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19 April 2010

Caroline Williams
Executive Officer
Environment and Natural Resources Committee
Parliament House
EAST MELBOURNE VIC 3002

By email: enrc@parliament.vic.gov.au

Dear Caroline

Inquiry into the Environmental Effects Statement process in Victoria

Thank you for inviting me, and then giving me an extension, to make this submission. I hope that you find it useful in your deliberations. If you require any clarification or have any questions arising from this submission please contact me on 02 6125 3624 or brad.jessup@anu.edu.au.

Overview

Victoria has an outdated environmental assessment legislative regime[1]. Among the States of Australia Victoria's legislative regime for environmental assessment is the weakest, most vague, and most prone to delay and susceptible to political interference. This was made clear at a recent conference held at the Australian National University where each State's environmental assessment regime was analysed[2]. These frailties of the Victorian environmental assessment regime result because the *Environment Effects Act 1978* (Vic) remains a model of 1970s environmental protection, and is devastating brief and absent of any meaningful legal model.

Interestingly, however, the environmental assessment system in Victoria has proven to be capable of thorough, open, and extremely rigorous assessments. We need reflect no further than the first Environment Effects Statement (EES) process for the Channel Deepening Project. This, however, is due not to the quality of Victorian laws, rather a highly active and interested public and media[3], an independent and public panel process, and the influence of the more regulated *Environment Protection and Biodiversity Conservation Act 1999* (Cth) on State processes. These features provide a good socio-political foundation for a new legal regime.

[1] Jane Holder, *Environmental Assessment: The Regulation of Decision-Making* (2004) sets out the key forms of an environmental assessment regime. They are: the prediction of environmental effects, an evaluation of the significance of those impacts, a consideration of alternatives, an opportunity for community participation in the process, and the regulation of environmental decision-making. See also Mandy Elliott and Ian Thomas, *Environmental Assessment in Australia: Theory and Practice* (5th ed, 2009), in particular the principles that ought be applied to each form of environmental assessment (page 24).

[2] Australian Centre for Environmental Law, ANU, The State of Environmental Assessment: A National Conference, 23 May 2008. Revised papers from this conference will shortly be published in Tim Bonyhady and Andrew Macintosh (eds) *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (2010).

[3] Bernard Salt, 'Objectors know the place to be', *Herald Sun*, 25 March 2008, viewed at <http://www.heraldsun.com.au/opinion/objectors-know-the-place-to-be/story-e6frfifo-1111115875896> (accessed 19 April 2010)

It has only been recently, with the assessments of water infrastructure projects and the Channel Deepening Project, that the public, and presumably this committee, has observed a trend of government-sponsored projects being treated differently, and sometimes not being assessed as rigorously, independently and transparently as has been warranted and expected by the public. This trend and concern is significant. It demonstrates that the *Environment Effects Act 1978* (Vic) has passed its time. After all, the Act was set up only to assess State-sponsored projects (defined as 'public works' in the Act) and not private projects. That the Act is seen as failing to properly achieve the one function expected of it in 1978 demonstrates that Victoria should start afresh, with a new environmental assessment law model.

Now is the time for reform. Now is the time for true reform. Claims by the government that it has only recently reformed this law are false.[4] Although the passage of the *Environment Effects (Amendment) Act 2006* (Vic) changed the law, it did so in only a minor way, and in fact lessened rather than increased the transparency, independence and rigour of the process. The reforms facilitated the controversial assessment of the North-South Pipeline project. The changes to supporting guidelines did little more than avoid legislative changes. The 2006 amendment Act represented the culmination of a lost opportunity. If anything, it was an example of governmental anti-reform[5].

A truly reformed environmental assessment regime for Victoria must create certainty and clarity through a legislative rather than guideline-based regime. It must mandate strategic environmental assessment for major projects, especially those projects that are State-sponsored. A new approach would broaden the role for planning panels and apply a deliberative, rather than consultative, model in interactions between developer, assessor and the public[6]. The environmental assessment regime should become an approval process subject to judicial review rather than simply an assessment process. Finally, internal Departmental oversight for government projects should be stopped, and instead vested in independent planning panels comprised of tenured experts.

One way of reforming Victoria's environmental assessment regime is to incorporate it, along with a strategic environmental assessment component, into the *Planning and Environment Act 1987* (Vic). This Act has a clear objective, certain requirements and timeframes and specified assessment criteria. In fact the recent review of that Act has identified possible means of integration with its proposal for 'impact assessment' of State significant projects[7]. This submission will suggest other ways to reform the EES process.

This submission is divided into five further parts. First, I outline my interest and expertise. Then I address each of the Committee's four terms of reference. I will draw on a number of recent case studies in this submission. They are: the Channel Deepening Project, the North-South Pipeline Project; the Norwingi Waste Project; and the Hazelwood Extension Project. The Channel Deepening Project went through two EES processes, the Norwingi Waste Project and the Hazelwood Extension Project went through a joint planning panel and EES process and the North-South Pipeline Project was subject to an out-of-the-ordinary process seemingly designed to circumvent the need for an EES.

About me

I am an academic at the ANU College of Law at the Australian National University. I teach in the undergraduate and postgraduate environmental law programs at the ANU College of Law, working alongside my colleagues within the Australian Centre for Environmental Law. I have research expertise in environmental law, and in particular the Victorian environmental assessment process. As part of my current PhD research into environmental justice in Australian environmental law I have closely analysed the Environmental Effects Statement process for the Channel Deepening Project and the Regional Forests Agreement process in Tasmania.

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[4] See for example: State of Victoria Department of Treasury and Finance, *A Sustainable Future for Victoria: Getting Environmental Regulation Right: Victorian Government Response* (January 2010), page 4.

[5] See: Tahi Mottl, 'The analysis of countermovements' (1980) 27 *Social Problems* 620 for an analysis of anti-movements. The Victorian Government response can be conceived as a rejection of mainstream expectation like many of the US countermovements in the 1960s and 1970s.

[6] See Holder, above n 2, page 195.

[7] See: Department of Planning and Community Development, *Modernising Victoria's Planning Act: Commentary on the Draft Bill* (December 2009).

Before commencing my employment with the ANU College of Law, I graduated with Honours degrees in law and geography from Monash University in 2001. I then worked in the planning and environment group for the law firm Freehills in Melbourne until September 2006. During this time I advised a number of clients on environmental assessment issues under the *Planning and Environment Act 1987* (Vic), the *Environment Effects Act 1978* (Vic), and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). I was heavily involved in advising the Port of Melbourne Corporation in its EES process, and I advised community groups in my role as a volunteer solicitor with the Environment Defenders Office (Vic).

From 2006 to 2007 I studied a Masters of Philosophy in Geography at the University of Cambridge. Relevantly, my thesis explored the assessment of wind farm developments and the associated environmental conflicts in Victoria and the United Kingdom.

Weaknesses in the current system including poor environmental outcomes, excessive costs and unnecessary delays encountered through the process and its mechanisms

The fundamental problem and weakness with Victoria's current environmental assessment process is that it is not set out in legislation, rather the process is principally found in guidelines. There is nothing certain and clear about the guidelines. They may be followed, but they are not mandatory. I have previously provided my view to the Commonwealth that one of the consequences of Victoria's environmental assessment approach being found principally in non-binding guidelines is that it cannot legally be accredited under a bilateral agreement with the Commonwealth for the purpose of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)[8]. While bilateral accreditation has occurred, in my view it is on a very uncertain footing unless and until Victoria replaces its current policy-based environmental assessment regime with a legislative-based regime.

The negligible contribution of the law can be seen in the attached summary of the Victorian environmental assessment process and the contribution of the law to that process.[9] Provisions of the *Environment Effects Act 1978* (Vic) are generally permissive rather than mandatory, they vest great discretion in the administering Minister, and those provisions that are drafted broadly are used for specific, and not necessarily the intended, purposes.

For example: a 'referral' is made by proponent inquiry only (s 8(3)); the general power to acquire technical advice (s 8G) is used to support a universal and specific Technical Reference Group process; the preparation of the EES is done relying on a provision without any stipulation about how an EES is to be prepared and what it is to contain (s 4(3)); the public component of the EES process is entirely discretionary and vague (s 9); and timelines for publication of assessment reports are uncertain (s 6(3)).

Indeed, the law does not specify any time frames at all, it does not compel referral of projects, it creates no offence of doing a project that will harm the environment. It mandates none of Holder's key forms of environmental assessment[10] and it does not embrace the principles of environmental assessment[11]. It fails to identify the aspects of the environment that are particularly important or activities that are especially problematic. 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 focussed 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. In the Hazelwood Extension Project, for instance, the Department was able to exclude consideration of greenhouse gas matters from the assessment and inquiry even though this was a matter of principal concern to the community. It was only because the Victorian Civil and Administrative Tribunal concluded that such an assessment and inquiry could not be excluded from

[8] See attachment 1.
[9] See attachment 2.
[10] Holder, above n 1.
[11] See Elliott and Thomas, above n 1.

consideration under the concurrent *Planning and Environment Act 1987* (Vic) process[12] that the matters got discussed publicly.

Similarly in the Norwingi Waste Dump project, it was only on the basis of the *Planning and Environment Act 1987* (Vic) that the project was rejected. This was largely because the planning legal regime has a policy and administrative framework. By contrast, the *Environment Effects Act 1978* (Vic) does not even have any objectives, let alone a policy framework under which decisions are to be made. There is no strategic underpinning to the *Environment Effects Act 1978* (Vic) and no consistency. All decisions about whether to recommend a project proceed or be rejected are made in an ad-hoc and project-by-project basis by bureaucrats assisting the Minister.

As a consequence of the absence of a legal regime, projects can occur that adversely affect the environment, decisions about what projects require assessment are not made transparently and consistently in accordance with the law, and developers have no clear and certain guidance on the entire process. Rather, the system and its actors depend on the Government and agencies following non-binding guidelines, which does not always happen.

What usually happens is that developers and the community lobby and liaise with the Minister about whether an EES is required. Invariably, a Ministerial decision about whether an EES is required occurs far too late in the project's development. Usually by the time a decision is made the project design has been finalised, the economic windfall has been calculated and developers are disinclined to contemplate alternatives offered by interested members of the community. This is precisely what happened in the Channel Deepening Project. A decision about the project was made long before the community of concern became involved.[13] Ideally, a proponent should know the moment it conceives a project whether it will require an EES and a community should know the moment it becomes aware of the project (by reference to a plan or list of prescribed projects). From that moment deliberation about the form of project and alternatives should begin. In my view this would be facilitated by the appointment of an independent inquiry head to guide the environmental assessment before the assessment begins rather than afterwards.[14]

Instead, the Victorian environmental assessment process ordinarily begins by groups taking sides and continues through an adversarial process with an independent inquiry panel convened after the publication of the EES is approved by the Department. An adversarial framework and bureaucratic oversight, however, is not ideal for reaching the least environmentally destructive or most widely acceptable project. Rather, it is a framework that best suited to a political process where the winner takes all.

Community and industry consultation under the Act

As noted above, participation in the EES process generally occurs too late, usually after the project development phase and during the assessment phase. This was evident in the Channel Deepening Project, where the late involvement of the community meant that the proponent was unable to adequately respond to the community's evolving knowledge about the project.[15] My research has also uncovered that in the same project industry members too felt unable to contribute ideas about project design because the process was fixated on a designated design while alternatives were not countenanced.

In Victoria, any participatory process occurs entirely outside the Act. This is because there is no 'community and industry consultation under the Act'. The Act fails to guarantee participation in the process. Instead, under the Act the Minister has the discretion to invite public comment and to conduct a public hearing.[16] While this has been used almost without hesitation, the form and nature of public involvement is not always consistent. As was seen in the second Channel Deepening Project hearing, the Minister can limit the extent of community and industry participation in a hearing by restricting the

[12] See *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100.
[13] See Attachments 3 and 4.
[14] See Attachment 4.
[15] See Attachment 4.
[16] Section 9 of the *Environment Effects Act 1978* (Vic).

subject matters for the inquiry and limiting the public from asking questions of experts[17]. Similarly, the Government can conduct pseudo-environmental assessments outside the Act. This is what happened with the North-South Pipeline. Outside the confines of the Act and the usual process and guidelines, the State was able to design a regime that even further diminished the ability of the community to contribute to the decision-making process.

