

Inquiry into the Approvals Process for
Renewable Energy Projects in Victoria

Submission no. 39

Submission

in response to

Inquiry into the approval process for renewable energy projects in Victoria

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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BACKGROUND

The ENRC invited the Environment Defenders Office (EDO) to appear before the Committee to address specific environmental questions in relation to renewable energy projects. At the conclusion of the appearance the Committee asked the EDO to also make a written submission.

The EDO has significant experience in the operation of the native vegetation management framework, the Flora and Fauna Guarantee Act (FFG Act), the Environment Protection and Biodiversity Conservation Act (EPBC Act) and the environmental impact assessment process in Victoria. However this experience is generally not in the context of renewable energy projects. As the EDO represents numerous environment and community groups who support renewable energy generation in Victoria, as lawyers, we have a potential conflict of interest if we also represent objectors to renewable energy projects. Therefore we do not act for parties in relation to renewable energy development objections.

Our comments therefore come from our knowledge of the environmental regulatory framework and its operation in relation to developments generally rather than necessarily from involvement in renewable energy approval processes.

In this submission we have made some general comments regarding renewable energy approvals, as well as addressing the specific questions the Committee initially asked us to address and addressing questions the Committee raised in the hearing.

GENERAL COMMENTS

Regulatory standards for renewable energy

The EDO agrees with the urgent imperative for greater adoption of renewable energy, including wind energy projects, and supports their greater uptake in Victoria. However we believe that all renewable energy projects should be subject to appropriate environmental impact assessment and approvals.

A number of submissions to the inquiry note that it would be preferable if renewable energy projects were not subject to current levels of regulatory supervision. It is understandable that profit-making enterprises prefer to be subject to less government regulation. Although there is an environmental imperative to increase renewable energy projects in Victoria, the usual policy objectives regarding the protection and preservation of native vegetation and biodiversity should not be compromised.

Regulatory consistency is important across different types of development, and the same rules should apply to major renewable energy infrastructure projects as apply to other major infrastructure projects. Regardless of the environmental imperative for developing further sources of renewable energy, the usual rules should not be suspended to allow renewable energy projects be exempted from environmental standards and approvals. Consistency in the application of planning and development laws across the board is beneficial for the whole community. Having reviewed the submissions that have been made to this inquiry, many of the problems identified stem from the tendency to create exceptions and special rules and to introduce discretions for different types of developments. That creates uncertainty and fosters a lack of transparency and accountability in processes, which is not beneficial to proponents or the community.

There is little evidence, through the submissions to this inquiry or otherwise, to suggest that environmental regulation or biodiversity regulation is the principal or even a significant obstacle to the increase in the development of renewable energy projects in Victoria. There are some areas of environmental regulation that could be improved upon particularly with respect to processes as discussed below. In our view the significant driver that is holding back renewable energy development in Victoria is lack of investment rather than 'red tape' in relation to any substantive environmental regulatory requirements that are imposed on renewable energy developments.

There is an urgent need in Victoria to bring environment and planning legislation up to date and ensure that basic, globally recognised environmental principals are enshrined in legislation. For example the Planning and Environment Act does not currently include ecologically sustainable development principles in its objectives, or indeed anywhere in the Act. The environmental impact assessment process in Victoria through the Environmental Effects Act is well below the accepted global standard and needs a complete overhaul. There is a need to put much greater structure around the way that the Planning Minister approaches the exercise of his or her discretion under the Planning and Environment Act, to create much more transparency and consistency in the exercise of that power.

SPECIFIC QUESTIONS OF THE COMMITTEE

We address the specific questions from the Committee below

Flora and Fauna Guarantee Act permitting requirements including their application and appropriateness for renewable energy facilities

The FFG Act can apply in the context of renewable energy proposals and other major infrastructure projects on public land. There are permit requirements under the Act to 'take' protected flora which may apply in renewable energy projects. In addition, if a species is listed as threatened under the FFG Act the planning approval processes may require certain assessment as set out in the wind energy development guidelines. However the FFG Act contains very little in the way of permit requirements, rather it falls into the same category that many things fall into under the planning system – it has to be taken into account or had regard to as part of the decision-making process.

The Victorian Government submission to the inquiry pointed out the need to get a permit for projects that will clear vegetation that amounts to critical habitat for a threatened species. However the reality is that there has only ever been one critical habitat determination made under the FFG Act since 1988, so in terms of the practical application of the FFG Act, this has no impact on renewable energy approvals and is unlikely to do so in the future..

