C O R R E C T E D V E R S I O N

STANDING COMMITTEE ON THE ENVIRONMENT AND PLANNING

Subcommittee

Inquiry into the Planning and Environment Amendment (Recognising Objectors) Bill 2015

Melbourne — 10 July 2015

Members

Mr David Davis — Chair
Ms Colleen Hartland
Mr Simon Ramsay

Staff

Secretary: Mr Keir Delaney
Research officer: Mr Anthony Walsh

Witnesses

Mr James Larmour-Reid (affirmed), Victorian president, and
Ms Natasha Liddell (affirmed), committee member, Planning Institute of Australia.

The CHAIR — I welcome James Larmour-Reid and Natasha Liddell to the stand as representatives of the planning institute. If you would want to lead off with some evidence in response to the bill, we will ask a few questions afterwards.

Mr LARMOUR-REID — I will read through our short submission, and then happy to take questions after that.

In announcing the bill, the media release from the Minister for Planning, the Honourable Richard Wynne, noted among other things that the number of objections and grounds for concern will be considered along with a development's planning merits; that previously VCAT had no mechanism to recognise the extent of community concerns about development proposals; and that the new consideration would give the community greater confidence in Victoria's planning system. In the second-reading speech the minister emphasised the importance of community participation in the planning process, noting that the community in Victoria already enjoys broad rights in the planning permit process.

PIA is supportive of these sentiments and believes that community involvement in the planning process is central to its relevance and integrity. We are also cautious, however, about the politicisation of the planning process. We believe that good planning is not populist planning. Planning works best when communities are strongly engaged up-front in the strategic planning process. Meaningful community engagement in strategic planning assists in understanding sense of place, identifying opportunities and constraints, addressing risks and needs, and developing visions for the future. Community engagement contributes to certainty by improving the level of understanding and acceptance when development proposals are put forward in accordance with those strategic plans.

The Victorian planning system encourages this type of up-front engagement. Unfortunately it is often only when a concrete development proposal is submitted that community members become closely involved in the planning process. While this is entirely understandable, it means that this involvement can lack the broader strategic context and occurs under the pressure of tight statutory time frames. It is a solid strategic plan, expressed clearly in the planning scheme, supported and understood by the community, and able to be implemented by the responsible authority, that provides certainty for the community and industry.

I will talk a bit now about our views on the bill itself. Community members often express frustration about a perceived lack of voice in the planning system. This is despite Victoria already having the most extensive third-party provisions in the country. While PIA supports the minister's aspirations that the bill will give the community confidence in the planning system, its likely impact on the consideration of planning permits is unclear.

The bill will amend the act to provide that the responsible authority or VCAT:

> must (where appropriate) have regard to the number of objectors in considering whether the use or development may have a significant social effect.

We understand that that bill arose from the Supreme Court decision in the Armadale case, which we have heard about a number of times today. In that case the court held that VCAT had not erred by refusing to consider as a discrete matter the number of objections. However, it did find that the number of objections to a proposal may be relevant in assessing the extent of significant social effect, noting that significant social effect must first be established.

On one view the bill codifies what the Supreme Court has identified should be practised when assessing significant social effects. On another view the bill goes further by mandating consideration of the number of objections or remaining silent on other measures that may serve as indicators of social impact. This could be considered an unusual approach as the act does not generally specify what has been taken into consideration in measuring social, environmental and economic impacts. Nevertheless, in our view the bill has been carefully worded such that it is unlikely to be of any detriment to the planning system, and that was one of our major concerns when we heard about the bill.

Undoubtedly there will be a period of testing. During this period various parties will seek to rely on the changes in the act to their benefit and it is probable the provision will be misconstrued or misapplied in the short term. However, its statutory impact will remain tightly constrained to the question of significant social effects and applied in the context of a range of other decision guidelines. There is, after all, an overarching obligation on the

part of the decision-maker to integrate the range of policies relevant to the provision sought and to balance conflicting objectives in favour of net community benefit and sustainable development for present and future generations.

