

Submission

in response to

Strategic Impact Assessment Report

For Environment Protection and Biodiversity Conservation Act 1999

prepared by

Environment Defenders Office (Victoria) Ltd

17 July 2009

About the Environment Defenders Office (Victoria) Ltd

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

For further information on this submission, please contact:

Samitha Rao, Law Reform and Policy Officer, Environment Defenders Office

or

Rupert Watters, Solicitor, Environment Defenders Office

T: 03 8341 3100

E: samitha.rao@edo.org.au or rupe.watters@edo.org.au

Submitted to:

Growth Areas Authority

www.vic.gov.au/planningmelbourne

17 July 2009

1. INTRODUCTION

1.1 Overview

We support the notion of Strategic Impact Assessment (SIA) in principle and agree that properly undertaken such assessment has significant advantages over ad hoc referral and assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). However this assessment is not a model for strategic impact assessment. It will facilitate the rapid and extensive loss of matters of national environmental significance within the proposed new Urban Growth Boundary in return for gains in the form of new reserves. While the concept of substantial reserves is a laudable one, the reserves proposed here are highly uncertain in term of the legal and financial assurance that they will be delivered. As offsets, it is unclear whether the gains promised satisfy the Victorian policy contained in the Native Vegetation Management Framework (NVMF). Even if they do, the proposal fails to acknowledge that many of the gains recognised under the Framework are in reality short term management gains or “paper gains” based on changes in legal status rather than real biodiversity outcomes.

The prescriptions proposed for vegetation within the new urban growth boundary are weak and fail to recognise the perilous state that lead to the various communities and species being listed in the first place.

In our view, there is no credible basis for the Commonwealth Minister to approve the current SIA or endorse the proposed Program to revise Melbourne’s Urban Growth Boundary (the Program). The problems identified are fundamental and to a large degree reflect that the SIA has in reality been hastily developed as a large scale impact assessment of an already announced plan, policy or program. There is little that is strategic about it in terms of early and fundamental consideration of alternatives or a serious attempt to understand and avoid individual and cumulative impacts.

Along with others we have attempted to respond to these issue within the constraints of the unreasonably short time frame available and to make the case as to why the SIA is so fundamentally flawed that it cannot be endorsed and actions or classes of actions under it approved. Anticipating, however, that the Commonwealth will be ultimately unlikely to require anything other than some limited improvements to some of the prescriptions and other matters, we have also adopted a pragmatic position of suggesting changes that would at least have the effect of making the widespread loss of biodiversity proposed a little less worse than the SIA presently proposes.

Our submission includes some commentary on the broad principles that we consider should inform strategic impact assessment. As the first Strategic Impact Assessment to proceed to conclusion under the EPBC Act, this ought to be a model for those that follow. It is not. It should be kept in mind that the matters “protected” by the EPBC Act reflect Australia’s commitment to internationally agreed priorities including the protection of biodiversity and ecologically sustainable development. It is impossible to see how biodiversity loss on such a large scale as foreshadowed in the SIA could be said to be consistent with these obligations.

1.2 Strategic Impact Assessment

Strategic assessment enables early consideration of the potential environmental impacts of actions under a plan, policy or program, including cumulative impacts, that are often difficult to identify at the project level; and better consideration of alternatives. However, given that endorsement and approval of actions or classes of actions under the proposed Program removes the need for individual project assessment for those actions or classes of action, it is imperative that the strategic assessment process is undertaken with the highest level of rigour and transparency.

This is particularly important as the strategic assessment of the Program to revise Melbourne's Urban Growth Boundary is the first of its kind to be completed under the *Environment Protection and Biodiversity Conservation Act 1999* and therefore is likely to set a precedent for strategic assessments in the future.

The EDO is concerned that, as described in the Strategic Impact Assessment Report (the Report), the current process is not a Strategic Impact Assessment properly so-called.

Strategic impact assessment should not simply be a "bulk" impact assessment but should seek to deliver some real advantages in terms of quality of information gathering, comprehensive consideration of cumulative impacts and early consideration of these impacts. A properly executed SIA would have focused on the selection of appropriate policies to achieve particular objectives. In the present case, an SIA would have considered the impact of the NVMF and Precinct Structure Planning process (PSP) and whether other policies could more effectively attain the twin goals of development and conservation. As Brown and Thérivel note:

SEA methodology should emphasise the role of SEA as a PPP formulation tool. It is at the stage of PPP formulation, rather than of appraisal of an already formulated PPP (for instance, green paper stage, review, public consultation) that SEA can be most effective. PPPs go through a complex process of evolution during their development, and SEA has a significant role to play in this [process]...

