



PARLIAMENT OF VICTORIA
Environment and Planning Committee

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

Parliament of Victoria
Environment and Planning Committee

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Committee Membership



Hon David Davis MLC*
Chair
Southern Metropolitan



Ms Harriet Shing MLC
Deputy Chair
Eastern Victoria



Ms Melina Bath MLC
Eastern Victoria



Hon Richard Dalla-Riva MLC
Eastern Metropolitan



Ms Samantha Dunn MLC
Eastern Metropolitan



Mr Shaun Leane MLC
Eastern Metropolitan



Ms Gayle Tierney MLC
Western Victoria



Mr Daniel Young MLC
Northern Victoria

Participating Members



Mr Jeff Bourman MLC
Eastern Victoria



Ms Colleen Hartland MLC*
Western Metropolitan



Mr James Purcell MLC
Western Victoria



Mr Simon Ramsay MLC*
Western Victoria

** These Members participated in the sub-Committee for the hearings on 10 July 2015.*

Committee Secretariat

Staff

Mr Keir Delaney, Secretary

Mr Anthony Walsh, Research and Legislation Officer

Committee contact details

Address Environment and Planning Committee
Parliament of Victoria, Spring Street
EAST MELBOURNE, VIC 3002

Phone 61 3 8682 2894

Email LCLC@parliament.vic.gov.au

Web www.parliament.vic.gov.au/epc

Twitter @VicParlCtees

The Planning and Environment Amendment (Recognising Objectors) Bill 2015 amends the *Planning and Environment Act 1987*. In evidence to the Committee, the Department of Environment, Land, Water and Planning advised:

This Bill builds on the strengths of the current performance based planning system by making it clear that the number of objectors, where relevant and appropriate, is a factor that must be taken into account when considering whether there may be a significant social effect of a proposal requiring a permit.

The Committee initiated this Inquiry after the Bill had been introduced and second reading commenced in the Legislative Council. Given the timeframe, the public hearings were undertaken by a sub-committee. Ms Colleen Hartland substituted for Ms Samantha Dunn for this Inquiry.

The Committee received 16 written submissions (see full list in section 5). The majority of these submissions were from individuals who supported the measures proposed in the Bill. However these submitters generally urged the introduction of stronger third party provisions. The Committee also conducted one public hearing on 10 July 2015 (see full list of witnesses in section 6). A majority of the organisations who gave evidence opposed the Bill on the grounds it lacked clarity and may not address public concerns. The Committee is grateful for all contributions to the Inquiry, particularly given the relatively short timeframe within which this Inquiry was conducted.

This Report provides a summary of the key issues raised at the hearings and in written submissions. Full copies of the transcripts are attached to this Report, and written submissions can be found on the Committee's website (www.parliament.vic.gov.au/epc).

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Referral of the Bill

On 11 June 2015, the Planning and Environment Amendment (Recognising Objectors) Bill 2015 was introduced into the Legislative Council and its second reading commenced. Debate was then adjourned following the usual procedures of the House.

On 24 June 2015, the Committee resolved:

That the Environment and Planning Standing Committee undertake an inquiry into the Planning and Environment Amendment (Recognising Objectors) Bill 2015, and that the Committee reports its findings and recommendations to the Legislative Council by 4 August 2015.

On 25 June 2015, the President advised the Council that the Committee was undertaking the Inquiry.

3

Provisions of the Bill

This Bill amends sections 60 and 84B of the *Planning and Environment Act 1987* to allow the Victorian Civil and Administrative Tribunal (VCAT) and other responsible authorities to consider the number of objectors to a permit application when considering if a proposed development or use will have a significant social effect.

4 Evidence Received

4.1 Planning Permits

The Committee received evidence that Victoria's planning system is based on land use zones, with broad discretion about the uses for each zone. The merits of individual proposals are tested through the permit system.¹

In 2013-14 over 56,400 planning permit applications were made in Victoria. Approximately 22,560 of these applications were advertised to third parties, with 1626 being subject to review by VCAT. A majority of the appeals to VCAT were by proponents arguing against a decision to refuse a permit or against conditions imposed on the permit.²

Victoria's planning system is characterised by third party participation. This enables the community to offer views and insights into the potential effects of a proposal, and ultimately leads to improved decision making through closer scrutiny of proposals. The Department paraphrased a former VCAT President to outline the advantages of third party participation in the planning system:

... one, it tends to improve the quality of governance. By 'governance' he referred to the process of making decisions, not just the end results. Two, it leads to better planning decisions. It is comparatively rare for an objector to completely succeed in overturning a decision but their involvement leads to a better planning decision. And three, it discourages corrupt behaviour between developers and local government by providing opportunities for third parties to scrutinise and challenge decision making, thus keeping decision makers accountable.³

The Committee received evidence from the Planning Institute of Australia (PIA) that third party engagement in the decision making process was one of the strengths of Victoria's planning system.

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.⁴

1 Christine Wyatt, Department of Environment, Land, Water and Planning, *Transcripts of Evidence*.

2 Christine Wyatt, Department of Environment, Land, Water and Planning, *Transcripts of Evidence*.

3 Christine Wyatt, Department of Environment, Land, Water and Planning, *Transcripts of Evidence*.

4 James Larmour-Reid, Planning Institute of Australia, *Transcripts of Evidence*.

Representatives from PIA also suggested to the Committee that some community members feel they do not have sufficient input into planning decisions.

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.⁵

Representatives from the Property Council of Australia (PCA) suggested that this perceived lack of voice may reflect a lack of community understanding of the planning system and the processes. They noted that the community often seeks to engage with a particular permit to challenge the use, however the decision to allow the use may already have been made and the only issue being considered at the time relates to the built form.

Going to back to your question in relation to participation by the community, the community has an opportunity to participate at the planning scheme amendment stage. I am talking about local policy rather than state policy. When a council wants to introduce new local policy, the community has an opportunity to participate at that stage. There is a planning scheme amendment process with public hearings and an opportunity to make submissions. That is an opportunity for the community to say to their local council what they want to see in the future for their municipality. I think there is a lack of understanding of that in the community. The community comes in a later stage, when the policy has been implemented and people are seeking permission based on that policy after that date. Perhaps there needs to be more education of the community in relation to the role that they should take or the interest they should take in the policy making.⁶

4.2 Background to the Planning and Environment Amendment (Recognising Objectors) Bill 2015

The Committee received evidence that Planning and Environment Amendment (Recognising Objectors) Bill 2015 has been proposed in response to four key planning decisions.

Case 1 – *Stonnington City Council v. Lend Lease Apartments (Armadale) Pty Ltd*

This matter went to VCAT when Stonnington Council refused to grant Lend Lease Apartments a permit for residential development. Although approximately 600 objections were received to Lend Lease's permit application, VCAT said:

We must not have regard to irrelevant considerations. The extent of resident opposition per se is one of these.⁷

5 James Larmour-Reid, Planning Institute of Australia, *Transcripts of Evidence*.

6 Amanda Johns, Thomson Geer Lawyers, *Transcripts of Evidence*.

7 *Lend Lease Apartments (Armadale) Pty Ltd v. Stonnington City Council* [2012] VCAT 906.

This matter was appealed to the Supreme Court, which affirmed VCAT's decision that the number of objections was not relevant in this case, but suggested the extent of opposition may be a relevant consideration when determining permit applications.

It may be relevant as a salient fact giving shape to a significant social effect in some circumstances but its status as such must be established in each case.⁸

Case 2 – McDonald's Pty Ltd v. Yarra Ranges Shire Council

This matter went to VCAT when Yarra Ranges Shire Council refused to grant a permit for a convenience restaurant. Although over 1,300 objections were received to McDonald's Pty Ltd's permit application, VCAT ruled:

... planning decisions are not to be based on the numbers of objections. Our decision must be based on the planning merits of the planning arguments and the evidence for and against this proposal.⁹

Case 3 – Minawood Pty Ltd v. Bayside City Council

This matter went to VCAT when Bayside City Council refused to amend an existing permit to allow the partial demolition of a hotel in Brighton and replace it with five dwellings. Although over 4,300 people objected to Minawood Pty Ltd's proposal, VCAT said:

... numbers for or against a proposal are not relevant per se in administrative decision making. Rather, it is the substance or merits of the views expressed ... that must guide the decision maker.¹⁰

However, VCAT also said:

... we consider that the number of objections and the consistency of their message about the significance of Khyat's Hotel within the local community is evidence of the cultural significance of Khyat's Hotel.¹¹

Case 4 – Rutherford & Ors v. Hume City Council

In *Rutherford & Ors v. Hume City Council*¹² VCAT set out a number of principles for assessing significant social effects. It suggested that the significant effect must have a causal connection to the use or development proposed. An assessment of these effects should be based on a proper evidentiary basis or empirical analysis, preferably through a formal social impact assessment.

⁸ *Stonnington City Council v. Lend Lease Apartments (Armada) Pty Ltd* [2013] VSC 505.

⁹ *McDonald's Pty Ltd v. Yarra Ranges Shire Council* [2012] VCAT 1539.

¹⁰ *Minawood Pty Ltd v. Bayside City Council* [2009] VCAT 440.

¹¹ *Minawood Pty Ltd v. Bayside City Council* [2009] VCAT 440.

¹² *Rutherford & Ors v. Hume City Council* [2014] VCAT 786.

The Department noted the importance of these rulings in establishing a principle that the number of objections was something that should be considered when determining planning permits.

Previous VCAT and court decisions therefore suggest that the number of objectors is likely to be most relevant where the impact assessment requires some understanding of community perception and values, such as whether a place has a social value or whether there is a specific social need or consequence in the community.¹³

However, the Committee received contrary evidence that the Bill, had it been enacted previously, would not have changed any of these outcomes as objections still need to address the substance of the matter being considered. Representatives from PCA noted:

If the expectation is, 'Tecoma would have been different because we had 1000 objections', it would not have been different because the issue that they were objecting to was not building a building that you could put a restaurant in or a takeaway or a crossover; it was the fact that it was a McDonald's and they did not want McDonald's in Tecoma. That was not on the table for change.¹⁴

4.3 Definitional problems

The Committee received evidence that the language used in the Bill was vague and lacked appropriate definition. This meant the application of the Bill would be uncertain and open to legal challenge through VCAT or the Supreme Court, at least until key phrases and terms were settled.

Representatives from PCA expressed concerns that the lack of definition of 'significant social effects' will mean people will not understand planning decisions:

... there is lack of clarity about what those words mean, and there will be diversions of opinion, depending on what side of the fence you sit, as to what they mean. ... I do not think that is what the community will understand as a relevant social effect. That will cause problems because the tribunal will, if it continues to follow that line of authority.¹⁵

According to evidence from the Urban Development Institute of Australia (UDIA), this lack of clear understanding about key terminology in the Bill may result in decisions being contested through the courts:

There is no definition of what a social impact is. There is no definition of what is significant, and what it will do is create the opportunity for debate over the meaning of those words, particularly in the early days, until it settles down — until we get some authoritative decisions, potentially from the Supreme Court.¹⁶

¹³ Christine Wyatt, Department of Environment, Land, Water and Planning, *Transcripts of Evidence*.

¹⁴ Brendan Rogers, Urbis, *Transcripts of Evidence*.

¹⁵ Amanda Johns, Thomson Geer Lawyers, *Transcripts of Evidence*.

¹⁶ John Cicero, Urban Development Institute of Australia, *Transcripts of Evidence*.

In relation to the phrase ‘significant social effect’ representatives from the Department noted that this is not defined in the Bill or the Act as its interpretation will depend on the circumstances:

The Act does not define a ‘significant social effect’, nor does the Bill amend the Act to do so. What is significant will always depend on the particular facts and circumstances ... There is not a definition of ‘social’, and in each case it will be different. ‘Social’ generally is akin to community or community effects.¹⁷

Representatives from Planning Backlash also flagged definitional issues as a concern with section 4 of the Bill, which states:

For the purposes of subsection (1)(f), the responsible authority must (where appropriate) have regard to the number of objectors in considering whether the use or development may have a significant social effect.

However they noted that no guidance is provided on what is or is not ‘appropriate’.

The other issue that may tend to leave decision makers in a quandary are the words ‘where appropriate’. Just when is this to be applied? Is it to be only when there is a large number of objections, or is it to be applied when there is one objection which accurately addresses the adverse social impacts a development may have on a community? Which takes precedence — the number or the relevance?¹⁸

In evidence to the Committee, representatives of the Department suggested that it is not mandatory to consider the number of objectors in every case; it is up to the responsible authority to determine what is appropriate.

