STRATEGIC ENVIRONMENTAL ASSESSMENT IN AUSTRALIA
An Evaluation of Section 146 of the *Environment Protection and Biodiversity Conservation Act* 1999

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This article considers the effectiveness of the Strategic Environmental Assessment (SEA) requirement in s 146 of the *Environment Protection and Biodiversity Conservation Act* 1999. The Bill was passed by the Commonwealth Parliament on 23 June 1999 and received the Royal Assent on 16 July 1999. It enters into force on a date to be fixed by Proclamation or 12 months after Assent if not already proclaimed. The Act contains provisions for the application of Environmental Impact Assessment (EIA) to policies, plans and programs. SEA is of interest to practitioners of many disciplines; it draws on the strengths of those disciplines and (as in Australia) may be required by the law. The article is in three parts: Part 1 evaluates compliance with international best-practice principles; Part 2 analyses the implementation of the recommendations of a 1994 Commonwealth consultancy report, making reference to how s 146 relates to the remainder of the Act — especially the provisions for EIA; Part 3 draws conclusions and makes recommendations. It is concluded that, while the incorporation of SEA requirements in the Act is to be encouraged, if triggering depends on ministerial and proponent agreement, the requirements are unlikely to be systematically applied. Section 146 fails to comply with many of the areas of international best practice, recommendations made in the 1994 consultancy have been poorly implemented, the relationship between SEA and EIA in the Act is not sufficiently defined, and there is a lack of certainty concerning application. It is recommended that s 146 should concentrate on the application of SEA to legislative proposals. All bills should be screened for their relevance to matters of national environmental significance by a committee, and an environmental impact statement assessing likely impacts should accompany the Bill to the Cabinet and Parliament.[1]

Introduction

Section 146 of the Act contains provisions for SEA which are known in the section as 'Strategic Assessments'. Section 146 derives from

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1 This article is based upon a submission to the Australian Senate Environment, Communications, Information Technology and the Arts, References/Legislation Committees, Hobart Town Hall, 19 February 1999.

recommendations made in an SEA consultancy report commissioned by the Commonwealth Environment Protection Agency into EIA reform.[2] SEA is the application of EIA to policies, plans and programs. Its purpose is to ensure that likely environmental impacts of policies, plans and programs (and alternatives to them) are addressed as early as possible, and on a par with social and economic impacts.[3] As such, it has attracted significant interest from practitioners from many disciplines, including law, land use planning, engineering, geography and the social sciences. As an important tool of environmental policy, planning and management, it has great potential to minimise adverse environmental consequences and contribute to ecologically sustainable development.

While the *Environment Protection (Impact of Proposals) Act* 1974 was also intended to apply to these types of proposals, in practice it was limited to individual projects.[4] Australia-wide, the state that has been most successful with the introduction of SEA has been Western Australia.[5] If EIA is applied to policies, plans and programs, there is less need to assess the detail of each subsequent project, as many likely impacts have already been assessed — this is known as 'tiering'.

There have been significant developments in SEA worldwide since EIA was introduced in Australia in 1974. Many countries have introduced SEA by legal or policy requirements, including the Netherlands (1987 and 1995), Canada (1990), New Zealand (1991) and Denmark (1993); a bibliography on SEA has been published highlighting its popularity in the academic and professional literature;[6] and several conferences have dealt with the subject in some detail, such as those hosted by the International Association for Impact Assessment in New Orleans (1997), Christchurch (1998) and Glasgow (1999). Australia has been closely involved with SEA developments, and many EIA practitioners and academics have taken a keen recent interest in procedural and methodological issues.[7] Section 146 of the Act sets out Australia's

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2 JD Court and Associates Pty Ltd and Guthrie Consulting (1994) *Assessment of Cumulative Impacts and Strategic Assessment in Environmental Impact Assessment*, Commonwealth of Australia.

3 B Sadler and R Verheem (1994) *Strategic Environmental Assessment: Status, Challenges and Future Directions*, Ministry of Housing, Spatial Planning and the Environment, p 26.

