Review of EIA decision-making with respect to the treatment of new information and natural justice/procedural fairness

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August 2006
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Executive Summary
This report presents a review of international and Australian practice of environmental impact assessment (EIA) with respect to the treatment of new information entering the process near or during the approval decision-making point. Specifically, it considers the expectations and responsibilities of EIA decision-makers to inform proponents and public stakeholders about significant new information prior to decisions being made. This is undertaken in light of best practice principles of EIA and consideration of matters of natural justice or procedural fairness. In doing so, distinction is made between the assessment stages of EIA (i.e. when advice is being formulated and is subsequently presented to decision-makers for their consideration) and the actual approval stage itself (i.e. when the decision-maker either accepts or rejects a proposal).

Information for this review was drawn from two principal sources:
- Literature review – including legislation, EIA procedural information, international EIA texts and articles and court cases; and
- Survey of international EIA practitioners.

With respect to EIA practice the concept of natural justice/procedural fairness relates to a duty to involve those affected by new development proposals to be involved in the assessment and decision-making stages through meaningful consultation and participation. This extends to fully explaining the reasons for a decision that has been made and reasonable provisions for appealing against decisions taken. Public participation in EIA has a long tradition and the more advanced systems generally provide for a high level of transparency, accountability and participation in the process. This public participation is designed essentially, however, to ensure all the relevant information is available for the decision-maker to consider rather than to provide a role for the public in the actual decision-making. There therefore tends to be a distinction between the roles of public participation between the assessment and approval stages of EIA.

The report reviews EIA practice in a number of jurisdictions internationally and within Australia in relation to the levels of public involvement at the decision-making stage. In systems where the environmental advice to the EIA decision-maker is available for public comment, there is a greater expectation for full disclosure of information relevant to decision-making. The nature of the legal direction provided for the basis of EIA decision-making, along with other aspects of the legal framework in a particular jurisdiction such as the definition of ‘environment’, also has direct bearing on the level of public involvement in decision-making. Decision-making by ministers or at Cabinet level is generally less transparent than that at the level of EIA agencies and expectations of practitioners varies accordingly.

Differentiation of stakeholders is not so important with respect to the disclosure of new information in EIA decision-making as consideration of the significance of the information in terms of whether it will substantially change the nature of a proposal or directly affect whether or not the proposal should proceed. The higher the significance of the new information, the greater the expectation to reopen public review processes in the name of natural justice/procedural fairness. This is relevant to all EIA stakeholders, not just the proponent or previously involved members of the public.

Expectations for natural justice/procedural fairness in EIA decision-making need to be determined in reference to the customs established in a given jurisdiction. It is not something that is prescribed in law in Australia. Balance has to be struck between efficiency of process and provision of endless
opportunity for public participation in decision-making. The provision of appeal rights along with full disclosure of the reasons behind a decision are important mechanisms here. Ultimately some judgement is required by decision-makers to decide when and how much information should be disclosed to stakeholders on a case by case basis, realising however, that a fair process is ultimately likely to lead to the best outcome and in the most efficient way.

1. Introduction
The purpose of this report is to present a review of Australian and international treatment of new information during approval decision-making for development proposals undergoing environmental impact assessment (EIA). The report has been prepared for the Australian Department of Environment and Heritage (DEH) in accordance with their Research Proposal (Appendix 1).

1.1 Research aims
The issue under investigation concerns the treatment of new information by EIA decision-makers with respect to expectations for public openness and transparency of procedures and the issues of natural justice or procedural fairness. Whilst EIA traditionally provides for public review of information pertaining to development proposals likely to have a significant effect on the environment prior to approval decision-making and once a decision has been made the results are normally publicly disclosed (and may be subject to third party appeal), the opportunity exists for 'new' information to become available to decision-makers after the normal public review process has ended but prior to actual decision-making. A key aim of this report is to examine how such information is treated in normal EIA practice around the world in relation to matters of natural justice/procedural fairness being afforded to the proponent of the development proposal and public stakeholders. In doing so, it was found to be useful to distinguish between the 'assessment' stages of EIA (taken to mean the step in the process following normal public review of proposals put forward by a proponent, when EIA agencies formulate advice on a proposal and submit their recommendations to the final decision-makers for their consideration) and the actual 'approval' stage itself (meaning when the decision-maker issues the approval decision that either accepts or rejects a proposal). The principal question in the Research Proposal (Appendix 1) to be addressed was:

- Prior to the final approval decision, what should be the status of information that has been generated outside the publicly available assessment process?

To answer this question, it was necessary to consider the legal and procedural requirements for EIA in a given jurisdiction and to consider what compliance with these procedures would entail (i.e. to uphold expectations for natural justice/procedural fairness) with respect to the timing and nature of information sharing with proponent and public stakeholders. Three sub-questions provided in the Research Proposal relate to these further details as follows:

- Should the decision-maker, prior to the final decision and also in considering attaching conditions to an approval, be required to make such information available to the proponent (and/or persons with an expressed interest/standing for review purposes) for comment which must then be taken into account in making the decision?
- If so, is it only information of an adverse nature (information supporting the proposed action not being approved, or supporting the attachment of particular provisions) that should be provided to the proponent for comment?
- What is the situation regarding persons with an expressed interest/standing for review purposes? Should information supporting an approval decision be seen as adverse to the interests of those opposed to the proposed action and therefore provided to them for comment?
In addition to considering the four questions in the Research Proposal, it was also expected that EIA processes and practices in Australia and internationally would be examined in relation to the issue of treatment of new information in EIA decision-making and the implications for natural justice/procedural fairness. Also, the issue of timeliness, efficiency and certainty of EIA process should be considered with reflection upon what would be considered to be desirable practice for EIA practice at the Commonwealth level in Australia (Appendix 1).

1.2 Research methods and scope

Research investigations utilised two methods: survey of EIA practitioners and literature review. These are discussed in turn.

EIA practitioners within Australia and internationally were surveyed principally by emailing them the four research questions outlined previously. Initially approximately 50 people were approached in this way. The people approached initially were predominantly members of the International Association for Impact Assessment known to the author. They were chosen for their known expertise in relevant aspects of EIA. Emphasis was placed on practitioners with experience mainly in English speaking countries (i.e. so that relevant legislation or EIA guidelines could be obtained and understood by the author) or places generally recognised internationally as having relatively advanced EIA systems. However, some non-English speaking locations and developing countries were included in the survey.

Some people responded directly to the four questions with a written response, some referred the author to other practitioners and some had not responded at the time of preparing this report. The people who responded and made a contribution to this research are identified in Appendix 2. In total, 45 practitioners representing 23 individual EIA jurisdictions contributed to this research. The author wishes to formally acknowledge and thank these EIA practitioners for their input. When discussing specific material provided by the survey respondents, individual identities are not revealed. Any errors of interpretation or 'fact' concerning EIA practice in individual jurisdictions are the fault of the author.

In some instances, further questions were put to respondents to probe their initial answers in greater depth. In other instances, answers were provided through phone conversations, not in writing. Some respondents provided references to published written materials which were subsequently incorporated into the literature review aspect of the research.

A review of the international EIA literature (i.e. books and refereed journal articles) was conducted which focussed on the provisions and expectations for public participation and decision-making in EIA practice generally. Articles addressing the issue of natural justice/procedure fairness were particularly sought in this process. To complement the survey of Australian and international practitioners, review of EIA legislation and administrative procedures or guidelines was also carried out for relevant jurisdictions. This more focussed investigation included court cases and other publications reviewing practice in one or more particular jurisdictions. Hence overall the literature review comprised general and specific material, formal academic and 'grey' literature as well as legal documents and cases.

An extensive body of EIA literature has built emerged during 35 years of experience worldwide. EIA is currently practiced at a national level in more than 100 countries world-wide not to mention the many hundreds of other jurisdictions such as states or provinces, municipalities, national and multilateral agencies and corporations that have adopted their own EIA processes (Gibson et al 2005). Consequently, the review of experience presented in this report is not intended to be comprehensive. Rather, as indicated previously, the emphasis has been on the more advanced and
experienced (and well documented) jurisdictions in order to provide informed views on understanding trends and normal practice in Australia and around the world.

1.3 Report structure
Section 2 briefly explains the concept of natural justice and procedural fairness with particular regard to the research aim. In Section 3, the general principles concerning public participation in EIA are outlined. Sections 4 and 5 present examples from international and national experience respectively. Here details of EIA procedures in selected individual jurisdictions are explored to elucidate the spectrum of possibilities for involving the public in EIA decision-making. This leads to a model which is presented in Section 6 for understanding the range of approaches evident in international practice. Section 7 presents the conclusions and reports on the treatment of new information in EIA decision-making for the benefit of DEH. References cited in the report and the two appendices mentioned previously complete the report.

2. The meaning of natural justice or procedural fairness
The purpose of this section is to define what is meant by natural justice/procedural fairness in legal terms and in an Australian context and to relate the concept to EIA decision-making generally. The two terms can generally be considered to be synonymous. Hunter and Allan (undated) expressed it as follows:

The expression natural justice relates to a general concept rather than a specific rule, and thus there is no precise definition of the term. The essence of the concept is simply a general notion of procedural fairness.

The Australian Law Reform Commission (ALRC 2002: 14.12) state that: 'in Australia the right to "due process" or procedural fairness is not constitutionally guaranteed'. However, they note that at the federal level the Administrative Decisions (Judicial Review) Act 1977 (Cth) provides a requirement that administrators observe the principle of natural justice. According to the definition given in s3, this Act would apply to EIA decision-making in Australia by federal and state level authorities. In s5(a), 'a breach of the rules of natural justice' that have occurred in the making of a decision to which the Act applies provides a legitimate ground for any person to apply to the Federal Court or the Federal Magistrates Court for an order of review of that decision. Despite this obviously important decision review function, the Act does not specify what actually constitutes natural justice.

In contrast, in the Republic of South Africa, the Promotion of Administrative Justice Act 2000, clearly specifies what constitutes a fair administrative procedure. Specifically, 'administrative action which materially, and adversely affects the rights or legitimate expectations of any person must be procedurally fair' (s3(1)). What this means is that an administrator must give an affected person (s3(2)):

- Adequate notice of the nature and purpose of the proposed administrative action;
- A reasonable opportunity to make representations;
- A clear statement of the administrative action;
- Adequate notice of any right of review or internal appeals, where applicable; and
- Adequate notice of the right to request reasons for the administrative action.

In the absence of statutory guidance for what constitutes procedural fairness in Australia, it appears that this is derived from common law (ALRC 2002: 14.13).

The ALRC (2002: 14.11) refer to procedural fairness as specific 'legal doctrines that express fundamental principles about the fair treatment of persons and the procedures needed to ensure fair treatment'. Further on they established that (ALRC 2002: 14.13):
the legal doctrine of procedural fairness has two principal limbs: decisions by public officials should be made in an unbiased manner (the bias rule) and those affected by such decisions should be given an opportunity to participate in the decisions that affect them (the hearing rule).

*Anderson and Another v Director-General, Department of Environment and Conservation and Others* [2006 NSW LEC 12 – 144 LGERA pp43-95] (hereafter *Anderson v Dept Environment*) establishes that 'the requirements of procedural fairness cannot be departed from by a decision-maker' (s163). Obviously, any departure from meeting the requirements for procedural fairness would be grounds for appeal to revoke that decision; this principle is relevant to any decision-maker including EIA approvals.

Similar to the position established by ALRC (2002), in *Natural Justice and Procedural Fairness* (undated) the concept of natural justice means in procedural terms that:

a decision maker should not only act in good faith and without bias but also should grant a hearing to any person whose interests will be affected by the exercise of that decision before the decision is made.

The second part of this definition is relevant to this research undertaking; i.e. relating to the provision of information to EIA stakeholders before a decision is made. *Natural Justice and Procedural Fairness* (undated) identifies ten foremost rules of procedural fairness that are required in the resolution of disputes, grievances and complaints; two of which are especially relevant to this research, namely:

- [VII] Give each party the opportunity to state their case adequately.
- [VIII] Give each party the opportunity to correct or contradict any statement prejudicial to their case.

In *Anderson v Dept Environment* a series of previous cases were cited in order to clearly define what procedural fairness entails. In *Country Energy v Williams 2005* (in *Anderson v Dept Environment*, s139), it was established that:

An obligation to accord procedural fairness may arise in one of three ways, namely by:

(a) the express terms of, or implication derived from, a statute;
(b) a public statement or practice adopted by the decision-maker, or
(c) an express promise made to, or arrangement with, the person affected.

Point (a) is the obvious starting place for considering the expectations for procedural fairness in EIA, by considering the specific provisions of EIA statutes and subsequently any related administrative procedures. This can be derived from documentation review and is addressed for individual jurisdictions in Sections 5 and 6 of this report. Point (b) is also relevant as statutes may not specify exactly what steps are to be taken and specific procedures may emerge through practice over time which are compliant with the legal framework, but not specifically identified within that framework. Information on this aspect for EIA decision-making was derived from direct survey of practitioners internationally. Point (c) relates to individual cases and is not further considered in this report.

In *Anderson v Dept Environment* (s140) it was stated that (emphasis added):

The category of persons entitled to complain of a lack of procedural fairness is fairly broad and does not depend upon the existence of a strict legal entitlement. The person must be able to show that he/she is affected in a particular way by the making of the decision; that he/she has *at the very least a "legitimate expectation" in relation to that decision.*

The case of *Attorney-General (NSW) v Quin 1990* is subsequently cited, which in turn draws on several previous cases to elucidate the meaning of 'legitimate expectation'. In summary, a legitimate expectation may be created by (*Anderson v Dept Environment*, s140):

- the giving of an assurance;
- the existence of a regular practice;
- the consequences of denial of the benefit to which the expectation relates; or
- the satisfaction of statutory conditions.
These factors equate strongly with the three points outlined previously (i.e. *Anderson v Dept Environment*, s139).

Further on in *Anderson v Dept Environment* (s163) the matter of a legitimate expectation is further explored. The case of *Minister for Immigration and Ethnic Affairs v Teoh 1995* is quoted as follows (*Anderson v Dept Environment*, s163):

…if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course. This position implies that in EIA decision-making, if new information is not going to be shared with the proponent or public stakeholders in advance of the making of a decision (and where there is an expectation that this would be the case), then they at least have to be notified of this and given the opportunity to argue a case for having the information provided to them.

