

PLANNING PANELS VICTORIA
IN THE MATTER OF AN ENVIRONMENT EFFECTS INQUIRY
OCEAN ACCESS BOAT RAMP, BASTION POINT, MALLACOOTA
ENVIRONMENT EFFECTS STATEMENT

EAST GIPPSLAND SHIRE COUNCIL (**Council**)

Proponent

and

SAVE BASTION POINT CAMPAIGN (**SBPC**)

and others

Submitters

**CLOSING SUBMISSIONS ON BEHALF OF THE
SAVE BASTION POINT CAMPAIGN**

Introduction

1. SBPC wishes to address the Panel on the following matters in reply:
 - (a) The relevance and application of *AS 3962-2001: Guidelines for design of marinas*;
 - (b) The independence of expert witnesses;
 - (c) The submissions of Gippsland Ports and Marine Safety Victoria, together with other relevant submitters;
 - (d) The precautionary principle; and
 - (e) Net community benefit.

The Australian Standard

2. It is now clear that the apparent requirement for a ramp with 90% usability at Bastion Point derives from:
 - (a) the definition of "Regional Boat Ramp" in the *Victorian Coastal Strategy 2002*; and
 - (b) the Australian Standard *AS 3962-2001: Guidelines for design of marinas*.
3. In our submission, there is no requirement that a "Regional Boat Ramp" provide ocean access. Further, readily accessible access to dangerous stretches of ocean, such as at Bastion Point, is specifically discouraged in the *Gippsland Boating Coastal Action Plan*. Contrary to Council's submission, there is no overwhelming policy support for what is being proposed at Bastion Point.
4. The Australian Standard is just as it is described: a set of guidelines for the design of marinas. It is misleading to refer to this as the Australian Standard for the design of boat ramps, just as it is misleading to refer to the section within the Australian Standard dealing with boat ramps in isolation.
5. Importantly, the Australian Standard contains the following description of its scope:

1.1 Scope

This Standard sets out guidelines for the design of marinas suitable for vessels up to 50m in length.

The Standard covers fixed berth and floating pontoon marina systems, single pontoons and floating wave attenuators. Guidance is also given for on-shore facilities such as dry boat storage, boatlifts, boat ramps and associated parking facilities.

NOTES:

1. *This document is intended for use as a guideline and should not be used as a design specification.*

2. *The environmental impact of marinas should be assessed according to the requirements of the relevant authority.*
[Emphasis added.]

6. In relation to the location and alignment of ramps, the word “should” prefaces each item. In relation to gradient, the Australian Standard states as follows:

The ramp gradient should be within the range of 1:9 to 1:7 with a preferred gradient of 1:8. Where local needs and conditions require a grade outside this range, the variation and its associated use limitations should be clearly shown on a sign adjacent to the head of the ramp. [Emphasis added.]

7. Further, there is no principle of tort law that failure to follow the guidelines set out in an Australian Standard constitutes breach of a duty of care. Australian Standards are not legislative requirements. They are not even requirements unto themselves. Courts in negligence actions look to a whole range of factors in determining whether, on the facts of a particular case, there has been a breach of a duty of care.

Independence of expert witnesses

8. It has been submitted that one expert witness called on behalf of SBPC, Dr Tim O'Hara, is not 'independent'. Other witnesses called on behalf of SBPC were cross-examined on their level of independence. As has already been submitted by SBPC, the independence of an expert witness can often be called into question by parties, particularly where a particular expert has been retained for a period of time to act as a consultant to a party. While it is acknowledged that expert witnesses are not to act as advocates for the party calling them, it remains the submission of SBPC that the weight to be placed on the evidence given by expert witnesses is a matter for the Panel. SBPC considers that all expert witnesses who have appeared before the Panel have given evidence within their areas of expertise that is of assistance to the Panel.
9. In the context of a Panel constituted by members who themselves have expertise in relevant areas, and constituted for the purpose of making

recommendations to a decision-maker who is to exercise a discretionary power, it is submitted that the Panel's focus should not be to prefer the evidence of one witness over that of another, but "upon what is the preferable decision having regard to *all* the matters that may be considered".¹ The emphasis should not be on "the *admissibility* of expert evidence" but instead on "an active and inquisitorial assessment of the *weight* of such evidence".²

Submissions by relevant authorities

10. On 29 July 2008, the Port Manager of Mallacoota Inlet, Gippsland Ports, made a submission to the Panel. That submission essentially makes three points:
 - (a) There are operational safety issues associated with the existing boat ramp and it appears from anecdotal advice and observation that the Special Use Zone in the vicinity of the existing boat ramp is not very effective, although only one or two zone breach incidents have been reported to Gippsland Ports;
 - (b) Gippsland Ports "agrees with the outcomes" of the Prior Knowledge Safety and Risk Issues report; and
 - (c) Gippsland Ports supports the provision of ocean access at Mallacoota.

11. While not entirely clear from the submission, it can be inferred that Gippsland Ports is supportive of Option 3 as exhibited. However, that support is clearly in reliance upon the work of Prior Knowledge, which is not before the Panel in the form of tested evidence, and which has not been independently reviewed by any witness with expertise in marine safety. As Gippsland Ports has not attended the Panel hearing in any formal capacity, the Panel cannot be confident that the specific safety issues raised during the Panel hearing have been brought to the attention of Gippsland Ports. The submission also provides the Panel

¹ Stuart Morris, then Justice of the Supreme Court of Victoria and President of the Victorian Civil and Administrative Tribunal. "Getting real about expert evidence," paper presented at the National Environment Law Association Ltd 2005 National Conference, 13-15 July 2005. p 1.

² Ibid. p 1.

with no advice as to how Gippsland Ports proposes to resolve the issues it says are apparent with the operation of the Special Use Zone.

