

Submission

in response to

Inquiry into the impact of the State Government's decision to change the Urban Growth Boundary

prepared by

Environment Defenders Office (Victoria) Ltd

12 October 2009

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:

Parliament of Victoria

Outer Suburban Interface Services & Development Committee

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12 October 2009

The EDO welcomes the Outer Suburban Interface Services and Development Committee's Inquiry into the impact of the State Government's decision to change the Urban Growth Boundary (UGB).

The EDO has made an extensive submission to the Growth Areas Authority on the Strategic Impact Assessment (SIA) report of the Victorian Government's proposed program to expand the UGB for the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). We attach our submission for your information. Based on this submission, below we raise some major concerns regarding the impacts of the State Government's decision to change the UGB on the environment. Our comments address the following two terms of reference:

- (d) the unintended consequences including the impact on all landholders and purchasers to be impacted; and
- (f) any alternative options, including any used in other jurisdictions

The unintended consequences including the impact on all landholders and purchasers to be impacted

The Victorian Government's proposed program to expand Melbourne's urban growth boundary will facilitate rapid and widespread clearing of critically endangered vegetation communities. Together with the associated transport projects, the program will result in a minimum of 6,918ha of Natural Temperate Grassland¹ and up to 924ha of Grassy Eucalypt Woodlands² being cleared over the next 20-30 years. Apart from being critically endangered ecological communities, Natural Temperate Grasslands and Grassy Eucalypt Woodlands provide important habitat for several species of plant and animal threatened at a national and state level.

We understand that the Growth Areas Authority has submitted a final draft of the SIA report to the Commonwealth Government for endorsement and approval of the Victorian Government's proposed program. The EDO is concerned that if the Commonwealth Government endorses and approves the proposed program this may be taken as authorisation for actions that would not otherwise be consistent with current Victorian law and policy. Commonwealth endorsement and approval of the proposed program is limited to "significant impacts" and "matters of national environmental significance" under the EPBC Act. There are potentially many obligations or requirements that extend beyond the scope of the EPBC Act under the Victorian Native Vegetation Framework – A Framework for Action (NVMF). Our main concerns are:

- The program proposes to offset the likely environmental impacts by establishing two large reserves outside the UGB in Melbourne's West. While the concept of substantial reserves is laudable, to the extent that the proposed new reserves are available for offsetting, it is unclear whether the gains promised satisfy the Victorian Government's policy contained in the NVMF which specifies a primary goal of achieving a 'net gain' in the extent and quality of native vegetation. It is possible that offsets additional to that demanded by the Commonwealth will be required to comply with the NVMF. However, even if the gains do meet the requirements of the NVMF, many of the gains recognised under the Framework are in reality short term management gains or "paper gains" based on changes in legal status rather than real biodiversity outcomes.

¹ Strategic Impact Assessment Report for the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), p124.

² Strategic Impact Assessment Report for the EPBC Act, p128.

- Sufficient effort has not been made to avoid the loss of vegetation, particularly high and very high conservation significance vegetation. The SIA report proposes a series of prescriptions for matters of national environmental significance (EPBC Act threatened species and communities) that will be applied as Precinct Structure Planning proceeds within the new UGB. The heavy emphasis on macro-level avoidance and minimisation of environmental impacts means that, at a precinct planning level, there may be a perceived lack of need for further avoidance and minimisation and a corresponding preference to simply offset environmental impacts that occur (particularly given the planned Western Grassland reserves which, as currently designed, depends for its viability on large scale offsetting occurring). The easy availability of offsets within the proposed Western Grassland reserves will create a perverse incentive for planners and developers to simply opt for the easy option and offset everything. This is a matter of serious concern as the proposed program will effectively turn the avoid-minimise-offset hierarchy contained in the NVMF on its head, making offsetting the primary choice of any development within the UGB. It is critical, however, that the Precinct Structure Planning process ensures that vegetation clearance has been adequately avoided, and that all reasonable steps to minimise impacts on threatened species have been pursued prior to considering offsets for residual harm, as required by the mitigation hierarchy the VNMF.

- To the extent that offsets for residual harm are available within the proposed Western Grassland reserves, to ensure that delays between clearing and the creation of the reserves do not exacerbate the risk to environmental values, it is critical that the Grassland reserves are established prior to any impacting action being undertaken. This is likely to maximise the chances of the offset succeeding. The SIA report, however, lacks critical details as to the timing of these reserves, as well as their legal security and funding arrangements.

