

# Rigour or Rubber Stamp?

Implementation and enforcement of  
the *Environment Effects Act 1978*

# ABOUT THE ENVIRONMENT DEFENDERS OFFICE (VICTORIA) LTD

The Environment Defenders Office (Victoria) Ltd ('EDO') is a community legal centre specialising in public interest environment law. We 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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# 1. ABOUT THIS REPORT SERIES

This is the second report in a series, *Monitoring Victoria's Environmental Laws*, to be published by the EDO. The reports examine the extent and effectiveness of government's implementation and enforcement of key environmental laws in Victoria.

The EDO has witnessed how Victoria's environmental laws are implemented and enforced for over 20 years through our advice to and representation of the community on environmental law issues. Over that time we have become aware of countless environmental laws that are in force but are not effectively used by government to protect or improve the environment. Of further concern is the lack of publicly available information indicating how government regulators implement and enforce their laws. Public release of this information is vital to ensure government is accountable for the way in which it operates.

## **The *Monitoring Victoria's Environmental Laws* series has three main aims:**

1. To empower the public by providing a consolidated source of information on whether regulatory agencies are implementing and enforcing their regulatory responsibilities under key environmental laws. The information will be a resource for the community for submissions or discussions with government, to encourage greater action and compliance by government.
2. To promote transparency and accountability by identifying what implementation and enforcement information is publicly available and, if that information is lacking, to inform government agencies of the type of information that should be publicly available.
3. To improve the implementation and enforcement of environmental laws by encouraging greater action and compliance by government agencies.

Ultimately we aim to ensure that Victoria's environmental laws are used to their greatest extent to protect and improve the environment.

Each report focuses on one area of environmental regulation. Each report will be updated and released every two years to provide an ongoing 'report card' of how environmental laws are being used. While we hope the 2011–12 reports will provide useful baseline data and recommendations for improvement, the full value of the reports will be seen over time through their ability to compare changes (and hopefully improvements) in the implementation of environmental laws over the next decade.

The reports are compiled using publicly available information, including information sourced from government agency websites, annual reports, and reports from review bodies such as the Auditor-General's and Ombudsman's offices. The EDO also requests information directly from the relevant regulating agency. Information is not always forthcoming and instances where information could not be found are highlighted in the report.

## 2. REPORT HIGHLIGHTS

This report investigates how effectively the Minister for Planning (**the Minister**) and the Department of Planning and Community Development (**DPCD**) are implementing and enforcing the *Environment Effects Act 1978* (Vic) (**EE Act**) through the environment effects statement process (**EES process**).

For many years the EE Act has been criticised as weak, discretionary, politicised, slow and cumbersome. Environmentalists and developers alike are frustrated by its unwieldy processes and fluid standards. It has long since fallen behind environmental impact assessment laws in comparable jurisdictions in Australia and overseas.

Foremost among those criticisms is the allegation that the EE Act allows the Minister almost unlimited discretion in deciding whether proposals require assessment, and if so whether their assessed impacts are environmentally acceptable. The lack of binding rules around when and how assessments must be conducted allows environmentally unsustainable development to avoid assessment altogether or to go straight through the EES process with no more than a 'rubber stamp' of approval. In essence, the EES process operates as a method of determining *how* a development will proceed, rather than whether it will proceed or not.

**The analysis in this report confirms these criticisms. It demonstrates that:**

- the Minister and DPCD do not have the power or the mandate to identify and require assessment of all projects which have a significant impact on the environment – of the 80 projects referred between 2006–07 and 2010–11, only 13 required assessment.
- the EES process is incredibly protracted – of the 13 projects referred from 2006–2011 that required assessment, only three had been completed at the time of writing, and they each took about two years to complete.

- in practice the process does not prevent significant negative environmental impacts from occurring as
  - a) the process rarely results in a finding that environmental impacts of development are unacceptable;
  - b) the Minister lacks the legal power to prevent such developments from occurring in any case; and
  - c) the Minister has no legal power to apply binding conditions to projects that do go ahead.

The outcome of the EES process (long and protracted that it is) is essentially a set of non-binding recommendations.

As this analysis shows, the Act is ineffective in improving the environmental standards of development, and in protecting the environment from harm from development.

The picture is not entirely bleak. The administration of the EE Act demonstrates a commitment to transparency and to involving the community. Further, DPCD keeps and publishes extensive records on the implementation of the EE Act. To the extent that DPCD does not investigate, monitor and enforce the EE Act, it is largely because the EE Act itself does not specifically require it to do so. To that extent, the problem lies chiefly with the legislation itself.

As this report demonstrates, the entire system is in need of legislative reform. The comprehensive recommendations made recently by the Environment and Natural Resources Committee (**ENRC**) in their report 'Inquiry into the Environment Effects Statement Process in Victoria' (**ENRC report**) further illustrates this point.

However, legislative reform options are beyond the scope of this report. They are documented by the EDO elsewhere.<sup>2</sup> Short of proposals for legislative reform, there are a range of steps which the Minister and DPCD could take to improve the administration of the EE Act in the short term.

1. Environment and Natural Resources Committee, 'Inquiry into the Environment Effects Statement Process in Victoria' (September 2011), Parliamentary Paper No. 59 Session 2010-11.

2. Submission to the ENRC Inquiry into the Environment Effects Statement Process in Victoria, 8 April 2010; Briefing Paper – Environmental Impact Assessment in Victoria: Summary of EDO views and recommendations, March 2010 [www.edovic.org.au/law\\_reform/submissions\\_and\\_reports/submissions\\_and\\_issues\\_papers](http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers)

## KEY RECOMMENDATIONS

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- The entire Victorian environmental impact assessment system should be reformed to address the problems set out in this report.

In the absence of comprehensive legislative reform, the EDO recommends that:

- DPCD strengthen its system for identifying projects which require referral, rather than relying on proponents to self-police;
- when DPCD gives proponents advice as to whether a referral is necessary, make this advice publicly available on the website of DPCD;
- when the Minister has determined that an EES is not required provided conditions are met, DPCD monitor compliance with those conditions, and publish the results;
- in the absence of legislative power to impose binding conditions, the Minister reduce his or her reliance on conditions and require an EES in more cases;
- when an EES is being prepared by a proponent, DPCD provide information on the progress of this preparation to the public;
- DPCD require proponents to provide public notice of the exhibition of their EES, and monitor compliance with this requirement;
- the Minister comply with the timelines for decision outlined in the Ministerial Guidelines;
- the Minister comply with the Inquiry's recommendations as a matter of course, particularly where the Inquiry recommends that a proposal has unacceptable environmental effects;
- the Minister ensure that all recommendations are measurable, and clearly and separately identified as recommendations;
- the Minister's assessment report clearly identify the recommendations that must be implemented to minimise or prevent any negative environmental impacts, and who is responsible for ensuring that each recommendation will be carried out;
- DPCD set up a system to require the proponent and relevant decision-makers to report whether they have implemented the Minister's recommendations;
- the information required to assess compliance with the recommendations be made publicly available;
- DPCD monitor compliance with these recommendations ongoing, and publish findings on its website.

## 3. BACKGROUND

### 3.1 The Environment Effects Act 1978

The *Environment Effects Act 1978* (Vic) (**EE Act**) is the principal environmental impact assessment (EIA) legislation in Victoria. It aims to identify and mitigate the adverse environmental impacts of projects that could have a significant effect on the environment.

The Act applies to projects that the Minister for Planning (**the Minister**) determines are capable of having a significant effect on the environment. Once the Minister has made that determination, the proponent is required to prepare an environment effects statement (**EES**) assessing the project's environmental effects. The Minister then makes a recommendation as to whether the project should proceed and under what conditions, including the conditions that other decision-makers should impose on the project – for example, approvals under the *Planning and Environment Act 1987* (Vic) (**P&E Act**) or the *Environment Protection Act 1970* (Vic) (**EP Act**). If those effects prove unacceptable, the Minister can recommend that other decision-makers withhold other approvals for the project.

