MEMO on CONSULTATIONS re: the PUBLIC REVIEW of the COMMONWEALTH ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

TO: Nature Conservation Council of NSW Executive, and
Peak Conservation Organisations group
cc:Mr James JohnsonEnvironmental Defenders Office

Sid Walker and I attended meetings in Canberra on 24 & 25 July 95 with

- Barry Carbon Director General, Environmental Protection Agency;
- Mark O'Neill, environment adviser to the Prime Minister;

to ascertain the attitude & readiness of Commonwealth officials and the political interest in completing the EIA process review before the Federal election.
The following records the major points which came out of those meetings.

Meeting withEnvironmental Protection Agency

The EPA is ready to proceed to a new Bill and is could undertake this next stage before the end of 95. Carbon is unhappy with the current EIA process and its operation and wants to see this substanially improved. He quickly reviewed our 9 point Summary saying he agreed with all our points in general and is comfortable with many of our detailed recommendations. There is a potential for significant opposition to such reforms from other Commonwealth agencies.

Carbon said he thought that in addition to 'Commonwealth matters', Federal EIA ought to cover projects in States where there was not adequate EIA legislation.Of particular concern to the EPA, however, is the issue of how to 'set the net' so that the Commonwealth would not have to undertake an EIA for a very large number of projects (EPA says they could only undertake 20 to 30 quality EIA's each year at current funding levels).

Carbon supported the recognition of EIA reform as a major national issue which could be seen as of a similar significance as the Native Title Bill, in that national issues were involved, a long standing policy issue was being addressed, a range of community & industry interests were affected, and there was an essential need for 'certainty' in process and consistent outcomes. He agreed that urgent consultations like those in the Native Title Bill's preparation could be a useful mechanism for finalising a new EIA Bill, and said that he has had experience in such consultations in introducing a new State-based EIA process in Western Australia.

Carbon said he intends to table EPA's position paper on EIA reform at the next meeting of the EPA advisory body, to be held on Friday 28th July.

Meeting with the Prime Minister's environment adviser

Mark O'Neill was unable to make a firm statement of the Keating Government's willingness to complete the review of the EP(IP)Act, because he had not seen the EPA briefing paper on the EIA. He is scheduled to meet with EPA on this 'next week'. O'Neill did indicate that he appreciated the significance of a united environment movement position as brokered by James Johnson from EDO through the co-ordinated submission process.

O'Neill said that the Government was at the stage that they did not want to introduce politically contraversial legislation into the Parliament and have political grandstanding in the Senate. He thought that Native Title-style consultations were a possibility if they could produce a Bill that was acceptable to the Government and the Senate. He is of the view that the environment movement could play a crucial role in seeking the involvement and co-operation of the Australian Democrats and the Greens WA in such consultations to ensure that a good Bill is devised and passed in the Senate.

Conclusions

The EPA is ready willing and able to deliver the final stages of the EIA review in a new impact assessment Bill. The PM's office can see, at the 'big picture' level, the electoral appeal of 'getting it right' on a major issue which touches on such flash points as woodchipping, the '3rd' runway, coastal development, mining, nuclear facilities, chemical manufacture etc.

Consultations with Senators is now the main focus. If the environment movement can achieve the co-operation of the Australian Democrats' and The Greens WA Senators, to participate in a consultation process to seek a consensus for a Bill which could pass unimpeded through the Senate, we could achieve new landmark Commonwealth environmental law which delivers effective reform of the EIA process BEFORE the next election. A real, and quite special, political opportunity is now available, but for a limited time only!

The exact nature and timing of the suggested 'urgent consultations' needs refining. It is apparent that the PCOs need to appoint a national liaison group to participate if the consultations move into a new and urgent phase: consultations on a draft Bill. The NCC intends to raise this as an immediate consideration at the PCOs next meeting. Possible participants in such a group are detailed below.

Caution is needed in disclosing the environment movements agenda and planned action on this issue to any State Government MPs or bureaucrats or, and especially, other Commonwealth agencies, to limit the chances of the urgent completion of the EIA review being frustrated through delay.

Next Steps ...

I refer to my earlier paper, 'Elements of a Suggested Strategy for achieving Major Progress in the Public Review of the Commonwealth Environmental Impact Assessment process'.

Review the Suggested Strategy

Following the recent meetings reported above, a number of the elements contained in the Suggested Strategy have been progressed and several of the unknowns have been quantified. Some key research done, the Suggested Strategy can now be updated and new priorities for action identified.

- Implement the Suggested Strategy's proposed actions in the **Educating 'green groups'** section;

- Given the EPAs readiness and the possible key involvement of the PM s office, it may be imprudent at this time to too widely publicise the potential for achieving a new EIA Act in the next 6 months, attracting avoidable opposition. Hence many of the actions proposed in the Suggested Strategy's section '**Publicly highlighting the issues'** should be deferred until the PMs office and the Environment Minister indicate their interests and roles;

- Since a distinct possibility for action on EIA reform by the Keating Government exists many of the proposed actions in the **'Creating the political climate for Federal Government action'** section of the Suggested Strategy may be irrelevant or counter-productive;

- intelligent advice coming from the PMs office (and the ALP Federal election committee?) has already recognised the political and electoral opportunities offerred by effective reform of the EIA process BEFORE the election. Hence the Suggested Stragtegy section '**Using the opportunities the pending Federal Election presents...'** may become redundant except for the proposals for liaison with Senators and the appointment of a team to consider any draft Bill.

Consolidating environment movement's position

- seek support for national liaison group to participate in urgent consultations and negotiate on a draft EIA Bill (Suggested nominees: James Johnson (EDO), Michael Lynch (TCT), Corkill (NCC) an ACF nominee plus ??
- draft a budget for a national environment movement EIA liaison group's advocacy for, and participation in, consultations on a draft new EIA Bill;
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Firming up Commonwealth interest

- feedback to Barry Carbon following meeting with PMs office;
- pursue meeting a.s.a.p. with Senator John Faulkner, Min for the Environment;
- seek views of Mark O'Neill following his briefing from EPA 'next week' & update him on any progress in appointing a national environment movement EIA liaison group or discussions with Senators;
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Senate Liaison

Provide briefing to, and explore interests in co-operative consultations, with

- Ben Oquist, new staffer @ The Greens WA Senators' office;
- Susan Brown, staffer @ Australian Democrats' office;
- Devereux, Independent Senator for Tasmania.
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JR Corkill 25July 1995

9 Point Summary of Commonwealth EIA Review

Issues of Concern to Australian environment groups

We want ***credible, effective, outcome oriented*** Commonwealth EIA laws which ***deliver*** in the public interest:

1. objectives and ESD principles for Commonwealth EIA written into law via a new Act;
2. clear 'triggers' for Commonwealth involvement in EIA, & Government to USE them;
3. where discretion is exercised, decisions on 'whether a proposal is assessed' must be made via resourced public participation, not secret deals;
4. decisions on 'what' is assessed & 'how' to involve the public via EIA 'scoping processes';
5. comprehensive, accurate, quantified information in professional, unbiased EIA documents on pain of penalty;
6. increased public access to all relevant information and all levels of decision making
7. effective legal powers for CEPA & Environment Minister, unfettered by politics;
8. environmental monitoring plus 'environmental audits' to review impacts and effectiveness of mitigation measures and ensure compliance;
9. the EIA process must be transparent & accountable with a capacity for 3rd party civil enforcement rights, including Commonwealth legal aid.

SUMMARY of the
SUBMISSION on behalf of the PEAK CONSERVATION ORGANISATIONS to the PUBLIC REVIEW of the
COMMONWEALTH ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

Prepared for the Nature Conservation Council of N.S.W. - July 1995

Preface

This summary is an urgent briefing of the status of reform of the Commonwealth environment protection & impact assessment laws and the preferred position of the mainstream environment groups, known as the Peak Conservation Groups (PCOs) The present situation is concerning since there is: little appreciation by the Australian environment movement of the importance of the many legal issues involved; and very limited pressure (if any) being applied to the federal Labor Government to deliver high quality changes to Commonwealth law, in line with the public interest. Woodchip licences, Sydney's 3rd runway & mining in the NT are only 3 examples of the environmental disasters approved under Commonwealth 'environment protection' law - highlighting the urgent need for a public campaign for a major rethink & overhaul .

Note: In this Summary the following abbreviations are used: CEPA =Commonwealth Environmental Protection Agency; EIA =environmental impact assessment; EIA documents = either, an Environmental Impacts Statement (EIS) a Public Environmental Review (PER) or a Report from a Public Inquiry; ESD = ecologically sustainable development; PCOs =Peak Conservation Organisations;

Introduction - Background to the Review

- Oct 93, the Commonwealth announced a review of its environmental impact assessment processes.
- Feb 94, the initial discussion paper, 'Setting the Direction' was released;
- Dec 94, the main discussion paper was distributed and funding was provided to assist the preparation of a co-ordinated submission;
- April 95 EDO completes major joint submission for the Peak Conservation Groups.

1. Objectives cited by the Commonwealth for its review, supported by the PCOs are :

- providing better protection for the Australian environment;
- better public participation in environmental decision making;
- maximising the effectiveness and efficiency of the Commonwealth EIA process;
- ensuring EIA promotes ecologically sustainable development;
- co-operation with state and territory governments and their processes to achieve a national approach to EIA.;

The adopted principles provided that Commonwealth EIA process should: provide real opportunities for public participation; be open and transparent; provide certainty to all participants; provide accountable decision making; be administered with integrity and professionalism; provide cost effective processes and outcomes; be flexible enough to deal effectively and efficiently with all proposals; ensuring practical outcome for effective environmental protection.

The International Context is described with reference to the :

- World Commission on Environment and Development, 'Our Common Future';
- World Experts Group on environmental law set up by the Brundtland Commission;
- Rio Declaration at the UN Conference on Environment and Development, June 92;

Commonwealth EIA since 1974

The PCOs reject as 'nonsense' the discussion paper's assertion that "the current assessment process has generally worked well". The PCO submission documents the extent and depth of criticism of Commonwealth EIA by community, industry and government, unlike the discussion paper which fails to even recognise the range of the legitimate criticisms.

Key failings of the current system of EIA are cited as:

- not limiting the extent of discretion via minimum standards;
- Administrative Procedures are vague and non binding;
- fast-tracking of major proposals;
- absence of any minimum timeframes or standards for assessment;
- tailoring decision making to suit the timetable of developers;

2. The Objective of EIA

At present the emphasis of Commonwealth EIA is process orientated - ensuring decisions are taken following examination of impacts; rather than outcome orientated, where ensuring the result is the best achievable.

The PCOs support Commonwealth proposal that the objective of EIA should be protection of the environment via the application of ESD principles, with the addition of two further matters:

- the principles of ESD need to be spelt out, and examples of legislation which adopts these principles are cited;
- there should be an legally binding obligation to achieve the objective of the new Act.

3. Commonwealth Jurisdiction - The Power to Assess

The Commonwealth's jurisdiction, as currently defined, does not give the Commonwealth a role in matters of national or international significance.

The Inter Governmental Agreement on the Environment (IGAE) attempted to define jurisdictions for environmental impact assessment but the IGAE has not succeeded.

The Commonwealth proposes to either make administrative arrangements with the State & Territory governments or to amend the EIA legislation to allow it to assess matters of national or international significance.

The World Commission on Environment & Development's report 'Our Common Future' stressed the need for public participation in decisions affecting the environment. It cited the need for: decentralising management of resources upon which local communities depend; giving communities an effective say over use of these resources; promoting citizen initiatives; empowering peoples organisations; & strengthening local democracy

The PCOs support these needs and recognise the importance of national & international significance being taken into account. They assert that local interests, while crucial, should not be <u>the</u> determining factor in decisions.

PCOs support the involvement of the Commonwealth in assessing matters of national or international significance. They reject the use of administrative arrangements cannot achieve effective Commonwealth involvement in EIA because:

- some states provide poor public participation processes;
- the process is uncertain despite the IGAE;

Legislation which changes the jurisdiction of Commonwealth EIA:

- must not remove rights which people currently enjoy;
- must have uniform application throughout Australia.

The Commonwealth has a responsibility to ensure that social and environmental impacts are mitigated as part of ensuring ESD. The changes required must be reasonably prescriptive in order to create certainty of process between levels of government.

Accreditation of State EIA Processes

There are real problems & dangers if the Commonwealth accredits State EIA processes.

- The Commonwealth loses the power to impose its own conditions to protect the environment, require monitoring and/or to enforce conditions.
- If a State government fails to meet its responsibilities, the Commonwealth cannot fulfil its role;
- Many States have less opportunities for "public participation" because there is no state Freedom of Information Act or an Act enabling the requesting of reasons for decisions or judicial review of administrative decisions such as the Commonwealth AD(JR) Act.

Mining at MacArthur River (Northern Territory) is a worst case example because:

- the development was 'fast tracked" with Commonwealth approval;
- there was insufficient information made publicly available;
- there was a paucity of information about the marine environment & potential impacts
- no proper assessment was made of the social impacts on Aboriginal people;
- key documents, parts of the environmental management plan, were withheld;
- baseline data and information were only released at the conclusion on the process.

Many of these shortcoming occur in other EIA documents.

The PCOs do not support Commonwealth accreditation of state EIA processes as proposed.

4. The Trigger for Assessment

The current system allows enormous discretion on whether a development undergoes an EIA, producing considerable uncertainty. This discretion has been seriously abused.

Despite a 1979 House of Reps report on EIA, the Commonwealth Treasury and the Department of Primary Industry have not entered into a Memo of Understanding on what matters likely to be generated by those departments qualify for EIA. DOPIE has repeatedly shown its inability to appreciate matters of environmental significance.

At present, the "Action Minister" makes the 'threshold decision' on whether an activity's impact will be significant and require EIA, yet the various Action Ministers:

- do not have expertise in the area of impact assessment;
- with economic or resource portfolios, have no interest in environmental impact;
- have a 'conflict of interest' due to their commitment to rapid approval and action;
- have been shown to seek, where-ever possible, to avoid the need for EIA.

The NSW legislative model, comprising a list of 'designated developments' and the general requirement to assess under Part IV, is discussed.

The Commonwealth proposes to continue to allow significant discretion without transparency or accountability, perpetuating the worst problems of the current system.

The PCOs support a list of designated developments being prepared which indicates the 'types and 'locations' of developments which will require impact assessment. It's crucial any list of 'designated developments' be prepared with extensive public participation.

The PCOs consider that if a list is adopted, activities which fall within the list, must be the subject of environmental impact assessment, automatically and without the operation of a further discretion which could permit exemptions.

The PCOs also believe it is essential that the Environment Minister have a discretionary power to designate projects as requiring EIA, even though they may not be on the list of designated developments. The new Act ought to provide guidance to assist in determining the level of significant impact.

5. Notice of Intention & Public Information at the Screening stage

The existing scheme is unsatisfactory because:

- the Action Minister decides whether a proposal should be assessed;
- no public notice is provided of the proposal or the pending decisions on its assessment;
- no formal time limits apply to decisions on the level of EIA, its process or contents;
- there is no public input or participation.

The Commonwealth proposes changes which will allow:

- for a Notice of Intention to be issued;
- a limit of 20 days on consideration of whether assessment is required;
- more secret decisions on whether or not assessment is required.

The PCOs support the idea of a Notice of Intention and believe that the Notice should contain certain information which includes:

- advice of the companies financial and technical capabilities;
- description of the existing environment;
- the location of the proposal;
- the precise nature of the proposal;
- the impacts of the proposal;
- the alternatives available which could the proposals objectives;
- the impacts on Commonwealth or State listed endangered species.

The PCOs recommend that, where a proposal falls within a category of development which requires assessment but no Notice of Intention has been provided, any person should be able to refer the proposal to CEPA for investigation and action by CEPA.

If CEPA rejects the PCOs call for automatic assessment & continues to exercise a discretion on whether a proposal undergoes EIA, the PCOs assert that CEPA should:

- advertise a Notice of Intention locally and nationally;
- call for public submissions to address the following:
  - likely impacts on the environment;
  - whether assessment should take place;
  - the level of assessment - either EIS or Public Environmental Review (PER)
  - what further information is required before a decision as to impact can be made;
- allow a minimum of 28 days for submissions to be received;
- take into account any submissions received;
- make a final decision within 40 days of receiving a Notice on the above issues.

The PCOs insist that some proposals must proceed to immediate assessment without any consideration of exemption by way of the exercise of CEPA discretion: especially nuclear facilities, armaments depots, developments over $x million.

The PCOs agree that some proposals should not proceed because their impacts are unacceptable. They recommend that "unacceptability criteria" must be developed and made publicly available, rather than have CEPA exercise a discretionary power in secret. No Notice of Intention should be entertained by CEPA for projects which meet these "unacceptability criteria".

6. Public Scoping

At present, there is no public participation into the scoping of EIA documents.
The Commonwealth proposes to:

- introduce public scoping for all proposals likely to result in significant impact;
- waive the public scoping process in limited cases to "avoid duplication";
- identify stakeholders with an interest in the assessment of the project;
- identify issues which need to be covered by the assessment;
- negotiate time schedules for the assessment process;
- develop acceptability criteria for proposals;
- determine the level of assessment to be undertaken (EIS, PER or Public Inquiry);
- develop "screening criteria" for proposals with culminative impacts needing assessment;

The Commonwealth does not intend to undertake comprehensive assessments of either social or health impacts, only as those impacts which arise from biophysical change.

The PCOs support

- the development of "acceptability criteria" via public processes, not Ministerial Councils or government agencies;
- assessment via a Notice of Intention only if the Notice includes all relevant information as described above.
- a rethink of the current scheme where proponents prepare responses to public submissions;
- the adoption of time schedules and recommends that the purposes for which that negotiated time schedule can be changed must be agreed and specified as part of the time schedule negotiations. No 'ad hoc' changes should be later made to the schedule;
- the incorporation of a standard list of issues to be considered in a scoping process into appropriate Regulations made under the new Act and should also include;
  - principles to guide the preparation of EIA documents, incl the principles of ESD;
  - intergenerational factors to be considered in social impact assessment;
  - economic analyses of proposals which evaluate the real costs of environmental degradation and resources loss;
  - citation of specific goals to be achieved by the development;
  - consideration of alternatives to achieve the stated goals;
  - the relevant time periods for which development approvals apply; and
  - the provision of information on the proponents financial ability to implement the proposal and effectively mitigate impacts.

7. Preparation of EIA documents

There is tremendous community cynicism with the current method of preparing EIA documents because:

- they are produced by the proponents and their consultants;
- they are not seen to be impartial;
- they are often affected by the commercial 'consultant / client' relationship;
- proponents selectively quote from and misrepresent written consultant reports.

The Commonwealth intends to leave document preparation with the proponent because this is claimed to be consistent with the "polluter pays" principle.

CEPA proposes, and the PCOs support, improving EIA documents' standards by requiring:

- better referencing and sourcing of data;
- detailing the expertise and qualifications of experts engaged;
- the publication of the EIA documents;
- the quantification of predicted impacts in table form to enable post-EIA monitoring;
- the development of guidelines on the adequacy of EIA documents, through the public scoping processes;
- that all obligations for the EIA documents' production have been met by the proponent before the documents are released for public comment.

The PCOs are concerned about proponents preparing EIA documents and recommend a major review of the current process of to develop procedures which are truly accurate and independent of proponent bias and conflicts of interest. Six options for new processes for EIA document preparation are suggested. They are:

- appointing a community consutation committee to steer EIA documents preparation
- closer scrutiny of EIA documents by CEPA before release for public exhibition;
- CEPA to engage consultants, with payment dependent on adequate EIA documents;
- strict criteria for certificiation of documents;
- strict criteria for the conduct of consultancies;
- rigorous assessment of EIA documents & public submissions by CEPA.

CEPAs response to these options will indicate how serious they are about major reforms to improve standards.

The PCOs recommend additional measures to improve the quality of EIA documents, viz:

- the development and adoption of Codes of Conduct for proponents & consultants;
- the inclusion of the Code of Conduct in client / consultant contracts;
- registration of consultants with strict criteria for acceptability;
- strict criteria for certification of EIA documents by CEPA;
- the development of rules for consultants, which include:
  - fines for not identifying impacts which exceed the impacts assessed;
  - preventing or limiting "downstream commercial interest" of proponents.

8. Public Assessments

At present, written submissions are the only available means of public participation. Even this is often limited by a lack of resources necessary to deal adequately with highly technical information.

The Commonwealth recognises that providing information to the public to enable participation, and presenting information to non-English speaking communities are important issues. They propose to investigate processes to enable indigenous and non-English speaking people to participate in EIA and to research means of participation.

The PCOs support:

- action by the Commonwealth on the issues it has identified above;
- a public registry system of information on projects assessed;
- an index of central details of assessments, and relevant documents;
- identifying non-public documents early in the process in a transparent way;
- advertising all environment impact decisions, incl. decisions not to assess;
- clarification of what constitutes "major" decisions;
- translation of technical information / jargon to improve readability of EIA documents;
- the preparation of an initial critique document by CEPA to assist public assessment;
- CEPA assessment of EIA documents before and after public review;

- an annual funding allocation to community groups to assist the preparation of submissions on EIA documents;
- funding to support public participation mechanisms other than submission writing;
- funding being made available for further scientific study, where appropriate;
- the payment of a fee, by the proponent when lodging a Notice of Intention, sufficient to cover public participation costs generated by the proposal;
- identification of key "publics" to be involved in the public assessment process;
- funding for involving relevant remote communities;
- the participation of non-English speaking and indigenous communities;
- immediate action on research into appropriate means to allow participation of non-English speaking and indigenous communities;

9. Government Assessment

At present, the Commonwealth Department of the Environment prepares an EIA Report after the exhibition of an EIS & the receipt of public submissions. CEPA proposes to "appraise" a EIS or PER & public submissions and forward advice to the Environment Minister; to assess whether the proposal is, or can be made, environmentally acceptable.

The value of this "appraisal" will depend on the effectiveness of earlier public scoping to determine clear, precise "acceptability criteria" and adopt appropriate methodologies.

The PCOs support

- a capacity for CEPA to reject a proposal at this stage as being "environmentally unacceptable" rather than continue with further assessment;
- the issue of a Notice of Inadequate Information which states that a proponent has not demonstrated the proposals environmental acceptability and which requests the provision of additional information to prove that the proposal can be made environmentally acceptable;
- CEPA having responsibility for developing conditions that can make developments environmentally acceptable;
- the development of criteria for the assessment process including: a list of principles as well as specific criteria.

10. Decision Making

At present, the Environment Minster can only make non-binding recommendations for changes or conditions, to the Action Minister.

The Commonwealth proposes to grant the Environment Minister power to set mandatory and legally binding environmental conditions on proposals, in consultation with the relevant Action Minister.

The PCOs support the granting of this power to the Environment Minister but reject the notion that this power should only be exercised in agreement with the Action Minister.

There is no requirement for economic Ministers to consult and obtain agreement on economic conditions and there should be no requirement for the Environment Minister to do so. A requirement for agreement on environmental conditions will prevent appropriate conditions being applied.

11. Monitoring and Review

At present the Commonwealth has a legal power to monitor and review developments, but it has rarely, if ever, been used. The Commonwealth regularly fails to monitor developments and keep under review critical conditions of approval relating to environmental protection. Predictions are regularly made which are inaccurately valued or are unquantified via statements such as "not significant".

The PCOs support the:

- Commonwealth taking up this power now and operating it to review and assess "the effectiveness of any safeguards or standards for the protection of the environment ... and the accuracy of any forecasts of environmental effects";
- including this power in a new Commonwealth EIA Act;
- systematic comparison of predicted and actual impacts (via an environmental audit) in order to improve scientific content in EIA documents;
- CEPA being given responsibility for, and a legislative obligation to, undertake post-assessment audit reviews of the accuracy, effectiveness and efficiency of Commonwealth environmental conditions;
- public release of all monitoring results a.s.a.p. after collection and at least quarterly;
- public release of all relevant information and monitoring data as regularly as monthly, during the start-up phase of an operation;
- provision of results in a way that all the raw data can be independently assessed, in addition to any interpretation of the data made by the proponent;
- granting of approvals for fixed periods, the maximum period being 10 years;
- further EIA and an audit of monitoring results & compliance conditions of a proponent's existing operation after 10 years, as a basis for further approval;
- quantification of impact predictions in EIA documents, incl. best estimates where quantification is not possible;
- continuation of the requirement for compliance statements by proponents, on a yearly basis, not every 24 months;
- making of an offence: failure to comply with Commonwealth EIA conditions;
- cancellation of consent for a proposal where monitoring indicates that there were inaccuracies in the EIA document, which materially influenced the decision, and that flaws in the EIA document are having a significant adverse affect;
- power to direct an approved proposal to vary its operations to comply with acceptability criteria and conditions of consent;

12. Accountability

At present there are major handicaps for members of the public wishing to challenge administrative decisions which do not follow 'due process' or which are 'unreasonable'.

The PCOs recommend that the Commonwealth ensure that new environmental impact assessment legislation includes a broad open standing provision permitting any person to take civil enforcement action, as 'a third party', to restrain or remedy breaches of relevant Acts, along the lines of s.123 of the NSW EPA & A(Act) 1979.

The PCOs support

- amending state & federal judicial review legislation to include:
  - broad 'third party' standing provisions for legal actions which seek the Court's review of decisions which are causing harm to the environment, or which were made in breach of an environmental law;
  - appeal rights to challenge the merits of decisions affecting the environment, such as a decision not to carry out an EIA;
- greatly increased legal aid funding for applicants enforcing environmental and administrative law;
- extending Commonwealth legal aid to include an indemnity against costs;
- authorising a person, other than the Government MP appointed as Attorney General to finally approve Commonwealth legal aid applications;
- seeking written opinions from legal counsel outside government on, and advice of prospects for success in public interest proceedings;

ends jrc 5/7/95

ELEMENTS of a SUGGESTED STRATEGY for achieving MAJOR PROGRESS in the PUBLIC REVIEW of the COMMONWEALTH ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

Prepared for the Nature Conservation Council of N.S.W. - July 1995

The following suggested strategy has been prepared to outline the actions necessary to achieve substantial reform of Commonwealth environmental law, in line with recommendations made by the mainstream Australian environment movement. For details of these recommendations see the 'Summary of PCOs submission to the Public Review of Commonwealth EIA Process', or the 47 p Submission itself prepared by EDO.

Timeframes, and people or individuals to take responsibility, for specific actions set out below, are required. Consideration of additional elements for this Strategy is also needed.

Note: In this Summary the following abbreviations are used: CEPA =Commonwealth Environmental Protection Agency; EIA =environmental impact assessment; EIA documents = either, an Environmental Impacts Statement (EIS) a Public Environmental Review (PER) or a Report from a Public Inquiry; ESD = ecologically sustainable development; PCOs =Peak Conservation Organisations;

In contemplating such a Strategy, it is crucial the environment movement understands & appreciates how:

- *important it is, for a wide range of environmental issues, to obtain credible, effective, public interest aligned, Commonwealth environmental law;*
- *sensitive the State Gov'ts are to Commonwealth environmental powers being used;*
- *slowly the ALP has made progress on this key environment policy area;*
- *resistant 'developers' are to effective EIA laws with 3rd party rights of enforcement;*
- *powerfully aligned the ALP is to these interests;*
- *limited & ineffective CEPA's proposed model Bill will be without major public debate;*
- *cynically the ALP will use the issue of EIA to inflate its 'green' credentials;*
- *limited in value it is to seek promises from the ALP in a pre-election run-up;*
- *critical it is for Labor to be pressured to pass good environmental law BEFORE going to the polls;*
- *powerful a nation wide, grass roots campaign can be in achieving major progress.*

Assessing the current situation & likely future scenarios

- research CEPAs timetable for finalising their legislative reform proposal to the Gov't;
- research the Government's timetable for introducing a Bill into the Federal Parliament;
- research the positions of various industry groups with a view to soliciting support for major changes;
- research Commonwealth Hansard on the EP (IP) Act and its Review, esp. the Senate;

Educating 'green groups'

- State & national groups to write urgently to all regional and local groups advising of the serious state of Commonwealth environmental law reform and the need to raise the issues in a major pre-election campaign;
- circulate 8 page Briefing Summary to all environment groups;
- prepare state based leaflets, drawing on the Summary, which cites worst case scenarios of Commonwealth EIA in each state;
- key briefing of these issues must be provided to Australian Greens and Australian Democrats Senate candidates;
- groups to include information on and a 'campaign alert' for reforming EIA process in newsletters and circulars to all affiliated member groups & individuals;
- groups to promote & attend a conference on Commonwealth EIA on October 19 & 20, in Sydney organised by the Environmental Defenders Office;

Elements of a Strategy for the Commonwealth EIA Review (Cont'd)

Publicly highlighting the issues

- articles discussing the issues in Commonwealth environmental law reform should be prepared & published in 'green' journals and publications
- major 'opinion pieces' should be prepared by known 'green' commentators or spokespeople, for major city daily papers' 'opposite editorials' (opp. ed.) pages;
- environment groups representatives and Green politicians to canvass issues on TV 'talk shows' and in-depth radio programs;
- callers to discuss issues on public and commercial talk back radio shows;
- letters to the Editor should cite e.g.s of failings of the present EIA system and state the need for major rethink and overhaul of Commonwealth environment laws;
- peak state groups to solicit endorsements for paid advertisements in major city daily papers calling substantial reform of the Commonwealth environmental law;
- groups or individuals to prepare paid TV advertisements for commercial stations calling substantial reform of the Commonwealth environmental law;
- briefings on the environment movements concerns and recommendations for Commonwealth EIA reform should be provided to all media environment reporters;
- environment groups to issue Media Releases commenting on need for a major rethink and overhaul of Commonwealth EIA law, citing necessary details & relevant e.g.s;

Creating political pressure on Federal Labor Government

- briefings on the environment movements concerns and recommendations for Commonwealth EIA reform should be provided to all federal and state political parties by experienced lobbyists;
- speech notes should be prepared & provided to key MPs in state & federal Parliaments (Democrats: Bell & Coulter; WA Greens: Chamarette, Margetts; Ind. Senators: Haradine, Devereux; ...)
  [NSW: Ind MPs: Moore, Macdonald; MLCs RSL Jones, Ian Cohen, Corbett, Niles;...]
- Questions Without Notice on EIA reform timetable and content to be prepared for Senators to ask Environment Minister Senator John Faulkner;
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- major opponents to effective Commonwealth environmental law reform within Cabinet to be identified and publicly exposed nationally & locally;
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- formal letters from a wide range of groups to be sent to specific related interest groups & associations seeking their support and action, e.g. :
  - National Environmental Law Association (NELA);
  - Australian Law Reform Commission;
  - Australian Environment Institute??;
  - Australian Ecological Society;
  - other professional bodies...
- the Prime Minister and Environment Minister to be targeted for a storm of postcards/ faxes requesting fundamental commitments on EIA law;

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- a team of lawyers and authorised activists be identified to comment upon any draft Commonwealth EIA Bill and prepare necessary amendments for the Senate parties;

ends.... jrc 5/7/95

A.C.N. 002 880 864

Environmental Defender's Office Ltd

Suite 82, Lincoln House
280 Pitt Street
Sydney 2000 Australia
DX: 722 Sydney
Pcg: EDO

TEL: (02) 261 3599

FAX: (02) 267 7548

FACSIMILE TRANSMISSION SHEET

Date: 27 June, 1995

To: Sid/Peter - NCC

Number: 247 5945

From: James Johnson

Number of Pages Sent (incl. this page): (6)

If there are any transmission difficulties please telephone (02) 261-3599

MESSAGE:

2.2 Who owns and/or has legal responsibility for the project site?

2.3 Have you sought all necessary permits to undertake your project (owners, local, State and federal authorities)? If not, when will you do this?

2.4 What public authorities (federal, State or local) have you consulted about the site or the issue?

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Suite 82, Lincoln House
280 Pitt Street
Sydney 2000 Australia
DX: 722 Sydney
Peg: EDO
TEL: (02) 261 3599
FAX: (02) 267 7548

Our Ref: jj
Your Ref:

27 June 1995

Peak Conservation Organisations

Dear Participant

Re: **Public Review of the Commonwealth Environmental Impact Assessment Process.**

On 14 June 1995, the writer briefed the Commonwealth EPA's EIA review team about the PCO's views on the EPA's proposals to review Commonwealth environmental assessment law and practice.

The briefing went for three hours. Below is a brief summary of the main points emphasised by us. It also details some of the responses of the EPA.

Should the Commonwealth Have an Increased Role in EIA?

I noted that the PCO's were comfortable with an increased role for the Commonwealth providing that the system of assessment and the level of public participation is at least as good as the current system is in each state system.

How is that Commonwealth Role to be Defined?

The point was made that a list ought to be developed to make it clear from the outset the scope of the Commonwealth's jurisdiction and the precise nature of developments which will be assessed. This will lead to the satisfaction of community expectations of assessment and a level playing field for industry.

There ought to be an additional discretionary power to enable the Minister for the Environment to require assessment of environmentally significant projects which are not on the list. The legislation ought to provide criteria to guide the Minister's discretion. There ought to be provision for public nomination of projects prompting a decision by the Minister.

If a development falls within the designated list, this ought to mean that a development is automatically assessed. It would defeat the purpose of providing a list if the EPA could exercise further discretion and decide that a development need not be assessed, despite the fact that it fell on the list of significant development.

1.2 Where is the site/s of your project? (Please attach an A4 size location map and plan of the site.)

1.3 What are the objectives of your project?

B - 2 Background to the proposal

2.1 What is the environmental significance of the site and the issue you are addressing?

The EPA have major concerns about developing the list of designated developments and requested the PCO's to give some thought to the list and the developments which ought to be on it.

As you will remember the EPA is proposing to "cast the net wide" in defining its jurisdiction, and then allowing the EPA to exercise its discretion and let developments slip through this net.

I expressed concerns that:

1. This will unnecessarily alarm industry by making the changes seem larger than they need to be and providing a bigger target for criticism due to erosion of "States rights"

2. Having being brought within Commonwealth jurisdiction, the developments will not be subject to state assessment. This is because of section 109 of the constitution which says that where there is an inconsistency between Commonwealth and State laws, then Commonwealth law applies.

The EPA replied that they will ensure that any new law allows concurrent jurisdiction of Commonwealth and state laws. This will ensure that even where a project falls within the Commonwealth jurisdiction and the EPA decides assessment is not required, assessment may be undertaken by a state agency.

Notice of Intention.

Under the current process, the responsibility to act and comply with the assessment process lies with the Action Minister. In some ways this process is not fair because a proponent, through no fault of their own, can be left without a valid licence because the Action Minister has failed to comply with the law.

The proposal to require a notice of intention to be lodged by the proponent places the burden of compliance on the proponent, not the Minister. Failure to lodge a notice of intention in respect of designated projects ought to attract a penalty.

A notice of intention ought to provide minimum prescribed levels of information and there ought to be public notification of the receipt of a notice of intention.

Scoping

The need to provide scoping at the earliest stages of assessment was emphasised. So too was the need for interest group funding for this process. The PCO's concerns about "acceptability" criteria were flagged.

SECTION B
DETAILS OF PROJECT

Name of applicant/organisation _____

Address _____

Amount requested $ _____

B-1 Project Description

1.1 Please describe your *Rivers reborn* project and the environmental issue you wish to address.

Preparation of EIA Documents.

It was emphasised that there must be improvement in EIA documents. Although it has only been used on a couple of occasions, the Victorian model of a panel providing community input during the preparation of EIS offered a good model. Another option was breaking the financial nexus between the proponent and the consultant, by the consultant being engaged by the EPA, with funding from the proponent.

The EPA raised the potential problem of disputes about additional costs for additional studies. I argued that this was largely a question of developing the brief or contract for the consultants adequately in the beginning.

It was very important that there be greater accountability for consultants by the naming of individual authors, the publication of EISs and the quantification of predictions where possible so that predicted values can be compared with actual values.

The EPA seemed keen to adopt a process where they approved the methodology for an EIS before writing or studies commenced.

Monitoring

The EPA see three potential areas for them to conduct monitoring.

1. Monitoring of Commonwealth agencies not subject to state laws. This is seen as vital by the EPA because, in the absence of their action, there would be no supervision of Commonwealth agencies.

2. Monitoring as a means to improve assessment for future projects. This would be monitoring simply for information gathering to compare predictions made in EISs with actual results.

3. Compliance monitoring.

I made the point that compliance monitoring is generally carried out by the proponent and requires substantial resources. While compliance monitoring might not be an appropriate role for the EPA, the conduct of audits to ensure the accuracy of that compliance monitoring is an important role.

Feedback

The EPA advised that industry's response had been provided by the Mining Industry Council of Australia, whose response argued for no increase in Commonwealth power. This seems curious given that it would be much easier for companies operating nationally to have a uniform, standard procedure for major projects.

The EPA team seem unclear about whether they favour:

* an increase in assessments under the Commonwealth scheme,

A-2 **Applicants who are Non-Government Organisations**

This section gives us important background information about the nature of your organisation, your organisation's ability to manage your project and the organisation which would be responsible for administering the grant.

What is the legal status of your organisation (e.g. company limited by guarantee, cooperative, incorporated association)? _____

Date of the formation of your organisation _____ Registration no. _____

Office Bearers

Name	Position	Address

Are your board members: elected ☐ appointed? ☐

Is there a regular turnover of board members? yes ☐ no ☐

How many members are there of your organisation? _____

Can members of the public join your organisation? yes ☐ no ☐

Public accountant who audits your books:

Name _____

Address _____

_____ Postcode _____

Phone no.( ) _____ Fax no.( ) _____

If your organisation is not a legally constituted body, please give the name of a suitable non-profit organisation that has agreed to receive and administer the grant.

Name _____

Address _____

_____ Postcode _____

Phone no.( ) _____ Fax no.( ) _____

Contact person _____

* assessments by state agencies which meet Commonwealth standards and with Commonwealth involvement, or

* assessment by state agencies without Commonwealth involvement because the agencies have been accredited by the Commonwealth.

The Commonwealth may or may not keep final decision making power under each of these models.

I expressed the concern that the rights to participate in environmental decisions vary in the different jurisdictions throughout Australia. This "participation infrastructure" is broader than simply the environmental assessment laws and includes freedom of information legislation, access to courts and availability of legal aid.

While the EPA were quick to assure that nobody would lose any rights as a result of the Commonwealth scheme, that is not the same thing as providing the same rights to participate throughout Australia. It would be of concern, in our opinion, if the Commonwealth proposes to maintain the unequal rights to information and justice which currently exists between States.

PCO's Specific Process Concerns.

I expressed concern on behalf of the PCO's that written recommendations from the EIA review team were already with Barry Carbon, Executive Director of the EPA. It was disappointing that we were giving our briefing so late in the process given that offers had been made some weeks earlier. The EPA responded that the recommendations were still fluid, that they meet regularly with Mr Carbon and that no EPA position had been finalised.

I expressed concern that the amendments to the administrative procedures pre-empted the course of the review, that they went further than was needed to go to address any real or imagined problems after the Sackville judgment and that they "restored" a position which both the EPA and PCOs were not happy with, reaffirming the key role of the Action Minister in environmental assessment.

The EPA responded that the decision was made by Cabinet from a number of options which were put to Cabinet. The option chosen was not the worst option from the EPA's point of view. The EPA did not want to open up broader issues of environmental assessment because this would pre-empt the review process and they feared they might loose powers to other agencies.

I expressed concern on behalf of the PCOs that administrative changes foreshadowed in the discussion document could be made now without the need to involve Cabinet or even the Minister. These include greater consultation with the community on key decisions and notification of things such as designation of proponents. There is concern that the EPA proposes best practice in these areas, yet practices the minimum legal requirement.

