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1. Finding the least worst option for a non-complying materials recycling use

Operators of a materials recycling business in Lara have allowed 350,000 cubic metres of predominantly building and demolition material to be stockpiled on site. A permit had been issued at the direction of the Tribunal for the use in 2016. However, although only two years had transpired since the grant of a permit, there was major concern by Council and other authorities whether the operators would ever be able to comply with the permit. Of major concern was what to do with the stockpiles, which posed environmental and bushfire risks and was an 'eyesore'. It was estimated that remediation of the site would cost in the order of $100 million.

In *Greater Geelong CC v C & D Recycling Pty Ltd* (Red Dot) [2018] VCAT 831, the Council brought both enforcement and cancellation proceedings against the operator. The Environment Protection Authority (EPA) and Country Fire Authority (CFA) were parties to the proceeding.

Despite the breaches of the permit and the adverse impacts of the operation, and having no confidence in the operator ever complying with the conditions of permit, the Tribunal considered that the relevant land was still an appropriate site for a materials recycling business (contrary to Council's position), having regard to relevant planning considerations, and that the use of the land for materials recycling had not become wholly untenable. Accordingly, it concluded that it would not cancel the permit but instead require a staged enforcement process, which it considered to be the 'least worst' option.

The decision also canvassed some of the competing considerations in deciding whether to cancel or enforce the permit, including a summary of some of the principles arising from other VCAT decisions. On this matter, the Tribunal stated:

> *In the exercise of our discretion under s.119, it would be open to us to simply direct a relevant person to simply stop the non-compliant use or development and to restore the land to its condition immediately before the use or development started. In the complex circumstances of this case, such an outcome would be akin to the cancellation of the Permit, and it will be apparent from the earlier discussion that we do not consider this to be the best option. It is clear to us that neither CDR nor Mr McAuliffe have the resources to clean up the Land and to restore it to its original condition. An enforcement order of this nature would in our opinion be unviable and doomed to fail.*
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> *In our opinion, the ultimate aim of any enforcement order (as opposed to a prosecution) is to attempt to fix the planning mischief that has been created by the contravention of the permit. With this in mind, the discretion under s 119 also enables VCAT to direct that specified things be done within a specified period, including the restoration of the land to any condition specified in the order and/or to otherwise ensure compliance with the Act, planning scheme or permit. Again, it will be apparent from the earlier discussion that we consider a staged approach towards compliance is the preferable option at this time, and in our opinion provides the best opportunity to address the significant planning issues that now confront this site over the medium to longer term.*
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> *In reaching this view, we have largely accepted the submissions of TASCO, referred to earlier, to the effect that the money and willingness to address the fire risks and on-going management of the Land will most likely come through there being some certainty of an ongoing business to cross-subsidise the costs of compliance and remediation – particularly if CDR and Mr McAuliffe vacate the site. Indeed, we should perhaps reiterate that:*
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> - *we have no confidence in CDR or Mr McAuliffe complying with the Permit or an enforcement order in the short to medium term.*
> - *our approach to the making of an enforcement order is based on the presumption that CDR and Mr McAuliffe are not associated with the on-going business, and that TASCO or a new operator will take over the management and control of the Land as soon as possible.*
> - *although we have given little weight to Mr McAuliffe's proposal for an operational gasification plant by 1 August 2018 to create 'energy from waste', our enforcement approach does not preclude such an option. Appropriate regulatory approvals would still need to be obtained.* [84-86]

Under the Tribunal's order, no new waste must be collected on site. A fence must be constructed and material removed from outside the permitted stockpile boundary. A plan to reduce the stockpile must be submitted by September. A fire management plan must also be submitted by the end of winter.

Recent public statements by Council make it clear that it opposed the use from the outset. Despite this, it is the Council, with the cooperation of the EPA and CFA, that has had ongoing responsibility for the enforcement of the permit. Council has responsibility of enforcing the Tribunal's order, so its allocation of resources and costs will continue.

