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Session Title: “*Impact assessment the Australian way(s)*”

Paper Title: “*Impact assessment the Victorian way, overview of an old legislative system administered through contemporary practices*”

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Overview

The Victorian EIA system is somewhat of a paradox. It's underpinned by traditional and arguably out-of-date legislation, the *Environment Effects Act 1978*, which was modelled on the 1970 US *National Environmental Policy Act*. This Victorian Act has evolved (somewhat) over four decades from its original 4 pages to a lengthy 12 pages. So it still includes very limited statutory parameters, particularly for the impact assessment process itself. However, despite the brevity of our Act, the impact assessment processes implemented in Victoria have evolved considerably over the decades, into a relatively modern and well-regarded, risk-based framework for assessing projects with significant environmental risk.

The brevity of the Act does leave it open to interpretation and flexible approaches to impact assessment being adopted to suit the circumstances, usually associated with the given project and its environmental risks. While the discretion afforded to the Minister under the Act is broad, there are detailed Ministerial Guidelines released from time to time under the Act which put in place scaffolding to help codify this system. This model can however result in a balancing act or tight rope walk, without much of a legal safety net.

As with any system there is of course room for improvement. Relatively recent reviews of the Act itself and/or its implementation have identified opportunities for more clarity and statutory certainty, including codification of specific process stages, as well greater efficiency and cost-effectiveness of the process. The reviews also identified a need for further legislative hooks and obligations to help ensure the system remains defensible, robust and transparent.

Background

Victoria is the smallest mainland state in Australia, but with an estimated population of more than 6 million and 250 thousand people. The types of development typically referred and assessed under the Act stems from a range of sectors, including mining and extractive, energy infrastructure, transport projects, water infrastructure and other forms of development proposed in sensitive areas such as the coast and alpine region.

The requirement for impact assessment or Environment Effects Statements (EES) as they are known in Victoria, occurs via a statutory decision of the Minister for Planning under the *Environment Effect Act 1978*. This is reserved for a relatively small proportion of development proposals i.e. those with potential for impact of state or regional significance. This amounts to between 6 to 10 full impact assessments (EESs)

being undertaken during any given year. In Victoria project proposals with potential for less significant environmental impacts are assessed via other planning or sector specific development approval processes.

The Minister for Planning is the responsible minister for the Act – impact assessment has traditionally resided within the Victorian planning portfolio. The Minister can either declare works to be ‘public works’, for the purposes of applying the Act, or a proponent or relevant decision-maker can seek a decision of the Minister on whether or not impact assessment is required.

The Act functions essentially by requiring an impact assessment “statement” (EES) to be prepared by the proponent, prior to the Minister issuing an Assessment to inform relevant statutory decisions. This Assessment needs to occur before statutory approvals can be decided upon under other legislation and works can proceed.

The Minister can make guidelines under the Act setting out detailed procedures and requirements for the administration of the Act. The current *Ministerial Guidelines under the Environment Effects Act 1978* is the seventh edition and was published in 2006. They greatly expand on the brief framework provided by the Act, including by specifying:

- a broad definition of “environment” for the purposes of the Act
- the objectives and principles that underpin the assessment/ EES process
- guidance on the various processes under the Act including:
 - criteria or thresholds to guide the need for referral of proposed works to the Minister
 - information to be included in a referral and factors to be considered when determining if an EES or conditions is required
 - the form of conditions the Minister might apply in lieu of an EES
 - the scoping of the EES by the Minister
 - stakeholder consultation for an EES
 - process for department to advise on the preparation of the EES, including appointing an inter-agency Technical Reference Group
 - the general requirements for exhibition of an EES for public submissions
 - the options for form of an inquiry /review of the EES and submissions, such as a hearing
 - the matters to be encompassed in the Minister’s assessment of a project’s effects
 - how assessment and approvals can interface and be coordinated.

Timelines

1972 to 1976 – Informal EIA began based on the *Ministry for Conservation Act* and then the Premier’s Directive issued for all government departments.

1978 – the *Environment Effect Act 1978* came into operation on 1 Oct 1978 – i.e. all four pages of it! Some basic guidance was issued in 1978 and 1980 to guide the implementation of the Act. The Act applied to ‘public works’ at the discretion of the Minister for Planning, and in some cases the Minister could require a preliminary environmental report to inform whether full assessment was required. Section 8(1) also allowed any statutory decision-maker to seek the Minister for Planning’s determination on whether an EES was required in relation to a statutory decision.

