment, are monitored and audited to ensure compliance.

6.3.2 The role of expert opinion in environmental impact assessment documentation and the EIA process

Concern was raised in some submissions regarding the role of expert opinion in the preparation of EES documentation and the EES process.⁶⁴³ Issues raised included the value placed on local knowledge, the use of peer reviewed evidence and independence of advice provided by experts.

Dr Matt Edmunds, Director of Australian Marine Ecology, advised that in his experience involving EES investigations, ecological impact assessment was generally held to a lower standard than other scientific disciplines, and that in some cases rigorous scientific testing was substituted by qualitative opinion.⁶⁴⁴ He also stated:

⁶⁴⁰ Watershed Victoria, submission no.10, p.2

⁶⁴¹ *ibid.*, p.5

⁶⁴² Environment Institute of Australia and New Zealand Ecology, *Ecological Impact Assessment Guidelines: First Working Draft*, May 2010

⁶⁴³ For example, refer to: Swan Bay Environment Association, submission no.21, p.1; Australian Marine Ecology, submission no.29, p.11; Port Phillip Conservation Council, submission no.15, p.5; Blue Wedges, submission no.31, p.6

⁶⁴⁴ Australian Marine Ecology, submission no.29, p.11

*From my experiences, there are frequent misapplications of ecological risk assessments, resulting in misrepresentations of hazards, likelihoods and consequences. Furthermore, risk assessments are treated as the results of robust scientific processes, which they are not, and generally have little scrutiny and testing for accuracy and bias. The EES assessment process is generally over-reliant and over-trusting of risk assessment outcomes.*⁶⁴⁵

In several submissions received by the Committee, it was argued that insufficient weight was accorded to local knowledge in formal EES processes in investigating the environmental impacts of developments.⁶⁴⁶ The Committee was also advised that expert opinion was preferred by panel inquiries investigating an EES, even in cases where much of the evidence was derived primarily from desktop studies.⁶⁴⁷ Port Phillip Conservation Council advised the Committee:

*For example, in the 2007 Channel Deepening Project Supplementary EES (SEES), retired harbourmaster Captain Frank Hart, Blue Wedges' expert on channel depth and safety issues at The Entrance, had conducted extensive research and had intimate knowledge with regard to channel design and ship manoeuvrability. He was concerned enough about the safety aspects of the Entrance channel design that he was willing to appear for no payment. Should that render his advice of lesser value than the expert hired by the proponent to undertake a desktop evaluation of the proponent's design? Contrast this with the Port of Melbourne Corporation's expert witness on bunding toxic sediments, who was a citizen and resident of the USA, and gave evidence via telephone. We are unsure whether he had ever seen the project area. Was his evidence more valuable than that of a 'lay' person who knew Port Phillip Bay intimately?*⁶⁴⁸

Describing their involvement with the Channel Deepening Project, Mordialloc Beaumaris Conservation League, advised that:

*The 2004 EES was remarkable in that community submitters were permitted to question expert witnesses. On occasions community members were able to provide panel members (and the Port of Melbourne Corporation) with relevant local knowledge e.g. fisherman, divers, local residents. On the final day of the EES panel hearing two of the panel members approached community submitters and expressed appreciation (and possible surprise) at the information provided by these submitters. The community then has a valuable role to play and must not be excluded from EES into major projects likely to impact on their environment and health.*⁶⁴⁹

The importance of peer review processes for ensuring transparency and community confidence in the outcomes of the assessment process was highlighted by the DPCD, Coffey Environments and the Victorian Planning and Environmental Law Association.⁶⁵⁰ Mr Nick Easy, Executive General Manager of the Channel Deepening Project of the Port of Melbourne Corporation stated:

⁶⁴⁵ *ibid.* p.14

⁶⁴⁶ For example, refer to: Ms P Hunt, submission no.13, p.12; Port Phillip Conservation Foundation, submission no.15, p.5; Blue Wedges, submission no.31, p.6

⁶⁴⁷ For example, refer to: Port Phillip Conservation Foundation, submission no.15, p.5

⁶⁴⁸ Port Phillip Conservation Council, submission no.15, p.5

⁶⁴⁹ Mordialloc Beaumaris Conservation League, submission no.11, pp.1–2

⁶⁵⁰ For example, refer to: Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.4; Mr B Napier, Principal, Coffey Environments, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.27; Mr C Wren, Victorian Planning and Environmental Law Association, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.300

There were two levels of peer review. The proponent obviously appointed its own consultants to undertake the scientific work. In many of those cases we appointed our own peer reviewer, and then separate to that that work was often reviewed by experts appointed by the Department of Sustainability and Environment, which was part of the independent expert group. The corporation had consultants it employed and who worked for us in delivery of the project. We had our own peer reviewers, and that was subject to further review by the independent expert group. They were chosen and appointed by Department of Sustainability and Environment, not by the port.⁶⁵¹

Some environmental consultants believe that the referencing of peer reviewed evidence over non-peer reviewed evidence in EES documentation is problematic, as peer reviewed evidence may not necessarily be more accurate or valid. Dr David Provis, Senior Principal for Cardno Lawson Treloar, related a recent experience in which he acted for a community group. His evidence, which contradicted peer reviewed evidence prepared for the proponent, was discounted in the final EES report as it had not been peer reviewed. However, in his view the consultant's evidence was flawed as the author had no local knowledge of the study area.⁶⁵²

Concerns were raised regarding the independence of consultants engaged by proponents.⁶⁵³ Port Phillip Conservation Council commented:

At present, expert witness engaged by the proponent are expected to give unbiased advice to the Panel - a difficult position to begin with. Add to this an inherent tendency for a proponent to choose 'experts' with a proven history of consulting to the very industry which would benefit from the project, and a propensity for the proponent to pay experts handsomely, and we have something less than independent. Worse still, the practice of the proponent making contact with all likely experts in the field, thus rendering them unavailable to offer advice to the projects opponents further degrades the likelihood that the Panel will receive expert and unbiased advice.⁶⁵⁴

Dr Matt Edmunds, Director of Australian Marine Ecology, advised the Committee:

Although proponents have a role for actively advocating a project, it is critical that the underlying information about a proposal is sound and trustworthy. It is necessary for ecological impact assessments to be objective, impartial, rigorous and unbiased.

The development of technical information for impact assessment is presently commissioned directly by the proponent. While this has benefits from a 'user-pays' principal, it is deleterious to the perception of impartiality and provides opportunity for bias or advocacy. The proponent is free to shop around to maximise the chances of getting the answers they want, having strong economic (and shareholder) drivers to do this. A third issue is that, despite any best intentions for impartiality, unintentional and subconscious biases can be introduced.⁶⁵⁵

⁶⁵¹ Mr N Easy, Executive General Manager, Channel Deepening Project, Port of Melbourne Corporation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.126

⁶⁵² Dr D Provis, c/- Cardno Lawson Treloar, submission no.18, p.1

⁶⁵³ For example, refer to: Blue Wedges, submission no. 31, p.8; Comments taken from EIANZ survey of its members, Environment Institute of Australia and New Zealand, submission no. 42, pp.16–17; Professor L Godden, Faculty of Law, University of Melbourne, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.100; Port Phillip Conservation Council, submission no.15, p.4

⁶⁵⁴ Port Phillip Conservation Council, submission no. 15, p.4

⁶⁵⁵ Australian Marine Ecology, submission no. 29, pp.22–23

In comparison, VicRoads believed that consultants appointed by proponents maintained independence, explaining that the duty of consultants was to the Panel rather than the proponent, and that the reputation and integrity of environmental consultants were important forces in ensuring that accurate evidence is presented.⁶⁵⁶

Based on submissions from community groups, and consistent with submissions sent to the *Environment Assessment Review* in 2002, the Committee notes there is a perception that the advice prepared by consultants who are contracted by the proponent, may be biased in favour of the proponent. The credibility of the environmental impact assessment process can be affected by this perception. For this reason the Committee believes that penalties for false or misleading conduct should be introduced to the EIA legislation, as discussed below.

6.3.3 Duty to provide accurate information

*The nature of the EES processes, reviews and oversight appears to just assume all information is impartial and valid. There are consultancies that provide scientific as well as advocacy services, to varying degrees. There is little transparency as to what sort of service is commissioned. Scientists are not beholden to a code of ethics or commitment to provide impartiality. Although most I know do or would, there are no assurances that this is the case unless an organisation has its own explicit code of ethics. There is no explicit audit or oversight process. Peer reviewers are likely to detect and report extreme bias, but it is rarely looked for explicitly. Moreover, the most common form of bias is by omission, which is difficult to detect at the reporting phase.*⁶⁵⁷

– Dr Matt Edmunds, Director of Australian Marine Ecology

Currently there are no penalties under the Environment Effects Act for providing false or misleading information to inquiries or in EES documentation. In contrast, the Environment Protection and Biodiversity Conservation Act contains provisions that make it an offence under the Act to provide false and misleading information to obtain an approval or permit, in response to a condition on an approval or permit, or to an authorised officer.⁶⁵⁸ The recent review of the legislation also addressed this issue, as set out below.

⁶⁵⁶ Mr C Mottram, Manager, Planning Investigations, VicRoads, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.92

⁶⁵⁷ Australian Marine Ecology, submission no.29, p.22

⁶⁵⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) division 17

The *Independent Review of the Environment Protection and Biodiversity Conservation Act* and quality of environmental impact assessments

The *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*⁶⁵⁹ made recommendations to improve the quality of environmental assessments prepared in relation to the Act. The Review concluded that existing codes help promote best practice but do not have the ability to enforce minimum standards because consultants are not obliged to abide by them and the range of sanctions associated with breaching the codes may not be strong enough. It also concluded that an effective scheme requires accreditation of specialist streams rather than just generalist consultants, but existing schemes are not yet developed enough to provide this.⁶⁶⁰

The review recommended that a Code of Conduct be developed in consultation with the environmental consulting industry and designed for the specific purpose of improving the adequacy of assessments. The review suggested that the Code could be endorsed by the Council of Australian Governments for use by consultants working in the different assessment regimes across Australia and could be made enforceable under the *Trade Practices Act 1974* (Cth).⁶⁶¹

To complement the Code of Conduct, the review also recommended that the federal environment minister undertake random audits to test for inconsistencies or irregularities in the information provided in referrals and assessments, as well as random audits to test whether the predictions about impacts or the effectiveness of mitigation measures are accurate. The review recommended that the results of the audits be used to inform decisions in relation to enforcing the Code of Conduct and feed back into ongoing improvements to the assessment process.⁶⁶²

The Committee supports these recommendations made in the independent review and notes that the Environment Institute of Australia and New Zealand (EIANZ), Australia's primary industry group for environmental consultants, has established the Certified Environmental Practitioner program, which is Australia's first accreditation scheme for environmental consultants. It includes a public register and a mechanism to deal with third party complaints against a certified member.⁶⁶³ EIANZ has also established a Code of Ethics to which members of EIANZ should adhere.⁶⁶⁴

Source: Environment and Natural Resource Committee, Inquiry into the approvals process for renewable energy projects in Victoria, 2010, pp.208–209

The Committee believes that the Victorian environmental impact assessment legislation may be enhanced with the inclusion of provisions in relation to false and misleading information.

Accordingly, the Committee recommends:

RECOMMENDATION 6.8

The Victorian environmental impact assessment legislation include penalties for the provision of false and misleading information.

⁶⁵⁹ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009

⁶⁶⁰ *ibid.*, pp.152–155

⁶⁶¹ *ibid.*

⁶⁶² *ibid.*

⁶⁶³ Environment Institute of Australia and New Zealand, *Certified environmental practitioner program*, www.cenvp.org, accessed 25 January 2010

⁶⁶⁴ Environment Institute of Australia and New Zealand, www.eianz.org/membershipinfo/eianz-code-of-ethics, accessed 25 January 2010

Chapter 7: Public participation

Key findings

- 7.1 Public participation is a cornerstone of environmental impact assessment. Community engagement and understanding of the process is a key element of an effective, credible and transparent environmental impact assessment framework.
- 7.2 The Environment Effects Act provides no mandatory requirements for when and how the public can participate in the environmental impact assessment process. There are few references to public participation in the ministerial guidelines. Furthermore the guidelines do not provide adequate direction to proponents in relation to the appropriate level of public consultation for a project.
- 7.3 The role of public participation in the environmental impact assessment process is currently unclear, particularly in relation to the extent to which community views are considered throughout the process and how public participation may influence the Minister's assessment. Legislated objectives for public participation in environmental impact assessment may provide the community with a better understanding of the process, and their role in it.
- 7.4 There are many benefits of the proponent engaging with the community early in the project planning process including that the key concerns of the community are identified and addressed. To ensure early participation in the process public participation opportunities need to be defined for the referral and scoping stages of the environmental impact assessment process.
- 7.5 The current environmental impact assessment framework in Victoria would be considerably strengthened with any person having the right to appeal the level of assessment determined by the Department of Planning and Community Development.
- 7.6 The time provided for public exhibition of environmental impact assessment documentation is currently inadequate for allowing community groups to interpret the documentation. Statutory time frames should be established and proportionate to the complexity of the proposed project.
- 7.7 The volume of technical documentation generated by the current environmental impact assessment process is a significant barrier to community groups effectively participating in the process.
- 7.8 The inquiry panel process is subject to a high level of ministerial discretion, including the establishment of an inquiry, the appointment of panel members to an inquiry, the length of time for hearings, who can present at an inquiry and who can cross-examine witnesses.

- 7.9 The transparency of the environmental impact assessment process would be significantly improved with the timely release of the Department of Planning and Community Development's advice provided to the Minister and the report of the inquiry panel.

7.1 Introduction

*If a Minister is going to make a soundly based decision, then his or her deliberations will be much and properly aided by a well-informed constituency of project stakeholders. Moreover, it is for these same reasons that public consultation is in a project proponent's interests. The proponent of a sound project has everything to gain when stakeholders have well informed and clear views on its merits. It is therefore right that EES procedures have evolved to the current point, where stakeholder consultation is both a core component of the EES process and the proponent's responsibility.*⁶⁶⁵

Coffey Environments

*The first thing I think you have to look at when you are looking at the environmental impact assessment systems is what their object is. Generally they break down into two. One is a discursive or a democratic function – that is, they are designed to provide opportunities for the public to participate in decision-making processes. The second one is an environmental objective – that is, they are designed to improve environmental outcomes in a way that increases social welfare.*⁶⁶⁶

*Mr Andrew Macintosh, Associate Director, Centre for Climate Law and Policy
Australian National University*

Public participation has an important role to play in the environmental impact assessment process. Internationally, public participation has long been considered a cornerstone of environmental impact assessment and an essential element of a robust environmental impact assessment process.⁶⁶⁷ Indeed, some commentators question the basic legitimacy of an environmental impact assessment process without meaningful public participation.⁶⁶⁸

Engagement of the community in the Victorian EES process is primarily the responsibility of the proponent, whether that be the government or private sector. For the most part, proponents recognise the importance and value of public participation in the environmental impact assessment process, as illustrated by Coffey Environments' observation above.

⁶⁶⁵ Coffey Environments, submission no.19, p.9

⁶⁶⁶ Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.251

⁶⁶⁷ Sinclair and Diduck, 2009 'Public participation in Canadian environmental assessment' in K S Hanna (ed), *Environmental impact assessment: Practice and participation*, 2nd ed., 2009, p.58; Also refer to: C Wood, *Environmental impact assessment: A comparative review*, 2nd ed., 2003; International Association for Impact Assessment (IAIA) *Public participation: International best practice principles*, August 2006; Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, pp.55–56

⁶⁶⁸ K S Hanna (ed), *Environmental impact assessment: Practice and participation*, 2nd ed., 2009, p.58

This chapter addresses term of reference (b), 'community and industry consultation under the Act'. The Committee has chosen to use the term 'public participation' rather than consultation to describe the involvement of the community in the environmental impact assessment process. The Committee believes that 'participation' encapsulates the active involvement of the public through a range of means such as: information sessions, consultations, stakeholder workshops, deliberative meetings, panel inquiries, periods for public comment and opportunities for appeal.

This chapter will provide some theoretical context to the significance and benefits of public participation including international best practice principles. Current arrangements for public participation are discussed including the community's understanding of participation. Opportunities for enhancing participation will also be examined including early consultation with affected communities, appeal rights, public exhibition of documentation and statutory time frames.

7.2 Best practice principles of public participation

Several submissions highlighted that best practice environmental impact assessment requires that assessment and decision-making processes are participative, and engage all stakeholders early and throughout the process. A number of international guidelines and agreements provide some guidance as to what constitutes best practice.

The International Association of Impact Assessment (IAIA) Best Practice Principles state that environmental impact assessment 'should provide appropriate opportunities to inform and involve the interested and affected publics, and their inputs and concerns should be addressed explicitly in the documentation and decision-making'.⁶⁶⁹ The IAIA *Public Participation Best Practice Principles* state that contemporary public participation practice in environmental impact assessment should be communicative, inclusive, equitable, educative and cooperative.⁶⁷⁰ The principles also emphasise that public participation should be initiated early and sustained, focused on negotiable issues, open and transparent, credible and rigorous.⁶⁷¹ It is recognised that a balanced approach is critical when applying the public participation principles.

In 2007, the International Association of Public Participation (IAP2) produced the *IAP2 Core Values for Public Participation*. The first core value is that 'the public should have a say in decisions about actions that could affect their lives'. Other core values outlined state that public participation:

- includes the promise that the public's contribution will influence the decision;
- promotes sustainable decisions by recognising and communicating the needs and interests of all participants, including decision-makers;
- seeks out and facilitates the involvement of those potentially affected by or interested in a decision;
- seeks input from participants in designing how they participate;
- provides participants with the information they need to participate in a meaningful way; and

⁶⁶⁹ International Association for Impact Assessment (IAIA) *Principles of environmental impact assessment best practice*, 1996, p.3

⁶⁷⁰ P André, B Enserink, D Connor, and P Croal, International association for impact assessment, *Public participation international best practice principles*. Special publication series no.4, August 2006, pp.1–3

⁶⁷¹ *ibid.*

- communicates to participants how their input affected the decision.⁶⁷²

The IAP2 also developed a *Public Participation Spectrum* which is designed to assist with the selection of an appropriate level of participation for community engagement programs.⁶⁷³ The spectrum is also useful in identifying the differences between consultation and other forms of community engagement (see appendix three).

The Committee notes that the United Nations *Aarhus Convention*⁶⁷⁴ plays an important role in directing public participation requirements of environmental impact assessment in European jurisdictions. The objective of the Convention is stated in article one as follows:

*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*⁶⁷⁵

Three core rights – the right to know, the right to participate, and the right of access to justice – form the three pillars of the Convention.⁶⁷⁶ While Australia is not a party to the Convention, it represents a well-recognised international standard.

Similarly, the Rio Declaration on Environment and Development (principle 10) states that:

*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*⁶⁷⁷

In the Australian context the Committee notes that according to the Intergovernmental Agreement on the Environment, all levels of government will ensure that opportunities will be provided for appropriate and adequate public consultation on the environmental aspects of proposals before the assessment process is complete.⁶⁷⁸

⁶⁷² International Association for Public participation, *IAP2 Core values of public participation*, 2007

⁶⁷³ International association for public participation Australasia, IAP2 Spectrum available at www.iap2.org.au/resources, accessed 30 August 2010

⁶⁷⁴ Established at the *United Nations Convention on access to information, Public participation in decision-making and access to justice in environmental matters*, which was adopted on 25 June 1998 in Aarhus, Denmark, at the fourth 'Environment for Europe' Ministerial Conference

⁶⁷⁵ United Nations Convention on access to information, *Public participation in decision-making and access to justice in environmental matters*, ECE/CEP/43, 25 June 1998, article one

⁶⁷⁶ United Nations Environment Program, *Your right to a healthy environment: A simplified guide to the Aarhus Convention on access to information, Public participation in decision-making and access to justice in environmental matters*, 2006

⁶⁷⁷ United National Environment Programme, *Rio Declaration on Environment and Development*, UN Doc A/Conf. 151/26;31ILM 874 (1992) signed June 13, 1992

⁶⁷⁸ Department of Sustainability, Environment, Water, Population, and Communities, *Intergovernmental Agreement on the Environment*, May 1992, schedule 3, 3(x)

7.3 The current environment effects statement process and public participation

In the first major study of environmental impact assessment law in Australia in 1982, Fowler observed that 'overall, the (Environment Effects) Act provides a rather fragile basis for public participation in the assessment procedures' with the only direct reference made in section 9(2) where the 'Minister may at any time invite and receive comments on the environmental effects of any works or proposed works from the public ...'.⁶⁷⁹ The few amendments to the Act since then have not improved this position. Some reference is made to public participation in the ministerial guidelines. According to the guidelines, the form and extent of public participation in the EES process is determined by the Minister for Planning on the basis of the complexity of issues and level of public interest in an EES.⁶⁸⁰ In practice, as outlined in the ministerial guidelines, the following opportunities for public participation generally occur:

- the proponent is required to prepare and implement a consultation plan, which should list stakeholder issues and when and how consultation will occur as part of the EES process;⁶⁸¹
- the proponent should ensure that stakeholders have access to the consultation plan and make hard copies available on request;⁶⁸²
- draft scoping requirements are released for public comment for a minimum of 15 business days;⁶⁸³
- the EES is publicly exhibited for a period of 20 to 30 business days. Public notice of the EES exhibition is required;⁶⁸⁴
- the proponent should respond to any submissions received during the public exhibition by providing a written response that addresses the key issues raised in the submissions;⁶⁸⁵ and
- an inquiry may be appointed to hear public submissions.⁶⁸⁶ If the Minister decides that an inquiry is to be held, the Minister will specify the form and terms of reference for an inquiry, and who shall participate in the inquiry.⁶⁸⁷

The absence of mandatory requirements for public participation during the environmental impact assessment process was raised as a significant issue by stakeholders and it was recommended that opportunities for public participation should be included in the legislation.⁶⁸⁸ For instance the Environment Defenders Office stated that:

⁶⁷⁹ R J Fowler, *Environmental impact assessment, planning and pollution measures in Australia*, 1982, p.42

⁶⁸⁰ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.24

⁶⁸¹ *ibid.*, p.13

⁶⁸² *ibid.*

⁶⁸³ *ibid.*

⁶⁸⁴ *ibid.*, p.23

⁶⁸⁵ *ibid.*, p.24

⁶⁸⁶ *ibid.*, p.21

⁶⁸⁷ *ibid.*, p.25

⁶⁸⁸ For example, refer to: Lawyers for Forests, submission no.14, p.2; Birds Australia, submission no.38, p.3; Mornington Peninsula Shire, submission no.56, p.4; Environment Defenders Office (Victoria), submission no.27, p.18; Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, p.3

... While public involvement is outlined in the supporting guidelines to the EE Act and is ordinarily undertaken, lack of statutory forces leave 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 environment effects statement, release of EES panel reports or of the Minister's own recommendation to the proponent or the public.

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.⁶⁸⁹

The Committee notes that the federal Environment Protection and Biodiversity Conservation Act mandates public participation at the referral and assessment stages, and has an option for further public participation at the decision-making stage as well. At the referral stage, the Minister must publish the referral on the internet, invite written comments on whether the action is a controlled action within 10 business days, and consider those comments when deciding whether the action is subject to the Act.⁶⁹⁰

At the assessment stage, all five of the assessment approaches available under the Environment Protection and Biodiversity Conservation Act involve some form of public participation. In the case of an assessment on preliminary information, for example, the Minister must direct the proponent to publish specified information and invite comments within a specified period. The proponent has to give the Minister a summary of any comments received and a copy of the comments themselves.⁶⁹¹ In the case of an environmental impact statement, the proponent has to publish the draft statement and invite written comments. The final statement has to take account of any comments received and must include a summary of the comments and how they have been addressed. The proponent must give the Minister a copy of the comments along with the final statement.⁶⁹²

The Minister can also elect to engage in further consultation at the decision-making stage. The Minister has the discretion to publish a proposed decision for public comment before he or she decides whether to approve an action and what conditions to impose.⁶⁹³

The Committee recognises the need for environmental impact assessment legislation to define public participation during key stages of the assessment process in order to increase certainty for both proponents and the community, strengthen public confidence and enhance transparency and credibility.

⁶⁸⁹ Environment Defenders Office (Victoria), submission no.27, p.18

⁶⁹⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss. 74(3), 75(1A)

⁶⁹¹ *ibid.*, ss.95–95B

⁶⁹² *ibid.*, ss.103–104. See also ss.93(3A)–(5) (assessment on referral information), ss.98–99 (Public Environment Report) and ss.108, 110, 122 (public inquiry)

⁶⁹³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 131A

Accordingly it recommends that:

RECOMMENDATION 7.1

The environmental impact assessment legislation be amended, based on best practice principles, to define opportunities for public participation at key stages of environmental assessment including the referral, scoping, public exhibition and inquiry panel stages; and specify that the Minister for Planning must consider such public comment.

The Committee was also advised by the Environment Institute of Australia and New Zealand (EIANZ) that the ministerial guidelines do not provide adequate direction to proponents in relation to the appropriate level of public consultation for a project, noting that some proponents engaged in unnecessarily elaborate consultation processes while for others public consultation was either very limited, or conducted in a manner which increases the risk of poor public perceptions of the project and/or proponent.⁶⁹⁴ The development of further guidance on community consultation was subsequently recommended:

Very little guidance exists to steer developers towards 'best-practice' methods of public consultation. Many proponents still believe that the public meeting is the best way to deliver information. In most cases, this is not the case. The EIANZ notes that the International Association of Public Participation (IAP2) could be asked to provide further guidance on community consultation to supplement guidance provided to proponents. The IAP2 have already provided similar guidance to the Victorian EPA.⁶⁹⁵

The Committee acknowledges the government's role in ensuring that public participation meets best practice standards.

Accordingly the Committee recommends that:

RECOMMENDATION 7.2

Best practice guidelines for public participation in the environmental impact assessment process are developed.

7.4 Enhancing public participation in environmental impact assessment

Some community groups and individuals expressed frustration with their experience of community consultation in the EES process, believing that their views were not properly considered in recommendations formed by inquiry panels or in the Minister's final assessment.⁶⁹⁶ Some community

⁶⁹⁴ Environment Institute of Australia and New Zealand, submission no.42, p.10

⁶⁹⁵ *ibid.*

⁶⁹⁶ For example, refer to Swan Bay Environmental Association, submission no.21, p.2; Friends of the Koalas, submission no.26, p.1; Ms P Hunt, submission no.13, p.1; Ms K Neave, submission no.30, pp.1–2; Bendigo and District Environmental Council, submission no.4, p.2; Blue Wedges, submission no.31, p.1

groups and individuals felt that although they had expended significant time, energy and resources on participating in the EES process, their efforts had little impact on the overall outcomes.⁶⁹⁷

The key issues raised in evidence to the Committee in relation to public participation in the current EES process include:

- provisions for public participation in the environmental impact assessment process are not mandatory, and are subject to the Minister's discretion;⁶⁹⁸
- there is a lack of meaningful opportunities for input at key stages of the process, including early consultation in the project design, referral and scoping stages;⁶⁹⁹
- the public are expected to review, understand and respond to large volumes of environmental impact assessment documentation and technical studies in short time frames;⁷⁰⁰
- there is a stark difference between proponent's access to legal representation, expert review and advice and that of the community;⁷⁰¹
- there are no third party referrals;⁷⁰² and
- there are no appeal rights available for proponents or the public.⁷⁰³

These issues are discussed in further detail below. The Committee's proposed opportunities for public participation, compared to the current process, are outlined in figure 7.1.

⁶⁹⁷ For example, refer to Swan Bay Environmental Association, submission no.21, p.2; Friends of the Koalas, submission no.26, p.1; Ms P Hunt, submission no.13, p.1; Ms K Neave, submission no.30, pp.1–2; Bendigo and District Environmental Council, submission no.4, p.2; Blue Wedges, submission no.31, p.1; Macedon Ranges Residents Association, submission no.24, p.2

⁶⁹⁸ For example, refer to: Lawyers for Forests, submission no.14, p.2; Birds Australia, submission no.38, p.3; Environment Defenders Office (Victoria), submission no.27, p.18; Mornington Peninsula Shire, submission no.56, p.3; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, pp.4–5; Mr Jonathon Crockett, submission no.7, p.8; Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, p.3

⁶⁹⁹ For example, refer to: Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.4; Environment Institute of Australia and New Zealand, submission no.42, p.11; Blue Wedges, submission no.31, p.3; Environment Defenders Office (Victoria), submission no.27, p.18

⁷⁰⁰ For example, refer to: Ms E McKinnon, Solicitor, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.35; Municipal Association of Victoria, submission no.5, p.1; Swan Bay Environment Association, submission no.21, p.1; Blue Wedges, submission no.31, p.4; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.254; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.5

⁷⁰¹ For example, refer to: Ms E McKinnon, Solicitor, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.35; Port Phillip Conservation Council, submission no.15, p.7; Blue Wedges, submission no.31, p.6; Save Bastion Point Campaign, submission no.43, p.5; Dr D Provis, c/- Cardno Lawson Treloar, submission no.18, p.1

⁷⁰² For example, refer to: Merri Wetlands Protection Group, submission no.8, pp.1–2; Port Campbell Community Group, submission no.51, p.1

⁷⁰³ For example, refer to: Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, pp.3–4; Cement Concrete and Aggregates Australia, submission no.46, p.2; Construction Material Processors Association, submission no.44, p.4

Figure 7.1 Current and proposed opportunities for public participation in the environmental impact assessment process

Current public participation opportunities		Proposed public participation opportunities
	Pre-referral	<ul style="list-style-type: none"> Early consultation with affected stakeholders encouraged by DPCD.
<ul style="list-style-type: none"> Proponents are required to submit a consultation plan with their referral documentation which outlines consultation conducted to date and any proposed future plan. 	Referral	<ul style="list-style-type: none"> DPCD displays all referrals on its website upon receiving a referral; and 10 business day public comment period for stakeholders to comment on whether the proposal should be assessed and if so, at what level of assessment.
	Referral decision	<ul style="list-style-type: none"> DPCD referral decision (no assessment required, or the level of assessment if assessment is required) can be appealed by the proponent, or any person; and Public participation plan to be prepared by the proponent and endorsed by DPCD. The public participation plan is to be made available on the DPCD website.
<ul style="list-style-type: none"> Proponents are required to prepare and implement a consultation plan. Once the plan is finalised it will be published on the DPCD website; and Draft scoping requirements are released for public comment for a minimum of 15 business days. 	Scoping	<ul style="list-style-type: none"> Preparation of draft scoping requirements should involve key affected stakeholders; and 20 business days public comment period on the draft scoping guidelines (to be made available on the DPCD website).
	Preparing EIA documentation	
<ul style="list-style-type: none"> EES released for 20–30 business days for public comment. 	Public review of EIA documentation	<ul style="list-style-type: none"> Level 1: Public exhibition of the DPCD draft report for 21 business days; or Level 2: Public exhibition of the Public Environment Report for 30 business days; or Level 3: Public exhibition of the Environmental Impact Statement for 50 business days; and any independent peer review report should be simultaneously placed on public exhibition to inform the public.
<ul style="list-style-type: none"> Public may be invited to present submissions or cross-examine witnesses. 	Inquiry panel (for PER and EIS)	<ul style="list-style-type: none"> The terms of reference for the inquiry placed on public exhibition with the Public Environment Report or Environmental Impact Statement document so that the comments that are received can be taken into account before the DPCD finalises the terms of reference; Requirement for inquiry to hear and review public submissions on the Public Environment Report, instigated at the discretion of the DPCD, and mandatory inquiry for Environmental Impact Statement; and Proponent addresses all pertinent issues raised in submissions and responds in writing to the DPCD and inquiry panel members.
	Making an assessment	

7.4.1 Community understanding of participation in the environmental impact assessment process

The Committee is of the view that the role of public participation in the environmental impact assessment process is currently unclear. This issue was discussed in relation to alternatives in chapter five. Concerns were raised by community groups and individuals regarding the extent to which their views were considered throughout the process and the extent to which their participation could influence the Minister's assessment.

