

NELA Conference 2002: Keynote address

Codification and Just Outcomes

by **Justice Osborne**, Victorian Supreme Court

The literature of Australia from Henry Handel Richardson to Tim Winton reflects the fact that for many of us the beach is a place for retreat, contemplation and refreshment. I hope you will enjoy your time here and that the temperature of the water will not be such as to totally deter interstate visitors from taking to the surf. The sea connects us with the world as a whole and I thought I would give you some lines from Pablo Neruda to contemplate.

Necesito del mar porque me enseña:
no sé si aprendo música o conciencia:
no sé si es ola sola o ser profundo
o sólo ronca voz o deslumbrante
suposición de peces y navios.
El hecho es que hasta cuando estoy dormido
de algún modo magnético circulo
en la universidad del oleaje

I need the sea because it teaches me.
I don't know if I learn music or awareness,
If it's a single wave or it's vast existence,
Or only its harsh voice or its shining one,
A suggestion of fishes and ships.
The fact is that until I fall asleep
In some magnetic way I move in
The university of the waves.¹

Although I have only been absent from the planning and environmental jurisdiction for six months I am reminded of the truth of the observation that "history is not what you think but what you can remember"². As most of you will be aware Victoria under the Kennett government went through a process of planning scheme reform which implemented new format planning schemes based on a standard framework. This framework had four principal factors which distinguished it from previous planning schemes:

- A. It expressly articulated a criteria of net community benefit and sustainable development as the touchstone both of decisions with respect to rezonings and the granting of permits under zone controls.
- B. It sought to establish a policy-based form of planning. Planning schemes were required both to set out a State Planning Policy Framework and a Local Planning Policy Framework containing in turn a municipal strategic statement and a set of local policies (the municipal strategic statement being referred to in my household as a matrimonial struggle statement due to my wife's involvement in the drafting of one of the first of them).
- C. It provided for standard zones with standard provisions; and
- D. It provided for refinement of those zones through overlays.

Because Victoria, like Australia as a whole, is predominantly a highly urbanised society the principal controversy which has engaged public debate since the implementation of the new format planning schemes has concerned the adequacy of the planning system to achieve appropriate amenity outcomes in urban development and in particular in multi-unit residential development. In turn the major statutory planning achievements of the current government have been to fine tune a Code for Residential Development and to formulate a metropolitan strategy. I do not propose to say anything about these initiatives because it seems to me that a more fundamental question from an environmental point of view is how the new system has responded to the area in which on one view it has created the greatest change, that is, with respect to rural planning schemes. I thought I would offer to you some thoughts with respect to that question, not because I would pretend to know all the answers but in the hope that it would provoke some questions for you as to the tension between statutory planning and appropriate environmental outcomes.

The resolution of that tension raises an underlying issue that also confronts other areas of the law, namely whether equality of treatment results in equality of outcomes.

The first thing to say is that, particularly for under-resourced rural planning authorities, the new system has involved some major pluses. Most obviously:

- A. It has required the prioritisation of local planning policy as a matter of budgetary and political consideration.
- B. It has provided a framework for planning which is considerably more sophisticated than that which existed in a number of rural areas prior to the inception of the new schemes.
- C. It has provided a framework within which sensible comparisons can be made relating to the outcomes achieved by the application of similar provisions in other contexts across the State.

On the other hand it has demonstrated a series of problems inherent in attempting codification in this context.

- A. Planning schemes have not become simpler but have become materially more complex.
- B. The use of standard format zones has placed significant pressure on those parts of planning schemes which are not standard – namely local policy and overlays – to achieve local objectives.
- C. The articulation of policy has led to the articulation of multiple competing objectives. It has to some extent led to a confusion of strategy with policy and to some extent encouraged competing policy objectives to remain unresolved by way of a coherent strategy. (Possibly because the time line for implementation was too short to resolve these conflicts.)
- D. Use of standard zones has led to pressures with respect to the use of overlays in the non-standard situations. The consequence can be that a scheme requires the application of a complicated succession of controls and discretions to a particular proposal. The overlays may in effect comprise the principal control on land use and development rather than a refinement of the standard zone controls. This is not particularly user-friendly.

The use of standard format schemes has also resulted in subtler difficulties.

- A. In my view they implicitly discourage a place-based environmental effects approach to the consideration of rezonings. The postulation of standard zones and overlays presumes that such provisions will generally be satisfactory vehicles for the control of land use and development. It discourages a problem-based consideration of what would be the best form of control for a particular place with particular environmental sensitivities.

B. It also creates a language, conceptual system and in effect a dogma. Lawyers, planners and other experts may learn to use this conceptual framework skilfully but it is not generally shared by the public. It does have the capacity to materially reduce the ability of the community to participate meaningfully in rezoning processes. I am one of those who strongly believes in third party objection processes and open community participation with respect to the approval of major land use proposals. In my experience there will be situations, particularly in the rural context, where local knowledge whether that of fishermen or naturalists or others will have much to contribute with respect to understanding the local habitat and specific matters such as the distribution of particular flora and fauna. Just as significantly, my experience has been that public debate seldom fails to refine proposals in positive ways although it may well fail to stop them. The capacity for this process of refinement hinges critically upon the capacity of planning controls to adapt to the particular sensitivity of the site and to encourage modification through a process which is flexible, transparent and capable of meaningful public participation.

Much has been said of the impact upon the environment which results from cumulative land use decisions in the rural context. I believe the process of the implementation of new format planning schemes in Victoria is a significant case study in terms of the potential for statutory planning processes to respond to this concern. It is timely for both the benefits and the limitations of this approach to be assessed. It would be particularly unfortunate if the urban sensitivities of the majority of Victorians inhibited an objective analysis of these issues.

In closing I can do no better than to adopt the words of a litigant in person who recently wound himself up to climax his submissions with the words:

"Your Honour those are my allegations and I'm the allegator."

1. Absence and Presence, translation by Alastair Reid New York 1990

2. 1066 and all that *Sellar and Yeatman* 1930