Submission on Regulatory Impact Statement for proposed Victorian Civil and Administrative Tribunal Fees Regulations

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PIA Victorian Division

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The Planning Institute of Australia

The Planning Institute of Australia (PIA) is the national peak body for planning professionals, with nearly 5000 members working across Australia and abroad, and over 800 members in Victoria. We aim to serve the public interest of urban and regional communities through our activities, including:

- Promotion of the professional interests of members
- Establishment and administration of standards of professional competency
- Provision of training to increase members' knowledge
- Facilitation of forums to exchange views on contemporary planning issues
- Advancement of planning issues to the community, governments, private sector and academia

Approximately 30 per cent of members are employed in strategic planning, development assessment or other planning roles within Local Government. The remaining members are primarily engaged in private consulting (40 per cent), State government, academic research and teaching, or are student members.

In order to gain membership of PIA specific requirements must be met, including completed qualifications from accredited universities and relevant industry experience.

Through advocating for better planning, developing the skills of planners and supporting the profession we lead effective planning for people and places.

This submission has been developed by the PIA Vic Committee on behalf of members in Victoria.

PIA considers VCAT should be adequately resourced to enable timely and equitable access to review of planning decisions. Review rights through VCAT ensure transparency and are critical underpinnings of the planning system in Victoria.

This role should influence decisions about funding and access to the Tribunal.

1. Introduction

PIA members are principle stakeholders in the Planning & Environment List, where they appear as advocates and experts for both public and private sector clients. PIA members are affected by the operation of the Tribunal indirectly through its influence on the operation of the planning system in Victoria more widely.

Victoria enjoys extensive review rights, making a smoothly operating Tribunal critical for appropriate and timely decision-making throughout the planning system. This role should influence decisions about access and resourcing of the Tribunal.

While we support some increase in fees and cost recovery, it is considered that the current proposal goes too far without adequately addressing alternate funding models, and in a manner that does not meet the objective of the regulations to:

- *Recognise the work of the courts and tribunals yields a mix of private and public benefits;*
- *Ensure that user contributions reflect this mix; and*
- *Ensure that user fees do not prevent access to justice for users.*

(RIS, page 35)

In particular, it is noted that under the proposed fee regulations, the 'commencement fee', for both objectors and applicants for developments of less than $1,000,000, would increase 313 per cent from $322 to $1,007.40. The proposed introduction of 'specific purpose' fees creates the potential for overall costs to parties to increase substantially.

Our primary concern with the proposed fee regulations is the impact of the proposed fee structure on equitable access to justice, particularly within the Planning and Environment List. This, in turn, is affected by:

- The funding model, including a relatively low level of government appropriations;
- The government policy seeking to achieve 45 per cent cost recovery (p77); and
- The fee generators under the proposed structure.

The RIS notes that there is currently a lack of data to inform the assessment of the proposed changes. It is further noted that the proposed fees are only intended to be in place for three years, during which time better data can be collected to inform a full fees review.

It needs to be acknowledged that reforms made as an interim measure will be difficult to wind back following a more detailed review. The proposed interim fee arrangements are therefore likely to form the basis of future, more permanent, regulations.

While some increase in fees and revenue recovery is supported, the existing lack of data and interim nature of proposed changes suggest that a more moderated approach would be appropriate.

In this submission, we therefore support a more moderate 30 per cent cost recovery model and propose alternate special purpose fees which could assist in cost recovery without prejudicing equitable access to justice.

PIA Vic does not support the magnitude of the proposed increase in fees for applications under sections 114 and 120 of the *Planning and Environment Act* 1987 (the Act) for interim enforcement orders and enforcement orders. The fees for planning enforcement action are proposed to increase from the current $38.80 to $1007.40 over three years.

There are also a number of other matters raised in the RIS that warrant further consideration, and are discussed within this submission.

