

## The Victorian Statutory Planning System: working for or against biodiversity?

Trevor Budge

Research Planning Design Group, Bendigo

### Abstract

The Victorian land use planning system provides the most comprehensive policy and administrative structure for the protection and management of biodiversity of any State in Australia. The effectiveness of its implementation in rural and regional Victoria largely relies on the actions, initiatives, procedures, attitudes and capacities of 45 separate local governments and their communities. The results to date, in terms of the protection and maintenance of biodiversity, is an uneven and inconsistent performance both in direction and outcome. In reality, the implementation of biodiversity policy and maintenance through Victoria's land use planning system needs a major overhaul before it can be relied upon as an effective and satisfactory approach. As in many other areas of land use policy, the current system displays a substantial gap between goals and rhetoric and the outcomes of the permit application process.

### Keywords

biodiversity conservation, legislation, land use, policy implementation

### The Victorian land use planning system

#### *An integrated approach to land use planning and environmental protection*

A cursory examination of the Victorian strategic and statutory land use planning system provides a strong basis for confidence that biodiversity will be comprehensively addressed and that decisions will achieve outcomes supportive of the maintenance of biodiversity. The framework provided at every level of the system assures the observer that it is a multilayer approach with a clear hierarchy to deliver on outcomes.

The basic structure of the Victorian planning system is provided by the *Planning and Environment Act 1987*. This Act provides the objective and administrative structure for planning in the state and has been in place for nearly 15 years. The Act is significantly a *Planning and Environment Act*; environment is an equal partner with land use planning in the conceptual underpinning. The Act contains clear objectives that embrace and seek to implement a consistent approach to the management of the state's environmental assets. The Act was a 1980s initiative that saw the state jump from a *Town and Country Planning Act* (the English tradition) to embracing the environment as a prime consideration in determining permit applications, and to the protection of the state's environmental and natural resource base as core elements of land use planning.

Unfortunately the concept of the environment as an equal partner was virtually 'lost' from day one of the new system. Land use planning was still in the hands of the same state government department and relied at that time upon over 200 local councils, many of which were still coming to grips with land use planning responsibilities let alone an environmental policy agenda. It must be remembered that, prior to the implementation of the 1987 Act, a number of councils in rural Victoria had no form of planning control and many others relied on very simple planning instruments that focused largely on issues such as managing minimum subdivision sizes. Embracing the idea of environmental outcomes was a long way from their

thinking. To this situation must be added the bureaucratic and ministerial manoeuvring at the time of the introduction of the 1987 Act that saw three core government functions, including public land management, effectively exempting themselves from the processes provided by the legislation — hardly a good start in terms of the all-embracing goals of the Act.

The overall goal of the Act was stated in the legislation, and still applies: ‘To establish a framework for planning the use, development and protection of land in Victoria and in the present and long-term interests of all Victorians’. Note the term ‘protection’. Objectives stated in the Act clearly support the pursuit of actions and outcomes that directly and indirectly support the maintenance of biodiversity. The objectives from the Act include ‘to provide for the fair, orderly, economic and sustainable use, and development of land’ and ‘to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity’. Further, the objectives of the planning framework established by the Planning and Environment Act include:

- to establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land
- to enable land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels
- to ensure that the effects on the environment are considered ...

The new Act made an important distinction between environmental considerations that were mandatory and economic and social considerations that relied upon demonstrating relevance to the application. The Act’s objectives, together with the framework objectives, are clear and unequivocal in respect to the environment, and certainly foreshadow recognition of biodiversity well before the term became as commonly used as it is now.

The second element of the Victorian planning system that inspires a strong belief that it can address biodiversity is that all planning schemes since the introduction of the Victoria Planning Provisions (VPP) over the last few years now include a framework of mandatory State Policies, set out in the State Planning Policy Framework. All decisions on permit applications must be consistent with those State Policies. Those State Policies are clear in respect to biodiversity. They include references to relevant national and state documents and they provide a clear strategy and policy base. It is a requirement in the administration of planning schemes that decisions on planning permit applications must deliver outcomes that are consistent with the State Policies. This approach is reinforced at the local level, where each planning scheme in Victoria must contain a Municipal Strategic Statement. Although this is a local construction it is common to find clear references to the support for and maintenance of a municipality’s biodiversity.

