Reforming the Environment Assessment Process in Victoria

Samitha Rao[1]

Background

The Victorian Parliament's Environment and Natural Resources Committee (ENRC) is currently conducting an inquiry into the environment effects statement (EES) process in Victoria, including the operation of the *Environment Effects Act 1978* (EE Act). In particular, the Committee will be considering and reporting on weaknesses in the current system including poor environmental outcomes, excessive costs and unnecessary delays encountered through the process and its mechanisms; community and industry consultation under the EE Act; the independence of environmental effects examination when government is the proponent; and how better environmental outcomes can be achieved more quickly and predictably and with a reduction in unnecessary costs.[2]

The Environment Defenders Office (EDO) has been advising on the operation of the EES process under the EE Act for almost 20 years. For example, EDO has advised clients in relation to the environment assessment process for the Victorian Channel Deepening Project, the Sugarloaf Pipeline Project ("North-South-Pipeline"), the Bastion Point boat ramp development, the Victorian Desalination Plant Project and the development of the Frankston bypass. EDO has also represented several community groups at EES inquiry panel hearings including Save Bastion Point Campaign, Environment Victoria, Victoria National Parks Association and Watershed Victoria Inc. Further, EDO represented Friends of Mallacoota Inc in the first legal challenge to a decision made by the Minister for Planning under the EE Act.

The EDO has also commented extensively on the Commonwealth environment assessment and approval process under the *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act") and has been undertaking research into best practice environment impact assessment globally.

This article is based on EDO's submission responding to the ENRC inquiry. It outlines some of the fundamental deficiencies in the current environment assessment process in Victoria and suggests that a major overhaul of the current system is necessary to ensure that Victoria's environment assessment process reflects leading practice.

Introduction

Victoria's environment assessment process has been widely criticised.[3] The EES process in Victoria is operating in the context of an out-of-date and inadequate legislative framework. The process is framed within the brief and ineffectual EE Act.[4] The EE Act is a mere 16 pages long, contains no objectives and provides no credible decision-making framework. The process is highly discretionary and almost entirely dependent on non-binding, unenforceable guidelines rather than on binding legislation. The process gives the Minister for Planning virtually unlimited discretion to decide whether an EES is required for a project, the content of an EES, the form and extent of public review of an EES and the assessment of an EES.

Victoria's present system does not reflect leading practice, failing to meet globally understood purposes of a rigorous, transparent, accountable, participative and deliberative assessment of projects.[5] The EE Act does not require comprehensive and transparent inquiries into proposed developments and does not guarantee opportunities for

1 Policy and Law Reform Officer, Environment Defenders Office (Victoria).

2 The ENRC's terms of reference can be found: http://www.parliament.vic.gov.au/enrc/inquiries/article/872. The Committee is required to report by 30 August 2010.

3 See for example Murray Raff, 'The Renewed Prominence of Environmental Impact Assessment: "A Tale of Two Cities"' (1995) August, Environmental and Planning Law Journal 241; Rodger Eade, 'Issues in Environmental Impact Assessment in Victoria: What Has Scoresby Taught Us?' (2000) 18(4) Urban Policy and Research 515; Robyn Leeson, 'EIA and the Politics of Avoidance' (1994) February, Environmental and Planning Law Journal 71; Brad Jessup, 'Victoria and the Channel Deepening Project' (draft copy) in Tim Bonyhady and Andrew Macintosh (eds) Mills, Mines & Other Controversies: The Environmental Assessment of Major Projects (2010).

4 lthough such legislation as the *Planning and Environment Act 1987* (Vic) and the *Environment Protection Act 1970* (Vic) provide for the assessment of certain environmental impacts of proposed development, it is the *Environment Effects Act 1978* (Vic) which purports to allow for the comprehensive environment assessment of public and other works in Victoria.

5 For best practice guidelines see the International Association for Impact Assessment, *Principles of Environmental Impact Assessment Best Practice*, 2.4. Accessed at: <http://www.iaia.org/publications/>.

public involvement in the process. The current system does not create a binding regime for comparing alternatives and options, integrating environmental, social and economic concerns, and avoiding or minimising any potential adverse effects. There are no offences in the EE Act and no requirement that proponents refer projects. Also, unlike assessment regimes elsewhere, the end result is a recommendation which is not binding on decision-makers, rather than mandatory action.

Furthermore, the high degree of discretion leaves the process open to manipulation and politicisation and is particularly prone to conflicts where the Government is the project proponent. Indeed, it has allowed the Victorian government to interpret environment impact assessment legislation in the context of its own development agenda.