Rivers reborn

GRANT APPLICATION FORM

CLOSING DATE: 29 SEPTEMBER 1994
GRANTS AVAILABLE: $25,000-$100,000

MAJOR PROJECTS

SECTION A
REGISTRATION AND ADMINISTRATION

A-1 All Applicants

Name of applicant/organisation _____

Postal Address _____

_____ Postcode _____

Street Address _____

_____ Postcode _____

Name of contact person for managing the project _____

Phone no.( ) _____ Fax no.( ) _____

Name of contact person for administering the grant _____

Phone no.( ) _____ Fax no.( ) _____

Short descriptive title of project: _____

_____

Project starting date _____

Project completion date _____

Amount you are seeking from the *Rivers reborn* Program $ _____

For example, the designation of an application for a licence to dump Jarosite and the designations of woodchip licences throughout the country were not notified to the PCOs despite intense and ongoing interest of PCOs in these issues. It is no answer to say that anybody can ring the Department and ask whether something has been designated.

It was pointed out that if these administrative changes were made now and put into practice, the legislation would be simply confirming what had become current practice and not imposing new obligations. This must make it easier to achieve legislative change.

The EPA responded that what was required was an attitudinal change within the EPA, which might require legislation. It was also hinted that the need for change would be highlighted and given greater impetus by not fixing the current problems, thereby creating a greater contrast between the existing problems and the proposed solutions.

Conclusion.

The EPA asked for the PCO's assistance by providing details of projects which are currently slipping through the Commonwealth "EIA net", such as the Tarkine Road and the Hinchinbrook development. Please forward any further examples of developments of a national or international significance which have not been assessed by the Commonwealth to Steve Munchenburg at the EPA.

The EPA indicated that there may be involvement of key stake holders before the package of recommendations goes from the EPA to the Minister. Industry have asked to be involved at this stage, noting that if the package goes to an Inter Departmental Committee, they will receive leaks of the package anyway.

Should you wish to discuss any aspect of the matters raised above, please do not hesitate to contact me. Maria Comino and I would like to thank the PCO's for their support in this project. The EDO intends to continue its involvement until a rational, effective environmental assessment process is in place at the Commonwealth level.

Yours faithfully
Environmental Defender's Office Ltd

James Johnson

James Johnson
Solicitor

CURRICULA VITAE

We ask you to provide curricula vitae (CVs) for the people directing and working on your project so that we can assess their skills and capabilities of successfully undertaking the project. To keep this information to a manageable amount, these CVs should be no more than two pages in length.

JOB BRIEFS/DESCRIPTIONS

We also ask you to provide job descriptions for all project employees and briefs for any consultants you may employ so that we understand clearly what you will be asking them to do.

ATTACHMENTS

We have designed the questions on the application to avoid the need for you to attach additional information. Please use the spaces provided and do not add extra material.

LETTERS OF SUPPORT FROM LOCAL COUNCIL

If your project is on council-owned or council-managed land you must attach a letter of support for your project from the general manager/s of the local council/s where the project will take place. This is separate from any approvals you may need to seek from council/s.

CHECKLIST

You should use the following checklist to make sure that your application is complete and accurately represents your project. You should:

- ☐ read the *Rivers reborn* grant guidelines
- ☐ read this introduction
- ☐ answer all the questions on this application form
- ☐ write only in the spaces provided
- ☐ attach all required curricula vitae, briefs and job descriptions
- ☐ sign and date your application.

ELEMENTS of a SUGGESTED STRATEGY for achieving MAJOR PROGRESS in the PUBLIC REVIEW of the COMMONWEALTH ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

Prepared for the Nature Conservation Council of N.S.W. - July 1995

The following suggested strategy has been prepared to outline the actions necessary to achieve substantial reform of Commonwealth environmental law, in line with recommendations made by the mainstream Australian environment movement. For details of these recommendations see the 'Summary of PCOs submission to the Public Review of Commonwealth EIA Process', or the 47 p Submission itself prepared by EDO.

Timeframes, and people or individuals to take responsibility, for specific actions set out below, are required. Consideration of additional elements for this Strategy is also needed.

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In contemplating such a Strategy, it is crucial the environment movement understands & appreciates how:

- *important it is, for a wide range of environmental issues, to obtain credible, effective, public interest aligned, Commonwealth environmental law;*
- *sensitive the State Gov'ts are to Commonwealth environmental powers being used;*
- *slowly the ALP has made progress on this key environment policy area;*
- *resistant 'developers' are to effective EIA laws with 3rd party rights of enforcement;*
- *powerfully aligned the ALP is to these interests;*
- *limited & ineffective CEPA's proposed model Bill will be without major public debate;*
- *cynically the ALP will use the issue of EIA to inflate its 'green' credentials;*
- *limited in value it is to seek promises from the ALP in a pre-election run-up;*
- *critical it is for Labor to be pressured to pass good environmental law BEFORE going to the polls;*
- *powerful a nation wide, grass roots campaign can be in achieving major progress.*

Assessing the current situation & likely future scenarios

- research CEPAs timetable for finalising their legislative reform proposal to the Gov't;
- research the Government's timetable for introducing a Bill into the Federal Parliament;
- research the positions of various industry groups with a view to soliciting support for major changes;
- research Commonwealth Hansard on the EP (IP) Act and its Review, esp. the Senate;

Educating 'green groups'

- State & national groups to write urgently to all regional and local groups advising of the serious state of Commonwealth environmental law reform and the need to raise the issues in a major pre-election campaign;
- circulate 8 page Briefing Summary to all environment groups;
- prepare state based leaflets, drawing on the Summary, which cites worst case scenarios of Commonwealth EIA in each state;
- key briefing of these issues must be provided to Australian Greens and Australian Democrats Senate candidates;
- groups to include information on and a 'campaign alert' for reforming EIA process in newsletters and circulars to all affiliated member groups & individuals;
- groups to promote & attend a conference on Commonwealth EIA on October 19 & 20, in Sydney organised by the Environmental Defenders Office;

Publicly highlighting the issues

- articles discussing the issues in Commonwealth environmental law reform should be prepared & published in 'green' journals and publications
- major 'opinion pieces' should be prepared by known 'green' commentators or spokespeople, for major city daily papers' 'opposite editorials' (opp. ed.) pages;
- environment groups representatives and Green politicians to canvass issues on TV 'talk shows' and in-depth radio programs;
- callers to discuss issues on public and commercial talk back radio shows;
- letters to the Editor should cite e.g.s of failings of the present EIA system and state the need for major rethink and overhaul of Commonwealth environment laws;
- peak state groups to solicit endorsements for paid advertisements in major city daily papers calling substantial reform of the Commonwealth environmental law;
- groups or individuals to prepare paid TV advertisements for commercial stations calling substantial reform of the Commonwealth environmental law;
- briefings on the environment movements concerns and recommendations for Commonwealth EIA reform should be provided to all media environment reporters;
- environment groups to issue Media Releases commenting on need for a major rethink and overhaul of Commonwealth EIA law, citing necessary details & relevant e.g.s;

Creating political pressure on Federal Labor Government

- briefings on the environment movements concerns and recommendations for Commonwealth EIA reform should be provided to all federal and state political parties by experienced lobbyists;
- speech notes should be prepared & provided to key MPs in state & federal Parliaments (Democrats: Bell & Coulter; WA Greens: Chamarette, Margetts; Ind. Senators: Haradine, Devereux; ...)
  [NSW: Ind MPs: Moore, Macdonald; MLCs RSL Jones, Ian Cohen, Corbett, Niles;...]
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Publicly highlighting the issues

- articles discussing the issues in Commonwealth environmental law reform should be prepared & published in 'green' journals and publications
- major 'opinion pieces' should be prepared by known 'green' commentators or spokespeople, for major city daily papers' 'opposite editorials' (opp. ed.) pages;
- environment groups representatives and Green politicians to canvass issues on TV 'talk shows' and in-depth radio programs;
- callers to discuss issues on public and commercial talk back radio shows;
- letters to the Editor should cite e.g.s of failings of the present EIA system and state the need for major rethink and overhaul of Commonwealth environment laws;
- peak state groups to solicit endorsements for paid advertisements in major city daily papers calling substantial reform of the Commonwealth environmental law;
- groups or individuals to prepare paid TV advertisements for commercial stations calling substantial reform of the Commonwealth environmental law;
- briefings on the environment movements concerns and recommendations for Commonwealth EIA reform should be provided to all media environment reporters;
- environment groups to issue Media Releases commenting on need for a major rethink and overhaul of Commonwealth EIA law, citing necessary details & relevant e.g.s;

Creating political pressure on Federal Labor Government

- briefings on the environment movements concerns and recommendations for Commonwealth EIA reform should be provided to all federal and state political parties by experienced lobbyists;
- speech notes should be prepared & provided to key MPs in state & federal Parliaments (Democrats: Bell & Coulter; WA Greens: Chamarette, Margetts; Ind. Senators: Haradine, Devereux; ...)
  [NSW: Ind MPs: Moore, Macdonald; MLCs RSL Jones, Ian Cohen, Corbett, Niles;...]
- Questions Without Notice on EIA reform timetable and content to be prepared for Senators to ask Environment Minister Senator John Faulkner;
- a petition to the Commonwealth Senate calling for action to amend any unsatisfactory Bill introduced by the ALP; (See draft e.g. which follows)
- formal letters from a wide range of groups, requesting key actions, to be sent to specific Ministers: Attorney General, Minister for Justice, Environment Minister, Treasurer, Minister for Resources;
- formal letters from a wide range of groups, requesting key actions, to be sent to key state-based federal backbenchers and factional organisers;
- major opponents to effective Commonwealth environmental law reform within Cabinet to be identified and publicly exposed nationally & locally;
  (Cook, Beddall, Lee, Crean, etc
- formal letters from a wide range of groups to be sent to specific related interest groups & associations seeking their support and action, e.g. :
  - National Environmental Law Association (NELA);
  - Australian Law Reform Commission;
  - Australian Environment Institute??;
  - Australian Ecological Society;
  - other professional bodies...
- the Prime Minister and Environment Minister to be targeted for a storm of postcards/faxes requesting fundamental commitments on EIA law;

Using the opportunities the pending Federal Election presents...

- local and regional environment groups to raise Commonwealth EIA issues with local ALP MPs &/or candidates, seeking statements of their position and commitment to action in the pre-election run-up;
- state and national environment groups to include questions on Commonwealth EIA reform in any pre-election Questionnaires to Candidates in the pre-election run-up with a view to publicly highlighting the responses;
- local Greens and Democrat parties to press ALP MPs in key marginal federal seats for statements on their position in pre-election run up and local preference discussions;
- state and national Greens and Democrat parties to press the ALP for key actions on Commonwealth EIA in pre-election run up and Senate preference discussions;
- senior Canberra Press Gallery journalists to be briefed on the issues in Commonwealth EIA by experienced lobbyists with a view to pertinent questions being asked of the PM & Ministers during press conferences and/or interviews;
- a team of lawyers and authorised activists be identified to comment upon any draft Commonwealth EIA Bill and prepare necessary amendments for the Senate parties;

ends.... jrc 5/7/95

AMENDMENT TO THE ADMINISTRATIVE PROCEDURES MADE UNDER THE ENVIRONMENT PROTECTION (IMPACT OF PROPOSALS) ACT.

On 10 January 1995 the Federal Court delivered judgment in Tasmanian Conservation Trust v. Minister for Resources and Gunns Ltd. This was the first case to come to grips with interpreting the Administrative Procedures under the Environment Protection (Impact of Proposals) Act 1974.

The procedures have not worked well and environmental assessment at the Federal level is a sham. Many major projects avoid assessment. There is tremendous discretion as to what is assessed, which creates uncertainty for industry and fails to provide the "level playing field" necessary to avoid favoured treatment being given for political reasons.

The judgment clarifies the meaning of terms and the obligations of Ministers under the procedures. The result is that designation is required even where an EIS has been done in the past.

The Environment Department has stood on the sidelines wringing its hands helplessly, saying they are powerless to intervene, and that the Action Minister has the responsibility for initiating the environmental assessment process.

The Sackville decision delivered the power to play a role to the EPA. As soon as a new step was taken in relation to a proposal which could affect the environment to a significant extent; then the EPA was put in the driver's seat. It didn't matter that an EIS had been done in the past. It didn't matter that the Action Minister didn't consider a variation in the proposal to be significant; it is not that minister's decision and that minister does not have the expertise to make the decision anyway.

On 5 May 1995, the Commonwealth government gazetted an amendment to the Administrative Procedures made under the Environment Protection (Impact of Proposals) Act 1974. Far from assisting Action Ministers, industry and the community in understanding when environmental impact assessment should take place, the new procedures further muddy the waters.

In addition the procedures exempt several classes of proposals from the requirement to designate and are a reaction to roll back the principles established in Tasmanian Conservation Trust v Minister for Resources and Gunns Limited.

Industry had lobbied the government, saying that the sky was falling. The EPA went weak in the knees and has effectively handed the threshold determination of when a matter should be assessed back to the Action Minister. After twenty years waiting for the ball on the wing, they were passed the ball and didn't like the pressure; they ran into touch.

The Commonwealth's environmental assessment procedures may well be worse in terms of environmental assessment and public participation than before the Sackville judgment. The amendments

On 22 October 1984, the plaintiff issued the writ in this action, claiming against the six defendants injunctions restraining them from infringing the plaintiff's copyright in its computer software, from passing-off of various descriptions, from breaching, or procuring the breach of, the agreement and from misusing the plaintiff's confidential or secret information regarding the system. I have described merely the substance of the injunctions sought. In addition, the writ claims damages and the usual ancillary relief common in breach of copyright passing-off and misuse of confidential information cases.

The writ was not, however, served on any of the defendants. Instead, the plaintiff moved the court ex parte for *Anton Piller* orders, *Mareva* injunctions and certain negative injunctions. The bulk of the relief sought I granted, including *Anton Piller* orders against the first five defendants in respect of their respective London premises. But, as I have said, I refused to make an *Anton Piller* order against the sixth defendant in respect of its Belgian premises. The justification put forward by Mr. Laddie, on behalf of the plaintiff, for the grant of *Anton Piller* orders at a stage before service of the proceedings on, or any notice of the proceedings to, the defendants was that the facts of the case gave rise to a fear that, if free to do so, the defendants, or some of them, might take steps to destroy or conceal the documentary and other evidence of the wrongdoing on which the plaintiff's action was based. Copied discs, it was said, could easily be scrubbed clean leaving no trace of the copying. Documentary evidence of improper sales of hardware or software to customers could be destroyed leaving no evidence of the transactions.

Very considerable affidavit evidence and very many exhibits were placed before me in support of the plaintiff's application. This evidence was, obviously, at the stage at which the application was made, unanswered. The defendants may have a complete answer to every allegation made against them. Nevertheless, on the basis of the evidence before me and for the purposes of the application being made, I was satisfied that the plaintiff's fear was a reasonable one and that the plaintiff ought to be protected by the grant of an appropriate *Anton Piller* order. I, therefore, made against the first five defendants, *Anton Piller* orders in respect of their respective premises.

The plaintiff's omission to serve the writ or give any notice to the defendants of the proceedings follows the usual practice where *Anton Piller* orders are to be sought. On the plaintiff's evidence the whole point of the *Anton Piller* order would otherwise have been lost. The plaintiff proposed that the writ, notice of motion and affidavit evidence should be served on the defendants, together with the *Anton Piller* order itself which would then immediately be executed.

In the case of English defendants, service presents no legal difficulty. The writ and other documents can be served in England. But where service abroad is necessary, leave of the court, under R.S.C., Ord. 11, must first be obtained and the case brought within one or other of the paragraphs of rule 1(1) of that order. Since the sixth defendant is a Belgian company with no place of business in England, service on the sixth defendant required leave under Order 11. Accordingly, the plaintiff applied for such leave and relied on paragraph (*j*) of Ord. 11, r. 1(1) as covering the case. Paragraph (*j*) enables leave to be given:

> "if the action begun by writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto."

That paragraph only applies if some defendant has been duly served within the jurisdiction. In the present case, no one had yet been served. But, if the facts are otherwise appropriate for leave to be given under paragraph (*j*), I do not see why, in a case such as the present, leave should not be given but expressed to be conditional upon service first being duly effected upon some proper defendant within the jurisdiction.

The plaintiff's evidence satisfied me, if the allegations in the affidavits are correct, that the sixth defendant represented one of the means whereby the two principal individual defendants combined to misuse the copyright material and the secret information of the plaintiff and one of the means whereby the first defendant committed breaches of the agreement under which that material and information was put at its disposal. I was, therefore, satisfied that this was, or would be, after service on an English defendant had been effected, a proper case for leave to be given for service abroad on the sixth defendant. Accordingly, I gave leave conditional upon service first being duly effected on the first defendant. But the conclusion that the requisite leave under Order 11 should be granted does not dispose, to my mind, of the difficulty of granting an *Anton Piller* order against the sixth defendant intended to be executed against that company's premises in Belgium before any service of process has been effected on that defendant.

There are difficulties both of jurisdiction and of discretion. I will deal first with jurisdiction. The High Court has a territorial jurisdiction. It has jurisdiction to make orders in respect of goods or land within the jurisdiction, or against premises subject to jurisdiction. It frequently exercises such jurisdiction ex parte and before service of process on the relevant defendant. It often, upon appropriate undertakings being given for the issue of a writ, exercises such jurisdiction before any action has actually been commenced. In these cases the question whether the desired ex parte order should or should not be made is generally one of discretion, not of jurisdiction.

But a foreign defendant is, prima facie, not subject to the jurisdiction of the court. Such a defendant may become subject to the jurisdiction of the court if service of process can be effected on the defendant in England, or if the defendant submits to the jurisdiction—as, for instance, by instructing solicitors to accept service—or if the court assumes jurisdiction by authorising service under Order 11. But until service has been effected the foreign defendant does not become subject to the jurisdiction of the court. The remedy of a foreign defendant against whom an order under R.S.C., Ord. 11 for service abroad has been made is to apply to set aside that order. It is well established that such an application is not a submission to the jurisdiction. If the application succeeds, and the order is set aside, the court is, in effect, declining to assume jurisdiction over that foreign defendant.

But an *Anton Piller* order is a mandatory order intended for immediate execution. The effect of execution of an *Anton Piller* order cannot, in practice, wholly be reversed by the setting aside of that order or, in the case of foreign defendants, by the setting aside of the leave given under Order 11. The foreign premises will have been entered into, the documents in those premises will have been copied or taken away by

have gone further than they need have gone to address the alleged problem of uncertainty as to when to designate and of proposals being designated too frequently.

An amendment to the procedures could have been made which would still require regular designation of existing developments for the purpose of reviewing any change to environmental impact, but not so frequently as to be absurd. The amendment could have been to the effect that, if there is no change to the proposed action having a significant effect on the environment, then only one initiative in any twelve month period need be designated in relation to a proposed action.

Annual referral is not excessive and there is precedent for this arrangement. The Australian Heritage Commission Act requires that advice be sought each year in relation to many approvals. An annual referral to the EPA would enable the EPA to keep a matter under review and for the Environment Minister to decide, based on the matters listed in clause 3.1.2, if and when further assessment should be done.

The burden on the Action Minister is negligible; one letter each year for matters affecting the environment to a significant extent. The EPA would need to update its information each year on these major projects; some might say this is an appropriate role for an EPA.

Application of the Procedures.

Formerly, Sackville J had interpreted the procedures to mean that matters affecting the environment to a significant extent were subject to the procedures; ie the action on the ground, rather than any decision or permission.

The procedures now apply to **Commonwealth actions.** These are actions of the kind found in section 5(1)(a)(e) of the Impact Act. These subsections describe the formulation of proposals, the carrying out of works and other projects, the negotiation, operation and enforcement of agreements and arrangements, the making of or participation in the making of decisions and recommendations and the incurring of expenditure.

A **proposed action** has been redefined to mean a Commonwealth Action which has been designated.

An **environmentally significant action** is a Commonwealth action which will, or is likely to:-

a. affect the environment to a significant extent or to result in such an effect; or

b. have the effect of committing or causing an action by another person that:

   i would otherwise be unlikely to occur and

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ii will or is likely to affect the environment to a significant extent, or to result in such an affect; or

c. have the effect of promoting or facilitating an action by another person that will, or is likely to, affect the environment to a significant extent to result in such an effect.

The Threshold Test for Assessment.

Under the former Administrative Procedures, the Action Minister was obliged to designate a proponent as soon as there was any initiative in relation to a proposed action (a matter affecting the environment to a significant extent).

Under the recently gazetted procedures, the test for designation is whether an action is an **environmentally significant action** . The revised procedures go on to provide that the Action Minister is not bound to designate in two broad categories.

A. A proponent has been designated in relation to another Commonwealth action (the earlier proposed action) and the Action Minister considers that any relevant environmental effect of the later action;

i has been fully taken into account in relation to the earlier proposed action; or

ii where the earlier proposed action has been allowed before environmental assessment has completed, will be taken into account when assessment is done.

B. A proponent has been designated in relation to another Commonwealth action and the Action Minister considers that any relevant environmental effect of the later action;

i. is an extension of the environmental effect of the earlier proposed action; and

ii is not of a nature significantly different from that of the effect of the earlier proposed actions; and

iii does not significantly add to the effect of the earlier proposed action.

These clauses represent a giant step backwards from the law as it was previously. Firstly compliance with the procedures in the manner suggested by the Sackville judgement would mean that wherever there was a significant effect on the environment from a development such as logging for export woodchips, an application for a renewal of a licence would prompt a referral to the Department of Environment. This is subject of course to the exception that a matter need not be referred if it had already been designated recently.

The scope of the exception is uncertain, but a reasonable analysis would conclude that once a coal mine had been designated, for example, as a result of an export licence application, then it would be some time before it needed to be designated again.

This is hardly onerous for the Action Minister. It simply requires a letter to the Department of Environment. The Department of Environment would be kept regularly informed about the progress of matters affecting the environment to a significant extent and, at some stage after an environmental impact statement had been done, may conclude that further assessment was required.

The position under the new Procedures is that matters need only be referred to the Department of Environment where the Action Minister considers that the environmental impact is of a significantly different nature or significantly adds to the impact of the proposal which had been designated before. One must remember that designation leads to assessment in very few cases.

This change has the potential to lead to "death by a thousand cuts". Woodchip licences around the country could be increased by 20% each without designation. It would be a risky and expensive exercise for a conservation group to convince a Court that the Action Minister was totally unreasonable in saying a 20% increase was not significant.

The procedures leave open the capacity for incremental increase and change in a development. Each individual increase or change may not be significant but the aggregate around the country could in theory be at least as great as any of the initial Commonwealth actions which prompted designation.

The decision as to whether the nature or extent of an environmental impact has changed lies with the Action Minister. This perpetuates the problem of the Action Minister not being the Minister with the expertise to ascertain significance and being the minister with an interest in ensuring that the action takes place. It is also contrary to the EPA's own recommendations in the EIA review process.

The Resources Minister has already indicated the fashion in which such changes will be interpreted. In his reasons for not designating Harris Daishowa in relation to its woodchip licence application last year, he asserts that the additional logging of 172,000 tonnes from Victoria, which has not been the subject of environmental assessment, is not significant. While this may appear unreasonable to ordinary people, a court may not reach the same conclusion. It is quite a different matter to prove to a Federal Court judge that this conclusion was SO UNREASONABLE that it was not open to the Minister.

CASE STUDY AND OBSERVATION

The case study and observation is an alternative in the course and constitutes 25% of the available marks.

1. Objectives

(a) To familiarise students with the contents of a solicitor's file - the court documents, records of interviews, etc.

(b) To place the procedural steps and consequent documents in the context of an actual case.

(c) To view the relationship between the client and the solicitor; the solicitor and the barrister; the legal practitioners and the court; the barrister and solicitor and unadmitted personnel.

2. The Case Suitable for Study

The course is based upon Victorian civil procedure with an emphasis upon pre-trial proceedings.

(a) The case must be a civil proceeding.

(b) The case ought to originate in the County Court, Supreme Court, Federal Court or High Court.

(c) A case with relatively extensive pre-trial manoeuvering is most appropriate.

(d) A student might wish to compare two or more cases or cases from two different courts. This is acceptable but by no means necessary.

3. Arrange the Study

Students must make their own arrangements in contacting a solicitor (or barrister) and selecting a case. Of course, if one has a family solicitor, a relative or friend in the profession, or knows an articled clerk, there should be no difficulty in arranging a visit. Even in the absence of an established contact, most practising lawyers should prove willing to help, and students should not be backward in seeking assistance.

4. What Stages of the Proceeding

Ideally, one should witness a case from the time the client first contacts the solicitor until final judgment and the time for any further appeal has expired. Unfortunately, litigation is not an environment controlled by the University and students study Civil Procedure only one academic semester. Therefore it is realised that some will see only the beginning of litigation, some one interlocutory step, some the hearing.

(a) The case chosen should have at least reached the stage where a writ has been issued and defendant appeared.

(b) The case need not have reached the hearing stage; even if settlement is likely and no open court appearance envisaged, the matter may be appropriate

(c) The witnessing of an open court hearing without any knowledge of or access to the pre-trial history of the case is NOT sufficient.

(d) A case that has been completed and is now a dead file, while not as desirable as a `live' case will accomplish most of the objectives listed above and would

Development Before Assessment.

Insertion of a new part in the Administrative Procedures, dealing with performing ongoing operations before complying with the procedures, formalises and attempts to legitimise a practice which has been going on for some time. That is, granting a Commonwealth approval before environmental assessment takes place.

On the face of the Procedures, the Minister for the environment can only exempt ongoing operations of a project; ie where a project is already operational. What of projects which have commenced in breach of the Admin Procedures, such as the Gunns export operation? The EPA wrote on three occasions, imploring DOPIE to designate the proposal. The Minister for Resources has now designated the operation, acknowledging its impact, following the commencement of two sets of court proceedings. You can bet that the EPA have tossed in the towel and will consider this an "ongoing project" and eligible for an exemption from assessment, at least for a period of time.

"Ongoing projects" are likely to be allowed to continue therefore, often despite an Action Minister's earlier unlawful failure to designate, until some indeterminate assessment process takes place. In 1990 the Action Minister designated the export of woodchips from the north coast of New South Wales. It was not until 1994 that a final EIS was presented. During the entire time, the company concerned continued to carry out the "proposed action".

With the MacArthur River mining project, a "new" project, assessment was commenced and completed within 6 months. This is a somewhat different timescale, because assessment was a prerequisite to approval.

Any project operating at the state level which seeks to expand markets by exporting may well will be an "ongoing project". The exemption described above is thus not limited just to developments which commenced before the Impact Act or which have slipped through the lawful designation process in the past.

The introduction of the concept of assessment after the development has taken place makes a mockery of the process of assessment.

The question arises , what else could the government do? It is worth examining the approach taken on other occasions, because this is not the first time that a test case has created uncertainty as to how to put the law into proactice equitably.

As a result of a Court of Appeal case brought by the EDO in NSW, many mines and quarries were found to be operating unlawfully because the Department of Mines had not considered an EIS when issuing leases for them. The COALITION government of the day didn't exhibit the same kneejerk reaction we have seen from the Commonwealth Government, overturning the court decision.

RAMBO LITIGATION: WHY HARDBALL TACTICS DON'T WORK

This article published in the American Bar Association Journal in March 1988 deals of course with the US scene but has a message some of us might ponder.

Robert N. Sayler

Hardball is taking the most difficult position for your opponent that your client will live with — and then doing what you say you will do. You never, ever back down.

— "Playing Hardball", ABA Journal, July 1987.

ABUSES IN THE LEGAL SYSTEM, G.K. CHESTERTON said, arose not because lawyers were wicked or stupid, but because they had "gotten used" to them.

A case in point is the conduct that parades under the banner of zealous advocacy. In the *Journal* article, proponents of hardball claimed that it was not just permissible, but obligatory for fulfilling an advocate's duty to serve his clients. Opponents denounced only the most egregious conduct. Caught in a definitional muddle, the discussion foundered, the two sides talking past each other.

Between spitball and slow-pitch softball exists an approach to trial advocacy warranting urgent attention, because it is pernicious and on the rise. Call it the Rambo Reflex or "hardball" lawyering — like pornography, you know it when you see it. It is characterized by:

☐ A mindset that litigation is war and that describes trial practice in military terms.

☐ A conviction that it is invariably in your interest to make life miserable for your opponent.

☐ A disdain for common courtesy and civility, assuming that they ill-befit the true warrior.

☐ A wondrous facility for manipulating facts and engaging in revisionist history.

☐ A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding.

☐ An urge to put the trial lawyer on center stage rather than the client or his cause.

Unfortunately, entire firms adopt this as a signature and many lawyers perceive a mini-epidemic. Why? The perception is that it works. But there is utterly no support for that assumption, which usually rests on this fallacy: X wins some cases; he's an ornery cuss; therefore, he wins because he's ornery.

But judges regularly contend that the reverse is true. It defies all common experience to believe that mean-spiritedness is persuasive. Try to find some other field of endeavour — from politics to public relations — where this is the case.

Another justification for hardball is that it proves you love your clients, they love you and anything short of it compromises them. Gerry Spence has even cast the argument as a moral imperative, noting in "Playing Hardball" that lawyers who don't pull out all the stops in presenting their cases "don't love their clients".

No doubt a few clients feel more "loved" if their lawyer is Attila the Hun — some lawyers have been retained for just this reason. But just as many clients, weary of the shouting and the expense it brings, have come to doubt its effectiveness.

On another level, Monroe Freedman, a Hofstra University law professor, states in "Playing Hardball" that civility in litigation can be "a euphemism for the old boy network, for covering up for one another". The notion is that civilized conduct is for the monied, the boring, the timid, the conservative — but not for the creative and the free-spirited. This is bonkers. Civility is not, and never has been, synonymous with pin-striped suits and the well-heeled. Nor has it ever been anathema to all but corporate America.

And then there is the military model: Litigation is war and the warrior must use its weapons. The first characterization is bizarre — indeed, dead wrong — and the second is a non sequitur. Litigation is a means of dispute resolution that has been carefully crafted to be non-warlike. Whatever its resemblance to war — to the limited extent that it produces winners and losers — it is nonsense to assume it requires the use of martial arts.

Another myth is that the closest thing to pure justice is achieved by a contest of hardball litigators. Why on earth, one wonders, should this be so? Scholars are not convinced that adversarial litigation yields a more pure form of justice than other dispute resolution methods. And no one has ever constructed

Instead an amendment was drafted, in consultation with interested parties. This allowed those people operating without an EIS to register. They were given two years to prepare an EIS and comply with the law. During this time their production was limited to current production rates. That is, they couldn't increase extraction during the window they had been given.

This was a mature response to a practical problem presented by a declaration by the court of the meaning of the law which differed from earlier understanding.

Cabinet documents forwarded to the EDO show that there was an express intention not to consult before bringing in these changes. The Commonwealth government considers the alternatives to the new Administrative Procedures to have been either to exempt existing industry, or to shut down industry until an EIS was done.

This is either a failure to display an ounce of commonsense or imagination, or a deliberate attempt to mislead and create a climate of crisis.

The "ongoing Project" exemption should be limited in time by a sunset clause. It implicitly acknowledges that there are projects operating which ought to have been designated and which have not, in breach of the law. It rewards these ongoing breaches by providing a mechanism for allowing the projects to continue if they are ever caught out at some stage in the future by a court ruling that there should have been an EIS.

Review and Assessment of Environmental Aspects of proposed action

Clause 10.1.1 gives the Department of Environment powers to review and assess the environmental aspects of a development at any time. Particular reference is made to assessing the effectiveness of safeguards and standards set for environmental protection and the accuracy of any forecasts of the environmental effects.

The Department has NEVER used this power in the past 20 years.

The changes to the Administrative Procedures would not be so important if the Department, or the EPA within the Department, could stand up for itself and use its existing powers of review.

The scramble to change the Administrative Procedures also defeats the purpose of the review which is currently taking place. Careful consideration has given way to cries that the sky is falling.

Current Litigation

Our clients are currently considering their positions in light of the changes. Some challenges to woodchip licences may be academic now. Proceedings in relation to the licence issued to North Limited in Tasmania have been discontinued.

(iii) Leasing Dispute. The Lessee and Lessor disputed the interpretation of additional fees, not specified in the original contract. The matter was successfully mediated and each side estimated they saved $100,000 in litigation costs.

There are a number of cases which have been successfully mediated in Victoria, arising from a commercial background, but it is noticeable that there is a reticence amongst some executives and their legal advisers who may be concerned with their subsequent legal rights before an adversarial body or the confidentiality of making a frank disclosure in mediation. My experience indicates there is no grounds for such fears.

Finally, an additional positive attitude arises from mediation, where the professional adviser is aware of the medium and, in appropriate circumstances, writes the initial letter inviting the other party or parties to join in mediation, rather than the aggressive letter normally delivered demanding payment or attention to whatever the circumstances may be within so many days or else! The situation is further enhanced by inclusion in commercial contracts, which is now becoming common in many parts of the world, of a dispute resolution clause requiring the parties to at first instance endeavour to dispose of any conflict by the non-adversarial means before commencing proceedings in arbitration or litigation.

Yes, Mediation in commercial disputes is a positive step to be considered by all entities, irrespective of size or industry. As quoted from Cardinal Newman in the 19th Century, "When men understand what each other need, they see for the most part that controversy is either superfluous or hopeless".

D.H. von Bibra

The Administrative Procedures can be disallowed by either House of Parliament by motion within 15 sitting days of their tabling in the House. The Minister for Resources has agreed to discontinue his appeal, providing the Administrative Procedures are not disallowed. Disallowal appears unlikely.

(a) in which the amount sought to be recovered or the value of the subject matter is more than the jurisdictional limit unless the parties consent in writing; or

(b) by which title to any property, the value of which at the time of commencement of the proceeding is greater than the jurisdictional limit, is sought to be affected unless the parties consent in writing; or

(c) brought by application for a prerogative writ or an order in the nature of a prerogative writ; or

(d) brought upon a judgment of the Supreme Court.

(3) If a verdict is returned for or a judgment is given for an amount greater than the amount sought to be recovered in the civil proceeding by the plaintiff -

(a) the Court must find and record the amount of the verdict or judgment; and

(b) the plaintiff may recover the full amount of the verdict or judgment or, if the full amount is liable to be reduced in accordance with Part V of the *Wrongs Act* 1958, the amount to which the full amount is so liable to be reduced, even if that full amount or reduced amount is greater than the amount sought to be recovered".

Value of property

"38. For the purpose of determining the jurisdictional limit in any application, claim, dispute or other civil proceeding relating to any rateable property, a certificate given under section 265A of the *Local Government Act* 1958 stating the most recent valuation of the rateable property made on or before the date of the filing of the originating process and being the capital value where stated or other relevant valuation where not, is conclusive evidence of the value of property which is the subject matter of the dispute in the application, claim, dispute or civil proceeding".

Whether proceedings within jurisdictional limit

"39(1) It is not necessary for a plaintiff to aver or, unless the issue is raised by any other party, to prove that the amount sought to be recovered, or the value of the subject matter of the dispute, is within the jurisdictional limit.

39(2) If civil proceeding is wholly or partly beyond the jurisdiction of the Court, the Court may -

(a) amend the originating process by which the proceeding was commenced for the purpose of bringing the proceeding within jurisdiction; or

(b) order that the proceeding be stayed pending the making of an application under Part 3 of the *Courts (Case Transfer) Act* 1991; or

draft only

[your address]
[date]

The Hon Paul Keating,
Prime Minister, Parliament House, Canberra. 2600.

Dear Prime Minister,

Re: Reform of the Commonwealth environment impact assessment law

Your Government promised to deliver a major reform of the Commonwealth environmental impact assessment (EIA) process via the Public Review being conducted by the Commonwealth Environmental Protection Agency (CEPA).

That review is now running very late indeed, almost 12 months late, and I am very concerned that the delays in the review process will mean that your Government will not achieve this major reform before the next election.

A failure to complete this review and achieve a very significant improvement in Commonwealth environmental impact assessment laws before the next Federal election will be seen as a major failure of your government and will be a major handicap to community acceptance of your Government's claim to 'green' credibility.

I am sick of having the Labor Party promise action on environmental issues and then not deliver by wasting time and diverting effort away from key policy areas.

I will not accept another promise by you, in a election campaign, that a future Keating Government will deliver the promised reforms to the EIA laws. You must deliver a new Act before any election in order for me to take seriously the ALPs commitment to environmental issues.

The Mabo issue was rightly seen by you as so important as to merit special, urgent community consultations and priority legislation. Reform of the EIA laws is of a similar national importance and it also demands effective action to achieve 'certainty'.

I am aware of the options and range of legislative proposals being developed, ever so slowly, by CEPA and their current thrust is too weak and unaccountable. CEPAs proposal will not ensure international best practice in EIA in Australia.

I want ***credible, effective, outcome oriented*** Commonwealth EIA laws which ***deliver*** in the public interest:

1. objectives and ESD principles for Commonwealth EIA written into law via a new Act;
2. clear 'triggers' for Commonwealth involvement in EIA, & Government to USE them;
3. where discretion is exercised, decisions on 'whether a proposal is assessed' must be made via resourced public participation, not secret deals;
4. decisions on 'what' is assessed & 'how' to involve the public via EIA 'scoping processes';
5. comprehensive, accurate, quantified information in professional, unbiased EIA documents on pain of penalty;
6. increased public access to all relevant information and all levels of decision making
7. effective legal powers for CEPA & Environment Minister, unfettered by politics;
8. environmental monitoring plus 'environmental audits' to review impacts and effectiveness of mitigation measures and ensure compliance;
9. the EIA process must be transparent & accountable with a capacity for 3rd party civil enforcement rights, including Commonwealth legal aid.

I request that you reply directly to me advising precisely what action you will take to ensure the above outcomes are actually achieved by the end of 1995.

Yours sincerely,
(signed)

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480.

FAX COVER SHEET

TO:	Sid Walker, Executive Officer	DATE:	13 July 1995
AT:	Nature Conservation Council of NSW	Per Fax No. (02) 247 5945	
FROM:	Corkill @ NEFA Bunka. Lismore.	No. of Pages incl. this:	2
RE:	Commonwealth EIA Review - Recommendations to NCC Executive		

MESSAGE:
Please find following a draft letter which could be multi-copied and circulated as part of a letterwriting campaign to highlight the need for Commonwealth EIA law reform.

In terms of what actions might be recommended to the NCC Executive I suggest:

- the Suggested Strategy, 8 page Submission Summary and 9 point Summary of Issues be tabled for information of Exec members;
- that NCC Exec carry a resolution recognising Commonwealth EIA reform as a top priority environmental issue in the up-coming Federal election;
- that in their motion on the issue, the NCC include recognition that NSW, and NCC as the peak NSW body, has the greatest experience with EIA and should play a leadership role in any national pre-election campaign on reform of the EIA law particularly since several of the key Commonwealth players are NSW based i.e. Faulkner, Keating, Harry Woods etc;
- that the Exec note the Suggested Strategy and defer discussion of it til the next Exec meeting, and in the meantime forward it for circulation to & discussion by the ELO group;
- that NCC request James Johnson of EDO to provide a special briefing to Exec members and / or ELO group members to explain and clarify any queries about the submission and suggested strategy;
- NCC Exec to request its delegate to the ELO group to seek the views of other groups in ELO network on additional elements of such a strategy and people / groups to pursue specific actions identified;
- the Submission Summary and 9 point Summary of Issues be distributed to all NCC member groups, as soon as possible;
- NCC delegate to next Peak Conservation Organisations (PCO) meeting place Commonwealth EIA reform on the PCO agenda and forward copies of the 3 documents for pre-circulation to other PCO delegates;
- NCC commission an article on the issue for the next edition of NCC newsletter;

Hope this helps! Cheers!! JRC

If this Fax is imperfect, please phone the sender on (066) 224 737

ATT: JOHN CORKILL

HANSARD PINK

«#48»

«start speech»

Senator FAULKNER (New South Wales - Minister for the Environment, Sport and Territories) (5.23 p.m.) - Amendments to these administrative procedures made under section 6 of the Environment Protection (Impact of Proposals) Act 1974 were tabled on 11 May. As a number of speakers have mentioned, these amendments were triggered by the decision of Mr Justice Sackville in the Federal Court in the Gunns case.

