

# VICTORIA'S WINDOW DRESSING: HOW THE ENVIRONMENT EFFECTS ACT 1978 FAILED AT BASTION POINT

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*Abstract:* In 1978, Victoria's Parliament enacted the Environment Effects Act 1978 ("EEA"), creating procedures by which the state could call for environmental impact assessments prior to beginning work on proposed construction projects. The EEA, however, is significantly flawed, in that it authorizes the Planning Minister, an elected official, the power not only to promulgate guidelines for the administration of the environmental assessment process, but also the power to determine whether the environmental effects of a project are outweighed by the economic or social benefits of the project's completion. A case study involving Bastion Point offers a prime example of the effect outside political interests may play in subverting the protection of the environment. With Bastion Point, the Planning Minister's approval of a contentious construction proposal led a community group to sue the Planning Minister in Victoria's Supreme Court, asserting he failed to adequately weigh the environmental effects of the proposed project under the Environment Effects Act 1978. The community group lost at the Supreme Court, but their case demonstrated the shortcomings of the EEA and the unreasonably high levels of discretion the Planning Minister enjoys. This comment argues that four changes should be made to the EEA to reduce the Planning Minister's discretion in order to better protect the environment.

## I. INTRODUCTION

Since 1988 the Shire of Orbost, then later, the East Gippsland Shire Council, have explored options to construct a new boat ramp at Bastion Point, near Mallacoota<sup>1</sup> in Victoria, Australia.<sup>2</sup> In May 1999, the East Gippsland Shire and the Department of Natural Resources and Environment prepared a preliminary brief for the minimum level of studies required for continuing with the development, and those bodies sought advice from the Planning Minister as to how to move forward.<sup>3</sup> In August 2000, the Planning Minister responded to this inquiry, stating that they must perform an environment effects statement under the Environment Effects Act 1978 ("EEA").<sup>4</sup> Despite the danger to the environment by building on this site,

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<sup>†</sup> The author thanks Professor Theodore Myhre, for helping to organize a series of ideas into a coherent framework. The author also thanks Megan Winder and Sarah Jordan for their advice and patience in working through the long writing process. Finally, the author thanks Dr. Jeff Birkenstein at Saint Martin's University for inspiring him to publish his writing.

<sup>1</sup> Mallacoota is a small town located in the far eastern part of the state of Victoria. Bastion Point is a natural landmark just to the southeast of the town of Mallacoota.

<sup>2</sup> East Gippsland Shire Council, *Bastion Point Boat Ramp Chronology*, in ENVIRONMENT EFFECTS STATEMENT Vol. 2, Appendix 5, 1 (2005).

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

the Planning Minister approved the project,<sup>5</sup> contrary to the community's wishes<sup>6</sup> and the professionals who evaluated the project's effects.<sup>7</sup> Parliament passed the EEA to protect the environment from adverse political motives; but, at Bastion Point, the EEA ultimately fell short.

This comment argues that Victoria's EEA fails to adequately prioritize the environment's health because it centralizes too much power in the Planning Minister and allows political will to prevail over environmental considerations. A case study focusing on the proposed plan to construct a boat ramp, breakwater, parking lot, and beach access road at Bastion Point demonstrates this legislation's weaknesses.

This comment first examines the history of Australian environmental impact legislation and Victoria's efforts to devise its own environmental policies. It then studies a proposed development at Bastion Point, and how the proposal's approval process exposed flaws in the EEA, ultimately leading a community group to challenge the Planning Minister's actions in the Supreme Court. Finally, it examines four proposed changes to the EEA that reduce the Planning Minister's powers and better safeguard the environment from political whim.

## II. THE ENVIRONMENT EFFECTS ACT 1978, PASSED TO ADDRESS SHORTCOMINGS OF PRIOR STATE POLICIES, IS FLAWED

This Part consists of several sections. First, it examines the history of environmental assessment legislation in Victoria, which will explain why Parliament overwhelmingly approved the EEA in 1978. It next focuses on the EEA's failure to adequately protect the environment because the statute places too much power in the hands of a politician, the Planning Minister. Then, it describes the Planning Minister's powers in Victorian state government and the Planning Minister's broad powers under the EEA. The next section confronts the problems that arise because the EEA does not define "environment." Lastly, this Part discusses the Planning Minister's Guidelines, a document that provides substance to the EEA.

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<sup>5</sup> See MINISTER FOR PLANNING, BASTION POINT OCEAN ACCESS BOAT RAMP, ASSESSMENT UNDER ENVIRONMENT EFFECTS ACT 1978 (June 2009).

<sup>6</sup> See Save Bastion Point, *EES Exhibition and Submission Writing Page*, <http://savebastionpoint.org/proposed-development/environmental-impact-assessment/ees-exhibition-and-submission-writing-stage/>.

<sup>7</sup> See MINISTER FOR PLANNING, *supra* note 5, at 3.

A. *Parliament Devised the Environment Effects Act 1978 to Offer Greater Environmental Protections than Other Existing Legislation But Was Weak when Passed*

This section outlines the pioneering efforts to create environmental impact assessment<sup>8</sup> procedures first at the federal level and later in the state of Victoria prior to the passage of the EEA. It then discusses the passage of the EEA, complete with a statutory analysis.

1. *Federal Environmental Planning Policies Did Not Provide Sufficient Environmental Protections in Victoria*

Australia designed its early environmental policies to facilitate the development and extraction of the country's natural resources.<sup>9</sup> It also attempted to control or protect the environment, focusing on anthropocentric considerations such as public health.<sup>10</sup> However, beginning in the 1950s and 1960s, the government stressed more eco-centric environmental control efforts, targeting specific environmental risks like air and water pollution.<sup>11</sup> Then, by the late 1960s and 1970s, conservationist philosophies reached the forefront of the environmentalist agenda and leaked into the political discourse.<sup>12</sup> As a result, that era's legislation better balanced environmental, social, and economic factors.<sup>13</sup>

By 1974, federal bodies, including the Australian Parliament, had addressed environmental regulation—particularly environmental impact and assessment—through legislation, namely the Environment Protection (Impact of Proposals) Act (“EPA”).<sup>14</sup> Environmental impact assessments ensure that developers consider their projects' environmental implications before beginning construction.<sup>15</sup> By the mid-1970s, each year the federal

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<sup>8</sup> Environmental impact assessments are studies done by parties seeking to alter an environment. Before they may begin work, however, they must study and predict how their development projects will impact the environment. This way, the government may be aware of the repercussions involved with these projects, and deny the permit to undertake the project if necessary.

<sup>9</sup> D.E. Fisher, *Environmental Planning, Public Inquiries and the Law*, 52 AUSTL. L. J. 13, 13 (1978).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Environment Protection (Impact of Proposals) Act, 1974, No. 164 (Austl.); See D.E. Fisher, *Environmental Law*, in ANNUAL SURVEY OF LAW 1978 29 (1979).

<sup>15</sup> Environment—Environmental Assessment, <http://ec.europa.eu/environment/eia/home.htm> (last visited Jan. 29, 2011).

government required a greater number of environmental impact assessments.<sup>16</sup>

The EPA legislation, however, failed to garner full efficacy due to constitutional difficulties and because states resented the vast powers harnessed by the federal government.<sup>17</sup> The EPA did not apply to many projects, so states like Victoria passed their own environmental impact assessment acts to fill the gaps left uncovered by the EPA.

## 2. *Victorian Legislation Was More Effective than the EPA*

In the 1970s many Australian states believed the federal approach, which reacted to environmental situations rather than proactively safeguarding ecosystems, lacked teeth to offer environmental protection.<sup>18</sup> By the end of the 1970s, states had begun passing legislation outlining their own environmental assessment procedures.<sup>19</sup>

In 1972, prior to the federal EPA legislation, Victoria passed its Ministry for Conservation Act (“MCA”).<sup>20</sup> The MCA outlined a set of informal environmental impact assessment procedures and created the Ministry for Conservation.<sup>21</sup> Essentially, the Ministry offered internal advice to government departments involved in major development projects.<sup>22</sup> At its outset, the Ministry called for a wholly informal system of environmental assessment and applied those assessment procedures strictly to government projects.<sup>23</sup> By 1974, the Ministry articulated that the formulation of an environmental impact assessment should not be compulsory,<sup>24</sup> as the incorporation of environmental awareness into planning

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<sup>16</sup> Fisher, *supra* note 14, at 29 (From July 1975 through the end of 1975, proponents drafted nine environmental impact statements. In 1976, proponents drafted ten. In 1977, twenty-two statements were drafted, and in the first three months of 1978, seven statements had already been performed under federal law.).

<sup>17</sup> See Rodney H. Bush, Barrister and Solicitor of the Supreme Court of Victoria and the High Court of Australia, *The Environment Effects Act 1978 (Victoria)—Milestone or Millstone*, Paper presented to the International Bar Association (March 26-31, 1983). From the Environmental Law Seminar on Cost-Benefit of Environmental and Planning Controls (3rd : 1983 : Singapore) 89.

