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VCAT Review 2008/9

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PREAMBLE

SOS applauds the continuing efforts of the Tribunal to improve its performance regarding processes and procedures. We also appreciate the encouragement of discussion and the opportunity for stakeholders to suggest potential improvements so VCAT can gather feedback on its performance generally, as well as identify further areas for improvement.

SOS also supports the establishment of a small rotating users group that would meet periodically with the Tribunal. As the key community lobby group on planning in Victoria (as opposed to activist groups), we believe it would be productive to have one of our committee members with a planning background appointed as one of several community representatives on the users group to help provide community feedback.

SOS has a number of examples of the issues discussed below and would be happy to meet one of the VCAT Review team to elaborate if this would be helpful. This submission concerns those issues that SOS members and our planning professional colleagues are most aware of from being parties and advocates before the Tribunal for most of this decade.

Part A of this submission deals with major structural reforms to VCAT that we believe are necessary to improve the overall performance of planning in Victoria

Part B consists of changes needed to improve the operation and natural justice objectives of the Tribunal as it is presently constituted.

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PART A: STRUCTURAL REFORMS OF VCAT

The current planning regime contains a number of structural weaknesses. Some of these are discussed in detail in Part B, but the overriding problems are due to the coupling of a performance-based planning system (with discretionary decision-making) and the availability of almost unlimited appeal rights as part of the planning permit process.

Ongoing "band-aiding" of planning regulations and the PE Act has lead to increasing complexity of policy and consequently even greater difficulty for council planners having to exercise discretion to balance complex and sometimes obscurely-worded or conflicting local policies. This has lead to what former VCAT head Justice Stuart Morris described as "an explosion in the intensity of scrutiny which is required for particular discretionary decisions. It seems that some public officials are fearful of making decisions unless every possible report has been obtained." (1)

No legislative system can operate like this and still provide certainty, transparency, consistency and optimum outcomes - as all the angst, delays, poor planning outcomes and continual attempts at "band-aid" planning reforms over the last decade have so amply demonstrated.

The present discretionary decision-making nature of the planning regime is outside the capacity of VCAT to resolve and it is the responsibility ultimately of government. However, VCAT must bear some responsibility for addressing the consequences of the operation of the system as it affects the Tribunal's role as an alternative Responsible Authority.

Both ICAC (NSW) and the Victorian Ombudsman have also pointed out that, partly for the reasons above, the local government area most prone to corruption is town planning. A number of irregularities have already come to light, notably the recent Brimbank investigations by the Ombudsman which included developer involvement in council elections as well as undue political influence.

At the very least, the conclusions of the report of May 2008 by the Victorian Auditor-General's Office (VAGO) supports the experience of SOS members and countless other residents that decision-making in most development assessments is flawed (2).

The report concluded that the areas for improvement acknowledged by councils included notification, documentation, staff training and enforcement. The main conclusion in relation to permit assessments in particular (section 6.3) was that:

"The number of council assessments that failed to demonstrate adequate consideration of the requirements of the Act and planning scheme was unacceptably high (78 %). Of particular concern was that nearly half of assessments failed to give adequate consideration to the relevant strategic and policy considerations in the planning scheme."

This is a stinging indictment of the standard of council administration of statutory planning and follows on the heels of an earlier VAGO report in December 1999 which raised similar concerns. The fact that the situation if anything is worse highlights the need for revision of VCAT's role as merely an alternative Responsible Authority. VCAT is the only body that scrutinises permit assessments apart from councils - it is therefore ideally placed to play a far more proactive role in overseeing council planning processes, a task that is clearly long overdue.

There are three crucial issues where the powers of the Tribunal in planning matters need to be either enhanced or reined in to improve planning standards in general:
(1) VCAT to be able to address the chronic situation of poor performance by council statutory planning departments
(2) to introduce some degree of accountability to VCAT
(3) to ensure that VCAT upholds local policy variations to standards that have been approved by the Minister and DPCD and incorporated into planning schemes

Other Tribunal powers also need to be reined in. Currently, the Tribunal can override a previous VCAT decision by approving a different development from that originally permitted, effectively negating most of the original assessment process involving objectors - and sometimes in the process legitimising illegal breaches of the original planning permit and in some cases illegal amendments to subdivision permits.

Most lawyers & planning consultants have detailed experience of poor council processes, but this information is rarely formally revealed or acted on because:
1) no-one pays professionals to document instances of poor process
2) the council or developer that a professional may criticise this week for deliberate or incompetent poor process may be the entity who employs them or who they have to deal with next week - a basic conflict of interest
3) it is also in the self-interest of professionals not to reveal poor process because the more it occurs, the more work it generates for them and their peers

This vested interest in failing to acknowledge or deal with poor process is a basic flaw in the system sustained by a lack of transparency and accountability (see VAGO report June 2008, ref 3). Council staff have become increasingly focused on risk reduction and covering up mistakes, not on correcting them and avoiding repetition.

Consequently, it is current SOS policy that VCAT should fulfil an oversight role for councils rather than conduct de novo hearings. Various VAGO reports make it clear that effective independent oversight by a body empowered to require remedial action and compliance is long overdue. VCAT is the only entity able in the course of its current duties to routinely oversee council DA assessment processes and order remedies where appropriate.

But at present VCAT has no role of judicial review of local government, only merits reviews (although with enforcement hearings councils can be ordered to pay costs). So despite all the issues uncovered by VAGO (including failure of effective enforcement - see VAGO Nov.2008, ref.4), there is no body exercising any regular oversight over

council performance - apart from DPCD which has so far not been able to establish an improved and transparent regulatory process and set KPIs for council performance (3).