EIA legislation is a common and important feature of environmental regulation in many jurisdictions.<sup>3</sup> Similar legislation exists in most other Australian jurisdictions and in most developed countries around the world, and has proven to be a vital legal tool in environmental protection.<sup>4</sup>

However, the EE Act is much weaker than most of its counterparts in other jurisdictions. The EE Act itself is a mere 16 pages, and most of the important detail (for example, what constitutes a 'significant impact') is left to Ministerial Guidelines which do not bind the Minister.<sup>5</sup> This makes the process highly discretionary, and often political – particularly where the State Government is the project proponent. Further, the Act does not give the Minister any binding legal powers to prevent environmentally unacceptable proposals or impose binding conditions on the project: the Minister may only recommend that other Ministers withhold approvals for the project.

The EDO has already set out these foundational problems with the EE Act in detail elsewhere, along with recommendations for legislative reform.<sup>6</sup> This review of the implementation of the EE Act has only further highlighted the need for reform of the entire system. However for the purpose of the present report, we focus on how the Minister and DPCD exercise the powers they do have under the EE Act, and whether they do so in the best interests of the Victorian environment and the community.

3. *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *Environmental Protection Act 1986* (WA) Pt IV; *Environment and Planning Assessment Act 1979* (NSW); *Development Act 1993* (SA); *Integrated Planning Act 1997* (Qld); *Environmental Protection Act 1994* (Qld); *State Development and Public Works Organisation Act 1971* (Qld); *Environmental Management and Pollution Control Act 1994* (Tas) Pt 3 Div 1-1A; *Planning and Development Act 2007* (ACT); *Environmental Assessment Act 1982* (NT).

4. See, for example, *Booth v Bosworth* (2001) 114 FCR 39; *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; *Brown v Forestry Tasmania and Others (No 4)* (2006) 157 FCR 1; *Gray v Minister for Planning* (2006) 152 LGERA 258.

5. *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978* (DSE, 2006) (**Ministerial Guidelines**).

6. See, for example, submission to the ENRC Inquiry into the Environment Effects Statement Process in Victoria, 8 April 2010; Briefing Paper – 'Environmental Impact Assessment in Victoria: Summary of EDO views and recommendations [www.edovic.org.au/law\\_reform/submissions\\_and\\_reports/submissions\\_and\\_issues\\_papers](http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers), March 2010; Samitha Rao, 'Reforming the Environment Assessment Process in Victoria' (2010) 1 *National Environmental Law Review* 34, p 37.

### 3.2 The Minister for Planning

The Minister for Planning is the Minister responsible for the EE Act. It is the Minister who makes the assessments and decisions under the Act. Specifically, the Minister is required to:

- determine when a project should be referred to the Minister to decide whether it is capable of having a significant effect on the environment;<sup>7</sup>
- decide whether or not a project must undergo an environmental assessment, or whether it can proceed without an assessment based on certain conditions;<sup>8</sup>
- oversee the preparation of an EES, including scope, public involvement and appointing an inquiry;<sup>9</sup>
- assess the environmental impacts of the project, based on the EES and any public consultation or inquiry and provide that assessment to relevant decision-makers;<sup>10</sup> and
- direct other Ministers to withhold approval until the Minister has made an assessment (including recommendations as to whether approvals should be granted or withheld).<sup>11</sup>

### 3.3 The Department of Planning and Community Development

The Department of Planning and Community Development (**DPCD**) does not have a legislated role under the EE Act, but in practice it provides administrative support to the Minister. DPCD manages the assessments and supports the Minister in making the required decisions under the EE Act. Specifically, DPCD:

- advises and assists the Minister in discharging his/her obligations under the EE Act;
- works with the project proponent to develop an EES timetable and consultation plan;
- convenes a Technical Reference Group to advise project proponents on the detail of preparing an EES; and
- reviews the draft EES once completed by the project proponent, and advises the Minister on its release.

7. *Environment Effects Act 1978* (Vic) s 8(4).

8. *Environment Effects Act 1978* (Vic) ss 3(1), 8B(3).

9. *Environment Effects Act 1978* (Vic) ss 3(3), 9, 10.

10. *Environment Effects Act 1978* (Vic) ss 6(3), 8C.

11. *Environment Effects Act 1978* (Vic) ss 8A, 8C.



## 4. THE OBJECTIVES OF THE ENVIRONMENT EFFECTS ACT

The purpose of this report, and of the other reports in this series, is to evaluate how well government ministers and agencies are achieving the objectives of the legislation they administer: to see whether they are meeting the task that Parliament has set for them. Therefore, in reading the following sections of this Report, it is important to keep the purposes or objectives of the EE Act in mind.

Unfortunately, the EE Act does not explicitly state its purposes or objectives.

As with so many other features of the EE Act and the EES process, the purposes and objectives must be sought in the Ministerial Guidelines made under section 10 of the EE Act. They are therefore administrative only, and not binding.

According to those Guidelines, the general objective of the EES process is:

*To provide for the transparent, integrated and timely assessment of the environmental effects of projects capable of having a significant effect on the environment.<sup>12</sup>*

The Guidelines then list the following specific objectives underpinning the EES process:

- to provide for the transparent assessment of potential environmental effects of proposed projects, in the context of applicable legislation and policy, including principles and objectives of ecologically sustainable development;
- to provide timely and integrated assessments of proposed projects to inform relevant decisions, in the context of coordinated statutory processes;
- to ensure proponents are accountable for investigating potential environmental and related effects of proposed projects, as well as for implementing effective environmental management measures;
- to provide public access to information regarding potential environmental effects as well as fair opportunities for participation in assessment processes by stakeholders and the public;
- to provide a basis for monitoring and evaluating the effects of works to inform environmental management of the works and improve environmental knowledge.<sup>13</sup>

These objectives are directly relevant to the assessment of how the EE Act is being implemented, monitored and enforced, as analysed in the following sections of this report.

12. Ministerial Guidelines, above n 5, p 3.

13. Ministerial Guidelines, above n 5, p 3.

## 5. IMPLEMENTATION OF THE ENVIRONMENT EFFECTS ACT

The process established by the EE Act can be divided into four stages.

1. **Referral:** a project proponent refers their project to the Minister.
2. **Decision whether an EES is required:** based on the referral information, the Minister decides whether or not an EES is required.
3. **Conducting the EES:** if the Minister decides an EES is required, an EES is conducted and made public.
4. **Minister's assessment:** the Minister makes and publishes his/her own assessment, including recommendations to other Ministers to approve or reject the project or impose conditions.

An overview of the EES process is at **Appendix A**.

### 5.1 Referrals

A key test of the effectiveness of any EIA legislation is whether proposed environmentally significant projects are 'picked up' by the assessment process. It is therefore important to look at the types of projects which are referred to the Minister for a decision.

Since amendments to the EE Act came into force in July 2006, there have been three ways in which a project can come before the Minister for a decision on whether or not an EES is required:

1. the project proponent may refer the project to the Minister;<sup>14</sup>
2. a decision-maker under another Act may refer the project to the Minister;<sup>15</sup> or
3. the Minister may him/herself decide to examine a project.<sup>16</sup>

In the five years from July 2006 to June 2011, 80 projects were referred to the Minister for a decision as to whether or not an EES is required for that project.<sup>17</sup> This is a very low level of referrals, when compared with other jurisdictions. This fact was recently noted by the Environment Institute of Australia and New Zealand (EIANZ) which stated that '[v]ery few projects trigger the EES Process in Victoria, unlike many other states and countries...'<sup>18</sup>

DPCD reports that every one of those proposals was referred by the project proponent themselves.<sup>19</sup> Clearly then, the Minister and other relevant decision-makers are not using their power to 'call in' (that is, require the proponent to refer) projects for assessment. DPCD takes the view that these powers are not being used because project proponents are referring all relevant projects themselves, making referrals from the Minister or other decision-makers unnecessary. They attribute this to 'the incentives for proponents to establish certainty regarding process requirements and to avoid delays...'<sup>20</sup> These incentives are said to arise because, if the proponents do not refer their own project, another decision-maker (for example, Environment Minister, or Planning Minister in another capacity) will refer it for them.<sup>21</sup> DPCD has a memorandum of understanding with other relevant departments to coordinate various agencies' roles in impact assessment, including provision to share information about forthcoming projects that may require impact assessment.

