



The Role of VCAT in a Changing World – President’s Review
Submission on behalf of the City of Port Phillip
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Coversheet for a submission on the President’s Review of VCAT’s Access, Operation and Jurisdiction

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1. ACCESS

1.1 What steps can be taken to further improve access to justice and to make VCAT quicker, more efficient and inexpensive?

- There should be a dedicated email address/contact person for dealing with specific enquiries or with specific municipalities because there are significant administrative delays when trying to reach a Member by email/fax for the purpose of providing additional information or trying to progress a consent order (noting that there is often a flurry of such activity in the days ahead of a hearing date). It is considered that documents should be able to be passed onto the intended recipient within 24 hours of receipt.
- A review of the Planning Practice Note requirements is essential (particularly in the case of Section 87 Amendments) because it should not be necessary for Councils to provide the Tribunal with historical application information that is already held somewhere on record in VCAT archives or where extension of time requests are concerned and Councils do not object to such requests being made. Additionally, Practice Note 2 (PNPE2) specifically requires Councils to advise of the names and addresses of previous objectors, however, the only relevant consideration should be whether there would currently be 'any interested parties' and who these parties are, for there may be new neighbouring owners/occupiers who did not previously object but would now have an interest in an application before the Tribunal.

Further on the matter of Practice Note 2 information, upon notifying Council that a S87 Amendment application has been lodged the Tribunal inquires as to whether the Council *consents to the cancellation or amendment of a permit requested, and would agree to the Tribunal making an order on the papers if no objection is received from any other party, eg where a new permit requires cancellation of an earlier permit.* However, the Council is rarely furnished with a full copy of the application (notably the plans) that forms part of the S87 Amendment before the Tribunal and cannot therefore determine that it has no objection and that the Tribunal could make an order on the papers. In such circumstances Council has to either recommend a hearing be scheduled (which could be unnecessary if the amendments are minor), or has to chase the applicant for a copy of the application, which in turn delays the return of the Practice Note information to VCAT and can invariably end up with a Practice Day Directions Hearing being scheduled because the Practice Note information is not provided to the Tribunal in time.

Either way, these processes lead to inefficiency, costs and delays in the system and could be easily resolved by either the Tribunal being obligated to provide Council with a full copy of the application before it or the Tribunal making it an obligation of the applicant to provide Council with a full copy of the application at the time of lodgement with the Tribunal.

Lastly, the lodgement of Practice Note information with the Tribunal should be able to be lodged on-line, rather than in hard copy only, as this would save on photocopying and is more beneficial to the environment.

- The Tribunal should consider reviewing its website for it is hard to use and illogically set out. For example if a third party wants to know how to lodge an appeal against a Council Notice of Decision to Grant a Permit, it has to know which section of the Planning Act is being appealed because the forms and guidelines are provided in this way. This is confusing for the unfamiliar customer of the Tribunal and immediately off-putting. Simple improvements such as linking relevant forms and guidelines to drop down boxes which state 'objector appeal against Council Notice of Decision' or 'permit applicant appeal against Council Refusal' would make the system much more user friendly. In addition, the daily law list for planning and the practice notes for planning appeals should be situated within the Planning and Environment webpages and not under separate sections of the website so that all information pertaining to Planning is contained in one place. Lastly, the Tribunal should put recent planning decisions (say decisions made within the previous month) on the VCAT website and allow them to be searched easily, including by address. The purpose for this is that members of the community that may not have participated in the appeal process but have an interest in the outcome would not know of the existence of Austlii or how to obtain a decision from Austlii. This would improve access to relevant community information. This is an improvement that the City of Port Phillip is also reviewing for its pending relaunched website.

1.2 Do the processes currently used by VCAT ensure that all parties to a dispute are given a fair hearing and an opportunity to present their case? Do parties come away from a VCAT proceeding believing that they have had a fair go?

- In the Planning List, the order of Responsible Authority presenting first, third parties second and permit applicants last consistently gives an advantage to permit applicants in that they get to hear all submissions first and make comment on the same (particularly for reviews over multiple days). Other parties however, do not have an opportunity to comment on the subsequent submissions.

It would be more appropriate that the permit applicant be required to present the development (usually through the provision of an Architect in development applications) or explain the use instead of Council at the commencement of a hearing. It appears nonsensical and inefficient for the Council to provide a straight bat explanation of a proposal when it is invariably repeated and expanded on by the permit applicant as an integral part of their presentation.