<sup>18</sup> Fisher, *supra* note 14, at 30.

<sup>19</sup> *Id.* at 37.

<sup>20</sup> Ministry for Conservation Act, 1972, Vict. Acts No. 8364 (Austl.).

<sup>21</sup> Public Record Office Victoria online catalogue, “Ministry for Conservation” <http://www.access.prov.vic.gov.au/public/component/daPublicBaseContainer?component=daViewAgency&entityId=551> (last visited Jan. 29, 2011).

<sup>22</sup> IAN THOMAS, ENVIRONMENTAL IMPACT ASSESSMENT IN AUSTRALIA: THEORY AND PRACTICE 105 (1996).

<sup>23</sup> ROBERT J. FOWLER, ENVIRONMENTAL IMPACT ASSESSMENT, PLANNING AND POLLUTION MEASURES IN AUSTRALIA 36 (1982).

<sup>24</sup> *Id.*

could be more efficient than through an environmental impact assessment.<sup>25</sup> For instance, the Ministry believed educating the public would render formal environmental impact statements unnecessary since environmental considerations would become as much a routine part of planning as engineering design.<sup>26</sup> Later, however, the system of non-compulsory environmental impact assessments proved unworkable.

In 1976, the Premier issued a Directive<sup>27</sup> to the Conservation Minister, ordering that formal environmental impact assessment procedures<sup>28</sup> be applied to all government proposals causing "significant environmental effects whether they be good or bad and whether they have short- or long-term effects, regardless of whether the project may be controversial."<sup>29</sup> At the time, the Chief Assessment Officer in the Ministry for Conservation, W.P. Dunk, responded, "We have taken the view that environment assessment will have its greatest effect as an educational tool, rather than as a regulatory or policing process which of necessity must have all the power and the cumbersome administrative complexity of the law backing it up."<sup>30</sup> He further articulated the nature of the Premier's Directive:

Emphasis will now shift to bring in those legal government activities and private works which are of special environmental significance. An advisory approach will be used at first, and if necessary this can be backed up by existing government controls over these activities. Legislation will only be considered if this approach proves ineffective.<sup>31</sup>

Unfortunately, the process proved ineffective, and the state badly needed legislation to address environmental impact assessment procedures.<sup>32</sup>

The lack of a legislative mandate in Victoria, together with the inefficacy of the EPA, encouraged a chaotic system.<sup>33</sup> Thus, in May of 1978, the Victorian government validated Dunk's prophetic prediction.

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<sup>25</sup> Brian J. O'Brien, *Environment Impact Statements and a 'Push me-Pull you' Approach*, Vol. 7 No. 6 SEARCH 264, 266 (1976).

<sup>26</sup> *Id.*

<sup>27</sup> The Premier is the leader of the Victorian Government. When a Premier issues a Directive, the Premier is directing another to do something.

<sup>28</sup> E.g., the completion of an environmental effects statement.

<sup>29</sup> THOMAS, *supra* note 22, at 106.

<sup>30</sup> W.P. Dunk, *Environmental Assessment in Victoria*, Vol. 7 No. 6 SEARCH 260, 261 (1976) (original punctuation omitted).

<sup>31</sup> *Id.* at 263.

<sup>32</sup> In order to offer structure to the Premier's Directive and provide clarity, a lengthier procedural manual was published in January 1977 applying these same procedures to private and government projects.

<sup>33</sup> J.G. Mosley, *Environmental Impact Assessment and Conservation in Australia*, Vol. 7 No. 6 SEARCH 267, 270-71 (1976).

Unsatisfied by the difficulties experienced in obtaining compliance with the administrative guidelines outlined by the Premier's Directive of 1976 and supplemental guidelines of 1977, the Victorian Parliament introduced legislation for new environmental impact procedures.<sup>34</sup> This legislation ultimately became the EEA.

### 3. *Legislative History Suggests Critics Considered the EEA Weak When Passed*

Parliament knew of the procedural shortcomings of the Premier's Directive as it debated new environmental assessment legislation.<sup>35</sup> The opposition spokesman on environmental matters alluded to the ineffectiveness of earlier directives.<sup>36</sup> On the other hand, a supporter of the new bill lauded the proposed legislation: "Although it is a small Bill, it nonetheless reflects the fundamental concern of the Hamer Liberal Government since coming to office to ensure that the environment is protected, even from the impact of its own public works."<sup>37</sup> Clearly, this supporter felt the EEA was designed to protect the environment. Others, however, were not so impressed.

Some legislators believed the legislation was weak and diluted. Members of the Opposition, primarily Mr. Cathie, addressed this. He spoke forcefully to the weaknesses of the proposal, as "nothing more than a damp squid [sic] and window dressing by the Government."<sup>38</sup> He noted that the only reason the government proposed the bill was because the opposition party had introduced a similar, yet more substantive bill, and the government felt pressure to take action to pass *some* environmental assessment legislation.<sup>39</sup>

Mr. Cathie discussed problems that could arise because the EEA was unclear as to what types of projects it covered; for example, "public works" was very vaguely defined and "environment" was not defined at all under the EEA.<sup>40</sup> Cathie expressed discontent because the EEA gave broad discretion to the then-Minister for Conservation, who could order certain

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<sup>34</sup> FOWLER, *supra* note 23, at 36.

<sup>35</sup> This legislation was to become the EEA.

<sup>36</sup> FOWLER, *supra* note 23, at 36 ("The Minister [for Conservation] is well aware that, although directions have been given by the Premiere, different bodies in Victoria have simply ignored the directions requiring them to undertake an assessment...The guidelines have been ignored in many cases.") (quoting Victorian Parliamentary Debate of the Assembly, May 16, 1978, 2060 (Mr. Cathie)).

<sup>37</sup> VICT. PARL. DEB. Vol. 338, Sess. 1978, 3071 (May 16, 1978) (Austl.) (Mr. Lacy).

<sup>38</sup> *Id.* at 3058 (Mr. Cathie).

<sup>39</sup> *Id.* at 3058 (Mr. Cathie: "Indeed, it was not until I had given notice of a similar Bill that the Government finally decided to introduce its own meagre Bill.").

<sup>40</sup> *Id.* at 3060-63 (Mr. Cathie).

procedures undertaken whenever he desired. He observed, "The Bill seems to be made up of 'ifs' and 'mays' and that is not sufficient to properly protect the environment of this State."<sup>41</sup> Cathie questioned, "What happens when the Government appoints a Minister who is not concerned about the environment and there is legislation which states, 'You may do this and, equally you may not do it?'"<sup>42</sup> He foresaw a Planning Minister selectively employing the EEA depending on her or his personal concerns regarding specific projects, and the environment could play victim to politics.<sup>43</sup> Despite his concerns, Mr. Cathie declared, "Even though it is a meagre Bill, at least it is a step in the right direction," and he voted in its favor.<sup>44</sup>

Ultimately, Parliament passed the EEA on May 23, 1978.<sup>45</sup> It consisted of only a few pages and provided only a broad outline for environmental impact assessment procedures, lacking the specifics required of those performing an environmental impact assessment.<sup>46</sup>

*B. The Language in the EEA Fails to Protect the Environment by Placing Significant Duties in the Hands of a Single Politician*

The EEA includes sparse language regarding the production of an environment effects statement,<sup>47</sup> the hallmark of environmental impact assessment procedures. Like environmental impact assessment legislation in other Australian states and many international jurisdictions, a project proponent such as a company or a government agency is responsible for preparing the environmental effects statement.<sup>48</sup> The EEA simply states, "the proponent must cause an Environment Effects Statement to be prepared and submit it to the Minister for the Minister's assessment of the environmental effects of the works."<sup>49</sup> Thus, the legislation itself offers a proponent little guidance as to what an environment effects statement should contain, even though the impact statement is arguably the most significant part of the process.

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<sup>41</sup> *Id.* at 3062 (Mr. Cathie).

<sup>42</sup> *Id.* at 3062.

<sup>43</sup> *Id.* at 3063 (Mr. Cathie).

<sup>44</sup> *Id.* at 3059, 3077 (Mr. Cathie).

<sup>45</sup> *Id.* at 3076-77.

<sup>46</sup> See generally Environment Effects Act 1978 (2006), Vict. Acts No. 9135 (Austl.).

<sup>47</sup> "Environment effects statements" and "environment impact statements" are used interchangeably. The environment effects statement or environmental impact statement is generally the primary component of an environmental impact assessment. An environmental impact assessment includes all the processes incorporated in the environmental impact procedures.

<sup>48</sup> See Environment Effects Act 1978 § 8 (2006), Vict. Acts No. 9135 (Austl.); See also DES ECCLES & TANNETJE L. BRYANT, STATUTORY PLANNING IN VICTORIA 36 (3rd ed. 2006).

