

Reference Group On Decision-making Processes

September 2002

Report 1
Using and Interpreting

Local Policy



Foreword

This report is the final report of Project 1 of the Reference Group on Decision-making Processes appointed by the Minister for Planning to analyse specific issues and provide advice about improvements to the Victorian planning system.

As required by the terms of reference, the Reference Group has looked specifically at the issue of Using and Interpreting Local Policy.

The Reference Group has concluded that the *Victoria Planning Provisions* (VPP) based system of planning control is one worthy of support. It is a system that transparently sets down the State and local objectives as a basis for reaching sound planning outcomes. However, the system is not without its weaknesses and the Reference Group acknowledges the merit in a number of concerns that have been raised about the system including those identified by the Inner South Metropolitan Mayors Group.

The findings and recommendations of the Reference Group are, therefore, not about abandoning or structurally changing the current system. They are about refinements and improvements that attempt to address the weaknesses so as to ensure the decisions arising from the system are soundly based and better understood and assist the State and local government achieve their respective goals.

In completing the task, the Reference Group met on eight occasions and sought advice from a number of bodies. It was also considerably assisted by Department of Infrastructure officers Michelle Croughan and Peter Allen and Municipal Association of Victoria consultant David Rae.



David Whitney
Chair
Reference Group on Decision-making Processes

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1.0 FINDINGS AND RECOMMENDATIONS

Planning is not a precise science – the rapidly changing social and economic structures of society make planning systems based on precise and detailed regulatory controls too inflexible.

The Victorian planning system is one in which decision-making is underpinned by policy. It is a system that was introduced to maximise flexibility and at the same time facilitate good outcomes that would assist to implement policy.

Experience with policy-based planning schemes is continually developing. Some stakeholders are still coming to grips with the task of writing, understanding and giving appropriate weight to policy.

The Reference Group considers that, in seeking to introduce a more flexible system to cope with these changes, the pendulum has swung too far and that the level of flexibility outweighs the desirable degree of certainty which is sought by the development industry, the community and their elected representatives.

The Reference Group supports the continuation of the policy-based system in Victoria but considers that some refinements can be made to:

- β create greater levels of consistency and certainty in decision-making
- β provide more guidance in balancing policies
- β clarify the status of policies outside of planning schemes in decision-making
- β improve the quality and clarity of both State and local policy.

The Reference Group considers that part of the cause for the current tension is simply the pressure on the Planning and Environment List of the Victorian Civil and Administrative Tribunal (VCAT) to hear applications for review and make decisions within reasonable time frames. The Group believes that there is adequate information to suggest that if additional resources were provided for VCAT some of this pressure could be relieved with consequent benefits to all parties.

The Group also strongly believes that the successful operation of any planning system depends on a constructive and cooperative approach by all participants with a willingness to recognise and respect each other's roles, responsibilities and motivations.

The findings and recommendations of the Reference Group are framed to respond to the terms of reference which ask that particular regard be given to: improving statutory processes and provisions; encouraging and documenting best practice and professional development and training.

1 IMPROVING STATUTORY PROCESSES AND PROVISIONS

FINDING	RECOMMENDED ACTION	BY
<p>The Reference Group supports the policy-based planning system provided by the VPP model. The ability to set out a transparent strategic vision, and policies and tools for achieving this vision, is of benefit to all parties within the planning system.</p> <p>The current balance in the system has gone too far in favour of flexibility and performance-based controls to the detriment of certainty and this should be reviewed.</p>	<p>1. The key policy guidance documents – <i>Format of Municipal Strategic Statements</i> and <i>Writing a Local Planning Policy Practice Notes</i> – should be reviewed so as to achieve a greater level of precision in policy statements.</p>	<p>DOI Local government</p>

FINDING	RECOMMENDED ACTION	BY
There is uncertainty about the relative weight to be given to policies that have yet to undergo serious testing in the community as opposed to policies in the planning scheme. Full statutory recognition should only be given to policies that are contained in the planning scheme or are in the formal process of being included.	2. Amend Section 60 to establish a hierarchy of matters for consideration clearly highlighting the pre-eminence of the planning scheme.	DOI
	3. Ensure that due weight is given to proposals which have been developed as planning scheme amendments and are undergoing due process by removing reference to a 'policy statement' from Section 60(1)(b)(ii) of the Act.	DOI
All parties involved in the preparation of policy (DOI, planning authorities) and the implementation of policy (responsible authorities and VCAT) should be rigorous in the way that local policy is applied.	4. Prepare a Practice Note that explains the proper application of policy including:	DOI Local government
	β promoting the use of the five principles of the <i>Australian Aluminium Shopfitters and Glazing Contractors Pty Ltd v. City of Fitzroy</i> (P82/1162) case when determining how much weight should be given to a 'strategic plan, code or guideline' not contained in a planning scheme.	VCAT
	β requiring responsible authorities using a 'strategic plan, code or guideline' in decisions to cite the relevant document, its current status and the process by which it has been prepared.	
The difference in construction of the general and specific provisions of the Strategic Planning Policy Framework (SPPF) creates the potential for tension with specific local policies and differences of interpretation.	5. Review the SPPF to seek to clarify the relationship between general provisions in the SPPF and the Municipal Strategic Statement (MSS) and local policies in schemes.	DOI Local government
	6. Consider rearranging the SPPF to separate broad policy directions to planning authorities from specific State policies which a responsible authority must respect such as the Telecommunications Code of Practice. In reviewing the SPPF, particular attention should be given to policies that deal with residential development and urban consolidation to ensure they are clear in intent and have defined outcomes.	DOI

FINDING	RECOMMENDED ACTION	BY
There is insufficient guidance about how to balance policy in decision-making.	7. Consider amending Section 7(4) of the <i>Planning and Environment Act 1987</i> to provide additional criteria to assist in balancing and prioritising policies.	DOI
	8. The Practice Note referred to in Recommendation 4 should also include reference to:	DOI
	<ul style="list-style-type: none"> β the consistent application of policy by the decision-maker except where, because of the particular circumstance, it is clearly inappropriate to do so or irrelevant to the matter being addressed. β the approval process ensuring local policies are developed in an integrated manner with State policy so that their interpretation will result in the overall objectives of the MSS being the fundamental guide to the balancing of different policies. 	
There is a lack of clarity as to the matters that the responsible authority and VCAT must consider when making a decision.	9. Clarify and consolidate the matters that must be considered in Sections 60(1) and 84B of the <i>Planning and Environment Act 1987</i> so that the requirements are the same.	DOI

2 ENCOURAGING AND DOCUMENTING BEST PRACTICE

FINDING	RECOMMENDED ACTION	BY
Where there is dispute about the policy aspects of a proposal, the resolution of the issues could be made more efficient if there was a process for the parties to establish areas of agreement through a process such as the British 'statement of common ground'.	10. Investigate the benefit of establishing a process such as the 'statement of common ground' to focus debate to the areas of acknowledged difference.	VCAT Local government DOI
The absence of a clear statement about how a decision is founded in achieving stated policy outcomes encourages decisions that are <i>ad hoc</i> and inconsistent with policy.	11. Decision-makers should clearly articulate the policy basis for all decisions in the documentation of the decision. In particular, responsible authorities should produce grounds of refusal which clearly spell out the issues which have determined the matter. Investigate the format for grounds of refusal and include, where appropriate, specific reference to relevant policies.	Local government DOI