SEA should start early in PPP formulation and be integrated, preferably as an active intervention in the PPP design process. The added value of the SEA is likely to be severely diminished if conducted too late in the formulation stage. As Hedoo and Bina (1999) note in their description of the SEA of an irrigation plan in Spain, "... the scope of the proposed options [initiated by the SEA] was limited by the advanced stage of the plans' [the PPP] formulation ...". Curran et al (1998) note, "... ideally, the [S]EA should be commenced at the beginning of formulation of the development plan and continued as an interactive and influential process throughout the evolution of strategy and policies of the plan".¹ [SEA, Strategic Environmental Assessment, is a synonym for SIA. PPP is a policy plan or program]

A 'good practice' SIA should consider alternative options. Thomas, citing the International Study on the Effectiveness of Environmental Assessment, notes that an SIA should:

- use a scoping process to identify key issues and alternatives, clarify objectives and to develop terms of reference for the SEA;
- elaborate and compare alternatives, including no action options to clarify implications and trade-offs;
- undertake an impact analysis or policy appraisal to examine effects (issues), evaluate alternatives, and identify mitigation and follow up measures²

Rather, the Report is essentially a 'spatial level' environmental impact assessment dealing with a number of similar, but distinct, planning projects involving the application of pre-existing government policies (notably, the NVMF and the PSP). Instead of evaluating what policies could

¹ A L Brown and Riki Thérivel, 'Principles to guide the development of strategic environmental assessment methodology' (2000) 18 (3) *Impact Assessment and Project Appraisal* 183, p187.

² Ian Thomas, *Environmental Impact Assessment in Australia: Theory and Practice* (3rd ed., 2001), 68. See also Barry Sadler, *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance* (1996), Chapter 6.

best deliver the objectives sought to be obtained in the UGB expansion, the current Report simply accepts the existing government policies as a given.

1.3 Consultation

Before commenting on the substantive content of the Strategic Impact Assessment Report, we would like to express our concern that the timeframe allowed for consideration of the Report is wholly inadequate to ensuring a well-considered, thoughtful analysis of the Report and thus provides little opportunity to meaningfully contribute to its improvement.

The Proposed Program to revise Melbourne's Urban Growth Boundary is a significant policy initiative. The proposed Program will have significant impacts on some key locations of national environmental significance and for all Melbournians. As such, the proposed Program must be subject to close scrutiny and involve all stakeholders. We therefore deplore the haste with which the Program is being dealt with, in particular, the lack of open consultation prior to the announcement of the Program in December 2008, the absence of public consultation regarding the scoping (Terms of Reference) of the Strategic Impact Assessment Report; and the absence of an adequate opportunity to prepare a comprehensive submission on the findings in the Report.

2. GENERAL COMMENTS ON THE REPORT

The Report does not in any way represent 'best practice' strategic impact assessment. Given the size and scope of the project, combined with its value as a precedent for future SIAs, the Report forms an inadequate basis for approval of the Program contained in it. The rest of this section comments, in general terms, on a number of ways in which the Report does not represent best practice.

As noted previously, the purported SIA under consideration more closely resembles a large scale EIA. As such, it is useful to critique it in those terms. We have evaluated the Report against a number of criteria:³

- Areas affected – was sufficient information on the affected areas provided

In our submission, the information provided by the Report was not adequate. In particular, there was insufficient information on the impact of the Program on development within the current UGB.

- Baseline conditions – were the baseline surveys sufficient

There remain significant gaps in the data about prevalence of particular species in the areas affected by the Program. Although the Report includes commitments to undertake further study, these commitments are inadequate because they appear unlikely to occur prior to the conclusion of the assessment and approval process and certainly not prior to the conclusion of the public comment period.

- Consultation – were the ranges of consultation sufficient

³ The criteria for evaluating the EIA discussed below are inspired by David Hickie and Max Wade, 'Development of Guidelines for Improving the Effectiveness of Environmental Assessment' (1998) 18(3) *Environmental Impact Assessment Review* 267.

In our submission, they were not. There was no serious consultation about the expansion of the UGB prior to its announcement and it has subsequently been presented as inevitable. This is highlighted by the decision to provide only 28 days, the minimum required by the Terms of Reference, for comment on a 242 page report, which is supported by a large body of technical report. This timeframe makes it extremely difficult to obtain expert analysis and provide fully informed comment.

- Impacts – were the full range of impacts sufficiently identified

The Report failed to give adequate consideration to the cumulative impacts of the Program and to the potential impact of the proposed offsetting regime itself.

In terms of the first, the Report appears to take the view that the total impact of clearing under the Program can be assessed by simply adding together the total amount of land cleared. The EDO is sceptical of this approach and believes that it fails to adequately address the potential cumulative impacts of removing a wide variety of habitat sites in diverse locations.

In addition, it is not clear what the effective impact of focusing most offsets, both floral and faunal, into a single area in the West will be. Both these concerns are matters that should properly have been addressed by the Report, even if only to explain why the impacts are insignificant or irrelevant. As such, the failure to address these matters represents a departure from best practice.

- Alternatives – were all alternatives considered and adequately assessed

The lack of consideration of alternatives is one of the major failings of the Report. It simply does not present any alternative to Program as currently conceived.

The EIS must take a 'hard look' at the environmental consequences of the proposal and what it entails – a hard look includes applying acceptable standards of reasonableness and good faith, considering alternatives as reasonable possibilities, and alerting decision-makers to inherent problems with the proposal.⁴

In particular, the Report fails to consider the option of 'doing nothing' or any other form of alternative or reference case. Even if doing nothing is not a realistic option, as the proponent would undoubtedly argue in this case, its inclusion is necessary to any realistic assessment of the environmental impact of a proposal. Without any consideration of alternatives there is no basis for concluding, as the SIA does, that vegetation removal has been adequately avoided, or that all reasonable steps for threatened species protection have been pursued.

The absence of any (public) consideration given to alternatives reduces the capacity of decision-makers to make fully informed decisions, as they are not necessarily well placed to identify potential alternatives, and undermines public faith in the EIA process by presenting whatever is proposed as inevitable.