However, we appreciate the legal complexities of judicial review and the advantages of merit reviews, so it may be an effective compromise to institute instead an "extended merits review" process for VCAT similar to its powers in enforcement hearings under the following conditions:

(a) a substantial degree of prescription is re-introduced into planning schemes (with a corresponding decrease in the exercise of discretion by both councils and VCAT)

(b) VCAT and councils are required to uphold *incorporated* local variations as the default standard or policy (as outlined for example in the Rescode preamble)

(c) VCAT is given the power to assess council DA processes in merits hearing (as with enforcement hearings), or at least be required to refer problems identified to an entity such as a Victorian ICAC or a Local Government Ombudsman (analogous to the situation under the *Building Act*, if it is clear that the PE Act has not been complied with by a Council officer. This would require councils to be more accountable and to be penalised where appropriate as well as directed to implement reforms to prevent repetition (eg, stronger & more transparent KPIs to improve accountability; staff re-training, etc)

(d) VCAT is given the power to protect councils from legal action in cases where councils sought to remedy their own mistakes in the public interest

(e) VCAT itself is made more accountable - there are cases where its exercise of discretion has been demonstrably in error but it can currently only be challenged on technical legal grounds.

(e) Substitution of amended plans is disallowed - while it undeniably results in improved outcomes, the same or better outcomes would also be achieved if well-designed and compliant plans had to be submitted to council in the first place. The main effect of the mere opportunity to submit amended plans is to encourage ambit claims. Invariably amended plans are submitted in response to the concerns of objectors and/or council, so it should only allowed during the council DA stage of the process, if at all. Developers must be encouraged to make the effort to "get it right" with their applications from the start, rather than having them effectively re-designed on their way through the permit process. While this approach is a gamble that often pays off, it does not represent the certainty that most developers claim they want in order to properly plan the timing of their projects.

A Local Government Ombudsman should also be specifically empowered to carry out regular audits and reviews of local government practices and decision-making, largely based on information from VCAT.

The ultimate aim of the above conditions (particularly disallowing of amended plans)

should be to persuade developers that they will only get a permit if they lodge accurate, compliant applications at the outset so they don't waste the time and resources of other parties. The present flexible system encourages the opposite.

While VCAT could fulfil a critically useful oversight role regarding council processes, addressing the scope of this problem is clearly beyond the abilities of the Tribunal. The ultimate - and simple - remedy is for the Government to dispense with performance-based planning regulations and make them mandatory (as with regulations in most other jurisdictions). This would restore certainty, efficiency and transparency to the system - all the key issues that all parties are asking for.

No other government department or private entity functions as planning does. Deficient applications in most other jurisdictions are simply rejected - there is no appeal; a properly-completed application just has to be re-submitted. Planning is in the public interest and should be treated as such. Permit applicants use professional architects, planning consultants and even lawyers to design and progress their development proposals so there is no excuse for sub-standard or erroneous DA's to be submitted.

VCAT should also consider requesting legislation to facilitate the correction of plans in cases where deliberate errors, additions or deletions are made to plans submitted for endorsement subsequent to approval of a permit. Councils are rarely prepared to address this issue due to their own lack of effective scrutiny in endorsing such plans and the consequent financial risk of enforcement action to seek correction once building has begun. However, councils planning staff are usually time-poor, and, crucially, these "errors" are the applicant's and it is usually obvious that they were not accidental.

In such cases, councils should be required to seek correction of plans and permit enforcement even if construction has begun, and councils and any objectors involved should not be liable for any consequent delays. This would put the onus on developers to avoid fraudulent or careless accidental changes to plans submitted for endorsement (the vast majority of cases we are aware of have been deliberate changes by stealth). Legitimate necessary change to plans could be dealt with as usual by a s73 amendment.

VCAT has made some strong judgments on this issue (see *Nakkasoglu v Bayside CC [2000] VCAT 682 (31 March 2000*) which should be enhanced by legislation to oblige councils to address their own mistakes, and to be protected when they do so; but to be penalized further if they avoid remediation which they are aware is necessary, if only from a natural justice point of view. The vast majority of residents simply expect to be treated honestly and fairly.

However, especially because of these added powers VCAT must also be made more accountable itself - currently it is effectively immune from challenge. Members must be required to adhere to local policy and local standard variations (see Part 2). Limits must be placed on the Tribunal's discretionary power to override policy and existing legal instruments.

Secondly, accountability measures are needed that don't require having to challenge VCAT decisions in the Supreme Court. A start could be made by mandatory training for Members in the issues outlined above (including the new Charter of Human Rights); by specific issues-based training for particular types of cases; by a requirement that Members with relevant professional backgrounds be appointed to hear more complex cases; and by encouraging formal complaints to foster an internal system of review of controversial decisions to at least lessen the likelihood of repetition. The tenure of Members who were the subject of more than a few valid complaints would not be renewed or could be terminated early.

To reduce the possibility of political bias, appointments to VCAT could also be made by the judiciary and/or professional committees made up of senior members of professions related to the particular VCAT List to which appointments will be made.

The costly delays in hearing VCAT cases have been described by Justice Stuart Morris himself (1) as being due not so much to bureaucratic delay but to the size of the public purse (ie, to provide enough resources for VCAT to deal with these cases). Ambit claims are thus directly costing the taxpayer, effectively subsidising unscrupulous developers to gamble at VCAT for windfall profits.

SOS policy that VCAT should not conduct merits appeals was based on the fact that if applicants knew they would only have redress to VCAT if the council DA assessment process was flawed, they would submit far more complete and compliant DA's. This would increase the certainty of the grant of a permit, greatly simplify the task of council planning staff and reduce the time taken for assessments.

PART B: REFORMS TO VCAT AS PRESENTLY CONSTITUTED

1 TIME LIMITS FOR LODGING APPEALS AT VCAT

Currently an applicant/developer has 60 days after the issue of an NOD in which to appeal against a decision, and an objector has only 21 days. This is inequitable, given that the applicant is initiating change to the status quo and that objectors are usually novices at planning matters with no access to tax-deductible professional advice.