FINDING	RECOMMENDED ACTION	BY
There is little consistency across local government as to what level and type of delegation is given to officers to assess planning applications.	12. Models of delegation to officers should be prepared to assist councils in establishing good delegation systems and effective relationships with the planning community and the broader community.	DOI MAV Local government
Decision-making would be assisted if 'Guideline Judgments' at VCAT were introduced for important issues which have been identified as likely to have wider application.	13. Introduce 'Guideline Judgments' with appropriate procedures.	VCAT
Some MSSs and local policies lack clarity and do not respond to the guidance of the <i>Format of Municipal Strategic Statements</i> and <i>Writing a Local Planning Policy Practice Notes</i> .	14. Following the review of the <i>Writing a Local Planning Policy Practice Note</i> new policies should be written in that format and existing policies systematically reviewed against the Practice Notes.	Local government
	15. DOI support the review and clarification of local policy by encouraging greater use of Ministerial amendments to implement policy where there is no significant change to the policy intent and the <i>Ministerial Powers of Intervention</i> are met.	DOI
A periodic review of the VPP should be instituted so that the State Government is under the same obligation to regularly review the VPP as local government is to regularly review MSSs.	16. A periodic review of the VPP should be instituted in the same manner as the three-year review of MSSs.	DOI
Reviewing decisions is vital to determine the effectiveness of policy and whether it is achieving the desired outcomes.	17. Investigate the potential for the effective linkage of relevant websites to provide easy access to both VCAT and Planning Panel decisions.	VCAT Planning Panels Victoria
	18. Promote a process of regular reporting of VCAT and Panel decisions by planning officers to council.	Local government

3 PROFESSIONAL DEVELOPMENT AND TRAINING

FINDING	RECOMMENDED ACTION	BY
In order to respond to the continuing development of the planning system and the influx of new players, there is a continual need for training in both basic and best practice skills for all users of the planning system.	19. That the MAV/DOI PLANET program continue and specific training be regularly scheduled on the development, writing and use of policy in the statutory system.	DOI MAV
	20. Continuation of the regular program of VCAT seminars under the PLANET program.	DOI
	21. The MAV councillor toolkit and councillor training program include specific material about the development and use of policy.	MAV
	22. Adequate resources be provided for training and professional development of VCAT members particularly sessional members.	Dep. of Justice
	23. Consideration be given to specific funding for councillor training and development.	MAV
The planning system would benefit from a greater awareness by the general community of the roles and responsibilities of participants of the system.	24. Initiatives, such as the Victorian Local Government Association consultation project, that seek to ensure greater community engagement and best practice for community participants should be supported.	DOI MAV VLGA Local government Professional groups

2.0 INTRODUCTION

2.1 Establishment of the Reference Group

Following representations from the Inner South Metropolitan Mayors Forum and others about the operation of various aspects of the planning decision-making process, the Minister for Planning, the Hon. John Thwaites MP, established a Reference Group to analyse specified issues and provide advice about what improvements can be made to the planning system or other processes to deliver better process performance and better planning outcomes.

The Reference Group was established under the auspices of the Continuous Improvement Program, a joint DOI and MAV initiative that promotes improvements in the operation of the planning system. The implementation of recommended improvements will be managed through this program.

The members of the Reference Group are:

David Whitney	- Chairperson
Catherine Dale	- MAV nominee
Julian Hill	- MAV nominee
Richard Horsfall	- VCAT
Ian Lonie	- Victorian Environmental and Planning Law Association (VPELA)
Ian Marsden	- VCAT
Rob Spence	- MAV
George Ward	- Planning Institute of Australia (PIA)

Judge Michael Strong (VCAT) and Mark Bartley (VPELA) attended on behalf of their respective organisations on a number of occasions.

The Committee was supported by DOI and MAV:

Michelle Croughan	- DOI Project Manager
Peter Allen	- DOI
David Rae	- MAV Consultant

2.2 Terms of reference

The terms of reference are attached in the appendix. The Reference Group is required to consider three projects. Each project has a specific brief set out in the terms of reference.

In considering all the projects, the Reference Group is required to have particular regard to the need for action in relation to:

- β improving statutory processes and provisions
- β encouraging and documenting best practice
- β professional development and training.

Project 1

This report responds to Project 1: *Using and Interpreting Local Policy*.

The decision of the Supreme Court in *Glen Eira v. Gory* highlighted different views about how policy in planning schemes should be used and applied.

Two fundamental questions are posed:

- β is policy in planning schemes given appropriate weight when decisions are made?

β is policy clear in its intent and can it be effectively implemented?

The Reference Group is required to:

...consider the intended role of policy in the statutory planning system as expressed in relevant documentation associated with the introduction of the new format schemes and recommend any actions needed to ensure that the statutory role of policy in schemes can be effectively implemented.

The terms of reference also require examination of the issues raised by the Supreme Court in the *Glen Eira v. Gory* decision and the consequential advice from the Victorian Government Solicitor.

2.3 Other contributors

The views of the following persons and organisations were sought in relation to this project:

- β VCAT
- β Mr Jeff Akehurst, City of Glen Eira
- β Planning Panels Victoria
- β Mr Ian Pitt, Senior Counsel, Best Hooper
- β Mr Mark Woodland, City of Melbourne
- β Mr John Keaney, planning consultant
- β Save Our Suburbs

The Reference Group has taken the views and comments provided into account.

3.0 BACKGROUND

3.1 Planning reform

Reform to the planning system was initiated in late 1992 through the establishment of the Perrott Committee. Three key objectives for reform emerged:

- β to establish a focus on State and local strategic directions which provides the basis for controls in planning schemes and guidance to decision-making
- β to provide a consistent set of State-wide planning scheme controls and provisions
- β to test the system's effectiveness by annual monitoring and review.

The VPP and new format planning schemes for all municipalities were developed in response.

Planning schemes were structured to include:

- β the SPPF, which comprises the Statewide ambitions for land use and development in Victoria
- β a Local Planning Policy Framework (LPPF) which consists of two components – the MSS and Local Planning Policy (LPP). The MSS contains the strategic vision for a municipality and the strategy for achieving this vision. The LPP provides a tool for assisting local government in the exercise of their discretion
- β a suite of standard zones
- β a suite of standard overlays with the ability to include local schedules
- β particular provisions
- β general provisions.

New format planning schemes were largely in place by 2000. Local government is currently reviewing MSSs in accordance with the three year review requirement of Section 12A(5) of the *Planning and Environment Act 1987*.

3.2 Roles and responsibilities in the planning system

Local government

Local government is generally both the planning authority and the responsible authority in relation to its municipal district.

The planning authority maintains the planning scheme and prepares and administers amendments to the scheme. Around 400 amendments are prepared each year (in contrast to about 900 a year under the old schemes). A small proportion, about 4 per cent, relate to local policy. Most amendments rezone land, correct errors or update the scheme.

The responsible authority administers and enforces the planning scheme. Primarily, this involves making decisions about planning permit applications. Responsible authorities must follow procedures outlined in the Act.

Local government deals with about 45,000 planning permit applications each year. The number of applications has increased since the introduction of the new format planning schemes because the intention of the new system was to make the planning permit the preferred form of development approval and to consequently reduce the need for planning scheme amendments.

Objections are received for about 33 per cent of applications in metropolitan councils and 12 per cent for rural councils.

