

02 July 2009

Strategic assessments under the EPBC Act

Under the environmental impact assessment provisions of the *Environment Protection Biodiversity Conservation Act 1999* (EPBC Act), the Commonwealth Environment Minister can agree to undertake an assessment of the impact of actions under a “plan, policy or program” on a matter protected under the EPBC Act. This is known as a “strategic assessment”.

Provisions for the strategic assessment of a plan policy or program have been in the EPBC Act since the Act commenced in 2000. There was, however, little incentive to utilise them. Until amendments to the Act in 2006, there was no facility for any approved strategic assessment to substitute for case by case decisions on individual actions. At best, the endorsement of a strategic assessment could form the foundation for individual approval decisions as development proceeded.

Amendments to the Act in 2006 expanded the strategic assessment provisions to include a facility for the Minister to not only endorse a strategic assessment but also to declare that a certain class or classes of actions are exempt from further assessment and approval under the Act, provided they are consistent with the assessment and meet any additional conditions specified. Although the prospect of not having to refer individual actions for approval was expected to increase the incentive for undertaking strategic assessments, there are still only two or three processes that have been commenced under the Act (ignoring fisheries assessments). None of these has been completed, so there is little guidance as to whether the process is a good one or not.

Potential benefits of strategic assessment

The concept of strategic assessment is a good one. Early and comprehensive assessment of the environmental values of an area and the potential impacts of a series of actions allows greater scope for avoiding and mitigating impacts and provides increased prospects for strategic and coordinated offsets, if impacts cannot be avoided.

The strategic assessment process agreed to by the Commonwealth and State governments in relation to the proposed Urban Growth Boundary (UGB) extension and the development of Native Vegetation Precinct Plans are both examples of strategic assessments. Both are intended to deal comprehensively with environmental impacts in a front-end planning process rather than leaving issues to be dealt with on a permit by permit basis.

Importantly, both of these strategic assessment processes extend beyond simply impact assessment and allow for the endorsement of a plan arising out of the assessment. This plan then forms the basis for an exemption from the need to seek further approvals as development proceeds.

Limitations of strategic assessments

Strategic assessment has the potential to achieve better outcomes for the reasons mentioned above and by avoiding the cumulative impacts of many small uncoordinated decisions. However, there are several preconditions that need to be satisfied for this potential to be realised:

- The identification of ecological values and potential impacts needs to be very thorough as typically there is little or no opportunity to adjust plans as development proceeds. The EDO is currently reviewing the Strategic Impact Assessment Report, published by the Department of Sustainability and Environment (DSE), to see how thorough the process has been in this case.
- Where mitigation and offsetting measures are proposed in response to impacts that are identified, any delay between the occurrence of the impact and the delivery of the mitigation or offsetting raises a significant risk that the mitigation measure or offset will not be fully delivered. In this case, the proposed Grassland reserves are a source of concern as the plan proposes the acquisition of the reserves over an extended period.

The strategic assessment process should be early in the planning process. In this case the strategic assessment is occurring in the context of an already announced plan to expand urban growth boundary which is obviously less than ideal. A far more desirable approach would be for the strategic assessment to consider the more fundamental question of whether and if the UGB should be expanded given biodiversity and other constraints.

The strategic assessment process

In summary terms, the EPBC Act process is as follows:

1. An agreement to undertake a strategic assessment of a plan, policy or program is entered into with the Commonwealth and terms of reference developed. The Act provides an option for the Commonwealth Minister for Environment to seek public comment on the terms reference. This option was not exercised in this case.

Note that under section 146(1) and the agreement, the assessment relates to the impact of actions under the plan policy or program on matters protected under the EPBC Act. In practical terms in this case, this means that the assessment will cover the impact on certain listed species and communities under the EPBC Act that will occur as a result of the expansion of the UGB and the associated transport infrastructure projects.

Section 146(1A) states that an agreement can provide for the assessment of "other impacts" (ie impacts on things that are not "protected matters" under the EPBC Act) but despite the broad wording contained in some terms of the agreement, this option has not been exercised in this case. This may be of some significance in terms of working out the extent to which the agreement and assessment and anything that flows from it "covers the field" and the relationship of the process generally with the development of Native Vegetation Precinct Plans under the *Planning and Environment Act 1987* (Vic).