The Bill does not direct the responsible authority or VCAT to consider the number of objectors in every case; that is, it does not make it mandatory for the number of objectors to be considered. The Bill leaves it to the discretion of the responsible authority and VCAT. Mandating is not considered appropriate because: firstly, each situation is different and must be considered individually; and, secondly, it would not be appropriate to direct how something must be considered — only what.¹⁹

4.4 Number of Objections

Several witnesses expressed concern that this Bill only gave a voice to objectors, who may be a vocal minority, and did not give equivalent recognition to supporters of a proposal. Several witnesses also expressed reservations that the Bill may result in planning decisions becoming ‘popularity contests’ rather than being considered on their merits based on matters of law.

¹⁷ Christine Wyatt, Department of Environment, Land, Water and Planning, *Transcripts of Evidence*.

¹⁸ Ann Reid, Planning Backlash, *Transcripts of Evidence*.

¹⁹ Christine Wyatt, Department of Environment, Land, Water and Planning, *Transcripts of Evidence*.

In evidence to the Committee, UDIA noted:

The Bill may unintentionally give weight to localised objections to the detriment of wider economic and social benefits for other communities and for the state as a whole. Our concern greatly relies on the absence of a voice for those who would be benefitted by a development proposal or whatever else is going through the planning system at that time in the interests of a loud minority who are given more influence over planning outcomes than the silent majority of Victorians who benefit down the track.²⁰

Representatives from the Victorian Farmers Federation (VFF) argued similarly that:

The proposed bill will give more weight to ideological protest groups who can build numbers of objections in pro forma letters. The VFF believes it should not be the number of signatures on a petition that is important; instead the proponents and council should focus on the legitimate amenity concerns of adjoining landowners.²¹

The VFF further argued that the Bill would make it more difficult to undertake certain agricultural activities. They noted that under the existing planning provisions the percentage of chicken meat produced in Victoria has declined from about 28 percent of the national total to 20 percent in the last 15 years.²² They suggested this was a direct result of Victoria's planning system and the difficulties in establishing new farms or expanding existing operations, compared to other states, disadvantaging the Victorian economy in jobs and exports. They noted that previously permits for some agricultural activities have been opposed on ideological grounds, rather than because of an issue with the merit or substance of the proposal.²³ The VFF were concerned that the Bill would increase the likelihood of more campaigns on this basis, and make it more difficult and costly for farmers to obtain planning permission.

Representatives from PCA also flagged that the Bill may promote short-term decision making and planning outcomes that are not in the longer term interest of the community.

Planning is all about managing change. If you put an expectation in the community that the number of submissions from the current population, with a current view about what should be the case, that is not balancing out, in their minds, against what the future plans are for the benefit of Victorians going forward. That is a really important consideration. If there is any chance that a change like this blurs that line and gives greater weight to the views of the minority today against a policy that is trying to deliver a better Victoria tomorrow, that is a bad change.²⁴

20 Danni Addison, Urban Development Institute of Australia, *Transcripts of Evidence*.

21 Gerald Leach, Victorian Farmers Federation, *Transcripts of Evidence*.

22 Mike Shaw, Victorian Farmers Federation, *Transcripts of Evidence*.

23 Gerald Leach, Victorian Farmers Federation, *Transcripts of Evidence*.

24 Brendan Rogers, Urbis, *Transcripts of Evidence*.

Representatives from PIA also noted that:

Turning planning into a numbers game would actually serve to diminish public and industry confidence in the system rather than enhance it.²⁵

4.5 Not meeting the community's expectations

The Committee received evidence that the language in the Bill may lead many in the community to believe the number of objections is a way to engage in the planning process and prevent developments they do not support. However in order to be considered by the responsible authority any objection needs to be relevant to the matter under consideration. As a result the community's expectations about how it can engage with the planning system may not be met by this Bill.

Representatives from PCA anticipated that the Bill would result in more irrelevant objections being lodged, making the permit process longer and more costly for proponents.

I think the result would be that you will see more objections of that kind, people believing that the number of objections will increase the likelihood of their success in having the proposal rejected. However, I do not think when it gets to a tribunal hearing, for example, that will add extra weight to a case, because the tribunal will test what a social effect is in a much narrower way than the community expectation.²⁶

Representatives from the VFF suggested that the Bill may lead the community to believe any objection to a planning application will hold merit, even if it does not address the matter being considered.

Part of my concern about this is that you are actually giving the community false hope so that, despite the fact that they may have no objections with any planning merit, they feel, 'Okay, now we've got hope that we can take this to VCAT on the basis of the number of objections', and create a huge amount of angst for the farmer, themselves and the community generally without any real hope that it is actually going to proceed in their favour, because they do not actually have any planning merit.²⁷

Representatives from Planning Backlash also suggested that the Bill in its current form may lead people to believe the number of objections will increase the likelihood of having proposals rejected.

As the Bill stands, a false expectation in the community — one where volume matters ... The bill, however, does not clarify if this is the overall number of objections to the proposal or if it is simply the number of objectors who specifically address social effects as a specific ground.²⁸

25 James Larmour-Reid, Planning Institute of Australia, *Transcripts of Evidence*.

26 Amanda Johns, Thomson Geer Lawyers, *Transcripts of Evidence*.

27 Mike Shaw, Victorian Farmers Federation, *Transcripts of Evidence*.

28 Joanna Stanley, Planning Backlash, *Transcripts of Evidence*.

They also noted that the Bill does not provide guidance on how much weight is to be given to objections.

... the Bill does not indicate what level of weight must be given to the number of objections in assessing social effect. Are we then to assume that weight must be given when the number of objections reaches 50 or 100 or 4000 ...²⁹

Representatives from the Department advised the Committee that the responsible authority would not be required under the Bill to give weight to the absolute number of objections, rather only those that raised a matter of merit.

It depends on the nature of the requirement for the permit. If it was a permit that was allowed as its use, then the zone contemplates a whole range of activities and that use might be one of them. If the permit is just for the built form, then regardless of your philosophical views of whatever shape or form, if it is not a matter in relation to the requirement for a permit trigger, it is irrelevant.³⁰

4.6 Conclusion

The primary purpose of this Inquiry has been to examine issues relating to the Planning and Environment Amendment (Recognising Objectors) Bill 2015 to inform the House prior to the conclusion of debate on this Bill. During this Inquiry, a number of issues were raised with the Committee at both public hearings and in written submissions. This Report does not discuss every issue raised, rather highlights key issues identified by the Committee. Information about these broader issues can be found in the transcripts of evidence for the Inquiry, which have been attached to this Report, and written submissions, which can be found on the Committee's website.

29 Ann Reid, Planning Backlash, *Transcripts of Evidence*.

30 Christine Wyatt, Department of Environment, Land, Water and Planning, *Transcripts of Evidence*.

5 Submissions

1. International Association for Public Participation Australasia (IAP2)
2. Victorian Chicken Meat Council Inc
3. Carlton Residents Association Inc
4. Ms Julie Buxton
5. Ms Tess Lynch
6. Ms Nina Earl
7. Ms Val Green
8. Green Wedges Coalition
9. Minerals Council of Australia
10. Glen Eira Residents Association
11. Save our Suburbs
12. Ms Suzanne Orange
13. Ms Elizabeth McKeag
14. Mr Stephen Koci
15. Cardinia Ratepayers and Residents Association
16. Islamic Council of Victoria

6 Public Hearings

Friday 10 July 2015

Department of Environment, Land, Water and Planning

Ms Christine Wyatt, Deputy Secretary Planning

Mr John Ginivan, Executive Director Planning and Building Systems

Ms Paula O'Byrne, Principle Policy Advisor, Legislation

Property Council of Australia, Urbis and Thomson Geer Lawyers

Ms Jennifer Cunich, Executive Director, Property Council of Australia

Mr Brendan Rogers, Director, Urbis

Ms Amanda Johns, Partner – Planning and Environment, Thomson Geer Lawyers

Urban Development Institute of Australia (Victoria)

Ms Danni Addison, Chief Executive Officer

Mr John Cicero, Chairman, Planning Committee

Mr John Casey, Policy Advisor

Planning Backlash

Ms Joanna Stanley, Brunswick Residents Group

Ms Ann Reid, Malvern East Group

Victorian Farmers Federation

Mr Gerald Leach, Chair of the VFF Land Management Committee

Ms Emily Waters, Senior Policy Advisor – Land Management

Mr Mike Shaw, Life member and past President of the VFF Chicken Meat Group

Planning Institute of Australia

Mr James Larmour-Reid, Victorian President

Ms Natasha Liddell, Victoria committee member

Appendix 1

Transcripts of Evidence

CORRECTED VERSION

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

Mr Simon Ramsay

Ms Colleen Hartland

Staff

Secretary: Mr Keir Delaney

Research officer: Mr Anthony Walsh

Witnesses

Ms Christine Wyatt (sworn), deputy secretary, planning,

Mr John Ginivan (sworn), executive director, planning and building systems, and

Ms Paula O'Byrne (sworn), principal policy adviser, legislation, Department of Environment, Land, Water and Planning.

The CHAIR — I declare open the public hearing of the Legislative Council’s environment and planning committee, which means all mobile phones and so forth are now to be turned off. Welcome. Today’s hearings are being undertaken by a subcommittee of myself, Colleen Hartland and Simon Ramsay, who will be with us quite shortly. We are receiving evidence about the Planning and Environment Amendment (Recognising Objectors) Bill.

First of all I will have Keir swear in Christine Wyatt, John Ginivan and Paula O’Byrne. Thank you for making yourselves available on relatively short notice. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and subject to the provisions of the Legislative Council standing orders. Therefore the information you give today is protected by law. However, any comments you repeat outside the hearing may not be protected. All evidence is being recorded. You will be provided with proof versions of the transcript in the next couple of days. We have allowed a reasonable period of time for this session to ensure that there is an opportunity not only for your evidence but also for some questions.

We have about 45 minutes for this session, so we will begin by asking you to give a presentation. The inquiry is seeking to obtain evidence in relation to the Planning and Environment Amendment (Recognising Objectors) Bill that is currently before the Parliament. Christine, are you leading off?

Ms WYATT — Yes. Thank you, Chair. I have a short set of notes that I will read out, if I may. It will not take long.

By way of introduction, the Planning and Environment (Recognising Objectors) Bill is important within the context in which the planning system operates, the growth pressures currently being experienced in Victoria, how this impacts on communities and the integral role that third-party participation plays in ensuring better planning outcomes are achieved for all Victorians. I will take you through each one of those little topics.

First of all, what does the bill do? To recap, the bill inserts a new decision-making consideration into the Planning and Environment Act. The act currently requires a responsible authority to consider any significant social effects and economic effects that a proposed development may have when determining an application for a planning permit. That is in section 60(1)(f) of the Planning and Environment Act. I will refer to the act as the act unless I refer to any others.

The Victorian Civil and Administrative Tribunal, or VCAT, must have regard to any matter considered by the responsible authority in making its decision, and that is in section 84B(1) of the act. The bill amends section 60(1A) and section 84B(2) of the act so that both the responsible authority and VCAT must have regard to the number of objections to a permit application in considering whether the proposal may have a significant social effect.

If I can just come back to the four points that I raised before, I will quickly touch on each one. First of all, it is important for the context of the planning system, because each state in Australia is different, so for once we can say we are all unique. The Victorian planning system is Victorian based and designed to facilitate development. The system has a number of key components: a strong focus on strategic planning and policy; a set of land use zones with broad discretion, and the types of proposals that can be considered in zones has generally been broad, and over the years that has had various considerations and been broadened through planning scheme amendments; the planning permit as the preferred form of development, which allows the merits of individual proposals to be tested through the permit process; and we have third-party participation or review through amendments to planning schemes and decisions on planning permits. Because discretion in planning zones is wide rather than narrow, strategies and policies play an important role in influencing how growth is managed, and the community’s view offers valuable insights into potential effects of a proposal.

If I can touch on planning permits, planning permits are often the final point of focus when competing objectives come to the fore and tensions arise between competing interests. Based on *Planning Permit Activity Annual Report: 2013–14*, over 56 400 planning permit applications were made in Victoria. This number is up 9 per cent from the previous year and reflects growth in Victoria’s population and the economy.

I will have to do a few facts and figures. Of that 56 400, 40 per cent — or 22 560 — of those applications were advertised to third parties, consistent with the statistics for previous years. Of the 56 400 applications received, only 3 per cent — 1626 — were subject to review at VCAT. For a system where there is a large number of applications advertised to third parties, only a small percentage are appealed to VCAT. To go a little further

with statistics, of the appeals to VCAT, a smaller proportion is known as objector appeals. Of that 1626, 488 were objector appeals, so about 25 per cent, and that was in the year 2013–14. All those statistics happened in 2013–14. That would say the majority of appeals — the 75 per cent of appeals — are by a proponent either against a decision by the council to refuse a permit or against conditions posed by the council on a permit or in some cases by other responsible authorities such as the Minister for Planning.