- It is not appropriate to direct all offsets to the proposed Western Grassland reserves. Given that a number of remnant areas of critically-endangered vegetation communities and important populations of threatened species are known to exist within the UGB but not necessarily with the proposed Western Grassland reserves, offsets will need to occur within the immediate area or at least in the same bio-region to meet the like-for-like criteria outlined in the NVMF.

- The *Native Vegetation Net Gain Accounting: First Approximation Report*, published by the Department of Sustainability and Environment in April 2008 highlights the continuing concerns with the protection and management of endangered native grasslands in Victoria.³ The report indicates that there has been net *loss* of some 4,000 habitat hectares per year in the period covered by the report.⁴ In respect of gassy native vegetation, the rate of clearing is approximately 3,200 hectares per year.⁵ The failure of the VNMF to achieve a 'net gain' in native vegetation is of significant concern in the context of the Victorian Government's proposed program which relies on the framework to offset losses of several thousands of hectares of native vegetation. The failure of the NVMF to operate as effectively as anticipated is also significant, because if the Framework is not functioning effectively, then it is legitimate to question whether the Precinct Structure Planning process will also be less effective than anticipated in protecting biodiversity.

³ Department of Sustainability and Environment, *Native Vegetation Net Gain Accounting: First Approximation Report* (2008).

⁴ Ibid, ii. 4,000 HHa/yr is based on netting the +5,900 HHa/yr figure for public land with the -9,900 HHa/yr for private land. IT should be noted that the First Approximation states there is a margin of error of up to +/- 20% associated with those figures.

⁵ Ibid.

Any alternative options, including any used in other jurisdictions.

As previously submitted to the Growth Areas Authority, the SIA process for assessing the potential impacts of the State Government's proposed program on matters of national environmental significance under the EPBC Act is fundamentally flawed and does not in any way represent best practice strategic impact assessment.

The Victorian Government's lack of consideration of alternatives is one of the major failings of the SIA process. Clear identification and comparison of alternative policy and planning options is a critical element in undertaking a SIA:

The EIS must take a 'hard look' at the environmental consequences of the proposal and what it entails – a hard look includes applying acceptable standards of reasonableness and good faith, considering alternatives as reasonable possibilities, and alerting decision-makers to inherent problems with the proposal.⁶

The Victorian Government simply has not presented any alternative to the Program. In particular, the Government has failed to consider the option of 'doing nothing' or any other form of alternative or reference case.⁷ This is presumably because the SIA process has been undertaken within the context of an already announced plan by the Victorian Government to expand Melbourne's UGB rather than within the context of a vision with alternative solutions. This is wholly inconsistent with the fundamental notion of strategic impact assessment and is highly unsatisfactory.

Without any consideration of alternatives and their likely impacts and benefits (social, economic, ecological) there is no basis for concluding that vegetation removal has been adequately avoided, or that all reasonable steps to minimise impacts on threatened species have been pursued. Further, the absence of any (public) consideration given to alternatives reduces the capacity of decision-makers to make fully informed decisions, as they are not necessarily well placed to identify potential alternatives, and undermines public faith in the environmental impact assessment process by presenting the proposed program as inevitable.

Given the size and scope of the Victorian Government's proposed program, combined with the value of the current SIA as a precedent for future SIAs, the EDO submits that the SIA process has not been best practice and does not form a proper basis for the Commonwealth endorsement of the Victorian Government's proposed program. Expansion of the UGB will significantly impact national, state, regional and local species. As such, a proper analysis of alternative options ought to have been conducted at the appropriate stage of decision-making.

A discussion of other problems with the SIA process is outlined in EDO's submission to the Growth Areas Authority.

⁶ Ian Thomas, *Environmental Impact Assessment in Australia: Theory and Practice* (3rd ed., 2001), 199, Figure 7.4. See also Murray Raff, 'Ten Principles of Quality in Environmental Impact Assessment' (1997) 14 (3) *Environmental and Planning Law Journal* 207, 216-217.

⁷ The International Study of the Effectiveness of Environmental Assessment identifies elaboration and comparison of alternatives, including "no action" options as one of a series of critical steps that represent good practice for strategic environmental assessment.