These weaknesses in the current system have resulted in a number of unsatisfactory assessments that have left the community with serious concerns about the projects and their potential impacts on the environment. The environment assessment processes for the Victorian Desalination Plant, the Channel Deepening Project, the Frankston Bypass, the North-South Pipeline Project and the Bastion Point boat ramp development all display the substantial weaknesses in the process and demonstrate the need for major reform. They are discussed throughout this article.

Simply, Victoria's environment impact assessment (EIA) regime is completely inadequate for the task of securing a sustainable future for Victoria.

Despite its many widely acknowledged weaknesses the EE Act has hardly changed in over 30 years. The few amendments to the EE Act have been to matters of process rather than substance. The promise of reform in 2002 with the special appointment of the Advisory Committee into the Environmental Assessment Review[6] was largely disappointing. The recommendations canvassed by the Committee to reform the environment assessment processes under the EE Act were largely ignored. Rather than pursing long overdue legislative amendments, the Government merely updated the Ministerial guidelines that support the EE Act.

A truly reformed environment assessment regime in Victoria must involve a shift from a non-binding guidelines-based regime to a binding legislative-based regime which emphasises rigorous, transparent, accountable, participative and deliberative processes designed to achieve ecologically sustainable development.

Environment assessment objectives

Victoria's EE Act lacks an explicit statement of objectives or purposes of the legislation, reflecting the lack of a clear and transparent framework for decision making under the Act.

While the objectives and principles contained in the supporting guidelines are largely acceptable, explicit binding objectives in EIA legislation are necessary to inform the Minister's assessment of the environmental effects of proposed projects and associated decisions under the Act and to guide the development and implementation of subordinate legislation and other instruments such as guidelines.

It is particularly imperative that the Act's objectives explicitly provide that the environment assessment process in Victoria is underpinned by the principles of ecologically sustainable development (ESD). The principles of ESD are widely recognised in Australia and internationally to be core components of government decision-making and are important guiding objectives in a number of other pieces of Victorian legislation.7 ESD objectives should be the

6 Report of the Environment Assessment Review Advisory Committee, 2 December 2002. Accessed at: <http://www.dse.vic.gov.au/CA256F310024B628/0/C2BEE4394A4DD233CA257020000A2BFA/$File/Environment+Assessment+Review+AC+Report+.pdf>

7 The Victorian Government formally committed to incorporating ESD principles in land use regulation and decision-making in 1992 in the *Intergovernmental Agreement on the Environment*: (1) The parties agree that the concept of ecologically sustainable development should be used by all levels of Government in the assessment of natural resources, land use decisions and approval processes (2) The parties agree that it is the role of government to establish the policy, legislative and administrative framework to determine the permissibility of any land use, resource use or development proposal having regard to the appropriate, efficient and ecologically sustainable use of natural resources (including land, coastal and marine resources). See *Intergovernmental Agreement on the Environment,* 1 May 1992, Schedule 2 - Resource assessment, land use decisions and approval processes.

framework within which environment assessment decisions are made. Legislation should provide that all decisions made under the EE Act – including EIA scoping, the making of recommendations and the final evaluation of proposals – be consistent with ESD principles.

The Commonwealth and all other states in Australia have clearly defined objectives in their environment assessment legislation.

Referral of projects

There is a great deal of uncertainty under the current regime regarding the obligations for proponents and decision-makers such as local councils to refer proposed projects to the Minister for determination as to whether an EES is required, and the types of proposals required to be referred to the Minister for assessment.

Currently, the scope of the EE Act is such that it applies if the Minister for Planning declares a project to be 'public works' if he considers that the works will have a significant effect on the environment.[8] This is at the Minister's discretion. The EE Act can also apply where the Minister calls in a project for an EES or where a decision-maker or proponent asks the advice of the Minister regarding the need for an environment assessment.[9] General guidance as to the types of projects that should be referred to the Minister for assessment is left to the supporting guidelines, which are not binding.[10] Therefore, in the absence of legislative requirements it is possible for projects that adversely impact the environment to proceed without assessment.

The environment assessment process for the Victorian Desalination Plant at Wonthaggi is one example demonstrating the lack of assurance regarding referral of projects and the obligations of proponents. Despite the enormous scale and significant environmental impacts of that proposal, the absence of requirements in the EE Act compelling referral of such projects meant that the Minister for Planning was able to use his discretion to decide that an assessment of the Government backed project was not required. The Victorian Government only agreed to an assessment once the Commonwealth Government had decided that an EPBC Act assessment would be required, triggering the bilateral approval process.

