Environmental Defender's Office ACT Inc.

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Dr Paul Rutherford
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By email: planning.systemreform@act.gov.au

Dear Dr Rutherford

Exposure Dra Planning and Development (Environmental Impact Statements) Amendment Bill 2010

The Environmental Defender's Office (ACT) (EDO) welcomes the opportunity to comment on the exposure draft of the Planning and Development (Environmental Impact Statements) Amendment Bill 2010 (the draft Bill).

The EDO is a non-profit, community legal centre specialising in public interest environmental law. Our office is one of nine independently constituted and managed Environmental

advice, take an active role in environmental law reform and policy formulation and offer education programs designed to facilitate public participation in environmental decision-making.

Whilst the EDO supports a number of measures contained in the draft Bill the EDO has some concerns about the watering down of the environmental impact statements (EIS) process and makes a number of recommendations which this Office believes would improve the EIS process and provide more appropriate environmental protection.

Summary of recommenda ons

The EDO supports:

- the increased role of the Conservator of Flora and Fauna and the Environment Protection Authority in the EIS process
- the amendments which allow the ACT Planning and Land Authority (ACTPLA) to reject an EIS if it does not adequately address matters set out in a scoping document or raised in public consultation
- the cost recovery provisions
  the ability to prescribe criteria that the Minister must take into account in deciding if a development can be exempt from preparing an EIS under s211, although the EDO believes that it is preferable that these criteria be included in the primary legislation.

The EDO recommends that the draft Bill be amended so as to:

- improve the accountability for the decision to exclude a matter from the impact track, by allowing public comment before a decision is made, prescribing criteria for making a decision, requiring a reasons statement and ensuring the decision is reviewable
- place on the onus on the proponent for proving there are no adverse environmental impacts so as to take a proposal outside the impact track
- include development proposals which are on land designated as a future urban area in certain cases in the impact track
  ensure direct and indirect impacts are included in the definition of significant adverse environmental impact
- require ACTPLA to undertake public consultation on scoping documents
  require ACTPLA to endorse draft assessment documentation as complying with the scoping document before the draft EIS is released for public comment
- require consultation on revised EIS, other than for minor revisions
  require assessment report on EIS to be publicly available
- require guidelines for exercising Ministerial discretion whether to hold a public inquiry.

Background Comments

The EDO recognises that environmental impact statements (EIS) are an integral part of a sound environmental planning and management system. An EIS provides a process for examining and evaluating the environmental effects of proposed activities that are considered likely to significantly affect the environment. An effective EIS process enables possible environmental impacts to be identified, helps determine whether a proposal should proceed or if alternatives are preferable, and if a proposal is to proceed how impacts can be mitigated. An effective EIS

process should also include a process of ongoing environmental management with monitoring and auditing of predicted and actual impacts.[1]

As a general principle the EDO supports the policy outcome sought to be achieved by the Bill, that is only requiring an EIS where there is likely to be a significant environmental impact, involving the Conservator for Flora and Fauna or the Environment Protection Authority in this decision, and not requiring an EIS where there are clearly no impacts. However, in accordance with the precautionary approach the EDO is of the view that where there is uncertainty as to the possible impacts of a proposal, an EIS should be prepared to properly assess the impacts. The onus should be on the proponent to demonstrate that there will not be significant environmental impacts if a proposal is to be taken outside the impact track.

The EDO notes that in 2008 the ACT government entered into a bilateral assessment agreement with the Commonwealth (under s45 of the *Environment Protec on and Biodiversity Act 1999* (Cth) (EPBC Act)) which allows the Commonwealth Environment Minister to rely on specified environmental impact assessment processes of the ACT in assessing actions under the EPBC Act. The EDO provided a submission on this draft agreement and made a number of recommendations to improve the agreement and the EIA process. A copy of this is on the EDO website at http://www.edo.org.au/edoact/submissions/Jun%2008%20Draft%20Commonwealth%20Australian%20Capital%20Territory%20Bilateral%20Agreement.pdf.