A meaningful and modern environmental assessment regime must reconsider the role for the non-proponents. If the desired intention of an environmental assessment is for rigorous and transparent evaluation of projects and community understanding and acceptance of decisions about those projects, it is no longer sufficient for the community and industry to merely be consulted. Participation needs to be more engaging, a broader spectrum of the community needs to be involved, and the participation needs to be more directed at project design, assessment design and assessment evaluation. There are a number of scholars researching deliberative models of decision-making that are suitable for an environmental assessment regime.[18] Currently, the extent of participation is: the public is told what is proposed, then invited to comment on assessment guidelines (though rarely do those guidelines change as a result of community input), and ultimately the public can either support or reject the project as presented: with no middle ground.

Of course, the middle ground is not always the preferred approach of those most fiercely objecting to a project. At the first Channel Deepening Project hearing, for example, the opponents of the project refused to participate in a deliberative environmental management forum. They argued that to do so was to accept that the project should proceed. This presents a particular problem with the current approaches to environmental assessments in Victoria as well as elsewhere. The process, being so complex, detailed and long is exclusionary. Only the fiercest supporters (and generally only the proponent) and the staunchest opponents can endure the environmental assessment process.

This could be partly overcome by involving the public and industry earlier in the process, by seeking out the contribution of a range of interested members of the public, and allowing contributions to be staggered rather than focussed in an intense period of review of reports and an intense and elongated panel inquiry process.

While the panel inquiry process is a very good one, as it provides Victoria with a uniquely and highly transparent assessment process, the process could be reformed. If the panel could be involved earlier with a role to direct assessments and oversee them (much like a judge case manages a court case and how the Resource Planning and Development Commission attempted to manage the Bell Bay Pulp Mill Project in Tasmania), the panel would be able to identify the points of contention for further scientific assessment and then public airing. The panel could neutralise or decide on relatively non-contentious or non-show-stopping matters along the way. For the Channel Deepening Project this could have included heritage matters, sea-level changes, spoil ground sites, dredging technology, and nitrogen loading. The panel could have also raised concerns about some of the scientific and environmental management techniques being employed much earlier than it did (ultimately at the very end of the process in its report!). All of these preliminary decisions could then be incorporated into further assessments and ultimately a shorter and more directed EES.

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 environment where such narrowing of matters should occur – not within the Minister's Department. There should also be an effort to compel the consultants engaged to write these reports to be clearer and brief, to predominantly articulate the potential effects of a project and its alternatives up front, and to leave decisions of policy, support and values to decision makers. I cannot see why any statement of environmental effects should fill volumes of ring binders as they often do. Reports should be discursive, explanatory, and free of jargon, rather than being formulaic and verbose with science often poorly communicated, as they so often are now.

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[17] For a criticism of this approach in the Channel Deepening Project see Royce Millar, 'Alarm bells ring loud', *The Age*, 23 April 2007, viewed at <http://www.theage.com.au/news/national/alarm-bells-ring-loud/2007/04/22/1177180483928.html> on 19 April 2010.

[18] See in particular the academic work of John Dryzek.

Finally, 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. The outcome is a Ministerial recommendation, not an independent conclusion or an approval. The Ministerial recommendation is used to inform decision makers under a variety of other Acts, and not the *Environment Effects Act 1978* (Vic). 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.

In my mind the best way to rectify this situation and to make contributions to the environmental assessment process more meaningful is to link the assessment process much closely with the approval process. In a way this is planned to occur in the planning context with the proposed creation of the State significant development planning pathway. This could be done simply by incorporating the EES process into the *Planning and Environment Act 1987* (Vic). How this could be achieved is suggested in a speech I gave in 2008.[19] Alternatively, a model similar to Tasmania's where projects that are subjected to an environmental assessment by an independent Commission are approved or rejected in one instrument could be considered. Of course, any reform of this nature ought be careful not to replicate the New South Wales model, where assessments are too often used to fast-track projects that have the favour of their Planning Minister.[20]

The independence of environmental effects examination when government in the proponent

Transparency and accountability is lacking in the current process for government-sponsored projects. There is an appearance that internal machinations operate differently for State developments, and this should be redressed. Decisions about the abbreviated assessment regime for the North-South Pipeline, and the constraining of the second EES for the Channel Deepening Project are the most notable examples.

The trend for the government (led by the Department of Finance and Treasury), in the wake of the first EES for the Channel Deepening Project, to offer only whole of government submissions for government projects operates as a haze over government environmental concerns that does not exist for other projects. Ordinarily all government agencies have the opportunity to present views about projects insofar as the project will have positive or adverse effects on the part of society or the environment that they are charged to administer. This opportunity should be reinstated for all projects and the whole-of-government submission approach rejected.

It is the lack of legal structure and the dependence on guidelines that feeds the appearance of partiality. This appearance would not exist if the *Environment Effects Act 1978* (Vic) set out requirements for an EES, the process, and outcomes. Hence, in my view, much of the concern about partiality in government project assessments would be ameliorated if all proponents had clear laws specifying their rights and obligations for environmental assessments. Further, it would be advantageous if all projects, not simply government ones, were managed by the panel inquiry from initiation rather than internally by the Minister for Planning's Department.

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 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.

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[19] See Attachment 5.

[20] See, eg, Ian Ratcliff, Jessica Wood and Sue Higginson, 'Technocratic Decision-Making and the Loss of Community Participation Rights: Part 3A of the Environmental Planning and Assessment Act 1979' *EDO NSW – Part 3A,* viewed at <http://www.edo.org.au/edonsw/site/part3a_article.php> on 19 April 2010.

For these projects, the best times for assessment of projects and community deliberation is before the project is settled as policy. Undoubtedly, for these projects a more considered and co-operative strategic environmental assessment[21] would have created better projects for the State with fewer environmental concerns than resulted from the shallow policy consideration and subsequent EES or alternative environmental assessment. If a policy that endorses a project does go through a strategic assessment then there is no reason for it to be subjected to an EES, which would create substantial cost and time savings.

How better environmental outcomes can be achieved more quickly and predictably and with a reduction on unnecessary costs.

The previous parts of this submission give details about how the environmental assessment process can – and should – change to: improve certainty around the process that does to exist now, increase community and industry deliberation, focus on early rather than late assessments of projects, and shift power away from the Minister and his Department into more independent hands.

There is also a suggestion to disband the *Environment Effects Act 1978* (Vic) and incorporate an environmental assessment process within the State's planning regime, and to convert the regime from its current assessment and political process to an approval process.

All of these suggestions are directed at improving the environmental assessment regime in fact (through more directed, detailed and responsive science) and in perception (by increasing transparency, accountability and certainty). As a corollary of reform, and in particular by shifting from a guidelines based regime to a legal regime, decisions about the environment will be more predictable and made more quickly. Having environmental assessments managed by independent minds could reduce costs[22], and using strategic environmental assessment for government policies in the pre-project development stage will eliminate all costs associated with project environment assessment. Duplication, costs and time losses will be eliminated if a Tasmanian-style single approval process is adopted or if the EES process was incorporated into the planning law regime. A likely positive consequence of such a change would be greater community comprehension of the environmental assessment process.

* * *

Yours sincerely

Brad Jessup
Australian Centre for Environmental Law
ANU College of Law

Attachments:

1. Submission to the Department of Environment, Heritage and the Arts concerning the draft Victorian bilateral agreement.
2. Overview of Victorian environmental assessment process and the legal contribution, 2008
3. Time line of the proposed reform of the Victorian environmental assessment process and the process for the Channel Deepening Project environmental assessments, 2008.
4. Brad Jessup, 'Victoria and the Dredging of the Bay' in Tim Bonyhady and Andrew Macintosh (eds) *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (2010).
5. Paper presented at the State of Environmental Assessment Conference, Canberra, 23 May 2008.

[21] For an overview of strategic environmental assessment and its operation in Australia see: Simon Marsden and Stephen Dovers (eds) *Strategic Environmental Assessment in Australasia* (2002).
[22] One of the arguments for greater case management in the civil legal system is that it reduces costs. See, eg, Ronald Sackville, 'The future of case management in litigation' (2009) 18 *Journal of Judicial Administration* 211.

Attachment 1

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10 November 2008

The Director
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Department of the Environment, Water, Heritage and the Arts
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By email: epbc@environment.gov.au

Dear Minister Garrett

Draft bilateral agreement between Victorian and the Commonwealth under section 45 of the EPBC Act

Overview

I wish to comment on the draft bilateral agreement between Victoria and the Commonwealth (**Draft Agreement**).

I am an academic at the ANU College of Law with research expertise in environmental law, and in particular the Victorian environmental assessment process. I worked as an environmental lawyer in Melbourne with the law firm Freehills from 2003 until 2006. During this time I worked closely on many projects that required assessment under the *Environment Effects Act 1978* and the *Planning and Environment Act 1987*.

My comments relate only to the inclusion of the assessment processes alluded to in the *Environment Effects Act 1978* and Section 151 of the *Planning and Environment Act 1987* within the Draft Agreement. I endorse the accreditation of the other processes included in the Draft Agreement, which in my view are generally clear, transparent, and robust.

In my view the *Environment Effects Act 1978* and Section 151 of the *Planning and Environment Act 1987* processes are insufficiently articulated and robust, opaque and fail to provide for necessary deliberation for inclusion in a bilateral agreement that must accord with the objects of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). Additionally and fundamentally, neither process is an 'authorisation process ... set out in a law' as required by section (2A)(a) of the EPBC Act.

The Draft Agreement, in its present form, should not be finalised. It would be wise for you to withhold those aspects of the Draft Agreement dealing with the *Environment Effects Act 1978* and Section 151 of the *Planning and Environment Act 1987* until the Victorian Government revisits amendments to those laws.

EPBC Act requirements for the Draft Agreement

Of relevance to my submission, the EPBC Act states:

At Section 46(2A):

> *An authorisation process is a bilaterally accredited authorisation process for the purposes of a bilateral agreement declaring that certain actions do not require approval under Part 9 for the purposes of a specified provision of Part 3 if and only if:*

(a) the authorisation process is set out in a law of the State or Territory that is a party to the agreement, and the law and the process are identified in or under the agreement; …

At Section 50:

The Minister may enter into a bilateral agreement only if the Minister is satisfied that the agreement:

(a) accords with the objects of this Act; …

On the basis of these two provisions, as explained further below, the Minister must not enter into the Draft Agreement.

The Draft Agreement purports to accredit processes that are not set out in a law
The environment effects statement process and the Advisory Committee processes are not set out in a law of Victoria.

The environment effects statement process depends on guidelines issued by the relevant Minister not the *Environment Effects Act 1978*. I have attached as Attachment 1 a chart outlining the contribution of the *Environment Effects Act 1978* to the environmental effects statement process in Victoria. As you can see the Act is silent on the most important parts of the process and requires a level of reinterpretation to see how the process is supported by the law. This should not be surprising given the brevity of the Act, the absence of any supporting regulations, and the antiquated nature of the law.

It cannot be said that the law 'sets out' the environment effects statement process.

The Macquarie Dictionary defines set out as 'to state or explain methodically'. The law, by contrast, does not clearly specify the initiation process for a statement; it does not make clear the nature of the projects that require assessment; the decision making functions of the Minister are steeped in broad discretion; the law depends on guidelines not included in the law; there is no requirement for public consultation in the assessment or comment on a statement; there is no mention of the Technical Reference Group, which has a high importance in the scoping and reviewing of the statement; there are no laws relating to advertising and exhibiting a statement (the Minister may make guidelines); critically there is no law relating to the output of an inquiry panel (and often the report is not released in reasonable time); and there is no law regulating the Minister's response to receiving any panel inquiry report.

In summary, the environment effects statement process in Victoria operates outside of the law. The Ministerial Guidelines on assessments are long and detailed. It is here that the environment effects statement process is 'set out'. However, these guidelines are not part of the law of Victoria.

The law that refers to the Advisory Committee process is even briefer. It is just one section: Section 151 of the *Planning and Environment Act 1987*. I have attached this section in Attachment 2. Importantly, the regulations do not provide any further details on Advisory Committees. This section says nothing about the assessment process that might be taken by the Advisory Committee. As the experience with the assessment of the Sugarloaf Pipeline demonstrated, the Minister solely determines how the process will run, what aspects of the environment will be assessed, and what, if any, contribution that community will have.

