ENVIRONMENT AND NATURAL RESOURCES COMMITTEE

Subcommittee

Inquiry into environment effects statement process

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Witness

Associate Professor G. Middle, head, department of urban and regional planning, Curtin University.
The CHAIR — I welcome Associate Professor Garry Middle, head of the department of urban and regional planning at Curtin University. Thank you for joining us today. Just as a formality, all evidence taken at this hearing is protected by parliamentary privilege as provided by the Victorian Constitution Act 1975 and is further subject to the provisions of the Victorian Parliamentary Committees Act 2003. Any comments you make outside the hearing may not be afforded such privilege. You are aware that today’s proceedings today are being recorded. As a witness you will receive a copy of the transcript of the discussion today in the next couple of weeks. We thank you for joining us and hope you are happy to take some questions later on. Over to you.

Assoc. Prof. MIDDLE — I was asked to address some issues, and being an academic I decided I had better use some bullet points to help me through as well. The first question related to the strengths and weaknesses of EIA. In my view, one strength is the independence of the assessment process, and that includes the EPA. The assessment has no political influence and the EPA is an independent statutory authority and again has no influence from outside sources, I guess you could say.

The next point is the so-called primacy of the act. The act has primacy where environmental issues are significant. It does not kick in unless it meets the significance test. I think that is a valuable thing to have. By primacy I mean that the environment takes precedence over social and economic concerns. It gives it that, and the EPA uses that part of the act judiciously, I think. It is in the environment portfolio. I notice that in other jurisdictions it is either with mines or planning or any number of things. I think there is a question there about conflict of interest. In this way the EPA overcomes any perception of conflict of interest by not being the proponent but the assessor.

The next one is public input. That is a very important part of the EIA process if managed carefully. It is free and open public input, and it is one of the strengths because I think everybody learns from public input through the idea of not just technical learning but also social learning. As you probably know, environment is deeply entrenched in the social. Questions of values come into that. I think it is important that all players — that is, the EPA and the proponent — learn from the public.

In terms of the appeals process, I should declare an interest here in that I was the appeals convenor before Anthony. I am of a view that the appeals process has strengths.

The next point is the EIA policies. Over probably the last 10 years, I would suspect, the EPA has deliberately developed a set of policies which enable proponents to understand the EPA’s thinking and which provide a greater degree of certainty than would otherwise be the case. In other words, they know the environmental rules before they start the process, and if they want to take them on, that is up to them. They know the kinds of things they have to comply with, so I think that is a very strong part of a process.

The EIA has an interesting thing here in that it actually drives broader policy making and decision making within government. Because it is front-end stuff and deals with issues which have often never been dealt with before, it actually drives policy making. It identifies issues that have to be dealt with. The Kimberley hub is a classic example of that, and I am happy to give other examples if you wish.

The last point there is what I call section 16, which is one of those general bits of the act. It says effectively that the EPA can provide advice to the minister on any matter it sees as important. That provides a lot of flexibility for the EPA and also for the minister. The minister can call on the EPA to provide advice on a whole range of matters, whether it be something as broad as prescribed burning or something as specific as, for example, aquaculture impact and those sorts of things, so the minister can ask the EPA to give specific advice. It is a very useful part of the act to have.

In terms of weaknesses — and I pick these points up elsewhere as well — strategic environmental assessment is not as well developed in WA as in other jurisdictions, particularly in places like Europe and North America, but I think we are improving on that one.

When you have policies you have to be flexible, and sometimes the EPA is not as flexible with policies as it could be, but that may well be an operational thing rather than necessarily a matter which involves the act.

I think there is a problem with the relationship with land use planning. I am a land use planner as much as an environmental planner. I work across both portfolios, and I have experienced firsthand the tensions that exist.
between the land use planning system and the environmental impact assessment system. I will get to that point later.

In terms of follow-up — by which I mean making sure that proponents do as they are supposed to do with the conditions — it has been a problem. I think that is improving, and the example most people use is the export of lead through Esperance and the issues that occurred there. There probably was not as much follow-up on that as there should have been, but I think we are getting better at that, so there is a stronger need for that.

The last point is offsets. I know you have offsets in your legislation involving the clearing of vegetation. We do in ours as well, but the EIA process does not have a formal process for offsets. I think it is a useful tool, but there is a problem with using it through the EIA process.