Firstly, objectors may require legal advice after receiving an NOD to at least determine if an appeal is worthwhile, and three weeks is a short timeframe to organise their approach to an appeal in the spare time they have available. However, developers and planning professionals are familiar with the appeal process and usually already have their Council and VCAT strategy mapped out in advance with a planning professional acting for them.

The most common injustice occurs after objectors win some reasonable concessions at the NOD stage as extra permit conditions and reluctantly accept a permit with improved conditions rather than prolong the unpleasant, potentially expensive and possibly

unproductive process of legally appealing the permit itself. Objectors are usually naive and hope or assume the developer will also accept the compromise permit.

However, the applicant typically waits until after the 21 day limit and then lodges a conditions appeal, thus preventing any challenge to the merits of the overall proposal itself while standing a good chance of having the extra conditions removed or relaxed. The applicant has nothing to lose and something to gain.

Conversely, the objectors have something to lose and nothing to gain. They can no longer challenge the merits of the NOD itself - the best they can hope for is to maintain the extra conditions. If they know an appeal is likely anyway, objectors in this situation usually prefer to be able to challenge the less satisfactory aspects of the draft permit itself, not just support the extra compromise conditions.

Finally, in terms of time limits, developers are the ones who complain about costly delays – indeed, the thrust of many of the Operation Jaguar VCAT reforms (such as Prompt and Practice Day hearings) was specifically designed to speed up the decision process where minimising delay was of great importance to the permit applicant.

A further issue is the referral of some permit applications to VCAT before the "60 day clock" has expired. This often occurs with larger and more complex applications, particularly those where the initial application was sub-standard and required council to seek further information.

SOS regards these as "ambit claims", where the intention of the applicant from the start is to by-pass the council process and have the matter decided by VCAT, because of the perception that many Members have a pro-development bias and often tend to downplay local policy in favour of state urban consolidation guidelines - see points 9 &10.

However, even when VCAT determines that the applicant has "gone early", the matter is allowed to proceed without any consequence or detriment to the permit applicant.

RECOMMENDATIONS: The simplest, fairest and most efficient remedy is to make the timeframe for lodging an appeal longer for objectors (the same time for both would still allow "ambushing" - objectors would still not have time to find out in time to act themselves if an applicant had lodged at the last moment). The permit applicant should be required to lodge within (say) 21 days and objectors within (say) 28-35 days - an extra 1-2 weeks to give objectors time to seek advice and respond (particularly necessary around xmas when many objectors are away).

The applicant would not be disadvantaged because if they didn't appeal but objectors subsequently did (s82 appeal), they would still have the opportunity to argue for both the proposal and for less stringent conditions. This would speed up the overall timeframe of the appeal process by a month or so. Secondly, it would remove the disadvantage to objectors without disadvantaging the developer (except by removing the developer's unfair advantage explained above).

If an NOD to grant with conditions was issued, a developer could appeal the conditions and objectors would still have the chance to appeal against the grant of the permit itself – both appeals would run concurrently as occurs now. If the developer decided not to challenge the conditions, in most cases that would be the end of the matter. Objectors are rarely litigious just for the sake of it - except perhaps in cases where the developer has deliberately mislead or intimidated objectors, in which case it seems appropriate that the threat of a full appeal could act as a deterrent to such inappropriate behaviour.

If the 60-day time limit for council assessment of applications is breached by a developer "going early" to VCAT, in the absence of proof of negligent handling of the application by council causing unwarranted delay, the appeal should be summarily dismissed.

This would act as a deterrent to encourage developers to get their application complete and accurate before lodgement (a point made by the Auditor-General to assist a speedy council assessment). This is yet another example of a legal planning requirement which is regularly broken without consequence (see point 15).

If there is reason to implement a law, it should either be upheld or repealed. Failing to enforce it allows the appearance of proper process while encouraging breaches via the exercise of discretion, which, when no reasons are required to be given, also encourages the possibility of impropriety.

2 ACCESS TO COUNCIL FILE DOCUMENTATION

VCAT Members should support the content and the intent of the updated October 2007 Departmental Practice Note (DSE) on access to planning file information, including internal council reports. This is necessary because of the high incidence of flawed delegate reports. This is common knowledge to many residents and has been confirmed by VAGO (2), as described in Part I. It is relevant to the submission of either an objector or a permit applicant if an internal report was not accurately reflected in the subsequent delegate report, so these internal memos should be available to improve the transparency of the planning process

3 INEQUALITY OF REPRESENTATION

Most permit applicants are now represented by lawyers who are practised at planning law, legal technicalities and cross-examination, skills most objectors can't match. This unfair and unequal level of representation not surprisingly results in a disproportionate number of pro-development decisions, as the VCAT yearly surveys indicate.

RECOMMENDATION: VCAT was established to provide natural justice to ordinary citizens who were to be able to represent themselves without the need for expensive legal assistance. Currently, well-heeled large development firms are frequently represented by QCs and a barrage of expert witnesses, all of their expenses being related to their business and hence a tax write-off - in effect, underwritten by the taxpayer. Thus, there

should be limits set on how much legal assistance developers are able to employ. Alternatively, they should have to either represent themselves or subsidise legal aid for objectors (who have no tax-deductibility status and do not choose for developments to be proposed near them).

4 RIGHT OF REPLY FOR ALL PARTIES [Since updated – Ed., 3.4.18]

Objectors and Councils have to present their case prior to the proponent, usually without any right of reply, despite the proponent having the advantage of being able to hear opposing arguments first and then to add verbally to their original submissions by addressing criticisms of the proposal, sometimes with half truths or worse. Such biased or inaccurate representations stand unchallenged unless objectors and Councils can respond to any such new "information".

