

4 December 2012

Hon. Tony Burke MP
Minister for Sustainability, Environment,
Water, Population and Communities
PO Box 6022
CANBERRA ACT 2600
By email Tony.Burke.MP@aph.gov.au

Dear Minister Burke

Melbourne Strategic Assessment: Non-Compliances with Program Report

We write on behalf of a number of Victoria's peak environment groups, listed below, to raise concerns about the Victorian Government's implementation of the Melbourne Strategic Assessment, which is currently being undertaken under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).

It is our clients' view that, to date, the Victorian Government has failed to comply with the Program Report endorsed under the Assessment process¹ in a number of respects. Our clients have previously raised some of these non-compliances with your Department in meetings, and in letters to you, over the past 12 months.

We understand that the Victorian Government has recently, or is about to, seek approval of a Biodiversity Conservation Strategy and two Sub-Regional Species Strategies and, subject to your approval of these documents, your approval under section 146B of the EPBC Act to proceed with the urban development of four new growth areas within the new Urban Growth Boundary.

The Victorian Government's non-compliances, identified in this letter, translate to serious negative impacts on the environmental values intended to be protected by the EPBC Act, and undermine the strategic approach to environmental protection that underpins the Melbourne Strategic Assessment process.

Relevant to the approvals sought by the Victorian Government, we note that under section 146B of the EPBC Act you can only approve actions that are in accordance with the endorsed Program Report. Therefore, if the issues raised below are not rectified, we are of the view that you cannot lawfully grant approval to development in the new growth areas under section 146B, as the developments will not be in accordance with the endorsed Program Report.

We have set out below a summary of each of the environment groups' concerns; what we understand the Program Report to require, and the ways in which we consider the Victorian Government has failed to comply with these requirements. In each case, we have set out steps that, in our clients' view, could rectify the non-compliances. We request that these steps be implemented before approval is granted to any of the above documents or actions.

¹ *Delivering Melbourne's Newest Sustainable Communities: Program Report* (December 2009), endorsed by Minister for Environment Heritage and the Arts Peter Garrett on 2 February 2010.

Background

The Victorian Government is currently taking steps to seek your approval for the third, and perhaps most significant, of the four classes of actions set out under the Program Report: the urban development of four new growth areas within the new Urban Growth Boundary (**growth areas development**).

To date, we understand that the Victorian Government has taken the following steps towards this approval:

- On 13 June 2012, the Victorian Government released, and seemingly finalised, four 'Growth Corridor Plans' (which correspond to the Growth Area Framework Plans described in the Program Report).²
- Recently, the Victorian Government finalised and submitted (or is about to submit) for your approval a Biodiversity Conservation Strategy (**BCS**) and two Sub-Regional Species Strategies (for the Growling Grass Frog and Golden Sun Moth) (**SRSS**).
- The Victorian Government is currently revising a third SRSS (for the Southern Brown Bandicoot), which is expected to be finalised next year.

In addition, the Victorian Government has prepared nine prescriptions for matters of national environmental significance, which you approved on 16 April and 27 May 2010.

What are our concerns?

1. Independent Monitor

The Victorian and Commonwealth Government have, as far as we are aware, failed to appoint an independent monitor to assess the Victorian Government's implementation of the Program Report.

What does the Program Report require?

The Program Report states at section 11.1.2 (page 72) that:

An independent monitor will be appointed at [Stage 2] to check compliance and provide assurance to the Commonwealth Government that the Victorian Government is effectively implementing the endorsed Program. Independent monitoring will occur frequently early on in the implementation process and greater reliance will be placed on existing Victorian monitoring processes as the Program progresses.

What is the non-compliance?

We understand that no independent monitor has been appointed, and no independent assessment of whether the Victorian Government is implementing the Program has been carried out.

The environment groups are of the view that the appointment of such a monitor will be crucial to provide an independent and expert assessment as to whether the Victorian Government is complying not only with the procedural requirements of the Program Report, but are achieving the environmental objectives that the Program Report mandates. Such assessment is essential not only because of the sheer complexity of the

² Minister for Planning, "Growth Corridor Plans to manage long-term growth", Press Release, 13 June 2012, available at <http://www.premier.vic.gov.au/media-centre/media-releases/4149-growth-corridor-plans-to-manage-long-term-growth.html>.

