



Modernising Victoria's Planning Act

*Submission by Pacific Hydro Pty Ltd
(6 May 2009)*

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Recommendations

This submission focuses on the adaptations needed to State Planning legislation and related statutes to better accommodate environmental enterprises aimed at combating climate change, especially through the generation of electricity from renewable sources, particularly wind.

Wind Energy Facilities are complex and unique projects; typically they are large in extent with a very small footprint. Flexibility is needed in the design stages to properly address the many interrelated environmental, heritage and community interests and impacts.

This submission highlights and endorses the need for:

- Climate change mitigation to be included in the objectives of planning in Victoria;
- Separate legislation to be introduced for State-significant projects;
- Definition of secondary (and potentially subsequent consents) beyond the initial planning permit (for complex or unique projects);
- Coordination and adaptation of the Planning and Environment Act 1987 and the Aboriginal Heritage Act 2006 in relation to the staging of statutory authorisations; to better reflect the design process of major projects (such as Wind Energy Facilities) and the timing of consents;
- Conditions on permits to be subject to tests of fairness, demonstrated impact, enforceability and clear linkage to the proposed land use;
- Continued involvement of the Minister for Planning in relation to the Wind Energy Facilities Approval process rather than the creation of a new role for the Development Assessment Committee;
- Change of the term "objection" to the term "submission";
- Submissions (or objections) to be considered on their planning merits i.e. their relevance to the planning scheme or other relevant policies or legislation and if applicable the submitter should also show how they might be affected by a proposal; and
- Allow responsible authorities to amend a permit without notifying referral authorities that are not impacted by the proposed amendment.

1. Introduction

One of the important changes since 1987 (not mentioned in s3.3 of the Discussion Paper) is that Victoria has substantially modified electricity production and distribution:

- Generation, transmission, distribution and retailing of electricity have been privatised.
- State involvement is now focussed through regulatory functions, largely implemented through the National Electricity Market (NEM).
- Generation from renewable sources is encouraged.
- Perhaps the most important drivers are in relation to renewable energy and the need to reduce reliance on fossil fuels and to mitigate climate change.

The spatial structure of energy production is changing, providing a role for planning legislation and the regulation of use and development through planning schemes:

- Most new private generation is small, embedded and dispersed, not large and centralised (as in Latrobe Valley).
- New generators are required to pay all or most of the costs of grid connection or augmentation (previously covered in the average cost pricing structure of power bills); although limited support is available and some connections may qualify as regulated assets.

The comments that follow relate to Wind Energy Facilities

Some important changes have been made to *planning schemes* through the *Victoria Planning Provisions* to accommodate and encourage private sector generation projects based on wind energy that are carefully designed and that mitigate their environmental and community impacts:

- Wind Energy Facility is defined;¹
- Application requirements and decision guidelines for Wind Energy Facilities are included; and
- Policy and planning guidelines for development of wind energy facilities (PPG) have been approved, and amended as at May 2003.

¹ While the definition of Wind Energy Facility is flawed (by the specific exclusion of anemometers which are a necessary permanent components of a wind farm), this can (and should) be corrected through an amendment to the Victoria Planning Provisions.

2. Are the Objectives of planning in Victoria Still Relevant?(DP 4, p15)

The Discussion paper asks if any specific Reference to issues such as climate change should be included within Section 4 (1) of the Act.

Pacific Hydro strongly supports climate change being included in the objectives for planning. While by one view the existing s4 (1) (b) could be interpreted to embrace climate change mitigation, the enormity of the challenge warrants specific reference. It is important that all industries and developers seeking to establish projects addressing greenhouse gas emissions abatement can refer to such a reference in the objectives for planning.

3. The Permit Process (DP Section 6)

The issuing of the "Planning permit" is seen by many planners as the end point in the permit process. (Refer to process diagram in DP Cl. 6.1). Yet for developers of Wind Energy Facilities (and other complex large infrastructure projects) it is really only the *first step* of a continuing process to demonstrate compliance that applies throughout the life of the project and beyond (decommissioning).

Planning permits for Wind Energy Facilities typically involve three (3) subsequent approval stages in practice: The initial '*permit*' is issued with conditions, which *always* require submission of additional documents and plans for endorsement *to the satisfaction* of the Minister for Planning:

- Before construction may commence;
- Before operations may commence; and
- Before decommissioning commences, following the cessation of generation.

