NATIONAL COMPETITION POLICY REVIEW OF VICTORIA'S PLANNING AND ENVIRONMENT ACT 1987 AND ASSOCIATED SUBORDINATE INSTRUMENTS

FINAL REPORT

INFRASTRUCTURE

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EXECUTIVE SUMMARY

Introduction

This Report has been produced following a review undertaken by Deacons and Tasman Economics, on behalf of the Victorian Minister for Planning, of the Victorian *Planning and Environment Act 1987* and its subordinate legislation ("**Victorian Planning Legislation**"), in light of the commitment of the Victorian Government made under the Competition Principles Agreement ("**CPA**") to ensure that provisions of its legislation do not restrict competition unless it can be demonstrated that:

- the benefits of the restrictions to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

Deacons, in conjunction with Tasman Economics, undertook a Model 2 ("semi-public") review of Victorian Planning Legislation based on the Victorian Government *Guidelines for the Review of Legislative Restrictions on Competition*. The review process involved notification to the public of the review, and the receipt and consideration of submissions by interested parties.

Objectives Of Victorian Planning Legislation

In essence, the Victorian Planning Legislation aims to:

- promote fairness and sustainability in decision-making;
- protect the natural and built environment from over-exploitation;
- prevent detriment to the community's amenity and safe environments resulting from the development and use of land;
- preserve places of significance to the community from harm;
- ensure that community infrastructure is provided in an orderly and properly co-ordinated fashion; and
- make net community benefit a basic planning principle.

How Does The Legislation Restrict Competition?

Victorian Planning Legislation may restrict competition both in the market for the use and development of Victorian land, and the markets for the provision of the range of goods and services which may be produced or provided using land situated in Victoria. This encompasses most businesses based in Victoria.

Because the Victorian Planning Legislation can affect the degree of competition in a wide range of product markets, the review includes five Case Studies highlighting elements of the Legislation, to allow a closer examination of the impact of restrictions on competition on the Victorian community.

Victorian Planning Legislation restricts competition in a variety of ways. For instance, it can:

- restrict entry of firms into markets (eg through zoning, overlays and activity centres policy);

- advantage some businesses over others (eg through permits or existing use rights and by granting a monopoly right for Responsible Authorities and Planning Authorities to undertake functions that may be efficiently provided by others);

- restrict prices or production levels (eg through Section 173 Agreements and Home Occupation Particular Provisions);

- restrict quality or location of goods and services (eg through building and site development standards and zoning);

- restrict the price and/or type of input used in production, including land (eg through zoning controls and Freeway Service Centre controls);

- restrict advertising and promotional activities (eg by regulating the size of certain classes of sign); and

- impose transactions costs on businesses or households (eg through fees; cost in terms of time to prepare and process applications, objections and appeals; cost to hear appeals; and monitoring and enforcement costs).

Identifying Costs And Benefits Associated With Restrictions On Competition

Recommendation 1: It is recommended that the Victorian Government develop and maintain a database providing information in relation to the number of planning scheme amendments/planning permit applications by type, number of objections by type, number of appeals by type and number of successful appeals by type. It is considered that the systematic collection of this information would greatly assist future analysis of the performance of the Victorian Planning System.

The review adopts a qualitative cost benefit analysis methodology to identify a number of potentially high cost system level restrictions on competition arising from the Victorian Planning Legislation and its administration. Costs and benefits considered in the review are broadly defined and go beyond financial flows. Costs take into account the value of opportunities foregone by the community.

A lack of data made it impossible to undertake a quantified cost benefit assessment of these restrictions. However, costs associated with restrictions of competition contained in planning legislation may include:

- cost to administer, monitor and enforce the particular restriction (not the cost to administer, monitor and enforce the planning system as a whole);
- loss of technical or allocative efficiency. Technical inefficiency indicates that a business does not produce the maximum possible output from a given set of inputs. Allocative inefficiency indicates that a business is not using inputs in the proportions or combinations that allow it to minimise costs. These types of inefficiency can arise when a restriction prevents a business from achieving economies of scale, adopting new technology or production methods or adopting a quality standard which lowers production costs, introducing a new product or service, expanding into a new market, or producing an optimal level of output;
- compliance costs borne by land-owners, developers, businesses and sometimes households;
- higher prices for goods and services (borne by consumers) in final product markets, for instance if producers cannot minimise unit production costs as a

result of the restriction, or obtain market power from the restriction and restrict output to push prices up;

- reduction in number of suppliers of a good or service or in product or service quality;
- lack of diversity in land developments; and
- reduced incentive for product or process innovation (eg development of pollution control technologies if producers rely on buffers in planning schemes).

Benefits associated with restrictions on competition contained in planning legislation include:

- reduction in negative externalities such as environmental damage and visual, noise, air or water pollution, or a reduction in health or safety risk or crime;
- achievement of positive externalities such as conservation or improvement of environmental quality, improved landscape, conservation of culturally significant buildings and sites, creation of effective networks, or a health and safety benefit;
- guaranteed or greater provision of public goods (eg public open space, parklands, roadside vegetation, bridges, most roads, drainage systems, public toilets, pavement and some community infrastructure such as public sporting complexes);
- ensuring that land is used for its most productive purpose;
- greater certainty for landowners and/or investors;
- increased efficiency in the provision and utilisation of infrastructure;
- public amenity through orderly development; and
- improved access to markets.

In this review, distributional effects (ie transfers) are not treated in the same way as allocative effects (ie costs and benefits). Examples of transfers that are common in the case of planning legislation include changes in land values (eg due to zoning) and changes in the profits of businesses. They are treated differently because usually one party gains at another's expense.

Balancing Costs And Benefits Associated With Restrictions On Competition

It is difficult to be definitive about whether costs will outweigh benefits because the answer will vary on a case by case basis, depending on the product markets affected. Notwithstanding this, it is possible to identify some situations where the costs associated with a legislated restriction may outweigh public benefits. For instance, where:

- Responsible Authorities are granted a monopoly right to undertake an administrative function even though there are other parties in the community who are able to provide the same service at lower cost;
- zoning controls prevent land from being put to a more productive use that is valued more highly by the community;
- zoning and overlay controls do not closely reflect externalities (eg minimum floor space provisions);
- activity centre provisions allow landowners to acquire market power by constraining the supply of land available for retail activities;

- Home Occupation restrictions prevent the sale of goods sourced elsewhere, even if the sale of such goods would not impose negative externalities on adjacent land uses;
- Section 173 Agreements, that are not transparent, are not used as a mechanism of last resort, particularly those that prescribe the way in which a business may price or produce its goods or services; and
- development contributions plans and Section 173 Agreements are used to collect revenue to fund the provision of public goods if the tax or rate system is a more efficient revenue collection mechanism

Recommendation 2: Government should scrutinise the above listed provisions in the Legislation and give careful consideration to either removing the restriction or modifying it to lessen its restrictiveness.

In some cases there is a net cost associated with the lack of enforcement of legislative provisions. For example, provisions to deter objections to planning applications on purely economic grounds are rarely enforced.

The solution is not to remove such provisions, but to encourage greater use of them by Responsible Authorities and the Tribunal. Plain English guidelines to educate prospective objectors could also assist to reduce the number of objections of this kind.

Even if restrictions have a net public benefit this does not mean they should automatically be retained. Under the guiding principles of the CPA, if on balance it is likely that there is a net benefit associated with a restriction, further assessment is required to determine if the objective could be achieved by a less restrictive means, before policymakers should decide to retain a restriction.

Potential For Less Restrictive Alternatives

There are a number of amendments that could be made to either the Victorian Planning Legislation itself or its implementation in practice so that Government can achieve legislative objectives at lower cost to the community. These are outlined below.

Recommendation 3: Planning specific National Competition Policy ("NCP") guidelines and workshops be implemented to assist Planning and Responsible Authorities to ensure that the public benefit associated with any policy or other intervention outweighs costs. If guidelines and workshops of this kind are not effective, insert into the Act an overarching public benefit test.

To minimise the probability that decisions made by Planning and Responsible Authorities are inconsistent with NCP principles and objectives (eg do not satisfy the two part competition test), the Department of Infrastructure should develop guidelines to assist Planning and Responsible Authorities to implement planning policy in a less restrictive way. These guidelines would relate NCP principles and objectives to the Victorian Planning System, to provide guidance to Planning Authorities and Responsible Authorities on the operation of market competition and its benefits for the community. They would provide an educative set of principles to guide decision-makers to use high cost planning restrictions as a matter of last resort, and only where the benefits of such restrictions are likely to outweigh costs. These guidelines could also assist Planning and Responsible Authorities to improve the consistency of planning decisions.

It is recommended that regular workshops be held for Planning Authorities and Responsible Authorities, and that a "hot line" be set up to assist decision makers in assessing the economic impact of proposals, without confusing the concept with the impact of competition on the viability of competitors.

If guidelines and education of this kind are not effective in facilitating outcomes that are in the net public benefit, it is recommended that there be introduced into the Legislation an overarching net public benefit requirement. This could be included as a new objective in Section 4(1) of the Act, or by amending the wording of the last objective (balance the present and future interests of all Victorians). In addition, the requirement to have regard to net community benefit could be included in Section 12 (duties and powers of Planning Authorities) and in Section 60 (matters to be taken into account in considering permit applications) of the Act. A compulsory test of this kind is likely to increase administration costs for Planning and Responsible Authorities and applicants, so it may be prudent to establish what can be accomplished through guidelines and education prior to legislative change.

Recommendation 4: Amend Section 60 to make it consistent with other parts of the Act.

Consideration should be given to amending Section 60 of the Act to make it consistent with Section 84B(1)(b) of the Act, which requires a Tribunal, in determining an application for review, to have regard to the objectives of planning in Victoria specified in Section 4(1).

Consideration should also be given to amending Section 60(1)(b) of the Act to make it mandatory for a Responsible Authority to consider significant social and economic effects of a use or development for which the application is made, if the circumstances appear to so require. At the moment, the language of the Act may be interpreted as being permissive only. The words "*appear to*" should also be deleted as they allow for subjectivity and inconsistency of approach.

Recommendation 5: Where it is cost effective to do so, use performance based overlays and particular provisions in preference to potentially costly prescriptive criteria.

This review recommends that the Victorian Government endeavour to make overlays and particular provisions more "performance based" to allow the legislation to better target activities which generate negative externalities and not be inflexible so as to penalise businesses that do not generate negative externalities. Planning legislation in Victoria contains a number of prescriptive limits on floor size, sign size, number of occupants etc. It is possible that the objectives underlying these prescriptive limits may be met at lower cost using performance criteria that focus on, for example, safety or traffic congestion.

Performance criteria should generally be preferred provided that any additional administration and monitoring cost associated with performance criteria (as opposed to prescriptive criteria) - and it is not clear that there will be any additional cost - are outweighed by the benefits associated with allowing businesses that do not generate negative externalities to operate without restriction. The adoption of this recommendation could be facilitated through the planning specific NCP guidelines discussed under Recommendation 3 .

Recommendation 6: Reduce costs associated with restrictions on competition under activity centre controls.

The review recommends that the Victorian Government reduce costs associated with restrictions on competition due to activity centre controls by:

- ensuring that the size of each activity centre area is sufficient to reduce risk of landlords attaining monopoly power in the Land Use Market as this can stifle competition and innovation much more than if each activity centre is of sufficient size to allow strong rivalry;
- ensuring that the list of policy exceptions is reviewed and updated regularly to match consumer preferences; and
- considering inserting another exception allowing retail businesses to locate outside activity centres provided they are prepared to pay for any negative externalities they generate (valued appropriately).

Recommendation 7: Improve consistency of planning decisions concerning planning scheme amendments and permit applications.

This review recommends that the Victorian Government encourage greater consistency in planning scheme amendments and permit application decisions. This could be facilitated through the use of planning specific NCP guidelines discussed under Recommendation 3. The guidelines should highlight the potential for adverse impact on competition if a Responsible Authority is inconsistent in:

- the level of detail it requires in respect of a permit application;
- its approach to notification of permit applications;
- the time which it takes to handle planning permit applications;
- the matters which it takes into account in considering whether or not to grant a permit; and
- determining what conditions it imposes in connection with a permit.

The guidelines should also highlight the need for Planning Authorities to be consistent in their approach to notification of planning scheme amendments.

The guidelines could further require that a Planning Authority and Responsible Authority document, and make publicly available, its decision as to the extent of notification.

Recommendation 8: Ensure that exceptions to particular State Planning Policy Framework and Local Planning Policy Framework policies (including those relating to activity centres), zones, overlays and Particular Provisions are consistent with NCP principles and objectives and are regularly reviewed to determine whether additional exceptions are appropriate.

This review recommends that the Victorian Government stress the importance of taking into account NCP principles objectives in considering exceptions to the application of State Planning Policy Framework and Local Planning Policy Framework policies, zones, overlays and particular provisions by encouraging Planning Authorities to follow the planning specific NCP guidelines discussed under Recommendation 3.

This review further recommends that the Victorian Government require Planning Authorities to regularly review exceptions to policy relating to activity centres to ensure they are consistent with community preferences.

Recommendation 9: Remove or narrow exemptions of land use or development by Responsible Authorities from Ministerial permit process.

This review recommends amending Section 96(1) and (2) of the Act to either remove the exception allowing planning schemes to exempt land use or development by Responsible Authorities (or persons using land owned or occupied by Responsible

Authorities) from the Ministerial permit process, or narrow the application of the exemption by amending Clause 67 in the Victorian Planning Provisions.

Recommendation 10: Amend the Home Occupation Particular Provision to make it more consistent with performance criteria and ensure that exceptions reflect community preferences.

This review recommends that the Victorian Government amend the Home Occupation Particular Provision to allow exemptions from limits placed on operating hours, floor area and products that may not be sold where the applicant can demonstrate that the activity does not impose significant negative externalities (eg traffic congestion, noise or visual pollution) on the community.

Recommendation 11: Reduce the costs associated with Section 173 Agreements.

Given strong potential for lack of transparency in development of Section 173 Agreements, the high transactions costs they generate, and the fact that they often operate and run with the land for longer than necessary to achieve their objective, this review recommends that the Victorian Government:

- amends the Act so that Responsible Authorities may only use Section 173 Agreements as a last resort, and accordingly must demonstrate that the purpose towards which the agreement is directed cannot be achieved by another means, for example, through appropriately worded permit conditions or development contributions plans;

- amends Section 62(6) of the Act to prevent the imposition of permit conditions requiring Section 173 Agreements for provision of services or facilities in relation to land development in circumstances where an approved development contributions plan covers the subject land;

- amends Section 177(1) of the Act so as to require a Responsible Authority to include a "sunset" provision in every Section 173 Agreement, to ensure that the agreement does not have a life beyond achievement of its intended purpose. Alternatively, amend the Act to require periodic review of Section 173 Agreements and for their complete or partial repeal if it is demonstrated that their purpose has been satisfied;

- amends the Act to require that any objectors to a planning permit application or submitters in respect of a planning scheme amendment that imposes a requirement for a Section 173 Agreement are consulted in respect of the contents of same prior to execution;

- amends the Act to prohibit Section 173 Agreements from imposing price controls; and

- through the Department of Infrastructure, issues educative guidelines to Responsible Authorities as to appropriate use of Section 173 Agreements. This could be included in the planning specific NCP guidelines discussed under Recommendation 3.

Recommendation 12: Reduce costs associated with economic objections and lack of enforcement of existing provisions of the Act intended to prevent economic objections.

This review recommends that the Government of Victoria take steps to reduce the opportunity for economic objection unless objectors can establish a proposal is not in the community interest (as opposed to private interest of a business). Given the reluctance of Responsible Authorities to apply Section 57(2A), which permits them to refuse to consider an objection if its primary purpose is to protect the economic interests of a party, and reluctance of the Tribunal to award costs or damages against a frivolous or vexatious objector, it is recommended that the Department consider:

- issuing guidelines which educate Responsible Authorities and parties seeking to lodge an objection as to what amounts to an appropriate economic objection, and what opportunity for submissions ought to be given to prospective commercial objectors prior to rejecting their objection;
- amending Section 57(2A) to overcome a Supreme Court ruling that commercial objectors must be given the opportunity of a hearing prior to rejecting their submissions;
- amending the Act so that a provision similar to Section 57(2A) also applies to enable a Planning Authority to reject similar "economic objector" submissions in relation to a planning scheme amendment; and
- taking steps to raise the awareness of Responsible Authorities and objectors of the requirement under the Act that objectors must demonstrate how they would be affected by the grant of a permit. This could be done in the guidelines referred to in Recommendation 3. If the guidelines prove ineffective, the Department should consider amending the *Planning and Environment Regulations 1998* to introduce a pro-forma objection form that includes a requirement that the objector state how the grant of a permit would affect them. The same ought to be considered in respect of submissions in relation to planning scheme amendments.

Recommendation 13: Conduct a review to determine whether it is feasible to remove Planning and Responsible Authority monopoly on provision of certain administrative functions that may be performed by other parties at lower cost.

This review recommends that the Victorian Government, through the Department of Infrastructure, implement a review of the essentially administrative functions performed by Planning and Responsible Authorities, including the preparation of planning scheme amendments and the issue of certificates of compliance, with a view to assessing which, if any, of those functions may be performed by other parties, including private sector entities.

Recommendation 14: Consider introducing a sunset clause in permits for alternative uses where the likely community benefits associated with an alternative use will not outweigh the costs, and the alternative use generates a major negative externality.

This review recommends that the Department seek to minimise the potential for alternative use rights under Clause 63.08 of new planning schemes to continue indefinitely in circumstances where the likely benefits flowing from the alternative use will not outweigh the costs, and the alternative use generates a major negative externality. The Department should consider amending Clause 63.08 to include a requirement that all permits for alternative uses contain a condition so that the use may be reviewed after a period sufficient to allow a business to generate a normal rate of return. In this way, businesses that generated a major negative externality could have their alternative use right terminated in future. This could restore their incentive to avoid generating negative externalities. Care would need to be taken

that this sunset clause did not remove all certainty for the business in question. This could be achieved by ensuring that alternative use rights were only terminated if the business activity were found to generate a major negative externality upon the community.

Good Regulatory Design

The recommendations made in this Report are not just consistent with NCP principles and objectives, they also are consistent with principles of good regulatory design. By following principles of good regulatory design, government agencies such as the Department of Infrastructure will help to develop a system of efficient and effective regulation that imposes the least possible burden on business and the community. This will help to make Victoria more attractive to investors and also improve the international competitiveness of Victorian-based businesses.

1. INTRODUCTION

This Report has been prepared by Deacons Lawyers and Tasman Economics on behalf of the Victorian Minister for Planning, as part of the commitment made by the Victorian Government in accordance with the National Competition Policy ("**NCP**") to review all existing Victorian legislation having regard to the Competition Principles Agreement ("**CPA**") principle that legislation (including subordinate legislation) should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

Deacons Lawyers and Tasman Economics were commissioned by the Department of Infrastructure to undertake a legislative review of the Victorian Planning and Environment Act 1987 ("**Act**") and its associated subordinate instruments ("**Victorian Planning Legislation**" or "**Legislation**"), having regard to clause 5(9) of the CPA. The terms of reference of this review are set out in Appendix 1 to the NCP Review of Planning and Environment Act Discussion Paper issued by the Department of Infrastructure, as part of its consultation in relation to this review ("**Discussion Paper**"). The Discussion Paper is attached as **Appendix 1** to this Report.

The review has been conducted in accordance with the model for a semi-public review, as established in the *Guidelines for the Review of Legislative Restrictions on Competition* prepared by the Competition Policy Task Force, Cabinet Office, Victorian Department of Premier and Cabinet ("**Victorian Guidelines**"). In particular, the review has:

- involved consultation with the public, insofar as the review was advertised to the public on 5 August 2000 and submissions called for and, as a result, a number of submissions have been received and considered. These submissions are listed in **Appendix 2** of this Report; and
- been undertaken independently of the Department of Infrastructure and Victorian Government by Deacons Lawyers, and Tasman Economics.

A draft Report was submitted to the Department of Infrastructure on 13 October 2000 and comments on the draft Report considered. This Final Report has been prepared taking into account comments received during a period of consultation between the date of submission of the draft Report and 10 November 2000.

2. BACKGROUND AND REVIEW METHODOLOGY

2.1 Competition Principles Agreement

As a signatory to the CPA between the Commonwealth, States and Territories of Australia, the Victorian Government committed to developing a timetable for the review and, where appropriate, reform of all existing Victorian legislation that restricts competition by the year 2000. This review of the Victorian Planning Legislation has been undertaken in accordance with that commitment as a semi-public review. Underpinning the review is the guiding principle articulated under clause 5(1) of the CPA that:

"*Legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:*

(a) the benefits of the restriction to the community as a whole outweigh the costs; and

(b) the objectives of the legislation can only be achieved by restricting competition."

The terms of reference of this review (see **Appendix 1**) are consistent with clause 5(9) of the CPA which, on a non-exhaustive basis, specifies that a review should:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- address and balance the costs and benefits of the restriction; and
- consider alternative means for achieving the same result including non-legislative approaches.

This Report addresses each of these elements, by closely following the *Guidelines For NCP Reviews (February 1999)* issued by the National Competition Council ("**NCC**") and the Victorian Guidelines.

The recommendations made in this Report are not only consistent with NCP principles and objectives, they also are consistent with principles of good regulatory design. Good regulatory design helps to improve the attractiveness of Victoria as a place to invest as well as the international competitiveness of Victorian-based industry. The Office of Regulatory Reform has published guidelines on good regulatory design for use by Victorian Government departments and agencies. These guidelines advocate:

- an understanding that freely functioning markets provide the best means of allocating goods and services within a community and are the best means of ensuring that goods and services are produced efficiently;

- identification of the problem using a market failure framework;
- clear identification of regulatory objectives;
- full consideration of market based and other regulatory alternatives before regulation;
- consistent and transparent decision criteria;
- minimum necessary regulation to achieve the regulatory objective;
- preference be given to direct and performance oriented regulatory approaches (as opposed to indirect or prescriptive regulation that focuses on inputs and processes);
- reasonable compliance burdens;
- consistent and transparent appeals processes; and
- effective and cost efficient enforcement regimes.

These principles are entirely consistent with NCP principles and objectives. Recognition of these principles of good regulatory design by government agencies, such as the Department of Infrastructure, will help ensure the use of efficient and effective regulation that imposes the least possible burden on business and the community.

The conclusions and recommendations made in recent comparable South Australian and ACT legislative reviews (*Competition Policy Review of the Development Act 1993 and the Development Regulations 1993 – South Australia (July 1999)* and the *NCP Review of the ACT's Land (Planning and Environment) Act 1991 (May 2000)*) have been reviewed, and where appropriate considered in the context of the Victorian planning system. It is recognised, however, that the Victorian Planning Legislation differs greatly from the South Australian and ACT planning systems.

This review also takes into account the findings of the Victorian Auditor-General in his December 1999 Report (Performance Audit No. 62) entitled "*Land Use and Development in Victoria – the State's Planning System*" ("**Auditor-General Report**").

This Report is structured as follows:

Section 3 provides an overview of the Victorian Planning Legislation, and accordingly identifies the legislation which is the subject of this review;

Section 4 clarifies the objectives of the Victorian Planning Legislation, and identifies the market failures which the Legislation addresses;

Section 5 identifies those elements of the Legislation which restrict or potentially restrict competition;

Section 6 provides a cost/benefit assessment of the identified restrictions;

Section 7 considers potentially less restrictive alternatives and contains a number of recommendations which are directed towards minimising or removing identified restrictions on competition; and

Section 8 contains five case studies which are discussed in **Section 2.2** below.

2.2 Role of Case Studies

A critical element of any NCP review of legislation is the definition of the markets which are to be considered in determining whether and, if so, the extent to which legislation restricts competition.

In **Section 5.1** of this Report, the concept of a "market" is considered. Two principal markets are identified as being relevant to a consideration of the impact on competition of the Victorian Planning Legislation: the market for the use and development of Victorian land, and the final product markets in respect of the range of goods and services that may be produced and sold using Victorian land.

As is recognised in the Discussion Paper, one of the challenges in undertaking the NCP review of the Victorian Planning Legislation is to identify the markets affected by the Legislation, given that planning schemes made under the Act regulate the use and development of **all** land in Victoria, except that in Commonwealth ownership. The Legislation potentially has some form of direct or indirect effect on all commercial activities in the State.

