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Submission to the VCAT Fee Review, February 2013

SUMMARY

Since its inception, VCAT's purpose has been to provide Victorians with a low cost, accessible, efficient and independent tribunal delivering high quality dispute resolution. The Tribunal aims to be "cost-effective, accessible, informal, timely, fair, impartial and consistent".

However, the proposed fee structure strongly militates against a low-cost accessible service, disproportionately denying justice to many on lower incomes. The need to meet increasing expenses must be balanced against the necessity of maintaining the availability of justice for all, especially in a country with no Bill of Rights.

Instead of simplistic and discriminatory user-pays solutions, other necessary VCAT reforms should be pursued to reduce both operational costs and the number of cases, without compromising the fairness of outcomes nor the accessibility of justice. Such reforms would not only introduce more certainty and compliance in the development assessment process at both council and VCAT, they would reduce the number, length and complexity of cases in the VCAT P&E List with significant cost savings.

The proposed fee rises are thus inappropriate and unnecessary.

Summary of Recommended Reforms for VCAT Planning & Environment List:

* **Substitution of amended plans to be limited to cases involving a change of circumstance which necessitates modification of the proposal**
* **In these cases, fees for substituting amended plans should be introduced equivalent to a new review application fee**
* **Limit the expert witness process in cases where such expertise is warranted to a single court-appointed witness only, paid jointly by the parties**
* **Introduction in VCAT decisions of some capacity for oversight of local government Development Application assessment processes**
* **Lobby the government to amend s60 P&E Act to establish the pre-eminence of local incorporated policy, supported by a ministerial directive to VCAT**
* **Lobby the state government for more mandatory guidelines in planning schemes for Rescode standards and zone and overlay schedules**
* **Consequently, limit fee rises for permit applicants (with tax deductibility status) to CPI + 5%p.a., to be reviewed in 2016 in light of other reforms**
* **Consequently, limit fee rises for objectors (with no tax deductibility status) to CPI p.a., to be reviewed in 2016 in light of other reforms**

THE PROPOSED VCAT FEE RISES ARE INAPPROPRIATE

The Administrative Appeals Tribunal system was established in Australia in the 1970s to provide individuals with an opportunity to challenge government decisions affecting their interests in a country without a Bill of Rights. Administrative law remedies were intended to improve the whole system of government decision-making by increasing its openness and transparency and providing feedback on its performance.

Anyone whose interests are affected by a decision may apply to a tribunal for a review of that decision. "Interest" is interpreted very widely and community groups also have a wide right of access to Australian tribunals.

VCAT in particular states that its vision is to be 'an innovative, flexible and accountable organisation which is accessible and delivers a fair and efficient dispute resolution service'.

Any substantial re-appraisal of VCAT fees, especially a move towards a "user pays" system, must be considered in light of the above. The right of objectors to affordable access to challenge the decisions of government bodies is the basic premise of the operation of Australia's tribunals and must be preserved.

We agree with the Environment Defenders Office submission which states:

Tribunal systems generally have been established to create greater access to and equity in the justice system. They are intended to be cheaper, quicker, less formal and more efficient than the courts. They commonly deal with a range of disputes that are more appropriate for less formal and/or more specialised resolution, such as consumer, residential tenancy and planning cases. The comparisons drawn in the Regulatory Impact Statement between VCAT and the courts are therefore inappropriate.

The public interest function of the Tribunal is also advanced by its role in and capacity to hold decision-makers to account or to ensure justice and transparency in the operation of markets (consumer protection). Undermining access to the Tribunal by way of eroding affordability will also undermine accountability, balance and elementary justice. It will contribute to erosion in the confidence of the provision of 'popular justice.'

Despite this, the Government maintains that it is appropriate to raise VCAT's cost recovery from around 14% to 45% of the total government appropriation funding for VCAT. We believe this demonstrates a disregard for the purposes and function of the administrative tribunal review system and its accessibility for ordinary Australians, particularly those on lower incomes.

Hence, as VCEC suggests, the proposed fee rises must give due attention to:
• the public and private benefits of different dispute resolution activities and the appropriate size of user and taxpayer contributions to VCAT's costs
• the ability of different user groups to pay proposed fees and the extent to which this may alter behavior.

THE PROPOSED VCAT FEE RISES ARE UNNECESSARY - A CHEAPER, MORE EFFECTIVE VCAT

The growing costs and delays in the VCAT hearing process, particularly in the Planning and Environment List, are clearly unsustainable and untenable. These changes are increasingly compromising the ability of VCAT to function effectively and deliver on its charter of being cost-efficient, accessible and able to deliver fair planning outcomes in the community interest.

But the first step in trying to meet burgeoning expenses should surely be to first reduce avoidable inefficiencies or delays in current VCAT hearing processes. This could significantly reduce current resource needs by reducing case length, complexity and number. We believe it is also possible to improve the impartiality of the hearing process and thus the fairness of VCAT decisions.

