# 2018 symposium for IA practitioners and researchers: Reimagining approvals - Strategic approaches to support Impact Assessment’

# IA Jurisdictions updates

## Northern Territory

##### Lisa Bradley, Director Environmental Assessment, Department of Environment and Natural Resources

The Northern Territory Environment Protection Authority (NT EPA) administers the *Environmental Assessment Act* in the NT. The NT EPA is an independent statutory authority made up of an independent Chair and five members. Secretariat services and staff to support the functions of the NT EPA are provided by the Department of Environment and Natural Resources (DENR).

The DENR is progressing Government’s agenda of environmental regulatory reform, including contemporising legislation for EIA and waste management and pollution control in two stages. The first stage will include provisions for EIA, with new legislation expected to be introduced in late 2018. Proposed EIA legislation will strengthen referral processes; introduce offences and penalties for non-compliance; introduce provisions for strategic assessments; and provide for an environmental approval.

In parallel with regulatory reform activities, over the past year the Department has transformed its approach to EIA, implementing standardised assessment methods based on assessment against the NT EPA’s environmental objectives for the Northern Territory. This has introduced greater rigour in the assessment of EIA documentation, and allows for greater consistency across different types of projects.

In 2017, the NT EPA completed six project assessments with the release of the assessment reports for:

* two aquaculture projects which are components of the Project Sea Dragon prawn farm
* the Jemena Gas Pipeline
* a new rural/urban master planned development
* a greenfield mine targeting rare earths
* a combined salt mine/hazardous waste storage facility and deep geological repository.

The mining industry accounts for more than half of projects under assessment in the NT. In the past year the NT EPA has focussed on ensuring that greenfield mining development in the Territory integrates mine closure planning with mine planning, including best practice closure and rehabilitation requirements prior to authorisation. The NT EPA is also of the opinion that progressive rehabilitation should be implemented as a part of project planning and operations. In response to concerns about the potential for mining projects to cause permanent drawdown of scarce groundwater resources, the NT EPA has focussed on sustainable water use by mining projects in semi-arid and arid zones. For example, by requiring such projects to respond appropriately and responsibly to water scarcity by establishing transparent corporate water governance.

With new environmental impact assessment legislation being drafted in the Northern Territory, 2018 will be an exciting year for the NT EPA, government and EIA practitioners.

## Queensland

##### Geraldine Squires, CEnvP Impact Assessment Specialist, Team Lead (Acting) – Environmental Assessment, GHD

Impact assessment (IA) / environmental assessment (EA) is still largely undertaken as a result of the need to achieve an environmental approval for a policy, plan, business case, project or action, that is there is a legislative driver (for the land use, activity, access to land acquisition powers or public funding approval).

#### What’s new since we last met?

Under the *Environmental Protection Act 1994* (EP Act), standard conditions or codes of environmental compliance have been developed to manage environmental impacts for a growing number of projects/activities eg. wind farms, mining activities (small-scale, exploration, etc.), petroleum and geothermal activities (exploration, survey, pipelines, etc.), sewage treatment, extractive industry, etc. Meeting the conditions set is the focus (for design compliance) as opposed to undertaking an assessment of the impacts and the application of avoid, mitigate, manage and/or offset actions being applied.

The first project has been declared to use the impact assessment report (IAR) process as an alternative to the EIS process under the *State Development and Public Woks Organisation Act 1971* (SDPWO Act). The intent is for the IAR to deal only with critical issues in relation to environmental impacts. No terms of reference are developed. The IAR is publically notified.The IAR process is accredited through the bilateral assessment agreement between State and Commonwealth to address matters of National environmental significance (MNES) under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Planning reform has concluded. The *Planning Act 2016* (Planning Act) supersedes the *Sustainable Planning Act 2009*. Consistent with its predecessors, environmental assessment under the Planning Act is a response to codes and do not require EIS. Impact assessment and/or public notification is not required for a large number of assessments. Most renewable (solar, hydro) projects are developed based on environmental compliance with codes. Impact assessable development is defined under the Planning Act but has limited application as they are defined as impact assessable due to the inconsistency with predictable land use outcomes rather than the potential to result in significant environmental harm

The *Strong and Sustainable Resource Communities Act 2017* will commence on 30 March 2018. It has been introduced to principally regulate the use of fly-in-fly-out (FIFO) on operational large-scale resource projects and align social impact assessments undertaken through the EP Act and SDPWO Act.

