

EDO Briefing Paper

Environmental Impact Assessment in Victoria

Understanding the recommendations of the Environment and Natural Resources Committee

The Environment and Natural Resources Committee (ENRC)—a Victorian Parliament Committee—has released its recommendations for reform of the Environment Effects Statement Process in Victoria.

The laws governing assessment of environmental impacts of projects are a key component in the system to protect the Victorian environment. The Environment Defenders Office (Victoria) Ltd (**EDO**) has prepared this briefing paper to help you understand the recommendations of ENRC, and if these recommendations are adopted by the government, what this might mean for Environmental Impact Assessment (**EIA**) in Victoria in the future.

The EDO previously published a briefing note summarising EDO's views on the current scheme for EIA in Victoria under the *Environmental Effects Act 1978 (EE Act)*, which is available on the [EDO website](#)¹.

What is the current EES process?

The EE Act is a 16-page framework Act which sets out the basic requirements for EIA in Victoria. It contains very little detail of how and when an EIA is to be carried out. That detail is instead provided in the *Ministerial Guidelines for Assessing Environmental Effects*², which are made under section 10 of the EE Act.

The EE Act applies to public and other works which could reasonably be considered to have, or be capable of having, a significant effect upon the environment. 'Public works' are projects and developments that the Minister for Planning (the Minister) declares to be 'public works' for the purposes of the EE Act.

An assessment under the EE Act is at the discretion of the Minister and therefore there are no designated classes of development for which an Environment Effects Statement (**EES**) is mandatory and no clear trigger for when an assessment is required. The EE Act contains no objectives to guide the Minister in deciding which developments will require an EES.

1 http://www.edovic.org.au/downloads/law_reform/edo_vic_eia_victoria.pdf

2 The guidelines can be viewed at [http://www.dse.vic.gov.au/CA256F310024B628/0/6243C40E42C9449DCA25719C001D2DF4/\\$File/DSE097_EES_FA.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/6243C40E42C9449DCA25719C001D2DF4/$File/DSE097_EES_FA.pdf)

If the Minister decides that an assessment is required, the proponent must prepare an EES which outlines the environmental impacts of the works. Other decision-makers cannot make a decision regarding the proposal until an EES is completed.

All other details of how an EIA is conducted are set out the Ministerial guidelines which are unenforceable and not binding.

The degree of discretion and flexibility provided to the Minister under the EE Act allows the government to ignore or alter procedures at will. This creates built-in uncertainty in the process and makes it possible for political interest to override environmental concerns.

Why was the process reviewed?

In July 2009 the Victorian Government instigated a Parliamentary inquiry into the EE Act. The Committee called for public submissions to be made, and was due to report to Parliament by 31 August 2010. Unfortunately the ENRC failed to table its report before the change of government in 2010, and the inquiry lapsed. The EDO and others requested that Planning Minister Matthew Guy release the report. Thankfully, on 4 May 2011 the Legislative Council passed a resolution requiring ENRC to revive the inquiry, utilising the evidence it previously gained, and report to the Parliament. This report was tabled in Parliament on Thursday 1 September 2011. Further information on ENRC, including the terms of reference of this inquiry, can be found on the [Parliament of Victoria website](http://www.parliament.vic.gov.au/enrc/inquiries/inquiry/303)³.

The EES process in Victoria was previously reviewed by a government-appointed inquiry in 2002, where it was identified that the process needed urgent reform. The recommendations of this panel—almost 10 years ago—was that the system was not working well and it proposed a number of areas for reform. The government failed to adopt the recommendations of the inquiry and the EES process continued to operate in a way that across the board was accepted to be ineffective and easily politicised. It is widely recognised that substantial reform of the EIA process in Victoria is many years—even decades—overdue.

What do the ENRC recommendations cover?

The ENRC report considers the submissions of over 55 stakeholders including industry, community, government departments and agencies, and environment groups. It contains very thorough analysis of the current system and strong recommendations for reform which are aimed at delivering more certainty and efficiency for all participants and better environmental outcomes.

The recommendations of ENRC can be grouped in to eight main ‘areas’ of regulation, which are:

- **the operating framework**—the governance and administration of the EIA framework in Victoria
- **the referral process**—how and when projects are referred to the Minister for decision on whether an EIA is required
- **‘levels’ of assessment**—when a project triggers the requirement for an EIA, to what extent it might be assessed
- **scoping and quality of the EIA documentation**—what might be required to be prepared by a proponent in the EIA documentation
- **public participation**—when in the process, and to what extent, the public can participate in the process
- **the Minister’s assessment**—the binding or otherwise nature of the Minister’s assessment
- **monitoring, auditing, enforcement and evaluation**—after completion of an EIA process, how the system will ensure that the outputs of the process will be obeyed by the proponent
- **strategic environmental assessment**—whether or not there is a role for assessment of policies, plans and programs in the EIA system, rather than just individual projects.

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³ <http://www.parliament.vic.gov.au/enrc/inquiries/inquiry/303>

What are the strengths of the ENRC recommendations?

Environmental protection should be the primary object of the EE Act

The Minister and all others involved in the administration of the EE Act must seek to further this primary objective in decisions made under the EE Act. This is a significant improvement on the current EE Act which does not contain objectives.

The environment and sustainability should be prioritised in decision-making

Ecologically sustainable development (**ESD**) should be the overarching principle underpinning decision-making under the EE Act and environmental matters should be considered first, before other considerations, in decisions under the EE Act. The Minister, when formulating his or her assessment, must balance conflicting objectives in favour of net community benefit and sustainable development. This would provide important guidance to the Minister not present in the current regime.

