Environment Defenders Office

Further Submission

in response to

Planning and Environment Act review – response papers

prepared by

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Planning and Environment Act Review

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Introduction

We are disappointed that the review has made no attempt to address the current failures in transparency and accountability within the Victorian planning process. In particular, it has made no attempt to rationalise the excessive Ministerial discretion in the Act. Despite the Planning Minister being given additional powers to deal with state significant projects and planning scheme amendments that are not supported by local council, none of the existing Ministerial discretions have been limited or structured in any way. The increasing propensity of the Government to a) sideline all other decision-makers in favour of the Planning Minister in environment and planning matters and b) favour development interests over community participation is of grave concern. This Government is abandoning key elements of good governance to its own detriment.

In light of the current push to transfer all significant planning approvals to the Planning Minister (i.e. planning scheme amendments, state significant projects, major transport projects and any permits called in by the Minister) the responsibility for environmental impact assessment under the Environmental Effects Act must be moved to the Environment Minister. These proposals set up bias under the planning laws as the Planning Minister under the Environmental Effects Act will be making a recommendation to himself as the decision-maker under the Planning and Environment Act and the Major Transport Project Facilitation Bill. This undermines the entire environmental impact assessment process. Although this has been a community concern for some time in relation to developments subject to Ministerial call in, the concern is heightened through these major development facilitation processes.

Objects

Ecologically Sustainable Development

We re-iterate the need for ESD principles to be specifically included in the Act as they have been in many other Victorian Acts. The proposed new objective "*to balance environmental, social and economic considerations in decisions about the use and development of land"* is not a substitute for ESD as it does not incorporate the full ESD principles as found in other Victorian Acts.

The following statement from the **1999** explanatory memorandum of the Commonwealth *Environment Protection Biodiversity Conservation Act* highlights how far behind Victoria is in this respect:

> The principles of ecologically sustainable development are now universally accepted as the basis upon which environmental, economic and social goals should be integrated in the development process. The failure to fully recognise and implement the principles of ecologically sustainable development is regarded as a fundamental deficiency in the Commonwealth's existing regime.[1]

Ecological Processes

The proposal to change 'ecological processes' to 'ecological systems' in the objects of the Act has seemingly appeared out of nowhere and no justification is made for the change. 'Ecological processes' has a context and meaning which is commonly understood by ecology practitioners and which is different to the meaning of 'ecological systems'. For more information on ecological processes see the recent report by Victoria Naturally which can be found here: http://www.victorianaturally.org.au/documents/file/Ecological_Processes.pdf

[1] Explanatory Memorandum, *Environment Protection and Biodiversity Conservation Bill 1999*, pp.6-7.

We do not support the change of terminology. Please provide us with information to justify this change and describe what you believe 'ecological systems' will mean in the context of the Act.

Planning Scheme Amendment process

Failure to clarify excessive Ministerial discretion

We note again that the review has failed to make any attempt to provide structure around the excessive Ministerial discretion to remove planning scheme amendments from the planning process. As noted in our original submission 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.

Allowing 'any person' to prepare an amendment

It is clear from Response Paper Two that the proposal to authorise any person to prepare an amendment to a planning scheme is aimed at making proponents and developers (and their consultants) an authorised person. The Response Paper states that this person can prepare the amendment, give notice, consider submissions, refer submissions to a panel, and consider the panel's report. This person then makes a recommendation to the planning authority about whether or not the amendment should be approved and submits the amendment to the Minister for a decision.

It is completely inappropriate for a proponent to have these powers. As noted in our original submission, an amendment to a planning scheme is an amendment to the law – it alters rights and responsibilities and affects public expectations about a broad range of issues. It should be open, transparent and accountable, and should therefore be conducted by a public authority. A proponent has the highest vested interest in the outcome of the process and should not be relied upon to prepare amendments, review submissions and make recommendations to the Minister. Outsourcing the amendment process to the person who has the most to gain from a favourable decision will undermine the entire process and increase distrust of the process from the community. This process should remain with the local council. This proposal is part of the concerning trend to increase the power of development interests at the expense of the community and local council.