12. On 28 July 2008, Marine Safety Victoria made a submission to the Panel. That submission essentially makes three points:
 - (a) When considering direct ocean access, an accurate assessment of risk must take account of the availability of adequate search and rescue services in the area, the proximity of any refuge or safe harbour in the area in case of an emergency, and any competing use for the area;
 - (b) A facility which provides easier access is also likely to attract a larger number of users, a number of whom will be vessel operators with a low level of local knowledge and boating experience;
 - (c) Any new facility should be designed and constructed in a manner that allows for an adequate level of usability in all weather conditions.
13. Marine Safety Victoria's submission raises the same safety and risk issues that have been raised in a number of submissions to the Panel. Relevant submitters included Mr Rod Thomas and Mr Michael Perry, both of whom have considerable local and professional expertise in the areas respectively of marine structures and marine safety. Again, none of those issues have been analysed in tested evidence to the Panel by an expert in the area of marine safety.
14. It is also relevant to note in relation to other relevant authorities that:
 - (a) The Gippsland Coastal Board does not support the options set out in the EES, on the basis that none of them are supported by the *Victorian Coastal Strategy 2002*, a 90% usability rate is more closely aligned with that of a safe harbour than a regional boat ramp, and a minimal upgrade of the existing facility warrants further investigation.

- (b) Parks Victoria considers that it is able to deliver its management of parks in the vicinity of Mallacoota through continued use of the current boat access at Bastion Point.
- (c) Fisheries Victoria and the Department of Primary Industries have not made a submission to the Panel.

The precautionary principle

15. As set out in SBPC's opening submissions, all but one of the evaluation objectives set out in the Assessment Guidelines are based on the precautionary principle of avoidance informed by the *1992 Intergovernmental Agreement on the Environment*. The precautionary principle states that where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environment degradation.
16. Interestingly, the VCAT has most recently applied the precautionary principle to climate change considerations in a coastal setting in *Gippsland Coastal Board v South Gippsland Shire Council* [2008] VCAT 1545. The precautionary principle requires "amongst other things, a gauging of the consequences and extent of intergenerational liability arising from a development or proposal and if found to be warranted, appropriate courses of action to be adopted to manage severe or irreversible harm" (at para [41]).
17. The VCAT, constituted by Deputy President Helen Gibson and Member Ian Potts, had regard to "the broader picture that there is a general consensus that some level of climate change will result in extreme weather conditions beyond the historical record that planners and others rely on in assessing future potential impacts". The VCAT stated that it is "no longer sufficient to rely only on what has gone before to assess what may happen again in the context of coastal processes, sea levels or for that matter inundation from coastal or inland storm events" (at para [40]). Applying the precautionary principle in the context of that case, the VCAT found that "there is a longer term risk of intergenerational liability

that can and should be avoided in the absence of no imperative or higher order need for the development that overrides these potential liabilities” (at para [43]).

18. In the submission of SBPC, in the context of clear uncertainty as to:
 - (a) how much sediment is likely to be deposited at the site of the proposed ramp (and therefore how much will be required to be removed);
 - (b) what effect the sea wall created by the modified access road will have on the existing beach and surrounding ocean environment;
 - (c) what effect the changing environment will have on the breakwater, sea wall and modified access road;
 - (d) what the impacts will be on the existing surf breaks; and
 - (e) what cumulative residual impacts will occur as a result of climate change,

the precautionary principle should be applied to this proposal and, in the absence of an imperative or higher order need for the proposal that overrides the potential liabilities, the proposal should be rejected.

Net community benefit

19. While the EES emphasised one evaluation objective set out in the Assessment Guidelines, “to provide efficient, safe infrastructure for the launching and retrieval of commercial and recreational boats under all-tides at Mallacoota,” another evaluation objective is “to provide a clear overall societal benefit” taking into account economic and environmental impacts and social outcomes.
20. In our submission, it remains unclear what the future use of the proposed facility will be. It cannot be said to be required for the abalone or other commercial industries. It cannot be said to be required for off-shore rescue operations. It cannot be said to be required by local regulatory authorities. Speculative future users such as an aquaculture industry (which would clearly be difficult to establish in this environment) or game fishing (which would have to compete with nearby well-serviced

and established centres such as Eden and Bermagui) are simply not persuasive. This leaves the Panel with future recreational users and the issue of providing a safe retrieval facility, two issues which are inevitably intertwined.

21. While it may be said that more recreational boaters and fishers will use an improved facility, will there be enough future users – and resulting social and economic benefit – to justify what is being proposed?
22. More recreational boaters and fishers raise the risk of marine incidents occurring in this difficult and unpredictable stretch of ocean. While safety and risk have been put forward by Council as paramount considerations justifying a need for a facility of this nature, the only safety and risk assessment that has been conducted is the Pryor Knowledge report, which is not the subject of tested evidence before this Panel. Similarly, no evidence has been put forward, beyond observation and speculation, to demonstrate how unsafe the existing ramp is, in terms of statistics or data of reported or known incidents and injuries. The submissions of the local community, including the Mallacoota Surf Life Saving Club, should carry significant weight in that regard. Most concerning is the lack of any tested expert marine safety evidence before the Panel of the risks posed by the proposed facility.
23. In our submission, the Panel also cannot be satisfied that this level of infrastructure is economically justified, and how much the facility will cost to operate and maintain.
24. Weighing up the potential benefits of this proposal with the significant detriments – both known and unknown – it is submitted that Council has not demonstrated that this proposal will result in net community benefit or in the words of the Assessment Guidelines a “clear overall societal benefit”. Accordingly, it is submitted that the Panel should reject all proposals in the EES, together with Option 4.

E Porter

Counsel for the Save Bastion Point Campaign

5 August 2008