The *Anderson v Dept Environment* case did not involve EIA; however, a comparable decision-making process was under dispute and some issues of the appeal applicant's claim concerning an alleged breach of procedural fairness and subsequent hearing are relevant to this report. Specifically, the applicant had an expectation that the relevant decision-maker would consult with interested parties and failed to do so adequately (s10(4)). In particular they were not provided with a draft copy of a final supplementary report concerning the decision issue, and 'had no input into the final conclusions and recommendations of that report' (s133(e)). An analogy could be made with common EIA decision-making processes here with regards the level of public involvement. Ultimately, it was determined in *Anderson v Dept Environment* (s164) that the level and timing of consultation with the applicants undertaken in the course of the approval process in question was adequate to discharge the decision-maker's obligations to accord the applicants procedural fairness.

Having established a basic understanding of the principles of procedural fairness and how they relate generally to EIA decision-making, the specific legalities of this issue are not further discussed in this report.

3. Transparency, openness and public participation in EIA

The purpose of this section is to establish the role of public participation in EIA internationally as well as at the federal level in Australia. To put this discussion in context, it is useful to briefly consider the key steps in a generic EIA process (Figure 1).

When a new proposal is put forward by a proponent that has the potential to have a significant impact on the environment, it will be subjected to screening by the relevant authority to determine whether or not EIA is required. For proposals requiring a formal EIA process, it is then necessary to engage in scoping to determine which environmental and project issues require investigation and evaluation. The proponent is then responsible for preparing an environmental impact statement (EIS), in which appropriate analysis of the issues, prediction of impacts and proposals for their mitigation are presented in a single report. The EIS will normally be made available for review by the public and by EIA agencies. Often the proponent will be expected to respond to public comments and to make appropriate modifications to proposal design or mitigation strategies accordingly. Decision making by government follows, based on all of the information generated in the EIA process to date, approval conditions are attached (assuming that the proposal is not rejected) and the proponent is then allowed to proceed subject to meeting any requirements for EIA follow-up.
In this generic process, public participation is seen to mainly occur immediately prior to decision-making. In many jurisdictions, there are other opportunities for public involvement (e.g., in scoping). However, for the purposes of this report, it is the relationship between public participation at the EIS review stage (the 'assessment stage') and approval decision making that is of particular relevance.

### 3.1 International EIA principles concerning public participation

Public participation is a key feature of EIA systems worldwide and relates to two basic principles of best practice identified by the International Association for Impact Assessment and Institute of Environmental Assessment (1999) as follows:

- **Participative**: The process should provide appropriate opportunities to inform and involve the interested and affected publics, and their inputs and concerns should be addressed explicitly in the documentation and decision making.
- **Transparent**: The process should have clear, easily understood requirements for EIA content; ensure public access to information; identify the factors that are to be taken into account in decision making; and acknowledge limitations and difficulties.

Previously Sadler (1996, p22) had identified some 'principles for design and development of effective EA processes' including:

- **Open, facilitative procedures**: Transparent and readily accessible, with a traceable record of assessment decisions and timely opportunities for public involvement and input at key stages.

Subsequently some 'principles for effective EIA practice' which include that (Sadler 1996, p23):

- **EIA should provide the basis for**: Environmentally sound decision making in which terms and conditions are clearly specified and enforced.

Vanclay (2003) provides similar principles to those above with respect to the practice of social impact assessment (SIA), but makes some further distinctions. Firstly he identifies as a core value of SIA that: 'People have a right to be involved in the decision making about the planned
interventions that will affect their lives'. Secondly, as a fundamental principle for development, he states that:

- The opinions and views of experts should not be the sole consideration in decisions about planned interventions; and
- Decision making should be just, fair and transparent, and decision makers should be accountable for their decisions.

In relation to this last point, Asimow (1997) notes that a decision-maker who is compelled to give (written) reasons must at least consider the appropriate factors and produce an apparently justified decision. Furthermore, a statement of reasons helps persons disappointed by the decision evaluate whether to seek judicial review, and it facilitates judicial scrutiny of the decision.

Similar principles for transparency of EIA decision-making and the involvement of affected stakeholders in decisions can be found in other guidance documents around the world; for example, the Environmental Protection Authority (2004) advocates similar principles for EIA practice in Western Australia. Consideration of the Australian EIA principles for public participation at the national level follow in the next section.

### 3.2 Australian (Commonwealth) EIA principles concerning public participation

In the early 1990s a major review of the Commonwealth approach to EIA was undertaken and this review was a precursor to the establishment of EIA under the *Environment Protection and Biodiversity Act 1999* (Cth) (hereafter EPBC). Documents prepared during this review period extol many of the EIA principles for public participation outlined in the international literature reviewed previously in 3.1. To avoid repetition, only aspects of these documents that provide further insights or suggestions will be considered here.

The Australian and New Zealand Environment and Conservation Council (ANZECC 1991) established principles for key stakeholders in EIA individually. For ‘assessing authorities’, they suggest that environmental advice should be provided (publicly) on information provided by the proponent and the public during EIA, and that they: 'should seek expert advice on any relevant aspects of significant environmental issues' (p6). This is a key mechanism for how new information can enter the assessment and approval stages of EIA. With respect to the public, ANZECC (1991, p7) state that: 'The public should have timely access to information about proposals ... in a form suitable to enable informed involvement in the EIA process...'. A key principle for government is to: 'Ensure assessment reports are available to the public before or at the time of decision-making' (ANZECC 1991, p8).

Similar to this last principle, Kinhill Engineers (1994) recommended that the (future) Commonwealth EIA process should 'ensure that there is easy access to all information reports and decision documents'. The question that remains is when (and to a lesser extent, how) this access is provided for; i.e. whether information affecting a decision should be put into the public domain before a decision is made was not specified in this advice.

The Commonwealth Environmental Protection Agency (undated) identified a number of ‘guiding principles and factors’ for EIA at the national level in Australia. Under the principle of 'transparency' they noted that transparency: 'requires that all participants in the assessment process have ready access to all available information' (p15). Similarly in the guidance provided by the Department of Environment and Heritage (DEH) on the present Commonwealth EIA processes, it is stated that 'the EPBC Act has been designed to provide for both a high level of public involvement in decision-making and an open and 'transparent' system that allows public scrutiny of decisions made' (DEH, 2005). Again the question of when this access should occur remains unanswered.
The principle of 'accountability' is put forward by the Commonwealth Environmental Protection Agency (undated, p15) on the basis that an EIA system must be accountable to all participants and stakeholders. They particularly focus on EIA decision-making stating that: 'decision makers should be accountable for their decisions to those who are affected by them'. They note that accountability is largely achieved through transparency and public participation (for which they have developed principles similar to those discussed in 3.1 previously). They also note that accountability can be achieved through requiring decision makers to give clear and detailed reasons for their decisions within reasonable time periods. Hence public disclosure of EIA decision-making is an important factor when considering the issue of natural justice/procedural fairness.

For the principle of 'integrity' Commonwealth Environmental Protection Agency (undated, p16) note that integrity can be achieved in part through having an open, transparent system with clearly defined objectives and processes and realistic opportunities for participation by stakeholders. Further they state that: 'integrity also requires that decisions are based on the best available information'. To satisfy this last point, it clearly would be appropriate for decision-makers to incorporate any relevant new information into the EIA approval process; however, this might be at odds with expectations to devolve such information to the public consistent with some of the public participation principles noted previously. This may be especially problematic in jurisdictions where decision-makers are bound to provide a decision within a fixed time-frame, because as the Administrative Review Council (1993, p14) acknowledged public consultation may adversely affect the cost and length of EIA decision-making processes. Also relevant here is the view of the Administrative Review Council (1993, p13) that: 'every decision-making process should take account of all interests that might be affected by that process'. When taken to the extreme, implementation of this principle may demand considerable investment of time and resources with respect to expectations for public engagement.

Further discussion of EIA principles for public participation at the Commonwealth level in Australia and the issues that emerge is provided in the final sections of this report. The relationship between public participation in EIA and the notion of procedural fairness is the next topic for examination.

### 3.3 Public participation in EIA and procedural fairness

All of the principles for what can be considered to be internationally agreed best practice EIA or for guiding practice in Australia (i.e. in 3.1 and 3.2) clearly strongly correlate with the matters of natural justice/procedural fairness discussed previously in Section 2. For example, the Administrative Review Council (1993, Executive Summary) stated that public participation in decision-making (emphasis added): 'promotes fairness, in that it ensures that any person whose interests are potentially affected by a decision has the opportunity to contribute to the decision-making process'.

In addressing the issue of how to make EIAs more ethical, Lawrence (2003, p401-402) explicitly addresses the issue of procedural fairness in EIA as follows:

**Procedural fairness is concerned with the fairness of the EIA process. It includes both how consultation with interested and affected parties is undertaken and how choices are made. Procedural fairness principles and standards can pertain to the rights of participants, to the duties of the proponent and EIA team members, and to the responsibilities of process participants.**

All interested and affected parties have a right to participate effectively in the EIA process. They may also see it as their right to be involved in designing and adapting the EIA process. They are likely to be particularly concerned with timely access to all relevant information and analysis and to timely (e.g. prior to major decisions) and adequate (e.g. sufficient time to formulate, review, and respond) involvement provisions. Rights also concern the ground rules for participating in and withdrawing
from the process. They can extend to how participants are treated and to how their knowledge is incorporated into the process.

Further on Lawrence (2003, p409) more succinctly states the case as follows:

The procedural fairness principles address such concerns as timely and complete access to information, the fair treatment of participants, the right to participate fully in planning and decision making, the removal of participation barriers, and access to an open, fair, impartial, and independent review process.

Lawrence (2003, p402) further states that 'EIA team members should comply with applicable ethical codes of conduct' and that the 'EIA process and methods should be consistent with good practice standards'. He notes that there are no fixed rules for determining exactly what constitutes procedural fairness in EIA that can be prescribed for all practice. Indeed he cautions against prescriptive regulation, stating that (Lawrence 2003, p408):

...there is danger in too much precision at the regulatory level. The interested and affected parties vary among proposals and settings. EIA processes frequently involve a negotiation of procedural and distributional rights and duties. These negotiations occur both between proponents and regulators and among interested and affected parties. It could be worthwhile, in many cases, to formalize such negotiations. In this way, confusion can be minimized and conflict contained.

Thus he advocates formalising the notion of negotiating about what constitutes procedural fairness in a given EIA, as opposed to prescribing the substance of the concept across all assessments. Previously, Davies (1989) similarly cautioned against adopting a rigid approach to public participation procedures on the grounds that it 'may result in a pro forma compliance with procedural requirements but provides little … to the development of informed consent'.

Elsewhere (Lawrence 2003, p403) notes that 'the choice and application of rights and responsibilities will vary among EIA processes'. While he maintains that 'all parties are commonly expected to participate in good faith' and that 'they also are accountable for their actions and should maintain contact with and be accountable to their constituents' (Lawrence 2003, p402), to accommodate the variation in EIA processes and for individual proposals and settings even within a given EIA jurisdiction, he advocates an adaptive, flexible and collaborative EIA approach involving all interested and potentially affected parties, and based on bargaining to reach consensus (p413). In his words: 'procedural fairness rules are determined jointly with stakeholders. They ensure that the dialogue and debate minimize distortion and are fair to all participants' (p409-410).

3.4 Public participation in EIA decision making

Fundamentally public participation is regarded as proper and fair conduct of democratic government in public decision-making activities (Shepherd and Bowler 1997) and it is a fundamental component of the EIA process (Hartley and Wood 2005). Glasson et al (2005) state that one of the key aims of the EIA process is:

to provide information about a proposal's likely environmental impacts to the developer, public and decision-makers, so that a better decision can be made. Consultation with the public and statutory consultees in the EIA process can help to ensure the quality, comprehensiveness and effectiveness of the EIA, as well as ensuring that the various groups' views are adequately taken into consideration in the decision-making process.

Roberts (1995) suggest that as a general rule, most decision-making processes benefit from some degree of public involvement. The final decision will generally be 'better' when local knowledge and values are included by ensuring that the decision maker is fully informed of the potential impact of the decision (Administrative Review Council 1993) and when expert knowledge is publicly examined by local and interested stakeholders (Shepherd and Bowler 1997). Public consultation and participation can help avert confrontation between parties in the EIA process and help achieve local support for the decisions that are taken at all steps in the process. Public involvement in EIA not only informs and educates the public about proposals and their potential
impacts, but also creates channels 'for the type of open, honest two-way communication which has been shown to help avoid worst case confrontations' (Roberts 1995, p225). Thus a project will carry more legitimacy and less hostility if potentially affected parties can participate in and influence the decision-making process (Shepherd and Bowler 1997). Gibson et al (2005, p29) further suggest that: 'Involving the public in assessment deliberations fosters an expectation that the decision making will be transparent and will reflect the participants' expressed judgements and preferences'.

The scope and role of public participation in EIA has evolved over time, along with people's expectations for the process. Roberts (1995) notes that in the early years of EIA practice (the first EIA process commenced in the US in 1970), the process of assessment was largely technical and scientific in nature. And the focus of EIA was principally related to biophysical issues as well as the economic growth issues associated with development activities giving rise to EIA in the first place. Increasing demands for public involvement and active participation in the process has led to a broadening of scope of EIA to include social concerns and the emergence of forms of assessment, such as SIA or health impact assessment, focussed on social issues. Not surprisingly this combination of content and procedural evolution has ramifications for practice and what might reasonably be expected of current EIA processes.

In discussing major trends in the growth of EIA worldwide, Gibson et al (2005, p23) suggest that over the past three decades, EIA in concept and practice has moved or is moving towards being 'more open and participatory (not just proponents, government officials and experts)' and 'more closely monitored (by the courts, informed civil society bodies and government auditors watching responses to assessment obligations...'). Similarly, when reporting on EIA practice in the United Kingdom, Glasson et al (2005, p157) suggest that while the British system of decision-making has traditionally been characterised by 'administrative discretion and secrecy, with limited public input', there have been recent moves towards 'greater public participation in decision-making, and especially towards greater public access to information'. Gibson et al (2005, p22) identify four stages in the development from environmental regulations to advanced environmental assessment whereby Stage 4 entails:

- integrated planning and decision-making for sustainability, addressing policies and programmes as well as projects, cumulative and global effects, with review and decision processes: devoted to empowering the public…

Gibson et al (2005, p28) maintain that general distrust of regulatory authorities, dissatisfaction with the results of 'conventionally closed regulatory decision making' along with court cases that have challenged and undermined the technical experts has driven the evolution of EIA processes with respect to openness and public participation and has changed the nature of EIA decision-making. It has also had a 'self-feeding effect' with respect to changing expectations for the level and depth of public involvement. They suggest that assessment decisions are increasingly seen as matters of public choice and that: 'In these circumstances, denial or restriction of public scrutiny and involvement in the decision making raises questions about hidden motives and significant political costs can be involved'.