<sup>49</sup> Environment Effects Act 1978 § 4(1) (2006), Vict. Acts No. 9135 (Austl.).

Parliament delegates many powers to the Minister for Planning<sup>50</sup> in the EEA. Sections Three and Eight of the EEA delegate to the Minister the power to decide which proposals require an environmental effects statement.<sup>51</sup> Section 3(2) expresses, “The Minister must not make an Order [requiring completion of an environmental effects statement] . . . unless the Minister is satisfied that the works could reasonably be considered to have or to be capable of having a significant effect on the environment.”<sup>52</sup> And, Section 8B(3) calls for the Minister to decide whether “(a) a statement should be prepared for the works; or (b) a statement is not required for the works if conditions specified by the Minister are met; or (c) a statement is not required for the works.”<sup>53</sup> If the Planning Minister decides an environmental effects statement is required, the proposed development cannot proceed.<sup>54</sup> No decisions regarding the approval of the relevant planning permit application or any amendment to the planning scheme may be made until the Planning Minister has assessed the environmental effects statement and that assessment has been considered by the relevant Minister, public authority, planning authority, or responsible authority.<sup>55</sup>

If an environmental effects statement is prepared under EEA Section Nine, the Minister for Planning may, with the approval of the Governor in Council, appoint one or more persons to hold an inquiry—either public or private as she or he sees fit—into a proposal’s environmental effects.<sup>56</sup> This inquiry acts as yet another environmental safeguard, performing an independent, objective survey of a proposal’s environmental effects.

Also, if anywhere in the process, the Minister’s recommendations are not followed, or if the Minister chooses not to follow any recommendations made to her or him, she or he must issue a written statement explaining the reasons for ignoring the recommendations.<sup>57</sup> This written justification serves as a transparency mechanism, so that the public may better understand why its government officials are taking steps contrary to another’s recommendations.

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<sup>50</sup> On September 1, 1983, Victoria consolidated four of its government departments into two. Prior to that date, the Ministry for Conservation administered the Environment Effects Act 1978. On September 1, 1983, the Ministry for Planning assumed the responsibility of administering the EEA. Victoria Government Gazette No. 87, at 2809 (Sept. 1, 1983).

<sup>51</sup> Environment Effects Act 1978 § 3, 8 (2006), Vict. Acts No. 9135 (Austl.). See ECCLES & TANNETJE, *supra* note 48, at 36.

<sup>52</sup> Environment Effects Act 1978 § 3(2) (2006), Vict. Acts No. 9135 (Austl.).

<sup>53</sup> *Id.* at § 8B(3).

<sup>54</sup> See ECCLES & TANNETJE, *supra* note 48, at 36.

<sup>55</sup> See *id.*

<sup>56</sup> Environment Effects Act 1978 § 9(1) (2006), Vict. Acts No. 9135 (Austl.). See ECCLES & TANNETJE, *supra* note 48, at 36.

<sup>57</sup> See ECCLES & TANNETJE, *supra* note 48, at 36.



C. *The Planning Minister's Powers are Too Broad Under the EEA*

The Planning Minister is a central figure under the EEA. To understand the nature of the Planning Minister's role in the EEA, it helps to understand the political nature of the Planning Minister's office.<sup>58</sup>

The Planning Minister is an elected member of Parliament, appointed to the Ministry by the Premier. Yet, the Planning Minister is politically accountable only to voters of the district from where she or he is elected. Thus, the Planning Minister decides matters affecting the entirety of Victoria yet is accountable only to her or his constituency; consequently, if the Planning Minister is politically safe in her or his district, then she or he, essentially, has free reign. These circumstances do not necessarily bode well for the environment because the Planning Minister's decisions are often based on pleasing a local constituency rather than seriously considering environmental health. Popular local decisions may trigger negative repercussions in areas beyond the Planning Minister's home district.

D. *The EEA Does not Define "Environment," a Serious Flaw*

Interestingly, the EEA does not define "environment,"<sup>59</sup> but, the Ministry-made Guidelines, discussed more extensively in the next section, do provide such a definition. This distinction is important because the Planning Minister dictates when and how to amend the Guidelines. Consequently, the Planning Minister may also redefine what constitutes "environment." The changing definition of "environment" creates uncertainty, and the Planning Minister may manipulate the definition to further the Minister's political motivations.

To complicate matters further, what constitutes "environment" is disputable. Some scholars believe "environment" should be construed broadly, including biophysical as well as socio-economic factors.<sup>60</sup> Still, others believe it should be limited strictly to biophysical aspects.<sup>61</sup> The Planning Ministry defines "environment" in the Guidelines, and each time

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<sup>58</sup> Victoria's Parliament is bicameral, made up of a lower house, the Legislative Assembly, and an upper house, the Legislative Council. Members of both houses of Parliament are elected to four-year terms. The governor of Victoria requests the leader of the majority party or alliance of parties in the Legislative Assembly to form a government. The Premier leads the majority party and the government—which includes the ministry. The Planning Minister is a member of this ministry.

<sup>59</sup> When the EEA was passed, an Assembly member proposed an amendment to include a definition of "environment." Despite his efforts, the Government quashed his proposal. VICT. PARL. DEB. Vol. 338, Sess. 1978, 3077 (May 16, 1978) (Austl.).

<sup>60</sup> Frank Talbot, *Environmental Impact Assessment: Summary and Prospects*, in Vol. 7 No. 6 SEARCH 273, 273 (1976).

<sup>61</sup> *Id.*

the Ministry revises its Guidelines, “environment” is redefined.<sup>62</sup> For example, the April 1995 Guidelines<sup>63</sup> state, “the meaning of environment incorporates physical, biological, cultural, economic and social factors.”<sup>64</sup>

In the current version of the Guidelines,<sup>65</sup> “environment” “includes the physical, biological, heritage, cultural, social, health, safety and economic aspects of human surroundings, including the wider ecological and physical systems within which humans live.”<sup>66</sup> The current edition expands the definition of “environment;” and, the determination as to what constitutes “environment,” important as it is, is not governed by Parliament, but by the Planning Minister alone.<sup>67</sup>

#### *E. The Planning Minister’s Guidelines Give the EEA its Substance*

The substance of the EEA lies in the Minister’s Guidelines. EEA Section 10 states: “The Minister may from time to time lay down guidelines for or with respect to any matters he considers expedient to enable the carrying out of the Act...”<sup>68</sup> Thus, in November 1978, the Ministry for Conservation<sup>69</sup> issued its Guidelines for Environmental Assessment and Environment Effects Act 1978<sup>70</sup> to lay out the EEA’s substance.<sup>71</sup> Scholars

<sup>62</sup> See, e.g. DEPARTMENT OF PLANNING AND DEVELOPMENT, GUIDELINES FOR ENVIRONMENTAL IMPACT ASSESSMENT AND THE ENVIRONMENT EFFECTS ACT (6th ed. 1995) (Austl.); DEPARTMENT OF SUSTAINABILITY AND ENVIRONMENT. MINISTERIAL GUIDELINES FOR ASSESSMENT OF ENVIRONMENTAL EFFECTS UNDER THE ENVIRONMENT EFFECTS ACT 1978, 2 (7th ed. 2006) (Austl.).

<sup>63</sup> DEPARTMENT OF PLANNING AND DEVELOPMENT, *supra* note 62.

<sup>64</sup> *Id.* This definition had been used by the Australian and New Zealand Environment and Conservation Council in 1991 and had been adopted by Victoria for purposes of the EEA guidelines. The Australian and New Zealand Environment and Conservation Council was disbanded in 2004 and its duties and roles were split between two other bodies.

<sup>65</sup> DEPARTMENT OF SUSTAINABILITY AND ENVIRONMENT, *supra* note 62.

<sup>66</sup> *Id.* at 2. Other states define “environment” for purposes of environmental assessment legislation. Western Australia defines “environment” as living things, their physical, biological and social surroundings, and interactions among them all. In New South Wales, “environment” includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings. Queensland defines “environment” in Section 8 of the Environmental Protection Act of 1994: ecosystems and their constituent parts, including people and communities; all natural and physical resources; the qualities and characteristics of locations, places, and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony, and sense of community; and the social economic, aesthetic, and cultural conditions that affect, or are affected by things mentioned earlier in this list. “Environmental effects” includes beneficial as well as the detrimental effects of any development on physical, biological, or social systems within which such development occurs.

<sup>67</sup> *Id.*

<sup>68</sup> Environment Effects Act 2006 §10 (2006), Vict. Acts No. 9135 (Austl.).

<sup>69</sup> At the date of publication, Victoria’s Minister for Planning and Development administers the EEA and its guidelines.

<sup>70</sup> The Guidelines that accompany the EEA have been revised and today exist in their Seventh Edition (2006).