Mr Brad Jessup, Teaching Fellow, College of Law, Australian National University, and Mr Barton Napier, Principal, Coffey Environments, advised the Committee that much of the frustration experienced by community groups, in the context of government projects, derived from the perception that they could influence the final assessment and approval of such projects through the EES process, when the government has already decided that the projects would go ahead. Mr Napier stated that many of the crucial matters, including the decision to proceed with the project, had already been determined by government in the case of state significant projects or projects that are in the national interest (which he referred to as Class A projects):

By the time it comes into the public domain, the framework of the project is largely settled, so we are tinkering around the edges. The fundamental decision about whether it will be here or over there or in this place or that place has already been resolved. We believe we disingenuously put before the community a perceived opportunity to influence where a project will be built or along what alignment it will be built because there are a number of fundamental factors which drive where and how a project will be built.⁷⁰⁴

Examples provided to the Committee include the government having acquired land before an EES is prepared or exhibited, and the terms of reference of an inquiry panel being restricted, thereby limiting consideration of alternative options to the preferred form of development.⁷⁰⁵ Watershed Victoria advised in its submission that the terms of reference for the Victorian desalination plant EES:

... were narrow and precluded evaluation of alternative means to secure water, alternative sites, alternative technology from the standard described reference project, carbon emissions and effect on migratory species. From there, the EES was unlikely to significantly influence the outcome, which had already been decided: the project would proceed.⁷⁰⁶

In its submission, Coffey Environments suggests that the public should debate the legitimacy (to what extent does the development proposal serve the interest of Victoria?) and the competence (how well has the project been planned and designed and how credible are its impact predictions, its safeguards and its representation of the people affected and their views?) questions in sequence, not at the same time, as debating both at the same time can detract from important issues and result in unintended consequences for the community.⁷⁰⁷ Coffey Environments describes an example of the Basslink Interconnector project, in which the Victorian community believed that it had a chance to

⁷⁰⁴ Mr B Napier, Principal, Coffey Environments, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.23

⁷⁰⁵ Colac Otway Shire, submission no.35, p.3

⁷⁰⁶ Watershed Victoria, submission no.10, p.8

⁷⁰⁷ Coffey Environments, submission no.19, pp.9–10

block the project so declined to discuss realignments and project optimisation with the proponents.⁷⁰⁸ By the time the community realised that the project was going to go ahead regardless, it was too late in the project to make adjustments to the route.⁷⁰⁹

Coffey Environments suggested that this problem 'can be remedied by little more than a better understanding of what an EES really is and the exercise of already existing ministerial discretion to exclude projects, for which an EES is not suited'.⁷¹⁰ As a result, Coffey Environments suggested it would be better to proceed in two distinct stages.

*Projects that are deemed by government to be in the overriding national interest require the exercise of ministerial discretion, so that they are assessed in separate sequential steps: first, to test the national interest credentials (if necessary and often it will not); and then to test how the project will be implemented.*⁷¹¹

Coffey Environments notes that the EES framework 'may or may not be suited to this function'.⁷¹² It suggested that the first question of 'if' could be addressed through strategic impact assessment. Strategic assessment will be discussed in chapter ten.

Mr Jessup advised the Committee that the community's perception that they can influence the final assessment decision stems from a misunderstanding of the purpose of environmental impact assessment in Victoria and the role of public participation in the process. He stated:

*... participation in the process would be stronger and more meaningful if the community understood the EES process. From my research it is clear that the community did not understand the Channel Deepening Project process. Overwhelmingly the community did not understand that the EES process is not an approval process and that it is not process that can halt a project. It is, instead, a purely political process ... A small number of the community members who opposed the Channel Deepening Project explained that they would not have participated as much as they did if they had understood the process more clearly before they began their engagement with the process. When the process became clear to them they saw it as less valuable.*⁷¹³

The Committee believes that best practice guidelines for public participation, defined opportunities and requirements for public participation at key stages in the environmental impact assessment process, and legislated procedures for the inquiry process may provide the community with a better understanding of the process, and the influence that their participation may achieve.

⁷⁰⁸ *ibid.*, p.10

⁷⁰⁹ *ibid.*

⁷¹⁰ *ibid.*, p.6

⁷¹¹ *ibid.*, p.3

⁷¹² *ibid.*

⁷¹³ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.6

7.4.2 Early participation

Early engagement with affected communities has been identified as best practice.⁷¹⁴ The *Environment Assessment Review* noted that consultation at the pre-referral, referral and scoping stages is considered to be a wise and appropriate course of action on the part of the proponent to ensure all key environmental issues are identified as early as possible and to ensure that proponents have an understanding of the issues that are most important to the affected community.⁷¹⁵

Elliott and Thomas describe the current arrangements for public participation in Victoria as follows:

... 'official' public participation occurs mainly around the midpoint of the EIA process. The public does not have the opportunity to contribute to the assessment (other than through comments on the EES/EIS) or to comment on the assessment when it is published. However, a practice has developed where proponents have occasionally sought comment on the proposed contents of the EES, providing the public with reasonably early information about proposals.

The Victorian EIA procedures are similar to others in that the levels of participation provided are to inform the public about [the] environmental effects of a proposal, and allow the opportunity to comment on the EIS/EES produced, rather than involving the public in the development and design of the proposal at an early stage.⁷¹⁶

The absence of formal requirements for early public consultation during the environmental impact assessment process was raised by some submitters as a notable weakness of the current Victorian framework.⁷¹⁷ The Environment Institute of Australia and New Zealand (EIANZ) advised the Committee:

By the time an EES goes to public hearing, many individuals and organisations have formed a strong (often negative) view of a project. The public hearing process often serves to satisfy many of the initial objectors. The EIANZ believe that many of these concerns could have been addressed at an earlier stage in the process. This situation is amplified by the fact that many of the staff in DPCD involved on a project are seen to be 'invisible' during the EES process, which often results in individuals holding off on their enquiries until the panel hearing.⁷¹⁸

⁷¹⁴ International Association for Impact Assessment (IAIA) *Public Participation: International best practice principles*, August 2006

⁷¹⁵ Environment Assessment Review Advisory Committee, *Report of the Environment assessment Review Advisory Committee*, 2002, p.52

⁷¹⁶ M Elliott and I Thomas, *Environmental impact assessment in Australia: Theory and practice*, 2009, p.87

⁷¹⁷ For example, refer to: Blue Wedges, submission no.31, p.3; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.4; Environment Defenders Office (Victoria), submission no.27, p.18; Environment Institute of Australia and New Zealand, submission no.42, p.11; Ms E McKinnon, Solicitor, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.36

⁷¹⁸ Environment Institute of Australia and New Zealand, submission no.42, p.11

A number of submissions supported early consultation in the environmental impact assessment process.⁷¹⁹ The Committee recognises that there are many benefits to early community engagement, including ensuring that the key concerns of the community are identified and subsequently addressed in the environmental impact assessment documentation and the community understands the project proposal. The Committee believes that the best practice guidelines (recommendation 7.2) should promote early engagement with affected communities.

Public comment on referrals

The Committee notes that public involvement is encouraged in the early stages of the assessment through third party referral and public comment opportunities under the environmental impact assessment framework in Western Australia. All proposals referred to the EPA (WA) are publicly advertised enabling community input, for seven days, into the decision as to which level of assessment, if any, will be conducted. Public comment on referrals is invited through an online comment form. The EPA require that succinct reasons are given for any recommendations.⁷²⁰

Similarly, under the Environment Protection and Biodiversity Conservation Act, members of the public are invited to comment within 10 business days on whether the action is a controlled action and should be assessed under the Act.⁷²¹ Referrals are publicly displayed on the website of the Department of Sustainability, Environment, Water, Population and Communities.

In order to increase transparency in the environmental impact assessment framework in Victoria, the Committee recommends that the public be invited to comment on whether a project should be assessed under the environmental impact assessment legislation. Accordingly, there should be a public comment period of ten business days for any person to comment on whether a project should be assessed and under what level of assessment. The Department of Planning and Community Development must then consider the public comments in formulating its referral decision. All referrals should be publicly displayed on the department's website.

The Committee also believes that the recommendations outlined in chapters four and six in relation to public participation opportunities during the referral and scoping stages will significantly strengthen the environmental impact assessment process.

⁷¹⁹ For example, refer to: Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.4; Environment Defenders Office (Victoria), submission no.27, p.18; Blue Wedges, submission no.31, p.3

⁷²⁰ Environmental Protection Authority (WA), www.epa.wa.gov.au, accessed 2 August 2011

⁷²¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s.74(3)

Accordingly, the Committee recommends:

RECOMMENDATION 7.3

The environmental impact assessment legislation is amended to require:

- (a) the public notification of all referrals, to be displayed on the website of the Department of Planning and Community Development, and
- (b) a public comment period, on whether a project should be assessed and the level of assessment, of 10 business days for all referrals.

Consultation plans

The preparation of consultation plans by proponents is an important part of the environmental impact assessment process because they publicly and transparently identify the opportunities for public participation. According to the ministerial guidelines, proponents must prepare a consultation plan:

A draft [consultation] plan, together with a preliminary listing of stakeholder issues, should be provided to the department for consideration. The department will advise the proponent on the refinement of the plan so that it provides for effective consultation. Once the plan is finalised, it will be published on the department's website. The proponent should ensure that potential stakeholders have access to information about the consultation plan and make copies of the plan available on request. There may be a need to provide access to information (in a summary form) in relevant languages other than English, depending on the cultural backgrounds of social groups potentially affected by a project.⁷²²

Mr Allan Cowley, Manager for Strategic Planning for Mornington Peninsula Shire Council, noted that the ministerial guidelines provide important guidance to proponents on the need for a consultation plan to be developed and approved at the early scoping stage of an EES. However, he recommended that these aspects of the guidelines should be translated into statutory obligations, along with requirements for public notice of all referrals and public exhibition of the proposed scope of an EES (or strategic environmental assessment), both with opportunities for public comment.⁷²³

To ensure early and ongoing participation in the process, the Committee is of the view that consultation (participation) plans prepared by the proponent, in accordance with best practice guidance on public participation in environmental impact assessment, should be mandatory and include opportunities for public participation at key stages of the assessment process. The Committee believes that the consultation (participation) plan should be approved by the Department of Planning and Community Development and made publicly available on the department's website.

⁷²² Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.13

⁷²³ Mornington Peninsula Shire, submission no.56, pp.3-4

Accordingly, the Committee recommends that:

RECOMMENDATION 7.4

The environmental impact assessment legislation is amended to require:

- (a) proponents to prepare public participation plans for a Public Environment Report (Level 2) and an Environmental Impact Statement (Level 3); and
- (b) public participation plans to be made available on the Department of Planning and Community Development's website.

7.4.3 Appeals regarding the level of assessment

The Committee noted in chapter four that under the Western Australian environmental impact assessment system, any person has the right to appeal the EPA's decision not to assess a project within 14 days of the date of the EPA's decision being placed on the public record.⁷²⁴

The *Independent Review of the Environment Protection and Biodiversity Conservation Act* (2009) also recommended that decisions regarding the assessment 'approach' should be open to review under this legislation.⁷²⁵

Professor Lee Godden and Associate Professor Jacqueline Peel from the University of Melbourne advised the Committee that legal safeguards for civic participation in the Victorian environmental impact assessment process were necessary to keep an appropriate check on executive power of the government.⁷²⁶ Professor Godden and Associate Professor Peel recommended that third party review should be available at the referral stage, enforceable within the legal system either through judicial review, or preferably through merits review.⁷²⁷

As recommended in chapter four, the Committee believes that any decision-making authority, proponent or person that disagrees with a decision that a proposal is not to be assessed, should be entitled to appeal the decision to the Victorian Civil and Administrative Tribunal. The Committee also believes that the current environmental impact assessment framework in Victoria would be considerably strengthened with the introduction of appeals regarding the level of assessment set by the Department of Planning and Community Development for a proposal.

⁷²⁴ *Environmental Protection Act 1986* (WA), s 100(1)(a)

⁷²⁵ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.259 (recommendation 49)

⁷²⁶ Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, p.3

⁷²⁷ *ibid.*, p.4

Accordingly, the Committee recommends:

RECOMMENDATION 7.5

Any proponent, decision-making authority, or person that disagrees with the level of environmental impact assessment should be entitled to appeal the decision to the Victorian Civil and Administrative Tribunal, within ten business days of the Department of Planning and Community Development's decision.

7.4.4 Public exhibition of environmental impact assessment documentation

A key issue raised in submissions in relation to the public exhibition of environmental impact assessment documentation was the length of time for public exhibition is inadequate for the community to be able to meaningfully respond to the document and technical studies and seek expert assistance if required.⁷²⁸

Length of documentation and time frames for review

The ministerial guidelines state that an EES will be exhibited for a period of 20 to 30 business days, although in exceptional circumstances the Minister may decide that a longer period of exhibition is warranted.⁷²⁹ The usual procedure for public notification of the EES exhibition is detailed in the ministerial guidelines, as follows:

*Public notice of the EES exhibition will be required in at least one daily newspaper; in one or more local papers circulating in the area of a rural or regional project; to be posted on the department's website.*⁷³⁰

The Committee was advised that the volume of documentation is a significant barrier to public participation in the environmental impact assessment process.⁷³¹ Mr Brad Jessup, Teaching Fellow, College of Law, Australia National University, advised the Committee:

The length of EES documents and the trend to include all supporting documents with the EES has become a significant barrier to participation in the process. With more involvement of an independent panel and the community in the assessment process these reports could be made shorter as matters of contention and importance are distilled. It is in this transparent and fair

⁷²⁸ For example, refer to: Ms E McKinnon, Solicitor, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.35; Municipal Association of Victoria, submission no.5, p.1; Swan Bay Environment Association, submission no.21, p.1; Blue Wedges, submission no.31, p.4; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.254; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.5

⁷²⁹ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.23

⁷³⁰ *ibid.*

⁷³¹ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.5

*environment where such narrowing of matters should occur – not within the Minister's department.*⁷³²

Community groups stated that it was often difficult for them to properly scrutinise an EES during the normal six week submission period, especially when the documentation is technical and lengthy.⁷³³ For example, the Victorian Desalination Project EES documentation comprised over 1,800 pages of highly complex technical material plus works approvals of about 430 pages and 84 appendices which averaged approximately 90-100 pages each.⁷³⁴ The first Channel Deepening Project EES contained 50 chapters, and a 44 page summary. In addition, there were 113 technical appendices. Describing its experiences with the Victorian Channel Deepening Project EES process, Blue Wedges Inc argued that:

*The usual six week period was and is insufficient time for the analysis of often complex and voluminous data contained in an EES. Time and resources in the production phase of an EES are managed and varied by the proponent entirely to suit the proponent's circumstances. Background studies to the EES took approximately two years, so it is inequitable that the community should be expected to assemble expert opinion and prepare a response to such extensive and detailed documentation within the usual six week response period.*⁷³⁵

The supplementary EES for the project comprised 15,000 pages of documentation.⁷³⁶

The Municipal Association of Victoria advised that councils also experienced difficulty in developing a formal position on project proposals subject to EES procedures during the public exhibition period, especially where the engagement of expert advice to examine large volumes of detailed information was necessary.⁷³⁷ It was suggested that the preparation and presentation of appropriate information would reduce costs associated with engaging experts for these purposes.⁷³⁸ The Environment Defenders Office advised:

*Certainly public consultation is something that we give a lot of thought to. A lot of our role is assisting the community, conservation groups and community groups in engaging in these processes. I suppose best practice has a lot to do with time and giving the community enough time to digest and form an opinion of material in relation to the project. In my experience, a lot, I could say almost all, of the EES processes in the last couple of years have not provided adequate time for that sort of thing.*⁷³⁹

⁷³² *ibid.*

⁷³³ For example, refer to Swan Bay Environmental Association, submission no.21, p.2; Blue Wedges, submission no.31, p.4

⁷³⁴ Environment Defenders Office (Victoria), submission no.27, p.11

⁷³⁵ Blue Wedges, submission no.31, p.4

⁷³⁶ A Hawke, K Mitchell and M Lisle-Williams, *Port Phillip Bay channel deepening supplementary environment effects statement report of the inquiry*, 1 October 2007, Appendix, p.40

⁷³⁷ Municipal Association of Victoria, submission no.5, p.1

⁷³⁸ *ibid.*

⁷³⁹ Ms E McKinnon, Solicitor, Environment Defenders Office (Victoria), Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.35

Mr Chris Fraser, Executive Director of the Victorian Division of the Minerals Council of Australia, questioned whether the production of a voluminous amount of material was an efficient use of time and resources.⁷⁴⁰ The Minerals Council of Australia advised the Committee that the Hazelwood Mine (West Field) Project generated approximately 14.5 shelf metres of documents.⁷⁴¹ The Minerals Council of Australia submission included the following photo of some of the final draft reports for the Donald Mineral Sands project EES, which was for a proposal to mine and process the Donald mineral sand deposit north-east of Horsham in western Victoria:⁷⁴²

Figure 7.2 The EES and associated studies for the Donald Mineral Sands project



Source: Minerals Council of Australia, Victorian Division, submission no.28, p.8

As discussed in chapter six, the Committee believes that scoping appropriately, utilising a risk-based approach to rank key environmental risks, public review of scoping documents, and early consultation between proponents and the local or affected community to identify key issues, may reduce the volume of documentation required for environmental impact assessment. Mr Andrew Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University made the following recommendation with regards to the length of EES documentation:

I would say improved guidelines that are given to the proponent about what has to go into an EIA, and by improved guidelines I mean very much trying to confine the scope of the EIA to the issues that are of greatest importance to the regulator and to third parties, and then also having limits on the amount of paperwork that can be created out of these processes. I am actually saying that you want to put a cap on the number of pages that you can publish or put in some other information limit to ensure that proponents do not generate 2500 pages that are completely incomprehensible to most people, and also make sure that the EIA documents are drafted in a way that is in plain English. That is obviously a pretty rubbery standard, but if the EIA process is given proper oversight, there are ways to ensure that the documents that are

⁷⁴⁰ Mr C Fraser, Executive Director, Minerals Council of Australia, Victorian division, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.280

⁷⁴¹ Minerals Council of Australia, Victorian Division, submission no.28, p.9

⁷⁴² Department of Planning and Community Development, www.dpcd.vic.gov.au, accessed 20 August 2010

generated are accessible to the average member of the public and also provide half decent information to both the regulators and to others.⁷⁴³

The Committee believes that there is significant merit in such a recommendation. The Committee is of the view that environmental impact assessment documentation should be sufficiently detailed but not so voluminous that it creates a barrier to stakeholder engagement. Accordingly the Committee recommends:

RECOMMENDATION 7.6

The environmental impact assessment legislation require that the environmental impact assessment documentation is written in plain English, where practicable, in order to be accepted by the Department of Planning and Community Development.

The Committee is of the view that public exhibition periods for environmental impact assessment documentation should be proportionate to the complexity, the scale and potential impact of the proposed project.

Accordingly, the Committee recommends:

RECOMMENDATION 7.7

The environmental impact assessment legislation is amended to include the following mandatory opportunities for public participation in the environmental impact assessment process:

- (a) the Department of Planning and Community Development's draft report for Level 1 assessment (Assessment on Preliminary Information) be placed on public exhibition for 21 business days; and
- (b) the Level 2 Public Environment Report to be placed on public exhibition for 30 business days; and
- (c) the Level 3 Environmental Impact Statement to be placed on public exhibition for 50 business days.

7.4.5 Public participation in inquiry panels

The Minister for Planning may appoint one or more persons with expertise to conduct an inquiry into the environmental effects of any works to which the Act applies.⁷⁴⁴ It is common practice for an inquiry to take the form of a formal hearing in which stakeholders present a submission to a panel selected by the Minister for Planning.

⁷⁴³ Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.254

⁷⁴⁴ *Environment Effects Act 1978* (Vic) s.9

Under the Victorian environmental impact assessment process, the Minister for Planning has broad discretion in relation to inquiries and panel hearings. The Minister can decide whether or not to have a inquiry panel, the length of the hearings, who will be represented on the panel, what the Terms of Reference will be, whether cross examination of witnesses can occur, and whether the public can present at hearings.

Several submitters objected strongly to the level of discretion accorded to the Minister in determining the process and content of inquiries.⁷⁴⁵ For example, a number of community groups reported that they felt constrained by the opportunities accorded to them to participate in inquiry panel processes, especially in respect of opportunities to present and examine evidence.⁷⁴⁶ From the perspective of the Environment Defenders Office (EDO), the discretion accorded to the Minister allowed inadequate time frames to be set to prepare and conduct inquiries, which limited constructive public involvement in the process.⁷⁴⁷ The EDO was particularly critical of the Minister's decision to limit the inquiry panel for the Victorian Desalination Plant to less than three weeks, advising that 'the panel itself was critical of the limited time frames, openly citing this as the reason for limiting the number and extent of oral presentations before the Panel'.⁷⁴⁸ Mr Jonathon Crockett, a retired consulting engineer suggested that the discretion of the Minister to direct which sections of the public will be invited to participate in an inquiry should be replaced with a provision under the Act allowing any interested party to participate.⁷⁴⁹

Ms Kimberly Neave, a community participant in the Victorian Desalination Plant inquiry panel process, also reported that attending hearings was burdensome on community members when hearings were primarily held in locations that were some distance away from the communities affected by the proposal.⁷⁵⁰

The ability of the Minister to set the Terms of Reference in a way that restricts opportunities for cross examination of expert witnesses was criticised by a number of community groups.⁷⁵¹ The inquiry panel hearing for the Channel Deepening Project SEES was cited as an example where the Terms of Reference had unfairly excluded third parties from cross examining the proponent's witnesses.⁷⁵² Dr Edmunds, Director of Australian Marine Ecology, highlighted the important role of third party involvement in cross examination:

*My experiences, as a panel member, expert witness and observer at hearings has been that third party involvement in cross examination is invaluable in ensuring information is appropriately tested and all important information comes to light. No panel member can be expected to be across all issues every minute of the hearing and other interested parties add substantial resources to the EES process.*⁷⁵³

⁷⁴⁵ For example, refer to: Environment Defenders Office (Victoria), submission no.27, p.11; Watershed Victoria, submission no.10, pp.6–8; Blue Wedges Inc, submission no.31, p.6; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.3

⁷⁴⁶ For example, refer to: Watershed Victoria, submission no.10, pp.6–8; Blue Wedges, submission no.31, p.6; Mordialloc Beaumaris Conservation League, submission no.11, p.2

⁷⁴⁷ Environment Defenders Office (Victoria), submission no.27, p.11

⁷⁴⁸ *ibid.*

⁷⁴⁹ Mr J Crockett, submission no.7, p.8

⁷⁵⁰ Ms K Neave, submission no.30, pp.1–2

⁷⁵¹ For example, refer to Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.3; Blue Wedges, submission no.31 p.7, 14; Mordialloc Beaumaris Conservation League, submission no.11, p.1; Australian Marine Ecology, submission no.29, p.21

⁷⁵² Mordialloc Beaumaris Conservation League, submission no.11, p.1

⁷⁵³ Australian Marine Ecology, submission no.29, p.21

Some submissions also reported inconsistency in relation to viewing and responding to documents.⁷⁵⁴ Watershed Victoria outlined an example from its experiences with the Victorian Desalination Plant inquiry panel:

*The proponent was able to view submissions made to a supposedly independent EES panel, prior to the hearing commencing. In response to an independent oceanographer's expert witness statement that was submitted by the closing date for submissions, the proponent (DSE) commissioned their consultant oceanographer to undertake further hydrodynamic analysis to address specific concerns raised by the expert witness's report. The proponent's supplementary report was then submitted weeks after closing dates without the ability for that to be report to be reviewed and commented on by the independent expert witness.*⁷⁵⁵

Ministerial discretion in selecting the members of inquiry panels was also viewed as problematic by some community groups. The Port Phillip Conservation Council expressed concern regarding the independence of inquiry panel members for the Channel Deepening Project Supplementary EES (SEES).⁷⁵⁶ Blue Wedges argued that the 'three SEES inquiry members were much less eminently qualified to assess the project than the four Panel members from 2004 who found so many flaws in the project – and none of whom were re-appointed'.⁷⁵⁷

The Minerals Council of Australia, Victorian Division, also advised the Committee that proponents experienced frustration in relation to the 'difficulty in enlisting suitably qualified people to sit on the Independent Panels'.⁷⁵⁸

There is also no legislated requirement for the Minister to accept the inquiry panel's findings. A number of community groups were critical of this situation.⁷⁵⁹ Port Phillip Conservation Council argued that ministerial discretion to make a recommendation which goes against the findings of an inquiry panel generated wastefulness, inconsistency and poor environmental outcomes.⁷⁶⁰ The Group drew attention to the Minister's recommendations to approve the Bastion Point Mallacoota Boat Harbour as a case in point:

*... after three Directions hearings, inquiry submissions and evidence over several weeks, and then weeks of report writing, the Panel report comprised over 150 pages of detailed evidence and learned opinion that the project was not warranted on environmental or safety grounds. Those were overturned by Minister Madden, using his discretionary powers, and justified in a 13 page document. What an enormous waste of time and resources.*⁷⁶¹

⁷⁵⁴ For example, refer to: Australian Marine Ecology, submission no.29, pp.24–25; Watershed Victoria, submission no.10, p.6; Friends of Wonthaggi Heathland and Coastal Reserve, submission no.48, p.5; Save Bastion Point Campaign, submission no.43, p.4

⁷⁵⁵ Watershed Victoria, submission no.10, p.6

⁷⁵⁶ Port Phillip Conservation Council, submission no.15, p.3

⁷⁵⁷ Blue Wedges, submission no.31, p.7

⁷⁵⁸ Minerals Council of Australia, Victorian Division, submission no.28, p.9; Mr C Fraser, Executive Director, Minerals Council of Australia, Victorian Division, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.279

⁷⁵⁹ For example, refer to Save Bastion Point Campaign, submission no.43, p.7; Watershed Victoria, submission no.10, p.2; Port Phillip Conservation Council, submission no.15, p.3

⁷⁶⁰ Port Phillip Conservation Council, submission no.15, p.3

⁷⁶¹ *ibid.*

The Minister's consideration of the inquiry's report will be discussed further in chapter eight.

The Committee is of the view that the reported perceived lack of transparency in the inquiry panel process is affecting the community's confidence in this process. In order to increase transparency and certainty for proponents and the community in relation to their role in the inquiry process, the Committee believes that the purpose and conduct of inquiry panels should be detailed in the environmental impact assessment legislation. Furthermore, in order to reduce ministerial discretion in the inquiry process, the Committee believes that the Department of Planning and Community Development (DPCD) should be responsible for establishing the inquiry's terms of reference, taking into consideration concerns raised in submissions from the community during public exhibition of the environmental impact assessment documentation. The DPCD and the Technical Reference Group should identify any areas that require further investigation.

Accordingly, the Committee recommends that:

RECOMMENDATION 7.8

The environmental impact assessment legislation should be amended to require that:

- (a) an inquiry panel is established at the discretion of the Department of Planning and Community Development for project proposals that trigger a Public Environment Report (Level 2); and
- (b) an inquiry panel is mandatory for project proposals that trigger an Environmental Impact Statement (Level 3).

RECOMMENDATION 7.9

The environmental impact assessment legislation should provide guidance on the role and conduct of inquiry panels and guidance on the opportunities for public participation in the inquiry panel process.

RECOMMENDATION 7.10

The environmental impact assessment legislation should be amended to require that the Department of Planning and Community Development establish and issue the terms of reference for an inquiry.

RECOMMENDATION 7.11

The environmental impact assessment legislation should be amended to require:

- (a) the inquiry panel's terms of reference be exhibited with the environmental impact assessment documentation for public comment; and
- (b) the Department of Planning and Community Development to consider public comments when issuing the final terms of reference for the inquiry.

