Environment Defenders Office

Submission

in response to

Modernising Victoria's Planning Act

A discussion paper on opportunities to improve the *Planning and Environment Act 1987*

prepared by

Environment Defenders Office (Victoria) Ltd
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Environment Defenders Office (Victoria) Ltd
ABN 74052124375

PO Box 12123
A'Beckett Street PO
Melbourne VIC 8006

The 60L Green Building
Level 3, 60 Leicester St
Carlton VIC 3053

T (03) 8341 3100
F (03) 8341 3111
E edovic@edo.org.au
W www.edo.org.au/edovic

About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd ('EDO') is a Community Legal Centre specialising in public interest environmental law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice. In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working to protect Australia's environment through environmental law.

For further information on this submission, please contact:

Nicola Rivers, Law Reform and Policy Director, Environment Defenders Office (Victoria) Ltd

T: 03 8341 3100

E: nicola.rivers@edo.org.au

Submitted to:

Department of Planning and Community Development

PEActreview@dpcd.vic.gov.au

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INTRODUCTION

General comments on the Planning and Environment Act review and our submission

The Environment Defenders Office ('EDO') believes that changes could be made to the *Planning and Environment Act 1987* ('the Act') that would result in better environmental outcomes, more certain outcomes and more efficient processes. Changes would also improve the quality and value of community involvement in the planning process. However, the EDO believes that to achieve real improvements in the planning system the Government should conduct a broad review of the planning system as a whole including the Victoria Planning Provisions.

As the only community legal centre with expertise in planning law, the EDO responds to many enquiries from members of the public about the operation of scheme amendment and permit processes under the Act. Many of these inquires relate to issues such as the failure to provide adequate notice of an amendment or permit application, the poor quality of material included with notices or permit applications, the lack of guidance for objectors about the nature of the permission being sought and the criteria applicable to determining whether a permit should be issued and in what form.

Many of these issues could be addressed through reforms to the Act. We would welcome such improvements, provided they do not undermine the public participation in planning decision-making. We consider that the ability to comment on a proposal should not only be acknowledged as a right that should be available to those with an interest in the subject matter, but also something that is critical to transparent and accountable decision-making. In short we believe that any reforms should have improved decision-making as their primary focus. We are aware that there is a push in Victoria at present, particularly under the Planning and Environment Act to fast-track or "streamline" approvals, particularly for major projects. Reducing delays, "streamlining" and other process-oriented reforms should be seen as only one element of improving decision-making and in particular should not be emphasised at the expense of transparency and accountability.

We are aware that the Government is proposing a Major Transport Projects Facilitation Bill which will, among other things, fast track planning approvals for major transport projects. The Government has stated that it will look at ways of streamlining approval process for other major projects. It is disappointing that the proposed major transport projects fast track has not been given any attention in this review and that major projects fast-tracking has only been given brief attention in the review through the discussion on State significant projects. The review discussion paper *Modernising Victoria's Planning Act* March 2009 (discussion paper) did not provide any real discussion of major project fast-tracking. There is considerable scope for poor decision-making to result from fast-track approval processes and therefore the Government should engage in proper consultation before seriously considering any options. Caution should be exercised to ensure any processes that facilitate approvals for major projects do not remove the ability to properly and fully assess impacts and do not result in compromised decision-making.

Another issue that has not been raised in the discussion paper but which should be a part of this review are the linkages between catchment management and land use planning. There is a lack of coordination and linkage between the strategic planning functions of Catchment Management Authorities (CMAs) and land use and development planning by Municipal Authorities under the Planning and Environment Act. The failure to translate priorities and actions identified at a catchment scale to local planning scheme policy and planning controls has been identified in several studies. The role of local government and particularly the interaction or lack thereof between their planning functions under the Planning and Environment Act and the functions and responsibilities of CMAs need to be reviewed and improved. Possibilities that could be considered include reallocation of some responsibilities under the Planning and Environment Act to CMAs, better resourcing of local government (particularly the smaller and less well resourced rural shires) and building on existing initiatives such as the Municipal Association of Victoria's project Integrating Local Land Use Planning and Integrated Catchment Planning. Further discussion on this can be found in our submission to the Land and Biodiversity at a time of Climate Change Green Paper.[1]

Our submission focuses strongly on the availability and use of exemptions in planning approvals. The present trend in planning approvals is that the use of exemptions from planning scheme amendments, permit approvals and from the Act itself is increasing. The EDO does not support the increase in exemptions from planning processes. Exemptions can lead to poor decision-making and a curtailment of the right of public participation. Exemptions to legislative processes should be used only in exceptional circumstances where the interests of the State merit it. They should not be used to routinely avoid planning processes.

This submission largely follows the structure of the discussion paper and uses the numbering from that paper. We have commented on issues raised in the discussion paper and have also included comment on issues that were not noted in the discussion paper but that the EDO believes must be addressed to improve the planning system.

KEY RECOMMENDATIONS

The EDO has made a number of recommendations throughout this submission which are summarised at the end of each Part. Our key recommendations are:

- Ecologically Sustainable Development (ESD) principles must be included in the objectives of the Act
- The provisions in the Act that allow the Minister to remove a scheme amendment or permit from the planning process in favour of Ministerial discretion (e.g. section 20(4) and section 97B) must be amended to include clear criteria which set out when that power can be used. In addition the Minister must provide reasons to Parliament for using the exemption.
- State-significant projects should be fully and openly assessed through a legislative process that allows proper consideration of social, economic or environmental impacts and appropriate public participation. For example, this could occur though a tiered assessment process which has a specific level of assessment for projects of State significance.

[1] Our submission can be accessed at http://www.edo.org.au/edovic/policy.html

- The Act should provide for improved public access to planning information and documentation on which planning decisions are based.
- The section 16 exemption from the Act should be carefully reviewed to determine its purpose and the appropriateness of its inclusion within such an Act. If it is to remain in the Act, the Act must clearly specify under what circumstances it can be used so that the power is narrowly limited.

PART 4 - OBJECTIVES.

The objectives of the Act need to provide a foundation for sound planning for land use and development in Victoria. While it cannot be said that objectives of the Act contained in section 4 contain anything that is objectionable or no longer relevant, we consider that this important part of the Act needs a major overhaul to ensure that it provides a foundation for planning that is capable of delivering ecologically sustainable development (ESD). This should be done not by just tweaking the current objectives, but instead by introducing much more detailed guidance and direction as to what ESD means and how it is intended to be implemented.

Legislation concerned with land use and land management should be based around modern concepts such as the principle of accountability and ESD principles such as the precautionary principle.[2] This is not confined to conservation-oriented legislation. In fact, the contrary is true. Victorian legislation relating primarily to use and development has begun to include such principles. Inclusion of these principles in relevant Victorian Acts encourages more consistency in decision-making across related land use, planning and environmental legislation.

Ecologically sustainable development – time for the Act to catch up with developments from 1992

The principles of ESD are now widely recognised in Australia and overseas to be core components of government decision-making. The Victorian Government formally committed to incorporating ESD principles in land use regulation and decision-making in 1992 in the *Intergovernmental Agreement on the Environment*:

> 1. The parties agree that the concept of ecologically sustainable development should be used by all levels of Government in the assessment of natural resources, land use decisions and approval processes.
>
> 2. The parties agree that it is the role of government to establish the policy, legislative and administrative framework to determine the permissibility of any land use, resource use or development proposal having regard to the appropriate, efficient and ecologically sustainable use of natural resources (including land, coastal and marine resources).[3]

Despite this, ESD principles are not specifically set out anywhere in the Planning and Environment Act.

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[2] For a detailed analysis of the use of the precautionary principle, see Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (2005).
[3] *Intergovernmental Agreement on the Environment,* 1 May 1992, Schedule 2 - Resource assessment, land use decisions and approval processes,

ESD is now commonly regarded to have four main elements: application of the precautionary principle; consideration of intergenerational equity; protection of biodiversity; and integration of long-term and short-term economic, environmental, social and equitable considerations into decision-making. The 'polluter-pays' principle and the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection are also recognised.

The principles of ecologically-sustainable development are included in recent legislation such as the *Pipelines Act 2005, Sustainable Forests (Timber) Act 2004* and *Mineral Resources (Sustainable Development) Act 1990*. These Acts outline the elements of ESD and provide guidance on how they should be used in decision-making. Incorporation of these principles ensures that legislation is responsive to evolving environmental concerns, such as climate change. Similar ESD provisions must be included in the objectives of the Planning and Environment Act if the Act is to remain relevant and forward looking.

While the current objectives of the Planning and Environment Act refer indirectly to ESD concepts, the full scope of ESD is not set out and there is no guidance on how the principles are to be used in decision-making. The planning framework recognises some of these concepts through the State Planning Policy Framework (SPPF) of the Victoria Planning Provisions but again, the reference is indirect and lacking in guidance. Clause 11.03-2 of the SPPF establishes that the *Intergovernmental Agreement on the Environment* forms part of the framework for decision-making concerning the environment.[4] ESD principles such as the precautionary principle are included in this national Agreement. Although the Agreement forms part of the planning framework for decision-making through its brief mention in the SPPF, clause 11.03-2 does not specifically refer to ESD or the precautionary principle, nor does it provide guidance on the weight to be given to the precautionary principle or how it is to be applied. These indirect references to ESD are not adequate to appropriately guide planners and decision-makers as to how ESD is to be incorporated into planning in Victoria. The Act must be amended to change this.

Ecologically Sustainable Development in VCAT

There is little analysis or discussion of ESD in VCAT decisions, reflecting the fact that despite the high level commitments to implement ESD, the Act is silent on the issue and the Victoria Planning Provisions contain very little specific direction to apply ESD concepts. Unsurprisingly the few cases in which ESD has been considered demonstrate varied and inconsistent approaches. For example, in *Hasan v Moreland CC* [2005] VCAT 1931 the Tribunal recognised the importance of sustainability, but stated that ESD conditions should not be imposed on permits where there is overlap with building regulations for similar requirements. The applicant in *Jolin Nominees PL v Moreland CC* [2006] VCAT 467 relied on the *Hansen* decision to argue that ESD conditions on its permit should be deleted. Although a number of cases after *Hansen* did result in ESD conditions being removed, the Tribunal in *Jolin* did not follow *Hansen* as the conditions were of a different nature to those in *Hansen*.