Melbourne Strategic Assessment process, but also because of the potential for this process to form a template for future Strategic Assessments under the EPBC Act.

What do we seek?

Prior to approving the BCS, the SRSS or the growth area development, an independent monitor should be appointed to assess whether the Victorian Government's implementation of the Program Report thus far is in compliance with the requirements of the Program Report, focussing particularly on the issues raised in this letter. The independent monitor should also provide recommendations about what steps the Victorian Government should take to address non-compliances.

2. Inadequate consultation

The Victorian Government has not adequately consulted with community groups about the BCS, the three SRSS or the four Growth Corridor Plans.

What does the Program Report require?

The Program Report explicitly states that it is the Victorian Government's role to work with all stakeholders, including community representatives, to effectively deliver the Program (section 6, page 43). Public comment on the Growth Corridor Plans, in particular, is also explicitly required by the Program Report (section 5.2, page 27).

What is the non-compliance?

In November 2011, the Victorian Government released draft versions of the BCS, the three SRSS and the four Growth Corridor Plans for six weeks public consultation. At the same time, in addition to these eight documents, the Victorian Government also called for submissions on eight precinct structure plans. The documents were accompanied by a large number of supporting documents, including information about the Victorian Government's 'time stamping project'. Given the amount of documents open for submissions and their complexity, the consultation period was inadequate, and the environment groups were unable to meaningfully respond to the detail of the documents. In our view, this is contrary to the spirit of consultation and cooperation contained in the sections of the Program Report outlined above.

Since this consultation period, we understand that the BCS and two of the SRSS have been finalised, with a number of changes from the draft versions provided for public comment in 2011. These documents have not been released publicly.

What do we seek?

We ask that prior to approving the BCS, the SRSS or the growth area development, the finalised versions of the BCS and SRSS be released for a public consultation period of no less than 6 weeks. This consultation process could be integrated with the appointment and assessment work of the independent monitor.

In addition, if you decide to approve the BCS and SRSS, we seek an opportunity to comment on whether you should approve the growth areas development under section 146B of the EPBC Act, and what conditions should be placed on any such approval.

3. Incorrect sequencing of documents

The Victorian Government has failed to prepare the BCS, the SRSS or the Growth Corridor Plans in the sequence required by the Program Report.

What does the Program Report require?

The Program Report states at section 5.2.1 the steps the Victorian Government must take prior to seeking approval for the growth areas development, and the order in which these steps must be carried out.

In particular, section 5.2.1 (page 27) states that the Victorian Government must prepare the SRSS, which must inform the preparation of four BCS, which must then in turn inform the Growth Corridor Plans. Importantly, the Program Report states that the BCS must be approved by the Commonwealth *prior* to the finalisation of the Growth Corridor Plans (section 5.2.1, page 27).

What is the non-compliance?

The Victorian Government has seemingly finalised the BCS and two SRSS simultaneously rather than finalising first the SRSS, and then the BCS. Moreover, the SRSS for the Southern Brown Bandicoot is not expected to be finalised until next year. It is therefore difficult to see how all the SRSS can properly have informed the BCS, as required by the Program Report. In addition, on 13 June 2012 the Victorian Government has seemingly finalised the Growth Corridor Plans, prior to the finalisation or approval of the SRSS and the BCS, in clear breach of the requirements of the Program Report.

It is our clients' view that the environmental consequences of these non-compliances are real and significant. The Program Report's sequencing requirements set up a process whereby conservation objectives and minimum requirements are established based on detailed environmental studies, and then development is fitted around these objectives and requirements. However, the sequencing implemented by the Victorian Government has meant that this process has been inverted, and development has instead dictated to and limited conservation objectives and requirements.

