Environment Defenders Office

Submission

in response to

Planning System Review 2011

prepared by

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31 August 2011

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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.

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Submitted to:

Victorian Planning System Ministerial Advisory Committee

Department of Planning and Community Development

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KEY RECOMMENDATIONS

The following is a summary of the key recommendations made throughout this submission:

- Reforms to the planning system should be aimed at improving decision-making and restoring public confidence in the system, and re-orienting the system around the core concept of sustainability.

- The Act should be amended to include the ESD principles in full, and to require that all decisions made under the Act be consistent with ESD principles.

- The system must be altered to require responsible authorities and planning authorities not just to consider the environment, but to ensure that it is protected.

- Planning schemes should contain fewer vague and non-binding provisions, and set clearer standards, particularly for issues of state-wide or regional significance. Important environmental assets must be protected through state-wide planning controls that transcend and bind individual decision-makers.

- Planning controls must provide that certain impacts on the environment are unacceptable, rather than leaving this to the individual discretion of each decision-maker.

- The planning system needs to contain an overarching framework to assist decision-makers to deal with climate change.

- The environmental impact assessment regime through the Environmental Effects Act needs to be replaced with modern EIA legislation that is integrated with the planning system and ensures that all developments are subject to appropriate assessment of impacts.

- Third party rights must be retained and strengthened.

- The Planning and Environment Act should be amended to allow greater access to documents that are integral to planning decisions.

- Councils should be required to list which types of documents are freely available, and which will require an FOI request, similar to the Information Statements used in Western Australia.

- The Ministerial exemption power should be removed, or at least limited through legislated criteria and safeguards.

- A tiered process for assessing planning proposals in Victoria should be established, including planning proposals of State significance. If a project is assessed to be of State significance or of very high impact, it should be mandatory that it go through the level of assessment it has been allocated according to this scheme.

- Decision-makers should be required to comply with panel recommendations, unless there is sound justification for not doing so, and only if reasons are given.

- A Land and Environment Court should be established.

INTRODUCTION

The Environment Defenders Office (EDO) welcomes the review of the planning system. We believe that changes could be made to the planning system 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. We believe that any reforms should focus on improved decision-making, restoration of public confidence in the system, and environmental sustainability.

The EDO advises and represents individuals and groups who seek to protect the environment in the public interest. We have a telephone advice line through which we provide advice to hundreds of people a year, primarily on planning issues. We run community legal education sessions around Victoria to help the community understand and apply environment and planning laws. We also run monthly public workshops to assist objectors to self represent in VCAT. In most cases we are the only organisation providing these services to the Victorian community. Although we can provide legal advice only to clients who have public interest environmental law issues, we have an understanding of the broader community planning concerns via our workshops (which are open to anyone regardless of their interests) and our advice line (where we provide basic information to callers to assist them to navigate the planning system, even when they do not have environmental concerns).

As such we have assisted many thousands of people in Victoria over the last 20 years on planning issues. We therefore have an excellent understanding of the Victorian planning system - particularly how well it protects (or does not protect) the environment, and the difficulties people face when they interact with the planning system.

For the Planning System Review we ran four public workshops to assist the community understand the planning system and make submissions to the review. About 80 people attended, representing approximately 50 community organisations. These workshops gave us further insight into community views and concerns with the planning system.

The following is a summary of the key issues we hear from the community about the planning system:

- The system is complex and confusing and it is difficult to understand the basis on which decisions will be made (due largely to the high level of discretion of decision-makers and the large number of incorporated documents);
- The system does not properly protect the environment from inappropriate development;
- There is a lack of emphasis on the 'bigger issues' of climate change, environmental sustainability, wellbeing – e.g. climate change impacts are not considered appropriately and often not at all;
- People routinely have difficulty accessing planning documents from councils that they have the right to access;
- Community participation through third party rights is greatly valued and seen as essential for the integrity of the system and the balancing of community views against those of developers;
- The community has a general distrust of, and concerns about, the Ministerial call-in process;
- There is a lack of transparency and accountability across the system;

- There is a community perception that developers have better access to decision-makers, especially councils. For example proponents often workshop their proposals with council, often before the views of the community are sought. When this occurs people feel like approval is a foregone conclusion, that consultation isn't genuine and objecting is a waste of time.

- Community members feel at a huge disadvantage in VCAT when appearing against proponents with costly barristers and experts;

- VCAT appeals can lack independence due to the one-sided nature of expert witness, the reluctance of VCAT to call its own experts, and the inability of the community to engage experts at all.