4 C Wood (1992) 'Strategic Environmental Assessment in Australia and New Zealand' *Project Appraisal* 7(3), p 144.

5 C Wood and J Bailey (1994) 'Predominance and Independence in Environmental Impact Assessment: the Western Australian Model' 14 *Environmental Impact Assessment Review*, pp 37–59; and R Sippe (1996) 'The Australian State Experience — Western Australia', in J Jaap de Boer and B Sadler (eds), *Environmental Assessment of Policies: Briefing Papers on Experience in Selected Countries*, Ministry of Housing, Spatial Planning and the Environment.

6 M Partidario (1996) *Bibliography on Strategic Environmental Assessment*, Canadian Environmental Assessment Agency.

7 M McCarthy (1996) 'Strategic Environmental Assessment: Rhetoric or Action?' *Australian Planner* 33(3) pp 125–31; J Bailey and S Renton (1997) 'Redesigning

approach to SEA; this article indicates the weaknesses in s 146 and related sections of the Act.

Part 1: Compliance with International Best Practice Principles

Section 146 of the Act is evaluated below against the 'Principles of SEA' which appear in a report prepared for the International Study into the Effectiveness of Environmental Assessment.[8] These principles incorporate most of the key features which practitioners and academics believe are necessary for the successful introduction of SEA. They have been cited in a conference paper presented to the 18th Annual Meeting of the International Association for Impact Assessment,[9] and have been used to evaluate the Canadian approach to SEA as applied to legislative proposals.[10] They are therefore a useful way to examine the content of s 146 and other related sections. The principles are set out in Table 1 and each is discussed below.

Table 1: Principles of SEA

The following principles appear to be widely supported:

1 *Initiating agencies are accountable* for assessing the environmental effects of new or amended policies, plans and programs.

2 The assessment process should be *applied as early as possible* in proposal design.

3 *Scope of assessment must be commensurate* with the proposal's potential impact or consequence for the environment.

4 *Objectives and terms of reference* should be clearly defined.

5 *Alternatives* to, as well as the *environmental effects* of a proposal should be considered.

6 *Other factors*, including socio-economic considerations, to be included as necessary and appropriate.

EIA to Fit the Future: SEA and the Policy Process' *Impact Assessment* 15(4), pp 319–34; L Brown (1997) 'The Environmental Overview as a Realistic Approach to Strategic Environmental Assessment in Developing Countries' in A Porter and J Fittipaldi (eds), *EIA Methods Review: Retooling Impact Assessment for the New Century*, Army Environmental Policy Institute, pp 127–34; and R Buckley (1997) 'Strategic Environmental Assessment' *Environmental and Planning Law Journal* 14(3), pp 174–80.

8 Sadler and Verheem (1996), p 79.

9 J Tonk and R Verheem (1998) 'Integrating the Environment in Strategic Decision Making: One Concept, Multiple Forms', Paper presented to the 18th Annual Meeting of the International Association for Impact Assessment, p 4.

10 S Marsden (1998a) 'Why is Legislative EA in Canada Ineffective and How Can it be Enhanced?' *Environmental Impact Assessment Review* 18(3), p 252.

7 Evaluation of *significance* and determination of *acceptability* are to be made against policy framework of *environmental objectives and standards*.

8 Provision should be made for *public involvement*, consistent with the potential degree of concern and controversy of the proposal.

9 *Public reporting* of assessment and decisions (unless explicit, stated limitations on confidentiality are given).

10 There is a need for *independent oversight* of process implementation, agency compliance and government-wide performance.

11 SEA should result in *incorporation* of environmental factors in policy making.

12 A policy of *tiering* to other SEAs, project EIAs and/or monitoring for proposals that initiate further actions should be implemented.

1 Initiating agencies are accountable for assessing the environmental effects of new or amended policies, plans and programs.

