

13 February 2015
Our Ref: 1516

Planning and Assessment Team
Environment Branch
Roads and Maritime Services
Locked Bag 928
North Sydney NSW 2059

By email: StrategicAssessment@rms.nsw.gov.au

Dear Ms Adamson,

Public exhibition – Strategic Assessment of RMS ‘Part 5’ environmental impact assessment procedures to replace EPBC Act assessments/approvals

Thank you for your letter of 16 December 2014 inviting EDO NSW to comment on the NSW Roads and Maritime Services (**RMS**) draft Strategic Assessment Report and Part 5 Program Report (**draft reports**). As a community legal centre specialising in public interest environmental law, EDO NSW’s primary interests in this matter relate to *environment protection* and *community engagement* in decisions that affect the environment.

This submission addresses:

1. The scope of the proposed accreditation
2. Specific comment on the draft reports for RMS strategic assessment
 - a. Positive elements
 - b. Areas of concern
 - c. Areas that require clarification
3. General comments on the EPBC Act strategic assessment process.

While noting positive aspects of RMS assessments, our key specific concerns about the strategic assessment proposal relate to the comparative lack of arms-length oversight, sufficient rigour, statutory consultation and enforceability of ‘Part 5’ processes, in place of EPBC Act assessment and approval by the federal Environment Minister and Department. More generally, we are concerned that increasing reliance on strategic assessments may ‘streamline’ project approvals without the additional safeguards recommended in the Hawke Review of the *Environment Protection and Biodiversity Conservation Act* (Cth) (**EPBC Act**).

1. The scope of the proposed accreditation

We note that RMS is seeking federal accreditation of RMS’s environmental assessment processes for smaller-scale road and traffic works, via a ‘strategic assessment’ under Part 10 of the EPBC Act. These are works that RMS ‘self-assesses’ under Part 5 of the *Environmental Planning and Assessment Act 1979*

(NSW) (**Environmental Planning Act**). Scope of accreditation is limited as noted below.

The draft reports extensively document RMS's environmental management processes for Part 5 activities, and include 14 high-level commitments, in order to demonstrate that RMS's processes and policies (i.e. the Program) meet the requirements for a strategic assessment under the EPBC Act.

We note that the practical effect of the strategic assessment, if adopted, will be that:

- RMS will assess and approve the environmental impacts of its own Part 5 activities on *specified* Matters of National Environmental Significance (**NES**):
 - nationally-listed threatened species and ecological communities; and
 - nationally-listed migratory species.
- This assessment and approval will be done in accordance with:
 - Part 5 of the NSW Environmental Planning Act;
 - RMS's commitments under the final strategic assessment; and
 - any conditions in the final strategic assessment report and the federal Minister's approval.
- As a result, RMS's Part 5 activities will **no longer require EPBC Act referral, assessment, or approval** by the federal Environment Minister.

We note that major road projects under Part 5.1 of the NSW Act are excluded from the strategic assessment. However, we understand that the Commonwealth has already accredited RMS assessments of major projects, regarding impacts on matters of NES, in its 2013 'assessment bilateral agreement' with NSW; and the Commonwealth intends to accredit the NSW Planning Minister's *approval* of such projects under the draft 'approvals bilateral agreement' (exhibited in May 2014).¹

2. Specific comments – Draft reports on strategic assessment of RMS 'Part 5' assessments and approvals

We provide the following brief comments and questions on the draft reports, noting positive areas, areas of potential concern, and areas which require clarification. In particular we note our concerns regarding a lack of arms-length oversight, rigour, statutory consultation and enforceability of Part 5 assessment processes.

a. Positive elements

We welcome the following aspects of the draft reports and RMS policies:

1. **ESD** - RMS's long-standing organisational commitment to implementing ecologically sustainable development (**ESD**) and applying ESD principles (while noting the Audit Office's 2002 recommendations on further integrating ESD).²

¹ See: <http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/nsw>.

² See for example NSW Roads and Maritime Services, *EIA Practice Note – Ecologically Sustainable Development* (Appendix B to the draft Strategic Assessment Report). See also the NSW Audit Office Performance Audit, *RTA – Managing Environmental Issues* (2002), 'Recommendations' (p 6), to 'expedite the integration of ESD within its planning, implementation and reporting processes.'