The next question related to the relationship between planning systems and the EIA process in WA, and I have mentioned that already. It is tense. As with all conflict, it can be positive, but it is tense. In terms of planners, my department turns out 60 planning students a year, and we try to get them to be balanced but they think that planning does everything and they often have trouble taking advice from environmental people. I think it is often a professional thing, and land use planning believes that it does sustainability-type work, which includes environmental work, and they believe they are in a position to weigh up and do the trade-offs and there is that tension between the environmental people and us, but I am sure you are used to that sort of thing as well.

My view is that it does need work. The process to deal with assessment of planning schemes is problematic. It is section 48A of the Environmental Protection Act, and the planning and development industry is not very happy with it. I do not think it is necessarily based on hard data — it is a perception. My view is that it should focus a lot more on strategic environmental assessment. I think, to its credit, the EPA has said it wants to do more SEA and it just needs to work harder. It is the old thing that if you have a limited workload, if you are going to do more strategic environmental assessments, then you have to do fewer project EIAs. So which ones do you drop off the bottom to do more strategic work? It is a real problem for the EPA, and the whole idea about the bar they set for what will and will not be formally assessed is always an issue, because if you start to say, ‘I want to do more strategic work’, you raise the bar higher for project EIA, so that is a bit of an issue for them.

The other issue is that, generally speaking, the community is not very trusting of the planning process. It is much happier with EIA and therefore uses the EIA process to overcome some of the shortcomings of the planning system, so we get lots of referrals out of section 38 of the act through that.

I am happy to take questions as we go along; otherwise I will keep going.

Mrs FYFFE — Perhaps I will just stop you there. What do you mean you have to raise the bar higher with the strategic planning?

Assoc. Prof. MIDDLE — What I mean is that, as with any government agency, the EPA is no different. You have a limited capacity to do work. You cannot just keep taking on more and more officers doing more and more work. They are very good at doing project EIA, which means if they have to now move into strategic environmental assessment, that means they have to do fewer project EIAs, which means you have to make a decision that some of the ones which are of lesser environmental impact which you are doing now you do not do. That is what I mean by lifting the bar. And that has implications for the public because they have a view of what should be assessed and what should not be assessed.

The CHAIR — And in terms of shortcomings in planning, do you have some examples?

Assoc. Prof. MIDDLE — Do you mean in planning or do you mean the relationship between environment and planning.

The CHAIR — You are saying the community uses EIA to address shortcomings in planning.

Assoc. Prof. MIDDLE — Sure. A couple of things: there are no third-party appeals in planning in WA whereas there are in the environmental impact assessment. There are only first-party appeals. That is one of the things. I guess the best example is urban bushland. Planning says that it can look out for urban bushland, which often means that most of it will be cleared; therefore they do not like the outcome for planning so they refer a proposal to subdivide bushland into urban areas to the EPA. They generally get the same outcome anyway but
at least they feel they have a better appeal process to go through, whereas with the planning process they do not feel they have.

Mrs FYFFE — So only those who are directly affected can appeal against a project under planning?

Assoc. Prof. MIDDLE — Under planning, that is correct, yes. There is some consideration of third-party appeals here, but nobody wants to talk about it.

The CHAIR — So how does EIA impact on or with the planning system over here?

Assoc. Prof. MIDDLE — I suppose you have to say it is mixed. Whenever the EPA decides to assess a scheme or a subdivision there is obvious tension about that, particularly if it is late in the time frame, like a subdivision. As you know, the zoning has at that stage already been decided; you then get down to a subdivision and say, ‘Hang on a minute, we are assessing a subdivision where zoning is already in place?’ . There is that kind of tension which is about, ‘Why haven’t you picked this up earlier?’ . That is often where tensions are.

Mrs FYFFE — So they are not an automatic referral body though, are they, for every subdivision? It is only if someone asks them? Or have I got that wrong?

Assoc. Prof. MIDDLE — No. It is actually quite complicated because in 1996 there was a change to the act. Prior to 1996 there was effectively a legal view that schemes were not a proposal under the act, so they were not subject to EIA. Subdivisions were, development was, but schemes, amendments and plans were not. There was a High Court case which determined it, and I will not go into that, but the long and short of it was that no schemes could be referred to the EPA.

