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Planning and Environment Amendment (General) Bill 2012

This Research Brief includes the following sections:

NB: *Readers should note that this Research Brief was current at the time of its preparation prior to the conclusion of debate on the Bill by the Victorian Parliament. For further information please visit the Victorian Legislation and Parliamentary Documents website @ http://www.legislation.vic.gov.au.*

Introduction

The Planning and Environment Amendment (General) Bill 2012 was introduced in the Legislative Assembly by the Attorney-General, the Hon. Robert Clark, on 29 August 2012.[1] The Bill makes a number of amendments to the *Planning and Environment Act 1987* including: abolishing Development Assessment Committees; establishing the Planning Application Committee; and streamlining processes under that Act. The Bill also amends the *Subdivision Act 1988* in relation to public open space and makes consequential amendments to the *Local Government Act 1989*.

1. Second Reading Speech

In his introduction to the second reading speech, the Attorney-General noted that the Bill aims to implement a 'number of government election promises' with regard to the planning system in Victoria.[2] He then identified the three main themes of the Bill: reducing paperwork; simplifying planning processes; and removing any impediments to efficient decision making.

The Attorney-General outlined that the Bill would reaffirm the role of local councils as the primary decision-makers on local planning matters by abolishing Development Assessment Committees (DACs). He stated that a new body would be established, called a Planning Application Committee, to work with councils on complex planning matters.[3]

Further, the Attorney-General stated that the Bill will return 'certainty, clarity and accountability to the planning system' by:

- clarifying the role and responsibilities of a referral authority in the permit process;
- introducing reporting requirements for all planning decision-makers;
- reducing red tape in the planning scheme amendment and planning permit processes;
- removing anomalies in the open space provisions of the Subdivision Act 1988;
- speeding up the way in which proposed planning scheme amendments are authorised to proceed.[4]

According to the Attorney-General:

> The net result of these reforms will enable local councils to focus resources on the most important matters, spending less time on low-risk, low-impact matters, and more time on high-value proposals that deliver councils' strategic objectives.[5]

[1] The Minister for Planning, the Hon. Matthew Guy, sits in the Legislative Council.
[2] Victoria, Legislative Assembly (2012) *Debates*, Book 12, 30 August, p. 3888.
[3] ibid.
[4] ibid.
[5] ibid.

Development Assessment Committees and the Planning Application Committee

Abolishing Development Assessment Committees

The key amendment in Part 2 of the Bill abolishes development assessment committees. The Attorney-General stated that local councils did not support the 'heavy-handed approach' of development assessment committees. Further, abolishing the development assessment committees will enable communities and local councils to 'maintain their role as decision-maker over local planning decisions within their municipality'.[6]

Planning Application Committee

Part 3 of the Bill establishes the planning application committee (PAC). The Attorney-General noted that councils will maintain their role as the responsible authority for planning decisions. However, they will be able to seek advice from the PAC, or delegate their powers to the PAC, with the Minister's consent. In this context, the Attorney-General suggested that the PAC will be particularly useful for rural and regional councils that need to deal with 'one-off complex proposals'.[7]

In discussing clause 10 of the Bill, which enables the Minister to appoint the PAC, the Attorney-General highlighted that membership of the PAC will be flexible in order to cater for different planning proposals. The Attorney-General stated:

> The key is that the membership of the PAC and PAC subcommittees will be tailored to provide the best expertise to the local council to respond to the particular proposal.[8]

Other Changes Proposed by the Bill

Referral Authority Process

Part 4 of the Bill makes changes to the process of referring applications to referral authorities. The Attorney-General noted the two new definitions in the Bill: a determining referral authority, which will retain the power to refuse applications or require certain conditions to be included; and a recommending referral authority, which may comment on an application for consideration by the responsible authority. As the Attorney-General noted, the recommending referral authority does not have a veto power, but may apply to VCAT for a review of the responsible authority's decision.[9]

In addition to these new definitions, the Attorney-General detailed the duties of the referral authority. In particular, an amendment to section 197 of the Act will require referral authorities to act promptly when undertaking required acts, such as forming opinions and making decisions. According to the Attorney-General:

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[6] ibid., p. 3889.
[7] ibid.
[8] ibid.
[9] ibid.

> These changes will speed up the turnaround time for referrals by improving communication between the referral authority, the council and the applicant and will ensure that the reason for the referral is clear.[10]

Two further amendments regarding the referral authority process were noted by the Attorney-General. First, there will be a new requirement that a referral authority keep a publicly available register of all permit applications referred to it. The Attorney-General stated that this will 'promote transparency and accountability'.[11] Second, new section 94(2A) makes the referral authority liable to pay compensation for a cancelled or amended permit resulting from an act or omission of the referral authority. As the Attorney-General noted:

> This addresses the situation where currently a responsible authority is liable to pay compensation even if it was the result of a mistake by a referral authority and will restore proper accountability.[12]

Other Changes to the Planning Permit Process

Clause 60 of the Bill allows responsible authorities to amend permits that have been issued by VCAT, unless VCAT has specified that a particular provision may not be amended. The Attorney-General noted that, 'Quite often the holders of these permits are faced with a complex and lengthy process when seeking amendments to the permit'. Further, these proposed amendments will 'enable changes to be made in a more expedient manner and ease the caseload at VCAT'.[13]

Extension of Expired Permits

Clause 77 of the Bill allows a responsible authority to grant extensions to permits in certain circumstances without the need to go to VCAT for approval. According to the Attorney-General, extensions requested within 12 months after a permit has expired are 'rarely contentious', resulting in the role of VCAT in these situations being 'essentially administrative'. Further, the process is currently 'inefficient and time consuming as these decisions can appropriately be made by the council'.[14]

Planning Scheme Amendment Process

Parts 5 and 6 of the Bill pertain to amending planning schemes. The Attorney-General stated that, 'There is concern that the current amendment process takes too long, particularly for straightforward planning scheme changes of a technical nature'. As such, the Bill 'streamlines the authorisation step in the amendment process', which is the first formal step in the process.[15] As the Attorney-General noted:

> Approximately one-third of amendments are for straightforward changes, such as removing redundant provisions and making corrections. These changes are important

[10] ibid., p. 3890.
[11] ibid.
[12] ibid.
[13] ibid.
[14] ibid.
[15] ibid.

> to keep planning schemes in good working order, but do not warrant the same consultation steps that strategically significant amendments require.[16]

The Attorney-General stated that any person can ask the Minister to prepare an amendment through this process, or the Minister may initiate the amendment. According to the Attorney-General, 'The key is that the proposed change must meet the criteria prescribed in the regulations'.[17]

Planning Agreements

Part 7 of the Bill contains various changes to the planning agreement provisions in section 173 of the Act. The Attorney-General highlighted that the changes allow for the process of ending or amending an agreement to commence where the responsible authority gives 'in-principle' support for the changes. The matter then proceeds 'following a process similar to the planning permit process'.[18] The Attorney-General stated that:

> This new procedure will allow agreements to be ended or amended in those situations where it is not possible to get the agreement of all parties. This is an important step in removing redundant agreements.[19]

Several technical changes were also reviewed by the Attorney-General in his speech. First, the need for the Minister to be involved in ending agreements is removed. According to the Attorney-General, 'This eliminates unnecessary administrative burdens from all parties'.[20] Second, if land that is subject to an agreement is later subdivided, the new owners will become parties to the agreement. The Attorney-General stated that these amendments will 'remove the current uncertainty' regarding the status of such agreements when land is subdivided.[21] Finally, such agreements will attach to the title of the property, removing the discretion of the responsible authority to decide whether to register the agreement or not. According to the Attorney-General, 'This reform will ensure greater transparency, certainty and promote compliance with planning agreements'.[22]

General Improvements to the Act

The Attorney-General noted several amendments, contained in Parts 8, 9 and 10 of the Bill, which will 'refine, update and improve' the operation of the Act.[23] These changes include the following: 'an act-wide definition of a permit, providing immunity to planning panels appointed by the minister under part 8 of the act, clarifying the allocation of financial responsibility for compensation under the act, and providing scope for VCAT to limit its review of a planning matter to the issues in dispute between the parties if all the parties agree'.[24]

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[16] ibid., p. 3891.
[17] ibid.
[18] ibid.
[19] ibid.
[20] ibid.
[21] ibid.
[22] ibid.
[23] ibid., p. 3892.
[24] ibid.

