Utility of Environmental Impact Assessment Processes in Western Australia

Submission to Inquiry into the Environmental Effects Statement Process in Victoria: Environment and Natural Resources Committee of the Parliament of Victoria
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1. Background

I have been asked to discuss a number of issues relating to the inquiry, including:

- the key strengths of environmental impact assessment (EIA) processes in Western Australia (WA), including objectives, project referrals, levels of assessment, appeal rights for third parties, and the role of the Environment Protection Authority;
- proposed reforms to the WA EIA Framework;
- your experiences in environmental impact assessment processes in other jurisdictions, including examples of EIA best practice in Australia and overseas;
- the role of strategic environmental assessment;
- the most suitable body/agency to carry out EIA; and
- post-EIA monitoring and enforcement.

A brief report addressing these points is provided following an account of the EIA context in WA.

2. Context

The Western Australian *Environmental Protection Act* 1986 (hereafter *EPAct*) establishes the Environmental Protection Authority (EPA) and provisions for EIA of project level proposals 'likely, if implemented, to have a significant effect on the environment' (s37B(1) of *EPAct*) as well as for planning schemes (initiated in s48A of *EPAct*) and 'strategic proposals' (defined in s37B(2) of *EPAct*). While the *EPAct* outlines the essential components of EIA, specific detail on procedures to be followed are provided in separate Administrative Procedures prepared by the EPA (under s122 of *EPAct*). EIA currently occurs in WA in accordance with the: Environmental Impact Assessment (Part IV Division 1) Administrative Procedures 2002. *Government Gazette*, WA, No. 26 special, 8 February 2002, pp561-580 (hereafter *Admin Proc 2002)*.

Important roles in the EIA process are determined in the *EPAct* for the EPA, Appeals Convenor and Minister for Environment. The EPA comprises five members (a full-time Chairman and four part-time members) who meet once per fortnight. The day to day administrative tasks associated with EIA (as well as other functions of the EPA relating to policy development and activities such as state-of-environment-reporting) are carried out by staff within the Office of EPA (OEPA).

A number of reviews of EIA practices in WA have occurred in recent years, some of which are ongoing. Some of the reviews pertain to all 'project approvals processes' in WA, of which EIA is one, while others have been specific to the content and operation of the *EPAct*. Review documents and/or processes that have helped to inform this submission in some way are as follows:

- Government of Western Australia (2002), *Review of the Project Development Approvals System: Final Report*, Prepared by the Independent Review Committee. Available: http://www.dsd.wa.gov.au/documents/Keating_Review.pdf [accessed 12 May 2010].

- Auditor General for Western Australia (2008) *Auditor General's Report: Improving Resource Project Approvals*, Report 5, October 2008, http://www.audit.wa.gov.au/reports/pdfreports/report2008_05.pdf [accessed 12 May 2010].

- Government of Western Australia Industry Working Group Report (2009) *Review of the Approval Processes in Western Australia*, Prepared for the Minister of Mines and Petroleum. Available: http://www.dmp.wa.gov.au/documents/Review_of_Approval_

Processes_070809_WEB.pdf [accessed 12 May 2010].

- EPA's Review of EIA Processes – In March 2008, the EPA initiated a review of EIA processes in WA. One initiative was establishment of the Stakeholder Reference Group which continues to meet approximately quarterly each year. Reports of these meetings are available on the EPA website at: http://www.epa.wa.gov.au/eiareview.asp [accessed 12 May 2010]. So far, the EPA has formally reported on its EIA review process on one occasion as follows:
  EPA 2009, *Review of the EIA Process in WA*, EPA, Perth (March 2009), Available: http://www.epa.wa.gov.au/eiareview.asp asp [accessed 12 May 2010].

- Environmental Stakeholder Advisory Group – The Environmental Stakeholder Advisory Group was established by the Western Australian Minister for Environment in June 2009 to provide her with advice on specific environmental matters. It ceased operation in December 2009 following preparation of four reports regarding specific matters pertaining to the *EPAct* and/or EIA processes in WA. These reports are all available on the EPA website at: http://www.epa.wa.gov.au/ [accessed 12 May 2010]. In practice there was significant cross-over in the membership of the Environmental Stakeholder Advisory Group and the EPA's Stakeholder Reference Group and consequently there was a large degree of consistency and compatibility in the nature of the advice provided by both groups.

- In November 2009, the Minister for Environment introduced the *Approvals and Related Reforms (No. 1) (Environment) Bill 2009* (hereafter Environment Bill 2009) to Parliament (Available: http://www.austlii.edu.au/au/legis/wa/bill/aarr1b2009468/ [accessed 12 May 2010]). This Bill, which has not been enacted to date, proposes a number of changes that will affect EIA procedures, especially in relation to appeals.

- In April 2010 the Review Committee appointed within the Legislative Council produced the following report in relation to the Environment Bill 2009: *Thirty-Eighth Parliament, Report Forty Eight Standing Committee on Uniform Legislation and Statutes Review Approvals and Related Reforms (No. 1) (Environment) Bill 2009*, Presented by Hon Adele Farina MLC (hereafter Standing Committee Report on Environment Bill).

