Environment Defenders Office

Submission

in response to

Draft Planning and Environment Amendment (General) Bill

prepared by

Environment Defenders Office (Victoria) Ltd

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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:

Planning and Environment Act Review

Department of Planning and Community Development

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12 February 2010

General comments on the Planning and Environment Act review

We refer to our previous two submissions to this review.[1] The comments in those submissions apply to this Bill. We have focused in this submission on those issues particularly relevant to the Bill.

We express our continuing disappointment at the results of the Planning and Environment Act review. The Response Papers and the draft legislation appear largely unresponsive to concerns previously expressed by many submitters including the Victorian Bar and the Law Institute. The major proposed amendments to the *Planning and Environment Act 1987* (Act) appear to be predetermined.

As we noted in our initial submission, the Environment Defenders Office (EDO) believes there is, and remains, scope for substantial improvement to the Planning and Environment Act to improve environmental outcomes, give participants greater certainty, allow for more efficient processes and promote meaningful public participation. This review has chosen not to make those improvements.

The changes that the draft legislation does make largely focus on enhancing Ministerial power and correspondingly reducing the capacity of local councils and residents to be involved in the development of their community. These changes will do nothing to address the concerns that many ordinary people have with the planning process, although they may make life easier for property developers and major corporations.

The current draft legislation mistakes expediency for flexibility and, contrary to the claims made in the Commentary, represents a significant retreat from the principles of certainty and transparency that underpinned the review. Those goals can most effectively be advanced through clearly expressed rules and well defined criteria. They will not be met by conferring new and enhanced discretion on the Minister whilst simultaneously failing to regulate his existing powers. Indeed, the reliance on secondary legislation and unenforceable documents such as Ministerial guidelines and directions in the legislation points to a desire to avoid accountability and transparency.

In commenting on the draft Bill, we have largely followed the structure adopted in the Commentary on the Bill prepared by the Department of Planning and Community Development.

The Objectives of Planning in Victoria

We note the proposed changes to s 4(1). We are concerned about the continuing absence of any reference to the principles of environmental sustainable development (ESD).

As we stated in our submission to the Response Papers, the failure to include ESD principles in the Act is a 'fundamental deficiency'. It is also a clear contravention of the 1992 *Intergovernmental Agreement on the Environment*. The ESD principles have been included in a number of other pieces of Victorian legislation and it is hard to imagine any convincing justification for not including them in the Act. None of the current changes to s 4(1) comes close to replicating these principles.

Insofar as s 4(1)(c) might be intended to ensure some degree of sustainable development, by 'balancing' environmental, social and economic considerations, it does not. The Victorian Competition and Efficiency Commission (VCEC) stated that '[e]ffective and efficient regulatory processes should seek to achieve

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[1] May 2009 http://www.edo.org.au/edovic/policy/edo_vic_pe_act_review_submission.pdf and September 2009 at http://www.edo.org.au/edovic/policy/edo_vic_pe_act_review_further_submission.pdf

outcomes that are a "synthesis" of economic, environmental and social objectives',[2] and noted that 'the outcome of a synthesis is qualitatively different from a simple 'balance' of considerations'.[3]

Section 3 should be amended to state that biological diversity in s 4(1)(g) has the same meaning as under the *Convention on Biological Diversity* in order to make clear that the amended s 4(1)(g) still requires the maintenance of genetic diversity within species.

Recomendations

- Full ESD principles should be included in the objects of the Act. Failure to include ESD principles in the Act is a 'fundamental deficiency'.
- Section 3 should be amended to state that biological diversity in s 4(1)(g) has the same meaning as under the *Convention on Biological Diversity.*

Planning Scheme Amendment process

Proposed Section 20A Streamlined Amendment Process

The EDO does not oppose the introduction of a streamlined amendment process confined to the narrow class of matters identified on page 27 of the Commentary. We do have three significant concerns about the current implementation of that proposal.

First, it is a matter of significant concern that the kinds of amendment subject to s 20A are not included in the draft legislation. We note the comment that '[t]he matters to which the streamlined process will be set out in the Regulations'. This is unsatisfactory.