Clarity and certainty regarding which projects must be referred to the Minister for a decision as to whether an assessment will be required are central to the effective operation of Victoria's environment assessment process. Clarity and certainty are important not only to ensure community confidence in the transparency and accountability of the environment assessment process, but also to ensure that the system operates efficiently for development proponents and the departments and statutory authorities involved in the process.

EIA legislation should contain clear, objective criteria, or 'triggers' for determining matters that must be referred for determination as to whether an EIA is required. These can be supplemented by guidance material in addition to the legislation if required. The recent inquiry by the Victorian Competition and Efficiency Commission (VCEC) into various aspects of environmental regulation in Victoria supports the need to incorporate clear, risk-based criteria in legislation to guide determinations on the need for assessment.[11]

Furthermore, the current legislation makes no provision for sanctions and enforcement mechanisms to address situations where referral and assessment are required but not undertaken. Penalties for non-compliance/non-referral are important to ensure accountability. Proponents should be held accountable in circumstances where the proponent should have referred a particular proposal but failed to do so. Accordingly, EIA legislation should contain penalties for non-compliance with referral requirements. Of course this will only be effective if clear and transparent triggers for referral are introduced.

The environment assessment process at the Commonwealth level, and in many states such as Western Australia, is triggered by an objective legislative test that is based on the likely level of impact of the proposal on the environment

8 *Environmental Effects Act 1978* (EE Act), s3.

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

10 Ministerial Guidelines for assessment of environmental effects under the Environmental Effects Act 1978, pp 5-12.

11 VCEC, *A Sustainable Future for Australia: Getting Environmental Regulation Right, Final Repor*t, July 2009, see pages 123-124 and Recommendation 5.1 at page 134.

and failure by a proponent to refer a proposal for assessment is an offence.[12]

Screening, scoping and Minister's assessment of projects

Under the current regime in Victoria, the circumstances in which an EES might be required, the content and extent of the matters to be covered by the EES, and the Minister for Planning's determination of whether the likely environmental effects of a project are acceptable, are all at the discretion of the Minister. The EE Act does not require the Minister to take into account any particular considerations in determining these matters. While the EE Act allows the Minister to request information to make a decision on whether an EES is required[13], it is left to the guidelines to detail the types of projects that should be subject to assessment and the matters the Minister should consider when deciding whether to require a proponent to prepare an EES.[14] The Minister's discretion cannot be limited by the guidelines – they are not enforceable against the Minister. In the absence of any consistent objective criteria in legislation, it is therefore possible for the Minister to require an EES, decide on the content and extent of the EES, and make an assessment of the EES without any real accountability.

The environment assessment process for the Victorian Desalination Plant clearly demonstrates the lack of accountability resulting from the broad discretion afforded to the Minister. The desalination plant is predicted to use power that would generate one million tonnes of carbon dioxide, a significant greenhouse gas and a matter which is of vital concern to the community. Extraordinarily, however, under the terms of reference for the inquiry panel the Minister for Planning limited the scope of the assessment process by excluding consideration of greenhouse gases from the assessment, completely undermining the rigour of the assessment process and the independent role of the inquiry panel.

Decisions as to whether an EES is required should be triggered by statutory processes, not Ministerial discretion. Similarly, decisions regarding the scope of the ESS and whether the likely environmental effects of a project are acceptable should be based on clear and enforceable legislative criteria, not Ministerial discretion.

Levels of assessment

As identified by the Environment Assessment Review Advisory Committee in 2002, the current system in Victoria provides little or no flexibility for matching the assessment process to the scale or level of complexity and the environmental impacts presented by the proposal to be assessed.[15] The existing processes provide for the assessment of major project proposals, and do not cater for smaller projects or projects with a moderate or limited level of environmental effects, which may benefit from a less rigorous or wide-ranging form of assessment.

To redress this issue, the Environment Assessment Committee proposed tiered levels of assessment intended to provide for a robust assessment of environmental impacts aligned to the environmental impact presented by the project and, therefore, the likely complexity of the assessment process. Indeed, the environment assessment processes in other states and the Commonwealth allow for varied levels of assessment based on the scale and likely level of environmental impact, though the number of levels available differs in each jurisdiction.

A legislated tiered assessment process similar to that proposed by the Advisory Committee aligning the level of assessment with the scale and likely impact of a proposed project should be adopted in Victoria. In its final report, VCEC supports options to facilitate a better matching of the environmental risks of a particular projects and the form of assessment, recommending the provision of an intermediate tier of assessment.[16] The introduction of levels of assessment would allow for the appropriate assessment of a broader range of proposals.