It is very difficult to determine whether there are projects that are likely to have a significant environmental impact and therefore should be referred, but are not being referred. All Australian jurisdictions have a similar referral standard – significant impact on the environment – and in comparison to other jurisdictions the level of referrals in Victoria is low. However this could also reflect variations in the number of significant projects occurring. It could also reflect the narrowness of the Victoria referral criteria. These are restricted to very large projects, which means that referral is the exception rather than the norm, unlike in some other states. The only way to determine whether projects are being properly referred would be to conduct an audit of the number of projects in Victoria which met the referral requirements but were not referred – a very difficult proposition when most of those projects are unknown.

14. *Environment Effects Act 1978* (Vic) s 8(3).

15. *Environment Effects Act 1978* (Vic) s 8(1).

16. *Environment Effects Act 1978* (Vic) s 6.

17. The DPCD website documents referrals made and decided upon since July 2006: [www.dpcd.vic.gov.au/planning/environment-assessment/referrals/decisions-on-ees-referrals](http://www.dpcd.vic.gov.au/planning/environment-assessment/referrals/decisions-on-ees-referrals). This includes the Portland Wave Energy Project which was referred by Oceanlinx, but subsequently abandoned, and which is therefore not listed on the DPCD website. Referrals accepted since 2010 where a decision has not yet been made are listed on another DPCD webpage: [www.dpcd.vic.gov.au/planning/environment-assessment/referrals/referrals2010-11](http://www.dpcd.vic.gov.au/planning/environment-assessment/referrals/referrals2010-11).

18. Environment Institute of Australia and New Zealand, Submission to the Victorian Environment and Natural Resources Committee, Inquiry into the Environment Effects Statement process in Victoria, April 2010, p 4.

19. Environment and Natural Resources Committee, Inquiry into Environmental Effects Statement Process, Victorian Government Submission, prepared by the Department of Planning and Community Development, March 2010, p 5 accessed at [www.parliament.vic.gov.au/images/stories/committees/enrc/environmental\\_effects/submissions/4o\\_Victorian\\_Government.pdf](http://www.parliament.vic.gov.au/images/stories/committees/enrc/environmental_effects/submissions/4o_Victorian_Government.pdf).

20. Environment and Natural Resources Committee, above n 19.

21. Letter from DPCD to the EDO, 8 February 2011.

In practice, the criteria in the Ministerial Guidelines and the way the process is administered means that only the most significant and major projects are referred.

DPCD states that since July 2006, when the EE Act was amended to allow project proponents to seek the Minister's advice as to whether referral was necessary, the number of referrals has decreased.<sup>22</sup> DPCD has stated that on occasion it gives informal advice to proponents that a referral is not necessary, however they state that it is always on the advice that the proponent should satisfy for themselves that referral is not required.<sup>23</sup> DPCD does not keep data on how many proponents seek informal advice that results in an assessment not being required. The Ministerial guidelines also allow a proponent to seek formal advice from the Secretary of DPCD as to whether a referral is needed, although this option has been taken up on only a few occasions.<sup>24</sup>

Certainly, as discussed in more detail in section 6.1 below, neither DPCD nor the Minister appears ever to have taken any action to enforce the referral obligation.

## 5.2 Decision on whether an EES is required

Once a project has been referred to the Minister, the Minister must decide whether or not an EES is required. The Minister may decide that:

- an EES is required;
- an EES is not required; or
- an EES is not required, if certain conditions specified by the Minister are met.<sup>25</sup>

### 5.2.1 Decision outcomes

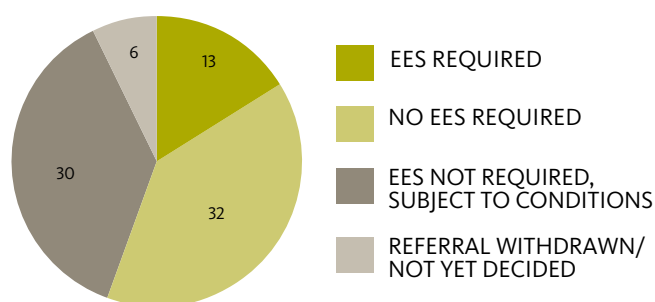
Of the 81 referrals<sup>26</sup> made between July 2006 and June 2011<sup>27</sup>, the Minister has decided that:

- an EES was required in 13 cases (16%);
- an EES was not required in 32 cases (39.5%); and
- an EES was not required, subject to conditions, in 30 cases (37%).

Six of the 80 have not yet been decided or have been withdrawn.<sup>28</sup>

In total then, an EES was not required in 83% of the projects that have been decided.

**FIGURE 1: BREAKDOWN OF REFERRAL DECISIONS FOR PROJECTS REFERRED JULY 2006 – JUNE 2011**



By comparison, in the previous five years between July 2001 and July 2006, a total of 117 referral decisions were made and an EES was required in 33 cases (28.2%).<sup>29</sup> This difference can probably be explained by the 2006 amendments, which a) allowed proponents to seek advice as to whether a referral was required which reduced the number of formal referrals and b) allowed, for the first time, the Minister to recommend conditions be placed on a project instead of requiring an EES (that is, 'no EES with conditions').

22. Environment and Natural Resources Committee, above n 19, p 18.

23. Pers. Comm. DPCD 21/10/2011.

24. Pers. Comm. DPCD 21/10/2011.

25. Ministerial Guidelines, above n 5, p 11.

26. Although there were 80 referrals in that period, percentages are calculated out of 81 because the Palmer Road Corridor referral was subsequently split into two projects that led to two decisions – no EES for Stage 1, and EES for Stages 2 & 3.

27. This figure includes the Magazine Point Harbour and Residential Development (which was deemed unlikely to be environmentally acceptable but EES required if pursued further), the Palmers Road Corridor (only Stages 2&3 of which required an EES), and the Frankston Bypass (which is listed as 'No EES with conditions' on the DPCD website, but for which an EES was in fact required): [www.dpcd.vic.gov.au/planning/environment-assessment/referrals/decisions-on-ees-referrals](http://www.dpcd.vic.gov.au/planning/environment-assessment/referrals/decisions-on-ees-referrals).

28. As at November 2011.

29. Victorian Competition & Efficiency Commission, *A Sustainable Future for Victoria – Getting Environmental Regulation Right*, Final Report July 2009, VCEC, Melbourne, p 105. Compare this with the DPCD submission to the ENRC Inquiry, which claimed an EES was required in 28 cases over the same period: Environment and Natural Resources Committee, Inquiry into Environmental Effects Statement Process, Victorian Government Submission, prepared by the Department of Planning and Community Development, March 2010, p 14.

## 5.2.2 Decision reasons

The published reasons for decision, available on the DPCD website, provide an insight into why an EES was not required (with or without conditions) in those 62 projects. The main reasons given were:

- the environmental impact was localised (that is, not of regional or state significance);
- the potential environmental impact was not significant;
- adequate assessment of environmental effects had already been conducted;
- the project site was already industrial land, or cleared agricultural land (that is, the environmental damage had already been done); and
- the project was subject to other statutory requirements, or approval processes, or environmental management requirements, which were sufficient.

This last reason is particularly notable. Of the 62 decisions where no EES was required, 38 (61.3%) cited existing statutory approval processes under the P&E Act and EP Act as a reason for the decision. However, these Acts are not a substitute for an effective EIA process. As explained by EIANZ:

*Other regulatory processes that cover these developments, such as the Planning and Environment Act 1987 (through the Planning Permit or Planning Scheme Amendment processes) or the Environment Protection Act 1970 (through Works Approvals and Licenses) don't necessarily provide the appropriate scope for a comprehensive environmental assessment, due to their restricted scope. A Works Approval Application only covers emissions to air, water and land for instance, not allowing for the integration of other issues such as flora and fauna. The Planning Process does provide a wider scope and remit, however the process can rely too heavily on expertise from local authority planners who do not necessarily have the expertise in environmental assessment. In this case in particular, many of the environmental assessment conditions are carried out as a condition of the planning permit, which can be too late to incorporate environmental issues into the final design.<sup>30</sup>*

This indicates that some decisions not to conduct an EES may be inappropriate and based on inaccurate assumptions.