As a result, it is not possible to make definite conclusions about the balance of the community costs and benefits at the general planning system level because of the difficulty in defining a **distinct** market and undertaking a meaningful cost/benefit analysis.

Accordingly, as part of this review, five case studies have been prepared to illustrate the manner in which components of the Victorian Planning Legislation may restrict competition in particular scenarios ("**Case Studies**").

The five Case Studies are set out in **Section 8** of this Report. Part (1) of each Case Study describes the provision of the Victorian Planning Legislation to which each Case Study relates.

3. OVERVIEW OF VICTORIAN PLANNING AND ENVIRONMENT LEGISLATION

The Planning System

The Act provides that planning control in each municipality in Victoria will be by a single mechanism, namely a planning scheme covering the whole of that municipality. This is not the case in other States where there are multiple planning instruments and no uniformity as regards common planning objectives and terminology.

The Act provides that all planning schemes must seek to advance stated "Objectives of Planning in Victoria" and make any provision which relates to the use, development, protection or conservation of land. This is accomplished by means of zones, which set out uses which are "as of right" (no permit required), uses which require a planning permit and uses which are prohibited. Planning schemes also contain overlays, which apply additional restrictions over certain areas which have special attributes that warrant careful attention.

A feature of all new Victorian planning schemes is that they contain all relevant planning policy and planning controls in one document. Planning scheme maps which show the location of zones and overlay controls are available at all municipal offices and at the Department of Infrastructure.

Structure of Planning Schemes

The Act requires that each planning scheme must include State standard provisions and local provisions. Because this is a fairly recent requirement, the current planning schemes are called "new planning schemes" or "New Format planning schemes". Under the Act, the State standard provisions must be selected from Victoria Planning Provisions ("**VPPs**") approved by the Minister for Planning. The current approved VPPs include all of the following parts:

- State Planning Policy Framework ("**SPPF**")
- Local Planning Policy Framework ("**LPPF**")
- standard zones
- standard overlay controls
- particular provisions
- general provisions
- planning definitions

Only those zones and overlays which the local Planning Authority requires need be included in any particular planning scheme; but those selected must be in standard format. The local authority may also include schedules to

zones and overlays, but these should follow Ministerial directions on the form and content of planning schemes.

SPPF

The SPPF is intended to inform those who prepare planning schemes and those who administer them of the State planning polices that they are to take into account and give effect to in planning and administering their respective areas. It is said that the Government expects that Planning Authorities and Responsible Authorities should endeavour to balance conflicting objectives in favour of net community benefit and sustainable development.

Principles of land use are set out in the SPPF under the headings of Settlement, Environment, Housing, Economic Development, Infrastructure and Particular Uses and Development. In each case, objectives, implementation guidelines and strategies are set out.

LPPF

Under the Act, the LPPF must include a Municipal Strategic Statement ("**MSS**") and any other provision directed by the Minister for Planning and may also include any other provision which applies to the municipality. These typically take the form of Local Policies which mainly deal with strictly local issues and special characteristics of the land in question.

The Act requires that each MSS contains strategic planning, land use and development objectives of the Council as a "Planning Authority", the strategies for achieving those objectives, an explanation of the relationship between the objectives and strategies and development and use controls and any other matter that the Minister directs. The MSS must be consistent with Council's Corporate Plan and be reviewed every three years, or sooner if the Minister so directs.

Zones

Under new planning schemes, zones are drawn from VPP standard groups of Residential (5), Industrial (3), Business (5), Rural (3), Public Land (4) and Special Purpose (5) zones. The zones contain Tables of Uses setting out what is "as of right" ie no permit is required (Section 1), what requires a permit (Section 2), and what is prohibited (Section 3). Uses not specified in either Section 1 or Section 3 fall into Section 2 and therefore require a permit.

The planning permit system allows a decision to be made as to whether a proposed use is appropriate for an area or not, having regard to State and Local Policies, and it provides a vehicle for the imposition of conditions which usually seek to limit the impact of the proposal upon other landowners or the amenity of the area. The new planning schemes have a greater number of uses in "permissible" areas (Section 2) than previous schemes – including some uses previously prohibited – because of the enhanced role of policy in deciding upon applications. The first stated purpose of each zone is to "*implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies*". Decision guidelines are prefaced by the words "*Because a permit can be granted does not imply that a permit should or will be*

granted', which are intended to send the message that policy will be given great weight in the decision process.

Overlays

Overlays in new planning schemes are selected from the VPPs. They are superimposed over the zoning pattern and several overlays may simultaneously apply to a parcel of land, in addition to its zoning. Overlays are grouped into Environment and Landscape (3), Heritage and Built Form (4) and Land and Site Management (12). A permit may be required for development and use under an overlay even in circumstances where the base zoning requires no permission, but the enquiry in all cases is limited to the precise matters in the overlay which "trigger" the need for a permit. Narrow exemptions under an overlay may override more generous exemptions available under general controls, such as vegetation protection controls, because of the more area-specific nature of the overlay. Local schedules to overlays can exempt the need for a permit or require a permit if the overlay itself provides for this. As with some zones in new planning schemes, (Residential 2, Business, Industrial, Public Land and Special Purpose) some overlays can provide that there are no third party rights of objection and appeal.

Standard Particular and General Provisions

New planning schemes include standard VPP Particular Provisions including subdivision, easements and restrictions, specific sites and exclusions, advertising signs, carparking, home occupation, service stations, native vegetation, crisis accommodation, shared houses, community care units, gaming and licensed premises. There are 30 such provisions in all. There is no opportunity for local variation of these provisions, but it is possible to add further considerations in the LPPF.

General Provisions in the new planning schemes deal with administration of the scheme, uses, buildings, works, subdivision and demolition not requiring a permit (eg public utility installations), existing uses, land used for more than one use, decision guidelines, referrals to referral authorities (ie other public authorities and utility providers) and applications for permit required by, or on land owned by, Councils.

Planning Authorities and Responsible Authorities

Under the Act, a **Planning Authority** is any person who is given power to prepare a planning scheme. Usually this is a Council, but the Minister may be the Planning Authority for land, such as French Island, that is not within a municipality. Councils may prepare amendments to VPPs – if authorised by the Minister – and local provisions, in accordance with the Minister's Direction as to form and content of new planning schemes. The Minister is therefore able to control the content of any draft planning scheme in the State and is the only person in Victoria who can ultimately approve their final form.

In preparing planning schemes or amendments, Planning Authorities must implement the objectives of planning in Victoria (discussed in **Section 4.1** below), and must take into account any significant environmental effects, and may also take in account any social and economic effects that the scheme or amendment might have.

A **Responsible Authority** is responsible for the administration or enforcement of planning schemes. In most cases this is the local Council, which wears a Planning Authority "hat" for preparing planning schemes and a Responsible Authority "hat" when implementing them. Most Councils have separate groups of officers to perform these tasks.

In addition to administration and enforcement of planning schemes and implementation of their objectives, Responsible Authorities have wide powers to deal with land and enter into joint ventures, and may compulsorily acquire land in certain circumstances.

Decision Making

The structure of the Victorian planning system facilitates two broad areas of decision-making. The first area is preparation of planning schemes by the Planning Authority and approval by the Minister. The planning scheme itself stipulates those land uses and development which will be as of right, those which will require a permit application and those which are absolutely prohibited.

The second decision area is the consideration of applications for permit by the Responsible Authority. There is opportunity to change the application to better meet planning standards and expectations and to control the off-site effects of the proposal by imposition of conditions of permit.

In both areas of decision, the decision-making process is subject to compliance with government policy which filters through the system at all levels.

The Planning Scheme Amendment Process

The process includes:

- Planning Authority notification of the preparation of a proposed amendment to all parties having an interest or likely to be "*materially affected*" by it;

- submissions (in support or objection) may be lodged with the Planning Authority by "*any person*";

- consideration of all submissions by the Planning Authority followed by a decision to:

  - change the amendment as requested by submitters; or

  - abandon the amendment; or

  - refer the submissions to an independent Panel appointed by the Minister;

- public hearing of submissions by the independent Panel;

- report (recommendations) by the independent Panel to the Planning Authority;

- consideration of the Panel report by the Planning Authority followed by either adoption or abandonment of the amendment;

- if adopted (with or without changes), submission of the amendment to the Minister who may direct further public notice, especially if changed; and

- decision of the Minister to approve the amendment with or without changes or refuse to approve it.

There are no rights of appeal by any party against the decisions of the Planning Authority or the Minister. There are limited rights to make application to the Victorian Civil and Administrative Tribunal ("**Tribunal**") in respect of defects in the above procedure. There are no rights of appeal against the independent Panel because its report is a recommendation rather than a "decision". It is possible to apply to the Court for relief in certain exceptional circumstances, such as manifest bias or denial of natural justice on the part of the Panel.

The Minister may exempt a Planning Authority from some of the requirements to give public notice of an amendment if he or she considers compliance is not warranted or that the interests of Victoria or any part of Victoria make such an exemption appropriate. The Minister may make such exemption conditional upon some alternative form of notice.

The Minister may also exempt himself or herself from complying with some or all of the requirements to give notice of an amendment that the Minister prepares if the Minister considers that compliance is not warranted or that the interests of Victoria or any part make such an exemption appropriate.

The Minister published a Practice Note for the use of powers of exemption in December 1999. These are referred to in more detail below under the "Ministerial call in" heading .

The Planning Permit Process

This includes:

- application in the prescribed form with any information required by the planning scheme;

- directions by the Responsible Authority to give notice to owners and occupiers of adjoining land unless it is satisfied that the grant of a permit would not cause "*material detriment*" to any person;

- directions by the Responsible Authority to give notice to any other persons if it considers that the grant of a permit may cause "*material detriment*" to them;

- referral to referral authorities (eg public utilities) who have power to require the imposition of conditions and a power of veto (subject to Applications for Review to the Tribunal by permit applicants);

- lodging of objections by interested persons, such as nearby residents;

- consideration of the application by the Responsible Authority upon considerations specified in the Act or the planning scheme, including planning policy;

- decision of the Responsible Authority to grant a permit or refuse the application upon stated grounds;

- if the Responsible Authority decides to grant a permit upon conditions, those conditions must accord with proper planning principles and include any matters required by the planning scheme or a referral authority;

- granting of a permit immediately if there are no objectors or if third party notice is not required to be given by the planning scheme. If objections have been lodged, no permit may be granted until the period allowed for objector appeals to the Tribunal has expired; and

- stipulation of time limits for the commencement of the permitted use or the commencement and completion of development on any granted permit. These may subsequently be extended at the discretion of the Responsible Authority. The rationale for this is to prevent permit holders relying on "old" permits which are no longer consistent with contemporary planning controls.

Planning Appeals

Applications for Review to the Tribunal include:

- appeals by permit applicants against refusal;

- appeals by permit applicants against failure of the Responsible Authority to grant a permit within the prescribed timeframe;

- appeals by permit applicants against conditions of permit imposed by the Responsible Authority (or referral authorities);

- appeals by permit applicants against refusal of the Responsible Authority to extend commencement/completion dates on a permit;

- appeals by objectors against the decision of the Responsible Authority to grant a permit (objector rights of appeal can be, and in the case of some zones and overlays in new planning schemes are, removed); and

- appeals by persons who were not objectors, but who claim to be "*affected*", may proceed with leave from the Tribunal.

In determining an Application for Review, the Tribunal must take into account or have regard to several matters, including:

- any relevant planning scheme;

- the Objectives of Planning in Victoria (discussed in **Section 4.1** below);

- any State Environment Protection Policy;

- any amendment to a planning scheme which is adopted by the Planning Authority but not yet approved by the Minister; and

- any relevant planning agreement affecting the subject land.

These are in addition to any other matters which the Responsible Authority could properly have taken into account in making its decision. In other words, the Tribunal is to stand in the shoes of the Responsible Authority when determining the appeal.

Appeals by applicants for permit may be brought within 2 months of the decision of the Responsible Authority or at any time after expiry of the prescribed timeframe for decision in the case of appeals against failure to decide. Appeals by objectors and other third parties, however, must be brought within 21 days of the decision of the Responsible Authority.

Site-Specific Amendments ("Spot" Rezoning)

The new Victorian planning system discourages applications for planning scheme amendments directed toward special zoning or special planning scheme provisions for specific sites.

It is now possible to apply for permission to carry out a prohibited use by means of a specified combined permit and planning amendment process. The procedural steps for conventional planning scheme amendments generally apply (with appropriate modifications) to this process.

Ministerial "Call In"

Under the Act, the Minister may call a permit application in for decision by an independent Panel appointed for that purpose if it appears to the Minister that:

- the application raises a major issue of policy and its determination will have a substantial effect on the achievement of planning objectives; or

- the decision has been unreasonably delayed to the disadvantage of the applicant; or

- the proposal requires consideration by the Minister under another Act (eg *Environment Effects Act*) and that consideration would be facilitated by the referral.

A Responsible Authority may request the Minister to decide an application for permit. Other parties, including the permit applicant or objectors, may also request Ministerial intervention. The Ministerial Practice Note (December 1999) in relation to use of the Minister's powers of exemption from some procedural steps regarding planning scheme amendments deals with the call in powers. Generally, applications must demonstrate proper grounds, proper consultation, and that attempts to resolve disputes have been made. The Practice Note states that reasons for and circumstances of intervention by the Minister will be made publicly available, with annual reports to Parliament.

Town Planning Compensation

The Act provides for compensation under certain circumstances including the placing of land in a public use zone or public acquisitions overlay, or other notification that the land will or may be required for a public purpose (eg a new sports oval, road, park etc) and:

- a planning permit is refused on that basis;
- the Tribunal directs that no permit may be granted on that basis; or
- there was a loss on sale of the land because of the "public purpose" intention.

Compensation is also payable if access to a road is restricted by closure under a planning scheme, and for loss suffered as a consequence of the lapsing of a public purpose reservation.

Enforcement

There are three means of enforcement of planning schemes, planning permits and planning agreements, namely:

- the issue of Planning Infringement Notices;
- prosecution in Court; and
- applications to the Tribunal for Enforcement Orders.

Enforcement Orders are not intended as punishment, but are a means of seeking compliance. They have the advantage of facilitating orders for restitution or rehabilitation of the land. Breach of an Enforcement Order made by the Tribunal is an offence. From 31 May 2000, general penalties under the Act were increased from a maximum of $4,000 to $120,000 and from $400 per day to $6,000 per day for a continuing offence. A person concerned in the management of a corporation charged with an offence may be charged with the same offence unless that person is able to prove that the relevant events took place without his or her knowledge or consent.

All penalties are payable to the Responsible Authority which prosecutes under the Act.

Another alternative, while not strictly regarded as "enforcement", is cancellation or amendment of permits by the Tribunal for substantial failure to comply with permit conditions.

Declarations

Applications may be made to the Tribunal for "arbitration" of disputes arising from provisions in planning schemes, permits, planning agreements or Enforcement Orders requiring that things must be done to the satisfaction of the Minister, the Responsible Authority, public authority, the Council or referral authority or must not be done without their consent or approval. There are no third party rights in respect of such applications, but the Tribunal may direct that notice be given to potentially affected parties, including persons who objected to the grant of the permit.

Applications may also be made to the Tribunal for declarations as to the status of land under the planning scheme, interpretation of planning scheme provisions, and the validity of actions taken by the Responsible Authority. Again, there are no third party rights, but the Tribunal can direct that notice be given of the application.

Damages against frivolous objectors

The Act provides that the Tribunal may order a person who has brought proceedings before it vexatiously or frivolously or "*primarily to secure or maintain a direct or indirect commercial advantage for the person who brought the proceedings*" to pay loss or damage suffered by any other person as a result of such proceedings.

Planning Agreements ("Section 173 Agreements")

These may be entered into between the Responsible Authority, the owner of the subject land and any other party and can act as a form of restrictive covenant on Title. Section 173 Agreements may act as an "extra layer" of planning control and are useful for obtaining concessions from intending developers and contributions towards the provision of community benefits, such as public open space and other community facilities.

Planning System Reform

The Victorian Planning System is subject to constant review by the Department of Infrastructure. Amendments are made to State standard provisions in response to comments and submissions made by Councils, the land development industry and interested members of the community, or at the initiative of the Department itself.

4. PLANNING LEGISLATION OBJECTIVES

4.1 Clarifying The Objectives Of The Legislation

Historical Background

Restrictions on the use of land arrived with the First Fleet in the form of "private nuisance" claims at common law against landowners who interfered with a neighbour's enjoyment of his or her land.

Municipal Councils were given power to set aside land for residential use under the *Local Government Act* in 1921, but the first dedicated planning legislation was the *Town and Country Planning Act 1944* which set up a system for the creation and administration of planning schemes.

Development of Planning Rationale

The *Town and Country Planning Act 1961* formed the basis for the current system of planning controls. There were many amendments, but those in 1968 established a State policy formulation system and the evolution of Statements of Planning Policy, which were the precursor of the current State Planning Policy Framework.

The *Town and Country Planning Act 1961* contained no explicit objectives. In the Second Reading Speech for the 1968 Amendments, the Hon R.J. Hamer said:

> *"The primary component of urban growth is land use, and this must be planned as an expression of people's needs for places in which to live, work, conduct their business, and enjoy their leisure. The society of the future will not have been well served by this generation unless the foreseeable problems of land use planning, together with the incidental needs of services and transport are anticipated as far as possible". (Hansard, Legislative Council, 1967-1968, Vol 290, P.3656)*

The Current Model

The draft *Planning and Environment Bill 1986* gave rise to much public discussion. The concept of town planning seeking to address "social and economic" factors was seen by some as a novel concept.

The then Minister for Planning and Environment, the Hon J.H. Kennon, said in the Second Reading Speech that:

> *"..."Planning" as envisaged by the Bill is about the use and development of land. While this requires taking into account a wide variety of issues, they are to be taken into account insofar as they affect the use and development of land. Conversely, other kinds of planning may have an effect on the way land should be used and developed, and they could be implemented, where appropriate, through planning schemes.*
>
> *Planning schemes should not in themselves be seen as major statements of economic or social policy. Where it is desirable to*

influence the use and development of land to implement such policies, they should be stated or referred to in planning schemes.

It was never intended to introduce a Planning Act to precisely define the scope of planning, or tell planners, councils or anyone else how to plan. The Bill enables planning proposals to be implemented. Most planning, as such, does not need specific legislation". (Parliamentary Debates, Legislative Council, 24 March 1987, pp 491-492).

Many of the current State Planning Policy Framework policies are derived from coordinated – ie interdepartmental – or Executive State Government policies. Urban consolidation policy is enshrined in *Shaping Melbourne's Future* (1987); *Cities in the Suburbs: the New District Centre policy for the 1990s* (1992); *Creating prosperity: Victoria's Capital City Policy* (1994) and *Living Suburbs: a Policy for Metropolitan Melbourne into the 21st Century* (1995).

Since 1993 there have been annual Planning Statements from the Minister which reinforce Government directions, progressive reform of the planning system and anticipate future changes to the Act and State standard planning scheme provisions. Not all of these changes follow consultative processes. Some changes are reflective of political and economic imperatives.

On 13 December 1999 the Hon J Thwaites, Minister for Planning, delivered a paper entitled "State Planning Agenda: A Sensible Balance". Under the heading "A Strategic Planning System" the following appears:

"In an economic and social environment characterised by rapid change, it becomes essential that our planning system is flexible enough to respond to and manage this change. But it needs to be prescriptive enough to provide certainty and consistency. A sensible balance must be reached.

Strategic land-use planning is pivotal to achieving the Government's objectives for economic development, environmental resource management, infrastructure coordination and service delivery. It enables the Government with the community to:

- *understand the way in which urban and rural communities operate, and their opportunities and problems;*
- *provide information and analysis that can assist private and public sector decision making;*
- *establish priorities for infrastructure and service delivery;*
- *create a framework for local planning policies; and*
- *establish long-term goals and objectives the entire Victorian community can strive for."*

Although individual Councils may initiate the preparation of planning scheme amendments for their municipality, they must comply with the Ministerial Direction on the Form and Content of Planning Schemes as revised from time to time. Even purely local provisions, including guidelines for the exercise of

discretion at the local level, are subject to this scrutiny and must be approved by the Minister after "vetting" by the Department of Infrastructure before they become operative.

Stated Purpose of the Planning and Environment Act

The purpose of the Act set out in Section 1 is "*to establish a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians*".

Although the title of the Act is "Planning and **Environment**", it does not purport to set up a regulatory regime for protection of the environment within the ordinary meaning of that expression. There are references to "ecology", "environment" or "environmental" in Sections 4(1)(b), 4(2)(c) and (d), 12(2)(b), 60(1)(a)(iii) and 84B(1)(d), but these generally take the form of relevant considerations rather than imperatives.

If, however, the wider definition in Section 4 of the *Environment Protection Act 1970* were adopted, many planning functions could be described as "environmental". That definition is:

> ""***environment***" *means the physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factor of aesthetics.*"

The underlined words clearly embrace the "amenity" planning concept and thus give rise to the possibility of describing many planning initiatives as steps to protect the environment.

Objectives of Planning in Victoria

The objectives ("**Objectives of Planning in Victoria**") set out in Section 4(1) of the Act are, **first** (Section 4(1)(a)):

> *"to provide for the fair, orderly, economic and sustainable use, and development of land".*

This is probably the most quoted paragraph of the Act in planning appeals. It is something of a two-edged sword, however, because aspiring developers rely upon it as a statement of the "land is a valuable resource" principle, while objectors argue that "*fair*" and "*sustainable*" have conservation significance.

The word "*orderly*" is something of a cliché frequently used in grounds of refusal of permit or by objectors to the grant of a permit. The most common interpretation is that individual planning decisions ought not prejudice future planning of the area in question.

The **second** Objective in Section 4(1)(b) -

> *"to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity"*

enlarges on the "*sustainable development*" element in the first Objective. It includes protection of the built as well as the natural environment and seeks to apply well known Ecologically Sustainable Development principles.

The **third** Objective in Section 4(1)(c) -

> *"to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria"*

relates to the concept of preservation of amenity and the separation of inconsistent land uses. Efficiency may be beyond the scope of town planning, as might workplace safety, but measures to prevent disruption or detriment to the beneficial use and enjoyment of land such as permit conditions are readily available. This Objective includes consideration of recreational and tourist potential of land in the public domain.

The **fourth** Objective in Section 4(1)(d) -

> *"to conserve and enhance those buildings, areas and other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value"*

essentially deals with protection of heritage assets and culturally significant places. Planning is intended to perform similar functions to the system under the *Heritage Act* wherever appropriate. The Heritage overlay in the new planning schemes is an example. Another example is protection of "aesthetic" values via Design and Development overlays.

The **fifth** Objective in Section 4(1)(e) -

> *"to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community"*

is self-explanatory in terms of public infrastructure. "*Other facilities*" include community facilities and may extend to quasi-public and private facilities located within larger shopping complexes and town centres. In that context, the words "*protect*" and "*co-ordination*" can be significant.

The **sixth** Objective in Section 4(1)(f) -

> *"to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e)"*

really means that planning schemes ought be administered in a way that gives priority to development and uses that meet relevant criteria.

The **seventh** Objective in Section 4(1)(g) -

> *"to balance the present and future interests of all Victorians"*

is frequently applied in the context of a "*net community benefit*" test, in assessing planning scheme amendments and proposals for the development and use of particular parcels of land. The usual principle is that the benefits of a proposal to the general community must outweigh the detriment to those

immediately affected by it. "*Future interests*" is frequently cited as an argument against the creation of undesirable precedents or proposals likely to inhibit forward planning initiatives.

Planning Framework Objectives

The twelve Objectives set out in Section 4(2) of the Act relate to the **planning system** itself.

The **first** is:

> *"(a) to ensure sound, strategic planning and co-ordinated action at State, regional and municipal levels".*

This is realised in the structure of all new planning schemes.

The **second** Objective is:

> *"(b) to establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land".*

This relates to the form of planning scheme operation actually established in the body of the Act itself.