The environmental approvals process for renewable energy generation in Victoria

We have concerns about the impact assessment and environmental approval process for any sort of development in Victoria, not just for renewable energy. The environmental impact assessment process under the Environmental Effects Act (EE Act) is a very discretionary process. There is no certainty as to when the Act will be triggered and an assessment required, and the actual process itself is very discretionary which results in significant uncertainty for proponents and the community, and in our view some poor environmental outcomes.

Very few wind farms have been required to go through an EES process, however there is still uncertainty about whether an EES will be required in each case. A number of wind farms have been referred to the Planning Minister for a decision as to whether an EES is required, but in the vast majority of cases the Minister has not required one.

This uncertainty applies equally to all environmental impact assessment in Victoria and the environmental assessment process needs to be reformed. The EDO recently made a submission to the Victorian Competition and Efficiency Commission review of environmental regulation which contains our detailed comments (attached). The main recommendations we made in that submission are:

- The environmental impact assessment process should contain a clear trigger for when an environmental impact assessment is required, which would provide more certainty for proponents and the community;

- The Act should contain a tiered assessment process based on the likely environmental impacts of the project;
- The Act should contain clear time frames for different stages of the proposal, so that the community and proponents know exactly what stage they are at and how long the whole process is going to take;
- There should be clear legislated opportunities for public comment, so the public knows exactly what they can get involved in and how; and
- There should be clear guidelines on the assessment processes, which would help not just proponents but the whole community to understand how the process works.

The effectiveness of Victoria's current native vegetation management framework in relation to renewable energy facilities, particularly wind energy facilities

Some submissions to the inquiry indicated that due to the environmental imperative to develop renewable energy the native vegetation standards could be reduced. There is no reason or imperative to argue that renewable energy facilities it should be exempted from native vegetation regulation. As noted above a consistent application of environmental regulation across a whole range of different development proposals is beneficial for the whole community.

Although there have been considerable problems with the implementation of the system of native vegetation protection in Victoria, in particular the net gain policy and implementation of the native vegetation management framework under the Planning and Environment Act, it has improved considerably in recent years. There is now sufficient certainty around what is expected of proponents.

Native vegetation, particularly that which is classified as significant, should be seen as a site constraint in the same way that, for instance, proximity to an aviation facility would be treated. If a proponent conducts proper due diligence prior to entering into an agreement to purchase land or prior to commencing the development of a facility in a certain area, it can avoid those issues becoming an obstacle to a particular development application in the future. The argument put forward by some development proponents that they were not informed of native vegetation constraints until the last minute can no longer be entertained. The onus should be firmly on the proponent to take these site constraints into account when making initial decisions about a development. When native vegetation requirements are taken seriously at the start of the process there is no reason why many of the supposed regulatory impediments presented by significant native vegetation being on a site cannot be avoided as an issue from the very outset.

The effectiveness of current arrangements between the Victorian Government and the Commonwealth Government in relation to the EPBC Act and the likely impact of the new bilateral agreement between the Victorian and Commonwealth Governments

The Commonwealth-Victorian EPBC bilateral agreement removes the requirement for Federal assessment of proposals that trigger the EPBC Act, where there is an assessment of the same proposal under Victorian law (for example under the EE Act). The aim of this arrangement is to reduce duplication of assessments of projects. Under the current bilateral agreement the Federal Minister is still required to make a separate decision under the EPBC Act on whether to approve the project or not at the completion of the assessment. The EDO has no concerns with the aim of this arrangement, however we do have concerns with the processes that the bilateral agreement has endorsed.

A number of submissions to the inquiry raised concerns with the environmental impact assessment process and the planning assessment process in Victoria. As noted above the EDO also has significant concerns with the Victorian EIA and planning processes. The EDO is of the view that the bilateral process

will have the negative consequence of bringing inadequate Victorian processes into the Federal assessment of matters of national environmental significance at the Federal level.

One of the aims behind the bilateral agreement process and the ability of the Commonwealth under the EPBC Act to endorse and approve State assessment processes was to raise all States up to a new level of environmental impact assessment, rather than endorse business as usual. Unfortunately in Victoria that has not occurred and instead the existing process has been endorsed.

The practical implication of the bilateral agreement is that it is unlikely that any sort of major environmental impact assessment of Victorian projects will occur separately at the Federal level (apart from a small number of strategic assessments) and therefore the inadequate Victorian process will apply for both Federal and State assessments.