[4] *Gippsland Coastal Board v South Gippsland SC & Ors (No 2)* (includes Summary) (Red Dot) [2008] VCAT 1545 (29 July 2008)

The Tribunal discussion in *Jolin* indicates that ESD principles are not being consistently used and applied in decision-making. Although the Tribunal recognised that "there is justification at all levels of the planning system for the imposition of objectives, strategies and (perhaps) permit conditions which incorporate best practice ESD principles"[5], it also noted that "unless a council can show that an ESD-type condition has a nexus with a transparent council ESD strategy or guideline, the Tribunal would be reluctant to allow such a condition just for the sake of it."[6] As noted in *Jolin* not all councils have ESD strategies or guidelines and those that do apply differing levels and standards. ESD principles are therefore being developed and incorporated into decisions inconsistently across responsible authorities and planning authorities. It would clearly be preferable for ESD to be incorporated as a fundamental objective of the Act rather simply than relying on planning authorities to develop ESD strategies and guidelines.

The precautionary principle is an important adjunct to ESD. Once again, in the absence of clear guidance in the Act and in the VPPs. In some cases, such as *Gippsland Coastal Board*[7] VCAT can be seen to be trying to introduce some clarity about how pressing planning issues such as sea level rise should be addressed by drawing on the precautionary principle. In other cases councils and VCAT have also had difficulty in correctly applying the precautionary principle. For example, *Rozen*[8] discussed the application of the precautionary principle in the context of contamination of water from septic tanks. At first instance the Council rejected a planning application on the basis of the precautionary principle. This was overturned at VCAT on the understanding that the precautionary principle did not apply as there was no substantial evidence as to the impacts, and any potential impact was not irreversible. On appeal to the Supreme Court[9] the decision was overturned and remitted for hearing on the basis that the precautionary principle had not been properly applied.

Incorporating the precautionary principle in the legislation itself is long overdue. It is a striking fact and an indictment of the failure of the Victorian planning system to keep pace with national and international developments that the recent VPP amendment prompted by the revised Coastal Strategy is the first time that the precautionary principle has found its way into the regulatory framework for planning in Victoria. It needs to be incorporated in the Act.

Implementation of ESD in the Planning and Environment Act

ESD is not another factor to be weighed up against other economic or social factors to achieve some form of trade-off, as ESD already specifically incorporates those factors. The current requirement contained in the VPPs for conflicts in policy to be resolved in favour of "net community benefit and sustainable development" tends to lead decision-makers to approach their exercise of discretion as an exercise in determining acceptable tradeoffs. ESD should therefore be the framework within which planning decisions are made. This will not require all decisions made under the Act to put environmental considerations above economic or social

[5] *Jolin Nominees PL v Moreland CC* at 54
[6] *Jolin Nominees PL v Moreland CC* at 54
[7] *Gippsland Coastal Board v South Gippsland SC & Ors (No 2)* (includes Summary) (Red Dot) [2008] VCAT 1545 (29 July 2008)
[8] *Rozen v Macedon Ranges SC* (Red Dot) [2007] VCAT 1814 (24 September 2007)
[9] *Western Water v Rozen & Anor* [2008] VSC 382 (29 September 2008)

considerations; it will simply mean that all three factors must be properly considered for short-term and long-term impacts and benefits.

As noted in the recent Victorian Competition and Efficiency Commission (VCEC) paper on environmental regulation in reference to ESD:

> "Effective and efficient regulatory processes should seek to achieve outcomes that are a 'synthesis' of economic, environmental and social objectives. Because the outcome is a synthesis that is qualitatively different from a simple 'balance' of considerations, this approach is intrinsically outcomes-focussed." [10]

This is particularly relevant in the planning context where 'net community benefit' is usually interpreted as a *process* of balancing rather than an *outcome* of a process of synthesis.

Recommendation for incorporation of ESD into the Act

ESD is central to modern planning and so should be specifically set out in the objectives of the Act. In addition the Act should be amended to require that all decisions made under the Act be *consistent with* ESD principles. The current objectives in the Act should remain, but a new section should be added (i.e. section 4A) which specifically refers to ecologically-sustainable development as an object of the Act and outlines the core elements of ESD. This provision could be similar to the ESD provision in the *Mineral Resources (Sustainable Development) Act 1990.* However the provision should state that all decisions made under the Act *must be consistent with* ESD principles. Merely requiring decision-makers to 'have regard to' ESD principles shows a fundamental misunderstanding of the intent and value of ESD in decision-making.

This type of approach has been recommended in the recent VCEC report which states:

> The Victorian Government should amend the *Victorian guide to regulation* to acknowledge ESD and place it within the context of best practice regulatory principles and processes. It should consider opportunities for adapting and adopting the Commonwealth Government's approach to incorporating ESD within a regulatory impact statement process. The Victorian Government and its agencies should also ensure they provide guidance on what ESD means in the context of specific environmental policy areas, at the level of implementation.[11]

The use of ESD principles in decision-making has a considerable legal history and it is incorporated into other legislation and applied in other jurisdictions without controversy. [12] Incorporation of ESD principles directly into the Act itself would give all interested parties a

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[10] *A Sustainable Future for Victoria: Getting Environmental Regulation Right*, March 2009, VCEC at page 13
[11] *A Sustainable Future for Victoria: Getting Environmental Regulation Right*, March 2009, VCEC at page LVII
[12] For example, the best practice application of the precautionary principle to decision-making is outlined in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10 and discussed in *Ecologically Sustainable Development in the Context of Contaminated Land,* Preston B, (2008) 164 25 EPLJ 164. See also discussion of the precautionary principle in the Advisory Note for Planning Permit Applications in Open, Potable Water Supply Catchment Areas
http://www.dse.vic.gov.au/CA256F310024B628/0/2B621C537A272364CA25700600224716/$File/Guidelines+for+permit+applications+in+catchment+areas.pd

better understanding of principles that is already indirectly part of the decision-making framework. It would encourage councils to consider the relevance and application of ESD principles in each decision. It would also arguably encourage development of more consistent principles on how ESD should be applied in practice in Victoria.

Principle of Accountability and Principle of Enforcement

In addition to the incorporation of ESD discussed above, we submit that the Act should be amended to include a principle of accountability and the principle of enforcement modelled on that contained in the Environment Protection Act 1970.

The *Environment Protection Act* includes a range of principles that serve to assist in the interpretation of the Act. These include the following:

1B. Principle of integration of economic, social and environmental considerations
1C. The precautionary principle
1D. Principle of intergenerational equity
1E. Principle of conservation of biological diversity and ecological integrity
1K. Principle of enforcement
1L. Principle of accountability

The principle of accountability and the principle of enforcement are particularly relevant. Section 1L of the EP Act reads:

> 1) The aspirations of the people of Victoria for environmental quality should drive environmental improvement.
> 2) Members of the public should therefore be given –
>
> (a) access to reliable and relevant information in appropriate forms to facilitate a good understanding of environmental issues;
>
> (b) opportunities to participate in policy and program development.

Section 1K of the EP Act reads:

> Enforcement of environmental requirements should be undertaken for the purpose of—
>
> (a) better protecting the environment and its economic and social uses;
>
> (b) ensuring that no commercial advantage is obtained by any person who fails to comply with environmental requirements;
>
> (c) influencing the attitude and behaviour of persons whose actions may have adverse environmental impacts or who develop, invest in, purchase or use goods and services which may have adverse environmental impacts.

These principles are very relevant to the Planning and Environment Act and should be included in the objectives of the Act (with appropriate adaption).

As noted above, inclusion of these principles in relevant Victorian Acts encourages more consistency in decision-making across related land use, planning and environmental legislation.

Inclusion of specific objectives

There is a sound argument to specifically refer to climate change in the objectives, as it is an issue that must be appropriately incorporated into all government planning and decision-making. This is particularly important for land use planning and development it is relevant to both greenhouse mitigation (for example, sustainable transport and residential planning) and climate change adaptation (for example, coastal setbacks and flood risk assessment). Although incorporating the principles of ESD into the objects would encapsulate climate change, ESD as a concept has been around for almost two decades and approaches to dealing with climate change have developed beyond these concepts. In addition, as climate change will increasingly impact on all aspects of land use planning it warrants specific mention in the objects of the Act.

It is not appropriate for the Act to refer to specific shifting social and demographical issues such as housing affordability. While social equity issues are important and relevant in land use planning, objects clauses should contain high order objectives rather than specific policy objectives. Specific policy objectives, particularly those that are regionally specific, belong in local planning schemes or municipal strategies. Short to medium-term economic issues such as these can be adequately addressed if necessary though ESD principles and other more encompassing economic and social objectives already listed in the Act.

Recommendations

Part 4 – Objectives

- **Include ESD principles in the objectives of the Act.**
- **Require all planning decisions to *be consistent with* ESD principles.**
- **Include the principle of accountability and enforcement in the objects of the Act.**
- **Include climate change in the objectives of the Act.**

PART 6 – THE PERMIT PROCESS

Development of a tiered assessment process

We can see the merit in recognising that permit applications vary in terms of their complexity and the scale and potential impacts of the proposed activity. On this basis, we recognise that there may be merit in developing different streams of permit applications appropriate to the circumstances.

We would however make the following points:

- Proposals such as the streamlined process outlined in 'Better Decisions Faster' are based on the assumption that the assessment of a large range of permit applications is simply a

matter of comparing a proposal against objective criteria – a straightforward 'tick the box' exercise rather than an exercise of discretion involving policy choices and the exercise of judgement. In fact the emphasis in the Victoria Planning Provisions on policy and standards rather than prescription means that in most cases the interpretation of policy and the exercise of judgement will be required. This policy element distinguishes planning from other performance-based regulation such as building regulation. Recommendations that this process be "streamlined" often in fact involve recommending that this exercise of policy judgment be excluded from public scrutiny or even be outsourced to private assessors.