2. An impact assessment report is prepared in response to the terms of reference. This must be exhibited for public comment for a period of *at least* 28 days. Although there is clearly discretion under the Act to allow for more than 28 days consultation, the time frame included in the agreement and terms of reference in this case only provide for 28 days consultation. This very short period combined with the lack of consultation about draft terms of reference together with the general lack of information about the impact assessment process which has apparently been underway for some time is obviously very problematic.

3. The EPBC Act and the terms of the agreement then provide for the Commonwealth Minister to endorse the plan, policy or program the subject of the impact assessment provided he is satisfied that the plan, policy or program adequately assesses the impacts to which the agreement relates.
4. There is then provision for the separate step of the Minister approving the taking of an action or class of actions in accordance with the endorsed plan, plan policy or program. Although this is a separate decision, there is no requirement to undertake a separate consultation process with respect to a proposal to approve a class of actions consistent with an endorsed plan, policy or program, so I expect that it will be made concurrently with the decision as to whether to endorse the plan, policy or program.

Sections 146E to 146L of the EPBC Act set out the matters that the Minister must consider before deciding to approve the taking of a class of actions in accordance with an endorsed plan and the conditions that will apply to that approval. General matters that the Minister must take into account are:

- Matters relevant to protected matters (threatened species and communities in this case).
- Economic and social matters.
- The principles of ecologically sustainable development.

In addition, in considering whether to approve the taking of a class of actions which relates to threatened species or communities the EPBC Act provides that the Minister “must not act inconsistently” with:

- Australia’s obligations under the Biodiversity Convention
- A recovery plan or threat abatement plan (note that recovery plans are only in place for some species and certainly not for the Grassland Community which will seriously limit the Ministers obligations and discretion here).

In addition, the Minister “must have regard to” any “approved conservation advice” – this is effectively the advice of the Scientific Committee which accompanied the listing decision for a species or community and will be particularly relevant where there is no recovery plan in place.

These considerations are very similar to the considerations that apply to decisions about whether to approve individual actions under the Act. The important difference in their application in this context, however, is that whereas the cumulative consequences of decisions can be dismissed or overlooked in the case by case approval of proposed actions, the more comprehensive assessment in this case will necessitate the consideration of impacts in a more comprehensive manner. We consider that it would be difficult for the Minister to be satisfied that the approval of the taking of a class of actions that would ultimately lead to losses of significant amounts of grassland within the proposed new UGB was consistent with international obligations or the “approved conservation advice” for the grassland community.

Issues

We have confined our consideration to the legal issues raised by the strategic approval process and the Assessment Report. It is fair to say that the Strategic Impact Assessment Report does not go into significant detail about the mechanics intended to support the UGB expansion and associated projects. In particular:

- The timing and security of the creation of proposed new reserves is uncertain. Under the proposed plan, the State Government will apply a Public Acquisition Overlay (or other planning instrument) to the areas of land set aside to form the grassland reserves. The State anticipates that land inside those areas will be acquired over a ten year period, initially voluntarily, but with the potential for compulsory acquisition subsequently. Developers needing to offset losses of biodiversity would purchase offsets within the designated areas. Unfortunately, there is little detailed information in the Strategic Impact Assessment Report about how the process is intended to work in practice. This is a matter of serious concern, as it makes it extremely difficult to assess how effective the planned program will be in achieving its goals. Outstanding questions include the legal security of the areas set aside, how it is proposed that they will be transferred to public ownership and what maintenance or stewardship arrangements will be in place in the interim.
- The legal mechanism for the creation of the reserves is a critical issue. The Strategic Impact Assessment is lacking in crucial details with respect to this issue. Although it foreshadows that the reserve will eventually become National Parks or other reserves, when and how this will occur is unclear (keeping in mind that the creation of a National Park and the addition of land to it would not only require a return of the land to public ownership, but a legislative amendment to the National Parks Act). As noted above, there is suggestion that the Public Acquisition Overlay will be used in the interim, however this is a planning tool, not a change in land status (the land remains freehold, with restricted development rights).

The thinking seems to be that the acquisition will be managed in a process similar to the reservation and acquisition of land for a freeway or other public infrastructure. While there is some foundation for this analogy, there are important differences. A significant difference is that whereas reservation of land for a future freeway merely requires restrictions that prevent incompatible development proceeding in the period between designation and actual acquisition, in the case of the proposed future grassland reserves, some mechanism needs to be found to mandate or at least strongly encourage the maintenance of the biodiversity values until the time of acquisition.