- Emphasis – was the information presented in an unbiased manner

⁴ Ian Thomas, *Environmental Impact Assessment in Australia: Theory and Practice* (3rd ed., 2001), 199, Figure 7.4. See also Murray Raff, 'Ten Principles of Quality in Environmental Impact Assessment' (1997) 14 (3) *Environmental and Planning Law Journal* 207, 216 – 217.

Whilst it may be anticipated that a proponent would favour their own proposal to a degree, the Report is not as forthcoming about deficiencies in the Program as it could. For example, at page 197, the Report states

Victoria has a well established and robust offsetting approach that ensures offset 'gains' are commensurate with the type and scale of 'losses' (ie clearing). Offsets are rigorously defined and take account of the extent, quality and conservation significance of the loss site using the habitat hectare metric and multipliers for higher conservation significance where relevant.

The Report does not, however, refer to *Native Vegetation Net Gain Accounting: First Approximation Report*, published by the Department of Sustainability and Environment in April 2008.⁵ That report indicates that there has been *net loss* of some 4,000 habitat hectares per year in the period covered by the report.⁶ In respect of grassy native vegetation, on which the Program is expected to have a major impact, the rate of clearing is 'approximately 3,200 hectares per year.'⁷ The failure of the Victorian Native Vegetation Framework to produce a 'Net Gain' in native vegetation is obviously extremely significant in the context of the Program which relies on the Framework to offset losses of several thousand hectares of native vegetation.

The failure of the Native Vegetation Framework to operate as effectively as anticipated is also significant, because if the Native Vegetation Framework is not functioning effectively, then it is legitimate to question whether the Precinct Structure Planning process will also be less effective than anticipated in protecting biodiversity.

The failure of the Report to act fairly and mention evidence that undermines it raises suspicions about what other information has not been included. As such, the EDO submits that the Report must be treated sceptically.

For all the reasons discussed above, the EDO submits that the Report and the process which produced it have not been best practice and do not form a proper basis for the endorsement of the Program contained in the Report. Further discussion of particular problems with the Report is outlined in the remaining sections of this submission.

3. COMPLIANCE WITH THE TERMS OF REFERENCE

3.1 Selection of Options – Clause 2 of the Terms of Reference

As discussed above, clear identification and comparison of alternative policy and planning options has been identified as a critical element in undertaking a Strategic Impact Assessment.⁸ The

⁵ Department of Sustainability and Environment, *Native Vegetation Net Gain Accounting: First Approximation Report* (2008).

⁶ *Ibid.*, ii. 4,000 HHa / yr is based on netting the +5,900 HHa / yr figure for public land with the -9,900 HHa/yr figure for public land. It should be noted that the First Approximation Report states there is a margin of error of up to ±20% associated with those figures

⁷ *Ibid.*

⁸ For example, an early and widely quoted definition of Strategic Impact Assessment by Therivel et al 1992 is "the formalised, systematic and comprehensive process of evaluating the environmental impacts of a policy, plan or programme and its alternatives, including the preparation of a written report on the findings of that evaluation, and using the findings in publicly accountable decision-making". A later definition by Partidário (1999) is "SEA is a systematic, on-going process for evaluating, at the earliest appropriate stage of publicly accountable decision-making, the environmental quality, and consequences, of alternative visions and

International Study of the Effectiveness of Environmental Assessment identifies elaboration and comparison of alternatives, including “no action” options as one of a series of steps that represent good practice for strategic environmental assessment.⁹

Clause 2.1 of the Terms of Reference provides that the Report must describe the planning and design process that has led to the Program, with particular reference to the treatment of environmental and cultural heritage through assessment and selection of options that maximise environmental, social and economic outcomes.¹⁰

The Strategic Impact Assessment Report, however, does not document the decision-making process that has led to the proposed Program. The Report includes no information suggesting that alternative policy approaches and options to the Program were contemplated and accordingly does not identify reasons for eliminating alternatives from further consideration or describe the basis on which the proposed Program optimises environmental, social and economic outcomes above other options.

This is presumably because the strategic impact assessment process has been undertaken within the context of an already announced plan by the Victorian Government to expand Melbourne’s urban growth boundary rather than within the context of a vision with alternative solutions. As discussed above, this is wholly inconsistent with the fundamental notion of strategic impact assessment and is highly undesirable. Given the permanency of the actions being proposed, an analysis of alternatives ought to have been conducted at the appropriate stage of decision-making.

Nevertheless, it is important that the Strategic Impact Assessment Report explicitly documents the planning and design process that has led to selection of the proposed Program, particularly its capacity to promote ecologically sustainable development, as required by clause 2.1 of the Terms of Reference. It is essential that the Report ensures the trade-offs involving environmental impacts are explicit in promoting transparent decision-making.

3.2 Management Measures – Clause 3 of the Terms of Reference

Ensuring that the environmental impacts of a proposed policy, plan or program are appropriately addressed is a fundamental step in a strategic impact assessment process. It is particularly important that delivery of proposed management, mitigation and offsets measures are assured.

Clause 3 of the Terms of Reference requires the Report to comprehensively set out details of the management measures that will be implemented prior, during and post implementation of the Program to prevent, minimise, rehabilitate and offset the potential environmental impacts caused by actions that are the subject of the Program¹¹. It also requires the report to identify uncertainties associated with the implementation of the proposed management measures and to set out responses to ensure an acceptable level of certainty and active management of those risks.