1990 – a rewrite of the Ministerial Guidelines was issued, including some cartoons!

1994 – the first major changes to the Act were made: the preliminary environmental report was removed and the Minister was able to determine what works the Act applied to by determining what constitutes ‘public works’ with the potential for a significant environmental effect.

2006 – Some moderate changes were made to the Act and a completely new set of Ministerial Guidelines was released. This followed a major review of the Act between 2000 and 2005. The most significant changes to the Act related to the referrals process, including enabling proponents to refer (this is now standard practice), as well as enabling the Minister to require a referral. The changes also introduced a new referral decision (in lieu of an EES being required), whereby conditions can be set to address quite specific matters/ risks or enable a broader set of issues to be examined through a more focussed or appropriate process.

2008 to 2013 – Successive governments reinitiated efforts to review and reform the EES process, largely in an effort to respond to concerns about statutory certainty, cost effectiveness and timeframes associated with impact assessment. However, governments have decided not to proceed with implementation of any proposed reforms.

2013 – 2019 – An internal reform program was undertaken to review administrative practices and leverage continuous improvement. This resulted in a documented quality management system (QMS), developed to improve the consistency and rigour of the EES process, consistent with Australian Standards. The QMS has successfully improved administration of the EES process providing more certainty, consistency and opportunities for responding to issues and other imperatives for improvement as they arise.

Current State of Impact Assessment in Victoria

Robust and contemporary administration of the Victorian impact assessment system is enabled largely due to it being spelt out in detail within the 2006 Ministerial Guidelines, as well as in internal administrative system with well-defined processes (i.e. a Quality Management System), both of which are updated quite frequently. This allows refinement and adaption of our processes in response to issues, best practice or changing needs. Therefore, our impact assessment process is quite scalable and flexible, ensuring it remains relevant and readily applicable to a wide range of projects and environmental decision-making.

Despite this, operating without a statutory safety net or codified legal process parameters can be a risk-benefit balancing act. The main administrative upside has been the flexibility to develop fit-for-purpose assessment processes. The main risk being that there are aspects of the process that are open to different interpretations, debate, inconsistencies and criticism. However, the impact assessment processes administered by the department and practices undertaken by the industry in Victoria are very well established and widely recognised to be effective, albeit with some aspects that are still considered to be short of best practice.

Aspects of the system that would benefit from further improvements are scoping, creating more explicit links to decision-making and better follow-up (on environmental performance and outcomes). While these later aspects are strictly outside the Victorian statutory impact assessment parameters, they remain a key area for refinement to help maintain the value of system in the State, if not increase both its utility and credibility.

The other area for improvement is accessibility and presentation of impact assessment information in an increasingly digital and time poor world.

Key Positives

- The impact assessment process is quite scalable and flexible - easily applicable to a wide range of projects and environmental risks.
- It is a well established and robust system that the private sector and public proponent, as well as the community can engage with. While it is not perfect these key stakeholders seemingly have confidence in the process.
- It continues to remain relevant and is consistently utilised by Governments of different persuasions.
- Public input and transparency of the system is well founded.
- The Minister can readily issue guidelines and specific process procedures under the Act.

Key Issues

- Our EES process doesn't always interface strongly with approvals, depending on the sector or risk we're dealing with – i.e. there are limited explicit statutory links between the EES process outputs and approvals decision-making. This is however largely overcome by good administrative practice.
- There are quite limited opportunities to follow-up and report on effects/environmental outcomes post EIA and project implementation, and no legislative hooks to do so in our Act or in most other development approval Acts.
- Could benefit from more statutory clarity and certainty, including legal codification of some specific aspects of the process, such as scoping, sunseting of decisions.
- Could benefit from more explicit legislative obligations to help ensure the system remains defensible, robust and transparent
- The inefficiency and cost-effectiveness of the process is often criticised.
- An emerging issue is the accessibility and presentation of increasingly complex and technical information, in an increasingly digital and time poor world
- We also face issues with the consistency & quality of EIA documentation produced by proponents.

Presenting Author - Geoff Ralphs is the Principal Adviser for Impact Assessment in the Victorian Government, located within the Department of Environment, Land, Water and Planning. He has been an environmental assessment and approvals practitioner for over 20 years, leading the EES/EIA team in Victoria since 2009. Between 2002 and 2019 he has worked on and led a large array of significant EIA projects across a range of sectors, including transport, energy, mining and extractive, coastal and port development, industrial facilities, gas and water infrastructure.