Amendments to the Subdivision Act relating to Public Open Space

The final amendment referred to by the Attorney-General is clause 87 of the Bill, which affirms that section 18(1A) of the Subdivision Act 1988 'does not apply to public open space requirements set in a planning scheme'.[25]

2. Background

Development Assessment Committees and the Planning Application Committee

Development Assessment Committees

Development Assessment Committees (DACs) were introduced by the former Labor Government in 2009.[26] Consisting of both state and local government nominees, DACs were established to address the then-government's 'commitment to partnering with local government to make decisions on planning permit applications in relation to areas and matters of metropolitan, regional or state significance'.[27]

Existing Part 4AA of the Planning and Environment Act provides for Development Assessment Committees. Under this Part, a DAC is established by the Governor-in-Council on the recommendation of the Minister for Planning.[28] Each DAC consists of: a Chairperson nominated by the Planning Minister from a list of persons prepared in consultation with the Municipal Association of Victoria and the Victorian Local Governance Association; two other members nominated by the Minister; and two other members nominated by the municipal council.[29]

The functions of DACs include considering and deciding any application for a permit that is:

- within the class or classes of applications specified under the establishing Order; and
- that relates to land that is within the DAC Activity Centre Area or Areas specified in that Order.[30]

The DAC has all of the powers that a responsible authority would have had to determine the application if it were not a DAC application.[31] The decision of a DAC is taken to be the decision of the responsible authority.[32]

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[25] ibid. Section 18(1A) of the Subdivision Act 1988 pertains to Council public open space requirements.
[26] The original Bill proposing to introduce the DACs, the Planning Legislation Amendment Bill 2009, was defeated in the Legislative Council on 11 June 2009 by the non-government parties. The Bill was then referred to the Parliament's Dispute Resolution Committee. As a result, a redrafted Bill (the Planning Legislation Amendment Bill No. 2) which incorporated amendments as agreed by the Committee, was passed by both Houses and enacted on 17 November 2009.
[27] Victoria, Legislative Assembly (2009) *Debates*, Book 4, 2 April, p. 998.
[28] Planning and Environment Act 1987, s 97MB.
[29] ibid., s 97MK.
[30] ibid., s 97MD.
[31] ibid., s 97MF.

Coalition Planning Policy and the Planning Application Committee

At the time the legislation providing for DACs was passed, the Coalition stated in a media release that it was 'opposed in principle to mandatory DACs, favouring an opt-in/opt-out system'.[33]

Then, prior to the 2010 state election, the Coalition released its *Plan for Planning*.[34] The Plan included replacing development assessment committees with 'planning referral authorities' (PRAs). The Coalition proposed that PRAs would:

- Be triggered on an opt-in, opt-out basis via a vote of the relevant municipality;
- Be able to apply to any geographic area of any municipality, as deemed by that municipality;
- Be able to form the responsible authority for any application within a municipality; and
- Legislate that the Chair of each five member PRA must come from a list of names nominated by municipal, local and industry bodies.[35]

The Plan also stated that many councillors and council planning departments were 'stretched for resources' and 'require[d] direct assistance from the state government'. It specified that PRAs would provide for a more consultative relationship between the state government, developers and local government and would be funded from existing resources.[36]

After the Coalition assumed government, the only DAC established under the Labor Government was disbanded by the Governor in Council on the recommendation of the Planning Minister, Matthew Guy. [37]

On 14 June 2011, the Planning Minister established the Victorian Planning System Ministerial Advisory Committee ('the Committee') to advise on ways of improving the planning system. The Committee's initial report, published in December 2011, included a finding that 'Encouragement should be given to establishing bodies that enable a council to delegate decision making powers on selected matters'.[38]

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[32] ibid., s 97MJ.
[33] M. Guy, Shadow Minister for Planning (2009) *DAC Changes a Win for Communities*, Media Release, 15 September.
[34] Victorian Liberal Nationals Coalition (date unknown) *The Victorian Liberal Nationals Coalition Plan for Planning*, Coalition policy document, Election 2010, p. 4.
[35] ibid.
[36] ibid.
[37] Victorian Government (2011) *Victoria Government Gazette*, no. G 15, 14 April, p. 835. The Doncaster Hill DAC was established on 26 October 2010 by the Governor in Council on the recommendation of the former Planning Minister, the Hon. Justin Madden. Prior to its disbandment in April 2011, the DAC had not made any planning application decisions. Manningham City Council, personal communication with B. Merner, 24 September 2012.
[38] Victorian Planning System Ministerial Advisory Committee (2011) *Initial Report*, Melbourne, DPCD, p. 57, viewed 3 October 2012, <http://www.dpcd.vic.gov.au/planning/panelsandcommittees/current/vpsmac>. For the full list of recommendations relating to the role of local government, see p. 57 of the Committee's initial report.

In May 2012, the government responded to the Committee's report. With regard to the above finding, the government stated: 'Consistent with the Liberal National Coalition's *Plan for Planning*, legislation will soon be presented to the Victorian Parliament to establish a Planning Application Committee'.[39]

On 29 August 2012, the Planning and Environment Amendment (General) Bill 2012 was introduced into the Legislative Assembly. In a recent media release, the Planning Minister stated that as part of the Bill, 'the Coalition Government will scrap DACs and introduce a new opt-in Planning Application Committee body (PAC)'.[40]

Part 2 of the current Bill will implement the government's commitment to abolish DACs. Part 3 of the Bill will establish the Planning Application Committee (PAC). Responsible authorities will be able to seek advice from the PAC on any matters, with the consent of the Minister, relating to a permit application or class of permit applications. The responsible authority may also delegate, with the consent of the Minister, any of its powers or functions under sections 58 ('Responsible authority to consider all applications'), 59 ('Time for decision'), 60 ('What matters must a responsible authority consider?'), 61 ('Decision on application') and 62 ('What conditions can be put on permits?') for a permit or an amendment of a permit, or a class of applications for permits or amendments to permits.

The PAC will consist of: a chairperson appointed by the Minister from a list prepared in consultation with the Municipal Association of Victoria, the Victorian Local Governance Association and two bodies the Minister considers represent the planning and development industry; and at least four other members appointed by the Minister.

National Context: The Development Assessment Forum Model

At its inaugural meeting in April 2012, the Council of Australian Governments' Business Advisory Forum agreed that all jurisdictions would undertake development assessment reforms to ensure that processes were efficient and did not create unnecessary delays.[41] The Development Advisory Forum (DAF), an independently chaired forum with representation from the development industry, related professional associations and the three spheres of government was formed in 1998 to recommend ways to streamline development assessment without sacrificing the quality of decision making. In 2005 it developed a 'Leading Practice Model for Development Assessment in Australia' which included ten leading practices that a development assessment system should exhibit.

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[39] State Government of Victoria (2012) *Victorian Planning System Ministerial Advisory Committee: Response to the Key Findings of the Initial Report*, Melbourne, State Government of Victoria, viewed 23 September 2012, <http://www.dpcd.vic.gov.au/planning/panelsandcommittees/current/vpsmac>.

[40] M. Guy, Minister for Planning (2012) *Pulling Labor's DACs Down*, Media Release, 12 September, viewed 24 October 2012, <http://www.premier.vic.gov.au/media-centre/media-releases/4840-pulling-labors-dacs-down.html>.

[41] Council of Australian Governments (2012) 'Council of Australian Governments Meeting, Canberra, 13 April 2012 – Communique', COAG website, p. 3, viewed 27 September 2012, <http://www.coag.gov.au/>.