<sup>71</sup> See FOWLER, *supra* note 23, at 35; see also THOMAS, *supra* note 22, at 106.

argue that the government's continued reliance on informal guidelines, which lack the force and effect of law, demonstrates the government's reservations and lack of political desire to formally codify a legislative environmental impact assessment system.<sup>72</sup>

Today, some argue whether these Guidelines are to be treated as delegated legislation.<sup>73</sup> Whether or not the Guidelines are "legislation" is significant because in Australia, parliamentary law is the primary source of legally-recognized environmental policy—its legal system places no restraints, apart from territorial and constitutional limitations, on Parliament enacting the policies it chooses.<sup>74</sup> However, when Parliament delegates authority to other bodies to create legislation, as it did with the EEA's informal Guidelines, the process results in individual policies lacking consistency, and as a result creates uncertainty among those bound to its policies.<sup>75</sup> Also, the Guidelines impose no concurrent legal obligations on the government agency administering the EEA to regulate a questionable activity since the exercise of control is discretionary and not controlled by an environmental policy.<sup>76</sup>

When properly administered, the EEA and its Guidelines require analysis of an existing environment, the proposed development there, and the impact of the proposed development on that environment.<sup>77</sup> The Guidelines outline a five-step process designed to result in a thorough analysis of proposed projects.<sup>78</sup> First, proponents must refer proposed projects to the Planning Minister, who will decide whether an environmental effects statement must be prepared.<sup>79</sup> Second, the scoping of the environmental effects statement requires the proponent to assemble a preliminary list of issues to be investigated before the Planning Minister ultimately determines the matters to be investigated and documented in the environmental effects statement.<sup>80</sup> Third, proponents must inform the public

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<sup>72</sup> FOWLER, *supra* note 23 at 36-7.

<sup>73</sup> Bush, *supra* note 17, at 93-4. Fowler asserts that the guidelines do not have the status of delegated, or subordinate, legislation. Bush contests that, though the status of the guidelines is unclear, they should be treated as delegated legislation. Either way, Bush admits that neither the Environment Effects Act nor the guidelines have been the subject of judicial scrutiny.

<sup>74</sup> Patricia Ryan, *Environment Impact Assessment and the Law*, in Vol. 7 No. 6 SEARCH 236, 236 (1976).

<sup>75</sup> *See id.*

<sup>76</sup> *See id.* at 237.

<sup>77</sup> *See* ECCLES & BRYANT, *supra* note 48, at 35.

<sup>78</sup> DEPARTMENT OF SUSTAINABILITY AND ENVIRONMENT, *supra* note 62, at 4.

<sup>79</sup> *Id.* at 5, 13.

<sup>80</sup> *Id.* at 13.

and consult with stakeholders.<sup>81</sup> Fourth, the EEA calls for public review of the proposed project, consisting of public notice of the proposed environmental effects statement, exhibition of the statement for a specified period, potential appointment of an independent inquiry, and receipt of public submissions.<sup>82</sup> An environmental effects statement is normally exhibited for two months—submissions are invited from those likely to be affected by the proposal or who have an interest in it, and the Planning Minister typically appoints a panel to conduct a public inquiry into the environment effects statement and to hear submissions.<sup>83</sup> Fifth, the Minister must draw conclusions to ultimately determine whether the likely environmental effects of a proposed project are acceptable.<sup>84</sup>

The EEA applies to proposed projects when they may significantly affect the environment.<sup>85</sup> These include public works projects, defined in Section 2 of the EEA as “works undertaken or proposed to be undertaken by or on behalf of the Crown or for public statutory bodies . . .”<sup>86</sup> Also included on the list of projects falling under the EEA are Ministerial decisions or actions proposing works, works proposed by a person or body under Victorian law, or other works the Minister for Planning may specify.<sup>87</sup>

Today, most development proposals submitted to the Planning Minister require an environmental effects statement. During the year ending in October 2004, of the twenty-four proposals submitted by various proponents, local councils, and members of the public, the Planning Minister called for preparation of an environmental effects statement in twenty-two of them.<sup>88</sup> Relatively few development proposals do not require an assessment.

Generally, one could conclude that the EEA works smoothly. Proponents submit their proposals and perform an environmental effects statement. An independent inquiry is convened to investigate the matter, public comments are taken, and the Planning Minister signs off on those projects that have acceptable environmental effects. However, a recent case study showcases the flaws in the EEA and how political inclinations may undermine the interests of the environment.

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<sup>81</sup> *Id.* Stakeholders are parties potentially affected by the proposed development and other interested parties.

<sup>82</sup> *Id.* at 23.

<sup>83</sup> See ECCLES & BRYANT, *supra* note 48, at 36.

<sup>84</sup> DEPARTMENT OF SUSTAINABILITY AND ENVIRONMENT, *supra* note 62, at 27.

<sup>85</sup> See *id.*

<sup>86</sup> ECCLES & BRYANT, *supra* note 48, at 35.

<sup>87</sup> *Id.* at 35-6.

<sup>88</sup> See *id.* at 37.

### III. THE PLANNING MINISTER'S POLITICS MOTIVATED HIS DECISION AT BASTION POINT

This Part examines the application of the EEA at Bastion Point. It first details the East Gippsland Shire Council's proposal to build a boat ramp, parking lot, beach access road, and other facilities at Bastion Point. It then articulates the fierce public opposition to the proposal, followed by an analysis of the recommendation made by the Planning Minister's own independent inquiry that was assigned the task of evaluating the potential hazards to the environment that could result from this project. This Part next analyzes the Planning Minister's determination to refuse the recommendation of the independent panel and approve the project. Then, it details the vocal public outcry chiding the Planning Minister's decision. Finally, this Part discusses the lawsuit a community organization filed against the Planning Minister in the Supreme Court of Victoria, claiming the Planning Minister failed to adequately perform his duties under the EEA.

#### A. *Bastion Point is a Unique and Pristine Area Worth Protecting*

Bastion Point is an ecologically important area worthy of protection. The legal battle over the proposed development there highlights the failure of the EEA to adequately safeguard the environment.

Bastion Point lies in southeast Victoria on the Tasman Sea, part of the South Pacific Ocean.<sup>89</sup> Less than two kilometers from Bastion Point is the city of Mallacoota,<sup>90</sup> which was first settled when Europeans established a whaling station there in the 1830s.<sup>91</sup> By the 1880s, the region had become a commercial fishing hub, and Mallacoota Inlet served as a base for fishermen on their way to Melbourne.<sup>92</sup> Early on in its history, Mallacoota became a destination for seekers of a tranquil, peaceful, comfortable setting to relax or vacation in order to avoid the hustle and bustle of the city.<sup>93</sup>

Commercial development increased in the region in order to accommodate the growing number of people flocking to its remote, pristine shores. This development often involved concrete construction projects,

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<sup>89</sup> Map of Bastion Point in Victoria. Bonzle Digital Atlas of Australia, [http://maps.bonzle.com/c/a?a=p&p=27911&cmd=sp&st=VIC&place=Bastion%20Point&file=Bastion\\_Point.htm](http://maps.bonzle.com/c/a?a=p&p=27911&cmd=sp&st=VIC&place=Bastion%20Point&file=Bastion_Point.htm).

<sup>90</sup> *Id.*

<sup>91</sup> Australian Heritage—Historical Towns Directory #1254 (Mallacoota), <http://heritageaustralia.com.au/search.php?state=vic&region=77&view=64> (last visited Jan. 29, 2011).

<sup>92</sup> *Id.*

<sup>93</sup> See, e.g. Ted Harrington, *Mallacoota*, in MALLACOOTA: A LOVE AFFAIR IN POETRY & PROSE 3 (Edna Brady ed., 2d ed. 1998); *Mallacoota—Culture and History*, THE SYDNEY MORNING HERALD, Nov. 26, 2008; Australian Heritage, *supra* note 91.

removing natural vegetation, and impeding the general landscape—negative environmental effects that were inevitable in the eyes of some. This development continues today, as local government officials are forced to weigh the interests of local industries against environmental protection as Mallacoota seeks to provide amenities for the growing numbers of visitors.

In the 1960s a concrete boat ramp was constructed by the Shire of Orbost<sup>94</sup> at Bastion Point, located approximately one and a half kilometers southeast of the Township of Mallacoota.<sup>95</sup> Today, the Bastion Point Ocean Access Ramp is the only ocean access site between Cape Conran on the Victorian coast, and the Port of Eden, located in New South Wales—a distance of roughly one hundred and fifty kilometers.<sup>96</sup>

Other natural ocean access entry sites near Bastion Point cannot accommodate the vast numbers of people who boat in this area, and the channel is very dangerous.<sup>97</sup> For example, Mallacoota Inlet's natural ocean entrance channel is generally relatively shallow and moves over time.<sup>98</sup> It is unsuitable for boat operators lacking local knowledge and skills to maneuver its channel,<sup>99</sup> and the bar at the inlet's entrance makes it dangerous to use during rough weather.<sup>100</sup> During the 1990s, authorities closed the entrance multiple times,<sup>101</sup> requiring all ocean access to take place from the Bastion Point boat ramp.<sup>102</sup>

Over the years, many have asserted that the Bastion Point boat ramp has failed to provide a safe location for boaters to access the ocean.<sup>103</sup> Detractors of the existing boat ramp cite the movement of sand over and around the ramp as having made the ramp ineffective, requiring boats to use a modified agricultural tractor to launch commercial fishing vessels.<sup>104</sup>

If the EEA failed to protect Bastion Point from development, the pristine coastline would be forever altered with a long breakwater, large

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<sup>94</sup> Victorian "shires" are rural Local Government Areas, controlled by an individual local government.