To illustrate this, our clients can identify a number of instances where important conservation controls or areas included in draft versions of the BCS and SRSS (released in 2011) have subsequently been excluded from the prematurely finalised Growth Corridor Plans, suggesting that these conservation controls or areas have been sacrificed to accommodate development. Three such instances are:

- *Growling Grass Frog*: The draft BCS outlined areas to be protected for the conservation of the Growling Grass Frogs, including corridors alongside creeks and reserves. The Growth Corridor Plans have removed a number of these corridors, including in the west along Skeleton Creek, Dry Creek and Lollipop Creek.
- *Southern Brown Bandicoot*: The draft BCS and SRSS included important protected areas for Bandicoots, including an east-west habitat corridor, a habitat node and two alternative north-south habitat corridors to be further investigated. The Growth Corridor Plans, however, have removed these protected areas, instead suggesting that they are available for forms of urban development.

- *Natural Temperate Grasslands of the Victorian Volcanic Plain*: The draft BCS and SRSS set out potential conservation areas in the west for protecting listed grassland species: these have been removed or reduced in the Growth Corridor Plans.

What do we seek?

Our clients ask that neither the BCS, nor the Growth Corridor Plans, be finalised until all SRSS, including the SRSS for the Southern Brown Bandicoot, have been finalised.

We also ask that, before you approve the SRSS or the BCS, the consequences of the Victorian Government's failure to comply with the sequencing required by the Program Report be investigated. We further request that reinstatement of conservation areas set out in the draft BCS and SRSS that have been lost in the prematurely approved Growth Corridor Plans be required. This should include those identified above, as well as others which our clients can identify.

4. Inadequate protection for matters of national environmental significance

The Victorian Government's implementation of the Program Report has failed to provide adequate controls to protect threatened flora, fauna and communities that are intended to be protected by the Program Report and the EPBC Act.

What does the Program Report require?

The explicit object of the EPBC Act is to provide for the protection of the environment, especially 'matters of national environmental significance' (**MNES**), and to achieve this by ensuring that activities that are likely to have a significant impact on the environment are properly assessed (section 3(1) and (2)).

Section 10 of the Program Report describes a number of MNES that will be impacted by the actions the subject of the Program Report and in particular by the growth areas development. Section 10 also sets out conservation outcomes for these MNES, and conservation activities that are to achieve these outcomes. Further requirements relating to the protection of MNES are set out in section 5 of the Program Report.

What is the non-compliance?

Our clients believe that the conservation controls and protected areas set out in the existing prescriptions, the BCS, the SRSS and the Growth Corridors Plans do not adequately protect MNES from the impacts of the growth area development as required by sections 5 and 10 of the Program Report in a number of respects.

Firstly, these documents do not deliver the environmental outcomes required by the Program Report. For example:

- *Natural Temperate Grasslands of the Victorian Volcanic Plain (Volcanic Plain Grasslands)*: The Program Report seeks to deliver "the long term sustainability and persistence of the [Volcanic Plain Grasslands] ecological community through permanent protection and enhancement of the ecological functions and values of the largest consolidated remaining area of grasslands" (section 10.1.1, page 47). The current prescription for Volcanic Plain Grasslands fails to achieve this objective by allowing significant areas of Volcanic Plain Grasslands to be simply cleared and offset (such as areas smaller than 150 hectares inside the current Urban Growth Boundary, and all areas between the current and

proposed Urban Growth Boundary not protected by other prescriptions). The Program Report also requires the creation of large consolidated areas of "permanently protected" Volcanic Plain Grasslands (section 10.1.1, page 47). However, the Victorian Government has failed to provide assurances that the steps required to achieve such permanent protection (such as the acquisition of the land) can and will actually be achieved. Similar concerns relate to the outcomes stipulated for the Grassy Eucalypt Woodlands.

- *Southern Brown Bandicoot and Growling Grass Frog*: The Program Report seeks to deliver "functioning sustainable populations of Southern Brown Bandicoot and Growling Grass Frog within and adjacent to the new Urban Growth Boundary with connectivity between populations" (section 10.5.1, page 58). Conflicting with this objective, important habitat corridors and nodes for Bandicoots set out in the draft BCS and SRSS to provide "connectivity between populations" have, as noted above, been removed in the Growth Corridor Plans. Similarly, the Growth Corridor Plans fail to protect adequate areas for Growling Grass Frogs, for example in the Lockerbie precinct, where narrowing of Growling Grass Frog protected corridors could threaten one of Victoria's healthiest populations of Growling Grass Frogs.