The scenario presented by Gibson et al (2005) regarding public participation in EIA is characteristic of the more progressive or advanced EIA systems. While public involvement in EIA processes is normal practice worldwide (with some minor exceptions), the minimum position is the ability to comment on the proponent's environmental impact statement (EIS). Wood (2003, p223) suggests that most jurisdictions forbid the taking of a decision on the action until an EIS has been subjected to review and that this is a fundamental requirement of any EIA system. Petts (1999) notes that participation in the making of the decision is less common. Not all jurisdictions provide for the evaluation of the EIA by officials to be made publicly available before the final decision is made. She suggests that the typical degree of public participation at decision-making is 'notification' (Petts 1999, p157).
In reality, many authorisation decisions involving EIA are usually taken behind closed doors (Sadler 1996) which means that it is not possible to fully understand the process. A common complaint identified by Glasson (1999) about many EIA systems is that the decision-making is too closed and biased towards the proponent. Wood (2003, pp223-224) establishes a number of tests for evaluating the effectiveness of decision-making in a given EIA jurisdiction, many of which correspond with openness and public participation principles. Firstly, for an EIA approval decision to be seen to be fair it is obviously preferable that it should, in general, be made by a body other than the proponent. And there should be some guidance provided for the decision-making process. Further, any summary evaluation prepared for decision-makers by their advisers should be made public as should the decision itself and the reasons for it. While acknowledging that some jurisdictions allow for consultation and participation once the evaluation has been prepared for decision-makers but before an approval decision has been reached, Wood (2003, p224) notes that this is clearly not possible where no separation of the steps in decision making takes place. Petts (1999) and Wood (2003, p224) both note that the right of appeal against an EIA decision increases accountability and public confidence in the EIA process and its outcomes.

Wood (2003, p225) derived a key evaluation criterion for EIA decision-making, thus: 'Must the findings of the EIA report and the review be a central determinant of the decision on the action?' Beneath this he identified a series of guiding criteria – those with a public participation and/or procedural fairness element are:

- Must the decision be postponed until the EIA report has been prepared and reviewed?
- Is any summary evaluation prepared prior to decision making made public?
- Must the EIA report, and comments upon it, be used to frame the conditions attached to any consent?
- Are the decision, the reasons for it, and the conditions attached published?
- Must these reasons include an explanation of how the EIA report and review influenced the decision?
- Does published guidance on the factors to be considered in the decision exist?
- Is consultation and participation required in decision-making?
- Is there a right of appeal against decisions?

To satisfy what would be considered best practice, the answer to each of these questions would be 'yes' when applied to a given EIA process.

To demonstrate the range of approaches to EIA decision-making and public participation, and the implications for the treatment of new information with respect to natural justice/procedural fairness, the following two sections provide examples from international and Australian practice respectively.

4. International examples
Previously it was noted that there has been an evolution of EIA towards greater openness and participation. Generally speaking the more developed countries with the greatest length of experience in EIA practice have come the furthest on this evolutionary path. The concept of natural justice/procedural fairness for jurisdictions in these countries tend to expect all information used in EIA decision-making to be within the public domain prior to decisions being made. At the other end of the spectrum, generally lesser developed countries have EIA processes more like the simple process outlined in Figure 1, with minimal public involvement in the approval decision-making step.

The purpose of this section is to highlight some of the differences apparent across international EIA practice, starting with the more advanced jurisdictions.
4.1 Canada

Governance in Canada is very comparable with that of Australia; both have national and state (provinces in Canada) level EIA systems. There are too many individual Canadian systems with unique features to review here. Attention will focus on the national level system which is provided for by the *Canadian Environmental Assessment Act 1992* (hereafter CEAA), the key points of which (with respect to the issue of natural justice/procedural fairness) generally appear to be mirrored in provincial level EIA practice.

In the federal Canadian EIA process, there are several stages involving public participation and decision-making; for instance the screening and scoping stages leading to a decision for full assessment process (CEAA s21-23). These are not addressed further here, but their provisions for full public disclosure are similar to those relating to the subsequent review and decision-making process. Also relevant is the Preamble to the Act which includes a commitment by the Government of Canada for:

- facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based.

To meet this commitment, the Act (s55) requires federal government institutions to maintain a public registry in respect of every project for which an EIA is conducted and they must ensure convenient public access to records relating to the EIA (Canadian International Development Agency 1998).

A key feature of Canadian EIA practice is the appointment of a Review Panel (CEAA s33) for the assessment of major proposals. The Review Panel is responsible for conducting public hearings and providing advice (i.e. effectively a draft decision) to government in the lead up to the final approval decision. Salient points in the CEAA for this process appear in sections 34 and 35 as follows:

### 34. Assessment by review panel

A review panel shall...

(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;

(b) hold hearings in a manner that offers the public an opportunity to participate in the assessment;

(c) prepare a report setting out

(i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project...

(ii) a summary of any comments received from the public; and

(d) submit the report to the Minister and the responsible authority.

### 35. Powers of review panel

(1) A review panel has the power of summoning any person to appear as a witness before the panel and of ordering the witness to

... (b) produce such documents and things as the panel considers necessary for conducting its assessment of the project.

(3) A hearing by a review panel shall be public unless...specific, direct and substantial harm would be caused to the witness or specific harm to the environment by the disclosure of the evidence...

By the end of the public hearing process, the Review Panel must have enough information about the proposal to write its report and make its recommendations (Walsh 1988). The Review Panel's report, which is always made public, is advisory; the final decision is made by the Minister.

Walsh (1988) has provided some guidance concerning the 'Principles of Fairness' as they apply to the operations of a Review Panel. One issue concerns the need to balance the competing demands of hearing all relevant information relating to a proposal but ensuring a timely assessment process.
The responsibility to resolve this fairly rests with the Chair of the Review Panel as the following comments indicate (Walsh 1988, p30):

There is therefore a great danger that the proceedings of a panel might be halted by a time-consuming application to review if the chairperson does not exercise discretion in what can clearly be seen to be a fair manner... The very possibility of fairness not being perceived by the party challenging it indicates that the chairperson should lean over backwards to ensure a full and complete hearing for everyone, while at the same time maintaining control of the proceedings and not allowing them to continue interminably with irrelevant or repetitious statements. The chairperson is clearly in a difficult position which requires good judgement, open-mindedness, and courteous attention to all participants.

Two other issues of fairness addressed by the Walsh (1988 p30) include whether a Review Panel has the ability 'to meet privately with certain groups of participants (the proponent, or government agencies or technical experts on a certain subject)' and whether panels could receive submissions after completion of the public hearings. It was stated that:

These two practices appear to violate the principle of fairness as participants do not have an opportunity to question the material discussed in the private meeting or received after the hearings.

Further on, Walsh (1988, p30) concludes this section on fairness principles with the following:

The receipt of submissions after completion of the hearings violates the principles of fairness as participants do not have an opportunity to question the material received. The Study Group feels that informal procedures must not become unfair procedures and suggests that post hearing submissions should not be allowed.

All of the Canadian EIA practitioners contributing to this report were emphatic that there must be full disclosure of information utilised in the assessment stage of EIA; or put another way, that the advice or recommendations put to EIA decision-makers must only be based upon information presented during the public hearing process or in the proponent's EIS previously. One practitioner recalled a court case from the early 1980s involving a transmission line proposal in which information was obtained from a consultant on the effects of electromagnetic fields after the public hearing had ended. A public stakeholder took the matter to court and the court ruling was that this was procedurally unfair because the stakeholders at the hearing did not have the opportunity to challenge what the consultant had submitted to the decision-makers.

In addressing the Research Proposal questions, this same practitioner made an interesting point: that 'we must distinguish between the EIA process and the decision making'. The implication of this is that the 'EIA process' refers to the aspects discussed previously (e.g. Review Panel hearings) while 'decision-making' refers to the final determination by the Minister; i.e. the notion that the final approval is part of a political process and occurs after EIA. This correlates with the distinction made between the 'assessment' and 'approval' stages of EIA made throughout this report. Certainly the CEEA provides no guidance on how the final approval decision should be made beyond requiring that where a report is submitted by a Review Panel, it shall be taken into consideration by the Responsible Authority (CEAA s37(1.1)).

Another Canadian practitioner suggested that the Responsible Authority, who ultimately advises their Minister, may be subject to lobbying by stakeholders or may conduct its own further investigations of a proposal. These inputs to the EIA process may be beyond public knowledge except where Access to Information legislation provisions can be used to force access. And where decision-making occurs at Cabinet level in Canada, and this includes the Canadian approach to strategic environmental assessment which operates at Cabinet level, public access to all information (e.g. Cabinet submissions and deliberations) is not provided. While the position on natural justice/procedural fairness is clear for the assessment stages of Canadian EIA, the issue of whether or not consideration of new information in approval decision-making at the Ministerial level constitutes a breach of natural justice/procedural fairness is not clear, but nevertheless appears to be an accepted part of Canadian practice.
4.2 New Zealand

In the context of this report, the EIA process in New Zealand is very similar to that of Canada in that it may include a public hearing in the lead up to final decision-making. A key point of difference, though, is that it is the decision-making body (i.e. a local government authority) that conducts the public hearing itself rather than a separate review panel. As with the Canadian situation, a hearing is conducted after an EIS has been prepared by the proponent.

EIA is provided for in New Zealand under the Resource Management Act 1991 (RMA). It is a lengthy statute with several sections that concern public participation, decision-making and the disclosure of information. Salient extracts from the RMA follow.

42A. Reports to local authority—

[[(1) At any reasonable time before a hearing or, if no hearing is to be held, before the decision is made, a local authority may require an officer of a local authority ... or may commission a consultant or any other person ..., to prepare a report on information provided on any matter described ... by the applicant or any person who made a submission.]]

(2) Any report prepared under subsection (1) may be considered at any hearing conducted by the local authority.

(3) A copy of any written report prepared under subsection (1) shall be sent... to the applicant ... and any person who made a submission and stated they wished to be heard at the hearing.

(4) The local authority may waive compliance with subsection (3) if it is satisfied that there is no material prejudice, or is not aware of any material prejudice, to any person who should have been sent a copy of the report under subsection (3).]

Key points about s42A are that the local authority can request new information on a proposal prior to a hearing, but that this must be shared with the proponent and identified public stakeholders (i.e. people who previously made a written submission or registered to participate in a hearing). Section 92 contains similar provisions and includes the rights for the authority to request the proponent to provide further information prior to a hearing or the making of a decision.

[92. [[Further information, or agreement, may be requested]]—

(1) A consent authority may, ... before the hearing of an application for a resource consent or before the decision to grant or refuse the application (if there is no hearing), ... [[request]] the applicant ... to provide further information...

[[(2) ...before a hearing or, if no hearing is to be held, before the decision is made, a consent authority may commission any person to prepare a report on any matter relating to an application, including information provided by the applicant in the application or under this section, if all the following apply:

(a) the activity for which the resource consent is sought may, in the authority's opinion, have a significant adverse environmental effect; and

(b) the applicant is notified before the authority commissions the report; and

(c) the applicant does not refuse, under section 92B(1), to agree to the commissioning of the report.]]

[[(3) The consent authority must notify the applicant, in writing, of its reasons for—

(a) requesting further information ...; or

(b) wanting to commission a report...]]

[[(3A) The information or report must be available at the office of the consent authority no later than 10 working days before the hearing of an application....

What is more pertinent in terms of issues of natural justice/procedural fairness is if new information is received after the public review period or a hearing has closed. An EIA practitioner contributing to this report suggested that sometimes lots of information comes to light after the EIS submission period has ended. If a hearing is to be conducted, then the information would be distributed to participants in the hearing and this would also be the case for any new information generated after the hearing itself. A test of significance would normally apply in that new submissions would be treated in this manner. However, if substantive new issues are raised, then the process should be
adjourned and there could be grounds for starting the public review process afresh. Council officers and hearing commissioners have the power to adjourn the process.

Section 104 of the RMA concerns decision-making – it provides direction on what the authority can consider, which in 1(c) would appear to enable new information to be incorporated into the process.

[104. Consideration of applications—

(1) When considering an application for a resource consent and any submissions received, the consent authority must... have regard to—

(a) any actual and potential effects on the environment of allowing the activity; and
(b) any relevant provisions of—
(i) a national policy statement;
(ii) a New Zealand coastal policy statement;
(iii) a regional policy statement or proposed regional policy statement;
(iv) a plan or proposed plan; and
(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

... Sections 113 and 114 of the RMA concern public disclosure of the EIA approval decision. The reasons for the decision need to be explained and guidance is provided concerning the content of the decision which includes issues from the hearing. The proponent and involved public stakeholders are notified about the decision and it is also put into the public domain generally.

[113. Decisions on applications to be in writing, etc—

(1) Every decision on an application for a resource consent shall be in writing and state—
(a) The reasons for the decision; and
[(aa) the relevant statutory provisions that were considered by the consent authority; and]
[(ab) any relevant provisions of the following that were considered by the consent authority:
(i) a national policy statement;
(ii) a New Zealand coastal policy statement;
(iii) a regional policy statement;
(iv) a proposed regional policy statement;
(v) a plan;
(vi) a proposed plan; and]
[(ac) the principal issues that were in contention; and]
[(ad) a summary of the evidence heard; and]
[(ae) the main findings of fact; and]

...]

[114. Notification—

(1) A consent authority must ensure that a copy of a decision ... is served on the applicant.
(2) A consent authority must ensure that a notice of decision ... is served on—
(a) persons who made a submission; and
(b) other persons and authorities that it considers appropriate.
(3) If the consent authority serves a notice summarising a decision, it must—
(a) make a copy of the decision available (whether physically or by electronic means) at all its offices and all public libraries in the district ... or region ...; and
(b) include with the notice a statement of the places where a copy of the decision is available; and
(c) send or provide, on request, a copy of the decision within 3 working days after the request is received.]

Once decisions are sent out to the applicant and submitters, either have the right of appeal or referral to the Environment Court (Ministry for the Environment 2001) as outlined in section 120.