If I can touch on the context of growth for some of the increasing development applications and the context for that range of statistics we have seen, at present Victoria is the no. 1 growth destination nationally. There are 100 000 new residents a year establishing in the state, and the population is driven by Melbourne's recent and continuing popularity as a place to live, work and raise a family. This has resulted in growth in residential building and an unprecedented shift in the types of dwellings being built. The Housing Industry Association, in a forecast of dwelling commencements released in May this year, anticipates that the figures for Victoria over 2014–15 will be nearly 60 000 housing starts, compared to around 20 000 in New South Wales.

During the past five years apartments have been quite a big growth story in Victoria's building industry, especially high-rise apartments in Melbourne. This aspect of dwellings represents between 30 and 35 per cent of all new dwellings constructed across the state. This has created a tension in the planning system that we have experienced, and it has influenced how local communities participate in shaping an appropriate level of change in their built environments because, as industry commentary will indicate, that is quite a significant shift in our stock of housing from what we are used to. Currently this is evidenced by the debate around the size, amenity and livability of apartments and what sort of legacy we are creating for the city, and by recent high-profile appeals regarding committee opposition to proposals.

If I can touch on the role of third-party participation, overall the planning system works relatively well, with a low level of disputes taken to VCAT if you look at those statistics of planning applications overall. Since the inception of the Town and Country Planning Act 1961, Victoria has had a strong culture of third-party involvement in the planning system, and in successive reviews of the system this has been widely acknowledged as one of its strengths. For example, in 2011 the Victorian Planning System Ministerial Advisory Committee concluded that third-party involvement is an important component of Victoria's planning system.

Recently we have seen a number of high-profile VCAT cases where the issue of community opposition and its role in permit decision-making has been commented on. When the then president of VCAT, former Justice Stuart Morris, QC, presented a paper, in 2005 he set out three advantages of the existence of third-party participation. These were that, one, it tends to improve the quality of governance. By 'governance' he referred to the process of making decisions, not just the end results. Two, it leads to better planning decisions. It is comparatively rare for an objector to completely succeed in overturning a decision but their involvement leads to a better planning decision. And three, it discourages corrupt behaviour between developers and local government by providing opportunities for third parties to scrutinise and challenge decision-making, thus keeping decision-makers accountable.

Finally, if I can just go to the role of the decision-maker, decision-makers are required to have regard to the planning scheme, the requirements of the act and the salient facts and impacts of a proposal in making their decision. Broadly, this already includes consideration of environmental, economic and social impacts. Objectors to a permit application must also demonstrate how they would be affected by a proposal. In a number of cases where there has been strong community opposition, VCAT has said that the number of objections is not relevant in deciding whether or not a permit should be granted. I am just going to touch on a couple of notable decisions in this regard, so I will read them out slowly as I do that so they can be recorded.

The first one is the notable decision of *Lend Lease Apartments (Armadale) Pty Ltd v. Stonnington City Council* [2012] VCAT 906. This case was an appeal against the council's refusal to grant a permit for a significant residential development in Orrong Road, Armadale. Approximately 600 people objected to that application, and VCAT said:

We must not have regard to irrelevant considerations. The extent of resident opposition per se is one of these.

That proceeded to the Supreme Court in *Stonnington City Council v. Lend Lease Apartments (Armadale) Pty Ltd* [2013] VSC 505. On appeal to the Supreme Court in this case, VCAT's decision was affirmed. While the court found that the number of objections was not relevant in that case, it did not rule out the possibility that the extent of residential opposition could be a relevant planning consideration. The court said:

It may be relevant as a salient fact giving shape to a significant social effect in some circumstances but its status as such must be established in each case.

Further cases include *McDonald's Pty Ltd v. Yarra Ranges Shire Council* [2012] VCAT 1539. This case was an appeal against the council's refusal to grant a development at a site in Tecoma's main street for a convenience restaurant. Over 1300 people objected. In that case VCAT said:

... planning decisions are not to be based on the numbers of objections. Our decision must be based on the planning merits of the planning arguments and the evidence for and against this proposal.

A further example is *Minawood Pty Ltd v. Bayside City Council* [2009] VCAT 440. This case was an appeal against council's refusal to amend an existing permit for the partial redevelopment of a hotel in Brighton. The amendment sought to demolish the remaining portion of a hotel and replace it with five dwellings. Over 4300 people objected. In that case VCAT said:

... numbers for or against a proposal are not relevant per se in administrative decision-making. Rather, it is the substance or merits of the views expressed ... that must guide the decision-maker.

However, VCAT also said:

... we consider that the number of objections and the consistency of their message about the significance of Khyat's Hotel within the local community is evidence of the cultural significance of Khyat's Hotel.

Further, in *Rutherford & Ors v. Hume City Council* [2014] VCAT 786 the tribunal set out a number of principles for assessing significant social effects. The effects to be considered are those the decision-maker considers to be significant. The significant effect must have a causal connection to the use or development proposed. The effects are those that affect the community at large or an identifiable section of the community. The assessment should be based on proper evidentiary basis or empirical analysis, preferably through a formal social impact assessment, and the social effect must be sufficiently probable to be significant.

Previous VCAT and court decisions therefore suggest that the number of objectors is likely to be most relevant where the impact assessment requires some understanding of community perception and values, such as whether a place has a social value or whether there is a specific social need or consequence in the community.

What is the response? In a performance-based planning system the choices available to recognise the number of objectors in a measured way are fairly limited. Previous court and VCAT decisions have told us that the extent of community opposition may be a relevant factor in assessing a proposal but ultimately the final decision needs to be based on a proper weighing up of all the planning merits of the proposal. Recognising local interests by moving back to highly prescriptive and codified planning requirements would be a retrograde step. It would return Victoria to a more cumbersome planning system that lacks the flexibility to deliver the innovation and good design that the community currently demands.

Conversely, mandating that the number of objections is to be considered in all circumstances without proper consideration of what the number of objections tells you about the impacts potentially bogs down the planning system in disputes based on numbers rather than merits.

We know from the statistics that the community is fair and reasonably minded in exercising its rights to object and consequently appeal in the current system. Generally citizens or communities only engage where they truly believe that the proposal at foot has a significant and real impact to the future planning and development of their area.

Whilst it might be easy to quantify traffic impacts or other tangible factors, the assessment of social impact is always more qualitative and highly value driven. It can be informed by analysing objections and considering the extent to which communities are sufficiently concerned about or are able to articulate the consequences that a proposal will have on them. When decision-makers need to exercise judgement, considering the extent of community views about a proposal is important to the overall outcomes.

Just to round out what the bill does in response to all of that, the bill seeks to amend the Planning and Environment Act to insert a new decision-making consideration so that both the responsible authority and VCAT have regard to the number of objectors to a permit application in considering whether the proposal may

have a significant social effect. The act does not define a 'significant social effect', nor does the bill amend the act to do so. What is significant will always depend on the particular facts and circumstances.

The bill does not direct the responsible authority or VCAT to consider the number of objectors in every case; that is, it does not make it mandatory for the number of objectors to be considered. The bill leaves it to the discretion of the responsible authority and VCAT. Mandating is not considered appropriate because: firstly, each situation is different and must be considered individually; and, secondly, it would not be appropriate to direct how something must be considered — only what. In arriving at the recommended changes, it is important to note that section 60(1)(c) of the act already requires VCAT to consider the issues raised in all valid objections when a matter is brought before it for review.

This bill builds on the strengths of the current performance-based planning system by making it clear that the number of objectors, where relevant and appropriate, is a factor that must be taken into account when considering whether there may be a significant social effect of a proposal requiring a permit. Thank you.

The CHAIR — Christine, thank you. Paula and John, do you want to add something to that before we proceed? No. I have a number of questions. The first is the definition of 'social'. I wonder if you have a working definition; is it one based on previous VCAT rulings or the common definition of 'social'?

Ms WYATT — There is not a definition of 'social', and in each case it will be different. Social generally is akin to community or community effects. I suppose in a general sense we tend to think of natural, built and social: the physical land use in the natural environment; environmental impacts about what we might do to land, air, water; and social is generally considered people and community.

The CHAIR — So it is a very wide definition.

Ms WYATT — Correct.

The CHAIR — I note a couple of comments you made in your presentation: that the significant point will derive from facts and specific circumstances, and the social impact is qualitative and more value driven. In those circumstances it seems to me that the whole definition of social and related matters is going to become a point of significant contest. There is obviously a more circumscribed power there now, but this seems to open up a broader impact in terms of social impacts as expressed through a large number of submitters, potentially, and that this is likely to be a point of significant legal contest by both proponents and objectors.

Ms WYATT — In response to that I would say that that already exists in the majority of the cases that go before VCAT and panel hearings — decisions by responsible authorities. Those matters are already in existence as to: just because you have a lot of objectors, does that mean there is a social impact? I think what this will do is put a stronger onus on objectors to demonstrate some effect, so that the decision-maker can discern whether numbers translate to social effect. So it is not trying to take away from the ability for a lot of people to be involved. I think what you will see contested is: just because you have numbers, is there merit in that social impact?

The CHAIR — So you see that it will certainly be a point of legal contest, and planning lawyers will seek to in some cases widen and in other cases narrow the appropriate definitions or impacts in an attempt to have the decision-maker, whether that is VCAT or a responsible authority, make a decision as to what is a significant impact.

Ms WYATT — I think they currently do that now. I think what they will do in this case is tie that to the degree to which those submissions need to be given weight.

The CHAIR — If a decision-maker decides it is significant, so it is like a trip-wire, in effect, the large number of objectors then become an aspect that has to be taken into account.

Ms WYATT — That is what this bill will do, so that will be in place. I think the contestability will be for the decision-makers to consider the merit of that large number of submissions and whether it has merit for a social effect, as opposed to the case in relation to Stonnington, where VCAT decided that the large number and the content of those submissions were, 'I just don't like it', but that did not equal a social effect.

The CHAIR — Does the department have modelling or estimates about whether this will generate more legal activity and more legal contest around particular — —

Ms WYATT — No, we do not.

The CHAIR — All right. You say it has to be established in each case. I just wonder whether this is in effect a ruse or a layer of giving the appearance of a different power or different head of capacity for communities to object, but that it may not fundamentally change the decisions that the relevant authority — the responsible authority or VCAT — actually has to make.

Ms WYATT — You can already do that now under the current provisions. So whether or not by just having more lodge grounds — it still comes back to the merit, because there is the ability for this to be done right now — for this to be taken into consideration in each case.

The CHAIR — So it is a bit of window-dressing?

Ms WYATT — I think what it does is put that ability for the tribunal and the decision-maker to consider the number of objectors and to direct them to have a look to see whether there is a social effect, because that was contested by both the VCAT case and the Supreme Court case, in effect.

The CHAIR — As you say, they could already do that now.

Ms WYATT — They could, but they are not required to really, which is the contestability. It is obvious in a couple of cases that the large number of submissions was an indication of a social effect.

The CHAIR — One case you quoted was the Tecoma case. It seems to me that that was squarely within the planning zonings and arrangements and that, despite the many sincere objectors, the responsible authority or VCAT would not have been able to come to any decision that was different, other than that there were lots of objectors but it was squarely within the zoning that was available.

Ms WYATT — Again, I cannot comment on that. I have not looked at it to that degree on that question. But I think the matter is that the merits of the objectors' case needs to be considered by the responsible authority, and obviously that is what was done.

The CHAIR — So it would not have changed anything there?

Ms WYATT — But they obviously came to the conclusion in that case — I am just second-guessing because I would have to refer to it and read it. The decision would have been that the responsible authority and subsequently VCAT took into account the nature of the submissions and the volume and came to a decision under the requirements of the matters that are required under the act.

The CHAIR — Just to get this clear in my head, you could have 10 000 submissions over here and the planning scheme is quite clear that a use is allowed and the responsible authority either gives a permit or does not and then there is an appeal by one party or another, but where it is squarely within the right to give that permit the 10 000 objections over here would actually have no particular impact.

Ms WYATT — If those 10 000 objections did not raise a matter of merit, correct.

Ms HARTLAND — I want to follow this line a little bit. If I can just give a scenario. I am a member in the western suburbs. I have experienced a number of Islamic groups putting forward either a school or an Islamic centre or a mosque. They have done their due diligence very well because they know there will be objections on social issues rather than on planning. How would this part of the bill assist where it is purely a planning issue — it has all been ticked off as far as planning is concerned — but there are 5000 objectors, often from across the state and around the country because it is an Islamic centre? How would VCAT take that into consideration?

