

Submission on Draft Victorian Bilateral Agreement under the EPBC Act

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Submission on the Draft agreement between the Australian Government and the State of Victoria under section 45 of the *Environment Protection and Biodiversity Conservation Act* 1999 relating to Environmental Impact Assessment.

Summary

The scope and complexity of environmental impacts and the need to avoid long-term cumulative problems requires an integrated and holistic approach to their assessment. Accordingly, the proposed Victorian Bilateral Agreement pursuant to the *Environment Protection and Biodiversity Protection Act* 1999 (C'th) (EPBC) represents a positive move in this direction, if stringent standards for assessment and evaluation of projects having environmental impacts that impinge on matters of national environmental significance (MNES) can be maintained and strengthened. Further, there is a need to ensure that there is effective integration of Federal/State environmental governance in the area of environmental impact assessment in order to promote regulatory efficiencies and to avoid duplication. The Bilateral Agreement is an opportunity for both 'partners' to the agreement to set best practice benchmarks for EIA that can incorporate more strategic and technically sophisticated processes. Recent amendments to the 'cumulative impact' test under the EPBC Act place it in the forefront of measures designed to address long-term and broad-ranging impacts from increasingly interconnected environmental problems, such as climate change. The Victorian assessment process has adopted an increasingly transparent and scientifically-oriented process hinged upon technical reference panels; albeit without direct legislative incorporation of these policies in some instances (e.g. *Environmental Effects Act* 1978) Nonetheless, from an environmental perspective integration of referral, assessment and monitoring processes needs to be approached cautiously to ensure that integrity of EPBC Act requirements are maintained and to ensure that the independence of judgment regarding impacts on MNES is not compromised.

In light of the need to ensure the integrity and independence of environmental impact assessment and to facilitate greater scientific and technical strategic evaluation of projects, the following addresses some general points about previously identified problems with bilateral agreements before moving to the examine some perceived deficiencies with the Victorian legislation that may require attention. However as the draft agreement reiterates Victoria has developed an extensive planning and assessment framework and that matters

not falling within the 'controlled action' designation under the EPBC will continue to be assessed in this manner.

Ensuring bilateral agreements meet environmental protection objectives

Bilateral agreements:

The following sets out some points for consideration potential issues with Bilateral Agreements.

- State Governments historically have been the supporters and at times the proponents of many major projects with environmental impacts. In other instances projects may be, financially backed or funded by states. In these instances devolving assessment processes to state governments may jeopardise adequate, impartial assessment.
- Bilateral agreements should provide the opportunity to lift assessment standards and procedures to set a benchmark for best practice Environmental Impact Assessment. In practice it seems that many Bilateral Agreements simply 'rubber-stamp' existing state processes without requiring amendment of legislation; policy and practice to meet or ideally exceed Commonwealth standards.
- MNES are a Commonwealth responsibility under the terms of the Inter-Governmental Agreement on the Environment. This responsibility, in turn, reflects in many instances, the international obligations that Australia has entered into for environmental protection across a wide range of International Treaties and Conventions. Devolution of assessment to states without adequate safeguards to protect MNES can detract from this central responsibility of federal governments and potentially may constitute a breach of international obligations.
- It is imperative also that there is maintenance of an independent capacity in the Federal government/ Minister to have sufficient information deriving from an EIA process to be 'satisfied' as to the adequacy of state-based examination of impacts on controlling provisions (typically related to MNES). Recent case law, (*Blue Wedges Inc v Minister for the Environment I* (2008) 165 FCR 211) highlights the critical need for transparency and adequacy of information as the basis for the Federal Minister's decision-making. The draft bilateral indicates at clause 14 that Victoria may supply additional socio-economic information. The selective nature of the obligation based on state government perception of 'relevance' may be a cause for concern. Notwithstanding that socio-economic information (and other data) may be sensitive, if a proper weighting of factors is to occur in terms of an approval decision then it is critical that the most complete information available is used to inform federal decision-making particularly with respect to considerations outlined in s 136 EPBC Act. Arguably also, it highlights the need for independent review including consultation and the opportunity for clarification (see Bilateral Draft Agreement clause 15) of that information;

bearing in mind the capacity of the Federal Minister to request further information under s132 EPBC Act.

'Accrediting Victorian EIA'

The substantive components of the draft bilateral agreement centre upon accrediting various modes of EIA that exist under Victorian legislation, as identified in Schedule 1 to the draft agreement, for the purposes of assessment under Part 8 EPBC Act. Given such accreditation, it is critical that such an accreditation does not diminish the ecologically sustainable development principles under which protection is afforded to the environment under the EPBC Act. Accordingly the following raises some issues about assessment and monitoring processes.

The *Environmental Effects Act 1978* (Vic)

The *Environmental Effects Act 1978* (EEA) was one of the first pieces of EIA legislation to be introduced into Australia. Although innovative at the time, the legislation now has many features which mark it as a product of its time.