RECOMMENDATION: All parties should be guaranteed a right of reply to be able to challenge any new point made by other parties during a hearing. VCAT Practice Note 1 should be amended to add:

> *"4.6 (f) All parties are entitled to a right of reply and, through the Chair, to seek or provide clarification with regard to issues raised by other parties"*

This concurs with VCAT's function as outlined by ex-VCAT president Stuart Morris: "*….hearings are conducted in an ordered manner, but with as little formality and technicality as is practicable. Fourth, the tribunal is empowered to inform itself on any matter as it sees fit and this power is used to promote the fair conduct of a case as well as to achieve a just outcome according to law."*
(VLRC Civil Justice Review Report 14, p63)

5 VCAT ADJOURNMENT PROCEDURE

Despite its own practice note, VCAT Members sometimes grant adjournments or change hearing dates without requiring proponents to formally inform the other parties of what is sought and why, wait for their responses and then seek the adjournment (notifying VCAT in the process of the views and reasons of the other parties). While in exceptional circumstances (emergencies or changed circumstances) this may be appropriate, it is otherwise a denial of natural justice.

It can also be not only an inconvenience but a significant extra cost to other parties. An objector may be forced to retain another professional because their former consultant has been double-booked by VCAT due to its failure to consider the situation of parties other than the proponent prior to making a decision. This can entail considerable extra expense because the original consultant may have completed the case analysis and part of their submission, which has to be repeated by the new consultant at the objector's expense.

In other cases, a Member has misread or misconstrued information in an adjournment request or response and made a decision with reasons at odds with the factual basis of the case, which there is not always time or the opportunity to remedy.

RECOMMENDATION: If any party wishes to change a hearing date, the rules of natural justice demand that without fail all other parties to the case should be notified in advance as per VCAT Practice Note 1, part 6, and given adequate opportunity to explain their support or opposition for the proposed adjournment prior to VCAT making a decision. The only exceptions should be in emergencies or sudden changed circumstances.

6 WEIGHT GIVEN TO DELEGATE REPORTS

VCAT has always placed considerable weight on Council Delegation Reports, yet the Victorian Auditor-General's Office (VAGO) has confirmed what many objectors have been pointing out for years - that council administration of the permit assessment process is frequently flawed. VAGO conducted major investigations into statutory planning and local governance in Victoria that were released in December 1999, May 2008 and June 2008, as well as several others including one in mid-2005 focussing on poor planning processes at the Shire of Glenelg.

As detailed earlier, **78%** of council assessments investigated by the VAGO report into Planning in Victoria (7 May 2008) failed to demonstrate adequate consideration of the requirements of the Act and planning scheme.

It is not surprising then that it is common for council officers' recommendations to be overturned by a committee of councillors, and to be varied or reversed by VCAT. In both types of cases, this is usually because of flawed decisions by council planners.

Councils must have reasonable grounds to refuse an application and councillors' reasons for overturning staff decisions are rarely trivial but similarly necessitated by poor staff assessments. Common faults are inappropriate exercise of discretion and failure to give due weight to policy (particularly local policy), misrepresentation of internal reports and sometimes factual errors and omissions. Some Council officers don't even carry out a site inspection - their decisions in such cases are usually based solely on the written information, plans, diagrams and photographs supplied by the proponent, which frequently contain some inaccuracies (likely to have been deliberate, given that such errors always seem to favour the proposal).

However, councillors and especially objectors are far more likely to cast a critical eye on the negative impacts of a proposal, particularly issues that are not immediately obvious or readily visible, such as inaccurate scaling of all or parts of plans, differing measurements of features on floor plans compared to other plans or elevation diagrams, incorrect placement or omission of adjoining habitable room windows, etc.

RECOMMENDATION: In light of extensive, consistent and critical evidence from successive statutory planning reports by the Auditor-General, VCAT Members should be

directed that they are not to place any extra weight on officer reports other than that justified by the empirical evidence in each case, presented not only by councils but also by all other parties (remembering that it is usually objectors with the strongest vested interest in a careful assessment who bring to light issues like inaccurate and inconsistent site measurements that can have a strong bearing on whether a proposal is compliant).

7 INDEPENDENCE OF EXPERT WITNESSES [Since updated – Ed., 3.4.18]

The Victorian Law Reform Commission (VLRC) has done extensive research on how to improve the vexed issue of independent expert witnesses. The most common criticism of expert witnesses is that they are overly partisan and fail to provide the court with a neutral or independent opinion:

> *When expert witnesses give paid evidence, they are part of a system that is an affront to common sense. Experts paid by parties to court cases may be unbiased but they are not disinterested. So, it should be no surprise that the evidence presented by expert witnesses is in most cases entirely predictable: it favours those who pay their bills.*[9]

The NSW Law Reform Commission categorises this 'adversarial bias' in three ways:
- deliberate partisanship - the expert deliberately tailors evidence to support the client
- unconscious partisanship - the expert does not intentionally mislead the court but is influenced by the situation to give evidence so as to support the client
- selection bias - litigants choose as their expert witnesses persons whose views are known to support their case

The Victorian Bar endorsed a number of the NSWLRC's recommendations, and in particular suggested that provision be made for:
- court-appointed and joint experts in appropriate cases
- identical duties of disclosure in relation to written and oral expert evidence
- the disclosure of fee arrangements with experts
- notifying experts of the sanctions applicable to inappropriate behaviour
- requiring litigants to give notice to the court of experts they intend to call, with an explicit power of the court to restrict the number of experts who can be called
- the use of concurrent evidence in appropriate cases.

The Victorian Supreme Court recommended that courts and tribunals be given a discretion to make orders:
- limiting the number of experts in a proceeding
- compelling an expert evidence directions hearing, to take place after discovery and the exchange of lay witness statements[264]
- directing the formal nomination of experts, and directing them to confer without reference to the parties or their lawyers, and to produce a joint report stating matters agreed and not agreed
- rendering the joint report the sole expert evidence permitted to be adduced at trial on an issue, subject to cross-examination and the use of concurrent evidence procedures where appropriate
- directing that mediation follow the production of a joint report.