No reasonable decision-maker could conclude that the Advisory Committee assessment approach is 'set out' in the law of Victoria.

The Draft Agreement does not accord with the objects of the EPBC Act
The accreditation of the environment effects statement process and the Advisory Committee process does not accord with the objects in Section 3 of the EPBC Act.

Critically, the *Environment Effects Act 1978* does not specify objectives, does not make clear that it is designed to pursue principles of biodiversity conservation, environmental protection and ecological

sustainable development. The Act merely foreshadows a process to assess environment effects with no goal or process in mind, no requirements on developers and no offences for generating environmental harm. The Act does not even define the environment. The Act does not guide the Minister on how to respond to the assessment report, it does not guarantee participation or Ministerial accountability. All of these flaws and more were outlined in an Advisory Committee report into the *Environment Effects Act 1978* of 2002. Significantly this report was not released for two-and-a-half years. Such delays are not uncommon and permissible under the Advisory Committee assessment regime..

While the Advisory Committee regime is found in the *Planning and Environment Act 1987* with its objectives and environmental principles, the Advisory Committee regime is used in an ad hoc and opportunistic way by the government. It was recently employed to assess a narrow range of environmental impacts associated with the Sugarloaf Pipeline. One can only presume it was used rather than an environment effects statement in order to minimise community involvement, to lessen the transparency of the process, and to constrain matters for inquiry. The matters for inquiry excluded social and economic matters. Mysteriously, however, the Commonwealth Department accredited the process despite it being expressly required to consider social and economic matters when making its decision under the EPBC Act.

Largely because both of these regimes are not articulated in a level of detail in the law they are misused or manipulated, politicised and often aggravate tensions between proponents, the community and the government. This was certainly the case in the Channel Deepening case, which is the focus of a book chapter I have written and have attached as Attachment 3.

By finalising the Draft Agreement the Commonwealth will be endorsing these flaws and failing to:

- Provide for the protection of the environment or promote the conservation of biodiversity. Neither process is specifically directed at these outcomes and provides no offence for failing to conduct an environmental assessment of a potentially environmentally harmful project (Section 3(1)(a) and (c)).

- Promote ecological sustainable development, with its focus on community involvement and assessment of environmental, social and economic matters. This focus is not an articulated feature of either regime (Section 3(1)(b)).

- Promote a co-operative approach to the protection and management of the environment involving governments, community, land-holders and indigenous people. In both regimes non-government groups are not guaranteed participation in the processes, and indeed are often denied meaningful contribution (which has in the past excluded or limited hearings and the presentation and challenging of expert evidence) (Section 3(1)(d)).

Specific comments

I make the following comments and suggestions for improvement to the Agreement if you elect to proceed with the Draft Agreement without deleting Part B and Part C (insofar as it relates to Advisory Committees), noting that to do so would, in my view, nevertheless breach sections 46 and 50 of the EPBC Act:

- Clause 8: No reasonable decision maker could conclude that Victoria's environmental assessment system is 'comprehensive'. The *Victorian Environment Effects Act 1978* is absolutely uncomprehensive. It is just 11 sections long with the environmental assessment process detailed in guidelines that are often not complied with. Such inaccurate rhetoric should not remain in the final agreement.

- Clause 9.3: What is meant by 'partially assessed'? Do you mean any controlled action for which an assessment approach has been decided? This should be clarified.

- Schedule 1, Part B, Item 3: Public comment should always be sought on scoping guidelines. There is no justification for exempting public comment from this process. Public comment is valuable to ensure that EPBC Act matters are included and that the matters principally

concerning the public are addressed. I remind you of section 3(1)(d) of the EPBC Act, which includes as an object of the EPBC Act promoting a 'co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples'

- Schedule 1, Part B, additional matters: Details are required about the establishment of an inquiry panel, the role of that panel, and the reporting responsibilities of that panel. The Victorian Government should be required to release the report of the inquiry panel within a specified time.

- Schedule 1, Part C, Item 2.2: This is very vague. It should be redrafted to make clear that the independent members be free to conduct the inquiry as they see fit limited only by the terms of reference.

- Schedule 1, Part C, Item 2.3(a): The use of the word 'relevant' is problematic. It should at least include all impacts that the Minister under the EPBC Act is required to consider (this would ensure that social and economic impacts are not excluded again).

- Schedule 1, Part C, additional matters: Public hearings should be required. The terms of reference should be subject to community comment. The Victorian Government should be required to release the report of the inquiry panel within a specified time.

- Schedule 1, Part D, Item 6: This item should be merged with Item 3. There appears no reason for them to be separate.

Yours sincerely

Brad Jessup
Teaching Fellow
ANU College of Law

Attachment 2

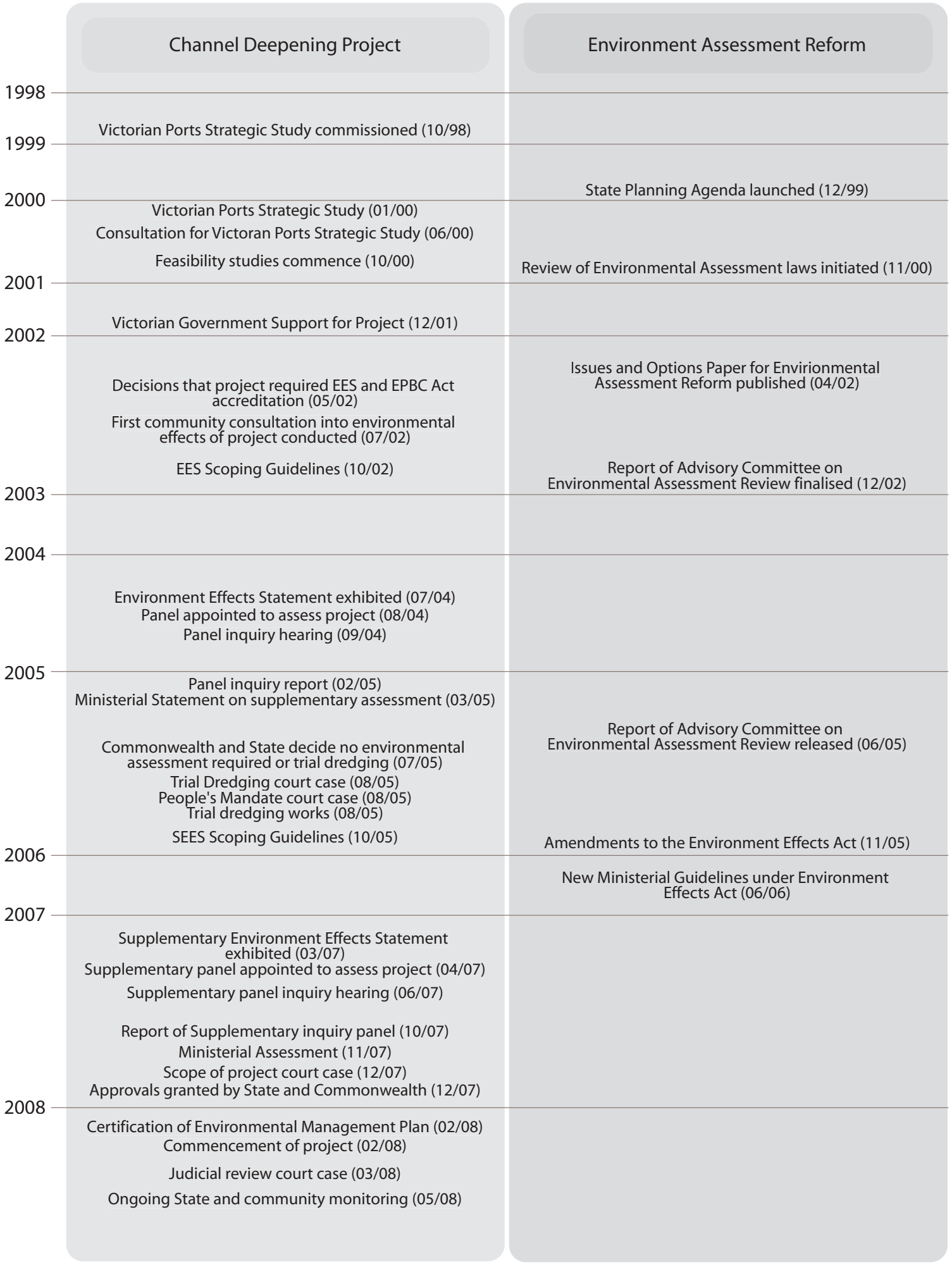
Victorian environmental assessment process

Usual assessment approach	Contribution of the Environment Effects Act 1978
Referral of project by Government or proponent	Minister may call for an EES (s 6 or s 8(4)) Decision-maker may ask whether an EES should be prepared (s 8(1)) Proponent may ask whether an EES should be prepared (s 8(3))
Decision by Minister for Planning on whether an EES is required	Minister can declare 'public works' that require an EES if satisfied that the works may have a significant effect on the environment (s 3) Minister may request information to decide if an EES is required (s 8(2)) Minister must decide whether an EES is required or if an EES can be avoided by the proponent fulfilling conditions (s 8(3)) Minister may make guidelines about the types of works requiring an EES (s 10(1)(a))
Prohibition on works being taken and approvals being granted	Works must not start or appraisals given until after the Minister's assessment of the environmental effects has been considered (s 8C) Works may not commence if an EES has been submitted until after the Minister's Assessment has been considered by the decision-maker (s 6(2))
Decision by Commonwealth whether to accredit the EES process under the EPBC Act	
Scoping of EES with assistance of Technical Reference Group	Minister may acquire technical advice for an EES (s 8G) Minister must make an order setting out the procedures and requirements for the EES (s 3(3) or s 8B(5)) Minister may make guidelines about the matters that should be contained in an EES (s 10(1)(c))
Preparation of EES with assistance of Technical Reference Group	An EES must be prepared and submitted at the propoent's cost (s 4(3)) Minister may make guidelines about the procedures to be followed by proponents (s 10(1)(b)) and for public consultation (s 10(ba)(ii))
Exhibition of EES on advice of Technical Reference Group	A copy of the EES must be submitted to the Minister (s 4(2)) Minister may make guidelines about the procedures and requirements for advertising and exhibiting an EES (s 10(1)(ba)(i))
30 business days of public comment	Minister may invite and receive comments on the environmental effects of a project from the public or specific sections of the public chosen by the Minister (s 9(2))
Panel conducts public inquiry	Minister may appoint people to hold a private of public inquiry into the environmental effects of any proposed works (s 9(1)) Minister may ask proponent to pay for any inquiry (s 9(3))
Panel reports to Minister for Planning on environmental effects of the project	(The output of any inquiry panel is normally stated in the terms of reference establishing the panel under s 9(1))
Minister prepares Assessment Report and recommendation within 25 business days	Minister may call for a supplementary EES for the purpose of making an assessment (s 5(1)) Minister will provide the assessment as soon as reasonably practicable in the circumstances (s 6(3))
Assessment Report provided to decision-makers, including Commonwealth if it accredited the EES process	Works must not start or appraisals given until after the Minister's assessment of the environmental effects has been considered (s 8C) Works may not commence if an EES has been submitted until after the Minister's Assessment has been considered by the decision-maker (s 6(2))

Brad Jessup, 2008

Attachment 3

Victorian environmental assessment laws and the Channel Deepening Project: a timeline



Brad Jessup, 2008

Attachment 4

CHAPTER 5

Victoria and the Channel Deepening Project

Brad Jessup[1]

Introduction

The saga of the Channel Deepening Project originated in 1998. The false promise of environmental impact assessment (EIA) reform in Victoria can also be traced to then. It is a sensible and convenient place to begin a story about a project that had no winners and a reform process that made us all losers.

A year before the unexpected defeat of the Kennett Government in 1999, a behind-closed-doors investigation into the state of Victorian ports was commissioned. The research was not intended to support a predetermined outcome but was called in order to provide a basis for policy development concerning port land, shipping and other modes of freight transport. Ultimately, however, this process, which gave rise to the *Victorian Ports Strategic Study*, narrowed in on an initiative to deepen the shipping channels that led from Bass Strait to the Port of Melbourne through Port Phillip Bay. That initiative became known as the Channel Deepening Project.