- Tailoring permit application processes to the scale and complexity of the proposal seems to be approached as an exercise in trying to find ways to reduce the burden on proposals thought to be unreasonably subject to the current 'one size fits all' approach. Logically, recognition of the inadequacy of the 'one size fit all approach' would also include a recognition that the permit process for large and complex proposals needs to be improved to ensure that it is suitably adapted to the subject matter. It is particularly notable that apart from the handful of major projects that are determined each year to require environmental impact assessment, there is no explicit requirement or process that requires major development proposals to undertake environmental impact assessment.

- The quality of the information supplied with permit applications needs to be improved significantly. For example, we have been involved in many applications involving native vegetation removal and habitat loss where proper assessment is not carried out until the VCAT appeal, if at all. This is exacerbated by the tendency for developers to treat requests for further information from Responsible Authorities and Referral Authorities as optional and appeal to VCAT on the basis that 'no decision has been made'. Reforms to strengthen the onus on permit applicants to address all necessary matters in their permit application would assist in this regard, as would the ability of Responsible Authorities to refuse to deal with applications that are clearly incomplete. Preventing appeals to VCAT or requiring a permit application to seek leave to do so where there are outstanding requests for information would also strengthen the powers of Responsible Authorities to demand the information they require to make a proper assessment of an application.

Suggested tiered model for planning assessment

The Report of the Environment Assessment Review Advisory Committee from 2 December 2002[13] recommended a tiered model of assessment for projects with environment effects. Projects are assigned to a level depending on their likely impacts. A similar model should be considered for assessment of planning projects in Victoria.

The Environment Assessment Review issues and options paper identified the need for a suite of assessment processes which would be suitable in different contexts, these being:

- projects with minor effects
- projects with potential effects of local or regional significance;

[13] Report of the Environment Assessment Review Advisory Committee, 2 December 2002, accessed at http://www.dse.vic.gov.au/CA256F310024B628/0/C2BEE4394A4DD233CA257020000A2BFA/$File/Environment+Assessment+Review+AC+Report+.pdf

- projects with potential effects of State significance;
- projects with strategic implications;
- strategic proposals with significant environmental implications;
- management programs with potentially significant effects;
- staged assessment.

The Environment Assessment Review Advisory Committee ('EAR AC') recommended that proposals should first go through a screening process to determine which 'level' of assessment they would go through. Referral of proposals for screening should be based on lists of designated types of developments combined with overarching State-significant issues criteria.

The final recommendations of the EAR AC were:

> "The Advisory Committee supports the introduction of multiple levels of assessment… It is recommended that the levels of assessment under the revised Environment Effects Act system should be:
>
> Level 1—Public Environment Report
> Level 2—Environment Impact Statement
> Level 3—Strategic Environment Assessment"

Level 1 being of lower environmental impact than level 3.

Although the above recommendations were made in the context of environmental assessments, a similar model could be used for planning assessments depending on the likely extent of their community, social, environmental and economic impacts. Matching the level of assessment to the complexity and level of impacts of the project will offer quality benefits and a degree of certainty in relation to planning projects in Victoria.

A similar model was outlined in the discussion paper in relation to the DAF 'impact assessment track', although with six tracks rather than three.

The EDO suggests that as with the recommendations for environmental assessment above, three different levels of planning assessment be established for permit approvals, and a combination of lists and criteria be developed to guide the responsible authority in allocating each application to a certain level of assessment. For example, there would be certain types of lower-impact proposals which would warrant assessment under Level 1 (small repairs or renovations on houses etc), certain proposals which would warrant assessment under Level 2 (some residential developments) and some high-impact projects which would require assessment under Level 3 (large wind farms, freeways, shopping complexes etc – essentially State-significant projects). Although the process for each will essentially remain the same, the notification times and public objections times will be different according to the level, as will the amount of information required from the proponent. It is noted here that in introducing levels of assessment, it is important that this does not result in a lowering of standards in the assessment process.

A system which is open and transparent for all parties but which maintains a degree of flexibility to address the individual requirements of a project or plan is desirable. The current

call-in process in section 97B, which provides complete discretion to the Minister with no opportunity to challenge these decisions, is not open and transparent, and in the experience of the EDO is the source of major public concern (this is discussed further under Part 8 below). It is submitted that this structured approach would benefit the community, the proponent, and decision-makers.

Although beyond the scope of this review, the tiered planning assessment process should be integrated with a tiered environmental assessment process that allows proper consideration of environmental impacts for projects that will have a significant effect on the environment. These two processes can be strongly integrated so that both processes work in parallel without lengthening assessment and decision-making processes.

A system of tiered levels of assessment is only valuable if the resulting final assessments are vigorous and independent. The Minister must not have the ability to exercise his/her discretion and circumvent or bypass the process for certain projects. If a project is assessed to be of State-significance or of very high impact, it should go through the level of assessment it has been allocated according to this scheme. It is illogical that a project with more significant impacts that raises greater community concerns should go through a process that is less stringent and less transparent than low-impact projects. The propensity of the current Minister for Planning to call in projects illustrates how the current provisions of the Act can easily be abused to facilitate the swift approval of large planning projects at the expense of natural justice and the proper operation of our planning system. The use of the Ministerial call-in power and State-significant projects is discussed further under Part 8.

Establishment of an independent assessor

The EDO recommends the appointment of an independent assessment director to oversee this process. This would give greater confidence in the conduct of the assessment process in a manner that is equitable to all parties. This role should not be part of the Department of Planning and Community Development.

The independent assessment director would not conduct assessments nor make permit decisions because this would remain with responsible authorities. The assessment director would provide support to responsible authorities and ensure the process was operating in an appropriate way.

Functions could include:

- liaising with Councils and DCPD during the process of allocating projects to certain assessment levels;
- hearing requests for review of the level of assessment decision and re-allocating if suitable;
- in conjunction with the DPCD, signing off on the proponent's consultation strategy for level 1 projects (the highest impact);
- reviewing the overall assessment process, including the need to draw upon peer review for issues that are viewed as being highly contentious and justifying further detailed examination;

- ensuring that timely exchange of information is achieved between the proponent and stakeholders;
- reporting and operating in a manner similar to the current administrative procedures for Planning Panels Victoria;
- having the power to compel parties to provide information requested or undertake specific tasks as directed under the terms of reference issued for the director by the Minister.

In addition, if the Planning Department is the proponent for a project, the independent assessment director must appoint a Panel to be the responsible authority for that project and that Panel should decide on the proposal. This will ensure a fair and transparent process.

Notice of a permit application

The obligation to provide notice of a proposal is fundamental to public participation in decision-making under the Act. We would strongly oppose any proposal to reduce or circumscribe the right of those who have an interest (broadly defined) to be advised of permit applications.

The discretion by a responsible authority to determine that a proposal will not cause material detriment needs to be exercised with great caution. Those affected by a proposal are in the best position to determine whether they will suffer a material detriment. In general we believe that this means notice should be required of most proposals (and indeed if a permit is required for something that is of no interest to anybody other than the permit applicant then one needs to question why the requirement for a permit has been imposed in the first place).

Notice should be for a reasonable period. Some flexibility may be warranted, but only to increase the notice period from that required at present, as the alternative (i.e. shortening notice periods) would create too much uncertainty.

Objections to permits

We oppose any recommendation to curtail third party participation in planning decision-making for the reasons outlined above.

We recommend reforming the current system to include a general right to make submissions with respect to a permit application. In practice many objections are in fact suggestions as to how a particular proposal might be improved or refined in any event.

We oppose the suggestion that the Act should be reformed to allow the responsible authority to refuse to consider an objection on the basis of relevance. This involves an assessment of the merits of the objection so it is doubtful that this would actually reduce the burden on the responsible authority in processing applications.

More fundamentally we consider that the suggestion misdiagnoses the problem as one of widespread abuse of the right to object. In our experience objectors are often lacking information about the nature of the discretion to be exercised and the matters relevant to the exercise of that discretion. In our view the issue would be better approached by focussing on

better communicating the nature of the discretion to be exercised and the matters relevant to that discretion rather than on amending the Act to provide for an ability to ignore or reject objections. Useful initiatives could include:

- Better information about the planning scheme provisions and the criteria relevant to the proposal. These could be identified at the time of notice, for instance.
- Improved quality planning permit applications.
- More assistance and guidance for objectors in how to ensure that objections address relevant matters. Apart from the services that we attempt to provide, there is almost no assistance or information available to objectors about matters which are relevant to the exercise of the discretion to grant a permit. Understanding Planning Schemes and the Act is not straightforward.

Amending a permit

With respect to allowing responsible authorities to make "minor" amendments to permits issued by VCAT, we are concerned that without clear guidance as to what amounts to a minor amendment this has the potential to allow important VCAT conditions to be undermined by subsequent responsible authority amendments. If such a provision were to be included it should be subject to strict conditions to ensure that its use is restricted to matters that are genuinely minor in nature. It should be borne in mind that there is scope for the original conditions themselves to provide scope to deal with foreseeable contingencies.

The exercise of secondary consent powers is an issue that is a frequent source of inquiries to the EDO. There is often a lack of transparency about how these powers are exercised and getting access to information or documents can be difficult or impossible.

These issues would best be dealt with by introducing some principles into the Act that govern when secondary consents are appropriate. These circumstances should be limited. Consistently with the position outlined above, we consider that matters such as the impact of a proposed development should be fully addressed in the documentation accompanying a permit application. Whether it is permissible to leave such matters to be addressed in a secondary consent under the current Act is probably legally questionable, however it would be desirable to put this beyond doubt by circumscribing the circumstances in which secondary consents can be used.

It would also be useful if secondary consents that require some form of further documentation such as the development of an Environmental Management Plan routinely included a requirement that the Plan actually be implemented. In addition, such plans should be made enforceable by making them part of permit conditions once certified to the satisfaction of a responsible authority or having permit conditions themselves provide for the enforceability of the plan. These outcomes may be simply a matter for better drafting of permit conditions, but could also be reinforced by some provisions in the Act making this a prerequisite of the use of secondary consents.

Finally, with the move toward electronic permit systems, we submit that consideration should be given to the possibility of increasing the transparency of the secondary consent process by

providing a public register of secondary consents and information related to their administration.

