Policy and Law Reform

Environment Defenders Office

EDO Position Paper

Creating a sustainable and equitable planning system

The Victorian Government wants to know how the planning system could be better.

The Government has appointed an Advisory Committee to advise it, and are asking for submissions by **31 August 2011**. It is really important that community concerns about the environment and community involvement in planning are raised to balance the views of industry and developer groups.

The Environment Defenders Office (**EDO**) will be making a submission, based around the following four key requirements:

1. **The community must have genuine rights to participate**
2. **Sustainability must be central to the planning system**
3. **The planning system must set clearer standards**
4. **Planning institutions must be effective**

This rest of this paper briefly outlines those four key requirements. We encourage you to make your own submission.

1. The community must have genuine rights to participate

Members of the public deserve to have a real say in their own planning system. That's why the EDO welcomes the Government's election commitment to 'honest and genuine community engagement and consultation'.[1]

Third party rights must be retained and strengthened

The EDO strongly supports the public's statutory rights to object to planning permit applications, to appeal planning permit decisions, and to enforce breaches of planning requirements. These rights need to be maintained and strengthened. We therefore strongly oppose the Government's proposal to legislate to limit appeals to VCAT for projects that are deemed to substantially comply with the Municipal Strategic Statement.[2] It's also essential that the public be given greater access to planning information and documentation (like planning permits, objections and advisory committee recommendations) to allow them to fully exercise their rights to participate.

'Fast-track' assessments must be reserved for projects of genuine state significance and contain appropriate safeguards

The EDO supports full and open public consultation on planning decisions. We oppose any attempt to 'fast-track' development assessment and approval — which raises a real risk of poor and politicised decision-making — unless it is genuinely in the interest of the State of Victoria to do so, and then only with appropriate safeguards. In particular, we oppose the fast-tracking of projects under the *Major Transport Projects Facilitation Act 2009* and projects called in by the Minister under s 97B of the *Planning and Environment Act 1987* (**PE Act**). In cases where it is genuinely in the interest of the State to expedite or have increased government intervention on a project (such as a new hospital or public transport corridor), those projects should be subject to a legislated process that allows proper consideration of social, economic and environmental impacts; has appropriate public participation; and limits the use of Ministerial discretion.

2. Sustainability must be central to the planning system

A core function of the planning system should be to guarantee that any growth and development is sustainable. This consists of two things:

- protecting the natural environment (and the communities that live in it) from inappropriate development; and
- ensuring that any development that does occur is based on sustainability principles (for example, adequate public transport, adaptation for future climate impacts).

The planning system already contains some measures to protect the environment and enhance sustainability, but these are often too limited and too discretionary to achieve their goal. Major shifts are required to ensure sustainability.

The environment must be protected — not just 'considered'

In the Victorian planning system, the environment is largely protected by requiring individual decision-makers to 'consider' it in individual cases. Environmental impacts are usually one of a number of often conflicting factors decision-makers must 'consider'. This is a not a mode of protection; it allows development interests to override environmental objectives and results in incremental encroachments on the environment — the 'death of a thousand cuts'.

To achieve more positive environmental outcomes, the PE Act must require responsible authorities and planning authorities not just to consider the environment, but to *ensure* that it is protected. In addition, planning controls must provide that certain impacts on the environment are unacceptable, rather than leaving this to the individual discretion of each decision-maker. Important environmental assets — like Melbourne's Green Wedge zones for example — must be protected through state-wide planning controls that transcend and bind individual decision-makers.

1 The Liberal National Plan for Planning pp 1, 11.

2 The Liberal National Plan for Planning p 23.

Planning decisions should take climate change into account

Decisions under the PE Act need to be brought within Schedule 1 of the *Climate Change Act 2010* (Vic), to require decision-makers to plan for climate change. The planning system is a vital tool for State Governments to tackle climate change in ways that the Federal Government and a carbon price cannot. The planning system currently allows piecemeal consideration of climate change. Linking the PE Act with the Climate Change Act would allow decision-makers to properly consider whether planning decisions will result in increased emissions, and how the proposed development will be impacted by climate change (for example, sea level rise).

Environmental impact assessment must be improved

A good planning system needs to be coupled with an effective environmental impact assessment (**EIA**) process. The *Environment Effects Act 1978* (Vic) has long passed its use-by date. It has practically no legal force, only applies to a handful of projects, provides no certainty for business, and is ineffective at protecting the environment. It is well below the standard of EIA in other Australian jurisdictions. It needs to be repealed and replaced with a modern EIA Act that ensures that all developments are subject to thorough and appropriate assessment of impacts. This would include a binding trigger for when assessment is required, independent assessment of environmental impacts, and the ability to impose legally binding conditions to minimise negative impacts or refuse inappropriate development.[3]

3. The planning system must set clearer standards

The planning system is characterised by policy statements, non-binding guidelines and a high degree of decision-maker discretion. This causes significant problems for councils, communities, business and the environment.