## 5.2.3 Decision timing

The Ministerial Guidelines say that '[t]he Minister will normally provide a response to a referral within 20 business days of receiving a referral with adequate supporting information.<sup>31</sup>

However, according to DPCD, since July 2006 the Minister has on average taken 41 business days to respond to a referral.<sup>32</sup> In calendar day terms, this amounts to two months. The time taken to respond to a particular referral fluctuates between cases: sometimes it takes a month, sometimes it takes up to four months. This impedes public participation and generates uncertainty for all involved.

The failure to meet the timelines set out in the Ministerial Guidelines underlines a deeper concern about these Guidelines and the EE Act. Because most of the detail of the EES process is not set out in the legislation, but is left to Ministerial Guidelines instead, the Minister is able to disregard and/or vary the process at will. This can only be rectified by legislative reform, which is why such reform is the primary recommendation of this report.

30. Environment Institute of Australia and New Zealand, above n 18, p 4.

31. Ministerial Guidelines, above n 5, p 12.

32. Environment and Natural Resources Committee, above n 19, p 8.

## 5.3 The EES process

Once the Minister decides that an EES is required for a project, the process of actually preparing an EES begins. There are five steps in this process.

1. **Scoping:** the scope of the EES is developed by the Minister, in consultation with the proponent and the public.
2. **Consultation:** the proponent must prepare and implement a consultation plan.
3. **Preparation:** the proponent must prepare the EES according to the scope, with assistance from the Technical Reference Group.
4. **Public review:** the EES is released for public comment.
5. **Inquiry:** the Minister may appoint an inquiry to review the EES, take submissions from the public, and report to him/her.

### 5.3.1 Scoping

We have not conducted a full review of EES scoping requirements and Inquiry Panel Terms of Reference (**scoping documents**) for all projects that have undergone assessment under the EE Act historically. However, there are a number of cases where the preparation of these scoping documents by the Minister has been inappropriate. EIANZ claim that in some cases it is far too broad: for example, the Terms of Reference for the Port of Melbourne Channel Deepening Project EES included 1000 items.<sup>33</sup> Such project scopes contribute to unnecessary costs and delay in the EES process.

In other cases, the scoping documents are drawn too narrowly. For example, the Terms of Reference for the Victorian Desalination Plant Inquiry Panel assessment excluded consideration of the climate change impacts of the desalination plant, despite it being at the time the largest desalination plant proposed in the southern hemisphere, and predicted to generate one million tonnes of CO<sub>2e</sub> from electricity use.<sup>34</sup> These Terms of Reference also excluded consideration of alternatives to a desalination plant to solve Melbourne's water problems. Submitters to the EES process were expressly prohibited from raising these issues in the EES hearing due to the narrow scoping set by the Minister.

Another example is the Terms of Reference for the Bastion Point Boat Ramp, which were again drawn narrowly and did not enable the Inquiry Panel to consider the option of a low-impact upgrade to the current boat ramp site, rather than a new facility with large stone breakwaters. The EES documentation also did not provide detailed analysis of this option. The Panel concluded that 'none of the options proposed...be approved. The only option the Panel thinks should be further considered is low scale improvement at the existing ramp' but also that '[t]he Panel does not feel that it can or should specify what could be done by way of improving the existing ramp'.<sup>35</sup> So after almost a month of public hearings, and an EES process spanning almost three years, the Panel Inquiry deemed that the only option for the development was the one that was not included in its Terms of Reference. This problem would have most certainly been avoided if the views of the community had been taken in to account when scoping the EES at the outset of the process.

33. Environment Institute of Australia and New Zealand, above n 18, p 5.

34. Samitha Rao, 'Reforming the Environment Assessment Process in Victoria' (2010) 1 *National Environmental Law Review* 34, p 37.

35. Nick Wimbush, Robin Saunders and Barry La Fontaine, 'Ocean Access Boat Ramp, Bastion Point, Mallacoota, Environment Effects Statement Panel Report' (2008), p 141.

### 5.3.2 Consultation and public review

The procedures for consultation and public review of an EES are very important to achieving the objectives of the EE Act – in particular, to ensure that each assessment is ‘transparent’ and to ‘provide public access to information regarding potential environmental effects as well as fair opportunities for participation in assessment processes by stakeholders and the public.’<sup>36</sup> It is also consistent with the VCEC Victorian Guide to Regulation (see **Appendix B**), and the Victorian Charter of Human Rights.<sup>37</sup>

To this end, the Guidelines require that:

- the proponent give public notice of the exhibition of their EES in at least one daily newspaper, one or more local papers, and on the DPCD website;
- the EES be exhibited for a period of 20–30 business days (or longer, if the Minister thinks that exceptional circumstances warrant it);
- the proponent take submissions, and prepare a response.<sup>38</sup>

As with everything contained in the Guidelines, these requirements are not enforceable and are able to be departed from at any time by the Minister.

It is very difficult to determine whether or not these requirements are being met. According to the DPCD website, EESs are exhibited for the required 20–30 business day period. EDO has received advice from DPCD that public notice of the exhibition of an EES is always given, although there is no available record of this.

Even if the formal requirements of consultation and public review are met, it is hard to tell whether these processes are qualitatively sufficient. For example, though it is possible to ascertain whether a proponent took and responded to submissions on their EES, it is harder to measure whether the submissions were properly considered, or whether the proponent’s responses were meaningful.

There is evidence that although these formal requirements are formally met, public consultation is nonetheless not meaningful or sufficiently thorough. For example, in the 2008 case of the Victorian Desalination Plant, the public were given from 20 August (when the EES was exhibited) until 30 September to make submissions on the voluminous EES documentation (more than 1,800 pages of highly complex, technical material plus works approvals of about 430 pages and 84 appendices which averaged approximately 90–100 pages each).<sup>39</sup> Consultations like these meet the formal requirements of the Ministerial Guidelines, but do not provide a real opportunity to the community to engage with the EES, digest its contents, and formulate a considered response. It is also unlikely that they elicit serious consideration or meaningful changes from the project proponent.

It is worth noting that the recent ENRC report identifies numerous deficiencies in public participation processes in the current EES system and makes a series of strong recommendations to improve this.

36. Ministerial Guidelines, above n 5, p 3.

37. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 18(1).

38. Ministerial Guidelines, above n 5, pp 23-4.

39. Rao, above n 34, p 38.

### 5.3.3 Preparation of the EES

Information available on the DPCD website suggests there is a significant time lag between the Minister's direction to prepare an EES and the actual preparation of an EES. Of the 13 projects referred in the five years from July 2006 and July 2011 for which the Minister has required the preparation of an EES, at the time of writing:

- three have actually been prepared;<sup>40</sup>
- seven are still pending;<sup>41</sup>
- one has not yet begun;<sup>42</sup> and
- two appear to have been abandoned.<sup>43</sup>

Table 1 gives more detail of the status of each project.