Leading Practice number eight, was that there should be professional determination for most applications. According to the model:

> Most development applications should be assessed and determined by professional staff or private sector experts. For those that are not, either:
>
> Option A – Local government may delegate DA determination power while retaining the ability to call-in any application for determination by council.
>
> Option B – An expert panel determines the application.
>
> Ministers may have call-in powers for applications of state or territory significance provided criteria are documented and known in advance. [42]

The DAF leading practice model had been endorsed by the Local Government and Planning Ministers' Council as 'an important reference for individual jurisdictions in advancing reform of development assessment'.[43]

According to DAF, feedback from stakeholders indicated general agreement that an independent expert panel should assess proposals but some maintained that decisions should be retained by elected representatives (local government or the Minister). In turn, the local government position concurred that elected representatives should retain the authority to determine applications 'in accordance with community expectations and policy objectives', but that this authority could be delegated to a panel as long as it retained a call-in power. Community representatives also generally supported the retention of decision-making power with local government but accepted that it could be delegated to officers or a panel if desired. Whereas industry stakeholders preferred independent panels determining applications.[44]

A recent communiqué stated DAF's intention to review the operation of the various assessment panel models used in Australia.[45]

Further discussion on assessment panels in Australia is provided in the Other Jurisdictions section of this paper.

Other Changes Proposed by the Bill

In addition to the changes outlined above, the Bill proposes amendments to other aspects of the planning system. Three of these aspects are: referral processes; the planning scheme amendment process; and section 173 agreements. The Victorian Planning System Ministerial Advisory Committee also considered these aspects as a

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[42] Development Assessment Forum (2009) *Benchmarking Program*, DAF, p. 8, viewed 27 September 2012, <http://www.daf.gov.au/current_projects/benchmarking.aspx>. Development Assessment Forum (2005) *A Leading Practice Model for Development Assessment in Australia*, DAF, p. 22, viewed 27 September 2012, <http://www.daf.gov.au/reports_documents/leading_practice.aspx>.

[43] Local Government and Planning Ministers' Council (2005) 'Communique- 4 August 2005', LGPMC website, viewed 27 September 2012, <http://www.lgpmcouncil.gov.au/communique/>.

[44] ibid.

[45] Development Assessment Forum (2012) 'Meeting Communiqué – 1 June 2011 – Melbourne', DAF website, viewed 27 September 2012, <http://www.daf.gov.au/reports_documents/index.aspx>.

part of its review. Outlined below are the Committee's findings and the amendments proposed by the Bill.

Referral Authorities

According to the Department of Planning and Community Development's publication *Using Victoria's Planning System*, a referral authority:

> …can be any person, group, agency, public authority or other body specified in the planning scheme or the Act whose interests may be particularly affected by the grant of a permit for a use or development.[46]

Referral authorities include: VicRoads; the Department of Sustainability and Environment; the Environment Protection Authority; Country Fire Authority; a range of utility providers and catchment management authorities.[47]

Under existing section 55 of the Act, a responsible authority must give a copy of a planning permit application to any referral authority specified for applications of that kind in the planning scheme. The referral authority must then consider the application and within the prescribed period, communicate with the responsible authority that it: does not object to the granting of a permit; or that it does not object if the permit is subject to certain conditions specified by the referral authority; or that it objects to the granting of a permit on any specified ground.[48] Under existing section 61(2), a responsible authority must decide to refuse to grant a permit if a relevant referral authority has objected.

With regard to the role of referral authorities, the Committee stated:

> …referral authorities are one of the key leaders in the planning system and have a corresponding responsibility in the way that they participate in the planning process. Their performance should reflect this leadership role.[49]

The Committee reported that referral authorities valued their role. However, the report also stated that many council and private sector submittors were concerned about the current referral process. These submittors were particularly concerned with the adherence of referral authorities to statutory timelines and the degree of ownership and accountability by referral authorities regarding their particular requirements.[50]

The Committee highlighted four key issues with respect to referral processes in the current planning application system. These were: timelines for referral authorities in responding to councils; whether permit conditions or planning application objections

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[46] Department of Planning and Community Development (2007) 'Chapter 3: Planning Permits', *Using Victoria's Planning System*, Melbourne, DPCD, p. 10, viewed 23 September 2012, <http://www.dpcd.vic.gov.au/planning/theplanningsystem/a-guide-to-the-planning-system>.
[47] Victorian Planning System Ministerial Advisory Council (2011) op. cit., p. 66.
[48] Planning and Environment Act 1987, s 56.
[49] Victorian Planning System Ministerial Advisory Council (2011) op. cit., p. 67.
[50] ibid., p. 66.

could be considered advisory or mandatory; the use of standard agreements for referrals; and referral authority participation in the VCAT review process.[51]

Part 4 of the Bill proposes a number of changes to referral authority processes. The most substantial change appears to relate to the reclassification of referral authorities as either 'determining' or 'recommending' authorities. Whereas currently, all referral authorities have the same powers, including the power to mandate refusal of a planning permit, the Bill will reserve this power for 'determining' referral authorities. Under the changes, if a recommending referral authority objects to the grant of a permit, the responsible authority will have the discretion to decide whether or not it ultimately refuses to grant the permit. However, under proposed new section 64A, if the responsible authority decides to issue a permit when there is an objection from a recommending referral authority, a permit must not be issued: until 'the end of the period within which a recommending referral authority may apply to the Tribunal for review of the decision to grant the permit'; or if an application for review has been made, 'until the application is determined by the Tribunal or withdrawn'.

Clause 15 of the Bill also establishes the duties of a referral authority when considering referred matters. These duties are to:

> (a) have regard to the objectives of planning in Victoria in considering the matters; and
> (b) have regard to the Minister's directions; and
> (c) comply with [the Planning and Environment] Act; and
> (d) have regard to the planning scheme; and
> (e) provide information and reports as required by the Minister.

Clause 41 of the Bill will include 'referral authorities' among those bodies that are required to act 'expeditiously' when fulfilling their duties under the Planning Act. Other changes made to referral authority processes by the Bill include: the requirement that a referral authority must give the applicant copies of correspondence sent to the responsible authority about their application (including a copy of the decision and comments about the application); and the requirement that a referral authority keeps a publicly-available register of all applications referred to it.

Planning Scheme Amendment Process

All Victorian local government areas, as well as some special planning areas, are covered by a planning scheme. Planning schemes provide for 'the policies and provisions for the use, development and protection of land'.[52] They consist of:

- Maps – these indicate the zones and overlays applying to the land;
- An ordinance – this specifies the written requirements of a scheme and includes local planning policies as well as listing the types of use or development that require a permit; and

[51] ibid., p. 143.
[52] Department of Planning and Community Development (2012) 'About Planning Schemes', DPCD website, viewed 4 October 2012, <http://www.dpcd.vic.gov.au/planning/planningschemes/about-planning-schemes>.

- Incorporated documents – these are documents that affect the operation of a planning scheme (e.g. a Code of Practice for Private Tennis Court Development).[53]

Planning schemes are administered and enforced by the responsible authority, which is usually the local council.[54] Sometimes, a change (or 'amendment') to the planning scheme is required in order to assist the responsible authority to support a new policy direction or achieve a desired planning outcome. For example, if a council decides it would like to encourage more residential development in an industrial area, it would need to amend the planning scheme to rezone the land from 'industrial' to 'residential'.[55]

The process for amending a planning scheme is provided for under Parts 2 and 3 of the Planning and Environment Act. The process involves many steps. These steps may include:

- A person requests that the council makes a planning scheme amendment or the council initiates the process itself;
- The council seeks the Minister's authorisation to prepare the amendment;
- If the Minister approves the preparation of the amendment, the council then prepares and publicly exhibits the amendment;
- If submissions are received about the amendment, they may be considered by a planning panel. The planning panel subsequently makes recommendations to the council about the proposed amendment;
- The council then decides whether to adopt, modify or abandon the amendment;
- If the council wants to adopt or modify the amendment, it must seek approval from the Minister for Planning or, if the Minister for Planning has previously authorised the council to approve the amendment, the council can approve the amendment itself;
- If the amendment is approved, it is then gazetted.[56]

The Committee reported that the planning scheme amendment process was 'a major focus of submissions' and that each step in the process had been criticised by councils, industry and individuals.[57]

Three of the recommendations of the Committee relating to the planning scheme amendment process included: that the process be streamed into different types of amendments relating to whether the amendment is regarded as 'technical', 'normal' or 'state significant'; that all steps in the amendment process be reviewed with the aim of increasing the efficiency of the process; and that the step requiring councils to seek Ministerial authorisation before preparing a planning scheme amendment be subjected

[53] ibid.
[54] ibid.
[55] Department of Planning and Community Development (2008) *Planning – A Short Guide*, Melbourne, DPCD, p. 27, viewed 4 June 2012, <http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0020/41267/Planning_-_a_Short_Guide.pdf>.
[56] Victorian Planning System Ministerial Advisory Committee (2011) op. cit., p. 154.
[57] ibid., p. 153.

to strict time limits (no more than 10 business days) with deemed authorisation to prepare an amendment where the time limit is not met.[58]

Parts 5, 6 and 10 of the Bill propose changes to the planning scheme amendment process. Part 5 of the Bill makes amendments to the 'authorisation to prepare an amendment' step of the process. The Bill proposes that, if a period of 10 business days has elapsed since the Minister received an application for authorisation, and there has been no response, a responsible authority may prepare the amendment as stated in the application.