12 For example see *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s11 and *Environmental Protection Act 1986* (WA) Pt IV, Div 1. Under the EPBC Act there are substantial penalties for taking action that have, will have or is likely to have a significant impact on any matters of national environmental significance without approval from the Australian Government Minister for Environment.

13 EE Act, s5.

14 EE Act, ss8(2), 10(1)(a).

15 Report of the Environment Assessment Review Advisory Committee, 2 December 2002, p29. Accessed at: http://www.dse.vic.gov.au/CA256F310024B628/0/C2BEE4394A4DD233CA257020000A2BFA/$File/Environment+Assessment+Review+AC+Report+.pdf

16 VCEC, *A Sustainable Future for Australia: Getting Environmental Regulation Right, Final Repor*t, July 2009, Recommendation 5.1, page 134.

Timeframes

The EE Act does not contain clear timeframes for the environment assessment process, resulting in great uncertainty for both proponents and the community. While the supporting guidelines indicate some process timeframes, these are not binding on the Minister and can be departed from.[17]

In the absence of adequate legislative provisions, timeframes can be unreasonably short or unreasonably long and directed to achieve political goals.

For example, in the environment assessment process for the Bastion Point boat ramp, the Minister for Planning did not release the inquiry panel's report of recommendations and provide his assessment until a lengthy 8 months after the recommendations were received by him, despite the guidelines stating that the "Minister's assessment is normally provided to decision-makers and the proponent with 25 business days of receiving the report of the inquiry."[18]

There are also numerous occasions when inadequate timeframes have limited constructive public participation in the assessment process and compromised the rigour of assessments. For example, due to the Victorian Government's decision to approve and build the Victorian Desalination Plant quickly, the Minister for Planning fast-tracked the environment assessment process for the plant. This had severe consequences for community participation and the rigour of the Inquiry panel's recommendations. The EES documentation (over 1800 pages of highly complex, technical material plus works approvals of about 430 pages and 84 appendices which averaged approximately 90-100 pages each) was exhibited on 20 August 2008, with public submissions due on 30 September, 2008. The Inquiry panel hearing was held just two weeks after this, on 14 October, 2008.

The timing available to the community to review and digest material of such length and complexity and to engage experts to prepare reports and give evidence at the hearing was completely unreasonable and inadequate. Furthermore, the Inquiry panel hearing itself was also rushed, with the Minister limiting the Inquiry panel hearing to just under 3 weeks (14 October 2008 to 7 November 2008) and assigning a date for completion of their report. The Panel itself was critical of the limited timeframes, openly citing this as the reason for limiting the number and extent of oral presentations before the Panel.

The environmental assessment process for the Channel Deepening Project occurred in a similar manner.[19]

In both these instances, the condensed timeframes effectively precluded the community from participating constructively in the environment assessment process and compromised the rigour of the assessment process.

It is critical that EIA legislation include clear process timeframes that must be adhered to for each stage of the assessment process (with some Ministerial discretion to extend periods if necessary). The timeframes should reflect the complexity of the type of project being assessed, the capacity of the assessing authorities and take into account meaningful opportunities for community participation so that robust assessments can be completed within the timeframe. Legislative clarity around timeframes would contribute significantly to creating greater certainty and confidence in the process.

Monitoring and enforcement

The EE Act does not require follow-up of any impacts of a project as part of the environment assessment process. Moreover, little attention is given to follow-up in the non-binding, unenforceable Ministerial guidelines.

17 For example, the guidelines state that the EES will be exhibited for a period of 20 to 30 business days. In exceptional circumstances the Minister may decide that a longer period is warranted. The guidelines also state that the Minister's assessment is normally provided to decision makers and the proponent within 25 business days of receiving the report of an inquiry or within 50 days from the close of the exhibition period of an EES if an inquiry is not appointed. See pages 23 and 28 of the guidelines.

18 Panel hearing concluded on 7 August 2008. Panel provided their report of recommendations to the Minister for Planning in October 2008. The Minister did not provide his assessment until June 2009. See Ministerial Guidelines for assessment of environmental effects under the Environmental Effects Act 1978, pp 25-26.

19 For details see Brad Jessup, 'Victoria and the Channel Deepening Project' (draft copy) in Tim Bonyhady and Andrew Macintosh (eds) Mills, Mines & Other Controversies: The Environmental Assessment of Major Projects. (2010).