The Supreme Court also considered that it should be possible for experts who breach the code of conduct to be made personally liable for the costs of their evidence.

The Victorian Law Reform Commission has in the past suggested a number of strategies for controlling expert evidence in Victorian courts. These include:
• limiting the number of expert witnesses to be called
• one expert appointed jointly by the parties or court-appointed experts
• experts give evidence concurrently as a panel ('concurrent evidence' or 'hot-tubbing')
• a code of conduct to be observed by experts
• requiring disclosure of fee arrangements
• imposing sanctions on experts for misconduct
• developing training programs for expert witnesses.
(Civil Justice Review, Report 7: Ch.7- Changing the role of Experts)

Victoria has implemented some, but not many, of these measures. Many of them should be considered for implementation in some form at VCAT.

Since the reputation of VCAT among most residents and particularly objectors is not very high (due largely to the issues listed in this submission), some serious changes need to be made if VCAT is to retain the confidence of the Victorian community.

"Independent" expert witnesses are currently paid for by the proponent of the proposal and, not surprisingly, always support the development to a greater or lesser degree. It is also common for witnesses to be senior members of the same consultancy hired as the proponent, yet this is not considered to be an obvious conflict of interest, although Members state that they take this into account.

Some witnesses also fail to include the "mandatory statement" of complete disclosure officially required in their report *(3.2, PNVCAT 2 - Expert Evidence)* but this is invariably overlooked as well. Lawyers at such hearings comment privately that it's not worth raising because the Member may interpret it as an attack on an opposing witness. But given that it is a legal offence to mislead the Tribunal, this should be taken much more seriously, with penalties imposed for failures by proponents to respect the court.

RECOMMENDATION: VCAT Practice Note 2 states that an expert witness has a paramount duty to the Tribunal to advise it on matters relevant to the expert's expertise, not to assist the party retaining the expert. To remove obvious conflicts of interest, a number of the options suggested above by law reform groups should be introduced.

As a variation on the above, witnesses could even be engaged and paid by VCAT itself and report objectively to the Member presiding. Alternatively, the permit applicant or proponent could request witnesses who were expert in particular areas of planning practice and would be required to meet the cost of hiring them from a pool of professionals approved by a Witness Panel made up of appropriately qualified and experienced persons (eg, senior members of PIA and RIAA). Experts could be ranked according to a hierarchy of professional fees set by the Panel and would not even be

aware of who had paid VCAT's hiring fee to retain them.

Or again, using a randomised process VCAT Members could pick experts from a list who would be paid a flat rate. A witness would not be able to have financial ties or other real or potential conflicts of interest in relation to other parties associated with the case.

In terms of traffic experts, there is an emerging trend of permit applicants to engage traffic consultants who use sophisticated CAD systems like the American Autoturn to produce turning circles that in some cases fail to even closely comply with Austroads & Rescode vehicle access and turning manoeuvre standards and templates. Some consultants argue as expert witnesses that these CAD turning circles are still Rescode compliant (ie, that the turning radius is still 4m) even in the case of a truncated arc (eg around 60 degrees instead of 90 degrees corresponding to a right-angled turn into a garage).

8 CIRULATION OF WITNESS REPORTS AND AMENDED PLANS

Despite VCAT Practice Note 1, VCAT often tacitly allows circulation of expert witness reports later than 10 business days (sometimes less than a week) before a hearing [PNPE1 4.2(a)], and sometimes substitution of plans later than the required 20 business days prior to a hearing [PNPE1 11.1(a)].

This was because the Prac Note was changed so that where the requirements are not observed this would not automatically lead to an adjournment of the hearing, but, rather, any adjournment "will be dependent upon prejudice being shown".

This is patently unfair - prejudice is caused automatically because of the inconvenience to objectors who usually have to deal with these issues in their spare time and may have to obtain extra legal advice at short notice, while professional parties have the time to deal with such delays as part of their employment. If expert reports are circulated only a few days before the hearing, how could it ever be actually proved that it was done deliberately to disadvantage objectors? That should be irrelevant - whether deliberate or just incompetent, it does disadvantage objectors.

But irrespective of the presence or absence of prejudice, the effect of this loophole has meant that now it is far more common than not for expert reports to be circulated less than a week before the hearing, thus disadvantaging most objectors in most hearings. If "matters of fairness, convenience and practicality are also relevant" (according to former VCAT president Stuart Morris), why was the practice note changed?

RECOMMENDATION: Clause 11 of Practice Note No 1 (P&E List) was introduced in October 2001 to eliminate "ambush strategies". It requires advance notice of at least 4 weeks before a hearing of any amended application. Similarly, expert witness reports should also be circulated at least 4 weeks prior to a hearing, as for the Supreme Court. Expert reports or modified plans should be circulated as per the Practice Note - ie, 2 or 4 weeks in advance, respectively (preferably both 4 weeks to allow objectors time to obtain

professional advice, since in most cases now the permit applicant is represented by a lawyer). If documentation is late, the hearing should be automatically adjourned with the proponent liable for the extra administrative and hearing costs of VCAT, as well as for any costs sought by the other parties due to the delay.

The usual reason given by Members during hearings to dismiss concerns by objectors that circulation deadlines have not been adhered to is that professional practitioners can always find time to deal with late documentation.

However, that is unacceptable for two reasons. Firstly, as explained above, most objectors are not professionals - they have day jobs and limited time to devote to case preparation. They are not familiar with analysing such documents and may even need to seek professional advice, so every day is vital.

Secondly, if recipient professionals can be expected to organise their time to cope with late provision of documentation, then professionals supplying the material should also be expected to demonstrate the same professionalism (and simple courtesy) of distributing it on time, or ahead of time.