The *Subordinate Legislation Act 1994 Guidelines* state '[s]ignificant matters should not be included in subordinate legislation'[4] and that 'matters of policy, general principle and the like should be reserved to primary legislation.'[5] Identification, in general terms, of the kind of amendments that fall within the scope of s 20A would seem to be a significant matter of policy or general principle. Presumably, these categories of amendment would not be subject to the kind of 'frequent change'[6] that would make them inappropriate for inclusion in primary legislation. Inclusion in the primary legislation would ensure that the scope and function of s 20A was clearly defined and ensure that any expansion of the streamlined process was subject to proper Parliamentary scrutiny.

If it became necessary to provide detailed criteria about whether particular amendments fall within the scope of s 20A, then secondary legislation would be an appropriate vehicle for providing that additional detail. As it stands, however, there is no justification for placing the language which defines the scope of a significant new policy in secondary legislation.

Our second concern is the absence of any notice whatsoever under s 20A. While a technical amendment may require less scrutiny than an ordinary amendment, there is no justification for simply allowing such amendments to be passed without notice (beyond gazettal). As a bare minimum, the intention to make a s 20A amendment should be required to be advertised on relevant websites (e.g. DPCD, local council) and in the local press for the affected area. This would at least let people know when the laws to which they are subject are to be changed.

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[2] VCEC, *A Sustainable Future for Victoria: Getting Environmental Regulation Right* (March 2009), 13.
[3] Ibid.
[4] 'Subordinate Legislation Act 1994 Guidelines', Appendix E, in Department of Treasury and Finance, *Victorian Guide to Regulation* (2nd ed., April 2007), [1.07].
[5] Ibid., [1.06]
[6] Ibid.

Our third concern is the inclusion of amendments reflecting the outcomes of other assessment processes where consultation has already occurred within the scope of s 20A. Given the wide variety of assessment processes contained in different pieces of Victorian legislation, it is inappropriate to treat these as equivalent to planning scheme corrections, technical changes and interim provisions. A particular assessment process under another piece of legislation may not have regard to matters relevant to assessment under the Act. The legislation should clearly define what other assessment processes can give rise to a streamlined amendment process. This should be limited to processes under the Act and the *Heritage Act* that specifically contemplated the need for the planning scheme amendment as part of the process.

Authorisation of persons to prepare planning scheme amendments

The EDO remains strongly opposed to this proposal. It is likely to be both profoundly undemocratic and to produce negligible benefits for the community at large (as opposed to particular individuals and organisations). In fact, the proposal seems almost designed to circumvent local involvement in planning scheme amendments.

The justification offered for the proposal in the Commentary is insufficient. If councils are not developing proposals because of a lack of time or resources, the answer is to increase funding to councils for planning purposes. Increased funding might also make it easier for council to actually enforce planning schemes, a significant problem not addressed in the review. If, on the other hand, councils are not developing proposals because they have different priorities or do not support the request, this is the reality of the democratic process and the important role Council's have as planning authorities under the Act. As the Commentary notes, it remains open for the Minister to prepare an amendment if the proposed change is a good idea. The proposal to authorise proponents to prepare amendments is a bad solution to a problem that does not exist.

Two particular problems arise from the current draft legislation: the lack of a planning authority veto and the lack of mandatory notice of all private amendments. The first is inconsistent with the central and important role of Planning Authorities under the Planning and Environment Act 1987.

The second issue is the lack of mandatory consultation, meaning that persons affected by a proposed amendment may not receive notice of it. We note the draft legislation takes the sensible step of removing the power to decide who must receive notice from the proponent. Unfortunately, it makes notice a matter in the discretion of the Secretary of the Department, rather than adopting the simpler and better approach of simply requiring a private proponent to be under the same notice obligations as a planning authority. The current draft legislation also makes it possible for a private proponent to be exempted from notice and exhibition requirements under the Act. This is unjustifiable. The legislation already provides for the fast tracking of certain amendments, either under the streamlined s 20A process or as a project of state significance. Given the availability of these processes, it is difficult to imagine circumstances in which it could ever be legitimate to allow a private amendment to proceed without notice or exhibition.