<sup>95</sup> EAST GIPPSLAND SHIRE COUNCIL, ASSESSMENT GUIDELINES ENVIRONMENT EFFECTS STATEMENT FOR THE BASTION POINT OCEAN ACCESS BOAT RAMP MALLACOOTA 5 (Dec. 2004).

<sup>96</sup> *Id.* at 6.

<sup>97</sup> Charles Daly, *Notes of a Visit to Mallacoota Inlet*, 34 VICT. NATURALIST 121, 125 (1917) ("Near the western side [of the Inlet] the current sweeps through the shifting and tortuous channel. There is a sand-bar near the mouth, with only three or four feet over it at low water, and off Captain's Point an inner bar with even less depth of water at low tide. This obstruction makes navigation difficult.").

<sup>98</sup> EAST GIPPSLAND SHIRE COUNCIL, *supra* note 95, at 6.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 5.

<sup>104</sup> EAST GIPPSLAND SHIRE COUNCIL, *supra* note 95, at 5.

parking lot, and access road replacing the vegetation and surf break that have made Bastion Point such a special place for locals and visitors alike.

*B. The Bastion Point Proposal Threatened to Disrupt This Sensitive Coastal Habitat*

Proponents of altering the existing ramp began seriously investigating the feasibility of improving the ocean access ramp site as early as 1988.<sup>105</sup> More recently, the East Gippsland Shire Council concluded that a new ramp would be safer and more reliable than either the existing 1960s-era concrete boat ramp or the natural entrance at Mallacoota Inlet.<sup>106</sup> The Council proposed to investigate at least three potential options for a new boat ramp and other associated facilities to provide improved public boating and ocean access from Bastion Point.<sup>107</sup>

The East Gippsland Shire Council's construction proposal consisted of many elements. Included in its proposal was a parking facility for both cars and trailers; specifically, the existing parking lot would be retained and extended, and its efficiency improved to accommodate parking for an additional thirty cars and trailers.<sup>108</sup> Also, the proposal advanced a new access road so automobiles could easily drive to the boat ramp.<sup>109</sup> The proposed boat ramp would incorporate a two-lane maneuvering area for two vehicles to use at a time; a small hardstand for passengers and equipment; and a holding area capable of accommodating three boats, designed to allow boats to queue to pick up and off-load passengers while waiting to use the ramp.<sup>110</sup>

The vastness of this project is significant because the proposed site is home to native vegetation, described as Coastal Dune Scrub Mosaic.<sup>111</sup> Archaeological and cultural artifacts are likely present at the site, and pouring concrete and asphalt to construct boat ramps, parking lots, and other facilities could irreparably harm these cultural sites.<sup>112</sup> In addition, the proposal called for a 130-meter rock breakwater to minimize the ingress of

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<sup>105</sup> Aff. of Jennifer Ruth Mason at 5, *Friends of Mallacoota, Inc. v. Minister for Planning*, No. 8132 of 2009, VSC 222 (Vict. Sup. Ct. 2010) (Austl.).

<sup>106</sup> EAST GIPPSLAND SHIRE COUNCIL, *supra* note 95, at 5.

<sup>107</sup> *Id.*

<sup>108</sup> EAST GIPPSLAND SHIRE COUNCIL, SUMMARY BROCHURE OF EXHIBITION MATERIALS OF BASTION POINT OCEAN ACCESS BOAT RAMP, MALLACOOTA 1 (May 2007), available at <http://www.egipps.vic.gov.au/Page/Download.asp?name=SummaryBrochure.pdf&size=115179&link=../Files/SummaryBrochure.pdf> [hereinafter SUMMARY BROCHURE].

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1-2.

<sup>111</sup> EAST GIPPSLAND SHIRE COUNCIL, *supra* note 95, at 7.

<sup>112</sup> *Id.*

sand and protect the boat ramp from waves.<sup>113</sup> The proposal also called for the use of sand management equipment, such as a small barge fitted with a suction pump and winch to remove sediment build-up in the channel.<sup>114</sup> Finally, the proposal called for construction of ancillary facilities, including boat washing and fish cleaning stations, as well as restrooms.<sup>115</sup>

On August 17, 2000, the Minister for Planning determined that the proposal required an environmental impact assessment under the EEA.<sup>116</sup> The East Gippsland Shire Council worked through the required procedures, and in December 2004, issued its statement on the project, which was quite favorable for the development.<sup>117</sup> The Council concluded the project would contain elements of strategic significance for the region as an ocean access site for boats.<sup>118</sup> The proponent of the project also claimed the boat ramp, breakwater, and parking lot facilities would satisfy state and local policies<sup>119</sup> with respect to providing a reliable ocean access point on the remote Victorian coast. Importantly, commercial and recreational users would benefit by secure access.<sup>120</sup> The Council claimed the proposal complied with environmental standards and policies.<sup>121</sup> Groups opposing the new boat ramp criticized the Council's reports as failing to account for all of the factors and circumstances discussed above.<sup>122</sup>

C. *The Public Overwhelmingly Rejected the Proposed Project, Yet the Planning Minister Continued to Support It*

The Planning Minister appointed an independent panel to investigate and examine the proposal's likely effects and solicited recommendations on whether to approve it. The panel held public hearings, and from June 4 through July 16, 2007, it received 482 written comments—87% of them opposed the development.<sup>123</sup> According to the Save Bastion Point

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<sup>113</sup> SUMMARY BROCHURE, *supra* note 108, at 1-2.

<sup>114</sup> *Id.* at 2.

<sup>115</sup> *Id.*

<sup>116</sup> Department of Community Planning and Development, Bastion Point Boat Ramp, <http://www.dpcd.vic.gov.au/planning/environment-assessment/projects/bastion-point-boat-ramp> (last visited Jan. 29, 2011).

<sup>117</sup> EAST GIPPSLAND SHIRE COUNCIL, *supra* note 95.

<sup>118</sup> *Id.* at 10.

<sup>119</sup> *Id.* at 11-2 (listing policies to which the boat ramp proposal must conform at state and local levels).

<sup>120</sup> *Id.* at 12.

<sup>121</sup> SUMMARY BROCHURE, *supra* note 108, at 6.

<sup>122</sup> See Save the Waves Coalition, *Endangered Wave: Bastion Point, Victoria, Australia*, <http://www.savethewaves.org/wave/bastion-point-victoria-australia>, (last visited Jan. 29, 2011).

<sup>123</sup> Save Bation Point, *supra* note 6.



Campaign,<sup>124</sup> 90% of oral submissions also opposed the development.<sup>125</sup> Many who opposed it noted that Mallacoota's pristine foreshore was registered with the National Trust of Australia for the area's aesthetic, historic, scientific, social, and spiritual values.<sup>126</sup>

The Australian Conservation Foundation also opposed the development proposal. Its Marine Campaign Coordinator, Chris Smyth, said: "How the Victorian Government acts on Bastion Point will be a real test of its commitment to coastal and marine protection. Under the Council's proposal, Bastion Point would be transformed from a natural icon into an industrial zone, with its scenic and wilderness coast values ripped apart."<sup>127</sup> Such strong disapproval reflected the high level of emotion and intensity in the battle over the proposed development.

#### *D. The Planning Minister's Independent Panel of Experts Recommended Rejecting the Proposal*

As stated above, the Planning Minister's independent panel analyzed the proposal, including the cultural, social, economic, and safety effects it would likely yield.<sup>128</sup> In October 2008, unbeknownst to the public at the time, the panel recommended rejecting all but one of the options the East Gippsland Shire Council proposed for renovating the boat ramp.<sup>129</sup>

The only option the panel thought should even be considered was a low-scale upgrade to the existing ramp at the site.<sup>130</sup> The panel rejected the proposed breakwater for the minor upgrade at the existing ramp because it would negatively affect the surfing area and a popular family beach at the

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<sup>124</sup> The Save Bastion Point Campaign (<http://savebastionpoint.org/>), is a coalition of the East Gippsland Boardriders, the Mallacoota Coast Action/Coastcare group, the Mallacoota Surf Lifesaving Club, the Friends of Mallacoota, the Melbourne Group, individual Mallacoota residents, non-resident ratepayers, and concerned individuals, working to protect the Bastion Point headland from inappropriate development.