The bottom line is that these VCAT deadlines were established for good reason and, like any legal rule, they should be enforced or they will be abused and not adhered to - which is now unfortunately quite frequently the case.

There is also a basic argument to be made for not allowing substitution of amended plans at all (as already mentioned). Scrupulous developers would plan within the confines of planning controls, not see how far they can push them in ambit claims for windfall profits. Compliant DAs would by definition be easier and quicker to assess, attract fewer objections and thus result in more certainty and fewer appeals and delays to projects.

If a development has been genuinely framed to comply with local and state guidelines, there would be no need to amend it a VCAT to improve its chances of receiving a permit.

Developers who complain about objectors and undue delays are usually those with ambit claims - they are responsible themselves if they encounter council and resident opposition. Why should the VCAT planning list (and most of the planning staff of most inner metro councils) have their publicly funded time taken up mostly by the ambit claims of developers seeking to extract the most out of each project?

The fact that compliant proposals are in a minority is testament to the fact that most development proposals are, to a greater or lesser extent, ambit claims under the present performance-based discretionary planning system. Thus developers are placing unnecessary burdens on residents purely to gamble for a VCAT decision more beneficial to their development. Residents should not have to pay with their time and money in such cases to keep developers honest - that should be the role of council and VCAT.

It follows that, as with any regulatory system, there should be penalties for breaches of VCAT rules - either procedural (eg, forfeiting of rights to submit amended plans,

summary dismissal of appeal, etc) and/or financial (fines). Fines should reflect the real costs to VCAT and to Councils of the extra time that would be required to deal with the situation caused by the particular breach of the rules. It is not appropriate that taxpayers money (at VCAT and at councils) should be wasted just to cope with delays and complications caused solely by the failure of developers and their consultants to submit compliant applications or to follow rules of procedure that have been instigated in the interests of natural justice.

If fines are not substantial they fail to act as a deterrent. We are aware of many cases where a developer has breached a permit during the construction stage. If detected, the offender simply lodges an application to retrospectively amend the permit and happily pays the fine (usually only several thousand dollars) because the work has already been completed, thus avoiding 3-6 months worth of holding costs by not waiting for council to approve the amended permit - far more than the relatively small fine.

9 WEIGHT GIVEN TO LOCAL POLICY

VCAT members sometimes trivialise or ignore local planning scheme policies that conflict with urban consolidation (eg, on local neighbourhood character), despite these having been extensively canvassed with the community, passed by a state panel and approved by the minister as appropriate guidelines for that council area.

There are numerous examples. The Administrative Appeals Tribunal (*Australand Holdings Pty Ltd v City of Boroondara and Crow and Others, 1997/47741*) discounted the importance of 'neighbourhood character' as just one of 11 elements in the Good Design Guide, and stressed 'the broader metropolitan benefits of urban consolidation'. It is unacceptable that a tribunal should operate upon such simplistic premises and it implies that efforts at a local level to meet GDG criteria are wasted once the case reaches VCAT.

In *155 Domain Rd Pty Ltd v Melbourne CC [2003] VCAT 349 (31 March 2003),* the Members decreed that the excess height of the proposal (20m in a DDO with a 12m height limit) was appropriate because "the proposal demonstrates a high standard of design which would justify any additional height above that recommended in the DDO."

In "VCAT edict troubles Delahunty" on 10 March 2003, Age reporters William Birnbauer and Royce Millar reported that "Victoria's Planning Minister Mary Delahunty has ordered an inquiry into the way the state's planning appeals tribunal is interpreting the Government's new metropolitan development strategy, Melbourne 2030. Ms Delahunty said she had received information that VCAT 'may not be giving a balanced assessment of all the directions of Melbourne 2030'. The move followed VCAT's recent approval of the controversial NKYA development. Ms Delahunty said the strategy had nine key directions and that she would be 'extremely concerned' and 'very disturbed' if developers argued for their projects on only one of the directions relating to higher-density living."

RECOMMENDATION: VCAT Members need clear direction on prioritizing competing elements in planning schemes so as to support local variations in incorporated local policies.

Councils usually develop local policies in consultation with their communities specifically to vary the state planning controls that would otherwise apply to a particular area. If these policies are appropriate enough to subsequently be endorsed by a panel and then by the Minister, they should take priority over state policy in the limited specific instances where they apply. Otherwise, there is no point in councils wasting their time and ratepayers' money on futile window-dressing which will only lull communities into a false sense of security. After being involved in their adoption, residents and ratepayers are entitled to believe such policies will be given due weight.

10 LACK OF CONSISTENCY IN VCAT DECISIONS

First, it is common knowledge that there are VCAT Members who are pro- or anti-development to some degree, and any planning consultant or lawyer will unofficially agree that the outcome of any given hearing often depends to some extent on which Member has been assigned to the case.

From observation of a number of cases over the last few years, a lot of this variation involves the weight that different Members give to local policy (see point 9) but also to the level of legal representation and number of expert witnesses that the applicant engages for the hearing. This provides an unfair advantage to those with the funds (and tax-deductibility) to be able to afford senior legal representation, which is a distortion of the natural justice objectives of VCAT.

Secondly, some Members have arguably "made policy on the run" rather than followed state and local policies. One obvious case was the Mitcham Towers appeal *(Golden Ridge v Whitehorse CC (Mitcham Towers) [2004] VCAT 1706 (7 September 2004)* where the Member (Stuart Morris himself, the then Head of VCAT) stated that the site should be a higher level activity centre than then designated because of its location with respect to public transport, and proceeded to assess the proposal accordingly. The council was subsequently criticised by the Victorian Attorney-General (Rob Hulls) for not applying interim protection to the site but this was disingenuous to say the least, since the Government had not made interim controls for activity centres available to councils at the time when the application for this site was being assessed.

