

Opportunity Lost? - ‘Significant Social Effects’ in Planning Permit Applications¹

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‘Significant Social Effect’ (‘SSE’) is a mandatory consideration in every planning permit application³. Its role in the planning permit process, however, is far from clear. Is current practice leading to lost opportunities for improved planning?

Review of the legislative history of SSE in planning permits, together with case law since it became mandatory, highlights awkwardness in its operation.

The requirement that decision-makers must consider whether a proposed use or development may have any SSE is often minimalised in practice. Successful reliance upon it is very rare, given the practical difficulties that appear now to exist in demonstrating a sufficiently significant impact.

Whilst vexing, this paper concludes that SSE has potential to be utilised in a more robust and rigorous way to achieve positive planning outcomes. SSE presents opportunities for innovative improvements in community engagement, more responsive permit conditions, and improved development, economic and planning outcomes, driven by communities actively cooperating to improve the society in which they live.

A discussion needs to occur within Victoria about SSE to explore its future. This paper recommends that SSE be the subject of a Ministerial Advisory Committee to lead discussion on this important topic and review best practices internationally in assessing social effects, to create a better understanding of SSE and a clear framework for assessing SSE.

Background

Town planning reflects a society’s social values and fears - whether it be anti-terrorist bollards at Flinders Street Station, contemporary bicycle trails, the treatment of heritage (buildings) or emphasis on providing sporting stadiums and facilities. Provisions within the Victorian Planning Provisions (‘VPP’), for example cl10.4, require decision-makers to take account of wide ranging social elements. In turn, planning decisions reflect, in part, society’s social values given the usual extent of public consultation.

However, where social values become articulated as an SSE and planners or communities seek to articulate particular community values and/or fears, these same societal values can be met with evidentiary mistrust or even disdain. Attempts to evidence SSE are often unwieldy and seem to be regarded by some decision-makers as if they require the taming, reinterpretation or containment of an inherent idealism in favour of more pragmatic planning controls (eg traffic, economics or even rescoding).

In 1961, Lewis Mumford in *‘The City in History’* theorised a future city. He identified ‘sprawling gigantism’, in which city growth would override community social structures:

¹ This analysis does not consider SSE in the Planning Scheme Amendment process although the overall approaches should also be useful to amendment considerations. The date of this paper is 23 December 2017.

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³ *Planning and Environment Act 1987* s60(1)(f).

“Failing to divide its social chromosomes and split up into new cells, each bearing some portion of the original inheritance, the city continues to grow inorganically, indeed cancerously, by continuous breaking down of old tissues, and an overgrowth of formless tissue...”⁴

Mumford warned of the dangers of a city that became disconnected from its social purpose, describing a formless ‘*ever-widening maw*’ driven by economic necessity and ease⁵.

Economics is often used to oppose SSE analysis. However, the commercial benefits of social capital are well understood within entrepreneurship and business. Notions, such as social capital, emphasise the commercial and governance benefits of improved sociability or social capacity. Francis Fukuyama, the renowned political scientist described ‘social capital’ as

“... a capability that arises from the prevalence of trust in a society or in certain parts of it... Social capital differs from other forms of human capital insofar as it is usually created and transmitted through cultural mechanisms like religion, tradition, or historical habit... The proclivity for sociability is much harder to acquire than other forms of human capital, but because it is based on ethical habit, it is also harder to modify or destroy.”⁶

Social capital and the strength that comes with an established and trusting network, is well understood to bring long term economic benefits⁷. Improving SSE assessment, therefore, should not be viewed as a soft, fluffy consideration but rather a fundamental element to improved planning in general and, in particular, in providing vital economic and commercial benefits.

Whilst perhaps messy, difficult, intangible or subjective, SSE provides the opportunity, the authority and the power to reflect, discuss and unlock expansive ideas that can properly guide and refocus planning for society and its social, human dimension. These concepts can be easily overlooked in contrast to other forms of evidence, particularly quantitative assessments such financial or conventional economic assessments.

Chief Judge of the NSW Land and Environment Court, The Honourable Justice Brian John Preston SC⁸, emphasised the flaws in reliance on quantitative rather than qualitative assessments:

*‘Undue attention and weight are given to quantifiable data to the detriment of unquantifiable data’.*⁹

Similarly, Simon Molesworth QC, as he then was, in a 2013 conference paper, reflected on the social and human importance of Environmental Sustainable Development (ESD) saying:

“Insufficient understanding and consideration of the human dimension, in social and cultural terms, in ESD statutory processes is causing a “disconnect” with the community-at-large and is undermining the attainment of the underpinning goals.”¹⁰

⁴ Lewis Mumford, *The City in History*, Secker and Warburg, 1961, p 543.

⁵ Lewis Mumford, *The City in History*, Secker and Warburg, 1961, p 544.

⁶ Fukuyama, Francis, 1995, *Trust: The Social Virtues and The Creation of Prosperity*, Free Press Paperback New York, NY.

⁷ Gambetta, Diego, 1988, Can We Trust Trust? in Gambetta, Diego (ed.), *Trust Making and Breaking Cooperative Relations*, Basil Blackwell; Fukuyama, Francis, 1995, *Trust: The Social Virtues and The Creation of Prosperity*, Free Press Paperback New York, NY. Putnam, R.D, 1995, *Bowling Alone: The Collapse and Revival of American Community*, Simon & Schuster.

⁸ ‘*The Adequacy of the Law in Satisfying Society’s Expectations for Major Projects*’, paper presented by Justice Brian J Preston to the International Bar Association Annual Conference, 22 October 2014, Tokyo, Japan, published in (2015) 32 *Environmental and Planning Law Journal* 182 pages 196-197.