In that case the court examined aspects of the administrative procedures not previously subject to judicial scrutiny. Following the Gunns decision, the government received advice that the case had implications for all areas of government decision making. The court's decision meant that whenever the government considered granting, for example, an export licence for coal or for bauxite, the environmental consequences of that decision needed to be considered. This was the case regardless of whether the project had already undergone environmental impact assessment.

The Commonwealth government, of course, makes a very significant number of such decisions on a weekly basis. For example, some coalmines in effect require several export approvals in a single month. Under the previous procedures, as interpreted by the Federal Court, every export approval decision for those coalmines would need to be referred to the

Environment Protection Agency for re-examination. Frankly, to allow such a situation to continue not only would create unnecessary delays, and certainly a significant level of uncertainty for industry, but also would, as a very important point, waste and distract resources away from the environmental assessment of new or changed projects.

«more to come - turn 49 follows»

«#49»

«Senator Faulkner - in continuation»

In order to avoid this particular situation the government has amended the administrative procedures made under the Environment Protection Act. The amendments removed the need for operational activities to be referred to the Environment Protection Agency if there has already been an environmental assessment. Where projects requiring Commonwealth approvals have not previously been assessed, the government's responsibilities to assess that project remain. Where a project requiring Commonwealth approvals has been assessed but has undergone environmentally significant changes since that assessment, that project must be referred again to the Environment Protection Agency to ensure the altered environmental conditions are taken into account when the next Commonwealth approvals are given.

The amendments also provide me with the power to allow day-to-day decisions to be made for an existing project while that project undergoes assessment. I do note the concerns that Senator Coulter has outlined to the Senate during this debate and on previous occasions that, under the amendments, judgments on which projects should be referred to the Environment Protection Agency remain with industry or, if one likes, approvals ministers. Of course, they are termed 'action ministers' in the procedures.

On this point I would draw the Senate's attention to the current review of the Environment Protection Act that is in fact being undertaken now by the EPA. Through that review the EPA has identified a range of issues which arise from the Commonwealth's current environmental impact assessment procedures. One such issue is the appropriate role of the environment minister in the determination of which projects should be environmentally assessed.

The review process has ensured that all stakeholders, including state governments, industry, community groups and environment groups, have had ample opportunity to put their own views on how the Commonwealth's assessment process can be approved. Given that this public review process is well under way, it would have been highly inappropriate for the government to have addressed the broader issues such as the role of the environment minister before the EPA reported on the consultations that have taken place with stakeholders.

The government, therefore, has elected to make these current amendments consistent with the current legislative framework. Let me state clearly that while these particular amendments are essential to allow important Australian industries to operate without delay or unwarranted uncertainty, and to ensure Commonwealth environmental assessment focuses on real environmental issues, nothing in these changes pre-empts the outcomes of the consultative

review process that is currently under way.

It is through the review of the Environment Protection (Impact of Proposals) Act that the issues raised by Senator Coulter should be pursued, not through the disallowance of these regulations. This issue really does represent a balanced government response which arises from what is frankly an unworkable situation that has resulted from the Gunns case.

«more to come - turn 50 follows»

«#50»

«Senator Faulkner - in continuation»

These procedures are already enabling the Environment Protection Agency to work with state governments and industry to ensure the Commonwealth's environment responsibilities are being fully met, and being fully met with no unnecessary disruption to key Australian industries. I stress the words 'unnecessary disruption' because that is what it is all about.

Senator Chamarette - That is what it is all about; avoiding disruption to industry.

Senator FAULKNER - I thank Senator Chamarette for her support on this matter. Finally, it should be noted that the changes to the procedures will have no effect on decisions made by the government before the amendments came into effect on 5 May this year. It is for these reasons that I will be opposing the proposal before the Senate from Senator Coulter. I ask the Senate to support what I think is continued good management of these issues by the government and a very sensible approach to our environmental assessment procedures and processes in Australia.

Senator Cooney - And the generous support of Senator Kemp.

Senator FAULKNER - Before I sit down, I would like to acknowledge, as a result of Senator Cooney's interjection, that for once Senator Kemp has got it right.

«end speech»

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480.
State Bank Acc. No. 000 270 14981

INVOICE

TO: Sid Walker, Executive Officer

OF: Nature Conservation Council of N.S.W.

@: 39 George Street, The Rocks. 2000 Per fax 02 2475 945

RE: Commonwealth EIA Review

DATE: 30 June 1995 and again July 5

Please forward payment for the following work:

Preparation of two documents on the Public Review of the Commonwealth EIA Process
- Summary of the PCO Submission on the EIA Review prepared by EDO;
- draft Strategy for achieving major progress in the Public Review.

As per: My fax of 19 June 1995 and your telephone advice 22 June 1995

Document preparation: 10 hours @ $35.00	350.00
Phone and Fax charges:	26.00
Total payment Required: $	**386.00**

J.R Corkill.

Direct payment to the above account no. is preferred.
Thank you for your prompt attention to this invoice.

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480.

FAX COVER SHEET

TO:	Sid Walker, Executive Officer	DATE:	30 June 1995
AT:	Nature Conservation Council of NSW	Per Fax No. (02) 247 5945	
FROM:	Corkill @ NEFA Bunka. Lismore.	No. of Pages incl. this:	2

MESSAGE:

Please find following my Invoice for work performed on the Commonwealth EIA Process Review. I would appreciate payment at your earliest convenience.

Cheers, J.R.C.

If this Fax is imperfect, please phone the sender on (066) 224 737

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480.

FAX COVER SHEET

DATE: 29 June 1995 TO: Sid Walker, Exec. Officer.
AT: Nature Conservation Council of NSW
Receiving FAX No. (02) 247 5945 No. of Pages incl. this one: ~~five~~ 6

MESSAGE: Dear Sid,
Please find following: + SMH 27 May 95

- my letter to Craig Knowles re Coastal Committee and a new Coastal Council; and
- two extra documents I've prepared for the Commonwealth EIA Review Summary.

as requested!

See you next month. Cheers! J. R. Corkill

If this Fax is imperfect, please phone the sender on (066) 224 737

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480.

FAX COVER SHEET

DATE: 29 June 1995 TO: James Johnson
AT: Environmental Defenders Office
Receiving FAX No. (02) 267 7548 No. of Pages incl. this one: three

MESSAGE: Dear James,
I hope you received my fax yesterday encl an 8 page summary and 3 page draft Strategy. Please find following two extra documents I've prepared for the Commonwealth EIA Review. I'd appreciate you consideration of these too! The 9 point summary could take a bit of wordsmithing, but it needs to be quite short.

See you next month. Cheers! J.R. Corkill
I'll be in Sydney 5-7 July

If this Fax is imperfect, please phone the sender on (066) 224 737

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480. Ph 066 21 6824.

FAX COVER SHEET

DATE: Wednesday, 28 June 1995 TO: James Johnson,
AT: Environmental Defenders Office
@ FAX No. (02) 267 7548 No. of Pages incl. this one: 12

MESSAGE: Dear James,

Please find following 2 draft documents on Commonwealth environmental law reform prepared by me for NCC in line with our recent agreement.
I've also sent these drafts to Sid Walker @ NCC for his review as agreed.

I understand that NCC or EDO may wish to make some changes to these draft documents and I am happy to do so following advice from you and/or Sid.

I intend to complete work this immediately.
Please advise me of your ~~c~~anges &/or views a.s.a.p., perhaps via a quick fax note.
Cheers!

J.R. Corkill

If this Fax is imperfect, please phone the sender on (066) 224 737 @ da NEFA Bunka

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480. Ph 066 21 6824.

FAX COVER SHEET

DATE: Wednesday, 28 June 1995 TO: Sid Walker, Executive Officer.
AT: Nature Conservation Council of NSW
@ FAX No. (02) 247 5945 No. of Pages incl. this one: 12

MESSAGE: Dear Sid,

Please find following 2 draft documents on Commonwealth environmental law reform prepared by me for NCC in line with our recent agreement.

I've also sent these drafts to James Johnson from EDO for his review as agreed.

I understand that NCC may wish to make some changes to these draft documents and I am happy to do so following advice from you and James.
I confirm your telephone advice that the budget ceiling for this work is $380.00 not $480.00.
I will provide a suitable invoice to NCC shortly following advice of any needed changes.

I intend to complete work this immediately.
Please advise me of your changes &/or views a.s.a.p., perhaps via a quick fax note.
Cheers!

J.R. Corkill.

If this Fax is imperfect, please phone the sender on (066) 224 737 @ da NEFA Bunka

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480. Ph 066 21 6824.

FAX COVER SHEET

DATE: Monday, 19 June 1995 TO: Dr Judy Messer,
AT: Nature Conservation Council of NSW
@ FAX No. (02) 247 5945 No. of Pages incl. this one: one

MESSAGE: Dear Judy,

I refer to our telephone conversation of Thursday last week, regarding the Commonwealth environmental law reform agenda. I agreed to record our agreement for this work in writing and forward it to you, Sid and James. The purpose of this fax is to meet that undertaking.

As you know, I spoke to James Johnson from EDO to enquire whether there was still work on this from NCC's perspective which needed to be done; and whether there was still time to make input. He said 'yes' to both.

James produced a 40? page submission which he presented at a recent briefing to CEPA on behalf of the Peak Conservation Organisations. He feels in its current form the submission is too lengthy to be easily accessible.

James advises that last week, the Commonwealth officials said that they have already developed a proposal for the Minister but that the situation is "still fluid".
James is very concerned that CEPA's proposal, developed and forwarded to the Minister before even hearing the PCO submission, is very narrow and may not even include open 'third party' rights for standing!

He is concerned that:
- the issues within C'wealth environmental law reform are not clearly understood by environment groups;
- an increased profile of these issues is needed if the necessary political will is to be focussed to achieve good reform of the EP(IP) Act.

He suggested, and I understand you agreed, that I spend some time to complete this submission by:
- summarising the long PCO submission into short point form;
- developing a strategy to deliver the summary to key Commonwealth players.

I propose to produce two documents as a consultant to NCC to address the separate points in the brief and undertake to provide them to NCC and EDO for consideration and further action by NCC and EDO. I understand the maximum project cost cannot exceed the funds remaining.
I will provide a suitable invoice to NCC on completion of the documents preparation.

I have faxed Sid and James in similar terms and unless there are significant problems with this proposed work, or with the details of the brief, I intend to start work on this immediately.
I have asked Sid to please confirm this with you & James and advise me, perhaps via a quick fax note, a.s.a.p.
Cheers!

J.R. Corkill.

If this Fax is imperfect, please phone the sender on (066) 224 737 @ da NEFA Bunka

Friday - 10 March 1995

AUSTRALIA NEEDS A COMMISSIONER FOR CHILDREN

The children and youth of Australia, particularly in NSW, urgently require a Commissioner for Children to represent their human rights according to The Greens NSW No. 2 Upper House candidate, Ms Josephine Faith.

"Such a Commissioner is essential to prevent other Australian states from following the 'law and order' agenda being pursued in NSW by the ALP and Coalition," said Ms Faith.

Ms Faith was responding to the Children (Parental Responsibility) Act 1994 recently passed by both the major parties, in breach of the ***United Nations Convention on the Rights of the Child*** and the ***International Convention on Civil and Political Rights.***

"This Act shifts the focus of "welfare care" to the "criminalisation" of the child. There are more than 4.5 million children and young people under the age of 18 in Australia, constituting almost 27% of all Australians," Ms Faith said.

Ms Faith said that, in the past, Australia has been at the forefront of the international children's rights movement. She said that Australia was represented at the World Summit in 1990 when 71 Heads of Government pledged their support to the ***UN Convention on the Rights of the Child*** and committed themselves to take political action at the highest levels to give priority to the rights of children.

"In 1994, the Human Rights and Equal Opportunity Commission drafted an optional protocol to the Convention at the request of the United Nations. However, Australia's claimed enthusiasm for children's rights has not been matched by any noticeable change in the policies or priorities of either the Commonwealth or state governments," she said.

"The NSW ALP and Coalition parties are running cynical "law and order" election campaigns to capitalise on fears in the community. By focussing on the vulnerability of politically powerless children, these opportunistic politicians demonstrate that the rights of children will always be swamped by party politics and entrenched punitive attitudes."

Ms Faith said that The Greens NSW believe that a Commissioner for Children should have the advantages of reporting to the Federal Parliament, independent of any particular minister or government department, as was done in New Zealand and Britain.

"Legislation to create the position of Commissioner for Children should provide a statutory privilege for communications between children and the Commissioner, and should empower the Commissioner to draw up and circulate a proposal for a code of practice on confidentiality and other ethical issues," she said.

"Candidates and parties aspiring to seats in the NSW Parliament should beware supporting the Children (Parental Responsibility) Act 1994 lest they condone further breaches of human rights and find themselves answerable to the United Nations. The Greens NSW cannot support any actions which will deny the human rights of future generations," said Ms Faith.

...ends.

For more info Phone: Josephine Faith on 02 281 2699 w or 02 550 4515 h.

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480. Ph 066 21 6824.

FAX COVER SHEET

DATE: Monday, 19 June 1995 TO: James Johnson,
AT: Environmetal Defenders Office
@ FAX No. (02) 267 7548 No. of Pages incl. this one: one

MESSAGE: Dear James,

I refer to our telephone conversations last week, regarding the Commonwealth environmental law reform agenda. I subsequently spoke to Dr Judy Messer, in Sid's absence, and agreed to record our agreement for this work in writing and forward it to you, & Sid. The purpose of this fax is to meet that undertaking.

I have advised Judy and Sid that I spoke to you to enquire whether there was still work on this from NCC's perspective which needed to be done; and whether there was still time to make input. I advised them you said 'yes' to both questions.

I reported to Judy & Sid that you advised that

- Commonwealth officials have said that they have already developed a proposal for the Minister but that the situation is "still fluid";
- you are very concerned that CEPA's proposal, developed and forwarded to the Minister before even hearing the PCO submission, is very narrow and may not even include open 'third party' rights for standing!

and that you believe that:

- the issues within C'wealth environmental law reform are not clearly understood by environment groups;
- an increased profile of these issues is needed if the necessary political will is to be focussed to achieve good reform of the EP(IP) Act.

I've advised Judy and Sid that you suggested that I spend some time to complete this submission by:

- summarising the long PCO submission into short point form;
- developing a strategy to deliver the summary to key Commonwealth players.

I have proposed to Judy Messer that I produce two documents as a consultant to NCC to address the separate points in the brief. I undertake to provide them to NCC and EDO for consideration and further action by NCC and EDO. I understand the maximum project cost cannot exceed the funds remaining.
I will provide a suitable invoice to NCC on completion of the documents preparation.

I hope these points correctly summarise your comments to me. If not please let me know a.s.a.p.

I have faxed Judy & Sid today also, and unless there are significant problems with this proposed work, or with the details of the brief, I intend to start work on this today.

I have asked Sid to please confirm this with you & Judy and advise me, perhaps via a quick fax note, a.s.a.p.
Cheers!

J. R. Corkill.

If this Fax is imperfect, please phone the sender on (066) 224 737 @ da NEFA Bunka

The Greens

The Greens NSW Election Campaign '95 • Ph (02) 267 4410 • Fax (02) 267 3158

★ Media Release ★

Friday - 10 March 1995

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"The NSW ALP and Coalition parties are running cynical "law and order" election campaigns to capitalise on fears in the community. By focussing on the vulnerability of politically powerless children, these opportunistic politicians demonstrate that the rights of children will always be swamped by party politics and entrenched punitive attitudes."

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"Legislation to create the position of Commissioner for Children should provide a statutory privilege for communications between children and the Commissioner, and should empower the Commissioner to draw up and circulate a proposal for a code of practice on confidentiality and other ethical issues," she said.

"Candidates and parties aspiring to seats in the NSW Parliament should beware supporting the Children (Parental Responsibility) Act 1994 lest they condone further breaches of human rights and find themselves answerable to the United Nations. The Greens NSW cannot support any actions which will deny the human rights of future generations," said Ms Faith.

...ends.

For more info Phone: Josephine Faith on 02 281 2699 w or 02 550 4515 h.

John R Corkill
Public Interest Advocate
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480. Ph 066 21 6824.

FAX COVER SHEET

DATE: Monday, 19 June 1995 TO: Sid Walker, Executive Officer.
AT: Nature Conservation Council of NSW
@ FAX No. (02) 247 5945 No. of Pages incl. this one: one

MESSAGE: Dear Sid,
Welcome back! I hope all went well for you & Kia on your holiday! **You deserved it!!!**

I recently spoke to Peter Hopper, & Judy Messer following an initial call from Peter H., regarding the Commonwealth environmental law reform agenda. NCC apparently still has some $480.00 from CEPA for the completion of its submission to CEPA.

I then spoke to James Johnson from EDO to enquire whether there was still work on this from NCC's perspective which needed to be done; and whether there was still time to make input. He said 'yes' to both.

James produced a 41 page submission which he presented at a recent briefing to CEPA on behalf of the Peak Conservation Organisations. He feels in its current form the submission is too lengthy to be easily accessible.

James advises that last week, the Commonwealth officials said that they have already developed a proposal for the Minister but that the situation is "still fluid".
James is very concerned that CEPA's proposal, developed and forwarded to the Minister before even hearing the PCO submission, is very narrow and may not even include open 'third party' rights for standing!

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He suggests that I spend some time to complete this submission by:
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I propose to produce two documents as a consultant to NCC to address the separate points in the brief and undertake to provide them to NCC and EDO for consideration and further action by NCC and EDO. I understand the maximum project cost cannot exceed the funds remaining.
I will provide a suitable invoice to NCC on completion of the documents preparation.

Following my conversation with James I spoke to Judy Messer last Thurday, who authorised me to undertake the two point brief above, as a consultant to NCC. I agreed to record our agreement for this work in writing and forward it to Judy, you and James. The purpose of this fax is to meet that undertaking.

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If this Fax is imperfect, please phone the sender on (066) 224 737 @ da NEFA Bunka

The Greens

The Greens NSW Election Campaign '95 • Ph (02) 267 4410 • Fax (02) 267 3158

MEDIA ALERT

Ms Josephine Faith,

The Greens NSW No. 2 Legislative Council candidate, and

WA Greens Senator,

Christabelle Chamarette

will hold a

Media Conference

on the lawns of the Domain, outside NSW Parliament House,

Tomorrow
TUESDAY, 14 March at
1.00 pm

Ms Faith and Senator Chamarette will address the impacts of the NSW Coalition Government's underfunding of vital women's health services, particularly on Aboriginal women.

"The PM's hollow apology to the international community will not heal the worsening health crisis affecting Aboriginal women," said Ms Faith.

For more info Phone: Jo Faith on 02 267 4406 or 02 550 4515 h or Senator Chamarette on 015 77 4441.

John R Corkill
Public Interest Advocate,
Environmental Educator, Planner, Policy Adviser

1 Oliver Place, Lismore. 2480. Ph 066 21 6824.

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Cheers!

J. R. Corkill

If this Fax is imperfect, please phone the sender on (066) 224 737 @ da NEFA Bunka

draft

3 pm, Thursday - 9 March 1995

GREENS TO DENY PREFERENCES TO ALP

Negotiations between The Greens NSW and the NSW Labor Party on preferences in 7 key marginal seats have stalled following an unsatisfactory ALP offer of Upper House preferences and The Greens stinging criticism of Labor's forest policy, released yesterday.

"There are no good reasons for Green voters to reward the Labor Party. Contrary to the ALP's claims, Carr's forest policy does not conform with the National Forest Policy Statement in several key areas," said The Greens NSW No. 1 Legislative Council candidate, Mr Ian Cohen.

"Both State and Federal Labor have failed to accept the wishes of 80% of the population who want export woodchipping to end. Labor is taking Green voters for granted yet again, while Carr kowtows to a minority union which will not permit him to announce the binding, transparent commitments which the rest of the community requires ," he said.

Mr Cohen was said that The Greens NSW had several times made it plain, in discussions held with the ALP, that a satisfactory forest policy and a preference flow to The Greens in the Upper House were essential to winning The Greens preferences in the Upper House and in marginal seats.

"Bob Carr ignored that warning and has attempted to buy Green votes with a cheap, no commitments forest policy and an Upper House preference split to the Democrats," he said.

Mr Cohen said that many Green voters were dismayed that the State Labor Party's policy on forests was, on several key issues, as bad or worse than Federal Labor's.

"Carr must face down the bullies in the timber industry and the unions, and deliver unequivocal commitments to protect **all** high conservation value forests from day one of a Carr government. He must provide detail on how his assessment and restructuring processes will be **publicly accountable** and he must state frankly that he will achieve an end to export woodchipping as soon as possible within his first term.

"Without those commitments being made public by noon Friday, The Greens will exhaust our Upper House preferences and recommend either no preference flow to the ALP or an exhausted vote to Green voters in Lower House seats," said Mr Cohen.

...ends.

For more info Phone: Ian Cohen 015 895 283 or 02 30 8043h.

Petition to the Commonwealth Senate on
Environmental Impact Assessment

draft 1 - 28 June 1995

To the Honorable President of the Commonwealth Senate and Senators assembled !

We , the undersigned Citizens of Australia ,respectfully showeth, that the present system of Commonwealth Environmental Impact Assessment (EIA) :

- **lacks community confidence & fails to provide certainty for development;**
- **does not aim to ensure the protection of the environment;**
- **has permitted avoidable adverse impacts upon Australians & their environment.**

Your Petitioners therefore humbly pray that you exercise your powers to amend any Commonwealth EIA Bill before the Senate to ensure it delivers credible, effective, public interest aligned, outcome oriented environmental law which includes:

1. objectives and ESD principles written into law;
2. clear 'triggers' for Commonwealth involvement in environmental impact assessment;
3. decisions on 'whether a proposal is assessed' via public participation, not secret deals;
4. decisions on 'what' is assessed & 'how' to involve the public via EIA 'scoping processes';
5. comprehensive, accurate, quantified information in professional, unbiased EIA documents on pain of penalty;
6. increased public access to all relevant information and all levels of decision making
7. effective legal powers for CEPA & Environment Minister, unfettered by politics;
8. environmental monitoring plus 'environmental audits' to review impacts and effectiveness of mitigation measures;
9. transparent & accountable processses and a capacity for 3rd party civil enforcement rights, including via Commonwealth legal aid.

And your Petitioners, as in duty bound, will ever humbly pray.

SIGNATURE **NAME** **ADDRESS**

When complete please return to:

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draft

9 point Summary of Commonwealth EIA

Issues of Concern to Australian environment groups

We want ***credible, effective, ~~public interest aligned~~*** outcome oriented Commonwealth EIA laws which ***deliver:*** (+ key)

1. objectives and ESD principles for Commonwealth EIA written into law via a new Act;
2. clear 'triggers' for Commonwealth involvement in EIA, and the Government to USE them;
3. decisions on 'whether a proposal is assessed' via must be inside resourced public participation, not secret deals;
4. decisions on 'what' is assessed & 'how' to involve the public via EIA 'scoping processes';
5. comprehensive, accurate, quantified information in professional, unbiased EIA documents on pain of penalty;
6. increased public access to all relevant information and all levels of decision making
7. effective legal powers for CEPA & Environment Minister, unfettered by politics;
8. environmental monitoring plus 'environmental audits' to review impacts and effectiveness of mitigation measures; and ensure Compliance
9. the EIA process must be transparent & accountable with a capacity for 3rd party civil enforcement rights, incl. ~~via~~ Commonwealth legal aid.

* Where discretion is excercised.

- an annual funding allocation to community groups to assist the preparation of submissions on EIA documents;
- funding to support public participation mechanisms other than submission writing;
- funding being made available for further scientific study, where appropriate;
- the payment of a fee, by the proponent when lodging a Notice of Intention, sufficient to cover public participation costs generated by the proposal;
- identification of key "publics" to be involved in the public assessment process;
- funding for involving relevant remote communities;
- the participation of non-English speaking and indigenous communities;
- immediate action on research into appropriate means to allow participation of non-English speaking and indigenous communities;

9. Government Assessment

At present, the Commonwealth Department of the Environment prepares an EIA Report after the exhibition of an EIS & the receipt of public submissions. CEPA proposes to "appraise" a EIS or PER & public submissions and forward advice to the Environment Minister; to assess whether the proposal is, or can be made, environmentally acceptable.

The value of this "appraisal" will depend on the effectiveness of earlier public scoping to determine clear, precise "acceptability criteria" and adopt appropriate methodologies.

The PCOs support

- a capacity for CEPA to reject a proposal at this stage as being "environmentally unacceptable" rather than continue with further assessment;
- the issue of a Notice of Inadequate Information which states that a proponent has not demonstrated the proposals environmental acceptability and which requests the provision of additional information to prove that the proposal can be made environmentally acceptable;
- CEPA having responsibility for developing conditions that can make developments environmentally acceptable;
- the development of criteria for the assessment process including: a list of principles as well as specific criteria.

10. Decision Making

At present, the Environment Minster can only make non-binding recommendations for changes or conditions, to the Action Minister.

The Commonwealth proposes to grant the Environment Minister power to set mandatory and legally binding environmental conditions on proposals, in consultation with the relevant Action Minister.

The PCOs support the granting of this power to the Environment Minister but reject the notion that this power should only be exercised in agreement with the Action Minister.

There is no requirement for economic Ministers to consult and obtain agreement on economic conditions and there should be no requirement for the Environment Minister to do so. A requirement for agreement on environmental conditions will prevent appropriate conditions being applied.

11. Monitoring and Review

At present the Commonwealth has a legal power to monitor and review developments, but it has rarely, if ever, been used. The Commonwealth regularly fails to monitor developments and keep under review critical conditions of approval relating to environmental protection. Predictions are regularly made which are inaccurately valued or are unquantified via statements such as "not significant".

The PCOs support the:

- Commonwealth taking up this power now and operating it to review and assess "the effectiveness of any safeguards or standards for the protection of the environment ... and the accuracy of any forecasts of environmental effects";
- including this power in a new Commonwealth EIA Act;
- systematic comparison of predicted and actual impacts (via an environmental audit) in order to improve scientific content in EIA documents;
- CEPA being given responsibility for, and a legislative obligation to, undertake post-assessment audit reviews of the accuracy, effectiveness and efficiency of Commonwealth environmental conditions;
- public release of all monitoring results a.s.a.p. after collection and at least quarterly;
- public release of all relevant information and monitoring data as regularly as monthly, during the start-up phase of an operation;
- provision of results in a way that all the raw data can be independently assessed, in addition to any interpretation of the data made by the proponent;
- granting of approvals for fixed periods, the maximum period being 10 years;
- further EIA and an audit of monitoring results & compliance conditions of a proponent's existing operation after 10 years, as a basis for further approval;
- quantification of impact predictions in EIA documents, incl. best estimates where quantification is not possible;
- continuation of the requirement for compliance statements by proponents, on a yearly basis, not every 24 months;
- making of an offence: failure to comply with Commonwealth EIA conditions;
- cancellation of consent for a proposal where monitoring indicates that there were inaccuracies in the EIA document, which materially influenced the decision, and that flaws in the EIA document are having a significant adverse affect;
- power to direct an approved proposal to vary its operations to comply with acceptability criteria and conditions of consent;

12. Accountability

At present there are major handicaps for members of the public wishing to challenge administrative decisions which do not follow 'due process' or which are 'unreasonable'.

The PCOs recommend that the Commonwealth ensure that new environmental impact assessment legislation includes a broad open standing provision permitting any person to take civil enforcement action, as 'a third party', to restrain or remedy breaches of relevant Acts, along the lines of s.123 of the NSW EPA & A(Act) 1979.

The PCOs support

- amending state & federal judicial review legislation to include:
  - broad 'third party' standing provisions for legal actions which seek the Court's review of decisions which are causing harm to the environment, or which were made in breach of an environmental law;
  - appeal rights to challenge the merits of decisions affecting the environment, such as a decision not to carry out an EIA;
- greatly increased legal aid funding for applicants enforcing environmental and administrative law;
- extending Commonwealth legal aid to include an indemnity against costs;
- authorising a person, other than the Government MP appointed as Attorney General to finally approve Commonwealth legal aid applications;
- seeking written opinions from legal counsel outside government on, and advice of prospects for success in public interest proceedings;

ends jrc 5/7/95

ELEMENTS of a SUGGESTED STRATEGY
for achieving major progress in the PUBLIC REVIEW of the
COMMONWEALTH ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

draft 2 - 28 June 1995

Prepared for the Nature Conservation Council of N.S.W. - July 1995

The following suggested strategy has been prepared to outline the actions necessary to achieve substantial reform of Commonwealth environmental law, in line with recommendations made by the mainstream Australian environment movement.
For details of these recommendations see the 'Summary of PCOs submission to the Public Review of Commonwealth EIA Process', or the 47 page Submission itself.

Timeframes, and people or individuals to take responsibility, for specific actions set out below, are required. Consideration of additional elements for this Strategy is also needed.

In contemplating such a Strategy, it is crucial the environment movement understands & appreciates how:

- *important it is, for a wide range of environmental issues, to obtain credible, effective, public interest aligned, Commonwealth environmental law;*
- *sensitive the State Gov'ts are to Commonwealth environmental powers being used;*
- *slowly the ALP has made progress on this key environment policy area;*
- *resistant 'developers' are to effective EIA laws with 3rd party rights of enforcement;*
- *powerfully aligned the ALP is to these interests;*
- *cynically the ALP will use the issue of EIA to inflate its 'green' credentials;*
- *useless it is to seek promises from the ALP in a pre-election run-up;*
- *critical it is for the movement to pressure the ALP to pass good environmental law BEFORE going to the polls;*
- *powerful a nation wide, grass roots campaign can be in achieving major progress.*

Assessing the current situation & likely future scenarios

- research CEPAs timetable for finalising their legislative reform proposal to the Gov't;
- research the Government's timetable for introducing a Bill into the Federal Parliament;
- research the positions of various industry groups with a view to soliciting support for major changes;

Educating 'green groups'

- State & national groups to write urgently to all regional and local groups advising of serious state of Commonwealth environmental law reform and the need to raise the issues in a major pre-election campaign;
- circulate 8 page Briefing Summary to all environment groups;
- prepare state based leaflets, drawing on the Summary, which cites worst case scenarios of Commonwealth EIA in each state;
- key briefing of these issues must be provided to Australian Greens and Australian Democrats Senate candidates;
- groups to include information on and a 'campaign alert' for reforming EIA process in newsletters and circulars to all affiliated member groups & individuals;

Publicly highlighting the issues

- articles discussing the issues in Commonwealth environmental law reform should be prepared & published in 'green' journals and publications
- major 'opinion pieces' should be prepared by known 'green' commentators or spokespeople, for major city daily papers' 'opposite editorials' (opp. ed.) pages;
- environment groups representatives and Green politicians to canvass issues on TV 'talk shows' and in-depth radio programs;
- callers to discuss issues on public and commercial talk back radio shows;
- letters to the Editor should cite e.g.s of failings of the present EIA system and state the need for major rethink and overhaul of Commonwealth environment laws;
- peak state groups to solicit endorsements for paid advertisements in major city daily papers calling substantial reform of the Commonwealth environmental law;
- groups or individuals to prepare paid TV advertisements for commercial stations calling substantial reform of the Commonwealth environmental law;
- briefings on the environment movements concerns and recommendations for Commonwealth EIA reform should be provided to all media environment reporters;
- environment groups to issue Media Releases commenting on need for a major rethink and overhaul of Commonwealth EIA law, citing necessary details & relevant e.g.s;

Creating political pressure on Federal Labor Government

- briefings on the environment movements concerns and recommendations for Commonwealth EIA reform should be provided to all federal and state political parties by experienced lobbyists;
- speech notes should be prepared & provided to key MPs in state & federal Parliaments (Democrats: Coulter?; WA Greens: Chamarette, Margetts; Ind. Senators: Haradine, Devereux;
  [NSW: Ind MPs: Moore, Macdonald; MLCs RSL Jones, Ian Cohen, Corbett, Niles;
- Questions Without Notice on EIA reform timetable and content to be prepared for Senators to ask Environment Minister Senator John Faulkner;
- a petition to the Commonwealth Senate calling for action to amend any unsatisfactory Bill introduced by the ALP; (See draft e.g. which follows)
- formal letters from a wide range of groups, requesting key actions, to be sent to specific Ministers: Attorney General, Minister for Justice, Environment Minister, Treasurer, Minister for Resources;
- formal letters from a wide range of groups, requesting key actions, to be sent to key state-based federal backbenchers and factional organisers;
- major opponents to effective Commonwealth environmental law reform within Cabinet to be identified and publicly exposed nationally & locally;
  (Cook, Beddall, Lee, Crean, etc
- formal letters from a wide range of groups to be sent to specific related interest groups & associations seeking their support and action, e.g. :
  - National Environmental Law Association (NELA);
  - Australian Law Reform Commission;
  - Australian Environment Institute??;
  - Australian Ecological Society;
  - other professional bodies...
- the Prime Minister and Environment Minister to be targeted for a storm of postcards/faxes requesting fundamental commitments on EIA law;

Using the opportunities the pending Federal Election presents...

- local and regional environment groups to raise Commonwealth EIA issues with local ALP MPs &/or candidates, seeking statements of their position and commitment to action in the pre-election run-up;
- state and national environment groups to include questions on Commonwealth EIA reform in any pre-election Questionnaires to Candidates in the pre-election run-up with a view to publicly highlighting the responses;
- local Greens and Democrat parties to press ALP MPs in key marginal federal seats for statements on their position in pre-election run up and local preference discussions;
- state and national Greens and Democrat parties to press the ALP for key actions on Commonwealth EIA in pre-election run up and Senate preference discussions;
- senior Canberra Press Gallery journalists to be briefed on the issues in Commonwealth EIA by experienced lobbyists with a view to pertinent questions being asked of the PM & Ministers during press conferences and/or interviews;
- a team of lawyers and authorised activists be identified to comment upon any draft Commonwealth EIA Bill and prepare necessary amendments for the Senate parties;

draft 2 ends.... jrc 28/6/95

19 + 20 Oct 95 EDO Conference on CW EIA. in Sydney

SUBMISSION ON BEHALF OF THE

PEAK CONSERVATION ORGANISATIONS

TO THE

PUBLIC REVIEW OF THE COMMONWEALTH ENVIRONMENTAL

IMPACT ASSESSMENT PROCESS

PREPARED BY

ENVIRONMENTAL DEFENDER'S OFFICE

SUITE 82 280

PITT STREET SYDNEY NSW

APRIL 1995

TABLE OF CONTENTS

EXECUTIVE SUMMARY

1. The following is a summary of the key proposals contained in the PCO submission.

2. THE OBJECTIVE OF EIA

1. The PCOs generally support the objective in Option 1 and agree that the emphasis should be on outcomes and not just on a legislative process.

2. The principles of ecologically sustainable development need to be spelt out in any new legislation. This would include, in particular the need to promote public participation throughout the EIA process. These principles have been adopted in several documents and pieces of legislation including.

3. The legislation should contain a positive duty on decisionmakers and other participants in EIA processes, to carry out functions provided under the legislation to meet the objective of ecologically sustainable development.

4. The legislation should also contain a provision recognising the Commonwealth's paramount concern for the protection of its environment from pollution impairment or destruction.

3. COMMONWEALTH JURISDICITION - DEFINING THE SCOPE, MEANS FOR IMPLEMENTATION AND ACCREDITATION OF STATE PROCESSES

1. The PCOs do not support consideration of Commonwealth interests through administrative arrangements with the States as proposed in Option 2. Changes to Commonwealth jurisdiction ought to be made by way of amendment to EIA legislation.

2. The PCOs do support the involvement of the Commonwealth in assessing environmentally significant matters of national or international importance, and therefore the proposals set out in Options 3 and 3a. A discretionary power as proposed in Option 4 would be unsatisfactory because there is no guidance on how the discretion is to be exercised.

However, where the Commonwealth is to have jurisdiction, application of Commonwealth processes must not have the

effect of removing existing rights of the public to participate in EIA processes and must have uniform application throughout Australia.

4. TRIGGERS FOR COMMONWEALTH JURISDICTION

1. The proposals in Options 3, 3a, 4, 5, 5a and 6, by moving the discretion from a range of "Action Ministers" to the EPA, will go some way towards achieving consistency of assessment.

2. There is no merit in option 7, which will perpetuate the worst of the problems with the current EIA process. It attempts to evaluate the process after the event requiring extensive resources with inadequate outcomes. It is non-preventative.

3. The proposed options do not provide certainty as the list of designated developments is not conclusive of whether a proposal will be assessed.

4. The PCOs consider that if a designated list is adopted then a proposal falling within that list ought automatically require public assessment.

If assessment were automatic, the EPA could move straight to the scoping exercise discussed in Section 6.

5. There should be a discretionary power for the Environment Minister to require assessment of projects likely to raise environmentally significant issues of national or international importance, not on the designated list as proposed in Option 5a.

6. The legislation ought to provide criteria to assist the Minister in determining whether impacts are likely to be significant and whether a proposal should be assessed.

7. These criteria will include the Minister having regard to advice from the EPA on whether to assess a proposal.

8. Falling within the scope of this discretionary power, will be proposals not on the list which have been referred by a member of the public if in the opinion of that person the proposal raises environmentally significant issues of national or international importance, as discussed in Section 5.3.1..

9. The proposed list of designated developments should be developed with extensive public participation and is broadly supported.

5. DECIDING WHETHER TO ASSESS - THE PROCESS

1. In addition to proposals referred by way of Notice of Intention, any person should have the right to refer a proposal to the EPA for consideration for assessment where, in that person's opinion, a proposal falls within a category of developments on the list of designated developments or, if not on the list, is likely to raise environmentally significant issues of national or international importance.

2. Some developments ought to automatically require a Public Inquiry. For example, nuclear facilities, armaments depots, developments valued over a particular amount.

3. There should be the power to reject proposals which are manifestly environmentally unacceptable as proposed in Option 9.

4. A Notice of Intention should contain certain key information to ensure the EPA and the community are in the best position to make a decision on whether any further assessment is required.

5. Public participation under the Commonwealth proposals comes far too late in the process as proposed by the EPA.

Under the current proposal there is no public input at one of the most crucial stages of the process - namely when a decision is made whether to assess - the "screening" stage.

6. Option 8 should be amended to incorporate public participation early in the process.

7. Once a Notice of Intention has been received it should be advertised both locally and nationally.

8. A minimum of 28 days should be provided to enable the public to make submissions which must then be considered by the EPA.

6. PUBLIC SCOPING OF ASSESSMENT

1. Acceptability criteria should be developed in consultation with the public and not just Ministerial Councils or government agencies as currently proposed. In developing criteria there should be consideration of regional planning requirements.

2. The proposed "zones" for the acceptability criteria are contrary to ESD and the draft National Biodiversity Strategy, including in particular the need for protection of biodiversity over a broad range of landuses and for in-situ conservation.

A more appropriate classification for receiving environments would be by the use of bioregions which will allow for consideration of regional impacts as well as site specific impacts.

3. Assessment by way of Notice of Intention will only be adequate if the form of the Notice of Intention is in accordance with the criteria listed in the earlier discussion on matters to be included in a Notice of Intention.

4. When setting a time schedule for the assessment process, it should be made clear that the time schedule can be revised for particular specified purposes.