Overall though, to ensure the feeling of a 'fair hearing', all parties should be given a formal opportunity to seek clarification, make corrections to the submissions of other parties and make concluding remarks/summations prior to the end of a hearing. The latter recommendation is considered to be particularly relevant in appeals

that are heard over the course of a whole day or several days and where there have been a number of submissions because the arguments raised early in the proceedings can be overlooked by the decision maker. Concluding remarks would therefore serve to reiterate the main arguments of the case for all parties and focus the Member's assessment (and thus decision) on those issues. This would serve to improve the content of appeal decisions, which are in many instances brief, skim over what were thought to be key matters and offer little explanation as to how the decision was reached.

- On the issue of appeal decision content, in cases where individual Members have more acceptance of the submission of an expert witness than that of the Council representative, the expert witness testimony is quoted at length in the appeal decision and Council's arguments barely rate a mention. This can give the impression that either Council did not turn up to represent itself or because it did not field its own expert witness that its case was insignificant; this does not seem to be a particularly fair approach.

Unfortunately, Councils (and in most cases third parties) are not sufficiently resourced to engage legal counsel and retain expert witnesses and individual planning officers and third parties are generally unqualified in cross examination techniques, which can be intimidating and disadvantageous to their case. There may be merit, therefore, in the Tribunal undertaking a statistical examination of appeal decisions that have gone in favour of parties fielding expert witnesses and legal advisers to determine if unrepresented parties are indeed getting a fair go. This could then in turn lead to a review on whether or not to change the legislation on how, when and if expert witnesses and legal representatives are indeed suitable for planning appeals in the 'equal, open and informal' Tribunal.

- Turning to the appeal timetable, the Tribunal's acceptance of amended plans and expert witness statements that are late without good reason should only occur in extraordinary circumstances. Too often such submissions are not received by all parties in accordance with the timelines specified in the relevant Practice Notes, which is bad practice and puts the receiving parties at a distinct disadvantage. Of course, it is acknowledged that there is a right for a receiving party to challenge the acceptance of late submissions at the commencement of a hearing, but at that time all parties are convened and it is generally considered too difficult to reschedule the hearing to allow more time for the consideration of the submissions; thus inevitably hearings continue with Council and third parties having to forge their case 'on the run'. Acceptance of late submissions seems to advantage the applicant in most cases.
- On the matter of timelines for the lodgement of amended plans in advance of a hearing there is increasing evidence of amendments to a scheme being submitted either at the 20 business day cut off as specified at Clause 11 of Practice Note 1, or late. This is unfair to Councils and objectors when they are presented with a relatively short timeframe to consider a substantially different application than that which was

originally advertised, that which was internally/externally referred and that which was appropriately assessed before a determination was made.

When new planning applications are made to Council, the statutory timeframe for determining the application is 60 days, thus the 20 business day timeframe for lodgement of amended plans in planning appeal cases is disadvantageous to Council and third parties who have less than half the original statutory time to reassess and obtain new advice on what could be a considerably altered proposal. Therefore, to strengthen the integrity of the appeals system, we suggest that there is a reasonable case to be made for increasing the time required for the lodgement of amended plans to allow internal and external referrals (including readvertising to the public) to be undertaken. In addition, in cases where amended plans result in a substantially different proposal than that originally considered there should be an opportunity for Councils to recommend that a new planning application should be lodged instead. The added advantage would be to discourage applicants putting in "ambit claims" and then amending at the death knell.

- Similarly with expert witness statements, if it is to remain an accepted practice that the use of expert witnesses is appropriate in planning appeals, the Tribunal should give some consideration to making it a requirement of any party seeking to engage the services of an expert witness to provide forewarning of an intention to engage a witness so that other parties can make an informed decision as to whether they would also call a witness. Indeed, appeals are not a time for surprises thus in order to ensure that all parties have a fair opportunity to present their case, they should be given reasonable warning of matters which could change the nature of the hearing, such as submission of amended plans or use of expert witnesses. It is suggested that such forewarning of the use of expert witnesses could be done at the time of lodging an application for review or when a party is required to forward the Practice Note information or lodge Statement of Grounds, but should not be less than 21 days prior to the hearing, with the service of the actual witness statement continuing to be not less than 10 days prior to the hearing.

The other parties should also be able to advise that an expert witness is NOT required in advance, where the matter subject of the expertise is not in dispute. That could shorten hearing times by not having unnecessary experts present to the Tribunal and avoid the increasing occurrence of applicants calling numerous "experts" to "throw everything at the case", whether the matters covered by the experts are in dispute or not.