Secondly, a number of MNES do not yet have prescriptions. The Program Report requires that "no impacts are permitted on a [MNES] under this Program unless an approved prescription is in place" (section 5.2.1, page 30). However, a number of prescriptions are still outstanding, including (but not limited to) the Dwarf Galaxias, the Australian Painted Snipe and the River Swamp Wallaby-Grass.

Thirdly, the Victorian Government has failed to prepare measures to protect the Seasonal Herbaceous Wetlands (Freshwater) of the Temperate Lowland Plains (**SH Wetlands**), which was listed as critically endangered under the EPBC Act in March 2012. Pursuant to the requirements of the Program Report (section 5.2.1, page 30 and section 11.2, page 82), the SH Wetlands should be protected by the preparation and approval of an additional prescription, and amendment of the approvals for the already-approved actions (the urban development within 28 precincts and the Regional Rail Link) to include conditions to protect the SH Wetlands, including by requiring compliance with any relevant prescriptions.

What do we seek?

Prior to approving the BCS, the SRSS or the growth area development, we seek that the following steps be taken to ensure that adequate measures have been taken to protect all MNES by:

- Ensuring that the environmental controls in place in the prescriptions, the BCS, the SRSS and the Growth Corridor Plans actually achieve the environmental objectives for each MNES set out in the Program Report. This could largely be achieved by amending deficient prescriptions (such as that for the Volcanic Plain Grasslands) or improving controls and protected areas set out in the BCS, including by reinstating measures removed from the draft BCS (as noted above) and by requiring the creation of additional reserves and habitat corridors for Volcanic Plain Grasslands, Bandicoots and Growling Grass Frogs. Our clients can provide you with detailed proposals to achieve this. We note that this process would be assisted by the appointment of an independent monitor.
- Requiring the completion of prescriptions for all relevant MNES including, but not limited to, the Dwarf Galaxias, the Australian Painted Snipe and the River Swamp Wallaby-Grass.
- Requiring the preparation and approval of a new prescription for the SH Wetlands, and the amendment of prior approvals to require compliance with this prescription.

Failure to address non-compliances

As noted above, under section 146B of the EPBC Act the Minister can only approve actions that are in accordance with the endorsed Program Report, and therefore, if the non-compliances raised above are not rectified, we are of the view that approval under section 146B cannot be lawfully granted to development in the new growth areas. Failure to sufficiently address our concerns may therefore jeopardise the entire Melbourne Strategic Assessment process and undermine the credibility of the strategic assessment approach in general.

What next?

We respectfully ask that you respond within 24 days from the date of this letter, outlining the ways in which the non-compliances listed above will be addressed. In particular, we request that these non-compliances be addressed prior to issuing any further approvals under the Program Report.

Prior to making any further approvals, the environment groups also request a meeting with you to discuss the concerns raised in this letter further. The environment groups are able to provide further examples to substantiate their concerns, and also detailed proposals (including for additional protections and reserves) to ensure that the development in the growth areas is carried out in accordance with the Program Report, and has good environment outcomes.

In conclusion, we note that, to date, the environment groups have contributed significant time and resources to this process, and the issues outlined above. As Victoria's peak environment groups, this contribution is extremely valuable to the Melbourne Strategic Assessment process as a whole, as the groups have a wide range of detailed and on-the-ground expertise on the issues directly concerned by this process. The groups' shared objective is to ensure that this process achieves the best possible environmental outcomes, in accordance with the objectives of the EPBC Act.

We thank you for your time, and look forward to your response.

Yours sincerely

Nicholas Croggon

Solicitor

Victorian environment groups on whose behalf this letter is sent

Victorian National Parks Association Inc.

Friends of Merri Creek Inc.

Merri Creek Management Committee Inc.

Melton Environment Group Inc

Western Region Environment Centre Inc

Werribee River Association Inc

Green Wedges Coalition

Cardinia Environment Coalition Inc

Mornington Peninsula and Western Port Biosphere Reserve Foundation Ltd

Australian Plants Society Victoria Inc

Australian Plants Society Keilor Plains Inc

Pinkerton Landcare and Environment Group Inc

Riddells Creek Landcare

Jacksons Creek EcoNetwork Inc