The *Victorian Ports Strategic Study* lacked community involvement, which was emblematic of the Kennett Government. It was renowned for its 'firm, swift and authoritarian'[2] approach to policy making and delivery. Consequently, many community and environment groups based on Port Phillip Bay, which later organised themselves as the Blue Wedges Coalition and coordinated opposition to the Channel Deepening Project, were not given the opportunity to participate in the initial policy development process.

By the time the Channel Deepening Project was approved, Victoria was led by Premier John Brumby, a politician with the same abrasiveness, and pro-growth and 'can-do' approach to development as his former political foe who

1 From 2003 to 2005 Brad advised the Port of Melbourne Corporation on environmental law aspects of its Channel Deepening Project.

2 N Economou, 'Corporatising conservation: environmental policy under the "Kennett Revolution" in B Costar and N Economou (eds), *The Kennett Revolution: Victorian politics in the 1990s,* UNSW Press, Sydney, 1999, Ch 19.

initiated the project.[3] The approval came after a contested public process that took an unparalleled turn when the government ordered a second process be undertaken with a much more constrained scope. Project opponents raised waves of environmental concerns that became more nuanced, specific and realistic as the process evolved. The proponent, the Port of Melbourne Corporation, mollified some concerns, especially relating to direct impacts on species and inundation and erosion. Other concerns about financial losses to tourism businesses, indirect and long term harm to species from turbidity and the effects of relocating toxic sediments from the mouth of the Yarra River to an undersea disposal site seemed never to be adequately resolved. The government elected not to confront them, instead deciding to manage them with private monitoring.

This chapter not only tells this story but also examines the operation of Victoria's EIA laws and the failure of the Victorian Government to reform these laws so they meet the government's long-stated objectives of greater transparency and accountability, community involvement, consistency and the depoliticisation of the process.

The Environment Effects Act

Victoria's EIA process is framed within the brief and ineffectual *Environment Effects Act 1978* (EE Act). The process is explained and elaborated in a set of ministerial guidelines. It is within these guidelines, and not the Act or any regulations, that criteria for assessment, commitments to public processes and community deliberation, and timelines and requirements for open and accountable steps within the process are all found. Being guidelines they can be amended without parliamentary or Cabinet approval or oversight. They contain malleable language, which provides opportunities for manipulation. Because they are not enforceable, they are often not complied with. Consequently, today Victoria's laws fail to meet the most important purposes of EIA. The laws do not require thorough and transparent inquiries into proposed developments, and they do not guarantee opportunities for community members to deliberate and contribute to the process. The laws do not create a binding regime for comparing alternatives and options, weighing up environmental effects and other social and economic consequences, and avoiding or minimising any predicted adverse effects. There are no offences in the Act and there are no requirements that proponents refer projects.[4] Obligations only apply to officials faced with applications for the approval of potentially harmful works.

Significantly, and unlike some regimes elsewhere, the EIA process in Victoria is not an approval process. The aim of the process is to investigate and assess projects. The outcome of the process is a recommendation by the Minister for Planning to those decision makers required by law to approve or reject a proposal. The minister's recommendation usually addresses whether the project should

3 D Rood and P Austin, 'Labor's secret state' *The Age*, 10 November 2007.

4 See R Seddon, B Ridgway, T Budge and P Davies, *Report of the Environment Assessment Review Advisory Committee*, **Publisher?, Place?,** 2002.

proceed and on what conditions any approval should be granted. Ultimately, the decision maker must make up his or her own mind. It is possible for a decision maker to ignore a recommendation from the Minister for Planning, although to do so would almost certainly lead to administrative law review.

When it was enacted, the EE Act was intended to apply only to 'public works' – projects of State agencies having significant effects – like freeways, dams and electricity utilities. These types of projects are now ordinarily done by the private sector. Despite the amendments made to the Act since the 1990s and the rise of private commercial involvement in large scale projects, the concept of 'public works' is still entrenched in the Act. Confusingly, following the 2005 amendments in particular, there are now two avenues into the Act and two almost identical processes for assessment.

The first avenue is where the Minister for Planning calls in a project for an environment effects statement (EES) or a decision maker or a proponent[5] asks the minister whether the preparation of a statement is required. The Act allows the minister to request information to make a decision on whether an EES is required, but it is left to the ministerial guidelines to detail the types of projects that should be subject to EIA and the matters the minister should consider when deciding whether to require a proponent to prepare a statement.[6]

The second avenue is for the Minister for Planning to declare a project to be 'public works'. This avenue is a legacy of the original application of the Act to government financed and built projects, and its continued presence reflects the outmoded nature of the Victorian law. The minister may make such a declaration under the Act if satisfied that the works will have a significant effect on the environment.[7] All 'public works' under the Act require an EES.

If the minister decides that an EES is required, works must not start and approvals must not be granted until after the minister's recommendation report has been considered by any relevant decision maker.[8] The minister must make an order setting out the procedures and requirements for the assessment[9], and then the assessment begins and is largely driven by the minister's guidelines[10] and the directive of the minister's department. Usually, the EES is scoped with input from the proponent and the community and the proponent prepares the statement with the assistance of a Technical Reference Group established by the minister.[11] It has become common practice for the Technical Reference Group to advise the proponent on when the EES is ready to be published and presented to the minister. This part of the process, like most other parts, is not regulated by the Act.

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5 EE Act ss 6, 8(1), 8(3), 8(4).

6 EE Act ss 8(2), 10(1)(a).

7 EE Act s 3.

8 EE Act ss 8C, 6(2).

9 EE Act s 3(3) or s 8B(5).

10 Section 10 of the EE Act provides that guidelines may be made about content of statements, procedures and public consultation.

11 One of the more recent additions to the EE Act is s 8G, which clarifies the minister's power to acquire technical assistance for an EES.

Following submission of the statement to the minister,[12] the minister may elect to exhibit the statement, invite comment on the statement and the project, and convene a public inquiry.[13] While each step is ordinarily done, these decisions are in the minister's discretion. Further, any appointed panel is constrained by its terms of reference. The minister is under no compulsion to release the panel report or his or her own recommendation to the proponent or the public.[14]

The promise of reform of Victorian EIA laws

The EE Act has been an unexpectedly resilient law. Despite its many publicised and agreed flaws, it has barely changed in over 30 years, even as promises and attempted efforts at reform have been made. In 1985 the Cain Government undertook a review that led to no notable or lasting changes to the Act. Then in 1994, the Kennett Government amended the EE Act to allow for the joint consideration of EIA and works approval applications by inquiry panels, and to limit the public works requiring an EIA to those specified by the minister.[15] Because these amendments were introduced at a time when one of the then government's pet projects, the Grand Prix, was exempted from the EIA laws of the State[16], the legislative changes were treated with suspicion and were accompanied by claims that the government was diluting the EIA process.[17] The claim that the Liberal-National Government was in charge of an EIA regime that excluded the community, and was pro-development and generally outdated became a theme of the then opposition, culminating in Labor's promises to overhaul the system. For example, Dimitri Dollis argued in Parliament in 1995 that the EE Act:

> [G]ives ascendancy to political rather than environmental concerns. There is a need for an assessment process that considers cumulative and not just individual impacts on the environment … The act does not define the types of development proposals intended to be covered. There is no uniform methodology for the assessment of impacts, no period of mandatory monitoring of any effects of development, no process for any results of monitoring to make significant changes to a development, and no consideration of the incremental impact of small developments.[18]

When Labor came to power, it duly promised to reform Victoria's EIA laws. Early in its first term, the Bracks Government foreshadowed the empowerment of communities and councils in the EIA process and an end to 'ad hoc ministe-

12 EE Act s 4(2).

13 EE Act s 9(1), (2).

14 Section 6(3) of the EE Act merely provides that the minister will provide the assessment as soon as reasonably practicable in the circumstances.

15 R Knowles, 'Second reading speech for the Environment Effects (Amendment) Bill', Victorian Legislative Council, Hansard, 9 November 1994, p 784.

16 *Australian Grand Prix Act 1994* (Vic) s 48(1) exempts the application of the EE Act.

17 B Pullen, 'Second reading debate into the Environment Effects (Amendment) Bill', Victorian Legislative Council Hansard, 29 November 1994, p 974.

18 D Dollis, Victorian Legislative Assembly Hansard, 8 March 1995, p 398.

rial intervention that characterised the previous government'.[19] In launching the review of the EE Act in November 2000, the then Minister for Planning John Thwaites commented:

> With only minor changes made to the Environment Effects Act since it was introduced in 1978, in many respects it no longer reflects leading practice.
>
> One of the key objectives of this review is to ensure that the environment assessment process provides the opportunity for affected stakeholders to have their concerns considered in a transparent and accountable manner.[20]

The disappointment of the reform to the Environment Effects Act

Following the launch of the Environmental Assessment Review, an Issues and Options Paper was published by the Department of Infrastructure in April 2002.[21] An Advisory Committee was also set up to receive community views on the paper and to recommend a reform strategy to the government. The Advisory Committee provided its report to the Minister for Planning in December 2002.[22] The report, like so many environmental reports produced by 'independent' panels and inquiries in Victoria, was kept under wraps. Due to this, many presumed the government had recoiled from its promise of reform so as not to subject major projects, in particular the Channel Deepening Project, to further scrutiny.[23]

The government's refusal to release the report became the subject of considerable controversy in late 2004 and early 2005. The opposition publicly condemned the government:

> for its lack of commitment to a comprehensive, transparent, accountable and up-to-date environment effects statement process in that it has failed to release the final report and recommendations of the environment assessment review committee for over two years …[24]

The Age tried unsuccessfully to acquire a copy of it through freedom of information laws but then, through leaks, was able to expose certain aspects of the Advisory Committee's recommendations.[25] Under mounting political pressure, as even the Victorian Competition and Efficiency Commission called for the release of the report,[26] the government did so in June 2005.

The suppression of this report was all the more remarkable because the recommendations of the Advisory Committee were largely predictable and

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19 J Thwaites, *Transcript of the policy launch of the State Planning Agenda: A sensible balance*, 13 December 1999.

20 J Thwaites, *Greater transparency and accountability for environmental assessments*, Press Release, 1 November 2000.

21 T Power, 'Review of Victoria's environmental assessment procedures', *Find Law Australia*, 2002 at <http://au.findlaw.com/article/5200.htm> (accessed 6 May 2008).

22 Seddon et al, n 4.

23 Editorial, 'Environmentally unfriendly act', *The Age*, 8 March 2005.

24 P Honeywood, *Victorian Legislative Assembly Hansard*, 8 December 2004, p 2105.

25 R Millar and M Fyfe, 'State suppresses vital environment report', *The Age*, 7 March 2005.

26 Victorian Competition and Efficiency Commission, *Regulation and Regional Victoria Challenged and Opportunities Final Report*, June 2005.

unadventurous. The bulk of the proposed reforms reiterated the earlier Department of Infrastructure Issues and Options Paper. In most respects the proposals were to mimic parts of legislation from other jurisdictions and to revitalise what was generally regarded as an outmoded and undemocratic form of EIA.

The Advisory Committee also restated many of the accepted problems with the Act, including that it 'favour[ed] … development over the environment'. This should not have been controversial. The Act was introduced in times when the concept of ecologically sustainable development was still formative,[27] and when there was a firm belief internationally that economic development could be pursued simultaneously with conservation.[28] Further, in 1978 governments and nations were not equipped with the same breadth of legal and policy instruments as exist now to balance human development with environmental protection. The Committee's finding, however, laid bare the unsuitability of the Act for current circumstances.