⁹ *Ibid*, page 197 – citing *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; (2006) 146 LGERA 10; [2006] NSWLEC 133 at [174]. See also Tribe LH, “Ways Not to Think About Plastic Trees: New Foundations for Environmental Law” (1974) 83 *Yale LJ* 1315, particularly at 1317; Boer B, “Social Ecology and Environmental Law” (1984) 1 *EPLJ* 233 at 237-239; and de Sadeleer N, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2005) p 199.

Molesworth identified that, often, in the process of responding to ESD requirements, social and cultural elements were overlooked, which in-turn undermined the quality of any ESD assessment.

SSE, as a mandatory consideration, presents Victoria with an opportunity to call up these important social inputs, through each individual permit decision, leading to better understanding and a more socially responsive city for the state's long term future.

SSE History in Victoria

In 1987, the *Planning & Environment Act 1987* (PEA) introduced SSE as a *discretionary* consideration¹¹. The term, SSE, was undefined and, given its breadth and aspirational tone, little could be implied from the general scope and purpose of the Act as a whole¹². As a result, interpretation of how the provision applied tended to be largely left to the decision-maker¹³.

In 1997, then Supreme Court Justice Kenneth Hayne noted, in *Returned & Services League of Australia (Victoria Branch) Inc, Glenroy Sub-Branch v Moreland City Council and the Carlton Cricket & Football Social Club Limited ('RSL Case')*¹⁴, that the wording of the SSE provision was 'difficult'. His Honour recommended:

*'There should be no doubt about the matters to which responsible authorities should have regard in deciding these applications. The drafting should be reconsidered'*¹⁵. (emphasis added)

In 2009, '*Modernising Victoria's Planning Act*' ('*Modernising Victoria*') and its five Government response papers¹⁶, discussed the need to distinguish 'social' and 'economic' from 'environment' and recommended that this distinction be 'made clear'¹⁷. Despite the absence of any clear policy link, both the *RSL Case* and *Modernising Victoria* appear to have been important drivers in the change to make SSE a mandatory consideration.

That change occurred in 2013, with the introduction of s60(1)(f) PEA, that required consideration of:

"(f) any significant social effects and economic effects which the responsible authority considers the use or development may have."¹⁸

In 2015, a further PEA amendment, known as the '*Recognising Objectors*'¹⁹ amendment, introduced s60(1B) PEA. This created an additional discretionary consideration:

¹⁰ Simon Molesworth AO QC, 'Has ESD had its day?' (Paper presented at the National Environmental Law Association Conference. Melbourne, 7-9 May 2013).

¹¹ *Planning and Environment Act 1987* s60(1)(b)(i). [Amended in 2004 to 60(1A) but the original wording of the SSE provisions was largely unedited].

¹² *Wardley Aust Ltd v Attorney-General* (WA) (1991) 5 WAR 453, 460-1.

¹³ *Minister of Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Seans Investments Pty Ltd v Mackellar* (1981) 38 ALR 363.

¹⁴ *Returned & Services League of Australia (Victoria Branch) Inc, Glenroy Sub-Branch v Moreland City Council and the Carlton Cricket & Football Social Club Limited* [1997] VSC 29, 8.

¹⁵ *Ibid*, Para 10.

¹⁶ Victoria, *Modernising Victoria's Planning Act – A discussion paper on opportunities to improve the Planning and Environment Act 1987*, (2009).

¹⁷ Sallyanne Everett and Megan Schroor, *Modernising Victoria's Planning Act: Draft Bill's proposed reforms* (2010) Clayton Utz ,

<https://www.claytonutz.com/knowledge/2010/april/modernising-victoria-s-planning-act-draft-bill-s-proposed-reforms>;

Sallyanne Everett and Asra Hewitt, *Modernising Victoria's Planning Act* (2009) Clayton Utz

<https://www.claytonutz.com/knowledge/2009/september/modernising-victoria-s-planning-act>

¹⁸ *Planning and Environment Act 1987* (Vic) s60(1)(f).

¹⁹ *Planning and Environment Amendment (Recognising Objectors) Act 2015*.

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

In introducing the *Recognising Objectors* Amendment, Minister Wynne noted that it:

*“...makes it clear that the number of objectors may be a relevant factor that ought to be considered in this assessment.”*²⁰

Subsequently, VCAT determined that the “number of objectors” can be a relevant factor, but *“the mere identification of significant community opposition to a proposal is not a significant social effect of itself.”*²¹

Cases

A review of twenty five cases since 2013²², together with five key cases pre-2013²³, identified two ‘leading’ cases - *Rutherford v Hume CC* [2014] VCAT 786 (‘Rutherford’) and *Hoskins v Greater Bendigo CC* [2015] VSCA 35 (‘Hoskins’). The two cases, in effect, bring together broad case principles, or perhaps ‘hurdles’²⁴, to be addressed in considering SSE. These lead cases *each* merit a brief description.

Rutherford considered an application for a mosque within an Industrial Zone in Coolaroo, a suburb in the north of Melbourne. The applicant for review objected to the Mosque on the basis it would have a SSE on the abutting Assyrian Christian Church, very closely located. The congregation of the Assyrian Church comprised predominately Iraqi and Syrian Christian Refugees who had fled religious persecution from Muslim communities. VCAT found that an ‘arguable’ SSE existed – it being the:

*“potential for members of the congregation of St Mary’s Church to feel so affronted by the presence of the mosque immediately adjacent to their church that they will cease attending the church, and it may close”*²⁵.

Interestingly, *Rutherford* appears to be the only case since 2013 in which a SSE was found to ‘arguably’ exist. However, in *Rutherford*, VCAT found that any SSE was insufficient to outweigh the proposal’s benefits. *Rutherford* also brought together a number of the key principals from earlier (discretionary) SSE cases.

²⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 27 May 2015, 1576 (Richard Wynne).