2. **Best practice** - Commitment to best practice environmental management and continuous improvement, including expertise, training of staff and contractors, and reporting.
3. **Impact hierarchy** - Commitment to the 'avoid, minimise, mitigate and offset' hierarchy (noting our comments on offsets as an area for clarification below).
4. **Exhibition** - The proposal to exhibit RMS Part 5 activities for 30 days' public consultation (but only where activities 'significantly' impact on matters of NES).³
5. **Transparency** - The level of explanation and transparency in the draft reports.

b. Areas of concern

1. **Oversight** - Our primary general concern with the strategic assessment proposal and the draft reports is the apparent lack of any *arms-length oversight* of RMS environmental assessments or decision-making processes. This is because the process to be accredited amounts to a self-assessment, where RMS is assessor and decision-maker. Oversight is a crucial function of the EPBC Act and the federal Environment Department.
 - Arms-length oversight is important for both *processes* and *decisions*.
 - For example, RMS could consider certification of its processes to ISO standards.⁴
 - Oversight is also important in relation to *reviews* of the Program. However, the draft reports propose that 18-month and five-yearly reviews will be undertaken by RMS itself, rather than an independent third-party.
2. **Rigour** - A strong related concern with the strategic assessment proposal is that 'Part 5' assessments, namely Reviews of Environmental Factors (**REFs**), are *not rigorous enough* to replace federal assessment. In particular, REFs are not designed to assess 'significant impacts' as the EPBC Act requires; and the Environmental Planning Act does not require public input or transparency before the decision to approve.⁵
3. **Consultation** - Part 5 activities do not require statutory public consultation.
 - Public consultation on Part 5 activities and their likely impacts should be a statutory process.
 - This process should apply, at a minimum, wherever an activity may affect matters of NES (not just for 'significant impacts' in RMS's judgement).
 - Requiring consultation for *all* Part 5 activities, or all activities affecting threatened species in NSW (not just nationally-listed species), could reduce the complexity and legal fragmentation of assessment processes.
4. **Enforceability** - Another concern relates to potential *lack of enforceability* of RMS strategic assessment commitments, compared with EPBC Act protections.
 - While a number of RMS commitments may aim for best practice environmental management, or community consultation, the fact that these commitments do not rely on legislation makes it unclear as to what

³ RMS, *Environmental assessment and decision-making by NSW Roads and Maritime Services*, p 20 (Program commitment 7).

⁴ See NSW Audit Office Performance Audit, *RTA – Managing Environmental Issues* (2002), pp 3-4.

⁵ As noted in the Australian Network of EDOs' recent submission on the draft NSW Assessment Bilateral Agreement, January 2015: [Download PDF](#).

the consequences would be (if any) if RMS did not comply with them. Further queries on enforcement are noted below.

c. Areas that require clarification

1. **Equivalence** - How would a strategic assessment of RMS's processes preserve existing (or equivalent) legal rights and responsibilities under the EPBC Act for:
 - community consultation?
 - public access to court oversight of decision-making and enforcement?
 - offences such as negligent provision of false or misleading information?⁶
2. **Offsets** - It is not clear that RMS's *Guideline for Biodiversity Offsets*⁷ complies with the *EPBC Offsets Policy*, including 'like for like' requirements, thresholds, timeliness and indirect offsets limits.
 - While the EPBC Policy provides relatively strong standards, EDO NSW remains concerned that the NSW *Offsets Policy for Major Projects* is not equivalent.⁸
 - Will the review of the RMS Guideline ensure it meets EPBC standards?
3. **Critical habitat** - How would the strategic assessment ensure that RMS Part 5 activities will not impact *habitat* critical to the survival of nationally listed threatened species, ecological communities and migratory species (for example, Cumberland Plain Woodland)?
 - Habitat critical to survival should constitute 'red flags' (no-go zones) in RMS's Offsets Guideline, or be excluded from the strategic assessment.
4. **Significant impacts** - With regard to applying the impact hierarchy and ensuring rigorous and independent assessment and decision-making, are there examples or statistics on when RMS Part 5 assessments have:
 - resulted in an activity not proceeding due to unacceptable environmental impacts?
 - found (via an REF) that environmental impacts are significant enough to warrant a full EIS under s 112 of the Environmental Planning Act?
 - required concurrence from NSW Environment & Heritage under s 112C?The report should provide this detail for the Minister's further consideration.
5. **Consultation** - Does RMS still conduct biennial community attitudes surveys,⁹ and if so, how have these informed continuous improvement to ensure RMS's public consultation methods address community expectations or concerns?
6. **Other MNES** - Where an RMS Part 5 project affects *other* Matters of NES in addition to threatened or migratory species (for example, a road upgrade in the Blue Mountains World Heritage Area), what is the anticipated process of EPBC assessment/approval? Are there any plans to extend the strategic assessment?
7. **Enforcement** - It is unclear how the strategic assessment would affect the federal approach, or ability, to pursue *monitoring and enforcement* under the