[120. Right to appeal—]
(1) Any one or more of the following persons may appeal to the [Environment Court] ... against the whole or any part of a decision of a consent authority... on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:
   
   (a) The applicant or consent holder;
   
   (b) Any person who made a submission on the application or review of consent conditions.

[(2) This section is in addition to the rights provided for in [[sections 357A, 357C, and 357D]] (which [[provide]] for objections to the consent authority).]

It is apparent from s120(2) that the RMA also provides for other forms of appeal (i.e. 'objections') at various points earlier in the EIA process.

Separate provisions of the RMA apply to assessments for 'proposals of national significance'. For these proposals, following review of an EIS and the hearing process, a draft decision is produced which is subject to comment by the involved stakeholders prior to the final decision being made as outlined in sections 148-149.

[148. Board to produce draft report—

(1) As soon as practicable after a board of inquiry has completed an inquiry... it must—

   (a) make its draft decision; and
   
   (b) produce a draft written report.

(2) The draft report—

   (a) must state the board's draft decision; and
   
   (b) must give reasons for the decision; and
   
   (c) must include the principal issues; and
   
   (d) must include the findings of fact...

(3) The board must send a copy of the draft report to—

   (a) the applicants to whom the report relates; and
   
   (b) the local authority that received the matter; and
   
   (c) any other relevant local authorities; and
   
   (d) the persons who made submissions; and
   
   (e) the Minister of Conservation, if the report relates to the functions of the Minister; and
   
   (f) the Minister.

(4) The board must invite the persons to whom the draft report is sent to send their comments on any aspect of it to the board within 20 working days of the date of the invitation.]

[149. Board to produce final report—

(1) As soon as practicable ... the board of inquiry must—

   (a) consider any comments received; and
   
   (b) make its decision; and
   
   (c) produce a written report.

(2) The report—

   (a) must state the board's decision; and
   
   (b) must give reasons for the decision; and
   
   (c) must include the principal issues; and
   
   (d) must include the findings of fact...

(3) The board must send a copy of the report to—

   (a) the applicants to whom the report relates; and
   
   (b) the local authority that received the matter; and
   
   (c) any other relevant local authorities; and
   
   (d) the persons who made submissions; and
   
   (e) the Minister of Conservation, if the report relates to the functions of the Minister; and
   
   (f) the Minister.

(4) The board must—

   (a) publish the report; and
   
   (b) give public notice of where and how copies of it can be obtained. ...
Appeals against RMA decisions are made to the Environment Court and the Act includes several sections that specify the procedures for dealing with these. Decisions of the Environmental Court are final (s295). However, in the event that significant new information comes to light after a decision has been made, Section 294 provides for a rehearing of the case as follows:

294. Review of decision by [Environment Court]—
(1) Where, after any decision has been given by the [Environment Court], new and important evidence becomes available or there has been a change in circumstances that in either case might have affected the decision, the [Environment Court] shall have power to order a rehearing of the proceedings on such terms and conditions as it thinks reasonable.
(2) Any party may apply to the [Environment Court] on any of those grounds for a rehearing of the proceedings: and in any such case the [Environment Court], after notice to the other parties concerned and after hearing such evidence as it thinks fit, shall determine whether and (if so) on what conditions the proceedings shall be reheard.
(3) The decision of the [Environment Court] on any such proceedings shall have the same effect as a decision of the [Environment Court] on the original proceedings.

Decisions of the Environment Courts and all evidence presented to the court are held in the public domain, with some exceptions as provided in Section 277 as follows:

277. Hearings and evidence generally to be public—
(1) All hearings of the [Environment Court] shall be held in public except as provided in subsection (2).
(2) The [Environment Court] may—
(a) Order that any evidence be heard in private:
(b) Prohibit or restrict the publication of any evidence—
if it considers that the reasons for doing so outweigh the public interest in a public hearing and publication of evidence.

The New Zealand Ministry for Environment and other EIA stakeholders have provided considerable guidance to the operations of the RMA including the conduct of hearings and decision-making. Salient points follow.

Quality Planning (2006) provide guidance aimed at RMA decision-makers; this is advice on how to implement aspects of the EIA process in practice and is not legal direction. They state that some documentation of the decision-making process needs to be made (in accordance with s32 of the RMA), particularly over areas of controversy and/or disagreement with report recommendations. They suggest that this could be achieved as minutes and/or as part of the written decision. When making decisions, they advise authorities to allow for some iteration for complex and contested issues, noting that a hearing does not have to be a one-time only event. Other possible methods for resolving issues suggested by Quality Planning (2006) include the issuing of interim/draft decisions, or preparing further reports to Council after the hearing, but that both of these should allow opportunity for all interested submitters to comment by reconvening the hearing. Finally, they maintain that providing clear decisions is critical to reduce misunderstanding and possible appeals. In particular, they point out that accepting or rejecting decisions in part needs careful explanation, with the reasons set out logically to clarify what is being accepted or rejected and why.

Hunter and Allan (undated) also provide advice to RMA decision-makers. They advise that decision making must be fair and transparent meaning that councils are expected to conduct hearings in a manner which is 'inherently fair and just' and that all applicants and submitters have a right to a hearing before unbiased adjudicators. They stress that it is important that councillors involved in a hearing do not have any private discussions with applicants or submitters before hand, or between a hearing and making a decision, or make any comment to the media (Hunter and Allan (undated p27). The implication of this point is that all information should be in the public domain, not as private communication between some stakeholders and decision-makers.
In relation to the process of decision-making, Hunter and Allan (undated, p30) caution that care must be taken to take into account all relevant matters and not to take into account extraneous matters. Hence each case should be assessed on its merits in terms of the requirement of the RMA and plans. Further on, they make a clear statement regarding new information in the EIA process as follows (Hunter and Allan undated, p30):

One of the purposes of public hearings is to ensure that all information made available to the council is known to all interested parties. No additional information, such as reports from council staff, can be received after the hearing. If during the course of a hearing it is evident that further information is required to make a decision, the hearing must be adjourned and any further information obtained and made available to all parties for comment or prior to a reconvened hearing.

Similarly the Ministry for the Environment (2001, p32) when providing guidance on 'Making decisions and recommendations' state that:

No person, other than the hearing panel, should influence the decision. Therefore, it is appropriate to ensure that deliberations occur in such a way that: no new information is introduced. Under the heading of 'No new information', they further state that: 'It is important that no one is permitted to bring forward new information after the hearing is closed. Every issue which is taken into account should have been raised during the hearing'. To this, they add, however, that: 'A council may obtain confidential legal opinions on matters raised from its solicitors or on administrative matters without disclosing them to all parties' (Ministry for the Environment (2001, p32).

With respect to the scope or ambit of the decision, Quality Planning (2006) summarise relevant case law concerning the RMA. They note that:

decisions have to be made in terms of the relief sought or where the broader submission was couched in terms that sought a Council decision: 'The test is whether the relief goes beyond what is reasonably and fairly raised in submissions…'

An amendment to a proposed plan must be 'fairly and reasonably within the submissions filed' (Quality Planning 2006), meaning that the: authority must consider whether interested parties would reasonably have appreciated that such an amendment could have resulted from the decisions sought by the submitter. An amendment to a Plan should not go beyond what was reasonably and fairly raised in submission lodged in relation to that Plan.

The Ministry for the Environment (2001, p34) provide a similar caution and address the issue of decision-makers making changes that extend beyond what could reasonably be expected from submissions received during a hearing as follows (emphasis added):

Any changes made [to a policy statement or plan] need to be within the relief sought by the submissions. If the relief sought has not been clear enough for cross-submitters to respond, there will be difficulties in putting something right without going through another public process such as a variation or plan change.

The implication here is that significant new information or a decision that makes a significant change to a proposal beyond matters raised during the public review process would warrant a return to a public review process.

The Ministry for the Environment (undated) provides guidance for members of the public taking part in RMA processes. They note that a Council is required to consider any submissions made by the public and that submitters will receive a written copy of the decision, along with the reasons for it. Elsewhere, the Ministry for the Environment (2001, p36) advise that if the decision fully explains its reasons in a section on how the hearing panel have weighed up the issues, it may not be necessary for the authority to list the reasons specifically. They also suggest that it is particularly useful to refer to submitter's concerns in a decision, especially if the decision is contrary to that sought by them.

In summary, the requirements and expectations for public participation in EIA decision-making in New Zealand are well documented both in terms of the legal provisions of the RMA and in
supporting guidance by the responsible government regulators. The concept of natural justice/procedural fairness that emerges is a clear expectation that all EIA information relevant to approval decision-making is made available (except for the usual restrictions for sensitive information) to proponent and public stakeholders before decisions are taken and that the grounds of decisions are clearly disclosed after the decision is announced. Further, rights of appeal are provided, and resolution of appeals is equally a public process.

4.3 Europe: The Netherlands and UK

In Europe, the role and importance of public participation in EIA decision-making is guided to a large extent by the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters 1998. Hartley and Wood (2005) provide an analysis of how public participation in the UK system for EIA implements the Aarhus Convention principles. EIA practitioners from the Netherlands, Hungary and the UK contributing to this report, have emphasised the importance of this convention to EIA practice within Europe.

There are three Articles within the Aarhus Convention that are particularly relevant to EIA practice with respect to decision-making, information and public participation as follows:

**Article 5 Collection and dissemination of environmental information**

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible...

The remainder of Article 5 outlines expectations for making environmental information accessible to the public, principally through electronic means as the 'information progressively becomes available' (3).

**Article 6 Public participation in decisions on specific activities**

2. The public concerned shall be informed... early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of: [proposed activity, nature of possible decisions and opportunities for the public to participate]

3. The public participation procedures shall include reasonable time-frames for...the public to prepare and participate effectively during the environmental decision-making.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure... The relevant information shall include at least...

(f) ...the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph (2) above.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

**Article 9 Access to justice**

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information... has been ignored, wrongfully refused, whether in part of in fully, inadequately answered, or otherwise not dealt with in accordance with the provisions
of that article, has access to a review procedure before a court of law or other independent and impartial body established by law.

Articles 6 and 9 clearly establish important procedures which conform closely with 'normal' EIA processes. Expectations for the treatment of 'new' information at the decision-making point is not specified, although public disclosure of that information along with the decision is implicit in Article 6(9) and the right to appeal should the information not be provided is established in Article 9. Definition of what is meant by 'the public concerned' is provided in Article 2 of the convention as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'; thus disclosure of information should effectively be open to any third party stakeholder.

The provisions of the Aarhus Convention are not only open to some level of interpretation with respect to the key issue being examined in this report, but also may be implemented differently in signatory countries. This is because the convention is intended to be enacted 'within the framework of [a signatory country's] national legislation'. Some examples follow.

In the Netherlands, the proponent’s EIS is released for public review along with the draft decision of the competent authority (VROM, undated). Following the public review process, the EIA Commission undertakes its evaluation of the proposal. In doing so, it may request additional information (eg. from the proponent). The advice of the EIA Commission on the proposal (including any additional information that might have entered the process after the public review period) is published on the website of the EIA Commission before the final decision is taken and in most cases the additional information is published as part of the final decision. The final decision is made by the competent authority and is subject to court based appeals. Dutch practitioners participating in this research were emphatic that the public and proponent must have access to all information relating to EIA decision-making (i.e. in accordance with the Aarhus Convention expectations). Further it was suggested that if any new information was going to significantly change the proposal or the final decision, then there would be an expectation for another round of public participation. One participant noted that there are some mechanisms for limiting information disclosure where it could harm a proponent's competitive power, but also that it is difficult to use these and one has to explain a lot before this is accepted. Consequently, in Dutch EIA practice it hardly ever happens.

In the UK, EIA is mainly conducted within the landuse planning approvals system. There is legislative provision for public participation in EIA decision-making and that the competent authority must give some consideration to the EIS and public comments (especially those from Statutory Consultees) in making the decision; this has been confirmed in case law (e.g. summarised in Berkeley v. Secretary of State for the Environment and Another 2000 [3 W.L.R. 420]). Practitioners participating in this research indicated a number of perspectives on actual practice. While the EIS and public comments on it are publicly available information (i.e. files of planning authorities are accessible to the public during the process), one participant was of the view that any consultations by the decision-maker after the formal public review process would normally be outside the public domain. However, it was pointed out that Freedom of Information Act 2000 (UK) provisions would enable the public to obtain access to this information within 20 days of the request being made; thus any such request would likely still be within the time frame of the final EIA decision-making period. Others indicated that consultation with the proponent concerning 'new' information would normally occur in practice but this would not extend to public stakeholders.

A third participant stated that a competent authority in the UK must make all information relative to the decision available for public inspection five days before the decision is made and that this is true of all planning applications not just those where an EIA has been completed. He also cited from case law (including Berkeley mentioned previously) to point out that conditions cannot be placed on a planning approval for an EIA project that are intended to mitigate impacts unless those mitigation
measures have been subject to the same formal public consultation process as the original EIS and that this is also true of any 'further information' that is provided by the project proponent that is intended to 'complete' the EIS. Specifically in *R (on the application of Lebus and others) v South Cambridgeshire District Council 2002* [EWHC 2009] it was stated that:

> It must have been obvious that with a proposal of this kind there would need to be a number of non-standard planning conditions and enforceable obligations ... which should have been identified in a publicly-accessible way in an environmental statement prepared under the Regulations [50].

Thus it would appear that in the UK practice of EIA, the introduction of significant new information in the decision-making process would not occur without previous public disclosure, and if it did, then there would be solid grounds for mounting a successful appeal.

4.4 South Africa

In Section 2 it was noted that the Republic of South Africa formalised requirements for natural justice/procedural fairness in the *Promotion of Administrative Justice Act 2000*; another relevant statute to this issue is the *Promotion of Access to Information Act 2000* which gives effect to the constitutional right of access to any information held by government. The EIA process in South Africa is provided for in the *National Environmental Management Act 1998* and Department of Environmental Affairs and Tourism (2004) and outlines specific and extensive requirements for participation and information sharing during various stages of the process.