²¹ *Glynn Hamm v South Gippsland CC* [2016] VCAT 1253 (Senior Member Laurie Hewet, Member Alison); *Backman & Company Pty Ltd v Boroondara CC (Red Dot)* [2015] VCAT 1836. [para 33] (Member Michael Deidun)

²² *Rutherford & Ors v Hume CC* [2014] VCAT 786; *Angels Health Service Aust Pty Ltd v Manningham CC* [2014] VCAT 1517; *Taylor v Kingston CC* [2014] VCAT 1397; *Carlton Football Club Ltd v Hobsons Bay CC* [2015] VCAT 645; *Sutanto Developments Pty Ltd v Glen Eira CC* [2015] VCAT 1073; *Hoskins v Greater Bendigo CC and Anor* [2015] VCAT 1124; *Backman & Co Pty Ltd v Boroondara CC* [2015] VCAT 183; *Hoskin v Greater Bendigo City Council* [2015] VSCA 350; *Victoria Amateur Turf Club v Mornington Peninsula SC* [2015] VCAT 1991; *Vukadinovic v Mount Alexander SC (No.6) (Correction)* [2015] VCAT 1993; *Lee v Maribyrnong CC* [2015] VCAT 1857; *Islamic Society of Victoria Inc v Moreland CC* [2015] VCAT 1847; *Islamic Education and Welfare Association of Dandenong Inc v Casey CC* [2016] VCAT 609; *Telstra Corporation Ltd v Greater Geelong CC* [2016] VCAT 1361; *Khanna v Boroondara CC* [2016] VCAT 1415; *Ozzi Trade Pty Ltd v Hume CC* [2016] VCAT 1876; *Hamm v South Gippsland CC* [2016] VCAT 1253; *Tuhan v Moira SC* [2016] VCAT 235; *Australian Muslim Media Ltd v Hume CC* [2017] VCAT 25; *Lahdo v Port Phillip CC* [2017] VCAT 686; *Japara Property Holdings Pty Ltd v Monash CC* [2017] 1009; *Hill v Maribyrnong CC* [2017] VCAT 1934; *ALH Group Property Holdings Pty Ltd v Whittlesea CC (Corrected)* [2017] VCAT 2164; *Empire State Holdings Pty Ltd v Kingston CC* [2017] VCAT 506; *Curry v Banyule CC* [2017] VCAT 430.

²³ *Tabcorp Holdings Pty Ltd v Moreland CC* [2004] VCAT 693; *Minawood Pty Ltd v Bayside CC* [2009] VCAT 440; *Johnson v Greater Shepparton CC* [2005] VCAT 1432; *Stonnington CC v Lend Lease Apartments (Armada) Pty Ltd* [2013] VSC 505; *Hunt Club Commercial Pty Ltd v Casey CC* [2013] VCAT 725.

²⁴ *Backman & Company Pty Ltd v Boroondara CC (Red Dot)* [2015] VCAT 1836, 26.

²⁵ *Rutherford v Hume CC* [2014] VCAT 786 [58].

Hoskins concerned the construction of a mosque in Bendigo. However, the social effect claimed in this case was quite different. Rather than a direct effect upon a proximately located existing minority refugee religious group, the SSE was claimed by a loosely affiliated group of Bendigo residents with connections to an anti-Muslim community organisation. The case considered whether a Council was obliged to conduct independent or expert SSE assessment every time an objection raised a potential SSE. VCAT confirmed the principles set out in *Rutherford*, but clarified that a Council was not obliged to undertake an independent assessment in all cases merely because objections raised SSE.

On appeal, the Victorian Supreme Court of Appeal ('VCA') Decision, comprising former Chief Justice Warren, with Justices Osborn and Santamaria, refused appeal on the basis that there was no prospect of success. The objector's grounds of appeal were that the Tribunal had misdirected itself on the operation of s60(1)(f) PEA and that it had wrongly "*treated the absence of supporting evidence as dispositive of the group objectors' case as to significant social effects*"²⁶. VCA confirmed that a Responsible Authority was not required to "*obtain an independent expert social impact assessment as a precondition to the grant of a planning permit*"²⁷. The Decision included 13 important 'preliminary observations' about s60(1)(f) PEA. Given their significance, these key elements are quoted in full in Appendix A.

Case Review

Of the cases reviewed, none refused a permit application based upon SSE. Interestingly, by contrast, a handful of early cases before VCAT's creation in 1998²⁸, did rely upon SSE to partially or wholly defeat a permit application²⁹ but, in these cases, 'social' issues tended to be conflated with other effects, such as 'economic' effects.

From the above, analysis suggests that three broad groups of key operational principles arise³⁰ that are core to SSE as well as required evidence, approaches to determining 'significance' and the required evidence and follow the order of the table.

Core Concepts of SSE

- Town Planning is 'not a panacea for all social ills'³¹.
- It is not defined by stipulated criteria³².
- It is 'necessarily protean', ie frequently changing³³.
- The responsibility for determining what constitutes a SSE is not placed with the Supreme Court³⁴.
- The Responsible Authority [and VCAT on appeal] determines whether something constitutes an SSE and what weight it should be given³⁵.
- The Responsible Authority may determine that no formal SSE assessment is required³⁶.
- SSE (and all s60(1) considerations), whilst mandatory are not determinative³⁷.

²⁶ *Hoskin v Greater Bendigo City Council* [2015] VSCA 350, 15.

²⁷ *Hoskin v Greater Bendigo City Council* [2015] VSCA 350, 94.

²⁸ Victorian Civil and Administrative Tribunal Act 1998

²⁹ Philip Barton, "Town planning: social and economic considerations" [1998] LJ 138, 46. – citing *Robert Pellicano & Co Pty Ltd v City of Springvale* (1988) 1 AATR 291; *R&A Marion v Shire of Orbost* (1994) 12 AATR 268; *Nancon Australia Pty Ltd v City of Maroondah* (1997) 18 AATR 50; *S& R Belmuda v City of Dandenong* (1992) 8 AATR 326; *St Albans Concert Band v City of Sunshine* (1992) AATR 290; *Office of Corrections v City of Heidelberg* (1988) 1 AATR 137; *West Moorabool Water Board v Shire of Buninyong* (1989) 2 AATR 202; *Odeon Hotels Pty Ltd v City of Melbourne* (1990) 4 AATR 338; *Bunge Meat Industries Ltd v Shire of Huntly & Anfuso* (1992) 8 AATR 337; *N Sammartino v Greater Geelong City Council* (1997) 19 AATR 295; *J Wood v Brimbank City Council* (1997) 20 AATR 192.