Part 6 of the Bill will introduce a 'streamlined process for the preparation and approval of amendments to planning schemes that are of a class or classes prescribed in the regulations'.[59] Under the changes proposed by this Part, the Minister may determine to prepare prescribed planning scheme amendments. The second reading speech states that any person will be able to ask the Minister to prepare the amendment or the Minister may initiate the process. For amendments prepared by the Minister, sections 17 to 19 of the Act (which refer to the exhibition and notice of an amendment) do not apply. The Explanatory Memorandum states, 'The objective of this change is to ensure that minor, technical and other appropriate amendments to planning schemes are dealt with in an expeditious manner'.[60]

Part 10 of the Bill makes a range of general amendments to the Planning Act. Clause 70 of the Bill will remove the power of planning authorities to approve, when previously authorised by the Minister, particular planning scheme amendments.

Section 173 Agreements

The publication *Using Victoria's Planning System* describes the nature of section 173 agreements:

> The responsible authority can negotiate an agreement with an owner of land to set out conditions or restrictions on the use or development of the land, or to achieve other planning objectives in relation to the land. [61]

The power to enter into an agreement is outlined in section 173 of the Planning and Environment Act. Under current provisions, the responsible authority has the discretion whether or not to apply to the Registrar of Titles for the agreement to be registered on the property title.

Section 173 agreements may be utilised for a variety of matters. For example:

- coordination of development with adjoining landowners or other regulatory authorities to provide for staged developments

[58] ibid., p. 166.
[59] Planning and Environment Amendment (General) Bill 2012, Explanatory Memorandum, p. 15.
[60] ibid., p. 16.
[61] Department of Planning and Community Development (date unknown) 'Chapter 8: Agreements', *Using Victoria's Planning System*, op. cit., p. 1, viewed 23 September 2012, <http://www.dpcd.vic.gov.au/planning/theplanningsystem/a-guide-to-the-planning-system>.

- rehabilitation of property, repair of the environment, heritage protection or vegetation protection
- provision of community infrastructure or specific development infrastructure – such as open space or facilities on the land or nearby land
- securing developer contributions
- restrictions on change of use, or abandoning existing use rights
- limits on future development, including neighbourhood agreements to protect neighbourhood character
- planning 'trade-offs', such as a planning concession on one property based on a commitment to do something on another property.[62]

The Committee determined that the role and processes associated with section 173 agreements required further analysis with the aims of: explaining where agreements should and should not be used; and streamlining the processes used to create, amend and remove an agreement.[63]

Part 7 of the Bill relates to section 173 agreements. As specified in the second reading speech, a key change proposed by this Part will be the creation of a new process for ending or amending an agreement.[64] In contrast to the current process, clause 49 of the Bill will allow an agreement to be amended or ended without the agreement of all parties. Also, clause 51 of the Bill will provide that the responsible authority must apply to the Registrar of Titles to have the agreement recorded on the property title.

[62] ibid., p. 3.
[63] Victorian Planning System Ministerial Advisory Committee (2011) op. cit., p. 100.
[64] Victoria, Legislative Assembly (2012) *Debates*, Book 12, 30 August, p. 3891.

3. The Bill

This section of the Research Brief provides an overview of some of the key provisions of the Planning and Environment Amendment (General) Bill 2012. For a description of the Bill in its entirety readers are directed to consult the Explanatory Memorandum.

Part 1— Preliminary

Clause 1 of the Bill states that the main purposes of the proposed Act are—

(a) to amend the Planning and Environment Act 1987—
  (i) to abolish Development Assessment Committees;
  (ii) to establish the Planning Application Committee;
  (iii) to streamline processes under that Act;
  (iv) to improve generally the operation of that Act; and
(b) to amend the Subdivision Act 1988 in relation to public open space; and
(c) to make consequential amendments to the Local Government Act 1989.

Clause 2 of the Bill provides that the Act will come into operation on a day or days to be proclaimed. If a provision of the Act has not come into operation before 28 October 2013, it comes into operation on that day.

Part 2— Development Assessment Committees Abolished

Clause 5 of the Bill repeals Part 4AA of the Planning and Environment Act which provides for the establishment and operation of the Development Assessment Committees.

Part 3— Planning Application Committee

Clause 8 of the Bill inserts a definition of 'Planning Application Committee' into section 3(1) of the Planning and Environment Act. The definition states that 'Planning Application Committee' means the Planning Application Committee established under the new Part 4AA.

Clause 9 of the Bill inserts new section 58A into the Planning and Environment Act which provides that a responsible authority – with the consent of the Minister – may ask the Planning Application Committee for advice in relation to an application for a planning permit or a class of applications for permits.

Clause 10 of the Bill inserts a new Part 4AA into the Planning and Environment Act. The new Part 4AA provides for the creation and establishment of the Planning Application Committee and consists of new sections 97MA to 97MI. The new Part 4AA is reproduced below in full:

"Part 4AA—PLANNING APPLICATION COMMITTEE

97MA Planning Application Committee

The Minister may establish a Planning Application Committee.

97MB Membership of Planning Application Committee

(1) The Planning Application Committee is to consist of—

(a) a chairperson appointed by the Minister from the list of persons prepared under subsection (2); and

(b) at least 4 other members appointed by the Minister.

(2) The Minister must prepare a list of names of persons available for appointment as a chairperson of the Planning Application Committee.

(3) The Minister must consult with the following bodies in respect of the list before making any appointment from that list—

(a) the Municipal Association of Victoria established under the Municipal Association Act 1907;

(b) the Victorian Local Governance Association;

(c) 2 bodies that the Minister considers represent the planning and development industry.

(4) The Public Administration Act 2004 (other than Part 3 of that Act) applies to a member of the Planning Application Committee in respect of the office of member.

97MC Functions of the Planning Application Committee

The Planning Application Committee has the following functions—

(a) to advise the Minister on any matters which the Minister refers to it in relation to an application for a permit or class of applications for permits;

(b) to advise a responsible authority on any matters which the authority, with the consent of the Minister, refers to it in relation to an application for a permit or class of applications for permits;

(c) to carry out, as delegate, any function delegated to it by the Minister under section 190;

(d) to carry out, as delegate, any function delegated to it by a responsible authority under section 188.

97MD Proceedings of Planning Application Committee

Subject to the regulations (if any), the Planning Application Committee may regulate its own proceedings.

97ME Subcommittees

(1) The Planning Application Committee may appoint one or more subcommittees for the purposes of carrying out any of its functions.

(2) A subcommittee may consist of—

(a) members of the Planning Application Committee; or
(b) one or more members of the Planning Application Committee and co-opted members appointed by the Committee.

(3) The Planning Application Committee must appoint a member of the Planning Application Committee to be the chairperson of a subcommittee.

97MF Delegation to subcommittee

The Planning Application Committee may, by instrument, delegate to the members of a subcommittee any of its functions, including any function delegated to it, but not including this power of delegation.

