The Climate Energy/Water Nexus

Law and Policy Aspects

Adequacy of EIA law
Outline

- Environmental impact assessment as main law/policy tool
- Scope of federal environmental impact assessment law
- Does federal EIA law apply to energy projects with potential climate change impacts (adverse or beneficial)?
- Options for reform
Environmental Impact Assessment (EIA)

- An assessment of the potential effects on the environment of a proposed project or activity

- Primary purpose: to assist decision-making related to project development control, land use and resource allocation planning

- Linear process: project referral, determination of assessable projects, terms of reference, evaluation (including public comment), decision relating to approval

- Different levels: local, State, federal (and international)
Federal EIA law: the EPBC Act

- EPBC Act was introduced in 1999, combining a new Commonwealth EIA framework with an associated regime for the conservation of biodiversity.

- EPBC Act framed in era of cooperative federalism where there was an explicit division of environmental responsibility and powers between federal and state governments.
  - Only applies to designated ‘matters of national environmental significance’

- Does EPBC Act provide mechanism for addressing climate/energy/water nexus?
Matters of national environmental significance

- World heritage properties
- Ramsar wetlands
- Migratory species
- Threatened species and ecological communities
- The Commonwealth land and marine area
- Nuclear actions
- Heritage places
Projects with adverse (e.g. coal mines) or beneficial (e.g. windfarms) implications for climate change may indirectly impact matters of national environmental significance.

- Vic coal-fired power station may be argued to have indirect impacts on Great Barrier Reef marine ecosystems.
- Windfarm on Gippsland Coast might disrupt flight patterns of endangered birds posing cumulative extinction risk.

Note: in determining whether EPBC Act applies decision-maker can only take account of adverse impacts.
EPBC Act 2006 amended to include indirect impacts test

- EPBC Act catches ‘indirect’ impacts of developments and undertakings (‘actions’)

- Defined as events or circumstances which are an indirect consequence of an action, provided the action is a substantial cause of those events or circumstances.

- Where the impact (direct or indirect) of an action is deemed to have, or be likely to have, a ‘significant impact’ on a protected matter then the EPBC Act’s environmental assessment and approval requirements are invoked

- This necessitates referral of the proposal to the federal Environment Minister for assessment (a process which may then be devolved to State authorities) and a decision on whether the project may proceed
Does EPBC Act allow regulation of climate/energy/water nexus?

- 2005 Action by Wildlife Whitsunday challenging two new coal mines in North Qld

- Action under EPBC Act as potential impact on a matter of National Environmental Significance i.e. Great Barrier Reef

- Coal is Qld most valuable export. Referral of new mine proposals to C'th Minister but proponents argued no impact on Reef. Wildlife Whitsunday challenged this view arguing GHG emissions would have significant impact on GB reef e.g. coral bleaching; loss of biodiversity

- Justice Dowsett did not accept that there was a causal link between GHG emissions from proposed coal mines and effects in GB reef
Does EPBC Act allow regulation of climate/energy/water nexus?

- 2006 federal environment Min refused Bald Hills windfarm project on basis of threats to endangered orange-bellied parrot

- After Vic government took court action, fed Min later withdrew refusal and approved project subject to relocation of 6 turbines away from parrots flight path
Victorian EIA for windfarms

- Planning and Environment Act s 60 – Council to assess if project may have significant impact on the environment (includes amenity concerns)
- Objector appeals to VCAT
- e.g. Perry v Hepburn Shire Council (2007) 154 LGERA 182; The Sisters Wind Farm Pty Ltd v Moyne SC [2010] VCAT 719

- Environmental Effects Act – Minister for Planning may require EIA for wind farm projects
Reform options

- Proposals for introduction of a GHG ‘trigger’ into EPBC Act

- Recent Review of EPBC Act recommends quantitative trigger of between 100,000-500,000 tonnes GHG annual emissions (including indirect emissions) as an interim measure

- Might assist RE projects at approval stage
Climate Change Act 2010
Victoria

- State-based laws and policies gaining prominence given federal ‘inertia’ in many areas of climate change regulation.

- In Victoria the Climate Change Act 2010 provides a range of mechanisms addressing climate change mitigation and adaptation.

- The Act has potential application in the context of Water/Energy nexus.

- In this regard, the ‘teeth’ for the law is the capacity for the Victorian Environment Protection Agency to directly regulate GHG emissions as a ‘waste’.
Key Features of the Act

- The Act sets an emission reduction target of 20% of 2000 levels by 2020.

- To regulate GHG emissions, the Act amends the *Environment Protection Act* 1970 to allow greenhouse gas emissions from licensed premises to be regulated as a waste through a series of licensing and approvals.
  - This ‘direct regulation’ already exists in relation to a range of other polluting activities.

- The Environment Minister is required to develop an adaptation plan every four years which outlines climate impacts, risks to Victoria and government priority areas.
Climate Change Considerations

- Government decision-makers ‘should have regard to’ Climate Change impacts -
  - Prima facie - an expansive scope of GHG emissions are taken into account
  - Considerations include indirect and cumulative impacts of GHG emissions

- However the potentially expansive range in relation to emissions is narrowed by limited application to Schedule 1 legislation

- Further, the Act requires the Government to report:
  - bi-annually on climate change science; and
  - Victoria's progress towards its emission reduction target.
GHG Emissions as regulated ‘waste’.

- s 4(1) of the EP Act 1970 amended by—
  
  “inserting a new definition of greenhouse gas substance. This definition corresponds to the definition of greenhouse gases in the National Greenhouse and Energy Reporting Act 2007 (C’th)” (Expl. Memo)

- GHG emissions as a waste within the definition in EP Act 1970.
  
  Note similarity to amendments to equivalent EPA in USA to allow GHG emissions from fuel to be regarded as “pollution”.

- The Act amends s.10 of the Transport Integration Act 2010 to include climate change considerations in the transport system objectives.
Could it regulate levels of GHG emissions from coal fired power stations?

Relevant provision – “A decision by the Environment Protection Authority relating to the licensing of scheduled premises under section 20”.

If coal fired power station or other premises such as a desalination plant is designated as ‘scheduled’ then Yes.

The proviso is that the power to regulate in this way is subject to a government ‘right to reserve’ power and transitional provisions.

- Decision area—Consideration of a draft Sustainable Water Strategy by the Minister under section 22G.
  - (i.e. EPA to consider GHG implications in draft Sustainable Water Strategy)

- Coastal Management Act—draft Coastal Strategy and endorsement of a Coastal Action Plan.

- CALP Act—Approval re management plan for catchment.
  - Biosequestration—water interception issues.


- See also s 71 Climate Change Act—Advisory Panel on Climate Change

- Edithvale Wetlands
Gaps in Climate Change Considerations at the Water/Energy Nexus

- Could the *Climate Change Act 2010* be used in relation to EIA in assessing projects such as the North-South Pipeline?

- Note exclusion of laws such as *Planning and Environment Act 1987*, the majority of the *Water Act 1989*, the *Major Transport Project Facilitation Act* and the *Environment Effects Act 1979* from the range of actions and decisions where decision-makers need to consider climate change impacts.

- North-South Pipeline
Questions