Ms WYATT — I cannot answer for VCAT on how they would do that. Again, I would imagine that they work their way through the policy and requirements under the act to be taken into account. They would look at all the things that the act requires them to do. If it comes down to religious or philosophical differences — as indicated in the case that is quoted in the Supreme Court ruling on Stonnington, that actually goes to that

matter — there would have to be some social evidence put forward to the tribunal that would show a cause and effect of significant social effect on the receiving community of having that proposition.

Ms HARTLAND — If for those 5000 objectors it was all on whatever theory they had about the centre rather than planning, it would not be counted.

Ms WYATT — It depends on the nature of the requirement for the permit. If it was a permit that was allowed as its use, then the zone contemplates a whole range of activities and that use might be one of them. If the permit is just for the built form, then regardless of your philosophical views of whatever shape or form, if it is not a matter in relation to the requirement for a permit trigger, it is irrelevant.

Ms HARTLAND — And it would be irrelevant under this amendment?

Ms WYATT — Correct.

The CHAIR — Thank you for your presentation, Christine. It was a very comprehensive one. I thank both Paula and John for appearing as well.

Witnesses withdrew.

CORRECTED VERSION

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

Mr Simon Ramsay

Ms Colleen Hartland

Staff

Secretary: Mr Keir Delaney

Research officer: Mr Anthony Walsh

Witnesses

Ms Jennifer Cunich (sworn), executive director, Property Council of Australia;

Mr Brendan Rogers (sworn), director, Urbis;

Ms Amanda Johns (sworn), partner, planning and environment, Thomson Geer Lawyers;

Ms Danni Addison (affirmed), chief executive officer,

Mr John Cicero (sworn), chairman, planning committee, and

Mr John Casey (sworn), policy advisor, Urban Development Institute of Australia (Victoria).

The CHAIR — I declare open this public hearing of the Legislative Council environment and planning committee. All mobile phones should be turned off or on silent. Today's hearing is being undertaken by a subcommittee of myself, Colleen Hartland, and Simon Ramsay, who will be here shortly. The committee is receiving evidence about the Planning and Environment Amendment (Recognising Objectors) Bill.

I welcome witnesses Danni Addison, John Cicero, John Casey, Jennifer Cunich, Brendan Rogers and Amanda Johns, and thank you for making yourselves available at short notice. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council standing orders. Therefore the information you give today is protected by law. However, any comment repeated outside this hearing may not be protected. All evidence is being recorded. You will be provided with proof copies of the transcript in the next couple of days. We have got 45 minutes for the session, and I will ask for some opening submissions to be followed by questions from myself and Colleen.

Finally, I remind you that the inquiry is to obtain evidence in relation to the Planning and Environment Amendment (Recognising Objectors) Bill 2015 that is currently before the Parliament. If you could give your name and address, that would be helpful.

Ms JOHNS — Amanda Johns, level 20, 385 Bourke Street, Melbourne.

Mr ROGERS — Brendan Rogers, level 12, 120 Collins Street, Melbourne.

Ms CUNICH — Jennifer Cunich, level 7, 136 Exhibition Street, Melbourne.

Ms ADDISON — Danni Addison, level 4, 437 St Kilda Road.

Mr CICERO — John Cicero, level 9, 451 Bourke Street.

Mr CASEY — John Casey, level 4, 437 St Kilda Road.

The CHAIR — Who wants to open the batting?

Ms ADDISON — I will let Jennifer open. Then I will say a couple of things and then we will allow our experts to take the floor.

Ms CUNICH — The property council is opposed to this amendment. It does not change the status quo under the act, and the current act deals with this issue. The property council believes it will not assist in better decision-making and it will not result in better planning in Victoria. In fact it will create unrealistic expectations within the community, confusion and additional administrative burdens, and hence additional costs.

The act requires currently that responsible authorities, being councils and VCAT, must consider any significant social effects of a proposal in making a planning permit decision, This is under section 60(1)(f) of the Planning and Environment Act. Just one objection raising a valid detrimental social effect is sufficient for the decision-maker to give some weight to it. The act also provides that decisions must take into account net community benefit and consider proposals in the context of current and future communities. Any person who may be affected by a planning proposal is entitled to lodge an objection and may raise social effects, which if significant must be taken into account by the councils and by VCAT.

As far as we are concerned, and our industry believes, this amendment really is aimed at fixing something that is not broken.

Ms ADDISON — The Urban Development Institute of Australia in Victoria echoes the views of the property council. I add to that just in a more detailed way that our view of this bill is that it will allow potentially frivolous objections to be increased within the planning system and to be given consideration in decision-making, which would likely result in an increase in litigation and legal costs to relevant planning authorities throughout the process. The bill may unintentionally give weight to localised objections to the detriment of wider economic and social benefits for other communities and for the state as a whole. Our concern greatly relies on the absence of a voice for those who would be benefitted by a development proposal or whatever else is going through the planning system at that time in the interests of a loud minority who are given more influence over planning outcomes than the silent majority of Victorians who benefit down the track.

We also agree that the Planning and Environment Act currently deals with the social and economic effects of planning proposals and planning scheme amendments and that this is just politics in planning once again.

The CHAIR — Thank you. I note the points that have been made. Essentially if I summarise, the argument is that this does not change the act fundamentally but may raise expectations and cause confusion, adding to administrative and legal burdens. In that context I ask about the definition of the word ‘significant’ and the word ‘social’. There is some VCAT decision-making around that. That is not necessarily binding on other VCAT decisions, but it seems to me that there is a risk that both of those words will be heavily contested by legal support for both objectors and proponents, and they are likely to become points of significant contest.

Mr CICERO — I can add to that as a lawyer, and quite cynically I welcome the bill because it will be a feast for lawyers. There is no definition of what a social impact is. There is no definition of what is significant, and what it will do is create the opportunity for debate over the meaning of those words, particularly in the early days, until it settles down — until we get some authoritative decisions, potentially from the Supreme Court.

The CHAIR — Are there decisions currently on those words or similar words from the Supreme Court?

Mr CICERO — There are decisions which talk about the considerations relevant to the inquiry before the tribunal, and the tribunal has noted and the decision-maker — let us leave aside just the tribunal; all decision-makers in the planning jurisdiction need to take into account social effects. There is some guidance as to what those effects might be, but I think we can test this bill by reference to its genesis. Its genesis was the Lend Lease decision, which concerned, basically, a proposal to construct apartments in an area designated for substantial change. There was wide community opposition to it, and the Supreme Court ultimately held, in line with authority that has been around for a long time — and good authority, we think — that the number of objectors is not relevant; it is the substance of the objections.

The expectation out there is quite clearly — as a practitioner who appears daily at VCAT, the expectation is that if there is an apartment building and there is a significant number of objectors, that of itself will be evidence of a significant social effect. If you read the Lend Lease decision, the sort of social effects it talked about were not social effects that could be said to arise out of a proposal to construct an apartment building in an area designated for change. I think the problem we are all going to face as decision-makers if this bill is introduced is that it will be used in circumstances where it was not contemplated, I think, to be used. Until that settles down there will be much disputation, much work for lawyers and planners and much angst for all involved in the planning process to make sense of what is an unnecessary piece of legislation.

Ms JOHNS — If I could add to that, there is lack of clarity about what those words mean, and there will be diversions of opinion, depending on what side of the fence you sit, as to what they mean. There was a recent VCAT decision that gave some guidance in relation to what social effects are and what significant social effects might be. It was a case in relation to a proposed mosque in Hume, and this case has been followed by other divisions of the tribunal since then. It said that what is significant must be objectively ascertained, must have a causal connection to the proposal, must affect the community at large and must be based on a proper, evidentiary basis or empirical analysis, preferably through a formal social impact or social-economic assessment. It should not be based on philosophical or moral or religious values, and the effect must be sufficiently probable to be significant. If a significant adverse social effect is found, it must be balanced with any other significant social and economic effects.

I do not think that is what the community will understand as a relevant social effect. That will cause problems because the tribunal will, if it continues to follow that line of authority — —

The CHAIR — Just on the precedent rules at VCAT, one VCAT tribunal is not necessarily bound by another decision?

Ms JOHNS — No, you are not necessarily bound.

The CHAIR — But they would be bound by a decision of the Supreme Court where there had been an appeal at some point?

Mr CICERO — Yes.

Ms JOHNS — That is correct. But they do tend to follow each other unless there is some reason to set something apart. The tendency is to follow each other. Can I just add that we have some — —

The CHAIR — I will let Ms Hartland follow up.

Ms HARTLAND — I am a member for the western suburbs, so the planning issues around mosques are something that come up quite regularly. I have seen it used very detrimentally by opponents, not just opponents who actually live in the area but opponents to Islam across the state and sometimes across the country. How do you think this clause would assist those who just are anti-Islamic and will not tolerate any kind of community centre, mosque or education centre?

Ms JOHNS — I think the result would be that you will see more objections of that kind, people believing that the number of objections will increase the likelihood of their success in having the proposal rejected. However, I do not think when it gets to a tribunal hearing, for example, that will add extra weight to a case, because the tribunal will test what a social effect is in a much narrower way than the community expectation.

Mr CICERO — I think there is an expectation by some members of the community that the number of objections of itself is evidence of significant social impact. That has to be dispelled. If this bill is going to get up — and let us hope it does not, but if it is going to get up — that should be dispelled as quickly as possible, because I can tell you that there is already that sense that if I can get a substantial number of objectors, that of itself will be evidence of significant social impact.

Ms ADDISON — Also at the council decision-making level as well, it is one thing to ask VCAT to make consideration within the context of precedents and the rest, but before it gets to that point, we have council officers and councillors who are looking at these applications and being required to make decisions on them, often without the rigour of the legal system behind them. Whether or not that translates at that level — I do not think it will. I think there will be a lot more pressure on local government officers and councillors to take the more superficial route of, ‘Yes, maybe the number of objections does determine the social impact in our decision-making process’, which is an outcome that just could not be tolerated.

The CHAIR — Can I just pursue for a second this point of the actual number of objectors in and of itself, notwithstanding the VCAT case you have quoted? It seems to me that a very effective lawyer may be able to mount a case that a large number of people actually could be evidence in of and itself of a community social concern.

Mr CICERO — There is no doubt, in my opinion, that the number of objectors is a relevant consideration in determining whether or not there is significant social impact. But, of itself, the number is not evidence of that. It is a factor, no doubt, that the tribunal or a decision-maker will need to take into account in determining whether or not there is a significant social impact.

The CHAIR — Under this proposal, once it gets over that trip-wire, as it were, that there is a social impact — —

Mr CICERO — But it has to be a significant social impact.

Ms CUNICH — Which is not defined.

The CHAIR — A significant social impact, then the number of objectors becomes significant.

Mr CICERO — Becomes indeed relevant.

Mr ROGERS — One of the concerns that we have is that when you are looking at planning — and the point was raised earlier about implementing policy change — there is no clarity here about how this will be applied. Planning is not just for the present population; it is for the future population, and planning policy looks at how areas will evolve. Some members of the community do not want to see evolution; they like it as it is. But the reality is that we need to be able to manage change. Planning is all about managing change. If you put an expectation in the community that the number of submissions from the current population, with a current view about what should be the case, that is not balancing out, in their minds, against what the future plans are for the benefit of Victorians going forward. That is a really important consideration. If there is any chance that a change

like this blurs that line and gives greater weight to the views of the minority today against a policy that is trying to deliver a better Victoria tomorrow, that is a bad change.

Ms HARTLAND — It is somewhat outside the scope of this, but I have been a local government member. I live in West Footscray, which is undergoing rapid change. I have been involved in a number of major planning issues in the western suburbs. I actually do not feel like residents get any say in the planning process, and I am not sure that this is going to help. How do we actually give residents a real say in planning, because I do not think they have it now? Councils will object and say they will not issue the planning permit. It goes to VCAT; it will always be overturned.

Mr CICERO — That is wrong. That is just a wrong statement, with all due respect.

Ms HARTLAND — It is actually not my experience.

Mr CICERO — Those of us who regularly appear before VCAT have been on the losing side, so I think it is wrong to say that it will always be overturned. That is far from the position. If you look at the statistics, you will see that that statement is just not borne out.

Ms HARTLAND — All right. Could you give me the statistics about how often, when councils have refused a permit, it is not overturned?

Mr CICERO — If the tribunal will make those statistics available, we will get them to you.

Ms HARTLAND — Thank you.