* There is an increased requirement to assess impacts on the Great Barrier Reef World Heritage Area in response to increased environmental pressures and agreements between the Commonwealth and State governments to achieve UNESCO targets.
* There continues to be a lack of rigorous or meaningful assessment with regard to cumulative impacts.
* Only a single Strategic Environmental Assessment has been completed in Queensland.

 In very simple terms, an EIS is undertaken for:

* Large scale projects with potentially significant Commonwealth interests (MNES) where the bilateral assessment agreement is adopted and there is inherently a lot of duplication in addressing of State and Commonwealth issues
* For large scale mining and petroleum projects, particularly where there is infrastructure off lease (roads, rail, port, etc.)
* Large scale infrastructure developments that are not State-owned
* Bulk water supply infrastructure (dams, weirs, pipelines)
* Port/marina/dredging type projects

 There is very limited impact assessment or environmental assessment undertaken for urban development projects. The nature and scale of these projects enables the use of standard conditions and environmental compliance codes. The system for this type of project is deliberately less prescriptive in response to industry dissatisfaction with onerous regulation. A regular review of performance criteria to ensure that the principles of IA are being appropriately met on projects to demonstrate compliance with conditions is still ever present.

## Australian Capital Territory

##### David Hogg

Impact assessment (IA) in the ACT is complicated by having two different authorities responsible for planning and development decisions. Most of the land in the ACT is Territory Land under the control of the ACT Government but, under the National Capital Plan, some areas which exhibit special characteristics of the National Capital are known as ‘Designated Areas’, where works approval is the responsibility of the National Capital Authority (NCA). Designated Areas include the Parliamentary Zone, major approach routes, the inner hills, some defence institutions and the Australian National University.

Within the ACT Government, the responsibility for IA lies with the Environment, Planning and Sustainable Development Directorate. This Directorate undertakes planning at both the strategic and local level, and is separately responsible also for assessing development applications for individual projects, both government and private. Under the ACT *Planning and Development Act* 2007 development applications are streamed into one of three tracks:

* Code track – minor works, typically involving a single dwelling, where environmental issues are generally of minor importance.
* Merit track – larger developments (e.g. multiunit dwellings) which may require some form of environmental assessment or management but not a formal EIS.
* Impact track – developments requiring an EIS on the basis of either the type of development or the nature of anticipated impacts.

In addition, all proposed developments are potentially subject to the *Environment Protection and Biodiversity Conservation Act (EPBC Act)*, both in relation to Matters of National Environmental Significance (MNES) and matters with Commonwealth implications (e.g. action by a Commonwealth authority or impact on Commonwealth land). There is provision for bilateral assessment in situations where both ACT and Commonwealth procedures are triggered. Developments requiring NCA works approval are subject only to the *EPBC Act*.

In practice, a large proportion of the environmental planning and assessment work in the ACT takes place outside the statutory frameworks, as part of the ongoing planning and design process. Such work commonly provides the background information for formal IA processes, if required. The approaches adopted often include community consultation outside the above statutory processes, although there are community consultation requirements in relation to Variations to the Territory Plan, which commonly address environmental issues.

EISs are relatively uncommon in the ACT, due partly to the provision under the *Planning and Development Act* for the Minister to grant EIS exemptions in situations where other planning processes have adequately addressed the relevant issues. If an EIS is required, the proponent needs to apply for an EIS scoping document prepared by the Planning and Land Authority. The proponent prepares and lodges a draft EIS which is exhibited publicly, and is then revised following public and agency comment. The revised EIS is then assessed by the Authority which prepares an EIS assessment report for the Minister. In rare situations, the Minister may decide to establish an independent inquiry panel to consider the EIS in further detail.

In practice, the most common type of formal IA in the ACT is through referral under the *EPBC Act*, usually in relation to MNES, which are usually threatened species or ecological communities. Many of these species and communities are relatively common in the ACT, as a result of strategic planning decisions taken over several decades, which have resulted in a high level of protection. Historically, the majority of referrals in the ACT have been made on a precautionary basis and have been determined to be Not Controlled Actions. In the case of Controlled Actions, further IA under the *EPBC Act* can include assessment based on referral information, preliminary documentation in accordance with Commonwealth scoping guidelines, and occasionally bilateral assessment if an EIS is prepared under the ACT *Planning and Development Act*. Because of the limited scope of the *EPBC Act*, such assessments are generally not comprehensive but are focused on MNES, except in situations where Commonwealth land or decisions form a trigger, as is often the case for proposals requiring NCA works approval.

There have been two examples of strategic environmental assessment under the *EPBC Act* in the ACT. There is provision also under the ACT *Planning and Development Act* for strategic environmental assessment, but this tends to be a less formal process, and has been ingrained into Canberra’s planning and development throughout most of its history.