¹²

development intentions incorporated in policy, planning or programme initiatives, ensuring full integration of relevant biophysical, economic, social and political considerations”.

⁹ Ian Thomas, *Environmental Impact Assessment in Australia: Theory and Practice* (4th ed., 2005), 53

¹⁰ Strategic Impact Assessment Report, clause 2.1 of Terms of Reference

¹¹ Agreement between the Commonwealth of Australia and the State of Victoria relating to the assessment of impacts of the Program to revise Melbourne’s Urban Growth Boundary, 16 June 2009, Attachment B (Term of Reference 3.2)

¹² Agreement between the Commonwealth of Australia and the State of Victoria relating to the assessment of impacts of the Program to revise Melbourne’s Urban Growth Boundary, 16 June 2009, Attachment B (Clause 3.3 of the Terms of Reference)

The Strategic Impact Assessment Report lacks significant detail relating to maintenance, operational, compliance and enforcement requirements associated with a number of key management measures proposed, resulting in a high level of uncertainty relating to their implementation.

In particular, we have significant concerns relating to the implementation of the proposed new grassland reserves. While proposals for the creation of new grassland reserves are welcome, the draft report lacks critical details as to timing, legal security and funding of these reserves and therefore increases the risk that this management measure will not be fully implemented.

The report proposes that large grassland reserves will be formally established outside the Urban Growth Boundary at the same time as the gazettal of the new Urban Growth Boundary.¹³ However the EDO was informed at a briefing by the Department of Sustainability and Environment that it is intended that the reserves be established over a 10 year period. In our view, the preferable approach would be an insistence that the grassland reserves be established prior to an impacting action being undertaken to guarantee the delivery of measure. Any delay between the occurrence of the impact and the delivery of the proposed grassland reserves raises a significant risk that the management measure will not be fully delivered. In fact, the Department of Sustainability and Environment's own modeling supports the creation of grassland offset reserves as early as possible in the process, with the greatest benefits occurring when offset reserves are set in place at "time zero".¹⁴ To the extent that the proposed new reserves are made available for offsetting, this approach is also consistent with the Commonwealth Government's Draft Policy Statement on the use of environmental offsets under the EPBC Act, which states: "it is important that an offset package be well formulated at the time of approval and preferably implemented prior to the commencement of the development. This is likely to maximise the chances of the offset package succeeding."

As the report notes, the vast majority of land within the proposed grassland reserves is currently in private ownership. These areas will need to be permanently protected and managed in order to create the eventual grassland reserves proposed. The report however lacks critical details regarding the legal mechanism that will be used for the creation of the reserves. Although the report foreshadows that the reserves will eventually become National Parks or other conservation reserves¹⁵, how this will be achieved (how the land will be transferred to public ownership and what maintenance or stewardship arrangements will be in place in the interim) is unclear.¹⁶

The report suggests that one possible mechanism that could be considered to achieve this would be to apply a Public Acquisition Overlay to the areas of land set aside to form the reserves under the *Planning and Environment Act 1987*.¹⁷ However a Public Acquisition Overlay is a planning tool and does not change the status of the land (the land remains freehold, with restricted development rights). The thinking seems to be that the acquisition will be managed in a process similar to the reservation and acquisition of land for a freeway or other public infrastructure. While there is some foundation for this analogy, there are important differences. A significant difference is that whereas reservation of land for a future freeway merely requires restrictions that prevent incompatible development proceeding in the period between designation and actual acquisition, in the case of the proposed future grassland reserves, some mechanism needs to be utilised to mandate or at least strongly encourage the maintenance of the biodiversity values until the time of acquisition.

¹³ Strategic Impact Assessment Report, p197.

¹⁴ Strategic Impact Assessment Report, p 204-241.

¹⁵ Strategic Impact Assessment Report, p124-126.

¹⁶ The creation of a National Park and the addition of land to it would require a return of the land to public ownership as well as a legislative amendment to the National Parks Act.

¹⁷ Strategic Impact Assessment Report, p200.

The draft Report is also unclear as to how the purchase and creation and management of the new grassland reserves will be funded.

Furthermore, the Strategic Impact Assessment Report also indicates that part of the grassland reserves will be made available as offsets for grasslands cleared within the Urban Growth Boundary. Again, there is little information in the report about how this process is to work in practice.

Similarly, in another example, regarding protection of Grassy Eucalypt Woodlands, the draft Report proposes to secure long-term protection of retained areas of this community on private land by donation to the Crown or by private land management agreements, however, the report does not present a clear or firm timeline for implementing the measure, as required by the Terms of Reference. Rather, it makes the vague promise to secure the Woodlands “progressively”.¹⁸

The lack of detail in the Report is a matter of significant concern. Comprehensive information as to timelines, accountabilities, maintenance, compliance, enforcement and operational requirements are critical to ensuring a high level of certainty that real long-term environmental gains will actually be delivered through the proposed measures. It is therefore paramount that the Report clearly and comprehensively addresses the deficiencies in detail identified above.

3.2.1 Prescriptions

The Report attempts to put in place prescriptive measures (referred to as prescriptions) to guide the management of the impacts of the Program on several key nationally threatened species within and near the existing and proposed Melbourne UGB through the Precinct Structure Planning process.