Enforcement

Lack of enforcement is one of the biggest problems with the Act. The failure to monitor or review compliance with planning schemes and permits, let alone to take necessary enforcement action, seems to characterise planning in Victoria and is probably the most significant source of public cynicism about the Act. It needs to be fixed.

To a large degree, this is a matter of ensuring that responsible authorities have the necessary resources to undertake the task, an issue that will not be addressed by amending the Act. However there are a number of reforms that with additional resources could improve the current approach to enforcement as outlined below:

- Significantly increased fines.
- Including a "Principle of Enforcement" in the objectives of the Act (see above).
- Introducing a legislative requirement for responsible authorities to develop an enforcement policy containing an enforcement hierarchy. This would recognise that "strong" enforcement action in the case of every breach is neither economically feasible nor desirable, while at the same time recognising that consistent resort to enforcement action is essential in some circumstances to ensure the credibility of the system.
- Include a specific obligation on the part of responsible authorities to investigate alleged breaches and to provide details of conclusions and an explanation of action taken or not taken.
- Consider amending the Act to specifically provide that responsible authorities and third parties can recover legal costs in enforcement actions provided that suitable preliminary steps have been followed to draw the breach to the attention of the offending party and give them an opportunity to fix it.

There is also a need to amend section 114 to ensure that VCAT has the power to order that remedial action be undertaken on land other than the land that was the subject of the breach. This is particularly important for illegal native vegetation removal where remedial action will often require offsets to be obtained offsite. In the case of *Whittlesea CC v Ozimek* [2006] VCAT 2283 it was held that provisions of Part 6 Division 1 of the Act (in particular section 119) confined the powers of the Tribunal to making an order only in relation to the land on which a contravention has or is likely to occur[14] . The Tribunal cannot therefore make an order under the enforcement provisions requiring native vegetation offsets to occur on other land, despite in this case 15 River Red Gums being illegally removed by the respondent.

[14] *Whittlesea CC v Ozimek* at para 25

Recommendations

Part 6 – Permit process

- **Three different levels of planning assessment should be established for permit approvals, and a combination of lists and criteria developed to guide the responsible authority in allocating each application to a certain level of assessment**
- **An independent assessment director should be appointed to oversee the assessment process**
- **We strongly oppose any proposal to reduce or circumscribe the right of those who have an interest to be advised of permit applications**
- **The current system should be reformed to include a general right to make submissions with respect to a permit application**
- **We oppose the suggestion that the Act should be reformed to allow the responsible authority to refuse to consider an objection on the basis of relevance**
- **The objection process should be improved by implementing measures to give objectors more useful and complete information about the proposal and more guidance on how to make relevant objections**
- **Principles should be introduced into the Act that govern when secondary consents are appropriate**
- **Reforms should be made to the Act to improve enforcement**

PART 7 - PLANNING SCHEMES AND THE AMENDMENT PROCESS

The fundamental consideration for assessing proposed amendments to planning schemes should be whether or not the proposal is consistent with ESD principles and is therefore in the public interest. Planning scheme amendment is a process of law reform. Amending a scheme is amending the law – it alters rights and responsibilities and affects public expectations about a broad range of issues. It should be open, transparent and accountable. These powers must be used accountably, and in particular the Act needs to ensure that they are not used for reasons of political expediency or in response to the lobbying of those with vested financial interests. Extensive discretion on the part of the Minister, and lack of transparency and accountability by planning authorities generally, means that this law reform power might be used in a manner that puts short-term political expediency or the interests of those seeking to change schemes to suit their financial interests ahead of the interests of the community as a whole.

If changes are made to the Act which alter the process for amending planning schemes they should be done in such a way that the accountability of the planning authority and transparency of the process is not compromised. The Minister has considerable power to amend planning provisions without scope for merits review or public consultation. In many cases these powers are inappropriate powers for the Minister to have. As outlined below these Ministerial powers should be limited and should not be extended to other planning authorities.

Ministerial exemptions and discretions

Although the discussion paper did not raise the issue of excessive Ministerial discretion, it is a key concern that must be examined in this review. The Minister has the power to prepare an amendment and can exempt him/herself from the section 17, 18 and 20 exhibit and notice requirements through section 20(4). In addition, the Minister can exempt a planning authority from giving notice of a proposed amendment under section 20. Also, section 27 allows for a planning authority to apply to the Minister to exempt it from the requirement to consider a planning panel's report if certain time frames are not met. There are additional significant opportunities for Ministerial exemption throughout the Act which are discussed in Part 8 below.

The current lack of controls over the use of Ministerial powers and discretions is inappropriate and must be curtailed. In our experience there is significant community concern over the Minister's ability to exempt planning scheme amendments and permit approvals from key aspects of the planning process. The current Government, when coming to power, made a commitment to reduce this Ministerial intervention in light of the previous Government's excessive use of the powers. The Governor's Speech to Legislative Council, 3 November 1999 stated:

> "The Government believes that participation in grass roots democracy is vital to a fully engaged citizenship and that control over the future of their streets, suburbs and towns must be restored to local communities."[15]

This commitment is not being upheld at present.

As noted in *East Melbourne Group Inc v Minister for Planning & Anor*, not only do the exercise of section 20(4) powers allow the Minister to remove projects from the planning process, they allow the Minister to depart from the objects of the Act such as section 4(2)(h) and 4(2)(i).[16] The exemption of projects from the notice and public participation provisions also raises issues under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). This was noted in *East Melbourne Group Inc v Minister for Planning & Anor*[17]. The use of Ministerial exemptions may, in some circumstances, breach public participation rights under the Charter.

These powers should only be used in exceptional circumstances where the need to waive essential elements of the planning process is justified by the nature of the project or proposal. For example, in situations where there may be pre-emptive destruction of native vegetation of heritage areas through changes to VPPs or planning schemes it may be appropriate for the Minister to use his power on an interim basis to prevent such destruction and allow a public process to follow. Similarly in situations of recovery from natural disaster it may be appropriate for limited use of Ministerial exemptions. However, these provisions should not be used to allow the Minister to circumvent planning processes that are inconvenient at the time or to rush projects past the normal approvals. They should not be used as a de-facto 'fast-track' process.

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[15] Accessed at http://www.parliament.vic.gov.au/downloadhansard/pdf/council/Spring%201999/Council%20Parlynet%20Extract%2003%20November%201999%20from%20Book%201.pdf

[16] *East Melbourne Group Inc v Minister for Planning & Anor* [2008] VSCA 217 (31 October 2008) at 366

[17] *East Melbourne Group Inc v Minister for Planning & Anor* [2008] VSCA 217 (31 October 2008)

The Act should be amended so that any provision in the Act that allows the Minister to remove an amendment or permit from the planning process in favour of Ministerial discretion includes criteria which set out when that power can be used. The criteria should be commensurate with the extent of the power. The current wording around Ministerial exemptions under sections 19 and 20(4) – i.e. that the Minister may make an exemption "if the Minister considers that compliance with any of those requirements is not warranted or that the interests of Victoria or any part of Victoria make such an exemption appropriate" – is not adequate. The use of this discretion should instead be based on objective criteria rather than Ministerial consideration.

In addition, the Act should require that in relation to any Ministerial exemption for a planning scheme amendment or Ministerial call-in of a permit the Minister must provide reasons for the exemption to Parliament.[18] This goes further than the mere notification requirement in section 38. Although this is currently Government practice, it should be specifically required under the Act.

For example, section 158 of the *Environment Protection Biodiversity Conservation Act 1999* (Cth) allows the Minister to exempt a project from that Act only if it is in the national interest, including in relation to national security or a national emergency. The Minister must publish reasons for the exemption within 10 business days.

Statutory time requirements for planning scheme amendments

It is unnecessary to impose additional time constraints on the planning scheme amendment process and to contemplate consequences for failing to comply with these constraints. Any failure to meet a time requirement should not result in the further erosion of the opportunity for the public to be consulted and to engage in the process.

Requests for amendments to planning schemes

It would be useful if a standard form was developed for amendment requests and more guidance were provided on the information that should be included in an amendment request. This would improve the quality of information, increase community understanding of the proposal and reduce the burden on the planning authority. Some key areas of information that must be included in a request could be provided for in the Act, however more detailed guidance is better suited to a practice note or a guidance document that accompanies the request form.

Refusal of request to amend planning scheme

The EDO does not support a right to merits review of the planning authority's decision not to support an amendment proposal. A planning scheme is subordinate legislation under the Act, and therefore the amendment of a planning scheme amounts to an amendment of the laws of Victoria. It is not appropriate for a private proponent to be able to appeal this type of decision.

[18] This was noted in *East Melbourne Group Inc v Minister for Planning & Anor* [2008] VSCA 217 (31 October 2008)

A primary concern in allowing a review mechanism for these decisions is that this will open the door for a vast amount of litigation. If such appeals are allowed, it is not hard to envisage that the majority of developers would appeal a rejected proposal. It would become standard course as the financial benefit in winning such an appeal would far outweigh any risk of losing. While other proposed reforms for the Planning and Environment Act are aimed at streamlining the planning process, this will have the opposite effect.

For example, there may be a situation where a council rejects an amendment proposal because it does not have sufficient resources to adequately develop the amendment plans. In the event it rejects the proposal, the developer will ask for merits review of the decision, further taxing the council's resources in defending its decision. In the event that the review body recommends that the amendment should proceed, council will not have the additional resources required to pursue the amendment. A standard merits review at VCAT or a planning panel will create a prime example of the gap in resources between developers, councils and community objectors. Time and cost considerations for all parties will be substantial. Over time, councils may feel pressure to recommend or approve scheme amendments that they would otherwise oppose because of the likelihood of the need to defend an appeal.

Some may argue that VCAT is the appropriate body for all types of merits review. However, VCAT's primary function is to conduct a merits review of decisions that are made by responsible authorities when they use their discretionary powers to determine planning permit applications. It is not appropriate for this body to review decisions made under planning schemes nor to review the merits of amendments to those schemes.

A preferable mechanism for pursuing planning scheme amendments is through the municipal strategic strategy process in section 12A and periodic review of planning schemes under section 12B. These provide an excellent opportunity to develop a systematic approach to local planning, rather than ad hoc amendments in response to private requests. These two processes should form the primary method of considering future planning scheme amendments in a strategic and informed manner without the considerable time pressures of ad hoc amendment requests.