If, as we understand it, the bill merely seeks to codify the Supreme Court's decision in the Orrong Road case, then it is likely that the raw number of objections will only hold weight in a very limited number of factual circumstances. This point is illustrated by paragraph 70 of that Supreme Court decision, in that the Justice said:

> Furthermore, had the tribunal taken account of the number of objections and considered what weight was to be given to that fact, I am not persuaded that its decision would have been, or might have been, different. In my view, in the context of the detailed, well-reasoned and comprehensive examination of the planning merits of the proposal, there is no reasonable argument to be made that the tribunal's decision would have been any different had it considered the extent of resident opposition. No weight could be given to the raw number of objections if the number of objections was not capable of evidencing a significant social effect.

While the bill would mandate that the number of objections is taken into account when considering the question of significant social effects, there appears to be no reason why that final sentence would not still hold true.

In conclusion, we would say to you that planning is a complex and multifaceted discipline. It must balance a wide range of information and objectives, and aim to support the interests of both current and future communities. Community involvement in the planning system is integral to its relevance and integrity, as we said before. That said, good planning is not populist planning. Turning planning into a numbers game would actually serve to diminish public and industry confidence in the system rather than enhance it.

PIA is of the view that the recognising objectors bill does not turn planning into a numbers game. The bill has been tightly crafted to require the number of objections to be taken into account only when considering whether a proposal may have a significant social effect. It is important, however, that the number of objections be considered in the context, for example, of the size of the community population and the impacts on the future population. Naturally, it would also need to be carefully weighed against other considerations as set out by the Planning and Environment Act, including the overarching requirement to achieve 'net community benefit and sustainable development for the benefit of present and future generations'. That is the end of our submission, thank you.

The CHAIR — James, thank you for that submission, which I think neatly summarises aspects of and views on the bill. I wonder if you might shed some further light on discussions earlier this morning with a number of other witnesses about some definitions: 'significant social effect' and 'where appropriate'. These seem to me to be very broad words that lawyers for both proponents and objectors may be able to drive a horse and cart, or even a Mack truck through. One possible consequence of this bill is that we will see more discussion and more effort devoted to legal machinery in trying to define these things.

Mr LARMOUR-REID — I think that is true, and I agree with the evidence given earlier that there are no definitions to these terms. There are no definitions around social, environmental or economic effects as it stands, so these are all matters that can be the subject of debate at VCAT or the Supreme Court.

The CHAIR — Or indeed at council level.

Mr LARMOUR-REID — Even at council level, correct. Going back to the question of the potential for the change to the legislation to create more legal debate, I think that is self-evident. I think, though, as we have submitted, that might be a short-term thing. It perhaps could be alleviated to some degree if there were some guidance to come out of the department around how this might be interpreted and the limitations of what this can actually achieve. We heard from Planning Backlash about the potential for unrealistic expectations about the legislation. I think it would be helpful to have a practice note, as is commonly produced by DELWP, to assist in the community's understanding of what the legislation is intended to achieve or what it can do.

The CHAIR — Finally, around the rest of the country, are there any clauses of this type that seek the weight of numbers in this way that you are aware of in other jurisdictions?

Mr LARMOUR-REID — I have never investigated that question so I do not know the answer to that.

Ms LIDDELL — I am not aware of any. I am aware that, as has already been discussed, we do already generally, compared to other states, have more extensive third-party appeal rights. In any case I would be surprised if anyone has anything that trumps this, but I have not done the research.

Mr LARMOUR-REID — I agree with that assessment.

Ms HARTLAND — I too do not think that the community is engaged enough in planning, nor are their voices taken much notice of often by VCAT or by council et cetera. How do you think this would assist residents in their claims, in their objections, in their concerns about inappropriate developments?

Mr LARMOUR-REID — I have been sitting here listening to all of the submissions and that has been weighing on my mind the entire time. I have been trying to consider what the actual benefit of the legislation would be, given that, as I said, it seems to be around codifying what already exists.

The best I can say is that it could potentially provide a signal that the number of objections is an important consideration. While that would not remove the need for a council or VCAT to consider the merits of those and consider that social effect in a broader context, at least it says it is a canary in a coalmine — it is a signal to say, 'Look, there's a large number of people involved here; we'd better look more closely at this and see whether we can uncover a social effect'.

I guess what that means for the layperson who might be involved in a planning matter only infrequently and might be caught out by the short time frame involved for objections, for example, they might lack experience or confidence in the system and will not have access to expert advice or certainly not have access to the resources that a development might have, at least this says to them, 'Your submission means something'.