The proposed prescriptions, however, over-emphasise offsetting, rather than seeking to avoid and minimise impacts prior to considering offsets for residual harm, as required by the mitigation hierarchy under Victoria’s Native Vegetation Management Framework. In fact, the mitigation strategy for a number of key threatened species explicitly proposes that “offsets will be the primary mitigation measure”. These include the mitigation strategies for key threatened species such as the Golden Sun Moth, the Matted Flax Lily and Spiny Rice Flower¹⁹. Without any consideration of alternatives to the Program there is no basis for concluding, as the Report does, that vegetation clearance has been adequately avoided, or that all reasonable steps for threatened species protection have been pursued. The proposed prescriptions are shamefully weak and fail to recognise the perilous state that led to the various communities and species being listed in the first place.

Grasslands

The prescriptions proposed for Natural Temperate Grassland within the existing and proposed UGB facilitate extensive clearing rather than seek to retain areas of high conservation value.²⁰ While the prescription proposes that retention of grassland will be determined on a case-by-case basis, the prescription proposes retention only if “it is part of a contiguous area of native vegetation under the same type of management typically of at least 150ha” despite evidence that sites smaller than 150ha have been found to be viable and maintain biodiversity.

¹⁸ Strategic Impact Assessment Report, p132.

¹⁹ Strategic Impact Assessment Report, see p149 for Golden Sun Moth, p162 for Matted Flax Lily and p170 for Spiny Rice Flower. The report also asserts this in relation to the Program more generally. See p3: “offsetting is the primary way to mitigate impacts.”

²⁰ Strategic Impact Assessment Report, p126.

For example, Williams notes:

“...current government conservation planning policy is to create a reserve system with an emphasis on long-term viability, thus there (is) a concentration on larger sites away from urban areas...This policy assumes that urban grassland reserves are not viable in the long term, despite evidence that with appropriate resources and management they are able to persist and maintain the majority of their biological value.”²¹

Recent developments in the field of conservation planning and reserve design have also emphasised “the need to conserve areas based on their ‘irreplaceability’ (the contribution that a site will make to the reserve network) and vulnerability (the likelihood of an area being destroyed or degraded).”²² Because of the very small amount of native grassland remaining in Melbourne, Williams stresses that “it is likely that all sites supporting native grassland in the region are irreplaceable and of great conservation value for any reserve system.”²³

The retention of Natural Temperate Grassland should not be based on minimum size, but rather should be assessed on the basis of:

- species richness;
- intactness/condition;
- landscape context and connectivity (whether it is part of a habitat corridor);
- extent of occurrence of key species e.g. nationally and State significant species;
- irreplaceability;
- role in ecological function/process; and
- reserve design and management opportunities.²⁴

It is also important to note that the values associated with grasslands around Melbourne are “floristically distinct to those in rural areas in Western Victoria and contain threatened species not found at other sites.”²⁵ Therefore it may not be appropriate to direct offsets to the proposed new grassland reserves.

The proposed prescriptions for key threatened species such as the Golden Sun Moth, Matted Flax Lily and the Spiny Rice Flower also facilitate clearing on the basis of a ‘one size fits all’ approach. The proposed prescriptions for all of the above species permit clearing if “there is protection across the relevant bioregion of at least 80 per cent of the total area of places where ‘high contribution to species persistence’ and confirmed habitat’ intersect.” The report suggests that the proposed grassland and grassy woodland reserves are largely expected to meet this requirement, essentially permitting clearance of vegetation.

The proposed prescriptions for vegetation and key species must be revised to retain key areas of high conservation value within the existing and proposed UGB. The extensive losses proposed under the current prescriptions cannot be said to be consistent with the objectives of the EPBC Act or Australia’s international obligations.

3.2.2 Clause 3.4

²¹ Williams et al, *Plant traits and local extinctions in natural grasslands along an urban-rural gradient*, Journal of Ecology 2005, 93, p1203-1213.

²² Williams et al, 2005

²³ Williams et al, 2005.

²⁴ Williams et al, 2005.

²⁵ Williams et al, 2005.

Pursuant to Clause 3.4 of the Terms of Reference the Report must include a “reasonable assurance statement” that gives a high degree of confidence that the management measures will be implemented and that the actions or classes of actions will not have a significant impact on matters of national significance.²⁶

Notwithstanding the fact that a “reasonable assurance statement” is a woefully inadequate requirement for an assessment of this nature, the report does not even include a formal “reasonable assurance statement.” Nor are there any definitive statements throughout the report expressing a high level of confidence that the management measures will be implemented or assure that the relevant actions or classes of actions that are proposed to be implemented under the Program will not have a significant impact on matters of national significance.

3.3 Follow-up: Clauses 4 and 5 of the Terms of Reference

Clause 4 and 5 of the Terms of Reference address the ‘follow-up’ stage of the SIA/EIA process. The International Association for Impact Assessment defines ‘follow-up’ in the context of particular proposals as:

The monitoring and evaluation of the impacts of a project or plan (that has been subject to EIA) for management of, and communication about, the environmental performance of that project or plan.²⁷

In the EDO’s view, the follow-up stage of the process is as significant, if not more so, than the assessment stage. In the absence of follow-up, an EIA effectively represents a best guess about what will occur. It is only through follow-up that the accuracy of the predictions made in the EIA process may be understood. As Thomas, citing Martyn, Morris and Downing, points out, monitoring serves many important purposes:

- Enforcing the conditions and standards associated with approvals
- Preventing environmental problems arising from inaccurate predictions, inadequate mitigation or unforeseen factors
- Minimise errors in future assessments and impact predictions
- Make future assessments more efficient, cost-effective and timely
- Provided opportunity for mitigation to be on as ‘as required’ basis where impact predictions are uncertain
- Provide ongoing management information about the project and its environmental effects.