EDO is pleased that the exposure draft Bill addresses some of these recommendations which sought clarification of the consequences where an EIS does not adequately address the matters set out in a scoping document and matters raised in public consultation. The EDO supports the amendments which allow ACTPLA to reject an EIS on these grounds and limits to two the number of times that a draft EIS can be revised to address these issues following public notification (new ss222(2)(b), 224(1), 224A and B, 225(1) and (1A), 225A, to be inserted by items 13-18).

The EDO also supports the cost recovery provisions which enable ACTPLA to recover the costs associated with the assessment of an EIS from the proponent and for the agency which provides an opinion on whether the proposal will have a significant environmental impact to recover the costs from the proponent (new s224B, to be inserted by item 15 and 138A(8) to be inserted by item 6).

[1] Gerry Bates, Environmental Law in Australia, 7th edition, p299

However the EDO reiterates a number of other recommendations made in the previous submission on the bilateral assessment agreement to improve the effectiveness of the EIS process. In addition the EDO makes a number of other recommendations in relation to proposed amendments outlined in this Bill.

Recommenda ons

1. **greater accountability for decisions to allow impact track proposals to be considered in the merit track**

Currently the Act provides that certain activities will automatically require an EIS and be considered under the impact track unless the Minister has exempted the proposal under s211 (Schedule 4). This provides certainty and ensures that activities which have the potential to have a significant impact on the environment will go through an EIA process to assess the environmental impacts of the proposal.

An EIS is designed to consider the likely impacts of a proposal. The EDO is of the view that a comprehensive EIS is the best method for assessing the environmental impacts of a proposal and ensuring that alternative options are assessed. An EIS also provides a mechanism for assessing appropriate mitigation measures.

The amendments proposed in item 6 of the exposure draft Bill introduces a discretion for certain of these activities to be taken outside the impact track and the requirement to prepare an EIS where the relevant agency (either the Conservator of Flora and Fauna or the Environment Protection Authority) has provided an opinion that the likely environmental impact of the proposal will not be significantly adverse.

The EDO notes that a 'significant impact' type test in effect currently exists for a number of activities included in the impact track under Parts 4.2 and 4.3 of Schedule 4 (see items 1, 9(b)(iv), 11(c) and 11(d) of Part 4.2 and items 1, 3(b), 4, 5, 6, 7, 8 (b) and 9 of 4.3). The EDO supports the Conservator, the EPA or the Heritage Council making a decision in relation to these impacts rather than ACTPLA, who currently makes this decision.

It is noted that the wording of the current impact tests in Part 4 differ somewhat. They include

- 'likely to adversely impact' (item 1, Part 4.3)
- 'could have a significant impact' (item 3(b), Part 4.3)
- 'with the potential to have a significant impact (items 4, 5, 7 and 9, Part 4.3)
- 'likely to significantly affect (item 9(b)(iv), 11(c), 12(d), Part 4.2)

- ‘likely to result in or cause’ (item 6, 8(b), Part)
- ‘with the potential to adversely affect’ (item 9, Part 4.3).

The EDO submits that the preferable test for taking a proposal outside the impact track is if it does not have ‘the potential to have a
precautionary approach and ensures that if there is doubt the impacts are comprehensively assessed.

The EDO supports an approach that requires a proposal to be included in the impact track unless the proponent has made an application to take it outside the track and the relevant agency has reached an opinion that there is not the potential to have a significant impact. This is the approach taken in proposed new items 1, 3(c), (d) and 7 of Part 4.2 and item 2 of Part 4.3. This appropriately places the onus of the proponent to deomstrate that there are no significant impacts.

It is noted however that proposed new items in Part 4.3, apart from item 2, adopt a different approach. These proposals do not fall within the impact track if they are likely not to have a significant adverse environmental impact (as determined by the Conservator for items 1 and 3, ACTPLA for items 4, 5 and 8, the Heritage Council for item 6 and EPA for item 7).