I think it is important that it does not refer to petitions. It refers to actual objections, so there has to be some thought process put into what is put forward. But I think that is the best way I can put it. It is a signal that says to the decision-maker, 'Look, there's a lot of people involved here; you'd better dig deeper and determine whether this is implying a significant social effect'.

Ms HARTLAND — You would have heard me ask the same question around the issue of mosques or Islamic centres or social housing. I have personally seen some pretty vicious campaigns run against both social housing and Islamic centres. For example, the Kew Group has run consistent campaigns against everything from a prayer room at the Prahran community centre to mosques or education centres. How would it not assist a group like that?

Mr LARMOUR-REID — I think that is almost the worst-case scenario. I look at what is happening already under the current provisions, particularly with the recent case in Bendigo, which has been quite appalling in terms of the activities of some individuals associated with that, so my first point is that it does happen already and it is disturbing. There is some potential, I guess, for this to encourage them further, but having worked 15 years in local government I have dealt with reasonably innocuous proposals that have generated 1800 objections and 600 objections, so I think it does happen anyway. There is already a perception that if we can drum up enough community angst behind an issue or enough either numbers or uncertainty or political momentum behind an issue, then we can at least influence council if not VCAT.

So, yes, I am concerned that it might encourage them, but I think there is a fair bit of incentive in the system already. I guess I am concerned that we do not undermine the legitimate rights of people with legitimate concerns because there are people who we do not agree with who are misusing the system for their own purposes. Perhaps it is the old freedom of speech argument unfortunately.

The CHAIR — So in a sense you do think there is a risk that this sends a signal to some groups of the type that Colleen has referred to?

Mr LARMOUR-REID — I think there could be. As we have noted, the language is fairly generalised. We do not have definitions around those points. I agree with some of the comments made by previous submitters that there is some potential that certain groups might take this as an opportunity to strengthen their arm in terms of generating social media campaigns, for example.

Ms LIDDELL — Can I add to that, if I may? If we go back to our submissions, while it might incite those groups further, if you like, I think once they actually get to a court of law or the tribunal, they will find that their case can readily be turned on its head in terms of looking at the significant social effects from the other side. Just because you have more numbers in submissions, it will still need to be weighed against the positive social effects of providing for those cultural institutions within our community. So I think while it is likely to incite

some further testing, it is stuff that will get weeded out and sorted through pretty quickly, or however long it takes through the system at some cost, but I think that testing and boundary setting will happen.

Mr RAMSAY — Thank you for your submissions. I get a sense that you probably do not see the need for this amendment. The question I pose is: if in fact it was passed, would a consequence be more uncertainty in the planning system and in the VCAT decisions? Are they actually not strengthening the decision-making process and the timeliness of it?

Ms LIDDELL — Is that directed at me?

Mr RAMSAY — Or James.

Ms LIDDELL — The position that we have arrived at is more one of ambivalence. One of the purposes of the bill was to provide some — what was the wording that was used in the early material? — community confidence in the planning system and people be taken into account, so if that helps people feel like they are being counted and are willing to engage in the planning system, then that is a good thing. In terms of the outcomes that we will see on the ground and what will change as a result of that, my view would be that we will have to wait and see if there is any effect.

Mr LARMOUR-REID — I agree with that. I think the best I can put it is that it is providing a signal, and based on the Supreme Court decision the mechanism is already there. If I can just quickly reflect on a couple of other comments that have been made previously because I think they are useful. Some of the commentary the VFF made around the provisions of the zones and strategic planning, we would fully support that that is the point where we need to have the conversations with the community about what is acceptable and where land uses are distributed and what level of change or impact might be anticipated in different areas, so we need to do more around that.

It sprung out at me that this Bill talks about the number of objectors. I think the fact that we talk about objectors now in our Planning and Environment Act sets up an adversarial, confrontational system from the outset. Unfortunately it is not just a matter of changing the word in this amendment, if it were to go forward, because that has a statutory meaning elsewhere in the act that would need to be considered, but I would like to at least put forward to this committee that that may be something we look at into the future in terms of refining our third-party conversation around submissions rather than just objections.

The CHAIR — Thank you, James, Natasha and the PIA. You play a very important role in the planning system statewide, and I am very thankful that you have made the submission today.

Mr LARMOUR-REID — Thank you.

The CHAIR — I declare this hearing closed and thank Hansard and the secretariat for their assistance.

Committee adjourned.