



SUBMISSION TO THE ADVISORY
COMMITTEE APPOINTED TO ADVISE
THE MINISTER FOR PLANNING

ENVIRONMENT ASSESSMENT REVIEW

26 AUGUST 2002

1) **INTRODUCTION**

Lawyers for Forests Inc (“LFF”) is a non politically aligned association of legal professionals working to promote the conservation and better management of Victoria’s native forests, and an awareness of environmental issues generally. LFF believes there should be no logging or other activities which detrimentally affect old growth and high conservation value forests.

LFF’s main focus is on the legal mechanisms in place to conserve and manage Victoria’s native forests, and also the environment in general. An appropriate legislative framework for Environmental Impact Assessment (“EIA”) in Victoria is required to achieve this.

LFF welcomes the State government’s initiative to review and reform the legislative framework for EIA in Victoria.

2) **THE OBJECTIVES AND PRINCIPLES OF THE EIA LEGISLATION**

- a) Must include 4 main principles of ESD: the precautionary principle; the principle of intergenerational equity; the principle of conservation of biological diversity and ecological integrity; and the principle of improved valuation, pricing and incentive mechanisms. Section 3.5 of the Intergovernmental Agreement on the Environment states:

The parties further agree that, in order to promote the above approach, the principles set out below should inform policy making and program implementation.

3.5.1 precautionary principle -

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental

degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and*
- (ii) an assessment of the risk-weighted consequences of various options.*

3.5.2 intergenerational equity -

the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3.5.3 conservation of biological diversity and ecological integrity -

conservation of biological diversity and ecological integrity should be a fundamental consideration.

3.5.4 improved valuation, pricing and incentive mechanisms -

environmental factors should be included in the valuation of assets and services.

polluter pays i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement

the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes

environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

- b) There should be a requirement to take these principles into account in decision-making under the Act.
- c) The EIS and the assessment report should address how the proposal addresses each principle.

3) REFERRAL AND SCREENING

- a) Existing system for referral and screening is inadequate and requires reform. In particular:
 - i) The guidelines for both referral and screening are vague and unenforceable, leading to inconsistent application (or public perception of inconsistent application) and confusion on the part of proponents and the general public.
 - ii) There are no enforcement mechanisms in place for breach even if the guidelines were enforceable. In particular there is no third party enforcement process, or penalties for a failure by a proponent to refer a matter. This is of particular importance where the system relies on the proponent to refer the matter. ¹
 - iii) No provision in the Act requiring public notification of a referral, or provision ensuring public participation in referral or screening process.
 - iv) No provision in the Act requiring the decision maker to provide reasons for a decision.
- b) LFF believes proponent based referral is the appropriate mechanism, provided there are penalties on proponents for failing to refer a matter, and third party enforcement mechanisms. It is noted that the Planning and Environment Act 1987, Victoria (“the Planning and Environment Act”) has these enforcement mechanisms in place for planning schemes

1) _____

1) ¹ Indeed as the Issues and Options Paper states at page 21; “Since there are no formal obligations to refer proposals under the Act, notification of proposals is essentially the initiative of the proponent or decision makers.”

and permits issued under them.

- c) To resolve the difficulties with the current EIA legislation:
- i) The requirement to refer a matter should be specified in some detail. LFF suggests the referral requirement should be:
- (1) A mix of specific triggers akin to the Environment Protection and Biodiversity Conservation Act, 1999, (Cwth), ("EPBC Act"), (and the appropriate specific triggers are discussed below), for which referral, and in some cases screening, is mandatory.
 - (2) A general requirement to refer matters which may have a significant effect on the environment. There should be a set of environmental significance criteria to guide proponents on whether the application should be referred, and the Minister or assessing agency on whether the application requires EIA, and if so, which level of EIA. This is similar to the proposal discussed in the Issues and Options Paper at page 25.
 - (3) As proponent based referral is proposed, tough penalties should be introduced for a failure to refer a matter.
 - (4) As proponent based referral is proposed, there should be a third party enforcement process. There are already procedures to prevent vexatious litigation. Standing rules should allow environmental organisations, community groups and interested individuals to seek to enforce the new EIA legislation. The EPBC Act, sections 475 - 480, and the Victorian planning system are examples of third party enforcement mechanisms with wide standing.