The EDO recommends that, consistent with the other amendments, these items should be amended to include in the impact track any proposal that has the potential to have a significant environmental impact on the relevant areas or processes as initially determined by the relevant agency unless the relevant agency has produced an opinion that the proposal does not have the potential to have a significant adverse environmental impact.

This correctly places the onus on the proponent to demonstrate that a proposal does not have a significant adverse environmental impact rather than reversing the onus and only including the proposal in the impact track if the relevant agency has reached the view that it will have a significant environmental impact.

The EDO also recommends that such decisions by the relevant agencies are subject to the same accountability mechanisms as outlined below.

The EDO understands that the amendments proposed to Schedule 4 to the Planning Act are designed to remove proposals which are unlikely to have a significant environmental impact from the requirement to prepare an EIS. Whilst the EDO supports this general policy objective

the EDO is concerned that the proposed amendments currently allow too great a discretion for the relevant agency to take a proposal outside the impact track without adequate accountability measures.

The impact of such a decision is large as it potentially removes the requirement to do a comprehensive assessment of the environmental impacts of the proposal and removes the right for public participation in this EIA process. The EDO is concerned that:

(a) there are no clear guidelines on how this discretion would be exercised
(b) without an EIS it may be difficult for the relevant agency to adequately determine the likely environmental impact of the proposal. The very nature of the EIS process is to enable information to be collected to assess the probable impacts
(c) there is no opportunity for public input into this decision making process
(d) there is no right for the public to access information which forms of the basis any decision
(e) there is no avenue for merits review of such a decision.

The EDO has made some suggested amendments below that would introduce a truncated assessment process which would not be as time consuming or rigorous as an EIS process but ensures appropriate accountability for the resulting decision.

This would be consistent with the environmental assessment under the EPBC Act. Under the EPBC Act where the environmental impacts of a proposal are assessed on referral information or preliminary documentation rather than a more comprehensive EIS process under the EPBC Act these preliminary forms of assessment still provide for public comment on the possible impacts (see Divisions 3A and 4 of Part 8 of the EPBC Act).

The EDO recommends that the dra Bill be amended to:

Require the agency to publicly no fy any applica on for assessment in the merit track on the ground that the likely impact of the proposal will not be significantly adverse

- ***Provide an opportunity for public comment on this applica on and the likely impact of the proposal***

Require the agency to take into account public representa ons when making its decision whether to accept or refuse the applica on

Set out the factors which the relevant agency will take into account when deciding whether to accept or refuse an applica on

- ***Provide a statement of reasons for the decision***
- ***Allow any person to seek merits review of the agency's decision to accept or refuse an applica on***

2. Development proposals which can be taken outside the impact track on the opinion of relevant agency and scope of ma ers subject to EIS

The Bill proposes to allow six types of proposals to be considered in the merit track if the relevant agency decide that they do not have a significant environmental impact (items 1, 3(c), 3(d), 7 of Part 4.2 and item 2(b) of Part 4.3).

The EDO's broad concerns about allowing these to be considered outside the impact track and therefore without an EIS are outlined above.

In addition the EDO has concerns about the proposed amendments to Part 4 as outlined below:

i) removal of proposals from the impact track if they are on land designated as a future urban area in the Territory Plan

The EDO notes that there are a number of amendments proposed to Schedule 4 which would remove certain proposals from the impact track if they are on land designated as a future urban area in the Territory Plan (new item 1, Part 4.2, items 2 and 8 Part 4.3 to be inserted by items 24 and 25 of the Bill).

It is understood that these amendments are proposed as an EIS is considered unnecessary because the variation of a territory plan to designate an area as future urban area land involves significant assessment and public comment.

However, the EDO notes that there is currently no legal requirement for an assessment of the environmental impacts of a variation to designate an area as a future urban area to be undertaken. The Minister may direct ACTPLA to prepare a planning report or a strategic environmental assessment to accompany a draft plan variation, but this is discretionary (s.62). In addition there is no prescribed criteria for any planning report or strategic environmental assessment. Therefore it is possible that a future urban area could be

designated in the Territory Plan without a comprehensive environmental impacts study having been undertaken.