2005 Amendments to the Environment Effects Act

Having taken so long to release the report, the government failed to implement its recommendations and instead proceeded with minor changes to the EE Act. One was to introduce a way for proponents to refer projects to the minister directly. However, it was already common for proponents to write to the minister and request he or she make a decision on whether an EES was required. The other notable changes were to give the minister the power to make conditional rejections and the ability to make multiple guidelines. The National Party's Peter Hall summed up the feeling of those wanting or expecting more from the reform process when he said:

> We have the outcome of five years work, and it is a very miserable outcome: an amendment bill of just 10 pages and 10 clauses that I do not think improves the EES process in any way at all.[29]

In announcing the amendments, the Minister for Planning Rob Hulls recognised the need for EIA processes to be transparent, systematic and accountable. He claimed that the 'system provides important environmental safeguards and a process for engaging with the community and interested stakeholders, who are

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27 Many academics have traced the concept of sustainable development and its predecessor concepts like 'wise use' to well before 1987 when the Brundtland Commission report of 1987 popularised the term ecological **[AQ: ecologically?]** sustainable development. See for example W Adams, *Green Development: environment and sustainability in the Third World*, Routledge, London and New York, 2nd edn, 2001 and J Dryzek, *The Politics of the Earth: Environmental discourses*, Oxford University Press, New York, 1997.

28 J McCormick, *The global environment movement: reclaiming paradise*, Belhaven Press, London, 1989. McCormick commented that a guiding principle of the 1972 Stockholm Convention on Human Development was that 'development and environment should go together'. See also J Clark, 'Economic development vs sustainable societies: reflections of the players in a crucial contest', *Annual Review of Ecology and Systematics*, Vol 26, 1995, p 225.

29 P Hall, *Victorian Legislative Council Hansard*, 22 November 2005, p 2108.

able to submit views and information which then must be considered'.[30] However none of these features were introduced into the legislation. Minister Hulls also claimed that 'new ministerial guidelines that establish the operational details of the system … will enshrine the best practice approaches currently being applied in Victoria'.[31] But nothing was enshrined by updating ministerial guidelines.

Predictably, the opposition attempted to gain political mileage out of the government's retreat, claiming that the government had failed to meet its own 'great expectations'.[32] The government responded by defending the Act, which it had previously described as no longer reflecting leading practice.[33] Labor Member of Parliament Don Nardella claimed:

> The EES process is not flawed. It is the same process under the same legislation that existed under the seven long dark years of the Kennett government … It has been in place during the six years of the Bracks Labor government. The process is open and provides people in those communities with opportunities to have their say. It also means that they have access to the documentation.[34]

Labor Member Elaine Carbines stated:

> The bill reflects the issues identified by the environment assessment review advisory committee. It seeks to modernise the act to strengthen the environmental impact assessment system in Victoria. It will make the system more workable and deliver improvements by creating greater certainty for all participants … The Bill is intended to improve the efficiency, transparency and accountability of existing procedures and to provide certainty for the proponent, the community and the agencies.[35]

In fact, the 2005 amendments weakened EIA in Victoria. The Act remains a skeleton and the process is still detailed in non-binding guidelines. Projects, like some that followed the Channel Deepening Project, can now be assessed through abbreviated, fast-tracked and partial processes. Transparency, participation, and accountability were all reduced in order for the government to speed up the process and appease political interests.

The Channel Deepening Project and EIA

The Port of Melbourne is Australia's largest and busiest container port. Indeed, the Port witnessed a doubling of its container traffic in the decade to 2007.[36] Faced with sustained increases in traffic and cargo, and wanting to promote more, the Port of Melbourne Corporation and the Victorian Government saw the depth of the shipping channels that run to the Port of Melbourne as a barrier to growth

30 R Hulls, 'Second Reading Speech for the Environment Effects (Amendment) Bill', *Victorian Legislative Assembly Hansard*, 6 October 2005, p 1355.

31 Ibid.

32 P Honeywood, *Victorian Legislative Assembly Hansard*, 27 October 2005, p 1918.

33 Thwaites, n 20.

34 D Nardella, *Victorian Legislative Assembly Hansard*, 19 October 2005, p 1492.

35 E Carbines, *Victorian Legislative Council Hansard*, 22 November 2005, p 2110.

36 Bureau of Infrastructure, Transport and Regional Economics, *Australian transport statistics*, Commonwealth of Australia, June 2008.

and economic efficiency. The Channel Deepening Project was presented as the solution to this perceived problem.

The project involved the dredging of tens of millions of cubic metres and many depths of metres of silt, sand, clay and rock from the principal shipping channels in Port Phillip Bay: from the very narrow and treacherous entrance of the large bay to the Yarra River upon which Melbourne sits. These channels have been dredged many times before. However, the volume of dredging for the Channel Deepening Project far exceeded past dredging effort. Further, the project involved the dumping of contaminated sediments dredged from the mouth of the Yarra River in an expanded pre-existing undersea disposal site in Port Phillip Bay. The project also included the creation of a second undersea disposal ground to accommodate vast quantities of the sand and rock dredged in the south of the bay, furthest from Melbourne.

The feared and perceived environmental effects of the project were manifold. They principally related to the removal of rocks at the Port Phillip Heads – the entrance to the bay and an area that abuts a marine park, the disturbance of toxic sediments in the Yarra River and the disposal of these sediments in the middle of the bay. There were predictions the project would disturb the nutrient cycle of the bay and permanently harm important seagrass communities.

Concerns about the project were not surprising given the bay's ecological and social importance. Port Phillip Bay is locally cherished and ecologically significant. It is a wide expanse of water that is relatively shallow and has a very narrow entrance to the sea. The Bay is located in a catchment of over four million people, and it contains the largest Australian port catering to the container trade. Much of the western shoreline and the Bellarine Peninsula to its west are included on the list of wetlands of international importance under the Ramsar Convention, and there are various notable seagrass, sponge and seaweed communities, reefs and sandy beaches. The eastern shoreline (including the Mornington Peninsula) is highly urbanised and depends on recreational and tourism activities, and the bay itself is used for recreational and commercial fishing.[37]

An outline of the process followed by the proponent of the Channel Deepening Project in securing approval for the project is shown in Figure 1. There are three key components: the strategic origins, the original assessment, and the trial dredging and novel supplementary assessment process that was ultimately used to support the approval of the project. The diagram also includes a snapshot of the long concurrent process that resulted in the passage of the *Environment Effects (Amendment) Act 2005*.

Figure 1: Victorian EIA laws and the Channel Deepening Project – a timeline

37 Port of Melbourne Corporation, *Channel Deepening Project Environment Effects Statement*, July 2004; R Smith, B Ridgway, D Smith and N Wimbush, *Report of the Advisory Panel into the Channel Deepening Project Environment Effects Statement*, 11 February 2005; Port of Melbourne Corporation, *Channel Deepening Project Supplementary Environment Effects Statement*, March 2007; A Hawke, K Mitchell and M Lisle-Williams, *Port Phillip Bay Channel Deepening Supplementary Environment Effects Statement Report of the Inquiry*, 1 October 2007.

The strategic assessment of the Channel Deepening Project

The Channel Deepening Project came to dominate news in Victoria, so much so that the reporting of the project became a matter of debate.[38] However, its origins barely registered in the news. The *Victorian Ports Strategic Study* was the first policy support for the Channel Deepening Project.[39] Commissioned in 1998, the study's stated objective was to inform and brief the government on the state of ports in the State and on opportunities for future expansion.[40] It was intended to build upon the reform that commenced in 1995 with the privatisation of ports facilities and the restructuring of port corporations through the enactment of the *Ports Services Act 1995*.

Despite the importance of the study to the Victorian community, it was largely carried out behind closed doors. Businesses, operators, and government agencies were consulted, though the general public was not. It surprised many outside the bureaucracy and commerce when it was released in 2000. Brian Cumming, a vocal voice for the preservation of Westernport Bay, the second of Melbourne's twin bays, was not expecting the publication, referring to its 'appearance' as 'extraordinary' in light of the historically regular forums on the development of port facilities on Westernport Bay.[41]

Because the authors of the report did not consult widely, and because they were directed to focus on infrastructure issues,[42] the environmental effects of the proposed developments were understated. The summary of the environmental and social impacts of the various options for expansion of the shipping industry did not include any marine channel deepening effects, including effects of turbidity, rock removal at Port Phillip Heads or the disturbance of contaminated sediments at the mouth of the Yarra River, all of which were contentious throughout the EIA process. The summary did note 'significant impacts' arising from dredging and other works on Westernport Bay, reflecting the contribution of environmental groups from the Westernport region and underscoring the lack of involvement of community groups based on the fringes of Port Phillip Bay, particularly those groups that later formed the Blue Wedges Coalition.

After the study had been completed, a post hoc consultation process was finally carried out. However, it did not advance knowledge or deliberation about the study, nor did it enlighten the community about the potential effects of deepening shipping channels in Port Phillip Bay. Meetings were confined to Melbourne, not in the areas around the bay where opposition eventually (and predictably) consolidated and where the effects of the implementation of strategic options for the Port of Melbourne were to be greatest. The consultation was also

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38 Statement of Support accompanying motion of *The Age* journalists before the House Committee and Independence Committee, 10 April 2008.

39 Affidavit of Stephen George Bradford made in relation to *Blue Wedges Inc v Port of Melbourne Corporation* [2005] VSC 305 (*Blue Wedges Trial Dredging* case).

40 Maunsell McIntrye, *Victorian Ports Strategic Study*, January 2000.

41 B Cuming, *Submission on the Victorian Ports Strategic Study by the Westernport and Peninsula Protection Council*, 15 September 2000.

42 Maunsell McIntrye, n 40, at A5.

criticised as being short and superficial. The fact that the government pre-empted the consultation process by implicitly supporting the strategy in the media and other materials did not help to allay community concerns.[43]

The weaknesses in this process were reflected in the consultation report that stemmed from it. None of the identified 'key themes' arising from the consultation process addressed community or environmental issues.[44] The only issue identified that resembled an environmental or community issue was a concern about 'pressures on scarce port land from encroaching urban development, and the management off neighbourhood issues'.[45] The key concerns did not include any of the many fears and effects raised in the ensuing long-winded assessment. The full consultation report[46] reveals concerns among environmental groups about dredging in the bay and at Port Phillip Heads, but also confirmed government support for the proposed deepening of shipping channels as recommended in the strategic study. Regardless, by the time the full consultation report was published, feasibility studies were underway for the Channel Deepening Project.[47] Already there was a sense of fait accompli about the project.

During the feasibility study, a consultation process was initiated. However, it was one sided. 'Consultation' was limited to briefings and forums held for local government, peak bodies, and community and environment groups.[48] The shipping industry was involved in issue identification processes but the same opportunity was not afforded to those holding environmental concerns. When the initial feasibility study recommending that the project proceed was released in December 2001, the government accepted the recommendation conditional upon the project undergoing an EIA process, and upon receipt of evidence of technical and financial matters.[49] By this time, however, no consultation on environmental matters had yet occurred on the strategy underpinning the project. The initial consultation process was largely deployed in order to establish a community consultation database so that further consultation could occur at a later date.[50]

By adopting this approach to consultation the government and the Port ensured that there was entrenched opposition to the project before the formal EIA process had even started. It also denied the community the opportunity to learn about and identify all of its concerns. As a result, throughout the EIA the proponent's science was not able to keep up with the changing concerns of the community.

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43 Cuming, n 41.

44 State of Victoria, *Victorian Ports Strategic Study – Consultation*, 2001.

45 State of Victoria, *Victorian Ports Strategic Study Consultation Summary – Port of Melbourne*, 2001.

46 State of Victoria, n 44.

47 Port of Melbourne Corporation 2004, n 37.

48 Ibid; A Coote, *Victorian Legislative Council Hansard*, 19 March 2002, p 245.

49 Coote, n 48, p 246.

50 Port of Melbourne Corporation 2004, n 37.

The lead up to the first EES

The scoping stage of the EES was completed by October 2002 when the *Assessment Guidelines for the Port Phillip Bay Channel Deepening Project Environment Effects Statement* were published. The guidelines had been subject to a period of community review. However, as is always the case with such review processes, only minor changes were made. The guidelines were long and included policies with only minor relevance to the project. In parts the guidelines were unnecessarily prescriptive, particularly in terms of assessment approach, while in other parts they were vague. The guidelines included evaluation criteria that the assessing inquiry panel later made clear it was not bound to use, and purported to require that the project comply with dredging and disposal guidelines that were not fit for purpose. Critically, the guidelines failed to specify the issues of environmental concern and social impact of most importance. Of course, at this time the government was ignorant of those impacts perceived by the community to be most important. The government set in train an assessment that was too big and too ambitious, and that turned out to be highly politicised within, and hamstrung by, the government's departments. Transparency, accountability and consistency were all lacking.

