

**Submission
No 42**

INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN PLANNING FRAMEWORK

Organisation: Building 4.0 Cooperative Research Centre

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The Secretary
Legislative Council Environment and Planning Committee
Parliament House, Spring Street
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Dear Secretary,

SUBMISSION TO THE INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN PLANNING FRAMEWORK

The Building 4.0 Cooperative Research Centre (Building 4.0 CRC) welcomes the opportunity to provide a submission to the Inquiry into the Protections within the Victorian Planning Framework.

Building 4.0 CRC is an industry-led research initiative co-funded by the Australian Government. The CRC aims to develop an internationally competitive, dynamic and thriving Australian advanced manufacturing sector, delivering better buildings at lower cost and the human capacity to lead the future industry.¹

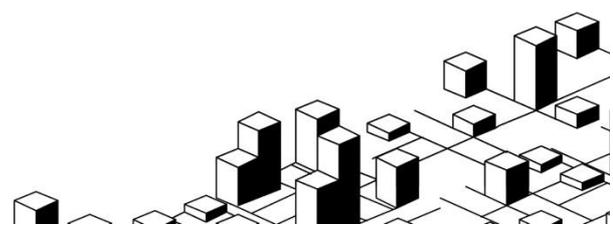
The first project commissioned by the CRC has the title 'ePlanning and eApprovals – Scoping Study'. It has as its objective developing a road map for the phased design and implementation of an innovative digital platform to facilitate effective, efficient and timely planning and building permits and approvals, thereby removing unnecessary delays and costs that impose substantial constraints on the building and construction sector.

The ePlanning and eApprovals project addresses a number of the issues identified in the Inquiry's terms of reference, specifically the high cost of housing and delivering certainty and fairness in planning decisions.

Each of these issues is addressed below. The comments draw from two reports prepared by the Project Team that are attachments to this submission.

1. The first report is entitled *E-Planning and E-Approvals Project: Technical and Legal Assessment*, and contains a current assessment of the technical and legal environment for planning and building permits and approvals, benchmarks it against initiatives in Australia and key overseas jurisdictions, and concludes with an assessment of the technical, policy, legislative and regulatory challenges and

¹ Building 4.0 CRC - <https://building4pointzero.org/>.



requirements that would need to be met in order to design and implement an innovative digital platform to facilitate effective, efficient and timely planning and building permits and approvals.

2. The second report is entitled *E-Planning and E-Approvals Project: Roadmap*, and contains a series of recommended projects for delivering on the project's vision.

(1) The high cost of housing

The current regulatory regime is **costly**. While our project did not seek to independently verify the cost of the regime, other studies have. For example, a March 2016 submission by SGS Economics and Planning to the Council on Federal Financial Relations Affordable Housing Working Group concluded the potential benefits from improvements in planning and building processes could be from \$400 million to \$600 million per year – or up to 2 per cent of the value of the sector - based on their analysis of delay costs faced by developers.² And using the SGS calculations of the average delay costs for low- and high-rise residential dwellings, Better Regulation Victoria estimates that for each additional day taken to approve residential permit applications for new dwellings as a category, applicants incur total delay costs of \$7.6 million. Moreover, Better Regulation Victoria estimates that if process improvements reduced the time taken to approve residential permits for new dwellings in Victoria by an average of one month, this would equate to around \$200 million in avoided delay costs.³

So what is the source of this delay that leads to these avoidable costs?

Our research revealed the regulatory space for planning and building permits is:

Crowded: The planning and building regulatory space is occupied by: (1) a variety of state (public) and non-state (private) actors extending beyond those directly involved with the preparation and assessment of planning and building approval applications; (2) a variety of formal legal instruments giving effect to diverse legal, economic and social objectives; and (3) by a variety of different decisions, permits, approvals, certificates and consents made under those legal instruments.