<sup>125</sup> Save Bastion Point, *Campaign Update No. 12*, 2 (Sept. 5, 2008), available at <http://savebastionpoint.org/wp-content/uploads/2008/09/update-no-12.pdf>.

<sup>126</sup> Posting by Don, *Surfrider Foundation Condemns Government Decision to Destroy Bastion Point*, REALSURF, June 16, 2009, <http://www.realsurf.com/2009/06/16/surfrider-foundation-condemns-government-decision-to-destroy-bastion-point/> (last visited Jan. 29, 2011).

<sup>127</sup> Australia Conservation Foundation, *East Gippsland Council Proposal Bad for Bastion Point* (Oct. 17, 2006), [http://www.acfonline.org.au/articles/news.asp?news\\_id=984&c=31184](http://www.acfonline.org.au/articles/news.asp?news_id=984&c=31184) (last visited Jan. 29, 2011).

<sup>128</sup> See PANEL REPORT, OCEAN ACCESS BOAT RAMP, BASTION POINT, MALLACOOTA, ENVIRONMENT EFFECTS STATEMENT EAST GIPPSLAND PLANNING SCHEME, PERMIT APPLICATION 162/2007/P, 148-51 (Oct. 2008).

<sup>129</sup> *Id.* at 148-49 (Note: the public did not learn of the Panel's recommendation until the Minister issued his assessment decision in June 2009. The Planning Minister publicly released both the Panel's recommendation and his assessment at the same time.).

<sup>130</sup> *Id.* at 152.

cove.<sup>131</sup> Additionally, the breakwater would create a significant negative visual impact on the wilderness landscape. Finally, it would restrict the view of those launching their boats of wave conditions beyond the breakwater, yielding very unsafe consequences.<sup>132</sup>

With regard to the road and parking requirements, the panel wanted further studies; specifically, it suggested that the parking lot extension should be studied to ensure that the lot size did not too greatly exceed the demand for spaces.<sup>133</sup> The panel's concerns were to minimize the visual intrusion on the landscape and the removal of native vegetation in a very sensitive ecosystem.<sup>134</sup> The panel also concluded that no washing or fish cleaning facilities should be provided under the renovation plan, but it determined that the relocation of the restroom, if needed, could be considered with an impact assessment of the targeted location.<sup>135</sup> Finally, the panel recommended that the East Gippsland Shire Council establish a broadly-based community advisory committee with an independent facilitator to assist in developing a detailed design of the minor upgrade of the existing ramp.<sup>136</sup>

*E. The Planning Minister Approved the Proposal, Despite the Panel's Recommendation*

Just months after the panel issued its recommendation to the Planning Minister, he issued his final assessment on June 10, 2009 and revealed to the public the independent panel's recommendations.<sup>137</sup> But contrary to the panel's recommendation to reject the proposal, the Planning Minister noted that safety considerations required him to ignore their recommendations. Because the boating industry had experienced a long-term trend towards increased recreational vessel size in Victoria, he said that the minor upgrade option for the ramp was "not viable."<sup>138</sup> Instead, the only safe option would

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<sup>131</sup> *Id.* at 148-52; *see also* posting by Don, *supra* note 126 (expressing concern over potential loss of local culture at Bastion Point as a result of the proposed breakwater and how Bastion Point will lose its beloved surf break).

<sup>132</sup> PANEL REPORT, *supra* note 128, at 149.

<sup>133</sup> *Id.* at 152.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 153.

<sup>137</sup> Aff. of Jennifer Ruth Mason at 10, *Friends of Mallacoota, Inc.*, No. 8132 of 2009, VSC 222 (Sup. Ct. of Vict. 2010) (Austl.); *see also* Originating Motion Between Parties at 6, *Friends of Mallacoota, Inc.*, No. 8132 of 2009, VSC 222 (Sup. Ct. of Vict. 2010) (Austl.).

<sup>138</sup> MINISTER FOR PLANNING, *supra* note 5, at 3.

be to close the ramp and remove it altogether.<sup>139</sup> That outcome would not address user needs and thus, was not a viable alternative either.<sup>140</sup>

The Planning Minister found holes in the panel's recommendation and picked its analysis apart. He said its recommendation failed to consider the inherent risks associated with swimmers and other beachgoers in close proximity to boating traffic near the current launch ramp location, and to do nothing would be unacceptable in the long term.<sup>141</sup> He claimed that insufficient weight was placed on the advice of the local port manager in relation to the current risks of boaters and water users<sup>142</sup> even though an accident between a surfer or swimmer and a boater at Bastion Point has never been reported.<sup>143</sup> In fact, some skeptics of the project believe easier boat access to the ocean would encourage inexperienced boaters to enter the often dangerous and unpredictable waters and would result in catastrophe.<sup>144</sup> Dave Allan, an abalone diver, predicted that greater use by inexperienced boaters would yield horrific circumstances, saying, "You're going to drown people without a doubt."<sup>145</sup>

The Planning Minister agreed with the panel that further studies should be performed to resolve issues involving the proposed parking lot expansion, and he also agreed with the panel that the East Gippsland Shire Council should appoint representatives from various local groups to determine the construction design of associated operational, safety and management arrangements. Yet, while the panel recommended this committee be formed to determine how to upgrade the old ramp, the Planning Minister wanted it to decide specifics for a new ramp.

Ultimately, the Planning Minister concluded that safety concerns were more prominent than environmental ones and said, "a new ramp [was] required that provides, to the extent possible, for mitigation of risks."<sup>146</sup> The physical separation of swimmers and other beach users from the boat launching and retrieval process provided, in his opinion, a long term solution to mitigating the safety risks, and any contemporary new facility would need to be designed consistent with a full safety audit.<sup>147</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 12.

<sup>142</sup> *Id.*

<sup>143</sup> Melissa Marino, *Town Divided as Development Row Ramps Up*, [theage.com.au](http://www.theage.com.au), (Nov. 14, 2005), <http://www.theage.com.au/news/national/town-divided-as-development-row-ramps-up/2005/11/13/1131816810854.html> (last visited Jan. 29, 2011).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> MINISTER FOR PLANNING, *supra* note 5, at 3.

<sup>147</sup> *Id.*

F. *The Public Felt Betrayed by the Planning Minister and His Manipulation of the Environment Effects Act 1978*

The Planning Minister disregarded the recommendation of his independent panel's inquiry and opted for his own plan. Many were outraged, especially considering that for generations it was understood that removing natural vegetation and laying concrete and asphalt would harm the area's sensitive habitat.<sup>148</sup> The Save Bastion Point Campaign, as well as the Victorian National Parks Association and the Australian Conservation Foundation, called on the Planning Minister to review his decision because it did not follow the environmental protections mandated by Victorian law.<sup>149</sup> Paige Shaw, a marine and coastal officer with the Victorian National Parks Association, expressed her concern over the Planning Minister's decision: "[w]e are concerned that the removal of more than 3000 cubic metres of reef, to make way for the boating channel, and the addition of more than 8000 tonnes of imported rock to construct the 130-metre-long breakwater will disturb tidal flows and damage the marine habitat."<sup>150</sup> Megan Clinton, the Victorian National Parks Association's Conservation and Campaigns Manager said, "This is a poor decision for our coasts and clearly a failure of the coastal managing system. The Environment Minister must now use his powers under the Coastal Management Act to ensure this environmentally destructive idea is dropped once and for all."<sup>151</sup>

Other members of the Victorian government took notice as well. Parliament Member Sue Pennicuik said:

Instead of the minister taking into account the needs of all users and the environment, he is supporting a proposal that caters for one user group while everything else will have to fit in. It is difficult to imagine a clearer finding by an independent panel against the proposals put forward by the proponent.<sup>152</sup>

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<sup>148</sup> See, e.g., Blanche E. Miller, *The Toll of the Road*, 51 VICTORIAN NATURALIST 251, 251-53 (1935) (discussing the impact increasing levels of cars and roads have had on birds in the East Gippsland area).

<sup>149</sup> *Australian Government Announces Construction of Controversial Bastion Point Breakwater*, SurferToday.com, (June 16, 2009), <http://www.surfertoday.com/environment/1499-australian-government-announces-construction-of-controversial-bastion-point-breakwater> (last visited Jan. 29, 2011).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Sue Pennicuik, *Adjournment: Minister Ignores Independent Panel Recommendations on Bastion Point*, THE GREENS, June 26, 2009, <http://mps.vic.greens.org.au/node/1194> (last visited Jan. 29, 2011).

Ms. Pennicuik criticized the Planning Minister's decision to prioritize political interests over those of the environment. Her call for reconsideration was never heeded.