In 1996 that changed, and the amendments effectively said that schemes can be assessed by the EPA and in fact all schemes and amendments have to be referred to the EPA. So small schemes have to be. The EPA has to make a decision to assess or not assess, but it means therefore with all subsequent proposals, whether they be subdivisions or development, they can be considered to be derived proposals and can be exempt from assessment because of that initial referral. That is why it is complicated.

Mrs FYFFE — Yes. If you want it to go under the radar, you hope that nobody else says anything and it gets through.

Assoc. Prof. MIDDLE — Exactly, yes. So all the scheme amendments that were prior to 1996 were never referred to the EPA. They have gone through a zoning, which means the EPA can pick up the subdivision if it wants. There have only been a few cases of that, but they do cause tension.

The CHAIR — Just to continue on with the interacting in the planning process, is there much duplication in effort and documentation with the two systems?

Assoc. Prof. MIDDLE — When a planning scheme goes through an assessment process, an EIA, the systems run parallel. If it is a scheme amendment for part of a place to go from whatever it is to residential, what will happen is that, in terms of the scheme documentation that goes out for review, there is an EIS produced at the same time, so it goes out for review at the same time. So they should run parallel rather than separate. That is the planning of the whole thing and therefore the submissions then come into the planning agency and they send off the environmental ones to the EPA but they keep the planning ones and then the EPA does its assessment and they cannot finalise the scheme amendment until the EPA has finished its assessment.

The CHAIR — What about normal planning applications apart from planning scheme amendments? Just a planning permit for a new power station or whatever?

Assoc. Prof. MIDDLE — That would go through project EIA, which is a separate process. So the planning system is then on hold, and the EPA act says effectively — and this is where the primacy comes in — that local government cannot make a decision to approve that project until the Environment Protection Authority has finished an assessment. So that is different.

The CHAIR — Once the minister makes a decision on the assessment as recommended or whatever or as varied by the EPA, does the planning process then require work of equivalent documentation that might have been done by a proponent, for example, for the EIA process?
Assoc. Prof. MIDDLE — Generally speaking, no. The planning will just deal with the planning issues: the socioeconomic impacts. There obviously will be some duplication — you have got to explain the background to the project — but generally speaking they are different. There is also another important difference. If it goes through that kind of project EIA, the minister herself in this case sets the conditions. She must consult with her fellow ministers, but she makes the decision. Whereas in the planning process, if it goes through a scheme amendment process, then the two ministers, which is planning and environment, must agree on the conditions. There are actually two processes. In the case of a straight EIA, just the Minister for the Environment through negotiation sets the conditions; through a scheme amendment, the two ministers must agree.

Mrs FYFFE — In Victoria the planning minister is the one who decides whether there has got to be an EES or not.

Assoc. Prof. MIDDLE — Whereas here it is the EPA.

Mrs FYFFE — Yes.

Assoc. Prof. MIDDLE — The EPA only makes two decisions, that is all it ever makes: to assess or not assess, and if so, to set the level of assessment. Everything else it does is advisory only, but it is a very influential agency nonetheless.

Mr MURPHY — You mentioned that the SEA system is not being well developed. In order to get a well-developed and comprehensive SEA system, what sort of mind shift do you think is required by proponents, by the community and by government to make the SEA process a bit better developed?

Assoc. Prof. MIDDLE — That is cutting across everything there. I will take the agencies first. First of all, the EPA is getting better at this, but it needs to think strategically. Project EIA is easy: you can think about management, you can think about conditions, and that is really straightforward. We are good at doing that. But when you start thinking strategically, you cannot talk about management plans or how high stacks should be. It is not as straightforward as that. You have to think about process, and you have to think about what we call fatal flaws. What are the things which are the no-goes, the things that are not going to go? So you think fatal flaws. Then we also think about what are the key issues and what are the rules that planning should apply. It is a different way of thinking for the EPA. They are getting better at doing it, but that is a bit of a change. Then for planners, they need to start thinking much earlier on and take on responsibility for environmental issues rather than leaving it to the EPA to do later on. It requires them to think higher up about environmental issues and start doing that sort of planning.

The community is a real problem, and this is so classic.

The CHAIR — Can we quote you on that?