1.3 Is decision making at VCAT seen to be reasonably consistent and predictable?

- Regular users of the VCAT Planning List, such as Councils, planning consultancies and planning solicitors would consider that decisions made by individual Members are reasonably consistent and

predictable; however, given that those decisions are made independently and in isolation from other Members it is reasonable to say that decision making is not consistent across the board. In this regard, there is a perception that favourable and unfavourable VCAT decisions are a lottery based entirely on the draw of the Member hearing the case with some Members being more conservative than others and some Members displaying a poor grasp of environmental and heritage matters and having little regard for neighbourhood character for example.

Given that the majority of Council decisions will be made after discussion with and consideration by a team of qualified people, it is considered that VCAT could adopt similar collaborative decision making approaches/peer review to take the subjectivity of the individual Member out of the decision. Collaborative methods can lead to more consistent decisions which would provide greater certainty for users of the system and indeed could avert unnecessary appeals being lodged where outcomes are clearly predictable.

- There should be clear guidelines as to when it is appropriate for the Tribunal to disregard policy and the Member's determination should be required to clearly set out the net community benefit in doing so.

2. OPERATIONAL

2.1 How can VCAT become more cost effective and efficient?

- VCAT is reasonably cost effective, particularly in comparison to the court system, however, it increases costs through delays in getting matters listed and producing decisions following hearings. Furthermore, as already noted, the increasing dependence of applicants using legal representatives and expert witnesses are increasing the costs for other parties also who sometimes feel compelled to field similar experts to 'even-up' the weight of the case before the Member. This is troublesome because for a frequent user of the Tribunal, such as a Council, there are cost limitations with calling witnesses or having legal representation. Therefore, limitations need to be placed on the use of legal representatives and expert witnesses to ensure that everyone has *equal access to justice* as per the objectives of VCAT.
- There is certainly a case to be made for more use of prompt and final hearings to deal with minor matters where decisions will be made on the spot, and trialling of decisions made 'on the papers', which is akin to the British system of Written Representation, to save all parties time and money in attending the Tribunal and to free up VCAT resources for allocation to major applications. This would in turn speed up hearing and decision timeframes. Indeed, the current restriction of the use of prompt and final hearings only to 'appeals against requirements' and 'appeals against conditions' (Sections 78 and 80 of the Planning and Environment Act) is nonsensical, for many appeals against Notices of Decisions to Grant Permits are often concerned with matters that are minor and could be heard and resolved in less than 60 minutes. Thus greater encouragement and promotion of more prompt and final hearings is

necessary to make the planning appeals system more efficient, and in the case of decisions 'on the papers', VCAT legislation might need to be amended to ensure that written submissions are provided at a certain timeframe after an appeal is lodged, say some 20 business days after all parties are notified that an appeal is registered.

- Lastly, there is a distinct need to legislate VCAT determination times or provide best practice guidelines to Members for the length of time post appeal that a Member should release its decision. Clearly VCAT need more members and there should be a limit on hours members hear cases per week, to keep a proportion between sitting hours and writing decision hours.

2.2 Are there significant delays in getting applications listed for hearing and mediations?

- Some processes are too complicated or simply do not exist to satisfactorily deal with recent changes to legislation, e.g. processes for dealing with minor amendments under Section 87 are cumbersome and there is no streamlined process for dealing with 'extensions of time' where Council does not object to the extension of time but has had to refuse to grant one because it was lodged out of time. As a result, there are substantial delays for hearing dates and decisions for all applications because minor matters (such as those noted) that could be dealt with easily and promptly are clogging up the system.

Specifically with regard to Section 87 amendment applications (which are only before the Tribunal because the said Council cannot decide amendments to planning permits issued by the Tribunal) VCAT should advocate to State Government that the new Planning and Environment Act remove the situation where permits issued by VCAT can only be amended by VCAT. This is often an unnecessary, cumbersome, costly and time consuming process.

- Moreover, when Councils advise that they have no concerns with a Section 87 amendment and that there are no third parties with a material interest in the case such that the matter could be determined on the papers, both Council and applicant anticipate a quick decision. Nonetheless, decisions in such circumstances can still take 3-4 months.
- Turning to minor appeal matters, such as provision/type of privacy screening proposed to a window, there should be a fast track appeal route available such as a 'prompt and final hearing' made at the request of applicants/councils, because often appeal listings on such minor matters are taking as long as major appeal applications, i.e. 3-4 months.