- ii) In the case of the EPBC Act, the Federal Court is the third party forum. LFF believes a Court based system (unless the Court is an informal one) is too restrictive, as it may limit public participation. Alternatives for EIA decision review and enforcement include a separate environment list at VCAT, or a specialist informal environment Court. In both cases, the decision makers should be appropriately qualified in environmental management and in particular EIA, and the Court or Tribunal receive sufficient funding for members to undertake continuing education.
- iii) The referral and screening mechanisms should ensure the cumulative effects of a proposal are taken into account, and prevent piecemeal applications.
- iv) Provided internal institutional conflict is removed, LFF believes the Minister for the Environment should undertake the screening process. The State Government's Our Forests Our Future Policy discusses the issue of internal institutional conflict in the Department of Natural Resources and Environment ("DNRE"), in the context of managing Victoria's State Forests and issuing timber licences. The Minister for Environment also has similar conflicts when the responsible Minister for the relevant environment conservation legislation, and also the responsible Minister for issuing commercial licences.
- v) LFF notes and supports the State Government's commitment to create VicForests as a separate commercial entity to administer and issue timber licences, with DNRE retaining its conservation role. LFF believes other internal institutional conflicts may arise in EIA. These should be removed if the Minister for the Environment is undertaking the screening process. As a solution, the role of VicForests could be extending to deal with all commercial utilisation of Victoria's natural resources, with a Minister apart from the Minister for the

Environment as the responsible Minister.

4) THE SCOPE OF THE EIS (OR ITS EQUIVALENT).

- a) The EIS should address how the proposal addresses each principle of ESD.
- b) The EIS should address “relevant and reasonable” alternatives, including the “no change” option in every case.
- c) Both off-site and on-site impacts must be addressed.
- d) Cumulative impacts must be assessed.
- e) The assessment of risk must be qualitative and quantitative. If a risk of harm is small, but its impact may be significant, it should not be acceptable to disregard the risk due to its low probability of occurrence.

5) PUBLIC CONSULTATION

- a) Concur with EDO’s submission.
- b) Agree with Issues and Option Paper, and congratulate the authors, on the focus on appropriate consultation with indigenous communities.
- c) Funding and access to independent technical advice must be made available to groups to assist in the preparation of their submissions.

6) QUALITY OF EIA

- a) The critical issue to ensure quality is to ensure that the executive officers are sufficiently educated and resourced to make sure the EIS is of a sufficient quality. This is particularly the case if local government is given

a role in undertaking EIA.

- b) There should be clear and unambiguous powers given to executive officers to require proponents to resubmit EIS's which do not meet acceptable benchmarks. Problems may include, but should not be limited to: the scope of the report; the quality of the data; the quality of the analysis; and the transparency of the report.
- c) Refer to Raff, "Ten principles of quality in Environment Impact Assessment" (1997) 14 *Environmental and Planning Law Journal* 207 which sets down the following 10 principles of quality, including:
 - i) assessments should not be restricted to site-specific effects
 - ii) an EIS should include an assessment of alternatives, including the option of doing nothing
 - iii) projects should be considered as whole projects, not according to 'stages'
 - iv) the assessment must engage in a real inquiry, not just a 'tick the box' approach
 - v) risks must be identified and quantified where possible, but risks which cannot be quantified must not be ignored
 - vi) the report must be easily read and understood by members of the public
 - vii) methodologies used must be explained.
- d) To ensure a higher level of independence, the consultants preparing the report should be accredited, and the report should be independently

reviewed. In this respect, we concur with EDO's recommendations. LFF also supports the option proposed on page 49 of the Issues and Options Paper, namely to require the consultants to certify that all potential significant impacts have been assessed to the greatest extent practicable. Increased post decision monitoring would also make consultants more accountable, and therefore lead to a quality increase in their reports.

- e) The draft EIS should be subject to public comment. This will increase quality.
- f) EIA should not involve a consideration of government policy unless endorsed by parliament.

7) **MANDATORY TRIGGERS**

- a) As discussed above, there should be a set of mandatory triggers for EIA, as well as a "catch all" section which requires assessment of activities "which may have a significant effect on the environment".
- b) Apart from a mandatory trigger for highly hazardous activities, the mandatory triggers should include activities which may have a significant effect on a threatened or endangered species. The *Flora and Fauna Guarantee Act 1988* should be incorporated within the EIA legislation, with a number of amendments.
- c) Activities in "CAR reserves" should trigger EIA, including activities in Special Protection Zones in Forest Management Plans, ("FMPs"), or the shifting of Special Protection Zones.²

1) _____

- 2) ²This is of particular importance with respect to mining and mineral exploration in Regional Parks, Nature Conservation Reserves and State forests, as contemplated by the Environment Conservation Council in its report entitled "Investigation into Box IronBark Forests and Woodlands – Final Report.

d) New FMPs and significant changes to FMP should trigger EIA.