Planning schemes should be more certain and set minimum standards

Planning schemes are replete with policy statements, incorporated documents, and disparate factors for decision-makers to consider. They are conspicuously short on binding rules and requirements, or even minimum standards to protect the environment and the community. This makes it very difficult to predict with any accuracy what planning schemes actually require. This also makes it very easy for decision-makers to ignore or dilute those instruments or provisions which protect the environment. Planning schemes need to contain fewer vague and non-binding provisions, and to set clearer standards, particularly for issues of state-wide or regional significance.

Ministerial discretion should be subject to legislative limits

The planning system currently affords too much discretion to the Minister. The PE Act gives the Minister almost unfettered power to call in planning permit applications — even where the Government is the proponent — thus bypassing many aspects of the planning process (for example, appeal rights).[4] The Minister also has the power to exempt him or herself from the planning process when preparing planning scheme amendments.[5] There are no legislative limits to when these powers can be exercised, and business and community groups are left without certainty. The Government has committed to putting some limits on these powers, including through non-binding guidelines.[6] However, only legislative limitations which reserve these powers for cases where it is genuinely in the interest of the State, and which provide safeguards in those cases, will secure integrity and certainty in the planning system.

3 For more detail on the EDO's views on a best practice EIA system for Victoria see our briefing paper *Environmental Impact Assessment in Victoria* at http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers.

4 *Planning and Environment Act 1987* (Vic) s 97B.

5 *Planning and Environment Act 1987* (Vic) s 20(4).

6 The Liberal National Plan for Planning p 9.

4. Planning institutions must be effective

In a planning system where planning decisions are highly decentralised and have a high degree of discretion, it's vital that there are effective institutions that can be relied on to make high-quality decisions.

Planning panels need to be made relevant

The reports of planning panels are too often disregarded. EDO has acted in a number of cases where many weeks were devoted to hearings, submissions, expert evidence and argument before a panel, followed by significant deliberation by the panel, only for the panel's report to be disregarded. The considerable effort and expertise of the parties and panel members then effectively goes to waste. Either the PE Act must be amended to make planning panels more relevant and binding, or the entire process should be rethought.

A Land and Environment Court should be established

The Victorian Civil and Administrative Tribunal (**VCAT**) has many very positive features. Its relative informality and 'no costs' jurisdiction have allowed many community members the opportunity to make their case, which would otherwise only be afforded to business and government. Allowing merits review has allowed them to avoid technical legal points and focus on the real issues.

This process still needs improvement however. Our experience is that not all VCAT members have the expertise in environmental law and science that is needed in environmental cases. In the event of legal errors on the part of VCAT, clients have the choice between seeking judicial review in the Supreme Court, which is expensive and complicated, or leaving the error unresolved. Both of these problems could be avoided by the creation of a Land and Environment Court similar to that in New South Wales, with specialist planning and environment knowledge, and combined merits and judicial review jurisdiction — a publicly accessible and high quality 'one-stop shop' for planning and environment appeals.

It's time for you to speak up!

The recommendations of the Advisory Committee are likely to play a key role in shaping the Government's agenda for planning. That's why it is so important that community groups and environmentalists make their voices heard — to make sure that public interest and community issues are given prominence.

The full details of the Advisory Committee review are on the DPCD website.[7] Submissions are due by 31 August 2011.

To help you make a submission, the EDO will be running the following workshops:

- **Melbourne**: Wednesday 17 August 5.30–7.30 pm, the 60L Green Building, 60 Leicester St, Carlton
- **Frankston**: Wednesday 17 August 6–8 pm, Frankston Library, 60 Playne St, Frankston
- **Bairnsdale**: Thursday 18 August 6–8 pm, DSE/DPI offices, 574 Main St, Bairnsdale
- **Stawell**: Monday 22 August 6–8 pm, Project Platypus Landcare Centre, 11A Ararat Rd, Stawell
- **Shepparton**: Tuesday 23 August 6–8 pm, Uniting Care Cutting Edge, 136 Maude St, Shepparton

These workshops are free but you need to make a booking as places are limited. RSVP to edovic@edo.org.au or by calling us on the number(s) below.

if you have any questions about making a submission to the review, give us a call!

8341 3100 — Melbourne callers
1300 336842 (1300 EDOVIC) — regional and country callers

7 http://www.dpcd.vic.gov.au/planning/panelsandcommittees/current-planning-panels-and-committees/victorianplanningsystemadvisorycommittee.

About the Environment Defenders Office (Victoria) Ltd (**EDO**)

The EDO is a community legal centre specialising in public interest environment law. We 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 collectively to protect Australia's environment through public interest planning and environmental law.

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SEEK LEGAL ADVICE REGARDING SPECIFIC CASES

While all care has been taken in preparing this publication, it is not a substitute for legal advice in individual cases. For any specific questions, seek legal advice.

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