³⁰ This analysis should not be relied upon on as exhaustive of SSE principles.

³¹ *Johnson v Greater Shepparton CC* [2005] VCAT 1432; *Rutherford v Hume CC* [2014] VCAT 786.

³² *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

³³ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

³⁴ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

³⁵ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

³⁶ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

³⁷ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

- SSE must be balanced with other significant effects³⁸ eg environmental.

Evidence Required

- SSE must be objective and evidenced. It requires a 'proper evidentiary basis'³⁹.
- SSE must have a causal connection to both the proposed use or development as well as the objectives of planning⁴⁰.
- SSE needs to be an effect upon the community and not merely upon one individual or a small group of individuals. It could, potentially, include the whole State⁴¹.
- SSE can be positive or negative. An SSE assessment must consider both types of effect⁴².
- SSE involves an evaluative judgment of fact and degree⁴³.
- SSE should be 'objectively ascertained through the decision maker's expertise'⁴⁴.

Determining Significance

- Determining significance is a question of fact⁴⁵.
- It must be of a sufficient extent⁴⁶.
- The effect must be sufficiently probable to be 'significant'⁴⁷.
- 'Significant' is informed by the possible gravity of the effect, including consideration of the 'postulated consequences'⁴⁸.
- When considering if an effect is 'significant', it is necessary to have regard to: the planning scheme definition of the use or development sought, the applicant's disclosed intentions and the capacity to confine and control the proposed use by permit conditions⁴⁹.
- The mode of assessing the significance of an effect is not prescribed in PEA⁵⁰.

The analysis reveals a degree of complexity and difficulty in identifying what an SSE actually is. This preliminary dilemma stands apart from the actual questions of how it should be considered, evidenced and weighted within a permit application. Terms such as '*social effect*', '*social impact*', '*social impact assessment*' and '*social and economic impact*' tend to be used interchangeably.

Apart from needing a 'proper evidentiary basis' there is no clear method of evidencing SSE, although many of the cases accepted a Social Impact Assessment ('SIA') as a 'proper evidentiary basis'⁵¹.

Analytical Method needed to better utilise SSE

It should be noted that SIA is only one form of at least thirty different possible methods for analysing and assessing 'Social Impact'. The lack of consensus regarding methodology and definition is recognised as hampering the ability to study social impact⁵². No Victorian or Australian SIA standard exists.

³⁸ *Rutherford v Hume CC* [2014] VCAT 786.

³⁹ *Minawood Pty v Bayside CC* [2009] VCAT 440; *Rutherford v Hume CC* [2014] VCAT 786.

⁴⁰ *Minawood Pty Ltd v Bayside CC* [2009] VCAT 440; *Rutherford v Hume CC* [2014] VCAT 786.

⁴¹ *Stonnington CC v Lend Lease Apartments (Armadale) Pty Ltd* [2013] VSC 505; *Rutherford v Hume CC* [2014] VCAT 786.

⁴² *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

⁴³ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

⁴⁴ *Rutherford v Hume CC* [2014] VCAT 786.

⁴⁵ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

⁴⁶ *Minawood Pty Ltd v Bayside CC* [2009] VCAT 440; *Rutherford v Hume CC* [2014] VCAT 786.

⁴⁷ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

⁴⁸ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

⁴⁹ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

⁵⁰ *Hoskins v Greater Bendigo CC* [2015] VSCA 350.

⁵¹ *Rutherford v Hume CC* [2014] VCAT 786 para 53.

⁵² Maas, Karen & Liket, Kellie. (2011). *Social Impact Measurement: Classification of Methods*, Environmental Management Accounting and Supply Chain Management, pp.171-202.

The SIA methodology developed in the United States of America in the 1970s as an extension of the Environmental Impact Statement process⁵³. International SIA principles and guidelines⁵⁴ were subsequently developed by the International Association for Impact Assessment (IAIA). These provide useful methodology and principles, as well as detailed guidelines to assessment. They extend to implementation, monitoring conditions and, where required, remediation. The IAIA regards high assessment standards as critical. For example, it recommends that good SIA practice requires any report to be subject to professional peer review⁵⁵.

The call for rigorous, high SIA standards is echoed locally. As then Victorian barrister Rebecca Leshinsky told a 2007 *State of Australian Cities National Conference*:

*“...it is only when SIA[s] are prepared to a high academic standard which can withstand rigorous cross examination, that they will be taken more seriously by the law.”*⁵⁶

To reach such a high standard, it is critical that SIA or any form of SSE assessment adopts rigorous research protocols. A number of guides and manuals exist that propose excellent methods of assessing social impact, many making similar recommendations. One example is the United Nations Environment Program’s ‘Environmental Impact Assessment Training Resource Manual’⁵⁷. At a minimum, three basic research methodologies are required. These are - clear identification of the precise assessment or research question⁵⁸ and its purpose⁵⁹, rigorous objective data collection methods⁶⁰ and tightly stated and justified analytic techniques⁶¹.

The assessment should also include qualitative research as a recognised method for uncovering deep rich data generating ‘*contextual, nuanced and authentic accounts of participants’ outer and inner worlds, that is, their experiences and how they interpret them*’⁶². Deep rich data is of particular importance to most forms of social effects assessment and key to possible mitigation of negative effects. Examples of qualitative methodologies include case studies, interviews, grounded research and action research⁶³. Qualitative methodologies should form a basic part of all social effect evidence and, from there, judicial review.