97MG Payment of members of Committee and subcommittees

A member of the Planning Application Committee or a subcommittee of that Committee is entitled to be paid the fees and allowances (if any) fixed in respect of the member by the Minister.

97MH Responsible authority to assist Planning Application Committee

A responsible authority, which has requested the advice of the Planning Application Committee or delegated a function to the Committee, must provide the Committee with any information or assistance that the Committee requires in order to provide the advice or carry out the function.

97MI Responsible authority to contribute to costs of Planning Application Committee

A responsible authority must, on the request of the Minister, contribute an amount specified by the Minister towards the costs of the Planning Application Committee or a subcommittee of that Committee that are incurred in providing advice to, or carrying out a function under delegation from, that authority."

Clause 11 of the Bill inserts new section 188(3) into the Planning and Environment Act. It provides that a responsible authority – with the consent of the Minister – may delegate decision-making powers to the Planning Application Committee in regard to an application for a permit or an amendment to a permit, or a class or applications for permits or amendments to permits.

Clause 12 of the Bill inserts new section 190(1A) into the Planning and Environment Act, which provides that the Minister may delegate decision-making powers to the Planning Application Committee in regard to an application for a permit or an amendment to a permit, or a class or applications for permits or amendments to permits.

Part 4— Amendments Relating to Referral Authorities

Clause 14 of the Bill inserts new definitions of a referral authority into section 3(1) of the Planning and Environment Act. It provides that:

> ***determining referral authority*** means, in relation to an application for a permit or an amendment to a permit, a person or body that a planning scheme specifies as a determining referral authority for applications of that kind;
>
> ***recommending referral authority*** means, in relation to an application for a permit or an amendment to a permit, a person or body that a planning scheme specifies as a recommending referral authority for applications of that kind;
>
> ***referral authority*** means a body or person specified in a planning scheme as—
> (a) a determining referral authority; or
> (b) a recommending referral authority.

Clause 15 of the Bill inserts new section 14A into the Planning and Environment Act, which provides for the duties of a referral authority. It states that a referral authority must, when considering matters referred to it under the Act, have regard to the objectives of planning in Victoria and the Minister's directions. It must also comply with the Act, have regard to the planning scheme, and provide information and reports as required by the Minister.

Clause 17 of the Bill makes a number of amendments to section 55 of the Planning and Environment Act. Section 55 is titled 'Application to go to referral authorities'. As the Explanatory Memorandum states, clause 17 amends section 55(1) of the Act to 'require that when the responsible authority gives a copy of a permit application to a referral authority, the responsible authority must also give the referral authority the information prescribed in the regulations'.[65]

Clause 17 also inserts new section 55(3) into the Act which requires a referral authority to give an applicant – without delay – a copy of any requests for more information that it makes to the responsible authority. Clause 17 additionally inserts new section 55(4) in to the Act, which provides that a planning scheme may specify that a referral authority is a 'determining referral authority' or a 'recommending referral authority'.

Clause 18 of the Bill inserts new section 56(3A) into the Planning and Environment Act, and provides that the referral authority must – without delay – give an applicant a copy of any decision and comments it gives to the responsible authority.

Clause 19 of the Bill inserts new section 56A into the Planning and Environment Act, which provides that a referral authority must keep a register of applications referred to it, and that the register must be made available to the public.

[65] Planning and Environment Amendment (General) Bill 2012, Explanatory Memorandum, p. 7.

Clause 21 of the Bill amends section 61 of the Planning and Environment Act. Section 61 deals with decisions on applications. At present, section 61 provides that a responsible authority must refuse an application if a referral authority objects to the grant of the permit. Clause 21 inserts a distinction between a 'determining referral authority' and a 'recommending referral authority'. As the Explanatory Memorandum states, the amended section 61 provides that the responsible authority must refuse to grant a permit if a 'determining referral authority' objects, but may choose to either grant a permit or refuse to grant a permit if a 'recommending referral authority' objects.[66]

Clause 32 of the Bill inserts new section 82AAA into the Planning and Environment Act. New section 82AAA provides that a recommending referral authority may apply to VCAT for a review of a decision made by a responsible authority that is inconsistent with the advice given by the recommending referral authority. Specifically, the recommending referral authority may apply for a review of a decision of a responsible authority to grant a permit when the recommending referral authority had objected to the grant of the permit, or a review of a decision not to include a condition on the permit that the recommending referral authority recommended.

Clause 37 of the Bill inserts new section 94(2A) into the Planning and Environment Act. New section 94(2A) provides that a referral authority may be liable for compensation where a permit has been cancelled or amended because of a mistake it has made. As the Explanatory Memorandum states, this provision 'addresses the current situation where a responsible authority is liable to pay compensation, even if it was the result of an act or omission by the referral authority'.[67]

Clause 41 of the Bill amends section 197 of the Planning and Environment Act, which provides that acts must be done as promptly as is reasonably practicable. As the Explanatory Memorandum states, the current section 197 applies to all key planning bodies except for referral authorities.[68] Clause 41 adds 'referral authority' to section 197.

Part 5— Authorisation of Planning Authorities

Clause 42 of the Bill substitutes section 8A of the Planning and Environment Act with a new section 8A and inserts a new section 8B. These sections deal with how a municipal council must not prepare an amendment to a planning scheme unless it has the authorisation of the Minister. The key provision is new section 8A(7) which states that if a council has made an application to the Minister for authorisation to prepare an amendment to a planning scheme in force in its municipal district, and the council does not hear back from the Minister within ten days, it can go ahead and prepare the amendment.

[66] ibid., p. 8.
[67] ibid., p. 13.
[68] ibid., p. 14.

Part 6— Streamlined Process for Prescribed Amendments

Clause 44 of the Bill inserts new section 20A into the Planning and Environment Act, which establishes a 'streamlined' process whereby the Minister may prepare and approve amendments to planning schemes in accordance with criteria that will be prescribed in regulations. Notably, subsection (3) of new section 20A states that if the Minister determines to prepare an amendment in a prescribed class or classes in accordance with this section, then sections 17, 18 and 19 of the Act do not apply in respect of that amendment. The Explanatory Memorandum states that this means that the following requirements of the Planning and Environment Act do not apply:

- the requirement to provide copies of the amendment to the persons under section 17;
- the requirement to make the amendment and associated documents available at the offices during office hours under section 18; and
- the requirement to give notice of the preparation of the amendment under section 19.[69]

Clause 45 of the Bill inserts new section 38(1AAA) into the Planning and Environment Act.[70] Section 38 of the Act provides that Parliament must be notified of every amendment made to a planning scheme, within 10 sitting days of the approval of the amendment. Section 38 further provides that an amendment may be revoked, wholly or in part, by a resolution passed by either House of Parliament within 10 sitting days of Parliament being notified of the approved amendment. New section 38(1AAA) provides that notices laid before Parliament regarding approved amendments to planning schemes must specify whether the amendment was prepared by the Minister under the new section 20A inserted by clause 44.

Part 7— Agreements

Part 7 of the Bill deals with planning agreements made under section 173 of the Planning and Environment Act. As explained in the Background section of this paper, these agreements are known as 'section 173 agreements'. At present, under sections 177 and 178 of the Act, a section 173 agreement cannot be amended or ended unless all parties to the agreement support the change.

Clause 49 of the Bill provides for a new process for amending or ending section 173 agreements, when not all the parties support the change. Clause 49 substitutes section 178 of the Act with a new section 178 and inserts new sections 178A to 178I into the Act.

New section 178 provides that a section 173 agreement can be amended either by agreement of the responsible authority and all persons bound by any covenant in the

[69] ibid., pp. 15-16.
[70] Clause 45 also makes a consequential amendment to section 38(1B) of the Planning and Environment Act.

agreement, or in accordance with this new Division (Subdivision 2—Ending and amendment of agreements).

New section 178A sets out how an owner of land, or a person who has entered into an agreement under section 173 in anticipation of becoming the owner of the land, may apply to the responsible authority for agreement to a proposal to amend or end an agreement regarding that land.