The upshot of these two matters is that an amendment could be pushed through with minimal participation by the people most directly affected by it. This is hardly consistent with principles of democratic accountability.

Delegation of the power to prepare amendments to private individuals is also bad policy for a number of other reasons:

- It will necessarily favour those who have the time and resources to prepare amendments to the required standard, largely restricting the use of the power to developers, major corporations and wealthy individuals.
- Any amendment produced by a proponent is likely to be the product of narrow self-interest, rather than any wide-ranging consideration of the needs of the local community. Compliance with Ministerial Direction No.11 on the strategic assessment of proposed amendment is unlikely

to resolve this. Currently, as is admitted in the Commentary, the requirements of this direction tend to be met through assertion rather than evidence. There is no reason to believe this will improve.

- It is unclear whether, in the discharge of what are statutory functions, a private proponent would necessarily be subject to judicial review.

Other changes to the amendment process

We note proposals 22, 54, 35 and 18 without comment.

The proposal (proposals 30 – 34 and 53) to replace the power of a planning authority to adopt or abandon an amendment with a power to recommend the Minister approve or refuse an amendment needs to be amended. As presently proposed we believe it is inappropriate. A planning authority should retain the power to abandon an amendment regardless of who proposes it. As we stated above, such a planning authority responsbility is an important part of ensuring local voices are heard in planning decisions.

The Commentary states 'The planning authority is required to support or justify its recommendation to the Minister.' As currently drafted, the legislation does not expressly impose this obligation on the planning authority. In our submission, it should do so. Further, any recommendation by a planning authority should be a public document and should be required to be made publicly available.

Proposal 24 proposes to insert s 21(1A) requiring persons make submissions to 'give reasons' for their submission. The EDO opposes proposal 24 for several reasons:

- It is unlikely to be effective at achieving its stated goal. The Commentary states the problem in terms of 'irrelevant' submissions. Proposal 24 will not a certain number of people from making irrelevant submissions. As such, it seems unlikely that s 24 will reduce the small number of genuinely 'irrelevant' submissions made about planning scheme amendments. If the problem is that people are making submissions that do not explain the basis on which they are made or do so poorly, it is unclear how proposal 24 will assist them in doing so.
- The obligation imposed under proposal 24 is unclear. It is not clear what it means to 'give reasons' for a submission and how this differs from explaining the grounds on which the objection is made. If giving reasons means explaining the motivation behind an objection, it is not clear how this is relevant to the objection. If an objection is well-founded, the motivation of the objector is irrelevant.
- The consequences of non-compliance with proposal 24 are unclear. If the consequence is that a non-compliant submission may be disregarded, it is unjustifiable and will marginalise those who are unable to express their submissions in clear and correct English.

It is not clear that genuinely irrelevant submissions are a real problem. If the problem is that submissions are frequently made that are hard to decipher or poorly expressed, the solution is public education and engagement.

Recommendations

- Types of amendment subject to s 20A should be included in the legislation and not left to regulation
- The types of amendments that go through the streamlined process because they have already been consulted on under another process should be limited to processes under the Planning and Environment Act or the Heritage Act that specifically contemplated the need for a planning scheme amendment.
- We strongly oppose the proposal to authorise persons to prepare planning scheme amendments. It should not be included in the legislation

- The proposal to require persons making submissions to give reasons for their submission is unnecessary and unlikely to affect the perceived problem.

The planning permit process

Code assess process

The EDO has grave concerns about the proposed code assess process and the way in which it is proposed to be implemented in the draft legislation. We question both the idea and its implementation in the draft legislation.

Poorly conceived idea

We question the value of a fast track that is restricted to uses and developments that are 'straightforward, consistent with policy, consistent with the zoning of the land, and have limited or no off-site impacts.' One would have thought that most activities matching this description would simply not require a permit. In 2001, at the time of the introduction of the ResCode, the then Planning Minister John Thwaites stated that 70% of applications for new homes would not require a permit.[7] As such, the need for a fast track process for low impact applications would appear to be limited.