⁵³ Rabel J. Burdge & Frank Vanclay, ‘*Social Impact Assessment: A contribution to the state of the art series*’ (1996)14 *Impact Assessment*,62.

⁵⁴ Frank Vanclay, *International Principles For Social Impact Assessment*, *Impact Assessment and Project Appraisal*, volume 21, number 1, March 20013 pages 5-11 Beech Tree Publishing / Vanclay, F., Esteves, A.M., Aucamp, I. & Franks, D. 2015 *Social Impact Assessment: Guidance for assessing and managing the social impacts of projects*. Fargo ND: International Association for Impact Assessment.

⁵⁵ Vanclay, F., Esteves, A.M., Aucamp, I. & Franks, D. 2015 *Social Impact Assessment: Guidance for assessing and managing the social impacts of projects*. Fargo ND: International Association for Impact Assessment.

⁵⁶ Rebecca Leshinsky, ‘*Urban tool: The role of social impact assessment in Victorian planning decision making*’, Conference paper presented at the State of Australian Cities National Conference, 2007.

⁵⁷ United Nations Environment Programme UNEP, *Environmental Impact Assessment Training Resource Manual*, Barry Sadler and Mary McCabe (eds), 2002, 2ed, <http://archive.iwlearn.net/www.sprep.org/www.sprep.org/att/IRC/eCOPIES/Global/217.pdf>

⁵⁸ Easterby-Smith, Mark, R Thorpe & P Jackson, 2008, *Management Research: Theory and Research*, Sage, London.

⁵⁹ Collis, Jill & Roger Hussey, 2009, *Business Research: A Practical Guide for Undergraduate and Post Graduate Student*, Palgrave Mcmillan, London 2nd ed.

⁶⁰ Carson, D, A. Gilmore, C.Perry and K. Gronhaug, 2001, *Qualitative Marketing Research*, Sage Publications, London; Eisenhardt, KM, 1989, Building Theories from Case Study Research, *Academy of Management Review*, Vol14, No 4, 532-550; Patton, M, 1990, *Qualitative Evaluation and Research Methods*, Sage, Newbury Park; Stake, R.E., 1995, *The Art of Case Study Research*, Sage, Thousand Oaks, CA; Hedges, A., 1985, Group Interviewing in Walker, R. (ed), *Applied Qualitative Research*, Gower, Aldershot; Yin, R.K., 2009, *Case Study Research Design and Methods*, 4th ed., Sage Publications Inc, Thousand Oaks; Glasser, B.G.& A.L. Strauss, 1967, *The Discovery of Grounded Theory: Strategies for Qualitative Research*, Adline Traction, Rutgers, Piscataway, NJ.

⁶¹ Coffey, A., B. Holbrook & P. Atkinson, 1996, Qualitative Data Analysis: Technologies and Representations, *Sociological Research Online*, Vol 1, No 1; Hussey, J and R. Hussey, 1997, *Business Research: A practical guide for undergraduate and post graduate students*, Basingstoke, Macmillan; Miles, M.B and A.M. Huberman, 1994, *Qualitative Data Analysis: an Expanded Sourcebook*, Sage, Thousand Oaks, CA; Nakata, Martin, 2008, *Disciplining the Savages Savaging the Disciplines*, Aboriginal Studies Press, Canberra; Dey, I, 1998, *The Foundations of Social Research: Meaning and Perspective in the Research Process*, Allen & Unwin, St Leonards.

⁶² Ulrike Schultze and Michel Avital , *Designing interviews to generate rich data for information systems research*, *Information and Organization* 21 (2011) 1–16; Hine, Damian and David Carson, 2007, *Innovative Methodologies in Enterprise Research*, Edward Elgar Publishing; Carson, D, A. Gilmore, C.Perry and K. Gronhaug, 2001, *Qualitative Marketing Research*, Sage Publications, London; Denzin, NK & YS Lincoln (Eds) *Handbook of Qualitative Research*, Sage Publishing Thousand Oaks, CA.

⁶³ United Nations Environment Programme UNEP, *Environmental Impact Assessment Training Resource Manual*, Barry Sadler and Mary McCabe (eds), 2002, 2ed, <http://archive.iwlearn.net/www.sprep.org/www.sprep.org/att/IRC/eCOPIES/Global/217.pdf>.

Some Australian Courts have taken steps to incorporate more rigorous research-based protocols into Court procedures. For example, the Federal Court of Australia has a Survey Evidence Practice Note⁶⁴ which outlines a detailed procedure for parties wishing to rely on survey evidence. It requires notice to the Court and all parties of the intention to rely on survey evidence and requires that the parties reveal, for example, the specific research question, survey design, form of survey, population investigated and a copy of any questionnaire(s). The Federal Court's example in this regard could be most helpful for a productive and contributory role for SSE in planning permit applications. However, it should extend beyond the survey methodology to other research methods and including qualitative research.

It is important that an SIA does not diminish the value of an individual's or a communities own experience. The requirement for an outsider 'expert' to record, understand and articulate an individual or community experience, can further exclude people – in particular vulnerable communities.

*"...the application of stringent standards of evidence may have the impact of excluding the most relevant and revealing evidence - that of the people actually experiencing the effect."*⁶⁵

A common example of vulnerable communities being impacted by such a requirement, is Indigenous Australian's Native Title experience which often requires a Native Title claimant to produce 'expert evidence' of the Indigenous culture, experience, knowledge and law in which the claimant is expert and must give to the outsider non-indigenous 'experts', rather than giving that evidence themselves⁶⁶.