The *Planning Permit* for a Wind Energy Facility (and probably most other complex projects) is really just an approval to plan! It gives a proponent the approval and necessary commercial certainty to undertake detailed design² and intensive surveys to satisfy the many conditions and to prepare environmental management plans in consultation with other agencies. Even though the permit 'approves' the use and development of land for a Wind Energy Facility, no buildings or works are permitted *other than for investigations needed to satisfy the conditions*. Construction may not commence until documents and plans (to the Minister's satisfaction) are approved.

² The detailed design stage must necessarily follow the Planning Approval stage as granting of the permit allows the company the commercial security to commit significant project funds to areas such as turbine selection. Only after the turbine model has been selected (through a competitive tender process) can the final siting of the turbines occur (every turbine model will have slightly different siting criteria). At this stage geotechnical investigations will commence to ensure the turbine locations are technically feasible and the design of the cable trenches, access tracks and substation can also be finalised.

The approval to construct is a significant milestone. In the case of Wind Energy Facilities the demonstration of compliances prior to construction commencement can take as long as or even longer than the initial permit approval. Yet this secondary stage is not formally recognised in the Act or Regulations. For convenience it is called '*Development Approval*' or '*Construction Approval*' in Pacific Hydro's office to clearly distinguish this event from the initial planning permit.

For Wind Energy Facilities, further conditions often apply to the commencement of operations. The approval of further documents required to the satisfaction of the Minister is, for convenience referred to as '*Operational Approval*', or '*Approval to Operate*'.

The requirement for approval of a Decommissioning Management Plan prior to decommissioning is loosely referred to as '*Decommissioning Approval*' (for which there are no examples yet!)

The fact that none of the subsequent stages (requiring endorsements by the Minister for Planning) are recognised in the *Planning and Environment Act 1987* leads to misunderstandings in the community and even in referral authorities and government agencies.

The Discussion Paper acknowledges 'secondary consents' and raises the issue for comment in relation to amending permits (DP 6.8). Pacific Hydro's submission accepts that *secondary consents are the norm* for many large projects (including Wind Energy Facilities), and supports their definition within the Act.

3.1. When is this a problem?

Problems may arise (and have arisen) under Victorian legislation where there is an intention to ensure seamless processes or cross-referencing of Acts and Regulations. Other legislators and regulators see the permit as a unitary event, when in practice the legislation or regulations contemplated by the other party *may not need to be applied until a 'secondary' (or even more remote) approval stage*. Without some additional milestones being recognised (i.e. *secondary consents*) within the on-going approval process the default is to require actions prior to the *planning permit* being issued (e.g. Aboriginal cultural heritage case below).

3.1.1. Aboriginal Heritage Act 2006 (DPCD) (DP section 10.5)

The Aboriginal Heritage Act (AHA) introduced new requirements and standards for assessment, reporting and mapping that demonstrate avoidance of harm to Aboriginal cultural heritage (ACH). Stringent requirements and high standards for the preparation of a Cultural Heritage Management Plan (CHMP) *presuppose* that detailed design has already been completed by the proponent for the CHMP to be assessed and approved.³

For the purposes of this Review the problem arises because under AHA s52 a decision maker must not grant a statutory authorisation for the activity unless a cultural heritage management plan is approved.⁴

In terms of the planning objective (PEA s4 (1)(a) to provide a *fair and orderly* planning process for use and development of land, this one 'puts the cart before the horse'! A proponent relies on the initial (first stage) *Planning permit* to commit the considerable funds needed to undertake detailed design. Contrary to this the standards and process in the AHA and *Aboriginal Heritage Regulations 2007* (AHR) effectively *assume that the detailed design has been completed* before the CHMP can be approved, but blocks the Minister for Planning from giving the very approval that is needed to facilitate detailed design⁵.

In addition, in the *absence* of a permit with conditions, *none of the many other* detailed design and management plans for the project can be progressed. This 'road block' is causing flow-on consequences that will hold up *Development approval* (and therefore construction) for at least three and maybe four years. This process does not therefore meet the objectives (PEAs4(1)(a) as it is neither fair, nor orderly, and is inconsistent with other policies of government to support renewable energy projects, including Wind Energy Facilities.

Perhaps an easy option for removing this impediment to efficient process, without losing *the intent and primacy* implicit in the Aboriginal Heritage Act and Regulations is to:

- Amend the PEA 1987 to recognise the secondary consent stage(s) of planning permits for specified classes of projects; and
- Seek to amend the AHA 2006 (s52) constraint on statutory authorisation of Cultural Heritage Management Plans to relate to the *secondary consent stage* for specified classes of projects.⁶

³ One needs to refer to the Act, Regulations, Approved Form and Guidelines to prepare a compliant CHMP. Early experience indicates that getting it right first time is almost impossible.