It is stated in the Commentary that the decision making criteria for permit applications under the code assess process will be 'confined to objective criteria'. It is unclear what is meant by objective criteria in this context. In its conventional use, this would suggest criteria that could be assessed without resort to subjective judgments. By contrast, its use in the Development Assessment Forum's *Short Guide for Writing Objective Rules and Tests*[8] appears to use it in an entirely different, incorrect sense to mean rules that aimed at achieving an objective, regardless of whether those rules involve objective or subjective assessment. In this context, the use of the word objective is confusing. If, as seems probable, the Commentary intends to use the term in the DAF sense, then this undermines the case for fast track assessment, because the criteria will necessarily involve subjective judgments (e.g. about consistency with local built character) rather than the kind of purely mathematical evaluation implied by the term objective.

No justification for removal of third party review

We disagree entirely with the assertion that, because any new criteria will be introduced through a planning scheme amendment, third party review is unnecessary. The putative justification for this is that 'the proposal's compliance will be assessed against criteria that have been subject to community input.' This is not an accurate reflection of how the planning scheme amendment process works. The current planning scheme amendment process allows a planning authority to adopt a planning scheme amendment in the face of substantial, or even complete, public opposition to that amendment. A planning authority is under no obligation to change an amendment to be responsive to submissions or even recommendations by a panel. As such, it is simply incorrect to say that any criteria will have been 'subject to community input', at least in the sense that anything needs to be done in response to that community input. To go further and remove third party rights on the basis of a demonstrably incorrect assertion is entirely inappropriate. We deal with the issue of third party review further below.

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[7] Minister for Planning, 'New housing code to protect our neighbourhoods' (Press release, 24 May 2001), available at <http://www.dpc.vic.gov.au/domino/Web_Notes/MediaRelArc02.nsf/d025c300601da9dc4a25688e00143d49/a332107aaa846cc64a256a56007a7236!OpenDocument&Click=> on 14 January 2010.

[8] Development Assessment Forum, *A Short Guide to Writing Objective Rules and Tests in Development Assessment Requirements* (2009) at <http://www.daf.gov.au/reports_documents/pdf/short_guide_for_writing_objectives_rules_and_tests.pdf> on 20 January 2010.

Poor implementation

Turning to the draft legislation, we are concerned about the unconfined nature of the powers conferred in the amendments to s 6. In particular, we are concerned about the ability to exempt certain classes of use and development from compliance with the decision making criteria contained in ss 60 and 84B(2). There is nothing in the legislation to indicate that this power is intended to be confined to 'straightforward, low impact' uses and developments. If the decision is made to continue to with s 6(kf) and (kg), then the legislation should expressly confine the ability of the planning authority to exempt classes of use and development to 'low impact' developments. We accept that what is 'low impact' may vary according to the nature of the location and use. That does not justify, however, failing to place any restrictions on the ability of planning authorities to exempt classes of use and development from ss 60 and 84B(2).

A preferable approach would be for the primary legislation to set out the basic parameters of any fast track approach, including both the classes of use and development that could be made subject to that approach and a streamlined set of criteria against which those use and development applications are to be evaluated. Planning authorities would then be allowed to decide if they wished to make some or all of the classes of use and development covered by the fast track approach subject to that approach. This would reduce the possibility of the powers conferred by s 6(hb), (kf) and (kg) being misused and ensure that classes of use and development which were subject to the fast track approach were those that both Parliament and the planning authority had determined were straightforward and low impact.

In any event, there is no justification for restricting rights of review under the code assess process to applicants. Any criteria, objective or subjective, may be applied incorrectly and any decision maker may exceed or misuse their authority. In such cases, objectors should not be required to go through ruinously expensive judicial review proceedings. There is simply no justification for making a right of review available to one side and not the other. Given that the right to review should be retained for objectors, then obligations of notice must also be retained.

Merits assess

The EDO notes the proposals to amend the merit assessment process.

