VCAT & Statutory Planning Reforms advocated by SOS

(*updated November 2016*)

NB: implementation of most of these reforms (1, 2, 3, 4 & 5 in particular) would not only improve the quality of planning outcomes and the fair and efficient administration of justice, but also substantially reduce the number of cases and the duration of hearings in the planning list, thus also reducing VCAT costs.

The reforms below should be introduced because of these multiple benefits in efficiency for all parties, which would also obviate the need for the current exorbitant "user-pays" fees introduced to meet the unsustainably-escalating caseload in the VCAT P&E List.

1. VCAT Merits Reviews should be based on more mandatory planning controls

Most community groups want VCAT to only be able to review Council development application (DA) assessment processes, not to act as the Responsible Authority by doing full Merits Reviews (MR). However, under the present administrative appeals system this approach would involve a largely judicial review process - much more legally abstruse and involving higher levels of evidentiary proof and potential financial penalties.

Former VCAT head Justice Stuart Morris described the issue as follows:
"It has been said that VCAT could still have the role of judicially reviewing local government decisions to ensure that these are made lawfully. But this method of review has many shortcomings. Judicial review tends to be more expensive, as it is a legal process requiring legal skills. And, as it involves an historical analysis of the primary decision, it tends to be a lengthy process. Judicial review also provides much less psychic satisfaction than review on the merits: parties become frustrated that they cannot address their real grievances about the merits of the decision. It is also true that a system that focused on judicial review as the method to ensure lawful decision making would have the tendency to embarrass local councils and councillors, by putting the spotlight on their methods instead of on the merits of the decision. The present system avoids many unnecessary and distracting personal attacks by insisting that parties focus on the merits of a decision." ***(Ref. 1)***

While we applaud any process that could put the spotlight on council DA decisions (by staff or councilors), we appreciate the difficulty of Judicial Reviews and advantages of Merits Reviews. Indeed, grounds for judicial review may also be hard to identify without a prior merits review - due process would be deemed to have been complied with as long as a council could establish that it had considered the matters required under the Act and the relevant Planning Scheme.

Judicial review could risk ignoring the fundamental issue of the integrity and transparency of the exercise of discretion and the quality and degree of compliance of planning outcomes. We note that VAGO (the Victorian Auditor-General's Office) has confirmed many flaws with the way councils administer statutory planning processes ***(Ref. 9).***

Merits Reviews have also been central to the administrative appeals system ever since it was established in the 1970s (initially under the AAT and now under VCAT). They were specifically introduced to meet the increasing need to counteract poor administrative decisions by state & local government departments. This was long before the deregulation of planning in the 90s under Kennett (which has been maintained by consecutive state governments ever since).

Part of the intent of MR was also to indirectly improve the decision-making processes of government authorities - this has clearly failed in town planning, even arguably causing the opposite by encouraging councils to "second-guess" the Tribunal in taking a weak approach to implementing discretionary local policies. If VCAT were required to take a stronger and more consistent stance on upholding policy (local policy in particular – see point 5), that situation would cease or even be reversed, in line with the original intent of the MR system.

So it is crucial that VCAT have some capacity for oversight and remedial action to deal with flawed local government DA assessment processes. The simplest solution is to retain Merits Reviews while simply making most current planning controls mandatory (eg, Rescode, zone and overlay standards - with allowance for specific, clearly defined exceptions). This would reduce the need for the exercise of discretion and thus actively discourage most of the "gaming" of the planning regime that speculative developers indulge in currently – eg, ambit claims at VCAT (see point 3), "flipping" development sites for quick windfall profits, etc.

As Justice Bell stated when head of VCAT in 2009:
"Local government is the primary decision-maker and we are truly a review tribunal, that's our statutory purpose," he said. "I would be disturbed if it were true that we had become a default state planning tribunal: if, for example, the power of amendment we have is being abused by developers such that they are not presenting their true case to council and are saving it for VCAT……"
He said he was also considering how best to respond to public concern about inconsistent decisions and perceived personal bias among ruling members…..
"One option is to recommend that the Government rewrite its Melbourne 2030 planning scheme to be more prescriptive and less general. 'If you're concerned about consistency, if you are concerned about decisions seen to be subjective, then those are met by altering the balance in favour of more prescriptive standards." **(Ref. 2)**

Mandatory controls for siting, building envelopes and residential amenity would greatly improve the consistency of the decision-making process, reducing the number of appeals and the workload of both councils and VCAT, as well as improving the quality of decisions and providing more accountability, quicker decisions and greater certainty for all parties - a much more efficient and effective system. (See point 4). **(Refs. 8, 9, 17)**