Right to refuse an amendment

Councils should retain the right to refuse an amendment. Where a local council rather than the Minister is the planning authority the proposed amendment is generally not one of state or regional significance. Rather than centralise powers of this nature to the Minister, the local council should retain the primary role of deciding what can occur in their local area and should retain the right to refuse scheme amendments.

Panel recommendations

Panel reports should be publicly released at the same time they are provided to the Minister. This is a public process and should not be concealed.

Proponents, councils and the community put significant time, effort and funds into panel processes. They do this in good faith. The Minister should be required to follow panel recommendations unless there is a good reason not to, otherwise the value of the process in undermined.

Permit Application Process

Code assess track appeals

In relation to appeals from code assess track permits, Response Paper Three states "Because the assessment is only against compliance with criteria that have already been agreed, there is no need for public notice or review of the decision. The applicant however, would have the opportunity to seek a review of a decision." This is illogical. If there is potential for a decision-maker to incorrectly *refuse* a permit there is potential for a decision-maker to incorrectly *approve* a permit. Establishing set standards that a decision-maker must apply does not mean the decision-maker will correctly apply those standards in every case. Many of these compliance criteria include scope for the exercise of discretion and judgement. Under the current proposal there will be no way to obtain a simple independent review of errors in applying the standards. The only option available will be a lengthy expensive Supreme Court judicial review action, by which time it will often be too late as the development will already be undertaken. Appeal rights to VCAT under the code assess track should apply to applicants and objectors.

Changes to notification

The proposal to change the notification requirement from notice being given "unless the responsible authority is satisfied that the grant of a permit would not cause material detriment to any person" to "notice is to be given if the responsible authority considers that the grant of the permit may cause material detriment" is not supported. This is not just a grammatical change, it will significantly alter the set of people who will be notified of permit applications. Currently the onus is on the responsible authority to actively consider who may be materially affected and ensure that all who may be materially affected are notified. The new proposal will remove the requirement on the responsible authority to even consider who may suffer material detriment, and will certainly reduce the set of people who are notified of permits. It is impossible to make a decision about whether a person suffers material detriment unless the responsible authority receives comment from those potentially affected. The current wording should remain.

State Significant Projects

As state significant projects are by their nature large in size and impact and in many cases will cause contention within the community, the state significant project assessment process must provide higher assessment standards and public engagement than ordinary assessment processes. These should be enshrined in legislation to ensure they are mandatory and enforceable. For example, to ensure open and transparent decision-making, the Act should include a requirement to publicly release a panel report, preferably at the same time it is given to the Minister.

There is no indication in Response Paper Four that there will be any minimum requirement for consultation. In light of the importance of these projects to Victoria and the community, the Act must include a legislated minimum consultation period to ensure the community will be able to properly engage in the consultation process.

Environmental impact assessment

As noted above, in light of the proposal to enshrine in the legislative process the Planning Minister as the decision-maker for state significant projects, the responsibility for environmental impact assessment under the Environmental Effects Act must be moved to the Environment Minister. If it is not, there is a strong case to allege bias under the Act as the planning decision is effectively pre-determined by the Planning Minister making a recommendation to himself under the Environmental

Effects Act. Under the proposal, all developments that require an EES will now be considered state significant and therefore approved by the Planning Minister under the Planning Act.

Panel Processes

Proposals of this nature require thorough assessment and public participation. The public engagement process including the panel process should be at least as broad and inclusive as the VCAT process. For example, the type of issues that can be considered should not be restricted, participation should be open to all parties, parties should not require representation and there should be a structured process with clear opportunity for all parties to contribute.

As noted above, panel reports should be publicly released at the same time they are provided to the Minister. This is a public process and should not be concealed.

Proponents, councils and the community put significant time, effort and funds into panel processes. They do this in good faith. The Minister should be required to follow panel recommendations unless there is a good reason not to, otherwise the value of the process is undermined.

VCAT appeal

The proposal to remove the right to appeal to VCAT for all state significant projects should not go ahead. Engaging the community in the assessment process is not a substitute for independent review of a decision. The very nature of state significant projects as large in size and high in impacts demands that a high level of scrutiny is applied to these decisions, and decision-makers must be held accountable.

Removal of Ministerial call in power

If the proposed state significance process is to be included in the Act, the s 97B Ministerial call in power should be removed.