In April 2010 the EPA published *Final Draft EIA Administrative Procedures 2010* (hereafter *Draft Admin Proc 2010)* on their website (Available: http://www.epa.wa.gov.au/docs/3151_Draft AdministrativeProcedures2010%20_2_.pdf [accessed 12 May 2010]). The *Draft Admin Proc 2010* were developed as part of the EPA's Review of EIA Processes and accommodated the changes to the *EPAct* proposed by the Environment Bill 2009 with respect to providing an alternative mechanism for transparency and public input in light of anticipated loss of some appeal provisions.

3. Key strengths of EIA processes in WA

Internationally the EIA process in WA has been acclaimed as a comprehensive and effective system (e.g. Wood C. 1994 Lessons From Comparative Practice. *Built Environment* **20**: 322-344). The key strengths of the EIA process in WA arise from the following mutually reinforcing characteristics of the institutional and/or procedural arrangements:

- ***statutory independence of the EPA*** – Section 8 of the *EPAct* states that the EPA is not subject to the direction of the Minister of Environment.
- ***the role of the EPA is to provide advice to the Minister for Environment*** – While the EPA is responsible for a number of 'small' decisions during the EIA process concerning procedural matters, its key role is to provide advice to the Minister on ways to 'protect the environment and to prevent, control and abate pollution and environmental harm' in accordance with its objectives (s15 of *EPAct*). Responsibility for all of the 'big' decisions such as approval of development proposals and determination of appeals (i.e. political decisions involving trade-offs or matters of substance) rests with the Minister.

- ***the Ministerial approval conditions are legally binding*** – Having legally binding conditions of approval that will be subject to audit and compliance follow-up once proposals become operational is very important to give credibility to the EIA process both during and following approval decision-making. Furthermore the results of the EIA process provides the basis for decision-making by the Environment Minister. [In many EIA systems elsewhere in the world there is simply a requirement that the results of the EIA 'be taken into account' during decision-making (often itself the responsibility of a 'competent authority' or their minister, not an environmental authority) and outcomes often are not legally binding on proponents].
- ***the EIA process is open and transparent*** – There is full public disclosure of all information and decisions in the EIA process (with the exception of commercially sensitive matters).
- ***public consultation provisions*** – There is a clear expectation and requirement for proponents to consult with affected stakeholders and for all proponent documents (scoping documents; environmental impact statements) to be subjected to public review (e.g. *Admin Proc 2002* sections 2, 2.1, 7 and 8). Thus there is accountability for the undertakings of proponents in the system.
- ***third party appeal mechanisms*** – Any person who disagrees with a decision of the EPA (e.g. level of assessment) or with the advice and recommendations of the EPA to the Minister (e.g. recommended approval conditions) may lodge an appeal and have their concerns addressed by an independent Appeals Convenor. Thus there is accountability for the undertakings of the EPA in the system.
- ***third party referral of proposals for EIA*** – While other government agencies ('decision-making authorities') are required to refer proposals likely to have a significant effect on the environment to the EPA (s38 of *EPAct*), proponents are encouraged to refer their proposals, and any member of the public may refer proposals. Combined with the appeal mechanisms discussed previously, this ensures that there are no loopholes for evading EIA processes and enhances the credibility and accountability of the process. Thus all proposals likely to have a significant effect on the environment will be considered by the EPA.
- ***objectives of EIA for continuous environmental management and protection*** – The *Admin Proc 2002* (s2.1) establish five objectives for EIA in WA, three of which specifically relate to environmental management and protection. These are: (1) that proponents take primary responsibility for protection of the environment influenced by their proposals; (2) that best practicable management measures are implemented by proponents to meet environmental protection and sustainability objectives; and (3) that proponents implement continuous improvement in environmental performance in implementing their proposals. This environmental management philosophy is symbolically captured in the name of the oldest form of environmental impact statement document used in Western Australia: the Environmental Review and Management Programme.
- ***definition of EIA that covers the entire life-cycle of proposals*** – The definition of EIA employed in WA (*Admin Proc 2002* s1.3) applies equally to the commissioning, operation and decommissioning phases of a proposal in addition to the initial concept and planning phases. In contrast many EIA definitions used in other parts of the world only relate to events leading up to the approval decision-making step. The WA definition also strongly endorses the environmental management emphasis outlined in the Objectives of EIA discussed previously.

In my experiences with EIA systems elsewhere in Australia and around the world I have never encountered another a system that contains all of the above ingredients simultaneously. I am of the view that all are necessary for a truly effective EIA system – they are mutually reinforcing.