Planning applications can be one of the most contentious aspects of council decision-making and the pressures on planning staff are often high. Local government have great difficulty in gaining and keeping experienced statutory planning staff. According to *A Profile of Local Government*

Planners in Victoria, November 2001 (Market Solutions), 44 per cent of council planners have less than two years experience.

Applicants

Applicants for planning permits must submit applications in accordance with the *Planning and Environment Act* and Regulations and include any information required by the planning scheme.

An applicant to provide may be asked to provide more information about the proposal. Often, the applicant will be asked to demonstrate how the application satisfies the relevant parts of the SPPF and the LPPF.

It is common for local government to encourage applicants to discuss their proposals at pre-application meetings with council officers.

In many cases, public notice of the application is required. If objections to an application are received, further consultation may be required.

During the consideration of the application for changes to the plans, a response to issues raised by the council or objectors may be suggested.

Applicants have the right to a review of a council decision at VCAT if their permit application is refused, the conditions of the permit are unacceptable, or the council fails to decide on the application within the prescribed time.

The community

The community has the ability to participate in decision-making in two ways:

- β when a proposed planning scheme amendment is given public exhibition an interested party can make a submission. If a planning authority does not change the amendment to address the concerns of the submitter then the submitter can present their concerns to an independent panel
- β in most cases, a person can make a submission to a planning application if they believe they may be affected by it. A third-party objector can also request a review of the council decision at VCAT and participate in any VCAT hearing.

VCAT

The right to an independent review of council decisions, which applies to both applicants and objectors, is set down in the *Planning and Environment Act 1987*. The Planning and Environment List of the VCAT fulfils this function.

VCAT decides the merits of the application on the basis of the planning scheme and the evidence and submissions put before it. Hearings held by VCAT provide the opportunity to present written and/or oral submissions, to call or give evidence and to ask questions of witnesses. VCAT can make a new decision or affirm, modify or overturn the decision made by council. The proceedings before the VCAT, in the main, include a complete reconsideration of an application and the decision of the VCAT replaces that of the council.

VCAT deals with about 3,300 cases each year, approximately 2,700 cases on review. This is about 6 per cent of the planning permit applications dealt with by local government each year. There is an average of 59 VCAT applications for review for each metropolitan council and an average of five for each rural council. The member councils of the Inner South Metropolitan Mayors Forum averaged 146 VCAT applications each in 2001.

The ability for an independent tribunal to review a planning matter on its merits has been a component of the planning process in Victoria since planning controls were introduced.

The Minister for Planning

The Minister for Planning:

- β is responsible for the operation of the *Planning and Environment Act 1987*

- β approves amendments to all planning schemes. The Minister for Planning must approve a planning scheme amendment by a planning authority before it comes into operation
- β prepares State policy such as *ResCode*
- β maintains and amends the VPP. This includes implementation of state policy through the SPPF, zones, overlays and particular provisions as well as improvements and clarification of existing provisions
- β provides advice regarding the use of VPP tools within planning schemes. This includes the development of Practice Notes and other documents such as *Using Victoria's Planning System*.

3.3 The Gory Decision

The recent Supreme Court decision in *Glen Eira City Council v. Michael Gory* [2001] VSC 306 raised questions in the minds of a number of councils about the effectiveness of the new format planning schemes in achieving local outcomes and the status to be given to local policy.

In the VCAT decision [*Gory M v. Glen Eira CC* [2001] VCAT 307 (28 February 2001)] the Member made a number of statements such as:

The City of Glen Eira has a particular policy in relation to incremental change and this area is of one of those specified as an incremental change area. It insists that incremental change does not only mean an increase but a decrease in the number of dwellings per site for locations where higher densities already exists.

I totally reject the incremental change area policy as applicable to this application.

I believe it is because of these factors that the Glen Eira Incremental Change Area Policy is clearly a negative one and contrary to the State Planning Policies of Urban Consolidation and medium density housing.

The Member questioned the value of the Glen Eira local policy and suggested that it played a subservient role to State policy. The City of Glen Eira interpreted this to mean that VCAT had not 'considered' the policy in its decision and on a question of law appealed to the Supreme Court.

The Supreme Court did not accept council's submission that VCAT had failed to consider the policy. The Court held that VCAT's obligation was to 'consider as appropriate' the provisions of the planning scheme, that to consider is not necessarily to adopt or follow, and that VCAT had in fact considered the policy and decided it was not applicable.

The Victorian Government Solicitor examined the decision and advised that:

- β an analysis of the cases does not suggest VCAT is generally ignoring local policy. Rather it is seeking to apply local policies as best it can, together with other applicable policies, in a balanced way, using professional expertise and experience.
- β the ICAP (Incremental Change Area Policy) needs to be refined by the completion of Glen Eira's Housing Strategy, so as to become a demonstrably realistic local refinement of state planning policy.
- β some changes to the linking provisions of the VPP could make the integrated structure of state and local policy clearer.
- β the redrafted SPPF incorporating the outcome of the Metropolitan Strategy will, in the medium term, provide a more precise framework within which local policy can be drafted.
- β the position should be reassessed after the effects of these changes and ResCode, are apparent, to consider whether the decision-making structure should be altered further in any of the ways suggested by Glen Eira.

He concluded as follows:

Accordingly, contrary to what Glen Eira has suggested, from a legal standpoint, I do not believe there is any significant flaw in the planning system as regards the application of policy.

4.0 WHAT ARE THE CONCERNS?

As a result of the Gory decision, the City of Glen Eira articulated a number of concerns in relation to the use and role of policy, namely that:

- β the legislative framework that exists to only 'consider' policy devalues the role of both State and local policy in decision-making in a manner which threatens the integrity and good operation of the planning system
- β if local policy can be effectively ignored, local government can also conceivably ignore State policy.

Additional criticisms expressed by the Inner South Metropolitan Mayors Forum (ISMMF) in relation to the application of local policy are:

- β the failure of VCAT to consider the macro view. VCAT assesses a proposal on its individual merits without consideration of either State or local policy.
- β the failure of VCAT to give adequate weight to, and correctly interpret local policy. VCAT decisions, especially on medium-density housing, focus primarily on State urban consolidation policy as a *prima facie* justification, rather than considering local policy frameworks contained within new format planning schemes.
- β VCAT is acting as a planning authority and not a responsible authority. Some VCAT decisions have taken on the role of planning authority because they openly state disagreement with council policy and then disregard it. To act in this manner is outside its jurisdiction and a confusion of role.

5.0 THE DECISION-MAKING FRAMEWORK

5.1 The Planning and Environment Act

The current decision-making framework includes:

- β Section 4(1) of the *Planning and Environment Act 1987*, which sets out the objectives of planning in Victoria
- β Section 4(2) which sets out the objectives of the planning framework established by the Act
- β the provisions of Section 60(1) set out what a responsible authority must consider when making a decision. Section 60(1)(a) ensures three specific matters are considered (namely submissions, referral authority comments and significant environmental effects). Section 60(1)(b) provides that social and economic effects, any strategic plan, policy statement, code or guidelines adopted by Minister, government department, public authority or municipal council, any adopted planning scheme amendment, and any other relevant matter may be considered. The provisions of planning schemes, including the policy provisions they contain, are also a relevant matter for a responsible authority to consider as part of its duty to implement the planning scheme under Section 14
- β Section 84B sets out the requirements that VCAT must consider in any review of the decision. Eleven matters are outlined. Section 84B(2) provides that these are in addition to other matters which the decision-maker could properly, or is required to take account of or have regard to. Section 84b(1)(9a) requires that the Tribunal 'must take into account any relevant planning scheme'.