In addition the time between the designation of a future urban area and the subsequent development of the land can be many years. In this time the conservation value of the land and the knowledge of the impacts of development may have changed significantly. In these cases it would be inappropriate to rely on studies undertaken many years previously.

If the Government is concerned that developments on future urban areas should not be considered in the impact track because they have already undergone significant assessment then no amendments are necessary. The Minister could exempt these proposals from the requirement to complete an EIS under s211.

The EDO recommends that the dra Bill be amended to:

Remove the amendments to Schedule 4 which exempt certain proposals from the impact track if they are on land designated as a future urban area in the Territory Plan

ii) amendments to remove certain proposals from the impact track where it is to be within 100m of a body of water, waterway or wetland, in an area with a high watertable, highly permeable soils, sodic soils or saline soils, in a domes c water supply catchment, or within 2km of a residen al zone and is likely to significantly affect the amenity of the neighbourhood because of noise, odour, dust, vermin attracted, lights, traffic or waste

Currently a number of activities come within the impact track if they are within 100m of a body of water, waterway or wetland, an area with a high watertable, highly permeable soils, sodic soils or saline soils, in a domestic water supply catchment, or within 2km of a residential zone and is likely to significantly affect the amenity of the neighbourhood because of noise, odour, dust, vermin attracted, lights, traffic or waste. The Bill proposes to remove these from the impact track (items 5, 8 and 10 of Part 4.2 to be inserted by item 24 of the Bill).

The EDO supports the general principle that it is preferable to consider activities within the impact track if they have a particular environmental impact rather than by using an arbitrary measure for example if a development is proposed within 100m from a body of water. However the EDO supports an approach which includes a mixture of activities (such as are in Part 4.2) and areas or processes which focus on particular impacts (such as are in Part 4.3).

As is recognised in the current approach, some activities which have the potential to have a significant environmental impact are included in the impact track without including an 'impact type test' (under Part 4.2). This is because the activities of their very nature have the potential to have a significant impact. In our view this is the preferable approach. It has the benefit of certainty and is consistent with a precautionary approach.

Consistent with other activities in Part 4.2 the EDO recommends that the Bill should reinstate these into the impact track table.

The EDO recommends that the dra Bill be amended to:

- ***Retain the current triggers***

iii) Removal of entertainment venues and spor ng venues (other than motor sports venues) from impact track

The Bill amends Schedule 4 to require an EIS for motor racing venues only. Currently other sporting venues and entertainment venues also require an EIS (item 7 of Part 4.2). The EDO is of the view that the environmental impact of any large capacity venue, regardless of the event to be held, could potentially have a significant environmental impact. It is not clear why other sporting and entertainment venues have been removed from the impact track.

No other EIS triggers apply for noise pollution therefore an entertainment or sporting venue (other than motor sports venues) which may have a significant impact on nearby residents would be removed from the impact track.

The EDO recommends that the dra Bill be amended to:

Include entertainment venues and spor ng venues in Schedule 4 so as to require an EIS

iv) Removal of places or objects nominated for provisional heritage registra on

Currently a proposal which has the potential to have a significant impact on the heritage significance of a place or object registered or nominated for provisional registration under the Heritage Act is to be considered under the impact track (item 7 of Part 4.3)

The amendments propose that this no longer applies where a place or object has been nominated for provisional registration but a decision has not yet been made on registration.

The EDO is of the view that it is critical to assess the impacts of a proposal where it may have a significant impact on a place or object which has been nominated for heritage registration. There can be a significant amount of time taken to assess a place or object for registration. If these amendments were passed there would be no protection for these places or objects while they were assessed.

The EDO also believes that the preferable test is whether the proposal will affect the heritage significance of the place or object. This is a slightly different test to whether it is likely to have a significant adverse environmental impact. It is possible that a development that would destroy the cultural or historical significance of a place or object would not amount to a significant impact on an environmental function, system value or entity.