Contested: The actors (state and private) occupying the regulatory space possess resources (information; institutional credibility; money; people) relevant to governments' regulation of the area. Yet, many of these actors have different interests and values, and different objectives that they would like to see a building and planning system deliver. These interests, values and objectives can differ economically, socially and environmentally. Even within government there are agencies with different missions, priorities and regulatory roles. The regulatory regime seeks to bring these actors together in a coordinated and synergetic manner that respects each actor's proprietary, legal and civic rights. Central to this is the use of qualitative and subjective decision-making criteria, referral, notice and

² SGS Economics and Planning submission to the Council on Federal Financial Relations Affordable Housing Working Group Issues Paper (March 2016)), pp. 1, 13.

³ Better Regulation Victoria, *Planning and Building Approvals Process Review: Discussion Paper* (State of Victoria, 2019).



objection processes, and rights of review before VCAT and other bodies. However, for many stakeholders, these processes introduce uncertainty and a lack of predictability that, in turn, translates into delay and cost.

Changeable: The sector operates in a dynamic and changeable environment. Some of this change is brought about by changes in industry practice; some by technological change and disruption; some by events and crises; and some by government policy. The complexity and cost of the system itself also is driving calls for change to which governments are responding with proposed changes to policy, regulation and law. The changes tend to be cumulative, with the result that the State's planning and building approvals and building system today contains many layers of state and local government policies, standards, and requirements.

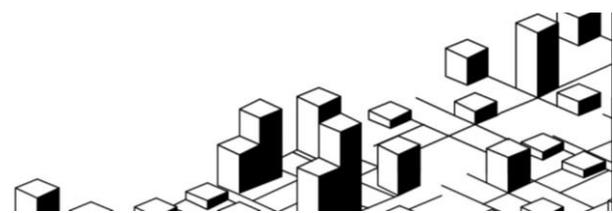
Complex: All of this contributes to complexity. The system also is technical and nuanced, sometimes with fine distinctions that can lead to significant consequences. Moreover, this complexity is exacerbated by the different regulatory requirements, approaches and processes employed by different local governments (and at a national level, by different legislative frameworks employed by States and Territories).

Cumbersome: This complexity is compounded by cumbersome systems. Approval processes have many complexities in planning, and this complexity manifests itself in complex information and forms that take time and cost to complete, assess and process. Yet the planning and building system contains old processes and lacks useful functionality. The limited adoption of technologies to the planning and building approval processes in Victoria has led to avoidable delay and cost in the issuing of planning approvals, and a lack of transparency in issuing and monitoring compliance with building permits.

Developing an ePlanning and eApprovals Digital Platform

The project's findings combined to underpin its primary recommendation for the development of a 'one-stop' innovative digital platform covering the whole-of-building lifecycle that would facilitate effective, efficient and timely planning and building permits and approvals, thereby removing unnecessary delays and costs that impose substantial constraints on the building and construction sector, and which flow through to consumers in the high cost of housing. Digital and information technologies have been identified as core enablers to facilitate effective, efficient and timely planning and building permits and approvals. Initiatives in various jurisdictions have demonstrated their opportunities and benefits.

Moreover, developing a digital platform has the potential to unlock other reforms to improve the efficiency and effectiveness of the planning and building approval process by, for example, introducing useful functionalities such as workflow capabilities and integration of statutory clock management, improved template and document management, and access and integration with council data management systems. It also creates the opportunity to capture aggregate urban level, smart data for better decision-making.



(3) Delivering certainty and fairness in planning decisions for communities

As noted above, the planning and building approvals system seeks to respect each actor's proprietary, legal and civic rights, and to facilitate decision-making that appropriately balances the economic, social and environmental interests, values and objectives involved in urban planning and design, by (in part): (1) employing qualitative and subjective decision-making criteria; (2) referral, notice and objection processes; and (3) rights of review before VCAT and other bodies. These processes are designed to ensure both fairness and better (fully informed) decision-making. Yet our research revealed this occurs at great financial expense (as noted above), and at the expense of certainty.