On June 11, 2009, the Planning Minister issued a press release explaining his approval of the Bastion Point development.<sup>153</sup> In it he again emphasized beach safety without mentioning environmental considerations: "I have disagreed with the panel report and conclude that doing nothing or a minor upgrade at the existing site would only increase the risk of swimmers and beach users sharing the ocean where boat launching occurs."<sup>154</sup> Consequently, a community group took legal action against the Planning Minister.

G. *Community Groups Sued the Planning Minister; Though the Planning Minister Prevailed, the Supreme Court Voiced Concern Over His Actions under the Law*

In June 2009, the Planning Minister's approval of the proposed development at Bastion Point<sup>155</sup> alarmed the community organization, Friends of Mallacoota.<sup>156</sup> The organization filed suit in Victoria's Supreme Court against the Planning Minister on August 4.<sup>157</sup> Friends of Mallacoota sought review of the Planning Minister's actions on two grounds.

First, Friends of Mallacoota asserted that the Planning Minister exceeded or failed to exercise his jurisdiction under Section 4(1) of the EEA because he considered only the merits of the proposed works, rather than assessing the environmental effects, as required under Section 4(1).<sup>158</sup> Second, they asserted that the Planning Minister took into account irrelevant factors,<sup>159</sup> including safety and commercial considerations—namely tourism.<sup>160</sup> Third, Friends of Mallacoota claimed the Minister breached the rules of procedural fairness in making his assessment under the EEA.<sup>161</sup>

<sup>153</sup> Media Release, Victoria Planning Minister Justin Madden, Safety First for New Bastion Point Boat Ramp, (June 11, 2009) (<http://www.premier.vic.gov.au/component/content/article/7195.html>).

<sup>154</sup> *Id.*

<sup>155</sup> See MINISTER FOR PLANNING, *supra* note 5.

<sup>156</sup> Friends of Mallacoota formed in 1983, a group devoted to ensuring the Mallacoota community's involvement in decision-making with regard to environmental and developmental issues.

<sup>157</sup> Madden Decision Taken to Supreme Court, Save Bastion Point, <http://savebastionpoint.org/2009/08/05/madden-decision-taken-to-supreme-court/> (last visited Jan. 29, 2011).

<sup>158</sup> Originating Motion Between Parties at 4, *Friends of Mallacoota Inc.*, No. 8132 of 2009, VSC 222 (Sup. Ct. of Vict. 2010) (Austl.) (described by the Court as the "Approval Argument").

<sup>159</sup> The Court described this as the "Irrelevant Considerations Argument."

<sup>160</sup> Originating Motion Between Parties at 5, *Friends of Mallacoota Inc.*, No. 8132 of 2009, VSC 222 (Sup. Ct. of Vict. 2010) (Austl.).

<sup>161</sup> *Id.*

Elizabeth McKinnon, the solicitor from the Environment Defenders Office who represented Friends of Mallacoota in this lawsuit, explained the claims Friends of Mallacoota brought. She asserted that the Planning Minister failed to assess how the proposed construction project would impact the environment—as he is required to do under the EEA: “We believe there are grounds to seek Judicial Review in that the Minister fundamentally misunderstood his task under the Act.”<sup>162</sup> She further explained that the legal action against the Minister was based on the argument that the Planning Minister is not a law unto himself, and he may be held accountable for his actions in administering the EEA.<sup>163</sup>

Moreover, according to McKinnon, the case was designed to also test the efficacy and credibility of the EEA: “While of course the legal action seeks to defend the integrity of the Independent Panel’s findings and save the Mallacoota coast from destructive development, the case is also an important test of the credibility of environmental assessment laws in Victoria.”<sup>164</sup> Chris Smyth, a spokesperson for the Australian Conservation Foundation, echoed McKinnon’s thoughts: “This week’s application by the Friends of Mallacoota for the Supreme Court to judicially review the Minister’s decision is the first time that such action has been taken against a Victorian Planning Minister.”<sup>165</sup>

The Supreme Court of Victoria heard the case on May 10, 2010, in Melbourne,<sup>166</sup> marking the first time in Victorian history that a community group sought review in the Supreme Court of the Planning Minister’s assessment under the Environment Effects Act.<sup>167</sup>

On May 27, 2010, the Supreme Court issued its ruling. With regard to the jurisdiction argument, the Court stated:

The purpose of the assessment is to assist the ultimate decision maker. There is nothing in that function which suggests that the Minister’s assessment cannot assess facts of the type identified and evaluated by the panel within a framework of

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<sup>162</sup> Media Release, Friends of Mallacoota, Community group takes Planning Minister to Supreme Court (Aug. 6, 2009), *available at* <http://savebastionpoint.org/wp-content/uploads/2009/08/final-bastion-point-legal-action-mr-friends-of-mallacoota.pdf>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Media Release, Friends of Mallacoota, Supreme Court Case Awaiting Decision (May 10, 2010), *available at* <http://savebastionpoint.org/2010/05/10/supreme-court-case-complete/>.

<sup>167</sup> Media Release, Australian Conservation Foundation, Conservation groups welcome community’s legal action against Planning Minister (Aug. 6, 2009), *available at* <http://savebastionpoint.org/wp-content/uploads/2009/08/final-bastion-point-legal-action-mr-acf-vnpa.pdf>.

considerations such as those adopted by the panel. It will be for the ultimate decision maker to decide whether the basis disclosed for the opinion contained in the assessment should be accepted.<sup>168</sup>

Similarly, the Court ruled in favor of the Planning Minister regarding the irrelevant considerations argument as well. The Court said that there was nothing wrong with the Planning Minister weighing different factors more heavily than did the panel.<sup>169</sup> Finally, as to the procedural argument, the Court concluded that the plaintiffs were given proper hearings throughout the process, and that there was no violation of procedural due process under the law.<sup>170</sup> The Court focused exclusively on the administrative process, rather than on the merits of the case.<sup>171</sup>

However, even though the Supreme Court decided in favor of the Planning Minister, Justice Osborn—the presiding judge—acknowledged that the Planning Minister did not necessarily build a perfect defense. Justice Osborn stated, “the panel’s reasons for its factual conclusions are far more replete . . . than the [M]inister’s reasons.” He also said that building a breakwater to solve safety issues between boats, swimmers, and surfers was akin to “. . . using a sledgehammer to crack a nut,” and that the Minister “doesn’t . . . give very good reasons if any for rejecting the panel’s conclusions about safety . . .”<sup>172</sup> Justice Osborn implied that the vagueness of the EEA gives such great deference to the Minister that he may legally take whatever action he desires, so long as he can create *any* justification for it—regardless of that rationale’s prudence. As is clear from the case study at Bastion Point, the law as written and applied fails to provide adequate environmental protection because it gives the Planning Minister too much discretion.

#### IV. FOUR CHANGES SHOULD BE MADE TO THE EEA TO DECENTRALIZE THE POWER VESTED IN THE MINISTER FOR PLANNING

Over the years, the EEA has drawn heavy criticism and nothing substantial has been done to alleviate its problems. Specifically, critics argue that the EEA leaves too much to the discretion of administrative

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<sup>168</sup> *Friends of Mallacoota, Inc.*, VSC 222, 26-7 (Vict. Sup. Ct 2010) (Austl.).

<sup>169</sup> *Id.* at 27-36.

<sup>170</sup> *See id.* at 36-44.

<sup>171</sup> Bastion Point Decision in Jennings Hands, Environment East Gippsland, <http://www.eastgippsland.net.au/?q=node/293> (accessed Jan. 29, 2011).

<sup>172</sup> *Id.*

bureaucracy by allowing the Minister for Planning great flexibility in administering the legislation.<sup>173</sup> Generally, environmental impact assessment legislation allows Ministers a convenient scapegoat in situations where it would not be easy to reject development proposals politically.<sup>174</sup> A crafty Planning Minister may reject politically unpopular proposals by hiding behind environmental impact assessment procedures.<sup>175</sup> Conversely, environmental impact assessment legislation may create political controversy when an inquiry's conclusions differ from an outcome the Planning Minister desires.<sup>176</sup> The problem at Bastion Point arose because the Planning Minister has too much power under the EEA to overlook important environmental considerations. This Part analyzes policy considerations cutting in favor of reforming the EEA. It offers four possible reforms, each of which would improve the EEA by curtailing the vast powers the Planning Minister wields under it.

A. *The Environment Effects Act Should Place the Duty of Setting the Guidelines to an Agency or Body Other than the Planning Minister*

As it is currently administered, the EEA concentrates too much power in the Planning Minister. In order to better effectuate strong environmental assessment procedures, the EEA must disperse power to actors beyond the Planning Minister and a project's proponent. To alleviate this problem, Parliament should amend the EEA and place the duty of setting the Guidelines to an agency or body other than the Ministry for Planning. This would significantly decentralize the Planning Minister's vast powers.