Unless $100m of public money is provided to pay for remediation, it appears the Tribunal's order is really the only reasonable outcome that could be achieved in this case. With the benefit of hindsight, perhaps a more rigorous examination of the operator's ability to conduct the materials recycling business when the original permit was issued would have been appropriate, particularly given Council opposed the granting of that permit after there had been breaches of an earlier temporary permit. As was stated in *Kaso v City of Coburg and Australian Islamic Social Association Inc* (1992) 9 AATR 119:

> *If the Tribunal were satisfied that there was real doubt, having regard to the past and continuing conduct of the Applicant, as to whether it would adhere to any conditions imposed or that it might otherwise breach the provisions of the planning scheme, it is clear both as a matter of principle and on previous decisions of the Planning Appeals Board, that the Tribunal could, in the exercise of its discretion, determine to allow the appeal and direct that no permit issue.*

See also:

- **Guide to Planning Appeals: Enforcement order, Permit > cancellation of permit**

2. Challenge to Minister's call-in dismissed

In early 2018 the Minister for Planning announced that he was calling-in and putting on hold 26 major projects in Fishermans Bend until new planning controls are established (Amendment GC81). A Planning Panel was appointed to consider new planning controls with hearings conducted between March and May 2018. Under the terms of reference, the Panel must submit its report 40 business days after the last hearing day.

In *Hudson Yards Pty Ltd v Minister for Planning* [2018] VSC 277, two developers sought a declaration that the call in by the Minister for Planning of a VCAT proceeding was of no effect. Each contended that the Minister's call in notice dated 21 February 2018 addressed to the Principal Registrar of the Tribunal was ineffective because the notice was given after the conduct of a compulsory conference by the Tribunal, and was therefore not given within the time period specified in sch.1 Cl 58(3) of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act).

Both Plaintiffs had sought a review against the Minister's decision to make a decision within the prescribed time period. Initiating orders, made by the Tribunal soon after the proceedings commenced, gave directions for the conduct of each proceeding including for a Practice Day hearing in December 2017, a compulsory conference in early February 2018 and a hearing date in March 2018. Compulsory conferences were conducted as scheduled under the initiating orders, but were unsuccessful in resolving the proceedings. The Tribunal gave further directions at the end of each compulsory conference.

It was on 21 February 2018 when the Minister gave notices to the Principal Registrar of the Tribunal that he was calling in the proceedings.

The Plaintiffs submitted that a compulsory conference was "a hearing in the nature of a directions hearing, preliminary hearing or interlocutory hearing" under clause 58(5), therefore, the call in notices were ineffective.

The Minister submitted that the reference to "a day fixed for the hearing of the proceeding" in clause 58(3)(b) did not include a compulsory conference, as clause 58(5) excluded all hearings "in the nature of a directions hearing, preliminary hearing or interlocutory hearing". Further, it was submitted that a compulsory conference was a hearing that was in the nature both of a preliminary hearing and an interlocutory hearing.

It may be recalled that clause 58 schedule 1 of the VCAT was amended following the decision of *Buttigieg v Melton Shire Council* [2004] VCAT 868 (VPR 17 VPR 136). In that case, it was held that a directions hearing was sufficient to constitute a hearing for the purpose of clause 58(3). Accordingly, this excluded the Minister's ability to use his or her power to call in the proceeding. Under the present provision, the call-in power may not be exercised later than seven days before the date fixed for the final hearing of the proceeding.

In dismissing the appeals, the Court stated:

> *Each of the expressions 'directions hearing', preliminary hearing' and 'interlocutory hearing' are of wide import. Taken collectively they embrace all types of hearings that may be required in the course*

of a proceeding in the Planning and Environment (Major Cases) List prior to the final hearing, which decides the merits and determines the ultimate outcome of the proceeding. Such a construction of such 1 cl.58(3) and (5) will give simplicity, certainty and clarity to the call in power, as was the purpose of the amending Act. [66]

See also:

- **Guide to Planning Appeals: 'Call-in' powers**

3. Expansion of an existing boat ramp – relevant considerations

The limited scope of considerations frequently found to apply in cases, especially those involving existing use rights, was again highlighted in *Cheers and Ors v Mornington Peninsula CC* [2018] VCAT 731. The case involved the expansion of an existing boat ramp in Rye. Council had approved the expansion of the ramp to add an additional lane, and also associated work such as the changes to reversing lanes, a new jetty, and associated dredging. Objectors had appealed on a variety of grounds, including that the proposal was unnecessary, too expensive, would cause adverse environmental impacts, and contribute to more conflicts between different users on the foreshore. Permits were required under the Public Coastal and Resource Zone and an applicable Environmental Significance Overlay, and because the proposed works were associated with a use enjoying existing use rights.

The objectors struggled to convince the Tribunal of the relevance of many of their points. The Tribunal adopted a formulation familiar from previous cases, quoting the conclusion in *Mason v Greater Geelong CC* (Red Dot) [2013] VCAT 2057 that "town planning is not a panacea for all perceived social ills, nor is the hearing of a planning matter at VCAT a forum for addressing all issues of social or community concern."

In line with such reasoning, the Tribunal considered many of the objectors' key issues not to be relevant. In particular, issues related to the changes to the use were considered entirely in line with the tests in Clause 63. As the Tribunal noted, a liberal approach has been taken to the characterisation of existing use rights over time, and issues such as the impacts of the increased patronage were considered irrelevant. The Tribunal was similarly unwilling to enter into discussions of the need for the works, noting that while this was potentially a valid consideration in the context of a planning decision, it was much less so in the context of an upgrade to an existing facility. The Tribunal also followed other decisions (it cited *Rutherford & Ors v Hume CC* (Includes Summary) (Red Dot) [2014] VCAT 786) in noting that the number of objections did not in itself establish a social effect of the type contemplated by the Act.

The Tribunal therefore devoted its most substantive analysis to the proposal's impacts on coastal and marine environments. It was satisfied on these points and therefore supported the proposal.

See also:

- **Guide to Planning Appeals: Existing use rights.**

4. Certificate of compliance

It would appear that there are few applications for a certificate of compliance made to responsible authorities pursuant to section 97N of the *Planning and Environment Act* 1987 (P&E Act), and that there are few reviews to the Tribunal as a result.

However, in the recent reporting period there have been two cases concerning certificates of compliance. In the first case, *Sivano v Yarra Ranges SC* [2018] VCAT 691, an application for certificate of compliance was made with respect to the status of the original dwelling on the land (the land contained two dwellings). Council had refused to issue the certificate of compliance. The planning scheme limited the number of dwellings per lot to one.

The Applicant appealed on the grounds that it had provided evidence to demonstrate 15 years continuous use of the original dwelling and that at no time during the relevant 15 year period did Council give a clear and unambiguous written direction for the use to cease by reason of any non-compliance with the relevant planning scheme. Hence, it was contended, the application sufficiently demonstrated existing use rights

In calculating the 15 year period, the Tribunal held, consistent with Clause 63.11 and the recent Supreme Court decision *Octopus Media Pty Ltd v Melbourne City Council* [2017] VSC 429, that if a user makes an application to Council or files proceedings with the Tribunal, that becomes the relevant date for the determination of existing use rights. However, such a use would not benefit from Clause 63.11 if the responsible authority took enforcement proceedings against the user before the user made an application to the Responsible Authority or took proceedings in the Tribunal. As stated in *Octopus Media*:

> *A responsible authority is under a duty to act to enforce the planning scheme for which it has responsibility. It is not an absurdity that a use that was always unlawful is not protected under cl.63.11. Rather, on the preferred construction, cl.63.11 does significantly simplify the proof of existing use rights as they are recognised in s.6(3).* [44]

The Council submitted that it had advised the landowner that upon approval of the second dwelling on the land in 1999 and the landowner's confirmation that the original dwelling would not be used as a dwelling, but rather, as an inhabitable outbuilding, it had enforced the planning scheme. However, the Tribunal noted that this correspondence had occurred before the commencement of the 15 year period.