2. Impacts on the Planning and Environment List

We acknowledge from the outset that VCAT and the proposed fees address numerous and wide ranging, jurisdictions. However, we are concerned that the RIS fails to appropriately consider the impact of the proposed fees on equitable access to justice within the Planning and Environment list.

While some of these considerations may also apply to other lists, parties to matters heard by Planning and Environment list arguably have distinct characteristics.

Put simply, within the Planning and Environment list, there are extremes of well-funded and of under-resourced parties. There are also those who stand to suffer great detriment and those who stand to achieve significant financial returns.

Parties to an application for review under the Planning and Environment list typically consist of:

- Planning permit applicants, or developers, who gain the most direct benefit from a successful appeal, and potentially lose a great deal through holding and other costs while waiting for outcomes of VCAT reviews.
- Responsible Authorities, generally Councils, who are frequently represented by officers or consultants with limited capacity to negotiate outcomes due to the levels of delegation. Both Councils and their representatives have varying levels of commitment to hearings, depending on the nature of the application and process by which the decision was made within Council. Nonetheless, the participation of responsible authorities is crucial.
- Third parties, or objectors, who usually would not stand to 'gain' as much as an applicant, however frequently have much to lose in an unsuccessful appeal.

Well-funded and under resourced parties, and everything in between, can be found within all of these groups. It is impossible to draw a generalised relationship between the resources available to parties and the merits of their cases. This means it is crucial that the Tribunal remain accessible for meritorious but under-resourced parties.

However, under the proposed new arrangements making an application for review will become reliant on the applicant initiating the review having adequate resources to meet the substantially increased commencement fee, and any arising specific purpose fees.

It is likely that this increase would disproportionately affect small developers and home owners caught up in the planning system and third party objectors, to whom such fees are not affordable. Furthermore, it seems that there is currently no data to monitor whether such behaviour change occurs, or the impacts of such a change.

The proposed three-fold increase in commencement fees, plus the prospect of further fees if a process is prolonged, is therefore considered inequitable.

The RIS emphasises the 'complexities' brought about by well funded parties, however fails to acknowledge the potential impact the proposed fee increases will have on under-resourced parties. It is suggested that further consideration should be given to cost-recovery methods that are better targeted at parties that disproportionately increase the cost of proceedings.

3. An Alternate Funding Model

Particularly given the purported interim nature of the proposed fees and the lack of data to measure the impacts, a more equitable approach would ensure:

- Alternate, secure, funding from other sources, including direct government funding;
- Moving towards a 30 per cent cost recovery model over this interim, 3 year, period before a full review; and
- Higher fees for those well-resourced parties who are contributing to the 'complexity' and length of hearings.

Equitable access could also be furthered by a broadening, or tiering, of the hardship provisions, which the RIS identifies are infrequently relied upon.

3.1 Government Funding

The RIS provides a comparison of the proportion of funding VCAT received directly from government in comparison to the Supreme Court, County Court and Magistrates Court. It confirms that VCAT receives substantially less funding, proportionately, than the Courts.

It is acknowledged that this is due in part to a number of lists receiving funding from Trusts. However, recent experiences within the Planning and Environment List, with extended delays between the lodgement of applications and decisions, and VCAT evidently 'running out of money' to maintain sessional members, should be considered unacceptable. Providing secure and increased government funding would go some way towards correcting this. It should be considered as part of the review of funding in a context of increasing costs, and would complement an increase in user-pays fees.

Given the steep rises proposed, the RIS also does not adequately explore the mechanisms for contributions from Trust funded lists, or alternate funding options for appropriations funded lists.

3.2 Target of 30% Cost Recovery

A targeted cost recovery of 30 per cent would seem to provide a more appropriate, interim, measure between the current 15 per cent cost recovery, and government's preferred 45 per cent cost recovery. This would provide for an increase in funding to VCAT while allowing data to be collected about the nature of VCAT hearings and the impact of the change, and for the modelling of alternate fee structures.