⁴ Statutory authorisation includes (*inter alia*) a permit under the Planning and Environment Act 1987 to use or develop land for all or part of an activity. (AHA s50)

⁵ The example is given of one wind farm project for which Ministerial approval has been delayed for over 15 months due to the difficulty imposed by the new ACH legislation (implemented to the letter within Aboriginal Affairs Victoria).

⁶ Although not within the scope of this review, for a Wind Energy Facility Aboriginal cultural heritage should be investigated using Desktop and Standard survey techniques and any additional cultural heritage sites identified during this process submitted for Registration prior to the hearings by the Minister for Planning's Panel. Aboriginal Affairs Victoria (DPCD) and the...(cont..pg 6

N.B. In the AHA this should only require a change to the definition of 'statutory authorisation' at s50. No change appears to be needed to s52 itself.

This action would enable the initial planning permit to be issued for the use and development of land, in turn facilitating the detailed design and bringing the assessment of the CHMP into a *parallel process* with all the other regulated objectives and management plans needed for a well-designed wind energy facility to be *approved for construction*.

3.1.2. Victoria's Native Vegetation Management Framework (DSE)

Approvals to remove native vegetation in compliance with *Victoria's Native Vegetation Management: A Framework for Action* (1992) illustrate a three-step sequence from statutory approval (planning permit) and subsequent consents before construction, then prior to operations.

- *Planning permit:* Approval to remove specified native vegetation subject to an approved Vegetation Management Plan (elaborated conditions included);
- *Construction consent:* Approval of the Vegetation Management Plan, and the losses assessed under the Framework for the final design of the works footprint; and requiring approval of an Offset Management Plan; and
- *Operations consent:* Approval of the Offset Management Plan (with implementation commenced).

This three-step process is in line with the project development process and as such further supports the need for formal recognition of the secondary approval stage within the PEA in order to facilitate the definition of the secondary consent and subsequent consent stages may facilitate more orderly assessment and planning for complex projects.

....from pg 5) Registered Aboriginal Party *should be submitters to the Panel process* if there is a *prima facie* case that any part of the project (or all of it) will be unable to avoid harming Aboriginal cultural heritage and that such harm cannot be acceptably minimised or mitigated. The detailed requirements for CHMP approval in accordance with the AHA and AHR can then be finalised and endorsed prior to *construction*.

4. Conditions (on permits) (DP 6.7, p25)

Pacific Hydro has several concerns about conditions on permits for Wind Energy Facilities that tie back to the PEA and as raised in the Discussion paper.

All planning conditions should be subject to a test to ensure that they are (for example) fair, relevant, practical, enforceable and have a clear linkage to the proposed land use / development. This will in turn limit the likelihood of a proponent appealing a condition.

Conditions that can be applied in planning permits under s62 provide excessive scope for obligations to be placed on the applicant to address matters that have no clear link to the Wind Farm Development itself, or its specific impacts. For example, under s62 (1) (a) the responsible authority must include any condition which the planning scheme or a relevant referral authority requires to be included. As this statement is unqualified, a condition by a referral authority may relate to any impacts or any land relevant to the referral authority's own purposes, and is not limited to the area affected by the use and development. All conditions suggested by the referral authority should also have to pass the test outlined above.

It is therefore recommended that PEA s62 should be amended to require that any condition (including those required by a referral authority) must have a clear and reasonable nexus to the development and be subject to a defined test.

4.1. Conditions on Wind Energy Facilities requiring the payment of money

The issue of requiring proponents to pay money for the management or mitigation of environmental issues needs to be addressed in the PEA review (DP Section 6.7). Examples of such conditions that have been issued are briefly described below with further detail provided at Appendix A. These examples specifically refer to two conditions which required the proponent to make an annual monetary contribution towards on-going (off-site) projects.

In the case of the Oaklands Hill Wind Energy Facility permit (2007/0370) conditions were included that required the operator to:

Clause 32: ...contribute \$10,000 annually (CPI indexed) towards salinity remediation works in the sub catchments containing the project site throughout the life of the project. This contribution may be discontinued earlier if the current salinity problems in the sub catchments are resolved to the satisfaction of the Glenelg Hopkins Catchment Management Authority.

Clause 33: ...make an annual contribution of \$10,000, throughout the life of the project, to a program to restore and improve wetland habitat suitable for Brolga. The contribution to this program may be discontinued if the monitoring program required by Condition 13⁷ demonstrates that Brolga strike by turbines is not occurring.