Proposals 43 and 46 would allow local councils to amend permits directed to be issued by VCAT unless VCAT specifies that they may not do so. The onus of this proposal should be changed. VCAT should be required to specify those permit conditions which can be changed by local councils. VCAT is well placed to make that decision based on its hearing of the permit application and any additional submissions that it asks for. It also ensures that VCAT will direct its attention to the task of deciding which conditions may be amended. This approach provides greater flexibility than the current approach of requiring VCAT to make any amendments to a permit the Tribunal directs to be issued, but also ensures that councils cannot subvert the intention of the Tribunal by amending permits inappropriately.

Recommendations:

- If the decision is made to continue to with s 6(kf) and (kg), then the legislation should expressly confine the ability of the planning authority to exempt classes of use and development to 'low impact' developments.
- The primary legislation should set out the basic parameters of any fast track approach, including both the classes of use and development that could be made subject to that approach and a streamlined set of criteria against which those use and development applications are to be evaluated.
- There is no justification for restricting rights of third party review under the code assess process to applicants. Third party rights of review should be available under the code assess track.
- When VCAT directs a permit to be issued, it should specify which conditions of that permit, if any, may be altered by the local council.

State significant development

The EDO accepts the desirability of a legislative scheme for identifying and assessing projects of State significance as an alternative to current *ad hoc* assessment procedures under the Act and the *Environment Effects Act* (EE Act). Such a legislative scheme should remove s 97B of the Act and replace it with a transparent framework that clearly sets out the parameters for determining when a project is of State significance and the process to be followed for such projects. This would enable community members to feel confident that the process was a fair one which would address any issues raised by the proposal.

Proposed Division 2 to Part 9A of the Act is not such a scheme. It does nothing to ensure that projects selected by the Minister for special treatment are actually projects of State significance. It does not even remove s 97B so that, if the State significant development process is found to be too demanding, projects can still be waved through under that section.

VCEC's report on environmental regulation recommended there be an intermediate tier of assessment between an EES or no EES, focussed on assessing the environmental impacts of a project.[9] In its response paper, the Government suggested that 'it is possible' that the State significant development track might amount to such an intermediate level of assessment.[10] The scheme currently provided for in the draft legislation meets only one of the best practice regulatory and institutional criteria set out in the VCEC report,[11] which is that it may produce more timely decisions. Given the failure to meet the other criteria, however, it is likely to be a case of worse decisions faster.

Lack of enforceable criteria

Perhaps the most signficant problem with the proposed changes is the failure to incorporate into the primary legislation the criteria for determining what is a State significant development. The statement that such criteria 'will be detailed in guidelines or a Minister's direction' strongly suggests a deliberate attempt to avoid any kind of enforceable legal restraint on the Minister's power. The criteria for deciding whether an Environment Effects Statement is required under the *Environment Effects Act* are also found in unenforceable guidelines and this has created a firm perception among the community that decisions about whether an EES is required are taken on the basis of political convenience, rather than objective facts.

This failure to include criteria in the legislation was criticised by the VCEC in its comments on the EE Act. VCEC stated that it was 'critical' that criteria triggering assessment be incorporated into the legislation in order to enhance 'certainty for proponents, and [the] accountability and transparency of the Minister's decision'.[12] By taking the same approach, the draft legislation ensures these criticisms apply with equal force to the State significant development track.

Limited notice and lack of mandatory consultation

The Commentary states '[c]ommunity and stakeholder engagement is an important part of the assessment process.' It goes on to say that

> A feature of [the State significant development] process is a commitment to an active community engagement and public enquiry process. This will ensure all views can be considered before a decision is made. (page 48)

Once again, the rhetoric is unmatched by the reality. Proposed sections 201QL and 201QM do not mandate any significant form of community engagement. Section 201QL contains very weak notice

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[9] VCEC, above fn 1, Recommendation 5.1
[10] Victorian Government, *Victorian Government Response to the Victorian Competition and Efficiency Commission's Final Report A Sustainable Future for Victoria: Getting Environmental Regulation Right*, 5.
[11] VCEC, above fn 1, 133 – 134.
[12] Ibid, 123.

requirements, requiring only that a notice be published in the Government Gazette and on the DPCD website and imposing a grossly inadequate mandatory submission period. In fact the period for comment allowed for State significant projects is half the time allowed for standard permits. Under the proposed legislation, a person objecting to the construction of a granny flat has a greater opportunity to comment than a person objecting to the construction of a project of State significance. Section 201QM is, if anything, worse, as it imposes no requirement for compulsory consultation whatsoever.