New sections 178B-178I include provisions that set out the matters the responsible authority must take into account in considering a proposal to amend or end an agreement; the notice requirements if the responsible authority agrees in principal to the proposal (if it does not agree that is the end of the matter[71]); and the procedure for actualising the amendment or ending of the agreement.

Clauses 53 and 54 of the Bill provide for the review of new sections 178A-178I. Clause 53 repeals the existing sections 184(3) and (4) of the Planning and Environment Act (which enable a purchaser or owner of land to apply to VCAT for an amendment to an agreement if the parties cannot reach agreement and, because of the clause 49 amendments, are no longer relevant). Clause 54 then inserts new sections 184A to 184G into the Act to replace them. These new sections set out the process for applying to VCAT for a review of a decision by a responsible authority in relation to the amendment or ending of a section 173 agreement.[72]

Part 8—Acquiring Authorities and Compensation

Clause 58 of the Bill amends section 109 of the Planning and Environment Act, which broadly deals with the payment of compensation to an owner or occupier of land. The existing section 109 sets out when compensation is payable by authorities other than the planning authority. The other authorities include 'a Minister or public authority'. Clause 58 widens the listed other authorities to also include 'a municipal council'.

Part 9— Proceedings Before the Tribunal

Part 9 of the Bill makes amendments to the Planning and Environment Act to do with the amendment and review of planning permits by VCAT ('the Tribunal').

Clause 60 of the Bill substitutes section 72(2)(a) of the Planning and Environment Act with a new section 72(2)(a). Section 72 of the Act currently provides that a person who is entitled to use or develop land in accordance with a permit may apply to the responsible authority for an amendment to the permit, unless that permit has been issued at the direction of the Tribunal. The substitution of new section 72(2)(a) provides that permits issued at the direction of the Tribunal can be amended by the responsible authority unless the Tribunal has directed (under section 85 of the Act) that the responsible authority must not amend that permit.

[71] Planning and Environment Amendment (General) Bill 2012, Explanatory Memorandum, p. 17.
[72] ibid., p. 20.

Clause 63 of the Bill inserts new section 84AB into the Planning and Environment Act to allow the Tribunal to confine a review of an application made under certain sections of the Act to particular matters, if all parties agree that this can happen. According to the Explanatory Memorandum, 'This will mean that VCAT will not have to revisit all elements that have already been agreed to or are not in dispute'.[73]

Clause 64 of the Bill inserts new section 85(1A) into the Planning and Environment Act, which relates to changes made to section 72 of the Act by clause 60. Section 85 of the Act deals with the Tribunal's determination of applications for review. New section 85(1A) provides that if the Tribunal directs a responsible authority to issue a permit (under section 85(1)(b)) or directs that a permit contain specified conditions (under section 85(1)(e)) then the Tribunal may direct that the permit or a specified part of the permit must not be amended by the responsible authority (under Division 1A—Amendment of permits by responsible authority).

Clause 66 of the Bill makes amendments to section 97P of the Planning and Environment Act. Section 97P provides that an applicant for a certificate of compliance may apply to the Tribunal for a review of a decision or failure of a responsible authority to issue a certificate. Clause 66 inserts a new heading and a new subsection 1A, which provides that in reviewing a decision or failure to issue a certificate under this section, the Tribunal may confine its review to particular matters in dispute, if all parties agree.

Part 10— General Amendments to Planning and Environment Act 1987

Clause 69 of the Bill inserts a definition of 'permit' into section 3 of the Planning and Environment Act. It states that 'permit includes any plans, drawings, or other documents approved under a permit'.

Clause 70 of the Bill removes the power that authorises planning authorities to approve amendments of planning schemes, by repealing sections 11, 31(3), 35(A), 35(B), 38(1AA) and 40(1A) of the Planning and Environment Act.

Clause 74 of the Bill amends section 24 of the Planning and Environment Act which deals with panel hearings in regard to the amendment of planning schemes. Section 24 currently provides that the panel must consider all submissions referred to it and give a reasonable opportunity to be heard to: any person who has made a submission referred to it; the planning authority; and any responsible authority or municipal council concerned. Clause 74 extends section 24 to include any person who asked the planning authority to prepare the amendment.

Clause 76 of the Bill amends section 60 of the Planning and Environment Act which sets out the matters that a responsible authority must consider before deciding on a permit application. Clause 76 adds that a responsible authority must also take into

[73] ibid., p. 24.

account any significant social and economic effects which the responsible authority considers the use or development may have.

Clause 79 of the Bill amends section 97E of the Planning and Environment Act which deals with panels appointed under Part 8 of the Act. Section 97E(2) provides that the panel must consider the objections and submissions referred to it, and give any person who made an objection or submission referred to it, a reasonable opportunity to be heard. Clause 79 inserts subsection (2A) which adds that the panel must also give the applicant a reasonable opportunity to be heard.

Clause 81 of the Bill inserts a new section 152 into the Planning and Environment Act which sets out the powers of a (Ministerial) advisory committee if it conducts a hearing into a matter. The powers for an advisory committee are drawn from sections of the Act that set out the powers of the panels (appointed under Part 8 of the Act) when they conduct hearings.[74]

Clause 82 of the Bill provides for the creation of a 'directions panel' by inserting new sections 158A and 158B into the Planning and Environment Act. New Section 158A provides for the appointment of a directions panel by the Minister. New section 158B provides that a directions panel may give directions in relation to a hearing in the same way that a panel may give directions under section 159 of the Act, and to the same effect. Section 159(1) states that a panel may give directions about: the time and place of hearings; matters preliminary to hearings; and the conduct of hearings.

According to the Explanatory Memorandum, the intended purpose of the creation of a directions panel is to provide for 'standing panels that can give directions on preliminary hearing matters and the conduct of hearings, allowing councils, parties and their advocates to better prepare for the panel process and ensure that panel hearings start without unnecessary delay'.[75]

Part 11— Amendments to the Subdivision Act 1988

Part 11 of the Bill makes amendments to the Subdivision Act 1988, primarily in regard to requirements for public open space. Clause 88 of the Bill inserts new section 18A into the Subdivision Act. Section 18 of the Act makes provision for the requirement of public open space in a subdivision of land when it is not specified in the planning scheme. The new section 18A inserted by the Bill sets out the requirements for the provision of public open space in a subdivision of land, when it *is* specified in the planning scheme.

[74] For a summary of the sections which will apply to an advisory committee when it conducts a hearing as if it was a panel, see pages 28-29 of the Explanatory Memorandum.
[75] ibid., p. 30.

4. Stakeholders

Up to the time of printing there has not been any apparent stakeholder reportage directly on the Bill in the media. Submissions in 2011 to the Victorian Planning System Ministerial Advisory Committee however canvas some relevant stakeholder opinion which is briefly presented below.

In its submission, the Municipal Association of Victoria (MAV) requested confirmation from the State Government that planning decisions will remain with democratically elected Councils and that the Victorian planning system adequately acknowledges the role of local Councils in local planning matters.[76] In a similar vein, the Victorian Local Governance Association submitted that in the context of industry calls for a transference of powers from local governments to authorised planners, Development Approval Committees and Planning Panels, 'Great caution needs to be applied in considering changes to the system that may reduce the role of local governments'.[77]

The Housing Industry Association proposed that planning referral authorities should be implemented to preside over certain applications of regional significance and that consideration could be given to expanding the availability of alternative consent models across Victoria and which could be used for matters of regional or State significance.[78]

While the Property Council of Australia advocated that development approvals committees, either in the form of Planning Referral Authorities, or some other form that complies with the Development Assessment Forum model be established in all councils. 'This would greatly increase the productivity of councils, reduce timelines for development approvals and increase certainty within the planning system'.[79]

5. Other Jurisdictions

One of the key purposes of the Bill is to establish the Planning Application Committee. Under the Bill, local government may, with the Minister's consent, seek advice about a planning permit application (or class of applications), or delegate their decision-making powers for a permit application (or class of applications), to the Planning Application

[76] Municipal Association of Victoria (2011) *Submission to the Ministerial Advisory Committee on Planning Reform*, MAV website, Attachment 1 State Council resolutions, viewed 3 October 2012, <http://www.mav.asn.au/search/Results.aspx?k=submission%20to%20Ministerial%20Advisory%20Committee>.