Conditions 32 and 33 above may be open to legal challenge on the grounds that they do not comply with PEA s62 (5) and (6) unless one or both rely upon:

- A requirement from a referral authority (s62 (1) (a) and (6) (c));
- The generic power that a responsible authority may include any other condition that it thinks fit (s62 (2)); or
- Unless offered by the applicant or negotiated as 'desirable' before the granting of the permit in accordance with s62 (5) (b); or imposed as 'necessary' under s62 (5) (c). [In relation to this option the conditions could be challenged on the grounds that the works are insufficiently 'specified'.]

Pacific Hydro opposes the use of planning permit conditions (along the lines quoted above) that intend to oblige specific monetary contributions for addressing pre-existing problems of land management (soil erosion and salinity) or habitat loss (ostensibly to compensate for potential Brolga deaths from collisions with turbines). It is not, in our view, an appropriate use of permit conditions to oblige the applicant to subsidise a referral authority, landowner or other stakeholder for the costs of mitigation that has no direct causal link with the proposed development. With reference to the proposed test outlined above such a condition would be tested prior to issue to ensure it accords with the planning requirements.

4.2. Recommendations

Pacific Hydro requests that the permissible conditions on permits, including those that might be 'required' (requested) by a referral authority for environmental outcomes from Wind Energy Facilities, be subject to a defined test. Any conditions requiring monetary contributions would also require to be subject to this test.

It is therefore recommended that all conditions be *subject to validity criteria* but not limited to (for example):

- Conditions (including those required by a referral authority) must have a clear and reasonable nexus to the development;
- Monetary contribution must be demonstrably based on observational evidence that the project will cause the impact for which the monetary contribution is sought; and
- The monetary contribution and amount is considered for relevance and effectiveness within a framework of other programmatic measures aimed at addressing the same issue in the district and elsewhere.⁸

⁷ Condition 13 - Bat and Avifauna Management Plan.

5. (Wind Energy Facilities as) State Significant Projects (DP s8)

The automatic call-in of all Wind Energy Facility exceeding 30MW capacity for decision by the Minister for Planning as responsible authority (PPG, Section 4) should qualify the project as a State-significant project. This is implied, but not made explicit in the Planning Policy Guidelines document.

5.1. Decisions on significant projects (DP s8.1)

The Discussion Paper asks: *If a proposal is of State significance, does it mean that it must always be decided by the Minister? Could specified types of proposals (such as wind farms over 30 MW) more effectively be decided by Development Assessment Committee (DP p38).*

Pacific Hydro does not support the introduction of a Development Assessment Committee (DAC) to assess Wind Energy Facilities. It is understood that a DAC would comprise of one independent chair, two State Government representatives and two local Government representatives. It is submitted that this approach will not align the assessment of the proposed development at the level of Government consistent with the proposal's scope, complexity and impact on numerous significant State Government policies. It is queried whether a DAC will have the experience and expertise of a Planning Panel.

Furthermore, it is understood DACs will make a decision, effectively as the responsible authority, that could then be appealed to VCAT. It is submitted that this process on average will result in a more time consuming planning process than the current process for wind farms of over 30MW.

5.2. Assessment process options: (DP s8.2)

The '*Impact assessment track*' cited as a possible approach for State-significant projects may be appropriate for the assessment of Wind Energy Facilities. This view is contingent on confirmations:

- That the *pre-set criteria for content and quality standards* are (essentially) those already embodied in the *PPG document* (reviewed if necessary); and
- That the *expert assessment panel* is not equivalent to the role envisaged for the *Development Assessment Committee* and is equivalent to (and replaces) the *Minister's Panel* (i.e. the Minister still determines the application).

⁸ It is unreasonable to ask a Wind Energy Facility to put money into managing an environmental problem within an area if (for example, in the case of soil erosion or salinity) insufficient resources are allocated to combating its primary causes in the district or sub-catchment.

5.3. Separate legislation for State-significant projects

Pacific Hydro strongly supports the concept of developing separate legislation for planning projects of State significance. This legislation should specifically include Wind Energy Facilities for reasons of their unique characteristics, complexity and support of leading-edge Government policies and assessment at the level of Government that aligns with the potential impact or scope of the proposal itself. Alongside local impacts, definition and separate legislation for State significant projects will ensure due consideration of bigger picture matters such as employment, sustainable development, renewable energy, energy diversity and security, and climate change mitigation / greenhouse gas emissions abatement.