These figures underscore the typically long timeframes involved in preparing, exhibiting and inquiring into an EES. Often these long delays are attributable to project proponents. With reference to projects referred before July 2006, DPCD have said that 'a disappointing proportion of these EESs have involved extended timeframes – largely because of factors in the control of the proponent.'<sup>45</sup> They further pointed out that:

*'a crucial factor affecting the overall timeframe of the EES process is the completion of a sound EES that effectively addresses the key issues, which therefore do not need to be revisited at a later stage. Several EESs initiated between 2000 and mid 2006 had shortcomings in the investigations conducted such that either the inquiry called for further information or the Minister directed that a supplementary statement be prepared to enable a sound assessment.'*<sup>46</sup>

**TABLE 1: STATUS OF EES FOR ALL PROJECTS REFERRED SINCE 2006 THAT REQUIRED AN EES**

PROJECT	DATE OF DECISION THAT EES REQUIRED	STATUS OF EES <sup>44</sup>
Penshurst Wind Farm	8 Mar 2011	In preparation
Western Highway Duplication – Ararat to Stawell	27 Oct 2010	In preparation
Western Highway Duplication – Beaufort to Ararat	27 Oct 2010	In preparation
Princes Highway Duplication – Traralgon East to Kilmany	22 Oct 2010	In preparation
Yallourn Combined Cycle Gas Turbine Power Station	12 Aug 2010	In preparation
Stockman Base Metals Project	16 Aug 2010	In preparation
Beaumaris Motor Yacht Squadron	13 Nov 2009	In preparation
Palmers Road Corridor	13 Nov 2009	Not yet commenced
Bondi East Far North Mineral Sands	3 June 2009	Abandoned
Shaw River Gas Power Station	7 Nov 2008	Prepared (completed)
Magazine Point Harbour and Residential Development	7 Jan 2008	Abandoned
Wonthaggi (Victorian) Desalination Project	28 Dec 2007	Prepared (completed)
Frankston Bypass	1 June 2007	Prepared (completed)

40. Shaw River Gas Power Station, Wonthaggi (Victorian) Desalination Project, Frankston Bypass.

41. Penshurst Wind Farm, Western Highway Duplication – Ararat to Stawell, Western Highway Duplication – Beaufort to Ararat, Yallourn Combined Cycle Gas Turbine Power Station, Stockman Base Metal Project, Beaumaris Motor Yacht Squadron, Princes Highway Duplication – Traralgon East to Fulham.

42. Palmers Road Corridor: Environment and Natural Resources Committee, Inquiry into Environmental Effects Statement Process, Victorian Government Submission, prepared by the Department of Planning and Community Development, March 2010, p 12.

43. Magazine Point Harbour and Residential Development, Bondi East Far North Mineral Sands.

44. Status as at November 2011.

45. Environment and Natural Resources Committee, above n 19, p 15.

46. Environment and Natural Resources Committee, above n 19, p 15.

### 5.3.4 Inquiry

Although the Minister is not required to appoint an inquiry for every project, in practice this is always done. As of July 2011, every EES for the last 15 years had an Environment Effects Inquiry panel appointed to conduct formal public hearings and report to the Minister.<sup>47</sup>

The appointment of Inquiry Panels with such consistency is a commendable step to ensure public participation in the EES process. However Inquiry Panels are sometimes conducted to unrealistically short timeframes, impeding the scope for meaningful consultation.<sup>48</sup> Considering the length of time allowed for every other stage of the process, it is illogical that the public consultation opportunities are so restricted. As demonstrated by the blowout in government and proponent timeframes discussed above, it is not the public consultation requirements that delay the assessment processes.

Inquiry findings are not binding on the Minister – he/she has complete discretion to accept or ignore them.

### 5.4 The Minister's assessment

Once the EES has been prepared, public submissions have been received and an Inquiry report has been submitted to the Minister, the Minister will make an assessment of the environmental effects of the project proposal. The assessment will include an evaluation of whether the environmental impacts are 'acceptable' or 'unacceptable', and a description of any necessary measures or modifications required to mitigate the proposal's adverse environmental impacts. Relevant decision-makers such as the EPA are required to consider the Minister's assessment, but its findings and recommendations are not binding on them.

### 5.4.1 Assessment timing

The EE Act requires that the Minister provide the assessment 'as soon as reasonably practicable in the circumstances of the case',<sup>49</sup> and the Ministerial Guidelines specify that an assessment be usually provided within 25 business days of receiving the report of an inquiry.<sup>50</sup> These timeframes serve a valuable purpose: they provide certainty to stakeholders, facilitate public involvement, and avoid decisions being postponed or delayed for political reasons.

As noted above, only three of the projects referred after July 2006 have progressed to Ministerial assessment. The Ministerial assessment took longer than 25 days in all three cases, although in two of the three cases it was only marginally delayed – 26 days, 35 days, and 60 days after the Inquiry.

Ministerial assessments of projects referred to the Minister before July 2006, but assessed after July 2006, also suffered from delays. It is difficult to obtain specific dates for these assessments, but there are some salient cases where the Ministerial assessment was long overdue:

- the Bastion Point Boat Ramp, where the Minister's final assessment was released eight months after the Inquiry Report was provided to the Minister; and
- the Mountain View Quarry Extension, where the Minister's final assessment was released 10 months after the Inquiry Report was provided to the Minister.

It is notable that the recent ENRC report contains the recommendation that this 25 business days 'guideline' should be incorporated in legislation and made an enforceable requirement of the system.

47. Victorian Competition & Efficiency Commission, *A Sustainable Future for Victoria – Getting Environmental Regulation Right*, Final Report July 2009, VCEC, Melbourne, p 100.

48. This was the case with the Victorian Desalination Plant and Port Phillip Channel Deepening Projects: Rao, above n 34, p 38.

49. *Environment Effects Act 1978* (Vic) s 6(3).

50. Ministerial Guidelines, above n 5, p28.



## 5.4.2 Ministerial rejection of recommendations

The high degree of discretion afforded to the Minister under the EE Act has led to the criticism that the EES process is a 'rubber stamp', lacking the independence and legal teeth to prevent environmentally adverse development. These perceptions of the politicisation of the process are reinforced by the conflict of interest in cases where the State is the project proponent, and by the Government's tendency to commit to projects before an EES has been completed (or, in some cases, before it has even begun).

One way of measuring the validity of this perception is to look at how often the Minister delivered a negative assessment. By this measure, the EE Act could be easily perceived to be a 'rubber stamp'. There are very few cases in which the Minister has completed a formal assessment and determined that a proposal has an unacceptable level of environmental effects. DPCD has stated informally that there have been two instances in which the Minister has deemed a project to be environmentally unacceptable at the end of the EES process – the Cranbourne East-West Road link in the mid-1990s and Big Hill Gold Mine at Stawell in 2001.<sup>51</sup> However we were not able to confirm this as no public information is available relating to these EES processes.

In 2008, the Minister (at the referral stage) decided that the Magazine Point Harbour and Residential Development was 'unlikely' to be environmentally acceptable, and that an EES was required if it went ahead.<sup>52</sup> The project was subsequently abandoned. We could find no other instance of this occurring.

In some cases, positive assessment has been made despite the recommendations of the Inquiry Panel. In the case of the Bastion Point Boat Ramp, the Ministerial assessment recommended that the project go ahead despite the Inquiry Report's finding that none of the proposals was environmentally acceptable.<sup>53</sup> Likewise, the Minister's assessment of the Nowingi Containment Facility reversed the Inquiry Report's recommendation that the project not go ahead (although in this instance, the Government ultimately decided to abandon the project).<sup>54</sup>

An often-cited response to this criticism is that projects that do go ahead are substantially improved as a result of the EES process. However there do not appear to be any cases where the Minister recommended that the project go ahead, provided that major modifications and/or further investigation occur. Many of the assessments in favour of a project included recommendations for improvement, and some even include conditions. But none of these appeared to require major changes to the proposals; most related to amendments to Environmental Management Plans, or improved monitoring programs.

It is true that improvements to projects might occur during the development of the EES and as a result of undertaking an EES, but this is difficult to measure. The fact that the community is often not involved or consulted adequately at early stages of the development of the EES for any given projects means that these improvements, if they do occur, are not appreciated by members of the public.

The significance of the rarity of adverse Ministerial assessments cannot be understated. This fact suggests that the EES process and the EE Act lack the capacity to prevent environmentally unsound projects going ahead. It may also suggest that, in the absence of clear legislative powers to approve or reject a project, or to impose binding conditions on an approval, that Ministers discharge their functions timidly and allow environmentally unsound projects to proceed.