[77] Victorian Local Governance Association (2011) *Review of Victoria's Overall Planning System Submission*, VLGA website, p. 12, viewed 3 October 2012, <http://www.vlga.org.au/Projects___Campaigns/Land_Use_Planning.aspx>.

[78] Housing Industry Association (2011) *Submission by the Housing Industry Association to the Victorian Planning System Ministerial Advisory Committee on the Review of Victoria's Planning System*, HIA website, p. 15, viewed 3 October 2012, <http://hia.com.au/media/Industry%20policy/A%20to%20Z%20submissions.aspx>.

[79] Property Council of Australia (Victorian Division) (2011) *Submission to the Victorian Planning System Ministerial Advisory Committee Review of the Victorian Planning System*, Property Council of Australia website, p. 18, viewed 3 October 2012, <http://www.propertyoz.com.au/Article/Resource.aspx?p=21&submission=810>.

Committee. This section of the Research Brief will focus on some of the planning bodies in other jurisdictions (New South Wales, South Australia and Western Australia) that are used to provide advice about, or assume decision-making responsibility for, development assessment in council municipalities.

Planning bodies formed primarily for the purpose of determining state significant development applications are beyond the scope of this research brief and therefore will not be considered in this section.

New South Wales

The principal planning legislation in NSW is the *Environmental Planning and Assessment Act 1979*. In NSW, local councils are the 'consent authority' (or decision-maker) for most development assessments.[80] However, the Planning Minister can appoint a 'joint regional planning panel' or a 'planning assessment panel' to exercise a council's function as a consent authority. A local council may also establish an 'independent hearing and assessment panel' to provide advice to the council about any aspect of a development application.

A brief outline of the functions of each of these planning bodies is provided below.

Joint Regional Planning Panels

Section 23G of the Environmental Planning and Assessment Act states that the Planning Minister may establish Joint Regional Planning Panels for particular parts of NSW. A key role of Joint Regional Planning Panels is to determine 'regionally significant' development applications as defined under schedule 4A of the Act. These include:

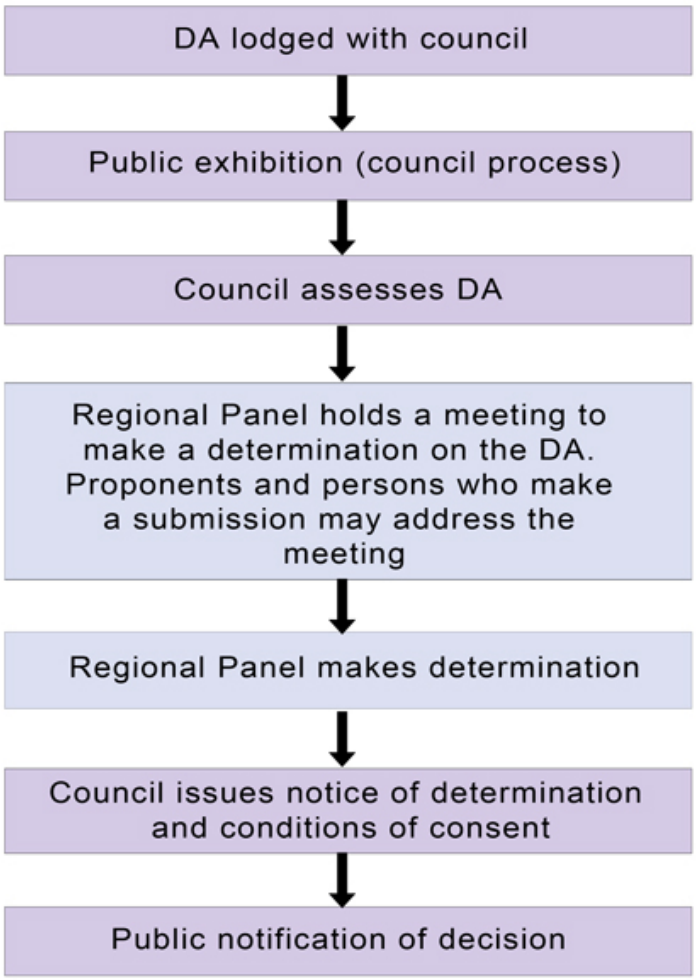
- development with a capital investment value (CIV) over $20 million
- development with a CIV over $5 million which is
    - council related
    - lodged by or on behalf of the Crown (State of NSW)
    - private infrastructure and community facilities or
    - eco-tourist facilities
- extractive industries, waste facilities and marinas that are designated development
- certain coastal subdivisions
- development with a CIV between $10 million and $20 million which are referred to the regional panel by the applicant after 120 days
- crown development applications (with a CIV under $5 million) referred to the regional panel by the applicant or local council after 70 days from lodgement as undetermined, including where recommended conditions are in dispute.[81]

[80] Environmental Defender's Office NSW (2012) '2.2 Development Applications and Consents', fact sheet, Sydney, EDO, viewed 2 October 2012, <http://www.edo.org.au/edonsw/site/factsh/fs02_2_6.php>.
[81] NSW Government (2012) 'Operations', Joint Regional Planning Panels website, viewed 2 October 2012, <http://jrpp.planning.nsw.gov.au/AboutUs/Operations/tabid/70/language/en-AU/Default.aspx>.

A regional panel consists of five members: three members are appointed by the Planning Minister; and two members are nominated by the local council. Members appointed by the Minister, and at least one of the council-nominated members, must have expertise in at least one of the following areas: planning, the environment, urban design, architecture, land economics, heritage, traffic and transport, law, tourism or engineering.[82] The Chair is to be appointed from one of the state members with the concurrence of the Local Government and Shires Association.[83]

The process for determining a regionally significant development application (DA) is shown in Figure 1.

Figure 1: Process for Assessing and Determining a Regionally Significant Development Application



Source: NSW Government (2012) [84]

[82] Environmental Planning and Assessment Act 1979, schedule 4. For members appointed by the Minister, expertise may also include 'public administration'.
[83] ibid.
[84] NSW Government (2012) 'Operations', op. cit.

Figure 1 shows that the local council administers the public exhibition and assessment processes. However, the regional panel hears submissions and makes the final determination. The council is then required to issue the notice of determination and provide public notification of the decision.

Planning Assessment Panels

Under s 118 of the Act, the Minister for Planning may appoint a Planning Assessment Panel or planning administrator[85] to exercise a Council's consent authority functions in certain circumstances. These include if:

> (a) the Minister is of the opinion that the council has failed to comply with its obligations under the planning legislation, or
> (b) the Minister is of the opinion that the performance of a council in dealing with planning and development matters (or any particular class of such matters) is unsatisfactory because of the manner in which the council has dealt with those matters, the time taken or in any other respect, or
> (c) the council agrees to the appointment, or
> (d) a report referred to in section 74C of the *Independent Commission Against Corruption Act 1988* recommends that consideration be given to the appointment because of serious corrupt conduct by any of the councillors in connection with the exercise or purported exercise of functions conferred or imposed on the council by or under this Act.

A Planning Assessment Panel comprises between three and five members appointed by the Minister. Together, the members of the planning assessment panel, in the opinion of the Minister, must have relevant expertise in the fields of planning and development. The Chairperson is selected by the Minister from the panel members.[86]

Independent Hearing and Assessment Panels

Under s 23I of the Environmental Planning and Assessment Act, a local council may establish a panel of experts to provide advice about any aspect of a development application or planning matter.[87] Such a panel is called an Independent Hearing and Assessment Panel (IHAP). The IHAP must consist of persons with expertise in at least one of the following areas: planning; the environment; heritage; architecture; urban design; traffic and transport; law; land economics; engineering; tourism; or government and public administration.[88] The IHAP may hear public submissions and must submit a report to the relevant council.[89]

In a recent Green Paper about the NSW Planning System, the NSW Government stated:

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[85] A Regional Planning Panel may also be appointed under this section.
[86] Environmental Planning and Assessment Act, s 118AA.
[87] A local council must establish an Independent Hearing and Assessment Panel for a development application or planning matter if an assessment by a panel is required under an Environmental Planning Instrument. Environmental Planning and Assessment Act, s 23I(2).
[88] Environmental Planning and Assessment Act, s 23I(3).
[89] ibid., s 23I(4).