This is known as self-assessment. The advantage of this is that it is cost-effective for the responsible authority, and educative for the proponent. Provided the assessment is adequately reviewed by an independent body, the potential for bias is minimised (see 10 below). Section 146(1) of the Act does not state whether this is the approach to be taken for strategic proposals, as it merely provides that: 'The Minister may agree in writing with a person responsible ... that an assessment be made.' By analogy with ss 92–105, which require self-assessment by the designated proponent of actions in preliminary documentation, public environment reports and environmental impact statements, self-assessment should also *be required* for strategic proposals and should not depend on agreement between the minister and the person responsible.

There is considerable doubt as to whether s 146 actually applies to 'the environmental *effects of* ... policies, plans and programmes', as it refers to an assessment being made 'of the relevant impacts *of actions under* the policy, plan or program that are controlled actions.' 'Actions' are defined in s 523 as including:

(a) a project; and
(b) a development; and
(c) an undertaking; and
(d) an activity or series of activities; and
(e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

Section 524 describes 'Things that are not actions'. These are said to be 'a decision by each of the following kinds of person (government body):

(a) the Commonwealth;
(b) a Commonwealth agency;
(c) a State;
(d) a self-governing Territory
(e) an agency of a State or self-governing Territory;
(f) an authority established by a law applying in a Territory that is not a self-governing Territory.

It also states that 'A decision by a government body to grant governmental authorisation (however described) for another person to take an action is not an *action*.'

While it is not unknown for 'project' to be broadly defined to include policies, plans and programs,[11] it would not seem that this was the intention of the legislator given the matters cited for inclusion in s 523. Although there is no definition of 'decision' in the Act, it is likely that the ordinary meaning of the word would include policies, plans and programs. As these are commonly prepared by government bodies, SEA cannot therefore be said to apply to the impacts from them insofar as they are 'actions'. However, it is clearly nonsensical that the impacts of policies, plans and programs are not to be assessed under s 146; the logic is for SEA to assess the likely impacts of policies, plans and programs in order that the assessment of 'actions' (as defined above) may be streamlined.[12]

Common sense must prevail, and s 146 should be amended to replace the words 'of the relevant impacts of actions under the policy, plan or program' with the words 'of the relevant impacts of the policy, plan or program'. The Explanatory Memorandum to the Environment Protection and Biodiversity Conservation Bill 1999 helps clarify the matter to an extent. Although it also refers to 'an assessment of actions that may be carried out under a proposed policy, program or plan', it additionally refers to a strategic assessment 'of a policy, program or plan', indicating that it is the *impacts* of the policy, program or plan and not the *action* thereunder that must be assessed.[13] How to make clear that 'relevant impacts' are limited to matters of national environmental significance[14] — and overcome the use of the word 'action' in

11 See the definition in the *California Environmental Quality Act* 1970–1986 which includes plans and programs.

12 This is emphasised by Notes 1 and 2 of s 146(2)(g). Note 1 indicates that a less onerous approach for an assessment of an individual action under the policy, plan or program may be decided on, and Note 2 indicates that assessment of impacts from an accredited management plan (see s 33) may avoid the need for an assessment of actions approved by the management plan.

13 The Parliament of the Commonwealth of Australia, House of Representatives (1999) *Environment Protection and Biodiversity Conservation Bill 1999 Explanatory Memorandum* p 62.

14 These are the triggers under the Act: see Part 3 Division 1.

'controlled action' — remains a problem and needs further consideration by the legislative drafter.

2 *The assessment process should be applied as early as possible in proposal design.*

If impacts are assessed at the highest level of generality — in the policies, plans and programs that precede projects — then assessment processes can be streamlined. This is the concept of tiering and is subject to the minister's discretion under Notes 1 and 2 of s 146 (see footnote 12 and number 12 below). Applying the process at this time also complies with the precautionary principle, which is set out in s 136(3)(b)(ii). Unfortunately, s 146(1) only refers to 'adoption or implementation of a policy, plan or program'. If assessment only takes place after this time, the process is not being *applied as early as possible* in proposal design. Important decisions may already have been taken concerning need and alternatives which should properly form part of the assessment process; these decisions should not have been made before the assessment has begun.