In subsequent correspondence in 2014, which was a little time after in which approval was granted for the new dwelling, Council advised the landowner that the kitchen from the original dwelling would need to be removed, as otherwise there would be a breach of the planning scheme. Following a site inspection, confirmation was then sent to the landowner that the property was in compliance with the planning scheme.

Despite this action, the Tribunal considered that Council did not provide anything to the landowner that could be considered a clear and unambiguous written direction for the use to cease because of its non-compliance with the scheme. In deciding to issue the certificate of compliance, the Tribunal stated:

> *I have concerns about the behaviour of the original owner in commencing and continuing use of the land for two dwellings in knowing breach of the Scheme and the current owner's agreement to remove the kitchen from the cottage in circumstances where he had every intention to reinstate the kitchen.*
>
> *However, I am also conscious of Council's failure to inspect the land after the house was constructed and Council's ongoing failure to provide a 63.11 written direction which would have removed the ability of the applicant to claim existing use rights.*
>
> *I have found that the land has been continuously used for two dwellings for the period of 15 years from 3 February 2002 to 3 February 2017, without a clear and unambiguous direction in writing from the Council to cease the use because it does not comply with the Scheme.*
>
> *Therefore, in accordance with clause 63 of the Scheme, the land enjoys existing use rights for two dwellings.* [75-78]

In the second case, *Kapitany v Casey CC* (Corrected) [2018] VCAT 615, the Council refused an application for a certificate of compliance that the use of the subject land for the purpose of warehousing and storage of rocks and crystals was lawfully established under the planning scheme.

A key issue identified by the Tribunal was whether there was sufficiency of the proof provided by the Applicant to establish that the asserted existing use was continuously carried out for 15 years. The Applicant provided sworn evidence and statutory declarations (though the signatories of the statutory declarations were not called as witnesses). In affirming the Responsible Authority's decision to refuse to issue a certificate of compliance, the Tribunal stated:

> *In my view, the evidence establishes that after the construction of the new shed in 2008, the applicant commenced the new use of warehousing/storage/retail sales and wholesale sales of rocks and crystals in addition to the rock cutting and polishing business already being conducted by the applicant at that time.*
>
> *After consideration of all the evidence, I am not satisfied on the balance of probabilities that the applicant has used the land for the purposes of "warehousing/storage/retail sales and wholesale sales of rocks and crystals" continuously for any15 year period prior to March 2017. I find that the applicant has failed to establish that he has used the land for the purpose of the asserted existing use continuously for 15 years.* [66-67]

See also:

- **Guide to Planning Appeals: Certificates of compliance**

5. Billy don't be a hero

An advertising sign proposed by a Yarrawonga golf club and resort containing a photograph and name of Billy Brownless, a former ALF player and current media personality, has been refused by the Tribunal on grounds that the sign is a promotion sign (which is prohibited by the planning scheme in the subject location).

The application made in *Lotus Projects Pty Ltd v Moira SC* [2018] VCAT 863, was for a dual sided structure 2.5 metres high and 6.1 width to be lit by electric lights located on both sides of the sign. The proposed sign was to advertise the Silverwoods Estate, a residential development in Yarrawonga, and the Black Bull Golf Club, which are located approximately 5.2 kilometres from the proposed sign in Yarrawonga. The signage contained both text and images, including that of Billy Brownless a "Silverwoods Ambassador".

Council refused the application and submitted to the Tribunal that:

- on any objective assessment, the proposed sign was for the purpose of promoting the Silverwoods Golf and Lifestyle Resort and the Black Bull Golf Club;
- that the primary purpose of the sign was not to provide factual information (although it inevitably did), but to positively promote the Silverwoods Golf and Lifestyle Resort and the Black Bull Golf Club by way of an association with Billy Brownless; and
- the endorsement of Billy Brownless, being a former elite level football player and media personality, was used as a means of promoting the desirability and credibility of the premises, and there was arguably no other rational explanation for his inclusion on the sign.