A further strength of the EIA system in WA relates to ***the flexible and discretionary nature of the process***. The *EPAct* establishes the essential or core elements for an EIA system. These are: legal definition of 'environment'; roles of the EPA, Appeals Convenor and Minister; decision-making specifications (including timelines) concerning whether EIA is needed, level of assessment and approval of proposals; and a role for the public and third parties. The *EPAct* is not overly

prescriptive and accounts for several different EIA processes (i.e. for project proposals, for planning schemes and for strategic proposals) in around 50 pages. [In comparison the EIA legislation in California (2009 *California Environmental Quality Act* (CEQA) Statute and Guidelines) is highly prescriptive for each individual step in the EIA process and runs to over 300 pages (of dense single-spaced text, unlike the well-spaced style of Australian legislation)]. The trigger for EIA in WA is discretionary and environment-centred (based on determining whether a proposal is likely to have a significant effect on the environment) and is conducted on a project-by-project basis rather. Experience overseas where a prescribed list of development types that require assessment is utilised typically encounter problems either with too many or too few proposals being assessed. Additionally, the EPA in WA is able to determine the level of assessment, including requirements for scoping and public review, according to the scale or significance of the environmental issues arising from a given proposal on a case-by-case basis.

The operation of the EPA has also been integral to contributing to a successful EIA process in WA. Firstly there has always been ***a scientific/technical basis to the work of the EPA*** – from its inception in 1971, the EPA has utilised a scientific approach to its work to ensure that its advice to the Minister is as technically sound as available information or knowledge permits. Secondly the ***EPA engages in all EIAs carried out*** in WA thereby maximising learning from experience opportunities. In other parts of the world where EIA is the responsibility of a 'competent authority' (or Action Minister as was the case under the EIA system established in the Commonwealth's former *Environment Protection (Impact of Proposals) Act* 1974) experience with conducting EIA is infrequent or limited for any one responsible government agency leading to inconsistencies between assessments carried out by different agencies and missing out on important learning opportunities. The scientific/technical basis for EIA in WA and long-term involvement of the EPA has ensured integrity in the advice provided by the EPA to the Minister. It has also enabled the EPA to develop supporting useful policy and guidance to guide and direct practice (e.g. Waldeck, S., A. Morrison-Saunders and D. Annandale (2003). Effectiveness of Non-legal EIA Guidance from the Perspective of Consultants in Western Australia, *Impact Assessment and Project Appraisal* **21**(3), 251-256).

Generally speaking the EPA is well-respected by both industry and non-government (conservation group) stakeholders alike. This became apparent in the internal workings of both the EPA's Stakeholder Reference Group and the Minister's Environmental Stakeholder Advisory Group with consensus being reached by industry and conservation representatives for most aspects of EIA debated as part of the review processes. Furthermore it is worthwhile noting that obtaining a recommendation of approval from the EPA for a development proposal is good for a proponent's business; often there is an immediate jump in company share value following publication of an EPA assessment report and it can be an essential step to reach before a proponent can raise finance for a business venture.

4. Reforms to the WA EIA Framework

The Environment Bill 2009 proposes a number of reforms to the WA EIA framework, all of which are intended to improve process efficiency. These are discussed in Section 5 of this submission.

The EPA (March 2009) report on 'Review of the EIA Process in WA' identified a number of areas for reform including:

- a need to improve scoping;
- simplifying the number of levels of assessment available;
- improving treatment of cumulative impacts;
- increasing the use of strategic assessments;
- adopting outcome-based EIA approval conditions;
- moving towards a risk-based approach to EIA; and
- a need to set target timelines for key steps in the EIA process in order to improve process efficiency.

Several of these have been subsequently addressed through provision of Environmental Assessment Guidance documents or Environmental Protection Bulletins published by the EPA as well as being treated differently in the *Draft Admin Proc 2010* relative to the current *Admin Proc 2002*. A brief commentary on each follows.

Currently scoping is the responsibility of proponents (note: this was a change instigated in 2002; prior to that the EPA issued scoping guidelines to proponents). This change did not lead to process efficiencies as expected, but rather the reverse with scoping documents well in excess of 100 pages frequently now being produced. In the *Draft Admin Proc 2010*, the EPA will determine on a case-by-case basis whether it will be the EPA or proponent that will be responsible for scoping and whether or not a scoping document prepared by the proponent warrants a public review period. The Stakeholder Reference Group informing the EPA's review of EIA processes, as well as recent trials with using a risk-based approach to EIA, determined that there was great value in holding a 'round-table' type discussion with relevant stakeholders at the scoping stage (e.g. not dissimilar to the Victorian model in use currently).

As outlined in the *Draft Admin Proc 2010*, the EPA intends to move to having just two levels of formal assessment in EIA, and these will align more closely with the equivalent arrangements in the Commonwealth *EPBC Act* 1999.

Cumulative impacts are given greater emphasis, including an internationally recognised definition of the concept, in the *Draft Admin Proc 2010*.

The move towards greater use of strategic environmental assessment is addressed in Section 6 of this submission.

The move towards outcome-based conditions was already underway when the EPA commenced its review of EIA processes in WA in 2008. It has now become an entrenched custom in EIA and the EPA has published an Environmental Assessment Guidance (No. 4) on this matter. The move to outcome-based conditions has increased the utility of audit and compliance follow-up and environmental performance accountability for proposals during implementation.