²⁸

The need for follow-up may be enhanced in particular circumstances, for example, where a development attracts public controversy or where threatened species are likely to be affected.²⁹ Here, the expansion of the UGB is plainly a matter of public controversy and, just as plainly, species threatened at national, State, regional and local levels will be affected by the Program. As such, the importance of a proper follow-up regime is paramount.

²⁶ Clause 3.4, Terms of Reference.

²⁷ Cited in Angus Morrison-Saunders and Jos Arts, ‘Introduction to EIA Follow-up’ in Angus Morrison-Saunders and Jos Arts (eds.), *Assessing Impact: Handbook of EIA and SEA Follow-Up* (2006), 4, Box 1.2.

²⁸ A Martyn, M Morris and F Downing, *Environment Impact Assessment Process in Australia* (1990). See also Barry Sadler, *International Study of the Effectiveness of Environmental Assessment* (1996), Chapter 5.

²⁹ Sadler, *ibid*, 126.

3.3.1 Clause 4(a)

Clause 4(a) requires that the Report set out

... monitoring and public reporting processes, effective during the development period that describe the implementation and associated management measures and condition requirements.

Inadequate information on the monitoring process

The Report does not 'set out' monitoring processes, as required by cl. 4(a). Rather, the Report promises the development of a number of monitoring processes without providing any significant detail.

- In respect of '[k]ey areas', the Report states that the Department of Sustainability and Environment will develop a monitoring protocol that will satisfy the Commonwealth. No detail is given.
- Monitoring processes for private land will be 'clarified' by the Growth Areas Authority 'as an outcome of the Precinct Structure Planning process'. No explanation is given of what this entails.
- In respect of species affected by the proposed development, the Report states that 'some' species will have management plans developed, which will include a monitoring component. Once again, no detail is provided.

As discussed above, monitoring is a key part of a functional impact assessment process. Given the extent of the information provided in the Report, it is not possible to make any kind of informed comment on whether the monitoring processes will be effective. In these circumstances, the EDO submits that it is impossible to have a 'high degree of confidence' that implementation of the project will not result in significant impacts on matters of national environmental significance.

Ineffective monitoring arrangements?

Clause 4(a) requires that the monitoring arrangements be 'effective during the development period'. Given that the Report indicates that a number of monitoring systems have yet to be developed, it is extremely difficult to feel confident that adequate monitoring arrangements will be in place before the development period commences.

We are also concerned that primary responsibility for taking enforcement action in respect of illegal clearing of natural temperate grassland lies with local government. It is the experience of the EDO that most local authorities are extremely reluctant to enforce planning laws. As such, the proposed arrangements are likely to be entirely unsuccessful in achieving their goal. Again, we refer to the First Approximation Report by DSE and its finding that almost 10,000 habitat hectares of native vegetation on private was being cleared each year.³⁰ This alone suggests that local government is not adequate pursuing enforcement.

³⁰ Department of Sustainability and Environment, *Native Vegetation Net Gain Accounting: First Approximation Report* (2008), ii.

Monitors conflicted

The two entities being identified as responsible for monitoring the impact of actions under the Report are the Department of Sustainability and Environment and the Growth Areas Authority. Both are intimately involved in the development of the Report and the processes laid out by it. It is not illegitimate to suspect them of having a vested interest in presenting the process as a success.

It is submitted that any 'best practice' monitoring scheme should involve the creation of an independent monitoring entity with representation by a number of stakeholders, including government, business and members of the public. See, for example, the Independent Environmental Monitoring Agency created to oversee the impact of the Ekati Diamond Mine in Canada.³¹ The IEMA is funded by BHP Billiton, the operator of the mine. Just so, an independent environmental watchdog could be funded by developers, along the lines of the GAIC.

Lack of public reporting

Clause 4(a) expressly requires a 'public reporting' process. There is nothing in Chapter 7 of the Report to suggest that any of the auditing or monitoring reports will be made publicly available. The Report refers to audit reports being sent to State and Federal governments, but there is no commitment to make the information contained in those reports available to the public, as well as an annual report to the Federal Government.

The EDO believes strongly in the importance of public involvement in any monitoring and auditing processes. As Arts and Morrison-Saunders state:

At the very least, the public should be informed of outcomes, but direct public involvement in EIA follow-up programmes is desirable and beneficial for all stakeholders.³²

For example, in Hong Kong, information on the environmental impacts of projects is made available electronically.³³ This enables interested persons to review and comment on the data themselves, allowing for a 'crowd sourced' approach to environmental impact detection that may mean that adverse environmental consequences are detected when otherwise they would have been overlooked. Again, this information could be made available by through an independent environmental monitor.