A number of such alternative reforms are discussed below.

As NSW Chief Justice Spigelman commented in the Law Society Journal in 2003 about similar trends in the NSW legal system, "*There are limits on the public resources which are appropriate to be devoted to the resolution of private disputes. There are difficulties in ensuring that the costs of the process are proportionate to what is at stake."*

"I appreciate that some of you may understand these observations as a threat to cut your business in half but recent history suggests that current practices are not sustainable in the long term".

Administrative review was intended to allow merit decisions to be made as much as possible without the conventional trappings of adversarial litigation.

However, due partly to the inability of the legal profession to resolve disputes without conventional adversarial processes, merit review has become a contest with winners and losers, when the legislation intended instead that public and private resources would be applied to achieving the "best community outcome".

Limitation on Expert Witnesses

One consequence is that in planning tribunals at least, merit review cases have grown in length and the number of expert witnesses have increased. Pressure on experts to assist the client rather than the court is intense, particularly when the client is a frequent litigator and further work is likely if the expert performs to the client's satisfaction.

One solution is better case management of complex statutory planning proceedings to identify the key issues to be resolved, coupled with the use of a single court-appointed expert where specialized knowledge is required to advise the tribunal, with joint liability by the parties for the expert's fee.

We note that the Victorian Law Reform Commission has strongly criticized bias in expert witnesses, and the Land and Environment Court in NSW has adopted the single court-appointed witness approach.

VCAT oversight of council process

The justice system should encourage transparency, compliance and consistent decision-making, not just correct individual decisions without addressing existing procedural flaws that will continue to produce poor decisions.

For decades it was believed that the administrative review system would promote consistent application of the law by decision makers and make them more careful to avoid error in their decisions, and thus improve administrative efficiency and the quality of primary decision making.

However, as two reports on Land Use Planning by the Victorian Auditor-General in Dec.99 and May 08 found, many aspects of the permit assessment process at the local council level are seriously compromised, despite decades of merits reviews. It is obvious that without external oversight and pressure to require change, the administration of DA processes by councils will not improve. Constant VCAT "feedback" has clearly made little difference to the quality of council DA procedures.

Consequently, various options including financial penalties could be available to VCAT to encourage reforms in under-performing councils, similar to VCAT's powers in planning enforcement hearings. These could include requiring re-training of relevant staff, discretion to recommend a performance audit of a council by the VAGO, and in extreme or clear-cut cases, the award of costs against parties whose poor performance or negligence resulted in the need for review or wasted the Tribunal's time in dealing with poorly prepared or inaccurate submissions.

S105 VCAT Act requires a person to answer questions honestly despite the fact that this may incriminate them. We are aware of a number of cases where Members have been aware of deliberate inaccuracies being presented to them at hearings, and in each case there have been no repercussions. S136 VCAT Act should thus be used to deal with parties who deliberately misled the Tribunal through flawed evidence or evasive answers to questions from the Tribunal or during cross-examination. This is a classic example of a rule that is not enforced and consequently often abused.

Limitation on the Lodgment of Amended Plans

The re-assessment of Practice Note PE9 in 2009 changed little about the process for lodging amended plans. VCAT's rationale for maintaining the practice is that it:

> *"... is part of an iterative process to ensure that a proposal will produce acceptable outcomes in terms of the decision guidelines of clause 65….The ability to amend plans in a proceeding for review saves the time and resources of responsible authorities, permit applicants and objectors by enabling improvements to be made to a proposal without a new application being required whenever changes are proposed. It introduces certainty to the planning and environmental approval process".*

This rationale ignores the wider context - that the mere availability of the amended plan option encourages ambit claims. Statistically, developers know they have a better chance of getting a non-compliant DA approved at VCAT than at council – a conclusion supported by a variety of evidence.

Firstly, it is intuitively obvious. Plans are invariably amended to address some degree of non-compliance with planning guidelines, as highlighted by councils or objectors. . So if amended plans are deemed necessary by a permit applicant at the VCAT stage of the DA process (typically a month before a final hearing), why weren't they presented earlier at the council stage of the process to meet the same council and objector concerns?

Clearly there is a potential advantage to the developer to submit amended plans at the VCAT stage, not when the DA is still before Council.

Secondly, an independent source that came to a similar conclusion was the 2002 Reference Group on Decision-making Processes in the planning system, chaired by David Whitney. Members included the MAV, VCAT, PIA and VPELA.

The Group was required to review and report on three specific areas:
1 Using and interpreting local policy
2 Substitution of amended plans
3 Enforcement methods

The three major conclusions of the second Whitney Report on amended plans were:

> *The focus should be on improving the quality of initial applications submitted so as to avoid the implications of ambit claims and to reduce the likelihood of significant changes to plans being needed.*
>
> *Councils need a clear framework within which they can legitimately and efficiently consider amended plans.*
>
> *There should be disincentives to substitution of plans at VCAT, so as to create greater incentives to the final plan being the plan assessed by council.*

Whitney also recommended that a fee equivalent to a planning application fee be introduced for the substitution of plans at VCAT, and suggested a 'gatekeeper' role for responsible authorities to determine if plans should be substituted at VCAT.