In EPA (2009) a strong preference for adopting a risk-based approach to EIA was expressed. Since then, two large resource development proposals have trialed such an approach and participants involved (proponents and others) have provided feedback to the EPA. While the trial risk-based approaches to EIA (especially at the scoping stage) have been found to very useful in terms of identifying and prioritising environmental issues for attention during EIA, the process is time consuming, and has not delivered efficiency improvements which was a core objective of the EPA's review of EIA processes in WA. Consequently, as outlined in recent Environmental Protection Bulletins (No. 7 and 9) published by the EPA in late 2009, it is now intended only to adopt a risk-based approach for certain types of projects and where the proponent already has experience or is comfortable with use of this approach.

The matter of process efficiency and timelines for EIA is addressed in the following section of this submission along with proposed reforms set out in the Environment Bill 2009.

5. Timeliness and efficiency of EIA

In recent years there have been numerous reviews of EIA processes instigated in Australia (e.g. WA, Victoria, Northern Territory, federal level) and elsewhere in the world (e.g. South Africa, Canada). Common to all of these reviews has been a focus on *efficiency* or the time that EIA processes take. Disappointingly few of these reviews have considered the *effectiveness* of EIA processes at delivering environmental or sustainability outcomes. An EIA process that might take months or even years to complete in order that all stakeholders are engaged adequately and to ensure that high quality information sources inform the process, and which leads to sustainable development is preferable to a process that fast-tracks development at the expense of

environmental or social capital. Ultimately the measure of success of EIA relates to performance outcomes not the speed or efficiency of the process in reaching an approval decision.

In Western Australia, for many years now the EPA has kept a record of the time each step in the EIA process has taken and this information has been published in their report to the Minister for each proposal assessed. In the EPA's *Annual Report 2008-2009* (available: http://www.epa.wa.gov.au/docs/3032_0809EPAAnnualReport7909.pdf [accessed 13 May 2010]) they provided the following commentary regarding 'Timelines for Environmental Impact Assessment of Proposals' (p23):

> Improving the timeliness of the assessment of proposals has been a major thrust of recent governments. It is also an area where the EPA has been and will continue to be responsive. This is one of the key issues considered in the EPA's Review of the Environmental Impact Assessment Process in Western Australia and will be further addressed in the revised Administrative Procedures for environmental impact assessment that are being drafted.
>
> ... the total time taken for assessments of projects involving public review has reduced in 2008-09. While much is made about the total time taken from the beginning to the end of the EPA's environmental impact assessment process, it needs to be acknowledged that most of the time is taken by proponents and is not subject to timing control by the EPA. As part of all assessments being undertaken by the EPA, an agreed timeline for the assessment is prepared by the proponent as part of the scoping of the assessment.
>
> A review of recently completed assessments indicates that most proponents take longer than they anticipated to have an EPA agreed environmental scoping document and to prepare their environmental review document. These delays have implications on the ability of the EPA and its Service Unit to progress the assessment.

The findings of the EPA are supported by other reviews of EIA practice in Western Australia. For example the Auditor General's 2008 report on *Improving Resource Project Approvals* (p9) found that:

> that DEC [Dept of Environment & Conservation; now Office of EPA] has maintained its performance on timelines for its management of the EPA's environmental impact assessment process.

With respect to the time taken to resolve appeals in the Western Australian EIA process the Standing Committee Report on Environment Bill reported that:

> Delay in environmental impact assessment arises not only from poor proponent documentation ... but also proponent delay in ... responding to an appeal. Provision of information can be an area of proponent delay. The Office of the Appeals Convenor also advised that delay can result from a proponent not being certain whether it wishes to proceed with an appeal or the proposal. The Office of the Appeals Convenor advised that proponent delay could be significantly more than 50% of the time taken to resolve an appeal. The evidence as to State elections, and requirement for Ministerial consultation, causing delay is recited in the quotes above (p134).

In concluding this section of their report, in Finding 19 of Standing Committee Report on Environment Bill was that:

> The Committee finds that, on the evidence made available to it, at least 50% of the time taken to resolve appeals under Part IV of the EP Act is due to proponent delay (p136).

The Standing Committee did not attempt to quantify the time taken by the Environment Minister in making decisions on appeals.

In March 2010 the EPA published *Draft Environmental Assessment Guidelines* (EAG) *No. 6 Timelines for EIA of Proposals* (available: http://www.epa.wa.gov.au/docs/3150_Draft_EAG6_TimelinesforEIAofProposals_2.pdf [accessed 13 May 2010] which addresses the responsibilities of the EPA and proponents for achieving timely and effective assessment of proposals. EAG No.6 sets out the steps in the EIA process with target timelines for the EPA's steps, the process for establishing proposal-specific timelines, the EPA's expectations in relation to information submitted by proponents, the process undertaken by the EPA to review this information and the process for preparing an EPA Report (EPA 2010, p1). The overall objective of EAG No. 6 is to 'enhance the efficiency, certainty and clarity of the EIA process by identifying the steps and target timelines for the assessment of proposals, the responsibilities of the proponent in submitting information during the assessment, and the responsibilities of the OEPA in reviewing the information submitted' (EPA

2010, p2). EAG No. 6 is meant to be read in conjunction with the *Draft Admin Proc 2010*. While timelines for some steps in the assessment process are specified in the *EPAct*, Schedule 2 of the *Draft Admin Proc 2010* and Section 4.2 of EAG No. 6 advocate agreement on timelines between the EPA and proponent at the beginning of the assessment process (e.g. scoping stage for Public Environmental Review assessments) which will be unique to each proposal and should be updated as required during the subsequent assessment process.