## Victoria

##### Kathy Friday, Impact Assessment Unit, DELWP

**Impact assessment team responsibilities and context** – the Impact Assessment Unit (IAU) is responsible for the Environmental Impact Assessment (EIA) system for major projects in Victoria, on behalf of the Minister for Planning. Core functions / responsibilities of IAU are to implement:

* The EIA system for projects under the Environment Effects Act 1978 (EE Act) - i.e. referrals and assessments.
* Assessment Bilateral Agreement between the Commonwealth and the State under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) (i.e. advice on referrals and accredited assessments).
* Implement major transport projects approvals under the *Major Transport Projects Facilitation Act 2009*.

IAU resides within the Statutory Planning Services Division of the Department of Environment, Land Water and Planning.

**Our team** - a director, two principal advisers (Impact Assessment and Transport Projects), five senior impact assessors, two impact assessors and one planner.

**EE Act referrals** – decisions on whether assessment is required under the EE Act via an environment effects statement (EES), Environment Report or other conditions.

The number of EE Act referrals, project types and decision types for 2017 is typical of other recent years.

**EE Act assessments** – ten EESs were progressed under EE Act during 2017. A number of other projects being assessed by Environment Report or conditions under the EE Act were also progressed during 2017.

The number of EESs and project types progressed during 2017 is typical of other recent years. It is notable for 2017 that a number of projects were progressed through early stages of the EES process and with these moving to later assessment stages during 2018. Two major transport project EESs (West Gate Tunnel - road and Melbourne Metro Tunnel – rail) dominated the later assessment stages for 2017.

**Reforms associated with the EE Act**

Victorian Auditor-General's Office audit report tabled in Parliament in early 2017 – largely supportive of how the EE Act is being implemented and included eight recommendations. Some have been addressed while others are at an early stage of being addressed.

Smart Planning Initiative – part way through developing systems and tools to improve efficiency of engagement with project proponents across the Victorian planning and approval system.

**EPBC Act referrals** - co-ordinating Victoria’s input/advice to the Commonwealth on 41 decisions on whether assessment is required under the EPBC Act (controlled action (CA), not a controlled action if undertaken in a particular manner (NCAPM), not a controlled action (NCA) or decision pending).

The number of project types being referred in Victoria under the EPBC Act has broadened over recent years.

**EPBC Act Assessments** - accredited assessments under EPBC Bilateral were progressed for ten Victorian projects during 2017:

* EES for five projects.
* Environment Report under EE Act conditions for two projects.
* Planning permit process for two projects.
* Heritage Act permit process for one project.

## South Australia

##### Nathan Zeman, Principal Mining Assessment Officer, Mining Regulation Branch, Department of the Premier and Cabinet

Mining Act 1971

* [Leading Practice Mining Act Review](http://minerals.statedevelopment.sa.gov.au/mining/leading_practice_mining_acts_review) – Statutes Amendment (Leading Practice in Mining) Bill 2017 was introduced into Parliament for consideration in October 2017, proposing balanced changes to mining legislation to better protect landowners and the environment, as well as increase transparency, red tape reduction and attract investment to South Australia. The Bill was drafted based on more than 130 written submissions and targeted engagement with more than 1,700 stakeholders. The Bill has subsequently lapsed due to the incoming State Government election being held on 17 March 2018. A new Bill will be reintroduced to Parliament with Cabinet approval following the election. This is intended to be substantially the same as the previous Bill.

Petroleum and Geothermal Energy Act 2000 - South East Gas study

* SA Government is partnering with CSIRO GISERA (Gas Industry Social and Environmental Research Alliance) to conduct a major scientific study into the social and environmental impact of the onshore gas industry in the Otway Basin in the states South East.
* This comes as the government fast-tracks new gas exploration areas in the South East in an attempt to increase the supply of gas into South Australia’s energy market and increase competition between gas suppliers. The SA gas incentives form part of the New Energy Plan for SA announced in March 2017.