2. Restore affordable and equitable access to VCAT by reversing the June 2013 VCAT appeal fee rises and substitute these with (10% + CPI) maximum rises, recognizing that implementation of many of the other reforms suggested here would substantially reduce the number of VCAT appeals and overheads, as well as party costs and delays. (Ref.20)

The 2013 and subsequent increases discriminate further against residents who can't claim legal costs as tax deductions and who have already been acting at their own expense as the only effective agent of public oversight over the activities of council planners and developers. The introduction of the new exorbitant fees has already led to a fall in the number of objector appeals, although proper analysis is impossible because since 2009 VCAT has failed to issue their detailed annual case analysis data (see point 14). Earlier case data and other documents such as the regulatory impact statement on the new fees posted in January 2013 have also been deleted from the VCAT website. This is poor transparency and accountability and should instead be reversed and strengthened.

3. Limit substitution of amended plans at VCAT to cases where a change of circumstance independent of the applicant necessitates modification of the plans. In these cases, a new review application fee should apply for substituting amended plans, which should still be required to be circulated at least a month before the hearing. (Refs. 1, 2)

(*Purpose – to deter ambit claims and induce developers to negotiate any amended plans with all parties at the council assessment level. It is statistically evident that developers know they are likely to get a more favourable outcome from VCAT than from Council*)

4. More mandatory guidelines in planning schemes to be introduced by the State Government, in particular for Rescode standards and zone & overlay schedules; and more specific formal justification to be required for the use of discretion where this would still be permissible under these new tighter guidelines (see pt.1) (Refs. 2, 8, 9, 18)

5. 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 (Ref. 7, 8).

Despite VCAT Members frequently deferring to state policy when it differs from local policy, the primacy of local policy is clearly implied in the planning regime. Eg, Planning Practice Note 8 ("Writing a Local Planning Policy") states "An LPP guides how discretion in a zone, overlay or a particular provision will be exercised"; and the Rescode preamble under "Requirements" states that where local variations to Rescode standards occur in schedules and overlays, these local variations apply, not the state standard set out in Clauses 54 and 55.

6. Introduce case management practices to reduce the increasing use of legal practitioners and expert witnesses (Ref. 3)

7. In cases where an expert witness is requested by a permit applicant and approved by VCAT as being warranted, limit this to one of two options to remove witness bias:
(a) a single court-appointed witness only, to be paid by VCAT but with those costs reimbursed by the requesting party (usually the permit applicant, who pays for their expert witness(es) currently anyway).
(b) "hot-tubbing" with 2 or more witnesses from opposing parties who must give and discuss their evidence concurrently (to be jointly paid by the parties). (Refs. 3, 4, 5, 6)

8. Combat the "ambit claim" abuse of failure (s79) appeals by introducing a sliding scale of prescribed timelines for council DA assessment decisions instead of the standard 60 days: eg, 40 – 100 days, depending on the size and complexity of the DA. (See point 9)

Unscrupulous developers typically lodge confusing, non-compliant &/or incomplete applications, to avoid a council decision within the present 60-day limit so they can appeal the case straight to VCAT. Technically, this is a breach of VCAT's role, which is to act as a court of review, not as the responsible authority making the initial decision on an application. Thus the earlier suggestion of former VCAT head Justice Morris to repatriate council application fees to VCAT in failure appeals is inappropriate and should not be considered (see point 9)

9. Rescind s115CA VCAT Act (reimbursement of applicant's fees in s79 failure appeals), and Regulation 18 (reduce time for seeking further information from 28 to 21 days under the proposed Planning and Environment Regulations). This would support the Planning Institute submission to the Review of P&E Regulations. (Ref. 20, 21)

These fairly recent regulatory additions pressure councils to make initial decisions within time to avoid financial penalties, even if this means rushing the assessment. PIA has recommended against Reg.18, particularly in tandem with s115CA. Better outcomes would be achieved if instead councils were given longer timeframes for deciding complex cases, balanced with shorter times for simple cases (see point 8 above).

10. Rescind s51A VCAT Act (Tribunal may invite decision-maker to reconsider)

This fairly recent change applies pressure on councils to compromise in cases where they have refused an application and is thus likely to favour developers even further. If a developer is intent on fighting a case and has not been prepared to compromise sufficiently at mediation, the legal stance of councils must not be undermined at VCAT hearings.