In any event, if the Act is amended to include a right to review when the planning authority makes the decision not to exhibit a proposed amendment, equity considerations dictate that this should also include a third party right to merits review where the decision is made to proceed to exhibition. The EDO does not recommend that either of these occur.

It may be appropriate to include in the Act a list of matters that should or must be considered by planning authorities when considering an amendment request. This would arguably facilitate more consistent decision-making. However the objectives of the Act serve this purpose to some extent and a requirement that decisions are made in accordance with ESD principles as set out in the objectives would assist with the decision-making process. It may also be appropriate for the Act to provide a right to request reasons for a refusal to amend a scheme. This would not give rise to a right of appeal but would provide more impetus for a council to consider all relevant matters and would assist a proponent to understand why an amendment request was refused.

Notice & exhibition of proposed amendment

The Act should require all councils to place a notice of all proposed amendments on their website. This should be in addition to, not a substitute for, other forms of notice. Online notification has the advantage of being more accessible than council offices or newspaper advertising for many people and more convenient in terms of the capacity for council to include copies of relevant documents. A number of EDO clients report they were not aware of proposed planning scheme amendments, as few members of the public will specifically look out for these notifications unless they already have a particular concern. Therefore councils should set up an electronic register that automatically notifies any person who has registered online to receive a notice of proposed amendments. The Act should also include more extensive obligations to consult and engage the community in the process where there are likely to be significant social or environmental impacts or community concerns. In addition new guidance should be developed on the type and quality of information that must be included in amendment explanatory reports, which often do not give useful information about the actual scope and intent of the amendment.

Submissions on exhibited amendments

As noted above a planning scheme is subordinate legislation, and therefore the amendment of a planning scheme amounts to a change to the laws of Victoria. As law reform of this type involves the change of land use and planning controls, it has particular potential to directly impact Victorian communities and individuals, perhaps more so that other legislative regimes.

For these reasons, it is of central importance that the planning scheme amendment process is a public process. The EDO does not support limiting or curtailing the rights of community members to participate in this process. The EDO recognises that it is a valid aim of this review to make the planning process more effective and efficient, but this must not be at the expense of community participation in the process.

Treatment of "irrelevant" submissions

The discussion paper states on page 34 that "Submissions are often 'pro-forma' letters of objection". This statement is not supported by any data and therefore it is unclear how often this occurs. Our own research did not produce any evidence that supports this statement. We therefore question the frequency of the 'pro-forma' letters of objections across the broad range of amendments heard by panels, and particularly question to what extent such pro-forma letters can be said to "add significantly to the processing costs of planning authorities". Regardless of how frequently it occurs, it is difficult to understand how it can otherwise be unreasonably burdensome on the planning authority, apart from the administrative time in physically opening the envelopes containing the letters. In addition, while section 24 of the Act states that a panel must consider all submissions referred to it, we question how burdensome this can be on a panel when there is nothing in the Act requiring a panel to show evidence of having considered submissions and nothing requiring them to respond to issues raised in submissions. This will be discussed further below.

The EDO also disagrees with the statement on page 34 of the discussion paper that these pro-forma letters "do not necessarily add weight or value to the assessment of an amendment". While it is clear that planning panel decisions should not and are not dictated by public popularity, opposition to a proposal on mass shows a certain level of community opposition, which can often be relevant to a decision. The recent VCAT case *Minawood Pty Ltd v Bayside CC* [2009] VCAT 440 considered this issue directly. This case involved the amendment of a planning permit (granted under the Planning & Environment Act) to facilitate a development at Khyat's Hotel in Brighton. Over 4,300 objections were lodged with VCAT as a result of a well-organised campaign against the proposal, and the Tribunal considered the weight to be given to the volume of objections. While it was held that planning decisions about permits are administrative decisions that should not be based on popularity, it was held that the number of objections was evidence of the social and cultural significance of Khyat's Hotel within the community, and that this *was* required to be considered under the Planning & Environment Act. A planning authority not allowing or disregarding pro-forma letters of objection in a planning scheme amendment process could result depriving a decision-maker of relevant information.

It is inappropriate for a planning authority to be given the power to decide whether an objection to a planning scheme amendment is irrelevant or not and as a result decide that it should not be referred to a panel. There is a risk that where a council perceives a submission as lacking merit or relevance, it may be the result of the issue being inconvenient to them or a lack of understanding within the council of the issue raised. If a submission is referred to a panel as required, the panel, once it has considered the submission, is free to declare it irrelevant in its recommendation if appropriate. Indeed at present there not even a requirement for the panel to respond to all submissions in its recommendation if it does not wish to.

Councils should not have the ability to withhold 'irrelevant' submissions from panels. Sections 22, 23 and 24 which require planning authorities to consider all submissions, to refer to a panel any submission that requests an amendment and to consider all submissions referred to it should remain in the Act.

Rather than attempting to streamline the panel process through reduced public involvement, panel hearings could be made more efficient if planning authorities were required in the Act to be better prepared for the hearing process. Planning authorities often put forward proposed changes at the panel hearing itself. If the aim is for the panel hearing process to be more efficient, a better option would be to require planning authorities to develop a response to submissions and suggestions for amendment changes well prior to the panel hearing.

Standard form for making submissions

It would be useful for community members to be provided with some guidance and assistance in making submissions to this process. However a form that attempts to mandate how people structure their submissions is not appropriate. In particular, a form or guidance should not attempt to limit the issues raised in submissions to private or direct impacts on the submitter. Many community members are concerned with public interest impacts such as environment, heritage and local character, rather than impacts on their private interests or amenity. A clear

comprehensive practice note to guide people on the level of detail and the type of information to include in submissions would be of use. This would help both the submitter in structuring their thoughts more easily, and the decision-maker in better understanding the specific concerns of each submitter in relation to a proposed amendment.

Referral of submissions to panel and panel consideration

The discussion paper (at p 34) says: "... a panel's terms of reference are limited to considering only those submissions referred to it, although section 25 also provides that a panel may make any recommendation it thinks fit in its report." This conclusion is not supported by the provisions of the Act. Section 168 of the Act states: "A panel may take into account any matter it thinks relevant in making its report and recommendations". In practice panels do routinely consider a broad range of issues in relation to a proposed amendment, not just those issues raised in submissions referred to it. We disagree that a panel is restricted from considering things outside what is contained in those submissions referred to it by planning authority.

However, there may be merit in referring all submissions including those which support an amendment to the panel in the same way that submissions which oppose an amendment are referred. Often a submission will generally support an amendment but will suggest ways it could be done differently or better. It is appropriate for the panel to have access to these submissions also, notwithstanding the potentially increased time it may take to consider the additional submissions. The panel then has before it all public arguments in favour or against the proposal.

Panel consideration of issues

Whilst section 24 of the Act states that a panel must consider all submissions referred to it, there is nothing in the Act requiring a panel to show evidence of having considered submissions and there is nothing requiring them to respond to issues raised in submissions. Further, it is our experience with these types of panel processes that panels routinely ignore certain issues raised in submissions, despite how many times or how effectively they have been raised, and avoid dealing with issues that are 'tricky' or inconvenient to them. This is unsatisfactory for a public process that results in a change to the planning laws of Victoria.

The Act should be amended to include a provision that panels must formally respond to issues raised in submissions before them. This information should be made public so that the community is confident that all issues have been properly considered. This requirement should apply to panel recommendations made to a planning authority or to the Minister.

'On the papers' panel hearings

We do not support any amendment which would limit the ability of persons to appear before a panel to raise their concerns. While it is important that people are given the opportunity to make submissions in writing to the panel, appearing before a panel in person and submitting orally to it is considered to be an integral part of the process. Not all members of society are proficient in expressing themselves in written form, and it is the experience of the EDO in assisting people to participate in these processes that many in the community feel unable to

convey their concerns genuinely and in full in a written letter. In addition, a process must be careful to not exclude people who do not have a high standard of written English skills, and/or are illiterate. Limiting public participation this way is not a desirable outcome, and may raise cause for complaint under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Again, the process of amending a planning scheme amounts to changing the laws of Victoria, and a full public consultation is appropriate for such an activity.

Independence of panel hearings

Contrary to the discussion paper, panels appointed to assess planning scheme amendments cannot be considered to be independent. Planning Panels Victoria is a component of the Victorian Government Department of Planning and Community Development. Panel members are appointed by the Minister for Planning.

Although it is desirable for panel members to be appointed for their expertise as planning professionals, the appointment of panel members should be more independent. Panel members could be appointed by an independent assessment director as recommended in Part 8 below. There should also be a greater mix of expertise of panel members. In particular we have strong concerns regarding the lack of panel members with ecological expertise.

Abandoning planning scheme amendments at any time

The EDO position on this issue reflects our position on proponent requests to appeal planning scheme amendments. A planning scheme is subordinate legislation under the Act, and therefore the amendment of a planning scheme amounts to an amendment of the laws of Victoria. It is not appropriate for a private proponent to be able to appeal a planning authority's decision to abandon a planning scheme amendment, regardless of where in the process this decision occurs.

A planning authority has a range of complex issues it must weigh up when making planning scheme amendments that may not be relevant or of material interest to a proponent. These include resourcing, long-term visions for their local government area and the views of the community. A planning authority should have the power to abandon an amendment at any time if it feels that an amendment is no longer desirable for its local government area.

A concern in allowing a review mechanism for abandoning an amendment is that this will open the door for a vast amount of litigation. As noted above in relation to decisions not to initiate an amendment to a planning scheme a large number of abandoned proposals could be appealed, putting great pressure on planning authorities to continue with amendments that they do not want to proceed with. While other proposals in the review are aimed at streamlining the planning process, this will have the opposite effect. Time and cost considerations for all parties will be substantial.

As noted above, it may be instead be appropriate for the Act to provide a right to request reasons for discontinuing a planning scheme amendment. This would not give rise to a right of appeal but would provide more impetus for a council to consider all relevant matters and would assist a proponent to understand why an amendment was abandoned.