Recommended changes to improve the planning and regulatory framework for renewable energy projects in Victoria

When a process is perceived to cause delay to development there is pressure to remove that scrutiny or remove third party rights or the ability of communities to participate in the decision-making process. However, that pressure should be resisted. There are clear benefits to having robust processes to assess the impacts of developments and these should be encouraged. There are however a number of areas where we think the process could be improved to benefit proponents and the community and the environment.

In our view the Planning and Environment Act and in particular the Environment Effects Act are in need of a major overhaul. We have made submissions to this effect to the current review of the Planning and Environment Act and the VCEC review of environmental regulation (attached).

In relation to renewable energy projects, in our view the main weaknesses that cause problems for proponents and that are not beneficial for the environment or the community are:

- The high level of discretion afforded to the Planning Minister under both the Planning & Environment Act and the Environment Effects Act;
- Lack of statutory time limits for assessments under the Planning and Environment Act and the Environment Effects Act leading to uncertainty for proponents and the community;
- Uncertainty and lack of consistency of planning panel and EES panel processes;
- Lack of detailed guidance as to what is expected of proponents in relation to biodiversity and native vegetation assessment and information.

We will address each of these in turn below.

Ministerial discretion

There should be greater structure around the exercise of discretion by the Minister for Planning under both the planning and EES processes. The Minister's ability to 'call in' projects under s97B of the Planning and Environment Act suspends the normal rules in relation to the responsible authority (usually the Local Council) dealing with the initial matter and suspends appeals to VCAT. As noted in the 'Councils in South West Victoria' submission¹ proponents have stated they prefer the standard planning process including

¹ Councils in South West Victoria submission, page 6

the possibility of an appeal to VCAT over the Ministerial process, because the standard process gives more certainty to proponents. Even though appeals to VCAT are a possibility under the standard process, it at least provides clarity around time limits and relevant issues that must be addressed.

The EES process does not contain a clear trigger for when it will apply to projects (unlike the EPBC Act) rather it relies heavily on Ministerial discretion. There is therefore great uncertainty as to when it might apply.

The Ministerial discretion under both Acts should be limited so that proponents and the community have greater clarity around when the processes will apply and so that each assessment proceeds according to a statutory process.

Statutory time limits

The Environmental Effects Act and the Planning and Environment Act do not have statutory time limits for assessments. In particular the Ministerial 'call in' power removes almost all statutory processes. Both Acts should be amended to include clear timeframes that responsible authorities must adhere to in assessing projects. These timeframes should reflect the complexity of the type of project being assessed and the capacity of the responsible authority so that robust assessments can be completed within the timeframe.

When time frames start to lengthen unexpectedly proponents suffer a detriment, as does any other person participating in the process. Decisions should be made within a timeframe where impacts can be properly assessed and the community has a meaningful opportunity to participate, but without extensive delays. Where there are delays there is a tendency to blame public participation however this misdiagnoses the problem.

Greater clarity around time frames would contribute significantly to creating greater confidence and certainty in the process. For example there should be an obligation on the Planning Minister to make a decision within a certain period after the conclusion of a panel process

Planning Panel and EES panel processes

There is considerable frustration by proponents and the community in relation to the delays and the inadequacies of some of the planning and EES panel processes. There are a number of ways these could be improved.

The Clean Energy Council submission suggested there should be a system of precedent developed at Planning Panels Victoria. Legally that would not be possible as the panel is not a court or tribunal that is bound by precedent. However principles that have developed over the course of several inquiries that have been shown to be a good approach could be documented and applied in subsequent hearings. The panel could then manage its process more effectively. For example the panel could develop guidance on what the best approach is to assessing landscape impacts and to presenting evidence on that issue and therefore the proponent would not be required to go into significant technical detail on that issue. Proponents would not be prevented from presenting different information, but the guidance would set up a default that the proponent could follow if it wished.

This would make the process more efficient for proponents, and have the added benefit of providing some greater clarity for those who are presenting different views about a particular development proposal. It would assist all parties to make decisions about the sorts of issues that are relevant and how they should structure their evidence and concerns in submissions.

It would also be beneficial to have greater consistency in the appointment of members to renewable energy panels. The appointment of members to panels is typically done by the chair of Planning Panels Victoria, except in some instances when the government chooses to intervene. This approach could be

assisted by establishing a pool of people who have particular experience in renewable energy projects and who have dealt with the issues before and can therefore deal with them effectively in any new proposal that comes before the panel.