This sort of action subverts the role of councils and their communities in carrying out the consultation process for structure plans and other planning scheme amendment that our changing city requires - basic democracy.

On some occasions the Tribunal appears to have exceeded what we consider to be the appropriate use of its power and exercise of discretion. For example, in the absence of written reasons in the controversial Cranbourne case, *Peet & Co Casey Land Syndicate Ltd v Casey CC [2004] VCAT 2647 (6 May 2004),* it appears that the Members may have

overridden a s173 agreement between Council & EPA, as well as failing to provide the usual detailed written reasons for their substantive decision, despite foreshadowing it in writing in the May 2004 decision. The subsequent publishing of the hearing transcript by VCAT was of little use because of the large proportion of missing words, to the extent where interpretation of the document was impossible. In our experience of the high quality of VCAT recordings and transcripts, this is very unusual, thus suggesting the possibility of a cover-up.

Finally, two conflicting approaches are taken by VCAT Members where design and compliance are concerned. While objectors may suggest design changes that would clearly improve the project in planning terms, some members respond that their role is legally limited to assessing the submitted (or amended) plans. On the other hand, other Members will facilitate discussion between the parties to reach a compromise, or even make preliminary judgments and adjourn a hearing for a few hours or days to allow the applicant to re-design the proposal on the un-stated understanding that if the Member's advice is followed, a permit will issue.

RECOMMENDATION: These issues need to be clarified as follows.

To address Member bias, Members should be required to give equal or even extra weight to local policy, since it has been canvassed locally, usually been through a panel process and then approved by the Minister to specifically address local context and should thus be treated as the default policy. Similarly, Members should be directed to restrict themselves to being guided by existing policy generally.

In the interests of transparency and accountability, Members should also be required in all cases to issue a written decision summarising the arguments presented at hearings and the reasons for their decisions.

While SOS supports better planning outcomes, we are concerned about Members exceeding their role as assessors of applications on their merits and becoming de facto designers and architects. To avoid ad hoc planning decisions, Members should be restricted to assessing proposal on their merits. If they find significant deficiencies or non-compliances, the existing plans should be allowed a permit but with extra conditions and modifications, or if this involves significant changes to the building envelope or design, the proposal should be refused.

Again, the point of regulations is not to achieve better outcomes by encouraging VCAT to substantially redesign sub-standard proposals on an ad hoc basis, but to encourage compliance with planning policy, as well as having a deterrent effect. As pointed out by the Auditor-General, the standard of development applications needs to improve, not just to get better outcomes but so that the resources of council are not tied up dealing with sub-standard proposals (which are often ambit claims anyway).

It is this minority of incomplete and sub-standard applications that take up the bulk of council time and are then involved in the majority of VCAT appeals.

11 COMPLIANCE WITH STATE & NATIONAL STANDARDS

VCAT members occasionally waive compliance with state or national standards (including building and parking standards) in dealing with issues such as easement access, clearance distances, parking space sizes, etc, often stating that these issues can be dealt with at the building permit stage. However, this can be impossible if the building envelope or dimensions allowed by the planning permit don't provide sufficient scope.

The community expects that state and national standards will be used to maintain amenity standards and that the judiciary will require compliance. Some standards (eg AS/NZS 2890.1:2004 - Off-street car parking) are incorporated into planning schemes so it is obviously intended that they be applied to planning proposals. Furthermore, Clause 62(4) P&E Act specifies that permits must not contain a condition which is inconsistent with building legislation. This should be adhered to.

As with the argument about incorporated local policies, there seems little point in national engineering and safety standards to maintain the amenity of community infrastructure if VCAT allows them to be waived simply for the convenience and profit of developers trying to extract the maximum return from a proposal.

Currently, VCAT can sanction non-compliance with standards required by a State body (AustRoads), standards which Councils are supposed to abide by. This undercuts the ability of a Council to insist on appropriate standards for new developments.

RECOMMENDATION: VCAT should not be able to approve a planning permit where any aspect of the development concerned does not conform to the appropriate safety and amenity standards not only of the Building Regulations but also of the Building Code of Australia and Standards Australia. S62(4) P&E Act should be strengthened to read:

> The responsible authority must not include in a permit a condition ***or approved plans*** which are inconsistent ***with***—
> (a) the Building Act 1993; or
> (b) the building regulations under that Act; or
> (c) a relevant determination of the Building Appeals Board under that Act in respect of the land to which the permit applies; or
> ***(d) the Building Code of Australia, or***
> ***(e) national planning-related standards promulgated by Standards Australia***

A related issue is the granting of permits in cases where lot boundaries do not comply with the actual boundaries or with boundaries established through adverse possession.

In these cases, VCAT typically takes the attitude that if boundary anomalies will require the applicant/developer to apply for a new or amended planning permit, that is entirely at the risk of the applicant. That may be appropriate from a technical legal and property law

point of view, but in practice it often means that the developer simply intends to persevere with the original development, relying on the fact that neighbours are loath to get involved in court battles and that council building inspectors are loath to prosecute breaches that involve no significant risk to council (ie no health & safety implications).

Developers frequently don't even fully comply with VCAT enforcement orders. [We have examples if VCAT would like more information on this point].

Thus if evidence shows that boundary anomalies will prevent the proposal in question from being constructed without requiring changes to the building envelope, the appeal should be refused (at a directions hearing) or the case should be heard based on the actual boundaries. A developer may be prepared to risk not having to make major changes, but a new or amended permit is more unnecessary time and effort for over-worked council planners (largely at ratepayers' expense) and sometimes another VCAT hearing, at the taxpayers' expense - all in a system already over-burdened by too many non-compliant development applications and too many VCAT appeals.

12 ACCESS TO EASEMENTS

Council engineering units often recommend ensuring access to easements when permit applications are referred to them. But in practice, these recommendations are rarely incorporated into permit conditions if changes to plans would be involved.