⁶ See *EPBC Act 1999* (Cth), ss 489-491.

⁷ Draft Strategic Assessment Report, Appendix C, *Guideline for Biodiversity Offsets (under review)*.

⁸ EDO NSW, *Submission on the Draft NSW Biodiversity Offsets Policy for Major Projects* (2014) - [Download PDF](#)

⁹ NSW Audit Office Performance Audit, *RTA – Managing Environmental Issues* (2002), p 3.

EPBC Act, where RMS activities impact on Matters of NES, or breach REF safeguards or approval conditions.¹⁰

- Our review of the draft reports did not reveal any significant discussion of *enforcement actions* in relation to Part 5 RMS works.
- For example, in how many instances has enforcement action been taken against RMS over the last 10 years, either by the NSW Planning Department or the federal Environment Department? How does this compare to the number of documented non-compliances?
- What specific measures and assurances will ensure appropriate oversight and enforcement of RMS activities in future?

The report should provide this detail for the Minister's further consideration.

8. **Audit recommendations** - The NSW Audit Office undertook a performance review of the RTA (now RMS) in 2002. Noting the age of the review, RMS and the Minister should consider any implications it may have for the strategic assessment proposal. For example, has RMS addressed recommendations on:
 - the setting of clearer objectives and targets?
 - the identification of risks?
 - measuring and reporting performance based on the development of key indicators? (see **Attachment A** to this submission).
9. **Parallel processes** - What is the interaction between this strategic assessment and the separate, parallel process of accrediting Part 5 activities generally under the revised draft NSW assessment bilateral agreement (December 2014)?

3. General comments – Reforms needed to make EPBC strategic assessments 'more substantial and robust'

The final part of this submission reiterates the need, as raised in the independent review of the EPBC Act (**Hawke Review**) more than five years ago, to strengthen the rigour of EPBC Act strategic assessment processes if they are to be pursued further. The federal Government should first commit to implementing the safeguards recommended in the Hawke Review package. In particular:

Recommendation 6

- (1) *The Review recommends that the Australian Government:*
 - (a) *expand the role of strategic assessments and bioregional plans so that they are used more often; and*
 - (b) **strengthen the process for creating these plans and undertaking these assessments, so they are more substantial and robust;**
- (2) *The Review further recommends that the Act be amended to provide: ...*
 - (b) *for **strategic assessments** to -*
 - (i) *specify **mandatory required information** for strategic assessments;*
 - (ii) *insert an **'improve or maintain' test for the approval of a class of actions** in accordance with an endorsed plan, policy or program;*
 - (iii) ***enhance provision for public engagement;** and*
 - (iv) ***create a 'call in' power** for plans, policies and programs likely to have a significant impact on matters of National Environmental Significance, and amending the term 'action' to incorporate these plans, policies or programs;*
and
 - (c) *for creation of **a broad performance audit power** to assess the performance of accredited systems. [See also Hawke Review Recommendation 4(5)]*

¹⁰ For example, see EPBC Act s 146D ('deeming provisions' regarding controlled action and approval)

We remain concerned that current plans to increase the use of strategic assessment may emphasise 'streamlining' of project approvals, without the additional safeguards recommended in the Hawke Review.

We strongly support Recommendation 6 to make EPBC Act strategic assessment processes 'more substantial and robust', including by amending the Act to improve information requirements; requiring activities to achieve objective environmental outcomes; improving community confidence and public engagement; and ensuring robust federal oversight, via new legislated performance audit and 'call-in' powers.