Sections 60(1) and 84B are particularly relevant. There is a perception that local government and the VCAT use two different sets of criteria in decision-making. Careful review of the two sections shows they are not significantly different. VCAT considers the same matters as the responsible authority when making a decision. In addition, VCAT must also consider and give effect to regional strategy plans and State Environment Protection Policies.

Neither section was altered upon the introduction of the VPP.

Section 7 of the Act sets out the required structure of a planning scheme. This section was replaced to provide for the introduction of the new format planning schemes.

Section 7(4) provides some assistance in interpretation of planning schemes. It states:

If there appears to be an inconsistency between different provisions of a planning scheme

- a) *the scheme must, so far as practicable, be read so as to resolve the inconsistency; and*
- b) *subject to paragraph (a)*
 - i) *the State standard provisions prevail over the local provisions; and*
 - ii) *a specific control over land prevails over a municipal strategic statement or any strategic plan, policy statement, code or guideline in the planning scheme.*

The SPPF is a State standard provision.

5.2 Planning schemes

Planning schemes can also include matters to be considered in making a decision.

On 24 December 1996, the Minister for Planning issued a direction under Section 7(5) of the Act on the *Form and Content of Planning Schemes*. It mandated the new format of schemes and included purposes of the new schemes. The third purpose is:

To provide for the implementation of State, Regional and Local policies affecting land use and development.

To give weight to policy, specific trigger points were included in schemes:

- β Clause 11 (the introduction to the SPPF) provides that:
...planning and responsible authorities will endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.
and that:
Planning and responsible authorities must take account of and give effect to both the general principles and the specific policies applicable to issues before them to ensure integrated decision-making.
- β Clause 20 (about the operation of the LPPF) provides that the MSS:
...further the objectives of planning of Victoria to the extent that the SPPF is applicable to the municipality and local issues.
- β Clause 31.01-2 (about the operation of zones) provides
Because a use is in Section 2 does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the SPPF, the LPPF, the purpose and decision guidelines of the zone and any other decision guidelines in Clause 65.
- β The first purpose in each zone is
to implement the SPPF and the LPPF, including the Municipal Strategic Statement and local planning policies
- β The decision guidelines at Clause 65 state that before deciding on any application a responsible authority must consider, amongst other things:
the SPPF and the LPPF, including the Municipal Strategic Statement and local planning policies.
- β The decision guidelines that appear in most zones and overlays usually include amongst the specific matters to be considered:
the SPPF and the LPPF including the Municipal Strategic Statement and the local planning policies.

This repeated requirement to have regard to policy in decision-making is intentional. The responsible authority, and VCAT on review, is expected to make decisions that will assist implementing the planning policy directions set out in the planning scheme at both a State and local level.

5.3 Other commentary about the role of policy

In 1996, with the introduction of the VPP and the new structure for all planning schemes, the then Minister for Planning indicated in the second reading speech that:

...schemes will have a much stronger strategic focus.

Any controls in the scheme over the use or development of land will be soundly based and be linked to intended policy outcomes.

The report of the Advisory Committee on the VPP in August 1997 stated:

- β much more than in the past, policy is expected to drive decision-making
- β responsible authorities should not be looking to the 'rules' (that is, the zone provisions) for automatic answers, but rather should be looking to the objectives of their local policies to determine the outcomes they want to achieve and should be saying 'yes' or 'no' on these bases
- β there are clear guidelines for the preparation of local policy set out in the *Manual for the Victoria Planning Provisions* *...In order to successfully play their role in decision-making however, these local policies will have to be drafted with a high degree of*

specificity and clarity. Motherhood statements open to wide interpretation will fail to give an adequate lead to decision-making...

- β the quality of local policies, the extent to which they are relied on in guiding decision-making and how successfully they function, will all be matters which should be monitored and reviewed as part of the planning reform program. If experience demonstrates that local policies are not being given the weight they should in decision-making by councils or the Administrative Appeals Tribunal (now VCAT), if they are proving inadequate in achieving desired outcomes or their objectives are being undermined, then their use within the framework of the VPP will need to be reassessed
- β identifying realistic outcomes and realistic expectations should be part of the process of developing local policies
- β if the preparation and processing of new schemes is correctly carried out, the various components of the schemes will thus support and complement each other. Even with the most careful scrutiny, however, schemes may be prepared where inconsistencies occur between the different provisions.

A number of relevant Practice Notes have been prepared:

- β Format of Municipal Strategic Statements (February 1999)
- β Writing a Local Planning Policy (December 1999)
- β The MSS and three-year review (October 2001)
- β Strategic Assessment Guidelines (November 2001)

Each of these documents provides guidance to local government about the operation of planning schemes. The *Writing a Local Planning Policy* Practice Note provides seven tests as to whether a local policy is appropriate:

1. does the LPP respond to a demonstrated need?
2. does the LPP implement an objective or strategy in the MSS?
3. does the LPP relate to a specific discretion or group of discretions in the scheme?
4. does the LPP help the responsible authority make a decision?
5. does the LPP help any other person to understand whether a proposal is likely to be supported or not?
6. does the LPP add to the other planning tools in the scheme, especially the relevant zone or overlay?
7. does the LPP address the format, content and language guidance in this Practice Note?

LPPs are statements of intent or expectation. They are not controls. However, they may contain decision guidelines for the responsible authority and criteria or performance measures against which an individual application will be tested.

6.0 INTERPRETING POLICY

6.1 Introduction

This chapter considers whether appropriate weight is being given to policy and whether there are impediments to the effective operation of the policy-based system.

The planning reform program was based, in part, on changing the statutory planning culture from one of control to one of performance. The expansion of the policy content of schemes emphasised this transition and gave greater weight to policy considerations.

The policy-led decision-making framework provided by the VPP model creates the ability to set out a transparent local strategic vision and is of benefit to all parties participating in the planning process. Decision-makers are given guidance in planning schemes about broad State policy and more detailed local policy.

A wide variety of matters need to be taken into account when deciding whether a planning permit should be granted and what conditions should apply. The particular facts of each application must be assessed against the background of all applicable policies. Decision-makers must work out which policies have greater relevance to the case before them. Where one policy is, or appears to be, inconsistent with another in the circumstances before it, decision-makers must make a judgment, using their professional expertise and experience as to which is the most important.

This has, however, resulted in varying expectations about how policy should be implemented and the weight to be given to different policy documents.

6.2 Certainty

Planning is not a precise science – the rapidly changing social and economic structures of society make planning systems based on precise and detailed regulatory controls too inflexible.

The Victorian planning system is one in which decision-making is underpinned by policy. It is a system that was introduced to maximise flexibility and, at the same time, facilitate good outcomes that would help to implement policy.

Experience with policy-based planning schemes is continually developing. Some stakeholders are still coming to grips with the task of writing, understanding and giving appropriate weight to policy.

The Reference Group considers that, in seeking to introduce a more flexible system to cope with these changes, the pendulum has swung too far and that the level of flexibility outweighs the desirable degree of certainty which is sought by the development industry, the community and their elected representatives.

