



OFFICE OF REGULATION REVIEW

INDUSTRY COMMISSION

EIA Review
Environment Assessment Branch
Environment Protection Agency
40 Blackall Street
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Attention: Steve Munchinberg

OFFICE OF REGULATION REVIEW COMMENTS ON THE EPA'S ENVIRONMENTAL IMPACT ASSESSMENT DISCUSSION PAPER

This letter provides comments on elements of the proposals contained in the Environmental Protection Agency's discussion paper *Public Review of Commonwealth Environmental Impact Assessment Process*. In particular, comments are made on the options favoured by the EPA relating to:

- the objective of Environmental Impact Assessment; and
- the jurisdiction of the Commonwealth EIA process.

Objective of Environmental Impact Assessment (EIA)

The objective of EIA in the current legislation is:

to ensure to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account [in the making of Commonwealth Government decisions].

The EPA proposes, under its Option 1, a change to the following:

The objective of environmental impact assessment should be the protection of the environment through supporting the applications of the principles of ecologically sustainable development.

The EPA argues that this change would shift the focus of EIA away from the process itself, and concentrate more on desired environmental outcomes.

The Office of Regulation Review (ORR) questions the appropriateness of this proposed



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change and, more fundamentally, the need for it. Firstly, the proposal appears to confuse means (the EIA) with ends (certain environmental outcomes). Secondly, when tested against the Commonwealth Government's standard principles of good regulation making, the proposal raises many issues which may warrant further investigation by the EPA.

On the first of those points, the practice in Australia is that EIA provides a key *input* to decision making on environmental matters. Its purpose is to present facts and to provide disinterested analysis of the impact (now and in the future) that a particular proposal will have on the environment, on the proximate community, and on the Australian community as a whole. Thus, EIA operates primarily as an advisory rather than as an approvals process. Indeed, the EPA's discussion paper makes it clear that EIA is a valuable *tool* for environmental protection. It seems incompatible with these facts to regard that input tool as having the (output) *objective* of protecting the environment. Indeed, for major projects having environmental implications, it is ultimately the Government that should decide what the environmental outcomes should be, after weighing up all priorities.

On the second point, the Legislative Instruments Bill currently before Parliament provides some general tests for new or amended regulation. They include:

- a statement of the objectives to be attained;
- analysis of alternative means of achieving those objectives;
- a statement of reasons for the preferred approach;
- an indication of the costs and benefits on all those affected by the proposal.

The ORR suggests that the EPA's Option 1 be considered further in the light of these tests, and advises that the EPA will need to demonstrate that it has done so if this option proceeds further to the stage of legislative amendments.

Jurisdiction of the Commonwealth EIA process

The EPA proposes that the jurisdiction of Commonwealth EIA be expanded. The objective of the expansion is to:

ensure Commonwealth interests are taken into account where environmentally significant issues of national or international importance arise through administrative arrangements with State and Territory Governments.

The option favoured by the EPA in order to implement any expanded jurisdiction for Commonwealth EIA legislation is:

- to embody in legislation a list of designated developments on which a decision of the Commonwealth Government is required on whether Commonwealth EIA is appropriate; and
- that there be an additional power of discretion residing with the Environment Minister (but to be exercised in consultation or agreement with other Ministers) to require the

assessment of proposals which are not designated but which raise environmentally significant issues of national or international importance.

These proposals raise two issues. Firstly whether the jurisdiction of Commonwealth EIA should be expanded and, secondly, whether EPA's favoured option would be the best way to implement any such expansion.

On the first, it is noted that expanding Commonwealth powers raises complex federalism issues which would require high level consideration by governments.

On the second issue, if the Commonwealth's jurisdiction were to expand, the EPA's favoured option would imply a high level of discretionary power which could create uncertainty as to when a Commonwealth EIA would be required. As the Discussion Paper points out, one of the greatest concerns of industry with EIA is the uncertainty generated by the assessment process. The ORR notes that the option of a designated list of developments reflects EPA's desire to provide more certainty as to when the Commonwealth EIA would be triggered. However, any increased certainty flowing from use of a designated list could be undermined if the discretionary power was employed too frequently.

Because of this potential to add to uncertainty, the ORR considers there should be further discussion as to whether a discretionary power is necessary. A practicable alternative worth considering would be to have regular (but not too frequent) review, in consultation with stakeholders, of the designated list. That should minimise, and even possibly eliminate, the need for a discretionary power.

In considering the EPA's jurisdictional proposal, it should not be forgotten that even if a project is not covered by the Commonwealth's designated list, it may well still be subjected to a formal assessment process. This is so because State EIA procedures would, in most cases apply, to environmentally sensitive proposals.

If the Commonwealth Government judges that a discretionary power is required then, as EPA notes, it would be likely to apply 'on rare occasions only'. Since these occasions are likely to involve sensitive issues, uncertainty would be lessened if the power to require an EIA were to reside with the Government as a whole rather than with the Environment Minister. This could be done by requiring that a decision of Cabinet is needed if the Government wants an EIA to be carried out on a project not on the designated list.

If you have any queries on these comments, the contact officer is Stuart Wilson ph 264 3093.

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Assistant Commissioner
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