5. The timetable ought not be agreed to until the end of the scoping process.

6. There should be a standard list of issues to be considered in the scoping process from which the public can identify the emphasis which should be given to particular impacts and issues.

7. The list of issues to be addressed in the assessment process proposed by the Commonwealth should be expanded to specifically include the following -

- The application of ESD principles (See Attachment 2)

- Comprehensive Social Impact Assessment not limited to impacts arising from biophysical environmental change. It should also include consideration of intergenerational

factors.

- Comprehensive economic analysis of proposals that reflects the true cost of environmental degradation and resources loss. There should be full cost benefit analysis of proposals, which includes effects of the proposal on the broader community, and not just feasibility of the proposal for the proponent.

- Goals to be achieved by the development. For example, the need for provision of power to a particular region as opposed to the desire to construct a particular power station facility.

- Detailed consideration of alternatives including, the no-go alternative and feasible alternatives for achieving the stated development goals.

- The relevant time periods for which the development approvals are to apply.

8. It should be mandatory to include information in the EIA documents on -

(1) the proponent, along the lines of a "fit and proper person" criterion, and

(2) a description of the financial resources required to implement the proposal and measures to mitigate environmental harm.

7. PREPARATION OF EIA DOCUMENTS.

There are several steps that will enhance the EIA process, in relation to the preparation of EIA documents.

They are -

1. The introduction of a community consultative committee, as exists under the Victoria EIA system, which helps steer the document preparation process, and makes the process more open and accountable, by reducing the exclusivity of the client/consultant relationship.

2. Closer scrutiny of the adequacy of EIA documents by the

EPA prior to its release for public comment.

3. Engagement of consultants by the EPA though still allowing full liaison between the proponent and the consultants. The proponent would pay the consultants via the EPA. Payment can be contingent in full or in part upon certification of the adequacy of the EIA documents.

4. Strict criteria for certification of documents.

5. Strict criteria for the conduct of consultancies.

6. Resourcing the EPA to enable it to assess rigorously the EIA documents and public submissions which will have an indirect effect on the preparation process.

7. Theree is a need to go beyond those issues identified in the Commonwealth proposals (listed in 7.2) as improving the quality of the documents.

8. There should be a set of minimum standards or indicators for determining adequacy of EIA documents provided in the Act or regulations to the Act.

9. Professionalism of consultants and the client/consultant relationship can be improved by -

- The development of codes of conduct between proponents and consultants;

- Inclusion of the codes of conduct in the client/consultant contracts;

- Registration of consultants, including strict procedures for registration;

- The development of rules regulating consultants. These should include fines or other penalties when variation between predicted impacts and actual impacts is greater than a certain percentage;

- Rules preventing or limiting in part, downstream commercial interest of consultants in implementation of a proposal.

8. PUBLIC ASSESSMENT OF EIA DOCUMENTS

1. Documents to be publicly available should include copies of public submissions.

2. Where a claim to confidentiality of documents is made, the onus should clearly be on those claiming confidentiality to substantiate their claim. Companies claiming that information is confidential should be required to show that:

- the information has not already been disclosed
- the information is not required to be disclosed under other laws
- the information is not readily discoverable; and
- disclosure would cause competitive harm.

In addition there should be penalties for false claims and requirements for disclosure of generic information where specific information is claimed to be confidential.

3. The proposal to advertise all major environmental impact decisions including decisions not requiring assessment should be extended to require advertisement of all decisions. (Option 17)

4. To ensure public participation does occur in the EIA process, the PCOs propose that mechanisms to resource public participation be developed as an integral part of the EIA process.

5. There should be a fee payable by the proponent at the time of lodgment of the Notice of Intention or as determined during the public scoping process.

6. Resourcing is required for participation at other stages of the EIA process, apart from the making of written submissions. This would include participation in the scoping process, and legal aid to enable exercise of enforcement rights.

7. The EPA will need to develop expertise or seek out the expertise of particular groups in identifying key "publics" to

be involved in the public assessment process.

9. FINAL ASSESSMENT

1. The EPA should be given a clear and specific right to determine that the proponent has not proven the environmental acceptability of the proposal and the proposal will therefore not be forwarded for decision. The EPA can issue a notice to the proponent to say that there is inadequate information to prove the environmental acceptability of the proposal and that the proponent has an opportunity to provide further data to prove that the whole or relevant parts of the proposal can be made environmentally acceptable. (Option 20)

2. There should be an opportunity for the public to comment on the further information provided to the EPA.

3. The proposal to give the EPA responsibility for preparation of environmental conditions that can ensure a proposal is environmentally acceptable is supported.

4. Where such conditions would significantly change the proposal, this should amount to a rejection by the EPA.

5. Criteria should be developed to guide the assessment process. This will include both a list of principles that are to direct the assessment, in addition to specific criteria.

6. The Commonwealth must ensure the EPA or assessing authority is properly resourced to carry out the assessment functions for which it is responsible.

10. THE DECISION - DECIDING THE FINAL TERMS OF APPROVAL

1. The PCOs agree that the Environment Minister should have the final say as to what environmental conditions are imposed on a development. (Option 21)

11. MONITORING AND REVIEW

1. Monitoring results should be made available at timeframes appropriate to the particular development but in any event no less frequently than quarterly.

2. The results must be provided in such a way that the raw

data, as well as any interpretation of the data made by the proponent, can be assessed independently.

3. Any approval should be for a fixed period depending on the nature of the development and having regard to developed criteria, for a maximum period of ten years, with further approval to be sought at the end of that period.

4. The PCOs support the proposal to require quantification of impact predictions in EIA documents, with best estimates where it can be substantiated that quantification is not possible.(Option 22)

5. The PCOs support the proposal to require compliance statements.(Option 23) However, the statements should be required on an annual basis.

6. The PCOs agree that failure to comply with environmental conditions set by the Commonwealth Government ought to be an offence. (Option 24)

7. In addition, there ought to be provision for an approval to be cancelled where -

- monitoring indicates that inaccuracies were contained in the EIS,
- these materially influenced the decision, and
- the flaws in the EIS are now having a significant adverse effect.

8. Where a consent has been cancelled, the proponent (including Directors) should be prevented from obtaining approvals for other projects for a prescribed period.

9. There should also be emergency powers to halt a development where environmental harm is occurring, irrespective of whether the actual impacts can be traced to flaws in the preparation of the EIA documents.

10. There should be power to direct that operations be varied to comply with acceptability criteria and conditions of approval.

11. There should be an obligation on the EPA to perform post-assessment audits rather than simply a discretion.

12. ACCOUNTABILITY

1. The PCOs strongly support the abolition of standing requirements to seek judicial review and enforcement of the legislation. (Option 26)

2. The PCOs agree that decisions under the EIA legislation be made subject to review before the Administrative Appeals Tribunal. (Option 27) However, only a limited class of decisions should be subject to such review rights. These would include rights to merits review in relation to -

(1) EPA or Ministerial decisions not to assess proposals;
(2) EPA decisions to certify the adequacy of EIA documents.

3. The Commonwealth needs to provide adequate resources by way of environmental legal aid to enable public enforcement of EIA legislation.

CONCLUSION

A summary of issues fundamental to ensuring accountability in the EIA process include -

1. Clear objects for the EIA process, identification of obligations and principles to guide implementation directed to achievement of the objects;

2. Access to Information;

3. Public participation rights throughout the EIA process;

4. Clear criteria for the exercise of discretions given to decisionmakers and other participants in the EIA process;

5. Rights to enforce the EIA legislation;

6. The resourcing of public participation rights, inclusive of resourcing the exercise of enforcement rights.

1. INTRODUCTION

1.1 BACKROUND TO THE REVIEW

In October 1993, the Commonwealth announced a review of its environmental impact assessment processes. In February 1994 an initial discussion paper entitled "Setting the Direction" was distributed inviting input on:

1. the objectives of environmental impact assessment;

2. the factors for determining the level of Commonwealth involvement in environmental impact assessment;

3. the issues which should be examined by the review; and

4. the principles which should guide the development of an effective and efficient environmental impact assessment system.

In December 1994 the main discussion paper, to which this is a submission, was distributed.

In order to participate efficiently and effectively, the peak conservation organisations (the "PCOs") made application for funding to coordinate a response to the public review. A grant was made in December 1994 to assist in:

1. Consultation with conservation groups regarding the EIA review and holding workshops in each capital (except Adelaide - The Conservation Council of South Australia has already prepared a submission.)

2. Preparation of a submission on the main discussion paper on the public review of the Commonwealth's environmental impact assessment process.

3. Engaging the New South Wales Environmental Defender's Office to prepare the submission.

4. Briefing the Commonwealth EPA and other relevant officials as determined by the EPA on the outcomes of the consultations and the key findings and recommendations of the coordinated submission.

The objectives of the Commonwealth Review are:

1. To provide better protection for the Australian environment.

2. To provide better public participation in environmental decision making.

3. To maximise the effectiveness and efficiency of the Commonwealth environmental impact assessment process.

4. To ensure environmental impact assessment promotes ecologically sustainable development.

5. To work together with state and territory environment protection and planning processes to provide a national approach to environmental impact assessment.

Principles to guide the review emerged from submissions made in response to the initial discussion paper. They include the need to:-

1. Provide real opportunities for public participation in government decision making.

2. Be open and transparent.

3. Provide certainty of application and process to all participants including the community, governments, industry and project proponents.

4. Provide accountable decision making.

5. Be administered with integrity and professionalism.

6. Provide cost effective processes and outcomes.

7. Be flexible enough to deal effectively and efficiently with all proposals assessed.

8. Ensure practical outcomes for effective environmental protection.

The principles are criteria against which to judge the achievement of the Commonwealth's objectives.

The review does not extend to the context in which environmental impact assessment of proposals is considered. In particular, this includes environmental management and strategic planning at a regional level. For example, the scope of the review does not enable consideration of particular government resource use policies that influence what particular proposals are presented for assessment. Greater attention to the overall context is more likely to head off potentially intense conflicts. Such an approach is also more comprehensive and is a precondition to the development of effective "acceptability criteria" for project specific assessment. The appropriateness of the Commonwealth's approach should be seriously questioned as it handicaps the potential scope and effectiveness of the reforms proposed.

Nevertheless, reform is long overdue and the strengths and weaknesses of the current reform proposals must be considered.

1.2 THE INTERNATIONAL CONTEXT

1.2.1 Our Common Future

The report of the World Commission on Environment and Development, Our Common Future, published in 1987, recognises that "sustainability requires the enforcement of wider responsibilities for the impacts of decisions".

"Some large scale projects however require participation on a different basis. Public inquiries and hearings on the development and environment impacts can help greatly in drawing attention to different points of view. Free access to relevant information and the availability of alternative sources of technical expertise can provide an informed basis for public discussion. When the environmental impact of a proposed project is particularly high, public scrutiny of the case should be mandatory and, wherever feasible, the decision should be subject to prior public approval, perhaps by referendum.

"Changes are also required in the attitudes and procedures of both public and private sector enterprises. Moreover environmental regulation must move beyond the usual menu of safety regulations, zoning laws and pollution control enactments; environmental objectives must be built into

taxation, prior approval procedures for investment and technology choice, foreign trade incentives and all components of development policy." (pages 63,64)

1.2.2 World Experts Group

The World Experts Group on Environmental Law, established by the Brundtland Commission, prepared a report on legal principles for environmental protection and sustainable development which ought to be in place now or before the year 2000. The most relevant of these articles are reproduced below.

Article 4

Environmental Standards and Monitoring

States shall:

(a) establish specific environmental standards, in particular environmental quality standards, emission standards, technological standards and product standards, aimed at preventing or abating interferences with natural resources or the environment;

(b) establish systems for the collection and dissemination of data and regular observation of natural resources and the environment in order to permit adequate planning of the use of natural resources and the environment, to permit early detection of interferences with natural resources or the environment and ensure timely intervention, and to facilitate the evaluation of conservation policies and methods.

Article 5

Assessment of planned activities

States planning to carry out or permit activities which may significantly affect a natural resource or the environment shall make or require an assessment of their effects before carrying our or permitting the planned activities.

Article 6

Timely information, access and due process

States shall inform all persons in a timely manner of activities which may significantly affect their use of a natural resource or their environment and shall grant the concerned persons access to and due process in administrative and judicial proceedings.

1.2.3 The Rio Declaration

At the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil in June 1992, Australia signed the Rio Declaration. The declaration sets out the fundamental principles that the assembled international leaders agreed should apply as the community of nations face the environmental challenges of the late twentieth century.

Article 10 provides:

> "Environmental Issues are best handled with the participation of all concerned citizens...states shall facilitate and encourage public participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided".

1.3 COMMONWEALTH EIA SINCE 1974.

The overwhelming response of the PCOs to the assertion in the executive summary that

> "the current assessment process has generally worked well..."

is that this is nonsense. The discussion paper fails to acknowledge the extent and depth of criticism of the current Commonwealth environmental impact assessment process from the community, industry and government. It is important to acknowledge in full, the concern and frustration about the existing system to ensure reforms address the core problems.

This submission discusses the failures of the existing system as they are relevant to the various proposals for reform. In

particular, the current system fails to provide sufficient "backbone". The Administrative Procedures are highly discretionary, containing many phrases such as "to the extent necessary in the circumstances...". Without a minimum framework, application of the Procedures has been open to pressure from within and outside government.

The assessment undertaken on the McArthur River project illustrates the problem. In that case, the lack of a minimum framework enabled the use of fast-tracking mechanisms which made a mockery of the EIA process. Documents obtained under FOI describe the extent to which the absence of any minimum timeframes or standards for assessment has made a mockery of the assessment process.

A Ministerial minute dated 25 May 1992 states:

> The NT Minister for Conservation has written to MIM proposing a revised timetable for the assessment process. This timetable does not meet MIM's objective of having Government approvals in place and cost estimates finalised in time for the MIM Board meeting scheduled for the week 12 July to 18 July 1992. MIM may yet seek to reduce the three week period allowed for preparing the final EIS so as to meet the Board meeting deadline.
>
> We will continue to liaise closely with the Conservation Commission of the NT throughout the assessment process to meet the tight timetable. Your attention is dawn to the two week period following the receipt of the final EIS. It will be necessary during this time to prepare an environmental assessment report on the proposal and to have your recommendations finalised.

The PCOs consider it totally unacceptable that the timing of a Board meeting of a proponent could have dictated the assessment process to such a degree.

The case highlights the enormous distrust generated by the use of "fast-tracking" mechanisms and why the exercise of discretion must be curtailed by open accountable processes.

Similarly, the "assessment" of Sydney airport's third runway has highlighted defects in the Commonwealth environmental impact assessment process and the public's cynicism about the

process, as seen from the following comments by the Nature Conservation Council's Chairman, Peter Prineas.

> "After the Third Runway, the Commonwealth's environment assessment process is not credible. Environmental impact statements produced by proponents, and immune to independent assessment, are little more than a licence to mislead the public".
>
> "Under the NSW law you can at least take an environmental impact statement to the Land and Environment Court and force the bureaucrats and their consultants to justify their statements in the witness box. If a similar process had been allowed for the Third Runway, things might have turned out differently".

2. THE OBJECTIVE OF EIA

2.1 THE EXISTING SCHEME

The current objective of environmental impact assessment under the Environment Protection (Impact of Proposals) Act 1974 (the "EPIP") is to ensure that matters affecting the environment to a significant extent are examined and taken into account in Commonwealth decisions.

2.2 COMMONWEALTH PROPOSAL

The Commonwealth proposes that the objective of environmental impact assessment be the protection of the environment through the application of the principles of ecologically sustainable development. (Option 1)

2.3 DISCUSSION AND RECOMMENDATIONS

1. The PCOs generally support the objective in Option 1 and agree that the emphasis should be on outcomes and not just on a legislative process.

However, the PCOs recommend that further matters relating to the objective of EIA be included in the legislation.

2. The principles of ecologically sustainable development need to be spelt out in any new legislation. This would

include, in particular the need to promote public participation throughout the EIA process. These principles have been adopted in several documents and pieces of legislation including;

> Section 6(2) of the Protection of the Environment Administration Act 1991 (NSW)
>
> Schedules 1 of the Land Use Planning and Approvals Act 1993 (TAS) and the Environmental Management and Pollution Control Act 1994 (TAS)
>
> Appendix 1 to the ACF and WWF publication "Environmental Impact Assessment and Ecologically Sustainable Development in Australia", September 1993
>
> Section 10 of the Environment Protection Act 1993 (SA)

3. The legislation should contain a positive duty on decisionmakers and other participants in EIA processes, to carry out functions provided under the legislation to meet the objective of ecologically sustainable development. This is necessary to give effect to the objective of the legislation. Moreover, it implements an outcome oriented approach.

This type of obligation is already found in the Tasmanian environmental legislation referred to above, and the New Zealand Resource Management Act 1991.

New York's environmental impact assessment legislation requires that -

> "Agencies shall use all practicable means to realise the policies and goals set forth in this article and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable minimise or avoid adverse environmental effects, including effects revealed in the environmental impact statement process."

Minnesota's environmental legislation provides -

> "No State action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resource management and development be

granted, where such action or permit has caused or is likely to cause pollution, impairment or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare in the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment or destruction. Economic considerations alone shall not justify such conduct".

4. The legislation should also contain a provision recognising the Commonwealth's paramount concern for the protection of its environment from pollution impairment or destruction.

3. COMMONWEALTH JURISDICITION - DEFINING THE SCOPE, MEANS FOR IMPLEMENTATION AND ACCREDITATION OF STATE PROCESSES

3.1 THE EXISTING SCHEME

In 1991, ANZECC (Australian and New Zealand Environment and Conservation Council) released a report on a National Approach to Environmental Impact Assessment in Australia. The report provided the basis for Schedule 3 of the Intergovernmental Agreement on the Environment. The Schedule attempts to define principles for EIA and the roles of the Commonwealth and the States in environmental assessment. Point 4 of the Schedule provides that -

> "A general framework agreement between the Commonwealth and the States on the administration of the environmental impact assessment process will be negotiated to avoid duplication and to ensure that proposals affecting more than one of them are assessed in accordance with agreed arrangements."

Current Commonwealth jurisdiction under the EPIP Act is based on a Commonwealth action or approval. The current definition of the jurisdiction does not give the Commonwealth a role in assessing some matters which are of national or international significance.

3.2 COMMONWEALTH PROPOSALS

The Commonwealth proposes to make administrative arrangements with State or Territory Governments or amend the EIA legislation to allow it to assess environmentally significant matters of national or international importance. (Options 2, 3, 3a, 4)

3.3 DISCUSSION AND RECOMMENDATIONS

3.3.1 Implementation through State processes.

1. The PCOs do not support consideration of Commonwealth interests through administrative arrangements with the States as proposed in Option 2. Changes to Commonwealth jurisdiction ought to be made by way of amendment to EIA legislation.

Administrative arrangements would result in the EIA processes being less transparent and uncertain. They have not proved workable to date, despite the best attempts to make the process more certain through the IGAE.

3.3.2 Defining the scope of Commonwealth Interests.

The PCOs recognise that some matters will be of national or international significance and that the Commonwealth's interests ought to be taken into account.

1. The PCOs do support the involvement of the Commonwealth in assessing environmentally significant matters of national or international importance, and therefore the proposals set out in Options 3 and 3a. A discretionary power as proposed in Option 4 would be unsatisfactory because there is no guidance on how the discretion is to be exercised.

However, where the Commonwealth is to have jurisdiction, application of Commonwealth processes must not have the effect of removing existing rights of the public to participate in EIA processes and must have uniform application throughout Australia. For example, in the case of the Third Runway the Commonwealth EIA processes were weaker and the public had more limited rights than under the New South Wales EIA legislation.

Application of Commonwealth processes must have the combined

best case public participation rights available under State systems.

3.3.3 Accreditation of State EIA Processes

Equally, the Commonwealth processes could be less effective if state processes were accredited.

Some states have less "participation infrastructure" than the Commonwealth. For example, they do not have an equivalent of the Adminstrative Decisions (Judicial Review) Act 1977 (Cth) imposing an obligation on the decisionmaker to give reasons for decisions, nor do some States have Freedom of Information legislation. Accreditation would validate processes that have different opportunities for public involvement in EIA processes.

1. The PCOs do not agree with the proposal for accreditation of state processes contained in para 86 of the discussion paper.

There should be no concern about the possibility of duplication of assessment because if the Commonwealth has jurisdiction to consider the particular proposal, s.109 of the Constitution provides that the Commonwealth legislation prevails, as happened in the Third Runway case. If for whatever reason some assessment has already occurred at the State level, then those studies can be considered in the Commonwealth's EIA process.

Accreditation should only occur if State EIA met minimum stringent criteria set by the Commonwealth. For example, these would include amongst others, public scoping, third party rights, and monitoring.

2. Accreditation would also mean that the Commonwealth loses the power to impose conditions to protect the environment, to require monitoring and to enforce conditions in the very matters of national or international significance for which it has responsibility.

If the relevant State government fails to impose conditions which give effect to the assurances and predictions contained in an EIS, then the Commonwealth has forgone its ability to do so and therefore cannot fulfill its role and meet its

objectives in EIA.

It is useful to refer to a case example to highlight the inadequacies of relying on state processes. Reference is made to the proposal to log 360,000 tonnes of timber in the Northern Territory over an area of 13,000 square kilometres.

There the Commonwealth Minister for Natural Resources provided a Statement of Reasons in which he made it clear that no study had been done by his Department and that the Minister relied on the licence provisions imposed by the Conservation Commission of the Northern Territory.

The Conservation Commission of the Northern Territory in turn advised that they did no assessment other than to review the Preliminary Environmental Impact Report.

The Preliminary Environmental Impact Report (PEIR) dated May 1989 prepared by the proponent stated that:

> "The logging of lancewood presents a challenge to man and machinery."
>
> "Selective harvesting in real terms represents a thinning operation vital to the survival of any forest"

The deficiencies of the document are manifest. Counsel briefed to advise described it as "a disaster report, without doubt the worst attempt at environmental assessment I have ever seen. Any decision based on it or relying on it to any extent is in my opinion open to challenge."

Approvals for McArthur River were fast tracked under the auspices of Commonwealth project facilitation procedures. The government at the time indicated that this fast tracking would not mean that corners were cut in terms of environmental impact assessment. The Treasury noted that the

> "Conservation Commission of the Northern Territory has identified the need for additional information and studies on some issues, which is to be forwarded to the Northern Territory government in the form of an Environment Management Plan...".

Major criticisms of the environmental impact assessment

process were made by various parties on the grounds that there was insufficient information presented from which the government could make a proper decision about the implications of the project. The paucity of information was especially apparent in relation to the marine environment at Bing Bong and the social impacts on Aboriginal people.

The Commonwealth Government required preparation of management plans and further studies carried out and made public.

Several documents which formed part of the environmental management plan were not made publicly available until near the very end of the process. They were the "MRM - Dredging and Management Plan" and the "Environmental Monitoring Program".

In addition large amounts of data and information, some of which had already been collated, had not been made available to the public as part of the environmental management plan until near the end of the process. These data included baseline studies, which ought ordinarily to form part of an environmental impact statement.

4. TRIGGERS FOR COMMONWEALTH JURISDICTION

4.1 THE EXISTING SCHEME

There has been much uncertainty and acrimony as to what matters will require assessment by the Commonwealth.

In 1979, a House of Representatives report on EIA recommended that Memoranda of Understanding be concluded with each Commonwealth Department to provide guidelines as to which matters would be referred to the Environment Department.

The Department of Primary Industries and Energy (DOPIE) and Treasury - two of the key Departments responsible for approving matters which affect the environment to a significant extent - have failed to conclude any such Memorandum of Understanding with the Department of Environment as to what matters will be referred to the Department.

One of the main causes of dissatisfaction with the current scheme has been that the process depends on the "Action Minister", being responsible for deciding whether the

environmental impact of a proposal will be significant.

The result is that Ministers without expertise in the area of environmental impact assessment are responsible for making the threshold assessment of whether environmental effect will be significant.

Although those Ministers can seek advice from Ministers or Departments with the relevant expertise, a Minister with resource or economic portfolio priorities has little interest in ensuring that the level of inquiry into the significance of environmental impact is genuinely considered.

There is a conflict of interest with Action Ministers being like "sponsoring agencies", having an interest in promoting the particular proposals.

The point was illustrated in the recent case a Tasmanian Conservation Trust Inc. v Minister for Resources and Anor (10.1.95 Sackville J. NG 536 of 94). On three separate occasions DOPIE wrote to DEST seeking an assurance that the proposal by Gunns need not be designated. On each of these occasions DEST replied that the proposal is likely to affect the environment to a significant extent and ought to be referred to the Department of Environment. Yet the Action Minister failed to designate the proposal.

Another example was provided in the case of the proposal to log 360,000 tonnes of timber in the Northern Territory over an area of 13,000 square kilometres discussed in 3.3.3 above, which was not designated.

The report simply adopted random phrases from text-books concerning the species to be logged, demonstrating a lack of study and appreciation of the issues to be covered. The refusal by DOPIE to refer the proposal demonstrates at best the Department's inability to appreciate matters of environmental significance.

4.2 COMMONWEALTH PROPOSALS

The Commonwealth suggests that proposals be referred to it either -

(a) by a list of designated developments, with a residual

power to assess matters not on the list but which are likely to raise environmentally significant matters of national or international importance, (Options 3 and 3a or Options 5 and 5a)) or

(b) by the exercise of discretion by the Environment Minister as to whether a proposal is likely to raise environmentally significant matters of national or international significance (Option 4 or Option 6)

Having been referred to the Commonwealth, the EPA would then exercise discretion as to whether assessment is required.

Alternatively, the Commonwealth suggests that the Action Ministers retain the discretion to refer matters and the EPA be given power to audit those decisions (Option 7).

4.3 DISCUSSION AND RECOMMENDATIONS

4.3.1 Other Jurisdictions

In the United States, the threshold decision of whether to require assessment is based on an assessment of the "significance" of the environmental impact of the proposal. Guidance is given in the regulations on how to assess significance and these guidelines are annexed to this submission. Decisions as to significance are open to judicial review. If a proposal is likely to have a significant impact (National Environmental Policy Act) or may have a significant impact (New York EIA legislation), there must be an EIS.

The NSW legislation has a combination of -

(a) A list of designated developments (Schedule 3 to the EPA Regulations, which has undergone substantial review recently) for developments requiring local government consent (Part 4 decisions); and

(b) An assessment by the ultimate decisionmaker about the significance of the environmental impact of an activity where local government consent is not required. (Part 5 decisions)

Again, if a proposal falls on the list, or alternatively, is likely to have a significant impact (Part 5), then an EIS is

required.

There is clearly a tension between the aims of certainty and flexibility. The NSW revised schedule attempts to ease this tension by providing a list of developments to provide certainty but also incorporating elements of the nature of the development and its location to give some flexibility. Thus, a small quarry might not require public assessment unless it is close to a water course.

One of the main criticisms of the schedule, which the recent review by the Department of Planning did not attempt to address, is the absence of major categories of developments with significant impacts, such as coastal and housing developments.

Under the legislation there is no process for the community to have input on what developments should be assessed.

4.3.2 The Current Proposals

1. The proposals in Options 3, 3a, 4, 5, 5a and 6, by moving the discretion from a range of "Action Ministers" to the EPA, will go some way towards achieving consistency of assessment.

2. There is no merit in option 7, which will perpetuate the worst of the problems with the current EIA process. It attempts to evaluate the process after the event requiring extensive resources with inadequate outcomes. It is non-preventative.

3. The proposed options do not provide certainty as the list of designated developments is not conclusive of whether a proposal will be assessed. The EPA which is under the direction and control of the Minister for the Environment, must make a determination about whether any assessment will take place.

4. The PCOs consider that if a designated list is adopted then a proposal falling within that list ought automatically require public assessment.

For those developments on the list, there would be certainty which -

- enables the community to know what assessment will take place and what their rights are in advance

- enables industry to plan for EIA in terms of time and money involved

- enables industry to operate on a level playing field, knowing that all entrants to the field will be faced with the same assessment process.

- ensures a consistent approach regardless of the State involved, its governing political party or the identity of the proponent.

If assessment were automatic, the EPA could move straight to the scoping exercise discussed in Section 6 to ascertain the level of assessment, matters for assessment, acceptability criteria and other issues.

5. There should be a discretionary power for the Environment Minister to require assessment of projects likely to raise environmentally significant issues of national or international importance, not on the designated list as proposed in Option 5a. The Minister for the Environment can consult with the Action Minister on whether assessment is required, but there should be no requirement for agreement of the Ministers.

Such a power would be important as seen in the example of the Port Hinchinbrook development where national interests are clearly involved, with development bordering on World Heritage Areas, but where the Commonwealth has been precluded from fully assessing the impact of the proposed development.

6. The legislation ought to provide criteria to assist the Minister in determining whether impacts are likely to be significant and whether a proposal should be assessed. These criteria might take the form of the National Environmental Policy Act Regulation in the US or the factors found in the New South Wales Department of Planning document, "Is an EIS required?"

This approach will provide more transparency and certainty of application than Options 4 or 6.

7. These criteria will include the Minister having regard to advice from the EPA on whether to assess a proposal.

8. Falling within the scope of this discretionary power, will be proposals not on the list which have been referred by a member of the public if in the opinion of that person the proposal raises environmentally significant issues of national or international importance, as discussed in Section 5.3.1..

Such proposals are referred to the EPA for its advice on whether a Notice of Intention is required. As with other matters to be decided by the Minister, the Minister must consider that advice from the EPA on whether a Notice of Intention is required and subsequent advice on whether assessement is required.

9. The proposed list of designated developments should be developed with extensive public participation and is broadly supported.

5. DECIDING WHETHER TO ASSESS - THE PROCESS

5.1 THE EXISTING SCHEME

Under the current scheme, the Action Minister must decide whether a proposal falls within the class of matters to be assessed and is responsible for referral to the Environment Department. Once referred, the decision about whether or not to require public assessment of a proposal is made without public notice or public input. The decision is made in secret and can only be reviewed on administrative review grounds. That is, matters that should have been considered were not, that irrelevant matters were considered or that the decision was absolutely unreasonable.

Clause 3.1.2 of the Administrative Procedures provides a list of matters which must be taken into account, but no guidance is provided as to how the discretion to assess or not, should be exercised.

After referral by the Action Minister, there is no formal time limit on the EPA or the Minister to make a decision about whether EIA takes place, at what level and what the EIA documents should contain. There is no public participation in any of these decisions. There appears to be nothing to prevent

the proposed action taking place while EIA takes place.
An example to illustrate the point relates to the decision by the Minister fr Resources in November, 1990 to designate Sawmillers Exports Pty Ltd in respect of a licence to export woodchips from the North Coast. It was not until 1992 that guidelines for the EIS were produced by DEST. An EIS was provided in 1994. Logging continued and a licence was issued for the whole of the period from November, 1990.

5.2 COMMONWEALTH PROPOSALS

Under the proposed scheme, if a proposal falls on the list of designated developments, the proponent must submit a Notice of Intention. The EPA then exercises its discretion on whether to require assessment of the proposal. (Options 3 and 5)

Where a matter is not on the list of designated developments and the Minister for the Environment is to have a discretion whether to require assessment, the Commonwealth does not propose to require a Notice of Intention or public input to be considered by the Minister in the course of exercising the discretion whether to assess.

Insofar as there is a decision by the EPA or the Minister whether to assess or not, the Commonwealth proposes to make its decisions without public input.

The EPA proposes to determine whether assessment is required within 20 working days of receiving a Notice of Intention (Option 8).

The EPA is also to have the power to reject proposals which are manifestly environmentally unacceptable without the need for detailed environmental assessment (Option 9).

5.3 DISCUSSION AND RECOMMENDATIONS

Where -

(1) The EPA is given a discretion whether to assess a proposal, upon receipt of a Notice of Intention, or

(2) The Minister is given a discretion whether to require assessment of matters of significance not on the list, or

(3) The Commonwealth adopts a scheme where it does require assessment automatically whenever a proposal falls within a designated list, but leaves open a discretion to the Environment Minister to also require assessment of matters of significance not on the list (as proposed by the PCOs),

the following issues arise.

5.3.1 What proposals can be considered for assessment?

1. In addition to proposals referred by way of Notice of Intention, any person should have the right to refer a proposal to the EPA for consideration for assessment where, in that person's opinion, a proposal falls within a category of developments on the list of designated developments or, if not on the list, is likely to raise environmentally significant issues of national or international importance.

This model operates successfully in Western Australia. Under Section 38 of the Environment Protection Act 1986 (WA) the EPA is obliged to investigate and then make public its recommendations on whether assessment is required. There are rights to appeal the decision to assess.

This right of referral is necessary, as it can lead to assessment of proposals which have environmentally significant effects, that would otherwise never have been assessed. This has frequently occurred under the EIA processes in Western Australia. A particular example involved large scale land clearing in the Esperance region which proposal had been referred by the Conservation Council of Western Australia. The EPA agreed the development ought to be assessed.

2. Some developments ought to automatically require a Public Inquiry. For example, nuclear facilities, armaments depots, developments valued over a particular amount.

3. There should be the power to reject proposals which are manifestly environmentally unacceptable as proposed in Option 9. The EPA or the Minister should also not be able to consider Notices of Intention in respect of proposals falling within developed "unacceptability criteria".

5.3.2 What information should the Notice of Intention contain?

The requirement for a Notice of Intention places the onus on the proponent to notify the EPA of a proposal and makes the proponent responsible for compliance.

This improves the current process where, if the Action Minister fails to comply with the law, the proponent may through no fault of its own become a party to Court proceedings and may lose its approval.

Equally, if the proposal has been referred by an individual or the Minister exercising discretion whether to assess, the EPA or the Minister could require a Notice of Intention.

1. A Notice of Intention should contain certain key information to ensure the EPA and the community are in the best position to make a decision on whether any further assessment is required. The types of information to be provided should be listed in the legislation. It should include the following: -

- Information about the proponent to enable the EPA to assess its technical and financial capabilities.
- The existing environment,
- The location of the proposal
- The precise nature of the proposal,
- Potential impacts of the proposal,
- The alternatives which are available to meet the objectives of the proposal,
- The impact on and species listed under the Endangered Species Protection Act 1993 (Cth) or under State Endangered Species legislation.

5.3.3 Public Input in the Decision to Assess

1. Public participation under the Commonwealth proposals comes far too late in the process as proposed by the EPA.

Under the current proposal there is no public input at one of

the most crucial stages of the process - namely when a decision is made whether to assess - the "screening" stage.

2. Option 8 should be amended to incorporate public participation early in the process. Otherwise, the defects of the past will be perpetuated. This is also consistent with the aims of Option 16 of proposing initiatives to promote public participation.

3. The significance of providing for public participation at this stage is highlighted by looking at a "best case example" of the value of public involvement throughout the process.

In 1989 Australian Newsprint Mills commenced a feasibility study for a light weight coated paper machine at its Boyer mill in Tasmania.

The company prepared an EIS and management plan. The government prepared a study of the social, economic and community impacts of the project.

The government study supplemented the cursory treatment of social, economic and community impacts which usually is found in an EIS. It went beyond the minimum legal requirements because the government recognised the "need to evaluate those matters in detail and to ensure that the project's implications are in the interests of the Tasmanian people".

The process is a best case example because:

- Input was sought from the community at the earliest opportunity, when the feasibility study was being done;
- Input was sought before the approval and consultation processes were defined;
- Input was sought on the scope of and guidelines for the EIS and SECIS;
- Public consultation was to be undertaken during the preparation of the EIS;
- The draft was to be made available for six weeks (while this may not be sufficient, it is 50% longer than the Commonwealth provides);

- An independent mediator was to be appointed to try to resolve any key issues which might arise;

- The final EIS was available for public comment for a further six weeks;

- The restrictive standing provisions under the Environment Protection Act were under consideration for broadening; and

- A Consultative Group was to be established, with broad representation including conservation groups, to provide a forum for exchange of information and input to government on matters relating to the project.

4. Once a Notice of Intention has been received it should be advertised both locally and nationally. Only a person intent on avoiding public input would consider publication in the government gazette as providing adequate "public notice". Submissions should be called for seeking input on each of those matters identified in the next section on Public Scoping. This step then also commences the scoping process.

This process is required as a minimum to ensure transparency and accountability at a stage in the EIA process which is one of the most contentious. Public input is essential to maintain confidence in the process.

The need to consider public values on what matters will be assessed outweighs concerns about ensuring simply the quickest process.

5. The proposed time limit of 20 days for the EPA to decide whether further assessment is required (Option 8) is not appropriate as it does not allow for public comments. A minimum of 28 days should be provided to enable the public to make submissions which must then be considered by the EPA.

In any event, public advertisement would not preclude the EPA from notifying the proponent in less than the 28 day public comment period that assessment is required.

A decision on the level of assessment and other issues can await the receipt of public comments and be decided after the public comment period.

6. PUBLIC SCOPING OF ASSESSMENT

6.1 THE EXISTING SCHEME

There have been examples where scoping has taken place under the current scheme. However, there is no specific provision in the legislation requiring scoping.

6.2 COMMONWEALTH PROPOSALS

Once a decision to assess has been made, the Commonwealth proposes to introduce public scoping for the purpose of involving stakeholders with an interest in the assessment of the project to identify the issues to be covered by the assessment and to negotiate time schedules for the assessment process. (Option 10)

The Commonwealth proposes that public scoping will be undertaken for all projects likely to result in significant impacts on the environment though the proposals do envisage a power to the Environment Minister to waive public scoping in "limited cases, when it would result in duplication".

Public scoping is to be commenced by advertising availability of the Notice of Intention, which is to be followed up with letters, public meetings, information exhibitions and individual consultations.

The EPA identifies the following anticipated results from public scoping:-

1. Acceptability criteria to determine the environmental acceptability of the proposal. The EPA has identified criteria for conservation areas, production areas and high development areas. It envisages the development of more precise criteria. (Option 12)

2. The level of assessment to be undertaken. The levels proposed are assessment by Notice of Intention, Public Environment Report ("PER"), Environmental Impact Statement ("EIS") or Public Inquiry.

3. Time schedules for all stages of the assessment process. (Option 11)

4. Guidelines for the preparation of a PER or EIS to detail all relevant impact issues including the following issues:-

- Biophysical impacts
- Cultural and heritage impacts
- Impacts on the surrounds of people
- Impacts on people themselves
- Cumulative impacts to the degree practicable.

The Commonwealth does not intend to provide comprehensive social impact assessment or comprehensive health impact assessment, but rather to concentrate on social and health impacts to the degree they arise from biophysical environmental change.

The Commonwealth intends to develop screening criteria to identify projects where cumulative impacts require assessment based on a listing of standard cumulative impacts and of proposal types which typically give rise to cumulative impacts. (Option 13)

Option 14 proposes that all proposals which raise environmentally significant issues will be subject to some form of environmental impact assessment.

6.3 DISCUSSION AND RECOMMENDATIONS

In carrying out the scoping process, there must be clear acknowledgement that the public input during the process will be seriously considered, and a genuine attempt made to incorporate the public input.

6.3.1 Acceptability criteria

1. Acceptability criteria should be developed in consultation with the public and not just Ministerial Councils or government agencies as currently proposed. In developing any general criteria for acceptability of proposals and of specific criteria for the particular proposal, there should be consideration of regional planning requirements. (Option 12)

2. The proposed "zones" for the acceptability criteria are contrary to ESD and the draft National Biodiversity Strategy, including in particular the need for protection of

biodiversity over a broad range of landuses and for in-situ conservation.

A more appropriate classification for receiving environments would be by the use of bioregions which will allow for consideration of regional impacts as well as site specific impacts.

6.3.2 Level of Assessment

1. Assessment by way of Notice of Intention will only be adequate if the form of the Notice of Intention is in accordance with the criteria listed in the earlier discussion on matters to be included in a Notice of Intention.