- People generally report a good experience of planning panels (open, consultative, expert based), but are disillusioned when the panel's recommendation is ignored by the decision-maker without any justification. This is particularly the case when people have spent considerable time and money participating in good faith in the panel process;

- There is a lack of enforcement of planning permits by local councils across Victoria resulting in a lack of respect for planning decisions and lack of confidence in the system.

Many of these issues and suggested solutions are discussed further below.

As a comment about this review, we are concerned about the Government's determination to review the entire planning system in such a short period of time, with such a short public consultation period, and without any indication of the Governments' intentions. To ensure the community is not disillusioned by the process the Government should conduct further consultation on any proposals that it develops as a result of this initial review process. It is also disappointing that there is no community representative on the advisory committee who can properly represent a community understanding of the system.

Due to the very broad nature of the present review, we have limited this submission to our overarching concerns with the planning system. More detailed issues and recommendations can be found in our submissions to the 2009/2010 review of the Planning and Environment Act (PE Act) *Modernising Victoria's Planning Act*[1]. In particular the committee should consider the recommendations in our May 2009 submission.

DISCUSSION AND RECOMMENDATIONS

The planning system should meet the needs of the Victorian community as a whole, and not just those who seek to facilitate development. Reforms should be aimed at improving decision-making and restoring public confidence in the system. Importantly, the entire planning system should be based around the core concept of sustainability to ensure that decisions being made now adequately protect the environment, maintain the health and wellbeing of the community and wisely manage land use in the interest of the whole community.

The key reforms that would achieve these goals are set out below.

1. 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:

[1] Submissions to *Modernising Victoria's Planning Act* are accessible at http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers

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

Although the planning system contains some measures to protect the environment and enhance sustainability, these are often too limited and too discretionary to achieve their goal. Major shifts are required to ensure that planning outcomes are sustainable outcomes. The EDO's views on this are supported by the findings of Planning Institute of Australia's recent survey of its members where almost 100% of participants rated the biggest Victorian planning policy issue as "the system does not give enough weight, or incentive, to consider issues around sustainability, climate change mitigation or environmental issues".[2]

1.1 Ecologically sustainable development principles must be integrated into the planning system

The principles of ecologically sustainable development (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*[3]. Despite this, ESD principles are not specifically set out anywhere in the planning system. While the current objectives of the PE 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 (VPP) but again, the reference is indirect and lacking in guidance.

The Act should be amended to set out the ESD principles in full, and to require that all decisions made under the Act be *consistent with* ESD principles. Further discussion of the problems caused by the failure of the planning system to incorporate ESD principles, and recommendations for their inclusion, are set out in our May 2009 submission on the review of the PE Act[4].

1.2 The environment must be protected — not just 'considered'

In Victoria the planning system is a crucial part of the environment protection system. This is especially the case in light of the weakness of our environmental impact assessment regime. As a general rule the planning system attempts to provide protection for the environment by requiring individual decision-makers to 'consider' it in individual cases. Due to the discretionary nature of the system environmental impacts are usually one of a number of (often conflicting) factors decision-makers must consider. What must actually be considered depends on the requirements of the particular zone, the VPPs and relevant incorporated documents, amongst other things. Planning schemes rarely contain even minimum standards to protect the environment and the community. All these factors make it very easy for decision-makers to ignore or dilute those instruments or provisions which attempt to protect the environment.

These problems mean that the planning system does not in fact provide a mode of protection for the environment; it allows development interests to override environmental objectives and results in incremental encroachments on the environment — the 'death of a thousand cuts'. This approach actively works against the achievement of state-wide environmental objectives such as those found in State Environment Protection Policies, the Victorian Coastal Strategy and the Native Vegetation Framework.

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[2] Planning Institute of Australia Victorian Planning System Review Survey 2011 accessed at http://www.planning.org.au/viccontent/2011

[3] *Intergovernmental Agreement on the Environment,* 1 May 1992, Schedule 2 - Resource assessment, land use decisions and approval processes,

[4] See Part 4 of EDO's *Submission to Modernising Victoria's Planning and Environment Act* May 2009 at http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers

Cumulative impacts are also largely ignored in the planning system, to the detriment of the community and the environment. Increasing pressures on the environment, and in particular biodiversity, from a multitude of development activities means that the planning system must be modernised to deal with cumulative impacts.