8) LEVELS OF ASSESSMENT

- a) Consider standardised levels according to the EPBC Act to reduce confusion of terminology and allow a better system of accreditation. This still leaves the possibility of Local Councils undertaking a “Desktop Inquiry”, and even a “Public Environment Report” if the reference group found this to be acceptable. It is LFF’s submission that only level 1 assessments are appropriate to be done at Council level.

- b) If any assessments are to be done at Council level, then Councils must be funded accordingly, for the staff required, and for those staff to receive appropriate training and continuing education. Quality in EIA will only be achievable with properly trained environment officers, who are not only trained in their discipline but also in ensuring quality in EIA. These officers should also have access to technical advice from State agencies. A referral process, similar to that under the *Planning and Environment Act* may assist in providing such access to expertise.

9) ASSESSMENT REPORT

- a) The assessment report must be publicly available and subject to comment, at least for higher level assessments.
- b) Subject to the provisos above regarding the internal conflicts, the decision to approve must be made by the Environment Minister, and a statement of reasons given, especially when the recommendation goes against the assessment report.

10) THE FORM OF THE LEGISLATION

- a) The Environment Effects Act is inadequate. LFF suggests it be repealed and new legislation introduced.
- b) LFF would prefer a one stop shop for planning and environment approvals. Therefore LFF believes it would be more appropriate that EIA be integrated into the Planning and Environment Act, like the Environment Planning and Assessment Act, 1979, NSW. LFF also believes the Flora and Fauna Guarantee Act and other legislation require review to incorporate the mandatory triggers suggested in this submission. LFF also believes the Flora and Fauna Guarantee Act is inadequate and should be updated.
- c) As far as possible, and for the sake of transparency and accountability, EIA processes should be incorporated into the EIA legislation, or, where some flexibility is required, Regulations. Some technical matters would more appropriately be placed in guidelines – but these guidelines should be published, and accessible to the public in printed form, as well as on the internet.

11) ONGOING MONITORING AND ENFORCEMENT MECHANISMS

- a) One of the fundamental flaws in the current system is post EIA decision making monitoring.
- b) This contrasts with the planning system, where planning permits are required to be complied with, obligations placed on landowners through agreements under section 173 of the Planning and Environment Act, and there are third party enforcement mechanisms.
- c) The issues and options paper discusses (at page 86) the need for ongoing monitoring to:
 - *“Monitor whether the conditions of approval in the determination or decision have been complied with*
 - *To monitor the actual environmental changes and associated impacts to establish whether the EIA impact predictions were accurate or not*
 - *To establish a context for “second-order” assessment processes dealing with the detailed aspects of the design*
 - *To assess proposed modifications to projects, either prior to, or before modification.*
 - *To learn from the experience of implementing the project to inform the design, assessment and management of future projects.”*
- d) LFF supports these principles, and the EIA legislation should incorporate measures to ensure these monitoring objectives are achieved.

- e) Post decision monitoring also spurs environmental consultants to provide accurate and high quality EIA.
- f) The EIA legislation should also incorporate:
 - i) Penalties for breaches of compliance with the conditions of approval in the determination or decision have been complied with, and penalties for breaches when EIA predictions are inaccurate as a result of the EIA consultant's negligence or dishonesty.
 - ii) Where actual environmental changes and associated impacts are found to be underestimated in EIA impact predictions, require the proponent to undertake remedial works or scale back the use the relevant site, This obligation could be enforced through an environmental agreement registered on title, similar to a section 173 agreement under the Planning and Environment Act.
 - iii) Third party consultation and enforcement mechanisms.
- g) Post decision monitoring should be reflective of the risk or harm and the type of project approved.
- h) There should be a mechanism to revoke approval in certain circumstances, as is the case with the EPBC Act.

12) CONCLUSION

- a) LFF supports the State Government's initiative to reform the EIA legislation.
- b) There are a number of specific matters which will arise when the Government forms draft legislation, and takes a position on the issues raised in the Issues and Options paper. Therefore there should be further

public consultation.

- c) LFF would welcome the opportunity to comment at the next stage of the consultation process and on any draft legislation released for comment.

Juliet Forsyth
Barrister
Lecturer, Planning and Environment Law
Victoria Institute of Technology

Andrew Walker
Solicitor
LLB/BSC
Convenor Law and Policy Section
Lawyers for Forests