As previously identified, it is considered unlikely that the extent of proposed 'interim' reforms could readily be wound back if found to be detrimental or ineffective at the end of the three year period.

The suggested (interim) 30 per cent cost recovery model should not, however, rely on the funding models put forward in the RIS. Rather, an alternate solution to increasing fees for all users is proposed to address the perceived resource drain of 'complex cases'.

3.3 Cost Recovery from 'Complex' Cases

The RIS describes the factors contributing to the rise of complex cases as including more use of legal representation and increased reliance on expert evidence. It further singles out the greater complexity of the Planning and Environment List proceedings and the rising cost of development.

Use of legal representation and expert evidence are a common occurrence within the Planning and Environment List. It needs to be acknowledged that experts should not actually add to the complexity of the matters to be considered by a Member. The intention is rather that they assist the VCAT Member by informing their decision making.

However, use of expert witnesses does have a direct impact on the VCAT resources required to consider a matter, simply through the amount of the Members' time taken in reviewing written evidence, and to hear verbal submissions and, frequently, cross-examination. Cross-examination of witnesses by each party can extend timeframes of hearings considerably, especially where there are multiple parties to an appeal. In some cases limited availability of experts has also been allowed to lengthen cases, for example by Members allowing cases to run in to extra days to allow a witness to appear. Some parties may also "stall for time" during hearings until one or more experts are ready.

Well-funded parties are much more likely to engage experts, therefore increasing the resources, particularly timeframes, required to consider matters.

Accordingly, a more direct and appropriate way of covering these costs would be to introduce a specific purpose fee for parties engaging expert witnesses. Using 'intuitive judgement', as described by the RIS for the only feasible approach to setting fees under specific enactments, this fee could be, for example, be $200 per expert, reduced to $50 if only written evidence is provided and the expert does not appear at the tribunal.

Modelling should readily be able to test if such a specific purpose fee could off set the price increases proposed for commencement and other specific purpose fees required under a 30 per cent cost recovery model.

In setting these fees, it needs to be remembered that it is not *only* well resourced parties who engage experts, and that under-resourced parties will stretch themselves to engage advocates and experts in recognition that they do not understand the system as those who work within it on a regular basis. Therefore, we would caution against a 'full cost recovery' model, of seeking the specific purpose fee to cover all of the Members time that might be taken up by hearing an expert.

Paying per expert is considered significantly preferable to requiring a party who has made the application for a review pay for additional hearing days. The latter, being the proposed funding model described by the RIS, does not necessarily target the party adding to the length of a matter by engaging expert witnesses. Further, it leaves it open to a well-resourced party to use the tactic of multiple experts and extending a hearing to 'hurt' an under-resourced party, typically an objector, who has brought them before the Tribunal.

4. Other Proposed Fees

4.1 Mediation

While the concept of some cost recovery through collection of specific purpose mediation fees is accepted as a broad principle, for such an approach to be reasonable requires further consideration under the Planning and Environment List.

It is the experience of practitioners within the list that mediations are frequently set at either the behest of VCAT or a request by a single party to a matter. The ability to achieve a mediated outcome is, in the best of circumstances, compromised when not all parties are willing participants.

This is further complicated in the Planning and Environment List by the need for representation of the Responsible Authority, frequently a Council officer or other representative who does not have the delegation from the Council to independently agree to a mediated outcome. In such circumstances, mediation is futile and is merely used as a forerunner to the hearing.

A specific purpose fee for mediation should therefore only be introduced in the Planning and Environment List if all parties are willing to participate in mediation.

There is a need for greater clarity about the arrangements that would surround mediations and associated fees under the proposed model. It is noted that the fees are specified "per party" but it is not clear whether this means all parties pay, or that the applicant for review pays the entire fee, which is set based on the number of parties. Either approach potentially involves some equity issues depending on the circumstances of the case. It should also be clarified whether this would mean Councils were required to pay. This would be a significant budgetary impost upon local government given the number of matters at which Councils appear.