This legislation, if carefully crafted, could address a number of the issues of co-ordination not adequately dealt with under the 'clumsy' existing planning processes. The examples raised above include:

Coordination across jurisdictions, agencies and legislation:

- To eliminate the need for multiple applications where proposals cross municipal boundaries;
- For Aboriginal cultural heritage management plans (CHMPs), to be approved prior to a *statutory authorisation for construction*;
- Ensuring native vegetation offset plan approvals are implemented in accordance with the Native Vegetation Management Framework (e.g. implemented within 12 months of the losses); and
- Avoiding duplication of assessment for other State approvals (e.g. EES; PEA).

Resolving incompatibilities within existing planning legislation and planning schemes:

- Defining legitimate conditions on permit (including requirements from referral authorities) demonstrating a clear nexus between the project and the impact (test), with additional criteria to be applied for monetary contributions.
- Recognition of multi-stage approvals and compliance obligations that apply throughout the life of a project and its decommissioning.

It would be important that any specific purpose legislation for State-significant projects ensures that applications made under that legislation are *exempt* from any requirement for separate assessment under the *Planning and Environment Act 1987* and the relevant Planning Scheme(s). For clarity, the *Planning and Environment Act 1987* should also specify this exemption.

While there should be a clear and formal consultation process and careful consideration of relevant objections and identification of appropriate impact mitigation measures, there should be no appeal rights to VCAT against the merits of the Minister's decision (rights to seek review on legal grounds, however, should be retained for integrity of process, relevant considerations and natural justice).

6. Other Matters

- Pacific Hydro supports the change of the term "objection" to the term "submission". Pacific Hydro also supports that an objector is required to provide more specific information about how they might be affected by a proposal. Whilst not affecting any person's right to make a submission this requirement may discourage frivolous objections, that distract from matters of substance, from parties that will suffer negligible or no impact. (DP S6.4)
- Pacific Hydro supports empowering responsible authorities to amend a permit without notifying referral authorities that are not impacted by the proposed amendment (DP S6.7)

APPENDIX A

Examples of Conditions Requiring Monetary Contributions

In the case of the Oaklands Hill Wind Energy Facility permit (2007/0370) conditions were included that required the operator to:

Clause 32: ...contribute \$10,000 annually (CPI indexed) towards salinity remediation works in the sub catchments containing the project site throughout the life of the project. This contribution may be discontinued earlier if the current salinity problems in the sub catchments are resolved to the satisfaction of the Glenelg Hopkins Catchment Management Authority.

Clause 33: ...make an annual contribution of \$10,000, throughout the life of the project, to a program to restore and improve wetland habitat suitable for Brolga. The contribution to this program may be discontinued if the monitoring program required by Condition 13⁹ demonstrates that Brolga strike by turbines is not occurring.

Soil erosion and salinity

In the case of soil erosion and salinity, a condition is *justifiably* placed to require a *sediment, erosion and water quality management plan* for the use and development that *avoids exacerbating an existing problem*, and by mitigating risks and impacts of erosion and salinity *that may arise from the construction and operation (and decommissioning) stages*. However, since these are covered by the subject management plan, no specified amount of money should be set in conditions for works that cannot be specified in advance for erosion or salinity arising from the activity itself. Again any such condition should be subject to the test.

Offset for Brolga fatalities

In the case of the anticipated problem of Brolga collisions with turbines, this possible impact is not yet supported by any evidence-based findings. A Research Project is currently under way, funded by the (Commonwealth) Department of the Environment, Water, Heritage and the Arts, DSE and Wind Industry developers through the Clean Energy Council. Until the findings can be assessed as to the level and significance of the impact, it is unreasonable, even on a precautionary

⁹ Condition 13 - Bat and Avifauna Management Plan.

basis, to apply a condition requiring an annual monetary contribution for the restoration and improvement of wetland habitat.

It is not questioned that the population of Brolga is in long-term decline¹⁰. However, the plight of this iconic species arises from a range of pressures, especially habitat loss due to the draining of wetlands, drought conditions and the predation of chicks prior to fledging. The current low population owes nothing to the presence or impact of wind farms. Unless the primary causes of decline are properly resourced and addressed any ad hoc attempts to force a Wind Energy Facility applicant to pay for habitat restoration to address a problem not of its making, and with no demonstrated evidence of impact, is not only unreasonable, but almost certainly doomed to fail.

¹⁰ DSE (2003) Brolga Action Statement, No. 119, issued under the *Flora and Fauna Guarantee Act 1998*