Council Policy

No Victorian Council appears to have a specific SSE policy. A handful of Councils have developed SIA policies⁶⁷. These include Hume City Council⁶⁸, the Responsible Authority in *Rutherford*. Hume's policy identifies specific types of permit applications which require consideration of 'social impact'. The policy seeks to respond to the mandatory SSE consideration, without clogging Council's permit system with unnecessary SIAs. It outlines a less burdensome assessment method that it terms a '*Social Impact Comment*'. Its '*Social Impact Comment*' is a basic assessment without requiring specialist or technical assistance⁶⁹. The Policy provides a list of different land uses as a guide to where it will require a full assessment rather than a '*comment*'. The author tabulated these lists in the Table 1.⁷⁰ In 2016, Hume City Council identified difficulty enforcing its policy, as it was not part of the Planning Scheme, and resolved to consider including the policy in its Planning Scheme to improve its utility.⁷¹ To the time of writing the policy does not yet appear to have been included in the Planning Scheme.

⁶⁴ Federal Court of Australia, *Survey Evidence Practice Note (GPN – SURV) General Practice Note*, 25 October 2016.

⁶⁵ Kelleher, Leonie and Forrester, Robert. *Significant social effects - lessons from Victoria* [online]. Australian Environmental Law Digest, Vol. 1, No. 2, Nov 2014: [41].

⁶⁶ Kelleher, Leonie and Forrester, Robert. *Significant social effects - lessons from Victoria* [online]. Australian Environmental Law Digest, Vol. 1, No. 2, Nov 2014: [41].

⁶⁷ Maribyrnong City Council, East Gippsland Shire Council, Greater Dandenong City Council, Hobson's Bay Council and Hume City Council.

⁶⁸ Hume City Council '*Social Impact Assessment Planning Policy and Guidelines*' July 2016: an update of an original July 2014 Version (adopted after *Rutherford*).

⁶⁹ Hume City Council '*Social Impact Assessment Planning Policy and Guidelines*' July 2016 page 7.

⁷⁰ Hume City Council '*Social Impact Assessment Planning Policy and Guidelines*' July 2016 pages 8-9.

⁷¹ Hume City Council Minutes, 11 July 2016, Officers Report 'Review of the Social Impact Assessment Policy' pages 25-45.

Table 1. Categories of Types of Use Requiring Social Impact Comment or Assessment in Hume City Council 'Social Impact Assessment Planning Policy and Guidelines' July 2016

Type of Use	Criteria for Social Impact Comment (SIC)	Criteria for Social Impact Assessment (SIA)
Child Care Centres	Up to 59 places	60 children's places or greater (new or extension)
Aged Care Centre/Residential Care Facility/Supported Residential Care Services	20 units or less	21 Units or greater (new or extension)
Retirement Village	Up to 59 units	60 units or more
Educational Facilities (non-government)	Any	-
Hotels/Taverns and Registered Clubs	-	Any
Community Facilities (neighbourhood house, community health/medical clinic/centre/consulting rooms etc.)	Any	-
Medical Consulting Facilities (health/medical clinic/centre/consulting rooms etc.)	More than 5 medical practitioners	-
Hostels (transitional, permanent, refuges, crisis accommodation)	Any	-
Multi-Unit Housing	Between 10 and 59 dwellings	60 dwellings or more
Place of Assembly/Public Worship	200 persons or less	200 persons or greater
Community Facilities (youth centres, skate parks)	Any	-
Recreational Facilities/Social Facilities/Place of Assembly	200 persons or less	200 persons or greater
Brothels	Any	-
Drug Rehabilitation/Counselling Services	-	Any
Establishment of a new Major Health Service Facility/Hospital	-	Any
Displacement of affordable, permanent or short term residential accommodation	-	Any
Subdivision of land for residential purpose which are not included in, or part, of a Council DCP or Section 173 Agreement	-	60 lots or greater
Out of sequence community infrastructure development in growth area subdivisions	-	Any
Rezoning of PPRZ	-	Any
Increasing the bulk or intensification of facilities on land zoned PPRZ (e.g. construction of an additional sports/recreation pavilion or leisure facility can result in a significant number of people and vehicle traffic being generated for extended periods of times)	-	Capacity for 100 persons or greater
Rezoning from industrial to residential use	-	60 dwellings or greater

The approach of Councils that developed SIA policies is both pragmatic and praiseworthy. However, it is also problematic. There is a risk that the policies may actually undermine SSE assessment rigour, rather than requiring higher standards. None of the policies appear to tap any of the global best practice and knowledge or the Federal Court Practice Note. Rather than adopting or even considering making a clear and robust SSE assessment practice, the existing policies tend to morph a SIA into a quasi-Net Community Benefit ('NCB') assessment. They actually move SIA away from a proper assessment of SSE.

This is unwise and concerning. NCB⁷² is not a social effect assessment. NCB is a weighting process. NCB is only arrived at after, and as the outcome of, considering and weighting a rigorous SSE assessment (or SIA) against other community benefits or effects. Where s60(1)(f) PEA requires the Responsible Authority to consider SSE, NCB is a useful tool to assist decision-makers resolve and weigh up all the various mandatory (and discretionary) considerations required for a permit application ie, for example, environmental effects, social effects, economic effects, the objectives of

⁷² cl 10.02 of the State Planning Policy Framework.

planning and the various objections received⁷³. NCB also requires a balancing or trading off of burdens and benefits between and within communities. Unless carefully done, this balancing can create and reinforce established patterns of exclusion and inequity. Thorough consideration of SSE assessment, or an SIA, must be a standalone input into a valid NCB assessment. It cannot be replaced by it.

In a paper considering the adequacy of law to satisfy society's expectations and social impact assessments, Chief Judge Preston, noted five elements that seem helpful if applied to SSE assessment:

1. They ought not trade social benefits and burdens between different communities;
2. They ought not trade social benefits and burdens between different members within a community;
3. Dealing with a community as a homogeneous entity may only reinforce established patterns of exclusion and inequity;
4. Care must be taken in trading off disparate social burdens and benefits. The benefits (eg of a hospital) and burdens (eg of dust, noise and lost amenity) are dissimilar and not tradeable.
5. Social benefits and burdens should not be traded with unlike elements, for example environmental or economic benefits and burdens (eg loss of a threatened species).⁷⁴

These examples of social effect assessment, both their problems and advantages, clearly demonstrate there is potential for SSE to be a more productive planning tool in Victoria. Further discussion and action from government is required to take the lead on putting SSE to use as a critical tool – not just a one line response 'lip-service' in an proponent's application or an officers report.