- How the purchase and creation of the new reserves will be funded also remains unclear. The range of options would include requiring individual landholders who want to develop land within the new UGB to obtain actual offsets in areas set aside as reserves. This has the advantage of providing a clear nexus between the loss and the offset (and the disadvantage of creating a very significant incentive to clear or degrade any remnants designating for removal to avoid or reduce such a liability in the future). The other end of the spectrum would be to fund the creation of the reserves by enabling payments for losses to be made to a central fund. Reserves could then be created by payments from the central fund, perhaps based on BushBroker, although the BushBroker mechanism is not likely to be directly applicable because the offset sites are predetermined.
- The nature of the offsetting activity will also need to be looked at very carefully. There is no well developed system of rules governing offsets under the EPBC Act (there is a draft policy which covers general principles). However, the system in place in Victoria effectively allows actual losses of vegetation to be in part compensated for by "paper gains" in the form of

increased legal security or gains in the form of the foregoing of certain legal rights that might not actually be being exercised. The nature of the “trade” proposed will need to be carefully scrutinised. Again, the Strategic Impact Assessment Report provides little detail as to how offsets will operate in the context of the UGB expansion.

- An associated question is the degree to which the total package is consistent with Victorian policy under the Native Vegetation Framework. In particular can it really be said that sufficient effort has been made to avoid the loss of vegetation, particularly high and very high conservation significance vegetation. With respect to the offsets proposed, it is difficult to assess compliance with the NVMF requirements on the basis of the information in the Strategic Assessment, however based on the global figures quoted in the report the offsets for the losses are less than what would be required if losses were offset on a case by case basis.
- The Strategic Impact Assessment report proposes a series of prescriptions for matters of national environmental significance (EPBC Act threatened species and communities) that will be applied as precinct structure planning proceeds within the new UGB. The appropriateness and adequacy of these prescriptions and whether they are consistent with EPBC Act obligations needs to be carefully scrutinised.
- A related issue is how any endorsed plan and approval of a class of actions relates to or interacts with Native Vegetation Precinct Plans and Victorian legislative requirements generally is unclear. This is potentially an issue because of the differing coverage and requirements of schemes at the Commonwealth and Victorian level. For example, there will presumably be a tendency to see the Commonwealth endorsed impact assessment as a comprehensive response to the biodiversity issues, however it is in fact legally limited to “significant impacts” and “matters of national environmental significance” under the EPBC Act. There are potentially many obligations or requirements that extend beyond the scope of the EPBC Act under the Native Vegetation Framework that might, for instance, require offsets additional to that demanded by the Commonwealth.
- Arrangements for monitoring, administration and accountability will be important. The current need to refer individual actions to the Commonwealth provides an important, albeit imperfect, mechanism that counterbalances the generally weak administration of Victorian provisions. In this case, it appears that the oversight of the implementation of any endorsed plan and approval of a class of actions in accordance with it will largely fall to the Department of Sustainability and Environment with only very general oversight by the Commonwealth.

Opportunities to influence the process

As the Commonwealth Minister decided not to seek public comment on the proposed terms of reference, the only formal opportunity for public involvement in the process is to exercise the opportunity to comment on the draft Strategic Impact Assessment report. The window to do this is very limited as, despite the discretion to permit a longer period, the current agreement commits the Minister to exhibiting the assessment for the minimum period of 28 days.

As outlined above, once this 28 day period lapses, the Growth Areas Authority will then submit the Strategic Impact Assessment including any revisions to the Minister. The Minister will then proceed to decide whether to endorse the plan and, if he does so, what classes of actions might be allowed to proceed without the need for referral or approval under the EPBC Act and the conditions that should apply to this conditional approval. Although the Act does not provide for any formal opportunity for comment at this point or participation in the process, given the lack of other opportunities it will probably be desirable to try and make submissions directly to the Minister at this stage of the process, particularly if any revisions to the Strategic Impact Assessment do not adequately respond to concerns raised during the formal consultation period.

As noted above, it is unclear how the strategic assessment process relates to the Native Vegetation Precinct Planning (NVPP) process which is typically something that would be expected to be developed in conjunction with proposals for rezoning new growth areas. As this process involves planning scheme amendments, the usual course would be for the NVPP to be exhibited as part of a planning scheme amendment and for opportunities to arise to attempt to influence outcomes through submissions about exhibited amendments and participation in Planning Panels processes. Whether and to what extent these usual processes will apply here is unclear, particularly as it appears that it is intended that most of the decision making at this stage will be determined by the prescriptions set as part of the Strategic Impact Assessment.