Mr MURPHY — In terms of the mines.

Assoc. Prof. MIDDLE — They are. It is difficult for them, because if you go through a layered process, you do a strategic plan, you do a regional plan, you do a scheme, you then do a subdivision. Hang on a minute! Now I can actually see that it is affecting my property. They then understand that. But to get them to understand that regional planning is very difficult. They then understand that. But to get them to understand that regional planning is very difficult. They just say, ‘I don’t know. I didn’t know. You didn’t tell me’. We did, but they just did not get it. It is a very difficult thing for the public to get used to, and taking submissions to get them to think strategically is quite difficult as well. That is kind of difficult.

The last thing I want to say about proponents is that because in the land-use planning system a strategic plan deals with hundreds, maybe thousands, of different proponents, they have to wait to hear about the outcome, and that is where the conditions are different. In a project EIA you set conditions on a proponent, whereas in a strategic assessment you set it on a planning agency to do that. Whether it be fishing management, whether it be land-use planning, you set conditions on the agency as to how they implement their plan, and they will then control the proponents. That is a long answer, but I think it is the right thing.

Mrs FYFFE — But isn’t a lot of it that with the general public we have got to get them to understand the cumulative impact of all the decisions that are made?
The CHAIR — I was going to ask Garry to continue with his submission, because he is getting to go on to cumulative impacts, and maybe you can do a follow-up.

Mrs FYFFE — Okay.

Assoc. Prof. MIDDLE — I will address that when I get to it, because I think it is a good point. We often miss that one, which is the next issue about cumulative impact in WA. Project EIA is not good at doing cumulative impacts. It is difficult. You have got one project, and at some stage you will say the next project is unacceptable because of the cumulative impacts. How fair is that? Two good examples are declaring an agricultural area. The good farmers have kept their vegetation, and now they cannot clear because it is below the threshold. We had one example in the north-east corridor where we had a number of gas-fired power stations. The EPA assessed one about two years ago and said, ‘That will be the last one. You can have no more gas-fired power stations in the north-east corridor because of the levels of nox and ozone’. That is how we deal with cumulative. We do not share the load. The next cab off the rank gets hit.

But anyway, cumulative impacts is really not an EIA thing, it is actually something we should be doing outside that. Governments or agencies need to start collecting data on cumulative impacts and start thinking more strategically. We have a clear issue here up in the north-west because we have a lack of data on a whole pile of things. The more proposals we assess, the more data we find out; and then we start thinking about cumulative impacts on top of that. It is a problem, but I think we are getting better at it.

I think SEA can address it better, because you can nominate an agency to look at it and assess it, but it does raise the question as to who is responsible. I think we have a problem with who is going to be responsible for looking after the Kimberley hub; we do not know yet. Those issues of responsibility come up in cumulative impact assessment, and you are right that the community itself does not always understand that; it is more focused on its local impacts

Mrs FYFFE — Themselves.

Assoc. Prof. MIDDLE — Yes. It is quite tricky to do that.

We have covered appeal rights and third parties to some extent, and my view is that it works well because it is a good check and balance on the EPA. The public will raise issues if the EPA gets it wrong or they have missed points, so I think it works well that way. I think the independent appeals convener also works well — but I would say that, wouldn’t I?

I think the question for you guys is always: what sort of appeals do you want? Are they merits-based appeals, are they points of law, and do you want ministerial discretion? The answer to that question, therefore, determines what you go with. Our appeal process here is not a matter of law, it is a question of merits, and to some extent you do not want courts caught up in those sorts of considerations, because they are a matter of judgement. That is where experts come in, and they can give you that kind of thing.

Our appeals are not quite appeals; they are not capital ‘A’ appeals, they are small ‘a’ appeals. The most significant appeals we have are against the EPA’s report. That is not an appeal, because an appeal is about a decision. That, generally speaking, is what an appeal is. The EPA has not made a decision, it has done an assessment, so in effect people are questioning the merits of the EPA assessment; therefore, by itself, that is a separate process. My view is that it should not be done by law courts. It is a question of technical merit and therefore should be judged on its technical merits rather than its legal merits. I will leave that with you as one to think about.

On the proposed reforms to the EIA framework appeal rights, my view is that you could argue that decisions the EPA makes could go to a place like the SAT, the State Appeals Tribunal, but the most important appeal of all, which is on the EPA report, I do not think belongs with SAT. I think that stays with the technical process; that is just my view.