There has been some criticism of the straightjacket nature of the current Victorian planning system, but on the other hand the unique format (compared with other states) of a consistent set of zone and overlay provisions and standard administrative provisions provides for common approaches and interpretations. This is exemplified at the specific level of permit applications within the VPP, and therefore in every scheme, by the native vegetation clearance provisions. This is a common approach across the whole state that further reinforces the precautionary approach to biodiversity and provides a consistent framework within which the issue can be addressed. Ministerial Directions and Practice Notes (such as the recent Practice Note on Biodiversity issued by the Department of Infrastructure) add support to the consistency of the system.

The sum total of this strategy, objective and policy framework and the set of administrative processes should provide the basis for maintaining Victoria’s biodiversity where applications for planning permits are made, even despite the reliance upon numerous local Councils to implement the system.

The land use planning framework with respect to the maintenance of the state’s biodiversity is also supported by the Victorian Catchment and Land Management system established under

the *Catchment and Land Protection Act 1994*. The Act provides in its objectives for, ‘a framework for the integrated management and protection of catchments’ and a structure ‘to encourage community participation in the management of land and water resources’. Notice how these objectives in the Catchment and Land Protection Act complement those in the Planning and Environment Act. The CALP Act provides for Catchment Management Authorities (CMA) to:

- maintain and enhance long-term land productivity while also conserving the environment
- aim to ensure that the quality of the state’s land and water resources and their associated plant and animal life are maintained and enhanced
- establish processes that can be used to assess the condition of the state’s land and water resources and the effectiveness of land protection measures.

There is a clear link in the legislation between the work of CMAs and the land use planning system:

‘An Authority that prepares a regional catchment strategy may recommend to a planning authority under the *Planning and Environment Act 1987* amendments to a planning scheme to give effect to the strategy.’

and

‘Without limiting the *Environment Protection Act 1987*, a regional catchment strategy may be incorporated in a State environment protection policy, in whole or in part, and with or without changes.’

These are potentially powerful links, but I have not heard of them being exercised to date. In addition, CMAs can, under the CALP Act, initiate a Special Area Plan, which can require certain works to be undertaken. Under that requirement a landowner or group of landowners could (among other matters) be compelled to undertake the planting of specified vegetation effectively to ‘restore’ a habitat. Failure to do so would enable the CMA to undertake the work and recover the costs. Despite the existence of this capacity in the land use and land management framework, there are no Special Area Plans in the state, and the only attempt to implement one was stopped at departmental / ministerial level.

In summary, Victoria has a comprehensive legislative and policy framework for the protection and maintenance of biodiversity. When viewed at this overview level one could rightly have confidence and reasonably expect that the land use planning system can and will deliver on biodiversity protection and management. It is my observation that there is a failure to fully appreciate the scope and capacity of the legislation, and the potential and impact of what could be achieved is being lost.

### *Assessing the overall performance of the land use planning system with respect to environmental protection and bioersity conservation*

What is the reality across rural and regional Victoria, and for that matter also the fringe areas of metropolitan Melbourne, in terms of the pursuit and achievement of biodiversity conservation through the land use planning system? In my overall assessment, through observation of the actions of councils, as a result of conducting a number of training programs for councils and their staff and for officers of a number of departments, and from teaching students in planning courses (most of whom are working in local government) that the reality in terms of the pursuit and achievement of biodiversity outcomes can be best described as uneven and very patchy, and at worst as a broad-scale failure. Why do I make such a harsh observation?

Having described what in theory at least is a ‘Rolls Royce’ model of legislation, strategy and policy, it would be reasonable to expect that the system would be purring. What I actually hear is example after example of the failure of the system to deliver on these noble goals and objectives. The administration of the Victorian land use system is littered with landowners undertaking action that has been detrimental to the State’s environmental and biodiversity assets

and who have been treated with kid gloves. There are numerous Councils who simply fail to enforce their schemes and carry out their statutory requirements. Lack of staff is the pragmatic response but it really is a lack of will on behalf of the elected representatives. Few planning permits and the conditions that are part of them are ever monitored or enforced. Government agencies that are also part of this system principally the Department of Infrastructure and the Department of Sustainability and Environment, avoid conflict with landowners and largely take a soft line with the councils, who have a statutory obligation to administer the Act. What makes this situation more disappointing is that it has been 15 years since the Planning and Environment Act came into force. Secondly, and largely since the introduction of the VPP, we have had in place a strategy and policy framework unrivalled in Australia. Thirdly, the VPP has provided the statutory tools through vegetation clearance controls and zone and overlay provisions to equip any municipality wishing to support the retention of its biodiversity assets.

As a general observation, the application of biodiversity objectives in the consideration of planning permit applications or in rezoning proposals is a hit-and-miss affair. It is generally a low-level priority in most councils; it depends on the skills, knowledge and available information; it is subject to political and private pressure; advice from departments is inconsistent and lacks strength and conviction; and outcomes are hardly ever monitored. Let's look a little deeper at the cause of this situation.