When presenting the Environment Bill 2009 bill to Parliament, the Environment Minister made the following statements in her Second Reading Speech [Extract from Hansard, Council - Thursday, 19 November 2009, p9406b-9408a, Hon Donna Faragher]:

> The approvals system has created uncertainty and delays. We have begun to address these issues through the establishment of a high-level task force that is currently reviewing the approvals system. By reviewing and streamlining approvals, the government is ensuring that resource development in WA occurs in a more efficient and sustainable manner, while not reducing the rigour of environmental impact assessment and regulation. Indeed, our approach is to implement a system that ensures timeliness and certainty, as well as meeting proper environmental, heritage and other legislative requirements. The Liberal-National government pledged to strengthen and streamline the approvals system.
> ...
> The Approvals and Related Reforms (No. 1) (Environment) Bill 2009 amends the Environmental Protection Act 1986. The amendments within this bill relate to streamlining of both appeal provisions and decision-making processes under other legislation while the Environmental Protection Authority is assessing a proposal.
> ...
> The bill deletes section 100(1)(b) to preclude appeals on the level of assessment when the Environmental Protection Authority has decided to assess a proposal. The Environmental Protection Authority is reducing the number of assessment levels from five to two. Third parties can make submissions on the public environmental review document and have appeal rights against the report and recommendations of the Environmental Protection Authority. It is also my expectation that the EPA will provide for the publication of referral information and the opportunity for public comment on the level of assessment in its revised administration procedures, as well as providing the outcome of its decision to ensure that transparency and accountability are retained.
> ...
> A proposal can be declared a derived proposal of a strategic proposal that has been assessed by the Environmental Protection Authority under certain conditions. ... It is proposed to remove the right of appeal on the declaration by the Environmental Protection Authority that a proposal is a derived proposal. This is intended to streamline the administrative process for declaring a proposal to be a derived proposal and encourage greater use of strategic assessments. Strategic proposals are subject to the same appeal rights as other proposals, and the notice declaring a proposal to be a derived proposal must be published. The EPA's administrative procedures will state that the reasons for the declaration are to be included in the published notice. These measures should safeguard expectations for accountability and transparency.

As foreshadowed in the Minister's second reading speech, in the *Draft Admin Proc 2010* the EPA included a mechanism to replace the proposed loss of level of assessment appeals in the WA EIA process as follows (s6.1):

> The EPA will publish information on each proposal that it accepts as a referral on its website (www.epa.wa.gov.au). The EPA will provide a 7-day public comment period on each referred proposal, before it proceeds to make a decision on whether or not to assess the proposal, and if so the level of assessment.

It should be noted that the *EPAct* grants the EPA 28 days to make a decision on the level of assessment of referred proposals; the 7-day public comment period cuts in to the EPA's available time for making this decision, plus adds additional material for them to consider in making it.

The Standing Committee Report on Environment Bill contains a lengthy discussion of the proposed reforms to the appeals mechanisms in the *EPAct*. The key findings are as follows:

> In summary, the practical effect of clause 5(1) of the Environmental Protection Bill 2009 is to remove from the *Environmental Protection Act* 1986 provision of a right for the public to review critical decisions of the Environmental Protection Authority made prior to the Environmental Protection Authority issuing its report and recommendations. Instead of this legislative right, the Executive suggests reliance on EPA administrative procedures which, it is proposed, will allow for limited

> opportunity for public comment on the referral of a proposal or scheme. The proposed period for public comment will be prior to the Environmental Protection Authority's decision on whether to assess a proposal or scheme. The Committee has concerns at this transfer of public participation from the legislative (Parliamentary) to the administrative (Executive) realm (pi).
>
> The Committee also has concerns with deletion of the right to review critical Environmental Protection Authority decisions, which constitute an important 'check and balance' in respect of the exercise of administrative power (pi).
> ...
> The Committee is of the view that provision of early opportunity for public comment has the potential, as the Executive says, to result in a more efficient and streamlined assessment process in respect of some proposals through earlier identification and resolution of issues with consequent reduction in resort to appeal (pii).
>
> However, the Committee has found that the practical effect of enactment of clause 5(1) of the Environmental Protection Bill 2009 may simply be to transfer challenge of the Environmental Protection Authority decisions to avenues such as: the appeal on the Environmental Protection Authority report and recommendations (which occurs later in the process); use of section 43 of the *Environmental Protection Act* 1986 to make submissions for intervention by the Minister for Environment; or appeals to the courts, which may result in greater uncertainty, lengthier approval times and more cost (pii).
>
> The evidence presented to the Committee, and submissions of community stakeholders, raise serious questions as to whether the practical effect of enactment of clause 5(1) of the Environmental Protection Bill 2009 will be an unintended reduction in the rigour and transparency of environmental impact assessment under the *Environmental Protection Act* 1986 (pii).