3 *Scope of assessment must be commensurate with the proposal's potential impact or consequence for the environment.*

The scope of the SEA will affect the decision on the form of documentation to be used in the assessment of the individual actions thereunder. However, the range of reporting options for individual actions under s 87 are not applicable to strategic assessments. This is illogical. The potential for impacts from policies, plans and programs is far greater than the potential from individual projects (actions) because the former set the framework for the latter. In preparing SEAs, there should also be a choice of whether to proceed with preliminary documentation, a public environment report, an environmental impact statement or an inquiry. This could be decided by a committee established to screen strategic proposals against matters of national environmental significance.

4 *Objectives and terms of reference should be clearly defined.*

The general objective of SEA is the promotion of ecologically sustainable development (ESD), one of the objects of the Act as a whole laid down in s 3(1)(b). This is defined with reference to the principles of ESD in s 136(3) (see Part 2(c) below).[15] There is no mention of the objectives of SEA in the Act other than references to tiering in Notes 1 and 2 of s 146(2)(g). Under s 146(2)(aa), (ab) and (ac), terms of reference must be included for individual SEAs, and these should include objectives of the SEA being prepared.

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15 Note that these principles are unfortunately absent from the 1999 Act incorporating the final amendments. This appears to have been due to a drafting error.

5 *Alternatives to, as well as the environmental effects of, a proposal should be considered.*

There is no express provision for the consideration of alternatives in s 146 or in the Act as a whole. It is essential that this be included in the Act or in any regulations prescribed thereunder. Environmental effects of any alternatives (including the 'do-nothing' alternative) must be considered in the documentation prepared on proposals if policy choices are not to be pre-empted or foreclosed. The 1987 *Administrative Procedures* (Cth), setting out the content of an impact statement, contained this requirement, which should apply to both strategic and project proposals.

6 *Other factors, including socio-economic considerations, are to be included as necessary and appropriate.*

Economic and social matters are mandatory considerations to be taken account of under s 136(1)(b) in making decisions on approvals and conditions. There is no limit to these considerations; this is in sharp contrast to environmental issues, which are restricted to matters of national environmental significance. While there is some scope for strategic impacts to be assessed under s 146(1A) if they do not arise from matters of national environmental significance, there are important limitations. Impacts must arise from trade or commerce or the implementation of Australia's international obligations, they must occur in a state or territory, and the state or territory *must request* the involvement of the Commonwealth. While s 146(1A) therefore has potential to broaden the range of matters that may be considered, its use is likely to be extremely limited in practice (see also Part 2(b) below).

Other factors to be considered should also include cumulative impacts, which are related to strategic assessments in the SEA consultancy report.[16] There is no explicit provision for the consideration of cumulative effects in the Act. 'Relevant impacts' are to be assessed; these are defined in s 82 as impacts that the action 'has or will have or is likely to have'. Relevant impacts must be assessed under s 146(1) in the same way as for other actions. Under s 146(1A), the term is broadened to 'other certain and likely impacts' (not defined) to encompass the wider range of considerations than is afforded by the assessment of impacts from matters of national environmental significance. Both terms may arguably encompass cumulative impacts, and since the potential of these is great, they should not be overlooked.[17] (See also Part 2(e) below.)

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16 JD Court and Associates Pty Ltd and Guthrie Consulting (1994).

17 The Explanatory Memorandum makes specific reference to them in the commentary on s 146. See Parliament of the Commonwealth of Australia (1999), p 62.

7 Evaluation of significance and determination of acceptability is to be made against policy framework of environmental objectives and standards.

Environmental objectives and standards set out in the Act are the principles of ESD; these are found in s 136(3) (see Part 2(c) below and footnote 11). The Act screens proposals with reference to matters of national environmental significance in Part 3, Division 1. Under s 146(1), these requirements are also applicable to SEAs because of the reference to 'controlled actions' (see s 67).

8 Provision should be made for public involvement, consistent with potential degree of concern and controversy of proposal.