One of the criteria VCEC used for assessing its proposed streamlined assessment process was consultation. It noted that this criterion was met because, under its proposed process, 'consultation was not reduced, and the quality of consultation material will be no less than at present.'[13] Neither of these statements is necessarily true under the draft legislation.

Imbalanced consideration and lack of review

Section 201QT and 201QZC regarding the Minister's decision are also problematic. Section 201QT is problematic because s 201QT(1)(d) requires the Minister to take into account 'any significant social and economic effects' of the proposed development, but s 201QT(1)(c) only requires the Minister to take into account 'any significant effects which the Minister considers the … development may have on the environment'. Consistent with the asserted need to balance environmental, social and economic considerations, the phrase 'the Minister considers' should be deleted from s 201QT(1)(c). Otherwise, there is scope for the Minister to ignore real environmental impacts because the Minister does not consider them significant.

Section 201QZC is problematic because it removes the capacity for merits review of the Minister's decision. Given the inherent importance of decisions on projects of state significance, it is imperative that decisions be made correctly and are seen to be made correctly. The possibility of independent review is an important part of ensuring this.

Miscellaneous

A number of other issues arise:

- Section 201QR continues the practice of only requiring that Panel reports to be released to the Minister. Panel reports should be made public at the time they are released in order to ensure an informed public debate on the merits of the proposal.
- The Minister should be required to follow the Panel recommendations unless there are good reasons for not doing so. The Minister has declined to follow Panel recommendations in a number of recent cases. This undermines the whole case for the Panel procedure and sends a message to the community that they should not bother getting involved in the process.
- As currently drafted, section 201QF allows the Minister to exempt 'part' of a State significant project from any aspect of the approvals process. The Commentary states that this power is intended to apply to 'preliminary works'. Section 201QF should therefore state that it applies to preliminary works, rather than leaving the door open for broader exemption.
- Section 201QX provides that, once a Minister has issued a permit for a State significant project, responsibility for enforcing that permit falls to the responsible authority. Typically, this will be the local council. This is wholly inappropriate. The DAF Leading Practice Model Impact Assess track, on which the State significant development process is based, states that 'Consent would always include complex performance conditions that would require ongoing compliance.'[14] Local councils barely have the resources and expertise to enforce their local planning scheme in respect of normal developments. To require them to enforce permit conditions for what are presumably

[13] Ibid, 133.
[14] Development Assessment Forum, *A Leading Practice Model for Development Assessment* (2005), 33 at <http://www.daf.gov.au/reports_documents/doc/DAF_LPM_AUGUST_2005.doc> on 20 January 2010.

large and complex developments will require resources to be diverted away from general enforcement. Moreover, it is an abdication of political responsibility. If a project is truly one of State significance, then there is a strong case for continuing involvement on the part of the Department and the Minister.

Recommendations

- Section s 97B should be removed from the Act in light of the availability of the State significance assessment process
- The criteria for determining what is a State significant development should be included in the Act not in guidelines.
- The Act should contain mandatory and adequate requirements for public consultation that reflect the significant nature of the projects. At the very least, the public submission period should be a minimum of 28 days
- The phrase 'the Minister considers' should be deleted from s 201QT(1)(c)
- State significant projects should be subject to merits review
- Panel reports should be made public at the time they are released in order to ensure an informed public debate on the merits of the proposal.
- The Minister should be required to follow the Panel recommendations unless there are good reasons for not doing so.
- Section 201QF should state that it applies to preliminary works, rather than leaving the door open for broader exemption.
- The Department of Planning and Community Development should be responsible for enforcing compliance with State significant approvals.

Section 173 Agreements

The EDO notes with approval the new process of the amendment or ending of s 173 agreements. We would favour a broader notification requirement that was consistent with the notification requirements for an application for a planning permit, i.e. persons should be notified about any proposal to amend or end a s 173 agreement unless the responsible authority is satisfied that they are not materially affected by the proposed changes.