Finally, there is the role of strategic environmental assessment. As I said, it is not well developed but I think it is an improvement. There is an issue that in this state it is by agreement rather than being compulsory. As you know, in Europe there is a directive from the European Union which says that all plans, programs and policies must go through a strategic environment assessment. We do not have that here. In effect, the Western Australian
Planning Commission has to agree to refer something to the EPA. That is a problem. I like section 16 because I think it gives the EPA a lot more flexibility and there is no ministerial process at the end. It is a strategic assessment, in effect, but there is less political involvement in that process. The EPA can be braver, I suspect, than it would normally be if it knows there are going to be conditions set. I think the section 16 process is very good.

I have got there how we deal with fatal flaw thinking and what needs to be addressed and managed, which I have already covered. I know that has been very quick and muddled, so I will leave it there. I have some graphs if you want to talk about time lines, because that always comes up. I am happy to leave that.

The CHAIR — As you have presented them to us, could you explain to us what they mean?

Assoc. Prof. MIDDLE — Yes. The reason why I have given those graphs is that often an EIA gets criticised for timeliness — it takes too long. Everyone says, ‘Oh, God. We’ve got an EIA; it’s going to kill me’. If you look at these raw figures here, they do not look the best. What I have done there is I have grouped a whole pile of EIAs from about 2000 to about 2009 and looked at the time it has taken to complete them. You can see a spread of figures there. There are the so-called quick EIAs, which are a separate form of EIA, and then there are the full EIAs. You can see the average times there: 410 days, over a year, for a quick EIA, and over two to two and a half years, on average, for a full EIA. That looks frightening; it scares a lot of people sometimes. But the data is not quite as bad as that, because if you flick over the page — and I think this is the kicker data, that actually shows you —

Mrs FYFFE — Do you want yours back again?

Assoc. Prof. MIDDLE — No, it is okay. It shows you the break-up of what actually takes the amount of time. You can see that the thing that takes most time is the time it takes the proponent to produce the EIS. So in effect it is the scoping and completing of all of that project work. That is not surprising, because sometimes some projects are quite complicated. In effect then it is the proponent doing its work. Then you look at the green section, which is the proponent responding to submissions — that is quite long as well. In effect then the proponent takes up a fair bit of the time in the EIA, as they have some responsibility there — not completely, but sometimes the paperwork is quite long.

I just wanted to show you that because I do not think it is actually a problem. If you are doing an EIA, it is best to get it right, and that scoping part of the process — producing the data — is critical. If you get it right the first time, it means everything else flows nicely afterwards. If you get it wrong, if you do it too quickly, then problems occur later on — you do not have enough data, everyone appeals, all that kind of stuff. So I just wanted to show you that because I know time lines often come up as an issue. I know I have gone over time, sorry.

The CHAIR — That is all right. It has been good. Can you just tell us a little bit more about the concept of SEAs and what might be getting assessed as an SEA here in WA at the moment to give us some perspective?

Assoc. Prof. MIDDLE — Sure. I guess that typically there are two kinds of things that get assessed. There are land-use plans; I think we have done a lot of those and we have done them pretty well. We are also starting to see agencies like the Water Corporation. I will give you one example. They have got a proposal to provide water from a place in Rockingham, which is south of the river, to some new housing developments which are about 25 kilometres away. They are concerned about where the pipeline might actually go and which roads to take, that sort of thing. Some of the road reserves contain bushland, some contain wetlands.

What they did is they put a number of options up to the EPA and said, ‘Give us your advice on which options are environmentally acceptable.’ I think that works very well, because it is early planning. They are told which ones are fatal flaw options and which ones they can go ahead with. They choose from the ones they want to go ahead with. If they want to choose a fatal flaw one, they take the EPA on, which means through the political process. But that is their choice. At least they know. I think they are the two best examples I can give you.

The CHAIR — Are there any further questions from anyone?

Mrs FYFFE — No, I am fine. It was good.
The CHAIR — That sounds very good, yes. Thank you very much, Garry.

Assoc. Prof. MIDDLE — It is a pleasure.

The CHAIR — It is much appreciated.

Witness withdrew.