9 Public reporting of assessment and decisions (unless explicit, stated limitations on confidentiality are given).

The public must have an opportunity to be involved in the scoping phase of the assessment through the publication of draft terms of reference under s 146(2)(ab). Any comments received at this time must be incorporated into the final terms of reference under s 146(2)(ac). Following the publication of the draft report, the public must also be given an opportunity to comment on it under s 146(2)(b). Publication is required to be for at least 28 days (see also Part 2(f) below). These are extremely useful provisions, but are of course only activated if there is an agreement between the minister and the proponent.

While draft terms of reference and a draft report must be available for public comment, the same documentation options in s 87 are not applicable to strategic assessments (see 3 above and Part 2(f) below). While this creates confusion and unnecessary complication, it appears that it is to the advantage of public reporting and participation generally. While public scoping is only triggered by minister–proponent agreement under s 146, there is no automatic public involvement in preparing terms of reference for the documentation options under s 87. It is solely dependent on the discretion of the minister, who is invited to comment on the guidelines for draft public environment reports (s 97(1)(b)) and draft environmental impact statements (s 102(1)(b)). This is a distinct advantage to the environmental citizen who wishes to be involved from the outset in scoping assessment issues.

10 There is a need for independent oversight of process implementation, agency compliance and government-wide performance.

There is no independent oversight of either the SEA or EIA processes. This is a significant weakness of the Act, and while it remains there is potential for bias without adequate redress. Section 28 contains requirements for approval of activities of Commonwealth agencies significantly affecting the environment; however, this does not deal with concerns of partiality, as approval by the Environment Minister provides none of the independence needed. Independent oversight of many areas of Australian public environmental performance is lacking. While the establishment of reporting

mechanisms is to be commended, in the long term there is a need to establish an Australian Environmental Commissioner to evaluate each of these areas. This was a powerful recommendation made by many of the submissions to the Senate Committee at the beginning of 1999.[18] The Canadian Commissioner for the Environment and Sustainable Development and the New Zealand Parliamentary Commissioner for the Environment may be used as models in the development of such an office.

11 SEA should result in incorporation of environmental factors in policy-making.

This is only common sense, and s 146(2)(f) provides for the endorsement of the amended policy by the minister if it adequately addresses the impacts and any modifications made as a result of their likelihood. While environmental factors should be considered on a par with economic and social factors, under s 136(I)(b), economic and social factors are 'mandatory considerations' the minister must take account of, yet under s 136(2)(a) the principles of ESD are only 'factors to be taken into account'. It is therefore not certain whether the latter assume a lesser significance than the former. If so, this must be wrong, as ESD is highlighted as one of the objectives of the Act in s 3(1)(b) (see also 6 above).

12 Tiered to other SEAs, project EIAs and/or monitoring for proposals that initiate further actions.

Tiering is provided for in Notes 1 and 2 of s 146(2)(g) and is a useful way to avoid unnecessary overlap and duplication. Monitoring is a significant weakness of s 146 and the Act as a whole. Although provisions for monitoring are present in Part 17, Division 3, these are limited to practical measures for enforcement. The most appropriate monitoring mechanism in the Act is the provision for environmental audits to be carried out in Part 17, Division 12. Monitoring in general needs to be given greater emphasis (see Part 2(f) below).

Part 2: Implementation of the Recommendations of the 1994 Consultancy Report

In 1994, a report was released following the public review of the Commonwealth EA process.[19] This report made recommendations under four heads: policy; administrative measures; legal measures; and resource implications. The legal measures recommended the introduction of an

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18 Senate Environment, Communications, Information Technology and the Arts/Legislation Committee (1999) *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998 — Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee, April 1999*, Commonwealth of Australia.

19 JD Court and Associates Pty Ltd and Guthrie Consulting (1994).

Ecologically Sustainable Development Bill with a division for SEA. The Act incorporates many elements of this ESD Bill, as it uses a framework of ESD to guide EIA and biodiversity conservation. Seven individual recommendations were made for incorporation into the SEA division, as set out in Table 2.

