Introduction
In this newsletter, we report on some recent case law in relation to validity of planning permit conditions. We also briefly report on other cases relating to brothels, secondary consents, and permit extensions.

Permit Conditions – Test of Validity
In *Melbourne Water Corporation v Domus Design Pty Ltd*,¹ the Supreme Court rejected an almost 50 year old English case that VCAT and many others thought to be the source of the law in relation to the validity of planning permit conditions. The Court endorsed a broader test of validity.

At issue was the validity of a subdivision permit condition requiring part of the land to be set aside as a drainage easement. The condition was imposed by Melbourne Water as a referral authority. The Court held that VCAT erred in finding the condition invalid because VCAT had relied on the test for validity in the English Court of Appeal case *Pyx Granite*.² The Court found *Pyx Granite* was not the law in Australia and that the correct test was as expressed by the High Court in *Allen*.³ Although VCAT had also referred to *Allen*, the Court found it had done so inaccurately.

In *Allen*, Walsh J stated that a condition must be ‘reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made. This purpose may be conveniently described … as being “the implementation of planning policy”, provided that it is borne in mind that it is from the Act and from any relevant provisions of the Ordinance, and not from some preconceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained’.⁴

The Court in *Domus Design* broadly applied the test in *Allen* and found that the relevant legislation included subdivision and water management legislation and these were relevant to ‘the implementation of planning policy’. It found that Melbourne Water had acted in accordance with the purposes of its powers to require easements under s 136 of the *Water Act 1958*. DPCD and State agencies should therefore be aware that the test relating to validity of a permit condition required by a referral authority is likely to be wider than that relating to conditions imposed by a responsible authority.

VCAT briefly considered the judgment in *Domus Design* in a recent case involving a challenge to the validity of a subdivision permit condition requiring removal of existing power poles and
the installation of underground power. In briefly reviewing the current law on the test of validity of a permit condition, VCAT referred to Rosemeer v City of Greater Geelong (No 1) and two subsequent VCAT cases as a ‘good overview of the framework’ for validity. VCAT distinguished Domus Design on the basis that the case did not relate to the powers of Melbourne Water.

The demise of Pyx Granite means its narrower test (the condition must ‘fairly and reasonably relate to the permitted development’) no longer applies. This narrower test has been adopted by many in planning for a long time. Domus Design will therefore create some uncertainty. No doubt the matter will be revisited by VCAT before long.

**Permit Conditions - Development Contributions**

In two recent cases, the Supreme Court considered the validity of conditions on permits to subdivide land that required payment of a levy under an approved development contributions plan (DCP) and that required construction of a road abutting the land. The infrastructure in the DCP to be funded by the levy included the road. VCAT had amended the conditions to allow the cost of the roadworks to be offset against the levy so the subdivider was not required to pay twice.

The Court discussed the relationship between part 3B, ss 62(1) and 62(2) of the Planning and Environment Act 1987, and the recently substituted ss 62(5) and 62(6), and concluded the Council (and VCAT) was required to impose conditions requiring payment of the levy to give effect to the DCP (under s 46N) and was unable to include an additional condition (such as the one imposed by VCAT) which defeated the intent of or conflicted with the condition requiring payment.

The Court also held that the Council’s decision to not agree to offset ‘...‘crosses the line” into the area reserved for governmental decision making as distinct from the exercise of the permit condition discretion. The Court also considered the effect of ss 62(5) and 62(6), as recently substituted by the legislature. It construed s 62(5)(a) as ‘referring to conditions other than conditions prescribed by s 46N(1); s 62(5) as ‘setting out cumulative alternatives’ and s 62(6) as providing ‘alternatives giving rise to a set of sequential prohibitions’. This was consistent with the Court’s observation that it ought to be possible that a collecting agency might agree to accept works instead of a levy if works or services must be provided under a permit.

In a more recent case, VCAT considered the validity of permit conditions requiring payments for development contributions and public open space in accordance with an unapproved DCP applying to multiple landowners. The Council argued the condition was required by the scheme. VCAT found the scheme provision contravened the intent of the 2004 amendments to the Planning and Environment Act 1987 relating to development contributions, and went on to find the condition invalid under s 62(6).

The Court and VCAT cases underline the need for great care in including development contributions conditions in permits.

**Brothels**

In Popular Pastimes Pty Ltd v Melbourne CC, the Court of Appeal considered s 74 of the Prostitution Control Act 1994 (the PC Act) and the prohibition on the grant of a permit ‘for a … development of land for the purpose of the operation of a brothel’ if the land is within 100 metres of a dwelling. The Court held that the prohibition applies not only to new brothels but also to extensions to existing brothels. It had regard to the principles of statutory interpretation in construing a provision consistent with the object of the PC Act, the context of the provision, and the drafting of s 74 itself. The judgment ensures that extension to the not inconsiderable number of brothels that existed before the commencement of the PC Act...
will be subject to the same restrictions as apply to new brothels established after that date.

**Secondary Consents**

In *Tentar Pty Ltd v Bayside CC*, VCAT held that refusal to consider the request for a secondary consent to increase the number of children at a child care centre from 70 to 78 was not open to the Council. VCAT granted the consent because the increase was minor. The decision is a reminder that secondary consent requests are not subject to formal notice requirements.

**Gaming Machines**

In *Walker Corporation Pty Ltd v Wyndham CC*, VCAT considered whether a hotel (including 50 gaming machines) should be permitted in an industrial zone in Point Cook having regard to the possible effect on the viability of two nearby activity centres (Point Cook Town Centre and Williams Landing). The gaming machines had already been approved under the *Gambling Regulation Act 2003*. VCAT found there was no inconsistency in policy because large planned centres in growth areas, such as Wyndham, can separate potentially incompatible uses such as gaming and retail functions. VCAT’s finding gives councils food for thought if scheme amendments are being prepared to include prohibitions on gaming machines in large planned centres.

**Extending Permits**

In *Burleigh v Frankston CC*, the Council refused to consider a request by a permit holder to extend the expiry date on a permit because it considered it had no power to consider a request outside the three month period following expiry. VCAT amended the date of the review application and held that the Council’s refusal to consider was a decision to refuse to extend the time. By extensive use of schedule 1 clause 62 and s 98 of the *Victorian Civil and Administrative Tribunal Act 1998*, VCAT created the circumstances in which it could determine the request and proceeded to extend the permit.

Although the decision could be doubted on the grounds that there was no valid proceeding at the time VCAT exercised its discretions and because the principles previously accepted in the Supreme Court were not considered, the decision is consistent with VCAT’s sometimes strenuous efforts to confer jurisdiction upon itself and to determine matters according to the substantial merits of the case. DPCD and municipal councils would be well advised to not refuse to make such a decision again in similar circumstances, at least until the matter is more authoritatively determined.

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**For further information**

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The VGSO is the primary source of legal services to the Victorian State Government and its statutory authorities, providing strategic advice and practical legal solutions.
7. Goodison v Yarra CC [2007] VCAT 1351, [12]. However, a potential difficulty in endorsing Rosemeier is that VCAT in Rosemeier endorsed Pyx Granite as a valid formulation of the test of validity – see Rosemeier, [67].
11. Carson Simpson Pty Ltd v Casey CC [2006] VCAT 1725, [70], [74].
14. [2007] VSCA 188.
15. [2007] VCAT 1315.