The Reference Group is of the view that greater precision is required in policy (both State and local). The *Format of Municipal Strategic Statements* and *Writing a Local Planning Policy* Practice Notes, while helpful, are expressed in a manner that generally promotes policies to be prepared in a non-precise manner. It is suggested that the Practice Note should be worded to allow terms such as 'must' and 'will' where appropriate.

FINDING	RECOMMENDED ACTION
<p>The Reference Group supports the policy-based planning system provided by the VPP model. The ability to set out a transparent strategic vision, and policies and tools for achieving this vision, is of benefit to all parties within the planning system.</p> <p>The current balance in the system has gone too far in favour of flexibility and performance-based controls to the detriment of certainty and this should be reviewed.</p>	<ol style="list-style-type: none"> 1. The key policy guidance documents – <i>Format of Municipal Strategic Statements</i> and <i>Writing a Local Planning Policy Practice Notes</i> – should be reviewed so as to achieve a greater level of precision in policy statements.

6.3 Hierarchy of policy

Since the introduction of the new format schemes some users and decision-makers have interpreted the term 'local policy' differently. The Reference Group, in this paper, uses the term local policy to mean everything included in Clauses 21 and 22 of Planning Schemes, that is, the whole LPPF including the MSS and Local Policies.

In dealing with applications, responsible authorities and VCAT are required to consider a range of matters under the *Planning and Environment Act 1997* and the relevant planning scheme. Key issues for consideration under the Act are set out in Sections 60 (for responsible authorities) and Section 84 (for VCAT). Both of these sections enable the consideration of:

Any strategic plan, policy statement, code or guideline which has been adopted by a Minister, government department, public authority or municipal council; and

Any amendment to the planning scheme which has been adopted by a planning authority.

Planning schemes set out in Clause 65 the general matters for consideration by a responsible authority and VCAT upon review. These include:

- β the matters set out in Section 60 of the Act
- β the SPPF and the LPPF including the MSS and the local planning policies
- β the purpose of the zone, overlay or other provision.

The manner in which the Act has been structured has caused some confusion in the community as to the relative weight that should be given to planning scheme policy and those documents that influence decision-making but which are not contained within the planning scheme.

The Reference Group suggests that it is important that policies contained within the LPPF be recognised as the fundamental policy basis of planning schemes and that their status should not be undermined by 'policies' which may be adopted with little or no consultation with stakeholders. This should be done by presenting a clear hierarchy of documents to be considered in decision-making and additionally removing the reference to 'policy statement' in Section 60 of the Act to eliminate any confusion as to what should be viewed as 'policy'.

In making these recommendations, the Reference Group is mindful that there may well be other documents which a responsible authority wishes to consider in making a decision, such as an economic development report or a stormwater management plan. It is expected that these documents have a sound basis of research and consultation and that this can be demonstrated in any decision and subsequent review to VCAT.

During its deliberations the Reference Group considered the principles set out in *Australian Aluminium Shopfitters and Glazing Contractors Pty Ltd v. City of Fitzroy (P82/1162)*. The principles for considering the weight to be afforded to policy in this case include:

- β the policy or code was based upon specific research

- β public involvement from those affected has taken place
- β the objectives are clearly stated and capable of implementation
- β the financial burden placed on a particular sector of the community is disproportionate
- β the local authority is seeking to achieve statutory recognition for the policy or code.

These principles are considered to represent a sound basis upon which to determine the weight to be given to 'codes and guidelines' currently not contained within the planning scheme and the use of these principles should be widely promoted.

FINDING	RECOMMENDED ACTION
There is uncertainty about the relative weight to be given to policies that have yet to undergo serious testing in the community as opposed to policies in the planning scheme. Full statutory recognition should only be given to policies that are contained in the planning scheme or are in the formal process of being included.	<ol style="list-style-type: none"> 2. Amend Section 60 to establish a hierarchy of matters for consideration clearly highlighting the pre-eminence of the planning scheme. 3. Ensure that due weight is given to proposals which have been developed as planning scheme amendments and are undergoing due process by removing reference to a 'policy statement' from Section 60(1)(b)(ii) of the Act.
All parties involved in the preparation of policy (DOI, planning authorities) and the implementation of policy (responsible authorities and VCAT) should be rigorous in the way that local policy is applied.	<ol style="list-style-type: none"> 4. Prepare a Practice Note that explains the proper application of policy including: <ul style="list-style-type: none"> β promoting the use of the five principles of the <i>Australian Aluminium Shopfitters and Glazing Contractors Pty Ltd v. City of Fitzroy</i> (P82/1162) case when determining how much weight should be given to a 'strategic plan, code or guideline' not contained in a planning scheme. β requiring responsible authorities using a 'strategic plan, code or guideline' in decisions to cite the relevant document, its current status and the process by which it has been prepared.

6.4 Balance and consistency

The provisions of the *Planning and Environment Act 1987* and planning schemes reflect the need to balance policy. There are few provisions that fetter decision-makers in weighing all the relevant matters before them. The Act does not seek to exhaustively set out the criteria to be applied.

There is no doubt that balancing policies is, on occasions, particularly difficult. In any process that involves discretionary decision-making, there will often be competing policy objectives. It is essential however, that the system is fair and equitable, that outcomes are good and that decisions are made in the interests of net community benefit and sustainable development and clearly reflect the overall objectives of the relevant planning scheme.

A guide to how a balance of policy is found at Clauses 11, 20 and 31.01-2 of all planning schemes that refer to the need to balance objectives in favour of net community benefit and sustainable development. More particularly, there must be a decision about whether an

'acceptable outcome' will be produced. In other words, the decision should consider the totality of the proposal and determine whether or not the application would produce an 'acceptable outcome' in terms of the strategic and statutory provisions.

Sometimes policies can be inconsistent with one another. While planning schemes should be written in a manner that resolves inconsistencies to the greatest degree, it is not reasonable to expect that this will always be possible at this time and matters may need to be resolved at the time of an individual decision. Section 7(4) of the Act provides 'rules' for resolving such inconsistencies in individual circumstances:

- β State standard provisions prevail over local provisions
- β a specific control over land prevails over an MSS or any strategic plan, policy statement, code or guideline in the planning scheme

The Victoria Planning Provisions Advisory Committee, in 1997, identified the potential tension in administering Section 7(4) of the Act:

The Committee would simply comment that subclauses (i) and (ii) may set up a 'tension' in scheme interpretation in so far as a State provision is to be preferred to a local, and specific controls over policy over more generalised components. This 'tension' may arise in the circumstances where a specific control is local and the general policy is Statewide.

Ideally, the approval of a local policy through a planning scheme amendment should imply that the policy is consistent with State policy.

The debate about the appropriate weight to give to policy most often manifests itself in discussion about the application of State and local policy. The difference in construction of the general and specific provisions of the SPPF creates the potential for tension with specific local policies and differences of interpretation. This has been particularly evident in decisions in which the State policy of 'urban consolidation' has been seen as a blanket provision applying across the metropolitan area and overriding MSS objectives that seek to channel intensive development into specific parts of a municipality and discourage intensive development in other areas. The SPPF would benefit from a review that seeks to clarify the relationship between the general provisions of the SPPF and the MSS and the local policies in schemes. Consideration should be given to rearranging the SPPF to separate those policy directions to planning authorities to use in the preparation of schemes or amendments from specific State policies that a responsible authority must consider and implement when considering planning permits.