Table 2: Provisions for Incorporation in the SEA Division of the proposed ESD Bill

It is recommended that provisions be incorporated in the SEA Division:

a to require that strategic environmental assessments be undertaken on all legislation presented to the Parliament where triggered by designated screening criteria;

b to require that strategic environmental assessments be undertaken on all new government programs of a designated type and/or having an expenditure above a designated value;

c to allow ecologically sustainable criteria to be established in subordinate legislation against which SEA of legislation, policies, plans and programs will be assessed;

d to establish triggering criteria in subordinate legislation of the type listed in Section 8.2.2(a).

e to establish administrative procedures and scientific methods of assessment for CIA analysis to be followed by sponsoring ministers and their agencies of the type listed in Section 8.2.2(b);

f to require that the SEA analyses be individually exposed to public review subject to prescribed confidentiality tests on an annual basis by tabling a summary report of SEAs to the federal Parliament;

g to allow progressive implementation of the requirement by region, sector, industry type, affected ecosystem type, or other appropriate determinant.

a To require that strategic environmental assessments be undertaken on all legislation presented to the Parliament where triggered by designated screening criteria

Section 146 should be applied to legislation, as it is often used to implement strategic proposals. At present there is no specific requirement for this, and no definition of policies, plans and programs to indicate whether legislation is included. The absence of a definition is perhaps due to the difficulty of determining when a policy, plan or program comes into effect. This lack of certainty may prevent the useful application of the s 146 requirement as it

stands. Legislation does not have the uncertainties of policies, plans and programs; applying SEA to bills can utilise the existing legislative process of drafting and approval.[20] It should not, however, be assumed that a law aimed at environmental improvement will automatically be beneficial; there may be adverse effects which are not clear.[21] All legislation should therefore be screened for potential impacts.

There is a requirement in the *Cabinet Handbook* for ESD to be considered in submissions made to cabinet.[22] While there is no requirement for an environmental impact statement to be prepared, there is no reason why there should not be, as impact statements are routinely prepared on Business Regulation and Legal Services.[23] Once a bill is prepared and approved by cabinet, the impact statement should also accompany its passage through Parliament. There is a requirement for a Financial Impact Statement to accompany legislative proposals, and the Act contains such a statement within the Explanatory Memorandum. While environmental considerations are addressed to a certain extent, there is a need for this to focus on each of the three dimensions of ESD and fully address environmental, social and economic matters.

In their comments to the Senate Environment Committee, the Australian Democrats recommended that SEA be applied to legislative proposals. Despite this, it did not form part of the amendments made to the Bill prior to its passage on 23 June 1999:

> The Australian Democrats also believe that legislative proposals should be subject to strategic assessment. The Australian Democrats do not consider that this will create an unnecessary administrative burden, given that the Government already requires a regulatory impact statement to be prepared for all legislative proposals that have an impact on business or competitiveness. In fact, the assessment of environmental impacts at an early stage of the legislative process will produce savings for government and community, which will be spared the expense of reversing or repairing any environmental damage resulting from legislation.[24]

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20 S Marsden (1998b) 'Importance of Context in Measuring the Effectiveness of Strategic Environmental Assessment' *Impact Assessment and Project Appraisal* 16(4), pp 255–66.

21 Scott Wilson Resource Consultants (1996) *Environmental Impact Assessment: Issues, Trends and Practice*, United Nations Environment Programme, p 60.

22 Department of Prime Minister and Cabinet (1994) *Cabinet Handbook*, AGPS, cll 5.40, and 5.41.

23 S Marsden (1997) 'Applying EIA to Legislative Proposals: Practical Solutions to Advance ESD in Commonwealth and State Policy-Making' *Environmental and Planning Law Journal* 14(3), p 164.