Periodic review of planning scheme

As noted above, the periodic review of planning schemes under section 12B is an excellent opportunity to develop a systematic approach to local planning, rather than ad hoc amendments in response to private requests. This process, combined with the municipal strategic strategy process in section 12A, should be the primary method of considering future planning scheme amendments to ensure this is done in a strategic and informed manner without the considerable time pressures of ad hoc amendment requests. The periodic review provisions and municipal strategic strategy provisions should be developed to allow planning authorities to use this process to indicate their future priorities and intentions and consult broadly with the community and proponents on these.

Recommendations

Part 7 - Planning schemes

- **If changes are made to the Act which alter the process for amending planning schemes they should be done in such a way that the accountability of the planning authority and transparency of the process is not compromised.**
- **The Act should be amended so that any provision in the Act that allows the Minister to remove an amendment or permit from the planning process in favour of Ministerial discretion includes criteria which set out when that power can be used.**
- **The Act should require that in relation to any Ministerial exemption a planning scheme amendment or permit from the planning process in favour of Ministerial discretion, the Minister must provide reasons for the exemption to Parliament.**
- **It is unnecessary to impose additional time constraints on the planning scheme amendment process and to contemplate consequences for failing to comply with these constraints. Any failure to meet a time requirement should not result in the further erosion of the opportunity for the public to be consulted and to engage in the process.**
- **The Act should not provide a right to merits review of the planning authority's decision not to support an amendment proposal.**
- **The Act should require all councils to place a notice of all proposed amendments on their website.**
- **Councils should set up an electronic register that automatically notifies any person who has registered online to receive a notice of proposed amendments.**
- **The Act should include more extensive obligations to consult and engage the community in the process where there are likely to be significant social or environmental impacts or community concerns.**
- **New guidance should be developed on the type and quality of information that must be included in amendment explanatory reports.**
- **Councils should not have the ability to withhold 'irrelevant' submissions from**

panels and sections 22, 23 and 24 which require planning authorities to consider all submissions, refer to a panel any submission that requests an amendment and require panels to consider all submissions referred to it should remain in the Act.

- **The Act should require planning authorities to develop a response to submissions and suggestions for amendment changes well prior to the panel hearing.**
- **A clear comprehensive practice note to guide people on the level of detail and the type of information to include in submissions would be of use, provided it does not attempt to limit their objections to private or direct impacts.**
- **The Act should be amended to include a provision that panels must formally respond to issues raised in submissions before them.**
- **We do not support any amendment which would limit the ability of persons to appear before a panel to raise their concerns.**
- **There should also be a greater mix of expertise of panel members especially those with ecological expertise.**
- **The Act should not provide a right to merits review of a planning authority's decision to abandon a planning scheme amendment, regardless of where in the process this decision occurs.**
- **The periodic review provisions and municipal strategic strategy provisions should be developed to allow planning authorities to use this process to indicate their future priorities and intentions and consult broadly with the community and proponents on these.**

PART 8 – STATE-SIGNIFICANT PROJECTS

There appears to be some confusion in the discussion paper between the 'State-significance' process in Part 9A and the 'call-in' powers in Part 4 Division 6. The discussion paper indicates that these processes are linked when in fact they are unrelated processes. The Part 9A State-significance powers allow the Secretary to compulsorily acquire land and recommend road closures etc. It has no relation to assessment of projects. The call-in power in section 97B allows the Minister to exempt projects from local council approval processes and bypass much of the permit approval process. Contrary to the discussion paper, there is no requirement in the Act for the Minister to declare a project to be of State-significance before using this power – indeed this power can be used for relatively minor projects provided the Minister believes that: it raises a major issue of policy; it may have a substantial effect on planning objectives; there has been unreasonable delay; or the development is also being considered by the Minister under another Act.[19] There is currently no separate process in the Act specifically for assessing State-significant projects.

The assessment of projects that have been called in by the Minister is not prescribed in any detail by the Act. The process is primarily governed by the *Ministerial Powers of Intervention in*

[19] Section 97B(1)

Planning and Heritage Matters Practice Note which sets out guidelines for the Minister in calling-in a project. These guidelines are non-binding.

In practice, the call-in power in section 97B can be used to assess large State projects. The current process is unsatisfactory for thoroughly and democratically assessing projects of State importance in Victoria. As noted in Part 6 above, the EDO's preferred model is for a tiered or levelled assessment process that will specifically include a path for State-significant projects.

As Part 8 of the discussion paper raises the issue of Ministerial call-in powers along with State-significant projects, we will comment here on the flaws in the current call-in process in section 97B and reiterate recommendations for a process to assess projects that are of State importance. Our conclusion is that there should be a separate and distinct process for assessing projects of State significance that is open and transparent and does not rely on the Ministerial call-in power.

Flaws with the Ministerial call-in power in section 97B

Under the current legislative regime, it is possible for the Minister for Planning to be the ultimate and final decision-maker in relation to a project for which his/her own Government is essentially the proponent. This has occurred recently in relation to the Victorian Desalination project, where the Department of Sustainability and Environment applied for various approvals on behalf of the Government to construct and operated the facility, and the Minister for Planning was the ultimate decision-maker in relation to these approvals. This represents a huge conflict of interest and is unsatisfactory. The Minister's call-in ability is a case of the fox looking after the hen house.

A further concern in relation to the call-in power is that a number of important steps in the permit application processes are overridden when the Minister calls in a permit under 97B. For example, the Minister is not required to comply with the *Coastal Management Act 1995* when deciding coastal developments and can approve a permit that breaches a restrictive covenant[20]. Most importantly, there is no VCAT appeal from a decision of the Minister to grant a permit.[21] In addition a person cannot apply to VCAT for a declaration that the planning scheme has been incorrectly interpreted as they can for other decision-makers.[22] The Minister can also call-in a decision that is under review by VCAT at any time with no recourse to an appeal.[23] These represent significant departures from the permit process. It is difficult to predict whether or not the Minister will call-in individual projects and at what stage of the approval process he or she will call them in. This creates significant confusion both from a proponent and objector perspective. Although we make these comments in relation to State-significant projects, they are of equal concern for the vast majority of projects that are called-in by the Minister.

As noted in Part 7 above, Ministerial powers of exemption and call-in should only be used in exceptional circumstances where the need to waive essential elements of the planning process

[20] Sections 97D and 61
[21] Section 97M
[22] Section 97M
[23] VCAT Act Schedule 1 clause 58

is justified by the nature of the project or proposal. They should not be used to allow the Minister to circumvent planning processes that are inconvenient at the time or to rush projects past the normal approvals.

The Act should be amended so that any provision in the Act that allows the Minister to remove an amendment or permit from the planning process in favour of Ministerial discretion includes criteria which set out when that power can be used. The criteria should be commensurate with the extent of the power.

In addition, the Act should require that in relation to any Ministerial exemption for a planning scheme amendment or Ministerial call-in of a permit the Minister must provide reasons for the exemption to Parliament.[24] Although this is currently Government practice, it should be specifically required under the Act.

Assessment of State-significant projects

The built-in conflict of interest inherent in the current process, and the unsatisfactory consequences of Minister's ability to call in projects should be the major driver for reform of the process of how important State projects are assessed.

As noted above, the call-in process is not confined to projects of State significance, but in practice - in the absence of a formal process for assessing large State projects - it is used to assess a number of these large projects. It is highly inappropriate for major projects of this nature that often have significant community, environmental, social and economic issues to undergo a less rigorous and transparent process than smaller lower-impact projects. There must be more structure and clarity associated with assessment of major projects and how and when these are assessed.

Part 8 of the discussion paper suggests that the call-in powers under the *Environment Effects Act 1978* could be a model for State-significant planning approvals. The EDO does not support this suggestion as there are a number of significant problems with processes under that Act. For example, an Advisory Committee was appointed by the Minister of Planning on 22 July 2002 under section 151(1) of the Planning and Environment Act to consider and hear submissions regarding the review of procedures under the Environment Effects Act. It submitted its report and associated recommendations on 2 December 2002.[25] The recommendations were ignored, and the Environment Effects Act remains a very unsatisfactory process to assess projects that have wide-ranging and significant environment effects. The Environment Effects Act should not be looked to in this review as a potential model to assess projects of State-significance.

For the above reasons and as noted in Part 6 above, the EDO supports a levelled or tiered process for assessing planning proposals in Victoria, including planning proposals of State significance. If a project is assessed to be of State significance or of very high impact, it

[24] This was noted in *East Melbourne Group Inc v Minister for Planning & Anor* [2008] VSCA 217 (31 October 2008)

[25] Seddon, R., Ridgway, B., Budge, T., and Davies, P. "Report of the Environment Assessment Review Advisory Committee" (2 December 2002).

should be mandatory that it go through the level of assessment it has been allocated according to this scheme. It is illogical that a project with more significant impacts that raises greater community concerns could go through a process that is less stringent and less transparent than very low level projects. The proposed tiered assessment process is outlined in more detail under Part 6 above.

Priority Development Panels

Section 151 of the Act allows the Minister to appoint an advisory committee. This section has been used by the Minister to establish a Priority Development Panel ("PDP") which advises the Minister on, among other things, ways to provide faster approvals . This process is often used in conjunction with the Ministerial planning scheme amendment powers in section 8, the Ministerial notice exemption powers in section 20 and/or the Ministerial call-in power in section 97B. The combination of these powers results in a de facto 'priority development process' which bypasses several very important steps in the planning process, and almost always results in curtailing or excluding third party participation. This process has been used to assess projects such as the former Laverton Air Base[26] and the Frankston Marina[27] among others.

It is noted that there is no mention or reference in the discussion paper of this facility within the Act, which is a significant omission. It is the experience of the EDO that the appointment of PDPs often occurs in relation to contentious or potentially significant proposals and results in a highly curtailed planning and approval process. For this reason it should be included as a major topic of law reform. Certainly, the assessment of State-significant projects cannot be discussed without taking these parallel provisions into account.

The role of the PDP as stated in its terms of reference[28] is to:

- identify ways to provide faster approvals processes for developments of State or regional significance;
- work closely with project proponents and local government to speed up decision-making; and
- provide expert advice to assist in resolving issues and facilitating strategic planning outcomes.