The Office of the Environmental Monitor

Precedent for both the creation of an independent monitor and the use of a dedicated website for the reporting of environmental impact data in a timely fashion already exists. As part of the conditions imposed on the Port Phillip Bay dredging, the Commonwealth required the creation of an independent monitoring agency, subsequently named the Office of the Environmental Monitor

³¹ See William A. Ross, 'The Independent Environmental Watchdog: A Canadian Experiment in EIA Follow-up' in Morrison-Saunders and Arts (eds.), *Assessing Impact: Handbook of EIA and SEA Follow-Up* (2006), Chapter 8. See also the IEMA website: <<http://www.monitoringagency.net>> at 15 July 2009.

³² See Jos Arts and Angus Morrison-Saunders, 'Lessons for EIA Follow-up' in Morrison-Saunders and Arts (eds.), *Assessing Impact: Handbook of EIA and SEA Follow-Up* (2006), 298, Box 12.5.

³³ See Elvis Au and Simon Hui, 'Learning by Doing: EIA Follow-up in Hong Kong' in Morrison-Saunders and Arts (eds.), *Assessing Impact: Handbook of EIA and SEA Follow-Up* (2006), Chapter 9.

(OEM).³⁴ The OEM published monthly reports on a number of monitoring programs, weekly updates on the dredging process as well as a number of irregular reports.

Although the OEM represents a good model, there is scope for improvement. Greater separation between the monitor and government would be desirable, instead of the heavy reliance placed by the OEM on EPA staff (including its Chairman). A more democratic governance structure and greater public involvement would also be desirable. Public involvement in the monitoring process ensures that both developers and government can be held accountable for the impacts of their decisions and would help further the perception of independence.³⁵

The Program is, of course, much larger, in terms of complexity and period of operation, than the Port Phillip dredging. In our submission, this is another argument for creating an independent and fully funded monitoring body that can consistently monitor the Program throughout its lifetime. It is suggested that any body should be created by statute and given appropriate enforcement powers to ensure that it is able to take effective action to enforce meaningful compliance with the management measures described in the Report and any conditions imposed by the Federal government.

3.3.2. Clause 4(b)

Clause 4(b) requires the Report to set out 'commitments for independent auditing of Program implementation'. The Report does not do this.

The Report states that '[a]n auditor' will be appointed to audit how well the Precinct Structure Planning Guidelines support the requirements of the EPBC Act. There is no express or implied commitment to the independence of that auditor.

Moreover, we submit that the audit commitments contained in the Report are inadequate. The Report commits to producing an audit report every two years, which will be used to inform a review that occurs every five years. It is self-evident that major environmental damage can occur in the space of less than two years and certainly less than five years. The substantial delay contemplated by the auditing procedures means that it may often be too long for the review to make any useful changes by the time it occurs. The infrequency of the reviews may themselves contribute to a 'nothing can be done' attitude.

3.3.3 Clause 5

The Report does not conform to Clause 5 of the Terms of the Reference.

'The Report must identify and analyse likely circumstances and procedures that may result in the review or modification of the report itself or the Program'

The Report does not do this. It provides for a number of reviews to occur, albeit never more regularly than on a two-yearly basis. There is a suggestion that these reviews may prompt changes to the Program, but it cannot reasonably be said that the Report identifies and analyses 'likely circumstances and procedures' that would result in modification of the Program. (We assume that the Report is unlikely to be modified, given the stringent timeframes under the Terms of Reference).

³⁴ The website of the OEM may be found here: <<http://www.oem.vic.gov.au>> at 17 July 2009.

³⁵ See Jos Arts and Angus Morrison-Saunders, 'Lessons for EIA Follow-up' in Morrison-Saunders and Arts (eds.), *Assessing Impact: Handbook of EIA and SEA Follow-Up* (2006), 298.

Clause 5 also requires mechanisms for the introduction, reassessment and accounting for new information, including changing community attitudes, in the implementation of the Program. The Report does not appear to provide any such mechanism except for the periodic reviews. As noted above, the various periodic reviews occur too infrequently to be a useful mechanism for the introduction of new information into the Program implementation process.

In part, this problem could be addressed through an independent monitoring program of the kind presented above, which would at least provide a mechanism for the introduction and assessment of scientific data about the component policies of the Program and the on-the-ground impact of the development authorised by it. An appropriate governance structure might also provide the opportunity to respond to changing community attitudes.

Regardless of what approach is taken, it is suggested that a proper procedure for review and modification of the Program would require reviews and reports on at least a six monthly basis, if not a monthly basis. Under Hong Kong's EIA procedure, mentioned above, proponents are typically required to create a dedicated website for the publication of environmental impact information and to publish information on the environmental impact 'in no event later than two weeks after such information is available.'³⁶

Clause 5 also requires that '[t]he Report must show how uncertainty is being targeted and addressed during Program implementation.' We consider that this requirement has not been complied with. The Reports states that further work will be carried out in a number of areas to confirm the presence / absence of threatened species, but provides no explanation of how it is addressing areas of uncertainty apart from presence / absence of nationally significant species.

4. CONSISTENCY WITH THE OBJECTIVES OF THE EPBC ACT

When deciding whether to endorse a policy, plan or program the Commonwealth Environment Minister must be satisfied that the Strategic Impact Assessment Report adequately addresses the impacts to which the agreement relates and that any recommendations to modify the policy, plan or program have been responded to appropriately.

In determining whether or not to endorse the Program, the Minister must have regard to the extent to which the Program meets the objectives of the EPBC Act. In particular, the Minister must be satisfied that the Program:

- protects the environment, especially matters of national environmental significance;
- promotes ecologically sustainable development;
- promotes the conservation of biodiversity; and
- provide for the protection and conservation of heritage.