The EDO recommends that the dra Bill be amended to:

- ***Include a proposal that has the poten al to have a significant impact on the heritage significance of a registered or nominated place or object, unless the Heritage Council produces an opinion that the proposal does not have the poten al to have a significant impact on the heritage significance.***

3. Meaning of significant adverse environmental impact

The draft Bill defines a 'significant adverse environmental impact' in item 23, proposed new section 4.2, Schedule 4. This is a crucial definition as it forms the basis of whether certain activities will be taken outside the impact track and the requirement to prepare an EIS.

The current definition does not include a definition of impact. It concentrates on defining whether an impact is significant. The EDO recommends that the definition makes it clear that a significant adverse environmental impact covers both direct and indirect impacts, including ex situ impacts. This would be consistent with the EPBC Act which defines 'impact' as including direct and indirect impacts (s.527E EPBC Act).

In addition the definition of a significant impact in 4.2(1) concentrates on whether the

irrelevant whether or not the environment which is impacted upon is significant or not. It is the effect of the impact which should be the relevant criteria.

EDO recommends that the Bill be amended to:

- ***Delete 4.2(1) and include a definition of impact along the lines of s527E of the EPBC Act***

4. Mandatory criteria and consulta on on scoping document

Currently the Act provides that where a proposal requires an EIS the 'guidelines for conducting the EIA are contained in the scoping document which ACTPLA is required to prepare (under s212).

Whilst the regulations prescribe a limited number of matters which must be included in the scoping document (regulation 54) the EDO is of the view that a more comprehensive list of matters which must be addressed should be included.

The EDO recommends that the dra Bill be amended to prescribe mandatory criteria for the scoping document

If these amendments were not included the EDO recommends that there be mandatory public consultation on the scoping document. Currently while ACTPLA must consult certain prescribed entities when preparing the scoping document, ACTPLA is not required to seek broader public comment on the scoping document. This is discretionary (s212(3) of the ACT Planning Act and Regulation 51(3) of the ACT *Planning and Development Regula on 2008*).

Currently the mandatory opportunity for public participation in the EIA process occurs around the midpoint of the process, ie once a draft EIS has been prepared. The EDO considers it appropriate to have wider mandatory consultation on the scoping document. The scoping document is an important part of the EIA process as it sets out those matters that an EIS must address.

There has been some debate about what stage in an EIA process public participation should occur. There are many advantages of providing early opportunities for public participation, at the pre-application and scoping stages. The advantages include helping to ensure that all appropriate matters are identified in an EIS, assisting in breaking down the perception that public review is mere tokenism or predetermined [2] and it may also make it harder for a public

[2] Stec S , Casey-Leftkowitz S and Jendroska J , Aarhus Convention Implementation Guide (for the Regional Environmental Centre for Central and Eastern Europe, 2000) p 85, http://www.unece.org/env/pp/acig.pdf viewed 15 September 2010 p86.

authority with a hidden agenda to draft the terms of reference of the EIS "narrowly…to exclude certain contentious issues".'[3]

The EDO recommends that the dra Bill be amended to require ACTPLA to:

- ***publish a dra scoping document and invite public comment on the document;***
- ***take into account any comments received; and***
- ***publish the final scoping document.***

5. Requirement to publicly no fy EIS only after satisfied it complies with scoping document

Under the current EIA process there appears to be no requirement for ACTPLA to ensure that an EIS sufficiently addresses the matters set out in the scoping document prior to the public notification and public consultation on the EIS. Paragraph 216(2)(a) of the ACT Planning Act requires a draft EIS to address each matter raised in the relevant scoping document.

However, in practice, the Authority's consideration of the EIS (and specifically whether it sufficiently addresses the matters set out in the scoping document) occurs after the public consultation period (see s222 of the ACT Planning Act).