7.4.6 *Lack of statutory time frames*

The Environment Effects Act does not contain time frames for the public comment period for draft scoping requirements, exhibition of EES documentation or the inquiry process. The Save Bastion Point Campaign felt that this aspect of the current arrangements for environmental impact assessment disadvantaged both proponents and community participants:

*The Environment Effects Act must be amended to remove the discretion that the Minister currently has to limit or lengthen timelines in EES processes. The legislation should contain clear time frames that must be adhered to for each stage of the assessment process. If these are not adhered to by the proponent, the project should be abandoned. Both the community and proponents deserve to have some certainty as to how long each stage of the assessment process will take, and the expected length of the whole process. This would breed greater confidence in the EES process in Victoria.*⁷⁶²

The final report of the Victorian Competition and Efficiency Commission, *Inquiry into environmental regulation in Victoria*, recommended that project specific time limits should be negotiated and applied to each stage of the EES process.⁷⁶³

Some submissions expressed concern regarding the lack of statutory time frames for the release of the inquiry's report and the subsequent delays that can occur as a result.⁷⁶⁴ For example, the Bastion Point Boat Ramp inquiry report was released in June 2009, eight months after the inquiry report was completed, at the same time as the Minister's assessment.⁷⁶⁵ Aventus Consulting advised the Committee of the difficulties this creates for proponents:

*The Environment Effects Act contains no clauses relating to timelines for the issuing of panel inquiry reports or the Ministerial assessment report regarding the outcome of the EES. Without these clauses, project planning for this phase of the project is impossible. This is problematic because often, EES outcome decisions are linked to a project's financial investment decision.*⁷⁶⁶

⁷⁶² Save Bastion Point Campaign, submission no.3, p.7

⁷⁶³ Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.127

⁷⁶⁴ For example, refer to: Lawyers for Forests, submission no.14, p.2; Glen Eira Environment Group, submission no.12, p.5; Save Bastion Point Campaign, submission no.43, p.7

⁷⁶⁵ Save Bastion Point Campaign, submission no.43, p.6

⁷⁶⁶ Aventus Consulting, submission no.58, p.5

The inquiry panel report is usually released with the Minister's assessment, sometimes several months after the Minister receives the report. This will be discussed further in chapter 8 in relation to the Minister's assessment.

This is in contrast with the arrangements for the release of advice in Western Australia. The Committee was advised that the timely public release of the EPA's advice increases transparency and accountability in the process. As Ms Michelle Andrews, Acting General Manager of the Office of the EPA (WA) explained:

I do not need to explain that from the community and the ENGOs point of view the independence of the EPA is paramount. They will defend that in any sort of way. They see the importance of not only the way in which the board operates — the independence of the members — but the publishing of the EPA's advice is seen ... as a very critical aspect of the independence of the EPA, so that its advice does not just get left in a drawer somewhere while government goes off and does something else or makes some other kind of decision. The EPA's advice gets published before the decision around the project is made.⁷⁶⁷

The Committee believes that the timely release of the inquiry panel report and DPCD's advice will result in greater transparency and certainty in the Victorian environmental impact assessment process. In addition to the time frames recommended in relation to the public exhibition and public comment periods, the Committee recommends that the following time period should be mandated under the environmental impact assessment legislation:

RECOMMENDATION 7.12

The environmental impact assessment legislation be amended to require:

- (a) the panel report of the inquiry; and
- (b) the Department of Planning and Community Development's advice

be made publicly available on the Department of Planning and Community Development's website, within ten business days of being submitted to the Minister for Planning.

⁷⁶⁷ Ms M Andrews, Acting General Manager of the Office of the EPA (WA), Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.147

Chapter 8: The Minister's assessment

Key findings

- 8.1 The current environmental impact assessment process in Victoria results in an assessment by the Minister for Planning. The process does not result in an approval decision or legally-binding conditions on project implementation. The powers of the Minister to approve or refuse a project based on acceptability of risk to the environment, and attach conditions to approvals, was identified as a key strength of the Western Australian and Commonwealth environmental impact assessment systems.
- 8.2 Opportunities for appeals are limited under the Environment Effects Act because the process currently results in advice rather than a legally binding decision. Providing the Minister for Planning with the statutory power to make determinations on the environmental acceptability of projects would ensure the Minister's decision is subject to judicial review.
- 8.3 Decisions made by the Minister for Planning, an elected representative, should not be subject to merits review. However, judicial review of a decision made under a legislated procedure ensures that a decision is lawful and fair.
- 8.4 The absence of legislated criteria to guide the Minister's assessment and balance the often conflicting environmental, economic and social considerations has to some extent diminished transparency and public confidence in the environmental impact assessment process.
- 8.5 The time frame for the release of the Minister's assessment is not always met. The introduction of statutory time frames for the release of the Minister's assessment would increase certainty for proponents and their investors, and increase transparency in the process for proponents and the community.

8.1 Introduction

The release of the Minister for Planning's assessment regarding the likely environmental effects of a proposal, has been described as 'the final step in the EES process'.⁷⁶⁸

This chapter will discuss the status of the Minister's assessment, drawing on the Western Australian and Commonwealth environmental impact assessment systems as the basis for comparison, and the implications for appeal. It will also examine the considerations taken into account by the Minister in assessing whether the environmental impacts of a proposed project are acceptable, and how the

⁷⁶⁸ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.27

Minister balances competing environmental, economic and social values. The final section of this chapter examines the timeliness of the release of the Minister's assessment.

This chapter addresses term of reference a) which requires the Committee to investigate 'any weaknesses in the current system including poor environmental outcomes, excessive costs and unnecessary delays encountered through the process and its mechanisms, and d) 'how better environmental outcomes can be achieved more quickly and predictably and with a reduction in unnecessary costs'.

8.2 What is the Minister's assessment?

Once the Minister for Planning determines that a project requires an EES, no decision can be made under any other statutory instrument until the environmental impact assessment has been provided to, and considered by, that decision-maker.⁷⁶⁹ This means that project approvals cannot be granted until the environmental impact assessment process is complete. 'Approvals' is used in the context of this chapter to describe all licences, permits and consents required from the government, to enable a proposed project to proceed.

The ministerial guidelines state that the Minister's assessment will provide:

- findings on the potential magnitude, likelihood and significance of adverse and beneficial environmental effects of the project;
- conclusions regarding any modifications to a project or any environmental management measures that are needed to address likely adverse effects or environmental risks; and
- evaluation of the overall significance of likely adverse effects and environmental risks of the project, relative to likely benefits of the project, within the context of applicable legislation, policy, strategies and guidelines.⁷⁷⁰

The Minister's assessment may conclude that:

- a project (with or without limited modifications) would have an acceptable level of environmental effects, having regard to overall project outcomes; or
- a project would have an unacceptable level of environmental effects; or
- a project would need major modifications and/or further investigations in order to establish that an acceptable level of environmental outcomes would be achieved. A further assessment process under the Act may be required, for example, a supplementary EES.⁷⁷¹

The Environment Effects Act does not prescribe the form of the Minister's assessment, however the assessment usually includes:

⁷⁶⁹ *Environment Effects Act 1978* (Vic) s.8B

⁷⁷⁰ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.27

⁷⁷¹ *ibid.*

1. an outline of the purpose of the assessment and a project description;
2. an overview of the EES process that was undertaken and relevant statutory approvals required for the project to proceed;
3. an assessment of the environmental, social and economic effects within the context of the applicable environmental legislative and policy frameworks. This includes a discussion on each key risk and the Minister's conclusion as to the acceptability of that risk;
4. a discussion on the acceptability of the environmental effects of the project in the context of the objectives and principles of ecologically sustainable development; and
5. responses to the recommendations contained in the inquiry report.⁷⁷²

The Minister's assessment has ranged between 14 pages in length for the Bastion Point Boat Ramp Project up to 152 pages for the Channel Deepening Project. The Minister's assessment is normally provided to decision-makers, the proponent, and made publicly available on the Department of Planning and Community Development's (DPCD) website within 25 business days of receiving the inquiry report from the Panel.⁷⁷³ If there is no inquiry appointed, the Minister's assessment is normally provided within 50 business days from the close of the exhibition period of the EES.⁷⁷⁴ The timeliness of the release of the Minister's assessment is discussed further in section 8.4.

8.2.1 Status of the Minister's assessment

As stated above, Victoria's environmental impact assessment process is not an approval process. Rather, the Minister's assessment is provided to relevant decision-makers to advise them of the environmental impacts of a proposal so they can make an informed decision about whether a project should proceed and if so, under what conditions.⁷⁷⁵ Relevant decision-makers could be other Ministers, local governments or statutory authorities (such as VicRoads, or the EPA Victoria). Mr Jeff Gilmore, Executive Director, Planning Policy and Reform, DPCD, advised the Committee:

*The EES process is essentially directed towards informing decisions under other legislation as to whether or not to approve proposed works. It is important to emphasise that the Environment Effects Act has a complementary role in relation to key approvals legislation in Victoria.*⁷⁷⁶

The ministerial guidelines state that if the Minister's assessment concludes that a project would have an acceptable level of environmental effects, it may provide advice on project implementation and environmental management measures, including:

- opportunities for incorporating necessary measures in conditions of particular statutory approvals or in binding agreements;
- coordinating different aspects of the environmental management regime to ensure an integrated approach for achieving acceptable environmental outcomes; and

⁷⁷² As set out in various Ministers assessments

⁷⁷³ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.28

⁷⁷⁴ *ibid.*

⁷⁷⁵ Department of Sustainability and Environment, *Assessing the environmental effects of projects in Victoria: summary of procedures under Environment Effects Act 1978*, June 2007, p.1

⁷⁷⁶ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.3

- recommended approaches to environmental monitoring and management, including further public involvement.⁷⁷⁷

Whilst relevant decision-makers are required to consider the Minister's assessment, the Minister's assessment and any recommendations contained within it, are not legally binding on decision-makers and proponents. The Committee was informed by Mr Trevor Blake, Chief Environment Assessment Officer, DPCD, that ordinarily the advice is adopted.⁷⁷⁸

In the case where the Minister decides that the 'No EES required subject to conditions' option is appropriate, the Committee notes that the legal status of such conditions is ambiguous. As the Victorian Planning and Environmental Law Association advised:

*Under the current regime, the amendments to the Act in 2005, among other things, inserted specific provisions which enable the Minister to decide that a statement is not required for works if conditions specified by the Minister are met. These provisions are problematic as they appear to try to impose conditions on projects despite the fact that the Act itself simply sets out an advisory process. These provisions reflect the confused message created by the Act itself. The Environment Effects Act is not legislation which forms the basis of any approval, yet it contains provisions which purport to operate as though it does...*⁷⁷⁹

The DPCD advised that if the Minister determines that no EES is required subject to conditions, and those conditions are not met, the Minister may require an EES.⁷⁸⁰ The DPCD further advised that the conditions are not explicitly tied to other statutory processes, but designed cognisant of them; more often than not the conditions are given effect to through other statutory processes as a result of the DPCD's consultation with other agencies.⁷⁸¹ The DPCD usually has a role in determining whether or not conditions have been met, and/or works with other identified agencies to establish if and how the conditions are met.⁷⁸²

The lack of a legally-binding approval decision at the conclusion of the EES process was identified by industry and community groups, including Watershed Victoria and Birds Australia, as a significant weakness of Victoria's environmental impact assessment process.⁷⁸³ The Victorian Planning and Environmental Law Association (VPELA) advised the Committee that:

⁷⁷⁷ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.27

⁷⁷⁸ Mr T Blake, Chief Environment Assessment Officer, Department of Planning and Community Development Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.262. Furthermore, the ministerial guidelines state: 'To assist in the transparency of the EES process, it is useful for the decision-maker to advise the Minister of the outcome of the decision. Where the decision-maker proposes not to adopt part of the assessment, the decision-maker should consult with the Minister'; Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.28

⁷⁷⁹ Victorian Planning and Environmental Law Association, submission no.55, p.5

⁷⁸⁰ *Environment Effects Act 1978* (Vic) s. 8E

⁷⁸¹ Department of Planning and Community Development, correspondence received 8 September 2010

⁷⁸² *ibid.*

⁷⁸³ For example, refer to: Victorian Planning and Environmental Law Association, submission no.55, pp.2, 3–4; Ms A Bolch, submission no.45, p.5; Birds Australia, submission no.38, p.1; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.2; Watershed Victoria, submission no.10, p.3

From the perspective of industry an EES process is broadly viewed as an unnecessarily costly exercise and involving considerable delays. The cost and delay is difficult to bear because at the end of the process a proponent who has successfully completed the process does not yet have approval to proceed.

At present, recommendations in the Minister's assessment can only be given effect through the subsequent step of approval under discrete Acts of Parliament on a case by case basis:

- (a) if the Minister's advice is accepted by the relevant decision-maker; and*
- (b) if those recommendations can legally be given effect through that statutory approval process.*

... It is likely that many of the complaints about the cost and delay associated with the current system would be assuaged if the money and time spent on the process was directed toward a tangible outcome. Such an approach would provide far more certainty for all parties and provide a consistent, integrated and co-ordinated approach.⁷⁸⁴

The VPELA recommended that projects that are of sufficient significance to warrant assessment through the Environment Effects Act should be the subject of separate statutory approval.⁷⁸⁵

In its submission, GHD advised the Committee that there could be greater clarity on how the Minister's assessment should be utilised and the linkages between the Minister's assessment and the secondary approvals that follow.⁷⁸⁶

Mr Brad Jessup, Teaching Fellow, College of Law, Australian National University, advised that in the case of the Channel Deepening Project, the community did not understand that the EIA process was not an approval process and that it is not a process that can halt a project but rather the outcome is a Ministerial recommendation, as discussed in chapter seven. Mr Jessup recommended that to make the EIA process more meaningful, the assessment process should be linked more closely with the approval process, with the creation of a state significant development planning pathway or with the consideration of a project by an independent commission, as is the case in Tasmania.⁷⁸⁷

8.2.2 Other jurisdictions

A comparison of the final decision made by the relevant Minister regarding the environmental impact assessment process in the Victorian, Western Australian and Commonwealth jurisdictions is set out in table 8.1.

⁷⁸⁴ Victorian Planning and Environmental Law Association, submission no.55, pp.2, 4

⁷⁸⁵ *ibid.*, p.4

⁷⁸⁶ GHD, submission no.17, p.1

⁷⁸⁷ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.6

Table 8.1 A comparison of the final environmental impact assessment advice/decision made by the relevant Victorian, Western Australian and Commonwealth Ministers

Jurisdiction	Advice or decision	Status – whether it is legally binding
Victoria	<p>ADVICE</p> <p>The Minister for Planning's assessment comprises advice, provided to decision-makers to inform statutory approvals under other legislation.</p>	<p>NO</p> <p>The recommendations in the Minister's assessment are not legally binding. However, if conditions set on a 'No EES required subject to conditions' referral decision are not complied with, the Minister has power under the Environment Effects Act (s.8E) to require that the proponent prepare an EES.</p>
Western Australia	<p>DECISION</p> <p>The decision as to whether the environmental impacts of a proposal are acceptable is made by the Minister or decision-making authority responsible for the statutory approvals of the development, and the Minister for Environment.</p>	<p>YES</p> <p>The Ministerial Statement sets out conditions on project implementation which are legally binding.</p>
Commonwealth	<p>DECISION</p> <p>After receiving the assessment report from the Department of Sustainability, Environment, Water, Population and Communities, the federal environment minister must decide whether to approve the taking of the controlled action.</p>	<p>YES</p> <p>The Minister can attach conditions to an approval. Conditions are legally binding and non-compliance can result in civil and criminal penalties.</p>

Western Australia

The Committee notes that in Western Australia, the environmental impact assessment process results in a decision by the Minister for Environment and legally binding conditions. Under the Environmental Protection Act, the Minister, informed by the EPA's report and any appeals, becomes a joint decision-maker and consults with other decision-making authorities as to whether the proposal should be allowed to proceed and if so, under what conditions.⁷⁸⁸ After the Minister receives and considers the EPA's assessment report, the Minister advises the decision-maker as to whether to approve the development proposal and under what conditions. If the Minister for Environment and the decision-making authorities cannot agree on the final decision, the Minister must appoint an appeals committee to consider and report to him or her on the matters in dispute.⁷⁸⁹

⁷⁸⁸ *Environmental Protection Act 1986 (WA)* s.45

⁷⁸⁹ *ibid.*, s.45(3). If the decision-maker is another Minister and they do not agree, the matters in dispute must be referred to the Governor for his or her decision (section 45(2)). The decision of the Governor is final and cannot be appealed

Following the environmental impact assessment process, if the Minister for Environment determines that the project does not present an unacceptable risk to the environment, a Ministerial Statement is issued, which is a 'statement that a proposal may be implemented'.⁷⁹⁰ The conditions and commitments in the statement set out the parameters to which project implementation is subject. Both the conditions and the commitments are legally binding.⁷⁹¹ The capacity for the Minister to set such legally binding and enforceable conditions has been identified as a key strength of the Western Australian environmental impact assessment process.⁷⁹² Dr Angus Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University, advised the Committee:

*Having legally binding conditions of approval that will be subject to audit and compliance follow-up once proposals become operational is very important to give credibility to the environmental impact assessment process both during and following approval decision-making. Furthermore the results of the environmental impact assessment process provides the basis for decision-making by the Environment Minister ...*⁷⁹³

Dr Morrison-Saunders also advised the Committee that the legally-binding conditions, if breached, constitute a criminal offence.⁷⁹⁴ Whilst the penalty provisions are rarely used, Dr Morrison-Saunders stated that they are important in ensuring proponents take the environmental impact assessment process 'very seriously'.⁷⁹⁵

In Western Australia, any person may lodge an appeal with the Appeals Convenor if they disagree with the content of or recommendations in a report of the EPA (for example recommended approval conditions).⁷⁹⁶ The Committee was advised by a range of witnesses that such appeal rights are a key strength of the Western Australian environmental impact assessment system.⁷⁹⁷ The right to appeal the EPA's advice was regarded as 'the most significant appeal' by Associate Professor Garry Middle, Head, Department of Urban and Regional Planning, Curtin University. He stated:

We have covered appeal rights and third parties to some extent, and my view is that it works well because it is a good check and balance on the EPA. The public will raise issues if the EPA gets it wrong or they have missed points, so I think it works well that way. I think the independent appeals convener also works well...Our appeal process here is not a matter of law,

⁷⁹⁰ Department of Environment and Conservation (Western Australia), *Environmental conditions (Ministerial)*, www.dec.wa.gov.au, accessed 31 August 2010

⁷⁹¹ *ibid.*, Also refer to: *Environmental Protection Act 1986* (WA), s.47

⁷⁹² Dr A Morrison-Saunders, submission no.53, p.3

⁷⁹³ *ibid.*

⁷⁹⁴ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.57

⁷⁹⁵ *ibid.*

⁷⁹⁶ *Environmental Protection Act 1986* (WA) s. 100(1)(d)

⁷⁹⁷ For example, refer to: Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.142; Dr A Morrison-Saunders, submission no. 53, p.3; Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.57; Associate Professor G Middle, Head, Department of Urban and Regional Planning, Curtin University, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.173; Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.184; Associate Professor S Mascher, Centre for Mining, Energy and Resources Law, University of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.194; Mr P Gamblin, Program Leader – West, WWF Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.219

*it is a question of merits, and to some extent you do not want courts caught up in those sorts of considerations, because they are a matter of judgement ...*⁷⁹⁸

The Conservation Council of Western Australia, which has been involved in appealing the content and recommendations of the EPA's report, advised the Committee that as a result of their participation in the appeals process:

*...what we generally see is that additional concessions are made as a consequence of the appeals that we raise. Often in the appeals we raise additional matters that the EPA have not been able to take into account, and then there is a ministerial condition-setting process whereby the EPA's suggested ministerial conditions might be taken up by the appeals convener. The appeals convener is an instrument of the minister's office in Western Australia. The appeals convener might take those conditions and then review them and add additional conditions that respond to the grounds of appeal that we make. That happens quite regularly.*⁷⁹⁹

The right to appeal the EPA's advice and recommendations is also open to proponents, and the Committee was advised that this appeal right was utilised equally by both proponents and community groups.⁸⁰⁰

Commonwealth

The environmental impact assessment process under the Commonwealth Environment Protection and Biodiversity Conservation Act also concludes with an approval decision. Following the assessment process, the federal environment minister can make a decision to approve, approve with conditions or not approve a proposed action.⁸⁰¹

The Minister may attach conditions to an approval, such as independent environmental auditing and compliance monitoring, in order 'to protect, repair or mitigate damage to a matter protected by the Environment Protection and Biodiversity Conservation Act'.⁸⁰² The conditions set by the Minister under the Act are legally binding, and non-compliance with conditions can result in civil and criminal penalties.⁸⁰³

It is worth noting, in this context, that for the first three-and-a-half years of the Commonwealth Act, the 'manner specified conditions' – where the federal Minister decides that an action does not require approval if it is undertaken in a specified manner – were not directly enforceable. This lack of enforceability was seen as a major shortcoming of the Commonwealth Act – paralleling the situation in Victoria, noted above, where the legal status of the 'No EES required subject to conditions' option

⁷⁹⁸ Associate Professor G Middle, Head, Department of Urban and Regional Planning, Curtin University, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.173

⁷⁹⁹ Mr P Verstegen, Director, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.188

⁸⁰⁰ Mr A Sutton, Appeals Convenor, Office of the Appeals Convenor Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.160; Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.188

⁸⁰¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), part 9

⁸⁰² *ibid.*, s.134; Department of the Environment, Water, Heritage and the Arts, *EPBC Act—Environment assessment process*, 2010, p.6

⁸⁰³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) part 9, division 2

is ambiguous. This aspect of the Commonwealth legislation was changed – and the conditions made enforceable – in 2003.⁸⁰⁴

The Committee believes that the ability of the relevant Minister to approve or refuse a project based on the acceptability of risk to the environment and attach legally binding conditions to approvals, is a key strength of the Western Australian and Commonwealth environmental impact assessment systems.

The *Environment Assessment Review* (2002) recommended that consideration be given to providing the Minister for Planning with the statutory power to make a determination on the environmental acceptability of projects under the environmental impact assessment legislation. The review also recommended that if the Minister determined that a project was environmentally acceptable, an approval should be issued by the Minister setting specific legally binding conditions of approval for the project.⁸⁰⁵ The *Environment Assessment Review* states that this approach would enable the ministerial finding to be considered the primary decision on the environmental acceptability of a project.⁸⁰⁶

The Committee believes that the value placed on the environmental impact assessment process, by proponents and community groups alike, would be significantly enhanced with the implementation of these recommendations. The Victorian environmental impact assessment process would result in a tangible outcome rather than advice only and also open up, albeit limited, avenues for appeal as discussed below.

Accordingly, the Committee recommends that:

RECOMMENDATION 8.1

- (a) The Minister for Planning have the statutory power to make determinations on the environmental acceptability of projects under the environmental impact assessment legislation.
- (b) The Minister's approval should set specific legally binding conditions for the project.

⁸⁰⁴ A Macintosh, 'The Commonwealth', T Bonyhady and A Macintosh (eds), *Mills, mines and other controversies: The environmental assessment of major projects*, 2010, pp.226–227

⁸⁰⁵ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, pp.67–68

⁸⁰⁶ *ibid.*, p.67

8.2.3 Appealing the outcome of the environment effects statement process

Opportunities for appeals are limited under the Environment Effects Act because the process currently results in advice rather than a legally binding decision. This was raised as an issue in some submissions and evidence.⁸⁰⁷ Mr Brad Jessup, Teaching Fellow, College of Law, Australian National University advised that the ability of community groups to effectively appeal the Minister's assessment was restricted, because the EES process did not lead to a decision:

*What happens now is that there is merely a recommendation, which is not a decision, so it cannot be subject to review. Then the various bodies that need to get approvals do that with, I suppose, that barrier, so they are essentially protected from effective review.*⁸⁰⁸

Mr Jessup recommended that the environmental impact assessment regime should become an approval process, and therefore the approval decisions made under the Act would be subject to judicial review.⁸⁰⁹

Further, in relation to the recent Supreme Court case, *Friends of Mallacoota Inc v Minister of Planning and Minister for Environment and Climate Change*,⁸¹⁰ Ms Juliet Forsyth, Barrister, Victorian Planning and Environmental Law Association, stated:

*In the Victorian system, because the EES process is only advisory, there is nothing to appeal, if you like. There is only a series of recommendations to the relevant decision-maker. This recent decision of Justice Osborn in the Mallacoota case makes that point that it is an advisory process. The minister may or may not give effect to the recommendations of the panel in his assessment, and then once his assessment goes off to the relevant decision-maker, he may or may not give effect to the minister's assessment or the panel recommendations, so it is very advisory. At the moment I do not see that there is anything to appeal against. What you would appeal against is the primary decision. For example, let us say you need a planning permit, then the appeal is in relation to the granting of a planning permit not in relation to anything that the panel or the minister has done under the [environmental impact] assessment.*⁸¹¹

The Committee notes that judicial review is possible for all decisions and conduct made in accordance with the Environment Protection and Biodiversity Conservation Act. Merits review under the federal legislation is limited to a small range of decisions that are generally recognised as marginal to the Act including permits for activities affecting protected species; permits for the international movement of wildlife; and advice about whether an action would contravene a

⁸⁰⁷ For example, refer to: Ms J Forsyth, Barrister and representative, Victorian Planning and Environmental Law Association, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.303; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.138; Construction Material Processors Association, submission no.44, p.4; Cement, Concrete and Aggregates Australia, submission no.46, p.2

⁸⁰⁸ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.138

⁸⁰⁹ Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, p.2

⁸¹⁰ *Friends of Mallacoota Inc v Minister of Planning & Minister for Environment and Climate Change* [2010] VSC 222 (27 May 2010)

⁸¹¹ Ms J Forsyth, Barrister and representative, Victorian Planning and Environmental Law Association, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.303

conservation order.⁸¹² Any decision made by the Minister is not subject to merits review, as decisions that 'are sufficiently important to be taken by the Minister as an elected representative' should not be able to be overturned by an unelected tribunal.⁸¹³ However, the *Independent Review of the Environment Protection and Biodiversity Conservation Act* (2009) took account of the counter-argument that 'merits review is a key means of achieving better decision-making regardless of the identity of the original decision-maker'.⁸¹⁴ On this basis the Independent Review recommended that merits review should be expanded to include Ministerial decisions relating to whether a project is a controlled action and should be assessed under the Act, and the level of assessment determined for a project.⁸¹⁵

The Committee notes that in Western Australia, under the Environmental Protection Act, proponents can appeal against any conditions or procedures imposed by the Minister on an assessed proposal.⁸¹⁶ When appealing against a ministerial decision, the appeal is heard by an Appeal Committee.⁸¹⁷

Table 8.2 illustrates the current appeal rights under the Victorian, Western Australian and Commonwealth EIA processes:

⁸¹² Department of the Environment, Water, Heritage, and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection Act 1999*, final report, October 2009, p.255

⁸¹³ Explanatory Memorandum, *Environment and Heritage Legislation Amendment Bill (No.1) 2006* (Cth)

⁸¹⁴ Department of the Environment, Water, Heritage, and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection Act 1999*, final report, October 2009, p.255

⁸¹⁵ *ibid.*

⁸¹⁶ *Environmental Protection Act 1986* (WA) s.100(3)

⁸¹⁷ Office of the Appeals Convenor (WA), www.appealsconvenor.wa.gov.au, accessed 25 August 2010

Table 8.2 **Appeal rights under the Victorian, Western Australian and Commonwealth EIA processes**

Jurisdiction	Appeal Rights – Merits Review ⁸¹⁸	Appeal Rights – Judicial Review ⁸¹⁹
Victoria	UNAVAILABLE As there is no formal decision made by the Minister under the Act, the decision cannot be appealed.	No specific provision exists in the Act for judicial review, however, the basis for judicial review can be found in the <i>Administrative Law Act 1978</i> (Vic) s 3 or common law (case law).
Western Australia	AVAILABLE A proponent can appeal against any conditions or procedures imposed by the Minister on an assessed proposal. When appealing against a ministerial decision, the appeal is heard by an Appeal Committee.	A failure to follow any of the procedures set out in the Environmental Protection Act may result in judicial review.
Commonwealth	UNAVAILABLE Any decision made by the Minister is not subject to merits review.	Judicial review of decisions made under the Environment Protection and Biodiversity Conservation Act can be made under the <i>Administrative Decisions (Judicial Review) Act 1977</i> (Cth) and the <i>Judiciary Act 1903</i> (Cth).

The Committee believes that the Minister's decision as to whether a project presents an acceptable risk to the environment, and any subsequent conditions applied to the implementation of the project by the Minister, should not be subject to merits review. However, the Committee is of the view that any decisions made under the Act should be subject to judicial review, to ensure that procedures have been followed and the decision is fair and lawful. Amending the environmental impact assessment legislation to provide the Minister for Planning with the statutory power to make determinations on the environmental acceptability of projects under the Act as set out in recommendation 8.1 will ensure the Minister's decision is subject to judicial review.

As recommended in previous chapters, the referral and level of assessment decisions should be subject to merits review, with any person being able to appeal to the Victorian Civil and Administrative Tribunal (VCAT) if they consider that a decision has been made erroneously.

⁸¹⁸ Where the merits of a decision can be reconsidered, new evidence can be presented and the primary decision-maker's decision can be overturned

⁸¹⁹ Where a court can decide if an administrative decision was made in accordance with the law. The court does not re-hear the case or make a new determination, rather it remits the decision back to the original decision-making authority to make a new decision that is in accordance with the law

8.3 Considerations in the Minister's assessment

There is currently no legislated criteria to guide the Minister's assessment, which was raised as a concern in some submissions.⁸²⁰

The ministerial guidelines state that the Minister's assessment will involve consideration of the following:

- the EES and any Supplementary EES if applicable;
- submissions, the proponent's response to submissions, and supporting information from the proponent or submitters;
- the inquiry's report, if applicable;
- any other information provided by the proponent at the request of the persons appointed to conduct an inquiry, the department or the Minister; and
- the objectives and principles of ecologically sustainable development, as well as applicable legislation, policy, strategies and guidelines.⁸²¹

The Committee notes one of the guiding principles of ecologically sustainable development is that 'decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equity considerations'.⁸²² However, as noted in chapter three, balancing the often competing considerations is not always easy.