The government established a Technical Reference Group to guide the proponent through the assessment process. Its role, historically and in this project, was to advise the proponent on the assessment requirements, adequacy of studies undertaken, and when the EES was ready to be published. The Technical Reference Group comprised government agencies, including the department responsible for the administration of the EE Act (then the Department of Sustainability and Environment), the Environment Protection Authority, the Departments of Infrastructure and Primary Industries, the Commonwealth Department of Environment and Heritage as well as some personnel with particular expertise in the project.[51] As will be explained, the Group played a key role in the assessment process by signing off on the Channel Deepening EES, which was later proved to be inadequate. The group also signed off on a risk assessment and management approach that was later criticised by the inquiry panel.[52]

The first assessment process

The EES was published in July 2004 with the approval of the government's Technical Reference Group. Shortly afterwards, the Minister for Planning established a panel inquiry to investigate the environmental effects of the project. The role of the panel was to consider the EES and community comments arising from the six-week public comment period. Community groups and local councils positioned their opposition in the months before the publication of the EES. The Association of Bayside Councils engaged a former CSIRO scientist to challenge unfinished science. The diving industry and established community environment

51 Ibid.

52 Smith et al, n 37. See Victorian Competition and Efficiency Commission, n 30, where Bendigo Mining Limited relays a similar experience with a Technical Reference Group.

groups disseminated their views among supporters and the Blue Wedges Coalition was formed to act as an advocate for a collection of interested groups, principally from the Mornington Peninsula. Newport Power Station engaged lawyers and experts to present evidence on the effects of dredging on its commercial operation. In addition to objections from established groups, the release of the EES generated broad and strong community reaction. In addition to the flood of pro-forma objections encouraged by the Blue Wedges Coalition many hundreds of individual submissions were made, the overwhelming majority opposing the project.

The first time community groups, opponents and supporters alike, got their chance to have their say on the policy support for, and strategic underpinnings of, the project was at the inquiry panel hearing. This made the inquiry panel hearings last 45 sitting days over three months: much longer than expected and longer than required. The panel allowed community members to raise concerns about strategic policy instead of halting submissions that diverted into challenging the policy underpinnings of the project that were excluded from the panel's terms of reference. Although frustrating to the Port, the decision of the panel to entertain argument beyond its terms stemmed from the flaws in the *Victorian Ports Strategic Study* process where the community was not given adequate opportunity to deliberate about policy direction. It also reflected standard panel practice to be flexible and generous with time and arguments for community members required to forgo their own time, energy and cost to participate in a panel inquiry process.

With hindsight, a number of observers and participants in the first assessment process, including Victorian Greens parliamentarian, Sue Pennicuik,[53] and the Blue Wedges Coalition,[54] identified several positives with the process, but these favourable attitudes were not evident during the inquiry. The Port of Melbourne Corporation, community opponents, supporters and commercial objectors all expressed disappointment with the process. Controversy about the project, and in particular the quality of the assessment, spread. Community groups regularly sought directions to modify the process and refused to discuss the draft environmental management plan claiming that that to do so would be to concede that the project ought to proceed. Commercial objectors claimed that they had not been considered or had been ignored so elected to employ a successful spoiling strategy. Newport Power Station engaged Queen's Counsel who unravelled the Port's science and encouraged novice objectors to follow its lead by subjecting expert evidence to very high levels of critique. The proponent, meanwhile, objected to the latitude afforded to opponents to make submissions beyond the terms of reference of the inquiry panel.[55]

Despite their informal approval role the agencies that made up the Technical Reference Group made submissions to the panel highlighting procedural or substantive concerns with the project, undermining the EES and the process. Their approval of the EES was exposed as a political manoeuvre rather than a

53 S Pennicuik, *Victorian Legislative Council Hansard*, 2 May 2007, p 1063.

54 Blue Wedges Coalition, *Submission to the Channel Deepening Supplementary Environment Effects Statement*, 7 May 2007.

55 Smith et al, n 37.

rational decision. In the first few days of the panel hearing the panel members began exposing flaws with the EES and dissatisfaction with the assessment. In particular, the panel was dissatisfied with the risk assessment and demanded a 'proof of concept' of the turbidity impacts, more thorough toxicity testing, and greater evidence about disposal options for dredged material.

After the lengthy and adversarial inquiry process, the report of the panel was greatly anticipated. It was completed in February 2005 and contained a scathing assessment of the project and the EES. In addition to the stylistic, procedural and methodological flaws, the panel identified many substantive deficiencies with the project. It considered the project fell short of 'best practice' environmental standards and that it failed to satisfy fundamental environmental and decision making principles embodied in legislation, including the integration of economic, social and environmental concerns, the precautionary principle, inter-generational equity and ecological integrity. Highlighted as being of particular concern was the proposed treatment of contaminated material and turbidity risks, which the panel believed had not been adequately addressed, and science not appropriately exhibited. The panel concluded that:

> [D]ata provided in the exhibited EES, as augmented by evidence and background documentation considered by the Panel is insufficient to enable an assessment of environmental effects at this time. If the project were to proceed directly to implementation without further consideration and review, the Panel considers that the potential for significant adverse environmental effects would not have been sufficiently excluded. It therefore follows that the project should not proceed to approval or the commencement of works until the issues addressed in the Panel's detailed recommendations have been thoroughly considered.[56]

The findings of the panel came as no surprise to those who had observed the hearings. During the hearings, the panel made it clear that further work was required. However, it was not until the inquiry panel issued its report that the decisive matters upon which decisions about whether the project should proceed or be prevented were articulated.[57] It need not have happened this way. If the inquiry panel had been involved early in the process it could have heard the concerns of agencies and interested parties and the results of initial investigations by the Port, and directed the assessment. This would have avoided the problems that emerged, reduced the time required for the panel hearing and ensured the EES was a more concise and accurate document.

In its report, the panel identified a number of areas that required further investigation and assessment, including modelling of turbidity plumes, toxicity testing of Yarra River sediments, and evidence of dredging and disposal techniques. It also recommended a trial of the dredging works to provide data on possible impacts and management responses.

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56 Ibid at 359.

57 Ibid.

The first round of court cases

As predictable as the panel's criticism of the project was, even more predictable was the Victorian Government's response to the panel report. The government reaffirmed its commitment to its own project and initiated a supplementary EES process: a process never before undertaken in the State but presented as a transparent and rigorous response.[58] It would give the State a second chance to justify its determination to deliver the project. To help advance this supplementary process, the Port of Melbourne Corporation referred a trial dredging program to the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and asked the Victorian Minister for Planning whether the works required their own assessment under the EE Act. On both fronts the Port was spared the requirement to undertake an EIA, and it was also granted consent under Victoria's *Coastal Management Act 1995* to do the trial dredging.

The Blue Wedges Coalition initiated court proceedings in the Supreme Court three days before the scheduled commencement of the trial dredging seeking an injunction to restrain the works and a declaration that dredging contravened the EE Act. The basis for this claim was that the broader Channel Deepening Project was still subject to an EES and the trial dredging was a component of that dredging.[59] The key provision was s 6(2) of the EE Act, which states:

> In any case where a statement has been submitted to the Minister no works referred to therein shall be commenced or proceeded with until the assessment of the Minister with regard to the environmental effects has been considered by the relevant Minister.

Justice Mandie conceded that there was an arguable case, commenting:

> I consider that there is a serious or reasonably arguable question to be tried concerning the alleged threatened breach of s 6(2) of the EEA Act [sic] but it is not an open and shut case by any means. There is at least one reasonably arguable answer to the plaintiff's contention. That answer is that, because the Trial Dredging works are the subject of a distinct proposal with a specific and limited purpose, and because they may never be subsumed in the Channel Deepening works (as those works may never proceed), there can be no breach of s 6(2) of the EEA Act [sic] when properly construed.

The question of law did not get decided by the Supreme Court. The likely claims about the Blue Wedges' lack of standing – given that the group had incorporated just two months earlier[60] and with no broadened standing rules for environmental associations available in Victorian laws – were also not raised. Justice Mandie[61] refused to grant the injunction on the balance of convenience, concluding that the

58 R Hulls, *Channel Deepening Project subject to further investigation*, Press Release, 31 March 2005; R Hulls, *Statement of Minister into the Channel Deepening Project Environment Effects Statement*, March 2005; M Fyfe, 'Shock of the bay: channel report fails', *The Age*, 1 April 2005.

59 Statement of claim by Blue Wedges Coalition in relation to *Blue Wedges Inc v Port of Melbourne Corporation* [2005] VSC 305 (*Blue Wedges Trial Dredging* case).

60 Affidavit of Jennifer Rhonda Warfe in relation to *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 165 FCR 211 (*Blue Wedges Federal Court case No 1*).

61 *Blue Wedges Trial Dredging case* [2005] VSC 305.

financial losses to the Port would be severe while 'there was no evidence that any irremediable harm would be caused by the Trial Dredging works'.[62] Critically, the Blue Wedges was unable and unwilling to provide an undertaking as to damages, and this fact overwhelmed its public interest arguments. According to Justice Mandie, the 'exceptional circumstances'[63] that would warrant a party being excused from giving an undertaking were not present. To establish those exceptional circumstances the Blue Wedges needed to show a threat of a 'manifest breach of the law' or 'a proven danger of irremediable harm or serious damage'.[64]

The court's refusal to grant an injunction made the case fruitless. By the time the court would have been ready to hear the case the trial dredging would have been finished. Unlike in most other land use disputes the Blue Wedges had no access to the Victorian Civil and Administrative Tribunal, where a claim could have been heard earlier in a less intimidating and less costly environment. The Blue Wedges withdrew its application, leaving the scope of s 6(2) of the EE Act unclear.

At the same time, three individual opponents of the project initiated another case before the Supreme Court. Their claim was based on an unrecognisable cause of action. They argued that the Channel Deepening Project could not proceed[65] because it was contrary to a people's mandate: a super petition signed by over 40,000 people[66] and any approval of the project by the State would, among other things, be 'an act of treachery against the people under section 76 ss (iii)[67] of the Commonwealth Constitution Act of Australia 1900'.[68] Justice Mandie swiftly dismissed the case and awarded costs against the applicants amounting to $17,000.

This costs award silenced the group of three agitators. The Blue Wedges Coalition, however, was spared a costs order. The Port and the State did not pursue costs against the Coalition at this time. Both were still treating the project and its opponents with sensitivity. The project, after all, had not yet been approved.

The supplementary assessment process

The government limited the scope of the supplementary EES process to the key matters the first inquiry panel identified as being of most importance, notionally to prevent replicating the first process and to focus attention on key matters.

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62 Ibid at [10].

63 Ibid at [11].

64 Ibid.

65 Statement of Claim and affidavit of Susan Beveridge in the matter of *Douglas v Victoria* (unreported, VSC, Mandie J, 8 August 2005).

66 The threat of a 'people's mandate' overturning a Victorian Government decision was earlier raised as a means of opposition to the proposed Nowingi waste disposal site. See 'People's mandate could halt dump plan', *Sunraysia Daily*, 6 December 2004.

67 Section 76(iii) of the Constitution gives the Commonwealth Parliament the power to make laws conferring original jurisdiction on the High Court 'of Admiralty and maritime jurisdiction'.

68 Affidavit of Susan Beveridge in the matter of *Douglas v Victoria* (unreported, VSC, Mandie J, 8 August 2005) at [3].

Initially this seemed compelling, however, as publication of the supplementary EES neared it became clear the process was not an adjunct to the first with limited foci but was a second holistic inquiry and assessment that would fast track an approval. The assessment occurred without the oversight of any of the original panel members or any person with expertise on the matters of contention.[69] Meanwhile, individual government agencies originally cautious about endorsing the project did not make submissions to the inquiry. The position of the bureaucracy was represented by the Department of Treasury of Finance, which provided a whole of government submission that emphasised the strategic support for the project, its need and the economic case for the project.[70]

Under the terms of reference for the inquiry panel the minister limited the scope to four, albeit broad matters, specifically relating to the design of the project, the likely environmental effects of the project, implementation, and considerations for approvals. The minister also prohibited cross-examination and limited the inquiry panel hearing time to four weeks. The prohibition on cross-examination was not well received by the inquiry panel, which cautioned the minister in its report from adopting a similar practice in future assessments.[71] Equally, the inquiry panel had 'some sympathy with the view that there was insufficient time to review the … material'.[72] Defending elements of the terms of reference, including a shorter period of review for the supplementary EES than the EES, Minister Madden, Minister for Planning, stated: 'I am very mindful of getting the balance right and giving people every opportunity to advocate for their positions … We believe we have the balance right … I believe this process will do justice to the project'.[73] A reading of the panel report, however, does not support this view.