Follow-up is a key part of a functional environmental impact assessment process. Follow-up can be defined as:

> "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." [20]

Thus follow-up comprises four elements: monitoring, evaluation, management and communication.

The follow-up stage of the environment assessment process is as significant as the assessment stage and should be appropriately emphasised in Victoria's environment assessment regime. It is important for determining the outcomes of environment assessment. 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. Follow-up serves many important purposes such as:

- enforcing the conditions and standards associated with approvals
- preventing environmental problems arising from inaccurate predictions, inadequate mitigation or unforeseen factors
- minimising errors in future assessments and impact predictions
- making future assessments more efficient, cost-effective and timely
- providing ongoing management information about the project and its environmental effects.[21]

With respect to monitoring, best practice could 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.[22]

Public involvement in any monitoring and auditing processes is also imperative. For example, in Hong Kong, information on the environmental impacts of projects is made available electronically.[23] 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, the information could be made available through an independent environmental monitor.

EIA follow-up should be formally built into impact assessment processes in legislation, requiring the development of a comprehensive monitoring program, inspection, enforcement of terms and conditions of approvals, monitoring and control of impacts (including unanticipated impacts), and public reporting of projects and their impacts.

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 (OEM).[24] The OEM publishes monthly reports on a number of monitoring programs and 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 staff on the EPA. A more democratic governance structure and greater public involvement would also be more 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 assist to further the perception of independence.[25]

---

20 Morrison-Saunders, A. and J. Arts (eds) Assessing Impact: Handbook of EIA and SEA Follow-up (2006).

21 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.

22 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 23 March 2009.

23 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).

24 The website of the Office of the Environmental Monitor may be found here: < http://oem.vic.gov.au > at 26 March 2010.

25 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.

As noted above, EIA legislation must also contain substantial penalties for non-compliance. This should include penalties for not referring a project that should have been referred, providing misleading or deceptive information as part of the EIA, non-compliance with the project decision and non-compliance with approval conditions.

Politicisation of the process

The fundamental and overarching problem with the environment assessment regime in Victoria is the high degree of discretion and flexibility afforded to the Minister as a result of Victoria's largely guidelines-based regime. In the absence of an adequate legislative structure surrounding the assessment process the current system allows the Minister to direct the process for political purposes – allowing political interest to override environmental concerns.

The degree of latitude afforded to the Minister is of growing concern as increasingly the Victorian Government appears to be treating the process either as optional or as a rubber stamp, rather than a proper and detailed environment assessment process. Indeed, the Victorian Government, which is openly committed to the promotion of investment in major projects, has been prepared to interpret the environment assessment legislation in the context of its own development agenda. This has left many with grave concerns for the environment.

Within the EDO's own recent experience, the Victorian Government determined that major developments, such as Channel Deepening and the North-South Pipeline would proceed quite some time before an EES was considered. As noted above, the Government also stated that an EES was not required for the Desalination Project at Wonthaggi but agreed to one after Commonwealth Government determined that an assessment would be required under the EPBC Act (thus triggering the bilateral agreement). As discussed above, it then undermined the process through haste to approve and build the plant. The Frankston Bypass EES was conducted in a similar manner, in that the project was a foregone conclusion before the assessment process even began. Alternatives to the bypass and to the route of the bypass were not genuinely considered, and the environmental effects of different options not weighed up and compared.

The Bastion Point decision is the most recent example of the politicisation inherent in the Victorian EES process. In this case, the Minister for Planning approved the East Gippsland Shire Council's ocean access ramp, breakwater and beach road for Mallacoota, despite his own expert inquiry panel recommending strongly against it. After a long, comprehensive and expensive investigation the panel concluded that the development could not be justified on environmental, social and economic grounds. Nevertheless, the Minister for Planning approved the development with the safety and separation of boat users his prime stated reason. This conflicted with the panel's explicit assessment that the proposed development itself raised significant safety concerns that far outweigh the safety concerns of the current situation.

It is not surprising that the environment assessment process in Victoria has been criticised as being "subject to political bargaining behind closed doors."[26] As one academic pointed out, what is the real purpose of environmental effects legislation, if it does not apply when the Minister decides so?[27] The absence of an adequate legislative structure has enabled the EES process to evolve into a process of ascertaining how a project will proceed rather than if it should proceed or not. The question has been: "what are the environmental impacts and how will we manage these impacts?", rather than "what are the environment impacts and are these impacts acceptable to us?"[28] This must be redressed.

In order to achieve more accountable decision-making in environmental impact assessment processes in Victoria it is imperative that there is greater structure around the exercise of the Minister's discretion.