The South African EIA process occurs in three broad phases. In the first, following scoping, environmental investigations and public participation, an Environmental Impact Report (EIR) is produced which is submitted to the relevant environmental authority (provincial or national) for consideration. The second phase then starts which is the ‘deliberation phase’ when the report is considered in house by the state. The public or proponent do not have access to the deliberation discussions which may involve the public. The *Promotion of Access to Information Act 2000* allows those involved in the deliberations to 'speak their mind' and not be inhibited by disclosure of discussions. However, any new information generated during this phase (not including any commercially sensitive or other confidential information) would eventually be publicly communicated. Practitioners indicate that normally very little (if any) new information is generated independently by the state during deliberations. The outcome of the deliberation phase is either i) a request from the state to the proponent for more information (or to rethink the proposal) ii) or a record of decision (ROD) approving (with conditions) or disallowing the activity. At this stage the appeal period starts which could be considered the third phase. Any person may appeal or apply for the review of a decision. Lack of access to information is a strong ground for appeal and any technical information generated during appeal deliberations should be made available before a final decision. Only once the appeal process has run its course will a final decision be made.

In *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism and Eskom Holdings Limited 2005* [HCSA 7653/03], a successful appeal to the Cape Town High Court was made by the non-government environmental group Earthlife Africa in 2005 concerning the EIA for a nuclear reactor proposal in which a final EIR produced after receiving public submissions on a draft differed substantially from the original, however no opportunity was given to interested parties to comment on the new report (McDaid et al 2005). The court ruling made two important conclusions. Firstly, if a new matter is raised in a final EIA after a draft document has been circulated for public comment, then interested parties should be allowed to comment on the final document. In the words of the judge:

> The question for decision can therefore be narrowed down to an enquiry whether it was procedurally fair to take administrative action based on ‘substantially different’ new matter on which interested parties have not had an opportunity to comment. ... fairness requires that an interested party ought to be afforded an opportunity first to comment on such new matter before a decision is made’ [Earthlife, 59-60]
Secondly, the public comments received should be placed before the decision-maker in an accurate summary and the decision-maker must consider them (McDaid et al 2005). The conclusion of the judge follows.

Taking a step back and considering the evidence as a whole, the picture that emerges is one where the requirements of procedural fairness were by and large recognised and observed on behalf of the department up to and including the submission by Eskom's consultants of their final EIR. Subsequent thereto, however, no further submissions from interested parties were entertained or even invited by the DG [Director General of the Department of Environmental Affairs & Tourism], notwithstanding the fact that the final EIR differed materially from the earlier report on which the applicant did comment. Furthermore, the DG made his decision without having heard the applicant and without even being aware of the nature and substance of the applicant's submissions. In these circumstances, I am driven to the conclusion that the process that underlay the decision of the DG was procedurally unfair and falls to be set aside. [Earthlife, 76]

The outcome of the case was that the original decision was struck down.

The timing and nature of information disclosure in the South African EIA decision-making process is relevant to the consideration of natural justice. The EIA procedures provide that the ROD must clearly indicate the key decision factors which underpin the decision and its contents must be communicated to the proponent and the public. However, it was pointed out by one practitioner contributing to this study that the ROD must be made public, but not the official assessment of the project that led to the decision. Another noted that there have been several recent cases where a publicly available ROD has been appealed. In each case, the Minister has sought expert opinion on the merits of the appeal. The expert's reports however were not made available to either the public or the proponent prior to the Minister announcing his final decision. In one case (for which the responding practitioner was a member of the Minister's review panel), one of the main appellants made several requests for access to the review report, which were repeatedly turned down by the Department of Environmental Affairs and Tourism. The appellant then invoked the Promotion of Access to Information Act 2000 in order to successfully obtain the review report. Whilst in this circumstance the basis of the decision was finally revealed, this South African EIA practitioner was not aware of any court case or use of the Act to access reports before a final decision was taken.

In summary, South Africa have gone a long way to ensure natural justice/procedural fairness in EIA and other decision-making. Nevertheless, it appears that there is no guarantee that any new information sourced by decision-makers during the final approval decision-making process will be publicly disclosed until after the decision has been announced.

4.5 Others
The previous international examples generally appear to be representative of relatively advanced EIA practice. Experience elsewhere is varied across the spectrum of possibilities for public involvement in EIA decision-making. The examples that follow commence with the more 'advanced' systems and progress to some lesser advanced systems.

United States
Individual EIA systems operate nationally and within the individual states of the US. The two most well-known EIA systems in the US are the national and Californian systems, having been written about extensively in the literature (e.g. Wood 2003). Provisions for public involvement in both systems appear to be similar and largely shaped by the extensive history of litigation concerning EIA practice over the past 35 years. The US has a tradition of openness with information; EIA processes are very open with draft assessment reports by decision-makers being available for public review. Importantly, all information relied upon in these reports (except commercial or confidential matters) must also be made available to the public either in the environmental report itself, or available for review at the Lead Agency's office. The process, as described in regulations, ties the
decision to the EIS record; the approving agency has to make its decision based on the Final EIS, and if it strays outside on an environmental matter, it is at risk of litigation. Information on environmental factors that may have been developed for an applicant or agency but not relied upon by the Lead Agency in the assessment document need not be made available to the public. Thus, all information must be made available to all interested parties prior to the final decision; however litigation is then limited to that information - in only very limited circumstances can additional information be presented to a court. The US has a freedom of information act (FOIA) and any information that does pose not a national security risk must be made available by the government where citizens submit a 'FOIA request'.

If new information emerges during the decision-making process, the Lead Agency could ignore it if it came from someone who could have or should have provided it during the EIS period. If it is legitimately new (and significant for the proposal), it is likely that a Supplemental EIS and public review would be required before decision-making.

The approval decision is explained in a 'Record of Decision' (ROD) which does not present new information, but rather points to the way the EIS findings were considered in the decision. RODs are usually distributed to the public and comments allowed before the decision is final, but if so that is a public process, and a practitioner comment suggests that it rarely changes things.

Legislation beyond the statutes establishing EIA procedures also play a role in the US processes. Most approving agencies also have separate review and notification statutes for the specific approval actions, which typically provide for at least two weeks notice/review time of the assessment report (although this varies according to jurisdiction/agency). Approval conditions are typically made available to the public and proponent at least two weeks prior to project approval via the various project-approval statutes. Sometimes additional or reduced or otherwise modified conditions of approval are included in a project approval at the last minute as a result of discussion at the project approval hearing or comments submitted by interested parties (including the proponent). If these have the potential to increase impacts, then additional public review may be required.

In short, EIA practice in the US is designed to ensure that no 'new' information can enter the process that is not publicly disclosed. If information is not available to the public (with the exception of information that poses a national security risk), then it does not exist for all practical purposes. Thus matters of natural justice/procedural fairness are similar to the situation in Canada or the Netherlands.

**São Paulo, Brazil**

Brazil, like Australia, Canada and the US, also has a federal EIA system as well as individual processes in each state such as São Paulo. The São Paulo EIA system is one of the most developed in Brazil. In São Paulo (and allegedly several other states, but not in the Federal procedure), a decision is only made after hearing an 'environmental council', composed of representatives of different government departments, NGOs, academics, business and labour representatives. In São Paulo this council is made up of 36 members, 18 from government and 18 from other interests. The EIA branch-DAIA (part of the Environment Department) reviews the EIS, asks for clarification or more detailed information and prepares a report (EIS review report), which is submitted to the Environmental Council with explicit recommendations regarding project approval (or not) and conditions that would be imposed through the environmental license. The Council usually accepts the DAIA opinion, but can add new conditions or can vote against the DAIA recommendation (which allegedly only happens in rare cases).
Hence the EIS review report is publicly available before the actual decision. Any additional report, prepared to support this review report, may be requested by any Council member. In theory, any document used by DAIA to prepare its report is publicly available. However, DAIA may hire external consultants to help its officials to prepare the review report and there is no control over how the review coordinator (or the head of DAIA) uses the opinion provided by consultants - these consultants reports are internal documents and are not publicly available. A consultant's contribution is considered as a draft and is not necessarily accepted by the review coordinator. Thus, apart from these particular 'drafts', all information generated during the EIA process is available before the actual decision. This is different under the federal procedure, for which the review reports are not submitted to any multi-stakeholder council.

In São Paulo EIA there are no written rules for decision-makers relating to consultation with proponents or public stakeholders concerning 'new' information. In practice, usually information pertaining to new approval conditions (i.e. different from those in the review report) would be discussed with the proponent but apparently this is not always the case. It is up to the discretion of the review coordinator (or the head of the EIA branch DAIA) to promote additional (informal) consultation/negotiation with interested parties.

**Hong Kong**

In Hong Kong, the decision-maker is not obliged to make internal documents or information available to the public or project proponent during deliberations following the public review of the EIS and response by the proponent. The Environmental Protection Department (EPD) is responsible for approval decision-making and for issuing an environmental permit. Thus, working papers and technical documents leading to the final decision along with information provided to the EPD by other Government agencies (e.g. ecological assessments by the Department of Agriculture, Fisheries and Conservation) are not disclosed prior to the decision. The proponent can appeal the decision under the appeal provisions in the EIA Ordinance. Sometimes, the decision maker will alert the proponent in cases where the proposal would be rejected, giving the proponent the chance to withdraw the proposal before announcement of the decision if they so wish.

**India**

In the Indian EIA system, there is a mandatory requirement for public opinion to be sought through a public meeting, the minutes of which should be taken into account during approval decision making. Review of the proponent's document along with the public meeting minutes is undertaken by the Ministry of Environment and Forest. Their document itself is a confidential document and is not available for public viewing. However, environmental approval conditions are made available to the public on request through State Pollution Control Boards and online ([http://envfor.nic.in](http://envfor.nic.in)). The decision maker is not liable to take comments from any other bodies or individuals into consideration prior to the final decision. Thus the decision-making process is excluded from public participation and the EIA process is largely non-transparent.

**Italy**

In Italian EIA, the general public is involved in the process in three ways: (1) information about proposals is published in the newspaper; (2) the EIS is deposited in local offices for public comment; and (3) the approval decision and the recommendations are made available to the public. Generally speaking, if new information emerges after the public comment period, they will not be informed or have the opportunity to resubmit comments. A 1996 law, which delegated EIA responsibilities to the regions, allows the competent authority to hold a public inquiry if they consider it appropriate. However, the decision-making process remains out of the public domain.
Mexico
In the EIA process in Mexico, once the EIS is ready, the proponent presents it to the authority for review, and only then it goes public. The authority has 60 working days to analyse the EIS and make a decision, which usually ends up in a conditional approval. There is no decision-maker’s own assessment report, only an official statement of approval.

During the authority evaluation process the EIS is available for public review. If any person is interested in the proposed project they may formally ask the authority to open a ‘public consultation’ process. If the authority consents, the proponent has to present a summary of the project in a local paper including the most significant environmental impacts it will produce. During this public consultation period, anyone can suggest prevention and mitigation measures and send them to the authority along with any other comments that they consider relevant. In its final approval document, the authority has to include the outcome of considering all of the public comments. Additionally, in more visible/problematic cases, the authority may choose to coordinate a public information meeting in the locality of interest at which the proponent makes a presentation and public comments are received. Between the meeting day and the final approval decision date the public can send additional comments to the authority. In practice, very few public information meetings have been held. Overall, public participation in EIA decision-making in Mexico appears to be very limited.

Bhutan
Bhutan has a relatively new EIA system that only came into being with the legislation in 2000 and regulations in 2002. The public review system is in its infancy as is development of rule of law. An automated EIA database has recently been set up to enable proponents and the public alike to access on proposal ‘status information’; some of this information will go beyond what is traditionally available to the public in EIA. At this stage, it appears unlikely that full public participation in EIA approval decision-making occurs or is likely to occur in practice.

5. Australian examples
As with the international examples presented in the previous section, EIA experience across Australia is varied. Each state or territory and the federal government have their own EIA system which exhibit unique procedures and processes. Many have more than one process in place, either for the assessment of:

- different scales of development (e.g. Tasmanian differentiate between projects of State significance and smaller ones with different statutes for each);
- different types of development proposal (e.g. Victoria has separate legislation to regulate land use planning proposals and project EIA); or
- strategic versus project level assessments (e.g. Western Australia has separate processes for these, but established under a single statute).

It is not practical to discuss all of the processes here; they have been described in some detail in Harvey (1998) and Thomas and Elliott (2005) although some systems have been amended since those accounts were published.

The purpose of this section is to highlight some key examples from Australian practice, starting with some of the state level processes and ending with the commonwealth system.

5.1 Western Australia
Transparency of process is a key aspect of EIA practice in Western Australian (Morrison-Saunders and Bailey 2000). Following public review of the EIS, the proponent is required to respond to the public comments received and these are subsequently published in the report and recommendations of the Environmental Protection Authority (EPA) on a proposal. The EPA report is a public document and subject to third party appeals.
The website of the Appeals Convenor (http://portal.appealsconvenor.wa.gov.au/portal/page?_pageid=1258,1&_dad=portal&_schema=PORTAL) outlines the process for determining appeals on the EPA report. In summary, the Appeals Convenor consults with appellants during the consideration of the appeal. Where there are a large number of appellants, this may be through joint meetings or similar processes. The Appeals Convenor also consults the EPA, the proponent and any other person, authority or group with a special interest in the proposal. Thus there is plenty of opportunity for 'new' information to enter the process. However, the Appeals Convenor will normally share this information with the affected or interested stakeholders and obtain their advice or views accordingly. Most appeals are assessed by the Appeals Convenor and the aim is to refer them to the Minister for decision within six weeks of the closing date for appeals, although more complex appeals or appeals involving a number of appellants typically take considerable additional time.

In determining an appeal against the content or recommendations in an EPA report, the Minister may:
- dismiss the appeal;
- remit the proposal to the EPA with a direction that it be further assessed or reassessed; or
- vary the EPA's recommendations by changing the implementation conditions.

The Minister writes to the appellant setting out full reasons for the decision as soon as possible after the appeal is determined. The Appeals Convenor provides a copy of the decision available to the proponent and other interested parties, including making it available in the library of the Department of Environment and Conservation and on the Appeal Convenor's web pages.

Unlike the EPA, which is constrained by provisions of the Environmental Protection Act 1986 (WA) to report only on 'relevant environmental factors' for a given proposal, the Minister is not constrained when making the final approval decision. Thus political factors will frequently be an influence on the final outcome. Decision-making by the Minister (or Cabinet) occurs behind 'closed doors' and only the proponent has the right of appeal against any conditions or procedures imposed by the Minister on an assessed proposal. Appeals against a decision of the Minister are required to be heard by an Appeal Committee. Appeal Committees will generally follow the procedures developed by the Convenor in investigating and reporting on appeals. While an appeal against conditions set by the Minister is pending, the proposal cannot be implemented or continue to be implemented. The Appeals Committee consults with the appellant during the consideration of the appeal. The Committee also consults the EPA and such other parties as appropriate. The Minister must determine the appeal in accordance with the recommendations of the Appeals Committee. This can be either that the appeal be upheld or dismissed. The Minister writes to the appellant setting out full reasons for the decision as soon as possible after the appeal is determined. The Appeals Convenor provides a copy of the Minister's decision to other interested parties and the outcome of the appeal is made publicly available as for EPA report appeals discussed previously.