The inquiry panel trod a careful line. It did not accord objectors the usual generosity and flexibility in its strict adherence to its terms of reference. The panel hearing process was alien to the community and the legal fraternity.[74] Community members no longer had the freedom to make their cases as they had in the first inquiry panel hearing and as is typical in EIA processes in Victoria. The panel's final report was tightly constrained. Adverse comments about the project or the process were excluded from the short main report, rather included in the long appendix. The panel neither recommended nor rejected the project. Instead, it presented an evaluation of the effects of the project, confirmed the safety and practicability of the design, suggested some changes to design, and recommended more rigorous management protocols and monitoring. It was only an assessment in name. The panel offered the mild conclusion that: 'The Inquiry supports the … case that the Port Phillip Bay Channel Deepening Project … can be delivered

69 R Millar and C Lucas, 'Madden dredges up new experts', *The Age*, 5 April 2007; R Millar, 'Channel dredging expert queries review panel', *The Age*, 16 April 2007.

70 Hawke et al, n 37, Appendix, pp 12, 23, 31, 32, 35, 192.

71 Ibid.

72 Ibid, Appendix, p 40.

73 J Madden, *Victorian Legislative Council Hansard*, 2 May 2007, p 1063.

74 R Millar, 'Outrage at dredging probe ban', *The Age,* 23 April 2007.

with low to medium risk, and moderate impact'.[75] Armed with this report, the Victorian Government prepared its assessment report recommending the project proceed: an outcome that had long seemed inevitable. The Victorian Minister for the Environment granted the necessary consent in accordance with his broad discretion under the *Coastal Management Act 1995* (Vic) in December 2007.

The Commonwealth decision and the second round of court cases

Because of all the politicking that surrounded the Channel Deepening Project in Victoria, it is easy to forget the Commonwealth Government's involvement in the process. The project was declared a controlled action under the EPBC Act by virtue of its likely significant impact on migratory species, threatened species and communities, Ramsar wetlands, and the environment of Commonwealth land on Swan Island. The Victorian EES process was then accredited for the purposes of the federal regime.

The environmental issues that triggered the federal approval requirement proved to be of only minor relevance. Both the EES and supplementary EES dealt with EPBC Act matters only briefly, indicating that the assessment of these matters were not broad or systematic concerns. Just seven pages of the supplementary EES inquiry panel report were dedicated to Commonwealth matters. The process highlighted a substantial limitation of the EPBC Act, namely its inability to thoroughly evaluate and regulate the environmental impacts of projects of national importance. It also exemplified the ineffectiveness of, and the lack of influence the Commonwealth has in, the accredited process.

In the end, given the relative unimportance of impacts on matters of national environmental significance in the assessment process, the Port probably did not need to refer the project to the Commonwealth at all. It took the low risk and probably low cost option and still ended up defending two Federal Court challenges at the end of the assessment process in early 2008 brought by the Blue Wedges Coalition.

The first case preceded the approval of the project by the Commonwealth minister – which was granted in early 2008 – and was based on an argument that the project could not be approved by the Commonwealth Minister for the Environment, Heritage and the Arts because the project in its final form no longer resembled the project referred to the Commonwealth minister in 2002. The Blue Wedges, in its submissions to the Federal Court compiled a long list of evidence and examples of changes between the referred project and the project presented for approval. These changes related to the depth, location, and scale of the project. They missed, however, a crucial report by Maunsell that described the project in more general terms than the succinct referral document.

The 2006 amendments to the EPBC Act that were characterised as a package of changes to streamline the operation of the Act, and which were not supported by environmental groups, appeared relevant to the case. The amendments included a process for a proponent of a controlled action to seek changes to their referral.

75 Hawke et al, n 41, Appendix, p 7.

The Explanatory Memorandum to the Bill said that of the proposed s 156A of the EPBC Act:

> This amendment allows a person who has referred an action to the Minister for assessment and approval to request the Minister to accept a variation to the action ... The purpose of this amendment is to provide greater flexibility for dealing with changes during the assessment process by providing a formal process for the variation of proposed actions.

While this avenue to seek a variation of a referral was available to the Port, it did not use it, and was not compelled to do so. Justice Heerey summarised his findings as follows:

> I accept that there are differences in the Project the subject of the Approval Decision as compared with the Project in the Referral (including the Maunsell report). For the reasons already mentioned, in a project of this magnitude it would be surprising if there were not. Whether those differences can be characterised as 'significant' or 'substantial' or by some other adjective suggesting importance is not to the point. The 'action' was described in the Referral in these terms:
>
> To deepen the shipping channels at Port Phillip Heads, in Port Phillip Bay and the Yarra River and its approaching channels.[76]

The Port and the Commonwealth succeeded because Justice Heerey concluded that an action should be construed widely and the proposal remained as referred.

Notwithstanding the Blue Wedges' legal failure in this first Federal Court challenge, its efforts produced an outcome that, in the light of the overall dampened state of public interest litigation in Australia, was somewhat unexpected. In rejecting an application for an award of costs against the Blue Wedges Coalition, Justice Heerey revived the flagging *Oshlack*[77] principle, finding that the case was one of 'high public concern' that raised 'novel' legal questions about the EPBC Act.[78] He therefore concluded that costs should not be awarded against a public interest litigant.[79]

Having been shielded from a costs order, the Blue Wedges Coalition initiated further litigation to stop the project. It lodged another Federal Court challenge, this time seeking judicial review of the approval of the project by the federal environment minister. Justice North dismissed an ambitious legal challenge seemingly based on a reconceptualisation of the legal principles of relevant considerations and ecological **[AQ: ecologically?]** sustainable development.[80] The Blue Wedges argued that the minister had not adequately considered the effects on the matters of national environmental significance that comprised the controlling provisions for the project. As identified above, however, these matters were not controversial in either the first or second EES processes. It would have been extraordinary if the

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76 *Blue Wedges Federal Court case No 1* (2008) 165 FCR 211 at [59].

77 *Oshlack v Richmond River Council* (1998) 193 CLR 72.

78 C McGrath, 'Flying foxes, dams and whales: Using federal environmental laws in the public interest', *Environmental and Planning Law Journal*, Vol 25, 2008, p 324.

79 Ibid. See also R Baird, 'Public interest litigation and the Environment Protection and Biodiversity Conservation Act', *Environmental and Planning Law Journal*, Vol 25, 2008, p 410.

80 *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463.

Federal Court concluded that impacts on these aspects were inadequately considered when they were barely recognised as needing consideration throughout the EIA. The Blue Wedges also argued that the minister acted unreasonably in not seeking opinions from ministers for climate change and tourism, and that he had not considered ecological sustainable development from a social perspective. The causes of action were not, however, supported by a tightly drafted statement of reasons for the minister's decision and were dismissed with minimal legal analysis and an award of costs against the Blue Wedges, which was vigorously pursued by the Port of Melbourne Corporation and the State of Victoria in unison.[81] It was at this point of the process the cosiness of the State and the Port, a statutory authority, became apparent for all to see.

A more appropriate forum for a review of decisions to approve the project would have been in a Victorian court. However, the only opportunity available to the opponents would have been to challenge a decision made with virtually unfettered discretion under the *Coastal Management Act 1995* in the Supreme Court of Victoria, a forum too costly and inaccessible for community groups accustomed to the less formal and inexpensive Victorian and Civil and Administrative Tribunal. In the end the Blue Wedges Coalition was channelled into the jurisdiction of the Federal Court, with little hope of success, because they had no other forum where the decisions that they saw as unfair could be independently reviewed. The consequence was that the Federal Court did not deliver them a victory, rather disenchantment with the law and a costs order that would silence them[82] just as the government began a media campaign to raise awareness about the project within the community – 10 years after the community was denied the opportunity to have its say about the strategic basis of the project.

Conclusion

The Channel Deepening Project exposed the weaknesses in Victoria's EIA laws. In the absence of an adequate legislative structure, the process was mismanaged and manipulated for political purposes. The result was a disjointed and unsatisfactory assessment that cost millions and left many with concerns about the project and its potential impacts on the environment and human health.

At least partly because of the perceived failings of the first EES process for the Channel Deepening Project, the Victorian Government has sought to constrain EIA processes for subsequent projects, particularly the North-South pipeline and the Wonthaggi desalination plant. For the pipeline a type of project assessment was invented and conducted that bore no resemblance to an EIA. In the desalination project, trial works were exempt from assessment and the policy support and need for the plant were specifically excluded from the EES process. The steps the government has taken in these and other projects have limited community involvement and undermined the role of independent adjudicators. Ironically,

81 Ibid.

82 J Turnbull, 'Melbourne dredging opponents lose case', *The Age*, 28 March 2008; P Gregory, 'Big legal bill may sink bay dredging opponents', *The Age*, 15 July 2008.

these aspects of the EIA process did not derail the Channel Deepening Project assessment. They helped to underscore the failings of parts of the assessment, highlighted faults with aspects of the project, and ultimately led to a more rigorous assessment.

Reform is overdue. No longer should the process be one where proponents and objectors offer themselves to a political game where only the politicians can and do win; and more than occasionally a proponent succeeds, battle-scarred. Changes need to be made to ensure the EIA process meets the commonly agreed objectives of rigour, transparency, fairness and participation.

The introduction of the EPBC Act has not raised the standard of EIA in Victoria. On the contrary, the Commonwealth's role has been used as a credential for the Victorian Government's assessment approach, thereby further stalling reform.[83] Moreover, the EPBC Act has offered misplaced hope to community opponents who do not appreciate its limits. This has resulted in litigation that has drained community resources for little public benefit.

83 A Morton and J Dowling, 'Environment impact tests "worst in country"', *The Age,* 30 May 2008; J Lindell, *Victorian Legislative Assembly Hansard*, 8 December 2004, p 2113.

Attachment 5

Victorian environmental assessment laws and the Channel Deepening Project

Posted on 26 May 2008 by Brad
Available at: http://bradjessup.wordpress.com/2008/05/26/victorian-environmental-assessment-laws-and-the-channel-deepening-project/

Here is the paper I presented at the State of Environmental Assessment Conference, Canberra, 23 May 2008. A book with a much longer chapter of my research into the Channel Deepening Project and Victoria's environmental assessment laws will follow in a few months. For the purpose of the blog I have removed all references. References will be included in the final paper and can be provided on request.

Introduction: a call for reform
Victoria's environmental assessment process, which is notionally found in the statute books within the Environment Effects Act 1978, but in reality is found on the Minister for Planning's desk, where it is always available for amendment and manipulation, is in need of reform. Reform is needed so that environmental assessment in Victoria meets its globally understood purposes of transparent, accountable, rigorous, and deliberative assessment of projects.

The most effective way to meet these purposes is to abandon the Environment Effects Act 1978 and incorporate a rigorous assessment within the Planning and Environment Act 1987. This change should be accompanied by greater use and empowerment of Planning Panels and an ongoing commitment to review State strategic policy with consideration for the environment and society.

In making my case for reform, I will report on the flaws of the Channel Deepening Project assessment. I will identify problems with the current process not fixed by the 2005 minor amendments to the Environment Effects Act 1978 and suggest improvements with the interaction between Victorian and Commonwealth assessment.

Channel Deepening Project
The Channel Deepening Project is underway in Port Phillip, the Yarra River, and Port Phillip Heads in Victoria. The proponent of the project, the Port of Melbourne Corporation, is dredging the channels for the existing main shipping route from Bass Strait to the Port of Melbourne, which sits on the Yarra River.