2.3 Is VCAT too legalistic?

- When VCAT was formed its objectives included *the provision of flexible and informal practices for hearing and determining disputes and equal and affordable access to justice*. However, overuse of legal representation and expert witnesses makes accessibility of the system difficult and is intimidating in an environment that is supposed to pride

itself on informal practices. Moreover, as already noted, Councils (and in most cases third parties) are not sufficiently resourced to frequently engage legal counsel and retain expert witnesses and with most planning decisions seeming to be in favour of a party that fields an expert witness (generally the permit applicant), the Planning List is in danger of becoming an appeal system that benefits the wealthy.

Indeed, it is important for VCAT to recognise that a permit applicant is motivated to spend lots of money on their proposal, which includes engaging expert witnesses and legal representation to defend their proposal; however, it is unreasonable for VCAT to expect Councils to resource each and every appeal case it is involved in with similar representation. The current Council budget for involvement in VCAT processes is around \$200,000 pa and rising due to the number of cases Council representatives are required to attend. Therefore, Council (nor third parties) should be disadvantaged because they are not able to field a witness when defending its position.

- In addition, on the same issue of the use of expert witnesses it must be noted that irrespective of which party has engaged the witness that witness has paramount duty to the Tribunal; moreover, the witness is not meant to be an advocate for a party to a proceeding, yet it is becoming increasingly common for expert witnesses to stray beyond their remit and provide advice and support in relation to other aspects of the planning proposal on behalf of their client. Such digressions from the witness's area of expertise are commonly going unchecked by Members and given that other appeal parties have no right of response there are limited opportunities to challenge such advice. Moreover, it is clear that in the less scientific fields, the expert is often a "hired gun" and is not impartially advising the Tribunal.

Indeed, it is noteworthy that in cross examination the Tribunal member rarely if ever questions the expert in a manner that suggests that a member believes some of the evidence being given is dubious. The perception is that the Tribunal accepts everything that is presented unless cross-examination by the Council reveals otherwise, thus the onus seems not to be on the expert to prove themselves, rather on the opposition (ordinarily Council) to discredit.

- Lastly, more clarity is needed on how VCAT Members utilise previous appeal decisions. It is noted that the Tribunal is not a court of precedent but some Members are swayed by previous appeal decisions for similar applications but on different sites and sometimes within a different policy context. Given that each case must be determined on its own merits, in its own context and against current and relevant planning policy it seems unreasonable for a party to introduce previous VCAT appeal decisions during the course of a hearing, which can firstly bear little resemblance to the facts of the current case and secondly provides the other party(ies) with no right to respond or challenge its relevance. With the exception of legal decisions, the reliance of parties on previous appeal decisions and the Member's acceptance of the submission of those decisions without warning should be prohibited.

2.4 Are VCAT's procedures for dealing with applications transparent, fair and flexible?

- Councils are not often treated as equal members of the VCAT application process. For example, there appears to be next to no opportunity for Councils to be able to request an adjournment for an appeal, which is unfair and inflexible and disadvantages Councils significantly if their expert witness(es) or the relevant planning officer that has had a substantial involvement in the application is unavailable for the allotted hearing date.
- In addition, each party has the right to be heard without interruption and most Members ensure that that occurs. However, often in cases where an applicant employs a legal representative or experienced consultant it is commonplace for that representative to interject and disrupt a case being put forward by another party, which is disconcerting for the other party, in particular for inexperienced self represented parties. Therefore, there needs to be clear protocol for the management of the hearing which needs to be appropriately implemented by the Member to ensure fairness to all parties.
- Furthermore and as already noted, there is limited flexibility in the actual hearing process with all but the permit applicant (due to the order of submitters) having a right of response and no other party gets a right to closing summations. In addition, there is no closing summary of the case provided by the Member indicating that they have fully grasped the main tenets of the arguments of all parties. The latter does not demonstrate transparency in decision making.
- Finally, there should also be an opportunity either in advance of the hearing or at the hearing to determine that there is no benefit or requirement to hear from an expert witness, particularly if a particular issue is not being disputed/contested by other appeal parties. This could save time and money for all concerned and increase the efficiency of the Tribunal.

2.5 Does VCAT give enough assistance to self represented parties?

- During the course of a hearing VCAT Members are generally always patient with self represented parties and clearly outline the hearing process and decision making role of the Tribunal. However, when a self represented party arrives at the Tribunal there is no reception to direct inquiries to, there is no information regarding the procedure for entering the appeal room (self represented parties often think they should wait to be called to the appeal room as is the case in Magistrates or County Court), and there is no information regarding what to do when entering the appeal room (such as signing the appearances list, where to sit, etc.). This experience can be intimidating for the unfamiliar self represented party and could be readily improved through simple measures such as a receptionist/concierge who can direct and provide advice to those parties on arrival at the Tribunal, as well as through

literature/information packs provided to appeal parties at either the time an appeal is lodged or an appeal date is confirmed.