Governance of the environment assessment process

Under the current system in Victoria, the Minister responsible for administering the EE Act is the Minister for Planning.

26 Wescott, G., *The Review of EIA Legislation in Victoria, Australia*, 1984-1988, Paper presented to the Annual Meeting of the International Association for Impact Assessment, Griffith University, Brisbane, 5-9 July 1988 in Leeson, R., EIA and the Politics of Avoidance (1994) *Environmental and Planning Law Journal* 71 at 74.

27 Robyn Leeson, EIA and the Politics of Avoidance (1994) *Environmental and Planning Law Journal* 71 at 83.

28 Robyn Leeson, EIA and the Politics of Avoidance (1994) *Environmental and Planning Law Journal* 71 at 83.

Therefore it is the Minister for Planning that governs the environment assessment process and determines whether environmental impacts are acceptable.

Decisions relating to the environmental impacts of proposals are environmental decisions and not planning decisions and thus it makes sense that such decisions should be governed by the Minister for Environment, not the Minister for Planning. Accordingly, it would be more appropriate for environment assessment legislation to be administered by the Minister for Environment, not the Minister for Planning.

In addition, environmental impact assessments should be conducted by an agency that has responsibility for environmental management and is staffed by officers who have environmental training and knowledge. One option is that environmental impact assessments could be conducted by the Environment Protection Authority (EPA) with final approval to go to the Environment Minister. The current functions of EPA Victoria include assessing and issuing works approvals and environmental licences and therefore correlate well with environmental impact assessment.

Alternatively, a separate independent body with sole responsibility for administration of the environment assessment process could be established. This is the case in Western Australia where the EPA (an independent board) is responsible for conducting environmental impact assessments and making recommendations to the Environment Minister on whether projects should be approved or not. Similarly in Canada the Canadian Environmental Assessment Agency is responsible for administering the federal environment assessment process.[29] A similar agency could be established in Victoria. Indeed, a recent inquiry into the environmental regulation in Victoria by the Victorian Competition and Efficiency Commission recommended establishing an independent body to oversee all stages of the EES process.[30]

The EPA or the independent body would report to the Minister for Environment on the environmental factors relevant to a proposal, and recommend whether a project should go ahead or not and whether any conditions should be applied. The Minister for Environment would then make an assessment as to whether the environmental effects of the proposal are acceptable, and therefore whether the proposal can go ahead, on the basis of the body's recommendations. Indeed, in its final report VCEC recommended establishing an independent body to oversee all stages of the EES process.

A system such as this would also go some way towards improving transparency and accountability in the current process and reducing the conflict of interest that arises when the Government is the proponent. This is discussed below.

Independence of environmental effects examination when government is the proponent

As noted above there is great potential for environmental considerations to be set aside in favour of political interests. One of the greatest concerns with the current environment assessment process is the conflict of interest that arises when the government is the project proponent.

A look at recent matters that have been referred to the Minister for Planning for a decision on whether an EES is required shows that increasingly large projects are either Government sponsored or often public-private partnerships. Examples include the Desalination Plant, the North-South Pipeline and the Frankston Bypass. These projects – large and likely to have the significant impacts on the environment – were all strongly backed by the Government, yet it was the Government as proponent who was also deciding whether or not the projects needed an EES and how the process would proceed. This lack of independence seriously undermines good decision-making and is a matter of great community concern.

Decisions regarding protection of the environment should be made by a person separate from the person who is proposing a particular use of the environment. As proposed above, the EPA or an independent body should be given the responsibility for governing the process of the development of the EES, thereby reducing political influences. An independent body would enhance the rigour of assessments and the credibility of the process. In addition, where

29 See ss. 5(1)(a) and 61-70 of the *Canadian Environmental Assessment Act 1992.* Accessed at <http://laws.justice.gc.ca/PDF/Statute/C/C-15.2.pdf> on 30 March 2010.

30 VCEC *A Sustainable Future for Australia: Getting Environmental Regulation Right,* Final Report, July 2009, Recommendation 5.1 page 134.

the Government is the proponent, greater independence could be achieved by requiring an independent reviewer to review the accuracy and comprehensiveness of the assessment. This would bring an added layer of scrutiny to the process.

Strategic environmental assessment/early assessment

Under the current system in Victoria, environment assessment applies after a decision has been taken for a development, and the project level EIA serves as a process to clean up the operational detail of the project. It is at this late stage that the community is first given an opportunity to comment. Further, project-level EIA does not canvass the high-level strategic alternatives that might have been possible or estimate the cumulative impacts over a period of development.