In our view, the Minister cannot be satisfied that the Program meets each of these objectives.

Contrary to the conclusion made in the SIA Report, the Program will have significant impacts on a number of matters of national environmental significance and does not provide for effective management, mitigation or offset of those likely impacts.³⁷

The proposed Program to revise Melbourne's UGB and associated infrastructure projects will result in rapid and extensive loss of critically endangered grasslands. A minimum of 6,918ha of Natural

³⁶ See Elvis Au and Simon Hui, 'Learning by Doing: EIA Follow-up in Hong Kong' in Morrison-Saunders and Arts (eds.), *Assessing Impact: Handbook of EIA and SEA Follow-Up* (2006), 202.

³⁷ Strategic Impact Assessment Report, p209.

Temperate Grassland³⁸ and up to 924ha of Grassy Eucalypt Woodlands³⁹ are proposed to be cleared over the next 20-30 years. Apart from being a critically endangered ecological community Natural Temperate Grassland provide habitat for several species of plant and animal threatened at a national (and state) level, as do Grassy Eucalypt Woodlands. While the Program proposes to offset the likely impacts by establishing substantial reserves, the reserves are highly uncertain in terms of the legal and financial assurance that they will be delivered. In any case, as noted above, to the extent that the reserves are used as offsets, “gains” in the form of new grassland reserves are in reality “paper gains” based on changes in legal status rather than actual biodiversity outcomes.

Furthermore, the proposed Program does not contain an effective system of adaptive management that is independently audited and publicly reported.

On this basis, it is impossible to see how biodiversity loss on such a large scale as foreshadowed in the Strategic Impact Assessment Report could be said to protect the environment (particularly matters of national environmental significance), promote the conservation of biodiversity or promote ecologically sustainable development.

There are a number of critical aspects of the proposed Program which need to be improved to ensure that these important objectives are met, including greater certainty as to delivery of management, mitigation and offset measures.

4. COMPLIANCE WITH VICTORIAN LAW

The EDO is also concerned that the SIA process is essentially being used by the Victorian Government as a one-off approvals process for all actions contemplated under the Program. This is not consistent with the purposes of the EPBC or of an SIA or even a spatial level EIA process. In all cases, there needs to be a serious individualised assessment of the actual impact of the proposed actions on the ground. The centralised, top-down nature of the Victorian planning process means that if the Program is endorsed and all actions required by it approved by the Federal Minister, there is no guarantee that there will be any further substantial assessment of the impact of those actions. In fact, Federal approval may be taken as authorisation for actions that would not otherwise be lawful under current Victorian law and policy.

A relevant example of what is anticipated following EPBC approval is Amendment C123 to the Wyndham Planning Scheme, the Truganina South Community Precinct Structure Plan. The Native Vegetation Precinct Plan (NVPP) associated with that amendment calls for the removal of 75.02 hectares of native vegetation. All of the vegetation proposed for removal has High or Very High Framework Conservation Significance. In some cases, the significance of the vegetation is accentuated by the presence of Golden Sun Moths or, in one case, Spiny Rice-Flower. As Clause 2.0 of the NVPP clearly states ‘No native vegetation is required to be protected or retained.’

This approach is consistent with the prescriptions contained in the Report which suggest that, generally speaking, land less than 150 hectares in area will not be protected, regardless of its conservation value.

³⁸ Strategic Impact Assessment Report, p124.

³⁹ Strategic Impact Assessment Report, p128.

As the Explanatory Report for the Amendment frankly admits, the proposed clearing is only lawful if the Program as currently conceived goes ahead, permitting the offsetting of the loss of native vegetation to the western grassland reserves:

Environmental effects

The Truganina South Community PSP has been prepared on the basis that the *Proposed Grassland Areas for Protection* flagged in *Melbourne @ 5 Million* will be established in a reasonable timeframe, and that the removal of grasslands from the Truganina South precinct will be offset by the establishment of the reserve(s).

If the proposed reserves cannot be established in a reasonable timeframe, the PSP will need to be reviewed to ensure that native vegetation and biodiversity values within the Precinct are managed in accordance with Victoria's *Native Vegetation Management: A Framework for Action*. This may result in significant changes to the PSP.

The amendment introduces the Truganina South Native Vegetation Precinct Plan, which will provide strategic protection and management of the western basalt plain grasslands through the provision of an appropriate offset.

The second paragraph makes clear that the NVPP that has been prepared may well not be compliant with the VNVF which is said to underlie the entire Program. The last paragraph is particularly disingenuous, as it purports to justify the loss of native vegetation in one place on the grounds that it will ensure protection of grassland elsewhere. This is reminiscent of the concept of destroying villages in order to save them.

The reality is that the arrangements set out in the Report will effectively turn the 'avoid-minimise-offset' hierarchy on its head, making offsetting the primary choice for any development within the UGB, as the Truganina South Community PSP indicates. No explanation is given in the Report about why the clearing of all the land in the Precinct is necessary and, therefore, unavoidable. The only environmental justification that is offered is that it will positively affect the environmental health of an entirely separate area. Instead, it appears that the easy availability of offsets within the proposed western grassland reserves has created a perverse incentive for planners to simply take the easy option and offset everything.