In addition, we support the establishment of a *National Environment Commission* to oversee and advise on strategic assessments, bilateral agreements and other federal decision-making.¹¹ We also support a 'requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments'.¹² Adopting these measures would improve environmental outcomes *and* regulatory efficiency – by providing appropriate legal safeguards, oversight, clarity and public assurances around the EPBC Act strategic assessment process.

We have argued elsewhere that strategic environmental assessment (**SEA**) must be underpinned by *legislative requirements* that are rigorous, objective and transparent – including for good process, implementation and outcomes. For example, the Australian Network of EDOs has advocated a number of core elements for SEA:

- *Strong legislative standards and science-based tools*
- *Strong decision making criteria, including a 'maintain or improve' test*
- *Comprehensive and accurate mapping and data*
- *Undertake strategic assessment at the earliest possible stage*
- *Require alternative scenarios to be considered*
- *Ground-truthing of landscape-scale assessment is vital*
- *Mandating public participation at all stages for positive outcomes*
- *Strategic assessment should complement, not replace, site-level assessment.*¹³

ANEDO has also noted some inadequacies of strategic assessments to date. These examples may provide lessons for future improvements.¹⁴

We hope these comments assist RMS and the federal Environment Department. We would welcome these specific and general issues being addressed in any further deliberations or proposals on the strategic assessment of RMS and other authorities. If you require further information please contact me, or Rachel Walmsley, Policy & Law Reform Director on (02) 9262 6989.

Yours sincerely,
EDO NSW

Mr Nari Sahukar
Senior Policy & Law Reform Solicitor

¹¹ Hawke Review, Recommendation 71: 'The Review recommends that an independent National Environmental Commissioner and National Environment Commission be established under the Act and supported by DEWHA.'

¹² Hawke Review, Recommendation 10(2).

¹³ *Submission to Productivity Commission major projects inquiry* (Sept. 2013) 'Strategic approaches' p.53.

¹⁴ See ANEDO, *Submission on 'Our Cities...' Discussion Paper* (March 2011), p 7 (Melbourne Urban Growth Boundary); EDO NSW, *Submission on the proposed Sydney Growth Centres Strategic Assessment* (June 2010).

Attachment A: Summary and excerpts from NSW Audit Office Performance Audit, RTA – Managing Environmental Issues (2002)

In 2002 the NSW Audit office reported on the RTA's arrangements to manage the environmental impacts of its operations. While this was over 10 years ago, **RMS and the federal Environment Department should consider any implications of the performance audit for the proposed strategic assessment of RMS works.**

The performance audit (p 2) gave credit to the RTA's pursuit of 'good environmental practice' and 'continuous improvement'; its publication of a separate Environmental Report; its Environmental Management System (**EMS**), introduced in 2000 and 'developed' (though not certified) 'to meet the requirements of the AUS/NZS ISO14001'; and the RTA's commitment to the principles of ESD.

The performance audit (p 2) further noted that the RTA had a structured process to advance its environmental policy. However, 'a more systematic approach in a number of areas would assist the RTA to achieve its stated objective and be at the forefront of environmental practices.' The Audit Office continued:

In our opinion the main areas that would require attention are:

- *The setting of clearer objectives and targets*
- *The identification of risks*
- *Measuring and reporting performance based on the development of key indicators.*

The audit findings (pp 4-5) considered the RTA's progress in managing the environment, integrating ESD and responding to government policy; its Environmental Policy and EMS; measuring and reporting on corporate-wide performance; and risk management. **Ultimately, the 2002 performance audit recommended that the RTA:**

- *reconsider its Environment Policy to ensure that it is in line with better practice. As a minimum it is recommended that the policy provide:*
 - *clearer direction for managing the environment RTA-wide*
 - *a better linkage between all planning documents*
 - *a commitment to the setting of performance targets*
 - *that environmental objectives be more specifically identified in terms of managing environmental impacts*
- *consider the suggestions in this report designed to improve the content of the RTA's Environment Report*
- *expedite the integration of ESD within its planning, implementation and reporting processes*
- *review its risk on an ongoing basis*
- *establish a suite of indicators to measure environmental performance RTA-wide over time in both absolute terms and against targets.*

In its formal response the RTA stated: '...The recommendations of the Report have been noted and will assist in improving RTA's environmental management practices.'