Where policies are non-specific, the discretion vested in the decision-maker is broad. In the absence of guidance for decision-makers in how to weight policy in individual cases, there is far greater scope for VCAT to take a different view to a council in relation to the merits of a proposal. It is also more likely that Section 7(4) of the Act will come into play.

The City of Glen Eira has suggested that legislative change is necessary to require that a decision-maker not only 'consider' state and local planning policy, but also 'implement' or 'give effect' to policy unless there is some clear justification to do otherwise.

To amend the *Planning and Environment Act 1987* and all planning schemes to provide that local government and VCAT 'must give effect to' any local policy is likely prove unworkable. Where there is more than one issue under consideration it is difficult, if not impossible, to give all policies equal weight. Additional criteria in Section 7(4) of the Act would, however, assist in providing decision-makers with better guidance on the way in which policy should be balanced.

There is also the perception that local government and VCAT are bound by different decision-making criteria in Sections 60(1) and 84B of the Act. While these two sections are not significantly different they should be aligned so that there can be no dispute that a council and VCAT on review are required to give consideration to the same matters in coming to a decision.

FINDING	RECOMMENDED ACTION
<p>The difference in construction of the general and specific provisions of the Strategic Planning Policy Framework (SPPF) creates the potential for tension with specific local policies and differences of interpretation.</p>	<ol style="list-style-type: none"> 5. Review the SPPF to seek to clarify the relationship between general provisions in the SPPF and the Municipal Strategic Statement (MSS) and local policies in schemes. 6. Consider rearranging the SPPF to separate broad policy directions to planning authorities from specific State policies which a responsible authority must respect such as the Telecommunications Code of Practice. In reviewing the SPPF, particular attention should be given to policies that deal with residential development and urban consolidation to ensure they are clear in intent and have defined outcomes.
<p>There is insufficient guidance about how to balance policy in decision-making.</p>	<ol style="list-style-type: none"> 7. Consider amending Section 7(4) of the <i>Planning and Environment Act 1987</i> to provide additional criteria to assist in balancing and prioritising policies. 8. The Practice Note referred to in Recommendation 4 should also include reference to: <ol style="list-style-type: none"> β the consistent application of policy by the decision-maker except where, because of the particular circumstance, it is clearly inappropriate to do so or irrelevant to the matter being addressed. β the approval process ensuring local policies are developed in an integrated manner with State policy so that their interpretation will result in the overall objectives of the MSS being the fundamental guide to the balancing of different policies.
<p>There is a lack of clarity as to the matters that the responsible authority and VCAT must consider when making a decision.</p>	<ol style="list-style-type: none"> 9. Clarify and consolidate the matters that must be considered in Sections 60(1) and 84B of the <i>Planning and Environment Act 1987</i> so that the requirements are the same.

6.5 Justifying decisions

Decision-makers are now confronted by an increasing complex array of strategies and policies.

In considering any application, the decision-maker must be able to:

- β identify the relevant controls and policies which apply

- β identify the overall objectives of the SPPF and LPPF which are relevant
- β balance the policies to achieve these objectives
- β clearly articulate the reasons for the decision.

If this is not done there is a danger of failing to consider, or adequately consider, the main issues. The absence of a clear statement about how a decision is founded on stated policy outcomes encourages decisions that are *ad hoc* and inconsistent with policy. Clear expression of reasons should assist all parties in appearing before VCAT in any application for review.

The Reference Group is aware of a recent initiative in the British appeals system is the ‘statement of common ground’. A statement sets out the matters of agreement between a council and the applicant so that, in any subsequent appeal the issues to be debated are confined to ‘outstanding’ issues. This may assist formalising issues for consideration, reducing the time and costs associated with VCAT hearings and focusing each party’s attention on the issues in dispute.

This technique currently operates in an environment with no ‘third party’ review rights. It may be more difficult to initiate where there is more than one party raising concerns. Nonetheless, it is worth investigating a similar process for parties to establish areas of agreement to aid efficiency in the planning process and potentially reduce costs. There have been recent examples of this occurring voluntarily in Victoria in matters before VCAT.

It is also important that local government identify what the critical issues affecting decisions really are and to reflect these in their policy frameworks. There is significant variation between councils with respect to the level of involvement in individual planning decisions. The Reference Group suggests that the development of models of delegation would assist councils to adopt delegation practices appropriate to their circumstances. Ideally delegations that enable a strong focus on policy development rather than application and which support effective working relationships and systems with the planning community and the broader community should be preferred.

FINDING	RECOMMENDED ACTION
Where there is dispute about the policy aspects of a proposal, the resolution of the issues could be made more efficient if there was a process for the parties to establish areas of agreement through a process such as the British ‘statement of common ground’.	10. Investigate the benefit of establishing a process such as the ‘statement of common ground’ to focus debate to the areas of acknowledged difference.
The absence of a clear statement about how a decision is founded in achieving stated policy outcomes encourages decisions that are <i>ad hoc</i> and inconsistent with policy.	11. Decision-makers should clearly articulate the policy basis for all decisions in the documentation of the decision. In particular, responsible authorities should produce grounds of refusal which clearly spell out the issues which have determined the matter. Investigate the format for grounds of refusal and include, where appropriate, specific reference to relevant policies.
There is little consistency across local government as to what level and type of delegation is given to officers to assess planning applications.	12. Models of delegation to officers should be prepared to assist councils in establishing good delegation systems and effective relationships with the planning community and the broader community.

6.6 Learning from decisions

Consistent interpretation of policy is difficult if there are no formal procedures for reporting of significant decisions. In every decision-making environment there are individuals with differing interpretations of matters. This can result in a loss of credibility if there are no measures in place which endeavour to achieve a degree of consistency. Ideally, this consistency should be across the planning profession rather than confined to one particular workplace.

The Reference Group considers the practice of providing principles for decision-making on a particular matter would be extremely useful to both local government and VCAT members. The use of Guideline Judgments has been implemented in the criminal justice system in relation to the subjective matter of sentencing. A similar practice could be instigated within the planning system. VCAT has proposed this initiative to the Reference Group (see attached letter at Appendix 2).

It is proposed that:

- β three member 'guideline' tribunals could be constituted where there are issues upon which members of VCAT and the broader planning community would be assisted by a statement of guiding principles
- β wherever possible, the presiding member should be a judge
- β guideline decisions will not be binding, however, the intention is that they should be followed in the interests of consistency.

This practice does occur informally, however guiding principles are not always visible. Providing access to guideline decisions would increase effectiveness and help reduce workload and hearing times at VCAT.

FINDING	RECOMMENDED ACTION
Decision-making would be assisted if 'Guideline Judgments' at VCAT were introduced for important issues which have been identified as likely to have wider application.	13. Introduce 'Guideline Judgments' with appropriate procedures.

7.0 DEVELOPING POLICY

7.1 Introduction

This chapter explores how local policy can be improved to be clear in intent.

The report of the Advisory Committee on the VPP in 1997 highlighted one of the potential pitfalls of a policy led system.

...Councils have a great opportunity to guide the future shape and direction of their municipalities. The opportunity will only be constrained by the quality of the local policies themselves and the way in which councils seek to employ them....In order to successfully play their role in decision-making however, these local policies will have to be drafted with a high degree of specificity and clarity. Motherhood statements open to wide interpretation will fail to give an adequate lead to decision-making.