RECOMMENDATION: VCAT (in de novo hearing cases) should impose such conditions to allow adequate access to infrastructure whether or not Council acted responsibly to include them.

13 WORDING OF PERMITS & CONDITIONS

It is quite common for conditions imposed by VCAT not to adequately reflect the extent of discussions at hearings and subsequent decisions arrived at in assessing the case. This is a vital issue for objectors because this often involves the main concern of their appeal which may have been considered favourably but then overlooked or inadequately dealt with by the conditions imposed. Sometimes this can be remedied by s119 requests but many residents acting for themselves do not realise this avenue is open to them and even so, any change to the conditions is entirely at the discretion of the Member.

The most common problem occurs with the majority of permits (issued both by VCAT and by Councils) where a proposal is only required to be built *generally in accordance* with the approved plans. This is almost as bad as omitting a condition because it makes specific dimensions very hard to enforce. In the *City of South Melbourne v Raftopoulos* (unreported VCAT Appeal 1999/34936, 7.2.89), the following comments on this issue were made by Senior Member Byard:
"*General accordance with plans allows much greater variation from them than would accord with the same plans. If the building must accord with the plans, then the*

permission granted is much clearer and more precise. A requirement of only general accordance leaves more scope for uncertainty and later disputes".

RECOMMENDATION:
In order to minimise the occurrence of enforcement cases due to lack of clarity such as described above, permit conditions should be as precise and unambiguous as possible, without qualification by phrases such as "*generally in accordance with approved plans".*

Luckily the slip rule (s119) allows some latitude for omissions or small errors to be corrected, as long as the parties scrutinise the appeal decision closely and lay persons are aware of their rights to apply for corrections under s119 (which is often not the case). Consequently, Members should be required to use the wording suggested by Member Byard above - ie, "development must accord with the plans".

14 FALSE WITNESS OR MISLEADING INFORMATION

VCAT needs to **USE** its power under s136 to fine, prosecute or otherwise penalise witnesses who mislead the Tribunal. This is a classic example of a rule that is not enforced and thus constantly abused. S105 also requires a person to answer questions despite the fact that this may incriminate them.

In one case *(Bayside CC v Sullivan & Ors [2000] VCAT 672 (31 March 2000*), the Member stated:
"In his oral evidence he was frequently evasive, and I am quite satisfied that he was deliberately evasive. He frequently sought to evade questions by giving answers to other questions not asked, or by giving unresponsive answers, and his responses frequently had to be carefully followed up to obtain answers to what was being asked of him. The ultimate answers frequently demonstrated that he knew the true situation all along but was trying to avoid disclosing it. Apart from frequently seeking to evade answering questions, he also gave untruthful answers."

This case clearly came under s136 VCAT Act yet no penalty was even hinted at - therefore no deterrent, which is why this sort of situation occurs frequently to varying degrees. We are aware of other cases where Members have been aware of, or been made aware of, deliberate inaccuracies being presented to them at hearings, and in each case there have been no repercussions.

15 NON-COMPLIANCE WITH VCAT ORDERS

Under s133, it is an offence to fail to comply with a VCAT order, and there are penalties of fines or imprisonment. But, as with other VCAT procedural rules, this is never enforced - it is left to councils to prosecute for failure to follow plans, not for breaching a VCAT order. Councils should be able to refer such breaches to VCAT for automatic enforcement resulting in penalties appropriate to contempt of court.

16 REFORM OF S39 & S149B P&E ACT AND S123 VCAT ACT

The opportunity to seek redress under these sections for residents who are victim to flawed council procedures only gives an illusion of relief because of the deterrent effect of potentially very large damages due to the involvement of developers as third parties in situations such as flawed planning scheme amendment processes for large commercial or residential projects.

17 ADMINISTRATIVE PROCESSES

There are anecdotal reports from objectors and professional Tribunal users of various administrative problems with case management at VCAT, including faxes and other correspondence going astray or being misinterpreted by staff (even occasionally by Members) and case decisions posted to the austlii website with the wrong case details. While these are mostly merely a matter of inconvenience, they can have more serious consequences, such as when applications for review are mislaid and a permit is issued before the error is discovered.

In some instances, after unsuccessful mediations at VCAT a date for a full hearing may be organised without checking first with the parties present as to suitable dates before finalising arrangements with staff. Where one or more parties may be double-booked or otherwise professionally unavailable, this means an official adjournment request has to be circulated and replied to by all parties, a process that often acquires an urgent time frame because of the duration of the adjournment procedure and the fact that most hearings due to failed mediations are arranged within only a few weeks of the mediation date.

There should be a mandatory requirement for Members to ascertain a suitable date with all parties present at a failed mediation before setting a hearing date.

Other cases we are aware of have involved Members mis-reading or mis-interpreting adjournment & other applications and making incorrect decisions that had to be revisited, sometimes in very short time frames that in some cases caused considerable inconvenience and cost. This sort of incompetence on the part of professional Members is inexcusable and should be noted on their record.

RECOMMENDATION: Appropriate staff KPIs, adequate training and revised procedures should be instituted to minimise administrative errors. In the case of Members themselves, three or more serious errors such as factually erroneous decisions despite having the facts to hand (eg, with administrative decisions related to re-scheduled hearings as a result of failed mediations, assessing requests for adjournments or s119 corrections, etc) should result in their being demoted or required to undergo re-training.

REFERENCES:

(1) S Morris, (Operation Jaguar) - Reforms to the Planning and Environment List at VCAT, 13.8.03
(2) Victoria's Planning Framework for Land Use and Development - 7 May 2008 (2007-08:18) VAGO
(3) Performance Reporting in Local Government - 11 June 2008 (2007-08:27), VAGO
(4) Enforcement of Planning Permits - 13 November 2008, (2008-09:10), VAGO