51. Pers. Comm. DPCD 4/10/2011.

52. Minister for Planning, Reasons for Decision Under Environment Effects Act 1978 – Magazine Point Harbour and Residential Development (2008).

53. Rao, above n 34, p 40.

54. Minister for Planning, *Nowingi Long-Term Containment Facility Assessment under the Environment Effects Act 1978* (2007).

### 5.4.3 Assessment recommendations

Another frequently criticised feature of the EE Act is that the Minister's assessment is not binding on other decision-makers. The Minister has no power under the EE Act to impose conditions on a proposal, or to prevent a proposed project with unacceptable environmental effects from going ahead. The system assumes that if the Minister finds that a project has unacceptable environmental effects, or recommends that certain conditions be imposed, other decision-makers (for example, the EPA, or the Minister exercising his/her functions under the P&E Act) would acknowledge the Minister's recommendation and reject the proposal or impose those conditions through their own approval processes.

This view is supported by the testimony of Mr T Blake, chief environment assessment officer, DPCD, who told the ENRC committee that 'ordinarily [the Minister's] advice is adopted'.<sup>55</sup> Where decision-makers do deviate from the Minister's advice, this is usually to allow 'fine tuning' – '[i]t is not a situation of diametrically opposed actions being taken in response to the minister's assessment'.<sup>56</sup>

Whether this is indeed the case is difficult to ascertain for a number of reasons:

1. Because the Minister makes an 'assessment' rather than recommendations per se, the report format that has been adopted to date does not clearly identify or collate his/her recommendations. Sometimes, it is not clear whether the Minister is making a recommendation that he/she expects to be followed, or whether he/she is simply reiterating best practice environmental management, or a component of the proponent's EES.

2. When the Minister does make a recommendation, it is often vague or immeasurable. For example, the Minister's assessment for the Victorian Desalination Project included recommendation for:

*Avoidance of disturbance of waterways and associated remnant vegetation to the extent practicable through detailed route design and appropriate choice of crossing methods.*<sup>57</sup>

For immeasurable recommendations like this, it is hard to meaningfully conclude that the proponent has implemented the Minister's recommendation.

3. The Minister has never recommended that approvals for a project be refused, so there are no clear cases where the willingness of other Ministers to adopt such a recommendation could be measured.
4. Because most recommendations are highly detailed and technical, and end up being implemented by the proponent, much of the information required to assess compliance with the recommendation is not publicly available. For example, many of the recommendations for the Frankston Bypass assessment related to the detailed design of the freeway, which is not publicly available.
5. There is no publicly available record of whether the Minister's recommendations are accepted and implemented. Indeed, in some cases it appears that DPCD does not gather this information. Where recommendations are directed at other government decision-makers, DPCD liaises with the relevant departments and agencies to ensure that the appropriate consideration and responses have occurred. However, where the recommendation is directed at the proponent, it appears that DPCD does not monitor whether the proponent has in fact considered or complied with the recommendation.

55. Transcript – Inquiry into the environment effects statement process, Environment and Natural Resources Committee, 7 June 2010, Witnesses: Mr J. Gilmore (executive director, planning policy and reform) and Mr T. Blake (chief environment assessment officer, Department of Planning and Community Development), p 262.

56. Transcript, above n 55, p 262.

57. Minister for Planning, Victorian Desalination Project Assessment under Environment Effects Act 1978 (2009) p 50.

Despite these limitations, we have analysed the recommendations made in the Minister’s assessments for projects which were referred after July 2006. There are only three such assessments. One of them – the Shaw River Power Station – was only released in November 2010, so it is too early to assess whether or not these recommendations have been implemented. Therefore, the following data is based on the Victorian Desalination Project and the Frankston Bypass only (see table 2).

The relatively high rate at which the Minister’s recommendations were accepted probably reflects two things:

- for the Desalination Project, 50 of the 99 recommendations were amendments to the environmental performance requirements in the Project Deed, which are easily implemented through simple (and mostly minor) amendments;
- more importantly, most of the recommendations made by the Minister were quite minor, as bigger and more controversial recommendations made by the Inquiry Panel (for example, that the Frankston Bypass not go through the Westerfield property) were reversed by the Minister.

To improve the certainty, uptake, implementation and monitoring of the Minister’s recommendations, the Minister’s assessment report should clearly identify which elements of the assessment are recommendations that need to be implemented to minimise or prevent any negative environmental impacts, and who is responsible for ensuring that the recommendation will be carried out (for example, the proponent, the EPA through licence conditions, the planning authority through planning approvals). DPCD should also set up a system to require the proponent and relevant decision-makers to report back to DPCD on whether they have implemented the recommendations in the assessment, and DPCD should release this publicly.

**TABLE 2: ASSESSMENT RECOMMENDATIONS AND THEIR IMPLEMENTATION**

PROJECT	RECOMMENDATIONS	MEASURABLE RECOMMENDATIONS	IMPLEMENTED	NOT IMPLEMENTED	UNCLEAR
Victorian Desalination Project	99	72	61/72	2/72	9/72
Frankston Bypass	34	19	9/19	1/19	9/19

## 6. ENFORCEMENT AND MONITORING

Unlike most EIA legislation in Australia and overseas, the EE Act does not include penalties for non-compliance. Nor does it provide the legal mechanisms whereby interested third parties can enforce the terms of the Act in court.

This makes it unusual to speak of the Minister or of DPCD 'enforcing' the EE Act. It also means that the usual main incentive for proponents to comply – the threat of penalties – does not exist for this Act. This absence of meaningful legal sanctions and compliance incentives makes it even more important for DPCD to conduct monitoring of proponent's implementation of EES recommendations and report publicly on those, to provide some level of incentive to comply with the process. However, ultimately the process should be overhauled to allow and encourage full monitoring and enforcement. The recent recommendations made in the ENRC report, if adopted, will go a significant way towards rectifying these issues.

### 6.1 Identifying projects with potential adverse environmental effects

Under the EE Act (unlike EIA legislation in other jurisdictions) there is no penalty for failing to refer a project capable of having a significant effect on the environment to the Minister.<sup>58</sup> Therefore, the Minister cannot, strictly speaking, 'enforce' this requirement. Rather, the Minister is given the power to 'call in' projects of this nature and make a decision.<sup>59</sup> Relevant decision-makers under other Acts are also given the power to refer such projects to the Minister.<sup>60</sup> To exercise these powers effectively, a monitoring system is required to identify projects which might have these environmental effects.

DPCD has stated that to ensure that all relevant projects are referred it regularly liaises with other Victorian Government agencies (for example, DSE and the EPA); the Commonwealth Department of Sustainability, Environment, Water, Population and Communities; DPCD regional offices; and local government.<sup>61</sup> That DPCD has such a system is a commendable recognition of the importance of monitoring and enforcement. However, this approach has its limitations. It is entirely dependent on the information-gathering powers of the other agencies and the assumption that relevant projects will make themselves known through other approvals processes (for example, planning permit applications). The system of liaison may be very effective or very ineffective, depending upon how well it is implemented. DPCD has not provided us with information on how this function is carried out – whether it is an ad hoc arrangement or whether it is a well-established and effective process.

A strong approach to monitoring projects that should be referred is consistent with the Ministerial Guidelines' commitment to 'ensure proponents are accountable for investigating potential environmental and related effects of proposed projects', and to implement 'a systems approach to identifying...potential environmental effects...'<sup>62</sup> Whether or not DPCD's system meets this standard is not clear.

58. See for example *Environment Protection and Biodiversity Act 1999 (Cth)* s 67A.

59. *Environment Effects Act 1978 (Vic)* s 3.

60. *Environment Effects Act 1978 (Vic)* s 8(1).

61. Letter from DPCD to the EDO 8 February 2011.

62. Ministerial Guidelines, above n 5, p 3.

## 6.2 Enforcing compliance with conditions

In July 2006 the EE Act was amended to allow the Minister to decide that a proposal does not require an EES provided that it complies with certain conditions. This is based on the principle that in cases where the environmental impacts are known and easily mitigated, the imposition of conditions will prevent the project from having 'significant environmental effects' and an EES is therefore not required. Since that time, conditions in lieu of an EES have been imposed on 30 occasions (37% of the time). Clearly, to ensure that projects are not in fact causing a negative environmental impact (thus justifying their avoidance of EES assessment) it is essential that these conditions are met. A system for monitoring and enforcing compliance with these conditions is therefore necessary.