The stakeholder interviews conducted as part of the research revealed three aspects in particular that are problematic.

Quantitative / qualitative assessment modes

Stakeholders interviewed as part of the ePlanning and eApprovals project revealed it is with respect to the application of qualitative or subjective decision-making criteria that much of the uncertainty and disputation found in the system exists. An example of a qualitative Criteria is Clause 54.02 (Neighbourhood Character) of the Victorian Residential Code that provides '[t]he design response must be appropriate to the neighbourhood and the site' and 'must respect the existing or preferred neighbourhood character and respond to the features of the site'. This is an inherently *subjective* factor that can have multiple interpretations and about which reasonable minds will differ. This is to be contrasted with quantitative assessment criteria such as Clause 54.03-2 (Building Height) that provides that if no maximum height is specified in a zone or overlay, 'the maximum building height should not exceed 9 metres, unless the slope of the natural ground level at any cross section wider than 8 metres of the site of the building is 2.5 degrees or more, in which case the maximum building height should not exceed 10 metres'. This is an *objective* factor that can be objectively assessed and verified.

A number of stakeholders called for reform of the manner with which qualitative criteria are both framed and applied. Perspectives differed, however, on the best approach. For example, some practitioners supported a separation of the two modes into different systems, at least in the initial stages of the assessment process. Other practitioners proposed that some or all of the qualitative criteria be transformed into quantitative measurement methods by, for example, the use of proxy measures.

A number of participants, however, warned of potential risks from quantification to designing good places. They expressed caution about a predominantly quantitative system placing emphasis on meeting individual requirements foremost without consideration of the cumulative effect of requirements considered together and experienced in the building as a whole. Others were concerned that the potential improved certainty and clarity from a quantitative system could fuel calls for the reduction or removal of qualitative assessment methods completely without understanding their purpose in design quality. This lack of clarity and understanding on the purpose between the two different modes for both



development practitioners and assessors, and the best utilisation of each mode within the current system, highlights the need for further research in this area.

Planning objection and appeals process

Stakeholders interviewed as part of the ePlanning and eApprovals project revealed that for a range of participants, third party appeal rights were the greatest source of delay and uncertainty in the process. Participants reported that third party appeals rights and its inherent high risk of design change acts as a disincentive to developers of projects in established areas investing in detailed project documentation at the design stage. Participants also criticised the ease of the process by which objections are gathered, and the role of councillors in the process that can turn evidence based assessments into political assessments. Some participants described developers gaming the system to bypass the objection stage and to have matters proceed straight to VCAT where they believe evidence based assessments prevail.

These stakeholder concerns are supported by research that indicates Council officers and VCAT look at decisions in a broadly similar manner compared to councillors who are more inclined to refuse applications.⁴ The literature also identifies a number of problems associated with the third party objection and VCAT appeals processes in addition to the delay, uncertainty and gaming mentioned above, including issues of perceived bias and legitimacy, democratic accountability and corruption, and costs and community access.⁵

All of this suggest the need for a holistic review of existing third party objection and appeals processes to: (1) ensure they properly align with the overall objectives of the planning process; and (2) deliver those objectives effectively (increase consistency and speed of decision-making; minimise unnecessary disputation and conflict); efficiently (increase speed; reduce delays and costs); and legitimately (improve system credibility; increase community acceptability and trust; improve perceptions of fairness amongst those engaged with the processes).

Multiple, overlapping regulatory requirements

The ePlanning and eApprovals project revealed that three of the more frequently cited factors contributing to the complexity of the planning and building approvals process are: (1) that they operate at multiple, overlapping levels: national, state and local (council / municipal); (2) that there are multiple regulatory requirements with overlapping and sometimes difficult to reconcile requirements (e.g., safety, heritage, energy efficiency, sustainability, neighbourhood character, etc.); and (3) at the local level, there is a lack of standardisation and consistency of approach.