The **third** Objective is:

> *"(c) to enable land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels".*

This reinforces the nexus between strategic and statutory planning and the importance of policy at State and local levels. As an example of interpretation, the first Purpose in every zone and overlay under the new schemes is:

> *"to implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies".*

The **fourth** Objective is:

> *"(d) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land".*

Shortly after the commencement of the Act, the then Planning Division of the Tribunal responded to developer claims that they ought have the benefit of economic considerations, and claims by local objectors that proposals ought be rejected if they had an adverse social impact on immediate neighbours, by holding that this Objective was directed toward the wider community (eg See Vernia Pty Ltd &Others v City of South Melbourne and Others 87/2453 cited at 1 AATR pages 2-3).

The **fifth** Objective is:

:

> *"(e) to facilitate development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes".*

This is similar to the general Objective in Section 4(1)(f). In the context of planning schemes, it means that certain types of proposals may be given priority over others if they meet strategic planning criteria or that special purpose controls may be applied to them.

The **sixth** Objective is:

> *"(f) to provide for a single authority to issue permits for land use or development and related matters, and to co-ordinate the issue of permits with related approval".*

This has been achieved through the abolition of dual planning controls which prevailed in many areas and the "co-ordination" ideal has been realised in areas such as heritage, mining and EPA works approval.

The **seventh** Objective is:

> *"(g) to encourage the achievement of planning objectives through positive actions by responsible authorities and planning authorities".*

This has been largely achieved through Ministerial Directions, the issue of guidelines and like publications and the conduct of workshops and public information sessions. A number of positive actions are available to Responsible Authorities under Section 171 of the Act including planning agreements, the purchase or exchange of land and carrying out use and development of land. There are powers of compulsory acquisition of land in Section 172.

The **eighth** Objective is:

> *"(h) to establish a clear procedure for amending planning schemes, with appropriate public participation in decision making".*

The drafting procedure is achieved by the "toolkit" issued by the Department of Infrastructure which includes Ministerial Directions, guidelines and samples of preferred techniques. Planning Panels Victoria has issued its own Strategic Assessment Guidelines for issues to be considered at Panel/Advisory Committee Hearings. Public participation procedures from notification to hearing of submissions are set out in Sections 17-39 of the Act.

The **ninth** Objective is:

> *"(i) to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice".*

This is similar to the previous Objective in terms of policy enshrined in planning schemes and "requirements" under such schemes. Procedures for giving notice to third parties, including relevant public authorities and utility providers, and dealing with responses are set out in Sections 51-60 of the Act. The question as to what is "appropriate" notice is a vexed one which has

given rise to many applications to the Tribunal and the Courts. Public notification procedures are expressly excluded in certain zones under the New Format planning schemes.

The **tenth** Objective is:

> *"(j) to provide an accessible process for just and timely review of decisions without unnecessary formality".*

Although this Objective recognises that planning appeals are intrinsically part of the planning system, there is little that the Act can do to achieve the stated ideals, because the entire framework for the conduct of appeals is set out in the *Victorian Civil and Administrative Tribunal Act 1998*.

The **eleventh** Objective is:

> *"(k) to provide for effective enforcement procedures to achieve compliance with planning schemes, permits and agreements".*

These take two basic forms. Firstly, "punishment" through Court prosecution and Planning Infringement Notices under Sections 126 to 132 of the Act and, secondly, Enforcement Order proceedings before the Tribunal under Sections 114 to 125, which allow the Tribunal to make orders which seek to achieve compliance and/or take mitigatory or rehabilitative steps.

The "effectiveness" of enforcement procedures is likely to be enhanced by substantially increased penalties which became effective from 31 May 2000.

The **last** Objective is:

> *"(l) to provide for compensation when land is set aside for public purposes and in other circumstances".*

Payment of compensation for land required or deemed to be required for public purposes has long been part of planning culture. Current provisions are found in Sections 98 to 113 of the Act. Compensation is not available for very restrictive controls which might be imposed over development and use of land, which are considered to be in the public interest but actually fall short of the "*public purposes*" criterion. The "*other circumstances*", apart from actual compulsory acquisition of land, are very limited.

Summary of Objectives of Planning in Victoria

In essence, the objectives of the Victorian Planning Legislation are to:

- promote fairness and sustainability in decision making;
- protect the natural and built environment from over-exploitation;
- prevent detriment to the community's amenity and safe environment resulting from the development and use of land;
- preserve places of significance to the community from harm;

- ensure that community infrastructure is provided in an orderly and properly co-ordinated fashion; and

- make net community benefit a basic planning principle.

The Importance of Objectives

The Objectives of Planning in Victoria are significant in a number of respects. In a sense, they "drive" the planning machine itself and they are arguably given greater status now than at the time of their first enactment. Planning schemes must seek to further them under Section 6(1)(a) of the Act, Planning Authorities must implement them in relation to planning schemes (Section 12(1)(a)) and the Tribunal must have regard to them in determining Applications for Review (Section 84B(1)(b)) or Requests for Cancellation or Amendment of Permits (Section 90A). These Objectives are set out at the start of all New Format planning schemes and the Goal, set out in Clause 12 of all such schemes, is stated as follows:

> *"The State Planning Policy Framework seeks to ensure that the objectives of planning in Victoria (as set out in Section 4 of the Planning and Environment Act 1987) are fostered through appropriate land use and development planning policies and practices which integrate relevant environmental, social and economic factors in the interests of net community benefit and sustainable development."*

4.2 The Extent To Which The Legislation Addresses Market Failure

This Section outlines the principal market failures which the Victorian Planning Legislation seeks to address.

What is Market Failure?

Market failure refers to any situation in which an unregulated market fails to deliver the best possible social, economic and environmental outcomes. Regulatory intervention is usually justified on the basis that such intervention can deliver more efficient, environmentally sustainable and/or equitable outcomes than markets in some cases.

This principle is neatly summarised in the Victorian Guidelines on page 24 as follows:

> *"While open and unrestricted competition in markets is generally regarded as the most efficient method of allocating the community's resources, it does not always provide the best possible economic and social outcomes. Nor are the conditions always present for competition to thrive.*
>
> *Markets may fail to operate competitively or efficiently for a number of reasons. Most commonly market failure arises in the presence of one or more of the following:*
>
> ***Sources of market failure***
>
> - *public goods*

- *externalities*
- *natural monopolies*
- *information asymmetries*

The presence of these market failures... serves as the principal rationale for government intervention in a market economy."

In the context of a review of the Victorian Planning Legislation, market failures in the form of externalities (positive and negative), public goods and information asymmetry are most likely to be relevant. Each of these concepts is explained on page 31 of the NCC Guidelines as follows:

- ***Externalities*** *arise when third parties have spillover costs (such as pollution) or benefits (such as reafforestation) from economic activities that they are not a party to, and pricing mechanisms do not exist to allow third parties to charge or pay for their costs or benefits, resulting in inefficient levels of production.*
- *Some goods and services once produced are difficult to charge for because it is too expensive or impractical to exclude some consumers from enjoying their benefits if they do not pay – for example, footpaths. Such goods are said to be nonexcludable and completely open markets without a way of financing them may underinvest in their production and repair. Also, some goods and services once produced may benefit many others without rivalling the use of those who paid for their production – such as the benefits of a lighthouse. Such goods are said to be nonrival in consumption, and completely open markets without a way of financing them may underinvest in their production and repair. Nonexcludable and nonrival goods define what are called* ***public goods****.*
- *When information to their producers or consumers is highly uncertain or unavailable to one party, market powers may be highly uneven resulting in producers being underpaid or consumers deceived. Such* ***information asymmetry*** *may result in underproduction or over-production of shoddy goods and services."*

Market Failures In an Unregulated Land Market

In an entirely unregulated market for the use and development of land, market failure would be manifested in the form of:

- a number of **negative externalities** flowing from the use and development of land, including:

  (1) co-location of incompatible land uses;

  (2) damage to the natural and built environment;

  (3) loss of amenity to those living in proximity to uses or developments which encroach on their surroundings whether by way of noise, pollution or visually;

(4) increased risk to health or safety;

(5) loss of or damage to assets considered by the community to be of heritage or cultural significance; and

(6) the imposition of excessive loads on existing community and industry infrastructure, which may lead to its decline and ultimate failure;

- the absence or lack of necessary or desirable **facilities which are in the nature of public goods** needed by the community generally, such as recreational reserves, buffer zones and some forms of public infrastructure; and

- **information asymmetry**, where parties do not have sufficient information to make informed decisions about the quality of land or buildings prior to purchase, or the nature of other land uses in the area which may impose negative externalities on them.

Linking the objectives of the Victorian Planning Legislation to market failures

The Objectives of Planning in Victoria (specified in Section 4(1) of the Act) which are discussed in **Section 4.1** of this Report address market failures in the following ways:

- the objective of providing for the fair, orderly, economic and sustainable use and development of land relates to the avoidance of negative externalities which may arise from co-location of incompatible land uses or development without regard to the impact of that development upon the community in general;

- the objective of providing for the protection of natural and man-made resources addresses negative externalities relating to over-exploitation of land resources for development purposes;

- the objective of securing a pleasant, efficient and safe working, living and recreational environment for all Victorians addresses market failure in the form of health and safety related negative externalities and public goods;

- the objective of conserving and enhancing heritage and cultural assets addresses market failure by way of negative externalities (eg protection of historical or culturally significant buildings, places or artefacts beyond the level afforded by the market) ; and

- the objective of protecting and enabling the orderly provision of community infrastructure addresses market failure in the form of negative externalities (eg avoidance of congestion externalities) and efficient provision of public goods (eg the provision of non-rival, non-excludable infrastructure that would not otherwise be provided by an unregulated market).

Most of the twelve Planning Framework Objectives which are listed in **Section 4.1** (being those specified in Section 4(2) of the Act) can also be related to addressing market failures in the form of negative externalities and

lack of public goods. The eighth objective of establishing a clear procedure for amending planning schemes, with appropriate public participation in decision making, and the ninth objective of ensuring that those affected by proposals for land use or development, or changes in planning policy, receive appropriate notice, address information asymmetry market failure. They establish as an objective of the Victorian Planning Legislation that the Legislation should result in implementation of appropriate procedures to ensure that those affected by land use or development, both directly and as members of the community, are appropriately notified and have the ability to voice any concerns that they may have in relation to a proposal.

Part (2) of each Case Study in **Section 8** contains an analysis of the objectives of the provision of the Victorian Planning Legislation to which the Case Study relates, and identifies the market failures which each provision is intended to address.

5. RESTRICTIONS ON COMPETITION

5.1 Identification of Relevant Markets

Critical to any assessment of the extent to which any legislation impacts upon competition is the determination of the market in respect of which the impact upon competition is to be considered.

A useful starting point in defining a market is to consider the definition of that term in the Commonwealth Trade Practices Act 1974, which is as follows:

> "*For the purposes of this Act, unless the contrary intention appears, "market" means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.*"

It is widely accepted that markets should at least be defined having regard to four elements:

- **product level** ie identifying competing products or services, usually on the basis of them being substitutable
- **geographical level** ie identifying the geographical extent of the market
- **functional level** eg manufacturing, wholesale or retail
- **temporal level** ie taking into account likely future developments and inter-generational issues including the impact of current activities on future generations and past activities on current generation.

The obvious "product" market that must be considered in the context of this review is the market for the **use and development of land** (**"Land Use Market"**). The "geographical" extent of this market is the State of Victoria, although it is recognised that in particular situations this market may be more geographically limited, so as for example to be divided into a market for the use and development of land in the Melbourne metropolitan area and a market for the use and development of land in rural Victoria. The market relating to the use and development of land is also an input market for the final product markets identified below.

The further set of markets which must be considered in the context of this review are the **product markets for the provision of the range of goods and services produced or provided using land situated in Victoria** (**"Final Product Markets"**). At a "product" and "functional" level, it is necessary to consider almost **any** market for the provision of goods or services on land situated in Victoria. The geographical extent of a particular Final Product Market will vary – for example, the market relating to market gardening is likely to be largely confined to land within a maximum radius of the Melbourne metropolitan area.

The breadth of markets which could be considered is alluded to in **Section 2.2** of this Report, and it is for this reason that this Report includes the five

Case Studies, which are designed to deliver an appropriate focus as to the potential impacts on competition of Victorian Planning Legislation. The restrictions on competition which flow or potentially flow from each of the five Case Studies are considered in Part (3) of each Case Study in **Section 8.**

In connection with the Land Use Market, there is a range of markets for complementary services (eg construction, surveying, civil engineering, soil testing, environmental auditing, town planning, architectural, and other similar services relevant to the use and development of land) in respect of which the Legislation may impact upon competition. The geographical extent of these markets will vary depending on the portability of the providers of these services – for example, as far as building services are concerned an appropriate territory may be the Melbourne metropolitan area, to the extent that builders are generally portable in terms of where they provide their services.

Legislation may affect competition in a particular Final Product Market and also in markets for goods or services which are substitutes for that Final Product Market. For example, if legislation reduces the efficiency of, say, the public transport system it will lose business to the taxi industry and alternative forms of transportation. In this way legislation can have a multiplied effect on markets throughout the economy.

5.2 Provisions of the Legislation That Restrict Competition

This Section considers the extent to which Victorian Planning Legislation creates, or has the potential to create, restrictions on competition in the Land Use Market or Final Product Markets, having regard to the seven main forms of restriction on competition identified in the NCC Guidelines, namely restrictions:

- on entry or exit of firms/individuals into or out of markets;
- which advantage some businesses over others;
- of prices or production levels;
- on quality or location of goods and services ;
- of advertising and promotional activities;
- of pricing and type of input used in the production process; and
- by imposing significant transactions costs on business or households.

Each of these categories of restriction is considered below. Consistent with NCP principles, the term "restriction" is not confined only to direct prohibitions of competition. It also includes factors that can reduce the degree of rivalry between firms in a market, for example by raising entry or operating costs or allowing some firms to dominate a market:

(1) Restriction by governing entry or exit for firms/individuals into and out of markets

(a) Planning and Environment Act 1987

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The following provisions of the Act restrict or potentially restrict new competitors with similar products or services from entering into the Land Use Market or an existing Final Product Market:

(i) **Section 6(3) Existing Use Rights** – this prevents planning schemes from restricting the continuation of a pre-existing use of land, or the continued use of buildings or works on land for a purpose, which would otherwise be prohibited by the current legislation or would otherwise require a planning permit with consequential costs and restrictions (e.g. permit conditions). Planning schemes are obliged to acknowledge the Act and to recognise existing use in this way in their General Provisions.

To the extent that an existing competitor in a Final Product Market is able to take advantage of this planning hiatus, that competitor may be advantaged over prospective new market entrants. For example, prospective new entrants may be prohibited by zoning from situating a business in a particular location or have to comply with design or site conditions which, in either case, may dissuade them from entering a particular Final Product Market or restrict their ability to compete effectively.

Case Study 5 in **Section 8.5** contains an analysis of the impact on competition of existing use rights recognised by the Act and the "alternative prohibited use" provisions in planning schemes.

(ii) **Section 46I Development Contributions Plans** – this permits a planning scheme to include one or more development contributions plans, which may require a proponent of new development to contribute towards the cost of providing development or community infrastructure. Those plans may provide for either or both the imposition of a development infrastructure levy or community infrastructure levy in relation to the development of land in the area to which the development contributions plan applies. Development contributions plans represent a potential additional transaction cost of entry into a Final Product Market for prospective new entrants by increasing the cost of acquisition and development of land as an input. Further, they potentially create a situation where incumbent developers may derive benefit from infrastructure provided by a later entrant.

(iii) **Section 173 Agreements** – Section 173 Agreements between a Responsible Authority and an owner of land may prohibit, restrict or regulate the use or development of land, or impose conditions subject to which land may be used.

To the extent that Section 173 Agreements amount to an additional layer of planning control over and above planning schemes, they have potential to expose individual developers to pressure by the Responsible Authority to accept restrictions that would not ordinarily flow from planning scheme control and/or to provide benefits over and above what would be required under legislation. There are examples of Section 173 Agreements which oblige the land owner to surrender rights to apply for further permits and to surrender existing use rights. Developers can be persuaded to enter into Section 173 Agreements in order to obtain favourable consideration by a Responsible Authority and avoid long and costly delay in obtaining planning approval by more conventional means.

Section 173 Agreements have sometimes imposed direct restrictions on the income that may be earned post-development. There are examples of restrictions on charges for recreational facilities and car parking fees. The Flinders Gate Carpark Section 173 Agreement which set up a pricing structure, is an example of this. That agreement sought to further the City of Melbourne Parking Limitation Policy.

Section 173 Agreements potentially impact upon competition in the Land Use Market by limiting or restricting available land in respect of certain purposes.

They may restrict competition in a particular Final Product Market, to the extent that a prospective competitor is affected by a restrictive Section 173 Agreement when existing competitors in the same market are not (it is recognised that Section 173 Agreement could equally disadvantage an existing competitor if that competitor uses land which is subject to restrictions imposed by an agreement).

If the Responsible Authority requires the affected party to provide a bond or guarantee in relation to performance of obligations under a Section 173 Agreement, this may further create a barrier to entry for a potential new competitor in a Product Market, in terms of increasing the cost of entry.

Case Study 3 in **Section 8.3** contains a detailed analysis of the impact on competition of Section 173 Agreements.

(iv) **Permit Application/Planning Scheme amendment process** - the mechanisms provided by the Act in respect of applications for planning permits and planning scheme amendments are potentially expensive and long-winded, having regard to the third party objection and appeal processes which potentially

apply. Each of these processes by definition imposes a barrier to entry in relation to a prospective new competitor, in any Final Product Market, to the extent that a proposed use or development of land requires a planning permit or planning scheme amendment, or is required to comply with a range of conditions attached to a planning permit.

These barriers to entry comprise the transaction costs associated with the application processes, including legal and other expert fees, as well as costs associated with delay with those processes including holding costs, opportunity cost and building costs. As a reflection of the potential impact which this process may have on the viability of a development project, there are recorded cases of money being paid for the withdrawal of objections and appeals.

The submissions received in relation to this review from the Australian Competition and Consumer Commission ("**ACCC**"), the City of Greater Geelong, the Housing Industry Association and the Institute of Surveyors Victoria recognise the potential for the planning processes to hinder competition, particularly in the context of retail planning.

The fact that the existing planning permit application and planning scheme amendment process accommodates what are essentially purely economic objections by existing competitors potentially restricts competition in Final Product Markets. This potential restriction exists to the extent that existing competitors are able to hinder and delay, or prevent, market entry by prospective new competitors.

A shortcoming of the notification/objection process is that, despite 1993 amendments to the Act that require that an objector must state how they are actually affected by a proposal, this is usually ignored and not followed up by Responsible Authorities. This allows vexatious objectors to hold the process up despite being unable to demonstrate how the proposal affects them directly.

Section 57 (2A) of the Act was introduced in 1993 in an attempt to overcome the problem of objections which the Responsible Authority may consider to have been primarily made to secure or maintain a direct or indirect commercial advantage for the objector. The provision allows the Responsible Authority to reject such objections, but in fact this does not happen. A decision of the Supreme Court in *No. 2 Pitt Street Pty Ltd v. Wodonga Rural City Council* 3 VPR 328 effectively means that the Responsible Authority may not reject a commercial objection unless the potential objector has

been given an opportunity to be heard. In practice, Responsible Authorities will take the line of least resistance and not challenge such objections.

Similarly, although Section 150 of the Act permits the award of damages and costs for vexatious or economically based objections, the Tribunal has ruled in a number of decisions that even commercially-based objections contain some planning merit and/or it is not possible to distinguish between grounds. (See the Editorial headed "Commercial Objections" in 21AATR 46 and the decision of the Tribunal in *Countrywide Retail Management Pty Ltd v. Yarra Ranges Shire Council* 21AATR 47).

This practical reality tends to further discriminate against a prospective new entrant, which is exposed to the full costs of the permit application process, in favour of commercial objectors, who may be incumbent competitors, who are not exposed to any risk for costs.

(v) **Administrative Functions of Planning and Responsible Authorities** - the Act may be argued to create barriers to entry of persons who may be appropriately qualified to undertake certain administrative functions in relation to the preparation and administration of planning schemes, including issuing certificates of compliance. For example, section 13 of the Act is drafted so that a municipal council will be the Responsible Authority in respect of land within its municipal district unless the planning scheme specifies otherwise, and Section 97N (which relates to applications for certificates of compliance) in effect requires a person to apply to the Responsible Authority for a certificate of compliance.

In its submission in relation to this review, the Housing Industry Association submits that many routine decisions associated with the administrative process, and particularly as to whether a development complies with established assessment criteria, "*could readily be undertaken in a competitive environment*". For example, ANSTAT presently issues informal advice on existing and proposed planning controls, but this advice has no legal status under the Act.

To the extent that in practice a monopoly is conferred upon a Responsible Authority in performing administrative functions which may otherwise be competently performed by private sector entities, the Act may be argued to offend the principle of competitive neutrality enunciated in clause 3 of the CPA (*"government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the*

business activities of publicly owned entities, not to the non-business, non-profit activities of these entities"), by favouring municipal authorities over potential private sector competitors.

(b) State Planning Policy Framework

The **SPPF** potentially influences the uses to which land may be put both by influencing the zoning of land by Responsible Authorities, and by requiring that Planning and Responsible Authorities have regard to the policy when considering planning scheme amendments/permit applications (including by requiring certain conditions to be imposed in relation to a particular use which is permitted).

The seven general principles of land use and development planning (*settlement, environment, management of resources, infrastructure, economic wellbeing, social needs and regional cooperation*) in the SPPF may restrict competition for land use in the Land Use Market, by favouring particular forms of land use in any given situation, and may restrict the land which is available to a prospective new competitor in a Final Product Market.

For example, the *settlement* policy provides that major suburban retail, commercial, administrative, health, education, entertainment and cultural developments should be concentrated in and around activity centres with good access to integrated transport modes. This may create a barrier to entry for new entrants in a range of Final Product Markets, to the extent that it has the effect of limiting the land available to them to establish a new business.

Similarly, the specific policies within the SPPF may limit land which is available to prospective new competitors in a Final Product Market, and as a result compel them to locate in a non-preferred location. For example, the policies articulated in the specific area of Economic Development, which focus on concentrating new commercial development into activity centres, are likely to limit the land available to a range of prospective new market entrants into a Final Product Market.

Case Study 1 in **Section 8.1** contains a detailed analysis of the impact of the Business policy within the SPPF on competition in the Land Use and Final Product Markets.

(c) Local Planning Policy Framework

The MSS and Local Planning policies in planning schemes are required to be taken into account when a Planning Authority prepares planning scheme amendments or a Responsible Authority makes any decisions under the planning scheme. Given that those policies specify in greater detail than the SPPF the manner in which policies are to be effected at a local level, they have a potentially greater impact upon competition

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in the Land Use Market and Final Product Markets. They also impact upon zone implementation and, depending on the way in which land within a local area is zoned, favour certain land uses over others (ie industrial, business, rural, residential, low density residential).

Specific Local Planning policies may restrict competition in terms of the additional burden which they impose upon prospective new market entrants into Final Product Markets. For example, policies in relation to industrial subdivision and design and commercial subdivision, respectively, provide that development proposals should include site analyses, design response statements or comprehensive development plans, and thereby impose additional barriers to entry, both in terms of the costs and information requirements associated with preparation of such documents, and in terms of delay.

Case Study 2 in **Section 8.2** contains a detailed analysis of the potential impact on competition of a Responsible Authority's planning scheme policy in respect of development on highways, main roads and tourist routes in relation to land within a Rural Zone.

(d) **Zones**

Zones directly impact upon the uses to which land may be put. Depending on the basis upon which particular land is zoned, a particular use of that land will be:

- permitted without a permit (but possibly subject to one or more conditions);
- permitted provided that a permit is first obtained (and any conditions included in the permit complied with); or
- prohibited.

By definition, zoning of land results in certain land uses in a particular location being favoured over others; and accordingly competition in the Land Use Market is restricted. This also impacts upon prospective new competitors in any Final Product Market, to the extent that it reduces the land which is available for that competitor to situate a new business. To the extent that the preferred site is not available, this may in turn increase the cost of production of that new business.