In practice the PDP commonly advises the Minister on whether or not he or she should call-in a project, and in addition advises on potential planning scheme amendments.

The EDO has significant concerns with the way the 'priority development process' operates in practice. The activities of the PDP are not regulated in the same way that a panel appointed for

[26] Priority Development Panel, "Response to Referral for Advice from the Minister for Planning in relation to Laverton RAAF Airbase" (July 2006) http://www.dse.vic.gov.au/DSE/nrenpl.nsf/LinkView/5C28EA7546FEABE7CA25733A00139DD0C754CFBA18BCFDA5CA257359001CAB7E

[27] Priority Development Panel, "Response to Referral for Advice from the Minister for Planning in relation to Proposed Frankston Safe Boat Harbour Land and Sea from Nepean Highway Olivers Hill, Frankston" (April 2008) http://www.dse.vic.gov.au/DSE/nrenpl.nsf/childdocs/-9F889687EADAE3B2CA2572DA007F071B-706E7682A0D0E6C9CA2572FF000BF58E-164714CEFA29277FCA257359001C9DCD?open#Frankston%20Safe

[28] See Priority Development Panel Terms of Reference, available: http://www.dse.vic.gov.au/DSE/nrenpl.nsf/childdocs/-9F889687EADAE3B2CA2572DA007F071B-706E7682A0D0E6C9CA2572FF000BF58E?open

a planning scheme amendment is. Section 151 does not require the PDP to operate in any particular way and does not contain any minimum standards for its operation. For example, a PDP is not required to consult the community before making its recommendations. It is primarily guided by a practice note which is very broad (and in any case not binding)[29]. There is significantly more leeway associated with this type of panel than with planning panels as it decides its own procedure for each investigation on a case-by-case basis. In addition, the PDP can "inform itself as it sees fit" without being required to take any particular considerations into account.

At the completion of a PDP, the Minister is able to exercise his/her discretion under section 20(4) of the Act and amend a planning scheme and approve a project without giving public notice of the proposal or having to consult with the public.

The ability of a panel to provide advice to the Minister is not in itself a concern. However, where advice from a panel which is not required to consult with the public is either combined with the power of the Minister to remove planning amendments from the standard planning process and instead be decided on Ministerial discretion, or else combined with the Ministerial call-in power, it results in a significant derogation from principles of good governance, good planning, public participation and natural justice.

This 'priority development' assessment is not a regulated process and in practice is a 'loophole' in the planning process to fast-track a project through its assessment stages without proper public involvement. Proponents can and do directly approach responsible authorities and the Minister to request that they be removed from the regulated process and put into this fast-track process. The current Minister for Planning has been actively using this provision in the Act to bypass consultation requirements and fast-track projects in Victoria. This inappropriate loophole must be closed.

It is recommended that section 151 of the Act is significantly amended to include minimum standards for advisory committees to give notice of their inquiries and call for submissions and consider those submissions in their recommendations. It must also be amended to require the Minister to publicly release the recommendations from the advisory committee before making a decision. In addition, section 151 must be amended to more stringently regulate the appointment and activities of advisory committees such as PDPs.

Recommendations

Part 8 – State-significant projects

- **The Act should be amended so that any provision in the Act that allows the Minister to remove an amendment or permit from the planning process in favour of Ministerial discretion includes criteria which set out when that power can be used. The criteria should be commensurate with the extent of the power.**

[29] Advisory note, Referral of projects to the Priority Development Panel, February 2006 http://www.dse.vic.gov.au/CA256F310024B628/0/8AC7B6D4F621DF61CA25712C0083C979/$File/PDP.pdf

- **The Act should require that in relation to any Ministerial exemption for a planning scheme amendment or Ministerial call-in of a permit, the Minister must provide reasons for the exemption to Parliament.**
- **The call-in powers under the *Environment Effects Act 1978* should <u>not</u> be used a model for State-significant planning approvals.**
- **A tiered assessment process should be introduced to assess permit applications. State-significant projects that are likely to have a high level of community concern or greater social, economic or environmental impacts would go through the highest level of assessment.**
- **Section 151 of the Act should be significantly amended to include minimum standards for advisory committees (PDPs) to give notice of their inquiries and call for submissions and consider those submissions in their recommendations.**
- **The Act should require the Minister to publicly release the recommendations from advisory committees (PDPs) before making a decision.**
- **Section 151 must be amended to more stringently regulate the appointment and activities of advisory committees such as PDPs.**

PART 10 – OTHER OPPORTUNITIES

Section 173 agreements - recommendations of the 2004 expert group

As the discussion paper notes section 173 agreements can be a very useful planning tool (particularly where there are complex ongoing obligations), however there is an increasing perception that these agreements are being over-used with little regard to their limitations.

The EDO broadly supports the options recommended by the 2004 expert group for improving the operation of section 173 agreements. Some of the relevant recommendations are discussed below.

> *1) Amending the Act to ensure that an ongoing requirement to comply with conditions on development permits can be enforced.*

One of the main factors contributing to the increase in the use of section 173 agreements is uncertainty surrounding the enforceability of ongoing conditions on development permits. One view is that the development permit expires on the completion of development and these conditions become unenforceable. This has resulted in responsible authorities adopting a cautious approach and frequently applying section 173 agreements for the purpose of securing ongoing compliance with these sorts of conditions.[30]

This is particularly important in the context of conditions requiring the establishment and maintenance of offsets in the context of native vegetation removal under clause 52.17. Although VCAT has stated[31] that permit conditions should be sufficient for and that section 173 agreements are not necessary, there remains ongoing confusion.

[30] Dwyer, M., *Review of section 173 Agreements*, Discussion Paper, May 2004.
[31] Villawood v City of Greater Bendigo

Given the continuing uncertainty surrounding this issue, EDO supports prompt legislative clarification. Addressing this issue is likely to reduce the need for many agreements (and the associated administrative burden, costs and delays). Section 68 of the Act should be amended to clarify that a development permit does not expire on the completion of a development where the permit includes valid conditions of an ongoing nature. Note however that one of the advantages of section 173 agreements is that they are registered on title which means that any subsequent purchaser becomes aware of the condition. Permit conditions are not registered on title and therefore an obligation should be created which would require the existence of a valid ongoing development condition permit to be disclosed in the vendor's statement that is required under section 32 of the *Sale of Land Act 1962*.

2) Amending the Act to ensure the power to impose conditions on a permit clearly includes the ability for permit conditions to require deposit of guarantees or bonds, to avoid the use for agreements solely for this purpose.

Because section 175 of the Act allows a section 173 agreement to include a condition requiring deposit of guarantees or bonds to secure compliance with conditions, but section 62 of the Act does not contain a similar provision in relation to permits, some responsible authorities have taken the view that section 173 agreements are the only means of seeking guarantees or bonds to secure compliance with conditions. This has resulted in increased use of section 173 agreements solely for this purpose.

Section 62 of the Act should therefore be amended to expressly allow permit conditions requiring deposit of guarantees or bonds to secure compliance with conditions. Addressing this issue may reduce reliance on section 173 agreements and, as noted above, the associated administrative burden, costs and delays.

3) Improving the availability of agreements for public inspection.

Despite obligations in the Act requiring a responsible authority to keep a copy of each agreement (including any amendment made to it) and make it available for public inspection during office hours free of charge, EDO frequently receives telephone inquiries in relation to lack of access to planning documents, including section 173 agreements.[32] Many clients state that council officers appear unaware of statutory requirements to make information available for public inspection or are unwilling to provide access to these documents. This can lead to uncertainty with respect to planning controls affecting land, prospective owners being unaware of agreements where they have not been registered and issues with enforcement. [33] EDO therefore strongly supports improving the availability of section 173 agreements specifically, and planning documents more generally, for public inspection. Our recommendations for improved access to planning information are discussed in more detail below.

[32] Section 179(2) of the Act states: (2) The responsible authority **must** keep a copy of each agreement indicating any amendment made to it available at its office for any person to inspect during office hours free of charge.
[33] Dwyer, M., *Review of section 173 Agreements*, Discussion Paper, May 2004.

Responsible authorities need to be aware of statutory obligations. A detailed practice note on section 173 agreements followed up with information or education for responsible officers would be beneficial.

The use of 'information statements' (see discussion below) with clear reference to the types of documents held by responsible authorities, arrangements for public inspection and any associated costs would facilitate access to planning documents, including section 173 agreements.

4) Broadening the jurisdiction of VCAT to settle disputes relating to section 173 agreements

As the Act is currently framed, VCAT can deal with section 173 agreements in limited circumstances. The discussion paper prepared by Mark Dwyer, *Review of section 173 Agreements*, suggested the following amendments to broaden the jurisdiction of VCAT to settle disputes relating to section 173 agreements:

- a general power to make a determination where a dispute arises as to the interpretation of a section 173 agreement; and
- a broader power to resolve disputes, and to approve the amending or ending of an agreement (including the power to direct the Registrar to cancel or amend the recording of the agreement against a title in the Register), where:
    - there has been a material change of circumstances since the agreement was entered into. or
    - VCAT is satisfied that agreement is no longer applicable to a particular owner or land (e.g. obligations completed, agreement obsolete, etc).

In broadening VCAT's jurisdiction EDO submits that it is important to bear in mind that section 173 agreements are intended to operate as a binding ongoing planning control and thus should not be capable of being too easily amended or ended without good reason. Thus it is paramount that VCAT support this intent in the exercise of its powers.

Access to planning information and privacy issues

The EDO provides a significant volume of telephone legal advice to the community on a range of planning matters. A large proportion of inquiries that are received are in relation to lack of public access to planning information. There are two issues in relation to access to planning information:

1) in some cases the Act does not require planning information to be released to the public and therefore important documents which should be available to the public are withheld by decision-makers, particularly the Minister.
2) planning documents that are required to be made available to the public are in practice is not being made readily available by responsible authorities, despite what is outlined in clearly in the Act.

Recommendations in relation to these two issues are set out below.

Access to information not currently required by the Act

The Act does not require the Minister to release the recommendations from an advisory committee. It is against the principles of good governance for the Minister to be able to make recommendations that impact so greatly on the public without disclosing the advice on which his/her decision was based. This process is currently seen by the public to be secretive and distrustful. The panel and advisory committee processes are an integral part of the planning process and should be open and transparent. The Act should specifically require the Minister to release all advice received from advisory committees within 7 days of receiving the advice.