2. An adequate Notice of Intention and public input on whether and what level of assessment is appropriate are required to meet the goal stated in Option 14.

As discussed in 5.3.1 above, some developments ought automatically to require a Public Inquiry.

6.3.3 Time Schedule

1. When setting a time schedule for the assessment process, it should be made clear that the time schedule can be revised for particular specified purposes. For example, this would include for the purpose of enabling proper completion of scientific studies. It would not include unreasonable commercial demands, as happened in the assessment of the Macarthur River project referred to above. (Option 11)

2. The timetable ought not be agreed to until the end of the scoping process.

6.3.4 Issues for Assessment

1. There should be a standard list of issues to be considered in the scoping process from which the public can identify the emphasis which should be given to particular impacts and issues. The issues should be included by way of a list in the regulations to the Act as appears in the New South Wales legislation which identifies matters to be included in an environmental impact statement.

2. The list of issues to be addressed in the assessment process proposed by the Commonwealth should be expanded to specifically include the following -

- The application of ESD principles (See Attachment 2)

- Comprehensive Social Impact Assessment not limited to impacts arising from biophysical environmental change. It should also include consideration of intergenerational factors.

- Comprehensive economic analysis of proposals that reflects the true cost of environmental degradation and resources loss. There should be full cost benefit analysis of proposals, which includes effects of the proposal on the broader community, and not just feasibility of the proposal for the proponent.

- Goals to be achieved by the development. For example, the need for provision of power to a particular region as opposed to the desire to construct a particular power station facility.

- Detailed consideration of alternatives including, the no-go alternative and feasible alternatives for achieving the stated development goals. For example, using the example above, alternatives to providing power to a particular region and not just alternative types of construction at the particular site. This would also include the need to consider the least intense development to achieve the stated goal.

- The relevant time periods for which the development approvals are to apply.

3. Assessment of impacts of a proposal in its regional setting will always be required. There should be consideration of cumulative impacts in relation to all, and not just some proposals (Option 13). A list identifying potential cumulative impacts as proposed will assist in the assessment process.

6.3.5 Information on the Proponent

1. It should be mandatory to include information in the EIA

documents on -

(1) the proponent, along the lines of a "fit and proper person" criterion, and

(2) a description of the financial resources required to implement the proposal and measures to mitigate environmental harm.

Base information on the proponent is required for the Notice of Intention. The scoping process should decide what further detail is required about the proponent and the financial resources needed to implement mitigatory measures for the proposal.

This information is critical in assessing what is likely to be the ultimate shape of a "proposal" and possible options for the proposal, having regard to resources required to effect particular environmental safeguards. In the past, no attention has been given to the proponent's capacity to carry out the proposal and in particular the resources required to minimise environmental harm. Although approvals can be passed on, analysis of the financial resources required to implement a development, and as personalised to the particular proponent, are relevant in assessing what types of mitigatory measures are likely to be undertaken, and therefore the likely environmental impact of the proposal.

7. PREPARATION OF EIA DOCUMENTS.

7.1 THE EXISTING SCHEME

There is tremendous community cynicism with the current process. Often times the decision to proceed with the project will have been made and the preparation of EIA documents is simply a hurdle to be overcome and a cause of "delay".

EIA documents - PERs and EISs - are prepared by the proponent in conjunction with consultants. This gives rise to the perception that the documents are biased due to the nature of the consultant/client relationship, whereby the client, being the owner of the final EIA documents, can interpret and "wordsmith" conclusions from the individual expert reports. In that compilation process, the information can be presented in such a favourable light, as to be misleading.

7.2 COMMONWEALTH PROPOSALS

Option 15 leaves responsibility for the EIA documents with the proponent. Justification of this approach is on the basis of it being consistent with the polluter pays principle and encourages cost-internalisation.

The EPA also proposes to improve the quality of EIA documents by better referencing and sourcing of data, detailing of expertise and qualifications of experts engaged, publication of the EIA documents, quantification of predicted impacts in tabular form to enable post-assessment monitoring and the development of guidelines regarding adequacy of EIA documents through the public scoping process. EIA documents will only be released once requirements are satisfied.

7.3 DISCUSSION AND RECOMMENDATIONS

When considering an appropriate process for preparation of EIA documents, the assessment process as a whole must be considered including what opportunity there should be for proponent advocacy, who should do the assessing, and who should assess the assessment.

This is necessary to provide for an independent process all the way through and to avoid the possibility of a conflict of interest. For these reasons, the body or persons responsible for assessing the EIA documents should not be the same body as that responsible for preparing the EIA documents.

7.3.1 Overview on Strengthening the Process for Preparation of EIA Documents

Problems that have arisen by having the proponent responsible for engaging consultants to prepare EIA documents and in control of the final form of the documents, could best be overcome by establishing an independent authority responsible for preparing the EIA documents, which would also reduce the need for further detailed assessment at a later stage.

Although such a body is to be preferred, it would require extensive resources to be effective.

Experience in Australia to date has shown that no government has been prepared to fully resource such a body to perform

this role and it is therefore considered unlikely that this position will change in the real future.

The PCOs propose particular initiatives to promote independent and impartial environmental impact assessment, whilst leaving preparation of EIA documents with proponents. (Option 15)

In brief, there are several steps that will enhance the EIA process, in relation to the preparation of EIA documents.

They are -

1. The introduction of a community consultative committee, as exists under the Victoria EIA system, which helps steer the document preparation process, and makes the process more open and accountable, by reducing the exclusivity of the client/consultant relationship.

2. Closer scrutiny of the adequacy of EIA documents by the EPA prior to its release for public comment.

3. Engagement of consultants by the EPA though still allowing full liaison between the proponent and the consultants. The proponent would pay the consultants via the EPA. Payment can be contingent in full or in part upon certification of the adequacy of the EIA documents.

4. Strict criteria for certification of documents.

5. Strict criteria for the conduct of consultancies.

6. Resourcing the EPA to enable it to assess rigorously the EIA documents and public submissions which will have an indirect effect on the preparation process. This need is discussed in Section 9 of this submission.

These proposals will improve the quality of EIA documents at a technical level and promote independence of process.

Particular aspects of these initiatives are expanded on below.

7.3.2 Improving the Documents

1. There should be strict criteria for certification of EIA documents.

2. There is a need to go beyond those issues identified in the Commonwealth proposals (listed in 7.2) as improving the quality of the documents. Of particular importance, there should be a specific requirement for the methodologies relied on in preparation of the EIA documents, including particular scientific assumptions, to be clearly specified. Also, full reports of experts should always be included, so there is a baseline from which to measure "wordsmithing".

The consultative committee, in its liaison with the proponent and consultants, during the document preparation process, will have a major role in overseeing the compilation process to ensure "wordsmithing" and unsubstantiated proponent advocacy in the documents is minimised.

It can also ensure attention is given to the readability (as distinct from "wordsmithing") of information presented in EIA documents to facilitate public review of the documents.

3. The EPA's intention to develop guidelines regarding the adequacy of an EIS or PER which are to be developed through the public scoping process is supported. However, there should be a set of minimum standards or indicators for determining adequacy of EIA documents provided in the Act or regulations to the Act. There can be the power for identified requirements to be modified through the public scoping process, though certain requirements should be mandatory.

Certification of EIA documents would not preclude the public from requesting, during the public review process, preparation of particular scientific reports in addition to the EIS or PER.

4. The EPAs intention to require EISs to be published is supported as this will require the documents to be placed on statutory deposit available for examination and research in central libraries.

7.3.3 Improving the Client/Consultant Relationship

Professionalism of consultants and the client/consultant relationship can be improved by -

1. The development of codes of conduct between proponents and consultants;

2. Inclusion of the codes of conduct in the client/consultant contracts;

3. Registration of consultants, including strict procedures for registration;

4. The development of rules regulating consultants. These should include fines or other penalties when variation between predicted impacts and actual impacts is greater than a certain percentage;

5. Rules preventing or limiting in part, downstream commercial interest of consultants in implementation of a proposal.

Each of these proposals is required to improve the overall quality of EIA documents.

8. PUBLIC ASSESSMENT OF EIA DOCUMENTS

8.1 THE EXISTING SCHEME

The current process provided under the Administrative Procedures enables members of the public to make written submissions in respect of an Environmental Impact Statement or Public Environment Report and oral and written submissions at a Public Inquiry.

The making of submissions is the only opportunity for public involvement. In the past, meaningful public participation has been limited by a lack of resources to enable participation even in this process. The problem has been compounded by the often highly technical nature of information contained in the EIA documents upon which comment is sought.

8.2 COMMONWEALTH PROPOSALS

The Commonwealth proposes a number of initatives to promote public participation. (Option 16) It identifies the following issues relevant to enabling meaningful public participation in environmental decision making:-

1. The provision of information to the public to enable participation, and regular advertisement of major environmental impact assessment decisions. (Option 17)

2. Presentation of information for non-English speaking communities. (Option 19)

3. Further investigation of processes to enable participation by non-English speaking and indigenous communities. (Option 18)

4. Resourcing of participation.

8.3 DISCUSSION AND RECOMMENDATIONS

8.3.1 Access to Information

The Commonwealth proposes to have a public registry system of information regarding projects assessed which would include a central index of details of assessments, listing of documents relating to each assessment and decision, and to provide access to those documents. Such proposals are supported.

1. Documents to be publicly available should include copies of public submissions. Experience with this practice in relation to Commissions of Inquiry under New South Wales legislation supports this proposal.

2. Where a claim to confidentiality of documents is made, the onus should clearly be on those claiming confidentiality to substantiate their claim. Companies claiming that information is confidential should be required to show that:

- the information has not already been disclosed
- the information is not required to be disclosed under other laws
- the information is not readily discoverable; and
- disclosure would cause competitive harm

In addition there should be penalties for false claims and requirements for disclosure of generic information where specific information is claimed to be confidential.

This will ensure that claims to confidentiality are not made routinely so as to frustrate the objects of the scheme and that where genuine claims to confidentiality are made the

integrity of the scheme is not jeopardised.

3. The proposal to advertise all major environmental impact decisions including decisions not requiring assessment should be extended to require advertisement of all decisions. (Option 17)

8.3.2 Resourcing the Public

Integrating Funding into the EIA Process

Option 16 identifies the EPA's intention to introduce initiatives to promote participation. Only some of those initiatives are summarized by way of separate options. (Options 17, 18, 19). Its initiatives relating to access to information and resourcing of participation are not presented by way of separate options.

It can be assumed that it was not intended to suggest that reduced status be accorded to those initiatives. However, presentation in this way fails to recognize that access to information and resourcing of participation are preconditions to effective participation, upon which all other options relating to public participation depend. Stated intentions in Option 16 to promote public participation are meaningless without satisfaction of these preconditions.

Experience at the State level in participating in state or local EIA processes, with some PCOs receiving many EISs per week for comment, highlights the need to resource that participation.

Reference is also made to the report of the Fraser Island Commission of Inquiry into Public Issue Disputes in 1991 which concluded -

> "Effective community involvement may require not only access to information, opportunities to participate and representative participation, but also the expenditure of public funds on financial support for appropriate community organizations to enable them to act within and contribute to, rather than oppose and seek to circumvent, the making and implementation of decisions."

The Commonwealth proposes to resource public participation by

seeking an annual funding allocation to assist community groups in preparing submissions for public assessment of EIA documents.

Funding from this source is likely to be very limited. Other more self-sufficient long term funding mechanisms are necessary and should be built into the EIA process.

1. To ensure public participation does occur in the EIA process, the PCOs propose that mechanisms to resource public participation be developed as an integral part of the EIA process.

2. There should be a fee payable by the proponent at the time of lodgment of the Notice of Intention or as determined during the public scoping process.

The amount of the fee should represent the whole or a nominated proportion of the total costs associated with resourcing the public participation required in the particular EIA process. The total amount allowed to resource public participation should be commensurate with the public interest concerns relating to the particular proposal.

3. Resourcing is required for participation at other stages of the EIA process, apart from the making of written submissions. This would include participation in the scoping process, and legal aid to enable exercise of enforcement rights.

There should also be scope to require funding of particular outcomes of the public assessment process such as the need for a further scientific study.

"Finding" the Public

4. The EPA will need to develop expertise or seek out the expertise of particular groups in identifying key "publics" to be involved in the public assessment process. This would include finding those community groups best able to facilitate public participation on the particular issues raised by the proposal. This is particularly important in relation to remote communities.

5. Proposals to promote participation by non-English speaking and indigenous communities are supported and should

be concluded as part of this review process with any studies on the issue not delayed beyond completion of this process. (Options 18 and 19)

9. FINAL ASSESSMENT

9.1 THE EXISTING SCHEME

The Department of the Environment prepares an environmental assessment report on the EIS or PER. In the case of an EIS, this is done after the proponent prepares a revised EIS responding to public comments. There is no revision in the case of a PER.

9.2 COMMONWEALTH PROPOSALS

The Environment Protection Agency will be responsible for "appraising" the Environmental Impact Statement or Public Environment Report and public submissions and forwarding its advice to the Environment Minister. There will be no revised EIS prepared by the proponent taking account of public comments. The stated aim of the EPA's appraisal is to assess if a project is, or can be made, by modification through conditions applied by the government, environmentally acceptable. (Option 20)

9.3 DISCUSSION AND RECOMMENDATIONS

9.3.1 Relationship To Earlier Processes

The strength of the assessment process will, as already discussed, depend on the strength of earlier aspects of the EIA process. For example, the acceptability criteria developed with public input for assessment of proposals, should be sufficiently clear and precise to ensure there is rigid assessment by the EPA of the EIA documents and public comments in accordance with those acceptability criteria.

Equally, improving the EIA document preparation process in the ways discussed in Section 7 above will affect the strength of the assessment made by the EPA. The opportunity for proponent advocacy will also have been reduced by not allowing revision of the EIS after the public assessment period.

9.3.2 Right To Reject

The current proposals do not make it clear that the EPA can determine, at this stage in the EIA process, that a proposal cannot be made environmentally acceptable. Due to the momentum that the EIA process obtains after the preparation of lengthy EIA documents and public comment and revision of the documents, assessment bodies are inclined to believe that it is not possible to reject a proposal at this stage.

1. The EPA should be given a clear and specific right to determine that the proponent has not proven the environmental acceptability of the proposal and the proposal will therefore not be forwarded for decision. The EPA can issue a notice to the proponent to say that there is inadequate information to prove the environmental acceptability of the proposal and that the proponent has an opportunity to provide further data to prove that the whole or relevant parts of the proposal can be made environmentally acceptable. (Option 20)

In practice, with clear acceptability criteria, a proponent is likely to modify or withdraw a proposal prior to final assessment where those criteria are not likely to be met.

2. There should be an opportunity for the public to comment on the further information provided to the EPA. This is necessary because the issues on which further information is sought, if sufficient to require rejection of the proposal, would go to the core nature of the proposal.

3. The proposal to give the EPA responsibility for preparation of environmental conditions that can ensure a proposal is environmentally acceptable is supported, to ensure outcomes of the EIA process are channelled as directly as possible into the decision-making process.

4. Where such conditions would significantly change the proposal, this should amount to a rejection by the EPA.

9.3.3 Criteria for assessment

1. Criteria should be developed to guide the assessment process. This will include both a list of principles that are to direct the assessment, in addition to specific criteria.

2. For example, the EPA will need to take account of the precautionary principle when making its assessment. In

particular, this would include being satisfied that the proponent has made out its case for why the proposal should go ahead, rather than the EPA taking the view that the public in its submissions needed to prove why the proposal should not go ahead.

This will also include the need to consider the inherent limitations of the EIA process. Namely, that it is an imperfect predictive process that rarely allows sufficient time to remedy limited knowledge about possible effects.

9.3.4 Resourcing the Assessor

Assessment of EIA documents by government must also be properly resourced. Too often environmental agencies are given too few resources to carry out detailed functions and responsibilities.

The assessment stage is the equivalent of peer review reviewing judgments made by experts, and therefore a critical part of the EIA process. Inadequate scrutiny of EIA documents at the assessment stage has been a problem under the existing Commonwealth and under many State systems.

1. The Commonwealth must ensure the EPA or assessing authority is properly resourced to carry out the assessment functions for which it is responsible.

10. THE DECISION - DECIDING THE FINAL TERMS OF APPROVAL

10.1 THE EXISTING SCHEME

EIA under the current process can come to nought, because whatever the assessments made by the Department and views formed by the Minister for the Environment, the Minister can only make recommendations to the Action Minister on what the final decision about a proposal should be. None of those recommendations have to be taken up.

10.2 COMMONWEALTH PROPOSALS

The Commonwealth's proposals seek to overcome this defect by providing that the Environment Minister should have the power to set mandatory and legally binding environmental conditions

on proposals. The EPA proposes that the conditions be determined in consultation with or in agreement with relevant Action Ministers. (Options 21 and 21a)

10.3 DISCUSSION AND RECOMMENDATIONS

The report commissioned by the EPA on "An Analysis of EIA Practices and Procedures in Australian States and Territories" notes that:-

> "EIA as a direct means to a decision imposes greater accountability on the decision maker, and increases the transparency which is often lost when the decision is left to a party with an interest in promoting the proposal."

1. The PCOs agree that the Environment Minister should have the final say as to what environmental conditions are imposed on a development. (Option 21) This is essential for incorporation of outcomes of the EIA process as directly as possible into a decision that will affect the environment, and to increase accountability of the decisionmaking process.

2. There should not be a requirement for agreement between the Environment Minister and Action Ministers on environmental conditions as proposed in Option 21a. Outcomes of the EIA process will again come to nought if agreement of the Action Minister is required.

This approach is necessary for the same reasons the Environment Minister and Department should have responsibility for deciding whether there should be environmental impact assessment, namely, by virtue of specialist environmental expertise, and independence from promotion of the proposal. It is consistent with the fact that Action Ministers in economic portfolios do not require the agreement of the Environment Minister in respect of economic conditions imposed on an approval.

The Environment Minister can still have regard to proposed environmental conditions as they relate to other types of conditions imposed.

11. MONITORING AND REVIEW

11.1 THE EXISTING SCHEME

The power to monitor and review developments currently exists but has rarely if ever been used by DEST/EPA. Clause 10.1.1 allows DEST to review all or any of the environmental aspects of a matter affecting the environment to a significant extent at any time. Specific reference is made to reviewing and assessing -

> "the effectiveness of any safeguards or standards for the protection of the environment adopted or applied in respect of the proposed action and the accuracy of any forecasts of the environmental effects of the proposed action".

11.2 COMMONWEALTH PROPOSALS

The Discussion Paper places emphasis on compliance statements as the means by which the community is informed about environmental impacts (para 206, 207). The assurance is given that all documents and reports relating to monitoring will be publicly available. It is not clear whether this means as soon as the results are measured or when they have been made available to the EPA. Other proposals are discussed by implication in the following discussion.

11.3 DISCUSSION AND RECOMMENDATIONS

One of the greatest failings of the current EIA process is the failure to monitor and keep matters under review.

Predictions are regularly made in assessment documents about the impacts of a development. These are either quantified, with numerical values given to the impact, or expressed in unquantified terms such as "not significant".

What has been overlooked has been the systematic comparison of predicted and actual impacts. In 1990, Ralph Buckley explained how environmental audits were required to improve the scientific content of EIA. His study revealed that:

> "In Australia at least, our predictions are less than 50% accurate on average and two orders of magnitude out on occasion. Improvement is clearly needed. It is to be hoped that continuing audits of environmental impact

predictions will provide the feedback link on which such improvement depends".

The failure to exercise the power to monitor and review developments may be due to

(i) Ignorance of the existence of the power. In discussions with the office of the Minister for the Environment, the power in the Administrative Procedures was stated to be a "motherhood statement" and "without any teeth". When confronted with this in writing, the power was acknowledged but it was said to lack teeth "because it is not in the Act".

(ii) Absence of political will to exercise the power. This would seem to be the more realistic explanation. Calls for review of developments assessed in the past have been made by conservation groups. The ongoing failure to act seems to be an example of the deference given by the environment portfolio to the more powerful resource and economic portfolios.

1. Monitoring results should be made available at timeframes appropriate to the particular development but in any event no less frequently than quarterly.

During the start-up phase of a development, monthly release of monitoring results may be required, lengthening to quarterly intervals upon satisfactory compliance. More frequent release of monitoring results would again be required following any modification to plant, process or operation of the development.

2. The results must be provided in such a way that the raw data, as well as any interpretation of the data made by the proponent, can be assessed independently.

3. Any approval should be for a fixed period depending on the nature of the development and having regard to developed criteria, for a maximum period of ten years, with further approval to be sought at the end of that period.

After that period, a project would require further environmental assessment in light of the ongoing monitoring

which has taken place and in light of any changes to the environment, whether due to the project or not.

4. The PCOs support the proposal to require quantification of impact predictions in EIA documents, with best estimates where it can be substantiated that quantification is not possible.(Option 22)

5. The PCOs support the proposal to require compliance statements.(Option 23) However, the statements should be required on an annual basis. Annual reporting and compliance statements are already required at State levels. Two years may be far too long to alert the EPA to impacts and to direct remedial action.

6. The PCOs agree that failure to comply with environmental conditions set by the Commonwealth Government ought to be an offence. (Option 24)

7. In addition, there ought to be provision for an approval to be cancelled where -

- monitoring indicates that inaccuracies were contained in the EIS,
- these materially influenced the decision, and
- the flaws in the EIS are now having a significant adverse effect.

Similar provisions are found in the New Zealand Resource Management Act 1991.

8. Where a consent has been cancelled, the proponent (including Directors) should be prevented from obtaining approvals for other projects for a prescribed period.

9. There should also be emergency powers to halt a development where environmental harm is occurring, irrespective of whether the actual impacts can be traced to flaws in the preparation of the EIA documents.

10. There should be power to direct that operations be varied to comply with acceptability criteria and conditions of approval.

11. The PCOs agree with the need for the EPA to undertake post-assessment audit reviews of the accuracy, effectiveness and efficiency of environmental conditions set by the Commonwealth Government.(Option 25) There should be an obligation on the EPA to perform such audits rather than simply a discretion. Otherwise, the current practice will continue which over the last 20 years administration of the EIA process has not seen the existing discretion exercised.

12. ACCOUNTABILITY

The history of poor decision making referred to in this submission is compounded by the inability of members of the community to challenge administrative decisions which do not follow due process or which are unreasonable.

Particular issues relevant to ensuring accountability in the process are set out below.

12.1 STANDING

Standing requirements are a legacy of the private rights base of environmental laws, and are no longer appropriate when addressing environmental problems which affect the broader public.

The argument that the need to show a special interest of an applicant is necessary to prevent actions by "mere busybodies" has shown to be a nonsense in NSW, where open standing has not "opened the floodgates". The arguments also fails when weighed against the practical effect of such inquiry.

Such inquiry usually obstructs and makes it less likely that there will be a determination on the substantive issues of whether an environmental law has been broken and the need to prevent environmental harm. By contrast, if a litigant is a mere busybody, any lack of good faith will quickly be revealed once legal proceedings are commenced.

It is a waste of resources to require those seeking to represent environmental interests in environmental proceedings to establish their special interest in doing so. This is particularly so, considering that it is no longer disputed that environmental interests should be represented and count in the decision making process.

Some states in Australia have now recognised the need to provide for third party civil enforcement in environmental legislation. This is seen in the recent Development Act 1993 and the Environment Protection Act 1993 in South Australia and the Land Use Planning and Approvals Act 1993 and the Environmental Management and Pollution Control Act 1994 (Tasmania).

New South Wales has third party civil enforcement provisions in a range of legislation including Environmental Planning and Assessment Act 1979, Heritage Act 1977, Wilderness Act 1987, Environmentally Hazardous Chemicals Act 1985, National Parks and Wildlife Act 1974, Environmental Offences and Penalties Act 1989, Local Government Act 1993, and most recently in the Fisheries Management Act 1994.

As a result of this history, government departments in New South Wales strongly support these provisions seeing them as integral to the effective administration of environmental laws. For example, the Department of Planning has stated that

> The right of any person to remedy or restrain a breach of the Act is a fundamental safeguard of the system's proper processes.

Section 25 of the Environmental Offences and Penalties Act (NSW) 1989 allows any person to bring proceedings to restrain a breach of any Act which is causing or is likely to cause harm to the environment so long as they have the leave of the Land & Environment Court.

In the Parliamentary debates on this amendment to the Act, the then Premier Mr Greiner, said

> There could be little debate that the provision of third party rights in a number of statutes has increased the accountability of environmental decision-makers and increased public participation in environmental decision-making generally.
>
> I advise some members on my side of the Chamber ... that third-party rights should not be built up into some form of mythological beast. They have been part of various statutes for a considerable time and have not caused the end of civilisation as we know it.

> Some members who are broadly supportive on my side of the Chamber have developed the view that such rights are a Trojan horse for all matters that are deemed undesirable. But the record just does not indicate that. It would be less than honest of me if I spoke to the contrary.

The record to date supports Mr Greiner. Only one case has been brought using the provisions of Section 25 since its amendment two years ago.

However, by contrast Queensland, has consistently failed to include third party civil enforcement provisions, apart from limited provision in planning legislation. Limited provisions in the Environment Protection Act 1994 have not yet been proclaimed.

In Western Australia there are no third party civil enforcement provisions under the Environmental Protection Act 1986. Similarly, there are no third party civil enforcement provisions in Northern Territory legislation.

As long ago as 1985, the Australian Law Reform Commission recognised the effect of standing rules in hindering access to justice, and proposed a Bill to address the difficulties.

The most effective approach is to provide for third party civil enforcement in environmental assessment legislation. An appropriate model would be s.123 of the Environmental Planning & Assessment Act 1989 (NSW) which provides that

> "Any person may bring proceedings...for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."

A general provision should also be enacted in an environmental protection statute enabling restraint of a breach of any Act which is causing harm to the environment.

1. The PCOs strongly support the abolition of standing requirements to seek judicial review and enforcement of the legislation. (Option 26)

2. The PCOs agree that decisions under the EIA legislation

be made subject to review before the Administrative Appeals Tribunal. (Option 27) However, only a limited class of decisions should be subject to such review rights. These would include rights to merits review in relation to -

(1) EPA or Ministerial decisions not to assess proposals;

(2) EPA decisions to certify the adequacy of EIA documents.

12.2 LEGAL AID

The discussion in Section 8 highlighted the importance of resourcing public participation. An aspect of this includes the need to resource the public so enforcement rights can be exercised.

Litigation is of course a last resort. However, inadequate legal aid prevents the public from exercising rights granted under legislation.

In practical effect, therefore a failure to provide adequate legal aid deprives the public of their rights, and undermines the potential effect of these rights on the accountability of the EIA process. It removes the possibility of review of decisions which is usually a strong motiviation for performance of functions.

The Commonwealth is currently not providing adequate resources for environmental legal aid. This is seen from the following amounts that have been granted in recent years:

1978/79 to 1983/84	$25,641.00
1984/85	$4,997.00
1985/86 (2 cases)	$16,083.00
1986/87 to 1987/88	$0.00
1988/89 (2 cases)	$195,614.00
1989/90	$0.00
1990/91	$84,622.00
1991/92 to 1994/95	$0.00

1. The Commonwealth needs to provide adequate resources by way of environmental legal aid to enable public enforcement of EIA legislation.

12.3 CONCLUSION

Discussion of the Commonwealth's proposals has highlighted several issues fundamental to ensuring accountability in the EIA process which should be incorporated in legislation. In summary, they include -

1. Clear objects for the EIA process, identification of obligations and principles to guide implementation directed to achievement of the objects;

2. Access to Information;

3. Public participation rights throughout the EIA process;

4. Clear criteria for the exercise of discretions given to decisionmakers and other participants in the EIA process;

5. Rights to enforce the EIA legislation;

6. The resourcing of public participation rights, inclusive of resourcing the exercise of enforcement rights.

The recommendations made by the PCOs have incorporated these issues.

If the Commonwealth is prepared to acknowledge that these issues are fundamental to the integrity and effectiveness of its EIA legislation and incorporates, without waiver, these issues into its proposals in the terms recommended by the PCOs, it will have guaranteed the achievement of the stated objectives of its review.

For this reason, the PCOs urge the Commonwealth to implement these recommendations.

Attachments

1. Guidelines for Determination of Significance
2. Guidelines for the Application of ESD Principles to the EIA Process.

Attachment 1

CHECKLIST 1.7

USA Council on Environmental Quality (CEQ)
Guidance on the word 'significance' provided in CEQ regulations

1 Context: the significance of an action must be analysed within the context of society as a whole; the affected region; the affected interest; and the locality, as appropriate Both short-term and long-term effects are relevant;

2 Intensity:

(a) the degree to which the proposed action affects public health and safety;

(b) proximity to historical or cultural resources, parklands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas;

(c) the degree to which the effects are likely to be highly controversial;

(d) the degree to which the possible effects are highly uncertain or involve unique or unknown risks;

(e) the degree to which the action might establish a precedent or affect future considerations;

(f) the implications for cumulatively significant impacts;

(g) the degree to which the action might adversely affect districts, structures, or objects listed in, or eligible for, listing in the National Register of Historic Places;

(h) the degree to which the action might cause loss or destruction of significant, cultural, or historical resources;

(i) the degree to which the action might adversely affect an endangered or threatened species or its habitat that has been determined as critical under the Endangered Species Act;

(j) whether the action threatens a violation of federal, state, or local law, or requirements imposed for the protection of the environment.

Attachment 2

APPENDIX 1

PRINCIPLES OF ECOLOGICALLY SUSTAINABLE DEVELOPMENT
Expanded for application in the context of EIA

1. Inter-generational Equity

Would implementation of the proposal:

- Result in irredeemable loss of natural capital?
- Create environmental damage that is repairable only by future generations at substantial cost?
- Produce unacceptable risk of either?

2. Conservation of Biodiversity and Ecological Integrity

Would implementation of the proposal:

- Result in the loss of species or habitats?
- Limit the capacity for continued evolution of species?
- Encroach upon or limit the opportunity for conservation of ecosystems, habitats or species?

3. Constant Natural Capital

Would implementation of the proposal:

- Result in depletion of the stock of natural capital in pursuit of short-run consumption benefits?
- Result in the use of natural capital as efficiently as possible?
- Involve investment of any type in the stock of natural capital - for example, replacing native vegetation that is to be removed or destroyed?

4. Sustainable Income

Does the proposal take into account:

- The maximum amount of resources that can be consumed (by a nation) without eventual impoverishment?
- The cost of remedying environmental damage in the future?
- The depreciation of natural resources?

5. Anticipatory and Precautionary Policy Approach

Does the proposal:

- Avoid adverse potential consequences even if it means that returns are not maximised in the short term?
- Where there is uncertainty about possible environmental impacts, err on the side of caution?
- Adopt a risk-adverse stance?
- Effectively prove, in the case of possible adverse environmental consequences, that the risk is acceptable?

6. Social Equity

Does the proposal:

- Result in a fair distribution of the benefits and costs within a community, population or society?

7. Biophysical Limits on Natural Resource Use

- Does the proposal increase, decrease or stabilise the throughput of material resources that contribute to environmental degradation?
- Does the project entail an increase, decrease or neutral per capita resource throughput?
- Do the anticipated energy and mass throughputs impose unacceptable stresses upon natural systems?

8. Qualitative Development

Does the proposal:

- Contribute only to quantitative growth as measured by conventional State and National accounts?
- Require an aggregate or per capita increase in the use of non-renewable physical and biological resources?
- Emphasise efficient use of natural resources (materials and energy)?

9. Pricing Environmental Values and Natural Resources

In assessing the economic worth of the proposal:

- are the natural resources used priced to reflect:-
  - (i) the true costs associated with the use of the natural resources?
  - (ii) the scarcity of the resource?
  - (iii) the cost of technical substitution if these resources should become exhausted?

- will the pricing formula or mechanism used protect or degrade the environment (or have a significant tendency to do so)?

10. **Global Perspective**

Does the proposal:

- Account for the need to contribute to global processes to sustainable development?
- Account for the need for development in Australia to be nationally sustainable?
- Take account of formal international environmental obligations that apply to Australia?

11. **Efficiency**

Does the proposal:

- Use natural resources as efficiently as is practicable given best available technology?

12. **Resilience**

Does the proposal:

- Contribute to the resilience of a state or the national economy? That is, is the proposal drawn from vulnerable sectors such as agriculture or mining?
- Contribute to economic diversification?

13. **External balance**

Does the proposal:

- Have the potential to redress current trade and economic imbalances (to produce a state of economic equilibrium) without depreciating the natural resources of the country or a state?

14. **Community Participation**

Has the process of environmental assessment:

- Realistically and meaningfully involved the potentially-affected community(ies) or population(s)? That is, what was the nature of the consultation process?
- At what stage of the process did consultation commence?
- At what stage of the process did it occur?

Environment
Protection Agency

Public Review of the Commonwealth Environment Impact Assessment Process

An Environment Protection Agency Discussion Paper

PUBLIC REVIEW
OF THE COMMONWEALTH
ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

MAIN DISCUSSION PAPER

November 1994

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MAKING A SUBMISSION

The review of the Commonwealth's environmental impact assessment legislation and process is being undertaken in recognition of the need for environmental impact assessment to evolve to reflect changing environmental imperatives and community and industry expectations. The objective of this review is to provide better protection for the Australian environment through maximising the effectiveness and efficiency of the Commonwealth's environmental impact assessment system.

An initial discussion paper, *Setting the Direction*, which sought public submissions on the parameters of the review, was released in late 1993.

This discussion paper forms the next step in the review process. The paper proposes a range of options for achieving the objective of the review. These options have been developed by the Environment Protection Agency based on extensive public consultation, starting with the Ecologically Sustainable Development Working Group process and continued by the Environment Protection Agency through the current review. This paper identifies a number of key areas for reform and proposes a framework of options designed to address the interests of all stakeholders in environmental impact assessment. The framework is proposed as the basis for further discussion with these stakeholders.

Public workshops in each State and Territory will follow the public release of this paper, allowing interested people and organisations the opportunity to participate more immediately in the review process. Details of the times and locations of these workshops will be advised to all recipients of this paper and will be advertised nationally.

Submissions are sought on the options and proposals put forward for discussion by the Environment Protection Agency in this paper, and on any other options which the Commonwealth Government should consider for improving the effectiveness and efficiency of the Commonwealth environmental impact assessment process.

Submissions on this paper, and expressions of interest in workshop participation, should be addressed to:

EIA Review
Environment Assessment Branch
Environment Protection Agency
40 Blackall Street
BARTON ACT 2600

Submissions should be received by Monday, 27 March 1995. All submissions received will be treated as public documents.

Additional copies of this discussion paper may be obtained at the above address or by calling 008 803 772. Further information on the review and discussion paper can be obtained from the Environment Protection Agency on telephone (06) 274 1925 or fax (06) 274 1620.

Submissions should be received by:
Monday, 27 March 1995

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GLOSSARY

AAT	Administrative Appeals Tribunal
Action Minister	Commonwealth Minister responsible for a decision or action
ANAO	Australian National Audit Office
ANZECC	Australian and New Zealand Environment and Conservation Council
ARC	Administrative Review Council
CIA	Cumulative Impact Assessment
Commonwealth	Commonwealth of Australia
Designated Development	class of proposal considered to raise environmentally significant issues of national or international importance or to be environmentally significant
DEST	Department of the Environment, Sport and Territories
EC	European Community
EIA	Environmental Impact Assessment: a process for the orderly and systematic evaluation of a proposal including its alternatives and objectives and its effect on the environment, including the mitigation and management of those effects. The process extends from the initial concept of the proposal through implementation to completion and, where appropriate, decommissioning. (Definition from the ANZECC report, 'A National Approach to Environmental Impact Assessment in Australia', December 1992)
EIS	Environmental Impact Statement
Environment	'all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings': s.3, *Environment Protection (Impact of Proposals) Act 1974*
EPA	Environment Protection Agency: an agency within the Commonwealth Department of the Environment, Sport and Territories
ESD	Ecologically Sustainable Development: defined as 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained and the total quality of life, now and in the future, can be increased'. The goal of Ecologically Sustainable Development is 'development that improves the total quality of life, both now and in the near future, in a way that maintains the ecological processes on which life depends' (National Strategy for Ecologically Sustainable Development, December 1992, pp. 6, 8)

HORSCERA	House of Representatives Standing Committee on the Environment, Recreation and the Arts
IAIA	International Association for Impact Assessment
IGAE	Intergovernmental Agreement on the Environment (1 May 1992)
Impact Act	*Environment Protection (Impact of Proposals) Act 1974* (Commonwealth)
MOU	Memorandum of Understanding
NEPC	National Environment Protection Council
NHMRC	National Health and Medical Research Council
NOI	Notice of Intention
PER	Public Environment Report
Proponent	a person, corporate body, organisation or Government agency responsible for implementing a proposal, and includes any person acting on behalf of a proponent
Proposal	any proposed project, policy, program, plan or other activity which may fall within the scope of environmental impact assessment legislation
Protected Areas	terrestrial and/or marine areas reserved under Commonwealth, State or Territory legislation, primarily for nature conservation purposes
Public	any individual or group
RNE	Register of the National Estate
SIA	Social Impact Assessment
Scoping	process to determine the range of issues to be addressed during an environmental impact assessment and to identify the significant issues related to a proposal
World Heritage Area	An area listed under the *World Heritage Properties Conservation Act 1983*

EXECUTIVE SUMMARY

KEY POINTS

- A comprehensive, public review of the Commonwealth environmental impact assessment legislation and process was announced in October 1993.
- The review aims to maximise the effectiveness and the efficiency of environmental impact assessment as a tool for achieving environment protection and for promoting ecologically sustainable development.
- The review will also allow the Commonwealth Government to give effect to its responsibilities under the National Strategy for Ecologically Sustainable Development, the Intergovernmental Agreement on the Environment and Agenda 21 as they relate to environmental impact assessment.
- Throughout the review there has been a strong commitment to ongoing consultation with all environmental impact assessment stakeholders.
- This discussion paper identifies three levels of change which could be adopted for improving the environmental impact assessment process. At each level the paper canvasses a range of options for achieving the object of the review.
- The three levels of change cover:
  - bringing the Commonwealth environmental impact assessment process into line with the role of the Commonwealth in environment protection, as set out in the Intergovernmental Agreement on the Environment;
  - ensuring the Environment Minister is able to provide environmental protection through environmental impact assessment; and
  - ensuring environmentally acceptable proposals proceed efficiently.

THE REVIEW

A comprehensive public review of the Commonwealth's environmental impact assessment legislation and process was announced by the former Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, in October 1993.

The review is being undertaken in recognition of the need for the environmental impact assessment process to evolve to reflect changing environmental imperatives and community and industry expectations. While the current assessment process has generally worked well to ensure that Commonwealth Government decision makers have been made aware of the environmental implications of their decisions and actions, a comprehensive public review is now needed to ensure environmental impact assessment continues to be a relevant tool for environmental protection and for promoting ecologically sustainable development at the lowest cost to society.

In addition to reflecting changing environmental, community and industry needs, the review also gives the Commonwealth Government the opportunity to implement its responsibilities under the National Strategy for Ecologically Sustainable Development,

the Intergovernmental Agreement on the Environment and Agenda 21 as they relate to environmental impact assessment.

The review is being co-ordinated by the Environment Protection Agency. Throughout the review process the Environment Protection Agency has actively involved all participants in environmental impact assessment, including Commonwealth, State and Territory Government agencies, local government, industry and community groups, impact assessment practitioners and academics, and other interested organisations and individuals.