The Guidelines drafted and put into effect by the Planning Minister lack statutory status, so not only does the Planning Minister have the power to author the Guidelines, but he is not bound to follow them.<sup>177</sup> As a result, the EEA does not guarantee the opportunity for the public to make submissions or a public inquiry.<sup>178</sup> Even if an inquiry is held, there is no guarantee that it will not be conducted in private, without any transparency and opportunity for public participation.<sup>179</sup> Even more alarming is the fact that the Minister also possesses the power to amend the Guidelines whenever she or he sees fit.<sup>180</sup> If the Planning Minister has a political

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<sup>173</sup> See Bush, *supra* note 17, at 116.

<sup>174</sup> See THOMAS, *supra* note 22, at 21.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

<sup>177</sup> See ECCLES & TANNETJE, *supra* note 48, at 36.

<sup>178</sup> See *id.* at 37.

<sup>179</sup> See *id.*

<sup>180</sup> Environment Effects Act 1978 §10 (2006), Vict. Acts No. 9135 (Austl.).



agenda to pursue, she or he may essentially bypass the EEA at the expense of the environment. Removing the Planning Minister's power to set the Guidelines would alleviate these problems.

*B. An Independent Body Should Be Responsible for Drafting the Environmental Effects Statement*

Next, the responsibility of drafting an environmental effects statement must fall to an independent body rather than the proponent of a project, so as to allow unbiased investigation and objective reporting of the effects of a proposed development. For example, a proponent can easily create a misleading environmental impact statement if the environmental impact statement is only specific to the particular site outlined in the scoping process but fails to take into proper consideration the cumulative, ripple effect of development throughout an entire region's broader surroundings.<sup>181</sup> This proposed change would have the effect of improving the public's perception of the process.<sup>182</sup>

An important policy concern is the amount of money required to perform an environmental impact assessment. The production of an environmental impact statement, the primary component of an environmental impact assessment, is the responsibility of the proponent to finance and is a significant part of a proposal's cost.<sup>183</sup> The public inquiry is also an expensive undertaking, and many groups invest considerable resources to support their cause, under the good faith assumption that a panel's recommendation will be followed in good faith.

Additionally, a general inequality surrounds the environment impact assessment process. Some people and groups are better positioned than others to take advantage of the environment effects process. Compiling an environment effects statement can be expensive, and fighting a proposed project may be financially challenging as well. In reality, only certain players in society possess the financial capacity to fully participate in the process, exacerbating pre-existing equality gaps.<sup>184</sup> Similarly, during the Assembly debate prior to the passage of the EEA, one opponent of the

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<sup>181</sup> See Bush, *supra* note 17, at 108.

<sup>182</sup> See ECCLES & TANNETJE, *supra* note 48, at 36.

<sup>183</sup> THOMAS, *supra* note 22, at 20. My proposal calls for an independent body to perform the environmental impact statement and does not necessarily mean shifting the cost to that independent body. The proponent should still be obligated to finance the environmental impact statement.

<sup>184</sup> See Ross King, *Project Development and the Social Environment*, in Vol. 7 No. 6 SEARCH 246, 247-48 (1976).

legislation discussed the way in which the EEA may advantage certain demographics:

The proposed legislation will give a great advantage to the academic pressure groups, mainly student-based, which have the time and apparently the finance and facilities to embark on intensive publicity campaigns to the disadvantage of people in rural areas, in particular, who do not have the advantage of people with 'Doctor' before their names and all sorts of alleged qualifications.<sup>185</sup>

The Planning Minister should consider these factors as well in any decision he makes, but in practice this simply is not the case. Ultimately, an independent body would impartially complete an environmental effects statement, free from biases and hidden agendas.

*C. The Environment Effects Act 1978 Should Require That an Independent Panel Evaluate Proposed Projects*

The EEA should also require an independent panel to examine each proposed project. An independent body should be capable of providing a nonbiased evaluation of the potential environmental consequences of a development proposal.

*D. An Independent Panel's Recommendation Should Bind the Planning Minister*

To insulate environmental decision-making from political pressures, the recommendation of the independent panel should bind the Planning Minister.

Environmental impact assessment evaluations are difficult decision-making processes, and, in theory, require the decision-maker to make value judgments on behalf of society.<sup>186</sup> But even while environmental impact assessment has been viewed as a very technical process, it is inherently a political process as well.<sup>187</sup> Australian Conservation Foundation spokesperson Chris Smyth believes the Environment Effects Act's current configuration caters too much to political motivations: "Victoria's

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<sup>185</sup> VICT. PARL. DEB. Vol. 338, Sess. 1978, 3066 (May 16, 1978) (Mr. Evans) (Austl.).

<sup>186</sup> Barry T. Hart & Peter Cullen, *Principles of Environment Impact Assessment*, in Vol. 7 No. 6 SEARCH 231, 234 (1976).

<sup>187</sup> THOMAS, *supra* note 22, at 17.

Environment Effects Act is a mere sixteen pages long and is open to broad interpretation and makes it easy for political self-interest to override environmental concerns.<sup>188</sup> Indeed, the environmental impact assessment process was the product of the politics that surrounded the effects development projects were having on the environment.<sup>189</sup> Environmental impact assessments involving the approval of certain development projects are made by elected Planning Ministers, and their decisions are inevitably affected by the economic and political climate at the time of their determinations.<sup>190</sup> Nothing in the EEA protects against a Planning Minister's political motivations.

The politics of the environmental impact assessment process in general, however, is not confined strictly to the politics of parties and elections, but includes the politics of personal and organizational survival.<sup>191</sup> This could be inferred from the Bastion Point environmental impact assessment process, as some skeptics suggest the Planning Minister approved the new boat ramp at Mallacoota in order to support a proposed aquaculture business planned for Gabo and Tullaberga Islands.<sup>192</sup> Making the independent panel's recommendations binding would guard against aggregation of power in individuals and organizations when those parties act solely for private benefit at the expense of the environment.

In sum, four reforms should be made to exponentially improve the EEA. First, to provide a check on the Planning Minister's powers, Parliament should amend the Environment Effects Act to place the power to amend the Guidelines into the hands of a body other than the individual charged with administering the EEA—the Planning Minister. Second, environmental impact assessments should be performed not by the proponent of a project, but by an impartial, independent party to assure that no corners are cut and that all potential environmental effects receive consideration. Third, all proposed projects should be required to go through the public inquiry process and be analyzed by impartial professionals. Fourth, in order to ensure that political will does not indiscriminately prevail over the interests of the environment, a public panel's recommendation should be binding on the Planning Minister. Therefore, if a panel performs its analysis of a proposal's effects and recommends that a project should not move forward, the Planning Minister should be bound by that decision and

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<sup>188</sup> Media Release, *supra* note 167.

<sup>189</sup> THOMAS, *supra* note 22, at 17.

<sup>190</sup> Mosley, *supra* note 33, at 268.

<sup>191</sup> THOMAS, *supra* note 22, at 18.

<sup>192</sup> Post by David Robertson to The Little Stevies Blog Archive, <http://www.thelittlestevies.com/wp/?p=44> (March 19, 2007, 20:35).

not be allowed to approve it. Any of these four changes by themselves would significantly improve the EEA, but implementing all four would ensure maximum consideration for environmental concerns.

## V. CONCLUSION

By the 1950s, tourists traveling Australia's Prince's Highway began to drive the fourteen miles down to picturesque Mallacoota.<sup>193</sup> This trend continues today. In order for Mallacoota Inlet and Bastion Point, located just off the western channel of the Inlet's mouth, to remain in their unspoiled state, they need greater protections than the EEA currently provides. The EEA, along with its overbroad Guidelines, has failed to protect Bastion Point's sensitive coastal ecosystems from the current politically-minded Planning Minister, as evidenced by his recent approval of the Bastion Point boat ramp project.

The EEA currently places too much power into the hands of the Planning Minister. This wealth of power allows him to execute the steps outlined in the EEA and its Guidelines and yet still undermine the interests of the environment. This comment has proposed four potential reforms to the Environment Effects Act, each of which, if adopted by Victoria's Parliament, would significantly curtail the power currently allotted to the Planning Minister and improve the functioning of the EEA.

E.J. Brady once predicted, "No coarse hand of progress will ever tear from Mallacoota and its surroundings the mystic beauty that still clings to it like an enchanted veil, showing under the soft transparency of sky and air a loveliness amongst the rarest in picturesque Australia."<sup>194</sup> Sadly, if reforms to the "window dressing" that is the EEA are not made soon, Brady's prediction may prove unrealistic.

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<sup>193</sup> See Peter Cook, *Eden to Mallacoota*, TOP TREKS OF THE WORLD 110 (Steve Razzetti, ed., 2001) (listing Mallacoota as a destination in one of the "Top Treks of the World").

<sup>194</sup> E.J. BRADY, *THE OVERLANDER: PRINCE'S HIGHWAY 156* (1926), reprinted in MALLACOOTA & DISTRICT HISTORICAL SOCIETY, *MALLACOOTA MEMORIES* 8 (1980).