Guidelines

The current wind energy guidelines set out some broad parameters as to process, but do not provide any great clarity around what is expected of proponents in terms of, for example, the detail of assessing biodiversity impacts or the impacts on native vegetation. It would be beneficial if guidelines could be developed that provide greater clarity around what is expected of proponents so that proponents can clearly factor those into their budget and timelines.

Under the EPBC Act some detailed policy guidelines have been developed as to how the Commonwealth is likely to treat wind energy proposals under the EPBC Act. These guidelines are not legally binding and the Commonwealth and the Minister cannot fetter their discretion or change the Act through guidelines. However they provide guidance as to what is likely to be expected of wind energy proponents. They are a statement as to how the Commonwealth interprets the legislation and what their expectations are for a typical project assessment.

Development of clearer Victorian guidelines would address some of the problems that have been identified in some of the submissions made by wind energy proponents. (For example the proponent had an understanding of the guidelines, but regional officers of DSE had a different approach.) Some greater clarity around what will be required for assessments would benefit proponents and the community and the environment.

OTHER ISSUES RAISED IN QUESTIONS

Adequacy of Victorian and Federal regulation for environmental protection

Current Victorian and Federal legislation are inadequate to protect biodiversity. The FFG Act, the EE Act, the Planning and Environment Act and the EPBC Act do not achieve their objectives in relation to biodiversity and the environment. This is true not just in the context of major infrastructure projects like wind farms but across the board for development in Victoria. Higher standards need to be incorporated in those legislative regimes. Higher standards do not have to result in delays to renewable energy projects, however they would in certain instances identify significant impacts that should be avoided and planned around during initial development of a project. This would ensure greater clarity around what is expected of proponents and for developments.

Opportunities for reconsideration of EPBC Act decisions

There appears to be a view expressed by some submitters to the Committee that the EPBC Act allows numerous or open-ended opportunities for project opponents to request reconsideration of the Commonwealth's decision to assess a project (a controlled action decision).² This is not an accurate statement. Section 78A of the EPBC Act allows a person to request the Federal Environment Minister to reconsider a controlled action decision only in very limited circumstances. These are if there is substantial new information about likely impacts on matters of national environmental significance; there is a substantial change in circumstances that was not foreseen at the time of the decision; the action is not being taken in the manner that it was supposed to have been taken; or alternative arrangements put in place to assess the project no longer exist. In these situations it is entirely appropriate that the decision go back to the Minister for reconsideration.

² For example the ACCIONA Energy submission states this at page 5

Further there is no evidence that this provision is being used detrimentally in relation to renewable energy projects. In the nine years since the EPBC Act has been in force only four wind energy projects have been sent for reconsideration. Of those four, one decision that approval was not required was confirmed as correct, two were downgraded from a controlled action to not a controlled action (meaning those proponents did not then require an EPBC Act assessment), and only one was changed from 'not a controlled action' to a 'controlled action' (ACCIONA Energy's Mortlake windfarm) due to substantial new information regarding the presence of protected migratory species in the project area.³

When considering this issue the Committee should keep in mind that it is the proponent's legal responsibility to provide accurate information about the impacts of a proposal when referring the matter to the Commonwealth for a controlled action determination. The reconsideration of decisions for projects like the Mortlake project indicates that the Commonwealth has found the information initially provided to be deficient. The best way to avoid this occurring is for the proponent to provide thorough and accurate information with their initial referral.

Flora and fauna and threatened species mapping

Currently in Victoria there is a significant amount of useful data regarding flora and fauna and threatened species mapping, however linkages between that information and strategic mapping and assessing of projects is lacking.

This information should be tied together more closely so that an integrated set of data is available that can be used to identify flora and fauna site restrictions for renewable energy projects from the outset. This will allow better decisions to be made at the start of the development planning process, so that any site constraints such as the presence of threatened species are identified initially rather than later in the process when they are more difficult or impossible to work with. It will also better assist proponents to know what environmental approvals will be required when planning the development.

In any environmental decision-making the adequacy of the information that is available to inform that decision is critical. That applies to pre-existing baseline information that a proponent and decision-makers get from existing sources as well as from field studies done as a result of a particular proposed development. If that data is lacking, it will affect the entire environmental approval process. The best environmental regulatory framework cannot overcome problems due to lack of accurate or complete data, as good decision-making is not possible.

³ This information can be found on the DEWHA website under the EPBC Act public notices