Third party rights relating to referrals should be improved

Any person should be able to refer a project to the Minister for decision on whether an EIA is required, not just the project proponent or a government authority. All referrals should be published on the Department of Planning and Community Development (**DPCD**) website, and the public should be able to make comment on these referrals. A decision that a project does not need to be assessed under the EE Act should be able to be appealed to the Victorian Civil and Administrative Tribunal (**VCAT**) by any person.

There should be a tiered approach to EIA assessment

This means that there would be three 'levels' of assessment that any given project could be considered under, depending on the complexity of the proposed project and how severely it might impact the environment. DPCD would be responsible for allocating the appropriate level of assessment, rather than the Minister. Any person that disagrees with the level of assessment allocated to a project should be able to appeal this decision to the VCAT. This means that large, high-impact projects would progress through a longer, more detailed assessment process, which is appropriate. Smaller projects (which are currently not assessed at all under the EES regime) will be looked at, but will be allocated a lower tier of assessment. This is an important recommendation for the efficiency and fairness of the system.

There should be community consultation on the scope of the EIA documentation

DPCD would prepare and release for public comment the proposed scoping requirements that the proponent must adhere to in its preparation of the EIA documentation.

DPCD should have the ability to seek its own expert assistance

DPCD would be given powers to seek its own scientific studies in addition to those provided by the proponent (when deemed necessary) and to appoint experts to peer review the EIA documentation provided by proponents. This will ensure thoroughness of assessment of all environmental impacts.

Public participation should be improved at each stage in the assessment process

The opportunities for participation by the public should be significantly improved for the referral, scoping, exhibition and inquiry panel stages of the EIA process, including improved access to information throughout these stages. Best practice guidelines should be developed relating to public participation through the process.

The Minister's final decision and conditions should have statutory force

The Minister should have the statutory power to make a determination on the environmental acceptability of projects under the legislation. This would mean that the Minister's decision will take the form of an 'approval' rather than an 'assessment'. Any conditions attached to the Minister's approval should be legally binding and subject to enforcement. This approach means that the Minister's decision at the outcome of the EIA process would be considered to be the primary decision on the environmental acceptability of a project, which represents a tangible outcome rather than merely advice to other statutory decision-makers (as it is currently).

An Office of the Environmental Monitor (**OEM**) should be established

There is the need for an independent body to undertake monitoring, compliance and enforcement activities for projects that have been through an EIA process. This body might be established by the Environment Protection Agency (**EPA**) and funded in part by project proponents. This is bringing the process in line with processes in other jurisdictions.

After the completion of the EIA, environmental impacts of a project must be monitored

This should include the random auditing of the proponent's monitoring programs by the OEM, and an assessment of whether the project is compliant or not. All monitoring information should be made available to the public on the internet. This is a significant improvement on the current system, which contains very little provision for the ongoing monitoring of a project once the formal EES process has been completed.

There should be penalties for non-compliance with the EE Act

For example, the legislation should include penalties for provision of false or misleading information in the EIA documentation, or for non-compliance with the EIA approval conditions set by the Minister in his or her decision.

Legislated timeframes should be included in the EE Act

All timeframes relating to the amendments above should be contained in legislation (rather than guidelines) and thus be binding on the Minister and the DPCD. This will result in improved certainty in the process for all participants.

Are there any other important changes proposed?

A shift of powers and functions from the Minister to DPCD

Overall the recommendations represent a shift in decision-making powers from the Minister to DPCD. If the recommendations are adopted:

- DPCD will determine whether an EIA process is required for a proposal
- DPCD will determine what level of assessment is appropriate
- DPCD will decide on the scoping requirements for an assessment
- DPCD will decide whether there will be an inquiry panel appointed to assess the project
- DPCD will establish and issue the terms of reference for an inquiry panel.

Provisions included in the EE Act to allow for strategic environmental assessment

This relates to the assessment of a policy, plan or program rather than a specific project. In general, the EDO supports the concept of strategic assessment, but does so with caution. EDO would be concerned if the approval of a policy or plan via a strategic assessment process acts in practice as a 'blanket approval' for a number of large, high impact projects ahead of time. The legislation should include a clear legal test for when strategic assessment is appropriate and there must be opportunities for public participation at clear stages throughout the process. It is also important that a SIA is very detailed and specific, and that there is monitoring and enforcement of any approval. EDO also advocated for a provision that the Minister can require a project under an SIA to get further approval if there is a significant change in circumstances since the SIA was made.

What is the overall effect of the ENRC recommendations?

The ENRC recommendations do not have any legal force. They will not come into force unless the government agrees to adopt them in principle, and then sets about drafting legislation to implement them. EDO is of the view that to implement the full suite of recommendations the whole system would need to be overhauled and a brand-new EE Act drafted.

What will happen now?

The government has six months to respond to the recommendations made by ENRC.

How can you get involved?

If, like the EDO, you think that the implementation of ENRC's recommendations will result in a more effective and robust EIA system in Victoria, improve participation rights for the community in the process, and better protect the environment—tell the State Government. Write to the Minister for Planning, Matthew Guy, and to your local Member of Parliament, and ask them to support the implementation of the ENRC recommendations.

If you would like to know more about measures you can take, you can contact us on the details below.

About the EDO

The EDO is a community legal centre specialising in public interest planning and environment law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest planning and environmental law.

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For any specific questions, seek legal advice.

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