As a general principle, parties should not be charged to participate in a mediation that they have advised is futile or which has been called against their wishes.

4.2 Inspection of a Proceeding File

Among proposed increases in other specific purposes file, it is notable that the fee *"For the inspection of a proceeding file by a person who is not party to a proceeding"* is proposed to increase from $32.60 to $117.10. Further, for each additional file, the cost increases from $4 per file to $107.50.

These costs increases are unexplained and appear excessive, and raise further concerns regarding access to justice. It would seem that they far outstrip the actual time resources it should take for VCAT to provide a file for inspection.

They raise concerns about access to justice as they inhibit the ability of an under-resourced party, such as a third party objector, to consider review information that may assist them in forming a view as to whether it is beneficial for them to join an existing application for review as a party.

It is considered that the 'first file' fee would more appropriately be set at half the price, or as an accurate reflection of full cost recovery for VCAT in providing the file, whichever is less. Subsequent files, presumably stored in the same location, should be a maximum of half the price of the first file.

4.3 Enforcement

PIA Vic does not support the magnitude of the proposed increase in fees for applications under sections 114 and 120 of the *Planning and Environment Act* 1987 (the Act) for interim enforcement orders and enforcement orders. The fees for planning enforcement action are proposed to increase from the current $38.80 to $1007.40 over three years.

Enforcement action taken by responsible authorities is initiated for the protection of safety, amenity and wellbeing in local communities - often in response to community concern. The integrity of the planning system and the proper administration of planning schemes, planning permits and agreements rely upon enforcement of non-compliance. This should not be inhibited by the costs to commence planning enforcement action which is ordinarily initiated for the public good.

PIA Vic recognises that the existing fee is relatively low and does not properly reflect associated administrative costs. However, planning enforcement action is usually specific and the matters for review limited in scope. Consequently, the time taken for the Tribunal's consideration of applications for enforcement orders is usually short. A fee change for applications under sections 114 and 120 of the Act in the order of $200 (a 500 per cent increase) would be acceptable.

PIA Vic is concerned that if fees for planning enforcement action do increase to over $1,000 there is a possibility that some breaches of the planning system may be disregarded by Responsible Authorities, with a detrimental cumulative impact for the community over time. In addition, it is also likely that local councils may seek alternative actions through other courts which ultimately shifts the burden to other jurisdictions and detracts from the intent of the Act.

5. Systemic Issues / Other Considerations

As noted, the RIS suggests that increasing costs are driven partly by increasing use of legal representation and experts, and a desire to increase cost recovery for such matters is partly behind the proposed increase in fees. However, many practitioners continue to report issues with the case management of Members where this increased "legalisation" has not been held in check and has disproportionately expanded hearing times. While beyond the scope of this review, it is suggested that these issues could be addressed through more careful management of legal practitioners and experts during hearings, and Members exercising more discretion in deciding whether or not an expert needs to appear at the hearing.

It is also suggested that an alternative approach to simple matters could involve cases being decided "on the papers," without the need for hearing. While not PIA's preferred option - as it raises its own issues with regard to equity and access to justice - the retention of an option for objectors to lodge a "papers appeal" for approximately $300 is considered preferable to a situation where the only appeal avenue is in excess of $1000.

6. Conclusion

PIA recognises that the current resourcing situation at VCAT is untenable, with a lack of secure funding leading to uncertainties and long delays. While beyond the scope of this review, it is considered that an increase in direct funding is urgently needed.

It is recognised that without such an increase, it is necessary for the Tribunal to achieve greater cost recovery. However, the proposed fee increases for matters in the Planning and Environment List are considered excessive and will have inequitable impacts on certain parties.

The proposed cost of lodging an application for review for simple planning matters is contrary to the principles underpinning the Planning and Environment Act and the Tribunal itself. It is suggested that there may be scope, as outlined in this submission, to improve cost recovery through alternative measures that would better reflect the real drivers of hearing costs and share this burden more equitably.