The land use planning system relies on 45 separate local government entities in rural and regional Victoria — the land use planning system in Australia is not provided for in the Australian Constitution, it is a state responsibility, and state legislation has delegated land use planning to a local government function. The quality of decision-making depends on how those council's resource and approach that function. While the mid 1990s restructure of local government helped to consolidate planning functions, the emphasis on output to the detriment of quality of decision-making sacrificed much. More planners were needed, to cope with the need for planners to administer more complex schemes and the community's demands for more say in planning. This was to the detriment of a supply of skilled and experienced planners in rural and regional areas. Most planners had been trained and educated on the basis of an urban agenda of issues. There has been a distinct lack of knowledge of what the rural and regional issues have been. By and large planners are still trained as urban land use planners, and there is little knowledge of the environmental systems and agendas that underpin issues such as biodiversity. The shortage of planners and the difficulty of attracting and retaining planners are well known. In my assessment of the 45 local governments in rural and regional Victoria, eight did not have a qualified planner and either had given up trying to attract a qualified person or did not see the need for one. Most rural councils have had enormous difficulty in attracting and retaining planners and are simply not prepared to pay the salaries needed to attract suitable staff.

Even if councils had the planning staff resources that they need and those staff had the knowledge and expertise on issues such as biodiversity, the system relies largely upon the elected representatives for decisions. Most councils in rural Victoria do not delegate decision-making, at least in relation to refusals; that is considered to be a council decision. An understanding of biodiversity issues is limited among most councillors. Lets face it: understandably, it is not high on the agenda. After a brief period of administrators during the 1990s restructure, elected representatives on the whole have drifted away from the principle that they set policy and direction. The parochialism of local government is still strong and firmly in place in many councils. Local government in rural and regional Victoria is still structured and has a culture that favours the election of older men who have strong ties to the traditional values of their local community. Let me illustrate this. I was one of three Panel members who considered over 400 submissions during a 24-day hearing at locations around Victoria following the introduction of the Native Vegetation Clearance Controls into the Victorian planning system in the early 1990s. There are many observations I could make but let me recount two that are still highly relevant today.

Firstly, many persons who opposed the controls and even some who supported them saw the controls as tree clearance controls. They spoke of their affinity with trees and that they had over the years planted numerous trees. In the same presentation they frequently referred to any

other vegetation as 'the scrub', or worse still, 'the rubbish'. There were few, among the many of those who presented, who had any acceptance or realisation of the importance of the whole complexity of a vegetation system. Unfortunately, part of that attitude was derived from the view that trees are a resource, a product to be managed and exploited, and that the rest simply got in the way. As a community there is still little appreciation of the vital importance of the understorey. At worst we see that attitude and lack of knowledge when vegetated areas are used for residential development. The understorey is cleared across each lot and the trees are left. The area is then marketed as living in an environmental area.

The second attitude, which emerged in those native vegetation clearance hearings, relates to intergenerational change. Frequently the Panel heard from two generations in the one family. The older generation spoke first; the halcyon days of ringbarking were lovingly remembered, when there were tax deductions for vegetation clearance. Tree clearing controls were an anathema to a way of life. Then the next generation spoke at the hearing. There was no comment on what had just been said, but the story was recounted that the family was now a supporter of Landcare, that the family could proudly say that in the last decade they had planted thousands of trees. What we were observing was simply a more enlightened generation trying to wrest control from the former. That process is still working its way through local government in much of rural and regional Victoria. Much of what we still see in local government attitudes and approaches mirrors that situation I observed a decade ago.

Even though the land use planning system pursues noble goals and objectives, the pursuit of biodiversity objectives through a planning scheme can only really be undertaken by two measures:

- refusing applications that would reduce the depth and extent of an area's biodiversity
- providing for conditions on planning permits that protect and better manage biodiversity assets.

Both of these powers rely upon a landowner or proponent putting forward a land use change or development that will adversely affect biodiversity. Mere inclusion of strong local strategies and policies in the planning scheme through the State and Local Planning Policy Framework will not in itself deter such applications or ensure the retention of biodiversity.