⁴ Brendan McRae and Joe Hurley, 'Spinning at Wheel: Examining Decision Making Process and Outcomes in Development Assessment (Paper presented at State of Australian Cities Conference, Sydney, 2013), cited in Stephen Rowley, *The Victorian Planning System: Practices, Problems and Prospects* (The Federation Press, 2017) 128-30).

⁵ See generally Stephen Rowley, *The Victorian Planning System: Practices, Problems and Prospects* (The Federation Press, 2017) Ch.4.



A review of the literature reveals that while a degree of harmonisation exist in the building regulatory space with the National Construction Code, calls remain for greater consistency in its application and enforcement. In the planning space however, there has been less progress.

A number of stakeholders called for the system to be consolidated or harmonised, albeit they had different perspectives concerning at what level it should be harmonised. Some called for harmonisation at the national level; some at the State level; and some still for harmonisation at the local (council) level. Some also called for harmonisation between planning and building (and other related) regulatory schemes. However, none were specific as to what harmonisation meant or involved (e.g., of policy, process, institutions and/or mechanisms?) and how it might be achieved (e.g., full legal centralisation, common national standards, template legislation; etc). Some also alluded to the answer to the harmonisation question being different for different projects (e.g., large v small; commercial v residential v infrastructure). This leaves the goal and scope of 'harmonisation', its benefits, and how to realise them, ill-defined and worthy of further research.

Conclusion and recommendations

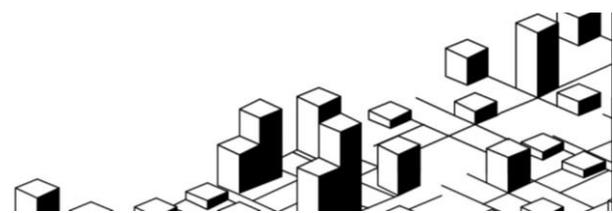
Our research revealed that attempting to meet the multitude of competing interests and objectives involved in the planning and building approval process has led to regulatory regimes that are complex and cumbersome which contribute to delays and uncertainties that inevitably contribute to the high cost of housing.

The available research also suggests that this complexity and uncertainty may be –

- creating an environment in which risks are not being identified or adequately addressed, undermining achievement of the system's underlying economic, social and environmental goals; and
- undermining industry and public confidence and trust in, and the fairness, legitimacy and credibility of, the regulatory regime.

The ePlanning and eApprovals project made a series of recommendations to address the complexity and cost of the current system. Of direct relevance to the current inquiry are the following recommendations:

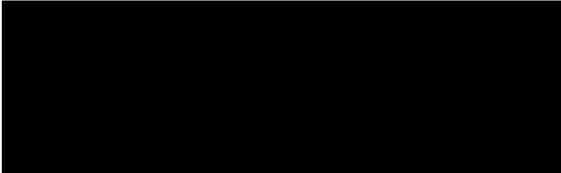
- The development of a 'one-stop' digital platform that cover the whole-of-building lifecycle that would facilitate effective, efficient and timely planning and building permits and approvals.
- Review and reform of the quantitative and qualitative assessment decision-making criteria part of the planning and building approvals and permits process.
- Review of the planning objection and appeals process to identify reform recommendations to leverage opportunities for improving the effectiveness, efficiency, fairness and legitimacy of those processes.



- Review options (and make recommendations) for a more harmonised regulatory framework and model for planning and building decision-making.

The CRC is grateful for the opportunity to make this submission. If you require further information about any of the above issues or have any questions about this submission, please contact me (details below).

Kind regards.



Dr Eric Windholz
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Building 4.0 CRC
and
Senior Lecturer - Faculty of Law
Monash University



Attachments:

Attachment 1 - E-Planning and E-Approvals Project: Technical and Legal Assessment

Attachment 2 - E-Planning and E-Approvals Project: Roadmap