THE CONSULTATIVE PROCESS

In November 1993, the Environment Protection Agency released an initial discussion paper aimed at focussing the direction and scope of the review. Specifically, the Environment Protection Agency sought public input on:

- the objectives of environmental impact assessment;
- the appropriate role for the Commonwealth Government in environmental impact assessment;
- the issues which should be covered by the review, and
- the appropriate guiding principles which should govern the development and administration of the Commonwealth EIA process.

Nearly 100 submissions were received in response to the initial discussion paper from a range of respondents, including State and Commonwealth Government agencies, industry and conservation groups, and individual members of the public. In general, the responses were positive and supportive of the issues and principles outlined in the paper.

Guiding Principles for Reform

Following this consultation the Environment Protection Agency has adopted eight guiding principles to govern the development of a reformed environmental impact assessment process, and to act as benchmarks to enable stakeholders to monitor the process' performance. The adopted principles are as follows:

The Commonwealth environmental impact assessment process should:

- **provide real opportunities for public participation in government decision making;**
- **be open and transparent;**
- **provide certainty of application and process to all participants, including the community, governments, industry and project proponents;**
- **provide accountable decision making;**
- **be administered with integrity and professionalism;**
- **provide cost-effective processes and outcomes;**
- **be flexible enough to deal effectively and efficiently with all proposals assessed; and**
- **ensure practical outcomes for effective environmental protection.**

A number of consultancy studies have also been commissioned by the Environment Protection Agency. The consultancies examined a range of reform options available to the Commonwealth Government, from minor modifications in current practice through to fundamental changes in the approach to impact assessment. The reports from these studies were developed in close consultation with all stakeholders including State Governments, industry and community groups. The reports provide useful information and recommendations on:

- assessing the social aspects of environmental change;
- assessing cumulative and regional impacts and strategic assessment;
- improving public participation in the assessment process; and
- improving the public inquiry process.

Reports have also been prepared to analyse:

- environmental impact assessment practice and procedures in other countries; and
- environmental impact assessment practices in Australian States and Territories.

A further study into improving the opportunities for participation by indigenous Australians in environmental impact assessment will commence in December.

Since the release of the initial discussion paper, the Environment Protection Agency has continued its commitment to consult widely through regular meetings with industry and community groups, and other stakeholders.

ISSUES

Consultations with stakeholders have identified a number of issues concerning the Commonwealth environmental impact assessment process which should be examined as part of the reform process.

Environmental Issues

A major issue to be examined is the inability of the current Commonwealth environmental impact assessment process to enable the Commonwealth Government to give full effect to its responsibilities for environment protection as set out in the Intergovernmental Agreement on the Environment. The Environment Protection Agency proposes that the Commonwealth Government should ensure environmental impact assessment occurs for all projects which raise environmentally significant issues of national or international importance. Issues such as who should decide when impact assessment will be required and how environmental conditions are set on proposals have also been raised by stakeholders and are examined in the paper.

Industry Issues

A report prepared by the Bureau of Industry Economics, *Environmental Assessment - Impact on Major Projects, Research Report No.35, 1990*, suggests that the two greatest concerns for industry in the environmental impact assessment process are the potential for costly delays and uncertainty associated with the assessment process. The Environment Protection Agency proposes the introduction of reform measures to overcome these concerns.

The package of reform options canvassed in the discussion paper strikes a balance between the need for effective environmental protection through impact assessment and the need for a transparent, certain and efficient process.

PROPOSED REFORM OPTIONS

The discussion paper outlines key areas for the reform of the environmental impact assessment process. Proposed reforms are put forward as the basis for discussion.

In summary, the discussion paper proposes:

- the amendment of the existing legislation to enable the Commonwealth Government to ensure environmental impact assessment occurs for all projects which raise environmentally significant issues of national or international importance. This would enable the Commonwealth to take a leading role in the co-operative establishment of environmental standards and protection and would place the Commonwealth in a better position to meet international environmental obligations. Where a State Government process satisfies Commonwealth requirements, the Commonwealth may accredit the State process under the draft National Agreement on Environmental Impact Assessment being developed under the Intergovernmental Agreement on the Environment;

- the amendment of the existing legislation to enable the Environment Minister greater involvement in the triggering of the environmental impact assessment process and in setting environmental conditions; and

- a range of options to improve the assessment of development projects. Benefits for stakeholders from these reforms will include:

  - increased and earlier opportunities for public involvement in environmental decision making;

  - increased accountability in decision making;

  - the introduction of project specific time management for the assessment process;

  - the removal of uncertainty over which proposals will require Commonwealth environmental impact assessment;

  - the increased application of consistent environmental standards nationwide; and

  - greater transparency in the environmental impact assessment process.

The reforms proposed represent three potential levels of change for the Commonwealth environmental impact assessment process, from the substantial change to bring the jurisdiction of the legislation into line with the role of the Commonwealth Government in environment protection through to proposals to improve the assessment process within the existing legislative framework. Within each of these levels, a number of options for giving effect to the proposed reforms are identified as the basis for further discussion with stakeholders.

Submissions on this paper should be addressed to:

EIA Review
Environment Assessment Branch
Environment Protection Agency
40 Blackall Street
BARTON ACT 2600

Submissions should be received by Monday, 27 March 1995.

INTRODUCTION

1. On 19 October 1993, the then Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, announced a comprehensive and public review of all aspects of the Commonwealth's environmental impact assessment (EIA) process. The review is being co-ordinated by the Environment Protection Agency (EPA), an agency of the Commonwealth Department of the Environment, Sport and Territories. The review involves all participants in environmental impact assessment, including Commonwealth and State Government agencies, industry and community groups, practitioners and academics and other interested organisations and individuals.

2. The objective of the review is to provide better protection for the Australian environment through improving the effectiveness and efficiency of the Commonwealth's environmental impact assessment process. A more effective and efficient assessment process will allow the Commonwealth Government to work co-operatively with State, Territory and local governments to ensure environmental impacts are given full consideration in decision making processes. The review also provides the opportunity for the Commonwealth Government to give effect to the outcomes of the ecologically sustainable development and Intergovernmental Agreement on the Environment processes and to implement international commitments, such as Agenda 21 and the Rio Declaration.

3. This discussion paper proposes as the basis for discussion a range of options for reforming the Commonwealth environmental impact assessment process. The reform options have been developed by the Environment Protection Agency following extensive consultations with all environmental impact assessment stakeholders and drawing on the National Strategy for Ecologically Sustainable Development, the provisions of the Intergovernmental Agreement on the Environment and work by the Australian and New Zealand Environment and Conservation Council towards a national approach to environmental impact assessment in Australia.

4. While the enactment of Commonwealth EIA legislation was a major step forward in environment protection in Australia, the process has remained relatively unchanged since its inception in 1974. To be effective and efficient, the Commonwealth process must reflect the changing needs of environment protection in Australia, including changes that have occurred in the environment in that time, and to incorporate current community perceptions of what is an appropriate role for the Commonwealth Government in meeting these needs. Environmental groups and industry have also indicated that the Commonwealth environmental impact assessment process, although it has generally worked well in the past, it is no longer sufficient in its present form. **Appendix A** provides a summary of the current Commonwealth environmental impact assessment process.

5. The discussion paper has three parts: Part I details the background and context of the review, including responses to the initial discussion paper, *Setting the Direction*, released in November 1993.

6. Part II identifies three levels at which changes to the Commonwealth environmental impact assessment could be made. Part II proposes, as the basis for discussion, a range of reform options at each level. These options are aimed at maximising the effectiveness and efficiency of environmental impact assessment.

7. Part III briefly identifies the future direction of environmental impact assessment in Australia, and particularly those issues which are important to environmental impact assessment stakeholders and where action is required, but which are dependent upon the currently proposed changes being brought into effect or which require further consultation before they can be addressed.

8. The reform options in this discussion paper focus on improving the assessment of development projects, the traditional area of operation of environmental impact assessment. Increasingly it is becoming apparent that project assessment alone is insufficient to provide environmental protection. The next generation of environmental impact assessment will see increasing attention to strategic assessment, or the assessment of policies, programs and plans, and to regional assessment capable of fully considering cumulative, incremental and regional impacts.

9. These developments in environmental impact assessment will not only ensure more effective environment protection, but will also increase efficiency through reducing the need for project specific assessment. It is the Environment Protection Agency's intention to promote the evolution of environmental impact assessment in Australia towards a greater focus on strategic and regional assessment. However, before such a step can be taken at the Commonwealth level, the Environment Protection Agency believes it is necessary to maximise the effectiveness and efficiency of that part of environmental impact assessment where most attention is currently focused, namely on project assessment.

10. Public submissions on this discussion paper should be made to the Environment Protection Agency by Monday, 27 March 1995 (see Making a Submission for details).

11. The Environment Protection Agency is committed to developing, in close co-operation with all interested participants, a Commonwealth environmental impact assessment process which allows the Commonwealth Government to fulfil its environmental responsibilities. The Environment Protection Agency is equally committed to ensuring that the Commonwealth environmental impact assessment process is efficient and promotes environmentally acceptable development in Australia.

PART I
BACKGROUND TO THE REVIEW

THE REVIEW

12. Since its inception in 1974, the environmental impact assessment process has generally worked well to ensure that Commonwealth decision makers have been made aware of the environmental implications of their decisions and actions. A comprehensive, public review is now appropriate to ensure environmental impact assessment continues to be an effective tool for environmental protection and for promoting ecologically sustainable development. The review will also enable the environmental impact assessment process to better reflect changed community and industry expectations.

CONTEXT

13. The review is being undertaken within the wider context of other major initiatives to improve environmental protection nationally.

The Intergovernmental Agreement on the Environment and the National Agreement on Environmental Impact Assessment

14. The Intergovernmental Agreement on the Environment came into effect in May 1992. Negotiation of the Intergovernmental Agreement on the Environment was instrumental in gaining consensus from all Australian Governments on the need for a more nationally consistent and improved approach to numerous environmental issues, including environmental impact assessment. Subsequently, the Australian and New Zealand Environment and Conservation Council (ANZECC) began work on a National Agreement on Environmental Impact Assessment to streamline and clarify the respective roles of the Commonwealth and the States and Territories in environmental impact assessment, and to increase the clarity, certainty and efficiency of the process at all levels of government.

15. The draft National Agreement has been endorsed by ANZECC Ministers and is currently being considered by the State Planning Ministers with environmental impact assessment responsibilities.

16. The current review builds on both these initiatives and aims to ensure that the Commonwealth environmental impact assessment process is consistent with, and fully implements, the provisions of the Intergovernmental Agreement on the Environment and the National Agreement.

> *The review is implementing and building on the Intergovernmental Agreement on the Environment and the draft National Agreement on Environmental Impact Assessment.*

The National Strategy for Ecologically Sustainable Development

17. The National Strategy for Ecologically Sustainable Development, agreed by the Commonwealth and State Governments, is another major initiative setting the context for this review. The Commonwealth Government is committed to implementing the principles of ecologically sustainable development. The National Ecologically Sustainable Development Strategy was developed in 1992 by all governments based on the recommendations of the Ecologically Sustainable Development Working Groups. Some 70 of these recommendations relate directly or indirectly to environmental impact assessment.

18. Ecologically sustainable development requires the integration of environment and development objectives and environmental impact assessment is an important mechanism by which this may be achieved. This was recognised by the Strategy, which included recommendations to improve:

- the coverage and effectiveness of the environmental impact assessment process;
- the knowledge base upon which assessment decisions about the acceptability of proposals are made;
- the clarity of the process and its application, including providing clear guidance on the types of proposals likely to attract assessment; and
- community access and post-approval accountability.

The review is responding to the recommendations of the Ecologically Sustainable Development Working Groups and to the National Strategy for Ecologically Sustainable Development as they relate to environmental impact assessment.

The Administrative Review Council Review

19. The Administrative Review Council has also undertaken its own inquiry considering Commonwealth environmental impact assessment during the period of the review. The Administrative Review Council inquiry was concerned with specific types of proposals, that is, those where review of the merit of decisions made by Commonwealth administrators could be undertaken by the Administrative Appeals Tribunal. However, its basic objectives parallel those of the review and the other initiatives noted above. These include reducing the potential for costly process delays and ensuring more efficient, timely and accountable decision making. The outcomes of the Administrative Review Council's inquiry complement the options proposed in this paper. Copies of the Administrative Review Council's report, *Environmental Decisions and the Administrative Appeals Tribunal, Report No. 36* are available from Australian Government Bookshops.

Internal Reports and Audits

20. The Commonwealth Government has also initiated its own internal audit on the efficiency of the environmental impact assessment process. The Australian National Audit Office undertook an efficiency audit of the process in 1992 and drew attention to areas where improvements could be made, such as the project referral process, post-approval monitoring, scoping and the minimisation of time delays. This report was followed by the report of the House of Representatives Standing Committee on Environment, Recreation and the Arts in 1994, which found that the

Environment Protection Agency was taking real and active steps to improve the efficiency of the environmental impact assessment process, but identified a number of weaknesses in administration by industry and development agencies of their responsibilities under the current legislation. Copies of these reports *Audit Report No. 10, 1992-93, Living with our Decisions, 1992* and *House of Representatives Standing Committee on the Environment. Recreation and the Arts: Commonwealth Environment Impact Assessment Processes, 1994* are available from Australian Government Bookshops.

21. The review of environmental impact assessment is a logical progression from the National Strategy for Ecologically Sustainable Development, the Intergovernmental Agreement on the Environment and the National Agreement. It also accords with the Administrative Review Council process and responds to the recommendations of the Audit Office and the House of Representatives Standing Committee. These initiatives all recommend that significant changes be made to Commonwealth environmental impact assessment.

22. The form and scope of these changes will now be determined by the next phase of the public review process, which commences with this discussion paper. This paper draws upon the initiatives discussed above, responds to submissions made on the initial discussion paper, *Setting the Direction*, and reflects extensive consultation and research, including the commissioning of several consultancies on aspects of environmental impact assessment within Australia and overseas. The paper outlines existing concerns, identifies opportunities to improve the process and offers possible solutions.

CONSULTATION

23. Throughout the review process the Environment Protection Agency has actively involved, and sought information and feedback from, all participants in environmental impact assessment, including Commonwealth and State Government agencies, industry and community groups, environmental impact assessment practitioners and academics, and other interested organisations and individuals. This commitment to an open process involving all stakeholders will continue throughout the review. As part of the public consultation process supporting the release of this discussion paper, workshops will be held in each State and Territory capital to facilitate discussion on the options for change. Details of the times and locations of these workshops will be advised to all recipients of this discussion paper and will be advertised nationally.

SETTING THE DIRECTION

24. In November 1993, the initial discussion paper of the review, *Setting the Direction*, was released. The purpose of the initial discussion paper was to invite public comment on the direction and scope of the review. In particular, comments were sought on:

- the objectives of environmental impact assessment;
- the appropriate role of the Commonwealth in environmental impact assessment;
- the issues which should be examined by the review; and
- the principles which should guide the development of an effective and efficient environmental impact assessment system.

25. The Environment Protection Agency received 93 submissions in response to the initial discussion paper from a range of respondents, including State and Commonwealth Government agencies, industry and conservation groups, and individual members of the public. Almost all respondents were supportive of the Commonwealth Government's initiative to review its environmental impact assessment process.

26. The following summarises the responses received on the initial discussion paper. A list of submissions received is at **Appendix B**.

Objective of Environmental Impact Assessment

27. The present objective of Commonwealth environmental impact assessment is set out in section 5 of the *Environment Protection (Impact of Proposals) Act 1974*. Section 5 states that the object of the environmental impact assessment 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.

28. While many submissions indicated satisfaction with the current objective, the majority expressed concern that the current environmental impact assessment legislation and its administration were focused on a legislative process rather than on outcomes. In particular, the majority of respondents believed that the appropriate objective for environmental impact assessment was the protection of the environment through supporting the application of the principles of ecologically sustainable development to government decision making.

29. As part of the overall package of possible reforms for the Commonwealth environmental impact assessment process, the Environment Protection Agency proposes that the objective of environmental impact assessment should be the protection of the environment through supporting the application of the principles of ecologically sustainable development. The Environment Protection Agency suggests that this objective should be clearly stated in the environmental impact assessment legislation and should form the basis for all decision making under the environmental impact assessment process.

Option 1

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

The Role of the Commonwealth

30. The Initial Discussion Paper proposed five factors which could help define the appropriate role for the Commonwealth Government in environmental impact assessment. The five factors, drawn from the Intergovernmental Agreement on the Environment, were:

- the Commonwealth Government represents the national interest;
- the Commonwealth Government has responsibility for meeting international obligations;

- transboundary impacts between States and Territories may lead to Commonwealth Government involvement;

- national environmental impact assessment standards can be promoted by Commonwealth Government involvement; and

- the Commonwealth Government has responsibility for the impacts of its own activities.

31. The majority of submissions gave general support for the five factors. In particular, nearly all respondents believed that the Commonwealth has a role in environmental impact assessment, particularly where environmentally significant issues of national or international importance arise. A small minority of respondents believed the Commonwealth Government has no role in environmental impact assessment outside of Commonwealth lands and waters.

32. The majority of respondents also supported clarification of the five factors identified as follows:

- while the Commonwealth Government clearly represents the national interest, a transparent and certain definition of what the 'national interest' involves is required;

- transboundary impacts between States and Territories may lead to Commonwealth involvement, but only where the environmental issues are not being adequately addressed by the State Governments. The Intergovernmental Agreement on the Environment indicates that the Commonwealth Government should be involved in such matters at the request of a State Government. The Commonwealth clearly has a responsibility for impacts outside of Australia arising from Australian actions;

- national environmental impact assessment standards can be promoted by Commonwealth involvement but must be developed in co-operation with State and Territory Governments; and

- the Commonwealth's environmental impact assessment process must apply to all Commonwealth bodies, including semi-autonomous statutory agencies.

33. Based on the submissions received on the initial discussion paper, and consistent with the Intergovernmental Agreement on the Environment, the Environment Protection Agency proposes that the Commonwealth's environmental impact assessment process be amended so that it fully enables the Commonwealth Government to fulfil its environmental responsibilities. This issue is discussed in detail in Part II, 'Initiating the Commonwealth EIA Process'.

The Commonwealth Government has a responsibility for the assessment of environmental issues of national or international importance.

Issues for the Review

34. Through their submissions on the initial discussion paper and in ongoing consultations with the Environment Protection Agency, stakeholders have identified a large range of issues which they feel need to be addressed to achieve the objective of maximising the effectiveness and efficiency of the Commonwealth's environmental impact assessment legislation and process.

35. The issues identified in the initial discussion paper were seen as covering the central concerns of stakeholders. In particular, respondents were concerned to ensure that the Environment Protection Agency addressed the following issues:

- the assessment of the environmental impacts of policies, programs and projects;
- the integration of the goals and principles of ecologically sustainable development into environmental impact assessment;
- the question of who is able to initiate the environmental impact assessment process;
- the assessment of cumulative, incremental and regional impacts;
- effectiveness and compliance monitoring;
- improvements to public participation in decision making through environmental impact assessment;
- the protection of biodiversity and ecological integrity;
- improvements to the timeliness, transparency and certainty of the environmental impact assessment process; and
- internal and external review of environmental impact assessment decisions.

36. The Environment Protection Agency has addressed most of the above issues with the reform options proposed in Part II of this paper. The remaining issues the Environment Protection Agency proposes to examine further, in consultation with stakeholders, following the implementation of reforms to the project assessment process. These remaining issues are identified in Part III of this paper.

Guiding Principles

37. The initial discussion paper listed eight principles which could be adopted to guide the development of an effective and efficient environmental impact assessment process. The majority opinion in the submissions was that the principles were relevant and appropriate to the review. A number of respondents sought further elaboration or expansion of the principles. Based on the submissions received, the Environment Protection Agency has redefined the eight guiding principles as follows:

- *Participation* — EIA should provide effective and timely access to the decision making process for all interested parties.
- *Transparency* — all assessment decisions, and the bases for those decisions, should be open and readily accessible.

- *Certainty* — the process and timing of assessment should be agreed in advance and followed by all participants.
- *Accountability* — decision makers are responsible to all parties for their actions and decisions under the assessment process.
- *Integrity* — assessments are undertaken with professionalism, objectivity and efficiency.
- *Cost-effectiveness* — the assessment process and its outcomes ensures environmental protection at the least cost to society.
- *Flexibility* — the assessment process is able to adapt to deal efficiently and effectively with any proposal or decision making situation.
- *Practicality* — the assessment process and outcomes are readily useable and operate effectively.

The guiding principles have been used to develop proposals for reforming the environmental impact assessment process to ensure effective environmental protection through an efficient process.

38. The initial discussion paper invited respondents to indicate which principles they considered the most important in guiding the development of a new environmental impact assessment process. Consistently, the most important principles were seen as participation, transparency, certainty, accountability and integrity.

39. Many respondents cautioned however that all eight principles were of importance and all should be taken into account in the development of environmental impact assessment.

40. In addition to adopting the eight principles as guidance in the development of reform options for the environmental impact assessment process, the Environment Protection Agency intends to use these principles as 'yard sticks' or 'benchmarks' against which the performance of the Commonwealth environmental impact assessment system can be measured, both by the Environment Protection Agency and by other participants in the environmental impact assessment process.

INFORMATION CONSULTANCIES

41. At the same time as releasing *Setting the Direction*, the Environment Protection Agency let six consultancies to examine particular issues for the review. These covered:

- public participation in Commonwealth environmental impact assessment;
- the public inquiry mechanism in Commonwealth environmental impact assessment;
- social impact assessment;

- cumulative and strategic impact assessment in Commonwealth environmental impact assessment;

- environmental impact assessment processes and practices in Australian States and Territories; and

- environmental impact assessment processes and practices in other countries.

42. The first four consultancies examined existing practices and procedures in Commonwealth environmental impact assessment as well as in other regimes within Australia and overseas. They evaluated the strengths and weaknesses of both the Commonwealth and other processes and used this information to develop options for improving the Commonwealth environmental impact assessment process. Options ranged from modest changes within the existing legislative framework through to substantial and fundamental changes to the manner in which environmental impact assessment is undertaken.

43. The fifth and sixth consultancies were essentially benchmarking exercises. They examined the perceived advantages and disadvantages of other systems and identified examples of best practice in environmental impact assessment around Australia and in selected other countries for possible adoption at the Commonwealth level. Copies of the Executive Summaries and Recommendations of the reports, and copies of the full reports, may be obtained from the Department of the Environment, Sport and Territories, by ringing 008 803 772.

PART II
REFORMING PROJECT ASSESSMENT

44. A large number of recommendations and proposals for reforming environmental impact assessment processes have been put forward in recent years. Internationally, the 1992 Rio Declaration and Agenda 21, together with treaties such as the climate change and biodiversity conventions, have called for improvements in environment protection through better environmental impact assessment. Similar proposals have been raised nationally, particularly through the recommendations of the Ecologically Sustainable Development Working Groups, the National Strategy for Ecologically Sustainable Development, and the provisions of the Intergovernmental Agreement on the Environment. Many of these recommendations and proposals were extracted in the Initial Discussion Paper, *Setting the Direction*.

45. The Environment Protection Agency's own consultations with stakeholders with an interest in the environmental impact assessment process have confirmed that action is required on many of these recommendations and proposals. Stakeholders have also identified issues of particular importance to the Commonwealth environmental impact assessment process.

Why are changes to the Commonwealth environmental impact assessment process being proposed?

In proposing changes to the environmental impact assessment process, the Environment Protection Agency is responding to:

- *the Commonwealth's international commitments, such as Agenda 21;*
- *the Commonwealth's national commitments, such as the Intergovernmental Agreement on the Environment and the National Strategy for Ecologically Sustainable Development; and*
- *issues raised by stakeholders who have identified a number of areas where improvements can be made.*

46. The majority of recommendations and proposals put forward are aimed at maximising the effectiveness and efficiency of the impact assessment of development projects. The assessment of development projects, rather than policies or programs, is the area where environmental impact assessment has traditionally focused its attention. While there are strong arguments that project specific assessment alone cannot guarantee fully effective environment protection, nor is project specific assessment always the most efficient form of assessment, it is clear that in the short term environmental impact assessment will continue to focus on the assessment of development projects. The Environment Protection Agency therefore proposes that the initial outcomes of the review of the Commonwealth environmental impact assessment process should also be focused on improving that part of environmental impact assessment which is currently most active, namely the assessment of development projects.

47. This Part of the paper outlines three potential levels of change for the Commonwealth environmental impact assessment process, from the substantial

change involving bringing the jurisdiction of the legislation into line with the role of the Commonwealth Government in environment protection through to proposals to improve the assessment process within the existing legislative framework. Within each of these levels, a number of options for giving effect to the proposed reforms are identified. These options are proposed by the Environment Protection Agency as the basis for discussion with all interested stakeholders in environment protection.

The proposed levels of change cover:

- *the relationship between the role of the Commonwealth in environment protection and the jurisdiction of the Commonwealth EIA process;*
- *how impact assessment is triggered and environmental conditions are set within the current jurisdiction of the legislation; and*
- *procedural changes to maximise the effectiveness and efficiency of the Commonwealth assessment process.*

48. The options have been developed to address stakeholders' key concerns with project assessment. The options have also been developed with careful attention to the eight guiding principles developed following responses to the Initial Discussion Paper. Part III of this paper identifies additional issues of concern to environmental impact assessment stakeholders. The Environment Protection Agency proposes further examination of these issues, in consultation with all stakeholders and they will not be examined further in this paper.

49. The options proposed are not mutually exclusive. For example, procedural changes to the project assessment process are warranted regardless of whether changes to the jurisdiction or triggering of the assessment process are made.

CHANGING THE JURISDICTION OF THE COMMONWEALTH EIA PROCESS

CURRENT POSITION

50. The 'jurisdiction' of the environmental impact assessment legislation (the *Environment Protection (Impact of Proposals) Act 1974*) determines the potential for the Commonwealth to be involved in the assessment of a proposal. That is, it defines those proposals over which the Commonwealth Government has the legislative power to direct impact assessment. The issue is therefore fundamental to the Commonwealth's environmental impact assessment process and review.

> *The jurisdiction of the environmental impact assessment legislation defines which proposals are potentially subject to environmental impact assessment under the Commonwealth legislation.*

51. The initial discussion paper for the review sought the views of stakeholders on the appropriate role for the Commonwealth in environmental impact assessment in Australia. As a basis for discussion, the initial discussion paper suggested a number of factors which could help to define the Commonwealth's role. The factors, drawn from the Intergovernmental Agreement on the Environment, were as follows:

The Commonwealth

- represents the national interest as one perspective in the assessment of a proposal;
- must ensure Australia's international obligations are met;
- may assist in the resolution of transboundary (interstate) impacts;
- can promote a co-operative approach to national standard setting; and
- must fulfil its own environmental responsibilities arising from Commonwealth actions and decisions.

52. All submissions received on the initial discussion paper agreed that the Commonwealth did have a role in environmental impact assessment. A large majority of submissions supported the proposed factors as the relevant considerations for determining Commonwealth involvement in environmental impact assessment.

53. The consultation process has demonstrated a general acceptance that the Commonwealth has a responsibility for environmentally significant issues of national or international importance. This view is supported by the Intergovernmental Agreement on the Environment.

> *The Commonwealth Government has responsibility for environmentally significant issues of national or international importance.*

54. The jurisdiction issues for the review therefore are:

- does the current legislation allow the Commonwealth to fulfil its environmental responsibilities;
- what is meant by 'environmentally significant issues of national or international importance'; and
- what mechanisms are available to allow the Commonwealth environmental impact assessment process to fully reflect the role of the Commonwealth Government in environment protection?

CURRENT LIMITATIONS

55. Consultations with stakeholders have identified a number of limitations and inefficiencies in the way in which the Commonwealth's jurisdiction in impact assessment currently operates.

Limitations in Effectiveness

56. The jurisdiction of the current legislation is not determined by environmental considerations, although the legislation was created for the purpose of protecting the environment. The *Environment Protection (Impact of Proposals) Act 1974* currently applies only to Commonwealth Government decisions arising under other legislation and to the actions of the Commonwealth itself. This means the Commonwealth can only be involved in the assessment of a proposal where some other Commonwealth decision or action is required which is unrelated to environmental impact assessment. For private sector developments the Commonwealth decision will typically be for commodity export or foreign investment approval.

57. Under the current legislation, the Commonwealth environmental impact assessment legislation applies to projects which raise environmentally significant issues of national or international importance only if the projects are being undertaken by a Commonwealth agency or are subject to some other Commonwealth approval. Projects may not therefore be subject to the Commonwealth assessment process even when they raise environmentally significant issues of national or international importance. This has increasingly become the case as the Commonwealth Government has relaxed industry controls, for example, through the removal of export controls on iron ore.

58. As the current jurisdiction of the Commonwealth environmental impact assessment process does not reflect the role of the Commonwealth in environmental protection, the Commonwealth Government's ability to use impact assessment to protect the environment is limited. For example, the environmental impact assessment process cannot provide a consistent or comprehensive process for the implementation of international obligations in Australia, as not all activities affecting our international obligations are necessarily subject to impact assessment. Nor is there consistent input of national or international environmental considerations into regional development.

59. Environmental impact assessment provides all affected governments with the opportunity to work together to ensure their concerns are taken into account in project approval and can therefore reduce controversy. Without a guarantee that Commonwealth concerns will be taken into account through impact assessment the assessment process cannot be used to resolve any conflicting State and Commonwealth environment and development concerns before final approvals are sought for a proposal. A comprehensive environmental impact assessment process supporting

Commonwealth involvement in environment protection would contribute to resolving these issues.

The current legislation does not allow the Commonwealth Government to fulfil its environmental responsibilities.

60. The lack of a consistent approach to EIA across Australia is also a concern for both industry and community groups. This concern is partially being addressed through the co-operative efforts of the Commonwealth, State and Territory Governments to develop an agreed national approach to environmental impact assessment in Australia. The National Agreement on Environmental Impact Assessment being developed through the Australian and New Zealand Environment and Conservation Council is an example of this co-operative approach.

61. For the Commonwealth to be a relevant contributor to the development of a consistent national approach to environmental impact assessment, the Commonwealth should itself be one of the governments with environmental impact assessment responsibilities and practical experience in the assessment of proposals. The Commonwealth's role in promoting a national approach to environmental impact assessment will be limited where its involvement in environmental impact assessment is not linked to an accepted role for the Commonwealth in environment protection.

The jurisdiction of the current Commonwealth environmental impact assessment legislation:

- *does not allow Commonwealth environmental impact assessment to apply to all projects which raise environmentally significant issues of national or international importance;*
- *does not allow the Commonwealth to use environmental impact assessment to ensure national and international environmental commitments are being met; and*
- *limits the ability of the Commonwealth to work with State and Territory Governments to develop a consistent approach to EIA across Australia.*

Limitations in Efficiency

62. The Bureau of Industry Economics has found that by far the two greatest concerns of industry with environmental impact assessment are the potential for costly delays in gaining project approvals and uncertainty in the application and operation of the assessment process. This finding was supported by industry submissions on the initial discussion paper. The manner in which the Commonwealth's jurisdiction is determined under the current legislation can bias the Commonwealth environmental impact assessment process towards delay and uncertainty.

63. As was noted above, for private sector proposals, Commonwealth environmental impact assessment is only triggered through Commonwealth involvement under some other process, typically through export or foreign investment approval. Both of these approvals are often sought later rather than earlier in a proposal's development. For example, proposals will often need to be well developed and detailed before agreements on foreign investment are finalised and approval

sought. Similarly, mines can be operational before export approvals are sought. As a consequence, the need for Commonwealth environmental impact assessment may not even be considered until the proposal is well advanced and modifications to the proposal are difficult and costly. Similarly, considerable costs may be incurred by developers in formulating project proposals which are unlikely to be environmentally acceptable.

64. The advantages of the early involvement of proposals in environmental impact assessment are well documented. For example, the early involvement of the Environment Protection Agency allows environmental impact assessment to occur simultaneously with project planning, reducing the time needed for environmental approval and allowing environmental considerations to be more readily factored into the project's development. Early involvement therefore reduces both costs and the potential for delays in project approvals for the proponent. Yet despite these clear advantages, the current legislation carries a bias towards the late involvement of the Commonwealth's Environment Protection Agency in the assessment of private sector proposals.

65. The manner in which the Commonwealth's jurisdiction is determined under the current legislation can also introduce uncertainty into the assessment process. For example, it may be unclear until late in a proposal's development whether foreign investment approval will be necessary. Until capital investment details are finalised, it will therefore be unclear whether there is any need for consideration of the Commonwealth environmental impact assessment process. Even where Commonwealth approval will clearly be required, as in the case of export licence approval, the proponent is often left uncertain whether the proposal will be referred to the Environment Protection Agency by the relevant action agency. Legislation which provides government agencies with very broad discretion does not support certainty of process for developers, conservationists or other government agencies.

66. Such uncertainty and potential for delay are inconsistent with the guiding principles of the review and with the goal of an effective and efficient Commonwealth environmental impact assessment process.

OPTIONS FOR CHANGE

67. A number of options are proposed for ensuring the Commonwealth Government is able to use the EIA process to give effect to its environmental responsibilities. The aim of the options is to enable the Commonwealth Government to ensure that impact assessment takes place where environmentally significant issues of national or international importance arise. The Environment Protection Agency is not proposing that the Commonwealth always take the lead role in the assessment of projects which raise such issues. Where a State or Territory assessment process adequately addresses the environmentally significant issues of national or international importance, the Commonwealth will be in a position to accredit that process. Similarly, where major national or international issues arise, State and Territory Governments should be in a position to accredit the Commonwealth assessment process.

> *The Commonwealth environmental impact assessment legislation should reflect the Commonwealth's responsibility for environmental issues of national or international importance.*

Administrative Option

68. The first option proposed to ensure the Commonwealth Government can require the assessment of environmentally significant impacts of national or international importance is to strengthen administrative co-operative arrangements with the State and Territories. The draft National Agreement on Environmental Impact Assessment currently being negotiated under the Intergovernmental Agreement on the Environment allows for the interests of a government to be taken into account in the assessment process even where that government does not have the jurisdiction to require assessment. This mechanism could be used to allow the Commonwealth's interests to be accommodated within a State assessment process even though the Commonwealth does not have jurisdiction.

69. The advantage of this approach is that it can be achieved without legislative amendments and it relies on a solely co-operative approach to addressing national and international environmental issues. This option does not however overcome the potential for uncertainty and delay which exists in the current legislation. Uncertainty could be increased as this process does not clearly define when the Commonwealth Government is likely to have an interest in the assessment of a project. This approach also provides no guarantees that Commonwealth interests will be taken into account where a State or Territory Government decides to allow a project to proceed without impact assessment. Experience with existing Commonwealth-State agreements shows that their implementation can be erratic and unreliable.

Option 2

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.

Legislative Options

70. As an alternative option the Environment Protection Agency proposes the amendment of the current environmental impact assessment legislation to enable the Commonwealth to effectively fulfil its responsibilities for environmental issues of national and international importance.

71. Such a legislative change would give the Commonwealth Government the jurisdiction to ensure that environmental impact assessment is undertaken for all projects raising environmentally significant issues of national or international importance.

72. The aims of the proposed amendments are to:

- ensure the Commonwealth environmental impact assessment process reflects the Commonwealth's responsibilities in environment protection;
- ensure the Commonwealth is involved only in those matters which raise environmental issues of national or international importance, or where the actions or decisions of the Commonwealth itself affect the environment; and
- provide certainty of when the Commonwealth will be involved in the environmental impact assessment of a proposal.

73. The Environment Protection Agency proposes developing a legislative mechanism to achieve these aims but believes any mechanism should be developed co-operatively by those affected by the changes, including State Governments, industry, community groups and other Commonwealth agencies with development responsibilities.

74. The Environment Protection Agency puts forward, as the basis for discussion, the following two options for the form of this legislative mechanism:

- the Commonwealth Environment Minister could be given the discretion to require assessment of any proposals involving environmentally significant issues of national or international importance; or

- the legislation could include a 'designated developments' list of proposals which must be referred to the Commonwealth for a determination of whether assessment is necessary. The list would include all proposals likely to raise environmentally significant issues of national or international importance.

75. Each approach has its advantages. The discretionary approach provides flexibility to ensure that all projects which raise issues of national or international significance are subject to assessment. The designated developments approach provides greater certainty of which proposals will require referral to the Commonwealth Government.

DESIGNATED DEVELOPMENTS

76. Consultation with stakeholders indicates a general preference for the increased certainty, transparency and accountability of the designated developments approach. A designated developments approach is currently used in New South Wales and overseas. Based on this preference, the Environment Protection Agency proposes amending the environmental impact assessment legislation to include a schedule of those proposals likely to raise environmentally significant issues of national or international importance. Where a proposal is listed in the schedule that proposal will require referral to the Commonwealth Government for a determination on the need for Commonwealth environmental impact assessment.

The Environment Protection Agency proposes basing the jurisdiction of the Commonwealth environmental impact assessment legislation on a schedule of designated developments.

77. A designated developments list could be used in a number of ways. A designated developments list could identify proposal types which are likely to raise environmentally significant issues of national or international importance, for example, uranium mining or infrastructure developments such as major airport expansions. Alternatively, a designated developments list could cover any activities affecting national or international environmental commitments. An example of such a list is provided by way of illustration in **Appendix C**.

78. To ensure all proposals which raise environmentally significant issues of national or international importance are captured, both lists could be used so that any proposal on either lists would be classified as a designated development requiring a Commonwealth environmental impact assessment decision. Alternatively, any proposal featuring on both lists could be deemed a designated development. Legislation relying on this designated developments approach can be developed

within the existing scope of the Commonwealth Constitutional powers, particularly relying on the corporations and external affairs powers.

The schedule of designated developments would list proposals likely to raise environmental issues of national or international importance.

79. Because of its obvious importance to all stakeholders, any designated developments schedule will need to be developed in consultation with all parties.

80. The Environment Protection Agency accepts that for a designated developments approach to successfully allow the Commonwealth to fulfil its environmental responsibilities, the schedule of proposals will need to be cast widely. Although a schedule which has been carefully developed in consultation with stakeholders should minimise the number of proposals caught by the Commonwealth process which do not warrant Commonwealth assessment, this may from time to time occur. To minimise delay where this happens, other changes which the Environment Protection Agency proposes to make to its project assessment process (see 'Procedural Reforms') will ensure that within 20 working days of a proposal being referred to the Environment Protection Agency a decision will be made on whether Commonwealth assessment is necessary.

81. Similarly, the use of a schedule of designated developments may result in some proposals which do raise environmentally significant issues of national or international importance not being automatically referred to the Commonwealth. The Environment Protection Agency therefore proposes that a residual discretion be included in the revised legislation to enable the Commonwealth Government to require the assessment of proposals not otherwise designated. Again, a schedule carefully developed in consultation with stakeholders should require the use of this power on rare occasions only. The Environment Protection Agency proposes that the residual discretion reside with the Environment Minister but accepts that it should only be exercised in consultation, or alternatively in agreement, with other relevant Ministers, or upon a decision of Cabinet. Clear guidelines will also need to be developed to indicate when this power will be exercised to minimise uncertainty.

Option 3

A schedule of designated developments be added to the Commonwealth legislation which defines those proposals likely to raise environmentally significant issues of national or international importance. Proposals so designated will require a decision of the Commonwealth Government on whether Commonwealth assessment is appropriate.

Option 3a

An additional power to require the assessment of proposals which are not designated but which raise environmentally significant issues of national or international importance be added to the Commonwealth legislation.

82. Under the designated developments option, Commonwealth environmental impact assessment would still be required for all environmentally significant activities undertaken by Commonwealth agencies which are not subject to State assessment legislation.