Specific zoning provisions may also create barriers to entry for a prospective new competitor in a Final Product Market, by discriminating between existing and prospective new entrants. For example, the zoning provisions which relate to land zoned as Industrial 1 potentially favour an incumbent in relation to the construction of buildings or carrying out of works, by allowing an exemption to the requirement that a permit be obtained (with the accompanying application requirements and costs associated with meeting those requirements) where the building

or works involved represents a rearrangement, alteration or renewal of existing plant and the area or height of the plant is not increased.

(e) Overlays

The application of an overlay to particular land is likely to require the owner or acquirer of that land to comply with additional conditions in relation to the use and/or development of the land. To the extent that a particular overlay applies to particular land, it is likely that the uses to which the land may be put, and the development allowed in relation to that land, will be restricted. This impacts upon the land available to prospective new market entrants in a range of Final Product Markets.

To the extent that a particular use or development may be permitted in relation to land which is the subject of a particular overlay subject to a permit being obtained, the overlay may operate to advantage existing competitors in a range of Final Product Markets, as against prospective new competitors. For example, the overlay may impose significant additional costs and delay in relation to entry into the market, as the prospective new entrant is required to negotiate the permit application process.

By way of further example, the Design and Development overlay potentially restricts new competitors' entry into a particular Final Product Market. Typically, a permit must be obtained in order to construct a building or construct or carry out works on, or subdivide, land which is the subject of a Design and Development overlay, even though a permit may not be required under the relevant zone (e.g Residential 1). This imposes on a potential new market entrant costs associated with the preparation of a permit application including, for example, a site analysis and site context plan, and design response to the site analysis to the satisfaction of the Responsible Authority, in relation to new buildings and works.

Similarly, the Development Plan overlay identifies land in respect of which a permit to use or subdivide the land or construct a building or construct or carry out works on the land, must not be granted unless a development plan has been prepared to the satisfaction of the Responsible Authority. The requirement that such a plan be prepared may represent a further barrier to entry of new competitors.

(f) Particular Provisions

Particular Provisions potentially impose additional requirements in relation to specific categories of use and development of land.

For example, the Particular Provision relating to subdivisions requires that a person who proposes to subdivide land must make a contribution to the council for public open space in an amount specified in the schedule to the clause. This represents a restriction on the manner in which the land may be used which might not apply to an incumbent competitor.

Other examples of the way in which Particular Provisions may impose barriers to entry for prospective new entrants into Final Product Markets are those which:

- require that an application for a permit to construct a dwelling on a lot of less than 300 square metres, medium-density housing or a residential building be accompanied by a site analysis and design response to the site analysis; and

- prohibit use of land or increase in the floor area occupied by an existing use unless required car spaces have been provided.

Case Study 4 in **Section 8.4** contains a detailed analysis of the impact upon competition of the Particular Provision relating to Home Occupation.

(g) **General Provisions**

Clause 63 in new planning schemes accords with Section 6(3) of the Act, in recognising existing use rights. It potentially restricts competition by favouring incumbent competitors in a Final Product Market, by allowing existing uses which would otherwise be prohibited, require a permit or require particular conditions to be attached to a permit. This is analysed further in Case Study 5 in **Section 8.5**.

The majority of the restrictions identified in paragraphs (a) – (g) of this **Section 5.2(1)** are likely to achieve the objectives of the Victorian Planning Legislation described in **Section 4.1**, to the extent that they are intended to ensure that community and industry infrastructure is provided (this is commonly achieved through development contributions plans and Section 173 Agreements), fairness and sustainability of use and development of land (this is a likely consequence of recognition of existing use rights, as well as the administration of the planning permit application/planning scheme amendment system) and the security of the community's amenity and the provision of a safe environment (the SPPF, LPPF, zones, overlays, Particular Provisions and general provisions all contribute to this end). However, it is difficult to link the conferral of a monopoly on a Planning or Responsible Authority of those functions relating to the preparation and administration of planning schemes with the objectives of the Victorian Planning Legislation, if the relevant function can equally be performed by other private or public sector entities.

In **Section 6.3**, the costs and benefits flowing from the restrictions identified in this **Section 5.2(1)** are considered.

(2) **Restrictions by providing advantages to some businesses over others**

Advantaging Existing Competitors Over New Entrants

Section 5.2(1) above identifies a number of provisions of the Legislation which potentially advantage incumbent competitors over new market entrants in Final Product Markets, including:

- Section 46I of the Act relating to development contributions plans (refer paragraph (1)(a)(ii));
- Section 173 Agreements (refer paragraph (1)(a)(iii));
- the permit application/planning scheme amendment process (refer paragraph (1)(a)(iv));
- the SPPF and LPPF (refer paragraphs (1)(b) and (c));
- zones (refer paragraph (1)(d));
- overlays (refer paragraph (1)(e)); and
- Particular Provisions (refer paragraph (1)(f)).

Advantaging Certain Existing Competitors Over Others

Each of the provisions above also potentially discriminates between existing competitors in the Land Use Market, and Final Product Markets. The SPPF, LPPF, zones and overlays potentially discriminate in this way by advantaging certain types of business or activity in a particular location. For example, the ports policy in the SPPF favours uses of land adjacent to a port, which depend upon or gain significant economic advantage by being near the port's shipping operations.

Development contribution plans, Section 173 Agreements and the administration of the planning scheme amendment/permit application process also potentially discriminate between existing competitors in the Land Use Market and Final Product Markets.

Development Contributions Plans:

To the extent that a development contributions plan discriminates in respect of:

- the land in an area, and the types of development, in respect of which a levy is payable; or
- the method for determining the amount of the levy payable in respect of a development of the land,

it has the potential to advantage certain existing competitors over other existing competitors in both the Land Use Market and Final Product Markets.

Similarly, to the extent that certain land uses and certain types of development may be exempt from payment of a development infrastructure levy or community infrastructure levy or both competition between existing competitors in the Land Use Market and Final Product Markets may be restricted.

Section 173 Agreements:

A competitor in a Final Product Market which uses or occupies land which is the subject of restrictions and controls due to the existence of a Section 173 Agreement may be hindered in its ability to compete. Conversely, a competitor which has negotiated favourable treatment in a Section 173 Agreement may have a competitive advantage. The potential for Section 173 Agreements to be discriminatory in the treatment of different proponents is significant, given that the community is usually shut out of the agreement process. Typically, a permit condition requiring that the owner of the subject land must enter into a Section 173 Agreement means that the details are something to be worked out later. Persons who may have contributed to the decision-making process to that point (eg objectors) have no further input and no right to see, let alone comment on, the agreement ultimately arrived at. The same applies to Section 173 Agreements required under a planning scheme.

Permit Application/Planning Scheme Amendment Process:

There are a range of ways in which the Victorian Planning Legislation may be applied in a discriminatory manner, which may result in a particular participant in the Land Use Market or a Final Product Market being advantaged over another. For example:

(a) there may be a lack of consistency as to the basis upon which a Responsible Authority notifies a planning permit application to both owners and occupiers of adjoining land, and other potentially interested persons. Responsible Authorities are required to notify owners unless they are satisfied that the grant of the permit would not cause "*material detriment*" to any person, and must notify any other person which the Responsible Authority considers will suffer "*material detriment*" by the grant of the permit.

As is noted in the Auditor-General Report, there is no definition of "*material detriment*" in the Act. Although there are Tribunal decisions which have attempted to flesh out what is meant by the word "*detriment*" ("*diminution, damage, loss, or disadvantage, harm or loss*"), there is scope for a subjective decision to be made on the part of a particular officer of a Responsible Authority when considering whether or not to require that notice be given of an application.

Given the lack of clear definition of "*material detriment*", the Auditor-General Report recommends that records be kept by Responsible Authorities to support the approach taken in determining whether or not to notify a particular party, and that those records be publicly available;

(b) similarly, there is scope for inconsistency in determinations by a Planning Authority as to whether or not to give notice of the preparation of a planning scheme amendment to various authorities and the owners and occupiers of land. In this case, the uncertainty surrounds the precise meaning of the words "*materially affected by the amendment*". The Auditor-General Report recommends a clear definition of the term "*materially affected*" to facilitate a consistent approach by councils to notifying affected parties of proposed developments or land uses arising from planning scheme amendments;

(c) the decision by the Minister for Planning to exempt a Planning Authority from any of the notification requirements in relation to planning scheme amendments potentially gives rise to discrimination between market participants. The Minister may so exempt a planning authority on condition that there is some alternative means of notification, but this is not essential. Responding to the recommendation on the Auditor-General Report that there be improved documentation and transparency of the exemption determination, the Victorian Government has moved to reduce the potential for this provision to be inconsistently applied by having issued a Practice Note entitled "Ministerial Powers of Intervention in Planning and Heritage Matters (December 1999)" ("**Practice Note**");

(d) the exercise by the Minister of the power to "fast-track" planning scheme amendments under Section 20(4) of the Act is also the subject of the Practice Note, which is intended to reduce the potential for this power to be inconsistently applied. The Practice Note seeks to address concerns raised in the Auditor-General Report concerning the possible lack of transparency in the exercise by the Minister of this power;

(e) the Minister has the power under the Act to call-in certain applications for permit to a Responsible Authority and similar power under the *Victorian Civil and Administrative Tribunal Act 1998* to call in a matter before the Tribunal. The Auditor-General Report recognises the potential for the exercise of the call-in power to discriminate between applicants, and reports (at the time the Auditor-General Report was issued) the absence of documentation at Departmental level setting out the reasons for a call-in. The Auditor-General Report recommends that, in the interests of transparency and accountability, such documentation ought to be in the public domain. The Practice Note issued since the Auditor-General Report seeks to increase the transparency of the call-in process;

(f) Section 60(1)(b) of the Act permits a Responsible Authority to consider "*any other relevant matter*" in determining whether or not to grant a planning permit. Although the need for flexibility in the consideration by a Responsible Authority of planning permit applications is recognised, the breadth of these words increases the potential for inconsistency in the manner in which

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a Responsible Authority determines apparently similar planning permit applications;

(g) the ability of a Responsible Authority, under Section 62 of the Act, to include "*any other condition that it thinks fit*" when granting a planning permit may restrict competition in a given market, to the extent that it allows discrimination in conditions imposed on similar applicants; and

(h) the length of time taken by a Responsible Authority to handle a planning permit application may vary from case to case. The Auditor-General Report recommends that councils develop strategies directed towards minimising the length of time not counted within the legislative limit of 60 days.

Case Studies 1 and 2 in **Sections 8.1 and 8.2** also illustrate how exceptions allowed under State Planning Policies and Local Planning policies may discriminate in favour of particular activities.

Advantaging Public Sector Entities Over Private Sector Entities

A number of provisions of the Victorian Planning Legislation potentially favour public sector entities over private sector entities including:

- the provisions of the Act which tend to allocate by default responsibility for administrative functions relating to the preparation and administration of planning schemes to Planning Authorities and Responsible Authorities (as summarised in paragraph (1)(a)(v) of **Section 5.2**);

- Section 95 of the Act, which establishes a procedure by which certain classes of applications for permits by Ministers or Government Departments can be required to be referred to the Minister, for determination by the Governor in Council;

- Section 96 of the Act, which requires a Responsible Authority to obtain a permit from the Minister before carrying out any use or development for which a permit is required under a planning scheme for which it is the Responsible Authority, unless a planning scheme exempts their land, use or development from the operation of the section. Similarly, a person other than the Responsible Authority must obtain the consent of the Responsible Authority and a permit from the Minister before carrying out any use or development of any land managed (whether as a committee of management or otherwise), occupied or owned by the Responsible Authority for which a permit is required under the planning scheme for which it is the Responsible Authority, unless the planning scheme exempts the land, use or development from the operation of the section.

  Significantly, the Act permits planning schemes to exempt certain types of land use or development from the operation of Section 96 and, in practice, the Clause 67 General Provision in all new planning schemes continues full exemptions from earlier planning schemes, and effectively nullifies Section 96. As a result,

Responsible Authorities are able to apply to themselves for a permit. This offends the principle of competitive neutrality by enabling the municipal authorities to adjudicate their own case, and creates the potential for subjectivity and lack of rigour in the assessment process.

The provisions identified in this **Section 5.2(2)** as restricting or potentially restricting competition are intended to achieve one or more of the objectives of the Victorian Planning Legislation described in **Section 4.1**, including provision of industry and community infrastructure (Section 173 Agreements and development contribution plans), prevention of co-location of incompatible land uses (the SPPF, the LPPF, zones, overlays and Particular Provisions), the securing of a pleasant, safe and effective living, working and recreational environment (the SPPF, the LPPF, zones, overlays and Particular Provisions) and the orderly, fair and sustainable development of land (the planning scheme amendment and permit application process). However, a permit application/planning scheme amendment process which fails to deliver transparency and consistency of application, and which may render the planning process inordinately long and expensive, may be argued to not achieve its objectives of promoting fairness and sustainability in respect of the use and development of land in Victoria. Similarly, the provisions in the Legislation which confer a monopoly on a Planning or Responsible Authority in respect of certain functions relating to the administration of the planning system cannot easily be related to the achievement of one or more of the objectives of the Victorian Planning Legislation identified in **Section 4.1**.

In **Section 6.4**, costs and benefits to the community which flow from the restrictions identified in this **Section 5.2(2)** are considered.

(3) **Restrictions on prices or production levels**

The Victorian Planning Legislation restricts or potentially restricts pricing and production levels in both the Land Use Market and Final Product Markets.

Impact on price that would otherwise be determined by the market

In the context of the Land Use Market, the application of the SPPF, LPPF, zoning and overlays tends to limit the uses and development which may be made in respect of particular land, which in turn may restrict the demand for and, as a result, value of that land as an input.

To the extent that each of the restrictions on competition which are identified in **Section 5.2(1)** impose additional costs of market entry upon prospective new entrants in Final Product Markets, those restrictions are likely to increase the cost of production and price applicable to the good or service produced by that new entrant.

Section 173 Agreements may have a more direct similar effect. For example, past Section 173 Agreements have specified the maximum price that a carpark operator may charge for carparking, or have permitted access to certain facilities such as rest rooms and boat

ramps on condition that the party to the Agreement does not charge others for the right.

Restrictions on price or production by limiting products which a firm may produce or trade

Zones and overlays directly impact upon the Land Use Market. Zoning may prohibit certain uses and development of certain land, or limit those uses and development by requiring that a permit, with accompanying restrictions, be obtained. Overlays similarly restrict certain developments and uses of certain types of land.

Restrictions on competition by limiting size of operation – restricting hours of trading or operation

The Home Occupation Particular Provision potentially restricts competition in the Land Use Market and in Final Product Markets, by restricting the type and scale of business that may be conducted from a home occupation. For example, it:

- requires that the home occupation not involve the offering for sale of any externally produced goods and, as such, inhibits retail activities from a home occupation;

- limits the hours of operation of a home occupation, by imposing a requirement that the hours of operation not affect the amenity of the neighbourhood in any way; and

- places a cap on the gross floor area used in conducting the home occupation, even with a permit.

The provisions identified in this **Section 5.2(3)** which restrict or may restrict competition in the Land Use Market or Final Product Market are intended to achieve one or more of the objectives of the Victorian Planning Legislation identified in **Section 4.1**, including the protection of the natural and built environment (zones and overlays), the securing of community amenity and the provision of a safe environment (the SPPF, the LPPF, zones, overlays and Particular Provisions) and ensuring that necessary industry and community infrastructure is provided (Section 173 Agreements).

Section 6.5 contains an analysis of the costs and benefits to the community of these restrictions.

(4) **Restrictions on quality or location of goods and services**

Quality Level

The Victorian Planning Legislation restricts competitive conduct in the Land Use Market by imposing quality standards in respect of the use and development of land. For example:

- specific Local Planning Policies impose development standards, such as policies relating to industrial and commercial subdivision

and design, which require development proposals to include a site analysis and design response statement;

- zoning provisions have a similar effect, to the extent that a particular use may be prohibited, or allowed only subject to satisfaction of certain conditions, or be allowed subject to the grant of a permit (including compliance with the conditions which are attached to that permit);

- overlays may require additional conditions to be complied with in relation to the use and/or development of particular land. The examples provided in **Section 5.2(1)** in relation to the Design and Development overlay and Development Plan overlay illustrate the additional costs which may be imposed upon persons wishing to construct a building or carry out works on land, or subdivide land, in the form of, respectively, the requirement that a site analysis and site context plan and design response to the site analysis be prepared and a development plan be prepared.

These provisions also impact upon competition in Final Product Markets to the extent that they introduce additional development and compliance costs in relation to land. Although the impact of these provisions on competition in a particular Final Product Market will depend upon the characteristics of that market, at a general level they are more likely than not to disadvantage prospective new market entrants by preventing a new entrant from siting its business at its preferred location and/or increasing the establishment costs of that new entrant.

Restriction on location of goods and services

The application of the SPPF and Local Planning Policies, together with specific controls by way of zoning, overlay and Particular Provisions, necessarily restrict competition in the Land Use Market by prohibiting or restricting certain uses and development of land having regard to the location of that land. Certain land uses may be more favoured than others depending on the location of land – this is reflected in SPPF policies such as those relating to agriculture, ports and airports and, in a social and economic context, gaming machines. Similarly, depending on the nature of the zoning of land, certain uses are favoured over others.

Whether or not this interference in the competitive market process in the Land Use Market has the effect of restricting competition in Final Product Markets depends on the particular circumstances of a particular Final Product Market. However, as is identified in **Section 5.2(1)** above, restrictions on the location of land use have the potential to create barriers to entry for prospective competitors in Final Product Markets, by preventing them from locating a new business in their preferred location, and increasing the cost of entry, particularly if a planning scheme amendment or permit is required.

Each of the provisions identified in this **Section 5.2(4)** as restricting the quality or location of goods and services is intended to achieve one or more of the Victorian planning objectives identified in **Section 4.1**,

including protecting the natural and built environment (zones and overlays) and securing community amenity and a safe environment (the SPPF, the LPPF, zones. Overlays and Particular Provisions) In **Section 6.6**, an analysis is undertaken as to whether the costs to the community of the restrictions identified in this **Section 5.2(4)** outweigh the benefits.

(5) **Restrictions on advertising and promotional activities**

The Victorian Planning Legislation imposes limitations on the type and form of advertising permitted on Victorian land, particularly in terms of the manner in which a product and/or service provided from the use of land may be promoted.

For example:

- a Local Planning Policy relating to Advertising Signs may specify a number of policy objectives in respect of advertising signs which relate to visual amenity and character, effectiveness of signs and road safety. Although the decision guidelines in respect of the application of that policy require the Responsible Authority to consider the type of land use and its need for identification (which may result in discrimination as between different types of land use and accordingly restrict competition in the Land Use Market), it is unlikely that the policy of itself will restrict competition in any given Final Product Market;

- the Particular Provision in relation to advertising signs imposes restrictions as to how products or services may be promoted, by creating (having regard to 4 categories of land: business areas, office and industrial, high amenity areas and sensitive areas) a category of signs which do not require a permit (in certain cases subject to complying with certain conditions, including in some cases specification of a maximum signage area), a category of signs in respect of which a permit is required (in certain cases subject to a condition) and a category of sign which is prohibited. By recognising an existing use right in relation to a sign that was lawfully displayed on the date that the scheme took effect or that was being constructed on that date, the provision may advantage an incumbent competitor which has erected a sign which would otherwise not be permitted under the present scheme. The current requirement for expiry dates in permits also advantages an incumbent competitor who is not the subject of such a restriction.

The provisions of the Victorian Planning Legislation identified in this **Section 5.2(5)** as restricting or potentially restricting competition by restricting advertising and promotional activities are directed towards achieving one or more of the objectives of the Victorian Planning Legislation identified in **Section 4.1**, including preventing detriment to the community's amenity and providing a safe environment. In **Section 6.7**, consideration is given as to whether the costs to the community of these restrictions outweighs their benefits to the community.

(6) **Restrictions on price or type of input used in the production process**

To the extent that the Victorian Planning Legislation restricts the land which is available for certain types of activity in the Land Use Market, it limits the availability of land as an input in a range of Final Product Markets. This is most directly manifested through the operation of the zones and overlays, which may prohibit certain uses and development of land outright or permit them subject to obtaining a permit and/or compliance with a range of conditions which may prove to be limiting.

These restrictions impact upon the price of land as an input either by:

- affecting the price of land in consequence of its zoning or the application of an overlay; or

- increasing the cost of acquisition of land to the extent that the quantity of suitable land for a particular business is diminished.

As has earlier been identified, this may impact upon competition in Final Product Markets, by preventing new entrants from situating their businesses at a preferred location (including a location which is in close proximity to important infrastructure), or by adding to the costs of establishing and maintaining a business operation.

The operation of the zoning provisions may also restrict competition in Final Product Markets by stifling innovation of new methods of production. For example, the tolerances in respect of noise or pollution allowed in land which is zoned in a particular way may provide insufficient incentive for that business to seek production efficiencies through innovation.

The zones and overlays which are identified as restricting or potentially restricting competition in this **Section 5.2(6)** are intended to achieve one or more of the objectives of the Victorian Planning Legislation identified in **Section 4.1**; including by preventing detriment to the community's amenity and safe environment which may otherwise flow from the development and use of land and protecting the natural and built environment from over-exploitation.

In **Section 6.8**, an analysis is made as to whether the costs to the community of these restrictions outweigh the benefits.

(7) **Restrictions by imposing significant transactions costs on businesses or households**

In **Section 5.2(1) of this Report**, a number of the Victorian Planning Legislation provisions are identified as imposing or having the potential to impose significant costs of entry and compliance on competitors in Final Product Markets. These provisions include:

- Section 46I of the Act relating to development contributions plans (refer paragraph (1)(a)(ii));

- Section 173 Agreements (refer paragraph (1)(a)(iii));

- the permit application/planning scheme amendment process (refer paragraph (1)(a)(iv));
- the SPPF and LPPF (refer paragraphs (1)(b) and (c));
- zones (refer paragraph (1)(d));
- overlays (refer paragraph (1)(e)); and
- Particular Provisions (refer paragraph (1)(f)).

To the extent that the administrative or compliance costs imposed by the Victorian Planning Legislation discriminate between competitors in a Final Product Market, they are likely to create restrictions on competition in those markets.

The Fees payable in respect of the planning scheme amendment/planning permit application process also represent additional costs on Land Use Market and Final Product Market participants. Those Fees have recently been the subject of a Regulatory Impact Statement (*Regulatory Impact Statement-Planning and Environment (Fees) Regulations 2000 (May 2000)*) prepared by the Department of Infrastructure). The Regulatory Impact Statement concluded that the *Planning and Environment (Fees) Regulations 2000* provided the following key advantages:

- consistency of fee schedules across the State;
- reasonable reflectivity of the costs of undertaking planning functions;
- achievement of full cost recovery;
- provision for indirect incentives to encourage efficiency improvements; and
- facilitation of appropriate allocation of resources by planning and responsible authorities.

It is unlikely that these Fees will significantly restrict competition in the Land Use Market or Final Product Markets.

The provisions of the Victorian Planning Legislation identified in this **Section 5.2(7)** as restricting or potentially restricting competition by imposing significant transaction costs on businesses or households, are intended to achieve one or more of the objectives of the Victorian Planning Legislation set out in **Section 4.1**. For example, development contributions plans and Section 173 Agreements can assist in securing necessary community and industry infrastructure needs which flow from the use and development of land. Similarly, the SPPF, the LPPF, zones, overlays and Particular Provisions tend to operate to secure community amenity and the safe environment, as well as to protect the natural and built environment, and the planning permit application and planning scheme amendment process is

directed towards providing a system which achieves fairness and sustainability in the use and development of land.

In **Section 6.9** of this Report, an analysis is undertaken of these restrictions to identify whether the costs to the community of these restrictions outweigh their benefits to the community.

5.3 Identification of Affected Parties

Land Use Market

The parties potentially affected by restrictions on competition in the Land Use Market defined in **Section 5.2** above are:

- suppliers (owners) of land in Victoria, including developers;
- current consumers of Victorian land (being purchasers of land for any purpose including residential, commercial, industrial, agricultural and public);
- future purchasers of Victorian land;
- occupiers of Victorian land including tenants;
- the Victorian community in general;
- Victorian taxpayers;
- the Victorian Government/Municipal Authorities;
- alternative providers of administrative services in relation to the preparation and administration of planning schemes; and
- providers of complementary services.