The *Manual for the Victorian Planning Provisions*, the final report on new format planning schemes by Planning Panels Victoria and the Practice Notes: *Format of Municipal Strategic Statements* and *Writing a Local Planning Policy* are all useful documents that provide assistance in relation to policy writing. Unfortunately, the preparation of many MSSs and local policies was well advanced when these became available.

Because the introduction of new format schemes was required to meet a deadline, in some circumstances policy statements that would have benefited from further refinement were included in schemes.

7.2 Quality of policy

Appropriate weight can only be given to policy if the policy intent is clear and unambiguous.

The *Final Report for New Format Planning Schemes* by Planning Panels Victoria identified a number of issues with local policies, namely:

- β unclear objectives
- β inadequate links between objectives and policy provisions
- β inclusion of controls or prescriptive standards
- β objectives that are too broad
- β issues spread across many policies
- β not all information contained in the policies
- β duplication of the SPPF or Overlays.

Some of these inadequacies were addressed prior to gazettal of new format planning schemes, however, many policies could still do with improvement.

The same criticisms could also be made of State policy. It makes it particularly difficult for local government to link their strategic objectives to the SPPF where this framework provides little direction, is too broad and at times unclear.

Ongoing experience in implementation and continual review are fundamental requirements for the development of good policy.

At times, because of the particular circumstances of the matter, a decision-maker may depart from policy, but if this takes place, then it is necessary to articulate why this is being done. Is the policy deficient in some way? Has it become irrelevant? Is it an inappropriate tool to achieve the intended outcome? What are the special circumstances that make it appropriate that the policy not be applied?

Monitoring of policy is about the extent to which the policy achieves the goals that have been set. While 'monitoring and review' forms part of new format schemes this element often falls aside in favour of more pressing concerns.

Review of both State and local policy is vital to the continual improvement of the policy-based planning system. It is unreasonable to expect local policy be reviewed in isolation of State policy and without an appropriate review structure. Existing local policies should be systematically reviewed (clarified and improved) following revision of the guidance documents – *Format of Municipal Strategic Statements* and *Writing Local Planning Policies* Practice Notes. It is also imperative that the VPP be periodically reviewed to respond to in a structured manner to changing social, economic and environmental priorities.

The advice of review bodies such as Planning Panels Victoria and VCAT is often useful in determining the effectiveness of policy and whether it is achieving the desired outcomes.

A reporting mechanism for VCAT decisions in the form of individual decisions and the Victorian Planning Reports has existed for some time. Individual decisions are also now available on the VCAT internet site. Planning Panels Victoria panel reports can be accessed via the DOI web site. The development of Internet sites and the ability to 'search' for particular key words has provided easier access to such information. Improvements to the reporting of panel decisions are being pursued.

The Reference Group considers that it would be beneficial for DOI, VCAT and local government web sites to further promote ease of access to information. This possibility should be investigated by VCAT, DOI and MAV.

Regular reporting of VCAT and Panel decisions by planning officers to council also is also helpful in raising awareness of the need to ensure policies are effective.

FINDING	RECOMMENDED ACTION
Some MSSs and local policies lack clarity and do not respond to the guidance of the <i>Format of Municipal Strategic Statements</i> and <i>Writing a Local Planning Policy</i> Practice Notes.	14. Following the review of the <i>Writing a Local Planning Policy</i> Practice Note new policies should be written in that format and existing policies systematically reviewed against the Practice Notes.
A periodic review of the VPP should be instituted so that the State Government is under the same obligation to regularly review the VPP as local government is to regularly review MSSs.	16. A periodic review of the VPP should be instituted in the same manner as the three-year review of MSSs.
Reviewing decisions is vital to determine the effectiveness of policy and whether it is achieving the desired outcomes.	17. Investigate the potential for the effective linkage of relevant websites to provide easy access to both VCAT and Planning Panel decisions. 18. Promote a process of regular reporting of VCAT and Panel decisions by planning officers to council.

7.3 Policy approval

There is a presumption that all local policy receives its genesis from the SPPF. However, the need for policy can also be generated at the local level. Policy is sometimes developed to respond to issues arising from planning application decisions.

There has been a consistent call for ‘strategically justified’ policy and controls. Little guidance has traditionally been provided about how this should be done.

The process for approval of an amendment to a planning scheme to include or review policy can be quite daunting. The requirement for exhibition and often review by an independent panel can be resource-hungry and prohibitive to finessing planning scheme policy and requirements.

The Reference Group considers that there is scope for greater use of Ministerial amendments to facilitate the clarification and improvement of policy, particularly where there is no significant change to the policy intent.

FINDING	RECOMMENDED ACTION
Some MSSs and local policies lack clarity and do not respond to the guidance of the <i>Format of Municipal Strategic Statements</i> and <i>Writing a Local Planning Policy Practice Notes</i> .	15. DOI support the review and clarification of local policy by encouraging greater use of Ministerial amendments to implement policy where there is no significant change to the policy intent and the <i>Ministerial Powers of Intervention</i> are met.

7.4 Education

Education of users of the system is critical to ensuring the effectiveness and acceptability of a policy-driven planning system.

The introduction of new format schemes involved a significant education component for planning officers, councillors, the planning and legal fraternity and the general community. The new system continued to evolve over time and there has been an ongoing need to ensure that new information and advice is available to those who need it. There is also an ongoing need to ensure those new to the system can obtain the information and skills they require.

The PLANET program, a joint initiative of the MAV and DOI, aims to enhance the professional development of planning professionals and is a valuable program for improving the planning system. The Reference Group supports the continuation of the PLANET program and suggests an element of the program concentrating on development, writing and use of policy in the statutory system.

However, consideration must also be given to how to encourage ongoing participation in the program, particularly where there is no financial incentive to do so.

Financially, there are limitations upon professional development for participants that have a ‘part-time’ role in the planning system such as sessional VCAT members and councillors. Consideration must be given to specific funding as payment for time spent in professional development for such participants.

The planning system would benefit from a greater awareness by the general community of the roles and responsibilities of participants of the system. Support should be provided to local government and/or peak bodies to investigate, map, publicise and promote examples of best practice in community consultation and engagement.

FINDING	RECOMMENDED ACTION
<p>In order to respond to the continuing development of the planning system and the influx of new players, there is a continual need for training in both basic and best practice skills for all users of the planning system.</p>	<ol style="list-style-type: none"> 19. That the MAV/DOI PLANET program continue and specific training be regularly scheduled on the development, writing and use of policy in the statutory system. 20. Continuation of the regular program of VCAT seminars under the PLANET program. 21. The MAV councillor toolkit and councillor training program include specific material about the development and use of policy. 22. Adequate resources be provided for training and professional development of VCAT members particularly sessional members. 23. Consideration be given to specific funding for councillor training and development.
<p>The planning system would benefit from a greater awareness by the general community of the roles and responsibilities of participants of the system.</p>	<ol style="list-style-type: none"> 24. Initiatives, such as the Victorian Local Government Association consultation project, that seek to ensure greater community engagement and best practice for community participants should be supported.

8.0 CONCLUSION

The Reference Group believes that generally, Victoria is well served by its planning system that includes policy-based planning schemes and a mechanism for independent review of both planning scheme amendments and planning permit applications.