Mr CICERO — But I can only speak from personal experience; I do not always win when I go to VCAT.

Mr ROGERS — I think the other issue with those statistics is that the important statistics to look at are the council officer recommendations versus the council decisions, because the officer recommendations are largely based on policy, and often councillor decisions will have a political aspect to them. They are a very important consideration.

Ms HARTLAND — I totally agree.

Mr ROGERS — The objective in planning for the community to have their say is as part of the strategic process. It is reliant on getting those policies right. That is the piece where it is important. If it is in line with policy, and there are objections because a proposal goes beyond that, then that has to be taken into consideration. That is why we have VCAT, because if a council makes a decision that is not in line with policy, someone has the opportunity to challenge that and say, 'Here is the strategic plan for the area. Here is the guidance'. VCAT is the independent arbitrator to say, 'Did that responsible authority make a responsible decision or not?'. That is exactly why we have the process and exactly why they have to look at it in a balanced way, considering all the relevant considerations.

If there is an expectation from the community that in fact numbers count, I actually think they will feel more disenfranchised. They will say, 'We had the numbers, and we were still not listened to'. In fact it is creating an expectation amongst the community that may not be real, and that will bring further problems, and there will be administrative problems as well. It will create additional red tape that in fact governments are trying to reduce. We are trying to simplify it so that the community understands where there are areas of change and where there are areas of no change. In fact some of the things that have been done in recent times in regard to residential zones and in regard to focusing on urban renewal areas is trying to get that clarity. I think this change is actually going to be an adverse step in muddying the waters.

Ms JOHNS — Going to back to your question in relation to participation by the community, the community has an opportunity to participate at the planning scheme amendment stage. I am talking about local policy rather than state policy. When a council wants to introduce new local policy, the community has an opportunity to participate at that stage. There is a planning scheme amendment process with public hearings and an opportunity to make submissions. That is an opportunity for the community to say to their local council what they want to see in the future for their municipality. I think there is a lack of understanding of that in the community. The community comes in a later stage, when the policy has been implemented and people are

seeking permission based on that policy after that date. Perhaps there needs to be more education of the community in relation to the role that they should take or the interest they should take in the policy making.

Ms CUNICH — That is right — engagement right at the beginning of the process.

Ms HARTLAND — I understand that completely from being both a councillor and someone who has been involved in neighbourhood planning disputes. I totally acknowledge that.

The property council made a public statement that this would drive up house prices and unit prices. Can there be some explanation about how that would occur? This was in an article in the *Herald Sun* suggesting that the bill will drive up house prices.

Ms CUNICH — By putting more pressure and — the planning process is already quite complex, so if you are adding in additional layers and complexity, it delays the process as well. If you are going back to VCAT, if you are ending up back in court, it is just going to continue to add the additional costs of lawyers you have to bring in to put forward your position. All of these things just continue to add to the cost of developing housing and apartments.

Ms HARTLAND — Have you got a figure of what you think it will increase by?

Ms CUNICH — No. Actually that is an interesting question, because we have constantly been trying to do work on all of the different levies and different imposts that are imposed on the development process, and it is a moving feast to actually try to nail a figure, because there are always additional levies, charges, taxes and timing that come into the process, but we could perhaps do some modelling and show you, around a particular development, what would happen if it was delayed by a period of time.

Ms HARTLAND — That would be helpful.

Mr CASEY — I think it is also on point to think of it as risk. If you increase the cost of development, you increase the risk. If you increase the risk, you increase the required rate of return, which in the end flows down to the consumer. Creating some uncertainty about how councils are going to make decisions and increasing the costs of providing development are in the end going to affect housing prices.

Mr CICERO — I want to put a different perspective on this. I think this bill is going to be socially divisive. Let me explain why. At the moment one of the fundamental problems with our planning legislation, which we have raised in the past with the previous government and the government before that, is that we think it starts off on the wrong foot. When you give notice to the community, it says, ‘You may be affected, and you should object’, or, ‘You have the entitlement or the right to object’, rather than just inviting submissions from interested parties, whether they are in favour or against.

I have a client who rang me and said, ‘Listen, I’ve got a lot of people who are in fact supportive of my three-storey development in Boroondara. Should I go out and canvass support for it and get them to actually write to me saying that they support it?’. The hearing is yet to start, and I am going to be faced with a situation where I am going to have on the one hand a number of objectors and on the other hand a number of supporters, who unfortunately at the moment do not have any statutory right to be heard, because the act is skewed towards ‘You may be detrimentally affected, and therefore consider objecting’. We have asked for that provision to be changed so it starts on a positive note rather than a negative note.

The CHAIR — Or at least a neutral note.

Mr CICERO — Or at least a neutral note. What do we do now? We are going to have the prospect of a hearing before a decision-maker with 100 people for and 101 against; who wins — or 104 and 99 against? Is it really a numbers game like that? This bill could be very socially divisive.

Ms ADDISON — It brings us to the point as well of what policy problem are we trying to solve, and that is what we have not been able to answer in looking at what the bill puts forward. We acknowledge that the Planning and Environment Act already deals with social effects of developments in various ways — that responsible authorities already need to take those things into account. The only answer we have been able to obtain from the government is that this was an election promise, but again without the substance of an answer to what policy problem are we trying to solve. It goes further to John’s point: we are moving more and more away

from a neutral starting point where we are having a discussion about Victoria's growth and the positives and benefits of that as a whole and moving even more towards a no-change agenda and a no-benefit-to-the-community agenda.

The CHAIR — This brings me back in a sense to the question of from whence this comes and so forth. The two cases — the three that we were made aware of that have been important in the development of this — one is the Armadale group, which is mentioned in the second reading and so forth, but also the Tecoma case. What I would be interested in, having two lawyers in the room — in this context — is understanding whether in the case of the tower in South Yarra it would have actually changed the outcome. We have obviously the Supreme Court's commentary on that. Then the second case is the Tecoma case. We heard testimony from the department just a few minutes ago that suggests that there may not be any impact there. It seems that in the Tecoma case the land use was squarely within the actual legal provisions, and if you had 1000, 2000 or 5000 objections, it does not seem to me that that actually gets it over the initial hurdle. I would be interested in commentary on those points.

Ms JOHNS — I do not know if John was involved in the Tecoma case — —

Mr CICERO — No, but I know about it — it was the McDonald's store in Tecoma.

Ms JOHNS — I was not involved in the Tecoma case, but I know enough about it to comment on it. That was a case where the use of the land for that purpose was allowed as of right, so you can object as much as you like to that use, but it had no bearing on the case because the application for the permit was actually for the building and works. McDonald's could go there; the application was actually about what they could build and the form that it was going to take. So the number of objections in relation to the use was irrelevant.

Mr ROGERS — The very point that that case has been flagged as one of the reasons for this is exactly the point we are making about the expectation of the community. If the expectation is, 'Tecoma would have been different because we had 1000 objections', it would not have been different because the issue that they were objecting to was not building a building that you could put a restaurant in or a takeaway or a crossover; it was the fact that it was a McDonald's and they did not want McDonald's in Tecoma. That was not on the table for change. That really does amplify one of the concerns we have with this change.

Mr CICERO — And in relation to Land Lease again, if this bill was law, in my opinion it would have made no difference at all to the outcome of that case, even if there were 1500 objectors and not 627 or whatever the number was. That is the problem. The problem is that this bill is seeking to address expectations that arise out of Tecoma and Land Lease when it would not — certainly in my opinion — have made any difference to the outcome of those two cases. Going back to the point that Jennifer made, what are we trying to fix here? What is it that is broken that we are trying to fix?

The CHAIR — So the conclusion from those two cases, as it were, case studies, is that it would have made no difference to the outcome, but with this law in place there would have been an apparent incentive for the community to collect large numbers of submissions, to go to enormous community effort and to see then the proponent hire additional support and legal backing and so forth, and then there would be costs generated there —

Ms ADDISON — Time, costs, uncertainty, risk.

The CHAIR — and time, but no actual finality that would make the objectives — —

Mr CICERO — No net community benefit.

Ms JOHNS — And administrative burden on the council.

The CHAIR — You are absolutely right, the council — —

Ms JOHNS — The cost for the council to have to deal with all those objections, and then at VCAT to deal with all the people who lodged statements of grounds, it will be enormous if people just continue to lodge many, many objections in the expectation that that will make a difference.

Mr ROGERS — It is not just the administrative burden of the actual case. When you get controversial matters, the extra strain that puts on the officers and the councillors having to deal with all of that is very significant. When you talk to officers who are having to deal with something as controversial and there is that angst in the community, it is problematic and, as John said, it is divisive. So we should not underestimate the social impact of this change and the expectation that it will raise on a broad scale. I think it is a really important point that the government needs to think about.

Ms HARTLAND — John, I just want to come back to your point about the objectors and those who actually support. There have been over the years a number of fairly vicious campaigns run against social housing and public housing. They never seemed to me to be on planning grounds — mainly on property values and, ‘I don’t want to live next to those kinds of people’, and having grown up in a housing commission house, I find it quite offensive.

Mr CICERO — Agreed.

Ms HARTLAND — How would your idea of bringing in the supporters improve the planning system?

Mr CICERO — No, it is not my idea.

Ms HARTLAND — No, I am just — —

Mr CICERO — I am saying that there is a danger that if this bill became law, you would get to that point, where you would have supporters — you would bring in supporters or try and lead evidence about a significant part of the community actually supporting the proposal.

Ms HARTLAND — Yes, okay.

Mr CICERO — Because if the numbers are relevant, surely the numbers are relevant for and against, not just against, and that is the point. It should not be a numbers game. That has been settled law for many, many years, and why we would want to overturn that, I do not know. It will not fix Tecoma, it will not fix the Lend Lease, so what is it that we are trying to fix that is broken? That was my point.

Ms JOHNS — You also have to remember that the social effect, if there is a social effect, is only one of the considerations that a decision-maker has to take into account.

The CHAIR — So even if you get over the trip-wire for that, that is still one effect?

Ms JOHNS — Yes, it is only one.

The CHAIR — It has to be balanced amongst the others.

Ms JOHNS — Yes, there are economic effects — there is a myriad of things that a decision-maker needs to take into account, including policy. Even if you had a significant social effect, it does not mean it will be refused.

Mr CASEY — Using that as an example, as someone who at some point in their life also lived in housing commission, if I was all of a sudden villainised by a certain community group who had been incentivised to write a significant amount of submissions saying that they ‘don’t like these types of people in our neighbourhood; we don’t want them here’, that would actually have a social impact in itself. I think we need to be very cautious in actually incentivising some of these groups to be able to spread those kinds of views.

Ms CUNICH — I think also, Colleen, just going back to your concerns around your experience in West Footscray and the community, it goes back to our conversation earlier about the engagement at the very, very beginning of the community working with the councils to decide, ‘What is it that we want?’. But at a higher level it is about government also saying, ‘If we’re an inclusive society, that means we are inclusive across the state. We are not inclusive in some areas where people will accept either social housing or mosques’. It is not up to some areas to say, ‘Well, actually we don’t want those types of people living here’, and I think the state government has a responsibility to say, ‘This is for all of Melbourne and regional Victoria’. They have to set the policy and then give guidance to councils, and communities should absolutely be engaged in those very early stages so both the community and the development community understand what the rules are.

Mr CICERO — That is a very good point. That was in fact the point made by the Supreme Court in the Lend Lease case, that in looking at the issue, it is not just a localised issue. There is a broader issue about —

The CHAIR — Statewide planning provisions.

Mr CICERO — statewide planning provisions and also a combination of new housing in Melbourne and where it should go, that if you made a decision in isolation — in the Lend Lease — without understanding the impacts that that would have on a more city-wide basis. I think that is a very good point that Jennifer made.

Ms ADDISON — Absolutely, yes.

Mr CICERO — Invariably it is not just a localised issue; it has wider ramifications beyond South Yarra or beyond Tecoma.

The CHAIR — Is there anything else anyone wants to add? That has been very helpful indeed, and I thank you for your submissions.

Mr CICERO — Thank you for the opportunity.

Witnesses withdrew.

CORRECTED VERSION

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

Mr Simon Ramsay

Ms Colleen Hartland

Staff

Secretary: Mr Keir Delaney

Research officer: Mr Anthony Walsh

Witnesses

Ms Joanna Stanley (sworn), Brunswick Residents Network, and

Ms Ann Reid (sworn), Malvern East Group, Planning Backlash.