As indicated in Section 3 of this submission, my personal view is that the current third party appeal mechanisms provided for in the *EPAct* are a key strength of the EIA process in WA. The future of the appeals system is currently under review and just how the Government of Western Australia intends to proceed remains to be seen.

6. The Role of Strategic Environmental Assessment (SEA)

In conceptual terms a SEA occurs at a 'higher' level than project level EIA and thus it might be applied to programmes, plans or policies. It can be characterised as (Noble B 2000 Strategic Environmental Assessment: What Is It? and What Makes It Strategic?, *Journal of Environmental Assessment Policy and Management*, **2**(2): 203-224):

- having a focus on strategy ('the art of the general');
- having an identified overall vision or set of goals for the proposed activity (which enables pursuit of the *most desirable* impacts not just assessing the *likely* impacts);
- considering alternatives (that are selected to meet the desired endpoint and ideally set 'in the context of a broader environmental vision, such as sustainable development');
- addressing objectives, targets, criteria and indicators established in the context of the overall vision;
- adopting a proactive approach (that 'acts in anticipation of future problems, needs or challenges' and 'seeks the preferred option among a variety of alternative options to reach the most desired end'); and
- being broad-brush and non-technical in nature (i.e. it is 'not project-specific, the focus is on identifying alternative options and opportunities for regions and sectors rather than on identifying the potential outcomes of options to a predetermined alternative').

With respect to the practice of assessment, there is not really any difference in the sorts of activities undertaken for SEA relative to EIA (e.g. there is still a need for referral, scoping, document preparation, public review, evaluation, approval decision, condition setting and audit activities). However, it does offer a more strategic way of thinking about development and in particular the consideration and evaluation of alternatives.

This is best illustrated by thinking in terms of the 'decision question' being posed in an environmental assessment (Morrison-Saunders, A. and R. Therivel (2006) Sustainability Integration and Assessment, *Journal of Environmental Assessment, Planning and Management*, **8**(3): 281-298). A traditional project level EIA (i.e. the process most often employed under the *EPAct*) asks the question: Is proposal X environmentally acceptable at site Y? (e.g. as for a new mining proposal). SEA enables more strategic questions to be asked such as: What should the future of area Z be? (e.g. as for a new regional land-use plan). Undertaking SEA enables many environmental problems to be avoided altogether through good planning and design (i.e. optimising performance) rather than relying on mitigation measures to bring performance up to minimum levels of acceptability. The emerging practice of 'sustainability assessment' similarly promotes higher level thinking and action.

From a legal perspective, a key defining characteristic of a strategic assessment concerns the mechanism for implementing approval conditions. With project level EIA, the proponent is directly responsible for proposal implementation, whereas an SEA is more likely to establish a framework or criteria for the development of subject projects or approvals. For example, the 'proponent' of a land-use plan most likely will not be the same agent that carries out the subsequent subdivision and development activity. Therefore SEA procedures need to be constructed so as to enable implementation conditions to be set and served upon other parties in the future.

With respect to the environmental assessment of planning schemes in Western Australia (triggered by s48A of the *EPAct*), this mechanism has been in place for many years now and appears to be working effectively on the whole. Environmental conditions are incorporated into the text of planning schemes administered by the responsible planning authorities and thereby brought to bear on the activities of individual land owners and developers.

With respect to the environmental assessment of 'strategic proposals' (as defined in s37B of the *EPAct*; inserted by the most recent amendments to the Act in 2003) experience so far has been limited. Unlike other formal EIA processes in WA, the strategic assessment process is a voluntary one and can only be initiated by the proponent. It states in s38(3) of the *EPAct*, that 'the proponent of a strategic proposal may refer the proposal' to the EPA. An incentive for proponents to voluntary submit to a strategic assessment is that a 'derived proposal' (i.e. pertaining to an already assessed strategic proposal) may not require project level EIA under the s38 process (i.e. a similar mechanism for avoiding the need to assess development proposals that conform with an assessed scheme in the s48A process under the *EPAct* and to that established in s146 of the *EPBC Act* 1999 for the federal EIA system).

The SEA mechanism for the assessment of strategic proposals is strongly promoted by the EPA (e.g. March 2009 report on review of EIA processes and 2008-2009 Annual Report) and by the Environment Minister (e.g. Second Reading Speech on Environment Bill 2009) alike. It is seen to provide a mechanism for better dealing with cumulative impacts, regional scale issues and consideration of alternatives relative to project-level EIA as well as to expedite development at the individual project level by avoiding the need for EIA of individual projects.

For all intents and purposes a normal EIA process would be followed for a strategic proposal. What is most important (arising from s40B of the *EPAct*) is that the Ministerial Statement of approval (issued under s45(5) of the *EPAct*) can effectively be put on hold into the future until the proponent is ready to proceed with a specific development proposal. If the development proposal can be classified as a 'derived proposal', then the Ministerial Statement of approval can immediately be brought into effect. In the only completed assessment of a strategic proposal to date (for the Smiths Beach Development Guide Plan – see EPA Report No. 1318) a 10 year time period was granted for commencement of derived proposals under this assessment, whereas for project EIA a five year approval only applies.