Finally, former VCAT President Justice Bell was quoted in The Age, 12 August 2009 commenting on public concern about inconsistent decisions, substitution of amended plans and personal bias among VCAT Members.

> *"I would be disturbed if we had become a default state planning tribunal: if, for example, the power of amendment is being abused by developers such that they are not presenting their true case to council and are saving it for VCAT..... If you're concerned about consistency, if you're concerned about decisions seen to be subjective, then those are met by altering the balance in favour of more prescriptive standards."*

It is intuitively and statistically obvious that ambit claims ARE encouraged by the present operation of the planning system and that these cases use a disproportionate amount of resources during their progress through the DA assessment process.

Just this single reform of disallowing amended plans at VCAT would result in much more complete and compliant plans being lodged with councils, cutting council staff assessment times and thus reducing developer appeals for failure to decide. More compliant plans would also mean fewer grounds for appeals against the grant or refusal of permits.

As Whitney said, developers should be encouraged to "get it right the first time".

Increase certainty and reduce appeals by establishing the pre-eminence of local incorporated policy

The first Whitney Report on local policy recommended among other things that s60 P&E Act be amended to highlight the pre-eminence of incorporated policies in the planning scheme. This was echoed by the August 2006 Carbines Report on "Cutting Red Tape in Planning" which noted that councils and residents want more weight on local planning policy in VCAT decisions:

"This is appropriate if the local policies are consistent with State policy or provide local expression of how State policy will be delivered on the ground."

Carbines recommended that the Minister for Planning formally clarify the relationship between State and local policy to reinforce the importance of local policy in planning decisions.

Consequently, VCAT Members should be required to follow incorporated local policies in planning schemes unless clear reasons exist for the exercise of discretion. To not do so makes a mockery of the claim by former Planning Minister Rob Hulls that councils and their communities must work to develop these local policies if they want to have some control over their own neighbourhoods.

The above conclusions of Whitney and Carbines in relation to adherence to local policy concur with the comments of the Hon. Deirdre O'Connor about merits reviews by administrative tribunals (*"Lessons from the Past/Challenges for the Future: Merits Review in the New Millennium" The Hon. Justice Deirdre O'Connor. 2000 National Administrative Law Forum - Sunrise or Sunset? Administrative Law in the New Millennium, June 2000*).

O'Connor pointed out that an administrative tribunal must be careful to exercise discretionary power in accordance with the terms and purpose of the relevant legislation and with due regard for government policy, including regard to any ministerial or departmental directions or guidelines.

As Justice McClellan (Chief Judge, NSW Land & Environment Court) stated in 2003:

There are many reasons why such a merit review process is appropriate. However, its continuing legitimacy rests on consistency of decision-making in accordance with identified principles…. As Sir Gerard Brennan said in Drake "inconsistency (of decision making) is not merely inelegant, it brings the process of deciding into disrepute."

However, VCAT Members are not consistent in upholding local policies even though they have been incorporated into planning schemes with formal state assent. Together with the perceived bias of some Members, this has led to a widespread lack of community respect for the Tribunal, at least in planning.

We also note that the arbitrary exercise of discretion by councils or the Tribunal leads to the devaluation of policy and at least the perception of bias, as well as the opportunity for corruption, as detailed by the NSW Independent Commission Against Corruption in its recent report, "Anti-corruption Safeguards and the NSW Planning System", February 2012

RECOMMENDATIONS

* **Substitution of amended plans should be limited to cases involving a change of circumstance in relation to the subject property which necessitates modification of the proposal**

* **In these cases, fees for substituting amended plans should be introduced equivalent to a new review application fee**

* **Limit the expert witness process in cases where such expertise is warranted to a single court-appointed witness only, paid jointly by the parties**

* **Introduction in VCAT decisions of some capacity for oversight of local government Development Application assessment processes, with discretion to refer councils for review by the Victorian Auditor-General**

* **VCAT to lobby the State Government to amend s60 P&E Act to establish the pre-eminence of local incorporated policy, supported by a ministerial directive to VCAT**

* **VCAT to lobby the State Government for more mandatory guidelines for Rescode standards and zone and overlay schedules to improve certainty, efficiency and the quality of built outcomes, and thus reduce appeals**

* **Consequently, limit fee rises for permit applicants (with tax deductibility status) to CPI + 5%pa, to be reviewed in 2016 to determine the effect of other suggested reforms on both cost recovery and delivery of fair and efficient justice**

* **Consequently, limit fee rises for objectors (with no tax deductibility status) to CPI, to be reviewed in 2016 to determine the effect of other suggested reforms on both cost recovery and delivery of fair and efficient justice**