The CHAIR — I declare open again the public hearing of the Legislative Council environment and planning committee. I ask for mobile phones to be turned off. Today's hearing is being undertaken by a subcommittee of myself, Colleen Hartland and Simon Ramsay. The committee is receiving evidence about the Planning and Environment Amendment (Recognising Objectors) Bill. I welcome Joanna Stanley from the Brunswick Residents Network and Ann Reid from the Malvern East Group.

All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and subject to the provisions of the Legislative Council standing orders. Therefore the information you give today is protected by law. However, any comment repeated outside the hearing may not be protected. All evidence is being recorded. You will be provided with proof versions of the transcript in the next couple of days.

We have allowed 45 minutes. In a moment I will ask you both to make an opening statement, and that will be followed by a series of questions. Finally, I remind you that the inquiry is to obtain evidence in relation to the Planning and Environment Amendment (Recognising Objectors) Bill 2015 that is currently before the Parliament. I thank both Ann and Joanna for providing evidence at short notice, noting that Mary Drost is in London and would very much have liked to have given evidence herself. I am appreciative that both of you are providing evidence. Ann, do you want to lead off?

Ms REID — Yes, I will. Thank you. I also have copies of my address to that paper, which I have not submitted. Planning Backlash has a community consultation group. Joanna and I are on that committee and, alas, we were the only two available at this time to come here. I am the convener of the Malvern East Group, and I am presenting this on behalf of Planning Backlash.

You all have a copy of the item in the Stonnington council notice paper of 22 June. In this, council highlights some of the practical challenges of what is proposed. There is no question that objectors to planning applications want to be recognised, and there is doubt that the implementation of the bill will achieve this recognition.

It is my contention that the bill actually maintains the status quo. Decision-makers have to 'have regard to the number of objectors' in deciding if a proposal may have 'a significant social effect'. It is my understanding that that is what they are supposed to do now — that is, of course, if they are able to define a 'significant social effect'. The bill does not seek to define this and it does not provide guidance on its meaning, so let us look at what it might mean. Julie Szego in the *Age* of 18 June called the term 'a typically bland euphemism for traffic chaos and clogged lanes at the council pool'. In *Minawood v. Bayside* Deputy President Helen Gibson said that the social impact of approval must not be detrimental. She indicated that there must be clear performance measures and availability of community facilities such as roads, open spaces, community centres, noise impacts, access to public transport, schools and recreation facilities. Further to that, she said that social impacts are impacts on people with regard to health, safety, neighbourhood identity and so on.

That covers just about everything and applies to all planning applications, so what is new? It appears that the new factor is having regard to the number of objections. This matter was also dealt with in *Minawood v. Bayside*. Deputy President Gibson declared that decisions are not based on popularity, even though there were 4300 objections to that application. She said consideration of a planning application should not be a political exercise or a popularity contest. Clearly public opinion cannot dictate a decision. It is the substance or merits of the views expressed, viewed through the prism of planning relevance, that must guide the decision-maker. So 100 objections based on an irrelevant consideration will not outweigh a single good objection based on a relevant consideration.

She went on to say that numbers matter when a community is affected — the social effects on the whole community. The large number of objections were the result of a very proficient campaign on the part of local residents.

The Stonnington paper points out that the bill does not indicate what level of weight must be given to the number of objections in assessing social effect. Are we then to assume that weight must be given when the number of objections reaches 50 or 100 or 4000 and that all of those objections refer to an adverse impact on the community in terms of social significance, cultural identity and so on rather than on individuals and their personal issues — that is, the content is to be considered, not just the numbers? I suggest that this bill gives false hope to the community. As Stonnington indicates, it may provide greater impetus for groups to organise the

lodgement of potentially hundreds of objections in the hope that the decision-makers will be dissuaded from issuing a permit.

This happened in Malvern East over a McDonald's application, where community members were incensed that the leafy suburbs would be damaged by a McDonald's in the commercial area. There were over 700 objections. They were all pro formas except for 78. I know that people just signed the pro forma. One woman told me, 'They came at dinnertime. We'd sold the house to a person with two children and thought they mightn't like to have McDonald's a kilometre away, so I signed it'. What worth is that? I could certainly cite — as I am sure Joanna could also — other instances like that.

In giving this false hope to the community that numbers are going to count, Stonnington indicates that it may provide greater impetus for groups to organise the lodgement of potentially hundreds of objections in the hope that the decision-makers will be dissuaded. Referencing the number of objections may establish expectations that numbers alone is the critical defining point.

The other issue that may tend to leave decision-makers in a quandary are the words 'where appropriate'. Just when is this to be applied? Is it to be only when there is a large number of objections, or is it to be applied when there is one objection which accurately addresses the adverse social impacts a development may have on a community? Which takes precedence — the number or the relevance?

Clearly this bill does not deliver on the promise of putting the voice of the community back into the planning process. The question of how it can be implemented for the benefit of objectors is not clear. It is ambiguous in nature. As it is written, it is just not acceptable. It is not giving us any more than we have got now, and we want more than we have got now.

The CHAIR — Ann, thank you very much. That was a very succinct presentation. Joanna, do you want to add to that?

Ms STANLEY — I have another two-page presentation as well.

The CHAIR — Why don't you present that now, and then we will ask questions, because I think some of it will interact with some of Ann's and others' points.

Ms STANLEY — Planning Backlash Victoria thanks the Environment and Planning Standing Committee for the opportunity to submit feedback on the proposed recognising objectors bill, which is to be debated in coming weeks in the Victorian Parliament.

Overall, PBV acknowledges the Victorian planning minister's aspiration in designing a bill that aims to give community members confidence because considering community views is vital to the health of Victoria's planning system. However, we believe there may be a need for potential clarifications and changes to the proposed bill in order to ensure decision-makers give more weight to community views than is currently the case.

As the bill stands, a false expectation in the community — one where volume matters — could arise that reduces resident confidence. The bill is a logical step on from the findings of the 2014 decision in *Stonnington City Council v. Lend Lease Apartments (Armada) Pty Ltd*. The ruling identified that when decision-makers are assessing if a proposal will create significant social effects they should take into account the number of objections. In simple terms, the bill is looking to give the extent of objections more consideration in assessing whether a proposed use or development may have a significant social effect, in appropriate cases. The bill, however, does not clarify if this is the overall number of objections to the proposal or if it is simply the number of objectors who specifically address social effects as a specific ground.

If you look at the bill's explanatory memorandum, an example on page 3 states:

... if ... a large number of objectors raise issues that point to a detrimental effect on the safety of the community at large, it may be appropriate to consider the number of objectors ...

This implies only those objections which specifically address social effects will have weight through numbers in this case. This is different from the number of objections to the same proposal which address other impacts, such as height, overshadowing et cetera — which I have left out of that sentence — or the overall number of

objections that is a total of the specific ones on social effects as well as all the other potential impacts. The bill's impact will be on most occasions limited to the question of significant social effects and likely be a nominal part of a raft of guidelines on which decisions are made.

There is also an issue, we find, with the onus on the objector to provide evidence of social effects. The bill allows consideration of the extent of community opposition in determining social effects where appropriate, so this bill influences only one of a large number of considerations for decision-makers to take into account. Other considerations include the relevant planning scheme and any significant economic and environmental effects. Despite the bill being passed, if that eventuates, all issues raised by objectors in the planning process must be relevant, they must be evidence based and clearly demonstrate impacts. In the case of objections, it is the usual practice of the proponents to demonstrate how the proposal will not have negative effects. A developer takes it as part of its usual operations to employ experts to argue against any negative effects that objectors feel will arise, and demonstrate otherwise. This will still apply post this bill being passed, if that is the case.

It is also important for the committee to consider that many exemptions apply to various types of applications in the Planning and Environment Act and also in the planning schemes. I am happy to give you examples of those if you would like to ask me afterwards. Therefore only a proportion of proposals in the state of Victoria give residents or adjoining properties rights of notice, objection and appeal.

Overall this bill is a negligible step in giving more voice to community members. As it stands, the bill will not necessarily benefit the community in a noticeable way. Or it may on occasion — and, I will stress, rare occasion — have a positive effect on objectors' rights. A recommendation we have is that the government amend the proposed bill to add the word 'overall' to 'objections', so it reads 'overall objections' in clauses 1 to 5 of the proposed bill. This will go some way to giving weight to community opposition.

The CHAIR — Joanna, thank you. I think both submissions are quite succinct and clear in what they mean. If I summarise them, it seems to me that essentially you are arguing that there will be little change in effect from the bill. In fact it is possible that it may in some cases have a negative effect because of some false hope and people not being able to get an outcome that they want but feeling, because the numbers are pointed to in the legislation, that they should gather up large numbers, but ultimately to often have hopes dashed.

Ms STANLEY — Yes, I think that is generally what we are saying. Nobody really knows what the immediate effect will be, but there will be potentially a flurry of confidence in the community whereby campaigns gain a bit of momentum against not just potential social effects but effects in all of the prism of effects that objectors have rights to object to. In the short term there may be a flurry of activity. However, the objectors who get organised to increase numbers in the short term may be misguided in that they may be unaware that specifically if they do not point to a social effect in their objection initially — —

The CHAIR — And prove it.

Ms STANLEY — And have means to prove it in the case of a council gallery or in the VCAT chambers, they may reach a point where a lot of effort has gone into a misguided campaign, and the flow-on effects of that we have seen in the past. We cannot necessarily see what will happen there, but that is a scenario.

The CHAIR — Joanna, on the recommendation that you make at the bottom of your submission to add the word 'overall', have you had some legal suggestion involved in that? I am just looking at the meaning of words and so forth.

Ms STANLEY — No. I am a resident. This is just anecdotal evidence based on appearing at VCAT over the last 15 years, as Ann can attest to as well. Just on experience of attending VCAT in particular — however, it has flowed forward into the council decision process from a resident's point of view — objections will be gone through with a fine toothcomb by the proponent's representatives to see what they point to and whether they can be counted in terms of content. It is really that I am speaking on behalf of an objector who has been in VCAT and who has also sat in galleries at councils.

Having seen the proposed bill online, I feel that it just leaves it ambiguous. Ann and I discussed this bill and what potentially could be of benefit to the residents of Victoria by instructing a decision-maker to take the number of objections into consideration when they are determining if a social effect is potentially going to apply. We figure this bill will create a pause in time, not a very big pause in time but a pause long enough to

count the objections again. I guess it is a matter of: is it the overall number of objections that apply here, or is it just the objections that point to a specific social detriment? Because it could backfire both ways, on everybody in the system. Because if there are 4000 objections, as Ann has pointed out, to a specific proposal and yet only 4 of them point out the specific social detriment, are they only going to count those 4, therefore not have to consider the social effect? These are things to be debated.

The CHAIR — Fair points.

Ms HARTLAND — Thanks for the submissions. I think you have made your position very clear. Given some of the scenarios we have been talking about this morning and some of the I suppose campaigns that I have seen against social housing and against, say, a mosque or an Islamic school, how do you feel that this might be used when it is just that someone does not like it rather than there is actual planning merit to their objection?

Ms REID — Used by whom? The developer or the — —

Ms HARTLAND — The objectors.

Ms REID — I think the problem is that nobody is sure. The Stonnington councillors, when they noted this report, said that the terms are not defined. If they are not defined, how can we predict? We — Joanna and I and Jack and Mary and the other people — would be able to whip up some social effects, but we are not sure that everybody will be able to whip up some social effects. And if the bill is not defined, what are we going to do?

The CHAIR — It is very open.

Ms REID — You have to define the terms in order to give us a go, because at the moment we have not got a go. The recent RMIT investigation into VCAT decisions, you might have seen, just weighs so heavily against the community, the people. If the bill is meant to give us a go, then let us be clear so that we know how to use it.

Ms HARTLAND — That is my experience, too, having been a councillor and a resident, that VCAT usually always overturns a council decision.

Ms REID — Not always but a huge percentage.

Ms HARTLAND — That is my experience. Should we be looking at planning in terms of how we actually give residents a real say in planning, rather than this, which I would agree is very vague?

Ms REID — Over the years we have met with Attorneys-General. We have met with Justice Kevin Bell, Justice Iain Ross and Justice Greg Garde. We have been to forums. We have made many submissions about how to reform the process of VCAT so that fairness will prevail. Fairness does not prevail now. Nobody has taken any notice of us at all. The then government did not take any notice of Justice Kevin Bell's recommendations, which would have made the system fairer. That is not really a separate issue from this bill. Other than in terms of fairness, what Parliament ought to be looking at is the reform of the VCAT process in order to deliver us what we have asked for so often in so many meetings.