Planning, Development and Infrastructure Act 2016

* The Planning, Development and Infrastructure Act 2016 establishes a modern planning system that will come into operation over a 5-year period. This replaces the Development Act 1991 and other planning legislation.
* Section 113 of the PDI Act sets out the EIS process in relation to impact assessed development.
* The PDI Act introduces Environment and Food Production Areas (EFPAs) to protect valuable food producing and rural areas as well as conserving prized natural landscapes, and tourism and environmental resources from urban sprawl

Recent Major Impact Assessments

* Closure of the [Pt Augusta Power Station](http://www.epa.sa.gov.au/business_and_industry/industry-updates/flinders-power-port-augusta) (Flinders Power) and [Leigh Creek Coalfields](http://minerals.statedevelopment.sa.gov.au/knowledge_centre/mesa_journal/feature_articles/leigh_creek_mine_remediation) (Alinta) – See public Assessment Report
* Closure of the Dry Creek Salt Fields – See [public PEPR](https://sarigbasis.pir.sa.gov.au/WebtopEw/ws/samref/sarig1/image/DDD/PEPR470606.pdf)
* [Carapateena Copper Mine](http://minerals.statedevelopment.sa.gov.au/mining/mines_and_quarries/carrapateena) – EPBC Bilateral Assessment - See public Assessment Report
* [Campoona Graphite Mine](https://sarigbasis.pir.sa.gov.au/WebtopEw/ws/samref/sarig1/image/DDD/MP3741269.pdf) (including use of HF Acid) – See public Assessment Report

Upcoming Major Impact Assessments

* [Dredging application to widen Outer Harbor channel](http://www.epa.sa.gov.au/business_and_industry/industry-updates/flinders-ports) – application currently being assessed under the Development Act 1993
* [Bird in Hand Gold Mine](http://minerals.statedevelopment.sa.gov.au/mining/mineral_projects/bird-in-hand_gold_project) – Mining Lease application to be assessed under the Mining Act 1971
* [Leigh Creek Energy – In Situ Gasification](http://www.petroleum.statedevelopment.sa.gov.au/latest_updates/invitation_for_public_comment_-_seoeir) – application for ISG demonstration Plant currently out for statutory consultation under the Petroleum and Geothermal Energy Act 2000

## New South Wales

##### Brian Cullinane, Director, EME Advisory

**EIA Improvement Project for State Significant Projects – Update (February 2018)**

***Purpose***

The NSW Department of Planning and Environment (the Department) is undertaking a review of environmental impact assessment (EIA) for State significant projects in NSW (the EIA Improvement Project).

The purpose of the EIA Improvement Project is to:

* identify areas where EIA can be improved across the entire project cycle, including before and after approval, while working within the existing legal framework of the Environmental Planning and Assessment Act 1979 (the Act)
* set out the Department’s expectations about the form and content of the Environmental Impact Statement (EIS) and other EIA documents, recognising the primary role of EIA is to provide decision-makers with the information needed to make sound planning and environmental decisions
* improve opportunities for public participation in EIA and clarify how feedback is taken into account in project development and decision-making
* strengthen planning and environmental outcomes by creating a clearer link between the identification and assessment of impacts, conditions of consent and actions to manage impacts during construction and operation
* build community and stakeholder confidence in EIA and decision-making
* provide industry with greater certainty about EIA timeframes and expectations for information to be contained in EIA documents

***Draft Guidelines***

Eight Draft Guidelines were exhibited between July and September 2018 and are currently being updated in response to submissions received from community, industry and government and feedback provided at a number of regional roadshow events. The 8 Draft Guidelines are:

* Community Guide to EIA
* Scoping an Environmental Impact Statement
* Preparing an Environmental Impact Statement
* Responding to Submissions
* Community and Stakeholder Engagement
* Approach to Setting Conditions
* Modifying an Approved Project
* Peer Review

The Draft Guidelines (as exhibited) can be found here: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Environmental-Impact-Assessment-Improvement-Project/Proposed-changes>

Two additional guidelines are also being prepared:

* Cumulative Impact Assessment in EIA
* EIS Signatories Certification

The finalisation of the additional Guidelines will involve ongoing consultation with community, industry and government.

A series of documents to support the implementation of the Guidelines is also being prepared.

It is intended that the full suite of Guidelines will be finalised and ready for approval by the middle of 2018.

## Western Australia

##### Garry Middle, VisionEnvironment

#### Policies and procedures

The most significant changes to EIA in WA over the last couple of years has been the supreme court decision on the EPA’s assessment of Roe Highway Stage 8, and the subsequent fall out of that decision. The court case centred on the significance and status of EPA policies. In summary, Roe Highway Stage 8 would have passed through some remnant bushland and wetlands – the wetlands are of most significance here. The EPA has an offsets policy which sets out when offsets could be considered by the EPA, and notes that direct impacts on important wetlands should be avoided and offsetting shouldn’t be considered where proposals could impact on any important wetlands – in short, impacts are to be avoided not offset.