On the other hand, the Applicant contended that:

- the proposed sign is a floodlit sign which was a section 2-permit required sign: and
- no more restrictive interpretation is required in this case.

Both parties referred to previous Tribunal decisions in support of their contentions. Cases referred to by Council included *Woolworths Ltd v Surf Coast SC* [2006] VCAT 1039; *TAG Winchelsea Pty Ltd v Surf Coast SC* [2016] VCAT 2034; *Becton Corporation Pty Ltd v Melbourne CC* [2007] VCAT 631 and *Melbourne Grand Apartments Pty Ltd v Melbourne CC* [2018] VCAT 254. The Applicant referred to *RW and MM Anderson Nominees Pty Ltd v Greater Geelong CC* [2016] VCAT 1904.

In finding the sign was a promotion sign, the Tribunal stated:

> *In my view, the purpose of the proposed sign is the promotion of the Estate and the Club. The sign does not just identify the Estate and the Club (although it does do this), it also promotes the acquisition of land at the Estate, and the golf activities available at the Club in the eyes of the viewer through the association with Billy Brownless and his endorsement as the 'Ambassador' for the Estate and the Club. Because Billy Brownless is a former AFL football player and a media personality, this association is a form of promotion which encourages viewers to acquire land in the Estate and to play golf at the Club.*
>
> *…..*
>
> *I note that the applicant's representative submits that there must be a difference between 'promotion' and 'advertising' because if there was no difference, and if 'promotion' was to encapsulate all forms of advertising then every type of sign would be a promotion sign. The applicant's representative relied on the Tribunal's decision in Andersonin this regard.*
>
> *In finding that the proposed sign is a promotion sign, I have recognised that there is a difference between 'advertising' and 'promotion'. The proposed sign not only advertises the Estate and the Club, in the sense of informing people about its existence and the relevant websites and telephone number if they want more information about the Estate or the Club. It also promotes the Estate and the Club, using the images of Billy Brownless on each side of the proposed sign with the word 'Ambassador' for the Estate and the Club to publicise the Estate and the Club, and to seek to persuade the viewer to acquire land in the Estate and to play golf at the Club.*
>
> *I find that the proposed sign falls within two of the defined categories of signs defined at clause 73, being a floodlit sign and a promotion sign. Where a sign can be interpreted as falling within more than one definition, clause 52.05-1 of the Scheme requires the sign to meet the most restrictive of those requirements. Because the floodlit sign requires a permit, and the promotion sign is prohibited under the table at clause 52.05-10 of the Scheme, the most restrictive requirement applies, and the proposed sign is prohibited. I have based my finding in this case on the images and words proposed for the sign, and the facts in this case have informed my assessment that the sign is a promotion sign.* [37, 40-42]

The Applicant advised the Tribunal it was willing to accept a condition to delete the references to Billy Brownless if the Tribunal found that it was this aspect that resulted in the sign being a promotion sign. The Tribunal made no findings about this matter, stating that "The role of the Tribunal is not to embark on redesigning the words and images on the proposed sign. Doing so raises too many uncertainties with respect to the words and images on the sign, including the desires and intentions of the applicant."

See also:

- **Guide to Planning Appeals: Advertising signs > Categories of signs**

6. Rejection of summary dismissal of Brimbank Council's application to be party to appeal on Ravenhall landfill

In *Brimbank CC v Environment Protection Authority* [2018] VCAT 953, the Metropolitan Waste and Resource Recovery Group (MWRRG), which is a Victorian State Government Statutory Body responsible for coordinating

and facilitating the delivery of waste management and resource recovery across metropolitan Melbourne, sought a summary dismissal of Brimbank's City Council's application to review a decision by the Environment Protection Authority (EPA) to grant a Works Approval for the construction of a landfill to deposit of solid inert waste, putrescible waste, pneumatic tyres and contaminated soil at the Ravenhill Landfill.