- As outlined previously, VCAT Members also need to be cognisant of the potential intimidation of self represented parties by more experienced advocates during hearings.

2.6 How does VCAT perform in handling large or complex cases (as opposed to small claims)?

- It tends to be overwhelmed by legal representation and can resemble the antics of a courtroom. It is also an overwhelming scenario for self represented parties.

3. ALTERNATIVE DISPUTE RESOLUTION

3.1 Should ADR be a compulsory step in every dispute at VCAT?

- It is noted that when all parties are amenable to mediation techniques in the planning process that considerable time and money has been saved; however, there are still delays in setting dates for this procedure whilst the Tribunal has on numerous occasions ignored Council advice that a matter is not suitable for mediation for the following reasons. Indeed, it would be a waste of time and resources to list a matter for mediation in the following circumstances:
 - Where Council representatives have no authority to mediate (delegation being determined by individual Local Government rules and regulations, etc.);
 - Negotiation methods have already been employed by relevant parties and common ground could not be established;
 - There are too many parties involved seeking conflicting resolutions.

In this regard, it is not considered that mediation should be a compulsory step in every dispute at VCAT and at the very least the Tribunal should not ignore the Council advice that mediation is/is not appropriate.

3.2 Should there be limits on legal representation?

- Mediation should not necessarily be based around the 'merits' of an application or compliance with planning policy, rather common sense solutions that work for all parties. In this regard it would be generally unnecessary for parties to be legally represented at mediations and barristers or solicitors should be discouraged or prohibited.

3.3 What additional steps can VCAT take to become a centre of excellence for ADR?

- Importantly, Members should be able to direct parties to mediate by providing some indication on the likelihood of success were the matter to proceed to a merits hearing. Unfortunately, where parties simply refuse to mediate the Member can currently provide no direction to parties as to how to proceed, but given that that Member is a qualified representative of the Planning List who could make a decision if the application were being 'heard' they should have the capability to advise of their opinion on the merits of the case before them. Particularly

in the case of minor disputes where parties cannot reach a mediated solution, the lack of direction by the Member at mediation causes cost and time delays for all parties who have to prepare for and reconvene at a later merits hearing, where the same issues will be debated.

4. GENERAL CLOSING COMMENTS

4.1 VCAT does not perform well in the following areas:

- It gives more weight to parties who are well represented by experts than those who are not, which makes for an unfair and wealth biased system.
- It allows late submission of amended plans and expert witness statements, which considerably disadvantages Councils and third parties, whilst the statutory timeframes for lodging amended plans and expert witness statements is inadequate.
- It does not have enough power to influence a resolution at mediation. Members need to have the capacity to play a more active role in the mediation to direct an outcome and should be able to proffer an opinion as to the chance of success of a particular party at a merits hearing where a mediation session looks like failing.
- It does not provide enough direction on the detail required in a 'statement of grounds'. In many instances 'statement of grounds' provided by an applicant or third party are blank or lack sufficient detail to enable another party to prepare a case to address the 'grounds'. This can either lead to too much or too little information being provided during a hearing and given that there is no right to respond or provide a closing summation a decision could be made by a Member that is light on facts or appropriate solutions. Of course, it is noted that any party can request further particulars of another party's grounds if it considers that statement of grounds are frivolous, vexatious, misconceived or lacking in substance, whilst it is also open to any party to seek a Directions Hearing on the same matter; however, this can add weeks to an appeal process thus clearer direction in VCAT Practice Notes are required on this matter, as well as the ability for the Tribunal to reject applications where statement of grounds are vague, merely state the exact opposite to the Responsible Authority's grounds of refusal, or no statement of grounds are provided at all.
- It does not provide enough direction on the content and role of Draft Conditions in refusal or Failure appeals. In particular, it seems nonsensical for Councils to have to provide draft conditions on refusal appeals because if it could have approved a development with permit conditions surely it would have done so. Thus it is imperative that the Act elicits what is expected from draft conditions as this is not clear. In addition, clearer explanation needs to be provided by the Member to third parties at the commencement of the hearing as to the purpose of the draft conditions.

Nonetheless, it is worth commenting that the requirement for Council to provide conditions in an appeal against refusal also confuses third parties (particularly a third party that is unfamiliar with planning hearings)

and gives an incorrect impression that Council now supports the proposal. It is therefore suggested that VCAT should have its own set of standard conditions and being the ultimate decision maker the Member should be required to compose their own detailed conditions as part of their decision making process.