Thus the key purpose and advantage of the process for environmental assessment of strategic proposals is to influence proponent decision-making at an early stage of proposal planning whilst at the same time expediting the approval process at the development stage. In short, a formal

assessment of strategic proposals is entered into voluntarily by a proponent, but it leads to binding conditions that would apply to derived proposals served on the relevant proponent of that development project and would be audited by the EPA.

A key challenge with this approach to SEA arises in relation to the ability to set legally binding conditions on a strategic proposal that will not require project-level EIA later on. A project level EIA in Western Australia is normally informed by a detailed environmental assessment enabling outcome-based approval conditions to be determined. It is not yet clear whether sufficiently detailed assessments can or will occur at a strategic level that will generate appropriately detailed conditions.

A second challenge relates to the proponent of a strategic assessment. In most cases it would appear that government will have to take a leading role here, especially in relation to regional planning activities. Whether or not governments are prepared to finance the necessary studies remains to be seen, especially where the suite of private proponents that might subsequently develop the derived projects are not known. In the case of the Browse LNG Precinct strategic assessment currently underway in WA, the proponent for the SEA is the Department of Resource Development and while Woodside has been identified as the lead company to operate at the industrial hub site, other future proponents have not yet been identified. It is not clear how environmental capacity (e.g. for emissions into the air shed) provided for in approval conditions for the SEA might be allocated to existing and future proponents at the site.

7. The most suitable agency to carry out EIA

As indicated in Section 3, I consider the EPA to be the most suitable agency for carrying out EIA in Western Australia. However, this viewpoint is based upon the fact that EIA in WA is predominantly focused upon managing the biophysical components of the environment (i.e. as per the definition of 'environment' provided in s3 of the *EPAct*). If EIA is taken to be a process for environmental advocacy in government decision-making, then vesting the process with an EPA (or equivalent) agency is appropriate. If, however, there is desire to implement a 'sustainability assessment' process rather than an 'EIA' process, then another type of agency (or combination of agencies) may be warranted.

An issue arising here concerns the extent to which existing EIA processes can be considered to support sustainability goals or outcomes. With respect to the *EPAct*, this concerns the role assigned to the EPA (i.e. to consider and report on relevant environmental factors - s44(2) of the *EPAct*), the underlying definition of 'environment' (s3 of the *EPAct*) and the application of the sustainability principles outlined in the 'Object and Principles' of the Act (s4A of the *EPAct*). Arguably a full sustainability assessment could be undertaken on the basis of the existing provisions of the *EPAct*, but this is not undertaken in practice.

The definition of 'environment' in EIA is relatively clear, but the meaning of 'sustainability' in a sustainability assessment is a contested concept. The process of deliberation over the meaning of this term and how an assessment process can deliver sustainable outcomes for the given activity or issue may significantly shape the nature or design of the proposal. It may also lead to thinking about different issues altogether as the concept of sustainability clearly extends far beyond the scope of the activities of a single proponent to include considerations such as inter- and intra-generational equity. Instead of focusing only on the acceptability of a given development proposal, sustainability assessment invites higher level engagement with alternatives. Posing an open decision question such as 'What is the best way to...?' or 'What is the most sustainable way to...?' as opposed to the narrow approach typically associated with project level EIA of 'Is this proposal acceptable?' provides the opportunity to come up with development alternatives that avoid problems altogether.

This more holistic approach to assessment also enables a more integrated approach to be taken with respect to recognising that socio-economic issues are intrinsically bound up with biophysical

ones. Often mutual benefits can be delivered – which EIA as practiced in WA is not able to address at present.

As is the case for best practice EIA, it is important that the commitment to achieving the best outcome is sincere. In other words, there needs to be a genuine commitment to sustainability. A process that avoids or minimises trade-offs between environmental, social and economic aspects is needed. Any such process must be transparent and preferably have established 'rules' for dealing with any trade-offs that arise (e.g. the model provided by Gibson, R, S. Hassan, S. Holtz, J. Tansey & G. Whitelaw (2005), *Sustainability Assessment Criteria, Processes and Applications*, Earthscan Publications Ltd, London is useful here). By way of comparison, in existing EIA decision-making any such trade-offs occur at the point of Ministerial approval which occurs 'behind closed doors' and is not subject to public involvement or third party appeals. A sustainability assessment process which actively embraces social and economic issues along with the environmental issues enables any trade-offs to be deliberated by the public and for decisions to be made in a more transparent way. To implement such a process would require an agency with a broader ambit than of the current EPA in WA (or combination of agencies with appropriate representation of environmental, economic and social aspects working collaboratively together). Some suggestions for how this might work effectively for WA were put forward in: Jenkins, B., D. Annandale and A. Morrison-Saunders (2003). The Evolution of a Sustainability Assessment Strategy for Western Australia. *Environmental Planning and Law Journal*, **20**(1), 56-65.