In particular, the legislation is marked by high levels of Ministerial discretion with respect to 'triggering' of the need for an EES – it tends to be used for large projects that the State wishes to promote. Further, Administrative Guidelines determine the scope and character of assessment under the EEA. While assessment is required under Part 8 EPBC Act for controlled actions, it does leave a question about whether some proposals may 'slip through the net' if assessment is left to a discretionary 'trigger' process and where administrative guidelines as opposed to mandatory criteria set the need and scope for assessment. Alternatively, it is assumed that the 'default' in such a situation remains assessment of controlled actions as per Part 8 EPBC Act, but this aspect could be further clarified. Clearly also it highlights the vital role played by adequate referral of projects and the draft agreement (clause 11) recognises this aspect.

Further, in terms of assessment procedures, the EES procedure under the EEA relies heavily on a technical assessment panel process. This process can work well by incorporating scientific and other expertise and in ensuring ongoing evaluation and adaptation of the assessment process but not if it is hamstrung by narrow terms of reference (We would identify the Hazelwood extension project as an example in point where aspects vital to gauging cumulative long term impacts on the environment and potentially on MNES, were excluded from the scope of assessment.) Accordingly, it is vital that the Commonwealth maintains power to review and make binding recommendations about the terms of reference for assessment where those matters, such as greenhouse gas emissions from projects are - a) relevant to MNES and b) likely to be sensitive to state interests and thus more at risk of exclusion from the terms of reference. We make this recommendation despite the recitals in clause 10 that Victoria will

seek to assess non MNES impacts to the 'greatest extent practicable'. We query also whether the phrase greatest extent practicable may also introduce unwelcome lowering of standards for rigorous assessment.

The EEA gives much more limited rights for third party review of referral, and assessment decisions than the EPBC Act. These limitations may reduce the overall transparency of the process. In particular, the broad standing rules under the EPBC Act and third party enforcement provisions that exist under the EPBC Act are not mentioned in the draft Agreement. It is vital that these major transparency safeguards that operate under the federal legislation are not obviated through the accreditation process.

Finally, we suggest that EEA lacks an overall framework of Ecologically Sustainable Development objectives equivalent to the EPBC Act. Arguably then decisions are not legally constrained by fundamental principles of sustainability, such as intergenerational equity and the precautionary principle; notwithstanding any policy context in which such principles may be acknowledged at a state level. Accordingly, consideration needs to be given to how the state-based regime may be informed by such fundamental goal, especially in view of the endorsement of these objectives within the agreement at clause 2.

Accreditation of other Victorian assessment processes

While the minimisation of duplication and the streamlining of assessment of environmental impact are laudable aims, the broad scope of the processes to be accredited needs careful consideration. In effect, this represents a broad devolution of Commonwealth responsibility although it is recognised that the state government has built extensive expertise in these areas. Given the wide scope of the proposed bilateral covering major projects, 'everyday' planning decisions, water licensing and environmental licensing it is imperative that Commonwealth responsibilities especially with respect to biodiversity protection and international law obligations are not simply subsumed within state-based regimes to become another 'tick off' in the list of cursory assessment processes. Moreover, to ensure transparency federal third party review rights should be carried across to these procedures where they impact MNES.

Further while a purported goal of the draft bilateral agreement is to 'cut red-tape' and improve efficiency of decision-making it should be recognised that such expediency often favours development interests over a careful consideration of the measures required for environmental protection. Thus any gains in efficiency should not be at expense of environmental sustainability. We note that similar 'red-tape cutting' exercises e.g. IPA/IDAS in Queensland, have had a perverse effect in that they have tended to produce a less streamlined process due to ineffective 'roll-in' of approvals. Accordingly we suggest careful examination of whether 'a one size fits all' accreditation process given all the pieces of legislation identified in the draft bilateral can be adequately integrated into the EPBC Act decision-making framework without compromising integrity of information and independence of final approvals.

In particular, while enhanced integration of decision-making and assessment under the Water Act 1989 Vic with EPBC Act decision-making and approvals is welcome, the suggested process appears somewhat cursory in its inclusion of federal involvement. Further, given that so much attention is being directed to water planning under the new Water Act 2007 as a means to address the deeply degraded over-allocated water systems of the Murray-Darling Basin it is unclear where/how that process will intersect the EIA procedures.

Finally we recognise the central importance of synchronising conditions on approval and subsequent monitoring to ensure ecologically sustainable development is enhanced and the environment is protected. Again though we reiterate the need for integrity of standards, particularly as so few projects are ever 'disallowed' and most proceed to an approval with conditions attached. It is vital that conditions are not a compromise simply in an effort to streamline the assessment process. Viable long-term environmental outcomes require adequate time to fashion and implement, and sufficient resources to support ongoing monitoring. Much emphasis in the bilateral seems directed toward achieving streamlining and much less attention directed to intergenerational equity.