Ms STANLEY — Colleen, I am happy to address your question as well. My understanding is that you are asking: could one secular group use it against another secular group in order to engineer a campaign to up the numbers? It is potentially possible. The campaign can be engineered. However, if you were the decision-maker, you could look at the bill and possibly use the 'where appropriate' clause there. I am just giving you a suggestion, but definitely the groups we represent would never endorse any engineered campaign to — —

The CHAIR — Misuse?

Ms STANLEY — Yes.

The CHAIR — I agree.

Ms STANLEY — When there is a secular argument I do not see that. No-one really knows what the outcome is going to be, so you would have to play through the scenario really in conversation. We would not endorse any of that. Objectors and representatives of the community who have been guiding and advising and collecting information on behalf of other groups across Melbourne and Victoria know how the game is played.

Most objector groups do not engineer campaigns that way because, as Ann has clearly said before, it is the content of the objection that actually really counts.

What this bill is doing is just putting a little pause in there to say, 'Hang on a minute. Look, there are a lot of residents here. You need to count how many, and you make a decision on that number'. That number could make you decide if you are going to consider whether they hold weight in the social decision here.

Mr RAMSAY — A quick question, and thank you for your submissions. It would appear that the intention of the bill is to provide opportunity for objectors to have a say in the planning process, but both of your contributions have indicated there is perhaps more confusion and grey in the proposed amendment than there is some certainty. In relation to the decision-makers and how they weight what you talk about as 'social effect' in the bill, in relation to a speedy outcome in relation to a planning decision: do you think the bill will provide more or less certainty in the planning system and VCAT decisions? And/or do you think it might allow a disproportionate voice to a vocal minority in some of the decision-making process?

Ms REID — The possibility is of course that it will allow a disproportionate voice to a vocal minority, of course it could. That is to address the last part of your question. I think it is going to take longer to make decisions, and I think that is what you referred to. The length of time is just going to take longer. Everything is going to take longer. Even to teach residents that if they do a mass protest, they have to find a social effect. They have to have their own definition because the bill does not give a definition of the impact of a social effect. All right? They have to provide evidence of that too. It has got to be evidence based; they cannot just say, 'There are too many cars at the council pool'. They have got to count them. They have got to go down there and provide the figures every day, day after day after day, to let the decision-makers know that they really have evidence to say, 'This is going to have a terrible impact on our community at the council pool'. I do not know if that answers your question or not. Does it?

Mr RAMSAY — In part. Joanna, do you want to say something?

Ms STANLEY — I do not believe there are going to be that many occasions where there are clear grounds for social effect that hold up the system, because I think the bill is designed to capture the rare occasion. I really do. If you read the rulings from the Supreme Court, it really was trying to decide if a council had erred in its way by not considering a large number of objectors when weighing up potential social effects. The ruling says, 'No. We do not think they were in error. However, there could be a case where it could have been an error'. We do not want to say there could not be a large number of objections that point to it, because there may be. We actually do not know what that social effect may be, because it is such a case-by-case basis of the proposals coming in. But I believe it is just not taking any chances, and it is allowing for that rare case where there will be a clear future impact to a community at large.

Its intention is there, that it wants to involve the broader community on a certain level, as opposed to what we generally see at VCAT and what we see in council chambers. It is really the adjoining neighbours who are the ones that the VCAT representatives and the lawyers and the barristers and the QCs listen to. It is really, 'You are living next door to this place, so we are going to make sure it does not overshadow you. If you are being overlooked, we're going to stick up some screens, don't worry about that. If you live two doors away, forget it'.

This is really a broad way of saying: how can the broader community be involved, and how are we going to give them a voice? I can see the intention of the bill, so in just going back to your question: it is really about how communities are dealing with changes in their neighbourhoods. Even so I do not think VCAT is going to put a lot of weight on people who, say, live in St Albans and who are objecting to something that is going on in Moonee Ponds, for instance. It is really about what the broad community thinks and feels and how it is going to change how they identify themselves within their communities. The bill has a great intention. However, it needs to be worked through a bit more.

The CHAIR — You think it is a bit of a hoax in that sense? It has the intention, but it just does not get there.

Ms STANLEY — Yes.

The CHAIR — Ann and Joanna, thank you. We very much appreciate your input. If there are further points you want to make, do not hesitate. The secretariat may want to talk to you about some of the bits as we go forward, but I am very thankful for you making your submission today.

Ms STANLEY — Before we go we have actually got a package of small submissions from the Boroondara Residents Action Group, which sent out an email and got about 10 back, so they wanted me to hand those to you, and we shall do that through Anthony.

The CHAIR — We appreciate that. Can you thank Jack and Mary for that.

Witnesses withdrew.

CORRECTED VERSION

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

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Research officer: Mr Anthony Walsh

Witnesses

Mr Gerald Leach (sworn), chair, land management committee,

Ms Emily Waters (affirmed), senior policy adviser, land management, and

Mr Michael Shaw (sworn), life member and past president, chicken meat group, Victorian Farmers Federation.

The CHAIR — I welcome Emily Waters, Gerald Leach and Mike Shaw. I ask you to make an opening submission, and then we will ask some questions. Gerald is the chair of the VFF land management committee.

Mr LEACH — Thank you, Chair, and committee members. I am a sheep and grains farmer from Walpeup in the Mallee. I am here today to make a submission on behalf of the VFF regarding the Planning and Environment Amendment (Recognising Objectors) Bill. I am joined by Mike Shaw, past president of the VFF chicken meat group and a chicken farmer, and also by Emily Waters, policy adviser for land management. I am going to present the VFF's submission, and Mike is here today if the committee wishes him to give evidence about how a chicken farmer deals with local planning issues when there are objections.

The first we knew of this bill was when it was introduced to the Legislative Assembly, so we appreciate the opportunity to comment further. I am the chairman of the land management committee of the VFF, which tackles a range of natural resource management issues from bushfire, invasive species management, mining and land use conflicts. Our committee is presented with a number of cases where farmers wishing to improve their productivity are subject to the stress and delays associated with planning. This is often despite compliance with the farming zone and relevant industry codes. The VFF represents a range of state commodity interests covering dairy, livestock, grains, horticulture, flowers, chicken meat, pigs and egg production.

While the state's population grows our agriculture sector is under increasing pressure to remain viable. Victoria contributes close to 30 per cent of the nation's agricultural exports and about 3 per cent of Australia's farming land. Farmers need to innovate, expand or intensify to remain competitive and meet the needs of both international and domestic markets. Victoria's agricultural sector depends on the availability of farming zoned land and a fair regulatory system to compete in a global market. There is increasing competition from sensitive non-agricultural uses for farming land, such as residential subdivision and tourism. Residential uses can be incompatible with agriculture when there is a lack of understanding of rural life and primary production.

The farming zone includes a purpose to ensure that non-agricultural uses, including dwellings, do not adversely affect the use of land for agriculture. However, from a free-range pig farm near Shepparton to a dairy farm near Foster significant hardship can be caused when an existing farm is subject to harsh community campaigning and opposition. Most activities in the farming zone do not require planning permission, as they are longstanding farms with existing use rights. However, intensive animal husbandry uses, such as new broiler farms and cattle feedlots, do require a planning permit.

The proposed bill will hurt agriculture. Uncertainty will be added to an already complicated planning system. It will increase the burden on rural councils and VCAT in assessing what is an appropriate objection to a farming operation. The proposal to consider the number of objections to measure social impact will undermine existing planning provisions. The purpose of the farming zone is to encourage the retention of agricultural land. Therefore farming practices should be supported, subject to compliance with well-established industry codes.

A planning permit for intensive agriculture is assessed against a relevant industry code, and adjoining landowners are consulted prior to a permit being issued. Economic and environmental considerations are made and are normally more relevant to farming than social impacts. These industry codes set standards that allow for the operation of an intensive farm or protecting the environment and amenity for people who live nearby. They set standards that cover odour, dust, noise and visual impacts. These codes are developed by government in consultation with industry and are consulted on with the community before forming part of planning schemes across the state. The local planning provisions reflect social issues relevant to a piece of land. That is the role of local planning schemes, zoning and overlay controls.

It would be unfair to rely on a farmer requiring a permit to assess the sentiment of the community towards farming. The VFF submits that the proposed bill will place a disproportionate regulatory burden on agriculture and will result in unintended consequences. The proposed bill will give more weight to ideological protest groups who can build numbers of objections in pro forma letters. The VFF believes it should not be the number of signatures on a petition that is important; instead the proponents and council should focus on the legitimate amenity concerns of adjoining landowners. Farming applicants have been subject to large numbers of objections despite being in relatively remote locations. These campaigns are often formed on ideological grounds rather than individual amenity concerns.

Public notification and providing opportunities to comment are important to fair decision-making. Planning should consider potential amenity impacts on adjoining landowners; however, there are opportunities to

improve the current public notice and third-party review system before this bill can be contemplated further. It is important that the community is educated on what activities are allowed to occur in a farming zone, as well as on the importance of maintaining the rural landscape and agricultural production.

Another reason we oppose the bill is that it will create uncertainty. The bill does not require decision-makers to consider the content of the objections, which may be resolvable or irrelevant. It relies on decision-makers to use their discretion in deciding what is appropriate. This discretion will add to the potential for dispute in the planning process. If this bill is entertained any further, please exempt agriculture — that is, the bill should exempt the planning zones that are designed to encourage agriculture, being the farming, rural activity and in some cases the green wedge zone. The Victorian planning provisions provide a degree of consistency in terms of what is required to operate a business in Victoria. Certainty is important for farmers when undertaking due diligence prior to expanding or upgrading business practices.

The VFF believes that local differences, such as different social considerations, should be reflected in planning policy and local planning provisions so that they are known up-front before proponents invest. The VFF calls on the government to consider alternatives to the proposed legislation. There are opportunities to improve the way local councils undertake public notification. Currently notification is at the discretion of council, resulting in differences in the extent of objections received. Some councils notify landowners 20 kilometres away who will not be directly affected by a proposal, and this can lead to irrelevant objections. Also, objectors could be better guided on what are relevant planning grounds. Affected parties should be encouraged to make recommendations if they want to suggest changes. Objections should be called ‘submissions’ to encourage participation rather than just opposition.

The VFF wants a comprehensive review before such a bill can be considered. The government needs to look at the existing planning system, in particular how public notification is given and how authorities decide what is an appropriate objection. We have zones and codes in place to regulate and facilitate our industry. If government wishes to improve the fairness of its planning framework, it needs to do this through public consultation. It needs to allow business and the community more time to consider such a significant change to the planning act.

The VFF has called on upper house MPs to oppose this bill in a letter dated 19 June. I have copies of this letter with me today. Thank you very much for your time, Chair, and we welcome any questions to us on this issue.

The CHAIR — Can I thank you, Gerald, for that submission? I think that is very enlightening. Essentially what I think you are calling for is a fairer regulatory system — and I am picking up some words you used. You do not believe this will be a fairer system. You believe there is a lack of understanding of agriculture in some quarters that means that objections are often not — I am paraphrasing here, in a sense. A lack of understanding of agriculture means that in a number of cases the objections are not relevant on planning grounds. You are very much saying that in certain areas of country Victoria there is increasing competition with other land uses and that this bill will impact negatively in those cases of increased competition?

Mr LEACH — Mr Chairman, I am delighted to note that you have picked up very well what we are saying, and I am encouraged by that.

The CHAIR — Let me just also understand the matters around the objection you have to the bill. Do you think that on some occasions it would give communities a greater say?

Mr LEACH — It depends. It might give communities a greater say, but whether or not the greater say is relevant is the issue. The issue is at what cost to productivity and agricultural business does that greater say occur, and is the greater say to the benefit of Victoria as a state. Obviously I am referring here to the impact on agriculture.

The CHAIR — The net benefit?

Mr LEACH — The net benefit. We already believe that Victorian agriculture is severely disadvantaged through some aspects of the planning process. I would very much like Mike to come in here and give us the example of what has happened to the broiler industry in Victoria relative to the nation and an example of the difference between Victorian planning laws and other states — with your permission, Chair.

Mr SHAW — Thanks for your time, Chair. Gerry asked me to come along and talk about some of the experiences that the broiler chicken industry has had in the past in relation to planning matters in Victoria. I guess it is fair to say that the chicken industry in Victoria has been under real pressure in terms of being able to expand the business and the contribution to the Victorian economy.

It currently provides about \$700 million worth of farm gate produce to the Victorian economy and employs about 10 000 people. If we go back 15 years, it was contributing about 28 per cent of the national production for chicken meat. Currently that has slipped to 20 per cent of the national production for chicken meat, so you can see that there has been a huge opportunity for economic growth lost to Victoria and jobs that have been lost to Victoria. A lot of that production has been taken up by South Australia and Queensland.