11. VCAT should become a "one-stop-shop" for enforcement cases, including assuming the powers of a magistrate's court to award costs. Follows recommendations of the Planning Enforcement Officers Association (Refs. 10, 11, 12)

12. Weight placed by Members on Delegate Reports should only be to the degree justified by the empirical evidence presented at VCAT hearings (supported by Ministerial Directive)

VCAT has traditionally relied on the accuracy of council development assessment reports but evidence from VAGO and many case hearings has demonstrated that these reports may contain significant errors, omissions and bias – another reason to make existing controls more mandatory ***(Ref. 9)***

13. Provide same-day availability to the parties of audio CDs of VCAT hearings to enable rapid review of a day's proceedings for objectors inexperienced in tribunal process so as to inform preparation of presentations or cross-examination for subsequent hearing day(s). Alternatively and preferably, allow parties (with prior notice) to make their own unofficial recordings of hearings for this purpose (Ref. 13, 19).

VCAT members can allow this if it "does not interfere with the proper administration of justice". Both remedies would also improve VCAT accountability (hearings are already open to the public), although such recordings are not official records suitable for legal use (eg, as evidence in appeals).

14. Restore more accountability and transparency to VCAT by reinstating the yearly publication of detailed Planning List case statistics (discontinued after 2009)

15. Equalise time limits for permit applicants & objectors for lodging appeals

16. Tighten wording of permits and conditions, and require all changes suggested to proposals in VCAT hearings to be reflected in specific conditions if VCAT accepted the changes as appropriate during the hearing or subsequent deliberations (Ref. 9, 14)

This includes ceasing the use of the phrase "….generally in compliance with" the plans, which makes the enforcement of small but sometimes significant departures from plans impossible.

17. Deter presentation of false evidence by prosecution under s136 VCAT Act of parties or witnesses who attempt to mislead the Tribunal (ref. 15, 16).

As far as we can determine, this provision has never been used despite a number of written VCAT decisions clearly documenting witnesses deliberately misleading the Tribunal

18. Maintain accessibility of VCAT files for inspection based on recouping actual costs

REFERENCES:

NB: many links to older documents on the Planning Dept website are no longer current and the documents concerned have often been removed from searchable access altogether. This includes the 3 Whitney Reports listed below, but these are now available from the SOS website.

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Whitney Report #2 (Amended Plans), 2002:
http://sos.asn.au/vic/wp-content/uploads/2015/02/Whitney-2-Amend-Plans.pdf

(2) Justice Kevin Bell, "VCAT chief admits faults, calls for overhaul", The Age, 12.08.09
www.theage.com.au/national/vcat-chief-admits-faults-calls-for-overhaul-20090811-egz3.html

(3) Victorian Law Reform Commission: Civil Justice Review – Report 14:
www.lawreform.vic.gov.au/projects/civil-justice/civil-justice-review-report

(4) Land & Environment Court, NSW: Ongoing Reforms of Practice & Procedure, 14 June 2006 (Expert Witnesses, p.21 – 28):
www.lec.justice.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721754/preston_ongoing%20reforms%20of%20practice%20and%20procedure.pdf

(5) Expert Evidence in the Land and Environment Court, January 21, 2013
www.lec.justice.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011711808/expert%20evidence%20in%20the%20land%20and%20environment%20court%20v2.pdf

(6) Saqqara Pty Ltd v Glen Eira CC [2009] VCAT 2357 (9 November 2009) (para. 8-10):
www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2009/2357.html

(7) Whitney Report #1 (Local Policy), 2002:
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(9) Victoria's Planning Framework for Land Use and Development; Victorian Auditor-General's Office, 7 May 2008
www.audit.vic.gov.au/reports__publications/reports_by_year/2008/20080507_land_use_and_devt.aspx

(10) NSW ICAC, "Anti-corruption Safeguards and the NSW Planning System", Feb 2012
http://www.icac.nsw.gov.au/documents/doc_download/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012

(11) Planning Enforcement Officers Association Inc: Submission to the Victorian Planning System Ministerial Advisory Committee – Key stakeholder consultation, July, 2011
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(12) Whitney Report #3 (Enforcement), 2002
http://sos.asn.au/vic/wp-content/uploads/2015/02/Whitney-3-Enforcement.pdf

(13) The Environmental Law Committee of NSW Young Lawyers: A Practitioner's Guide to the Land and Environment Court of NSW, 2009 (Chapter 10: Judgments, Transcripts and

Cassette Tapes):
www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/026378.pdf

(14) *City of South Melbourne v Raftopoulos* (unreported VCAT Appeal 1999/34936, 7.2.89)

(15) Bayside CC v Sullivan & Ors [2000] VCAT 672 (31 March 2000) (paras. 23-35):
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(16) BG Architecture Pty Ltd v Port Phillip CC [2003] VCAT 1804 (2 December 2003) (paras 73-83): www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2003/1804.html

(17) Stephen Willey, 2004: Are planning appeal rights necessary? A comparative study of Australia, England and Vancouver BC, Progress in Planning 63 (2005) 265–320
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