Better access to information that must be provided under the Act

Section 57(5) of the Act states: "The responsible authority must make a copy of every objection available at its office for any person to inspect during office hours free of charge until the end of the period during which an application may be made for review of a decision on the application." Section 70 of the Act states: "The responsible authority must make a copy of every permit that it issues available at its office for inspection by any person during office hours free of charge."

It is the experience of the EDO that the council officers and staff who are responsible for facilitating access to planning information are frequently either unaware of the above provisions in the Act, or are unwilling to abide by them. There is a large demand within the community for improved access to planning information.

In addition it is difficult for members of the public to access secondary documents such as plans and reports approved by the responsible authority pursuant to permit conditions. The majority of these documents can eventually be obtained under Freedom of Information laws and therefore there is little reason to withhold them at first instance. This creates more confusion and difficulty for both members of the public and officers of responsible authorities.

It is recommended that the Act is amended to include stronger mandatory provisions aimed at responsible authorities in relation to the provisions of planning information.

One model that could be adopted is that of the on-line Information Statements required pursuant to the *Freedom of Information Act 1992* (WA) in Western Australia. This scheme requires every Government Department in Western Australia to maintain a list accessible on their website which sets out the kinds of document that are generally held by that Department, and how they are accessible to the public. Section 94 of the *Freedom of Information Act 1992*, reads:

> *"...an **information statement** , in relation to an agency, is a reference to a statement that contains —*
>
> *(a) a statement of the structure and functions of the agency;*
>
> *(b) a description of the ways in which the functions (including, in particular, the decision-making functions) of the agency affect members of the public;*

(c) a description of any arrangements that exist to enable members of the public to participate in the formulation of the agency's policy and the performance of the agency's functions;

(d) a description of the kinds of documents that are usually held by the agency including —

(i) which kinds of documents can be inspected at the agency under a written law other than this Act (whether or not inspection is subject to a fee or charge);

(ii) which kinds of documents can be purchased; and

(iii) which kinds of documents can be obtained free of charge;

(e) a description of the agency's arrangements for giving members of the public access to documents mentioned in paragraph (d)(i), (ii) or (iii) including details of library facilities of the agency that are available for use by members of the public;

(f) a description of the agency's procedures for giving members of the public access to the documents of the agency under Part 2 including —

(i) the designation of the officer or officers to whom initial inquiries as to access to documents can be made; and

(ii) the address or addresses at which access applications can be lodged;

(g) a description of the agency's procedures for amending personal information in the documents of the agency under Part 3 including —

(i) the designation of the officer or officers to whom initial inquiries as to amendment of personal information can be made; and

(ii) the address or addresses at which applications for amendment of personal information can be lodged." (emphasis added)[34]

Note that the information statement does not require *each document* held by the agency to be listed, it requires *each kind* of document generally held by the agency to be listed, along with whether the document is available to the public and if so how it can be accessed. This information statement has proved to be a valuable resource for the community who frequently confused as to which documents it can access and how. It reduces the administrative burden for government agencies as the public can work out for themselves whether a document should be freely available or whether they need to make an FOI request.

The EDO recommends that similar provisions are included in the *Planning and Environment Act* in relation to responsible authorities. If local councils were required to maintain a list of the types of documents they hold, those that are available to the public and the procedure for the public to access these documents, this would dramatically reduce the burden on the council in

[34] Section 94 of the *Freedom of Information Act 1992* (WA)

dealing with constant inquiries. It would also greatly reduce the frustration that the public experiences in dealing with local councils and will ensure that the public are getting access to the documents they are entitled to view under the Act.

There should be a rational assessment of which documents can be publicly obtained and which have strong and reasonable grounds to be only accessible through FOI, with the majority of documents publicly available. In addition, the Planning and Environment Act should provide a right to copy documents for a reasonable cost rather than just view documents (a right which is of little use where there are hundreds of pages of reports and maps).

Some councils in Victoria have identified the need for planning information to be more readily available to the public and have taken voluntary action to facilitate this. For example, the Yarra Ranges Shire Council now has a facility on their website that enables the public to electronically search current planning applications.[35] The Act should include a mandatory provision to require councils to make planning applications and proposed planning scheme amendments available in this way to improve public access to planning information. This should be in addition to, not a substitute for, other forms of notice. Online notification has the advantage of being more accessible than council offices or newspaper advertising for many people and more convenient in terms of the capacity for council to include copies of relevant documents. Councils should set up an electronic register that automatically notifies any person who has registered online to receive a notice of proposed amendments.

The provision to the public of information on-line and via the internet is well aligned with the ideas promoted in the section 10.2 of the discussion paper on "Facilitating e-planning", and the recently released *e-Planning Roadmap* strategy.

Public access to personal information of applicants or objectors

It is the experience of the EDO that some planning issues cause vast division within communities and that some individuals and groups can be nervous or hesitant in objecting to certain applications due to the perceived power of applicants in the community, or a concern that the process of objecting might have negative ramifications for them, either personally or professionally. Whether this is real or perceived, a facility that allows objectors to elect at the time of making their objection to not have their names and contact details made publicly available in connection with an objection would rectify this. Alternatively, a provision could be included in the Act that specifically makes it an offence to threaten objectors.

Recommendations

Part 10 – Other Opportunities

- **Section 68 of the Act should be amended to clarify that a development permit does not expire on the completion of a development where it includes valid conditions of an ongoing nature.**

[35] Yarra Ranges Shire Council Website – Planning http://www.yarraranges.vic.gov.au/Page/page.asp?Page_Id=237&h=0

- **Section 32 of the *Sale of Land Act 1962* should require valid ongoing development condition permits to be disclosed in vendor's statements.**
- **The Act should specifically require the Minister to release all advice received from advisory committees within 7 days of receiving the advice.**
- **The Act should be amended to include stronger mandatory provisions aimed at responsible authorities in relation to the provisions of planning information.**
- **The requirement for an information statement as set out in the WA Freedom of Information Act is recommended.**
- **There should be a rational assessment of which documents can be publicly obtained and which have strong and reasonable grounds to be only accessible through FOI, with the majority of documents publicly available.**
- **The Act should include a mandatory provision to require councils to make planning applications and proposed planning scheme amendments available on their website in a searchable database.**
- **Objectors should be able to elect at the time of making their objection to not have their names and contact details made publically available in connection with an objection would rectify this. Alternatively, a provision could be included in the Act that specifically makes it an offence to threaten objectors.**

APPENDIX 3 – SECTION 16

Section 16 of the Act reads:

"A planning scheme is binding on every Minister, government department, public authority and municipal council except to the extent that the Governor in Council, on the recommendation of the Minister, directs by Order published in the Government Gazette"

It is unclear from parliamentary records why this section was incorporated in to the Act in the first instance and how it was intended to be used. The EDO suspects that the section exists to allow projects that are overwhelmingly in the State interest, for example, to exempt the Health Minister from the operation of the Act in order for him or her to build a hospital. The EDO does not take major issue with this section being used in this way.

However it is the view of the EDO that recently, in two occasions in particular, this section has been misused by the Minister for Planning. In relation to both the North-South Pipeline Project and the Barwon Heads Bridge Project, it is apparent that the Minister for Planning did not agree with the emerging outcome of the planning process and did not want the Planning and Environment Act to be applied in those instances, and decided to exempt himself from its operation. We submit that this is an acute misuse of the section, is contradictory to the objects of the Act and the intent of section 16 in the overall context of the Act, and should be seriously scrutinised in this review. The value of the Act itself and indeed of this review of the Act is futile if section 16 remains in its current form, and allows the Minister to simply bypass the operation of the Act when it does not suit him or her in particular instances.

Case Study – The Barwon Heads Bridge Project

The Barwon Heads Bridge project involved the rebuilding of the heritage listed wooden bridge at Barwon Heads. There were a variety of approvals required for this project under a number of different Acts. An amendment to the City of Greater Geelong Planning Scheme under the Act was also required for the development to go ahead.

An advisory committee was appointed to advise the Minister in relation to the project, and they provided their recommendations in January 2007. Two years later, the Minister exempted himself from the notice and consultation requirements under section 20(4) of the Act and amended the City of Greater Geelong Planning Scheme to facilitate the development.

Section 38 of the Act requires all planning scheme amendments to be put before Parliament, and for either House to pass a motion which disallows the amendment within 10 sitting days. This occurred in the case of the Barwon Heads Bridge project, with amendment C118 being revoked in the Upper House. The Minister for Planning immediately directed the Governor-in-Council to publish an Order exempting the project from the operation of the Act., pursuant to section 16 of the Act.

Section 16 allows the Executive to totally subvert the planning process. In particular this provision allows the Executive to usurp the power of Parliament to disallow planning scheme amendments.

Section 16 should not have the apparent breadth of application that the wording of the section suggests. When interpreting this section in light of the objects of the Act, the Act as a whole and the purpose of the legislation, it is absurd to argue that this is what Parliament intended when passing this section of the Act. There must be limits on how and when this section of the Act can be employed by a Minister, and this issue must be resolved in this review of the Act.

Section 16 should be carefully reviewed to determine its purpose and the appropriateness of its inclusion within such an Act. If it is to remain in the Act, the Act must clearly specify under what circumstances it can be used so that the power is narrowly limited. It should only be used where it is in the overriding State interest to do so. It can not be used as a “last ditch” effort when every other possibility of passing the amendment has been exhausted under the Act, as in the case of the Barwon Heads bridge project. In addition, to ensure that there is proper scrutiny of the use of this exemption, each exemption made under this section should be contained in a disallowable instrument which is tabled in Parliament. This will help to ensure that the power is only used in extenuating circumstances, when there is a need to facilitate a project that is in the interest of the State.

If this review does not occur the section should be removed from the Act.

Recommendations

Section 16

- Section 16 should be carefully reviewed to determine its purpose and the appropriateness of its inclusion within such an Act. If it is to remain in the Act, the Act must clearly specify under what circumstances it can be used so that the power is narrowly limited