The issues and options paper for the *Environment Assessment Review* (2002) explained that in cases where a clear framework of regulatory and policy criteria exist, and a robust prediction of the performance of the proposed technology in a particular location, the assessing agency might be well positioned to evaluate the performance of a proposal relative to this framework, and therefore it will not be difficult to determine the overall merit of the proposal.⁸²³ However, if a clear policy framework does not exist for particular issues, if there are 'cross-cutting' policy considerations, or if there are significant uncertainties in the environmental, social or economic outcomes that might result, it may be more difficult to evaluate the merits of a proposal, and therefore, policy judgements balancing these various considerations may be unavoidable.⁸²⁴

The issues and options paper states that in such cases, a determination of the overall merits of the proposal may need to be undertaken at a political level, and the determination will involve the weighting of different values and interests.⁸²⁵ In such circumstances, the government may need to:

⁸²⁰ For example, refer to: Victorian Planning and Environmental Law Association, submission no.55, p.4; Lawyers For Forests, submission no.14, p.2; Environment Defenders Office (Victoria), submission no.27, p.9; Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, p.3

⁸²¹ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.27

⁸²² *ibid.*, p.3

⁸²³ Department of Infrastructure, *Environment assessment review: Issues and options, Technical paper*, 2002, p.85

⁸²⁴ *ibid.*

⁸²⁵ *ibid.*, p.86

- interpret relevant policy, or create a policy basis, to address the particular case, for example, in relation to the protection of landscape values;
- address any tensions between different aspects of policy, for example, between landscape protection and economic development; and/or
- determine the acceptability of the likely environmental, social and economic outcomes in the shorter- and longer-term, in the context of relevant legislation and policy.⁸²⁶

The issues and options paper notes the difficulty in applying ecologically sustainable development as a standard for decision-making because 'usually there is no indication what weight should be given to the competing principles of ecologically sustainable development' – environmental, economic and social.⁸²⁷

The Committee was advised by community and environmental groups that, when balancing environmental, economic and social considerations, the economic benefits of a proposal usually prevail over environmental values.⁸²⁸ For example, Associate Professor Ian Thomas, Discipline Head of Environment and Planning at RMIT stated that:

Environmental impact assessment processes have broadly been set up to provide advice to decision-makers, not necessarily to ensure that the outcomes and recommendations give priority to the biophysical environment; and this is the case in Victoria. As a consequence, and in relation to the first term of reference, there are plenty of instances of poor environmental outcomes since economic issues and interests predominate. This comes from the situation we currently have where the values of the community and related government actions, give preference to (social) human and short-term economic interests.⁸²⁹

This outcome may be attributed to the short-term, or 'generalised' appeal of cost savings, compared to long-term environmental benefits.⁸³⁰

Furthermore Blue Wedges and the Port Phillip Conservation Council advised the Committee that the economic value of the environment, and the value of ecosystem services, are generally excluded from economic analysis.⁸³¹

In ensuring sustainability objectives are balanced, the Victorian Planning and Environmental Law Association suggested that the Committee look at how conflicting objectives are considered in the Planning Scheme process in Victoria:

⁸²⁶ *ibid.*

⁸²⁷ *ibid.*

⁸²⁸ For example: Glen Eira Environment Group, submission no.12, p.5; Macedon Ranges Residents Association, submission no.24, p.1; Associate Professor I Thomas, submission no.20, p.1

⁸²⁹ Associate Professor I Thomas, Discipline Head, Environment and Planning, RMIT, submission no.20, p.1

⁸³⁰ For example, Mornington Peninsula Shire stated: 'Arguably the notion of environment impact has expanded to encompass assessment of the sustainability of projects... in this context it is important to recognise the strengths of the system and to not trade off long term environmental values or opportunities to achieve more sustainable outcomes for short term cost/time savings, or a generalised appeal to the economic benefits of development.' Mornington Peninsula Shire, submission no.56, p.1

⁸³¹ For example, refer to: Port Phillip Conservation Council Inc, submission no.15, p.9; Blue Wedges, submission no.31, p.11

Any new Act should require decision-making to be made in a manner similar to that required by each planning scheme in Victoria – namely that decision-makers 'will endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development'.⁸³²

While the *Independent Review of the Environment Protection and Biodiversity Conservation Act* embraced the principles of ecologically sustainable development, the Review also noted the difficulties in applying the principles of ecologically sustainable development to decision-making. It stated:

For example, it is difficult to determine how the principles can be operationalised at the individual decision level, particularly when attempting to consider inter-generational equity and other long-term environmental, social, and economic considerations. Defining success in achieving ecologically sustainable development, given the inherent ambiguity of the ecologically sustainable development principles, is another challenge.⁸³³

The review made the following suggestions to address this issue:

- the Environment Protection and Biodiversity Conservation Act should be amended such that environmental considerations are to be given primacy over social and economic considerations;
- where other considerations are deemed to outweigh environmental ones, it is important that the public understand the decision-maker's reasoning; and
- the Act should require decision-makers to publish a statement of reasons with each decision.⁸³⁴

The Committee concludes that in the Victorian context conflicting objectives should be balanced in favour of net community benefit and sustainable development, which is currently the case under the Planning Scheme process in Victoria. In cases where other considerations are deemed to outweigh environmental considerations, proponents and the community must be able to access a statement of reasons in order to understand the Minister's decision. The Committee believes that the release of such accompanying information would be in the public interest and enhance community confidence in the EIA process.

The Victorian Environment Effects Act does not require the Minister to consider an inquiry report. Some environmental consultants felt that the capacity of the Minister to disregard recommendations of an inquiry panel undermined the integrity of the EES process.⁸³⁵ Several participants argued that the Minister's discretion in making a recommendation which conflicts with the panel's findings should be constrained through legislation and that the Minister should have to provide reasons for such a decision.⁸³⁶ For example, Save Bastion Point Campaign advised the Committee that the Minister's assessment in the Bastion Point Boat Ramp project EES was contrary to the inquiry's recommendations. In order to increase transparency in this process, Save Bastion Point Campaign recommended:

⁸³² Victorian Planning and Environmental Law Association, submission no.55, pp.4–5

⁸³³ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.53

⁸³⁴ *ibid.*

⁸³⁵ Environment Institute of Australia and New Zealand, submission no.42, survey response, p.18

⁸³⁶ For example, refer to: Watershed Victoria, submission no.10, p.4, Save Bastion Point Campaign, submission no.43, p.8

That the legislation is amended so that significant barriers are placed in the path of the Minister for Planning in departing from the recommendations made by his own EES inquiry panel. If the Minister decides to ignore a recommendation of the inquiry, he must give written reasons for this decision, these reasons should be made public and be subject to scrutiny. In certain circumstances community members should be able to appeal this decision to a further decision-maker.⁸³⁷

Accordingly, the Committee recommends:

RECOMMENDATION 8.2

- (a) When formulating the Minister's assessment, conflicting objectives should be balanced in favour of net community benefit and sustainable development; and
- (b) The Minister for Planning publish a statement of reasons with each decision.

8.4 Time frames for the Minister's assessment

The absence of statutory time frames for key stages of the EES process, including the release of the Minister's assessment was raised as a concern in evidence received by the Committee.⁸³⁸

The ministerial guidelines state that the Minister's assessment is 'normally' provided to decision-makers and the proponent within 25 business days of receiving the inquiry report from the Panel.⁸³⁹ If there is no inquiry appointed, the Minister's assessment is normally provided within 50 business days from the close of the exhibition period of the EES.⁸⁴⁰

The Committee received evidence indicating that these time frames are not always met. For example, the Minister's assessment for the Bastion Point Boat Ramp EES was released eight months after the inquiry report was completed.⁸⁴¹ Mr David Hyett, Technical Director of Environmental Management and Planning, AECOM advised the Committee that:

There are examples I am aware of: there is the Point Wilson quarry expansion and the Yallourn mine expansion where the decision-making process, particularly right at the minister's assessment end, was quite elongated and took a long time.⁸⁴²

Figure 8.1 illustrates the time elapsed between the submission of the inquiry panel report and the Minister's assessment by EES project.

⁸³⁷ Save Bastion Point Campaign, submission no.43, p.8

⁸³⁸ For example, refer to: Save Bastion Point Campaign, submission no.43, p.7; Aventus Consulting, submission no.58, p.5; Environment Defenders Office (Victoria) Ltd, submission no.27, p.11; Mr J Crockett, submission no.7, p.10; Mr B Jessup, Member, Australian Centre of Environmental Law – College of Law, Australian National University, submission no.37, attachment 1, pp.3–4; Energy Supply Association of Australia, submission no.32, pp.2–3; AGL submission no.16, p.1; GHD, submission no.17, p.2; Cement, Concrete and Aggregates Australia, submission no.46, p.2; Construction Material Processors Association Inc, submission no.44, p.5

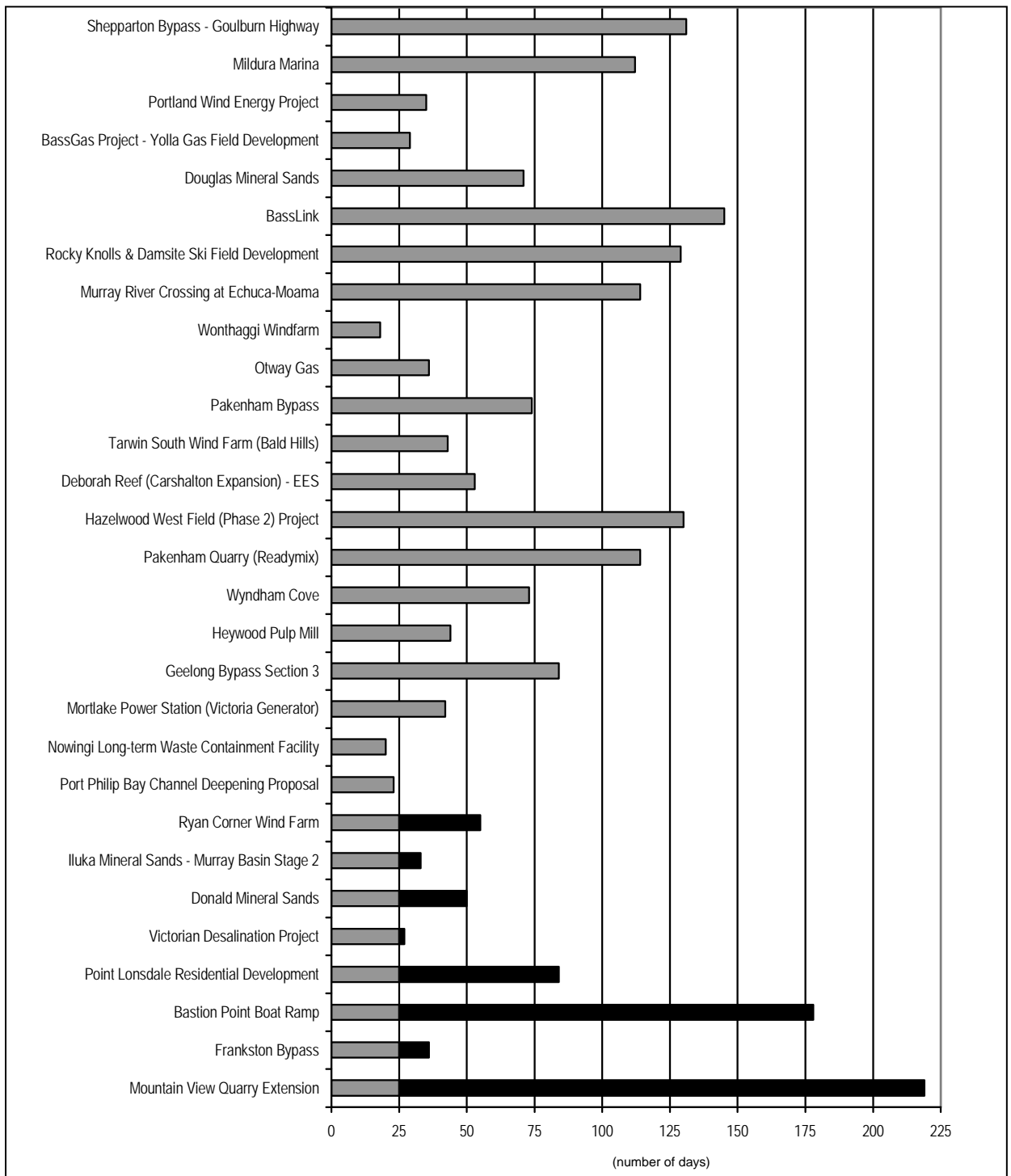
⁸³⁹ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.28

⁸⁴⁰ *ibid.*

⁸⁴¹ Save Bastion Point Campaign, submission no.43, p.6

⁸⁴² Mr D Hyett, Technical Director of Environmental Management and Planning, AECOM, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.15

Figure 8.1 Time elapsed between the submission of the inquiry panel report and the Minister's assessment by project⁸⁴³



Black demarcates the number of days beyond the 'target' of 25 business days defined in the 2006 ministerial guidelines.

⁸⁴³ Department of Planning and Community Development, correspondence received, 7 September 2010

The Committee is of the view that statutory time frames for the release of the Minister's assessment should be introduced to increase certainty for proponents and their investors, and increase transparency in the process for proponents and the community.

Accordingly, the Committee recommends that:

RECOMMENDATION 8.3

The environmental impact assessment legislation be amended to require that the Minister for Planning's approval decision for the three new levels of environmental impact assessment be released in writing to the proponent and made publicly available on the Department of Planning and Community Development's website within 25 business days of receiving the department's advice and the inquiry panel's report.

The Committee was also advised by DPCD that under the Planning and Environment Act, the planning authority may make a planning panel's report available at its office during office hours any time after the planning authority has received the report,⁸⁴⁴ and must make it available if 28 days have elapsed since the planning authority received the panel's report.⁸⁴⁵ This means that if a joint inquiry panel is established to consider an EES and a planning scheme amendment under the Planning and Environment Act, the inquiry panel's report can be publicly available on request after a period of 28 days.

⁸⁴⁴ *Planning and Environment Act 1987* (Vic) s.26(1)

⁸⁴⁵ Department of Planning and Community Development, correspondence received, 8 September 2010; *Planning and Environment Act 1987* (Vic) s.26(1)(b)

Chapter 9: Monitoring, auditing, enforcement and evaluation

Key findings

- 9.1 Post-EIA monitoring, auditing, enforcement and evaluation is recognised internationally as a principle of best practice environmental impact assessment. However, there are no provisions for the monitoring of environmental impacts, audit or evaluation in the Environment Effects Act, which was identified as a weakness of Victoria's EIA framework.
- 9.2 Under the Western Australian and the Commonwealth EIA frameworks, conditions established by the Minister through the EIA process are legally-binding on the proponent and both jurisdictions have dedicated audit and enforcement teams to ensure compliance with conditions.
- 9.3 A key benefit of monitoring environmental impacts during project construction and operation is that data collected can inform future assessments and decision-making which can lead to long-term time and cost efficiencies for future environmental impact assessments.
- 9.4 The current process of applying approval conditions through a range of statutory approvals may not address every aspect relating to the EIA. Evidence suggested that providing the Minister for Planning with the statutory authority to set legally-binding conditions, specifically related to issues associated with the EIA, with penalties for non-compliance with conditions, would greatly strengthen the process in Victoria.
- 9.5 Providing an appropriate independent authority with the responsibility for auditing proponents' monitoring programs would address, in part, concerns raised when the government is the proponent. An Office of the Environmental Monitor for proposals assessed as level three EIA would provide more rigorous, detailed and high-level audits for projects that pose significant environmental risks.
- 9.6 Ensuring that monitoring and auditing results are publicly accessible was supported in some evidence. Mandatory public disclosure of monitoring and audit results increases transparency in the EIA process and increases the likelihood of compliance with approval conditions.
- 9.7 There has not been a comprehensive examination of the environmental effectiveness of the Victorian environmental impact assessment outcomes to date.

The missing link in most jurisdictions in Australia is a clear legal requirement to incorporate EIA recommendations into the final decisions, to basically give reasons as to how they had been included and to ensure monitoring and reporting on those conditions or to give reasons for a particular decision — for example, not to proceed. Even in jurisdictions like Indonesia there is a connection between the EIA process and the implementation in the decision-making process, and I think that is the missing link.⁸⁴⁶

*– Professor Donna Craig, Board Member,
Environment Protection Authority Northern Territory*

... some of the weaknesses of the EPA process in Western Australia would be typical of most jurisdictions. There is an awful lot of effort that goes into the front-end assessment processes and relatively very little effort into determining what the ultimate outcomes of those assessment processes were to the environment in terms of not just compliance but also in a sense of adaptive management. If we do not learn from what we do, then why are we doing things this way?⁸⁴⁷

*– Dr Nic Dunlop, Citizen Science Project Coordinator,
Conservation Council of Western Australia*

9.1 Introduction

Post-environmental impact assessment (EIA) monitoring, auditing, enforcement and evaluation is regarded world-wide as an important and necessary feature of EIA.⁸⁴⁸

However, there are no provisions for the monitoring of environmental impacts, the audit of proponent's monitoring programs and compliance with conditions, or evaluation of the EIA process in the Environment Effects Act. As the current EIA process in Victoria does not result in a decision or legally-binding approval conditions, there are no penalties in the Environment Effects Act for non-compliance. The only provision in the Act for applying conditions is the 'no EES with conditions' referral decision available to the Minister, as discussed in chapters five and eight.⁸⁴⁹ If the conditions are not complied with, the Minister may require that an EES be prepared for the project.⁸⁵⁰

This chapter will discuss the purpose and benefits of post-EIA monitoring, auditing, enforcement and evaluation, including international and national best practice principles. It will examine Victoria's current post-EIA arrangements, with the Commonwealth and Western Australian regimes as the basis for comparison. This chapter will also consider the effectiveness of environmental impact assessment, including research conducted to date.

This chapter primarily addresses term of reference a) which requires the Committee to investigate 'any weaknesses in the current system including poor environmental outcomes, excessive costs and unnecessary delays encountered through the process and its mechanisms'.

⁸⁴⁶ Professor D Craig, Board Member, Environment Protection Authority, Northern Territory, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.288

⁸⁴⁷ Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.183

⁸⁴⁸ M Elliott and I Thomas, *Environmental impact assessment in Australia: Theory and practice*, 2009, p.203

⁸⁴⁹ *Environment Effects Act 1978* (Vic) s.8B(3)(b)

⁸⁵⁰ *ibid.*, s.8E

The Committee has chosen to use the following terms in relation to post-EIA activities:

Monitoring

Monitoring is primarily the responsibility of the proponent. In the context of this report it describes: systems for observing, measuring and recording information about environmental impacts identified in the environmental impact assessment, testing the effectiveness of mitigation measures and early detection of any potentially damaging changes in the environment.⁸⁵¹

Auditing

Audits are generally conducted by a relevant government agency or department. Auditors check the proponent's monitoring program, procedures, reports and results to ensure that proponents are complying with conditions of approval and environmental standards.⁸⁵²

Evaluation

An evaluation reviews EIA practice and performance and provides decision-makers with an understanding of the environmental consequences of actions and feedback for process improvement.⁸⁵³ Evaluation investigates whether or not predicted impacts have actually occurred, whether methods used to make these predictions were reliable, and whether safeguards were effective.⁸⁵⁴

9.2 Best practice principles

An international study for the International Association of Impact Assessment (IAIA) on the effectiveness of environmental assessment identified the following objectives of monitoring, audit and evaluation:

- to ensure terms and conditions of project approval are implemented;
- to verify environmental compliance and performance;
- to cope with unanticipated changes and circumstances;
- to adjust mitigation and management plans accordingly; and
- to learn from and disseminate experience with a view to improving the environmental impact assessment process and project planning and development.⁸⁵⁵

⁸⁵¹ M Elliott and I Thomas, *Environmental impact assessment in Australia: Theory and practice*, 2009, pp.202, 265

⁸⁵² *ibid.*, p.203

⁸⁵³ Bisset and Tomlinson (1988) in M Elliott and I Thomas, *Environmental impact assessment in Australia: Theory and practice*, 2009, p.264

⁸⁵⁴ M Elliott and I Thomas, *Environmental impact assessment in Australia: Theory and practice*, 2009, p.203

⁸⁵⁵ B Sadler, *International study of the effectiveness of environmental assessment*, final report, June 1996, p.127

In the Australian context, the Intergovernmental Agreement on the Environment states: 'the environmental impact assessment process will provide a basis for setting environmental conditions, and establishing environmental monitoring and management programs (including arrangements for review) and developing industry guidelines for application in specific cases'.⁸⁵⁶

Dr Matt Edmunds, Director of Australian Marine Ecology, advised the Committee that in the context of ecological impact assessment, best practice includes the following components:

- ecological monitoring to strengthen the knowledge base and provide opportunities for corrective action in the light of unforeseen outcomes; and
- feedback to assess proposal implementation and compliance.⁸⁵⁷

Dr Edmunds further advised that there are existing best practice documents on monitoring and environmental evaluation, such as the Victorian Biodiversity Strategy and ISO 14000.⁸⁵⁸ However, he stated that there should be audits against the standards to ensure compliance because, although the general principles of best practice environmental monitoring have been established for decades, they are 'rarely implemented'.⁸⁵⁹

9.3 Current Victorian process

The ministerial guidelines include a specific objective of the environmental impact assessment process is 'to provide a basis for monitoring and evaluating the effects of works to inform environmental management of the works and improve environmental knowledge'.⁸⁶⁰ Therefore, an EES should include:⁸⁶¹

- a framework of statutory approvals and agreements that will underpin Environmental Management Plans and measures;

⁸⁵⁶ Department of Sustainability, Environment, Water, Population, and Communities, *Intergovernmental agreement on the environment*, May 1992, schedule 3, (xii)

⁸⁵⁷ Australian Marine Ecology, submission no.29, p.4

⁸⁵⁸ *ibid.*, p.6; The Victorian Biodiversity Strategy provides a framework for achieving the *Flora and Fauna Guarantee Act's 1988* objectives of conserving native species, communities and gene pools, preventing threats and encouraging community involvement. (Department of Sustainability and Environment, *Victoria's biodiversity strategy 2010–2015: Consultation draft*, www.land.vic.gov.au/DSE, accessed 17 September 2010). The strategy is guided by core principles, including ecological, risk management and sustainable development principles, and outlines how to apply the principles to ecological systems and biodiversity conservation and management. The strategy also includes directions in management, and objectives for the management of biodiversity (Source: Government of Victoria, *Victoria's biodiversity strategy*, 1997)

⁸⁵⁹ Australian Marine Ecology, submission no.29, p.6

⁸⁶⁰ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.3

⁸⁶¹ *ibid.*, p.20

- the Environmental Management System to be adopted (e.g. based on ISO 14001), including organisational responsibilities and accountabilities;⁸⁶²
- the proposed program for evaluating environmental outcomes, reviewing and revising Environmental Management Plans, as well as the auditing and reporting of performance; and
- arrangement for management of and access to baseline and monitoring data, to ensure the transparency and accountability of environmental management as well as to contribute to the improvement of environmental knowledge.

The Department of Planning and Community Development (DPCD) advised the Committee that Environmental Management Plans are formally required as part of the approvals, which are issued under other legislation by the relevant decision-makers.⁸⁶³ Proponents usually have responsibility for implementing the Environmental Management Plan/s.⁸⁶⁴ Plans provide important information on how environmental values will be protected as a project is implemented.⁸⁶⁵ Plans identify key environmental issues, management strategies and controls, and monitoring requirements. For example, the Environmental Management Plan for the Channel Deepening Project was prepared to establish the processes and controls that will be implemented to ensure that the project is delivered with no greater risk or effects than those identified in the Supplementary EES.⁸⁶⁶ The Environmental Management Plan for the Victorian Desalination Plant:

*... covers the design, construction, operation and maintenance phases of each project component. The Environmental Management Plan identifies the key environmental issues across the project and provides strategies and plans for managing them effectively. It also defines the legal requirements for the project and identifies the regulatory permits and licences required for construction activities.*⁸⁶⁷

Dr Edmunds advised the Committee that an EES should evaluate the Environmental Management Plan as rigorously as the impact and risk assessments.⁸⁶⁸ He stated that there is considerable scope for improvement in the way the EES process considers the efficacy of proposed Environmental Management Plans and deals with inadequacies.⁸⁶⁹ He indicated that this largely rests with the panel assessment phase, 'where critical review and cross-examination can occur, but also through the direction of the Department of Sustainability and Environment (DSE) and the EPA, which can proscribe acceptable practices'.⁸⁷⁰

⁸⁶² The EPA Victoria describes an environmental management system as: 'a program that can be used to identify, manage and reduce an organisation's impact on the environment and generate reports on environmental performance progress. It provides a systematic and methodical approach to planning, implementing and reviewing an organisation's response to those impacts. An environmental management system does not set environmental standards, but sets out procedures designed to meet environmental performance requirements that are most relevant to the organization'. www.epa.vic.gov.au, accessed 22 September 2010

⁸⁶³ Department of Planning and Community Development, correspondence received, 27 July 2010

⁸⁶⁴ Various Environmental Management Plans

⁸⁶⁵ Australian Marine Ecology, submission no.29, p.19

⁸⁶⁶ Port of Melbourne Corporation, *Channel Deepening Project Environmental Management Plan*, Revision 11, March 2010, p.9

⁸⁶⁷ Aquasure, www.aquasure.com.au, *Environmental management plan*, accessed 26 August 2011

⁸⁶⁸ Australian Marine Ecology, submission no.29, p.19

⁸⁶⁹ *ibid.*, p.20

⁸⁷⁰ *ibid.*

According to the ministerial guidelines, the Minister's assessment can include 'recommended approaches to environmental monitoring and management'.⁸⁷¹

The EES for the Victorian Desalination Project contained draft Environmental Performance Requirements which were developed by DSE (with some advice from the Technical Reference Group) during the EES process, to provide a framework that the proponent needed to comply with and guide project design and environmental management during the construction and operation of the desalination plant.⁸⁷² The Performance Requirements 'set the environmental parameters' for the Desalination Project, and in their final form, were 'intended to be the basis of any contract with the Project Company' (the AquaSure consortium).⁸⁷³ AquaSure states:

The fundamental output from the environment effects statement process was the establishment of the performance requirements for the project. These requirements define the minimum environmental performance required to ensure the project delivers on the environmental expectations of the community and key stakeholders. The Victorian Desalination Project must comply with 221 strict environmental performance requirements across 38 areas, from wetlands and waterways to air quality and visual amenity. These performance requirements have been addressed in the Environmental Management System⁸⁷⁴ and Environmental Management Plan for the design, construction, operation and maintenance phases of each of the project's four main components — the plant, the marine works, the water transfer pipeline and the power supply.⁸⁷⁵

The Minister's assessment noted that while 'the project will have unavoidable environmental impacts, these impacts can be substantially minimised through application of Performance Requirements'.⁸⁷⁶ In the Minister's assessment, after the inquiry panel process and the consideration of public submissions, the Minister provided some additional and modified Performance Requirements.⁸⁷⁷ As discussed in chapter eight, the Minister's assessment does not result in legally binding conditions of approval, which means that any recommended environmental management actions detailed in the Minister's assessment cannot be enforced under the Environment Effects Act. However, the Committee was advised by DPCD that all Performance Requirements in the Minister's assessment were incorporated into the Deed of Agreement signed with the successful tenderer, Aquasure.⁸⁷⁸

⁸⁷¹ Department of Sustainability and Environment, *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978*, June 2006, p.27

⁸⁷² Aquasure, *Environmental Management System Manual*, 2009, p.9; Minister for Planning, *Victorian Desalination Project Assessment under the Environment Effects Act 1978*, January 2009, p.5

⁸⁷³ Victorian Desalination Project Environment Effects Statement – Volume 1, 2008, pp.1–12

⁸⁷⁴ The Environmental Management System (EMS) Manual 'provides AquaSure with a structured approach to managing environmental outcomes during each stage of the project to meet the requirements of the Performance Requirements. The EMS Manual provides the tools and templates to allow AquaSure and its contractors to provide comprehensive management of environmental outcomes and ensure compliance with the performance requirements ... AquaSure retains the responsibility of ensuring that the framework for development of project specific Environment Management Plans is developed in accordance with EMS requirements'. (Source: Aquasure, *Environmental management system manual*, 2009, p.9)

⁸⁷⁵ Aquasure, www.aquasure.com.au, *The environmental management system*, accessed 21 September 2010

⁸⁷⁶ Minister for Planning, *Victorian desalination project assessment under the Environment Effects Act 1978*, January 2009, p.1

⁸⁷⁷ Minister for Planning, *Victorian desalination project assessment under the Environment Effects Act 1978*, January 2009

⁸⁷⁸ Department of Planning and Community Development, correspondence received, 23 September 2010

In Victoria, approvals for project construction and operation are granted under other legislation, such as (but not limited to), the Planning and Environment Act, the Environment Protection Act, the Coastal Management Act or the Mineral Resources (Sustainable Development) Act, with conditions attached to permits or licences, such as a planning permit or works approval.⁸⁷⁹ Therefore, conditions are monitored and enforced by the relevant department or agency administering the approval legislation. Mr Stuart McConnell, Director, Future Focus, EPA Victoria described the post-EIA works approval process to the Committee as follows:

*In our case, where we issue a works approval subsequent to an EES, the EPA is responsible for assessing whether or not the works have been completed in accordance with that approval and then, if we are satisfied with that, issuing a licence consistent with that and monitoring people's compliance associated with that. That is a process that is in place. So there is a clear chain of responsibility, if you like, around monitoring and enforcement of the outcomes in that case, through the works approval and licensing process. It is then our job to make sure that there are the necessary monitoring and compliance investigations and so on to give effect to that.*⁸⁸⁰

However, Mr David Hyett, Technical Director of Environmental Management and Planning, AECOM, advised that 'there are some other statutory vehicles that are already there like EPA licences and things of that nature that of course can be easily adapted to do the monitoring, but that does not pick up every aspect of every project'.⁸⁸¹

The current process of applying conditions through a number of approvals was raised as an issue in the *Environment Assessment Review* (2002). According to the review, as environmental conditions are placed on projects outside the Environment Effects Act through a range of statutory approvals, monitoring approaches can vary. It stated:

*The Minister's assessment under the Environment Effects Act can guide an integrated approach, but the Act itself does not provide a framework for delivering this. Therefore, the manner in which the monitoring of implementation of each of the various statutory approvals is applied to a project will vary, depending on the statutory powers and the availability of resources for monitoring.*⁸⁸²

In regards to ensuring that all advice in the Minister's assessment is implemented through statutory approval processes, the DPCD advised the Committee:

*DPCD seeks advice on actions taken by the relevant decision-makers or other parties to implement the Minister for Planning's advice in Assessment Reports. While it is usually straightforward to obtain this advice with respect to primary project decisions, sometimes secondary matters may be resolved in an extended time frame. Consequently, obtaining feedback is sometimes affected by the varying time frames in which actions are addressed. Opportunities to develop a more formalised approach to obtaining advice on responses to Assessment actions are being considered.*⁸⁸³

⁸⁷⁹ Department of Infrastructure, *Environment assessment review: Issues and options, Technical paper*, 2002, p.88

⁸⁸⁰ Mr S McConnell, Director, Future Focus, EPA Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, pp.52–53

⁸⁸¹ Mr D Hyett, member, Environment Institute of Australia and New Zealand, and Technical Director of Environmental Management and Planning, AECOM, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.19

⁸⁸² Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.69

⁸⁸³ Department of Planning and Community Development, correspondence received, 22 September 2010

The Committee notes that there is not currently a clear connection between the EIA process and the subsequent monitoring regime, and is of the view that the monitoring of environmental impacts should be directly related to the Minister's assessment under the EIA legislation to ensure that the Minister's advice is translated into legally-binding conditions that can be monitored, audited for compliance and enforced.