It does not appear, however, that DPCD has a comprehensive or reliable system for monitoring compliance. DPCD has two ways to monitor compliance with these conditions:

- First, in some cases, conditions recommended under the EE Act are legally enforceable under other Acts, if carried through to that approval (for example, a condition of a licence issued under the EP Act). The regulator under the other Act (in this example, the EPA) would enforce the conditions, and DPCD will liaise with them to ensure that this has been done. However, there is no readily available way to work out whether the conditions have been made enforceable in this way, and no indication of how regular or reliable these liaisons are.
- Second, the Minister tries to frame these conditions such that they can be readily monitored, usually by specifying that the conditions must be met to the satisfaction of another regulator (for example, the Environment Minister). DPCD will then liaise with the relevant regulator to check that they are done. However, as above, there is no indication of how regular or reliable these liaisons are.

As a system for monitoring compliance with conditions this is piecemeal and inadequate. It leaves a large number of conditions which are simply not monitored. It leaves the public with no information as to whether conditions have been complied with. It also leaves proponents with no incentive to stringently abide by the conditions.

There are a range of monitoring and compliance options which DPCD could implement, depending on what resources they have. It would not be hard, for example, to require project proponents to sign a statutory declaration after a year, stating that they have complied with all the conditions with a brief report attached of how they have complied. If the conditions were not complied with, the proponent would then be liable for perjury.<sup>63</sup> This could be complemented by voluntary audits on some projects. DPCD would then be able to publish details of the conditions and the declaration, and invite members of the public to report any breaches of the conditions. This system would be easy to implement without any changes to the EE Act.

63. *Evidence (Miscellaneous Provisions) Act 1958 (Vic)*, s 141.

### **6.3 Ongoing monitoring of implementation and environmental effects**

An EIA process such as that under the EE Act essentially involves making educated judgements as to what the environmental effects of a development will be, and what action is required to manage them. It is important to monitor the actual effects of a project and whether mitigation measures are being properly implemented.

There is no requirement to do this under the EE Act. The only ways that such monitoring requirements can be imposed are:

- as a commitment by the proponent in the EES;
- as a recommendation of the Minister in the Minister's Assessment; or
- as a condition of another regulatory approval ( for example, a licence under the EP Act).

Only the last of these is a binding legal obligation on the proponent.

It is encouraging to see that the Minister appears to recommend monitoring requirements in Ministerial assessments quite often. In the three Ministerial assessments made for projects referred after July 2006, a total of 30 recommendations requiring ongoing environmental monitoring were imposed.<sup>64</sup>

However, as noted above, DPCD does not monitor or enforce compliance with the Minister's assessment recommendations, and it is difficult to tell whether or not these recommendations are actually adopted and implemented. Further, as noted above, DPCD does not have a coordinated process for incorporating those recommendations as conditions of other regulatory approvals, or tracking those recommendations that have already been so incorporated.

64. See the Minister's Assessment for the Victorian Desalination Plant, the Frankston Bypass and the Shaw River Power Station.

## 7. TRANSPARENCY AND ACCOUNTABILITY

According to the VCEC Victorian Guide to Regulation, two key characteristics of good regulatory systems are:

- **Transparency.** The development and enforcement of government regulation should be transparent to the community and the business sector. Transparency can promote learning and information-sharing within the regulatory system, and can also help to build public trust in the quality of regulation and the integrity of the process.
- **Accountability.** The Government must explain its decisions on regulation and be subject to public scrutiny. The same is true of its enforcement agencies. As such, the development and enforcement of regulation in Victoria should be monitored, with the results being reported to the public on a systematic basis.<sup>65</sup>

Measures to provide transparency and accountability in EES processes are included in the Ministerial Guidelines, but not in the Act. The Guidelines require the following to be made publicly available on the DPCD website:

- a list of all projects referred to the Minister for a decision about the need for an EES;<sup>66</sup>
- the Minister's decision and reasons for decision on the need for an EES;<sup>67</sup> and
- the Minister's final assessment of the environmental effects of a proposal.<sup>68</sup>

The DPCD website does in fact contain all of these documents. It has made the administration of the EE Act far more transparent and accountable than other environmental legislation in Victoria. This is an important step towards achieving the objectives of the EE Act, and consistency with good regulatory principles.

To further improve the transparency and accountability of the EE Act and its administration, DPCD should make the following information publicly available on its website:

- a list of projects where the proponent has sought advice from DPCD as to whether referral was necessary, and DPCD's advice (that is, referral necessary or not necessary);
- when the Minister requires an EES, information on the progress of its preparation by the proponent;
- when an EES Inquiry panel is appointed, the report of this Inquiry;
- information on how many of the recommendations made by the Minister as part of his/her assessment were implemented by other decision-makers and the proponent;
- information on compliance with conditions imposed by the Minister, whether instead of an EES or as part of it; and
- monitoring data on the ongoing environmental effects of projects which have already been assessed.

65. See Appendix B.

66. Ministerial Guidelines, above n 5, p 6.

67. Ministerial Guidelines, above n 5, p 12.

68. Ministerial Guidelines, above n 5, p 28.

## 8. CONCLUSIONS AND RECOMMENDED NEXT STEPS

The EE Act has long been criticised for lacking the ‘teeth’ to identify, mitigate and ultimately prevent development with unacceptable environmental effects. It has been called legally weak, highly discretionary and politicised.<sup>69</sup> The recent findings of the ENRC highlight these problems, and the need for substantial reform to improve the rigour and accountability of the process.

The findings of this report confirm this. It suggests that:

- environmentally significant projects might not be adequately identified or referred for assessment;
- the EES process is needlessly slow and cumbersome;
- the Minister routinely ignores the requirements of the non-binding Ministerial Guidelines;
- proposals are rarely rejected due to negative environmental impacts (they are ‘rubber-stamped’); and
- the Minister has no legal power to impose conditions on proposals, and cannot ensure that his/her recommendations are accepted.

There is some cause for commendation, in that the administration of the EE Act appears to be more transparent and include more scope for community involvement than many other environmental laws in Victoria. However, on the whole, the implementation of the EE Act appears to confirm the criticisms of its detractors.

The change of government in Victoria provides a new opportunity to reform the EE Act, modernising environmental impact assessment in Victoria in line with most other jurisdictions in Australia and overseas. The EDO has previously made recommendations for the amendment and improvement of the EE Act, which would help to do this.<sup>70</sup> ENRC is also of the view that legislative reform is necessary. However, it is clear that even without legislative change, there are a number of steps that DPCD and the Minister could take to improve the administration of the EE Act.

69. Robyn Leeson, ‘EIA and the Politics of Avoidance’ (1994) February, *Environment and Planning Law Journal* 71; Murray Raff, ‘The Renewed Prominence of Environmental Impact Assessment: “A Tale of Two Cities”’ (1995) August, *Environment and Planning Law Journal* 241; Roger Eade, ‘Issues in Environmental Impact Assessment in Victoria: What Has Scoresby Taught Us?’ (2000) 18(4) *Urban Policy and Research* 515; Brad Jessup, ‘Victoria and the Channel Deepening Project’ in Tim Bonyhady and Andrew Macintosh (eds), *Mills, Mines and other Controversies* (2010) 105; Rao, above n 34.

70. Submission to the ENRC Inquiry into the Environment Effects Statement Process in Victoria, 8 April 2010; Briefing Paper — Environmental Impact Assessment in Victoria: Summary of EDO views and recommendations, March 2010; Rao, above n 34.