From a planning perspective, if I am a chicken farmer looking to start a new farm in South Australia, I can go through a planning process that would give me a planning approval in about a three-month time frame, and I can start establishing a chicken farm after that process. If I am in Victoria, I am looking regularly at a one-and-a-half to two-year time frame at best under the current arrangements. Clearly the bill, as it is envisaged, would necessarily add significantly to both the time frames and the level of uncertainty that is created around a proposal for a new farm.

The process for a new entrant into the broiler chicken industry at the moment, looking to establish a new or expand an existing farm, is that, firstly, you have to go and find a suitable block of land, which has suitable infrastructure available to it in terms of water and power and those types of things. Once you have found that block of land, you have to assess it against the relevant code, which is the broiler code, which is part of the planning scheme.

The CHAIR — On that, can I ask — and this is a point that has been, as it were, in my mind since I first read this bill — are there areas of inconsistency? For example, the broiler code has standing. There are established processes around the broiler code. Does this bill introduce an inconsistency with that current broiler code?

Mr SHAW — It does in that the broiler code deals with the issue of amenity and a number of other things that may have an impact on neighbours or the local community. Those things have all been dealt with exhaustively under the process that developed the broiler code in the first place. This adds an element of not necessarily getting to the merit of objection; it just gets to how many numbers — —

The CHAIR — It kind of adds a grenade almost in the middle of the broiler code.

Mr SHAW — It does. As a chicken farmer, I have been through the process a number of times where our family has established new farms. Before you start, you have to say, ‘Okay, I’m going to find a block of land. I’m going to put up a couple of million dollars to purchase that block of land and commit to a few hundred thousand dollars worth of planning process up-front’. I know that under the broiler code that — —

The CHAIR — Just on the cost, how does a small farmer deal with those planning costs?

Mr SHAW — It has got terribly difficult, to the point where small farmers cannot really justify that cost. The industry is being pushed more and more into the larger corporate type of farmers, because that sunk cost of planning is just enormous. The broiler code was put there for the whole purpose of giving the industry certainty. Basically if you comply with the broiler code, you should get your permit. But that has been overtaken by the fact that — in the 40 years I have been in the business, we have established six new broiler farms, starting from a 15 000-bird farm on 10 acres at Red Hill on the Mornington Peninsula to a 300 000-bird farm at Labertouche on 686 acres. But every time we have been to VCAT, and once you are in VCAT you are in the realms of significant cost implications, which are ongoing.

Part of my concern about this is that you are actually giving the community false hope so that, despite the fact that they may have no objections with any planning merit, they feel, ‘Okay, now we’ve got hope that we can take this to VCAT on the basis of the number of objections’, and create a huge amount of angst for the farmer, themselves and the community generally without any real hope that it is actually going to proceed in their favour, because they do not actually have any planning merit. I would have thought that the time, effort and money would be much better spent in sitting down and having a sensible dialogue, not necessarily about

whether this proposal proceeds or not but about what changes could be made to the proposal that would satisfy some of the concerns about what the objectors are feeling may impact on them.

The CHAIR — I am going to be very quick and finish with two very quick things. Do you think that this approach in the bill will lead to a decline in the activity in a number of areas, like the broiler industry?

Mr SHAW — Absolutely, necessarily. I get back to the uncertainty point that I got diverted from — the uncertainty of that. Not only do I have to go through that assessment, find a block of land, assess its merits, see that it meets all the requirements of the broiler code; I have now somehow got to try to assess what will be the level of public opposition to this particular proposal and what the merit of the public opposition is. That is another huge level of uncertainty that has been added to the process before I make the economic decision, ‘Yes, I want to invest’. As I said, if you are looking at these sort of semi-corporate farms, they will just not invest in Victoria. They would say, ‘It’s already too hard; you are just making it harder’.

The CHAIR — I have one further short question to Gerald, and that is — and I did not hear this clearly — you were arguing that instead of these being called ‘objections’ they should be called ‘considerations’ — —

Mr LEACH — ‘Submissions’ was the term I used.

The CHAIR — ‘Submissions’ was the word, and that would apply more generally under your proposal; is that what you are saying?

Mr LEACH — Yes, that is correct, Mr Chairman.

Ms HARTLAND — Thanks. That was a really good submission. I think you have clarified exactly how you feel about the bill. If I could take it, I suppose, a little outside of this bill and look at some of the things you might actually want to see in planning, having been on previous parliamentary committees where we looked at the right to farm and farming in the peri-urban areas, it has always been my contention that one of the things we actually need is proper buffer zones so that people who move into the country who do not know they are going to be living next to an active farm and do not know what that actually means will have that information before they purchase, whether it comes in a pack with their title or — are any of those the kinds of things you have actually considered? I suppose I am also asking: what are the things that government should look at about planning for farms rather than this?

Mr LEACH — Thank you. I think Emily is in a very good position to answer that question.

Ms HARTLAND — Fantastic.

Ms WATERS — Thank you. I think that it is a very good question, because we have to think strategically about how we can address some of these issues that the bill is trying to address. When we look at our planning system we see that there are opportunities in a strategic planning sense to ensure that we have those buffers and that we have, say, the higher density or the typical residential area or suburb filtering to the farming zone. Where we have the residential zone right up against the farming zone, that is often where we are getting reports from our members that there is that potential for the land use conflict. Also where we have legacy residential subdivisions that have created smaller lots in and around Port Fairy we have a lot of issues with managing the concerns of people who have bought a property that has existed for a very long time but it is a smaller subdivision, and it cannot be used for farming, or it is not used for farming.

Strategic planning is very important, as is giving councils the tools to manage these issues and educate residential areas about the importance of agricultural production and ensuring that strategic planning gets it right and creates those buffers so you do not have the residential, Fitzroy suburb right up against farming outside of Hamilton.

Ms HARTLAND — Yes, because I know from other parliamentary committees that people have moved to the country not aware of things like gas guns and netting of orchards and the fact that farms start very, very early in the morning, so I think it is a really important one. If we want good local food supply, we have to be able to manage that well.

Mr LEACH — If I could just add, through you, Mr Chairman, to Emily’s response, my recollection is that there used to be a section 32 certificate — I will stand corrected if I am wrong — that was required when people

moved into farming or rural activity zones. I am not sure exactly what the requirement was, but if they moved near farming areas, it was a requirement, as I understand it, that they be issued with this section 32 certificate or notice, which advised them of the sorts of issues that they would be confronted with in living next to farms so at least there was some preparedness for that. My recollection is that the requirement for that is now not there — that it has been withdrawn — so we do get that scenario where people move into a farming area for lifestyle purposes and find it is not quite the lifestyle that they had in mind. Some of us love the smell of animal manure, I might say. It smells like profit to me when I smell animal manure, but some people have a totally different attitude to it, sadly.

Ms WATERS — In section 32 statements, in the vendor statements, you do get the zone and the overlay, so you know that you are buying in a farming zone or a rural activity zone. What that actually means is that there is still a role for local council in educating their community on what that means.

Mr RAMSAY — Good to see you again, Gerry and Michael, and welcome, Emily. Thank you for your contribution. I thought David summed up your response well.

I just want to make a couple of comments in relation to the planning zones. To my mind this amendment would not be good for agriculture; in fact it would create a disincentive for further investment. I think Michael has already illustrated the difficulty that new investors wanting to invest in intensive farming would have if this amendment were passed. You are opening it up for a whole range of potential problems — objectors, minority groups, others who do not like the smell and farming generally. It might be in the face of a growth corridor. Farmers and agriculture do not need legislation that will encourage those to object in relation to the right-to-farm issues and the normal status of farming. I am pleased to see that you have been very forthright in your evidence this afternoon in suggesting that this bill would be a disincentive for further investment in agriculture, particularly intensive, and that it would have some detrimental effects on the current planning zones in the state of Victoria.

The issues I want to raise with you are in relation to councils, VCAT and the costs. I think Michael said that for a small business person or a farmer who has potential objectors to a planning permit, to go through local council, which is always very quick to handball to VCAT, it means that on many occasions that small business person or farmer will not want to pursue the legal recourse through VCAT, merely because of the costs associated with going to VCAT. I always remember some good advice to me was, ‘If you can settle before going to VCAT, do it’, because invariably the costs run so high through the process of VCAT that there are no winners. My concern would be that this particular amendment would almost force farmers and potential investors in farming to have to go through the VCAT process, which would come at a significant cost to them and agriculture generally.

So I see a whole lot of disincentives, with this amendment, to agriculture. There are enough problems associated with planning at the moment in Victoria. I remember that we had the flying squads, which tried to alleviate some of the timeliness issues in relation to planning decisions in applications put through council and VCAT. I am not sure if they are still going. As to the section 32 you referred to, if you remember, the previous minister for agriculture was trying to include in the section 32 issues around farming smells and other things that people might want to live next to. It never got there actually, so the section 32 does not include that, but it does give a background about, I guess, the geography and the enterprise itself.

Turning to the question, I know you have given some options in relation to submissions instead of objections, and I am not sure how that would travel in the Legislative Council. But other than allowing an amendment for objectors to be able to object to a planning permit or decision, how would you suggest that VCAT weigh community opinion or allow community opinion some engagement, which this bill is trying to do, towards proposed developments, without it compromising right-to-farm issues and investment in intensive farming and agriculture generally — to try to safeguard agriculture and its potential investments but also provide some community opinion in the decision-making process?

Mr LEACH — Thank you, Simon. I think the issue is not so much a matter of how would VCAT weigh that in relation to agriculture; the issue is should agriculture be placed in that position in the first place? I assume that the thought processes behind this proposed amendment are not related to planning issues in agricultural areas. If they are relevant and required in urban planning, then the obvious thing, as we propose, is that the zones that we mentioned that are agriculture related be excluded from it. The problem we have is that if this proceeded and VCAT or the local council had to consider the number of objections, or whatever else we might

want to call them, to it, then it would create that awful uncertainty that Mike spoke about, and we are already seeing a situation where Victorian agriculture in some respects, because of those planning requirements, is uncompetitive with agriculture in other states.

So there are two aspects to our competitiveness. There is the competitiveness of agriculture in Victoria. As a part of Australia as a nation, are we competitive with other states? If we are not, then we are going to be losing business, as we are in the broiler industry, to other states. Also, if we are imposing regulatory burdens — and when I say ‘regulatory burden’, just to have this extra process, if you like, in that planning requirement is a cost that is therefore a burden and it will make our agriculture less competitive with the nations that we compete with. We become less internationally competitive as well, which harms our exports. So it does not matter what process you put in place; it is the mere fact that it is there. If you look at the broiler and feedlot industries, they have already been through a community consultation process in developing the codes of practice.

Those codes of practice are developed with industry and the community. Government oversees those codes of practice, government can enforce them, so the consultation has already occurred. Do we want to then put another consultation process with the community into it? When we are saying ‘the community’, we spoke in our submission about ideological factors. We have seen where a proposed broiler farm was opposed on purely ideological grounds, simply because a number of objections were on the basis of the fact that they thought the chicken industry was cruel. Surely the fact that there is the code of practice there, which has gone through a community consultation stage, is all that is required in that instance.

Mr RAMSAY — Mike, why has the industry not tried to harmonise the buffer zones in relation to the broiler code between states?

Mr SHAW — Why aren’t they or why are they?

Mr RAMSAY — Why don’t they? In South Australia, as I understand it, they have smaller buffer zone requirements. The point being that a number of constituents have suggested to me that they are caught in the buffer zone trap, so you have five or six adjoining landholders and you have an intensive industry and the buffer zone actually includes those adjoining properties, where in South Australia it is less of a buffer zone. That is one of the planning issues, of adjoining land use.

Mr SHAW — I think the industry would love to, but that is a very difficult thing to achieve, to get all of the state governments to agree about anything really, but planning controls on — —

The CHAIR — And why should we on lots of issues? I am not sure we would want everything that South Australia or Queensland or New South Wales or Western Australia have on lots of areas. That is why we have our states.

Mr SHAW — Quite possibly. There has been quite a bit of discussion from the industry trying to get the relevant EPAs around the country to actually agree about how some of these things are determined and measured and what is appropriate, and they have not even been able to agree themselves as to what the best approach is, so I think harmonisation, whilst it would be in some ways aspirationally a good thing, is a very difficult thing to achieve.

The CHAIR — I think these things are case by case rather than always wanting to have the same system as another state. I thank the VFF for its submission, Mike, Gerald and Emily. I really appreciate the material that has been presented. The transcript will come back to you in the next period. Thank you indeed.

Witnesses withdrew.

CORRECTED VERSION

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

Mr Simon Ramsay

Ms Colleen Hartland

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.