Accordingly, the Committee recommends that:

RECOMMENDATION 9.1

The environmental impact assessment legislation be amended to require the monitoring of environmental impacts and compliance with conditions set by the Minister for Planning in the Minister's assessment.

9.4 Monitoring, auditing and enforcement

9.4.1 Monitoring

Monitoring is important in establishing whether proposed controls were adequate and impact predictions correct.⁸⁸⁴ Monitoring is also crucial for the early identification and mitigation of any unexpected environmental impacts or changes.⁸⁸⁵ The absence of provisions for monitoring environmental impacts under the Environment Effects Act was identified in several submissions as a significant weakness of the current Victorian environmental impact assessment regime.⁸⁸⁶

The Committee was advised by Dr Angus Morrison-Saunders, Senior Lecturer in Environmental Assessment, Murdoch University, that there has been a recent move in Western Australia towards the use of 'outcome-based conditions':

*We have moved to outcome-based conditions in Western Australia in the last few years because there were problems where you could not demonstrate compliance or non-compliance unless you had a clear outcome specified, so the legal advice has been that we need to have clear outcomes specified, but in doing that you do not preclude the proponent from adaptive management.*⁸⁸⁷

Dr Morrison-Saunders believes that this move has 'increased the utility of audit and compliance follow-up and environmental performance accountability for proposals during implementation'.⁸⁸⁸

⁸⁸⁴ For example, refer to: Environment Institute of Australia and New Zealand, submission no.42, p.6; Australian Marine Ecology, submission no.29, p.20; Environment Defenders Office (Victoria), submission no.27, p.12

⁸⁸⁵ Associate Professor A Gardner, Faculty of Law, University of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.197

⁸⁸⁶ For example, refer to: Australian Conservation Foundation, submission no.36, p.6; Environment Institute of Australia and New Zealand, submission no.42, p.6; Birds Australia, submission no.38, p.2; Environment Defenders Office (Victoria), submission no.27, p.12; Ms A Bolch, submission no.45, p.15; Western Coastal Board, submission no.50, pp.1–2

⁸⁸⁷ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.61

⁸⁸⁸ Dr A Morrison-Saunders, submission no.53, p.5

Responsibility for monitoring

The Committee received some evidence in relation to the most appropriate body to oversee monitoring of EIA approval conditions. Several submissions to the Committee supported a body or agency independent of government, to carry out monitoring, particularly for projects when the government is the proponent.⁸⁸⁹ Professor Lee Godden, Faculty of Law, University of Melbourne, advised the Committee:

... often what is neglected is what happens after impact assessment and the project goes ahead. I would stress a consideration of the monitoring and evaluation and the follow-up. As it is very important that we get things right up front and that adequate time is available to ensure independent best practice scientific input into the environmental impact statement process, often not enough attention basically goes to the other end when it is a project operating. If we are looking at what is known as adaptive management, we need to have continual feedback into the process so that that informs decision-making into the future...

I would favour independent monitoring, and I would also favour, as I have said in my submission, some powers of sanctioning. That may need to run through, for example, the Environment Protection Authority where it involves pollution or perhaps involve the Department of Sustainability and Environment if we are looking at heritage or biodiversity impacts ... I do think establishing an independent body would be important to that whole adaptive governance process for managing environmental impacts so that we have that independence of monitoring.⁸⁹⁰

According to the Western Australian EIA Administrative Procedures, one of the objectives of EIA is to ensure that proponents take primary responsibility for the protection of the environment impacted by their proposals.⁸⁹¹ Proponents are expected to implement continuous improvement in environmental performance, and apply best practicable measures for environmental management in implementing their proposals.⁸⁹² Dr Morrison-Saunders identified this environmental management philosophy as an important feature of the Western Australian EIA framework.⁸⁹³

The Committee notes that the *Environment Assessment Review* (2002) recommended that proponents be required to monitor the implementation of environmental conditions and commitments in the construction and operation of their proposal, with 'reports on the results of monitoring and compliance with the conditions provided as required (as set in conditions) to a body capable of auditing the implementation of conditions and commitments (such as the Environment Protection Authority)'.⁸⁹⁴

⁸⁸⁹ For example, refer to: Professor L Godden, Faculty of Law, University of Melbourne, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.101; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.113; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.253; Environment Defenders Office (Victoria), submission no.27, p.12

⁸⁹⁰ Professor L Godden, Faculty of Law, University of Melbourne, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, pp.98, 101

⁸⁹¹ Western Australian Government Gazette, *Environmental impact assessment administrative procedures*, 2010, p.5984

⁸⁹² *ibid.*

⁸⁹³ Dr A Morrison-Saunders, submission no.53, pp.2–3

⁸⁹⁴ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.71

The Committee is of the view that monitoring programs, once approved by the relevant agency, should be implemented by the proponent.

9.4.2 Auditing

Mr Ian LeProvost, President, Environmental Consultants Association of Western Australia, advised the Committee that it is important to have a body auditing compliance that is independent of the proponent, particularly when the proponent is a government department:

The community will not accept leaving the proponent in charge of his own compliance. ... you have to have somebody who is responsible to the community confirming that that work has been done. It is okay for the proponent to demonstrate that he has complied — to do the work and have provided the reports — but there has to be somebody at the other end reading those reports and ticking them off and saying, 'Yes, they are okay'.⁸⁹⁵

The Committee received some evidence that supported an independent body, or agency separate from government, particularly when the government is the project proponent, to audit proponent's monitoring programs and compliance with conditions.⁸⁹⁶ Professor Godden suggested that the EIA legislation in Victoria would be strengthened through provisions that mandate the review of post-approval auditing information, by the public and by an external, independent institutional body.⁸⁹⁷ Mr Andrew Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University advised the Committee that self-regulation is a problem when the department is the project proponent and also responsible for auditing and enforcement, and this can result in the community losing trust in the process.⁸⁹⁸ He advised:

In all [EIA processes] there is a strong emphasis on self-regulation and self-reporting, and that results in problems with both monitoring and enforcement and the effectiveness of the regime. For state projects, in terms of Victoria, the EPA and those sorts of bodies, or a similar body if you wanted to create a separate one, are the only ones that should really provide a third-party evaluation of monitoring and enforcement. I do not think it is good enough on an ongoing basis solely for the department or the agency that is responsible for the project to be responsible also for monitoring and enforcement. It simply does not work, and the community also has no trust in that process, so it is necessary to have a third agency to carry out that evaluation and to publish [the evaluation]⁸⁹⁹

Although monitoring is undertaken by the proponents, the Western Australian EPA conducts regular audits, and sometimes appoints external auditors if required, paid for by the proponent.⁹⁰⁰ The Office of the EPA has a team that oversees compliance auditing of the environmental impact assessment

⁸⁹⁵ Mr I LeProvost, President, Environmental Consultants Association of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.181

⁸⁹⁶ For example, refer to: Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.253; Professor L Godden and Associate Professor J Peel, submission no.54, p.3; Environment Defenders Office (Victoria), submission no.27, p.12; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.113

⁸⁹⁷ Professor L Godden and Associate Professor J Peel, submission no.54, p.3

⁸⁹⁸ Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.253

⁸⁹⁹ *ibid.*

⁹⁰⁰ Mr P Skitmore, Manager, Licensing, Department of Environment and Conservation, Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.228

process.⁹⁰¹ The Committee was advised that the Western Australian EPA takes a risk-based approach to compliance auditing. Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, stated:

*We have a team of about 10 officers within the office of the EPA that oversee the compliance auditing part of the process. Again, collaboration with other parts of government is fairly important. Again, if you were going to take an industrial development that went through the EPA's assessment process, there will be ministerial conditions on that project but there could also be some more detailed licensing conditions on it from the Department of Environment and Conservation. There could also be some conditions on it from the Department of Mines and Petroleum. Our compliance auditing team looks to work collaboratively with other parts of government in terms of undertaking site inspections and so on. They take a risk-based approach to compliance auditing. We have probably got over 450 projects at the moment that are in the implementation phase that they have some compliance auditing responsibility for. They take an approach of looking at what the risk is around those projects, what the compliance auditing process needs to be for those projects, whether desk audit is what is intended for that year, whether there is going to be a site inspection, and whether they do a site inspection with other parts of government. Where they identify a possible non-compliance, we have policies and procedures around enforcement and prosecutions, so they then go through those steps.*⁹⁰²

As discussed in chapter eight, following environmental impact assessment in Western Australia, the conditions and commitments in the Ministerial Statement set out the conditions to which project implementation is subject.⁹⁰³ Conditions relating to compliance auditing are outlined in the Ministerial Statement, including the requirements for a compliance assessment plan. Dr Morrison-Sanders advised the Committee:

*In the approval conditions, the EPA sets a whole series of conditions, and some will be specifically about air quality, water quality and so on, but there are always two conditions in there. They are normally [condition] numbers 4 and 5, if you ever download a ministerial statement, and no. 4 is about auditing and compliance. The proponent has to provide a compliance report annually, until such time as you have ticked them off and they do not need to do them anymore, and it talks about what conditions have been complied with, what is their status.*⁹⁰⁴

Under the Commonwealth Environment Protection and Biodiversity Conservation Act, there are several options available for audit compliance with conditions attached to an approval, including the following:

- desktop audit/review of documents supplied by the proponent;
- site inspections;
- inspections under monitoring warrant;
- audit by Department of Sustainability, Environment, Water, Population and Communities officers;

⁹⁰¹ Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.153

⁹⁰² *ibid.*

⁹⁰³ For example, refer to: www.epa.wa.gov.au/peia/approvalstatements, accessed 22 August 2010

⁹⁰⁴ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.66

- joint audit with another agency;
- external environmental audit; and/or
- directed audit.⁹⁰⁵

The option selected will reflect 'the complexity of the action, the number of matters to be audited, and a risk assessment of the impacts on matters protected under the Act'.⁹⁰⁶

The Department of Sustainability, Environment, Water, Population and Communities has implemented a Compliance Auditing Programme, and all projects referred under the Act can be audited under this program.⁹⁰⁷ The audits ensure that projects with the potential to impact on matters of national environmental significance are implemented as planned.⁹⁰⁸ Projects that have been approved with conditions, or given a 'not controlled action – particular manner'⁹⁰⁹ are currently selected at random for auditing.⁹¹⁰

As mentioned above, the *Environment Assessment Review* (2002) recommended that auditing of the implementation of conditions and commitments be conducted by a body such as the EPA.⁹¹¹ Several submissions to the Committee also supported an independent body, or an agency separate from government, such as the EPA, to carry out auditing.⁹¹²

The Committee notes that an independent monitor was established for the Channel Deepening Project after the completion of the environmental impact assessment process, as set out in the case study below.

⁹⁰⁵ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.278

⁹⁰⁶ *ibid.*

⁹⁰⁷ Department of Sustainability, Environment, Water, Population and Communities, *EPBC Act, Compliance auditing*, www.environment.gov.au/ebpc/compliance/auditing.html, accessed 29 August 2011

⁹⁰⁸ *ibid.*

⁹⁰⁹ Where an action does not require assessment and approval provided it is undertaken in a particular manner.

⁹¹⁰ Department of Sustainability, Environment, Water, Population and Communities, *EPBC Act, Compliance auditing*, www.environment.gov.au/ebpc/compliance/auditing.html, accessed 29 August 2011

⁹¹¹ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.71

⁹¹² For example, refer to: Professor L Godden, Faculty of Law, University of Melbourne, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.101; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.113; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.253; Environment Defenders Office (Victoria), submission no.27, p.12

Case study 2 Office of the Environmental Monitor, Channel Deepening Project

Whilst the proponents (Port of Melbourne Corporation) are responsible for implementing the Environmental Management Plan for the Channel Deepening Project, the Office of the Environmental Monitor was established to 'bring an added layer of scrutiny to the Project' by providing an 'around-the-clock independent and transparent view of the environmental performance of the Project'.⁹¹³

The objectives of the Office of the Environmental Monitor are to:

- be accessible to all stakeholders and the community;
- scrutinise, report and advise on the Project's environmental performance in an independent and transparent way; and
- communicate all available information on the Project's environmental performance in a timely manner to stakeholders and the community.⁹¹⁴

The post-EIA monitoring and enforcement process for the Channel Deepening Project includes the following:

- an Environmental Management Plan was developed to identify the controls and requirements for project delivery;
- a performance bond was provided by the Port of Melbourne Corporation (the project proponent) for the delivery of the works;
- an independent regulator, the Office of the Environmental Monitor, was created by the government and funded by the Port of Melbourne Corporation;
- independent audits, to be commissioned by the Office of the Environmental Monitor, are a condition of the Channel Deepening Project's Environmental Management Plan; and
- results of the monitoring programs are made publicly available on the Office of the Environmental Monitor's website.⁹¹⁵

Mr Mick Bourke, the then-CEO of the EPA Victoria, was appointed the Environmental Monitor when the Office was established in 2007. The Office of the Environmental Monitor has technical support from an Independent Expert Group, for conducting audits, or other investigations as required, and administrative support from the Department of Sustainability and Environment.⁹¹⁶

According to the Office's terms of reference, the Environmental Monitor will:

1. review the management reports of the Environmental Management Plan prepared by the Port of Melbourne Corporation and examine any other reports related to the Environmental Management Plan that may be requested by Victorian Ministers;
2. monitor and evaluate the environmental performance of the Project, including matters raised by stakeholders and the community to 31 December 2011; and
3. advise Port of Melbourne Corporation and relevant Ministers, or their delegate, on the above matters, and any other matters referred to the Environmental Monitor by a relevant Minister, as appropriate.

All matters are to be examined against the Environmental Management Plan's requirements.⁹¹⁷

⁹¹³ Office of the Environmental Monitor, www.oem.vic.gov.au, accessed 26 July 2011

⁹¹⁴ Office of the Environmental Monitor, *About the Office*, www.oem.vic.gov.au/AbouttheOffice, accessed 14 September 2010

⁹¹⁵ Mr N Easy, Executive General Manager, Channel Deepening Project, Port of Melbourne Corporation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.124; Office of the Environmental Monitor, *Independent audits of the Channel Deepening Project*, www.oem.vic.gov.au/Independentaudits, accessed 14 September 2010

⁹¹⁶ Office of the Environmental Monitor, *About the Office*, www.oem.vic.gov.au/AbouttheOffice, accessed 14 September 2010

⁹¹⁷ *ibid.*

The Port of Melbourne Corporation described the Channel Deepening Project's Environmental Management Plan as the 'penultimate document in terms of the management of the works'.⁹¹⁸ It was approved by both the Victorian and Commonwealth governments.⁹¹⁹ The Port of Melbourne Corporation advised the Committee that the Environmental Management Plan was 'very extensive for any dredging project in Melbourne or Australia, but probably anywhere in the world'.⁹²⁰

The Office of the Environmental Monitor describes the Environmental Management Plan as the 'rule book'.⁹²¹ One of the responsibilities of the Office is to scrutinise results from monitoring programs, and the Port of Melbourne Corporation's conformance against the regulatory and environmental controls set out in the Plan.⁹²²

*The Office uses a wide range of information and data to assess whether or not the Project has followed the rules set out in the Environmental Management Plan. Data from more than 20 monitoring programs operating across Port Phillip Bay is routinely examined by the Office to detect any changes to the bay's health.*⁹²³

The Office of the Environmental Monitor reports quarterly, annually, and at any other critical points, on the Channel Deepening Project's environmental performance.⁹²⁴ All reports are publicly available.⁹²⁵

In regards to the independence of the process, and how it remained 'at arms length', the Port of Melbourne Corporation advised the Committee:

... the Office of the Environmental Monitor reported to a separate minister. They were located in a separate office. They had their own people with professional backgrounds and qualifications in terms of the project and its requirements. They were certainly located elsewhere from the project personnel. They had different reporting lines and, from our point of view, it was up to us to demonstrate, if you like, the information and the requirements of delivery of the project, that it met and fulfilled what were the requirements of the environmental management plan...

*They were clearly distant to us, but obviously a lot of time was spent in the transfer of information and in providing evidence. It was a very evidentiary process in terms of what we did, that we had to show and demonstrate that to the Office of the Environmental Monitor. I think to add to the independence an external auditor was appointed. Again, they were appointed by the Office of the Environmental Monitor that undertook their own checks on the project. There were probably two levels of checking, if you like, and assurance around the project delivery.*⁹²⁶

⁹¹⁸ Mr N Easy, Executive General Manager, Channel Deepening Project, Port of Melbourne Corporation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.124

⁹¹⁹ Office of the Environmental Monitor, *Quarterly Review No.9 – June 2010*, p.3

⁹²⁰ Mr N Easy, Executive General Manager, Channel Deepening Project, Port of Melbourne Corporation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.124

⁹²¹ Office of the Environmental Monitor, *Independent audits of the Channel Deepening Project*, www.oem.vic.gov.au/Independentaudits, accessed 14 September 2010; Office of the Environmental Monitor, *Quarterly Review No.9 – June 2010*, p.3

⁹²² Office of the Environmental Monitor, *About the Office*, www.oem.vic.gov.au/AbouttheOffice, accessed 14 September 2010

⁹²³ *ibid.*

⁹²⁴ Office of the Environmental Monitor, *Quarterly Review No.9 – June 2010*, p.2

⁹²⁵ Mr N Easy, Executive General Manager, Channel Deepening Project, Port of Melbourne Corporation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.124

⁹²⁶ *ibid.*, p.126

Mr David Hyett, Technical Director of Environmental Management and Planning, AECOM advised:

I think we have an example with the channel deepening project with the government environmental monitor. That level of rigour is not required for lots of projects, but the model where you have a government authority to do some checking one and two years beyond the approval decision for a project sounds like a sensible idea to me. The level of effort and resources to be put into that is to be determined, but I think that sort of government checking of projects — even if it is not every project but just a selection of projects — just provides the community and the government with greater assurance that the system is working and that the proponents are delivering on the conditions of their approval ...⁹²⁷

However, Mr Len Warfe, President, Port Phillip Conservation Council, a federation of fourteen conservation groups around Port Phillip Bay, advised the Committee that post-EIA monitoring, 'so far from what we have seen of it, has not been very effective'.⁹²⁸ He stated:

We are seeing a lot of erosion at the southern end of the bay and none of these monitoring people wants to know about it. They are saying in fact that it is nothing to do with channel deepening, yet it seems to have coincided with the opening up of the Rip. We believe that channel deepening has been the cause of it ...⁹²⁹

For EIAs assessed and approved under Levels 1 and 2, the Committee is of the view that the proponent's monitoring programs should be audited by an appropriate independent authority, utilising a risk-based approach. For proposals assessed and approved under Level 3, the Committee believes that an Office of the Environmental Monitor should be established, with independent auditors appointed by the EPA to audit monitoring programs and compliance with conditions.

The Committee believes that the capacity to conduct more rigorous, detailed and high-level audits and the public availability of monitoring and audit information on a dedicated website, distinguish the Office of the Environmental Monitor from the regular auditing functions of EPA.

Accordingly, the Committee recommends that:

RECOMMENDATION 9.2

The environmental impact assessment legislation be amended to require an appropriate independent authority to randomly audit the proponent's monitoring programs and ensure compliance with conditions set by the Minister for Planning, for projects assessed under Levels 1 and 2.

⁹²⁷ Mr D Hyett, member, Environment Institute of Australia and New Zealand, and Technical Director of Environmental Management and Planning, AECOM, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.19

⁹²⁸ Mr L Warfe, President, Port Phillip Conservation Council, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.45

⁹²⁹ *ibid.*

RECOMMENDATION 9.3

The environmental impact assessment legislation be amended to require an Office of the Environmental Monitor, established by the Environment Protection Authority Victoria and funded in-part by the proponent, be responsible for the auditing of environmental impacts and compliance with conditions set by the Minister for Planning for projects assessed under Level 3.

9.4.3 *Funding post-EIA monitoring and auditing*

Evidence received by the Committee emphasised the importance of the body responsible for monitoring and auditing having appropriate expertise and adequate resources.⁹³⁰

Associate Professor Alex Gardner, Faculty of Law, University of Western Australia, advised the Committee that there is a strong argument for a user-pays regime with auditing:

*... whether you use an independently certified auditor or a government official as an auditor. I think generally the cost of the basic monitoring should be imposed on the proponent. This is certainly what happens with water resources. I have a bit more recent familiarity with water resources. The idea is that the licensee is the one that is monitoring and reporting, and I think it should be the same thing with environmental impact assessment conditions.*⁹³¹

However, Dr Nic Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, advised the Committee that the user-pays system in Western Australia has some flaws:

*... when there is a pecuniary relationship between a proponent and the parties doing the monitoring there is inevitably going to be a great deal of scepticism about what is produced, but there is probably no feasible alternative to a proponent-pays system. I think in the federal US jurisdiction they have a system where money is recovered from proponents but the government manages the assessment process, so it is one step away from a direct pecuniary relationship between proponents and consultants.*⁹³²

Mr Doug Kootnz, Chairman, Environment and Water Policy Committee, Association of Mining and Exploration Companies supported 'some opportunities for companies to contribute' to compliance monitoring, but it has to be 'very open and transparent'.⁹³³

⁹³⁰ For example, refer to: Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.253; Mr I LeProvost, President, Environmental Consultants Association of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.181; Associate Professor S Mascher, Centre for Mining, Energy and Resources Law, University of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.198

⁹³¹ Associate Professor A Gardner, Faculty of Law, University of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.198

⁹³² Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.189

⁹³³ Mr D Kootnz, Chairman, Environment and Water Policy Committee, Association of Mining and Exploration Companies, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.216

The Committee is of the view that a user-pays system should be adopted for monitoring, and that proponents make some contribution to funding for auditing and enforcement activities. However, funding for auditing should be administered by an appropriate independent authority to ensure audits are carried out independently and transparently.

Accordingly, the Committee recommends that:

RECOMMENDATION 9.4

The appropriate independent authority should be adequately resourced to conduct auditing (for Level 1 and 2 assessments) and enforcement activities for projects that require an environmental impact assessment.

9.4.4 Public disclosure of monitoring and auditing information

The Environment Defenders Office supported the use of an independent environmental monitor to ensure that monitoring and auditing information is made publicly available.⁹³⁴ The Environment Defenders Office also note that 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'.⁹³⁵

Associate Professor Sharon Mascher, Centre for Mining, Energy and Resources Law, University of Western Australia, advised the Committee that making monitoring results available to the public operates as an additional check to ensure compliance:

*... there are always concerns around commercial in confidence and all those sorts of things, but public availability of information is a really important low-cost, high-impact tool in ensuring compliance.*⁹³⁶

Dr Morrison-Saunders and the Environment Defenders Office highlighted Hong Kong's EIA framework as a progressive example of public reporting of monitoring and auditing activities.⁹³⁷ In Hong Kong, environmental permits are required for the construction, operation and decommissioning of designated projects.⁹³⁸ All recommendations in the EIA report are incorporated in the environmental permits, including environmental monitoring and audit requirements, which are legally-binding on the proponent.⁹³⁹ Public participation in post-EIA activities in Hong Kong is encouraged through the following mechanisms:

⁹³⁴ Environment Defenders Office (Victoria), submission no.27, p.12

⁹³⁵ *ibid.*, p.13

⁹³⁶ Associate Professor S Mascher, Centre for Mining, Energy and Resources Law, University of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.198

⁹³⁷ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Western Australia, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.62; Environment Defenders Office, submission no.27, p.12

⁹³⁸ J Arts, P Caldwell and A Morrison-Saunders, 'Environmental impact assessment follow-up: good practice and future directions — findings from a workshop at the IAIA 2000 conference' *Impact assessment and project appraisal*, volume 19, number 3, September 2001, p.178

⁹³⁹ *ibid.*

- all monitoring information is publicly available on the internet;
- there is sometimes real-time monitoring by use of web-cameras, for example installed on building sites; and
- the public can make comments or complaints on the project through the Environmental Protection department's website.⁹⁴⁰

Dr Morrison-Saunders stated:

Hong Kong requires all proponents to establish a dedicated website for their project, and everything is on there. Every bit of documentation about that project is on the proponent website. Of course the proponent has to maintain that website at their own cost, and monitoring data and monitor reports go on that system in real time as much as they possibly can, so it is interesting where the Hong Kong system is using the public as a kind of watchdog to keep an eye on what is going on. There is no way 8 or 10 people in a government agency can do that role by themselves.⁹⁴¹

The Western Australian Department of Environment and Conservation (DEC), currently responsible for enforcing compliance with EIA conditions, advised the Committee that the department 'strongly enshrines' 'openness and transparency' in regards to the public release of information.⁹⁴² While there is no requirement under the Western Australian Environmental Protection Act for the Minister or the Environmental Protection Authority to publish information from monitoring and compliance activities, the Committee was informed that freedom of information laws apply to such documents.⁹⁴³ Those laws allow the public to request access to documents held by government agencies.⁹⁴⁴ Mr Peter Skitmore, Manager, Licensing, Department of Environment and Conservation, Western Australia, advised the Committee:

A requirement under Freedom of Information (FOI) is that each government department is required to produce an information statement, and that is available on the Department of Environment and Conservation's website, which lists all the relevant documents that we may actually hold in relation to both EIA and works approvals and licensing. That document says 'This is publicly available' or 'You are required to apply for FOI' because there are certain protocols for FOI... If there is anything commercial in confidence, then that goes through FOI. The DEC certainly strongly enshrines that process of openness and transparency. It is a reasonable public right to know.⁹⁴⁵

⁹⁴⁰ J Arts, P Caldwell and A Morrison-Saunders, 'Environmental impact assessment follow-up: good practice and future directions — findings from a workshop at the IAIA 2000 conference' *Impact Assessment and Project Appraisal*, volume 19, number 3, September 2001, p.178

⁹⁴¹ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Western Australia, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.62

⁹⁴² Mr P Skitmore, Manager, Licensing, Department of Environment and Conservation, Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, pp.228–229

⁹⁴³ *ibid.*

⁹⁴⁴ *ibid.*

⁹⁴⁵ *ibid.*

There may be cases where monitoring and compliance documents contain sensitive commercial information. The Committee was told that the Western Australian freedom of information laws contain provisions for handling commercial in confidence material.⁹⁴⁶ The Committee notes that the Victorian *Freedom of Information Act 1982* (Vic) also contains some protections for information relating to trade secrets and other matters of a business, commercial or financial nature.⁹⁴⁷

The Committee believes that the environmental impact assessment legislation in Victoria should require proponents to release all monitoring reports within five business days and that the appropriate independent authority should in turn be required to post all monitoring information on the internet within another five business days. The legislation should contain a similar provision in relation to auditing reports. Accordingly, the Committee recommends that:

RECOMMENDATION 9.5

The environmental impact assessment legislation be amended to require that:

- (a) proponents be required to publish all monitoring information on the internet within five business days.
- (b) the appropriate independent authority publish all auditing reports on the internet within five business days of receipt.