> To restore public confidence in the planning system and merit based decision making, the Government considers a shift towards independent expert decision making as highly desirable. The Government strongly supports those councils which are already using independent expert panels and encourages all other councils to consider and implement this reform, initiated by local government, in the transition to new planning system for NSW.[90]

South Australia

The key planning legislation for South Australia is the *Development Act 1993*. Under section 34(23) of that Act, it is mandatory that a local council delegates its powers and functions with respect to determining development applications to: a council development assessment panel; or a council officer; or a regional development assessment panel. Under s 34(27) of the Act, the council must develop a publicly available policy stating the basis on which it will delegate its development assessment functions to these bodies.

Outlined below are the roles and functions of Council Development Assessment Panels and Regional Development Assessment Panels.

Council Development Assessment Panels

Under s 56A of the Development Act, a council development assessment panel (CDAP) must consist of seven members (unless otherwise authorised by the Minister). The presiding member of the panel is appointed by the council and must: not be a member or officer of the council; be a fit and proper person to be a member of a development assessment panel; and, in the opinion of the council, have a reasonable knowledge of the requirements of the Act as well as appropriate qualifications or experience.

Council Development Assessment Panel members are also appointed by the council. Up to half of these members may be council members or officers of the council (subject to certain restrictions).[91] The remaining members must: be fit and proper people for the purpose of the panel; in the opinion of the council, have a reasonable understanding of the Act and appropriate qualifications, or expertise. Together with the presiding member, the remaining members must provide a reasonable balance across the fields relevant to the activities of the panel.[92]

The council must also ensure that at least one member of the panel is a woman and at least one member is a man. And, as far as reasonably practicable, the council should ensure there are equal numbers of women and men on the panel.[93]

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[90] NSW Government (2012) *A New Planning System for NSW Green Paper*, Sydney, NSW Government, p. 49, viewed 2 October 2012, <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=fUggrUzDe3A%3d&tabid=68&language=en-US>.

[91] See Development Assessment Act 1993, s 56A(3)(c)(i).

[92] ibid., s 56A(3)(c)(ii).

[93] ibid., s 56A(3)(d).

The Planning Institute of Australia – South Australian Division – states that:

> Generally only a small percentage of development applications are actually referred to CDAPs for a decision. The vast majority of applications are usually assessed by Council Development Assessment Planners acting under delegated authority.[94]

Regional Development Assessment Panels

Under s 34(3) of the Development Act, the South Australian Governor may, by regulation, constitute a regional development assessment panel (RDAP) to determine development applications in relation to: an area of the state administered by two or more councils; or an area of the state not within the area of a council. The regulation constituting a RDAP may also provide for: the number of members; the criteria for membership; and appointment procedures.[95]

The regulation establishing the RDAP may only be made with the concurrence of the relevant councils.[96] A council may decide to participate in a RDAP instead of, or in addition to, a council development assessment panel.[97] A council may also withdraw from the RDAP by giving the Planning Minister two months written notice.[98]

Western Australia

Development Assessment Panels (DAPs) were introduced into Western Australia in 2011 as a direct response to DAF's leading practice model,[99] whereby an expert panel has the power to determine applications on behalf of the relevant decision making authority. Western Australia's DAPs were also established as a response to DAF's leading practice five, that is, to have a single point of assessment.[100]

Part IIA of the *Planning and Development Act 2005* provides the head of power for DAPs, while the details are set out in the Planning and Development (Development Assessment Panels) Regulations 2011.

According to s 171C of the Planning and Development Act 2005, the Minister can establish two different types of DAPs:

> (a) a LDAP for a district;

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[94] Planning Institute of Australia, South Australian Division (2009) 'Role of the Development Assessment Planner', DA website, viewed 3 October 2012, <http://www.daonline.net.au/site/role_of_the_development_assessment_planner.php>.
[95] Development Act 1993, s 34(4).
[96] Development Act 1993, s 34(20).
[97] Government of Western Australia. Department of Planning (2009) 'Implementing Development Assessment Panels in Western Australia', *Discussion Paper September 2009*, Perth, Department for Planning and Infrastructure, p. 6, viewed 5 October 2012, <http://www.planning.wa.gov.au/publications/888.asp>.
[98] Development Act 1993, s 34(21).
[99] Government of Western Australia. Department of Planning (2010) 'Implementing Development Assessment Panels in Western Australia', *Policy Statement April 2010*, Planning WA website, viewed 1 October 2012, <http://www.planning.wa.gov.au/publications/889.asp>.
[100] Government of Western Australia. Department of Planning (2009) op. cit., p. 4.

(b) a JDAP for 2 or more districts.

A local development assessment panel (LDAP) services a single local government deemed to be a high growth local government with enough development to support its own DAP and a joint development assessment panel (JDAP) services two or more local governments where those local governments are not considered to have enough development to support their own DAP.[101]

The regulations provide for DAPs to determine the following types of applications:

- all Mandatory DAP Applications made across the State (prescribed under s.171A(2)(a) of the 2010 Amendment Act);
- any Optional DAP applications that an applicant has elected to have determined by a DAP (prescribed under s.171A(2)(ba) of the 2010 Amendment Act);
- applications delegated to the DAP by a local government or the WAPC (as permitted under section 171B of the 2010 Amendment Act); and
- r.17 minor amendment applications, which are applications to amend or cancel any development approval, or conditions of approval, granted previously by a DAP.

DAPs will not determine any applications that do not fit within the criteria prescribed in the regulations.[102]

Mandatory DAP Applications automatically apply to:

- $7 million or more except City of Perth
- $15 million or more in City of Perth

Except for excluded development applications:

- Single house or incidental development;
- Less than 10 grouped dwellings;
- Less than 10 multiple dwellings;
- Development by a local government or the WAPC;
- Development in an improvement scheme area; and
- Development in a redevelopment scheme area.

Optional DAP Applications (i.e. the applicant may opt-in)

- Where the applicant has elected to "opt-in", the relevant DAP will determine the application instead of the relevant local government and/or the Western Australian Planning Commission.
- $3 million - $7 million except City of Perth
- $10 million - $15 million in City of Perth

Except for excluded development applications (as listed earlier) or delegated applications.

[101] Government of Western Australia. Department of Planning (2011) *Development Assessment Panel – Questions and Answers*, p. 1, Planning WA website, viewed 1 October 2012, <http://daps.planning.wa.gov.au/5887.asp>.
[102] ibid., p. 2.

Delegated DAP Applications (i.e. a Local Government or WAPC may delegate to a DAP)

- $3 million - $7 million except City of Perth
- $10 million - $15 million in City of Perth

Except for excluded development applications.[103]

Membership

Membership requirements are set out in Part 4 of the Planning and Development (Development Assessment Panels) Regulations 2011.

Each DAP will consist of five panel members:

- the presiding member (a specialist member),
- two specialist members (one of which is the deputy presiding member); and
- two local government representatives (elected members nominated by the relevant local government).

Appointments are for a term of two years with a Ministerial option to reappoint.

Two local government representatives from the local government area permanently sit on an LDAP (which services one local government). Whereas two local government representatives from each relevant local government area will be appointed to a JDAP (which services two or more local government areas). They will however, only sit on the panel for determining applications being made under their local planning scheme. Therefore two local government members from each individual local government will rotate on and off the panel (to join the three specialist members), when an application within that particular local government area is being considered. Consequently, the local government membership of JDAPs will depend on the location of the development applications being determined at the time, to ensure local knowledge.[104]

Usually specialist members will have a tertiary qualification and may have experience in one or more of the following areas of expertise: town planning; architecture; urban design; engineering; landscape design; environment; law; and property development and management.

The Minister is required to ensure that any presiding member or deputy presiding member has experience and a tertiary qualification in town planning.[105]

[103] ibid., p. 3.
[104] ibid., pp. 9-10.
[105] ibid., p. 10.

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