Planners in rural Councils often find that they are seen both within and outside council as 'holding up development'. Ironically the planner is invariably only applying the procedures set out by the Act and the accompanying Regulations. This is frequently seen as being obstructionist. Calls for further information (because of the gross inadequacy of what has been supplied with a planning permit application) are often regarded as pedantic and bureaucratic. The implementation of the application notice requirements of the Act is seen as excessive and only inviting objections. The climate understandably in many rural areas, particularly those with population decline, loss of jobs and uncertain commodity returns, is openly dominated by an agenda of a presumption for development. There is the factor of 'a tyranny of small decisions'. In the whole scheme of things what is another paddock with a few trees or an area that is 'only scrub?' In many instances a planner will have great difficulty arguing the case against vegetation clearing or the impact of a land use on a vegetated area, when someone is proposing a land use change or new development that has an outcome of more jobs and new investment.

Vegetation removal and habitat loss are not necessarily a prime factor in the consideration of many proposals. Planners in many rural councils are heavily reliant on local community support when it comes to conservation issues. Unequivocal support from the Department of Sustainability and Environment and where relevant the Catchment Management Authority is usually critical. This means the department must be prepared to provide documented evidence and to run the case at the Victorian Council and Administrative Tribunal. It is a level of support I frequently hear local government planners complaining that they have not received. When vegetation is illegally cleared the onus is clearly on the council to take action. I hear often that the planner is the metaphorical 'meat in the sandwich' between departments urging action and a council reluctant to prosecute a member of its own community.

The Practice Note approach by the Department of Infrastructure is a very useful and supportive method of assisting councils, planners and the community to implement and interpret key elements of policy and provisions. The Biodiversity Practice Note released in May 2002 is a welcome addition to the suite of Notes. While commending the preparation of this Practice Note, I make three pragmatic observations. First, it has taken 14 years since the introduction of the *Planning and Environment Act* in early 1988 to provide a definitive guide to biodiversity, despite it being one of the core elements in the 1987 Act objectives. Second, while the Practice Note is well prepared and user-friendly it is largely passive. It frequently treats biodiversity as an optional extra for local government (which is largely the way councils have been operating) when undertaking planning. Take for example this statement in the Practice Note: ‘In implementing environmental and biodiversity objectives in the SPPF, planning schemes *should* [author emphasis] include objectives for biodiversity in the MSS.’ The third observation is that, as with the introduction of most Practice Notes, there is a flurry of activity and workshops to explain the Note and then the system largely settles back to where it was before.

### **A coordinated approach to biodiversity retention through the Victorian land use planning system**

#### *Changing the culture and practice*

The theme of this paper has been that the rhetoric is a long way from the reality, that the system is pervaded by a culture that works against the achievement of goals like biodiversity, and that there is reluctance by anyone in authority to redress this situation. The tenor of the paper is that, unless we tackle the culture and practice that pervades the system, we will see more of the same — a progressive loss and diminution of a precious resource. I have argued that in essence we do not need more legislation: the framework exists. We need people and governments at all levels who are inspired and have the resolve to make it work. There is simply no point any more in looking any further than ourselves for the problem. If we want to achieve biodiversity outcomes, we have to stop turning a blind eye to what we see going on. Specifically, I believe we need six actions:

- 1 The State Planning Policy Framework needs to be strengthened to make it absolutely clear that the retention of biodiversity cannot be compromised.
- 2 Every Municipal Strategic Statement in every local planning scheme, including the metropolitan area, must include a clear and unequivocal statement about the retention of biodiversity.
- 3 Each local council must be supplied with the best possible information about its biodiversity assets, and that information must be updated regularly and referenced in each planning scheme. Local policies and the application of overlays in each planning scheme must reflect that information.
- 4 Planners and other relevant council officers, and councillors, must be trained and educated in what we are dealing with in terms of the significance of the state’s biodiversity assets. That training and education must extend to the training of planners undertaking their studies.
- 5 State government departments and agencies must embrace and implement their legislative responsibilities with respect to biodiversity and the state’s land use planning system. They must take on a wider community education role, and at the same time support local government with prosecutions and enforcement and support local councils at tribunal hearings in relation to vegetation clearance applications.
- 6 There needs to be a system of positive incentives that facilitate biodiversity retention when land use change and new development is proposed.

Too often in recent years we have taken action only on the last of these initiatives — the incentives — and ignored the need for the total package. Over the last 25 years two forces can be observed in the Victorian land use planning system with respect to biodiversity. The overall system has progressively equipped itself with every tool available to achieve the desired outcome, while at the same time the practice and implementation has progressively lost

opportunities because of an increasing reluctance by any individual or organisation in authority to take a stand on specific issues. The constant talk is of strategy and policy at the big picture level, while the brush strokes on the painting are dissolving before our eyes. We need to make a stand as individuals, as departments and as local councils and admit that we are watching the slow loss of a resource because we will not change our practices, and that compromise is easier than principle.