If the EPA was consistent with that policy, it should have said ‘no’ to the proposal. Instead, it recommended approval subject to an offset, but the report did not give a reason as to why the EPA did not adhere to its policy. The initial Supreme court ruling found that the EPA erred in its report, and, subsequently, the approval by the Minister was also flawed. The Government appeal the decision which was overturned in part. The key outcomes of all of this – including and re-assessment and advice to the EPA on its process and procedures - are as follows:

* Whilst policies are not binding, they are the default position, and the EPA needs to make clear the reasons why a policy is not adhered to; and
* The policy framework of the EPA is confusing and need to be reviewed.

The EPA went through a thorough review of its policies throughout 2017 and sought feedback from stakeholders and the community. Staff training on the new framework was carried out. Their assessment reports now are much more clear on how policies are applied, and, where a policy is not adhered to, the reasons for that are now clearly explained. These decisions sent ‘shockwaves’ through all decision-making processes in WA and the relevant agencies have done a similar review of their assessment and decision making to ensure the same level of transparent deliberations.

#### Strategic assessments

Two significant SEAs are currently being carried out. The first is the SEA of BHP Billiton Iron Ore. The company has prepared a Strategic Proposal of its future operations in the Pilbara for the next 50 to 100 years. The Strategic Proposal will facilitate a more holistic and longer term view of mining activities in the Pilbara region by identifying and assessing how impacts to the environment at a landscape scale will be managed. The EPA has yet to complete its assessment of the proposal.

The second on of the WA Planning Commission’s strategic plan for the growth of the broader Perth Region - Perth and Peel @ 3.5 million. This is being assessed by the Commonwealths under the EPBC Act, and the WA EPA, not a s formal SEA but an informal assessment using Section 16 (e) of the EP Act.

#### Yeelirrie Project assessment

The final decision making for this project will have a more significant impact on the EIA proves in WA than the Roe Highway Stage 8 proposal.

The Yeelirrie project is an open pit uranium mine located about 400km north of Kalgoorlie. In its assessment of the project, the EPA found that the proposal was unacceptable because of likely impacts on Subterranean fauna. The proponent subsequently appealed that assessment – appeals are to the Minister, who takes advice from the Appeals Convenor. The Appeals Convenor found that the EPA’s assessment was sound, and the Minster agreed with that advice and dismissed the proponent’s appeal – in effect, the Minister agreed with the EPA that the proposal would have unacceptable environmental impacts. However, the Minister, in consultation with the other decision making authorities – Ministers – found that the proposal could be implemented taking into account broader socio-economic considerations. Not surprisingly, the Conservation movement in WA took that decision to the Supreme Court.

It’s worth pointing out that in the 30 years of the operation of the EPA Act, that the accepted practice is that the EPA assessment, the appeals process and the final Ministerial decision making are both sequential and strongly linked. This means that the EPA assessment report is the default position subject to fine tuning in the other two steps. The EPA’s assessment has two parts to it – or questions – is the proposal environmentally acceptable; and, if so, what conditions should be set? The appeals process is about these two questions, with most focus on the conditions. In determining the appeals, the Minister fine tunes the EPA’s recommendations and then moves on to consult with fellow Ministers. Braider socio-economic considerations come into this discussion, as ‘add-ons’ to the environmental conditions. The practice has also been that when the EPA finds a proposal to be environmentally unacceptable, the Minister deals with that issue through appeals, and will only proceed to approve such a proposal by first finding the EPA erred in its assessment and in the Minister’s opinion the proposal is environmentally acceptable. The Minister’s decision on Yeelirrie has turned that accepted practice and understanding of the Act on its head.

Unfortunately, Justice Martin of the Supreme Court found as follows:

(a) the Minister did not in fact decide on appeal that the proposal should not be implemented;

(b) the Minister had no power to decide on appeal that the proposal should not be implemented; and

(c) even if the Minister had lawfully decided on appeal that the proposal should not be implemented, that decision would not prevent the Minister and/or other decision-makers from deciding that the proposal should be implemented having regard to the broader considerations properly taken into account pursuant to s 45 of the Act.

The decision was handed down just a few days ago and I am still digesting what this means. My initial thoughts are:

* The EPA assessments now have little relevance to the decision as to whether a proposal should proceed or not;
* Appealing an EPA assessment is an academic exercise now – what’s the point of appealing?
* The Minister for Environment is required to get agreement on project implementation – how can he/she agree to approving a proposal when he/she has found under appeal that a proposal is environmentally unacceptable? What ‘hat’ is he/she wearing?
* In getting agreement, the Ministers can take into account broader socio-economic considerations -this is an informal process that is opaque, and there is no documentation explaining how that decision was arrived at. This is the most important step in the whole process and lacks any transparency, and accountability is at best hidden.