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. Planning schemes need to contain fewer vague and non-binding provisions, and set clearer standards, particularly for issues of state-wide or regional significance. 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 must be protected through state-wide planning controls that transcend and bind individual decision-makers.

1.3 Planning decisions must take climate change into account

The PE Act and the VPPs are largely silent on climate change and provide almost no guidance to decision makers on how climate change impacts should be dealt with, resulting in piecemeal and inconsistent consideration. This fragmented decision-making will only become worse as our understanding of climate change impacts increases and councils develop their own approaches to fill the policy vacuum. Although the Victorian Coastal Strategy and associated VPPs attempt to address issues around sea level rise, there is no other attempt to ensure planning decisions do not exacerbate climate change impacts, both through mitigation and adaptation. 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 needs to contain an overarching framework to assist decision-makers deal with climate change.

This could be done by bringing the PE Act within Schedule 1 of the *Climate Change Act 2010* (Vic), to require decision-makers to plan for 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. Further guidance for decision-makers will be required via VPPs to ensure there is a consistent state-wide approach to tackling these issues.

1.4 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* is of little practical value in environmental protection. 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. Our 2010 submission and briefing paper on the Environment Effects Act sets out our recommendations for reforming the EIA system[5], and our May 2009 submission on the PE Act provides recommendations for its integration into the planning system[6]. An improved EIA system 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.

[5] See EDO briefing paper *Environmental Impact Assessment in Victoria* and *Submission n Response to the ENRC Inquiry into the Environment Effects Statement Process* March 2010 at http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers

[6] See Part 6 of EDO's *Submission to Modernising Victoria's Planning and Environment Act* May 2009 at http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers

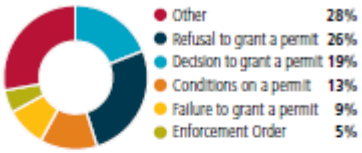
2. The community must have genuine rights to participate

The ability of the community 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. As noted above there is significant discontent in the community regarding transparency and consistency of decision-making. EDO therefore welcomes the Government's election commitment to 'honest and genuine community engagement and consultation'.[7]

2.1 Third party rights must be retained and strengthened

The public's statutory right to object to planning permit applications, appeal planning permit decisions, and enforce breaches of planning requirements is crucial to maintain public confidence in the system and improve decision-making. These rights need to be maintained and strengthened. A frequent knee-jerk reaction to perceived delays in the planning process is to curtail third party rights, however such a reaction ignores the real root causes of delays and ignores the significant benefits of maintaining these public participation rights. As the diagram below shows, third party appeals to VCAT are likely to make up only about 25% of appeals with the remainder being brought by proponents.[8] If the number of appeals in Victoria is a concern it is a consequence of the decision-making systems themselves, rather than the availability of third party rights.

APPLICATIONS BY CLAIM TYPE



APPLICATIONS BY TYPE

	2008/09	2009/10	Variance
Major Cases – Original Jurisdiction	0	9	0.0%
Major Cases – Review of a Decision	0	40	0.0%
Original Jurisdiction	561	750	33.7%
Review of a Decision	3,082	2,527	-18.0%
TOTAL	**3,643**	**3,326**	

Almost 100% of planning practitioners who participated in the Planning Institute of Australia's survey on the Victorian planning system rated the most positive aspect of the Victorian planning system as "Community and stakeholder engagement in strategic process, and third party appeal rights when used correctly".

For the above reasons we strongly oppose any proposal to limit third party rights. In particular the Government's pre-election proposal to legislate to limit appeals to VCAT for projects that are deemed to substantially comply with the Municipal Strategic Statement[9] is unworkable in practice[10] and will cause increased confusion, delay and lack of public confidence in the planning system.

[7] The Liberal National Plan for Planning pp 1, 11.
[8] Source: VCAT Annual Report 2009-2010, p10
[9] The Liberal National Plan for Planning p 23.
[10] For example, the PE Act states that if a planning control is inconsistent with the MSS, the planning control applies. If appeals are based on the MSS this could result in the inability to appeal a decision that is not compliant with a specific planning control.

2.2 Access to information

It's also essential that the public have access to planning information and documentation (like planning permits, objections and advisory committee recommendations) to allow them to exercise their rights to participate. In our experience there are two key issues in relation to access to planning information:

1) planning documents that are required to be made available to the public are in practice not being made readily available by responsible authorities, despite what is clearly outlined in the Act.
2) 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.