ENVIRONMENT MINISTER'S DISCRETION

83. An alternative approach to the schedule of designated developments is to provide a discretionary power in the legislation to be exercised to 'call-in' a proposal for assessment when that proposal will clearly result in environmental impacts of national or international importance. If such an approach were preferred, the Environment Protection Agency proposes that the legislation be amended to enable the Commonwealth Environment Minister to require environmental impact assessment for a proposal, following consultation with relevant Ministers. Again, clear guidelines would need to be developed to indicate when this power will be exercised.

Option 4

A discretionary power be introduced into the legislation to enable the Commonwealth Environment Minister to require the assessment of any project likely to raise environmentally significant issues of national or international importance.

NATIONAL IMPORTANCE

84. Whichever approach is ultimately preferred by the Commonwealth Government, the Environment Protection Agency will need to work closely with State and Territory Governments, industry, community groups and other Commonwealth agencies to clearly define which proposals are likely to raise environmentally significant issues of national or international importance. The starting point for this process will be the five factors for determining the role of the Commonwealth outlined in paragraph 30 above.

RELATIONSHIP TO STATE AND TERRITORY ASSESSMENT PROCESSES

85. Under the Environment Protection Agency proposals, State and Territory Government environmental impact assessment requirements will continue to apply to private sector proposals subject to Commonwealth assessment. This approach ensures that proposals are assessed from both national and regional perspectives. However, this does not mean proponents will have to do two assessments. To avoid duplication, the Environment Protection Agency is committed to the finalisation of the National Agreement on Environmental Impact Assessment in Australia currently being developed through the Australian and New Zealand Environment and Conservation Council. This agreement establishes clear guidelines for the efficient assessment of proposals subject to environmental impact assessment legislation of more than one government, and provides for the application of a single assessment process which satisfies all relevant governments.

86. Where a State process will provide for protection of the environment and is able to take account of national or international issues, the Commonwealth will give consideration to the accreditation of that process, consistent with the Intergovernmental Agreement on the Environment. Alternatively, where national or international environmental issues arise, State Governments may also accredit the Commonwealth assessment process, again in accordance with the Intergovernmental Agreement on the Environment.

87. The options outlined above focus on ensuring the Commonwealth Government can use the environmental impact assessment process to fulfil its responsibilities for

environmentally significant issues of national or international importance. To ensure the correct balance of government involvement in environmental impact assessment, it is also important for the Commonwealth not to be involved in environmental issues outside its responsibilities. These issues may be of local or regional environmental significance and may therefore require assessment at the local or State Government level. Consideration needs to be given to whether activities on Commonwealth land or undertaken by Commonwealth proponents which raise only local or regional environmental issues are not better assessed by State or local Governments.

Why change the jurisdiction of the Commonwealth EIA legislation?

- *To ensure the Commonwealth Government can fulfil its environmental responsibilities.*
- *To ensure that environmental matters of national or international importance are taken into account in environmental impact assessment.*
- *To provide government, industry and the community with certainty of when Commonwealth environmental impact assessment will apply.*

TRIGGERING ASSESSMENT

88. Proposals which are likely to affect the environment to a significant extent must be easily identifiable by the proponent, the public and the government. The procedures for determining whether a project is environmentally significant enough to require assessment therefore need to be as simple and certain as possible, while still ensuring that the decision making process takes into consideration all relevant environmental factors. The procedures and criteria also need to be public, so all participants will be familiar with the requirements of the assessment process, and can better predict when assessment will be required.

89. If the Commonwealth Government elects not to pursue changes to the scope of the jurisdiction of the Commonwealth environmental impact assessment process, the way in which the Commonwealth assessment process is 'triggered' becomes a critical issue. Triggering of Commonwealth environmental impact assessment occurs when a decision is made that a particular proposal within the jurisdiction of the legislation requires Commonwealth environmental impact assessment. Under the current process, the power to trigger assessment resides with the Commonwealth Minister with responsibility for approving proposals (the action Minister), not with the Commonwealth Environment Minister.

90. When the Impact Act was enacted in 1974 both the potential scope of environmental impact assessment for environment protection and the Commonwealth's Constitutional ability to legislate on environmental matters were uncertain. Maximising administrative and ministerial discretion in triggering and administering the Act was considered the best way to deal with these uncertainties.

91. Twenty years practical experience, and changes in public expectations of the role of the Commonwealth Government, indicate that the Commonwealth environmental impact assessment legislation can and should provide a more structured and broader base for environmental protection, as discussed above in 'Changing the Jurisdiction of the Commonwealth EIA Process'.

92. If the jurisdiction of the Act is not extended, it is essential that a more timely, transparent and predictable mechanism for determining when assessment will occur is developed. The process also needs to be flexible enough to ensure that proposals are not unnecessarily subjected to the assessment process. Even where changes to the jurisdiction are made, consideration of triggering issues will still be required for proposals where the Commonwealth itself is the proponent (and therefore within Commonwealth jurisdiction already).

LIMITATIONS

93. The current process for triggering is of limited effectiveness in securing effective and efficient protection of the environment in that it can be:

- uncertain and unpredictable;
- inadequate at providing information to the public and proponents;
- not timely enough; and
- not effective in implementing ecologically sustainable development.

94. As noted above, under the current impact assessment legislation, the Commonwealth Environment Minister has no power to trigger the assessment process. Whether there will be an environmental assessment is determined by the Commonwealth action department and action Minister with responsibility for project approval or, where a Commonwealth action is involved, by the proponent. This approach raises a number of concerns for environment protection and for industry proponents.

Discretion to Refer

95. The Impact Act does not define what activities will have a significant impact on the environment. This allows considerable discretion to be exercised by action agencies and Ministers in determining which projects should be assessed. Consultations by the Environment Protection Agency with stakeholders suggest that the process' reliance on this unfettered discretion has created controversy, uncertainty and administrative inefficiency, for both proponents and government.

96. There has always been concern that this approach allows projects that should be assessed to avoid referral to the Environment Protection Agency. Several submissions to *Setting the Direction* focused on this issue. This concern has also arisen consistently in the course of other consultations undertaken by the Agency.

97. Although action agencies frequently seek the opinion of the Environmental Protection Agency about whether or not a proposal should be considered significant, advice given is not binding and frequently not followed. The significance of action agencies not acting on Environment Protection Agency advice is often magnified by those agencies' own lack of environmental expertise.

98. The Impact Act assumes action agencies have sufficient environmental expertise to make determinations on the environmental significance of proposals. Notwithstanding attempts by the Environment Protection Agency to assist action agencies acquire these skills, two recent independent inquiries have reported that action agencies, despite twenty years of the operation of the assessment legislation, have little or no expertise to enable them to fulfil their responsibilities under the Impact Act.

99. In December 1992, the Australian National Audit Office tabled its report, *Living with Our Decisions - Commonwealth Environmental Impact Assessment Processes*, Report No. 10, 1992-93, noting that lack of expertise in action agencies led to unnecessary referrals and the inefficient use of Environment Protection Agency and action agency resources. In June 1994, the House of Representatives Standing Committee on the Environment, Recreation and the Arts reported that despite vigorous steps by the Environment Protection Agency to improve the effectiveness and efficiency of the environmental impact assessment process, action agencies lacked commitment to make the process work as effectively as it should (*Commonwealth Environmental Impact Assessment Processes - A Review of Audit Report No.10, 1992-93*).

Uncertainty

100. The unfettered discretion of action Ministers also introduces considerable uncertainty into the process for proponents. Proponents have no way of determining in advance whether they will be subject to the Commonwealth's impact assessment process and are therefore unable to satisfactorily factor impact assessment into their project planning.

A process with unlimited discretion causes uncertainty for government, industry and the community.

101. The Environment Protection Agency has attempted to deal with this problem by negotiating Memoranda of Understanding with key action departments and agencies. Memoranda of Understanding provide guidelines to assist action agencies decision-makers in determining whether a proposal affects the environment to a significant extent and should be referred to the Environment Protection Agency.

102. However, Memoranda of Understanding were primarily developed as an *ad hoc* attempt to rectify the lack of statutory guidance in the Impact Act for decision makers. It is clear the Memoranda of Understanding have only been of limited use in achieving this. Several key action departments and agencies have been reluctant to enter into Memoranda, in spite of the best efforts of the Environment Protection Agency. This leaves many key Commonwealth decision makers with no formal guidance as to whether a proposal should trigger the assessment process. The performance and usefulness of Memoranda of Understanding has been questioned by both the Australian National Audit Office and the House of Representatives Standing Committee on Environment, Recreation and the Arts.

Lack of Public Access to Information

103. Non, or late referral, of environmentally significant proposals not only compromises the Commonwealth's environment protection responsibilities, it can also result in environmentally significant proposals not being brought to the attention of the community through the public review process.

104. The lack of accountability in the current referral process is exacerbated by the absence of any requirement in the legislation for action departments or agencies to disclose to the public the existence of projects that they have not referred.

Timing

105. The Act also provides no direction as to the appropriate time or stage at which the assessment process should be triggered.

106. Starting the process early provides proponents with time to more comprehensively analyse the possible impacts on the environment. Early triggering and assessment also reduces the potential for delay and allow the results of the assessment to be fully integrated into the planning and design of the project.

107. If initiated too late in the development of a proposal, environmental impact assessment can be perceived as an obstacle by proponents who will already have made a substantial investment in a preferred option and will be highly resistant to change.

Inconsistency with Ecologically Sustainable Development

108. The result of all these difficulties is inadequate consideration by Commonwealth decision makers of the environmental consequences of developments, contrary to the principles of ecologically sustainable development.

OPTIONS FOR CHANGE

109. Research and consultation undertaken by the Environment Protection Agency, including submissions on the initial discussion paper, *Setting the Direction*, have indicated there are two main options for change in how Commonwealth assessment is triggered.

110. These options are:

- designated developments, with the Environment Minister having a residual power to trigger the Act; or
- the Environment Minister having a discretion to trigger assessment where she/he considers it justified.

111. It should be noted that in most States and Territories, it is the Minister with responsibility for environmental impact assessment who has the power to determine when environmental impact assessment will be required. The Environment Protection Agency is therefore suggesting the adoption at the Commonwealth level of a procedure already in place in most other jurisdictions.

DESIGNATED DEVELOPMENTS

112. A more timely, transparent and predictable mechanism for determining whether assessment should occur is needed. This can be achieved through a list of Commonwealth decisions and actions which are designated as likely to be environmentally significant.

113. It is proposed that the current legislation be amended so that listed proposals or types of proposals (including projects, programs, plans and policies), are automatically referred to the Environment Protection Agency for a decision on whether impact assessment is required. While action portfolios will remain responsible for ensuring environmentally significant proposals are referred to the Environment Protection Agency, the decision on which proposals are likely to be environmentally significant will already have been made by the Parliament.

> *The Environment Protection Agency proposes the use of a list of designated developments to pre-determine those proposals which are likely to be environmentally significant and hence require assessment.*

114. This type of 'designated developments' approach has been implemented overseas in Canada and the European Community. Within Australia, New South Wales and Queensland use some form of designated developments procedure to simplify the assessment triggering process and provide certainty for proponents. The process has also been mentioned favourably by industry and community group representatives in consultations held by the Environment Protection Agency.

115. Under this option, when a proposal is put forward by a proponent to an action department or agency, the relevant Commonwealth decision maker will be required to consult a list of proposal types in a schedule to the revised legislation to determine whether the proposal in question is to be referred to the Environment Protection Agency.

116. This list will be negotiated in consultation with all stakeholders. It will include those proposals that twenty years assessment experience indicates are environmentally significant and any others which consultation determines are likely to affect the environment to a significant extent. The list will be regularly reviewed and updated to keep abreast of environmental changes, new types of developments and technological advances.

117. The Environment Protection Agency will then assess all designated developments, following the process detailed in the following section of this discussion paper.

Are there different ways of using the proposed schedule of designated developments?

A designated developments list provides government, industry and the community with certainty and transparency of when the environmental impact assessment process will apply. The Environment Protection Agency proposes the use of a schedule of designated developments either to:

- *determine those proposals likely to raise environmental concerns of national or international importance (see Changing the Jurisdiction of the Commonwealth EIS Process); or*
- *determine those proposals subject to the current Commonwealth EIA legislation which are likely to be environmentally significant.*

A Residual Discretion

118. Although the main way in which the Impact Act would be triggered is through the designated developments system, the Commonwealth Environment Minister could also have a residual discretion to require assessment. However, this will only apply if a development, although not listed, is likely to have a significant impact on the environment and is of a suitable character to warrant Commonwealth involvement.

119. Allowing the Environment Minister to directly initiate the environmental impact assessment process, even on a residual basis, provides a fall back for unique proposals with unforeseen effects which have escaped the listing process. The Environment Minister's residual power to trigger the Impact Act would therefore only be exercised in unusual circumstances and in consultation, or agreement, with relevant industry Ministers.

120. A residual Ministerial discretion to require assessment is not intended to act as a substitute for the designation process. If the listing process for designated developments is rigorous and accurate enough to cover most foreseeable proposals, it is not likely that the discretionary powers of the Environment Minister would often be used. It is therefore in the interest of all parties to participate fully in the development of any list to make it as accurate and comprehensive as possible.

121. This dual approach is the one favoured by the Environment Protection Agency as it strikes the right balance between certainty and flexibility, while ensuring that the most appropriate and experienced environment authorities, the Environment Minister and the Environment Protection Agency, make the decisions concerning the environmental significance of proposals.

The Benefits of the Designation Process

122. Deeming classes of proposals significant by means of a designation process has several advantages over the current system. It will provide all interested parties and participants with pre-determined and publicly known parameters against which to assess their activities and to plan their future developments. Increasing the certainty of the assessment process was identified as necessary by many submissions to the initial discussion paper and consultations with industry and environmental impact assessment practitioners. A designated developments approach substantially achieves this goal.

123. This approach should also result in more environmentally responsible proposals and more integrated environmental management. Potential proponents will have sufficient certainty to be able to act to minimise their possible assessment liabilities and costs. When planning projects they can avoid or modify listed types of developments. Knowing that a proposed project will definitely be subject to some level of assessment will also enable proponents to have time to collect all relevant and necessary data and to more comprehensively analyse the possible impacts on the environment. This will result in better quality impact assessments.

124. Proponents will also be more able to plan for an integrated assessment early in their proposal's developmental phase, enabling environmental considerations and the results of any public review to be more readily factored into project design.

125. A designated development approach will also be faster and more administratively efficient. A list of designated developments offers an easy to use system readily understood by all involved in the decision making process. It will also assist in removing the potential for unnecessary referrals to the Environment Protection Agency.

126. A designation process can also help avoid delay by increasing the confidence of the public in the objectivity of Commonwealth environmental impact assessment. It can do this by providing certainty for proponents, shortening assessment time lines and reducing the potential for stakeholder conflict. In doing this, a designated developments approach can also reduce the costs of the assessment process for all participants.

Option 5

A schedule of designated developments, covering all Commonwealth actions or decisions likely to result in environmentally significant impacts be added to the current legislation. Any action or decision on the designated developments list would be referred to the Environment Protection Agency for a decision on whether assessment was required.

Option 5a

A power be introduced into the legislation to enable the Environment Minister, in consultation or agreement with the action Minister, to determine that a proposal not on the list of designated developments is likely to be environmentally significant and therefore will require assessment.

A DISCRETION FOR THE ENVIRONMENT MINISTER TO TRIGGER ASSESSMENT

127. As an alternative to designated developments, the discretion to determine whether a proposal is environmentally significant and should be referred for assessment could be shifted from the action Minister responsible for the proposal to the Environment Minister. The Environment Minister would have the power to call in for assessment any proposal he/she thinks may be environmentally significant. This procedure would enable the Commonwealth environment authorities to be responsible for the administration of the Commonwealth's environmental responsibilities through environmental impact assessment. Action Ministers would remain responsible for the other aspects of a proposal's development and approval. This division of responsibility is more consistent with the principles of ecologically sustainable development by ensuring equal consideration of environment and development matters.

128. Although this option gives considerable discretionary power to the Environment Minister, just as the current action Ministers' discretion to refer creates uncertainty, lack of predictability and may lead to conflict and delay, a similar discretion in the hands of the Environment Minister is potentially subject to the same problems. For these reasons, the Environment Protection Agency favours the designated developments approach.

Option 6

The legislation be amended to enable the Environment Minister to determine which Commonwealth actions or decisions will require environmental impact assessment.

129. An alternative to options 4 and 5 is to leave the decision on which proposals will be referred to the Environment Protection Agency for assessment with action Ministers and their agencies, but to give legislative power to the Environment Minister to undertake audits of action agency decisions under the Impact Act. This option would give statutory power to the Environment Minister to ensure all responsibilities under the Impact Act were being fulfilled. Accountability could also be increased through making public the results of these audits.

Option 7

The legislation be amended to enable the Environment Minister to direct audits of action agency referral decisions under the Impact Act.

Why change the way EIA is triggered?

- *To remove the uncertainty associated with a discretion to refer proposals for assessment.*
- *To reduce controversy over which proposals will be referred for assessment.*
- *To give proponents the opportunity to reduce costs and delay by factoring EIA into the earliest possible stages of their project development.*
- *To ensure all proposals raising environmentally significant impacts undergo impact assessment.*

PROCEDURAL REFORMS

130. Two levels of possible change have already been canvassed in this discussion paper, covering the jurisdiction and the triggering of the Commonwealth EIA process. The third level of change focuses on procedural changes designed to improve the assessment of projects once they have been referred to the Environment Protection Agency. These changes should also be considered whether changes to the jurisdiction or triggering process are adopted or not.

131. The Environment Protection Agency has identified a number of options for procedural reform for the environmental impact assessment of development projects. These options, developed in response to stakeholder consultations and the eight guiding principles, are proposed as a basis for discussion. The aim of the options is to ensure that the environmental impact assessment is able to determine the environmental acceptability of a proposal, and to provide real opportunities for public involvement in decision making, while ensuring the approval process is undertaken in a timely and efficient manner.

132. The reforms proposed by the Environment Protection Agency include:

- a formalised Notice of Intention process;
- a public statement of no significant impact for decisions not to assess projects;
- the introduction of public scoping as a standard element of assessment;
- project specific time schedules;
- the development of comprehensive criteria for determining the environmental acceptability of projects undergoing environmental impact assessment;
- improvements to the quality of proponent prepared public environment reports and environmental impact statements;
- improvements to public participation;
- changes to the setting of environmental conditions;
- the introduction of post approval monitoring; and
- improving accessibility to the external review of Commonwealth EIA decisions.

A FORMALISED NOTICE OF INTENTION

133. The first stage of the assessment process for any proposal referred to the Environment Protection Agency is the preparation by the proponent of a Notice of Intention. The Notice of Intention provides the information to the Agency necessary for a determination of whether a proposal requires environmental impact assessment under the Commonwealth process. The Notice of Intention will advise who is undertaking the proposal, the nature of the proposal, a description of the affected environment, the likely impacts of the proposal, proposed mitigating measures and any other information relevant to a preliminary assessment of the proposal by the Environment Protection Agency.

134. To improve the certainty of the assessment process and to facilitate early decisions on assessment requirements, the Environment Protection Agency proposes

preparing guidelines on the type and detail of information required in the Notice of Intention. Under the proposed reforms, when a proponent provides the Agency with a Notice of Intention which satisfies these guidelines, the Environment Protection Agency will determine, within 20 working days, whether the proposal requires environmental impact assessment.

Option 8

Under the proposed reforms, the Environment Protection Agency will determine, within 20 working days of receipt of a Notice of Intention, whether assessment of a proposal is required.

135. Once provided to the Environment Protection Agency, the Notice of Intention will become a public document, available on request. The Environment Protection Agency will accept the exemption of some material in the Notice of Intention from public release for reasons of commercial confidentiality, national security or other reasons of public interest. Proponents will need to identify this information and justify its exemption on the basis of guidelines prepared by the Environment Protection Agency.

A STATEMENT OF NO SIGNIFICANT IMPACT

136. The determination of whether assessment is required will be made based on the likely environmental significance of the proposal. All proposals which are likely to result in environmentally significant impacts will undergo some form of assessment (see Level of Assessment below). Where the Environment Protection Agency determines that assessment is not required, it will prepare a Statement of No Significant Impact setting out the reasons for the Agency's decision. This Statement will be publicly available no later than 20 working days after the decision not to assess is made. All decisions of the Environment Protection Agency will be published regularly to inform the public of Commonwealth environmental impact assessment activities.

DECISION NOT TO ASSESS

137. In rare instances, a proposal may be put forward which, from the outset, is clearly not environmentally acceptable. Where a proposal is not environmentally acceptable, nor could it be made acceptable through the setting of environmental conditions, a detailed environmental impact assessment would serve no purpose and would waste government, community and proponent resources. It is therefore proposed that consideration be given to giving statutory power to the Environment Minister, to be exercised in consultation or in agreement with other relevant Ministers, to advise proponents up front that their proposal is not environmentally acceptable and will not be approved by the Government.

Option 9

The Commonwealth Government have the statutory power to reject proposals which are manifestly environmentally unacceptable, without the need for detailed environmental impact assessment.

PUBLIC SCOPING

138. The Environment Protection Agency proposes the introduction of public scoping into the Commonwealth environmental impact assessment process. Public scoping involves identifying stakeholders with an interest in the assessment of a project early in the assessment process and working with stakeholders to identify those issues which need to be covered by the assessment.

139. Public scoping will help to tailor the Commonwealth environmental impact assessment process to the individual project and will enhance the level and quality of public participation. Assessment guidelines can be formulated with an awareness of the important issues and aspects of the project, and formulated early enough in the assessment process to make it responsive to stakeholders' concerns. In addition, scoping will also enhance the transparency of the environmental impact assessment process by allowing stakeholders to see how their views are incorporated into the assessment process.

140. Proponents benefit from public scoping by having a properly targeted environmental impact assessment process which is more assured of canvassing all important issues up front. Early public involvement in the assessment process can also help reduce controversy. The Environment Protection Agency benefits by identifying and accessing local knowledge, and is therefore in a better position to accurately assess the environmental impacts of projects.

Option 10

The Environment Protection Agency proposes to introduce public scoping into the Commonwealth environmental impact assessment process.

141. Public scoping in environmental impact assessment has precedents in, for example, Canada, New Zealand and the United States as well as a number of State processes. Scoping has been found to be enormously beneficial in enhancing public participation and public confidence in EIA and in improving the efficiency of the assessment process.

142. Under the proposed reforms, the public scoping process will be used to identify stakeholders and important issues for assessment and to negotiate time schedules for the assessment process. Public scoping will normally be undertaken for all projects likely to result in significant impacts on the environment, although the Environment Minister may waive public scoping in limited cases, such as when it would result in duplication.

143. The public scoping process will begin with the Environment Protection Agency advertising the availability of the Notice of Intention through appropriate media such as local or national newspapers. The Environment Protection Agency will then undertake active public consultation, which could include letters, public meetings, information exhibitions and displays, and individual consultations. The Environment

Protection Agency will manage the public scoping process so that affected communities are provided with a realistic opportunity for involvement in the assessment process. The Agency will also ensure that public scoping does not unduly delay the environmental impact assessment of a project. Under the proposed reforms, the Environment Minister or Environment Protection Agency will make the final decision on the issues to be canvassed by the assessment process, following a reasonable time for the public scoping and participation process and consultation with all relevant parties.

Project Specific Time Schedules

144. Another important aspect of the public scoping stage will be the negotiation between the EPA and the proponent of time schedules for the assessment process. This will meet the Intergovernmental Agreement on the Environment provision that 'time schedules for all stages of the assessment process will be set early on a proposal specific basis, in consultation between the assessing authorities and the proponent', and will enable community concerns to be factored into the timing of a project's assessment. The use of time schedules can also be used by the Environment Protection Agency to monitor the progress of proposals through the assessment process and as a basis for lapsing proposals where the proponent does not intend to proceed with the development.

Option 11

Project specific time schedules covering all stages of the assessment process will be developed during public scoping.

Results of Public Scoping

145. At the end of the public scoping period, the Environment Protection Agency will advise the proponent of:

- the criteria to be used to determine the environmental acceptability of the proposal (see 'Acceptability Criteria' below);
- the level of assessment to be undertaken (see 'Level of Assessment' below);
- the time schedule for all stages of the assessment process; and
- guidelines for the preparation of any public environment report or environmental impact statement detailing all relevant impact issues to be covered, including:
  - biophysical impacts;
  - cultural and heritage impacts;
  - impacts on the surrounds of people;
  - impacts on people themselves; and
  - cumulative impacts, to the degree practicable.

ACCEPTABILITY CRITERIA

146. Environmental impact assessment can be viewed as a process for ensuring the environmental acceptability of projects being considered for approval. Environmental impact assessment can achieve this through identifying the likely environmental impacts of a proposal and determining whether those impacts are acceptable or whether they can be made acceptable through setting environmental conditions on project approval.

147. To facilitate both environmental protection and project assessment, the Environment Protection Agency proposes the development and collation of comprehensive criteria for determining the environmental acceptability of projects. Many of these criteria already exist, such as State pollution controls, or can be developed through processes such as the National Environment Protection Council. To ensure transparency and certainty of process, these criteria will be publicly available as they are collated and developed.

> **Option 12**
>
> The Environment Protection Agency proposes the development and collation of comprehensive criteria for assessing the environmental acceptability of projects undergoing environmental impact assessment.

148. Clearly the development of environmental acceptability criteria is a major task and it will be some time before detailed criteria can be adopted. As an interim step, the Environment Protection Agency proposes generic criteria which can guide all participants in the assessment process until more detailed criteria are developed and accepted.

149. The environmental acceptability of a project will be largely determined by the nature of the receiving environment. The Environment Protection Agency proposes interim criteria based on the environmental values of receiving environments. In simple terms, receiving environments can be divided into three categories: conservation areas, production areas and high development areas. The criteria for each category will reflect its environmental values as follows:

- conservation areas: environmentally acceptable proposals will be those which maintain the conservation values of the area. For example, only those activities within a World Heritage area which do not detract from the World Heritage values of that area can be considered environmentally acceptable. Conservation areas would include World Heritage areas, national parks, areas on the Register of the National Estate, areas identified under the National Reserve System or other areas identified as having high conservation values;

- production areas: environmentally acceptable proposals will be those which maintain the productive capacity of the environmental resources of the area. For example, only those proposals which are consistent with the principles of ecologically sustainable development can be considered environmentally acceptable. Most of Australia falls within the production area category. Production areas would include agricultural and pastoral areas, fishing grounds and river systems; and

- high development areas: environmentally acceptable proposals will be those which are, for example, clean and safe and can be accommodated with other activities in the area. No proposals resulting in pollution (environmentally

unacceptable emissions or effluent) can be environmentally acceptable. High development areas would include urban and industrial areas.

150. In addition, all environmentally acceptable proposals must be clean and safe and must not threaten the survival of any species or ecological community.

Interim Acceptability Criteria

In conservation areas, *only those proposals which maintain the conservation values of the area will be environmentally acceptable.*

In production areas, *only those proposals which maintain the productive capacity of the area will be environmentally acceptable.*

In high development areas, *only those proposals which are clean and safe will be environmentally acceptable.*

No proposal which threatens the survival of a species or ecological community will be environmentally acceptable.

151. The above criteria are intended only as a starting point in determining environmental acceptability. Ministerial councils, such as the National Environment Protection Council, government agencies and international bodies are progressively developing more precise criteria. Precise criteria will enable better project planning and provide the community, and the Environment Protection Agency, with an increasingly sound basis for determining which projects are environmentally acceptable.

ISSUES WITHIN SCOPING

152. Consultation with stakeholders has identified the need to improve the ability of the environmental impact assessment process to deal with the social and human health aspects of environmental change. The assessment of incremental and cumulative impacts also offers opportunities for improving the environmental impact assessment process.

Impacts on People and Their Surroundings

153. Impacts on people and their surroundings (particularly the social and health aspects of environmental change) go beyond the natural world to encompass human activity and quality of life. These impacts may include changes in people's lifestyles, their cultural traditions and their community (for example, population structure, cohesion, stability and character). These aspects of the environment are already recognised in the Commonwealth's environmental impact assessment legislation, which defines the environment as 'all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings' (s. 3, *Environment Protection (Impact of Proposals) Act 1974*).

154. The Environment Protection Agency proposes to continue to improve its treatment of the social and health aspects of environmental change as part of the environmental impact assessment process. The Agency does not propose that

environmental impact assessment be expanded to provide comprehensive social impact assessment or comprehensive health impact assessment. While there may be a need for comprehensive social and health impact assessment and the linkages between environmental quality and social and health issues are clear, the environmental impact assessment process is best suited to examining social and health impacts to the degree that they arise from biophysical environmental change.

155. Given this, changes can be made to the assessment process to enhance the consideration of impacts on people and their surroundings in the context of assessing the environmental impacts of activities. Two recent reports have been prepared which are relevant to this area of environmental impact assessment: *Social Impact Assessment*, prepared by BBC Consulting Planners and Environmental Affairs for the Environment Protection Agency and the *National Framework for Environmental and Health Impact Assessment*, prepared for the National Health and Medical Research Council. Based on these reports, the Environment Protection Agency proposes to develop methodologies, in consultation with stakeholders, to improve the ability of the environmental impact assessment process to manage environmental impacts on people and their surroundings. The Environment Protection Agency will prepare for public comment an options paper addressing the assessment of social and health aspects of environmental change. This paper will be prepared as part of the Environment Protection Agency's commitment to the ongoing development of environmental impact assessment in Australia (see Part III).

Cumulative Impact Assessment

156. Cumulative impacts include those impacts which arise as the result of a combination of effects from several activities, or manifest themselves over a period of time. They therefore may not be immediately evident in the assessment process. As such, the consideration of cumulative impact assessment is generally more appropriate to strategic assessment, or the assessment of government policies and programs, and regional assessment. This issue is discussed further in Part III of this paper.

157. By its nature, project by project assessment can only deal with cumulative impacts in a very limited way. However, the Environment Protection Agency proposes that the first stages of cumulative impact assessment be introduced within the context of the current project based approach to environmental impact assessment.

158. As a first step towards improved assessment of cumulative impacts, the Environment Protection Agency proposes the development of screening criteria to identify early in the assessment process those proposals likely to result in significant cumulative impacts. Such criteria could be developed based on:

- a listing of standard cumulative impacts; and
- a listing of proposal types which typically give rise to cumulative impacts.

Option 13

Screening criteria be developed to identify projects where cumulative impacts require assessment.

159. In determining the extent to which the potential cumulative impacts of a project can be addressed through project based environmental impact assessment, the Environment Protection Agency will take into account:

- the existence of an environmental data base, including State of the Environment reports, against which cumulative impact can be assessed;

- the existence of strategic analysis of that data, to an adequate degree, at a sectoral, policy or regional level (eg Regional Environmental Plans) to render an analysis of cumulative impacts by the project proponent effective; and

- the existence of adequate predictive tools for the project proponent to employ in making cumulative impact predictions.

160. The screening criteria will be used by the Environment Protection Agency, proponent and community at the scoping stage to determine whether cumulative impacts can realistically be identified and covered in the assessment process and to what degree the proponent can be expected to address those impacts. It may also be necessary for the Environment Protection Agency to make an assessment in consultation with the action agency as to whether the burden imposed on the proponent is reasonable in relation to the likely impact and the scale of the project and the extent of strategic analysis undertaken.

LEVEL OF ASSESSMENT

161. A number of levels of assessment will be available under the proposed environmental impact assessment system. Which level is appropriate for the assessment of a project will be determined by the Environment Minister based on a preliminary judgement of the environmental acceptability of the impacts of the project, the number of impacts anticipated and the level of public concern with those impacts.

162. Three levels of assessment are proposed:

- Assessment by Notice of Intention

- Public Environment Report, and

- Environmental Impact Statement

163. In addition, the ability of the Environment Minister to direct a public inquiry will be retained. This power has recently been used to direct inquiries into land use at Shoalwater Bay, Queensland, and the proposed relocation of the East Coast Armaments Complex to Victoria.

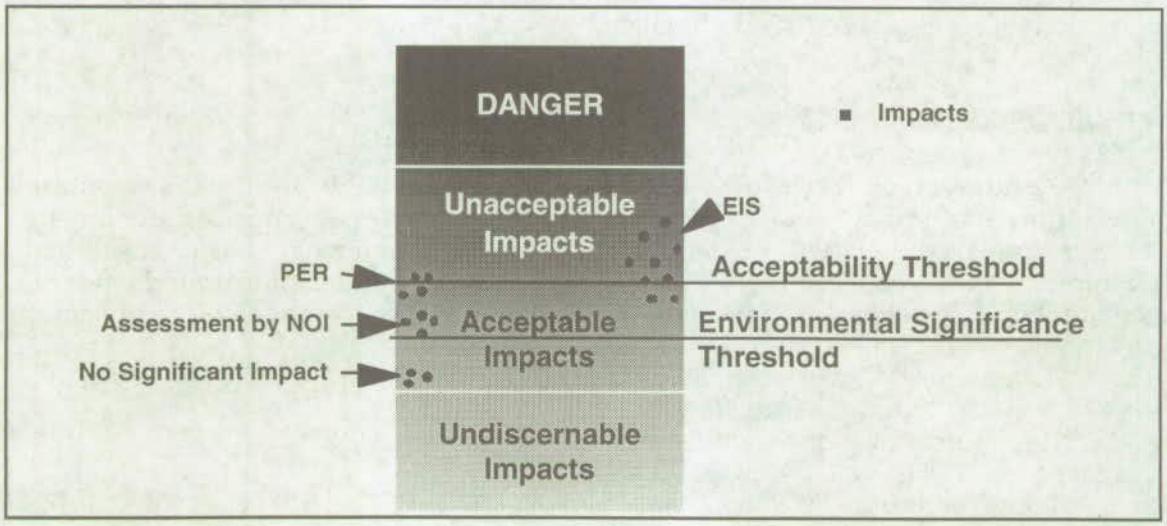
Assessment by Notice of Intention

164. Assessment by Notice of Intention will occur where the impacts of the proposal on the environment are significant but, following public scoping, the Environment Protection Agency determines that the assessment process can be completed without the preparation of additional environmental documentation (such as a public environment report or environmental impact statement). Based on the Notice of Intention and the results of the public scoping process, the Environment Protection Agency will assess the environmental acceptability of the project and identify any environmental conditions which should be placed on the project's approval.

Public Environment Reports and Environmental Impact Statements

165. The public environment report and environmental impact statement levels of assessment will be retained and will be directed where additional environmental information is needed before a determination on environmental acceptability can be made. Public environment reports will continue to be directed where the Notice of Intention and public scoping indicates that the proposal has only a few significant impacts or impacts which can readily be made acceptable. Environmental impact statements will be required where the preliminary assessment process indicates there are a significant number of impacts which are likely to be environmentally unacceptable without carefully developed environmental conditions.

166. The figure below illustrates graphically the basis for different assessment decisions by the Environment Protection Agency, showing their relationship with the environmental significance and acceptability of impacts.



Option 14

All proposals which raise environmentally significant issues will be subject to some form of environmental impact assessment, generally through:

- assessment by Notice of Intention, where assessment is completed based on the Notice of Intention and public scoping;
- assessment by Public Environment Report, where assessment is completed based on the PER prepared by the proponent and public submissions on the PER; or
- assessment by Environment Impact Statement, where assessment is completed based on the EIS prepared by the proponent, public submissions on the EIS and the proponent's response to those submissions.

Public Inquiries

167. The Environment Protection Agency proposes retaining the public inquiry mechanism under the current legislation as a further tool available to government for environmental impact assessment. To facilitate efficient public inquiries, the Environment Protection Agency proposes reforming the current process by, for example:

- reducing the judicial nature of the current process to facilitate more flexible and accessible inquiries;
- increasing the use of pre-hearing 'focus' meetings and informal (but open) hearings to ensure examination of all relevant issues and to remove spurious issues from consideration; and
- allowing for round table sessions as an alternative to formal hearings.

PREPARATION OF ENVIRONMENTAL DOCUMENTATION

168. Under the current Commonwealth assessment legislation, the proponent of a project is responsible for preparing the environmental documentation (the public environment report or environmental impact statement). This approach has given rise to criticisms of the lack of impartiality of proponents and the intrusion of bias into the assessment process. However, for the reasons set out below, the Environment Protection Agency favours that proponents remain responsible for the preparation of the assessment documentation.

Option 15

Project proponents will remain responsible for the preparation of environmental documentation (notices of intention, public environment reports and environmental impact statements).

169. Requiring proponents to become aware of, and regularly take into account, the environmental impacts of development encourages cultural change within industry and business sectors in favour of responsible environmental management. Consistent with ecologically sustainable development it also encourages greater integration of environmental considerations into the project design process. In practical terms, the proponent is also often in a better position than the Environment Protection Agency in terms of access to the information necessary to complete the environmental documentation.

170. By making proponents responsible for researching and providing information it also makes potential polluters pay for some of the environmental protection costs associated with the proposed activity. It is therefore consistent with the polluter pays principle and encourages cost-internalisation.

171. Steps are proposed by the Environment Protection Agency which are aimed at improving the quality of proponent prepared public environment reports and environmental impact statements, namely:

- environmental impact statements and public environment reports are to be fully referenced, so that sources of data are identified and the basis of predictions is clear. Where judgements are made, these will need to be clearly

identified and the basis on which these judgements are made and the expertise and qualifications of those making judgements will need to be spelled out;

- the Environment Protection Agency will require all public environment reports and environmental impact statements to be published;

- all public environment reports and environmental impact statements will need to quantify in tabular form all predicted impacts which are capable of quantification (with an indication of their statistical confidence). A summary of all non-quantifiable predictions with a statement as to why they cannot be quantified will also be required; and

- the Environment Protection Agency will only release for public review public environment reports and environmental impact statements which the Environment Protection Agency is satisfied meet the requirements of the guidelines developed through the public scoping process.

172. The referencing requirement will introduce a greater degree of accountability and transparency into environment documents, requiring the proponent to identify all sources of information and the basis of any judgements made about that information. This in turn should promote greater acceptance of the proponent's document and enable the Environment Protection Agency to determine the adequacy of the public environment report or environmental impact statement.

173. The lack of quantifiable predictions in public environment reports or environmental impact statements prohibits effective post-assessment monitoring, which is essential to the ongoing improvement of the environmental impact assessment process and environmental protection. This issue is discussed in detail under 'Monitoring' below.

174. When the draft documentation is completed, the proponent will refer it to the Environment Protection Agency for approval to be released for public review. The Environment Protection Agency's approval of the document will establish whether the draft document meets the guidelines agreed after the public scoping process. That is, the public environment report or environmental impact statement must examine the environmental impacts of the proposal in an acceptable way. When the Environment Protection Agency is satisfied that the document does adequately cover the guidelines, then it will be released for public review.

PUBLIC REVIEW OF ENVIRONMENTAL DOCUMENTS

175. Public participation is the vital component of the public review phase, encompassing the involvement of members of the community, either individually or in organised groups, in the assessment process. Public participation is valuable to environmental impact assessment for a number of reasons:

- it can enrich the process by informing it of a diversity of viewpoints on issues and by accessing information held by members of the public on the affected environment;

- it can give the public a sense of ownership of the process;

- it can give the public greater confidence in the outcome of the assessment process; and

- it can provide a forum in which the government, proponent and the public can resolve issues.

176. The Environment Protection Agency has a strong commitment to public participation in environmental decision making. In addition to public scoping, the public review of environmental impact statements or public environment reports will continue under the proposed changes to the Commonwealth assessment process.

Option 16

Effective public participation is an essential element of environmental impact assessment. The Environment Protection Agency proposes a number of initiatives to promote public participation.

177. The Environment Protection Agency proposes a number of initiatives to facilitate effective and efficient public participation in the environmental impact assessment process. The approach to public participation will be flexible, depending on the nature of the project and the degree of public interest.