The impact of the restrictions on competition identified in **Section 5.2** on these parties is considered in the cost benefit assessment of those restrictions in **Section 6** below.

Final Product Markets

The parties potentially affected by restrictions on competition in relation to Final Product Markets are:

- current producers of goods or services in Final Product Markets;
- future producers of goods or services in Final Product Markets;
- consumers of goods or services in Final Product Markets;
- the Victorian community in general;
- Victorian taxpayers;
- the Victorian Government/Municipal Authorities;

- producers of other goods and services who could have produced those goods or services from the same land;

- consumers of other goods and services which could have been produced using the same land; and

- alternative providers of administrative services in relation to the preparation and administration of planning schemes.

The impact of the restrictions on competition identified in **Section 5.2** on these parties is considered in the cost benefit assessment of those restrictions in **Section 6** below.

6. ASSESS AND BALANCE COSTS AND BENEFITS ASSOCIATED WITH RESTRICTIONS ON COMPETITION

6.1 Introduction

Under Clause 5 of the Competition Principles Agreement ("**CPA**"), governments agree not to restrict competition unless the community-wide benefits of the restriction outweigh the costs. To this end, legislative reviews must assess and balance the costs and benefits associated with restrictions to competition. This Section identifies, assesses and seeks to balance the costs and benefits associated with various restrictions on competition contained within Victorian Planning Legislation.

Consistent with NCP, the analysis compares costs and benefits associated with the restriction against those applying if there was no legislative restriction. It does not address all costs and benefits associated with all aspects of the Legislation or measure the extent to which the Legislation achieves the Government's objectives. Also, consistent with NCP, costs and benefits will be broadly defined to encompass both economic, social, health and safety, and environmental costs and benefits borne by various groups in the community, including applicants, parties who compete with applicants, consumers, State and local governments and tax payers, and the general public.

Assessing and balancing costs and benefits associated with restrictions on competition in the Victorian Planning Legislation is more complicated than for most other legislative reviews undertaken by Australian governments because the Legislation affects the use of a resource (ie land) that is fundamental to the operation of most Victorian businesses and also is valued highly by members of the public for housing, recreational and aesthetic purposes.

Importantly, costs and benefits are likely to vary significantly between planning proposals, for example due to differences in:

- the type of business, nature of products and services, and sensitivity of demand for products and services to changes in price;
- costs to comply with each restriction across different types of business or residence;
- the size of affected Land Use and Final Product Markets;
- the nature and value of activities that would have otherwise used the land subject to a development proposal;
- different attitudes towards certain types of development across Victoria; and
- the number of people who stand to benefit from a restriction and how much would they be willing to pay to receive that benefit (or how much would they be prepared to pay to avoid a reduction of benefit).

Quantification of the costs and benefits associated with planning restrictions is therefore extremely complex, data intensive, time consuming and expensive. It would require analysis of the costs and benefits associated with all planning proposals, objections and appeals made over the period the restriction has been in place. Data does not exist to make this level of analysis possible.

Even gathering qualitative information in each of the areas listed in the dot points above can be a difficult and time consuming exercise.

The task of analysing costs and benefits of the planning system would be made easier if time series information/data — covering, for example, the number of applications by type, number of objections by type, number of appeals by type, and number of successful appeals by type — was systematically collected by a central agency. Currently, this information is not collected by the Department of Infrastructure or any other single agency. The Tribunal has some statistics on appeals, but not at this level of detail. This information, if available, would assist Government to monitor the performance of the planning system. Accordingly, this review recommends that the Victorian Government develops and maintains such a database.

The method used for this legislative review — the only option feasible within the required timeframe — is to identify and assess costs and benefits associated with particular restrictions identified in **Section 5.2** of this Report. It is not possible to definitively balance costs and benefits associated with each restriction because in practice they will vary with each application. Nevertheless, it has been possible to describe circumstances where each restriction is more likely to confer a net public benefit.

The same method is used to assess and balance costs and benefits for each of the five Case Studies considered in **Section 8**. However, a more detailed description and analysis of costs and benefits is provided for Case Study restrictions relative to system level restrictions considered in this Section. Rough orders of magnitude (ie minor, moderate or major) are subjectively attached to Case Study costs and benefits, based on conservative criteria. Conservative criteria require that analysts are careful not to overestimate the value of benefits and also careful not to understate costs. Conservative orders of magnitude of costs and benefits are then compared to provide a rough indication of whether a restriction has a net public benefit. However, results should be considered indicative, not definitive. This approach is consistent with the Victorian Guidelines and good economic practice.

Section 6.2 outlines the method used to identify costs and benefits. It also describes how transfers (ie redistributive effects) are identified and dealt with in the cost benefit analysis. **Sections 6.3 to 6.9** identify and assess system level costs and benefits associated with the restrictions identified in **Section 5.2** of this Report. Concluding remarks are made in **Section 6.10**. The costs and benefits associated with each provision of the Victorian Planning Legislation which is the subject of a Case Study are analysed in Part (4) of each Case Study in **Section 8.**

6.2 Identifying costs, benefits and transfers

One of the most challenging tasks in any legislative review is to properly identify the costs and benefits to be assessed and balanced. Identification of economic costs and benefits associated with planning restrictions is not straightforward. Often there is confusion as to whether an effect is positive (ie a benefit), negative (ie a cost) or neutral. The concepts of consumer and producer surplus are useful for correctly attributing an effect as a benefit, cost or transfer.

It is not obvious who are producers and consumers in the context of land use planning. For the purposes of this cost benefit analysis, producers are all businesses that use Victorian land as an input to production (eg landlords, businesses that own the land they are sited on, businesses that seek to

purchase land in Victoria, and businesses that lease land from landlords) as well as businesses providing services in relation to the sale of land. It therefore includes producers of a range of goods and services, including financial institutions, real estate agents, housing developers, car dealers, restaurants, cinemas, florists, chemists, post offices, public swimming pools and newsagencies. Producer surplus is a measure of how much these businesses receive for their outputs relative to what they paid for inputs. It is affected by the availability of inputs, the cost to produce a good or service, and the quantity of output produced.

Consumers, in this context, are people who purchase and consume the goods and services produced by businesses using Victorian land. Members of the general public who enjoy or "consume" land and the environment for its own sake (ie not to carry out a business activity — eg people who use or enjoy parklands or derive pleasure from an attractive landscape) are also "consumers" relevant to this cost benefit analysis. Consumer surplus is a measure of how much consumers would be willing to pay to receive a benefit (or prepared to pay to avoid having a reduction of benefit) relative to how much they actually pay.

Generally, if a planning restriction bestows a benefit, it increases the size of consumer or producer surplus in either the Land Use Market or Final Product Markets. Examples of benefits associated with a planning restriction may include:

- reduction in negative externalities such as environmental damage, visual, noise, air or water pollution or a reduction in health or safety risk or crime;
- achievement of positive externalities such as conservation or improvement of environmental quality, improved landscape, conservation of culturally significant buildings and sites, creation of effective community networks, or a health and safety benefit;
- guaranteed or greater provision of public goods (eg public open space, parklands, roadside vegetation, bridges, most roads, fire hydrants, public toilets, pavement and some community infrastructure such as public sporting complexes);
- ensures land is used for its most productive purpose;
- greater certainty for landowners and/or investors;
- increased efficiency in the provision and utilisation of infrastructure;
- public amenity through orderly development; and
- improved access to markets.

When a restriction imposes a cost, it reduces consumer or producer surplus in the Land Use Market or Final Product Markets. Examples of costs associated with a planning restriction may include:

- cost to administer, monitor and enforce the particular restriction (not the cost to administer, monitor and enforce the planning system as a whole);
- loss of technical or allocative efficiency. Technical inefficiency indicates that a business does not produce the maximum possible output from a given set of inputs. Allocative inefficiency indicates that a business is not using inputs in the proportions or combinations that allow it to minimise costs. These types of inefficiency can arise when a restriction prevents a

business from achieving economies of scale, adopting new technology or production methods or adopting a quality standard which lowers production costs, introducing a new product or service, expanding into a new market, or producing an optimal level of output;

- compliance costs borne by land-owners, developers, businesses and sometimes households;

- higher prices for goods and services (borne by consumers) in Final Product Markets, for instance if producers cannot minimise unit production costs as a result of the restriction, or obtain market power from the restriction and restrict output to push prices up;

- reduction in number of suppliers of a good or service or in product or service quality;

- lack of diversity in land developments;

- reduced incentive for product or process innovation (eg development of pollution control technologies if producers rely on buffers in planning schemes); and

- reduction in environmental quality.

Thus, costs and benefits go beyond financial flows. Costs should take into account the value of opportunities foregone by the community. This includes factoring in the productivity of land if put to an alternate use.

If a restriction has a redistributive effect — ie, changes the composition of consumer or producer surplus but does not increase or reduce it — it is a transfer. It is important that distributional effects (ie transfers) are not treated in the same way as allocative effects (ie costs and benefits).

Frequently, transfers are mistakenly treated as costs or benefits. This happens because transfers usually involve one party gaining at another's expense. It becomes a problem in cost benefit analyses because often only one side of the transaction is reported as either a cost or benefit. Examples of common transfers include:

- the effects on equity when zoning provides windfalls for some property owners while others have lower land values; and

- changes in profits of businesses as a result of the restriction.

In this analysis, transfers are separately identified (using italics) in summary cost benefit matrices.

When it is known that transfers redistribute wealth from low income earners to high income earners, it is standard practice to attach weights to transfer flows so that a dollar acquired by a person on high income is valued less than a dollar acquired by a person on low income. However, transfers identified in this analysis redistribute wealth between different types of land owners and different firms operating in product markets. They do not appear to consistently disadvantage people on low incomes. Consequently, in this

analysis transfers do not affect the assessment of whether a restriction confers a net public benefit.

6.3 Restrictions on entry or exit of firms into or out of markets

As discussed in **Section 5.2(1)**, several provisions of the Legislation limit the entry or exit of firms into or out of markets, although restrictions on entry tend to be more common than restrictions on exit.

Some restrictions to entry directly prevent a firm from entering a particular product or geographical market at all. For example, zoning controls and activity centre provisions may prohibit some types of businesses from establishing in their preferred location. Alternatively they may prohibit businesses from supplying certain outputs, for example Home Occupation provisions prohibit home-based businesses from offering goods and services from external sources for sale and therefore preclude conventional retail activity. Similarly, a firm may be prohibited from entering a market without a permit and not be able to obtain a permit.

Other restrictions do not directly prohibit entry, but effectively deter entry by imposing considerable barriers to entry. For example, if a potential applicant believes competitors can easily exploit economic objection provisions of the Legislation to further their own self-interest (ie on frivolous or vexatious grounds or without substantiating their claims against public interest criteria), potential rivals can delay the progress of a planning application and impose large transactions costs so that prospective applicants may be deterred from or frustrated in entering the market.

No provisions of the Legislation prohibit exit from markets. However, some provisions restrict the ease with which incumbents can leave the market and/or the terms on which they exit the market. For example, sometimes the impact of a Section 173 Agreement is not known until after a firm enters the market. If the Agreement is used to apply new constraints on a business that were not factored into the initial entry price, it may limit the number of interested purchasers and affect the terms on which a firm can exit the market.

Table 1 summarises the costs and benefits that are likely to apply in the case of restrictions that either prohibit entry or effectively deter it by imposing substantial barriers to entry. The prospective applicant bears no economic benefit from the restriction. The only cost the applicant bears is the additional application cost associated with the restriction if they choose to proceed with an application. They may forego profit by not entering, however this is a transfer captured by rival firms in the form of increased profit due to less competition.

The rest of the community may or may not incur a significant cost as a result of the restriction, depending on how the restriction affects the degree of rivalry between firms in the market place.

The community may incur significant costs as a result of restrictions on entry or exit of firms if:

- the efficiency of the Land Use Market is compromised because the restriction prevents land from being put to a more productive use. There

can be significant costs associated with a restriction if land allocated for a particular set of activities has an alternative use that is valued more highly by the community. Even if the area allocated to these activities is an efficient use of land when the restriction was put in place, there are no guarantees that it will remain so in future. Thus, in future, the costs associated with restrictions on entry to secure positive externalities may outweigh the benefits unless the restriction allows sufficient flexibility for an entirely new set of activities to take over the land if they can generate higher returns than incumbents;

- the restriction limits the number of firms or size of the geographic area in which a business may locate, so that demand for land exceeds supply. This can allow some land owners to secure a degree of market power in the Land Use Market and set rents higher than they otherwise would in a fully competitive market; and

- the restriction significantly reduces the degree of rivalry between firms in Final Product Markets. The resulting increased market power can allow incumbent businesses to set prices higher than otherwise. There also is less market pressure on them to develop new products. For consumers, this can mean higher prices, less choice of supplier, and fewer new products.

If a restriction on entry or exit of firms significantly affects rivalry in either the Land Use Market or Final Product Market, it is highly likely that costs associated with the restriction will outweigh benefits, except where the restriction prevents prospective applicants from imposing a major negative externality on the community, such as a substantial health or safety risk that could have a large and widespread impact on the community.

If the Land Use Market and Final Product Markets are highly contested , competition may not be significantly lessened by the restriction. In this situation, there may be sufficient rivalry between firms to keep prices low and develop new products. Consequently, the impact on consumers in terms of prices, choice of supplier and quality may be negligible. In this situation, whether benefits will outweigh costs will be determined by comparing the size of the negative externality that the applicant would have generated against both the economic loss if land is not put to a more productive use and the cost associated with administering and enforcing the restriction.

However, it is likely that the benefits associated with the restriction will outweigh the costs if:

- the negative externality that the restriction overcomes is substantial;

- land is being put to its most productive use;

- rivalry in the Land Use Market and Final Product Markets is sufficient that incumbents cannot dominate the market; and

- the restriction is not costly to administer.

Table 1: Summary cost benefit matrix for restrictions on entry of firms to market [a]

	Prospective or actual applicant	Rest of the community
Benefit	Nil	• *Incumbent firms may receive higher profits due to less competition.* • If the applicant would have imposed negative externalities (eg health or safety risk, generation of toxic pollution), the community benefits by avoidance of negative externalities.
Cost	• Higher unit production costs if applicant not allowed to locate in preferred area. • Additional cost to prepare application due to restriction. • *Applicant foregoes profit by not being able to enter market or being forced to locate in a less profitable market.*	• Loss of efficiency in the Land Use Market if land is not put to its most productive use under the restriction. • If the degree of competition in Final Product Market is low or significantly lessened by not allowing applicant into market there is potential for: ➢ Higher prices in Final Product Market; and ➢ Lower quantity/less of a range of quality of good(s) or service than would otherwise have been produced by prospective applicant. • Additional time spent by consumers to travel to nearest alternative service provider. • Cost associated with administration, monitoring and enforcement of restriction.

[a] *Note: Italics denote a reference to a transfer.*

6.4 Restrictions which advantage some businesses over others

There are many provisions under the Legislation that potentially advantage some businesses over others (see discussion in **Section 5.2(2)**). Usually it is not clear which businesses are advantaged and which are disadvantaged by a restriction from the wording of the Legislation as it provides a set of rules which, when implemented, can affect parties differently. Advantaged parties may include incumbent businesses, businesses located in certain areas, businesses supplying certain goods or services, businesses that operate in a certain way (eg businesses operated from home), parties who entered into

planning agreements and/or are subject to development contributions plans, or businesses who applied for a permit earlier rather than later. Disadvantaged parties may include new entrants, businesses located in certain areas, businesses supplying certain goods or services, businesses that operate in a certain way, parties who undertake development after a development contributions plan takes effect, or businesses who are not among the first to apply for a particular permit.

As outlined in **Section 5.2(2)**, there are numerous examples of this type of restriction in the legislation. For example:

- Existing use rights advantage a business by allowing it to continue a particular land use when the same use would otherwise be prohibited by legislation. These firms receive an advantage over firms that do not have existing use rights and are currently involved in the same activity or seeking to undertake that activity;

- Under the SPPF, the seven principles of land use and development planning may favour particular forms of land use and restrict the amount of land available to new entrants seeking to operate in certain Final Product Markets. For example, the settlement policy provides for concentration of suburban retail, commercial, administrative, health, education, entertainment and cultural development around activity centres with integrated transport nodes. This disadvantages any business that would prefer to locate outside activity centres;

- Under the LPPF policy relating to subdivisions, a person who proposes to subdivide land may be required to contribute an amount for public open space even though an incumbent competitor may not;

- Where a permit is granted to one applicant, but denied to another even though there is no difference between two business activities in terms of generation of externality or contribution towards a public good; and

- Where the Responsible Authority is granted a monopoly right to undertake various administrative functions even though there are other parties in the community who may be able to provide the same service at lower cost.

It is difficult to generalise about the nature of costs and benefits associated with restrictions that discriminate between firms because they vary according to the nature of the discrimination and the characteristics of the market in which these firms participate. Nevertheless, **Table 2** seeks to summarise the types of costs and benefits that could apply in such cases.

Typically, advantaged parties benefit through higher profits or land values than they would otherwise have experienced if there were no restriction. If the restriction secures their tenure, they will also benefit from a reduction in risk (and hence financing costs) which may reduce production costs. Advantaged parties generally are able to achieve these benefits in return for an additional (though usually minor) cost to prepare their application to become an advantaged party under the restriction. In some cases, for example existing use rights, advantaged parties are spared even this cost.

Disadvantaged parties tend to receive no benefit from such a restriction. They incur a range of costs, including costs to object to a planning

application. They may also suffer a loss in technical or allocative efficiency as a result of the restriction if it prevents them from achieving economies of scale, adopting best practice production methods or technologies or producing as much output as they prefer, or if it forces them to locate in a higher cost area.

The community may gain considerably from restrictions that advantage some businesses over others, but they may equally incur significant costs. Provided the restriction substantially reduces a major negative externality, brings about the generation of a major positive externality, or ensures the provision of a highly valued public good, the benefit side of the equation may be substantial and sufficient to outweigh costs provided that the restriction:

- does not significantly reduce the degree of rivalry between firms in either the Land Use Market or Final Product Markets so that advantaged parties do not dominate their market;
- does not significantly increase production costs for disadvantaged firms and lead to higher prices in Final Product Markets; and
- is not too costly to administer and enforce.

In some cases it is difficult to understand how a restriction that advantages one business over another is necessary to achieve the community benefits listed in **Table 2**. An example is where legislation provides a monopoly right to a Responsible Authority to provide services that may be performed just as well by another party. In principle, other parties could be accredited to undertake some functions thereby removing the monopoly advantage held by the incumbent.

Table 2: **Summary cost benefit matrix for restrictions which advantage some businesses over others** [a]

	Advantaged party	Disadvantaged party	Rest of the community
Benefit	• *Profit associated with advantage.* • *Increase in value of land owned by advantaged party.* • Reduces risk by securing tenure (eg in the case of a planning permit) which leads to lower production costs.	Nil	• Increased provision of a public good (eg public open space). • Ensured generation of positive externality (eg improved environmental quality or health and safety benefit). • Potential for reduction of negative externality (eg noise or air pollution, traffic congestion). • Reduction in travel and search costs (eg when activities

	Advantaged party	Disadvantaged party	Rest of the community
			centrally located).
	Advantaged party	Disadvantaged party	Rest of the community
Cost	• Additional cost to prepare application due to restriction.	• *Profit foregone as a result of relative disadvantage.* • *Decrease in value of land owned by disadvantaged party.* • Loss of efficiency due to increase in production or compliance costs (eg if restriction forces business to locate in a higher cost area).	• Higher prices in Final Product Markets due to higher input or compliance costs (only if disadvantaged firm is able to pass on higher costs to customers). • Cost to government to administer and enforce restriction. • Time spent by Tribunal to deal with disputes associated with restriction (ie over and above level of dispute that would occur in absence of restriction).

[a] *Note: Italics denote a reference to a transfer.*

6.5 Restrictions of prices or production levels

Except for some Section 173 Agreements, no provisions of the Act and accompanying Regulations directly restrict **prices** for goods and services in Final Product Markets. Section 173 Agreements can impose various conditions, including limiting the flexibility of businesses to price efficiently and even directing them to charge a particular price. For example, in the past Section 173 Agreements have sometimes specified the maximum price that a car park operator can charge for car parking. They have also been used to permit access to facilities on the condition that a party does not charge others for that right.

Other types of restriction can indirectly raise prices in Final Product Markets by affecting the cost structure of businesses (eg by making inputs more expensive, forcing businesses to adopt inefficient methods of production, or by imposing substantial transaction costs), however these types of restrictions are generally treated under other headings in this Section.

Zones, overlays, Particular Provisions and Section 173 Agreements can restrict **production levels** by limiting the size of the operation, restricting hours of trading or operation, or limiting the products a firm may produce or trade. For example, as discussed in **Section 5.2(3)**, Home Occupation provisions limit the scale of operation, hours of trading or the products a firm

may produce. Sometimes, the Legislation does not prevent businesses from operating in a market, but forces them to apply for a permit if their operations exceed a specified level of production. For example, zoning controls require a permit for Bed and Breakfast businesses that seek to accommodate more than six persons and unless one car parking space is provided for each two persons.

Many provisions in the Legislation that directly limited the number of firms in a market have been removed. For instance, in the past applications for liquor licences, convenience stores and residential unit developments were subject to a "saturation" test. If it was considered that the market was saturated with these types of businesses, applications were denied. The only remaining "*saturation*" clause in current planning controls concerns brothels, however this restriction is contained in the *Prostitution Control Act 1994*, and only in planning legislation by cross reference.

Table 3 below summarises costs and benefits commonly associated with these types of restriction. The costs and benefits associated with Section 173 Agreements are considered more fully in **Section 8.3(4)**.

Generally, by limiting the flexibility of businesses to price efficiently, pricing restrictions such as those contained in some Section 173 Agreements may make certain goods and services more affordable. However, they rarely target low income consumers directly and tend to be very costly to the community in terms of efficiency.

Restrictions on hours of operation, scale of operation and products or services delivered can also be very costly to the community. For example, they may prevent businesses from improving efficiency by increasing scale of operation or by extending operating hours. They also may inadvertently prevent businesses from innovating new products or processes or exploiting the full advantage of new, cost saving technologies.

In many cases, it is likely that the economy-wide costs associated with these types of restrictions will outweigh the benefits. This is particularly the case where the negative externalities they seek to overcome are not substantial. It may be possible to achieve the regulatory objective at a lower cost by regulating outcomes rather than inputs or outputs such as floor area, trading hours, products and services.

Table 3: **Summary cost benefit matrix for restrictions of prices or production levels** [a.]

	Applicant	Rest of the community
Benefit	Nil	• Reduction of a negative externality (in the case of restrictions on production levels). • Increased affordability of certain goods and services in the interests of social equity (eg affordable car parking space or free community facilities under S173 Agreements).

	Applicant	Rest of the community
Cost	• *Reduction in profit by precluding firm from pricing to fully recover costs (in the case of pricing restrictions).* • Loss of allocative efficiency by preventing firms from minimising production costs (eg by achieving efficient scale of operation or operating for optimal number of hours each day in the case of production restrictions). • Stifles innovation of new products and production processes and uptake of new technologies.	• Higher prices if production restriction prevents producers from operating efficiently. • Reduction in consumer choice of supplier or product quality. • Fewer new products and services offered. • Cost to monitor and enforce restriction. • Loss of allocative efficiency in the economy if resources transferred from more productive uses to applicant's activity due to underpricing.

[a] *Note: Italics denote a reference to a transfer.*

6.6 Restrictions on quality or location of goods and services

As noted in **Section 5.2(4)**, the Legislation can restrict the quality of land through the imposition of building and site development standards. Often such restrictions are made in the interests of public health and safety or protection of the environment. They may also be justified on the grounds that they overcome persistent information asymmetry problems. That is, through standards consumers who may otherwise find it difficult to determine the quality of a building can be given some reassurance by the knowledge that the building complies with independently determined criteria. One example of this is the mandatory application of the Good Design Guide to certain classes of residential development, such as units. Members of the local community who might otherwise find it difficult to determine appropriate standards, can infer that a building is of "appropriate" quality if they know it complies with prescribed criteria.