9.4.5 Enforcement and penalties for non-compliance with EIA conditions

In 2007, the Commonwealth Government allocated 'substantially' more resources to compliance and enforcement activities under the Environment Protection and Biodiversity Conservation Act, and established a dedicated Compliance and Enforcement Branch within the Department of Sustainability, Environment, Water, Population and Communities.⁹⁴⁸ The department also has a Compliance and Enforcement Policy.⁹⁴⁹

The Environment Protection and Biodiversity Conservation Act also includes a range of enforcement mechanisms for reviewing compliance of projects assessed under the Act and managing non-compliance, as well as provisions for criminal and civil penalties for contraventions, or breaches, of the Act.⁹⁵⁰ These mechanisms include:⁹⁵¹

⁹⁴⁶ *ibid.*

⁹⁴⁷ *Freedom of Information Act 1982* (Vic) s.34

⁹⁴⁸ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.268

⁹⁴⁹ Department of Sustainability, Environment, Water, Population and Communities, *Compliance and enforcement policy*, December 2009

⁹⁵⁰ Part 17 of the Act contains the majority of the compliance and enforcement provisions, although there are also others spread throughout the Act. Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p.268

⁹⁵¹ This section is sourced from: Department of Sustainability, Environment, Water, Population and Communities, *EPBC Act, Compliance and enforcement mechanisms*, www.environment.gov.au, accessed 10 September 2010

- court injunctions, to prevent a party from undertaking or continuing with an activity;⁹⁵²
- directed environmental audits, if the Minister ‘suspects’ that an authorised action is having impacts greater than anticipated when the action was assessed or a breach of conditions is likely to occur;⁹⁵³
- civil or criminal penalties, for individuals and corporations that contravene the requirements for environmental approvals under the Act;⁹⁵⁴
- remediation order and determination to repair or mitigate environmental damage resulting from a contravention of the Act;⁹⁵⁵
- enforceable undertakings;⁹⁵⁶
- liability of executive officers (of a body corporate), for a contravention of the Act committed by the body corporate;⁹⁵⁷ and
- making contraventions public, ‘in any way [the Minister] considers appropriate’.⁹⁵⁸

While the Commonwealth is yet to bring a prosecution for a breach of approval conditions, a civil action has been brought by a conservation group for a declaration and an injunction to restrain an alleged contravention of an approval under the Act. The case was recently dismissed.⁹⁵⁹

Under the Environment Protection and Biodiversity Conservation Act, the maximum civil penalty for a corporation is \$5.5 million and \$550,000 for an individual. The maximum monetary penalty for a criminal action is much lower. It is just \$231,000 for a corporation and \$46,200 for an individual, though that is coupled with a possible maximum term of seven years’ imprisonment.⁹⁶⁰

The *Independent Review of the Environment Protection and Biodiversity Conservation Act* (2009) recommended that responsibility for monitoring, audit, compliance and enforcement activities under the Act be transferred to a National Environment Commissioner.⁹⁶¹

⁹⁵² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), division 14

⁹⁵³ *ibid.*, Division 12

⁹⁵⁴ See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), part 17, divisions 15 and 17, s.74AA, s.142A

⁹⁵⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), division 14A and 14B

⁹⁵⁶ *ibid.*, s.486DA and 486DB; An enforceable undertaking is ‘a written undertaking provided by a person to the Minister that specifies that the person will pay a specified amount within a specified period to the Commonwealth or to another specified party for the purpose of protection and conservation of a protected matter. An enforceable undertaking is one option for enforcing contraventions of the civil penalty provisions of Part 3 of Act’. Department of Sustainability, Environment, Water, Population and Communities, *EPBC Act, Compliance and enforcement mechanisms*, www.environment.gov.au, accessed 10 September 2010

⁹⁵⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Part 17, Division 18

⁹⁵⁸ *ibid.*, s.498

⁹⁵⁹ *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 8)* [2011] FCA 175

⁹⁶⁰ See Z Lipman, ‘An Evaluation of Compliance and Enforcement Mechanisms in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and their Application by the Commonwealth’, *Environmental and Planning Law Journal*, vol. 27, 2010, p.107

⁹⁶¹ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p.280

In Western Australia, the Environmental Protection Act provides for projects to be monitored,⁹⁶² enforced⁹⁶³ and provides for penalties for breaching conditions.⁹⁶⁴ Enforcement is currently conducted by the Department of Environment and Conservation, however, Ms Andrews stated that arrangements for enforcement were still being finalised, since a dedicated department was established for the EPA in November 2009.⁹⁶⁵ The Committee was advised that resources for enforcement were recently increased:

*... in Western Australia a couple of years ago we had the lead contamination at Esperance, which was dreadful. It precipitated major funding for the EPA enforcement branch in terms of making sure that does not happen again.*⁹⁶⁶

The Committee was advised that the penalties for breaching ministerial approval conditions are a significant strength of the Western Australian EIA framework.⁹⁶⁷ Dr Morrison-Saunders stated that penalties, particularly the criminal offences, encourage proponents to take the environmental impact assessment framework 'very seriously'.⁹⁶⁸

Concern was expressed in several submissions regarding the absence of penalties under the Environment Effects Act for contraventions of the Act.⁹⁶⁹ There was also support for legally-binding ministerial conditions, provisions in the environmental impact assessment legislation for enforcing ministerial approval conditions, and penalties for non-compliance with conditions.⁹⁷⁰ Dr Bryan Jenkins, CEO, Environment Canterbury, advised the Committee:

*The ability to set practical enforceable conditions is important. Most projects going through EIA, if they are major projects, will change throughout the process, and a lot of the ability to achieve environmental outcomes will depend upon the way the conditions are specified. You want to make certain they can be practically implemented and, from the government's point of view, capable of being enforced. You do not want vague conditions; you want something that is very clear to both applicants and administrators. Including a mechanism for enforcement and restoration is necessary in case something goes wrong.*⁹⁷¹

⁹⁶² *Environmental Protection Act 1986* (WA) s.48

⁹⁶³ *ibid.*, s.48(1)

⁹⁶⁴ *ibid.*, schedule 1

⁹⁶⁵ The Office of the EPA was part of the Department of Environment and Conservation until November 2009. Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.153

⁹⁶⁶ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.61

⁹⁶⁷ *ibid.*, p.57

⁹⁶⁸ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.57

⁹⁶⁹ For example, refer to: Environment Defenders Office (Victoria), submission no.27, p.12; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.114

⁹⁷⁰ For example, refer to: Mornington Peninsula Shire Council, submission no.56, p.5; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.114, Victorian Planning and Environmental Law Association, submission no.55, pp.5-6; Environment Defenders Office (Victoria), submission no.27, p.12; Professor L Godden and Associate Professor J Peel, University of Melbourne, submission no.54, p.3

⁹⁷¹ Dr B Jenkins, Chief Executive Officer, Environment Canterbury New Zealand, Environment and Natural Resources Committee public hearing – Melbourne, 2 June 2010, transcript of evidence, p.237

Mr Julian Chenoweth, General Counsel, Australian Conservation Foundation, stated that Victoria's environmental impact assessment legislation should contain offences, as 'there is no point having a regulatory regime if there are not consequences for not complying'.⁹⁷²

The *Environment Assessment Review* (2002) established that non-compliance with environmental approval conditions could be discouraged by the application of penalties for breaches. It recommended that environmental impact assessment legislation provide for penalties in the event that monitoring shows that environmental approval conditions are not being complied with.⁹⁷³ The *Environment Assessment Review* further stated that penalties for non-compliance would provide the community with confidence in the implementation of the outcomes of the assessment process, particularly if they have the opportunity to be consulted on environmental management matters during the project's construction and operation.⁹⁷⁴

A key question, raised by the Environment Protection and Biodiversity Conservation Act review, and not addressed by the *Environment Assessment Review*, is whether these penalties should be civil and/or criminal and, if both civil and criminal penalties are created, what the interrelationship between these provisions should be. This issue has received little attention in Australia so far as environmental law is concerned⁹⁷⁵ and warrants further investigation. But, however it is resolved, the Committee is of the view that the environmental impact assessment legislation should contain substantial penalties for breaching ministerial approval conditions. The Committee believes that substantial penalties will go towards ensuring that proponents are held to account for appropriately managing their project, and increase community confidence in the environmental impact assessment process and the value of the process.

Accordingly, the Committee recommends that:

RECOMMENDATION 9.6

The environmental impact assessment legislation be amended to provide penalties for non-compliance with environmental impact assessment approval conditions set by the Minister for Planning.

9.5 Measuring the effectiveness of environmental impact assessment

... proponents are required to do monitoring and produce annual reports The problem we have is that that information, generally speaking, is extremely difficult for the community to actually see. In many cases it is apparent that that information is rarely used inside government. Often no-one is assigned the responsibility to find out whether a particular project is meeting its requirements, or even if it is meeting its requirements, whether in doing so it is producing a good environmental outcome or not, because we do not know in many cases. We do the best we can, but it is a learning process. Strictly speaking you can be following the letter of the law to

⁹⁷² Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.114

⁹⁷³ Environment Assessment Review Advisory Committee, *Report of the Environment Assessment Review Advisory Committee*, December 2002, p.71

⁹⁷⁴ *ibid.*

⁹⁷⁵ For a general discussion of civil penalties, see the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, 2003

*the absolute hilt and still stuffing up the environment big time because of the lack of knowledge that we have about our effects, particularly on ecosystems...*⁹⁷⁶

– Dr Nic Dunlop, Citizen Science Project Coordinator,
Conservation Council of Western Australia

The term ‘effectiveness’ refers to whether something works as intended and meets the purpose for which it is designed.⁹⁷⁷ Whilst there is much interest in the evaluation of EIAs both in Australia and overseas, there has been minimal evaluation undertaken.⁹⁷⁸

Several studies have attempted to evaluate the environmental effectiveness of the Commonwealth environmental impact assessment framework under the Environment Protection and Biodiversity Conservation Act.⁹⁷⁹ Mr Andrew Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University has analysed the environmental and cost-effectiveness of the Environment Protection and Biodiversity Conservation Act, and examined whether the environmental objectives of the Act have been achieved.⁹⁸⁰ In relation to what is known about the environmental effectiveness of the EIA processes, he advised the Committee:

- the quality of science that comes out of environmental impact assessment processes ‘tends to be very variable and the predictions that are made in that science are generally poor’;
- decision-makers tend to use environmental impact assessment information ‘sparingly’ and generally, ‘EIA information does not have a substantial impact on decision-making processes’. Mr Macintosh recognised that the outcomes from government processes are influenced by a range of factors, including politics;
- environmental impact assessment processes do not appear to result in significant differences in environmental outcomes, when regulatory processes are compared; and
- the direct costs of environmental impact assessment processes to government and proponents can be ‘very high’.⁹⁸¹

⁹⁷⁶ Dr N Dunlop, Citizen Science Project Coordinator, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.189

⁹⁷⁷ B Sadler, *International study of the effectiveness of environmental assessment*, final report, June 1996, p.37

⁹⁷⁸ M Elliott and I Thomas, *Environmental impact assessment in Australia: Theory and practice*, 2009, p.203

⁹⁷⁹ A MacIntosh, ‘The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): An Evaluation of its Cost-Effectiveness’, *Environmental and Planning Law Journal*, (2009) 26, p.337; also refer to: C McGrath, *Review of the EPBC Act* (paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment, Water, Heritage and the Arts, 2006), www.environment.gov.au/soe/2006/publications/emerging/epbc-act/index.html, accessed 7 August 2009; A. Macintosh, ‘Why the Environment Protection and Biodiversity Conservation Act’s Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives’ (2004) 21 *Environmental and Planning Law Journal* 288

⁹⁸⁰ A Macintosh, ‘The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): An Evaluation of its Cost-Effectiveness’, *Environmental and Planning Law Journal*, (2009) 26, 337; A Macintosh, ‘Why the Environment Protection and Biodiversity Conservation Act’s Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives’ (2004) 21 *Environmental and Planning Law Journal* 288; Andrew Macintosh, *The EPBC Survey Project: Final Data Report*, September 2009

⁹⁸¹ Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.252

As a result, according to Mr Macintosh, for all the significant costs of EIA processes, they do not seem to be significantly changing outcomes, because the information from the EIA process is not utilised enough.⁹⁸² Mr Macintosh stated that the cost-effectiveness of environmental impact assessment processes should be regularly and routinely evaluated.⁹⁸³ He also suggested that costs could be reduced by decreasing the size of environmental impact assessment documentation, and utilising strategic environmental assessment.⁹⁸⁴

The Committee notes that there has not been a comprehensive examination of the environmental effectiveness of Victorian environmental impact assessment outcomes to date. In regards to post-EIA evaluation the Victorian Government submission stated:

*EESs and Ministerial assessments since mid 2006 have considered potential effects in the context of the principles and objectives of ecologically sustainable development. The effectiveness of this is difficult to evaluate, in part because the legislation under which projects are approved is a more direct influence on environmental outcomes. However, there have been no substantial environmental problems arising from projects referred since mid 2006 and which have commenced implementation.*⁹⁸⁵

The Committee is of the view that environmental impact assessment has an important role in the protection of the natural environment, and the lack of evaluation in relation to the effectiveness of EIA processes and whether EIA has achieved better environmental outcomes is of concern to the Committee. The Committee does not believe that it is adequate to simply assert that there has been 'no substantial environmental problems' arising from referred projects. That is not a robust or appropriate method of measuring the success of EIA.

The Committee was advised in several submissions that it is difficult to measure the effectiveness of environmental impact assessment when there is a lack of post-EIA monitoring.⁹⁸⁶ According to several submissions, a key benefit of monitoring environmental impacts during project construction and operation is that data collected can inform future assessments and decision-making.⁹⁸⁷ This can minimise errors in future assessments and lead to long-term time and cost efficiencies for future environmental impact assessments.⁹⁸⁸ For example, Dr Edmunds advised the Committee:

Monitoring is critically important in the long-term for understanding ecosystem processes and is a legacy for future EESs in determining and predicting what impacts might occur. Although I am hesitant to use this as an example because what I am stating applies to almost every EES, an example is the decades of maintenance dredging in Port Phillip Bay. If there had been more

⁹⁸² *ibid.*

⁹⁸³ *ibid.*

⁹⁸⁴ *ibid.*

⁹⁸⁵ Victorian Government, submission no.40, p.19

⁹⁸⁶ For example, refer to: Environment Institute of Australia and New Zealand, submission no.42, p.6; Dr M Edmunds, Director, Australian Marine Ecology, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.70; Australian Marine Ecology, submission no.29, pp.19–20

⁹⁸⁷ For example, refer to: Professor L Godden, University of Melbourne, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.98; Dr M Edmunds, Director, Australian Marine Ecology, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.70; Environment Defenders Office (Victoria), submission no.27, p.12; Dr D Provis, Senior Principal, Cardno Lawson Treloar, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.84

⁹⁸⁸ For example, refer to: Australian Marine Ecology, submission no.29, p.7; Environment Defenders Office (Victoria), submission no.27, p.12; Dr D Provis, Senior Principal, Cardno Lawson Treloar, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.86

*attention to outcomes monitoring a long time ago, a lot of the more recent controversies in, say, the channel deepening project could have been alleviated because we would already have that information on hand to say, 'No, it is going to be okay. It does not disturb the system. Here is the evidence from previous work'. There are enormous social values from monitoring outcomes of outcome-based systems. It is expensive, but in the long term it is a lot cheaper.*⁹⁸⁹

According to Dr Edmunds, monitoring is important for building up knowledge bases, particularly knowledge of habitats, communities, dynamics of populations and functioning of marine ecosystems, which in Victoria is 'very poor'.⁹⁹⁰ He stated that the EES process generally starts with a description of existing conditions, including from previous studies, and a major problem for management of marine natural values is that there is very little useful existing information.⁹⁹¹ Similarly, Dr David Provis, Senior Principal, Cardno Lawson Treloar, recognised that it is often difficult to assess a project's impact since there is very limited background knowledge to compare it to.⁹⁹² He suggested that routine monitoring could address this issue:

*You can go and borrow dollars from the bank, but if you need 12 months' data, there is nothing you can do but sit around for 12 months and collect it. That is, where you have got significant seasonal variation and those sorts of things; that can be a real impediment. I think that is probably a more significant factor than dollars in terms of projects going ahead or EESs being an obstruction to projects happening. That gets back to this point about background information, government's role and responsibility in collecting background, routine monitoring, seasonal variability-type information.*⁹⁹³

The Environment Institute of Australia and New Zealand (EIANZ) advised that:

The current EES Guidelines and process do not automatically require proponents to undertake a project audit at completion to determine if the EES was effective (recognising that most projects require issue specific monitoring and audits to be carried out e.g. stream sampling). This is critical also to the ability of government policy makers to respond to the EES process.

According to the EIANZ expert panel, the Victorian Government has not undertaken a broader technical assessment of EES projects post-completion, to indicate whether or not the process is effective in terms of managing environmental risk (as opposed to the efficacy of the process itself).

*A deficiency in many environmental impact processes relates to an absence of operational monitoring to assess whether the proposed controls are adequate or impact predictions correct. In contrast to the impact assessment process provided for particular projects under the Environment Protection Act 1970 (Victoria), where steps such as auditing of operational licences are consequent to the impact assessment, the EES process does not typically include provision for any post-assessment auditing. The EIANZ also recognises that some detail, e.g. prescription of remediation measures, is unable to be specified during the impact assessment phase, and that a clearer process for ensuring such issues are followed through to project operation would be a valuable addition to the current Victorian process.*⁹⁹⁴

⁹⁸⁹ Dr M Edmunds, Director, Australian Marine Ecology, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.70

⁹⁹⁰ Australian Marine Ecology, submission no.29, p.7

⁹⁹¹ *ibid.*

⁹⁹² Dr D Provis, Senior Principal, Cardno Lawson Treloar, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.84

⁹⁹³ *ibid.*, p.86

⁹⁹⁴ Environment Institute of Australia and New Zealand, submission no.42, p.6

Subsequently, the EIANZ recommended that consideration be given to the provision of post-assessment auditing processes 'that can serve to identify instances where impact assessment may have been insufficient and to provide assurance that performance requirements are achieved during operation'.⁹⁹⁵

The DPCD advised the Committee that neither the department or its predecessors 'has either undertaken or commissioned research on the operational effectiveness of the EES process in Victoria, in the sense of a systematic, evidence-based evaluation'.⁹⁹⁶ DPCD stated:

*The principal reasons for this are that evaluation of the effectiveness of EIA systems and their performance is inherently difficult since, first, there is no recognised framework for doing so, and, secondly, individual projects often involve quite unique aspects... While there have been several academic reviews of the Victorian EES system, these have typically been based on a comparative evaluation of system features, rather than an in-depth evaluation of process performance in a practical context.*⁹⁹⁷

The Victorian Competition and Efficiency Commission report (2009) considered the cost-effectiveness of the environmental impact assessment process under the Environment Effects Act, and Victorian environmental regulation in general. However, the Commission noted that few attempts have been made to examine how specific environmental regulations have contributed to changes in the physical environment.⁹⁹⁸ The report stated that information on regulatory effectiveness is 'very limited' in some areas, such as the environmental assessment process.⁹⁹⁹ The Commission stated:

*The evaluation of regulations also has an important role to play in ensuring that regulation is effective and efficient in a dynamic environment... Based on the review, it appears that comprehensive reporting frameworks for environmental regulation are uncommon in Victoria, mirroring the Commission's findings across other areas of regulation in Victoria ... the inquiry also found that there have been very few detailed studies of the effectiveness of environmental regulation ...*¹⁰⁰⁰

The Committee was advised by several stakeholders that measuring the effectiveness of environmental impact assessment may lead to improvements in the EIA process.¹⁰⁰¹ Dr Edmunds advised the Committee that better environmental outcomes are most efficiently produced by 'capitalising on information collection, including better impact assessment monitoring to inform and improve predictions for future projects'.¹⁰⁰²

⁹⁹⁵ *ibid.*

⁹⁹⁶ Department of Planning and Community Development, correspondence received, 22 September 2010

⁹⁹⁷ *ibid.*

⁹⁹⁸ The Commission could find only three evaluations of the effectiveness of environmental regulation (the most recent being an evaluation of the *Flora and Fauna Guarantee Act 1988*). Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.XXXIV

⁹⁹⁹ Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.XXXIV

¹⁰⁰⁰ *ibid.*, pp.285–286

¹⁰⁰¹ Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.143; Australian Marine Ecology, submission no.29, p.27

¹⁰⁰² Australian Marine Ecology, submission no.29, p.27

Ms Michelle Andrews, Acting General Manager, Office of the EPA in Western Australia, advised the Committee that the effectiveness of the environmental impact assessment process was an area that the EPA is currently looking at. She stated:

*We are looking back at previous environmental impact assessments and projects that have been implemented. We are looking at what we can learn from those processes, how effective was the environmental impact assessment, how good were the predictions about the impacts, and how good were the tools we were using in terms of modelling and so on, and then, what can we learn about how the project was implemented and what might that tell us for future assessments.*¹⁰⁰³

The Committee believes that evaluating the effectiveness of environmental impact assessment has many benefits, including whether EIA processes are managing environmental risks. The Committee is of the view that research is required into the effectiveness of environmental impact assessment in Victoria. Past projects assessed under the Environment Effects Act should be examined to analyse the contribution of EIA to environmental protection. The Committee believes that better monitoring could assist in determining the effectiveness of environmental impact assessments, as recommended earlier in the chapter.

Accordingly, the Committee recommends that:

RECOMMENDATION 9.7

An independent agency undertake a broad assessment of environmental impact assessment projects post-completion, as a matter of urgency, to determine whether the outcomes are effective. The findings of this assessment be made public.

¹⁰⁰³ Ms M Andrews, Acting General Manager, Office of the Environmental Protection Authority, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.143

Chapter 10: Strategic environmental assessment

Key findings

- 10.1 Strategic assessment is a relatively new concept in relation to environmental impact assessment. There is considerable debate worldwide about its nature, scope and implementation, and there is no internationally agreed definition.
- 10.2 Legislation explicitly providing for various forms of strategic assessment has been established in a number of jurisdictions in Australia, including at a Commonwealth level and in Western Australia. In Victoria, the *Environment Effects Act 1978* and the *Planning and Environment Act 1987* do not explicitly provide for strategic assessment.
- 10.3 Various witnesses were supportive of the use of strategic assessment in Victoria and argued that it may achieve better environmental outcomes, increase the efficiency of the environmental impact assessment process and improve public participation. The Committee also received evidence that strategic assessment can increase approval certainty and reduce delays for subsequent project proposals.
- 10.4 The Committee was advised that because strategic assessment occurs earlier in a decision-making process it enables a more thorough consideration of alternatives *to* a project compared to environmental impact assessment.
- 10.5 Some witnesses highlighted that strategic assessment may be a useful mechanism to address the problems created by the cumulative impacts of projects.
- 10.6 Witnesses highlighted a number of key challenges associated with strategic assessment. In particular, concerns were raised in relation to the quality of information and level of analysis on the environmental values of the area on which a strategic assessment is based. The Committee was also advised of the risks associated with the often long-term nature of an approval, and received evidence that the level of detail contained in strategic assessments may cause problems in setting adequate approval conditions.

10.1 Introduction

Strategic environmental assessment (subsequently referred to as strategic assessment) involves consideration of the environmental, and sometimes also the social and economic, implications of policies, plans and programs, rather than individual projects.¹⁰⁰⁴

A key objective of strategic assessment is to streamline the assessment process by reducing the number and scope of project-level environmental impact assessments that are subsequently required. Strategic assessment has evolved for a number of additional reasons:

- to ensure that environmental matters are considered earlier in decision-making processes; and
- to address the perceived failure of environmental impact assessment to adequately consider alternatives to projects and address cumulative impacts.¹⁰⁰⁵

Strategic assessment is a relatively new concept in relation to environmental impact assessment and there is considerable debate amongst academics and practitioners worldwide about its nature and scope.¹⁰⁰⁶ In its submission to the review of the Commonwealth legislation, the Western Australian Government stated that:

*In relation to strategic assessment, it is noted while it is strongly advocated in several submissions, there remains considerable uncertainty as to appropriate methodologies and circumstances for its application, the scale at which it might operate, the extent to which it can reasonably substitute for project-by-project assessment, how it can deal with mitigation strategies including offsets, and its capacity to address intractable land use conflicts. There is limited experience in use by both Commonwealth and states and territories.*¹⁰⁰⁷

This chapter describes the use of strategic assessment in Australia to date, particularly at a Commonwealth level and in Western Australia, and discusses the potential benefits and challenges associated with strategic assessment. This chapter is relevant to terms of reference a) and d).

¹⁰⁰⁴ B Noble and J Harriman Gunn, 'Public participation in Canadian environmental assessment' in K S Hanna (ed), *Environmental impact assessment: Practice and participation*, 2nd ed., 2009, p.103; In general, policies are broad statements of intent that reflect and focus a government's agenda, while plans and programs give policies effect and involve identifying options to achieve policy objectives and setting out how, when and where specific actions will be carried out, International Institute for Environment and Development, 'Strategic environmental assessment: a rapidly evolving approach', *Environmental Planning Issues No. 18*, 1999 pp.2–3

¹⁰⁰⁵ B Noble and J Harriman Gunn, 'Public participation in Canadian environmental assessment' in K S Hanna (ed), *Environmental impact assessment: Practice and participation*, 2nd ed., 2009, pp.103–104; International Institute for Environment and Development, 'Strategic environmental assessment: a rapidly evolving approach', *Environmental Planning Issues No. 18*, 1999, pp.4–5

¹⁰⁰⁶ International Institute for Environment and Development, 'Strategic environmental assessment: a rapidly evolving approach', *Environmental Planning Issues No. 18*, 1999, p.1

¹⁰⁰⁷ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, p.83

10.2 What is strategic assessment?

There is no internationally agreed definition of strategic assessment. However, the definition provided by Sadler and Verham is widely used:

*[strategic assessment is] a systematic process for evaluating the environmental consequences of proposed policies, plans or program initiatives in order to ensure they are fully included and appropriately addressed at the earliest appropriate stage of decision-making on par with economic and social considerations.*¹⁰⁰⁸

After reviewing the international literature, Noble and Gunn identified a number of characteristics of strategic assessment, including:

- strategically focused – involves defining objectives, proposing and evaluating alternative options for achieving objectives, and selecting the most appropriate approach;
- focused on alternatives – assesses alternative options to achieve an objective, with the option chosen set within the context of a broader vision, such as ecologically sustainable development;
- proactive – acts in anticipation of future problems or needs and attempts to avoid and minimise negative impacts and enhance positive outcomes;
- integrated – involves consideration of environmental, social and economic factors, multiple objectives and the integration of different knowledge systems;
- broad focus – is not project specific and is more broad-brush than project-level assessments, requiring different assessment methodologies and techniques; and
- tiered – is set within the context of, and sets the context for, previous and subsequent planning and assessment processes, including environmental impact assessment.¹⁰⁰⁹

While there is debate about the nature and scope of strategic assessment, some academics and practitioners suggest that strategic assessment differs in a number of ways from environmental impact assessment. Table 10.1 outlines some of the key differences.

¹⁰⁰⁸ International Institute for Environment and Development, 'Strategic environmental assessment: a rapidly evolving approach', *Environmental Planning Issues* No. 18, 1999, p.1

¹⁰⁰⁹ B Noble and J Harriman Gunn, 'Public participation in Canadian environmental assessment' in K S Hanna (ed), *Environmental impact assessment: Practice and participation*, 2nd ed., 2009, pp.105–109

Table 10.1 Differences between environmental impact assessment and strategic assessment

Environmental impact assessment	Strategic assessment
Is reactive to development proposals and typically begins at a late stage of decision-making	May proactively inform development proposals and typically begins at an early stage of decision-making
Is narrowly focused with a high level of detail	Is broadly focused with a low level of detail
Assesses the impacts of a development	Assesses the impacts of a policy, plan or program
Focuses on a specific project at a specific location	Focuses on areas, regions or industry sectors
Assesses the direct impacts and benefits of a development	Assesses cumulative impacts and identifies implications and issues for sustainable development
Focuses on the mitigation of impacts	Focuses on achieving environmental objectives or targets
Has a well defined beginning and end	Is a continuing process

Sources: Adapted from International Institute for Environment and Development, 'Strategic environmental assessment: a rapidly evolving approach', Environmental Planning Issues No. 18, 1999, p.2 and M Elliott and I Thomas, Environmental impact assessment in Australia: Theory and practice, 2009, p.66

Other academics have argued that strategic assessment should set a higher standard to that indicated in the table in relation to the level of detail on which the assessment is based. For example, in referring to the strategic assessment of Melbourne's urban growth boundary Dr Kirsten Parris, Senior Research Fellow, University of Melbourne, rejects the notion that strategic assessments can be based on a low level of detail. In commenting specifically on biodiversity issues, Dr Parris suggested that, after gathering all the existing biological information of an area, the strategic assessment should then 'identify gaps in the information and fill these with targeted field surveys', model the habitat requirements and distribution of species and ecological communities of concern, and 'evaluate and report uncertainty and errors in model predictions'.¹⁰¹⁰

10.3 Strategic assessment in Australia

The Committee understands that legislation explicitly providing for various forms of strategic assessment has been established in at least three jurisdictions in Australia, including:

- at a Commonwealth level under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act);
- in Western Australia, under the *Environmental Protection Act 1986* (EP Act); and

¹⁰¹⁰ K Parris, 'What are Strategic Impact Assessments? And why are they important? (And what about Melbourne?)', *Decision Point*, no. 32, p.4; See also K Parris, 'Strategic Assessments and Bioregional Planning, with special reference to the strategic impact assessment for the proposed expansion of Melbourne's urban growth boundary', Submission on the *Interim report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2009

- in NSW, under Part 7AA of the *Threatened Species Conservation Act 1995*.¹⁰¹¹

The situation in Victoria in relation to strategic assessment, and the strategic assessment processes at a Commonwealth level and in Western Australia, are described below.