The dredging is not a new occurrence. The channels have been dredged many times before. In this instance, however, the volume of dredging far exceeds past dredging effort. The motive behind the project is to deepen shipping channels to an adequate depth to accommodate the larger ships that are predicted to arrive in the port in the coming years. The fear in not doing the project is that Melbourne's competitiveness as a trading port, especially for the container trade, will be hampered. The perceived and actual environmental effects of the project are manifold. They principally relate to the removal of rocks at the Heads, an area that abuts a marine park, the disturbance of

toxic sediments in the Yarra River and the disposal of these sediments in the middle of the bay.

The project was referred under the Victorian Environment Effects Act 1978 and the Commonwealth Environment Protection and Biodiversity Conservation Act 1999. The upshot of those referrals was that the project was required to be subject to an Environment Effects Statement, which was accredited for the purpose of the Commonwealth investigation.

Victoria's environmental assessment process

The environmental assessment process in Victoria, and the minor contribution the Environment Effects Act 1978 makes to that process, is typical of environmental assessments.

Less typically, however, it fundamentally depends on the implementation of the guidelines that support the Act. It is within the supporting guidelines that criteria for assessment, commitments to public processes and community deliberation, and timelines and requirements for open and accountable steps within the process are all found. 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.

Contrasted with other regimes, there are no offences in the Victorian Act, and there are no requirements on proponents to refer projects.

Promises of environmental assessment reform

My call for reform of the Environment Effects Act 1978 is not the first. In fact a reform agenda existed just years ago.

The Labor Party, originally in opposition and then in government, promised to revitalise Victoria's environmental assessment process, which they claimed 'no longer reflected leading practice'. The promised changes were not revolutionary. Commitments to greater transparency and accountability, community involvement, consistency and the depoliticisation of the process were understood by interested parties.

The recommendations of the appointed Advisory Committee into the Environmental Assessment Review were largely predictable and unadventurous despite being withheld for two-and-a-half years. In most respects the proposals were to mimic parts of legislation from other jurisdictions and to update what was generally regarded as an outmoded and undemocratic form of environmental assessment. The Advisory Committee's proposal was for a three-tiered assessment approach within the Environment Effects Act 1978 along with new guarantees of transparency, deliberation, and accountability.

However, the Government ignored the recommendations despite them being heavily influenced by its own Department's suggestions. The Act barely changed with the passage of the 2005 Amendment Act. The changes of note were the opportunity for proponents to refer projects was clarified and the Minister received the power to issue conditional 'assessment not required' advices. Despite the timidity of the changes, the

Government unconvincingly claimed to have responded to the mood for change and that it had 'enshrined' improvements to the process merely by updating the Ministerial guidelines that support the Act.

Real reform

Perhaps it was because of the perceived failings of the first Environment Effects Statement process for the Channel Deepening Project that the Victorian Government ignored recommendations for reforms to the State's environmental assessment laws. If that was the case then the State was misguided to think that to continue with the current regime and use it in a much narrower fashion, as it has sought to do for the proposed North-South Pipeline, and will likely repeat for the proposed Wonthaggi desalination plant, will improve the timeliness of assessments and enhance society. Rather, transparency, participation, and accountability have all been weakened by the Government's current approach. The Channel Deepening Project could have been assessed in a much fairer and much quicker way in a reformed environmental assessment process. As it was, the Environment Effects Statement took longer than the State expected, the panel inquiry went for three arduous months, the project was highly criticised as being not supported by the assessment materials, and during the panel inquiry failings with the assessment work and management approach were revealed. The Government did not get the tick of approval it wanted from the process.

Unfortunately, the current tight leash approach to environmental assessment characterises the Channel Deepening Project process as a failure, rather than acknowledging that the project was not ready to undergo the process in the first place, and that the process succeeded in demonstrating this.

Key matters and panel control

Two improvements of the Government's current efforts to fast track assessments is the focus on identifying key environmental matters and giving greater control to inquiry panels to manage the process. This has been taken too far in the North-South pipeline, but was useful in the Supplementary Environment Effects Statement process for the Channel Deepening Project. These aspects, which will undoubtedly expedite the process, should be considered in a reformed Environment Effects Statement process that also entrenches community rights to participate and government obligations to be open.

These two changes do respond to one of the key flaws of the first process, which was the scoping of the Environment Effects Statement. Critically, the guidelines for the project failed to identify the issues of environmental concern and social impact of most importance. Instead they set in train an assessment that was too big and too ambitious. It was not until the inquiry panel for the Environment Effects Statement issued its critical report on the project and the assessment process to that date that the decisive matters upon which decisions about whether the project should proceed or be prevented were articulated. Unfortunately, the Government has produced guidelines for the Wonthaggi desalination plant scoping that are too long, at times ambiguous, and in other parts complex.

If, as I propose in a reformed assessment regime for Victoria, the inquiry panel had been involved early in the first Channel Deepening Project process, rather than being appointed just one-and-a-half months before the commencement of the public inquiry,

then it could have heard the concerns of agencies and interested parties and the results of initial investigations by the Port, and directed the assessment appropriately. The inquiry panel could have indicated its requirements for a 'proof of concept' of the turbidity impacts, more thorough toxicity testing, and greater evidence about disposal options for dredged material. These requirements were apparent to the panel in the first few days of the hearing. The Environment Effects Statement would not have been published so under prepared and so open for attack. The weight of documents produced would have been less and better directed and opponents would not have needed to read through volumes of reports that proved to be indeterminate.

I also question the sensibility of the Technical Reference Group signing off on the Environment Effects Statement then challenging the process and substance of the Environment Effects Statement in the panel hearing, as it did in the Channel Deepening Project. This role of approving the publication of the report should be allocated to the panel in a reformed environmental assessment approach for Victoria.

Model for reform

As I have already mentioned, at the State level, in order to meet the objectives of environmental assessment processes and to fulfil the Government's unmet promises of legislative renewal, I propose that the environmental assessment process be included in the framework of the Planning and Environment Act 1987. This was one of the non-favoured options in the 2002 review of environmental assessment laws. The option was not favoured principally because it was seen as lowering the importance and rigour of assessments, that a matter of such importance as environmental assessment deserved a standalone piece of legislation with its own objectives, and because it would fail to account for strategic policy direction beyond the planning sphere.

None of these perceived faults necessarily stack up to analysis, especially if any project of potential significant environmental impact is addressed in a prominent part of every planning scheme and the policy documents guiding development and environmental conservation in the State are included in the framework.

If every project nominated as potentially having significant environmental effects requires a planning scheme amendment a detailed assessment would be necessary by technical and independent experts in an open and accountable forum, and strategic policy would be critical to any decision made to certify a planning scheme amendment.

The example of the Nowingi waste disposal project should encourage the inclusion of environmental assessments into planning regulations. In that case, the inquiry panel concluded that the environmental effects of project were acceptable. The project was rejected only because the inquiry panel concluded that the required planning scheme amendment was inconsistent with State planning objectives. Far from the planning scheme failing to engage with strategic policy, it facilitated it and would do similarly in environmental assessments.

There would be many benefits of incorporating the environment effects statement process into the Planning and Environment Act 1987. In particular, transparent and predictable processes, fixed timelines, and guaranteed community participation all

specified in the planning scheme or the Act, and greater scrutiny of decisions, including by both houses of Parliament. There would be a common policy framework in the State Planning Policy and a transparent process for the making of policy. Opponents would not need to venture to the Supreme Court as the Blue Wedges were forced to do, and potentially face difficulties establishing standing. Access would be available to the Victorian Civil and Administrative Tribunal for people who make a submission to an assessment panel.

Problems with the Channel Deepening assessment

In contrast to the suggested reform approach, in the Channel Deepening Project the first panel was poorly directed and was unable to halt a process that was inquiring into an assessment that it believed was flawed. The terms of reference for the supplementary inquiry panel prohibited cross-examination and limited the inquiry panel hearing time to four weeks. The prohibition on cross-examination was not well received by the inquiry panel, which cautioned the Minister in its report from adopting a similar practice in future assessments. Equally, the inquiry panel had 'some sympathy with the view that there was insufficient time to review the … material'. There is hope that the process will be improved if it is left to the discretion and control of such independent minds.

This reform approach depends on a faith in the planning system, and respect for the competency of the Victorian Civil and Administrative Tribunal and the independence of Planning Panels Victoria. It attempts to fix some of the problems in the Channel Deepening Project process while maintaining key features of deliberation, independence, clarity, and fairness.

Strategic assessment and early consultation

A reformed process could include strategic environmental assessment. A standing Advisory Committee could be formed to review strategic policy, and with a capacity to include strategy in the planning system as reference documents. Strategic environmental assessment would have prevented the making of poorly planned policies that led to the failed proposal to locate a waste disposal site in Nowingi, and would ensure that policies like the Victorian Ports Strategic Study and Our Water Our Future incorporate community views and are subject to rigorous analysis. Without such involvement and analysis the Our Water Our Future policy has been criticised by the Auditor General as being rushed and prepared with inadequate consultation.

A lack of consultation and inclusion in the development of the policy that underpinned the Channel Deepening Project led to fiercely held opposition to the Channel Deepening Project, including by the Blue Wedges Coalition and initially by Newport Power Station. This lack of consultation was, in my view, the main reason why the assessment and the project has been delayed and surrounded in controversy.

It was only after the environmental assessment works for the Channel Deepening Project were initiated that a consultation strategy for the project was put in place. By the time opponents were consulted their opposition to the Project was entrenched and the proponent was in a difficult position of trying to respond to community concerns that changed and built as people learnt more about the project and as potential weaknesses with the project were uncovered. This evolution of opposition can be seen throughout the environmental assessment process. The proponent's science was not

able to keep up with the changing concerns of the community. A focus on sea level changes and hydrodynamics diverted attention from turbidity concerns for businesses that extract water from areas close to the proposed works. A focus on a fix to those problems disguised the problems with the toxicity testing that would be spectacularly uncovered during the inquiry panel hearing into the Environment Effects Statement.

The EPBC Act dimension

The Commonwealth's interest in this project proved to be a sideline matter until after the project was assessed and close to approval, when the absence of any accessible avenue for legal challenge to State environment assessment decisions led the Blue Wedges to take ambitious causes of action to the Federal Court.

The project was declared a controlled action by virtue of its likely significant impact on migratory species, threatened species and communities, Ramsar wetlands, and the environment of Commonwealth land on Swan Island. All of these aspects of the environment proved to raise only minor environmental issues in the greater scheme of the assessment. The project underscored the ineffectiveness of the accreditation process and the need to empower the Commonwealth to undertake rigorous and holistic environmental assessments of projects of national importance. It was folly that the Commonwealth was concerning itself with effects on bird species capable of avoiding impacts, marine species rarely seen in areas of predicted effects, the consequences of any inundation of Ramsar areas that would be miniscule compared to predicted sea level changes resulting from climate change, and the environment of a naval base that was on the periphery of the predicted scale of the effects.

The project is one of national importance. Through the project the Port aims to maintain its international competitiveness and increase exports and overall international trade effort. Yet the only aspects of national interest investigated by the Commonwealth were the social and economic effects, not the environmental ones. There is cause to pause and inquire into whether some of the features of the now defunct Environment Protection (Impact of Proposals) Act 1974 should be revived and activities of an international nature or national infrastructure projects be included as triggers for whole of environment assessments under the Environment Protection and Biodiversity Conservation Act 1999.

The Environment Protection and Biodiversity Conservation Act 1999 has not proved influential in Victoria aside from its use by the former Minister for the Environment, Ian Campbell, to temporarily reject the Bald Hills wind farm. Frustratingly, however, the accreditation of Environment Effects Statement processes by the Commonwealth has been used as a credential for the Victorian Government's assessment approach. This may be the greatest obstacle to real reform of environmental assessment laws in Victoria.

Extraordinarily, the Commonwealth recently accredited a process for the proposed North-South pipeline that is not recognised in Victoria's laws and that excludes from its terms and references an investigation any economic and social impacts. How the Commonwealth Department for Environment, Heritage and the Arts proposes to satisfy its legal obligation in the Environment Protection and Biodiversity Conservation Act 1999 to consider not only environmental but also social and economic impacts when deciding whether to approve the pipeline remains unclear.

Conclusion

What is clear, however, is that reform of environmental assessment laws in Victoria is overdue. We, as participants in the process, cannot be satisfied with the tinkering of the process in 2005 that was trumpeted as reform and we should not be complicit in a further weakening of the process as is occurring now.