### KEY RECOMMENDATIONS

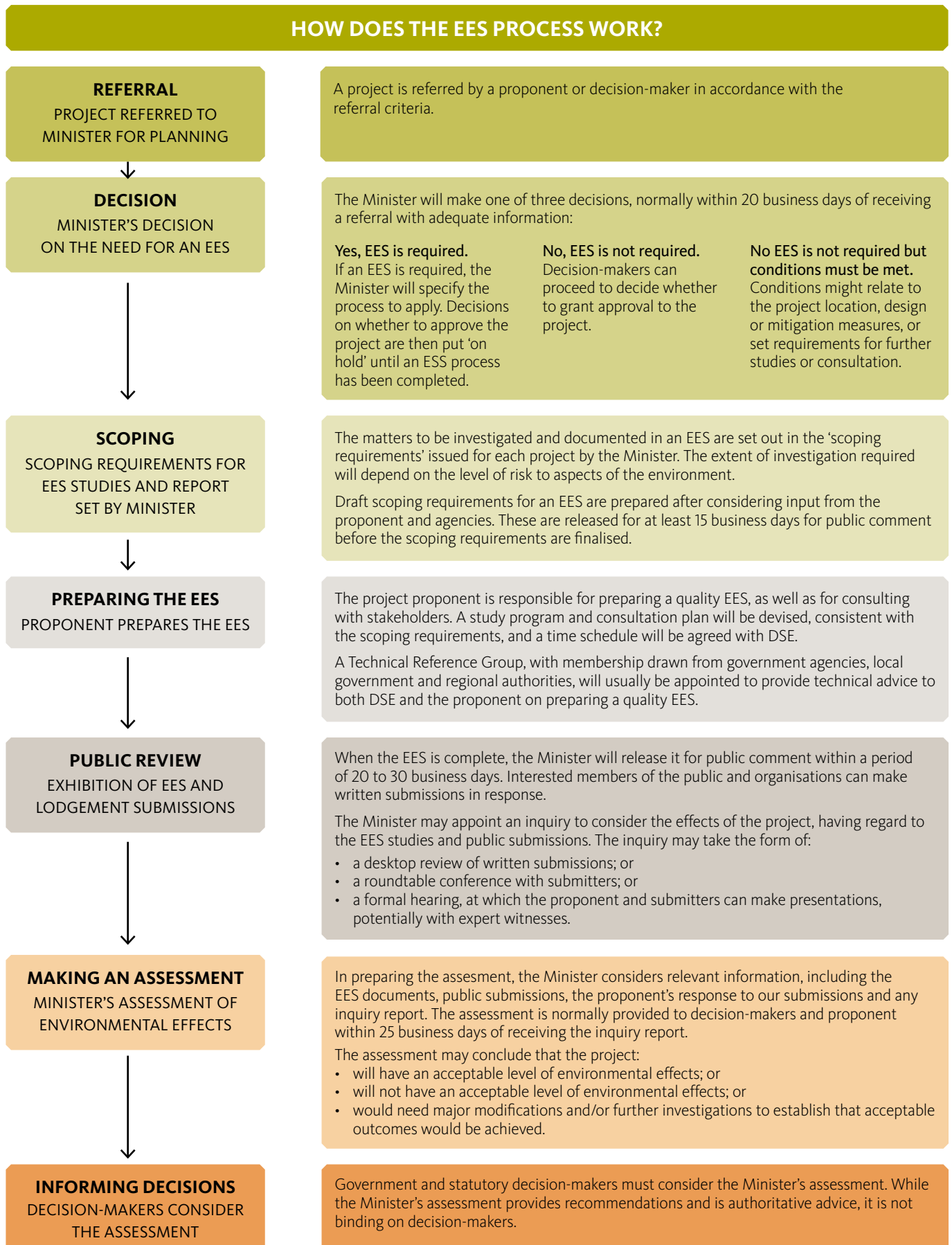
- The entire Victorian environmental impact assessment system should be reformed to address the problems set out in this report.

In the absence of comprehensive legislative reform, the EDO recommends that:

- DPCD strengthen its system for identifying projects which require referral, rather than relying on proponents to self-police;
- when DPCD gives proponents advice as to whether a referral is necessary, make this advice publicly available on the website of DPCD;
- when the Minister has determined that an EES is not required provided conditions are met, DPCD monitor compliance with those conditions, and publish the results;
- in the absence of legislative power to impose binding conditions, the Minister reduce his or her reliance on conditions and require an EES in more cases;
- when an EES is being prepared by a proponent, DPCD provide information on the progress of this preparation to the public;
- DPCD require proponents to provide public notice of the exhibition of their EES, and monitor compliance with this requirement;
- the Minister comply with the timelines for decision outlined in the Ministerial Guidelines;
- the Minister comply with the Inquiry’s recommendations as a matter of course, particularly where the Inquiry recommends that a proposal has unacceptable environmental effects;
- the Minister ensure that all recommendations are measurable, and clearly and separately identified as recommendations;
- the Minister’s assessment report clearly identify the recommendations that must be implemented to minimise or prevent any negative environmental impacts, and who is responsible for ensuring that each recommendation will be carried out;
- DPCD set up a system to require the proponent and relevant decision-makers to report whether they have implemented the Minister’s recommendations;
- the information required to assess compliance with the recommendations be made publicly available;
- DPCD monitor compliance with these recommendations ongoing, and publish findings on its website.



# APPENDIX A: OVERVIEW OF OPERATION OF THE ENVIRONMENT EFFECTS ACT



Source: DSE, Assessing the environmental effects of projects in Victoria – Summary of procedures under the Environment Effects Act 1978 (2003)

## APPENDIX B: CHARACTERISTICS OF GOOD REGULATORY SYSTEMS – VCEC VICTORIAN GUIDE TO REGULATION

- **Effectiveness.** Regulation, in combination with other government initiatives, must be focused on the problem and achieve its intended policy objectives with minimal side-effects. The regulatory system should also encourage innovation and complement the efficiency of markets.
- **Proportionality.** Regulatory measures should be proportional to the problem that they seek to address. This principle is particularly applicable in terms of any compliance burden or penalty framework which may apply. This characteristic also includes the effective targeting of regulation at those firms/individuals where the regulation will generate the highest net benefits.
- **Flexibility.** Government departments and agencies are encouraged to pursue a culture of continuous improvement, and regularly review legislative and regulatory restrictions. Where necessary, regulatory measures should be modified or eliminated to take account of changing social and business environments, and technological advances. All subordinate legislation must be reviewed regularly and systematically under the Subordinate Legislation Act 1994. The Act mandates that subordinate legislation ‘sunset’ after ten years. This should be considered as the maximum time period at which the legislation is reviewed. Best practice would require more frequent review periods (although overly frequent changes in the law can place burdens on the community).
- Flexibility should also be taken into account when drafting legislation, to ensure that it does not unnecessarily constrain future government responses. For example, if primary legislation requires prices to be specified in subordinate legislation, it makes it illegal to adopt other less prescriptive options (e.g. price monitoring), even if such less prescriptive approaches become more appropriate over time.
- **Transparency.** The development and enforcement of government regulation should be transparent to the community and the business sector. Transparency can promote learning and information-sharing within the regulatory system, and can also help to build public trust in the quality of regulation and the integrity of the process.
- **Consistent and predictable.** Regulation should be consistent with other policies, laws and agreements affecting regulated parties to avoid confusion. It should also be predictable in order to create a stable regulatory environment and foster business confidence. The regulatory approach should be applied consistently across regulated parties with like circumstances.
- **Cooperation.** When appropriate, regulation must be developed with the participation of the community and business and in coordination with other jurisdictions, both within Australia and internationally, to ensure that it reflects the interest of Victorians and takes into account Victoria’s major trading relationships. Regulators should also seek to build a cooperative compliance culture.
- **Accountability.** The Government must explain its decisions on regulation and be subject to public scrutiny. The same is true of its enforcement agencies. As such, the development and enforcement of regulation in Victoria should be monitored, with the results being reported to the public on a systematic basis.
- **Subject to appeal.** There should be transparent and robust mechanisms to appeal against decisions made by a regulatory body that may have significant impacts on individuals and/or businesses.