The EDO is of the view that the Act should specifically require ACTPLA to satisfy itself that the draft EIS has been prepared in accordance with the scoping document prior to notifying it for public consultation. This ensures that the public has an opportunity to comment on an EIS which has specifically addressed all the relevant matters. Without this requirement, the public would not have an opportunity to comment on any revised EIS prepared later to address any previously unaddressed matters from the scoping document.

This requirement would be consistent with the EPBC Act process. Under the EPBC Act, the Commonwealth Environment Minister may only approve the publication of a draft EIS if satisfied that the draft statement is in accordance with the EIS guidelines (s.103(2) of the EPBC Act).

The EDO recommends that the Bill be amended to:

- ***require ACTPLA to publicly notify the draft EIS only after it is satisfied that the draft EIS has been prepared in accordance with the scoping document.***

[3] Richardson BJ and Razzaque J, "Public Participation in Environmental Decision-Making" in Richardson BJ and Wood S (eds), Environmental Law For Sustainability: A Reader (Hart Publishing, 2006) p 174

6. Consulta on on revised EIS

The Act provides for a proponent to provide a revised EIS if ACTPLA is not satisfied that an EIS adequately addresses matters outlined in a scoping document (s.224). However, there is no provision for the public to be notified or to provide comment on any revised EIS.

It is possible that a revised EIS will provide substantial new information. Without an opportunity for public comment on any new material provided it is possible that the accuracy of the information will not be rigorously assessed. The EDO is of the view that it is important for the public to have an opportunity to provide comment on any revised EIS.

This would be consistent with the current development application process. Where a DA has been amended ACTPLA must renotify the application unless no one other than the applicant will be adversely affected and there is minimal increase in environmental impact (s.146).

The EDO recommends that the dra Bill be amended to:

- ***require the same notification and public consultation provisions to apply in relation to a revised EIS as apply to the dra EIS, except for minor revisions.***

7. Requirement to make assessment reports publicly available and include reasons

Under the current Act and the new provisions (new s225A to be inserted by item 18), if ACTPLA accepts an EIS they are required to prepare an assessment report and provide it the relevant Minister. The assessment report must confirm that ACTPLA is satisfied that the EIS addresses each matter raised in the scoping document, takes into account timely representations and demonstrates how these were taken into account. In addition the report may set out how ACTPLA came to be satisfied of these matters.

The EDO is of the view that any additional information about how ACTPLA came to be satisfied of these matters should be a mandatory inclusion in an assessment report and also recommends that these assessment reports should be publicly available.

The EDO recommends that the dra Bill be amended so as to:

> ***Require an assessment report to include informa on about how ACTPLA was satisfied about ma ers in 222(2)(a) and enable anyone to request a copy of the EIS assessment reports.***

8. Guidelines on whether to hold a public inquiry

Under the ACT Planning Act, once the ACT Minister has received an EIS, he or she must decide whether to establish a panel to conduct an inquiry about the EIS (s226 of the ACT Planning Act).

The EDO is concerned that the Minister has a largely unfettered discretion in determining whether or not to establish a panel. No guidance is given as to when a panel should be established. A further concern is that once a panel has been established there is no requirement for public hearings to be held or for community input into the process.

The EDO is of the view that guidance should be given as to when the Minister may choose to establish a panel. This is consistent with the EPBC Act which sets out criteria which the Commonwealth Environment Minister must consider when making a decision as to which assessment approach to follow (for example assessment by EIS or assessment by inquiry, see s87(2) of the EPBC Act). The EPBC Act also provides for hearings held as part of an inquiry to conducted in public (see Division 7 of Part 8 of the EPBC Act). The EPBC Act also requires hearings held as part of an inquiry to be conducted in public (Division 7 of Part 8 of the EPBC Act).

The EDO recommends that the dra Bill be amended to:

- ***provide guidance as to when a panel will be established ; and***
- ***require a panel to invite public comment as part of their inquiry.***

I would welcome the opportunity to discuss the matters raised in this submission further.

Yours sincerely

(ACT) Inc.

Kirsten Miller
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