10.3.1 Victoria

Neither the *Environment Effects Act 1978* nor the *Planning and Environment Act 1987* explicitly provide for strategic assessment.¹⁰¹² In its submission, the Victorian Government advised:

... the capacity for environmental assessments of projects under the [*Environment Effects Act 1978*] does not extend to the assessment of overarching plans, programs or policies.¹⁰¹³

However, section 12 of the *Planning and Environment Act 1987* provides a mechanism for examining strategic proposals¹⁰¹⁴ that require amendments to planning schemes.¹⁰¹⁵ Furthermore, section 151 of the Act allows the Minister for Planning to appoint an advisory committee to advise on the merits of a proposal or planning policy issues. According to the issues and options paper for the *Environment Assessment Review* (2002),¹⁰¹⁶ section 151 has been used several times to investigate the merits of strategic proposals, including alternatives in relation to major transport projects.¹⁰¹⁷

A number of witnesses suggested that the *Environment Effects Act 1978* should be broadened to include specific provisions for strategic assessment.¹⁰¹⁸ For example, Mr Brad Jessup, Teaching Fellow, College of Law, Australian National University, argued that strategic assessment should be

¹⁰¹¹ Under the *Threatened Species Conservation Act 1995*, the NSW Minister for Climate Change and the Environment is able to certify an environmental planning instrument, such as a land-use plan prepared by a local council, if satisfied that the instrument will lead to an overall improvement or maintenance in biodiversity values, including threatened species and ecological communities. If a land-use plan is certified, a proponent proposing a development on land certified under the plan is not required to assess the impacts of the development on biodiversity. The NSW Government has established a detailed assessment methodology that must be applied in determining whether an environmental planning instrument will improve or maintain biodiversity values, *Threatened Species Conservation Act 1995*, part 7AA; Department of Environment, Climate Change and Water

¹⁰¹² *Environment Effects Act 1978*, ss.1–11; Department of Infrastructure, *Environment Assessment Review: Issues and Options, Technical Paper*, 2002, p.36

¹⁰¹³ Victorian Government, submission no.40, p.24

¹⁰¹⁴ Defined as a proposal that would establish a strategic framework for, or have other strategic implications for, subsequent development proposals, Department of Infrastructure, *Environment Assessment Review: Issues and options, Technical paper*, 2002, p.101

¹⁰¹⁵ The Committee was also advised by DPCD that: 'Ministerial Direction No.11 made under section 12(2)(a) of the *Planning and Environment Effects Act 1987* relates to 'Strategic Assessment of Amendments', including the consideration of environmental, economic and social effects. This is complemented by a General Practice Note 'Strategic Assessment Guidelines', which provides detailed guidance on preparing and evaluating a proposed planning scheme amendment. This is generic guidance on relevant strategic considerations, rather than specific guidance on conducting strategic assessments of potential development proposals or activities in a particular regional setting'. Department of Planning and Community Development, correspondence received, 22 September, 2010

¹⁰¹⁶ Department of Infrastructure, *Environment assessment review: Issues and options, Technical paper*, 2002, p.36

¹⁰¹⁷ *ibid.*

¹⁰¹⁸ Mornington Peninsula Shire, submission no.56, p.3; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, pp.114, 115

mandatory in Victoria for major projects, especially state-sponsored projects.¹⁰¹⁹ Mr David Hyett, Technical Director of Environmental Management and Planning, AECOM stated that:

*We think there is possibly a role within the Victorian framework for strategic environmental assessment. It is something that has been pursued all around other parts of the world as a tool that is effective in the assessment framework, in particular in Europe where it is an EU directive that each EU state member has to have a legislated strategic environmental assessment process. That has been strongly pushed forward there with a good deal of success. It is not without its flaws. On its own you would not rush into it without looking at how it would best fit in with other parts of the Victorian framework, but it is showing some real positives for places where it is being used.*¹⁰²⁰

The Committee asked the Department of Planning and Community Development (DPCD) two questions in relation to strategic assessment in Victoria. DPCD advised the Committee that it is not yet in a position to provide a definitive answer to these questions. However the department provided general comments. In relation to the first question – how does DPCD see strategic assessment fitting with the current environmental impact assessment process in Victoria? – DPCD advised that:

In principle, strategic assessment would only be a relevant option if there were good grounds that it would have a useful and efficient relationship to project planning and/or [environmental impact assessment]. This might be the case if:

- First, prior assessment of strategic issues would enable requirements for project EIA to be streamlined. Relevant considerations would include whether: (a) there was a distinct potential for significant, broad-scale impacts that are likely to arise from prospective projects within a definable time frame; (b) these impacts would need to be considered in a wider spatial context than individual projects; (c) they could practically be assessed ... with adequate reliability and at reasonable cost; and (d) the need for site-level impact studies could be deferred as well as reduced overall;*
- Second, the outcomes of a strategic assessment would need to provide a robust basis for: (a) reducing the required scope of project EIA including the assessment of siting alternatives; and/or (b) establishing a sound, evidence-based framework for decision-making on individual projects; and*
- Thirdly ... a strategic assessment process would need to avoid duplication of requirements and processes as part of a subsequent project EIA process.*

*Consequently, strategic assessment may have a potential in certain, limited circumstances to reduce either the need for or scope of an EES.*¹⁰²¹

¹⁰¹⁹ Mr B Jessup, Member, Australian Centre for Environmental Law – College of Law, Australian National University, submission no.37, p.2

¹⁰²⁰ Mr D Hyett, Technical Director of Environmental Management and Planning, AECOM, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.15

¹⁰²¹ DCPD added further that: 'For example, the non-statutory strategic studies undertaken in relation to Melbourne@5 million informed the Minister for Planning's decisions that an EES was not required for either the Outer Metropolitan Ring/E6 Transport Corridor or the Regional Rail Link (West Werribee to Deer Park), subject to certain conditions in both cases. It may also be the case that some issues that transcend an individual project (e.g. greenhouse gas emissions or regional water management or coastal management) might be assessed through a separate, strategic assessment process, either before or after a project EIA process'. Department of Planning and Community Development, correspondence received, 22 September, 2010

In relation to the second question – under what circumstances, or for what types of projects or activities does DCPD see strategic assessment applying to? – DPCD advised that:

The government's response to [the Victorian Competition and Efficiency Commission's inquiry into environmental regulation in Victoria] was in the context of the potential for strategic assessments to inform planning decision-making where there is a prospect of multiple projects with potential cumulative impacts being put forward in a region...

... strategic assessment would need to be practicable, in terms of both the technical and cost-effective ability to acquire sufficient data at a broad-scale to inform robust decision-making with respect to relevant impacts. Consequently, [the Victorian Government] would need to determine that: (a) there are development pressures that could warrant a strategic approach to provide enhanced planning certainty; (b) it is technically possible to conduct a useful strategic assessment; and (c) it would be cost-effective to do so. For example, there was a strong incentive for the Victorian Government to provide the resources to undertake strategic assessments of ecological and other issues within the expanded urban growth boundary for Melbourne, in order to both provide planning certainty and to facilitate subsequent decision-making for individual development proposals.¹⁰²²

10.3.2 Commonwealth level

Under the EPBC Act, actions, such as proposed developments, that are likely to have a significant impact on a matter protected by the Act¹⁰²³ must be referred to the federal environment minister for a determination of whether assessment and approval is required. Under the Act to date, most developments have been assessed and approved on an individual basis. However, the Minister is increasingly making use of section 146 of the Act, which allows a strategic assessment to be undertaken of the impacts of actions proposed under a policy, plan or program on matters protected by the Act.¹⁰²⁴ Such policies, plans and programs include:

- land-use plans;
- regional plans and policies;
- large-scale industrial development proposals; and
- fire, vegetation, or pest management policies, plans or programs.¹⁰²⁵

Section 146 of the EPBC Act allows the Minister to assess multiple developments together. For example, if a land-use plan proposes that land be zoned for multiple developments within a specific area, the Minister is able to assess the impacts of the plan as a whole rather than having to assess the impacts of the developments proposed under the plan individually.

¹⁰²² Department of Planning and Community Development, correspondence received, 22 September, 2010

¹⁰²³ Matters protected by the EPBC Act include listed threatened species, ecological communities, migratory species and wetlands, and World Heritage Areas, Department of Sustainability, Environment, Water, Population and Communities, www.environment.gov.au, accessed September, 2010

¹⁰²⁴ *Environment Protection and Biodiversity Conservation Act*, section 146

¹⁰²⁵ Department of Sustainability, Environment, Water, Population and Communities, www.environment.gov.au, accessed September 2010

The Department of Sustainability, Environment, Water, Population and Communities stated that strategic assessment is the most appropriate form of assessment for areas with large numbers of projects requiring assessment under the EPBC Act, complex, large scale projects involving multiple stakeholders, or where cumulative impacts may be significant.¹⁰²⁶

To date, strategic assessments under the EPBC Act include:

- Melbourne's urban growth boundary (Victoria);
- Browse Basin liquefied natural gas precinct (Western Australia);
- fire management policy (South Australia); and
- midlands water scheme (Tasmania).¹⁰²⁷

A strategic assessment under the Act involves the following key stages:

1. The Minister enters into an agreement with a proponent (usually a state or local government agency) to undertake a strategic assessment.
2. The department prepares Terms of Reference to guide the preparation of a draft report assessing the impacts of actions proposed under a policy, plan or program.
3. A draft assessment report is prepared by the proponent of the policy, plan or program.
4. The draft assessment report is exhibited for public comment for at least 28 days.
5. The Minister may decide to endorse a policy, plan or program if satisfied that the assessment report adequately addresses the impacts of the actions proposed under the policy, plan or program and any recommendations made by the Minister to modify the policy, plan or program.
6. If a policy, plan or program is endorsed, the Minister may approve actions undertaken in accordance with it and may specify conditions to the approval. If this occurs, these actions do not require further assessment or approval. In making this decision, the Minister must consider economic and social matters and the principles of ecologically sustainable development.¹⁰²⁸

¹⁰²⁶ *ibid.*

¹⁰²⁷ *ibid.*

¹⁰²⁸ *ibid.*

The strategic assessment of the expansion of Melbourne's growth boundary is described in the box below.

Case study 3 Strategic assessment of the expansion of Melbourne's urban growth boundary

The Australian Government signed an agreement in March 2009 with the Victorian Government to undertake a strategic assessment of the expansion of Melbourne's urban growth boundary. This program proposes to develop new residential and employment areas and construct a rail link and transport corridors to accommodate Melbourne's predicted population growth.

The assessment report *Delivering Melbourne's Sustainable Communities: Strategic Impact Assessment Report*, was completed by the Victorian Government in October 2009. The report assessed the potential impacts of the expansion of Melbourne's urban growth boundary on matters protected by the EPBC Act, including listed threatened species and ecological communities.

The federal environment minister endorsed the program as outlined in the *2009: Delivering Melbourne's Sustainable Communities: Program* report in February 2010. This is the first strategic assessment to be endorsed under section 146 of the EPBC Act.

To date, the Minister has approved two classes of actions proposed under the endorsed program: the regional rail link project; and development within 28 urban precincts located within the growth boundary. This means that these developments can proceed without further approval being required from the Minister, provided they are undertaken in accordance with the endorsed program.

The approvals of both classes of actions were subject to a range of conditions, including the requirement that actions must be undertaken in accordance with a range of prescriptions setting out protection measures for listed threatened species that occur in the development areas.

The Committee is aware of a range of views on the adequacy and outcomes of the strategic assessment. For example, the Environment Defenders Office was of the view that the process was rushed and did not provide adequate opportunity for public participation.¹⁰²⁹ The draft strategic assessment report was placed on public exhibition from 17 June to 17 July 2009.

Some have suggested that, contrary to the ideals of strategic assessment, the Melbourne urban growth boundary strategic assessment process was not only designed to reach a predetermined outcome, but also was based on poor science, which included significant data gaps and flawed survey protocols.¹⁰³⁰ For example, Dr Parris argued that:

¹⁰²⁹ Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.36

¹⁰³⁰ K Parris, 'What are Strategic Impact Assessments? And why are they important? (And what about Melbourne?)', *Decision Point*, no. 32, p.5; see also Kirsten Parris, 'Strategic Assessments and Bioregional Planning, with special reference to the strategic impact assessment for the proposed expansion of Melbourne's urban growth boundary'; Submission on the *Interim report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2009, and Kirsten Parris, 'Requirements under the EPBC Act 1999 and Victorian Legislation', Submission to the Growth Areas Authority on the *Strategic impact assessment report* for the proposed expansion of Melbourne's Urban Growth Boundary, July 2009

*[the strategic assessment] largely fails to demonstrate how threatened species and communities will be protected during and after development. The [strategic assessment] report plainly states that there will be a significant impact on Federally-listed species and communities, but the size of this impact is not stated. It is also unclear how the proposed mitigation strategies will reduce the expected impacts. Upon reading the ... report, it is impossible to know whether the proposed development will result in the extinction of any species, whether it will substantially increase their probability of extinction, or whether (and how) it will improve the situation of the relevant listed species and communities.*¹⁰³¹

In contrast, Mr Clive Mottram, Manager of Planning Investigations, VicRoads, stated:

*I think [strategic assessment] has led to a better outcome for all concerned. The proposal is for 15,000 hectares of grasslands to be managed by Department of Sustainability and Environment out in the west. Environmentally that is going to be better. We have avoided the significant places ..., and that has been a much faster and less costly process for VicRoads, the Department of Transport and anybody who wants to develop land in Melbourne's west or north. I think it is a much more efficient process altogether.*¹⁰³²

Sources: Department of the Environment, Water, Heritage, and the Arts, www.environment.gov.au, accessed September, 2010; Department of Sustainability and Environment, www.dse.vic.gov.au, accessed September, 2010; Department of Planning and Community Development, *Delivering Melbourne's new sustainable communities: Program report, 2009 pp.1–18*

10.3.3 Western Australia

In Western Australia, strategic assessment has been undertaken by the Environmental Protection Authority (EPA) under three sections of the Environmental Protection Act:

- section 38, which allows the EPA to undertake an assessment of strategic proposals, which are typically plans, programs or policies likely to have a significant effect on the environment¹⁰³³ – only a few assessments have been undertaken under this section;¹⁰³⁴
- section 48, which allows the EPA to undertake an assessment of planning schemes and scheme amendments – many assessments have been undertaken under this section;¹⁰³⁵ and
- section 16, which allows the EPA to provide advice to the Minister on a range of environmental matters, including any proposal or scheme.¹⁰³⁶

The strategic assessment process triggered by section 38 of the Environmental Protection Act is regarded as the formal strategic assessment process under the Act.¹⁰³⁷ Under this section, a proponent may voluntarily refer a strategic proposal to the EPA for assessment. Proponents have an incentive to refer a strategic proposal because it may then be declared a 'derived proposal', which

¹⁰³¹ K Parris, 'What are Strategic Impact Assessments? And why are they important? (And what about Melbourne?)', *Decision Point*, no. 32, p.5

¹⁰³² Mr C Mottram, Manager, Planning Investigations, VicRoads, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.94

¹⁰³³ A strategic proposal is one or more future proposals that will be likely, if implemented, to have a significant effect on the environment. A strategic proposal typically involves a plan, programme or policy, *Environmental Protection Act 1986*, section 37B; Environmental Protection Authority, *Sussex Location 413 Yallingup — Smiths Beach Development Guide: Report and recommendations of the Environmental Protection Authority*, April 2009, p.2

¹⁰³⁴ Dr A Morrison-Saunders, submission no.53, p.9

¹⁰³⁵ *ibid.*

¹⁰³⁶ *Environmental Protection Act 1986*, section 16; Associate Professor G Middle, Head, Department of Urban and Regional Planning, Curtin University, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.169

¹⁰³⁷ Environmental Protection Authority, *Annual Report 2005-06*, p.24

will not require subsequent environmental impact assessment.¹⁰³⁸ As stated in the submission from Dr Angus Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University:

*... the key purpose and advantage of the process for environmental assessment of strategic proposals is to influence proponent decision-making at an early stage of proposal planning whilst at the same time expediting the approval process at the development stage.*¹⁰³⁹

The EPA assesses a strategic proposal by preparing a report that sets out the key environmental matters associated with the proposal and the EPA's recommendations as to whether the proposal should be approved and the approval conditions to which the proposal should be subject. The EPA's report is then submitted to the Minister for Environment, who approves or refuses the proposal and determines what conditions, if any, should be attached to the approval.

Dr Morrison-Saunders advised the Committee that one implication of the strategic assessment process is that an approval given for a strategic proposal can '... effectively be put on hold into the future until the proponent is ready to proceed with a specific development'.¹⁰⁴⁰ For example, a 10 year approval period was granted for derived proposals under the strategically assessed Smiths Beach Development Plan (ie. the proponent had 10 years to commence the project). A 20 year approval was granted for the Rockingham Industry Zone, and 50 years to Water Corporation's Southern Source Integration Assets Project for drainage and wastewater infrastructure in a southern corridor of Perth. In contrast, a five year approval period applies to projects assessed by environmental impact assessment.¹⁰⁴¹

Since the introduction of the strategic assessment process in 2003, only four strategic proposals have been assessed to date: the Browse Basin liquefied natural gas precinct, which is also currently being strategically assessed by the Australian Government under the EPBC Act; the Smiths Beach Development Plan, Rockingham Industry Zone, and Water Corporation's Southern Source Integration Assets Project. The Committee understands that the EPA is currently trialling the strategic assessment process triggered by section 38 of the Environmental Protection Act before preparing administrative procedures setting out how the process is to be undertaken in the future.¹⁰⁴²

¹⁰³⁸ Dr A Morrison-Saunders, submission no.53, p.9; This is also the case for developments proposed in accordance with a planning scheme that has been assessed under section 48 of the *Environmental Protection Act 1986*, Associate Professor G Middle, Head, Department of Urban and Regional Planning, Curtin University, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.171

¹⁰³⁹ Dr A Morrison-Saunders, submission no.53, p.9

¹⁰⁴⁰ *ibid.*

¹⁰⁴¹ *ibid.*

¹⁰⁴² Environmental Protection Authority, *Annual Report 2007-08*, p.18

Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, advised the Committee that strategic assessment in Western Australia is still an emerging area:

*What we have been doing in this state is exploring why [strategic assessment] has not been taken up to the extent we thought it might have been in the last few years, what are the precursors that you must have in place for strategic assessments to work and also, perhaps, what are the situations where they are more likely to bring some value to government, the community and industry, and targeting our efforts in that sort of way. Strategic assessment is an emerging issue for us*¹⁰⁴³

Mr Warren Tracey, Assistant Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, Western Australia, described the strategic assessment process undertaken for the Browse Basin liquefied natural gas precinct:

*... there are a couple of proposals that are now going through a strategic assessment, one of which is the so-called Browse liquefied natural gas hub in the Kimberley region about 60 kilometres north of Broome ... Our state development agency, the Department of State Development, is the proponent, with a view to creating a precinct where a number of liquefied natural gas producers can co-locate. Instead of having everybody have their own site up and down the Kimberley coast, the state said, 'No, we'd like to have them in one spot'; and the whole idea is to do a strategic assessment, create a precinct and then have project proponents come along subsequently and establish there ... that seems to be the sort of thing that lends itself to strategic assessment - things where you have a regional approach.*¹⁰⁴⁴

Under section 16 of the Environmental Protection Act, the EPA may provide advice on environmental matters involving strategic issues. This is regarded as the 'informal' strategic assessment process under the Act.¹⁰⁴⁵ The EPA used section 16 of the Environmental Protection Act to provide non-binding advice to the Western Australian Government in relation to potential suitable sites for the Browse Basin liquefied natural gas precinct,¹⁰⁴⁶ as well as broad scale land (eg. proposed industrial estates) and port developments.¹⁰⁴⁷

Associate Professor Garry Middle, Head, Department of Urban and Regional Planning, Curtin University, explained the scope and benefits of section 16 of the Act to the Committee:

It says effectively that the EPA can provide advice to the minister on any matter it sees as important ... The minister can call on the EPA to provide advice on a whole range of matters, whether it be something as broad as prescribed burning or something as specific as, for

¹⁰⁴³ Ms M Andrews, Acting General Manager, Assessment and Compliance Services, Office of the Environmental Protection Authority, Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.143

¹⁰⁴⁴ Mr W Tracey, Assistant Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.146

¹⁰⁴⁵ Associate Professor G Middle, Head of Department of Urban and Regional Planning, Curtin University, 'Integrating environmental assessment as part of regional strategic land use planning: a step towards integrated sustainability assessment', presentation given at *Sustainability Assessment Symposium: Towards Strategic Assessment for Sustainability*, 2010

¹⁰⁴⁶ Environmental Protection Authority, *Annual Report 2008-09*, p.23

¹⁰⁴⁷ Environmental Protection Authority, *Review of the environmental impact assessment process in Western Australia*, March 2009, p.29

*example, aquaculture impact and those sorts of things, so the minister can ask the EPA to give specific advice. It is a very useful part of the Act ...*¹⁰⁴⁸

*I like section 16 because I think it gives the EPA a lot more flexibility and there is no ministerial process at the end. It is a strategic assessment, in effect, but there is less political involvement in that process. The EPA can be braver, I suspect, than it would normally be if it knows there are going to be conditions set.*¹⁰⁴⁹

10.4 Potential benefits of strategic assessment

Various witnesses were supportive of the use of strategic assessment in Victoria and argued that it can improve environmental outcomes and increase the efficiency of the environmental assessment process.¹⁰⁵⁰ The key potential benefits of strategic assessment highlighted were that it:

- may enable better consideration of project alternatives;¹⁰⁵¹
- facilitates proper assessment of cumulative impacts;¹⁰⁵²
- can increase transparency by engaging the public early in decision-making processes and promote debate on broad policy issues;¹⁰⁵³
- may increase the efficiency of the assessment process by reducing the need for or scope of environmental impact assessments, thus reducing costs and time;¹⁰⁵⁴ and

¹⁰⁴⁸ Associate Professor G Middle, Head, Department of Urban and Regional Planning, Curtin University, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.169

¹⁰⁴⁹ *ibid.* p.174

¹⁰⁵⁰ Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.114; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.252

¹⁰⁵¹ Dr A Morrison-Saunders, submission no.53, p.9; Ms J Warfe, President, Blue Wedges Inc., Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.80; Mr B Jessup, Member, Australian Centre for Environmental Law – College of Law, Australian National University, submission no.37, p.7; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.114

¹⁰⁵² Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.36; Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.60; Professor L Godden, Melbourne Law School, University of Melbourne, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.97; Associate Professor G Middle, Head, Department of Urban and Regional Planning, Curtin University, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.173; Environment Victoria, submission no.39, p.1

¹⁰⁵³ Mr P Gamblin, Program Leader – West, WWF-Australia, Environment and Natural Resources Committee public hearing – Melbourne, 1 June 2010, transcript of evidence, p.220; Mr D Hyett, Technical Director of Environmental Management and Planning, AECOM, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.15; Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.114

¹⁰⁵⁴ Mr B Jessup, Member, Australian Centre for Environmental Law – College of Law, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, pp.131, 137; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, pp.252, 255

- can increase approval certainty and reduce delays for subsequent developments, for example, by proactively identifying areas suitable for development.¹⁰⁵⁵

10.4.1 Alternatives

In evidence to the Committee, witnesses highlighted that environmental impact assessment usually occurs too late in a decision-making process to allow for the adequate assessment of project alternatives, and in particular, alternatives *to* a project, as opposed to alternatives *for* a project.¹⁰⁵⁶ By the time it is applied, the range of alternatives has often been narrowed by earlier decisions that may not have considered environmental matters. As a result, environmental impact assessment ‘...may fail to illuminate crucial trade-offs, incorporate public values, and explore more environmentally sound approaches’¹⁰⁵⁷ and ‘...often becomes a rationalisation for a decision already made’.¹⁰⁵⁸

In his submission, Mr Jessup argued that:

*The greatest obstacle to rigorous and thorough assessments of state projects is that they are assessed too late in the policy-making cycle. There is almost a pointlessness to an environmental assessment when the state has affirmed a project as its infrastructure priority. This happened [in Victoria] with the channel deepening project and the two recent major water projects. There was a fait-accompli about these projects irrespective of the government's rhetoric about only proceeding subject to environmental clearance. In each instance the policy foundations for the projects and alternatives to the projects were excluded from assessment, meaning that the community was unable to vent fundamental concerns about projects and offer alternatives*¹⁰⁵⁹

The assessment of project alternatives was discussed in chapter six. As noted, an environment effects statement will not normally require that the alternatives *to* a project be assessed.¹⁰⁶⁰ The Committee received evidence that this causes two main problems:

- the alternative chosen may not be optimal in terms of environmental outcomes;¹⁰⁶¹ and
- the alternative chosen may not be widely acceptable to the public.¹⁰⁶²

¹⁰⁵⁵ Mr P Verstegen, Director, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, pp.186–187; Ms S Brown, Manager, Environment Branch, Water Corporation of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, pp.205–206; Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.261

¹⁰⁵⁶ Environment Defenders Office (Victoria), submission no.27, p.16

¹⁰⁵⁷ A Steinemann ‘Improving alternatives for environmental impact assessment’, *Environmental impact assessment review*, 2001, vol.21, p.4

¹⁰⁵⁸ *ibid.*, p.16

¹⁰⁵⁹ Mr B Jessup, Member, Australian Centre for Environmental Law – College of Law, Australian National University, submission no.37, pp.6–7

¹⁰⁶⁰ Department of Sustainability and Environment, *Ministerial Guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.15

¹⁰⁶¹ Mr J Crockett, retired consulting engineer and former environmental auditor, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.39; Mr N Rankine, submission no.9, p.2

¹⁰⁶² Mr B Jessup, Member, Australian Centre for Environmental Law – College of Law, Australian National University, submission no.37, p.7

A number of witnesses suggested that because strategic assessment occurs earlier in a decision-making process, it enables better consideration of project alternatives, and in particular, the alternatives *to* a project.¹⁰⁶³ For example, Dr Morrison-Saunders stated in his submission:

A traditional project level EIA (i.e. the process most often employed under the Environmental Protection Act) asks the question: Is proposal X environmentally acceptable at site Y? (e.g. as for a new mining proposal). [Strategic assessment] enables more strategic questions to be asked such as: What should the future of area Z be? (e.g. as for a new regional land-use plan). Undertaking [strategic assessment] enables many environmental problems to be avoided altogether through good planning and design (i.e. optimising performance) rather than relying on mitigation measures to bring performance up to minimum levels of acceptability.¹⁰⁶⁴

Similarly, Ms Jenny Warfe, President, Blue Wedges, stated in evidence to the Committee:

Our experience in the channel-deepening project was that the proponent said that they had considered [alternatives], but in our view they were considered in a very rudimentary way. I think that in part, it could be dealt with — as some other witnesses have submitted — by a strategic approach ... So in that respect, by the time you get down to doing what we might consider a traditional EES, we would have done analyses of other viable alternatives.¹⁰⁶⁵

As noted above, the assessment of alternatives is a key characteristic of strategic assessment. This is illustrated in Table 10.2.

Table 10.2 Differences between environmental impact assessment and strategic assessment in terms of the assessment of alternatives

Environmental impact assessment	Strategic assessment
Asks: 'what are the impacts of our option'	Asks: 'what is the preferred option'
Assesses alternatives <i>for</i> rather than alternatives <i>to</i> a project	Assesses alternatives <i>to</i> rather than alternatives <i>for</i> a project
Assesses options in terms of a pre-determined alternative – options are often limited to issues of technical design	Assesses a broader range of alternative options at an early stage of decision-making
Emphasis on minimising the impacts of a preferred option by implementing mitigation measures or changing design	Emphasis on minimising impacts by choosing the option with least impact at an early stage of decision-making

Source: B Noble, 'Strategic environmental assessment: what is it? and what makes it strategic', *Journal of Environmental Assessment Policy and Management*, 2000, p.204

¹⁰⁶³ Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.114; Ms J Warfe, President, Blue Wedges, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.80; Mr B Jessup, Member, Australian Centre for Environmental Law – College of Law, Australian National University, submission no.37, p.7

¹⁰⁶⁴ Dr A Morrison-Saunders, submission no.53, p.9

¹⁰⁶⁵ Ms J Warfe, President, Blue Wedges, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.80

The Committee recognises the importance of a comprehensive analysis of project alternatives, including alternatives *to* a project. The proper analysis of alternatives has the potential to ensure that proposals are more environmentally sound and publicly acceptable.

While the Committee acknowledges that strategic assessment will not always result in a proper examination of alternatives *to* a project,¹⁰⁶⁶ the evidence received in the inquiry suggests that strategic assessment, because it occurs earlier in a decision-making process, may enable a better consideration of alternatives than project-level environmental impact assessment.