In summary, the Western Australian EIA process, especially the conduct of the Appeals Convenor, ensures transparency of all environmental information used in decision-making up until that point in the process and upholds general principles for natural justice/procedural fairness. However, the final decision of the Minister is essentially a private process. Again, this reflects the essential difference between the assessment stage and the approval stage of the EIA process.

5.2 Tasmania
In Tasmania two EIA approvals systems operate.
Projects of state wide significance are assessed under the terms of the *State Policies and Project Act 1993* (Tas). Only a small number of these are typically conducted each year. In the process the draft 'integrated assessment report' (i.e. following normal public review of an EIS) is subject to public review (s22-23). The Resource Planning and Development Commission is required to consider the public submissions (s24) and may modify the integrated assessment report accordingly (s25). The Commission then makes recommendations on the proposal, including proposed conditions of approval, to the Minister and this report must be made publicly available (s26). In one recent assessment, the proponent came back with modifications to the proposal following the draft integrated assessment process and the Commission put the information out for further public comment. The implication here is that full disclosure of information relevant to decision-making is paramount prior to the approval decision being made. In making the final approval decision, the Minister is not fettered in terms of what they can include in the decision-making process (i.e. it would be possible for new information to enter the process at this point) and there are limitations on rights of appeal against the Minister's decision (s28). Overall, though, this process appears to be cognizant of natural justice rights.

Land use planning permits are assessed under the terms of the *Environmental Management Pollution Control Act 1994* (Tas) with proposals falling into Schedule 2 of the Act requiring EIA. Following public review of the EIS, assessment is carried out by the Board of Environmental Management and Pollution Control (Department of Environmental and Land Management, undated). The Board has the power to exclude public disclosure of information which has a legitimate commercial, security or environmental reason for its non-disclosure. The Board may consult with other government agencies during its assessment, which can result in 'new' information entering the decision-making process. This information would not normally be publicly available until the decision is announced. Appeals against the approval decision (i.e. granting a permit) may be made by any person who made a representation during the public review period (Department of Environmental and Land Management, undated).

Comparing the two systems in operation in Tasmania, it seems that the observance of natural justice/procedural fairness in the assessment of Schedule 2 proposals under the *Environmental Management Pollution Control Act 1994* is of a 'lower level' than that for projects of state significance assessed under the *State Policies and Project Act 1993* in terms of the level of public involvement in decision-making prior to the making of decisions.

### 5.3 New South Wales

In New South Wales, EIA is provided for in the *Environmental Planning and Assessment Act 1979* with final decision-making the responsibility of the Minister for Planning as specified in s75J as follows:

**75J Giving of approval by Minister to carry out project**

(1) If:

... (b) the environmental assessment requirements under this Division with respect to the project have been complied with, the Minister may approve or disapprove of the carrying out of the project.

(2) The Minister, when deciding whether or not to approve the carrying out of a project, is to consider:

(a) the Director-General’s report on the project and the reports, advice and recommendations contained in the report, and

(b) if the proponent is a public authority—any advice provided by the Minister having portfolio responsibility for the proponent, and

(c) if the Minister has directed an inquiry be held in accordance with section 119 with respect to the project—any findings or recommendations of the Commission of Inquiry.

...
(4) A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine. Some appeal rights are provided for regarding decisions under the Act in Part 3A. While the considerations of the Minister are specified in s75J(2) for making the decision, whether or not any 'new' information should be shared with stakeholders is not mentioned. In the absence of any statutory direction, guidance on this matter would have to be derived from case law such as Anderson v Dept Environment discussed previously. Presently the specific issue remains untested in NSW law.

5.4 Victoria
Of each of the state processes examined in Australia, Victoria appears to have the least provisions for public participation in EIA decision-making. In the Environmental Effects Act 1978 (Vic), which is a very short statute compared to all others examined in this report, there is no mention of public participation or appeal rights. However, the supporting Ministerial guidelines for assessment under this Act (Department of Sustainability and Environment (DSE) 2006) outline the public review process for the EIS (p24) and state that the Minister's assessment of a proposal will involve consideration of public submissions amongst other factors including any other information provided by the proponent (p27). The Minister's assessment is placed in the public domain on the DSE website. Nothing, however, is binding in the process established under the Act, and while the Minister's assessment is required to be considered by relevant decision-makers (i.e. operating under other statutes), their recommendations are not binding on the decision-maker (DSE 2006, p28). In short there is little or no provision for public participation in the EIA decision-making process and any consideration of natural justice/procedural fairness concerning this issue would depend upon the provisions of the statutes that the final decision-makers operate under; these are not further considered here.

5.5 National approach to EIA in Australia
Previously in 3.2, some of the principles for public participation in the EIA process at the Commonwealth level were presented. The purpose of the discussion here is to identify the specific legal framework for the current process in operation.

Most Commonwealth EIA decisions will be undertaken as part of an accredited state or territory EIA. This means that the Commonwealth Minister will make a final approval decision once the normal state/territory EIA process has ended. Thus, while the state/territory systems clearly have some bearing, this section considers only the Commonwealth role in EIA, as defined in the EPBC Act. It should be noted, however, that state or territory processes can only be accredited by the Commonwealth if they meet certain benchmarks, one of which is a requirement for public participation in the assessment process.

EIA is triggered under the EPBC Act if a proposal (specifically known as an 'action') is likely to have a significant impact on (DEH, 2006):

- a matter of national environmental significance (the Act defines 7 of these);
- the environment of Commonwealth land; or
- the environment anywhere in the world if the action is undertaken by the Commonwealth.

The EPBC Act makes a clear distinction between the assessment and approval stages: assessment is addressed in Part 8 of the Act; approval is addressed under Part 9. Part 8 of the Act makes it clear that the assessment of a proposed action must relate only to the relevant environmental impacts. Under Part 9, however, the approval decision considers those environmental impacts as well as economic and social matters. The public participation requirements of the two processes are very
different. Full public participation is mandated in the assessment stage to ensure all stakeholders have the opportunity to put information before the decision-maker. However, once the decision-making stage is entered, while the statutory regime provides the opportunity for the decision-maker to seek further information, if required, the Act is silent in relation to providing opportunities for anyone else to comment on that further information. Once the decision is actually made, however, all relevant information, including the decision and any conditions, is publicly released.

Following the public review processes for an EIS typical of EIA practice generically (or assessment by a state or territory government in the case of an accredited process), the DEH prepares an assessment report in accordance with s105 of the EPBC Act as follows:

105. Assessment report
Preparation
(1) The Secretary must prepare, and give to the Minister, a report relating to the action within 30 business days after the day on which the Minister accepted from the designated proponent the finalised statement.

Publication
(2) The Secretary must provide to a person who asks for the report a copy of it (either free or at a reasonable charge determined by the Secretary).

Discretion not to publish
(3) However, the Secretary may refuse to provide a copy of so much of the report as:
   (a) is an exempt document under the Freedom of Information Act 1982 on the grounds of the security of the Commonwealth or its providing advice to the Minister; or
   (b) the Secretary is satisfied is commercial-in-confidence.

Commercial-in-confidence
(4) The Secretary must not be satisfied that a part of the report is commercial-in-confidence unless a person demonstrates to the Secretary that:
   (a) release of the information in that part would cause competitive detriment to the person; and
   (b) the information in that part is not in the public domain; and
   (c) the information is not required to be disclosed under another law of the Commonwealth, a State or a Territory; and
   (d) the information is not readily discoverable.

Thus there may be public disclosure of the assessment advice provided to the EIA decision-maker (subject to the usual security or commercial confidentiality clauses) similar to many other EIA systems around the world. The current practice, however, is that the assessment advice is released publicly once the final decision is made rather than during the approval process itself.

Division 7 of the Act establishes procedures for conducting Inquiries. These are not further considered here other than to note that at the end of an inquiry, the commissioners conducting the inquiry must report to the Minister and publish their reports (s106).

The Act provides direction for the Minister when making the final EIA approval decision. Firstly, s130(1) establishes a basic rule for a decision that: ‘the Minister must decide for the purposes of each controlling provision whether or not to approve the taking of a controlled action’, meaning that the decision must pertain only to the matters (e.g. of national environmental significance) that the EIA process for a particular proposal was based upon.

Before making the final EIA approval decision, the Minister is required to consult with other affected Ministers as specified in s131 as follows:

131. Inviting comments from other Ministers before decision
(1) Before the Minister (the Environment Minister) decides whether or not to approve the taking of an action, and what conditions (if any) to attach to an approval, he or she must:
(a) inform any other Minister whom the Environment Minister believes has administrative responsibilities relating to the action of the decision the Environment Minister proposes to make; and
(b) invite the other Minister to give the Environment Minister comments on the proposed decision within 10 business days.

(2) A Minister invited to comment may make comments that:
(a) relate to economic and social matters relating to the action; and
(b) may be considered by the Environment Minister consistently with the principles of ecologically sustainable development.

This does not limit the comments such a Minister may give.

Thus new information, including material not directly relevant to the scope of the EIA previously, may be introduced into the process. Additionally, s132 of the Act enables the Minister to seek more information for the decision-making process as follows:

**132. Requesting further information for approval decision**

If the Minister believes on reasonable grounds that he or she does not have enough information to make an informed decision whether or not to approve for the purposes of a controlling provision the taking of an action, the Minister may request any of the following to provide specified information relevant to making the decision:

(a) the person proposing to take the action;
(b) the designated proponent of the action;
(c) if a commission has conducted an inquiry under Division 7 of Part 8 relating to the action—the commission.

There is no requirement in the Act to disclose this information to the proponent or the affected public prior to decision-making. However, publication of the decision is provided for in s133 as follows:

**133. Grant of approval**

Approval
(1) After receiving an assessment report relating to a controlled action, or the report of a commission that has conducted an inquiry relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action by a person.

Content of approval
(2) An approval must:
(a) be in writing; and
(b) specify the action that may be taken; and
(c) name the person who may take the action; and
(d) specify each provision of Part 3 for which the approval has effect; and
(e) specify the period for which the approval has effect; and
(f) set out any conditions attached to the approval.

Notice of approval
(3) The Minister must:
(a) give a copy of the approval to the person; and
(b) provide a copy of the approval to a person who asks for it (either free or for a reasonable charge determined by the Minister).

Limit on publication of approval
(4) However, the Minister must not provide under subsection (3) a copy of so much of the approval as:
(a) is an exempt document under the *Freedom of Information Act 1982* on the grounds of commercial confidence; or
(b) the Minister believes it is in the national interest not to provide.

The Minister may consider the defence or security of the Commonwealth when determining what is in the national interest. This does not limit the matters the Minister may consider.

The same restrictions on public disclosure of information as for s105 discussed previously are included in this section (i.e. s133(4)). Finally, some direction is given to the Minister concerning the basis of the final approval decision in s136 as follows:

**136. General considerations**

Mandatory considerations
(1) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:
   (a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action;
   (b) economic and social matters.

Factors to be taken into account
(2) In considering those matters, the Minister must take into account:
   (a) the principles of ecologically sustainable development; and
   (b) the assessment report relating to the action; and
   (c) if the action was assessed under Division 5 or 6 of Part 8 (which deal with public environment reports and environmental impact statements)—the report or statement about the action finalised by the designated proponent; and
   (d) if an inquiry was conducted under Division 7 of Part 8 in relation to the action—the report of the commissioners; and
   (e) any other information the Minister has on the relevant impacts of the action (including information in a report on the impacts of actions taken under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments)); and
   (f) any relevant comments given to the Minister by another Minister in accordance with an invitation under section 131.

Person’s environmental history
(4) In deciding whether or not to approve the taking of an action by a person, and what conditions to attach to an approval, the Minister may consider whether the person is a suitable person to be granted an approval, having regard to the person’s history in relation to environmental matters.

Minister not to consider other matters
(5) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must not consider any matters that the Minister is not required or permitted by this Subdivision to consider.

The general intention behind this section is to focus the decision on the substance of what has been previously presented in the EIA documents up until this point (i.e. principally on matters of national environmental significance) as was also established in s130(1) previously. There is no explicit suggestion that 'new information' might enter the process under this section. However, the inclusion of 'economic and social matters' in s136(1)(b) along with any 'relevant comments' provided by another Minister (s136(3)(f)) means that matters other than environmental considerations (e.g. political issues) are a legitimate component of the decision.

As specified in s391, the Minister must also consider the precautionary principle in making EIA approval decisions under s133. Specifically: 'lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage' (s391(2)).

Section 487 provides for 'extended standing for judicial review' of decisions made under the Act, meaning that any (Australian) person, organisation or association aggrieved in relation to the provisions of the Administrative Decisions (Judicial Review) Act 1977 (mentioned previously in Section 2) may appeal with respect to:
   • review of a decision made,
   • a failure to make a decision, or
   • conduct engaged in for the purpose of making a decision,
under the EPBC Act or its Regulations. Thus, albeit indirectly, the EPBC Act provides for observance of the rules of natural justice in connection with the making of an EIA approval decision. However, exactly what might constitute a breach of natural justice with respect to the treatment of 'new' information in EIA decision-making under the EPBC is open to interpretation; the final section of this report provides some further reflection on this.
6. Discussion: understanding EIA decision-making, public participation and procedural fairness

The purpose of this section is to provide a model for understanding EIA decision-making and public participation with respect to matters of natural justice/procedural fairness. To do this, firstly it is important to synthesise some of the key aspects surrounding these three components, introduced in the previous sections; namely

- Exactly what natural justice/procedural fairness entails is not outlined in (Australian) legislation – rather it has to be derived from case law and actual experience;
- The concept of natural justice/procedural fairness in EIA has not previously been defined in absolute terms internationally and cannot or should not be in light of differences between individual proposals and their environmental settings, not to mention different jurisdictions and cultures;
- Regulatory provision for natural justice/procedural fairness in EIA can only be prescribed in terms of being a principle to uphold; it can be advocated in procedural terms as an expectation or requirement that should be negotiated between EIA stakeholders for a given proposal and its assessment; and
- The practice of EIA, particularly with regard to specific legal provisions for public participation in the process and the manner in which decisions are made, is not uniform generically but nevertheless tends to be more relevant at the assessment stage of EIA. International experience suggests public participation is designed primarily to provide the public with an opportunity to put their views before the decision-maker. However, once the decision-making stage is entered (and this is typically at a political level), there seems to be far less opportunity for public participation.