Zoning restricts the locational decisions of businesses all the time. Often they prevent businesses from locating in their preferred location. For example, under planning schemes, heavy industrial activities usually cannot locate in residential or commercial areas. Similarly, uses that are considered highly industrial in nature such as broiler farms are not permitted to locate in industrial zones. However, zoning does not only restrict the locational decisions of firms engaged in high polluting activities. For example, schemes inhibit some businesses (eg bulky goods businesses) from locating in low cost industrial zones by prescribing a minimum floor area which is more than such businesses normally require.

Table 4 below summarises costs and benefits associated with restrictions on quality or location of goods and services. Zoning and planning policy can force businesses to locate in higher cost locations. When business activities do not generate significant negative externalities it is difficult to understand the objective of this type of restriction in a market failure context. Unless

planning controls protect the community from a significant negative externality (such as pollution, traffic congestion, environmental damage, or a health and safety risk) or overcome a persistent information problem about land or building quality, it is highly likely that the costs associated with such a restriction will outweigh the benefits. This means that there is likely to be a net public benefit from the restriction of noisy, polluting heavy industrial businesses to industrial zones. There may also be a net public benefit from excluding business activities that are associated with heavy traffic congestion from residential areas. However, in situations where a business does not impose a significant negative externality (eg bulky goods businesses), it is highly unlikely that costs will outweigh benefits.

Table 4: **Summary cost benefit matrix for restrictions on quality or location of goods and services** [a]

	Applicant	Rest of the community
Benefit	• Reduced liability for damages claim (in case of restrictions on quality).	• Reduced risk of negative externality being imposed on other land uses (eg pollution, traffic congestion, health and safety risk, crime, environmental damage). • Reduced information asymmetry (for restrictions on quality of land or buildings). • Achievement of economies of scale in the use of core infrastructure (for restrictions on location). • Potential for strategic alliances, networks and clusters among complementary firms (in the case of restrictions on location).
Cost	• Additional development, construction, or site costs to comply with restriction. • Increase in production costs (ie loss of allocative efficiency) if business is forced to locate in a more expensive location than it would prefer. • *Reduction in profit due to compliance cost and/or higher operating costs.*	• Higher prices in Final Product Markets due to higher production costs. • Reduction in efficiency if land is not put to most productive use due to location restriction. • May crowd out commercial initiatives leading to higher quality outcomes. • Impede product differentiation in the Land Use Market (eg by preventing unique quality developments). • Additional travel time for consumers to access good or service (in the case of location restrictions).

	Applicant	Rest of the community
		• Reduction in number of suppliers of good or service. • Monitoring and enforcement costs associated with restriction.

[a] *Note: Italics denote a reference to a transfer.*

6.7 Restrictions on advertising and promotional activities

Section 5.2(5) outlines current limitations on the type and form of advertising permitted. Various provisions restrict how products and services may be promoted. The legislation has moved away from costly input controls towards outcome or performance criteria, which significantly lessens the economic cost of such restrictions. For instance, current arrangements require advertising signs to meet local planning policy objectives in respect of visual amenity, character, effectiveness of signs and road safety. They do not specify the material that may be presented on signs. However, the Particular Provision (Clause 52.05) in planning schemes regulates the size of certain classes of sign, and imposes expiry dates for permits for signs.

A summary of costs and benefits associated with current restrictions on advertising and promotional activities is presented in **Table 5** below. It is likely that the benefits associated with performance based restrictions are likely to outweigh the costs, provided the performance criteria are consistently applied across all businesses.

It is less clear that benefits are likely to outweigh costs in the case of Particular Provisions that regulate the size of certain types of sign. Prescriptive regulation of this type can be more costly than performance based criteria (eg requiring that the size does not impair visual amenity or road safety) except where:

- the cost to administer and enforce performance criteria is greater than the cost to administer and enforce prescriptive criteria; and
- this increased administration and enforcement cost outweighs any benefit firms may obtain (eg by reducing production costs) by moving to performance based criteria .

Some advertising restrictions may seem to advantage incumbents over newcomers to the extent that existing use rights were enjoyed by businesses displaying lawful signs when a scheme was introduced, but newcomers are required to obtain a (time limited) permit. While newcomers incur a cost associated with applying for a permit that incumbents did not, this cost usually is not significant assuming the matter is not taken on appeal. The benefits of existing use rights in this context are likely to outweigh the cost, since it provides a mechanism for minimising administration costs by obviating the need for Councils to process a large number of applications from applicants that are known to comply with the performance criteria.

Table 5: Summary cost benefit matrix for restrictions on advertising and promotional activities

	Applicant	Rest of the community
Benefit	Nil	• Protection of visual amenity (ie prevents congestion of signage and use of offensive material). • Enhanced road safety. • Reduced administration cost.
Cost	• Additional cost to prepare signage to comply with performance criteria or size restrictions.	• May inhibit desirable innovative approaches to advertising. • Cost to monitor and enforce Particular Provisions.

6.8 Restrictions of price and type of input used in production processes

Victorian Planning Legislation tends to restrict the land available for certain uses. This can have a large economy wide impact, since land is an important input to the production of most goods and services in Final Product Markets.

If zoning controls do not closely reflect externalities, there is a strong risk that they may cause less efficient patterns of land use than would otherwise prevail. One example of where zoning controls do not reflect concerns about externalities is Restricted Retail provisions that stipulate minimum floor space. Such a restriction does not appear necessary to prevent a negative externality from being generated. The benefits associated with such provisions are likely to be non-existent or negligible, whereas the cost to the applicant and the rest of the community may be considerable depending on the nature and extent of the market. As discussed in Section 6.6, when a zoning law is used to force a business to locate in a non-preferred area, it increases unit production costs. This increase often is passed on to consumers in the form of higher prices and may reduce consumer access to some goods and services. To the extent that these final goods and services are inputs to other production processes, the inefficiency created by the initial restriction is multiplied throughout the economy.

The Legislation can also restrict the freedom of businesses to choose an optimal combination of inputs. Examples of this are restrictions on what may be included in Freeway Service Centre Controls under Clause 52.28 of new planning schemes and restriction on area for gaming machines in hotels and other premises under Clause 52.30-1. This can cause allocative inefficiency by inflating unit production costs if such restriction does not allow businesses to achieve an efficient scale of operations.

Another way the Legislation can restrict competition is by requiring businesses to contribute towards the cost of providing non-rival and non-excludable public goods. This adds to unit production costs of affected firms. They become disadvantaged relative to competitors in other parts of Victoria, other jurisdictions in Australia or competitors based overseas who are not levied in the same way. Raising revenue to fund public goods in this way may

have appeal on equity grounds if households are considered less able to afford such an impost than business. However, there is potential for political interference to discriminate between firms in terms of whether they incur a levy and the quantum of the levy to create the kind of restrictions on competition discussed in **Section 6.4**.

If provisions requiring contributions towards the provision of public goods are not applied consistently and transparently to all potential beneficiaries of the public good, including all businesses and all households, there is significant potential for the economy-wide costs to outweigh benefits. If development contributions plans (or similar requirements under Section 173 Agreements) did not exist, governments would raise funding to provide public goods through the tax system or through the levying of rates or special charges to households and businesses. Thus, in order for development contributions plans to provide a net benefit to the Victorian public, the community-wide cost of raising revenue through contributions plans must be lower than the cost to raise tax or rate revenue.

Generalised costs and benefits of restrictions on pricing or use of inputs to production processes are summarised in Table 6 below.

Table 6: Summary cost benefit matrix for restrictions on pricing or use of inputs used in production processes

	Applicant	Rest of the community
Benefit	Nil	• Reduces negative externalities such as pollution, environmental degradation and congestion. • Provision of public good such as parklands, public open space and some public infrastructure.
Cost	• Higher unit production costs due to higher cost of land.	• Imposes costs on businesses and households that do not generate negative externality. • In the case of development contributions, contributing businesses cross-subsidise non- contributing beneficiaries of public good who are able to free ride. • Potential for political interference to create restrictions that advantage some firms over others (see **Section 6.4**). • May stifle commercial incentive to reduce negative externalities (if regulation permits a tolerable level of externality, firms have no incentive to reduce negative externalities below this threshold).

6.9 Imposition of significant transaction costs on businesses or households

This restriction relates to the additional transaction costs imposed on parties to enter the Land Use Market and continually comply with planning legislation relative to the transaction costs that would apply in the absence of such legislation. These transaction costs are incurred not only by applicants, but also by parties making objections, governments and taxpayers who fund the hearing and appeals system. Typical planning related transaction costs include:

- fees paid by applicants and other users of the planning system. (Note, the requirement to pay a fee is not of itself a restriction on competition if the fee schedule is consistently applied, and fees reflect efficient cost to administer or enforce planning laws);
- time taken by applicants and others to prepare applications, objections and appeals;
- time taken by State and local governments to process applications, objections and appeals;
- cost to amend planning scheme, including cost associated with unwarranted delays;
- monitoring and enforcement costs; and
- time taken to process appeals.

Table 7 below summarises costs and benefits commonly associated with restrictions created by high transaction costs. If total transaction costs are sufficiently high, they may deter businesses and households from lodging applications, making objections or appealing decisions when they otherwise would. This can limit the effectiveness and efficiency of the planning system. Where transactions costs are high (in absolute terms and relative to other jurisdictions), there is a risk that planning administration arrangements will deter applicants altogether. Businesses may locate in a jurisdiction where transactions costs are lower. Some parties may go ahead with their proposed land use without seeking planning approval. This is more likely to occur where it is difficult or costly for authorities to monitor and enforce compliance with planning and environment legislation (eg small or incremental variations in existing land uses). This reduces the effectiveness of planning and environment legislation.

Transaction costs are inevitable, however they are more likely to be in the net public interest if:

- cost recovery is consistent with the principle of "user pays";
- authorities seek to recover only efficient administration costs from users;
- arrangements create a system for appeals and objections that is cheaper to use and operate than the Court system that would otherwise deal with planning appeals and objections;

- the scope for litigation is kept to a minimum, without reducing the individual's common law rights; and

- arrangements made to restrict the ability of parties to lodge vexatious objections and appeals (usually by competing businesses or frivolous litigants) are utilised.

Based on submissions to this review, it appears that there currently is potential on economic grounds for potential rivals to lodge frivolous or vexatious complaints without presenting clear evidence. While there is provision in the Legislation for costs and damages to be awarded against rivals if they lodge a frivolous or vexatious complaint, in practice this is very rarely enforced. Rival firms can object to a planning application simply because it may reduce their own profit. This is not consistent with competition policy principles and objectives and adds considerably to transactions costs borne by applicants. These transactions costs could be reduced if the Planning Authority or Responsible Authority published guidelines for anyone seeking to object to a planning application on economic grounds. These guidelines should explain what are acceptable grounds for objection (ie grounds most likely to be consistent with a net public interest) and grounds that are unacceptable (eg reduction of rival's profit). This recommendation is discussed further in **Section 7**.

Table 7: Summary of costs and benefits of restriction due to imposition of significant transaction costs on businesses or households

	Applicant	Rest of the community
Benefit	• Lower cost to appeal decision by avoiding tribunal and courts.	• Lower cost to administer and/or enforce planning legislation. • Reduction in use of Tribunal time to process disputes. • Increased compliance of planning scheme with competition policy principles and objectives.
Cost	• Increases in unit cost of production. • Additional cost to prepare applications, respond to objections or appeal.	• Increased risk of non-compliance with planning legislation by businesses and households, requiring additional monitoring and enforcement. • Reduced number of suppliers in Final Product Market if transaction costs are significant enough to deter entry. • Higher prices for goods and services in Final Product Market.

6.10 Concluding remarks

Where a net benefit case for retaining a restriction cannot be established, the CPA to which the Victorian Government is a signatory, recommends that the restriction should be removed from legislation.

At a system level it is not possible to definitely identify restrictions involving a net cost to the community. However, it is highly likely that there may be a net cost associated with some provisions of the Victorian Planning Legislation if they are implemented in a particular way. For instance, in situations where:

- Responsible Authorities are granted a monopoly right to undertake an administrative function even though there are other parties in the community who are able to provide the same service at lower cost;
- zoning controls prevent land from being put to a more productive use that is valued more highly by the community;
- zoning controls do not closely reflect externalities (eg minimum floor space provisions);
- activity centre provisions allow landowners to acquire market power by constraining the supply of land available for retail activities;
- Home Occupation restrictions prevent the sale of goods sourced elsewhere, even if the sale of such goods would not impose negative externalities on adjacent land uses;
- Section 173 Agreements, that are not transparent, are not used as a mechanism of last resort, particularly those that prescribe the way in which a business may price or produce its goods or services; and
- development contributions plans and Section 173 Agreements are used to collect revenue to fund the provision of public goods if the tax or rate system is a more efficient revenue collection mechanism.

Government should scrutinise these provisions in the Legislation and give careful consideration to either removing the restriction or modifying it to lessen its restrictiveness.

In some cases there is a net cost associated with the lack of enforcement of legislative provisions. For example, provisions to deter frivolous or vexatious objections to planning applications on economic grounds are rarely called on. The solution is not to remove such provisions, but to encourage greater use of them by Responsible Authorities and the Tribunal. Plain English guidelines to educate prospective objectors could also assist to reduce the number of objections on frivolous or vexatious grounds.

Even if restrictions considered in this Section have a net public benefit, this does not mean they should automatically be retained. Under the guiding principles of the CPA, if on balance it is likely that there is a net benefit associated with a restriction, further assessment is required to determine if the objective could be achieved by a less restrictive means before policymakers should decide to retain a restriction. That is, a restriction should only be retained if:

- there are net public benefits to the community from retaining the restriction; **and**

- less restrictive alternative means to achieve the legislative objective cannot be found.

This second aspect of the public interest test is considered in **Section 7**.

7. POTENTIALLY LESS RESTRICTIVE ALTERNATIVES

7.1 Guiding principles

As noted in previous Sections, the guiding principle in undertaking legislative reviews involves two elements. First, the benefits of legislative restrictions on competition must outweigh the costs. Second, the objectives of the legislation must only be achievable by restricting competition. Thus, even if current arrangements are justified in terms of net benefit, this is not sufficient by itself to conclude that the restriction is in the public interest. It also must be shown that the objectives of the legislation can only be achieved by restricting competition.

In practice, this is taken to mean that reviewers should investigate whether there are net benefits from establishing alternative arrangements, taking into account the practicality of such alternative arrangements.

When considering the potential for less restrictive alternatives it is important to refer to the objectives of the legislation. In essence, the Victorian Planning Legislation aims to:

- promote fairness and sustainability in decision-making;
- protect the natural and built environment from over-exploitation;
- prevent detriment to the pleasant, efficient and safe environments for the community resulting from the development and use of land;
- preserve places of heritage and other significance to the community from harm;
- ensure that community infrastructure is provided in an orderly and properly co-ordinated fashion; and
- make net community benefit a basic planning principle.

Any less restrictive alternatives must still assist Government to achieve these objectives. In this Section, we suggest some less restrictive alternatives that may achieve those objectives at lower cost. In most cases, the suggested alternatives are less costly because they seek to target more directly the nature and source of underlying market failure.

7.2 Suggested less restrictive alternatives

Currently, many of the restrictions on competition occur under provisions where Planning Authorities and Responsible Authorities have a degree of discretion. To minimise the probability that decisions made by these authorities are inconsistent with competition policy principles and objectives (eg do not satisfy the two part competition test), the Department of Infrastructure could consider developing guidelines to assist Planning and Responsible Authorities to implement planning policy in a less restrictive way. These guidelines would inform Planning Authorities and Responsible Authorities of the objectives which are the basis of NCP and provide guidance on the operation of market competition and its benefits for the community. They would provide an educative set of principles to guide decision-makers to use high cost restrictions as a matter of last resort, and only where the

benefits of such restrictions are likely to outweigh costs. These guidelines would also assist Planning Authorities and Responsible Authorities to improve the consistency of planning decisions.

The suggested guidelines could be included in the current revision of the document entitled "Victoria's Planning System" which is directed to all persons involved in the planning process, or could be a stand-alone document to influence decision making under the Act and planning schemes by both Planning Authorities and Responsible Authorities.

Having regard to the fact that planning officers would generally be unfamiliar with competition policy principles and objectives (and some of the technical expressions used), it is also recommended that regular workshops be held for Planning Authorities and Responsible Authorities, and a "hot line" set up to assist decision makers in assessing the economic impact of proposals, without confusing the concept with the impact of competition on the viability of competitors.

If guidelines and education of this kind are not effective in facilitating outcomes that are in the net public benefit, it is recommend that there be introduced into the Legislation an overarching net community benefit requirement. To this end, this requirement could be included as a new Objective in Section 4(1) of the Act, or by amending the wording of the last Objective (balance the present and future interests of all Victorians). Further, the requirement to have regard to net community benefit could be included in Sections 12 (duties and powers of Planning Authorities) and 60 (matters to be taken into account by Responsible Authorities in considering permit applications) of the Act. Since a compulsory test of this kind may increase administration costs for Planning Authorities and Responsible Authorities, it may be prudent to establish what can be accomplished through guidelines and education prior to legislative change.

In any case, consideration should be given to amending Section 60 of the Act to require a Responsible Authority to have regard to the Objectives of Planning in Section 4(1) of the Act when determining a planning permit application. This would make Section 60 consistent with Section 84B(1)(b) of the Act, which requires a Tribunal, in determining an application for review, to have regard to the Objectives of Planning in Victoria.

Consideration should also be given to amending Section 60(1)(b) of the Act to make it mandatory for a Responsible Authority to consider significant social and economic effects of a use or development for which the application is made if the circumstances appear to so require. At the moment, the language of the Act may be interpreted as being permissive only. The words "*appear to*" should also be deleted, as they allow for subjectivity and inconsistency of approach.

7.2.1 Restrictions on entry or exit of firms into or out of markets

To make current arrangements that restrict entry or exit of firms less restrictive, and hence, less costly to the community, the Department could consider:

- making planning controls more "performance based" to allow the Legislation to better target activities which generate negative externalities

and not be inflexible so as to penalise businesses that do not generate negative externalities. Performance criteria should generally be preferred provided that any additional administration and monitoring cost associated with performance criteria (as opposed to prescriptive criteria) – and it is not clear that there will be any additional cost – are outweighed by the benefits associated with allowing businesses that do not generate negative externalities to operate without restriction. For example, there may be circumstances in which a convenience shop with a floor area greater than 80 square metres may not adversely impact upon neighbourhood character or cause traffic and like problems. A more performance based provision would allow a development of this kind if it could be demonstrated that the benefit to the community of the development outweighs its costs.

- the Government can do a lot to minimise costs associated with restrictions due to activity centre controls. Although policy normally has a facilitatory rather than regulatory function, current SPPF policy for activity centres is given great weight in proceedings before the Tribunal and independent Panels. That policy already recognises three exceptions to activity centres policy (ie new developments, new convenience shopping, trade related businesses that support industry with adequate on-site car parking.) Options to further reduce costs associated with restrictions on competition due to activity centre controls include:
  - ensuring that the restriction does not allow landlords to acquire monopoly power in the Land Use Market, for example by ensuring that the size of each activity centre area is sufficient to allow several land owners to compete within an activity centre. If landlords are allowed to develop monopoly market power under this restriction, it is likely to stifle competition and innovation in both the Land Use Market and Final Product Markets;
  - ensuring that the list of policy exceptions is reviewed and updated regularly to match consumer preferences; and
  - considering inserting another exception allowing retail businesses to locate outside activity centres provided they are prepared to pay for any negative externalities they generate (valued appropriately).

7.2.2 Restrictions which advantage some businesses over others

To make current arrangements that advantage some businesses over others less restrictive, and hence, less costly to the community, the Department could consider:

- encouraging greater consistency in planning scheme amendments and in respect of permit applications. This could be facilitated through the use of guidelines discussed in the introduction to this Section 7.2. The guidelines could highlight the potential for adverse impact on competition if a Responsible Authority is inconsistent:
  - in the level of detail it requires in respect of a permit application;
  - in its approach to notification of permit applications in terms of both whether to notify at all, and the extent of notification required;
  - in the time which it takes to handle planning permit applications (prescribed time limits are not effective in this regard because the only remedy for non-compliance with them is an appeal to the Tribunal, and

applicants are reluctant to pursue this given that the appeal process itself would entail substantial further delay);

- in the matters which it takes into account in considering whether or not to grant a permit ; and
- in determining what conditions it imposes in connection with a permit.

The guidelines could also highlight the need for **Planning Authorities** to be consistent in their approach to notification of planning scheme amendments, given the uncertainty of the words "*materially affected by the amendment*". They could emphasise the need to achieve consistency in the manner in which similar applications are notified, particularly with regard to the criteria which are applied by a Planning Authority in determining whether or not a person is materially affected by a proposed amendment. There are a number of decisions of the Tribunal which could be used to provide examples of situations which do, and do not, give rise to a "material affect". The guidelines could also:

- require that a Planning Authority (and a Responsible Authority) document, and make publicly available, its decision as to the extent of notification, having regard to those criteria; and
- stress the importance of taking into account NCP principles and objectives – particularly the principles that benefits should outweigh costs, and that the objective of the provision cannot be achieved in a less costly way - in considering exceptions to the application of policies, zones, overlays and particular provisions.

- ensuring that SPPF and LPPF exceptions to policy, which potentially advantage certain businesses over others, are reviewed periodically as to their impact. For example, the current exceptions to the requirement in the State Planning Policy For Economic Development: Business (clause 17.02) that commercial facilities be located in existing or planned activity centres should be periodically reviewed.
- amending Section 96(1) and (2) of the Act, which address permit requirements of land owned by Responsible Authorities, to either remove the exception allowing planning schemes to exempt land use or development by Responsible Authorities (or persons using land owned or occupied by Responsible Authorities) from the Ministerial permit process, or narrow the application of the exemption by amending Clause 67 in the VPPs. This would limit the possibility of restriction on competition as a result of Responsible Authorities being able to by-pass the Ministerial permit process in relation to their use or development of land.
- minimising the potential for alternative use rights under Clause 63.08 of new planning schemes to continue indefinitely in circumstances where the likely benefits flowing from the alternative use will not outweigh the costs, and the alternative use generates a major negative externality. The Department should consider amending Clause 63.08 to include a requirement that all permits for alternative uses contain a condition so that the use may be reviewed after a period sufficient to allow a business to generate a normal rate of return. In this way, businesses that generated a major negative externality could have their alternative use right terminated in future. This could restore their incentive to avoid generating negative externalities. Care would need to be taken that this sunset clause did not remove all certainty for the business in question. This could be achieved by ensuring that alternative use rights were only terminated if the business

activity were found to generate a major negative externality upon the community.

7.2.3 Restrictions of prices or production levels

To make current arrangements that restrict prices or production levels less restrictive, and hence, less costly to the community, the Department could consider:

- as discussed in **Section 7.2.5**, amending the Act to prevent Section 173 Agreements from imposing price controls. As is discussed in **Section 6**, controls of this kind can impose a high cost on the community.
- amending Home Occupation provisions to allow exemptions from limits placed on operating hours, floor area and products that may not be sold where the applicant can demonstrate that the activity does not impose significant negative externalities (eg traffic congestion, noise or visual pollution) on the community.

7.2.4 Restrictions on quality or location of goods and services

To make current arrangements that restrict quality or location of goods and services less restrictive, and hence, less costly to the community, the Department could consider:

- issuing the guidelines discussed in the introduction to this **Section 7.2** with a view to ensuring that zones, overlays and Particular Provisions which impose restrictions of this kind are as performance based as is practicable.
- minimising costs associated with restrictions due to activity centre controls contained in the SPPF by implementing the measures referred to in Section 7.2.1 above, namely:
  - ensuring that the size of each activity centre area is sufficient to minimise the risk of a landlord developing monopoly market power;
  - regularly reviewing and updating exceptions to the activity centre policy; and
  - considering an additional exception which allows a retail business to locate outside an activity centre if it is prepared to pay for any negative externalities generated.
- issuing the guidelines referred to in **Section 7.2.2** with a view to achieving greater consistency in planning scheme amendments and permit application decisions.
- amending the Home Occupation provisions as recommended in **Section 7.2.3** to accommodate exemptions from operating and other limits if it can be demonstrated that their activity does not impose significant negative externalities on the community.