The MWRRG did not challenge Brimbank's standing under section 33B(1) of *Environment Protection Act* 1970 (EP Act), but submitted that Brimbank's grounds did not fall within the scope of permissible grounds of review under the two available grounds in section 33B(2). The MWRRG argued that Brimbank's case was entirely about waste policy. The key question to be determined was whether its waste policy grounds fell within the scope of permissible grounds for review under section 33B(2)(a) and (b).

Brimbank submitted that:

- Council's application under section 33B(2)(a) was made on the basis that the disposal of solid inert and putrescible waste and shredded pneumatic tyres to the landfill adversely and unreasonably affected the interests of Council in that the capacity, scale and duration of the waste disposal activity would influence the waste management market discouraging investment in alternative waste technology infrastructure and services otherwise available to Council and other Councils in the region.
- The basis of Council's application had a genuine connection with Council's aims. Council had a genuine connection to waste disposal, management of municipal waste and the waste management market and technology that is affected by the reviewable decision of the Authority.
- Council had clear financial and other like interests which would be unreasonably and adversely affected by the use of the proposed works.

The Tribunal supported the EPA's submission that the substantive issue raised by the strike out application of whether State-wide waste management policy and market economics were matters that properly fell within the scope of third party reviews under section 33B(2) of the EP Act was an important issue that had not previously been the subject of judicial consideration. Further, the Tribunal considered it was a matter that ought to be decided as part of the overall consideration of the review applications for the Ravenhall Landfill because of the importance of the matter. It stated:

> *It is not appropriate to be dealt with in the context of a strike out application by a person who is neither the relevant authority nor the works approval applicant.* [19]

The Tribunal supported the view in *Western Region Environment Centre Inc v EPA* [2018] VCAT 154 (editorial comment VCAT Vol 5 No 8) that while a party's case may be weak (in that case, Wyndham City Council), "that does not mean that its application is utterly hopeless, or unsustainable in fact and law, or doomed to fail." The Tribunal stated:

> *I take a similar view in the present case. It may well be challenging for Brimbank City Council to establish its grounds relating to waste and landfill policy in Victoria. However, I do not find that its arguments are so untenable that it should not be given the opportunity to advance them more fulsomely and to support them by evidence at the final hearing of the proceedings.*
>
> *I am also conscious that this application for strike out or summary dismissal is not made by the relevant authority (EPA) or by the respondent/works authority applicant (Landfill Operations). It is made by a party joined under section 60 of the* Victorian Civil and Administrative Tribunal *1998. Under section 60(1), the Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that:*
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> a. the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
> b. the person's interests are affected by the proceeding; or
> c. for any other reason it is desirable that the person be joined as a party.
>
> *In making its order for joinder, the Tribunal did not specify which of these categories it relied upon in joining Metropolitan Waste and Resource Recovery Group as a party. Having regard to the statement of grounds by the Metropolitan Waste and Resource Recovery Group, I consider the Group's participation in the hearing of the proceedings regarding the Ravenhall Landfill will assist the Tribunal in its consideration of policy affecting waste and resource recovery infrastructure and, in particular, the Metropolitan Waste and Resource Recovery Implementation Plan (Metropolitan Implementation Plan).*
>
> *In these circumstances, and where the application is neither opposed or supported by the relevant decision-maker or the works approval/permit applicant, I am not persuaded that the applicant for review (Brimbank City Council) should be denied the opportunity to have its application heard and determined on the merits.*
>
> *I have a discretion under section 75 about whether to strike out or summarily dismiss the proceeding. In exercising this discretion, especially in situations where a judgement must be exercised about whether*

the proceeding is unsustainable and it is not completely clear-cut, I consider I should be guided by the principle set out in section 97 of the Victorian Civil and Administrative Act *1998 that the Tribunal must act fairly and according to the substantial merits of the case in all proceedings. This does not mean that the Tribunal is able to act outside the framework of its jurisdiction, but it lends weight to the principle that a party should have a reasonable opportunity to present the merits of its case.* [23-27]

See also:

- **Guide to Planning Appeals: Persons interested affected by a decision**