Thus it will not be possible to define or prescribe what constitutes natural justice/procedural fairness across all EIA practice; rather, it is necessary to interpret and determine this on a jurisdictional and case-by-case basis. To guide this process, a framework for conceptualising and classifying individual EIA processes has been developed.

While the generic EIA process described previously (Figure 1) provides a useful outline of key steps in EIA all jurisdictions have different characteristics and procedures (i.e. their legal nuances are unique). In relation to Figure 1, what is of particular interest to this report are three of the steps in the generic process: EIS/Report Review, Decision-making and Approval; each of which may actually involve several smaller discrete steps within them as follows:

- EIS/Report Review – this can be divided into public review of the EIS (and in some jurisdictions, proponents are required to respond to the public comments and to amend their mitigation commitments or proposal design accordingly) and 'evaluation' by the EIA agency (often known in international terms as the 'competent authority') in what has been referred to as the assessment stage of EIA throughout this report. This evaluation is sometimes known as, or treated as a 'draft decision' which is then forwarded to the ultimate EIA approval decision-maker;
- Decision-making – this step entails deliberation by the EIA approvals decision-maker (typically a senior government Board, agency or Minister) and subsequent public announcement of the approval decision (in essence, the 'final decision'). In some jurisdictions there is provision for appeals against the approval decision by the proponent and/or public stakeholders; and
- Approval – once any appeals over the 'final decision' are resolved, approval to proceed with the proposal is granted to the proponent along with any conditions for mitigation or project operation.

Overall, international EIA practice provides a spectrum of possibilities for decision-making, public participation and consequently what adherence to or delivery of procedural fairness would entail
(e.g. some are more ‘advanced’ than others with respect to levels of public engagement and was made evident in Section 4). However it is possible to single out two key aspects of EIA procedures concerning approvals decision-making (i.e. the EIS/Report Review, Decision-making and Approval steps in the generic EIA process) where significant points of difference can arise:

1. Whether or not the environmental advice to the decision-maker at the end of the assessment stage (e.g. draft decision effectively) is available for public comment; and

2. Whether or not there is legal direction provided for the basis of the approval decision. These are addressed in turn, with particular reference to the implications for dealing with ‘new information’.

Firstly, though it is important to note that there could be 100% compliance with respect to natural justice/procedural fairness for each EIA system type represented in the various scenarios arising from these points of difference, but what actually occurs with respect to the level of public participation in EIA decision-making may still vary tremendously between different systems. Hence, evaluation of procedural fairness must be judged in relation to the specific legal context of a given EIA system.

Is the environmental advice to the EIA decision-maker available for public comment?
There appears to be two types of EIA system in operation worldwide – those that allow for public comment on the final approval advice presented to EIA decision-makers and those that don’t.

For the latter type, the EIA system would look much like the generic process outlined in Figure 1; public comments would be received on the proponent's EIS, but any subsequent deliberations by EIA agencies during the assessment stage (i.e. the 'draft decision') would not be part of the public (or proponent) domain. Only when the final approval decision is announced would the public become aware of the substance of the evaluation (and as outlined previously, there may or may not be opportunity to lodge appeals against the decision). Thus, any 'new information' brought into the process by the EIA agency and/or the EIA approvals decision-maker would only enter the public domain (including that of the proponent) after the decision had been made. A variation on this model is to have public disclosure of the draft decision prior to final decision-making, but no opportunity for public comment. In this variation, the proponent and public stakeholders would be aware of any new information introduced into the EIA process after the formal public EIS review process had ended, but not entitled to formally respond to it.

In the former type, the draft decision is subjected to public scrutiny and comment. Thus any 'new information' introduced in the evaluation process by the EIA agency would be subject to public disclosure and comment. In some jurisdictions (e.g. Western Australia), public comment on the draft decision is treated as though it were a formal appeal [in reality a so called 'draft decision' is really just a statement of intent, so technically cannot be 'appealed' against]. In this instance, any new information that comes into the process during resolution of those appeals would presumably be shared between the appellants, the agency hearing the appeals and the proponent. Following the public comment or appeals process, the EIA approvals decision-maker would be able to factor in the reactions of the public and proponent into the final decision. If, however, the EIA approvals decision-maker draws upon some further new information in reaching the final decision, then whether or not there is public/proponent disclosure of this information first is dependent upon the next point of difference between EIA systems.

What manner of legal direction is provided for the basis of EIA approval decisions?
The legal framework for a given EIA system will generally specify who is responsible for the various tasks involved in the process; hence the EIA approvals decision-maker will normally be defined. Additionally, too, the procedures for making a decision and directions concerning the
substance of the decision may also be elucidated. A spectrum of possibilities exist here; for example:

- that a decision-maker 'should' or 'must' take the relevant EIA documents (e.g. EIS, public comments, proponent response, assessment report by EIA agency etc) into account when making the decision;
- that the decision must be based only on the content of the relevant EIA documents;
- that the decision must be based only on particular factors identified during scoping or specified in a statute or regulations (i.e. the basis for the decision might be more limited in scope than the entire range of issues brought up by the proponent in their EIS or in public comments); and/or
- there is no prescription or direction provided for decision-making.

The details of the EIA statute and/or regulations will make a big difference to the outcomes in each case, especially the definitions provided for important terms. For instance, the definition of 'EIA' and what is meant by 'environment' varies tremendously between different jurisdictions. Some definitions of EIA determine whether just 'projects' are to be subjected to EIA or whether more strategic level decision-making (plans, policies, legislation etc) are to be assessed; some have different expectations for consideration of alternatives, mitigation and follow-up. Some definitions of 'environment' in EIA are restricted to biophysical considerations, whereas others include social and economic dimensions so the scope of EIA decision-making can vary tremendously. Where the emphasis of EIA is on biophysical aspects only, it is likely that information generated in the EIA may be only one consideration taken into account by political decision-makers – hence there is plenty of opportunity in this instance for 'new information' to be introduced into the final decision making process that has not been disclosed to public or proponent stakeholders.

In jurisdictions where a Minister or Cabinet makes the final approval decision, there is scope for political issues to sway the decision-making process; such issues would typically be beyond the scope of most EIAs (again, depending to some extent on the definition of environment in use). In this arrangement, there may not be a strict requirement for decision-making to be based on the information contained in the EIA documents. In the words of Gilpin (1995, p24): 'In the end, the decision-maker reaches a determination; the EIA is simply an input to that process. There might be other important considerations known only to the government'.

It is interesting to reflect on systems where the approvals decision-maker is required to only consider information previously raised in EIA documents, particularly if there is a considerable time lag between the closure of public review processes and the making of the final decision, because this requirement ignores the possibility (or even likelihood) that new information will emerge or become evident. For instance, publication of a research paper or a new monitoring event might generate data of relevance to a particular decision at hand. In this case, the decision-maker would have to either ignore the new information or else revisit a part of the EIA process again (e.g. another public review period) if there is an expectation or requirement that this information is publicly disclosed prior to decision-making.

This gives rise to a need for some test of significance with respect to the treatment of new information entering the process during EIA decision-making. New information could be significant in two main ways:

- if it changes the project substantially and by extension, introduces or raises new environmental issues (e.g. new location, technology or mitigation measures); or
- if it substantially changes the appraisal of the existing/original proposal (e.g. discovery of a rare or endangered species in the project area might lead to a rejection of the proposal that otherwise would not have been the decision outcome).
This generally conforms with the 'Project' perspective on the significance of environmental impacts advanced by Duinker and Beanlands (1986). They suggest that 'impacts of any magnitude can be deemed insignificant if they are not considered in making project-related decisions'. For the purpose of this report, new information is being substituted for 'impacts'. The implication for natural justice/procedural fairness is that new information deemed to be significant should be disclosed to relevant stakeholders in the EIA process.

Finally, it should be noted that privacy or sensitivity rules might apply in relation to some information as has become evident in many of the systems addressed in the previous sections. This may be the case with matters of national security (e.g. assessments of defence related proposals), commercial confidentiality matters (e.g. new technologies not yet patented) or possibly to protect the environment (e.g. not disclose the location or a rare species to protect it from exploitation by other parties). Thus in certain circumstances, decision-makers may be legitimately exempt from disclosing particular information used in EIA decisions. Provision for this is generally outlined in relevant EIA legislation.

7. Conclusions: Treatment of new information in EIA decision-making

The purpose of this section is to pull together the main findings of this report in light of the four questions underpinning this research (Appendix 1). These are addressed in turn starting with the principal question. In addressing each question, an international perspective will be provided although particular emphasis will be directed to the EIA process under the EPBC Act.

Before addressing the four questions, it is appropriate to reiterate some of the key points which became evident in the international and Australian examples of EIA practice and made in Section 4; namely:

- the treatment of 'new information' in EIA decision-making is not explicitly addressed by statutes for any of the EIA systems examined in this study and this issue typically becomes a 'grey area' that falls 'between the gaps' in regulation. Thus, the concept of natural justice/procedural fairness needs to be determined or interpreted in a given context (i.e. what is acceptable in one jurisdiction may not be adequate in another owing to differences in legislative processes or expectations arising from customary practices);
- there is a spectrum of possibilities for public involvement in EIA decision-making. Two areas for examination are whether or not the environmental advice to the decision-maker is available for public comment and whether or not there is legal direction provided for the basis of the final EIA approval decision;
- expectations for natural justice/procedural fairness may vary according to the nature of the decision-maker itself (e.g. a competent authority whose specific function is to conduct EIAs may attract higher expectations for public participation in EIA decision-making and the sharing of new information than where the final decision rests with a Minister and where the EIA documents are only one input to what is actually a political decision);
- not all 'new information' is the same and it may be necessary to apply some test of significance on it with respect to the level of influence it has on decision-making; and
- many jurisdictions enable decision-makers to withhold sensitive information from the public domain and there is no way of knowing whether such a provision is abused without first having access to the particular information in question and undertaking some test for reasonableness on it (i.e. such access is not going to happen).
7.1 Addressing the Research Questions

1. Prior to the final approval decision, what should be the status of information that has been generated outside the publicly available assessment process?

It is clear from the examples presented in this report that EIA practice varies tremendously around the world. Generally speaking though, there appears to be an expectation in the more advanced systems that 'new' information emerging during the assessment stage should be shared with EIA stakeholders prior to decision-making. Australian EIA practice would generally fall into this more advanced category. However, such a clear position is not evident with respect to new information emerging during the approval stage. In other words, expectations for natural justice/procedural fairness with respect to the deliberations by a panel or EIA agency (i.e. essentially community members in the case of a Canadian panel or public servants in the case of a EIA agency acting on behalf of a given society for the greater common good) appear to be higher than that of decisions made by a government minister.

This distinction affects the answer to each of the Research Proposal questions. In the case of the former, the rules of natural justice/procedural fairness would require as a minimum public disclosure of new information and ideally the opportunity to comment. Thus, for example, proponents could continue to adapt their proposal accordingly so as to achieve an approval rather than a rejection. One EIA practitioner made the comment that: 'If new information crucial to the decision appears between the assembly of EIA information and the decision, either live with ignoring it or reopen the [public participation] process to include the information'. However, this same practitioner was talking about the assessment report arising from a panel review process, not the actual final EIA decision by the relevant Minister in that particular jurisdiction. In the case of decisions at the political level, expectations for public disclosure at this point in the process may be somewhat lower. For example a survey of EIA practitioners in Western Australia with regard to the role of science and scientific information in the EIA process recorded significantly lower expectations for the use of science in approval decision-making relative to other steps in the process (Morrison-Saunders and Bailey 2003). The key reason for this was recognition of the political (as opposed to scientific) nature of Ministerial decision-making. It could be expected that a similar expectation would apply to the public disclosure and/or level of consultation concerning new information in EIA decision-making.

A similar distinction can be made between decisions made by an EIA agency and those of a minister with respect to the basis of the decision. In the case of the former, there is usually a legal requirement for the decision-maker to be restricted only to considering information that has been raised during the EIA process previously and which is relevant to EIA considerations (i.e. in light of the definition of 'environment' or a proposal in the relevant legislation). Whilst a minister may be directed to consider certain information when making the final approval decision (as is the case under the EPBC), no examples were found in this study where they were actually excluded from also factoring in other considerations.

However, regardless of the extent of public engagement prior to the decision being made, EIA practice worldwide generally has an expectation (i.e. as a matter of principle) that public disclosure of the basis of the final approval decision along with any information used in reaching that decision should occur (except where it is sensitive information). Whether or not appeal rights exist to challenge the decision varies considerably. In general, it seems that in jurisdictions where there is an opportunity to appeal or at least comment on the assessment advice being put to the final EIA approval decision-maker, there are no third party appeals on the final decision. Only the proponent, in some cases, may appeal at this level to seek to change conditions of approval. In systems where the public are barred from the deliberations of the agency putting together the assessment report, appeals of the final decision appear to be more common. In some instances, whilst third party
appeals of the final decision are allowed, they only pertain to matters of procedure (i.e. merit appeals not the substance of the decision).

2. Should the decision-maker, prior to the final decision and also in considering attaching conditions to an approval, be required to make such information available to the proponent (and/or persons with an expressed interest/standing for review purposes) for comment which must then be taken into account in making the decision?

This question effectively only pertains to the more 'advanced' systems where there is already a relatively high level of public participation in decision-making processes. For draft decisions put forward by an EIA agency the answer to this question is invariably 'yes' but as explained previously this may not be the case for decisions at the ministerial level. In the more advanced EIA systems, there is no differentiation between proponents and public stakeholders; i.e. both parties should be treated equally. Some variation does arise as to whether public disclosure should be to any interested member of the public as opposed to only those that have already actively participated in the EIA process for a given proposal. If it is the former, then public disclosure (e.g. posting on an internet site) or access via through freedom of information provisions may be all that is necessary to meet expectations for procedural fairness. If it is the latter, then more active consultation with the affected stakeholders is more likely to occur (e.g. as is the process adopted by the Appeals Convenor in Western Australia) and seems to be an expectation held by EIA practitioners.