24 Senate (1999) p 207.

b To require that strategic environmental assessments be undertaken on all new government programs of a designated type and/or having an expenditure above a designated value

While the Act does not require SEAs to be carried out on programs above a designated value, the criteria in Part 3 for matters of national environmental significance set out the designated types of all proposals that are to be assessed. The main criticisms of designation in the Act are that it unfairly restricts environmental matters where social and economic matters are not; that other matters of national environmental significance could arguably also have been included; and that there is far too much discretion available to the minister.

The first criticism derives from the requirement in s 136(b) that economic and social matters are mandatory considerations without limit, but environmental matters are only mandatory insofar as they relate to Part 3, Division 1. While it may be legitimate and appropriate for the role of the Commonwealth to be limited in environmental matters, by analogy this should also be the case in economic and social matters, many areas of which are also within the control of the states. The second criticism is directed to the exclusions from the matters of national environmental significance which arguably should be included. Forestry practices and environmental matters of relevance to a number of states (such as the Murray-Darling Basin) are obvious examples.[25] The third criticism is at the heart of the Act. Ministerial discretion should be restricted in s 146 by establishing a Parliamentary committee to screen strategic proposals against matters of national environmental significance. Those proposals which are believed likely to have significant potential impacts could then be subject to a mandatory process of assessment, which should take one of the four forms set out in Part 8, Division 3. With regard to the assessment of bills, the Dutch government has successfully established a committee to screen proposals in this way.[26]

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25 Although approval is not required for forestry operations permitted by the Regional Forestry Agreements process (RFA), if an RFA had not been concluded for a region by 1 January 2000, approval will be required (see s 40).

26 Ministry of Housing, Spatial Planning and the Environment (1996) *Environmental Test: Points of Interest for the Testing of Draft Regulations on Environmental Effects*; Y de Vries and J Tonk (1997) 'Assessing Draft Regulations — The Dutch Experience' *Environmental Assessment* 5(3), pp 37–38; S Formsma (1997) 'The Dutch Approach: Carrot and Stick', paper for the Quality of European and National Legislation and the Internal Market conference, session III: Assessment of Draft Legislation; and S Marsden, 'Legislative EA in the Netherlands: the E-Test as a Strategic and Integrative Instrument', (1999) *European Environment* 9 (3), pp 90–100.

c To allow ecologically sustainable criteria to be established in subordinate legislation against which SEA of legislation, policies, plans and programs will be assessed

Section 136 incorporates principles of ESD into the Act itself, which is to be commended (but see footnote 11). While a number of important principles are present, others are unfortunately absent. These include the public trust doctrine (which imposes a duty to hold the environment in trust for the benefit of the public), the subsidiarity principle (whereby decisions are taken by the communities most closely affected by them) and the polluter and user pays principles (which require the true cost of the use of environmental resources to be accounted for). The first two are addressed to some extent by ss 3(a)(i) and 3(b)(i) and (vii), but these do not go far enough and should be stated more clearly. The polluter and user pays principles are completely absent. Although there is reference to cost-effectiveness in s 3(b)(iv), the Act should be amended to ensure their specific inclusion. The Financial Impact Statement included in the Explanatory Memorandum to the Bill makes much of the benefits of the environment often being used without charge; the polluter and user pays principles are directed at remedying this inequity.

d To establish triggering criteria in subordinate legislation of the type listed in Section 8.2.2 a) above

Section 8.2.2(a) sets out a number of ways which could be used to screen proposals; these are divided into two categories. The first specifies the screening analyses that could be used by proposers of policies, plans and programs; the second lists policies, plans and programs which require mandatory analysis. The government's decision to include screening criteria within the Act is a positive one to overcoming uncertainty, provided they are seen in the light of the comments made in (b) above.

e To establish administrative procedures and scientific methods of assessment for CIA analysis to be followed by sponsoring ministers and their agencies of the type listed in Section 8.2.2(b)

Cumulative impact assessment (CIA) is the evaluation of effects from proposals which in combination may exceed the sum of the individual effects. The Act does not give adequate attention to this important issue, which was also discussed at length in the 1994 SEA consultancy. There is no requirement to consider them, and the only mention appears in the Explanatory Memorandum reference to SEA (note 296), which refers to cumulative impacts 'of relevant individual actions'. There should be a specific requirement to consider them in all circumstances, possibly by their inclusion in guidelines that could be prescribed by regulations under s 146(2)(g).