A reformed environment assessment process in Victoria could consider earlier strategic environment assessment (SEA) of strategies, policies, plans and programs that will initiate projects. The aim of SEA is to ensure that environmental aspects are addressed and incorporated at decision-making levels prior to project level announcement.[31]

Globally, there is a move towards higher level environmental assessment prior to detailed project level assessment. Indeed, Canada [32] and the Netherlands[33] have introduced a higher level of assessment, that of Strategic Environmental Assessment (SEA), to consider and integrate environmental aspects into the review process of policies, plans and programs, rather than relying on project proposals to drive consideration of the environment. This gives the community an opportunity to comment on the strategic basis of projects and strengthens the quality and credibility of policies, plans and programs in terms of the environment.

The Victorian EE Act does not specifically preclude the use of SEA[34], however there is little evidence in Victoria of its application early in planning processes. Approaches such as the native vegetation precinct planning are still in its infancy.

A reformed environment assessment regime in Victoria should consider earlier strategic impact assessment; however, before building SEA into the process, the fundamental flaws in Victoria's current EIA regime need to be addressed. In particular, there are a number of preconditions that need to be satisfied for strategic assessment to operate successfully:

- Decisions must be based on a very thorough investigation of environmental values. Environmental decision-making is highly dependant on the quality of information available, and this is particularly the case when decisions cover matters of the temporal and spatial scale of strategic assessments.
- The process should be transparent and public with a clear assessment framework, mandatory opportunities for public comment, and a clear explanation of the implications of strategic assessment.
- Sufficient flexibility should be provided to deal with new information if it comes to hand in the future. Best practice strategic assessment provides for some flexibility for changes in development plans based on new information that comes to light after the assessment.

The current environment assessment regime in Victoria is in no way capable of dealing with a robust strategic assessment process. The fundamental flaws in the process must be addressed before Victoria can contemplate strategic assessments.

Implications for the Commonwealth environment assessment process

The Victorian environment assessment process is accredited for the purposes of the Commonwealth EPBC Act regime under the Agreement between the Australian Government and Victoria relating to environmental impact

31 Barry Dalal-Clayton and Barry Sadler, *Strategic Environment Assessment: A Rapidly Evolving Approach.* Accessed at <www.nssd.net/pdf/IIED02.pdf >

32 Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals. Accessed at <http://www.ceaa.gc.ca/default.asp?lang=En&n=B3186435-1>

33 *Environmental Management Act 2004, Environmental Impact Assessment Decree 1994*, and *EU Strategic Environmental Assessment Directive (Directive 2001/42/EC)*. See also the Ministry for Housing, Spatial Planning and the Environment website: <http://international.vrom.nl/pagina.html?id=37573> at 31 March 2010.

34 Strategic impact assessment is also available under the EPBC Act in certain circumstances.

assessment.[35] The bilateral agreement removes the requirement for Commonwealth assessment of proposals that trigger the EPBC Act, where there is an assessment of the same proposal under Victorian law.[36]

The development of bilateral agreements was partly intended to raise the standard of state environment assessment processes. To the contrary, however, the Commonwealth-Victoria bilateral agreement has been used as an endorsement of the Victorian Government's existing assessment approach.

The consequence of the Commonwealth accrediting Victoria's existing assessment approach is that Victoria's inadequate process is applied to assess and regulate the environmental impacts of Victorian projects on matters of highest concern to the Commonwealth.[37] These matters are therefore not guaranteed to be comprehensively and transparently assessed.

Furthermore, endorsement of Victoria's existing process has likely delayed much needed reform. Disappointingly, the Commonwealth did not demand higher standards from Victoria's assessment regime before entering into a bilateral agreement.

Community Participation

Under the current Victorian regime public involvement in the environment assessment process is at the discretion of the Minister for Planning, rather than assured in legislation. The Minister for Planning can decide whether to invite comments on any works or proposed works, whom participation is to be invited from, and whether to appoint a panel to conduct public hearings.[38] While public involvement is outlined in the supporting guidelines to the EE Act and is ordinarily undertaken, lack of statutory force leaves such involvement unenforceable. Furthermore, the nature of public involvement is at the Minister's discretion.

For example, the experience of the Channel Deepening Project demonstrates the Minister's ability under the current regime to limit the extent of community participation in the process. In that hearing the Minister restricted community involvement by constraining the subject matter of the inquiry and limiting the public from asking questions of panel experts, therefore preventing the community from voicing fundamental concerns.