10.4.2 Cumulative impacts

The Victorian Government has described cumulative impacts as: 'where a project, in combination with one or more other proposed projects, or existing activities in an area, may have an overall significant effect on the same environmental asset'.¹⁰⁶⁷

Mr Paul Gamblin, Program Leader – West, WWF-Australia stated in evidence to the Committee that the assessment of cumulative impacts '... is one of the most important fundamentals of environmental impact assessment...'.¹⁰⁶⁸ Furthermore, Professor Lee Godden, Melbourne Law School, University of Melbourne, advised the Committee that:

*The scope of the idea of 'significant impact' has been expanded considerably with advances in scientific knowledge and our understanding of [the] environment as a complex interrelated facet. When we are dealing with major projects we are aware that it is not just the project and its immediate site impacts that we need to be concerned about ... things are broadening out. In particular I think the legislation needs to take into account the idea of cumulative impact, which is not just spatial but cumulative over time.*¹⁰⁶⁹

The Victorian ministerial guidelines require that proponents assess cumulative impacts in an environmental impact assessment where there is a risk of significant impacts and note that a 'regional perspective can be helpful in this regard, by putting the potential effects of a project in a wider context'.¹⁰⁷⁰ However, witnesses argued that environmental impact assessment is unable to adequately address cumulative impacts because it focuses on assessing impacts on a project-by-project basis.¹⁰⁷¹ For example, Associate Professor Middle stated that:

Project EIA is not good at doing cumulative impacts. It is difficult. You have got one project, and at some stage you will say the next project is unacceptable because of the cumulative impacts ... We had one example ... [in Western Australia] where we had a number of gas-fired power stations. The EPA assessed one about two years ago and said, 'That will be the last one. You

¹⁰⁶⁶ See also Mr P Gamblin, Program Leader – West, WWF-Australia, Environment and Natural Resources Committee public hearing – Melbourne, 1 June 2010, transcript of evidence, pp.221–222

¹⁰⁶⁷ Department of Sustainability and Environment, *Ministerial Guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.18

¹⁰⁶⁸ Mr P Gamblin, Program Leader – West, WWF-Australia, Environment and Natural Resources Committee public hearing – Melbourne, 1 June 2010, transcript of evidence, p.220

¹⁰⁶⁹ Professor L Godden, Melbourne Law School, University of Melbourne, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.97

¹⁰⁷⁰ Department of Sustainability and Environment, *Ministerial Guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.18

¹⁰⁷¹ Dr A Morrison-Saunders Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.60; Professor L Godden, Melbourne Law School, University of Melbourne, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.97

*can have no more gas-fired power stations in the north-east corridor because of the levels of [nitrous oxides] and ozone'. That is how we deal with cumulative. We do not share the load. The next cab off the rank gets hit.*¹⁰⁷²

Similarly, Mr Piers Verstegen, Director, Conservation Council of Western Australia advised the Committee that:

*... the EIA process in Western Australia was established in the 1980s [by] the ... Environmental Protection Act and reflects the thinking of that time, which essentially is what can be described as a fairly reductionist approach to managing environmental impact. It looks at the impact at the site of the development and ... until we have seen the strategic assessments come into effect, it has not really taken in the broader regional context, and it has really failed at being able to address cumulative impact in any meaningful way.*¹⁰⁷³

Furthermore, the Victorian ministerial guidelines note that the assessment of cumulative impacts at a project-level is often difficult for a number of reasons, including as a result of:

- limited access to information on the impacts of existing activities or proposals in an area; and
- a lack of available regional information on environmental values.¹⁰⁷⁴

Many witnesses suggested that strategic assessment may be a useful mechanism to address cumulative impacts.¹⁰⁷⁵ For example, Dr Morrison-Saunders advised the Committee that it is not possible to take into account cumulative impacts without taking a regional and strategic approach:

*You need to take a regional approach and you need to take a strategic approach, because we have so many individual mining projects in one region, and there are several regions that are very active in Western Australia, you cannot account for the cumulative impacts unless you take a strategic approach.*¹⁰⁷⁶

Mr Andrew Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, advised the Committee that strategic assessment could be a useful approach to address the cumulative impacts of wind farm projects across a region.¹⁰⁷⁷

¹⁰⁷² Associate Professor G Middle, Head, Department of Urban and Regional Planning, Curtin University, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.173

¹⁰⁷³ Mr P Verstegen, Director, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.186

¹⁰⁷⁴ Department of Sustainability and Environment, *Ministerial Guidelines for assessment of environmental effects under the Environment Effects Act 1978*, 7th ed., June 2006, p.18

¹⁰⁷⁵ Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.36; Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.60; Professor L Godden, Melbourne Law School, University of Melbourne, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.97; Associate Professor G Middle, Head, Department of Urban and Regional Planning, Curtin University, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, p.173; Environment Victoria, submission no.39, p.1

¹⁰⁷⁶ Dr A Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA, Environment and Natural Resources Committee public hearing – Melbourne, 17 May 2010, transcript of evidence, p.60

¹⁰⁷⁷ Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, pp.256–257

The Committee acknowledges the difficulty of assessing the cumulative impacts at a project-level and agrees that strategic assessment may be a useful mechanism to assess cumulative impacts.

10.4.3 Efficiency and approval certainty

The Committee received evidence from witnesses and in submissions that strategic assessment can increase the efficiency of the environmental assessment process because it often means that the number or scope of subsequent project-level environmental impact assessments is reduced.¹⁰⁷⁸ For example, Mr Macintosh stated in evidence to the Committee that:

I think there has to be a trade-off between the use of strategic environmental assessments and project-based assessments. Really the whole idea of strategic environmental assessment is either to white out, or be a substitute for, project-based assessment. Or if you then decide that you also need project-based assessment, the information requirements and the complexity of the project-based assessment are greatly reduced.¹⁰⁷⁹

As noted above, both the strategic assessment process undertaken at a Commonwealth level under the EPBC Act and in Western Australia under the Environmental Protection Act may negate the need for subsequent project-level environmental impact assessment in certain circumstances.

Furthermore, Mr Jessup was of the view that strategic assessment is efficient because it involves assessment earlier in a decision-making process, which means that, for example, proposal designs can be influenced and modified before considerable time and effort has been spent on them.¹⁰⁸⁰

The Committee was also advised that strategic assessment can increase approval certainty and reduce delays for subsequent proposals.¹⁰⁸¹ For example, Ms Suzanne Brown, Manager, Environment Branch, Water Corporation of Western Australia described the benefits of a strategic assessment of a proposal involving the construction of a network of water pipes:

I saw [strategic assessment] as a mechanism to just get a little bit ahead of the game and take a more strategic approach to our planning internally in the Water Corporation as well, so once we had locked in these routes we would then have an approval for these routes and that is bankable. If you are thinking in commercial terms that is worth money to an alliance or a

¹⁰⁷⁸ Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.114; Mr B Jessup, Member, Australian Centre for Environmental Law – College of Law, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, pp.131, 137; Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, pp.252, 255

¹⁰⁷⁹ Mr A Macintosh, Associate Director, Centre for Climate Law and Policy, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.252

¹⁰⁸⁰ Mr B Jessup, Member, Australian Centre for Environmental Law – College of Law, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.137

¹⁰⁸¹ Mr P Verstegen, Director, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, pp.186–187; Ms S Brown, Manager, Environment Branch, Water Corporation of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, pp.205–206; Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.261

*contractor that we have a guaranteed approval that we can give you when we give you the contract to build this thing, we know there are no delays.*¹⁰⁸²

10.4.4 Public participation

The Committee received evidence about the potential value of strategic assessment in terms of improving public participation in decision-making processes. For example, Mr Gamblin stated that strategic assessment can increase the transparency of decision-making:

Strategic environmental assessment can provide for a very open, transparent and information-rich assessment of the impacts of a range of projects across a region. Even for significant projects within a single organisation — a government department or a corporation — you can look at a range of options, describe those options fully and then use a systematic process to decide which option is the most appropriate to take ...

*One of the real values in doing things that way is that you can describe options transparently and bring the community and stakeholders along with you, to help people understand the logic behind particular options and keep those options alive for as long as possible. We think that that goes to good governance, it goes to transparency and it builds community confidence in the assessment process.*¹⁰⁸³

Mr Hyett was of the view that strategic assessment enables the public to engage in debate on broad policy issues that set the context for a proposal, which in Mr Hyett's view, often occurs inappropriately during project-level environmental impact assessment:

*One of [the] advantages [of strategic assessment] is that it provides a vehicle for some of the policy decisions that are being made rather than the EES project itself becoming the vehicle for those debates. To give you an example, is a coal project the place to be debating energy policy more widely for the state? No, it is not really. You should be focusing on the one project, but inevitably you get into debates about the amount of alternative energy versus other sources of energy. Similarly with transport projects: you will find that you enter into a debate about the right mix of public transport and road transport in a road project, whereas that debate should be held in another forum which deals with the policy issue itself.*¹⁰⁸⁴

Furthermore, Mr Jessup argued that strategic assessment has the potential to focus the debate on specific proposals and take the 'heat' out of community opposition because the community has had the opportunity to debate the need for a proposal before a final decision has been made:

... you have your strategic assessment, you work out that yes, we are going to deepen the channels in Port Phillip Bay or we are going to build the desalination plant and the engagement then becomes about how we are going to do this thing without ruining the environment, because the decision has been made, so that heat [has been] removed. The community may not like it,

¹⁰⁸² Ms S Brown, Manager, Environment Branch, Water Corporation of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 1 June 2010, transcript of evidence, p.205

¹⁰⁸³ Mr P Gamblin, Program Leader – West, WWF-Australia, Environment and Natural Resources Committee public hearing – Melbourne, 1 June 2010, transcript of evidence, p.220

¹⁰⁸⁴ Mr D Hyett, Technical Director of Environmental Management and Planning, AECOM, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.15

*but at least the community has had a chance to be involved in that process and it knows going into the next process that it is not going to change it.*¹⁰⁸⁵

10.5 Challenges associated with strategic assessment

While many witnesses highlighted the benefits of strategic assessment, some also highlighted a number of potential problems and key challenges. For example, Ms Nicola Rivers, Policy and Law Reform Director, Environment Defenders Office, highlighted a risk associated with the long-term nature of a strategic assessment approval, using an example in Western Australia:

*Fifteen years after the initial [strategic] assessment was carried out, projects that involved clearing large amounts of native vegetation and impacting on threatened species habitat were going ahead but there was no possibility of doing an environment impact assessment because that had been done ... 15 years earlier and the project was exempt. There were huge concerns there. Even the EPA at that stage had concerns that ... an assessment had [already] been done on certain areas that probably would not be given the same level of approval now, particularly in relation to the clearing of native vegetation and the impacts on threatened species; approval had been given and there was no way to bring that back.*¹⁰⁸⁶

Dr Morrison-Saunders stated in his submission that the general level of detail often associated with strategic assessment may cause problems in setting adequate approval conditions:

*... it is not yet clear whether sufficiently detailed assessments can or will occur at a strategic level that will generate appropriately detailed [approval] conditions.*¹⁰⁸⁷

In its submission, the Environment Defenders Office argued that because strategic assessment is usually undertaken early in the decision-making process, it needs to be adaptable to ensure that new information on the environmental values of the area subject to the assessment can be adequately taken into account, should such information become available at a later date.¹⁰⁸⁸

A key issue raised by witnesses related to the quality of information and level of analysis on the environmental values of the area on which a strategic assessment is based.¹⁰⁸⁹ For example, the Environment Defenders Office stated in evidence to the Committee that:

*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.*¹⁰⁹⁰

¹⁰⁸⁵ Mr B Jessup, Member, Australian Centre for Environmental Law – College of Law, Australian National University, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.136

¹⁰⁸⁶ Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.37

¹⁰⁸⁷ Dr A Morrison-Saunders, submission no.53, p.10

¹⁰⁸⁸ Environment Defenders Office (Victoria), submission no.27, p.16

¹⁰⁸⁹ Mr J Chenoweth, General Counsel, Australian Conservation Foundation, Environment and Natural Resources Committee public hearing – Melbourne, 24 May 2010, transcript of evidence, p.114; Environment Defenders Office (Victoria), submission no.27, p.16

¹⁰⁹⁰ Environment Defenders Office (Victoria), submission no.27, p.16

*The problem that we find with strategic impact assessment is that it is often done at a very high level — often over a large landscape or in relation to projects that are not fully developed yet — so you can only assess at the highest level of environmental impact and in practice it is sometimes not done robustly enough ...*¹⁰⁹¹

Similarly, in her submission to the Independent Review of the EPBC Act, Dr Parris outlined concerns about the quality of information associated with the strategic assessment of the Melbourne urban growth boundary, including in relation to: the existing biodiversity values of the area proposed for development; the predicted impacts of the proposed developments on threatened species and ecological communities; and the effectiveness of the proposed biodiversity offsets.¹⁰⁹² Dr Parris warned that if strategic assessments are done poorly 'we might ... witness large-scale losses of important populations, habitats and landscape connectivity'.¹⁰⁹³

Mr Verstegen argued that a lack of information on environmental values in many places in Western Australia and elsewhere is a key barrier to strategic assessment:

*There is also a whole range of barriers to doing strategic environmental assessment properly. One of them ... is the paucity of data that we have in relation to our environmental systems in Western Australia and elsewhere. To do good strategic assessment we need very good datasets about what the condition of the environment is and what the environmental values are so that we can identify areas of higher conservation value to feed into a strategic assessment, whether it is done on a regional basis or on the basis of a particular industry type or group. We do not have those sorts of datasets in Western Australia, and it seems to us that it is a classic case where the gathering of that data is resource intensive but is very much in the public interest.*¹⁰⁹⁴

Mr Jeff Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development advised the Committee that the costs of collecting and analysing information required for strategic assessments can be high.¹⁰⁹⁵ Governments are likely to take the lead in collecting such information¹⁰⁹⁶ because strategic assessments usually involve many proponents and may cover land that is not owned by a proponent.

¹⁰⁹¹ Ms N Rivers, Policy and Law Reform Director, Environment Defenders Office, Environment and Natural Resources Committee public hearing – Melbourne, 3 May 2010, transcript of evidence, p.36

¹⁰⁹² K Parris, 'Strategic Assessments and Bioregional Planning, with special reference to the strategic impact assessment for the proposed expansion of Melbourne's urban growth boundary', Submission on the *Interim report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2009, pp.1–14

¹⁰⁹³ K Parris, 'What are Strategic Impact Assessments? And why are they important? (And what about Melbourne?)', *Decision Point*, no. 32, p.5

¹⁰⁹⁴ Mr P Verstegen, Director, Conservation Council of Western Australia, Environment and Natural Resources Committee public hearing – Perth, 31 May 2010, transcript of evidence, pp.186–187

¹⁰⁹⁵ Mr J Gilmore, Executive Director, Planning Policy and Reform, Department of Planning and Community Development, Environment and Natural Resources Committee public hearing – Melbourne, 7 June 2010, transcript of evidence, p.6

¹⁰⁹⁶ Dr A Morrison-Saunders, submission no.53, p.10

The evidence received by the Committee in a previous inquiry¹⁰⁹⁷ suggests that, while there is adequate information about some species and ecosystems in Victoria, some of it at a state scale, there are also large gaps and uncertainties in critical data. As Mr Verstegen suggested of Western Australia, similarly the Committee believes that high quality information will also have to be collected in Victoria to support strategic assessment.

10.6 Conclusions

The Committee acknowledges the evidence received from witnesses and in submissions that strategic assessment has a range of potential benefits, particularly in relation to increasing the efficiency of the environmental assessment process and improving public participation. However, the Committee also recognises there are risks associated with strategic assessment and acknowledges that it is a relatively new concept that is still evolving in terms of its nature, scope and implementation.

The Victorian Competition and Efficiency Commission's (VCEC) inquiry into environmental regulation recommended that the previous government undertake strategic assessments in regions with similar projects and common environmental issues.¹⁰⁹⁸ In its response to the VCEC inquiry, the previous government supported the recommendation in principle, stating:

*The government will evaluate the merit (including a comparison of the costs and benefits) of a formalised strategic assessment process that might be triggered to assess the environmental impacts of broad scale development proposals or the cumulative impacts of multiple projects or activities.*¹⁰⁹⁹

The Committee asked DPCD how the previous government would undertake its evaluation and over what time frame the evaluation will be conducted. DPCD advised in response that:

DPCD has commenced work on the evaluation of potential approaches for strategic assessment and their merit in the context of project EIA, in part through a consultancy to prepare a concept paper in 2009. However, because of the overlap with the current inquiry by [this Committee], the approach to complete this evaluation, including the extent of stakeholder consultation, will be confirmed following [this Committee's] report. The review would now be completed in 2011.

In this context, DPCD has begun to evaluate experiences in Victoria and other jurisdictions of both (a) strategic assessments and (b) project-based EIA involving strategic issues. In particular, the experience gained in 2009 from the strategic assessment of ecological impacts of the expansion of Melbourne's urban growth boundary within the legislative framework of the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999 provides a useful benchmark for assessing information requirements and management responses for a strategic approach to ecological impacts... In conjunction with other departments, DPCD has

¹⁰⁹⁷ Parliament of Victoria, Environment and Natural Resources Committee, *Inquiry into the approvals process for renewable energy projects in Victoria*, 2010, for example, see Mr G Hull, Group Manager, Biodiversity Services, south west Victoria, Department of Sustainability and Environment, Environment and Natural Resources Committee public hearing – Port Fairy, 8 September 2009, transcript of evidence, p.220

¹⁰⁹⁸ Victorian Competition and Efficiency Commission, *A sustainable future for Victoria: Getting environmental regulation right*, final report, July 2009, p.136

¹⁰⁹⁹ Victorian Government response to Victorian Competition and Efficiency Commission's final report, *A sustainable future for Victoria: Getting environmental regulation right*, January 2010, p.7

*also begun to consider the practical cost/benefit of strategic assessments in informing planning and decision-making for wind farm developments ...*¹¹⁰⁰

The Committee supports the VCEC's recommendation. In evaluating strategic assessment in Victoria, the Committee believes that the government should consult with both the Australian and Western Australian governments in relation to their experience with strategic assessment.

The Committee is of the view that strategic assessment would be a particularly useful mechanism in Victoria in cases where there is high quality existing information on the environmental values of a region or such information can be readily collected, and where:

- a large number of activities or projects are proposed within a region (eg. a land-use plan proposing rezoning for large-scale urban development or a large-scale industrial precinct);
- a range of feasible alternatives to the proposed project or activity are available;
- the cumulative impacts of projects or activities within a region may be significant (eg. a series of wind farm projects within a region); or
- there is a significant public interest in a proposed project or activity.

In its submission, the Victorian Government suggested that while strategic assessment can be undertaken in the absence of specific legislation, there may be benefits in formalising strategic assessment in Victoria by establishing a legislative head of power that:

*... might be used in special circumstances, for example, to assess the suitability of different areas for particular activities, or to assess significant risks and/or the potential for cumulative impacts arising from a combination of multiple projects and existing activities.*¹¹⁰¹

The Committee asked DPCD for more detail about how it sees strategic assessment being formalised in Victoria. DPCD stated that it is not yet in a position to provide a definitive answer to this question. However, the department provided some general comments, advising that:

*The merit of establishing a formal strategic assessment process under the Environment Effects Act 1978 and/or the Planning and Environment Effects Act 1987 has yet to be evaluated ... [However] strategic assessments can be conducted in the absence of a statutory head of power ... Consequently, non-statutory guidelines could provide a minimal formal framework, for example: (a) to identify opportunities for strategic assessment, (b) to provide guidance on the scope of assessment studies and public processes. While a core legislative provision may be found to be desirable, this would need to be enabling rather than prescriptive in view of the need for strategic assessments to be responsive to particular circumstances. Further, an enabling legislative provision would probably need to be complemented by guidelines...*¹¹⁰²

The Committee believes that strategic assessment should be formalised in Victoria through the establishment of stand-alone provisions in environmental impact assessment legislation. To safeguard against the risks posed by strategic assessments, the legislative provisions for strategic assessment should include the following elements:

¹¹⁰⁰ Department of Planning and Community Development, correspondence received, 22 September, 2010

¹¹⁰¹ Victorian Government submission no.40, p.25

¹¹⁰² Department of Planning and Community Development, correspondence received, 22 September, 2010

- an objective or 'legal test' for strategic assessment – the Committee supports the recommendation in the Independent Review of the EPBC Act that strategic assessments should be subject to an 'improve or maintain' test – this is, proposals approved under the assessment should result in the improvement or maintenance of environmental quality.¹¹⁰³ The Committee noted that such a legal test has been established for strategic assessments in NSW;¹¹⁰⁴
- a list of factors that a decision-maker must consider in deciding whether to approve a policy, plan or program assessed by strategic assessment – this should include environmental, social and economic matters and the principle of ecologically sustainable development;
- mandatory opportunities for public participation at key stages of the strategic assessment process, including in relation to: public notification of proposed assessment processes and key documents; public exhibition of key documents; and time frames for public comment;
- minimum form and content requirements for strategic assessment reports (ie. a list of matters that a report must address at a minimum, such as a description of the proposal or activity, impacts on the environment, project alternatives, cumulative impacts, etc); and
- a process for ensuring that new information on the environmental values of the area subject to strategic assessment can be incorporated into future decision-making processes, in cases where such information becomes available after an approval is given.

Due to the often complex nature of strategic assessments and the large area over which it is undertaken, the Committee believes that statutory time frames for public comment should be greater than for environmental impact assessment. The Committee supports the recommendation in the Independent Review of the EPBC Act that statutory time frames for the public to comment on a draft strategic assessment report comprise a minimum of 60 business days.

To address concerns about the quality of information on which strategic assessment is based, the government should establish guidelines that clearly set out the minimum quality of information and level of analysis required to undertake strategic assessment. For example, in relation to biodiversity issues, guidance should be provided in relation to matters such as:

- the minimum information required in relation to vegetation types, vegetation condition, threatened species and their locations, habitats and population sizes;
- the minimum requirements in relation to surveys, the use of habitat modelling to predict species' distributions, and the production of vegetation and species maps;
- the circumstances under which modelling tools¹¹⁰⁵ should be used to predict impacts;
- principles and/or rules that set out the appropriate use of mitigation measures, such as the translocation of species and the use of biodiversity offsets; and
- how uncertainties in relation to existing information on biodiversity values, the prediction of impacts, or the effectiveness of mitigation measures should be addressed.

¹¹⁰³ Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act, Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, final report, October 2009, October 2009 p.90

¹¹⁰⁴ As noted above, under the *Threatened Species Conservation Act 1995*, the NSW Minister for Climate Change and the Environment is able to certify an environmental planning instrument, such as a land-use plan prepared by a local council, if satisfied that the instrument will lead to an overall improvement or maintenance in biodiversity values, including threatened species and ecological communities (referred to as the 'improve or maintain test')

¹¹⁰⁵ Such as population viability analysis

Accordingly, the Committee recommends that:

RECOMMENDATION 10.1

- (a) Stand-alone strategic environmental assessment provisions in environmental impact assessment legislation be established and include the following elements:
 - (i) an objective or 'legal test' for strategic assessment;
 - (ii) factors that a decision-maker must consider in deciding whether to approve a policy, plan or program assessed by strategic assessment;
 - (iii) opportunities be made for public participation at key stages of the strategic assessment process, with statutory time frames for the public to comment on a draft strategic assessment report being a minimum of 60 business days;
 - (iv) minimum form and content requirements for strategic assessment reports; and
 - (v) a process for ensuring that new information on the environmental values of the area subject to strategic assessment can be incorporated into future decision-making processes.
- (b) The government establish guidelines that clearly set out the quality of information and level of analysis required to undertake strategic assessment.

Adopted by the Environment and Natural Resources Committee – 29 August 2011

Appendix 1: List of submissions

1	John Peter Laverack
2	Gippsland Ports
3	John Kowarsky
4	The Bendigo and District Environment Council
5	Municipal Association of Victoria
6	Warrnambool Environmental Action Group
7	Jonathan Crockett
8	Merri Wetlands Protection Group
9	Neil Rankine
10	Watershed Victoria
11	Mordialloc Beaumaris Conservation League
12	Glen Eira Environment Group
13	Patricia Hunt
14	Lawyers for Forests
15	Port Phillip Conservation Council
16	AGL Energy
17	GHD
18	Dr David Provis, C/- Cardno Lawson Treloar
19	Coffey Environments
20	Associate Professor Ian Thomas, Discipline Head of Environment and Planning, RMIT
21	Swan Bay Environment Association
22	Moira Shire Council
23	Land Owners Rights Association
24	Macedon Ranges Residents Association
25	Peter and Gail Sands
26	Friends of the Koalas
27	Environment Defenders Office (Victoria)
28	Minerals Council of Australia – Victorian Division
29	Australian Marine Ecology
30	Kimberley Neave
31	Blue Wedges
32	Energy Supply Association of Australia
33	Annabel Richards
34	Commissioner for Environmental Sustainability
35	Colac Otway Shire
36	Australian Conservation Foundation
37	Brad Jessup, Australian Centre for Environmental Law, College of Law, Australian National University
38	Birds Australia

39	Environment Victoria
40	Victorian Government
41	Victorian Employers' Chamber of Commerce and Industry (VECCI)
42	Environment Institute of Australia and New Zealand (EIANZ)
43	Save Bastion Point Campaign
44	Construction Material Processors Association (CMPA)
45	Andrea Bolch
46	Cement, Concrete and Aggregates Australia (CCAA)
47	Transpacific Industries Group Ltd
48	Friends of Wonthaggi Heathland & Coastal Reserve
49	Hume City Council
50	Western Coastal Board
51	Port Campbell Community Group
52	Melbourne Water
53	Dr Angus Morrison-Saunders, Senior Lecturer, Environmental Assessment, Murdoch University WA
54	Professor Lee Godden and Associate Professor Jacqueline Peel, Faculty of Law, University of Melbourne
55	Victorian Planning and Environmental Law Association
56	Mornington Peninsula Shire
57	Associate Professor Sharon Mascher, Centre for Mining, Energy and Resources Law and Associate Professor Alex Gardner, Faculty of Law, University of Western Australia
58	Aventus Consulting

Appendix 2: List of public hearings

3 May 2010 – Melbourne

Department of Planning and Community Development

Mr J Gilmore, Executive Director, Planning Policy and Reform

Mr T Blake, Chief Environment Assessment Officer

Environment Institute of Australia and New Zealand

Ms E Hurst, Victorian President

AECOM

Mr D Hyett, Technical Director of Environmental Management and Planning

Coffey Environments

Mr B Napier, Principal

Environment Defenders Office Victoria

Ms N Rivers, Policy and Law Reform Director

Ms E McKinnon, Solicitor

Retired Consulting Engineer and former Environmental Auditor

Mr J Crockett

Port Phillip Conservation Council

Mr L Warfe, President

17 May 2010 – Melbourne

Environment Protection Authority Victoria

Mr S McConnell, Director, Future Focus

Murdoch University WA

Dr A Morrison-Saunders, Senior Lecturer in Environmental Assessment

Australian Marine Ecology

Dr M Edmunds, Director

Hume City Council

Cr G Porter, Mayor

Mr N Walker, Manager Sustainable Environment

Blue Wedges Inc

Ms J Warfe, President

Cardno Lawson Treloar

Dr D Provis, Senior Principal

24 May 2010 – Melbourne

VicRoads

Mr P White, Director, Network Planning and Policy

Mr C Mottram, Manager, Planning Investigations

University of Melbourne

Professor L Godden, Melbourne Law School

Cement Concrete and Aggregates Australia

Mr B Nicholson, Chairman, Victorian State Committee

Mr B Hauser, State Director, Victoria, Tasmania, South Australia

Mr R Buckley, Industry Relations Manager

Australian Conservation Foundation

Mr J Chenoweth, General Counsel

Mr S O'Connor, Economic Adviser

Watershed Victoria

Mr S Cannon, President

Port of Melbourne Corporation

Mr S Bradford, Chief Executive Officer

Mr N Easy, Executive General Manager, Channel Deepening Project

Australian National University

Mr B Jessup, Member

Australian Centre of Environmental Law – College of Law, Australian National University

31 May 2010 – Perth, WA

Office of the Environmental Protection Authority, Western Australia

Ms M Andrews, Acting General Manager

Mr C Murray, Director, Assessment and Compliance Services

Mr W Tacey, Assistant Director, Assessment and Compliance Services

Office of the Appeals Convenor

Mr A Sutton, Appeals Convenor

AECOM (USA)

Dr W Gorham, Industry Director – Oil and Gas

Curtin University

Associate Professor G Middle, Head, Department of Urban and Regional Planning

Environmental Consultants Association Western Australia

Mr I Leprovost, President

Conservation Council of Western Australia

Mr P Verstegen, Director

Dr N Dunlop, Citizen Science Project Coordinator

1 June 2010 – Perth, WA

University of Western Australia

Associate Professor S Mascher, Centre for Mining, Energy and Resources Law

Associate Professor A Gardner, Faculty of Law

Water Corporation of Western Australia

Ms S Brown, Manager Environment Branch

BHP Billiton (Iron Ore)

Mr G Price, Manager, Environment

Association of Mining and Exploration Companies Inc

Mr D Koontz, Chairman, Environment and Water Policy Committee

WWF – Australia

Mr P Gamblin, Program Leader – West

Department of Environment and Conservation, Western Australia

Mr A Sands, Acting Deputy Director, General Environment

Mr P Skitmore, Manager, Licensing

2 June 2010 – Melbourne

Environment Canterbury, New Zealand

Dr B Jenkins, Chief Executive Officer

7 June 2010 – Melbourne

Australian National University,

Mr A Macintosh, Associate Director (*via teleconference*)

Centre for Climate Law and Policy

Department of Planning and Community Development

Mr J Gilmore, Executive Director, Planning Policy and Reform

Mr T Blake, Chief Environment Assessment Officer

Melbourne Water

Mr R Clifford, Regional Delivery Manager – Waterways

Minerals Council of Australia – Victorian Division

Mr C Fraser, Executive Director

Ms M Davison, Assistant Director

Environment Protection Authority, Northern Territory

Professor D Craig, Board Member (*via teleconference*)

Mr R Horton, Policy and Project Officer (*in person*)

AGL Energy

Mr A Cruikshank, Head of Energy Regulation

Mr N Bean, Head of Generation Development

Victorian Planning and Environmental Law Association

Mr C Wren, Director and Senior Counsel

Ms J Forsyth, Barrister and Representative

21 June 2010 – Melbourne

Aboriginal Affairs Victoria

Mr I Hamm, Executive Director

Mr J Moon, Senior Heritage Policy Officer

Appendix 3: IAP2 Public participation spectrum



International Association
for Public Participation
Australasia

IAP2 Public Participation Spectrum

Developed by the International Association for Public Participation

INCREASING LEVEL OF PUBLIC IMPACT

INFORM	CONSULT	INVOLVE	COLLABORATE	EMPOWER
Public Participation Goal:	Public Participation Goal:	Public Participation Goal:	Public Participation Goal:	Public Participation Goal:
To provide the public with balanced and objective information to assist them in understanding the problems, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision-making in the hands of the public.
Promise to the Public:	Promise to the Public:	Promise to the Public:	Promise to the Public:	Promise to the Public:
We will keep You informed.	We will keep you informed, listen to and acknowledge concerns and provide feedback on how public input influenced the decision.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will look to you for direct advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.
Example Techniques to Consider:	Example Techniques to Consider:	Example Techniques to Consider:	Example Techniques to Consider:	Example Techniques to Consider:
<ul style="list-style-type: none"> • Fact sheets • Web Sites • Open houses 	<ul style="list-style-type: none"> • Public comment • Focus groups • Surveys • Public meetings 	<ul style="list-style-type: none"> • Workshops • Deliberate polling 	<ul style="list-style-type: none"> • Citizen Advisory Committees • Consensus building • Participatory decision-making 	<ul style="list-style-type: none"> • Citizen juries • Ballots • Delegated decisions

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