Access to Information

178. An important way of improving public participation is to improve the availability of information. The Environment Protection Agency proposes to establish a public registry system of information regarding projects assessed under the Commonwealth legislation. The system will ensure easy access by the public to all information reports and decision documents related to a given proposal, consistent with Freedom of Information provisions at the Commonwealth level and protection of privacy and reasonable commercial confidentiality requirements.

179. A public registry mechanism proposed as part of the new Canadian environmental impact assessment legislation provides a model for this approach. This arrangement ensures public access to the Federal Environmental Assessment Index (a master index of essential details of all environmental assessments carried out under the Canadian legislation) and an up to date listing of available departmental documents relating to each assessment.

180. The Environment Protection Agency also proposes to advertise all major environmental impact assessment decisions including decisions not to require assessment (through the Statement of No Significant Impact), decisions to assess proposals and the form of that assessment, the release of public environment reports and environmental impact statements for public review and decisions on the environmental acceptability of projects and any environmental conditions which have been set.

Option 17

The Environment Protection Agency proposes to regularly advertise all major environmental impact assessment decisions.

181. In addition, the Environment Protection Agency will shortly launch a bi-monthly newsletter, which will update all Environment Protection Agency activities and include a record of environmental impact assessment decisions. The newsletter

will be distributed to environment and industry groups, and State and local government agencies, and will have a circulation of over 4000.

182. To facilitate the public review of public environment reports and environmental impact statements, the Environment Protection Agency will organise, where appropriate, public meetings, hearings or workshops to improve the opportunities for members of the public to be involved in the review of the environmental documentation.

Community Resourcing

183. The ability of community based interest groups to participate in public review processes can be constrained by lack of resources. Often these groups are run entirely by individual members of the public who are also juggling other commitments, often including full-time work. Nevertheless, these groups, if able, can provide valuable input to the assessment process, particularly through their knowledge of and close affinity with the receiving environment.

184. The Environment Protection Agency proposes seeking an annual funding allocation to be used to assist community groups prepare submissions for public review processes on major and/or controversial proposals. In addition to supporting community groups' participation in project assessment, assistance with resources can also improve the efficiency of the assessment process by enabling effective public participation to occur over shorter periods of time.

185. Funding has been provided to assist community involvement in the assessment of some projects under the Commonwealth process, such as the Sydney Third Runway Proposal and the Shoalwater Bay and East Coast Armaments Complex Inquiries. Participant funding also has a precedent in Canada, which runs a Participant Funding Program at the Federal level. It assists the public to become more involved in the development of draft guidelines and documents for proposals, and to make submissions to the public review process.

Participation of Non English Speaking Background and Indigenous Communities

186. One aspect of public participation which requires particular attention from the Environment Protection Agency is the existence of barriers to the involvement of non-English speaking and indigenous communities in public consultation processes. Language and cultural barriers can be significant obstacles to involving these communities in environmental impact assessment.

187. These barriers can deny communities adequate opportunity to contribute to and participate in public consultation activities, even though they may be significantly affected by proposals. In addition, the Environment Protection Agency does not have full access to the knowledge and views of affected communities with which to tailor the assessment process and therefore maximise its efficiency. This will be particularly relevant with the advent of public scoping on a routine basis in Commonwealth environmental impact assessment.

188. Effective public participation issues for indigenous Australians will be a particular concern for the Environment Protection Agency during the review. The Environment Protection Agency has established a study specifically to examine participation issues in relation to indigenous communities in Australia. The report will examine existing barriers to participation by indigenous Australians and the means of overcoming these barriers.

Option 18

Effective public participation issues for indigenous Australians should be a particular concern for the Environment Protection Agency and measures should be adopted to ensure indigenous Australians have real opportunities to participate in decision making through the EIA process.

189. Where a project is likely to have a significant impact on non-English speaking communities, the Environment Protection Agency will ensure that basic information regarding the proposal and its assessment is available in the relevant community languages.

Option 19

Basic information regarding proposals affecting non-English speaking communities should be provided in community languages.

APPRAISAL

190. Following the public review stage, the Environment Protection Agency will appraise the environmental impact statement or public environment report and public submissions and formulate its advice to the Environment Minister.

191. The aim of the Environment Protection Agency's appraisal will be to assess whether the proposed activity is environmentally acceptable, or is capable of modification to become environmentally acceptable through conditions applied by the government. The Environment Protection Agency's appraisal of the environmental impact statement or public environment report and public submissions and its consequent appraisal of the environmental acceptability of the project will be set out in a publicly available Environment Assessment Report.

Option 20

The Environment Protection Agency should assess if a project is, or can be made, environmentally acceptable.

192. To improve the transparency of its appraisal, the Environment Protection Agency proposes sending a summary of the Environmental Assessment Report, including the proposed environmental conditions for the project, to every individual or group who made a submission on the public environment report or environmental impact statement in the public review stage of the process.

ENVIRONMENTAL CONDITION SETTING

193. At the end of the current assessment process, the Environment Minister writes to the action Minister or agency to recommend what conditions, if any, should be applied to the project approval to protect the environment.

194. In the past, the action Minister has been obliged only to take into consideration any conditions recommended by the Environment Minister and can consequently choose not to apply some or all of those conditions. Therefore, for private sector developments, it is the relevant action agency or action Minister who determines what environmental conditions or safeguards, if any, will be set on an approved project. Where the Commonwealth itself is engaging in an activity, it is the proponent of that activity who determines which environmental conditions it will accept.

Current Limitations

195. Under the current Commonwealth environmental impact assessment process there are no guarantees that the outcomes of the assessment process will have any effect on the conditions under which a project is approved. The Environment Protection Agency can undertake an extensive and public assessment process, involving many stakeholders, without any assurance that the final outcomes of the assessment process will be adopted by the action Minister.

196. This approach fundamentally compromises the credibility and integrity of Commonwealth environmental impact assessment if the results of the assessment process and/or public review can be modified or disregarded without consultation. It can effectively deny the public and other legitimate stakeholders real opportunities to affect the proposal's development and to safeguard the environment. This approach also diminishes the accountability of approving agencies to those affected by their decisions.

197. A lack of feedback from action agencies and proponents about what environmental conditions or recommendations have or have not been taken up, and how successful they have been, has also meant that the Environment Protection Agency does not know how effective and accurate conditions developed through the environmental impact assessment process are. Without knowing the final conditions set on approved projects, the Environment Protection Agency cannot establish a post-approval monitoring process to enable the effectiveness and efficiency of the assessment process to be examined.

Condition Setting by the Environment Minister

198. The Environment Protection Agency proposes that the Environment Minister be given the power to set mandatory and legally binding environmental conditions on proposals assessed under the Commonwealth environmental impact assessment process. Such conditions would be determined in consultation, or alternatively in agreement, with relevant action Ministers.

Option 21

The Environment Protection Agency proposes that environmental conditions be set by the Environment Minister in consultation with the relevant action Minister.

Option 21a

Alternatively, environmental conditions could be set by the Environment Minister and action Minister in agreement.

199. This approach will substantially increase the environmental impact assessment process' effectiveness as a mechanism for environment protection. It will also render any public review undertaken in the assessment of the project real and effective. This approach will also provide benchmarks by which later post-assessment monitoring can be carried out.

200. It is arguably more consistent with the principles of ecologically sustainable development if the Environment Minister has some responsibility in setting environmental conditions, just as industry Ministers have responsibility for setting other conditions relating to their responsibilities for the same proposals. Government decisions will then carry a better balance of economic and environmental considerations, consistent with ecologically sustainable development.

201. The Commonwealth currently sets environmental conditions on private sector proposals through regulations such as foreign investment or export control approvals. Where projects are subject to both State and Commonwealth approvals, the relevant agencies co-ordinate their approval conditions to avoid duplication or inconsistencies. This process is currently being formalised through the National Agreement on Environmental Impact Assessment being prepared by the Australian and New Zealand Environment and Conservation Council.

202. Cooperation with all relevant State agencies would continue if environmental conditions were set by the Commonwealth Environment Minister.

MONITORING

203. The Environment Protection Agency proposes the introduction of post-approval monitoring for all projects assessed under the Commonwealth environmental impact assessment legislation. The proposed approach to monitoring is aimed at:

- publicly reporting on the state of assessed environments and ensuring the environmental impact assessment process has resulted in the protection of the environment and a project which is environmentally acceptable;
- examining the performance and cost-effectiveness of environmental conditions set following the environmental impact assessment process; and
- publicly reporting action taken by proponents to comply with environmental conditions.

Option 22

The Environment Protection Agency proposes the introduction of post-assessment monitoring as a standard element of the Commonwealth environmental impact assessment process.

204. Post-approval monitoring is essential to the ongoing development of an effective and efficient environmental impact assessment process. It will enable improvements in predictive capacity and provide a measure of the success of impact assessment in protecting the environment. It will also allow the Environment Protection Agency to refine its environmental condition setting to allow effective environmental protection at least cost. Post-approval monitoring also improves the public accountability of the outcomes of the environmental impact assessment process.

205. To implement post-approval monitoring, the Environment Protection Agency will require quantification of impact predictions in public environment reports and environmental impact statements. Where impact predictions cannot be strictly quantified, the Environment Protection Agency will require best estimates of likely impacts and explanations of why impacts cannot be quantified.

206. The proponents of proposals assessed under the Commonwealth assessment process will be required to provide a compliance statement every two years directly to the Environment Protection Agency. The compliance statement will provide details of proponent actions in response to the environmental conditions set on the project as a result of environmental impact assessment. The failure to report or false reporting will become an offence under the Commonwealth legislation. Consideration can also be given to introducing enforcement provisions into the Commonwealth legislation to ensure environmental conditions set by the Commonwealth Government are given effect to. The Environment Protection Agency will also conduct compliance checks, focussing particularly on Commonwealth proponents not subject to State environment laws.

207. To assist both the Environment Protection Agency and the proponent to manage the monitoring aspects of the reformed assessment process, proponents will be required to prepare monitoring programs as part of any Environmental Management Plan developed for the project. Under such plans, the Environment Protection Agency may undertake a post-assessment audit review of the project two to three years after commissioning of the project. While compliance statements will provide a regular update on proposals, audit reviews will assess the accuracy, efficiency and effectiveness of recommendations made under the assessment process.

Option 23

Proponents with projects assessed under the Commonwealth process be required to provide a statement every two years of actions taken to meet Commonwealth set environment conditions; failure to report or false reporting to be an offence.

Option 24

Failure to comply with environmental conditions set by the Commonwealth Government to be an offence.

Option 25

The Environment Protection Agency to undertake audits of the effectiveness and efficiency of environmental conditions set by the Commonwealth Government.

208. All documents and reports relating to monitoring and auditing will be publicly available, subject to strict commercial-in-confidence guidelines. Public comments will be taken into account in developing the Environment Protection Agency's monitoring program.

JUDICIAL REVIEW OF COMMONWEALTH EIA DECISIONS

209. Provisions for extended public participation only go part of the way towards ensuring accountability in the Commonwealth EIA decision-making process. To further enhance the accountability and integrity of the Commonwealth EIA process, it is important to provide the public with mechanisms for ensuring that proper procedures have been followed in the assessment of a proposal. One such mechanism is the availability of judicial review of environmental impact assessment decisions.

210. Although judicial review is currently available under the *Administrative Decisions (Judicial Review) Act* for most administrative decisions of the Commonwealth Government, there are restrictive requirements that parties must satisfy to show they have the legal standing to bring an action. This standing requirement can operate to exclude many parties who otherwise do have a valid interest in, or are affected by, the proposal at issue.

211. The Environment Protection Agency therefore proposes that the Commonwealth EIA legislation be amended to remove the standing requirement for decisions made under the Commonwealth's environmental impact assessment legislation. This would allow any person concerned about a perceived irregularity in the decision making process to bring this to the attention of the courts. A similar provision has recently been adopted by the Commonwealth in its *Endangered Species Protection Act 1992*.

Option 26

The Commonwealth environmental impact assessment legislation be amended to remove the standing requirements to seek judicial review.

212. By extending public access to judicial review, Commonwealth decision-makers would need to ensure all environmental considerations are given their proper weight in assessing the environmental acceptability of developments, and that all procedures designed to protect the environment are complied with. Judicial review can also be useful in persuading administrators to perform their duties with greater sensitivity to public concerns.

213. Although open standing does in theory provide the potential for some delays in the development of disputed projects, experience in jurisdictions with very broad or open standing provisions, such as New South Wales, has shown that very few actions are in fact ever brought. The cost of legal action has proved highly dissuasive to merely vexatious or publicity seeking litigation. It should also be noted that the other procedural reforms and enhanced capacity for public participation and access to information proposed by the review will work towards eliminating the sort of unresolved conflict that leads to such claims.

214. There are also advantages to industry in allowing any person to have the capacity to bring any breaches in correct procedure by Commonwealth decision makers to the attention of the courts and the rest of the community. It greatly assists in placing the consideration of the environmental acceptability of all proposals on an equal footing. If assessment procedures and requirements are applied inconsistently between proposals, some proponents may gain a comparative advantage over others through having to do less to protect the environment. If third parties aware of this can bring it to the attention of the court, it provides an added assurance of a 'level playing field' in impact assessment.

MERITS REVIEW OF COMMONWEALTH EIA DECISIONS

215. In addition to removing the standing requirements for judicial review, consideration could also be given to making environmental impact assessment decisions subject to merits review. Through merits review, an independent review body examines the administrative decisions of the Government to determine if the decision is the correct and preferable decision. If it is not, the review body may substitute the decision with its own.

216. Merits review can be undertaken where the legislation under which the decision is made makes provision for review by an internal or external body, such as the Administrative Appeals Tribunal (AAT). The current Commonwealth EIA legislation makes no provision for either internal or external merits review.

217. As with judicial review, the introduction of merits review could have positive effects on the accuracy and appropriateness of decision-making about the environment. Decision makers are more likely to perform their duties and responsibilities diligently if they know that their decisions are susceptible to challenge by interested persons with justified criticisms as to whether the decision was correct, given the facts of the situation.

Option 27

Decisions under the Commonwealth EIA legislation be made subject to review before the Administrative Appeals Tribunal.

218. The availability to third parties of merits review does however have the potential for introducing delays, uncertainty and costs into the Commonwealth assessment process. Decisions subject to merits review cannot always be taken as final until all opportunities for third parties to seek merits review have lapsed. The complexity of the issues that tribunals have to consider to determine whether the decision was correct can also draw the process out. As with judicial review, the cost of the review process in terms of money and resources will limit the number of appeals on the merits which will be brought by third parties.

219. The desirability of increasing accountability through the limited availability of independent merits review has been recognised by the Commonwealth in the recently enacted *Endangered Species Protection Act* 1992, which allows interested parties to seek AAT review of Ministerial decisions. The Administrative Review Council has also recently canvassed the introduction of merits review for the Commonwealth EIA process, but rejected this approach in favour of improved procedures within the AAT to manage review of those decisions already subject to review.

SUMMARY

220. The Environment Protection Agency has proposed a number of options for improving the effectiveness and efficiency of the Commonwealth environmental impact assessment legislation and process. These options are put forward as the basis for discussion and comments on the options, together with alternative options, are being sought by the Environment Protection Agency before a final package of proposed changes is put to the Commonwealth Government for consideration.

221. Table 1 summarises the options described above.

TABLE 1: SUMMARY OF OPTIONS

	Option		Page
Objective of EIA	1	The objective of environmental impact assessment should be the protection of the environment through supporting the application of the principles of ecologically sustainable development.	6
Level 1: Jurisdiction of the Commonwealth EIA Legislation	2	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.	17
	3	A schedule of designated developments be added to the Commonwealth legislation which defines those proposals likely to raise environmentally significant issues of national or international importance. Proposals so designated will require a decision of the Commonwealth Government on whether Commonwealth assessment is appropriate.	19
	3a	An additional power to require the assessment of proposals which are not designated but which raise environmentally significant issues of national or international importance be added to the Commonwealth legislation.	19
	4	A discretionary power be introduced into the legislation to enable the Commonwealth Environment Minister to require the assessment of any project likely to raise environmentally significant issues of national or international importance.	20
Level 2: Triggering EIA	5	A schedule of designated developments, covering all Commonwealth actions or decisions likely to result in environmentally significant impacts be added to the current legislation. Any action or decision on the designated developments list would be referred to the Environment Protection Agency for a decision on whether assessment was required.	27
	5a	A power be introduced into the legislation to enable the Environment Minister, in consultation or agreement with the action Minister, to determine that a proposal not on the list of designated developments is likely to be environmentally significant and therefore will require assessment.	27
	6	The legislation be amended to enable the Environment Minister to determine which Commonwealth actions or decisions will require environmental impact assessment.	28

OTHER EIA ACTIVITIES

222. The Environment Protection Agency is also involved in other environmental impact assessment activities that are separate from, but complement, the review.

223. The Environment Protection Agency proposes promoting the development of environmental impact assessment in Australia through a range of education and information initiatives, including the annual release of an Environmental Impact Assessment Performance Statement and the establishment of an Australian Environmental Impact Assessment Network.

ENVIRONMENTAL IMPACT ASSESSMENT PERFORMANCE STATEMENT

224. The Environment Protection Agency proposes releasing each year an Environmental Impact Assessment Performance Statement detailing environmental impact assessment activities at the Commonwealth level. The Performance Statement will cover all assessment decisions made by the Commonwealth, any changes in the Commonwealth environmental impact assessment process and the results of Commonwealth project monitoring. The Performance Statement will also report on the state of environmental impact assessment in Australia, including major developments in State and Territory processes and other matters of relevance to environmental impact assessment stakeholders.

AUSTRALIAN NETWORK

225. The Environment Protection Agency is in a good position to act as a catalyst for the creation of an Australian Environmental Impact Assessment Network. This will be a network of environmental impact assessment administrators and practitioners (private and public sector), academics and representatives of community and industry groups. The network will facilitate the interchange of information and provide the forum for linking key participants in environmental impact assessment across Australia. The Australian Environmental Impact Assessment Network will also provide the main connection with an international network currently being developed through other governments and the International Association for Impact Assessment.

EDUCATION AND INFORMATION

226. The Environment Protection Agency has a responsibility for promoting knowledge about environmental impact assessment in the general community. A well informed community is in a better position to comment on proposals which may affect them, while well informed industry will be less likely to have costly misconceptions about what is and is not required of them as proponents.

227. The provision of environmental impact assessment education and information in Australia is not as well developed or co-ordinated as in some other countries. A range of approaches are on offer in Australia, including:

- environmental degree course work;
- electives as part of science or engineering based degrees; short courses for industry, government and the public;

- training sessions run by professional institutions on particular environmental impact assessment aspects; and

- a limited number of in-house courses run by government and some businesses.

228. Notably, these courses always attract sufficient demand to justify their continuation. The Environment Protection Agency believes each of these approaches can benefit from greater access to national and international environmental impact assessment information, including guidelines, legislation and case studies.

229. Once fully established, the Australian Environmental Impact Assessment Network will provide a medium for improving the linkages between the various education and information centres and will work to improve access to environmental impact assessment information. For example, access to electronic data bases (nationally and internationally), located at tertiary institutions and the Environment Protection Agency and open to public access, would benefit environmental impact assessment practitioners, as well as industry and the community.

230. The Environment Protection Agency will also consider support for an environmental impact assessment training needs survey for Australia. This type of survey has been undertaken in almost all European countries. It is a useful tool, providing a matrix which shows the identified need against the number of potential trainees and therefore enables a sensible allocation of resources.

PART III
FUTURE DIRECTIONS

231. In this paper, the Environment Protection Agency has proposed a range of options for reforming the environmental impact assessment of development projects. These reform options address most of the issues raised by stakeholders during consultation with the Environment Protection Agency and cover most of the provisions of the National Strategy for Ecologically Sustainable Development and the Intergovernmental Agreement on the Environment.

232. The Environment Protection Agency has targeted reform of its project assessment procedures as the initial focus of its reform process as the assessment of development projects is currently the area of most Commonwealth environmental impact assessment activity.

233. Once these reforms have been implemented, the Commonwealth environmental impact assessment process will be a more effective and efficient tool for environmental protection and for promoting ecologically sustainable development.

234. The implementation of the project assessment reforms, however, cannot be the end of the process of ongoing review and development of Commonwealth environmental impact assessment. It is becoming increasingly apparent that project assessment alone, however good the process, cannot wholly produce effective and efficient environmental protection through environmental impact assessment. For example, project assessment cannot deal effectively with the environmental consequences of government policies, plans and programs. Similarly, project assessment can only deal with the cumulative and regional impacts of development in a limited manner. Increasingly, governments will need to focus on more strategic environmental assessment to ensure that all environmental impacts are examined as efficiently as possible.

235. Many of these issues have already been raised by stakeholders with the Environment Protection Agency. Issues which remain to be addressed include:

- the assessment of cumulative, incremental and regional impacts;
- the assessment of social and health aspects of environmental change;
- the assessment of government policies, plans and programs;
- the assessment of the overseas impacts of Australian activities; and
- improving the linkages between environmental impact assessment and planning and pollution controls.

236. These issues relate to the evolution of environmental impact assessment towards a greater focus on strategic and regional assessment. The Environment Protection Agency proposes examining these issues further following the current round of consultations and the implementation of project assessment reforms.

237. The reform and development of environmental impact assessment cannot cease with the reform options for project assessment that have been proposed. The Environment Protection Agency will have an ongoing responsibility to maintain and develop, with the participation of all stakeholders, an effective and efficient Commonwealth environmental impact assessment.

SUMMARY OF THE CURRENT COMMONWEALTH ENVIRONMENTAL IMPACT ASSESSMENT PROCESS AND COOPERATIVE ARRANGEMENTS WITH STATE AND TERRITORY GOVERNMENTS

The Commonwealth Government's *Environment Protection (Impact of Proposals) Act* was originally enacted in December 1974. The Act seeks to ensure that environmental matters are examined and taken into account in the Commonwealth's decision making process. The Administrative Procedures under the Act detail arrangements for administering the Act. The Act is administered by the Environment Minister and the Environment Protection Agency.

In summary, the Act and the Administrative Procedures set out:

- the types of Commonwealth activities to which the Act applies;
- the powers of the Commonwealth Environment Minister including the authority to require preparation of an Environmental Impact Statement (EIS) or Public Environment Report (PER);
- the content of an EIS or PER;
- the arrangements for public involvement in the assessment process;
- the provisions for recommending environmental conditions to apply to approvals;
- the arrangements for holding public inquiries.

What is the environment?

The term 'environment' as used in the Act refers to 'all aspects of the surroundings of human beings'. It includes the natural environment, the built environment and social aspects of our surroundings. The definition covers such factors as air, water, soils, flora, fauna, buildings, roads, employment, housing and recreation facilities.

What types of proposals are subject to environmental assessment?

The Act only applies to proposals in which there is some involvement by the Commonwealth Government. Generally, these fall into one or more of the following categories:

- activities and projects carried out by Commonwealth departments and authorities, including defence projects, railways, national highways, airports, postal and telecommunication facilities and developments on Commonwealth land;

- grants to State Governments for specific programs;
- proposals which require Commonwealth approval to export primary products which currently include fissionable materials, coal, mineral sands, bauxite & alumina, liquid natural gas and unprocessed wood; and
- proposals involving foreign investment approval particularly in mining and manufacturing, real estate development and tourist developments.

Are all such proposals subject to assessment?

No. The Act is limited to matters which affect the environment to a significant extent. The Act is not concerned with proposals which are not environmentally significant. When applied, the level of assessment varies with the environmental significance of the proposal.

What are the different levels of assessment under the Act?

The Act provides for four levels of environmental assessment:

1. examination by the Environment Protection Agency without the preparation of an EIS or PER;
2. assessment by the Environment Protection Agency following the preparation and public review of a PER;
3. assessment by the Environment Protection Agency following the preparation and public review of an EIS;
4. examination by a Commission of Inquiry.

What level of assessment has been most commonly used?

Since the Act came into force approximately 2,600 environmentally significant proposals have been submitted for assessment. By the end of June 1994, 132 of these required the preparation of an EIS and five were subject to inquiries. PERs were introduced in 1987 and to June 1994 25 PERs have been directed. The remainder were assessed without the preparation of an EIS or PER.

What is the first step in the assessment process?

A proposal is identified as falling within the scope of the Act if it is likely to affect the environmental to a significant extent and there is a need for a decision or action by the Commonwealth. A proponent is designated by the action Minister (the Commonwealth Minister responsible for the action or decision) or by the action Minister's department on his/her behalf.

The proponent can be either a Commonwealth department or authority (if the proposal is a Commonwealth development) or a private company (if the proposal is a private sector development requiring Commonwealth approval). The proponent is

required to provide preliminary information on the proposal to the Environment Protection Agency usually in the form of a document called a 'Notice of Intention'.

What is a Notice of Intention?

A Notice of Intention (NOI) usually consists of a brief summary of the proposal, illustrated as appropriate with maps, plans and photographs. It includes a description of the proposed project, a list of alternatives considered, the current stage of development and an indication of the potential impacts on the environment.

What action is taken following examination of a Notice of Intention?

Following examination of an NOI:

1. the Environment Protection Agency or the Minister may determine that neither a PER nor an EIS is required, provided that particular environmental conditions are met; or

2. the Environment Minister may direct that a PER should be prepared: or

3. the Environment Minister may direct that an EIS be prepared. The direction of a PER or an EIS is advertised in the Commonwealth of Australia Gazette.

What is a Public Environment Report?

A Public Environment Report (PER) is a report prepared by the proponent which describes a proposal, examines the environmental implications and describes any safeguards necessary to protect the environment. A PER is usually directed where the Minister considers that the public should be made aware of the environmental impacts of a proposal and of the measures which will be taken to protect the environment, but where the impacts are expected to be few, or focused on a small number of specific issues, and the preparation of an EIS is not warranted. A PER provides a more selective treatment of the environmental implications of a proposal than does an EIS.

What is a draft Environmental Impact Statement?

A draft Environmental Impact Statement (EIS) is a document prepared by the proponent which describes a proposal and the existing environment, examines the likely effects of the proposal on the environment, examines alternatives to and within the proposal and their effects and describes proposed safeguards and monitoring arrangements.

Who determines the content of a draft EIS or PER?

The Environment Protection Agency consults with proponents on the content and coverage of the draft EIS or PER and provides guidelines for their preparation. The Environment Protection Agency may consult with other individuals, experts or organisations in preparing guidelines. The Environment Protection Agency also consults with proponents during the preparation of the draft EIS or PER to ensure that the documents are suitable for public review.

What provisions are there for public review of draft EISs and PERs?

EISs and PERs are made available for public review and comment except in rare cases where there is a need to retain confidentiality (eg for commercial or national security reasons). The release of a draft EIS or PER for public review is announced in the Commonwealth of Australia Gazette and in advertisements in national, State and, if appropriate, local newspapers. The advertisements include a brief summary of the proposal, details of where the document can be purchased or read, an address to which comments can be forwarded and the closing date for receipt of comments.

How much time is the public given to comment on a draft EIS or PER?

The minimum period of review for a draft EIS is 28 days, which is also the period of review for a PER. The review period for a draft EIS may be extended by agreement between the Environment Protection Agency and the proponent, or at the discretion of the Minister.

What happens to public comments submitted on draft EISs?

Copies of all public comments are forwarded to the proponent, together with comments by Government departments and agencies. The proponent is then required to revise the draft EIS, taking all comments into account and incorporating further information where required. The revised document is termed a final EIS.

The final EIS may comprise either a revised draft EIS or the draft EIS with a supplement which responds to the comments received during public review.

The final EIS is submitted to the Environment Protection Agency for assessment. Copies are provided by the proponent to persons who have submitted public comments on the draft EIS. Copies are also made available to the public by sale or otherwise.

What happens to a final EIS?

Following receipt of a final EIS, the Environment Protection Agency examines the document to:

- ensure that the object of the Act has been met with respect to the proposal (that matters affecting the environment have been fully examined and taken into account to the greatest extent practicable);
- determine whether additional environmental information on the proposal is required, including data to be obtained from monitoring before the project commences or during construction or operation of the project;
- formulate any recommendations or suggestions on the environmental aspects of the proposal, which may be applied in association with approval of the proposal.

The results of this examination, including any recommendations or suggestions, are set out in an Environment Assessment Report to the Environment Minister.

..... and a PER?

The Environment Protection Agency assesses a PER in the light of comments submitted during the public review period and prepares an assessment report, including any recommendations or suggestions, for the Environment Minister. The proponent is not required to produce a revised or 'final' PER.

How are the recommendations contained in assessment reports acted on by the Government?

The Environment Protection Agency prepares an Environment Assessment Report to the Minister following examination of:

- a final EIS; or
- a PER and associated public comments; or
- any other proposal at the request of the Minister.

With the exception of those containing material of commercial confidence, or having security implications, assessment reports are made available to the public on request.

The Environment Minister may make comments, suggestions or recommendations to the action Minister on the environmental aspects of a proposal. The action Minister is required to take into account such comments, suggestions or recommendations in making a decision on the proposal.

What time limits are placed upon the Minister and the Environment Protection Agency in assessing EISs and PERs?

The time limits for the Environment Protection Agency to carry out an environmental assessment and for the Minister to provide recommendations to other Commonwealth Ministers are:

for a final EIS	42 days
for a PER	28 days

How can a member of the public find out what action has been taken or is proposed on a proposal?

Section 10 of the Act provides that any person may, by writing to the Environment Minister, obtain advice as to what action, if any, has been taken or is proposed to ensure that the environmental aspects of any proposal coming within the scope of the Act are given adequate consideration. The Minister is required to respond as soon as possible, and no later than three months, from the time of receiving the request. The Minister is also required, on written request, to make public the:

- reasons for not directing an EIS; and
- recommendations put forward following examination of a final EIS with the exception of any recommendations having confidential or security implications.

Are there other opportunities for public involvement in assessment?

At the Environment Minister's discretion, selected organisations or individuals may be consulted during the preparation of EIS guidelines. The Minister may also direct the Environment Protection Agency to hold 'Round Table' discussions with the proponent and members of the public following the public review of a draft EIS or a PER.

What about proposals which also require State or Territory approvals?

To avoid duplication of actions, arrangements have been made with most States and the Northern Territory to facilitate joint assessment of proposals involving both State or Territory and Commonwealth decisions. Wherever possible the requirements of both governments are satisfied by the preparation of one document. In deciding whether a Commonwealth EIS or PER is required, consideration is given to any environmental assessment undertaken, or required to be undertaken, to meet State or Territory requirements.

When may the Minister direct an inquiry under the Act?

The Minister may direct an inquiry under Section 11 of the Act at any stage of the assessment process. The Administrative Procedures require the Minister to consult with the Action Minister before directing an inquiry. Under the 1987 amendments to the Act, the Minister may specify a date by which a Commission of Inquiry should report its findings.

To date five inquiries have been directed - sandmining on Fraser Island, Queensland, uranium mining at Ranger, Northern Territory, a transmission station at Ulladulla, New South Wales, land use at Shoalwater Bay, Queensland and the proposed relocation of the East Coast Armaments Complex to Victoria.

CO-OPERATIVE ARRANGEMENTS WITH STATE AND TERRITORY GOVERNMENTS

In addition to the Commonwealth, each State and Territory has an environmental impact assessment process. To avoid duplication between the processes, the Commonwealth and a number of States and the Northern Territory have entered into agreements for the co-operative assessment of proposals subject to more than one EIA process. The current agreements are:

- *Arrangements between the* ***South Australian*** *Department for the Environment and the Commonwealth Department of Environment, Housing and Community Development concerning cooperation in the environmental assessment of proposals* of 22 June 1977

- *Provisional working arrangements between the* ***Victorian*** *Ministry for Conservation and the Commonwealth Department of Environment, Housing and Community Development concerning cooperation in the environmental assessment of proposals* of 6 July 1977

- *Agreement on Guidelines for co-operation in environmental analysis of proposals by the Commonwealth Minister for Environment, Housing and Community Development and the* ***Western Australian*** *Minister for Conservation and the Environment* of 17 May 1977

- *Arrangements concerning cooperation in the environmental assessment of proposals between the Commonwealth Department of Environment, Housing and Community Development and the* ***Western Australian*** *Department of Conservation and Environment* of 15 July 1977

- *Arrangements between the* ***Tasmanian*** *Department of the Environment and the Commonwealth Department of Environment, Housing and Community Development concerning cooperation in the environmental assessment of proposals* of 18 July 1977

- *Agreement between the Commonwealth Minister for Home Affairs and Environment and the* ***New South Wales*** *Minister for Planning and Environment concerning procedural guidelines for environmental assessment involving the Commonwealth and the State of NSW* of 19 December 1983

- *Agreement between the Commonwealth Minister for the Arts, Sport, the Environment, Tourism and Territories, and the* ***Northern Territory*** *Minister for Conservation concerning arrangements for cooperation in the environmental assessment of proposals* of 4 February 1990

The Commonwealth does not currently have an agreement with Queensland or the Australian Capital Territory.

The existing bilateral agreements are proposed to be replaced with a single National Agreement, consistent with clause 4 of Schedule 3 of the Intergovernmental Agreement on the Environment.

The principal aim of the Agreement is to ensure that any proposal in Australia will be subject to only one clearly defined assessment process, greatly reducing the potential difficulties for proponents when dealing with more than one government. The Commonwealth has taken a lead role in preparing the draft Agreement.

A draft National Agreement was released for public comment in November 1992. Following the receipt of over fifty submissions, a revised Agreement was endorsed in principle by Australian and New Zealand Environment and Conservation Council (ANZECC) Ministers. The draft Agreement is now being considered by State Planning Ministers with EIA responsibilities who are not members of ANZECC. Planning Ministries were represented on the ANZECC Working Group which prepared the draft.

Following endorsement by Planning Ministers, the Chair of ANZECC will refer the draft Agreement to the Prime Minister as the chair of the Council of Australian Governments for consideration by that Council. It is proposed that the Agreement will then be adopted at First Minister level.

APPENDIX B

SUBMISSIONS RECEIVED ON THE INITIAL DISCUSSION PAPER

Submissions on the initial discussion paper, *Setting the Direction*, were received from the following:

1. Queensland Department of Environment and Heritage
2. Conservation Council of South Australia
3. Australian Antarctic Division
4. H.L. Yin
5. Mr Bob Hewitt
6. Office of Regulation Review
7. Commonwealth Department of Tourism
8. The Australian Gas Association
9. The Colong Foundation for Wilderness Ltd
10. Urban Development Institute of Australia
11. Mr James Chu
12. Mackay Port Authority
13. Griffith University
14. Jamadite Pty Ltd
15. University of Canberra
16. Hawkesbury-Nepean Catchment Management Trust
17. Mr Hugh Evans
18. Australian Department of Administrative Services-Corporate Policy Branch
19. Brisbane City Council
20. Ms Bronwyn Ridgway
21. Murdoch University
22. Telecom Australia
23. New South Wales Coal Association
24. Pacific Power
25. Federal Airports Corporation
26. Aboriginal and Torres Strait Islander Commission
27. Queensland Conservation Council
28. Supervising Scientist for the Alligator Rivers Region
29. Woodside Offshore Petroleum
30. The University of Western Australia
31. Western Mining Corporation

32. CSIRO Division of Oceanography
33. Mr Paul Harrington
34. Australian Heritage Commission
35. CSIRO Institute of Natural Resources and Environment
36. North Coast Environment Council
37. Australian Petroleum Exploration Association Limited
38. Urban Development Institute of Australia
39. The Australian National University
40. Australian Council for Overseas Aid
41. Tasmanian Conservation Trust
42. University of Western Sydney, Hawkesbury
43. Department of Housing and Urban Development
44. Department of Industry, Technology and Regional Development
45. University of Wyoming
46. BHP Health Safety and Environmental Affairs
47. The Electricity Trust of South Australia
48. Roger Alsop Consulting
49. Mr Eric M. Anderson
50. West Australian Petroleum Pty Ltd
51. Gladstone Port Authority
52. Ms Sandra Welsman
53. Environment Institute of Australia - National Office
54. Australian Mining Industry Council
55. Environment Institute of Australia - South Australian Division
56. Federal Environmental Assessment Review Office - Canada
57. National Association of Forest Industries
58. Chamber of Manufactures of New South Wales
59. State Forests of New South Wales
60. United Scientists for Environmental Responsibility and Protection- South Australia
61. CSIRO Division of Fisheries
62. The Royal Australian Chemicals Institute
63. Australian Chamber of Commerce and Industry
64. Commonwealth Department of the Environment, Sport and Territories - Climate Change and Marine Branch
65. Mr Dante Giana
66. Western Australian Department of Resources Development
67. Australian Chamber of Manufactures
68. Law Institute of Victoria - Environmental Law Section

69. Municipality of North Sydney
70. The Wilderness Society
71. The Department of The Prime Minister and Cabinet - Office of Indigenous Affairs
72. South Australian Chamber of Mines and Energy Inc.
73. Commonwealth Environment Protection Agency - Waste Management and Pollution Avoidance Branch
74. Environmental Defender's Office
75. National Parks Association of NSW
76. Commonwealth Department of Human Services and Health
77. Commonwealth Department of Primary Industries and Energy
78. Premier of Victoria
79. Australian Conservation Foundation
80. Yeppoon Environment Centre
81. Australian Institute of Environmental Health - National Office
82. Commonwealth Treasury, Foreign Investment Review Branch
83. CRA Limited
84. Australian Tourism Industry Association
85. Victorian National Parks Association
86. Environment Institute of Australia - Victorian Division
87. Mr Tony Crossman
88. Worksafe Australia
89. Australian Institute of Environmental Health - Western Australian Division
90. The Environment Centre of N.T.
91. Commonwealth Department of the Environment, Sport and Territories - Strategic and Economic Analysis Branch
92. Avertano Role, Australian National University
93. Mr Page

APPENDIX C

EXAMPLE SCHEDULE OF DESIGNATED DEVELOPMENTS

For Determining the Jurisdiction of the Commonwealth Environmental Impact Assessment Process

Appendix C provides an example of a schedule of designated developments which could be used to determine the jurisdiction of the Commonwealth environmental impact assessment legislation.

The schedule is provide by way of illustration only and is not intended to be definitive or exhaustive. The schedule focuses on the jurisdiction of the Commonwealth over private sector developments. All Commonwealth activities not subject to State or Territory environmental impact assessment legislation will continue to be subject to the Commonwealth environmental impact assessment legislation.

As the content of the schedule will be of great importance to all stakeholders its composition will be the subject of an extensive consultation before any schedule can be finalised. This will ensure that the schedule is accurately and properly focused.

Draft Schedule

The following activities will be designated developments for the purposes of the Commonwealth environmental impact assessment legislation. Any designated development must be referred to the Commonwealth Government for a decision as to whether assessment is required.

An activity will be a designated development if that activity:

- will impact upon any species or ecological community listed under Schedule 1 or Schedule 2 of the *Endangered Species Protection Act 1992 (Commonwealth);*
- is engaged in, at or near an area protected under international agreements listed in Schedule 4 of the *Endangered Species Protection Act 1992 (Commonwealth);*
- is engaged in, at or near identified property within the meaning of section 3A of the *World Heritage Properties Conservation Act 1984 (Commonwealth);*
- is engaged in, at or near a site listed on the Register of the National Estate or the Interim List of the Register of the National Estate;
- is engaged in, at or near a place protected by the terms of an international agreement to which Australia is a signatory;
- is engaged in, at or near a terrestrial or marine area that is reserved, under a law of the Commonwealth, a State or a Territory, primarily for nature conservation purposes;
- is engaged in, at or near a place protected from disturbance under a law of the Commonwealth, a State or a Territory;

- will emit [x] tonnes or more of carbon dioxide, or [x] tonnes or more of carbon dioxide equivalent (methane, nitrous oxide or ozone) per annum;

- is engaged in, at or near an area designated for protection because of its high biodiversity.