7.2.5 Restrictions of price and type of input used in production processes

To make current arrangements that restrict price and type of input used in production processes less restrictive, and hence, less costly to the community, the Department could consider:

- amending the Act so that Responsible Authorities may only use Section 173 Agreements as a last resort, and accordingly must demonstrate that

the purpose towards which the agreement is directed cannot be achieved by another means, for example, through appropriately worded permit conditions;

- amending Section 62(6) of the Act to prevent the imposition of permit conditions requiring Section 173 Agreements for provision of services or facilities in relation to land development in circumstances where an approved development contributions plan covers the subject land. Development contribution plans are less likely to restrict competition to the extent that they are more transparent and equitable in the determination of the circumstances in which a levy is imposed, and the quantum of the levy imposed. Capacity for **voluntary** Section 173 Agreements should be retained, however;

- amending Section 177(1) of the Act so as to require a Responsible Authority to include a "sunset" provision in every Section 173 Agreement, to ensure that the agreement does not have a life beyond achievement of its intended purpose. Alternatively, amending the Act to require periodic review of Section 173 Agreements and for their complete or partial repeal if it is demonstrated that their purpose has been satisfied;

- amending the Act to require that any objectors to a planning permit application or submitters in respect of a site-specific planning scheme amendment that imposes a requirement for a Section 173 Agreement are consulted in respect of the contents of that Agreement prior to execution;

- amending the Act to prohibit Section 173 Agreements from imposing price controls; and

- through the Department of Infrastructure, issuing educative guidelines to Responsible Authorities as to appropriate use of Section 173 Agreements. This is considered particularly necessary if the words "*any matter incidental*" are to be retained in Section 174(2)(d). This could be included in the guidelines discussed in the introduction to **Section 7.2.**

These recommendations are made having regard to the strong potential for lack of transparency in the development of Section 173 Agreements, the high transactions costs they generate, and the fact that they can operate and run with the land for longer than necessary to achieve their objective.

7.2.6 Restrictions on advertising and promotional activities

To make current arrangements that restrict advertising and promotional activities less restrictive, and hence, less costly to the community, the Department could consider:

- removing input controls such as size limits and maximum time limits on permits for signage, and opting instead for performance criteria wherever practicable.

7.2.7 Imposition of significant transactions costs on businesses or households

To make current arrangements that impose significant transactions costs on businesses or households less restrictive, and hence, less costly to the community, the Department could consider:

- introducing greater transparency in processes concerning Ministerial intervention by way of exempting a Planning Authority from notification of amendments, expediting planning scheme amendments and call-in of permit applications. The need for greater transparency in these areas was highlighted by the Auditor-General Report. A Practice Note has since been issued which should address this issue. No further recommendation is made at this stage.
- taking steps which are directed towards reducing the opportunity for economic objection. Given the reluctance of Responsible Authorities to apply Section 57(2A) of the Act, which permits them to refuse to consider an objection if its primary purpose is to protect the economic interests of a party, and reluctance of the Tribunal to award costs or damages against a frivolous or vexatious objector, it is recommended that the Department consider:
  - issuing guidelines which educate Responsible Authorities and parties seeking to lodge an objection as to what amounts to an appropriate economic objection, and what hearing ought to be given to prospective commercial objectors prior to rejecting their objection;
  - amending Section 57(2A) to overcome a Supreme Court ruling that commercial objectors must be given the opportunity of a hearing prior to rejecting their submissions;
  - amending the Act so that a provision similar to Section 57(2A) also applies to enable a Planning Authority to reject similar "economic objector" submissions in relation to a planning scheme amendment; and
  - taking steps to raise the awareness of Responsible Authorities and objectors of the requirement under the Act that objectors must demonstrate how they would be affected by the grant of a permit. This could be done in the guidelines recommended in the introduction to this **Section 7.2**, or, if guidelines prove ineffective, by amending the *Planning and Environment Regulations 1988* to introduce a pro-forma objection form that includes a requirement that the objector state how the grant of a permit would affect them. The same ought be considered in respect of submissions in relation to planning scheme amendments.
- through the Department, implementing a review of the essentially administrative functions performed by Planning and Responsible Authorities, including the preparation of planning scheme amendments and the issue of certificates of compliance, with a view to assessing which if any of those functions may be performed by other entities.

8. CASE STUDIES

8.1 Case Study 1 – State Planning Policy For Economic Development: Business

(1) Background

The State Planning Policy for Economic Development: Business (Clause 17.02) in new planning schemes requires that commercial facilities be located in existing or planned activity centres unless they constitute new free-standing centres in significant emerging residential areas, improve accessibility to or provide convenience shopping ancillary to existing commercial centres, or equate to factory outlets. The policy also requires that cinema-based entertainment facilities should be located within or on the periphery of existing or planned activity centres where they should be as-of-right use, but not otherwise.

There is no definition of activity centre in the planning scheme. Cinema-based entertainment facility is defined as:

> *"Land used to provide screen based entertainment or information to the public, in association with the provision of meals or sporting, amusement, entertainment, leisure or retail facilities."*

The policy was derived from Clauses 14-4 and 14-5 of the Regional Section of "old format" Metropolitan Planning Schemes and has been modified following reports of Advisory Committees appointed under section 151(1) of the Act. Given this history and the reliance placed upon the policy by existing retail operators in establishing themselves in existing centres, they draw heavily upon it in objecting to proposals for new retail and cinema-based facilities which do not appear to comply.

(2) Objective/Market Failure which is addressed

The objective of the Business activity centre policy is to encourage developments which meet the community's needs for retail, entertainment, office and other commercial services and provide net community benefit in relation to accessibility, efficient infrastructure use and aggregation and sustainability of commercial facilities. It is directed towards achieving a number of the Objectives of Planning in Victoria described in **Section 4.1** including:

- providing for the orderly, economic and sustainable use and development of land; and
- enabling the provision and co-ordination of public facilities for the benefit of the community

The policy seeks to address market failure by preventing negative externalities that may flow from unregulated developments such as

inconvenience to the community due to fragmentation of retail facilities; and increased demand for car-based shopping trips.

The policy seeks to facilitate the efficient provision of quasi public goods (such as street lighting, bridges, roads, pavement) by assisting the attainment of economies of scale. The policy also seeks to attain economies of scale in retailing to facilitate efficient provision of community facilities, such as child care facilities, which might not be provided otherwise.

The policy also seeks to address information asymmetry by providing clear directions as to suitable places to site retail and entertainment facilities.

(3) **Identification Of Any Restriction on Competition**

The Business policy restricts or potentially restricts competition in the Land Use Market by:

- discriminating in favour of certain land owners over others in respect of the uses to which land may be put;
- limiting the land available to prospective purchasers of land/developers of land seeking to undertake the development of a commercial facility or cinema based entertainment facility;
- discriminating in favour of purchasers of land which seek to undertake a development which fits within the three exceptions to the policy that a commercial facility should be located in existing or planned activity centres, namely:
    - new free-standing commercial developments in new residential areas which have extensive potential for population growth or will accommodate facilities that improve the overall level of accessibility for the community, particularly by public transport;
    - new convenience shopping facilities to provide for the needs of the local population in new residential areas and within, or immediately adjacent to, existing commercial centres;
    - outlets of trade related goods or services directly serving or ancillary to industry and which have adequate on-site carparking; and
- impacting upon the price of land which would otherwise be determined by the market. Land within existing or planned activity centres is likely to have a higher value than land situated outside it.

In the context of Final Product Markets, the Business policy is likely to restrict competition in the following ways:

- by creating a barrier to entry for potential new competitors. This will occur directly to the extent that the policy tends to limit the land which is available for the development of commercial facilities and

cinema complexes, by requiring that subject to certain exceptions those facilities be located in existing or planned activity centres. Barriers to entry also arise to the extent that a prospective new entrant is unable to locate its business at its preferred location or, due to unavailability of a site within an activity centre, at all or incurs significant entry costs in seeking planning approval to develop a facility which does not comply with the policy;

- by restricting the location of commercial facilities and cinema complexes to the extent that they are required to be located within existing or planned activity centres. This restricts consumer choice;

- by increasing the cost of land as an input into the production process. To the extent that the Business policy tends to increase the value of land which is located within an existing or planned activity centre, and requires new entrants to locate a commercial facility or cinema complex in that planned or existing activity centre, it is likely to increase the establishment and operating costs (eg. Rental) of the business, which in turn may impact upon the competitiveness of the business, and result in higher prices to consumers; and

- by discriminating in favour of certain businesses over others. The policy will tend to advantage incumbent competitors in Final Product Markets over prospective new entrants seeking to establish a commercial facility or cinema complex for the reasons identified in the preceding three paragraphs. It may also advantage those businesses which are new entrants which are included in new convenience shopping facilities or new free-standing commercial developments and, as a result, are able to take advantage of the exceptions to the requirement that commercial facilities be located within an existing or planned activity centre.

(4) **Cost/Benefit Analysis**

Costs and benefits associated with restrictions posed by activity centre arrangements are summarised in **Table 8** below.

Businesses have a market incentive to locate where they can be near complementary activities and supporting infrastructure. By co-locating with other retailers, businesses can attract more customers than if they were free standing. Similarly, if they locate close to a transport hub they can maximise their accessibility to consumers. It does not require a legislated restriction to capture these economies.

However, there is no market incentive for businesses to take into account the negative externalities they impose on others or the implications of their location for the provision of public goods. This means that their location decisions are not likely to take into account:

- the ability of State and local governments to achieve sufficient economies of scale in provision and use of infrastructure, including public transport and car parking;

- the increased dependence on car based shopping trips due to fragmentation and associated traffic congestion problems;

- any lack of sense of community due to fragmentation of community facilities; and
- any reduction in environmental amenity when development is not orderly (ie centralised).

Some market intervention appears warranted to overcome these market failures. In particular, the inability to achieve economies of scale in the provision and use of infrastructure could potentially impose a major cost on taxpayers (who tend to fund public infrastructure) as well as consumers and the general public (who bear the inconvenience of inefficient transport and related infrastructure).

However, the current activity centres policy is highly restrictive. It leads to higher production costs for businesses who prefer not to locate in activity centres and may entail higher production costs for incumbents if the restriction gives activity centre landlords market power. This means higher prices and less choice of supplier for consumers. Restricting location may also stifle innovation among retail businesses in approaches to marketing, or even the development of new products. This is particularly the case if the restriction grants monopoly power to landlords who insist on uniform marketing and may even place limits on the types of goods or services that may be sold.

Also there is potential for "government failure". That is, just as markets fail to achieve outcomes that are in the community's best interest, so too can governments. Activity centre policies can fail to serve the community's best interest when:

- Governments choose the wrong location to site an activity centre, for example by siting it in an area where another land use would generate higher returns. This reduces allocative efficiency in the economy by reducing the productivity of land;
- the number or size of activity centres is not sufficient to match demand for retail space. This would allow landowners to monopoly price — rents would be higher, unit costs higher and prices in final goods market would be higher. Some businesses may be forced out of the market (or deterred from entering) leading to less consumer choice. As well as monopoly pricing, landlords with market power may also regulate products and marketing and stifle innovation. They may force retailers to conform with uniform marketing policies of shopping centre management leading to lack of diversity in shopping experience, particularly when the same management operates other shopping centres in the region; and
- the exemptions listed in the Legislation — currently, there are three: new developments; new convenience shops; and trade related businesses that support industry with adequate on-site car parking — do not match community preferences.

It is difficult to generalise across all activity centres to definitively balance costs and benefits of restrictions posed by activity centre controls. Submissions to this review do not provide much guidance in this regard. All submissions referring to activity centre legislation came from incumbents who may have a vested interest in maintaining the restriction to protect their profits. No submissions were received from businesses that preferred not to locate in an activity centre and so did not enter the market.

(5) **Conclusion/Recommendation**

Generally, activity centres may confer a net public benefit if governments are ensuring that:

- supply of activity centre space matches demand;
- that monopoly power does not develop among activity centre landlords; and
- exemptions closely reflect community preferences.

However, if any of these conditions is violated, the restriction may confer a net public cost.

Notwithstanding this it may be possible to achieve the objective at lower cost, for example by:

- ensuring the legislation does not allow landlords to dominate the Land Use Market by ensuring that the size of each activity centre is sufficient to allow sufficient rivalry between landlords;
- regularly reviewing exemptions and updating them to reflect community preferences; and
- inserting another exception allowing retail businesses to locate outside activity centres if they are prepared to pay for any negative externalities they generate (valued on an appropriate basis).

Table 8: Cost benefit matrix for restrictions associated with activity centres [a].

	Benefit due to restriction		Cost due to restriction	
Allected party	Description	Order of magnitude	Description	Order of magnitude
Businesses forced to locate within activity centre which prefer to locate outside	Nil		*Profit foregone by not locating in preferred area* Higher unit production costs because business must pay higher rent in activity centre relative to their preferred location Higher unit production costs if landlord has market power due to restriction and is able to prevent a firm from marketing their product, supplying certain goods and services, setting trading hours, etc as they prefer Stifles incentive to innovate through business location.	 Moderate Moderate Moderate
Businesses that would locate in activity centre even if not required to do so	Nil		Nil	
Businesses supplying goods and services other than those permitted in activity centres who would prefer to locate in activity centre	Nil		*Profit foregone because business not allowed to locate in activity centre.* Unit production costs higher because business not able to locate in preferred location (ie activity centre)	 Moderate
Businesses already located in activity centres	*Profits protected because potential rivals are not able to locate outside activity centre where rents are cheaper.*		Higher unit production costs because businesses pay higher rent than if they located outside activity centre May stifle innovation in retailing	
Consumers (ie shoppers, movie goers)	Time saving due to co-location of retail outlets	Minor	Consumer surplus reduced because some consumers prefer to shop outside activity centres to avoid crowding Higher prices due to higher unit production costs Reduced choice of supplier of particular goods and services because land availability is constrained	Minor Moderate Moderate
Tax payers	Permits efficient provision and use of public transport, car parking and other infrastructure	Major		
General public	Public amenity through centralisation of retail outlets (ie seen as orderly development)	Moderate	Loss of diversity in shopping experience (eg shopping strips outside activity centres).	Moderate
Landowners	*Value of land on which activity centres are based increases*		*Land values in adjacent areas may decline due to increased congestion. This will already be factored into land prices if land purchasers knew that activity centre or proposed activity centre was located nearby at time of purchase.*	

[a] *Note: Italics denote a reference to a transfer.*

8.2 Case Study 2 – Local Planning Policy: Development On Highways, Main Roads And Tourist Routes

(1) Background

A Local Policy in the Mornington Peninsula Planning Scheme entitled "Development on Highways, Main Roads and Tourist Routes" (Clause 22.06) ("**Local Policy**") provides that highway service facilities should be limited as far as possible to existing service nodes and that applications for new development sites on main roads must demonstrate a significant limitation in the current level of service. It also provides that commercial and industrial proposals should be directed to township locations. Before deciding applications to use or develop land adjoining a highway, major road or tourist route, the Responsible Authority must consider Decision Guidelines which include visual, traffic and "commercial intrusion" factors.

The profile of the Mornington Peninsula in the Mornington Peninsula Municipal Strategic Statement (Clause 21.02) notes that the rate of car ownership among households is 93% compared with a Melbourne average of 87%. The Peninsula is characterised by a distinctive settlement pattern based on more than 20 townships with relatively clear boundaries and individual character, and is Victoria's most visited destination for informal recreation.

The Mornington Peninsula Strategic Framework Plan (Clause 21.04) includes the following strategic directions:

- defining township growth boundaries as a method of focusing future development;
- recognising and protecting strategic landscape areas between and around townships due to their strong influence on the Peninsula's sense of place;
- maintaining rural areas for their environmental, landscape/ recreational and agricultural values; and
- supporting the maintenance and development of the arterial road network as a key economic and recreational resource.

Under the Commercial Activities Centres heading (Clause 21.07–3), the Mornington Peninsula Municipal Strategic Statement notes that commercial expansion on main roads outside town centres may reduce the range of goods available, in turn reducing benefit to shoppers in terms of a compact centre providing a wide range of goods and shopping convenience. It is said that concentration of commercial activity in the townships will attract critical mass to attract other kinds of investment and generate multiplier effects and that, while the strategy may be contested with arguments about flexibility and increased competition and levels of service, it is considered that a strategy of consolidation is more sustainable and equitable and will result in net community benefits.

"Key Issues" under Clause 21.07-3 include:

- provision for further retail and commercial development on the Peninsula should provide for net community benefit, involving a balance between opportunities for competition and support for existing public and private investment;

- a strategy of consolidating new retail and commercial activity within existing town centres and in support of the existing commercial hierarchy is considered to best achieve long term community benefit, and will reinforce the overall strategic framework plan for the Peninsula; and

- pressure for retail development outside of the main town centres, on main highways or fringe sites, based on gaining greater exposure, would adversely affect the viability of planned town centres.

(2) **Objective/Market Failure Which Is Addressed**

The Local Policy is directed towards achieving the Objective of Planning in Victoria described in **Section 4.1** of securing a pleasant, efficient and safe living and recreational environment. It protects highways, main roads and tourist routes from inappropriate commercial and industrial intrusion, maintains visual outlook and visual sequences from such roads, prevent commercial strip development and meet safety, convenience and aesthetic standards for such roads and their environs. It refers to the need to preserve the "townships" character of the Peninsula and prevent "significant negative impact that is disproportionate to the improved level of community service".

The Local Policy seeks to address the negative externalities associated with commercial and industrial use and development on important roads, such as unsightly visual clutter, loss of use of rural landscape, detriment to "gateway" character at entry points to townships and traffic hazards, that would result in an unregulated environment.

(3) **Identification of Any Restriction On Competition**

The Local Policy potentially restricts competition in the Land Use Market in the following ways:

- by limiting the land available to prospective developers of services businesses, by requiring them to locate those services businesses within existing service nodes unless they can demonstrate that there is a significant limitation in the current level of service which they are seeking to provide so as to justify the situation of their business on land outside an existing service node; and

- by increasing the cost of land. Land located within an existing service node will tend to have a higher value than Rural Zone land lying outside it, insofar as the former land is more likely to be approved for a service development.

The Local Policy is likely to restrict competition in Final Product Markets in the following ways:

- by restricting the entry of potential new competitors into Final Product Markets. To the extent that the Policy has the effect of limiting the locations adjoining highways at which new entrants may establish competing businesses, it creates a barrier to entry. It may also restrict market entry by a prospective new entrant to the extent that it gives rise to compliance costs in respect of a proposed new service development. For example, a prospective new entrant may seek through the permit application process to locate outside of an existing service node, arguing that there exists a significant limitation in the current level of service. In so doing, the prospective entrant must confront the expense and delay typically associated with the planning permit application process;

- by providing advantages in favour of certain businesses over others. As well as advantaging incumbent competitors in Final Product Markets in the manner identified in the preceding paragraph, the Local Policy expressly favours commercial and industrial uses and developments which can be demonstrated to be required either to service the rural area or as being associated with major recreational facilities. Those developments are more likely to be approved to be located on land adjoining highways, main roads and tourist routes, as opposed to being located in alternative areas such as business areas or industrial areas within existing townships;

- by increasing the price of final goods and services. To the extent that the Local Policy has the effect of requiring new service developments or commercial and industrial use or developments to be located within existing service nodes or business areas/industrial areas within existing townships, rather than on rural land adjoining highways, it may require competitors to incur higher land acquisition or lease costs. These costs are likely to be passed on to consumers by way of higher prices for goods or services;

- by restricting the location of business or industry which produces final goods and services to existing service nodes or business areas/industrial areas within existing townships. This may inconvenience consumers of those goods or services; and

- by restricting the ability of producers of final goods and services to situate their businesses in a location which will enhance their ability to advertise their goods and services through their visible presence to the motoring public or by use of appropriate signage on land adjoining highways, main roads and tourist routes.

(4) **Cost/Benefit Analysis**

The costs and benefits associated with restrictions on development on highways, main roads and tourist routes are summarised in **Table 9** below.

Under the current restriction, development on land within the Rural zone adjoining highways, main roads and tourist routes is not allowed unless:

- there is a significant limitation in the current level of service; or
- the business is required either to service the rural area or is associated with a major recreational facility.

This restriction imposes costs on businesses that would prefer to site in such locations but are unable to. For instance, they may have to pay higher rents for premises in service nodes relative to premises sited in a Rural zone. Some businesses seeking to provide a product or service, or use a method of production, that is unique to location near a highway (eg convenience products or fast service methods) may not enter the market if location within existing service nodes does not allow them to sufficiently differentiate their product.

Tourists and other travellers may prefer that certain goods and services (eg petrol, food, drinks, tourist information services) are conveniently located beside highways, main roads and tourist routes to minimise travel delays. The restriction imposes additional travel costs (including time delays, petrol and vehicle wear and tear costs) by forcing tourists and travellers to divert to the nearest service node..

There are potentially many benefits associated with a restriction on development on highways, main roads and tourist routes. For instance, consumers may benefit by saving time and transport costs when businesses and shops are co-located within service nodes. Motorists using highways may benefit from a reduction in journey time because significant highway development may require a reduction in speed limits to maintain the level of road safety, with increased unrestricted access to and from the highway. This saving is likely to be particularly significant if the highway is a major transport link.

Tourists derive enjoyment from the maintenance of green belts along tourist drives. Indeed, this may assist some regions to differentiate themselves from others and attract tourists to the area, which could benefit local businesses. In this way the restriction may promote regional development. It can also do this by encouraging travellers to divert to existing service nodes and purchase goods and services from local businesses and businesses employing local people. This may enable some communities to maintain the critical mass to retain valuable community services such as schools, medical and banking facilities.

Generally, the benefits associated with this restriction are likely to be maximised if the restriction applies to roads that serve primarily as either a tourist route (where visual amenity is highly valued) or a main arterial route (where the road traffic authority has a responsibility to maintain a high average travelling speed).

(5) Conclusion/Recommendation

It is difficult to definitively balance costs and benefits associated with this restriction as they will vary on a case by case basis, depending on:

- the volume of traffic that uses the highway, major road or tourist route in question;
- the value that the general public and tourists to the area place on the preservation of green belts along such roads;
- the nature and extent of services offered within existing service nodes;
- the location of the nearest alternative service node; and
- the extent to which communities rely on passing traffic to maintain the viability of community services.

Notwithstanding this, provided the restriction is not used to protect incumbent businesses at any cost, it may confer a net community benefit. Costs associated with the restriction may be minimised by :

- allowing businesses providing essential services to travellers to locate on highways (eg petrol station, shops selling food and drink, tourist information centres) provided the benefit to travellers outweighs any accompanying reduction in green belt amenity or traffic speed; and
- ensuring that there are sufficient existing service nodes and that each node is of sufficient size to accommodate demand for new business space.

Table 9: Cost benefit matrix for Local Planning Policy: Development on highways, main roads and tourist routes [a]

	Benefit		Cost	
Affected party	Description	Order of magnitude	Description	Order of magnitude
Businesses already located within existing service nodes	*Increased profit if restriction helps to attract more tourists to service node.* *Increased profit if restriction reduces number of competitors.*		*Reduction in profit if restriction prevents businesses from providing services to passing tourists who do not wish to divert from their journey into existing service nodes.*	
Businesses that prefer to locate along highway (ie new and those already in service nodes)	Nil		Higher productions costs as unable to site in cost minimising location. Stifles innovation of new products, production processes or marketing methods that may have emerged if highway development was allowed.	Moderate Moderate
Owners of land on which existing service nodes sited	*Value of land probably higher than if businesses were able to locate along highways to take advantage of lower land values.*		Nil	
Owners of land next to highways	Nil		*Value of land next to highway lower than it would otherwise be if it could be used for commercial or industrial purposes.*	
Consumers	Time and travel costs saved due to co-location of shops and businesses within service nodes.	Minor	Less choice of supplier location. Higher prices if restriction leads to higher production costs.	Minor Moderate
Tourists	Improved visual amenity along highways, main roads and tourist routes	Moderate to Major	Increased journey time to divert to existing service nodes to purchase goods and services (eg petrol, food and drinks).	Minor
Other motorists using highways	Reduction in journey time as speed limits not lowered to accommodate reduction in road environment (due to increased unrestricted access).	Major	Increased journey time to divert to existing service nodes to purchase goods and services (eg petrol, food and drinks).	Minor to Moderate
General public	Utility derived from preservation of "green belts" along highways, main roads and tourist routes. If motorists are encouraged to divert to existing service nodes, they may purchase goods and services from local businesses. This may stimulate local employment opportunities and enhance regional development.	Moderate to Major Minor to Moderate		

[a] *Note: Italics denote a reference to a transfer.*

8.3 Case Study 3 – Section 173 Agreements

(1) Background

Section 173 of the Act allows the Responsible Authority to enter into Agreements with owners of any land within the planning scheme area, as well as any other person or body. A significant feature of these Agreements is that they may be registered on the Title to the subject land and bind future owners.