8 Post-EIA Monitoring and Enforcement

Having in place an appropriate agency responsible for carrying out post-EIA monitoring and enforcement is obviously important. However, it is unlikely that there would ever be sufficient government resources available to ensure that such an agency could comprehensively carry out audit and follow-up studies. At the same time, there is a danger of giving too much attention to monitoring and enforcement elements at the expense of other aspects of an effective EIA process.

Before considering the role of post EIA monitoring and enforcement, it is worthwhile considering the following questions:

- How does EIA protect the environment?; and
- When does this occur?

In Western Australian EIA practice, each year the EPA formally assesses around 40 project proposals. For example, the EPA's *Annual Report 2008-2009* (p21) reveals that 38 proposals were formally assessed in that financial year and that this figure was similar to the 2006-07 year but less than the 2007-08 year. What is perhaps more interesting to realise is that a total of 457 development proposals and planning schemes were referred to the EPA in 2008-09. For 174 of these, the EPA determined that formal assessment was not required but specific advice was provided to proponents and approval agencies (primarily in relation to planning schemes). Similar results are presented in previous EPA annual reports. These informal assessment hardly attract any attention relative to the 40 or so formal assessments conducted each year, and yet cumulatively they represent a significant potential environmental protection outcome of EIA practice in WA. There is no post-EIA monitoring of enforcement of these informal assessments. However, discussions with staff in the Office of EPA who deal with planning schemes suggests that they are satisfied that their environmental management suggestions are addressed. This judgment is based on their ongoing relationships with staff in the relevant planning agencies and knowledge of the planning scheme texts produced (i.e. which usually accommodate the informal assessment comments of the EPA within them).

In a similar vein, the informal strategic assessment process utilised by the EPA in WA with its s16 (of EPAct) functions is a type of EIA that ends with the publication of the EPA's advice. There are no appeals against the EPA report and no conditions of approval established. Entry into a 's16 assessment' is voluntary by both proponents and the EPA. Its ongoing popularity with both stakeholders (e.g. 11 were conducted between 2006 and 2009) points to a clear perceived

environmental benefit, but there is no monitoring or audit follow-up element to this type of assessment. It also points to the role of collaboration between stakeholders involved in EIA. A lot of important outcomes are achieved simply through maintaining healthy working relationships (e.g. Morrison-Saunders A and M Bailey (2009) Appraising the Role of Relationships Between Regulators and Consultants for Effective EIA, *Environmental Impact Assessment Review*, **29**(5): 284-294, Available: http://dx.doi.org/10.1016/j.eiar.2009.01.006); undue attention to the legal aspects of EIA may jeopardise these relationships (i.e. generating adversity rather than collaboration and cooperation).

Aside from informal application of EIA in WA, it has been said that: 'The greatest contribution of EIA may well be in reducing adverse impacts before proposals reach the decision-making stage' (Wathern 1988 An Introductory Guide To EIA In: Wathern, P. (ed) *Environmental Impact Assessment: Theory and Practice*, Unwin Hyman, London, p6). Simply having a formal EIA process in place, especially one that leads to legally binding conditions of approval, influences proponent behaviour and the design of development proposals for the benefit or advancement of environmental protection.

Notwithstanding the some kind of EIA follow-up is essential to enable learning from experience to occur (e.g. Morrison-Saunders, A. and J. Arts (eds) *Assessing Impact: Handbook of EIA and SEA Follow-up*, Earthscan James & James, London) the effectiveness and utility of an EIA process arises from many aspects of practice. It is important to ensure that all aspects of EIA that contribute to environmental protection outcomes are recognised and resourced as appropriate.

Returning to the question of what is important for an effective EIA process in relation specifically to post-EIA monitoring or enforcement undertakings, the following aspects are highlighted:

- having an EIA system that emphasises ongoing and continuously improving environmental management performance (e.g. as outlined in Section 3). This must be the responsibility of the proponent along with appropriate requirements for reporting of monitoring and performance evaluation to the EPA (or other regulators) and which is publicly disclosed;
- locating regulator staff responsible for audit and compliance functions in the same administrative unit overall as those responsible for assessment and evaluation of EIA proposals. This enables lessons learned to be fed back to the EIA regulators, thereby improving EIA processes over time. Feedback may be immediate and specific to fellow staff undertaking assessments (e.g. understanding which types of environmental conditions are effective or not with respect to specific wording or application) or more general in the form of inputs to EIA guidance and policy that benefits all stakeholders in the process (e.g. such as the EIA guidance documents published by the EPA);
- having outcome-based approval conditions that specify a clear and unambiguous performance outcome that proponents are required to deliver and demonstrate; and
- having legally binding approval conditions backed up with suitable penalties (e.g. fines and making non-compliance a criminal offence).

Clearly an agency unit responsible for post-EIA monitoring and enforcement must be adequately resourced for its task, including ability to undertake field visits to implemented proposals.

I hope that this submission is helpful for the purposes of the Inquiry. I will be happy to provide any further explanations or information regarding matters raised on request.

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