Best practice requires that environment assessment processes are participative. Effective and timely community engagement informs the public about proposals that may affect community interests, allows identification of matters of public concern and interest and input of local expertise, and may result in resolution of public concerns. Effective public participation is an important element in achieving transparency, credibility and efficiency in the assessment process. It is therefore imperative that Victorian environment assessment legislation guarantee adequate opportunity for informing and consulting the public at key stages of the assessment process such as screening, scoping, public exhibition and public hearing phases, and ensure that public input and concern is then considered in decision-making. Statutory requirements for consultation during the assessment process should correspond with the level of assessment and the stage of the assessment process.

Furthermore, the EE Act does not require other elements essential for public participation such as requirements for public notification of projects referred, public exhibition of the environmental effects statement, release of EES panel reports or release of the Minister's own recommendation to the proponent or the public.

In order for the public to participate properly in the environment assessment process, they must be made aware of a particular proposal, its referral and the level of assessment to be applied, if any. If the public is not given adequate notification about such issues, this not only immediately limits the level of public consultation and involvement but also creates a feeling of mistrust and suspicion in the community, should they subsequently be made aware of that proposal. Therefore legislation should include provision for informing the public of project referrals and

35 Accessed 29 March 2010, < http://www.environment.gov.au/epbc/assessments/bilateral/vic.html >

36 Under the current bilateral agreement the Minister is still required to make a separate decision under the EPBC Act on whether to approve the project or not following the assessment.

37 It is unlikely that any sort of major environmental impact assessment of Victorian projects will occur separately at the Federal level (apart from a small number of strategic assessments) and therefore the inadequate Victorian process will apply for both Federal and State assessments.

38 EE Act, s9(1), 9(2).

public review of environmental review documents, including exhibition of the EES, and mandatory release of both a panel's report and the Minister's assessment of the impacts.

Best practice requires consultation with key stakeholders as early as possible. Therefore legislation should provide an opportunity for the public to provide comment at the project referral stage – that is, on whether or not a project could have a significant effect on the environment - as is the case under the Commonwealth EPBC Act and in other states such as Western Australia.

Furthermore, the broader concept of greater public involvement would require the opportunity for third parties, such as a local community, to enforce any proposed legislation as currently occurs under the Commonwealth EPBC Act. Such provisions would certainly enshrine the transparency and accountability in the legislation.

Conclusion

The purpose of this article has been to provide an outline of some of the fundamental deficiencies in Victoria's current environment assessment process and to suggest some necessary reforms to ensure that Victoria's environment assessment regime reflects leading practice. The article is based on EDO's submission to the Victorian Parliament's ENRC Inquiry into the EES process in Victoria. It is hoped that the article has made a compelling case for reform. Principally, a truly reformed environment assessment regime in Victoria requires a shift from a non-binding guidelines-based regime to a binding legislative-based regime that emphasises rigorous, transparent, accountable, participative and deliberative processes designed to achieve ecologically sustainable development.

In summary, a comprehensive new regime should contain key stages of the assessment process in binding legislative provisions, including:

1. Inclusion of a clear statement of objectives of environment assessment, incorporating the objective of ecologically sustainable development.
2. Clear legislative triggers as to when a project will be required to be referred and penalties for non-compliance with referral provisions.
3. Clear and enforceable criteria that set out when an EIA is required and that guide the Minister's assessment of whether the likely environmental effects of a project are acceptable.
4. A tiered assessment process similar to that recommended by the Environment Assessment Review Advisory Committee in 2002 which aligns the level of assessment with the scale and likely environmental impacts of the proposed project.
5. Clear process timeframes that are appropriate to each level of assessment.
6. Monitoring and enforcement provisions that require a comprehensive monitoring program, inspection, control of impacts (including unanticipated impacts), enforcement of terms and conditions of approvals, and public reporting of project impacts.
7. Opportunities for community input at key stages of the environmental assessment process, including public comment at the referral of a proposal, and a requirement to consider public submissions when making a decision.
8. Public notification requirements and requirements for mandatory release of assessment reports and the Minister's recommendations.

Environment assessment legislation should be administered by the Minister for Environment, with the Environment Protection Authority (EPA) or an independent body conducting the assessment process for the Minister. The Minister's decision on whether the environmental impacts are acceptable or not, and therefore whether the proposal can go ahead, should be binding on other decision-makers.

Finally Ministerial discretion in the EIA process should be removed or limited by strict legislative criteria, so that the community and proponents have greater certainty as to when the environment assessment processes will apply and so that assessments proceed in a comprehensive, participative, transparent and accountable manner.