3. If so, is it only information of an adverse nature (information supporting the proposed action not being approved, or supporting the attachment of particular provisions) that should be provided to the proponent for comment?

No evidence of a legal distinction between types of information was found in the EIA systems examined in this study. However, participating practitioners often had a view on this matter. What can be generalised from the responses received is that a test of significance should apply whereby there would be consultation concerning information likely to substantially change the proposal outcome (either the design of the proposal, types of mitigation required in approval conditions or lead to rejection of the proposal where previously it seemed likely that an approval would eventuate). Generally speaking, the right to be informed and/or to comment on 'significant' new information by proponent and public stakeholders alike was an expectation of practice in the more advanced EIA jurisdictions.

4. What is the situation regarding persons with an expressed interest/standing for review purposes? Should information supporting an approval decision be seen as adverse to the interests of those opposed to the proposed action and therefore provided to them for comment?

The same finding applies to this question as to Questions 2 and 3 previously in that the more advanced EIA systems generally take an open approach to the matter of standing (i.e. that previous involvement in the EIA process for a particular proposal is sufficient to warrant ongoing consultation) and information is not distinguished as being 'adverse' or otherwise other than the consideration of 'significance' discussed previously.

7.2 Implications for Timeliness

An addition component of the Research Proposal (Appendix 1) was to analyse Australian and international practice with regard to the effect, if any, on timeliness, efficiency and certainty of the EIA process of the release for comment of such reports. This was put to EIA practitioners approached in this research in the form of the following question (i.e. as a continuation from Question 4 previously):
5. Do you consider the release of such reports to proponents and/or persons with standing prior to decisions being made to be a desirable practice in EIA/SEA? (Please comment in relation to timeliness, efficiency and certainty of the EIA process).

Little has been published on this issue, but several EIA practitioners provided commentary and a number of individual responses are recorded here to highlight the range of issues and opinions raised.

Firstly though, the Administrative Review Council (1993, p12) acknowledged that public consultation increases the cost and length of EIA decision-making and that the longer an environmental decision-making process is, the more expensive it is likely to be, both for the participants and the decision maker. They also note that some parties may avoid being involved in initial deliberations, especially if these decision-making processes are complex, 'preferring instead to initiate, or join, review proceedings if the primary decision is adverse to their interests'. The implication of this for treatment of new information in EIA decision-making if it became established practice that new information will be shared amongst affected stakeholders is two-fold: firstly it will obviously lead to additional time taken to reach decisions and secondly this practice could be exploited as a delaying tactic by opposition groups.

Of course, timeliness and efficiency cannot be the only consideration in EIA and must be balanced with expectations for natural justice/procedural fairness. One practitioner was of the view that:

[an EIA system:] which requires that all relevant information be made available to all parties, but then limits litigation to only that information that was available to the decision-makers (and the public and applicant) at the time of project approval (with some exceptions for changed circumstances and clarifications) strikes a good balance between expediency and transparency.

Hence the legislative provisions for appeal in combination with openness of decision-making are very important in striking a balance between natural justice/procedural fairness and timeliness. A similar viewpoint for controlling the appeal process was put forward by a different respondent. Specifically they stated that:

Obviously there cannot be infinite loops of appeal. The proponent (or those opposed) should be given sight of the independent review that was commissioned by the authorities as part of an appeal process but should not be allowed, in my view, to then take this review on further appeal or the loops will never close.

Thus it would appear necessary for the legislative framework to provide clear boundaries concerning how many times an issue or a given step in the EIA process can be visited.

Another practitioner suggested that it would not be feasible to create clear legislative rules to guide practice and suggested that EIA practitioners simply need to apply some judgement and common sense. In their original words:

My understanding is that best practice calls for all available information to be readily available to all interested parties (proponents, opponents etc.) However, we should not forget that the government authority responsible for EIA should also be concerned with efficiency and equity: should we delay decisions until everybody is happy? should we put all our energy and resources into one or two controversial cases and pay little attention to ordinary projects? I believe that it is virtually impossible to write clear and objective rules for all this and the task of the EIA process manager is ... to use his/her skills to manage the process, observing the law, regulations and ... common sense (are we short of common sense in the EIA process?).

This sentiment is consistent with much of EIA practice in that it often appears to be most effective when conducted in a flexible and adaptive manner, rather than where rigid prescription is relied upon.

As stated previously, the distinction between stakeholder types was not one considered to be useful to most of the practitioners who responded in relation to this specific aspect of the research. One
noted that at one level efficiency gains could be made by treating all stakeholders equally stating that:

Trying to figure out what may or may not be adverse to the host of different parties is not likely to be a useful expenditure of resources. In the public interest, it is much more sensible to make the information available to all. Now that we have electronic means of distribution, it is cheap too.

This practitioner was strongly in support of full information disclosure of information to be used in EIA decision-making to all stakeholders, as well as post-decision disclosure of the reasons for decisions made at ministerial or cabinet level in accord with the purposes of the applicable law.

Another response suggested that the nature of the information informing the decision is an important consideration in relation to the issue of timeliness. In their original words:

This is a difficult one! The argument for this proposition is that it allows decisions to be more transparent and opportunities are presented to contest a reviewer's conclusions if they are patently, factually incorrect. The argument against this is that the whole process could get bogged down in an endless debate over the merits of the case, particularly if the grounds for the decision are based on subjective findings and not legally defensible facts.

One EIA practitioner participating in this research was emphatic that any new information brought into the decision-making process (at least at the level of a panel or EIA agency) should be publicly disclosed, stating that:

information provided in secret (as in not in a form where others can challenge it), is something that ought not to be permitted. Why? The answer is clear to me. Because the information may not be correct, or at the very least, other stakeholders may wish to challenge the information...

If new information crucial to the decision appears between the assembly of EIA information and the decision, either live with ignoring it or reopen the process to include the information.

They were of the view that the benefits of seeking public comment on new information in terms of a better decision resulting outweighed concerns about efficiency. Once again their original words (including formatting) follow:

Doing the wrong thing quickly or cheaply is not helpful and is not efficient. The issue of certainty is crucial here. It is the same as effectiveness. Regulatory decision makers develop over time processes that are seen to be fair and the courts uphold most such decisions. This creates a great deal of certainty *for ALL stakeholders!* Such processes can be relied upon.

This same practitioner also implied a moral stance on the issue of the treatment of new information in EIA decision-making over and above a legal perspective, stating thus:

Lastly, the fundamental question, in my mind, is what OUGHT to be, not merely what the law requires. If EIA is to be transparent and seen to be fair, then one ought to make clear that the entire process is procedurally fair, along the lines of what I have outlined or hinted at above.

There was agreement amongst the EIA practitioners that participated in this research, that generally speaking all information pertaining to an EIA decision should be publicly disclosed prior to the making of that decision. However, as noted previously, this perspective was principally aimed at the ‘draft decision’ at the level of a panel or EIA agency. Political level decision-making was largely exempt from this expectation, although the expectation for full disclosure of the reasons for a decision was strongly apparent. This provides a useful perspective for the final issue to address in this research.

7.3 Implications for Australian EIA Practice

The final aspect of the Research Proposal was to: 'consider the questions noted above and advise whether release of such reports to proponents and/or persons with standing prior to decisions being made is considered a desirable practice that the Australian Government should initiate as part of its EIA regime under the EPBC Act' (Appendix 1).
With respect to the legal framework for EIA at the Commonwealth level presented in 5.5 it relates to the provisions of s131(2) (information provided by other Ministers), s132 (new information sought by the Minister) and s136(1)(b) (consideration of economic and social factors) which enable new information to enter the process after the normal public involvement channels have ended. There is no legal requirement to disclose this information prior to making a decision (but it would generally be understood that the information would be disclosed along with the decision itself as outlined in s133). In the absence of a legal imperative, it is necessary to consider what has been custom or normal practice under the EPBC Act to date as well as any relevant case law (the latter being beyond the scope of this report).

As noted in 5.5, it has been custom under the EPBC Act to have open communication with affected stakeholders during the assessment process but less so during the decision-making or approval stage where new information may arise through the provisions of ss131(2), 132 and 136(1)(b) as noted previously. During the decision-making or approval stage, there is often, but not always, consultation with proponents (particularly regarding possible approval conditions) but there is generally no contact with other stakeholders. This contrasts with the situation in Western Australia where natural justice/procedural fairness is provided by the Appeals Convenor when dealing with appeals against the EPA report and recommendations. Nevertheless, the EPBC custom to date seems in line with a general acceptance that political decision-making in the Westminster tradition of democracy largely takes place behind closed doors, and it is reasonable practice not to disclose information prior to decision-making.

Having said this, some consideration should be given to the test of significance of the information in question. Substantial new information (i.e. that will dramatically change the nature of the proposal or the outcome for the proponent) would provide reasonable grounds for reopening the public review phase of EIA prior to taking the final decision; this would be in the best interests of all stakeholders in the process, the Minister included. Being judged on a case by case basis, taking such an approach need not establish precedent or generate an (unreasonable) expectation that all new information would always be disclosed to all stakeholders all of the time. Given the importance of natural justice within the Australian legal system, however, there may well be merit in specifying within the EPBC Act a process whereby new information in an EIA process should be disclosed to relevant stakeholders. By so doing, possible problems for timeliness and efficiency may be negated while still providing an appropriate opportunity for public consultation and input.

Finally, it should be noted that any non-disclosure of new information prior to decision-making can only be acceptable providing the reasons for the decision are subsequently disclosed and that appropriate rights of appeal exist.
References


Appendix 1 – Research Proposal

Background
Environmental impact assessment (EIA) is a key decision-making and management tool used worldwide to achieve protection of the environment. It can broadly be categorised as a technique or process by which information about the environmental impacts of a proposed action is collected from the proponent of the action and other sources, including the general community, and taken into account by the approving authority in deciding whether or not to approve the action and, if so, under what conditions. The action is generally in the form of a project or development but can also include a policy, plan or program (more commonly known as strategic environmental assessment).

Context
The Department of the Environment and Heritage administers the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), including the Australian Government’s EIA regime included within it. The Department is concerned to ensure the EIA regime is as efficient and effective as possible. This proposal is designed to provide information and advice to the Department to facilitate that outcome.

The Issue
Collection of information about the proposed action by the proponent as part of the EIA process is generally an open and transparent process. The community is usually provided an opportunity to comment on the proponent’s information. The proponent in turn gets to see public comment and then has an opportunity to revise or add to its documentation in response to that public comment.

Once these processes are complete, it is normal practice for the approving authority or advisers to the approving authority to prepare an independent assessment report canvassing all the environmental issues including possible mitigating strategies. If particular issues are problematic, it is not uncommon for independent studies to be commissioned to assist the decision-maker further.

EIA often provides for proponents or persons with standing to appeal, or seek review of, the final decision. The idea of ‘standing’ differs between jurisdictions; however, persons with standing are generally those who can demonstrate some material interest in the decision or, in some cases1, can demonstrate a level of environmental activity in a period prior to the decision.

While information provided by the proponent and members of the public is usually freely available, the decision-maker’s own assessment report and other independent reports or studies are not normally released until after the decision is made, if then2.

This raises the issue whether such arrangements deny natural justice/procedural fairness and should be amended. Questions include:

- Prior to the final approval decision, what should be the status of information that has been generated outside the publicly available assessment process?
- Should the decision-maker, prior to the final decision and also in considering attaching conditions to an approval, be required to make such information available to the proponent (and/or persons with an expressed interest/standing for review purposes) for comment which must then be taken into account in making the decision?

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1 Section 487 of the EPBC Act provides extended standing for judicial review.
2 Current practice under the EPBC Act is that such reports are released publicly after the final approval decision is made.
• If so, is it only information of an adverse nature (information supporting the proposed action not being approved, or supporting the attachment of particular provisions) that should be provided to the proponent for comment?
• What is the situation regarding persons with an expressed interest/standing for review purposes? Should information supporting an approval decision be seen as adverse to the interests of those opposed to the proposed action and therefore provided to them for comment?

The Proposal

The proposal is in two parts. The first part requires an appropriately qualified researcher with expertise in EIA including an understanding of international trends and best practice in EIA. The task is to:

• Provide a brief overview of the principles and objectives of EIA with particular regard to the Australian Government EIA regime as set out in the EPBC Act;
• Examine EIA within Australia and other countries and report on practice with regard to release of environmental assessment reports and other reports and information obtained independently by, or on behalf of, the decision-maker, including arrangements for seeking comment on such reports prior to decisions being made;
• Analyse Australian and international practice with regard to the effect, if any, on timeliness, efficiency and certainty of the EIA process of the release for comment of such reports; and
• Consider the questions noted above and advise whether release of such reports to proponents and/or persons with standing prior to decisions being made is considered a desirable practice that the Australian Government should initiate as part of its EIA regime under the EPBC Act.
Appendix 2 – List of Study Respondents

The following people made contributions to this study (i.e. they responded to the four questions outlined in the Research Proposal in Appendix 1 or provided other information) either by email or in phone conversations.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Name</th>
<th>Organisation</th>
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</thead>
<tbody>
<tr>
<td>Australia (+ elsewhere)</td>
<td>Frank Vanclay</td>
<td>University of Tasmania</td>
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<tr>
<td>Australia: New South Wales</td>
<td>Yolande Stone</td>
<td>Dept of Planning</td>
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<tr>
<td>Australia: New South Wales</td>
<td>Ian Radcliffe</td>
<td>Environmental Defenders Office (NSW)</td>
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<tr>
<td>Australia: Tasmania</td>
<td>John Ashe</td>
<td>RPDC panel member</td>
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<td>Australia: Tasmania</td>
<td>Pam Scott</td>
<td>Resource Planning and Development Commission</td>
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<tr>
<td>Australia: Tasmania</td>
<td>Derek Walter</td>
<td>Dept of Tourism, Arts &amp; the Environment</td>
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<tr>
<td>Australia: Victoria</td>
<td>Brendan Sydes</td>
<td>Environmental Defenders Office (Vic)</td>
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<td>Australia: Western Australia</td>
<td>Garry Middle</td>
<td>Office of the Appeals Convenor</td>
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<td>John Bailey</td>
<td>Conservation Commission</td>
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<td>Austria</td>
<td>Ralf Aschemann</td>
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<td>Bhutan</td>
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<td>Luis Sanchez</td>
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<td>Peter Leonard</td>
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