The Future

SSE presents a decision making tool and opportunity for not only for social improvement and innovation but as a critical component of economic and commercial improvement. One such innovation could include more sophisticated 'deliberative and empowering techniques'⁷⁵ to achieve genuine social and community involvement. Certainly, a rigorously undertaken SIA may challenge the all too frequent 'top-down' systems of decision-making, consultation and public participation "Such systems are often known as DAD ('decide, announce, defend') or even DEAD ('decide, educate, announce and defend')"⁷⁶.

Instead, SIA's can strive for more "effective or sustainable... new participatory philosophies ... sometimes called MUM ('meet, understand, modify') or POP ('public owns project')." These new approaches aim to establish a:

"...dialogue intended to induce deep reflection (i.e. serious consideration) of options and possibilities in an open and inclusive way (i.e. without the intrusion of power or politics), and that considers the concerns of all stakeholders."⁷⁷

Such techniques do not avoid robust decision-making. They expand exploration of social matters in decision-making with social legitimacy and its 'ownership' by the public. They also present linking

⁷³ *Planning and Environment Act 1987 (Vic)* s 60.

⁷⁴ Hon Justice Brian J Preston Chief Judge of the NSW Land and Environment Court, 'The Adequacy of the Law in Satisfying Society's Expectations For Major Projects' (November 15, 2014). (2015) 32 EPLJ 182.

⁷⁵ Vanclay, F., Esteves, A.M., Aucamp, I. & Franks, D. 2015 *Social Impact Assessment: Guidance for assessing and managing the social impacts of projects*. Fargo ND: International Association for Impact Assessment.

⁷⁶ Ibid, page 20-21 see - *IAP2's Public Participation Spectrum*, International Association for Public Participation, AP2 International Federation 2014.

⁷⁷ Ibid, page 20.

opportunities for more refined articulation and validation of intangible factors, for example, the 'lived' experience of indigenous communities, nuances of the refugee experience⁷⁸ or the social value of a heritage building to a community beyond its built form⁷⁹. Whilst alone or in isolation, a singular experience may not be determinative in an application. However, a singular experience shared throughout a community may create a significant effect.

Innovation in SSE assessment should draw on other fields of thinking beyond planning. For example, it could draw on recent mathematical modelling showing that societal co-operation improves where an institution encourages fewer, stronger connections,⁸⁰ rather than popularly perceived 'social' forums such as Twitter or Facebook. Such modelling could help Councils better engage with communities and enable smaller community groups to more effectively advocate for change. In this way, SSE could be used more effectively, through the permit application process, with key minority groups, to create greater co-operation and involvement around better planning outcomes.

Another example of left-of-field of thinking that also could potentially improve our understanding and response to society, includes Dr Mitch Mooney's work, with Netball Australia and the Australian 'Opals' Netball Team. They used 'systems thinking' to achieve amazing sporting goals. Dr Mooney drew on animal behavioural science (shoals of fish) to analyse societal group dynamics. The research uncovered distinct social and cultural patterns for an:

*"intuitive, collective style of play; just like the swirls of a shoal of fish, these patterns weren't decisions that the players were making. It was instinct, hard-wired into the whole team over decades... And he discovered it wasn't just New Zealand that displayed these team-level, instinctive behaviours. Every nation he analysed — New Zealand, England, Jamaica and, yes, Australia — had its own quantifiable patterns... these nation-specific instincts weren't unique to the national, elite teams; the patterns were apparent all the way down to the junior level."*⁸¹

He demonstrated that social decision-making can be unconscious and hardwired but incredibly influential.

SSE provides an opportunity for integrating, new innovative thinking into planning analysis to reassess and better understand societal instincts and community patterns. SSE may also help develop a baseline of 'data', qualitative and quantitative, on key societal assumptions and common social effects.

Ministerial Advisory Committee

An opportunity exists in Victoria to better respond to the human and social dimension of planning by embracing SSE in a far more sophisticated way *'to bring about a more ecologically, socio-culturally and economically sustainable and equitable environment'*⁸².

Direct application of far more serious and rigorous assessment processes needs urgent attention in the Victorian planning permit system. This paper does not propose any preferred methodology or SSE assessment approach. It seeks to start a discussion. That discussion should be led by the

⁷⁸ Kelleher, Leonie and Forrester, Robert. *Significant social effects - lessons from Victoria* [online]. Australian Environmental Law Digest, Vol. 1, No. 2, Nov 2014: [37]-[41].

⁷⁹ Kate Gray and Gary Vines, *Last Drinks? Heritage and Melbourne's Pubs*, VPELA Presentation, 24th May 2017.

⁸⁰ Benjamin Allen, 'Global cooperation depends on the strength of local connections', 5 September 2017 < <https://aeon.co/ideas/global-cooperation-depends-on-the-strength-of-local-connections> > / Benjamin Allen, Gabor Lippner, Yu-Ting Chen, Babak Fotouhi, Nagmeh Momeni, Shing-Tung Yau and Martin A Nowak, 'Evolutionary dynamics on any population structure', *Nature*, Volume 544 13 April 2017, MacMillan Publishers, 227.

⁸¹ *Shoal attack: How a school of fish helped Aussie netballers win gold*; *Radion National*; By Joel Werner and Jonathan Webb <http://www.abc.net.au/news/2017-10-05/australian-netballs-secret-weapon-is-a-school-of-fish/9014326>.

⁸² Frank Vanclay, *International Principles For Social Impact Assessment*, International Association for Impact Assessment, 2003.