The system, however, is not without its faults and a number of these have been identified by the concerns of the ISMMF. The changes required to the system to address these concerns represent, in the Group's opinion, refinements to the system rather than substantial changes or departures from it. Victoria has a relatively new system and the problems should be seen as 'teething' problems rather than major weaknesses. In an environment where a degree of discretion exists, there will always be decisions that displease one party or another. Acceptance of unpopular decision will be easier, however, where the objectives being achieved by those decisions, and the basis for reaching them, can be better understood.

Appendix 1

CONTINUOUS IMPROVEMENT PROGRAM

Reference Group on Decision-making Processes

Terms of Reference

Purpose

Following representations from the Inner South Metropolitan Mayors Group and others about the operation of various aspects of the planning decision-making process, the Minister for Planning, the Hon. John Thwaites MP, has established this Reference Group to analyse specified issues and provide advice about what improvements can be made to the planning system or other processes to deliver better process performance and better planning outcomes.

Background

The Continuous Improvement Program (CIP) is a joint DOI and MAV initiative that promotes improvements in the operation of the planning system. The Reference Group is established under the auspices of the CIP and the implementation of recommended improvements will be managed through that program.

Methodology

The Reference Group will comprise representatives from the MAV, the VCAT and the Royal Australian Planning Institute (Victorian Division) (RAPI).

Specific projects are identified for the Reference Group's consideration and a project brief provided for each issue. The Reference Group should analyse the issue identified, including examining case studies, consulting stakeholders, analysing data or other means as the Reference Group thinks appropriate. The Reference Group should, respond to any matters specified in the project brief, identify any problems in relation to the issue and recommend appropriate actions to address the issue, including evaluating options where alternative options are available.

In considering issues, the Reference Group should have particular regard to the need for action in relation to:

- β improving statutory processes and provisions
- β encouraging and documenting best practice
- β professional development and training.

Delivery

The advice of the Reference Group must be delivered in a short written report, delivered within the time frame specified in the project brief. Administrative support will be provided to the Reference Group by the Planning Systems Unit of DOI.

Hon. John Thwaites MP

Minister for Planning

PROJECT 1: USING AND INTERPRETING LOCAL POLICY

Background

A recent decision by the Supreme Court in *Glen Eira City Council v. Gory* has highlighted different views about how policy in schemes, particularly local planning policy, should be used and interpreted.

Issue

To operate effectively, policy in planning schemes must be given appropriate weight when decisions are made, must be clear in its intent and be able to be applied in a realistic way. The Gory decision has raised uncertainties about these issues that need to be resolved.

The task

Examine the issues raised by Glen Eira in relation to the Gory decision and the consequent advice from the Victorian Government Solicitor, consider the intended role of policy in the statutory planning system as expressed in relevant documentation associated with the introduction of the new format schemes and recommend any actions needed to ensure that the statutory role of policy in schemes can be effectively implemented. An opportunity must be given to the City of Glen Eira and to VCAT to make a submission to the Reference Group.

Timetable

A report and recommendations should be delivered within four months of this project being initiated.

PROJECT 2: SUBSTITUTION AND AMENDMENT OF PLANS

Background

It is common practice for development plans to be changed during the consideration of a planning application. This can happen either during the consideration of the application by the responsible authority or at any hearing at VCAT. VCAT has issued a Practice Note that sets out the procedural arrangements that apply when plans are sought to be changed at a VCAT hearing.

Issue

There is perceived inconsistency about the circumstances and criteria which should reasonably apply when plans are sought to be changed. Decision-making by all parties would benefit from clearly articulated performance or decision-making guidelines that assist decisions about when changes can be considered to be 'minor' and when additional notice or consultation is appropriate. Suitable guidelines would also potentially discourage the practice of including 'ambit claims' in applications.

The task

Prepare appropriate draft performance or decision-making guidelines that assist decisions about changes to plans. Recommend an appropriate format for publishing the guidelines (such as a Planning Practice Note).

Timetable

A report and recommendations should be delivered within four months of this project being initiated.

PROJECT 3: ENFORCEMENT METHODS

Background

Enforcement of planning matters can be made via either VCAT or the Magistrate's Court. The enforcement provisions of the *Planning and Environment Act 1987* have recently been documented in *Using Victoria's Planning System*. The 2002 PLANET training program will include a seminar on enforcement run in conjunction with the Planning Enforcement Officers Association.

Issue

There is a perception that enforcement through VCAT is predisposed to normalising the matter or reviewing the merits rather than terminating the unlawful activity. Concern has also been expressed about other matters such as the relative costs of the two approaches, exposure of councils to damages claims, lack of ability to enforce determinations and other matters.

There is a need to:

- β ensure that users understand the differences between the two approaches and best practice in the use of each method.
- β identify any shortcomings of either approach and suggest ways in which these might be addressed.

The task

1. Recommend any additional methods for promoting understanding of best practice in the use of the existing enforcement provisions of the *Planning and Environment Act 1987* and other legislation.
2. Document and review identified shortcomings of the VCAT and Magistrate's Court options and recommend ways in which these might be addressed.

The Reference Group should take into account the views of the Planning Enforcement Officers Association and any other party it considers relevant

Timetable

A report and recommendations should be delivered within six months of this project being initiated.

Appendix 2

VICTORIAN CIVIL AND
ADMINISTRATIVE TRIBUNAL



The Honourable Justice Kellam
PRESIDENT

16 July 2002

Mr David Whitney
Planning Systems Management Unit
Department of Infrastructure
GPO Box 2797Y
MELBOURNE 3001

Dear Mr Whitney,

Re: Guideline Decisions

VCAT's representatives on the Reference Group have discussed with me the proposal that VCAT initiate a procedure for the production of "Guideline Decisions". I am agreeable to the proposal.

Consistency in decision making should be a broad objective of every Court and Tribunal. On the other hand, the variation of approach which will inevitably be found is a healthy demonstration of judicial independence. The challenge is to achieve the right balance. The community generally, and planning stakeholders in particular, expect consistency. The lack of it tends to create uncertainty and lack of confidence in the reliability of the process.

Guideline judgments may provide a useful means of promoting consistency and facilitating consideration of difficult issues in cases which follow.

I will implement the proposal in the manner and to the extent outlined hereunder.

I will constitute a three member 'guideline' tribunal if I am persuaded, first, that in a particular case, there are issues upon which members of the List generally and the broader planning community would be assisted by a statement of guiding principles; secondly, that the Tribunal's resources permit this to be done without undue impact on the need for daily allocation of members to listed cases.

I intend that, wherever possible, the presiding member of a Guideline Tribunal will be a judge. The other members will either be two planning members or one planning member and one legal member of the Planning and Environment List, depending on the nature of the case. It should be noted that if a judge presides, any appeal will go direct to the Court of Appeal.

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A Guideline Tribunal will be expected to produce its decision in a form which will provide such guidance (subject to the exigencies of the particular case). The catchwords will include "Guideline Decision" to enable other members and planning practitioners to identify those decisions. Naturally, they will be "Red Dot" decisions.

Guideline decisions will not be binding on other members of the Tribunal. The intention is, however, that they should be followed in the interests of comity unless, in a corresponding subsequent case, a member does not believe that he or she can conscientiously follow the Guideline Decision.

I will encourage Members to assist in the identification of cases suitable for a guideline decisions.

I should add, I needed no convincing of the desirability of constituting multi-member tribunals in important cases. The Tribunal's budget presents a significant obstacle at the moment, though the Department of Infrastructure is currently exploring that very issue - for which we are grateful.

Yours sincerely



President