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 provisions in the Act that give public access to certain planning documents, or are unwilling to abide by them. 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 (FOI) laws and therefore there is little reason to withhold them at first instance. Refusal to provide documents that the public has a right to access, or that they could ultimately access under FOI, creates confusion for the public and councils, and ties all parties up in unnecessary FOI requests.

It is recommended that the PE Act be amended to allow greater access to documents that integral to planning decisions. There should be a rational assessment of which documents should be publicly obtained and which have strong and reasonable grounds to be only accessible through FOI, with a presumption that the majority of documents should be publicly available. This is the approach the Commonwealth has taken in recent years with its move towards more open access to documents to reduce the need for expensive and time consuming FOI requests. This should be coupled with clearer guidance for council officers and the community on which documents are freely available, and which will require an FOI request. 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. The has considerably reduced the public confusion and burden on government agencies around access to information. Further discussion of this recommendation can be found in the EDO's May 2009 submission to the PE Act review[11].

3. Exemption and fast tracking processes

The trend for the use of 'fast tracking' and exemptions from planning scheme amendments, permit approvals and from the Act itself is concerning. The EDO does not support the increase in exemptions from planning processes. Fast tracking and exemptions can lead to poor decision-making and a curtailment of the right of public participation. They 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.

3.1 Ministerial discretion should be subject to legislative limits

The planning system currently affords too much discretion to the Minister. As noted above, in our experience there is significant community concern over the Minister's ability to exempt planning scheme

[11] See Part 10 of EDO's *Submission to Modernising Victoria's Planning and Environment Act* May 2009, particularly pages 33-36 at http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers

amendments and permit approvals from key aspects of the planning process. The current government made a pre-election commitment to curtail these powers due to their inappropriate use by the Brumby government[12], which was ironically a mirror of the commitment made by the Labor government when coming to power in reference to the excessive use of the power by the Kennett Government[13]. To date no government has properly curtailed these powers.

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).[14] The Minister also has the power to exempt him or herself from the planning process when preparing planning scheme amendments.[15] 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[16]. 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. The Ministerial exemption power should be removed and replaced with a tiered assessment process as discussed below. If the Ministerial call in power is to remain it should be limited through strict legislative criteria and safeguards.

3.2 'State significant' 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.

It is highly inappropriate for major projects 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. 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.

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 should be mandatory that it go through the level of assessment it has been allocated according to the 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. If these projects are of State importance their assessment can be expedited by having more government and expert resources applied to them rather than less scrutiny and public participation. The EDO's recommendations for a tiered planning assessment process and independent planning assessor, including for state significant projects, is set out in detail in our May 2009 submission to the PE Act review.[17]

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[12] The Liberal National Plan for Planning p 9.
[13] Governor's Speech to Legislative Council, 3 November 1999 accessed at http://www.parliament.vic.gov.au/downloadhansard/pdf/council/Spring%201999/Council%20Parlynet%20Extract%2003%20November%201999%20from%20Book%201.pdf
[14] *Planning and Environment Act 1987* (Vic) s 97B.
[15] *Planning and Environment Act 1987* (Vic) s 20(4).
[16] The Liberal National Plan for Planning p 9.
[17] See Part 6 of EDO's *Submission to Modernising Victoria's Planning and Environment Act* May 2009 at http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers

4. Planning institutions must be effective

As the Victorian planning system is highly decentralised and contains a high degree of discretion for decision-makers, it's vital that there are effective institutions that can be relied on to make high-quality decisions.

4.1 Planning panels need to be made relevant

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 by the decision-maker. This often appears to be an illogical approach and raises questions of bias or irrelevant considerations being brought into the final decision. It can also lead to lack of confidence in the system by the community. Although there may be some situations in which a departure from the recommendations of the panel is justified, these are likely to be limited. To ensure that open, transparent and sound decision-making is occurring, and that the considerable effort and expertise of the parties and panel members does not go to waste, the system should be adjusted to require a decision-maker to comply with panel recommendations, unless there is sound justification for not doing so, and only if reasons are given for the departure.

4.2 A Land and Environment Court should be established

As VCAT is not the focus of this review we will only make brief comments in this regard. 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.

However the VCAT process still needs improvement. As noted above, community members often feel at a significant disadvantage in VCAT due to their inability to engage costly barriers and experts as proponents are able to. This results in a very one-sided view being presented to VCAT. Although VCAT has the power to appoint its own experts it very rarely does so. This power should be used more often to establish independent expertise.

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.