f To require that the SEA analyses be individually exposed to public review subject to prescribed confidentiality tests on an annual basis by tabling a summary report of SEAs to the federal Parliament

Public participation requirements in the Act are weak and based on discretion, and this is true of both SEA and EIA. Under s 146, the public have no right to refer proposals for assessment. An assessment is only required by agreement between the minister and the proponent after screening the proposal against the matters of national environmental significance. While the public have an opportunity to comment on the terms of reference for any report and the report itself, the public should also have an opportunity to refer significant strategic proposals for assessment, as they may be in the best position to know what effects proposals may have on their communities; the public should also be given a range of opportunities to comment. Regulations to be passed under the Act should include provisions for both of these matters.

If environmental impact statements were prepared on bills presented to Parliament, they would automatically be exposed to public review. This is a major reason why it is important that legislation should be assessed, and that assessment documentation should not be limited to proposals submitted to the government (where issues of Cabinet confidentiality arise); instead, documentation should also be made available to the Parliament, as the body of review. A requirement for a summary report to be tabled to Parliament on SEAs could supplement this. This could be prepared by the Parliamentary committee screening all legislative proposals, and it would form the basis of an audit that could be prepared at a later time. In this way, the appropriate checks and balances would exist to ensure that equity concerns were adequately met.

g To allow progressive implementation of the requirement by region, sector, industry type, affected ecosystem type, or other appropriate determinant

This final recommendation emphasises the need for SEA to be implemented gradually. While each of the determinants suggested above has merit, the important thing is that all proposals have potential for impact, and this does not depend on whether their object is environmental protection or not. The Dutch approach to the application of SEA to legislative proposals does not prevent assessment of other types of policies at a later time. A flexible approach is needed to deal with the many complex different issues involved, including the context within which different proposals are prepared and assessed.[27]

Fisheries management has been singled out for the specific application of the SEA requirements in ss 147–154. The reason for this is that it enables the existing policies and plans approved under the *Fisheries Management Act* 1991 and the *Torres Strait Fisheries Act* 1984 to be accredited. The provision

27 Marsden (1998b).

for SEA is used to avoid the need for further approval under Part 9 of the Act (which protects the marine environment). Sections 147–154 therefore add nothing to the SEA requirements under s 146, and are included in the Act for legislative convenience.

Part 3: Conclusions and Recommendations

The legal implementation of SEA requirements by the Commonwealth is a commendable step in the right direction. Most of the other countries with recent SEA provisions have opted for policy implementation until further experience is gained. While the extensive use of ministerial discretion in s 146 denies much of the certainty and transparency that a legal framework should bring, the legal requirement is a useful introduction to such an important multidisciplinary instrument of environmental policy, planning and management. SEA in Australia has significant potential to make a contribution to the advancement of ESD, and if supplemented by adequate guidelines prescribed through regulations, it may at last amount to more than an afterthought.

Regulations should be introduced to require strategic assessments to set out specific objectives, consider alternatives and cumulative impacts, and include more detailed provisions for public participation. The Act should be amended to ensure it does apply to the impacts of strategic proposals, that it includes the polluter and user pays principles in s 136(3), limits the economic and social matters which must be had regard to in s 136(1), includes other areas of national environmental significance in Part 3, and provides clearly for self-assessment in s 146(1).

Above all, s 146 should require strategic assessment of Bills, as recommended by the consultancy report and the Australian Democrats. There is great potential for environment protection if Bills are assessed for their environmental impacts during the drafting and approval stages. This is the most serious omission of s 146, and one which should not be overlooked. Effective strategic assessments of draft legislation comply with many of the international principles through the legislative process. National environmental significance should be decided by a committee, with alternatives and public participation an enhanced feature of the Parliamentary process. If this is done, the legislature may be able to provide the independent oversight that is so urgently needed.

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