Victorian Government, for example through a Ministerial Advisory Committee, to further our understanding of SSE, develop clearer and more robust SSE systems and open up to innovative practices in and outside immediate social sciences.

Ideas for potential Terms of Reference for such a Committee could include:

- Developing rigorous SSE assessment principles and theory that proscribe basic research techniques including and adapting concepts from international guidelines such as the International Association for Impact Assessment;
- Creating clear guidelines as to when SSE should be assessed and whether differing levels of SSE assessment are appropriate: and for what and why;
- Clarifying how to establish social effect and how to understand or measure it;
- Creating opportunities for projects or developments which actively create positive social effects, and principles of SSE mitigation, prior to and through the planning process eg earlier mediation.
- Embracing innovative social knowledge outside and within planning;
- Facilitating transparent public disclosure and testing of assumptions of any computer modelling recommended or used.

Conclusions

Using SSE assessment, in ways not yet commonplace, could unlock silenced or minority communities as well as deep cultural instincts and patterns. Improved principles and guidelines for the use of SSE will assist more rigorous collection of social effect data to monitor and improve our understanding of social and economic impacts, allowing us to better align improved planning and development with improved social engagement, empowerment and capacity.

Given Victoria's growth, SSE should require practitioners and decision-makers to review, consider and calculate, in far more depth, how planning decisions effect our social structure. A greater understanding and respect for rigorously researched social assessment can help us improve planning decisions. SSE can be a microcosm to genuinely discuss how we can continue to make Victorian cities and rural areas more socially effective.

Planning decisions often can undervalue achievement of positive social impact and more readily praise economic benefits. However, SSE has profound potential as a mechanism to improve economic outcomes as well as sharpening our focus on how we want to shape our society, its built form, and contemporary planning to create a socially inclusive and cohesive State through each planning permit decision.

If we ignore this challenge, we risk, as Lewis Mumford foreshadowed, that we:

"find ...[ourselves] 'strangers and afraid', in a world ...[we] never made: a world ever less responsive to direct human command, ever more empty of human meaning"⁸³.

Maybe, just maybe, this paper can start a discussion on the role of SSE to help planning decisions to use SSE to positively affect our society for our future.

Hubert Algie.

⁸³ Lewis Mumford, *The City in History*, Secker and Warburg, 1961, p 546.

APPENDIX A – Extract from Hoskins v Greater Bendigo CC [2015] VSCA 350.

- (1) “Section 60(1) describes matters which the responsible authority and, in turn, the Tribunal must consider. It does not stipulate that a particular matter should necessarily be determinative of the decision as to whether a permit be granted or refused.
- (2) It is for the responsible authority and, in turn, for the Tribunal on review to determine whether something constitutes a significant social effect and what weight it should be given in reaching a decision whether to grant or refuse a permit.
- (3) ‘A significant social effect’ might be either positive or negative.
- (4) A particular use may have social effects which are both positive and negative. Thus a helipad erected on or adjacent to public parkland may have adverse social effects in the sense that it adversely affects the public use and enjoyment of the parkland but at the same time it may convey overwhelming social benefit if it services an adjoining hospital trauma centre.
- (5) Both s 12(2)(c) of the P&E Act, which relates to planning scheme amendments, and s 60(1)(f) give effect to the planning framework objective stated in s 4(2)(c), namely to provide for explicit consideration of social and economic effects when decisions are made about the use and development of land.
- (6) The language of s 60(1)(f), however, materially confines the type of social effect which must be considered. The identification of ‘significant’ social effects is to be contrasted with the language of s 12(2)(c) of the P&E Act which simply requires a planning authority in preparing a planning scheme or amendment to take into account ‘its social effects and economic effects’.
- (7) The notion of social effect is necessarily a protean one — land uses change, the composition of society changes and particular patterns of behaviour within society change over time.
- (8) The notion of significant social effect is not defined by stipulated criteria. ‘Significant’ is an ordinary English word. Whether a potential effect is significant is thus a question of fact.
- (9) The mode of assessing the significance of a possible social effect is not prescribed by the P&E Act.
- (10) The question of whether something may constitute ‘a significant’ social effect involves an evaluative judgment of fact and degree.
- (11) The statutory scheme places the responsibility for that evaluative judgment in the first instance with the responsible authority (ordinarily the elected council)⁸⁴ and in the second, in cases such as the present, upon merits review with an expert tribunal.⁸⁵ It does not place responsibility for that judgment with this Court. Mason J said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd.*⁸⁶

The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion and the decision made within those boundaries cannot be impugned.
- (12) Although s 60(1)(f) requires a prospective judgment about possible effects of a proposed use, the question whether those effects will be significant is logically informed both by the possible gravity of the effect and the probability of its occurrence. It follows that it is proper for a decision-maker to consider the probability of postulated consequences in deciding whether what is in issue is a ‘significant’ possible effect.
- (13) In considering whether a possible social effect is significant it will be proper to have regard, not only to the planning scheme definition of the use for which a permit is sought, but also to the applicant’s disclosed intentions⁸⁷ and the capacity to confine and control the proposed use by permit conditions.”⁸⁸

⁸⁴ The responsible authority may also be the Minister or a person nominated in the planning scheme, P&E Act ss 13(2), 61A.

⁸⁵ See VCAT Act sch 1 cl 52; *Attorney-General (Victoria) v The Warehouse Group (Australia) Pty Ltd* [2002] VSCA 76; (2002) 19 VAR 111, 115–6 [17]–[19]; (2002) 11 VPR 113, 117–8 [17]–[19].

⁸⁶ [1986] HCA 40; (1986) 162 CLR 24, 40–1 (citation omitted).

⁸⁷ *Franceschini v Melbourne & Metropolitan Board of Works* (1980) 57 LGRA 284, 288.

⁸⁸ *Hoskin v Greater Bendigo City Council* [2015] VSCA 350, 55.