Although these are planning agreements, and frequently arise as the result of provisions in planning schemes or conditions in a planning permit, they may be entered into independently of any planning instrument. A land owner may be prepared to voluntarily accept what amounts to a restrictive covenant on the Title to his or her land or agree to provide some public benefit in anticipation of seeking development approval. Alternatively, the Responsible Authority may seek to reduce the impact or effect of an existing activity in order to ensure compliance with the planning scheme. Section 173 Agreements are particularly valuable in circumstances where a proposed use may or may not give rise to the need for future works such as traffic signals and the nature, extent and timing of such works is uncertain .

Section 174 of the Act provides that Agreements may provide for "*any matter incidental*" to a range of planning functions. In practice, Section 173 Agreements may place more onerous restrictions upon the use and development of land than those available under the planning scheme. For example, Agreements have provided that land may not be used for a purpose for which permission is available under the planning scheme, that a party may not exercise statutory rights of objection to a planning application for other land or complain about activities on other land, and that existing use rights must be surrendered. A more dubious example of the use of a Section 173 Agreement by a Responsible Authority is an Agreement which specifies the basis on which the Responsible Authority will in future exercise its discretion in relation to an application for permit .

Section 173 Agreements frequently relate to:

- provision of dedicated carparking spaces;
- provision of carparking land under licence;
- contribution to infrastructure with refund as and when other development occurs;
- bonds for contingency works;
- contribution to community facilities and works not immediately connected with the subject land;
- gifts of land to Council;

- creating obligations to build within building envelopes shown on plans of subdivision;
- staging of development and ancillary works;
- height and scale limitations on future buildings;
- measures required by utility organisations;
- future maintenance of site features, like landscaping;
- performance measures to the satisfaction of Council or other public authorities;
- requirements that are too detailed to specify in permit conditions;
- site-specific undertakings given to obtain a planning scheme amendment.

Agreements relating to the development of land over which Council has ownership or control or as part of a joint venture arrangement are common.

There is no third party involvement in the process of establishing a Section 173 Agreement, and notice and objection procedures similar to those relating to planning scheme amendments and permit applications are not available.

(2) **Objective/Market Failure Which Is Addressed**

The objective of the provisions relating to Section 173 Agreements is to attain desirable planning outcomes where such outcomes are not available by more conventional means, such as planning permit conditions. For example, Section 62 (6) of the Act prohibits a permit condition from requiring payment of an amount for public services or facilities unless that condition is imposed in accordance with a Development Contributions Plan or Section 173 Agreement. Similarly, a new development may be likely to, but will not necessarily, generate traffic congestion so as to give rise to a need for traffic signals. A permit condition which required traffic signals if the development proposal generates traffic congestion may be challenged on the ground of uncertainty and, for this reason, a Responsible Authority may seek to address the issue through a Section 173 Agreement.

Section 173 Agreements are often employed where a Responsible Authority determines that a proposed use is not amenable to permit conditions because the impact of the proposed use is difficult to determine in advance. Section 173 Agreements also address impacts which result from intensification of uses and ancillary activities over which no planning control is available because of arguments that they amount to a "natural progression" of a permitted use.

Section 173 Agreements may be used to either derive funds or directly provide for public goods, such as parks, landscape features, and pavement. Often they are used to mandate the provision of

infrastructure such as sporting facilities which are not public goods in nature but used by the community. Often these obligations are the "price" of favourable consideration of an application, in circumstances where such provision may not be demanded under planning controls.

In summary, the Objectives of Planning in Victoria referred to in **Section 4.1** which Section 173 Agreements are commonly used to achieve include:

- to provide for the economic and sustainable use and development of land;
- to provide for and co-ordinate development infrastructure and community infrastructure for the benefit of the community; and
- to secure a pleasant, efficient and safe working, living and recreational environment.

(3) **Identification of Any Restriction On Completion**

A Section 173 Agreement which restricts or regulates the use or development of land, or imposes conditions subject to which the land may be used or developed for specified purposes, potentially restricts competition in the Land Use Market as follows:

- by discriminating against land owners and developers which own or have rights in relation to land which is the subject of a restrictive Section 173 Agreement, as against other land owners. For example, those conditions may effectively prevent or restrict the use or development which may be made in relation to the land or increase the cost of that use or development as a result of the imposition of conditions which must be complied with; and
- by imposing significant compliance costs on owners of land or developers, to the extent that they are required to negotiate a Section 173 Agreement with a Responsible Authority. For example, this process may require the owner of the land to incur legal expenses.

Section 173 Agreements potentially restrict competition in Final Product Markets in the following ways:

- by restricting market entry of prospective market entrants, to the extent that the prohibitions or restrictions relating to the land in effect limit land available to new market entrants to establish potentially competing businesses. A requirement that a prospective new entrant negotiate a Section 173 Agreement as part of the process of obtaining planning permission further creates a barrier to entry for new competitors to the extent that it is likely to increase the compliance costs of entry, including legal costs associated with negotiating the Section 173 Agreement;
- to the extent that a competitor in a Final Product Market occupies or uses land which is the subject of a Section 173 Agreement, with its attached restrictions, that competitor may be disadvantaged in

relation to other competitors in the market, who are not subject to such agreements. For example, the Section 173 Agreement may impose additional establishment or operating costs on the competitor which, as a result, leave that competitor at a competitive disadvantage; and

- to the extent that a Section 173 Agreement imposes initial compliance and establishment costs, and/or ongoing operational costs on a business, it will tend to increase the cost of production of the good or service produced by that business, which costs will be passed on to consumers in the form of higher prices.

(4) **Cost/Benefit Analysis**

It is impossible to be definitive about the costs and benefits associated with restrictions imposed by Section 173 Agreements because the nature and extent of the restrictions vary under individual agreements and also because the parties affected by such agreements are involved in a diverse range of activities and Final Product Markets.

However, potentially, Section 173 Agreements are highly restrictive and very costly. To begin with, they can impose significant compliance costs on land owners and on businesses occupying or using land that is subject to an Agreement. Sometimes compliance costs are ongoing and borne by all future land owners and businesses occupying or using that land.

Provisions that do not clearly specify future obligations create uncertainty that increases financing costs for developers. These costs may be passed on to consumers in Final Product Markets if the degree of competition permits. To the extent that Section 173 Agreements prevent businesses from setting efficient prices, output, and quality or using the most efficient production processes, they can inflate production costs and make it difficult for such businesses to compete against rivals, including rivals in other states and overseas, who are not burdened by such arrangements. Where such agreements are onerous they may limit the number of new developments and, hence, number of businesses competing in Final Product Markets.

Section 173 Agreements also impose costs by removing low cost appeal options that are available elsewhere in the planning system. Landowners can only appeal Section 173 agreements to the Tribunal to a limited extent. Many disputes would have to go through expensive court processes. The Agreements are also likely to involve a considerable monitoring and enforcement cost to ensure that future owners of the land abide by and comply with the restriction even though they were not party to the original Agreement.

Responsible Authorities have a large degree of discretion in imposing Section 173 Agreements and, because normal avenues of third party appeal and public consultation do not apply, there is great potential for Responsible Authorities to impose excessive obligations on developers in a manner which is not transparent, without repercussion.

Consequently, it is likely that some Section 173 Agreements may impose considerable costs on businesses and consumers.

The primary benefit derived from many section 173 Agreements is a contribution towards the provision of non-rival, non-excludable public goods such as parklands, bridges, public toilets, public drink fountains, most roads and pavement. Some Section 173 Agreements seek contributions toward the provision of quasi public goods, ie goods that are only non-rival and non-excludable up to a point, such as community sporting facilities. However, as discussed in **Section 7**, there may be less restrictive ways to provide such public goods.

Many Section 173 Agreements relate to the provision of infrastructure that is not public good in nature, for example car parking. In such cases, Section 173 Agreements provide a mechanism for implementing user pays or coordinating the provision of infrastructure among the beneficiaries of that infrastructure. However, they do not address a form of market failure. Again, it is likely that there are more efficient means to implement user pays, for example by targeting the beneficiaries of such infrastructure services more directly.

Some Section 173 Agreements seek to minimise the incidence of negative externalities, for example by imposing performance measures, mandating future maintenance of site features, or height and scale limitations on future buildings, and by facilitating coordination between infrastructure service providers. However, these Agreements are not an ideal means to minimise the incidence of negative externalities because they attach to land irrespective of the use to which that land is put, and they often remain as a permanent fixture on title. Usually externalities are generated by parties that occupy or use the land, not necessarily the land owner. A more effective means of addressing externality concerns would be to directly target *activities* that generate negative externalities.

(5) Conclusion/Recommendation

In many cases it is highly likely that the costs associated with Section 173 Agreements will outweigh the benefits. Even in individual situations where benefits may outweigh costs, often there is a less restrictive way to achieve these objectives using more conventional planning processes. There is no justification for eliminating rights of third party appeal and responsibility to undertake public consultation that apply elsewhere in the planning system.

This review recommends that Section 62(3) of the Act be amended to prevent the imposition of permit conditions requiring Section 173 Agreements for provision of services or facilities in relation to land development in circumstances where an approved development contribution plan covers the subject land. Development contribution plans generally are preferred to Section 173 Agreements because they are less likely to restrict competition in that they are more transparent, and more consistent in the determination of the circumstances in which a levy is imposed and the quantum of the levy. Notwithstanding this, capacity for voluntary agreement by the landowner for provision of services and facilities ought to be retained.

Irrespective of whether the Act is amended in this way or not, a number of legislative changes could be made to reduce the costs associated with Section 173 Agreements. For instance, this review recommends:

- amending the Act to prohibit Section 173 Agreements from imposing price controls as these can be particularly restrictive and costly;

- amending Section 177(1) of the Act to require a Responsible Authority to include a sunset provision in every Section 173 Agreement to ensure that it does not have a life beyond the achievement of its intended objective. While there is scope for Ministerial consent or agreement between the parties to that effect in Section 177(2), this can be difficult to achieve in practice. Alternatively, wording could be inserted in Section 177(1) requiring periodic review of Section 173 Agreements and for their complete or partial repeal if it is demonstrated that their purpose has been satisfied;

- amending the Act to require that any objectors to a planning permit application or submitters in respect of a site-specific planning scheme amendment that imposes a requirement for a Section 173 Agreement are consulted in respect of the contents of the Agreement prior to execution; and

- that the Department of Infrastructure issue educative guidelines to Responsible Authorities as to appropriate use of Section 173 Agreements. This is considered particularly necessary if the words *"any matter incidental"* are to be retained in Section 174(2)(d).

Table 10: Cost benefit matrix for Section 173 Agreements [a]

	Benefit		Cost	
Affected party	Description	Order of magnitude	Description	Order of magnitude
Owner of land subject to S173 Agreement	*Lower purchase price for land due to restrictions imposed by S173 Agreement*		*Lower sale price for land due to restrictions imposed by S173 Agreement*	
			Cost to comply with provisions of S173 Agreement	Minor to Major
			Additional costs borne due to lack of normal planning system appeals mechanism.	Minor
Businesses occupying or using land subject to S173 agreement	Nil		Higher financing cost due to uncertainty about future liability created by some S173 agreements.	Moderate
			Cost to comply with provisions of S173 Agreement.	Minor to Major
			Additional transaction costs due to lack of normal planning system appeals mechanism.	Minor to moderate
Businesses that may occupy or use land subject to S173 Agreement in future	Nil		Ongoing compliance cost.	Minor to Major
			Increased unit production costs if S173 Agreement limits flexibility of businesses to set prices, level of production or production method as they prefer.	Moderate to Major
			Additional costs borne due to lack of normal planning system appeals mechanism.	Minor to Moderate
Consumers of products produced by businesses occupying or using land subject to S173 Agreements	Accessibility to business may be improved (eg better parking facilities), depending on the nature of the S173 Agreement	Minor to Moderate	Higher prices due to compliance costs and inflated unit production costs	Minor to moderate
			Less choice of supplier if S173 Agreements deter new entry.	Minor to moderate
General public	May obtain contribution towards provision of public goods, quasi public goods and other infrastructure.	Minor to Major		
	Visual amenity of site may be improved, depending on nature of S173 Agreement.	Minor to moderate		
Taxpayers	*Businesses fund infrastructure and public goods rather than taxpayers.*		Monitoring and enforcement costs.	Moderate

[a] *Note: Italics denote a reference to a transfer.*

8.4 Case Study 4 – Particular Provision: Home Occupation

(1) Background

Uses which would ordinarily fall within defined categories such as Office, Manufacturing Sales, Medical Centre and Hairdresser in the planning scheme and be subject to varying control within respective zones are given as-of-right status in all zones (save Business 4 where a permit is required) if they fall within the definition "Home Occupation" in Clause 74 of all new planning schemes, and if they also meet Clause 52.11 requirements. The definition is:

> *"An occupation carried on in a dwelling or on the land around a dwelling, by a resident of the dwelling. It may include a use defined elsewhere, but not a Brothel".*

Clause 52.11-1 applies a number of requirements to Home Occupation that limit the scale and intensity of the use and apply local character and amenity standards. A permit may be granted for a limited variation of these requirements.

(2) Objective/Market Failure Which Is Addressed

Certain municipalities are experiencing rapid growth in home-based business. For example, there are 5,000 businesses trading in Manningham and approximately one half of these are home-based. In Knox, home-based businesses account for approximately 26% of all businesses in the municipality, and the promotion of opportunity for such business is planning scheme policy. Both Councils have published a Home Based Business Strategy.

The objective of having a special Home Occupation category of use is facilitation of small home-based business enterprises, in recognition of emerging new business/employment trends, demographic change and technological advances.

This special treatment addresses a market failure in respect of negative externalities flowing from travel between place of residence and place of work – usually during peak times – including increased energy consumption, greenhouse gas emissions, air pollution and noise.

It also addresses government failure. That is, in the absence of such provisions, the development of home based businesses may be thwarted or prohibited by existing planning laws. These provisions potentially assist the legislation to be more responsive to emerging markets in the new economy.

The conditions of operation included in the Home Occupation Particular Provision are directed towards achieving the Objectives of Planning in Victoria identified in **Section 4.1** of:

- providing for the fair and orderly use and development of land; and

- securing a pleasant, efficient and safe working, living and recreational environment for all Victorians.

In particular, it is designed to ensure that the amenity of the neighbourhood is not adversely affected by an occupation conducted in or from a dwelling.

The market failure addressed is negative externalities such as noise, parking problems, air emissions, loss of residential character and aesthetic enjoyment and stresses upon public infrastructure, that would result in an unregulated environment.

(3) **Identification of Any Restriction On Competition**

The Home Occupation Particular Provision potentially impacts upon competition in the Land Use Market as follows;

- although the effect of the inclusion of a home occupation (an occupation carried on in a dwelling, or on the land around a dwelling, by a resident of the dwelling (but excluding a brothel)) in Section 1 of most zones will tend to increase competition in the Land Use Market to the extent that it increases the range of activities which potentially may be carried on from that land, the Particular Provision relating to home occupation in effect limits the range of commercial activities which may be conducted as a home occupation by prescribing a range of conditions which the home occupation must meet (for example, maximum floor area, limited retail activity, no display of goods manufactured, serviced or repaired so that they are visible from outside the site, the occupation must not adversely affect the amenity of the neighbourhood in terms of hours of operation, electrical interference, parking and storage of chemicals, gases and other hazardous materials); and

- the requirement that a home occupation comply with the conditions set out in the Particular Provision either expressly or effectively prevents certain commercial activities from being carried out as a home occupation without a permit or at all, or limits the attractiveness of doing so, which in turn will impact upon the value of the relevant land.

The Home Occupation Particular Provisions will restrict competition in Final Product Markets in the following ways:

- the range of restrictions imposed upon a home occupation discriminate against a home occupation in favour of competing businesses which are not carried on as a home occupation (refer to the restrictions listed above under the first dot point above under the heading "Land Use Market");

- the conditions set out in the Particular Provision effectively create a barrier to entry for smaller competitors into existing markets – while on the one hand the conferral of as of right status to home occupations under most zones encourages market entry of home occupations with potentially low entry and establishment costs, the

conditions imposed by the Particular Provision relating to home occupation counteract that position by imposing a range of operational limitations which may dissuade a potential entrant from entry;

- by limiting the types of activity which a home occupation may engage in and, in particular, by restricting retail activity;

- by restricting market conduct of home occupations by limiting hours of operation of the home occupation and, by imposing a maximum gross floor area, restricting the scale of the operation;

- by restricting the location of producers of certain final goods and services. For example, the particular provision relating to home occupation restricts retail activities as a home occupation. The effect of this restriction is to make it difficult to establish a conventional retail business within land which is zoned as Residential; and

- by restricting the ability of home occupations to advertise and promote their activities. For example, the requirement that no goods manufactured, serviced or repaired may be displayed so that they are visible from outside the site. To the extent that a home occupation is in a category 4-sensitive area, it is likely to be subject to the further limitation that the total advertising area of a home occupation sign must not exceed 0.2sqm unless a permit permitting a variation is obtained. Typically, home occupation signs cannot be flood lit, internally illuminated or reflective.

(4) Cost/Benefit Analysis

The Home Occupation category of use enables small businesses to be home based to exploit new trends in technology and work preferences. This confers a significant benefit to the community. To the extent that the Legislation allows home based work, it prevents the planning system from stifling innovative approaches to conducting business. By allowing home based work, the Legislation facilitates growth in the number and type of small businesses. It enables businesses to begin on a small scale from a home base with low overheads. Consumers stand to benefit from a larger number of sellers who are able to pass on lower overheads in the form of lower prices. Taxpayers stand to benefit from Home Occupation provisions because in many cases they obviate the need for permits and hence reduce administration costs. Thus, although Home Occupation controls entail some monitoring and enforcement expense, the Legislation lowers administration costs to Government and also reduces transactions costs for parties seeking to undertake home based work.

Home Occupation provisions regulate the nature and extent of home based work activities to minimise negative externalities that might be associated with home based work that may arise in an unregulated environment. The restrictions on competition that result from these provisions are likely to confer a moderate benefit to the community. For instance, they can help to prevent noise, traffic congestion and

parking problems, loss of residential character, air pollution and visual pollution.

However, in some cases the restrictions created by these provisions may impose a significant cost on businesses and consumers by preventing home based businesses from minimising unit production costs. This may be more likely to occur where the restrictions are not directly linked to a form of negative externality. For instance, the nature and extent of negative externalities generated by a business often is not directly correlated to the floor area it utilises. By regulating outcomes or performance (ie in terms of noise levels, traffic congestion, etc), the controls may target particular forms of externality more directly. Generally, performance criteria of this kind should be preferred as long as any additional cost that may be associated with the administration and enforcement of performance criteria (as opposed to prescriptive criteria) is outweighed by the benefits that accrue by not restricting businesses that do not generate negative externalities.

(5) **Conclusion/Recommendation**

On balance, it is likely that the benefit associated with Home Occupation provisions outweigh the costs. However, Government may be able to take action to reduce the cost side of the equation. For instance, this review recommends amending Home Occupation provisions to allow exemptions from limits placed on operating hours, floor area and products that may not be sold where the applicant can demonstrate that the activity does not impose significant negative externalities (such as traffic congestion, noise or visual pollution) on the community.

Table 11: Cost benefit matrix for Home Occupation Particular Provision [a]

	Benefit		Cost	
Affected party	Description	Order of magnitude	Description	Order of magnitude
Party seeking to undertake home based activities	Lower cost structure of home based business means more small businesses are able to enter Final Product Markets.	Moderate	Higher unit production costs if business is unable to achieve economies of scale in production due to maximum floor area and hours of operation provisions.	Moderate
			Higher unit production costs if business is unable to achieve economies of scope due to limits on retail activity.	Moderate
			Higher unit production costs due to restrictions on display of goods.	Minor
Potential competitors based in commercial zones	Some businesses may be able to lower unit production costs by making use of Home Occupation laws (eg rather than expand into more costly commercial zone space).	Minor to Moderate	*Profits may be lower if they compete with home based operators with lower cost structures.*	
	Reduction in transactions costs as no requirement to obtain a permit, except for certain commercial activities.			
Consumers	Increase in the number of suppliers offering a range of price and quality combinations.	Moderate	May pay higher prices for goods and services supplied by home based businesses if such businesses are unable to minimise production costs due to restrictions created by Particular Provisions.	Minor to Moderate
Taxpayers	Saving to administration by eliminating the need to obtain a permit, except for certain commercial activities.	Moderate	Monitoring and enforcement costs.	Minor
General public	Avoidance of parking, noise and high traffic congestion problems in residential zones due to home based businesses.	Moderate	Nil	
	Preservation of residential character of the neighbourhood.	Moderate		
	Preservation of visual amenity and air quality due to restrictions on storage of chemicals, gases and other hazardous materials.	Moderate		

[a] *Note: Italics denote a reference to a transfer.*

8.5 Case Study 5 – Existing Use Rights

(1) Background

Section 6(3) of the Act confers existing use right status on any land use which commences "lawfully" (ie, in accordance with planning controls – if any – current at the relevant time) prior to any planning scheme change which otherwise would require a permit for, or prohibit, such uses.

Existing use rights may arise from the fact that the use was in existence prior to any relevant planning scheme control coming into effect or, alternatively, from a permit being granted for the use prior to a change in the planning scheme that would prevent the issue of such a permit.

The provisions of Clause 63 of new planning schemes amplify existing use rights. Clause 63.11 effectively allows an "unlawful" use to continue legitimately if its establishment has not been detected by the Responsible Authority within 15 years.

Existing use rights run with the subject land and are a tradeable commodity. Clause 63.08 goes further than the protection given under the Act and allows the grant of a permit for an alternative prohibited use if the Responsible Authority considers that the replacement use is less detrimental to the amenity of the area than a current use which is in a prohibited class, but enjoys existing use rights. In a recent case before the Tribunal relating to a circumstance in which the Responsible Authority had granted a permit for a replacement use, it was established that the replacement use had in fact proved to be more detrimental post-establishment than the Responsible Authority had anticipated. Nonetheless, the permit was upheld. The Tribunal and the Courts have ruled that existing use rights may intensify and change with time, provided that the fundamental "purpose" is still served.

(2) Objective/Market Failure Which Is Addressed

Existing use rights allow the continuation of existing uses when new legislation is introduced. They are directed towards achieving the Objective of Planning in Victoria described in **Section 4.1** of providing for the fair, orderly, economic and sustainable use and development of land.

They are a means by which Responsible Authorities can minimise their own administration costs and the transactions costs they impose on others when new legislation is introduced, because they make it unnecessary for incumbents to reapply to undertake their current activity. They also provide a degree of certainty for incumbents that a legislative addition or amendment will not undermine their investment.

The objective of allowing the Responsible Authority to consider an application for permit for an alternative "less detrimental" use under Clause 63.08 is to bring the use closer to conformity with the planning scheme and, in a market failure context, to lessen the negative

externalities which may otherwise flow from the permitted existing use, such as unsightly premises, noise, air emissions and parking problems. In its consideration of an application for a permit in respect of a replacement use, an opportunity is created for the Responsible Authority to impose permit conditions which deal with hours of operation; car parking; delivery vehicles; lighting; signage; amenity matters like noise, smoke and litter; and, in some cases (eg redevelopment of a shopping centre), the delivery of public goods like public open space, improvement to local infrastructure and community facilities.

(3) **Identification of Any Restriction On Competition**

Existing use rights restrict competition in the Land Use Market in the following way:

- land owners/developers which own or occupy land which has the benefit of an existing-use right will be advantaged over other land owners, to the extent that they are in a position to engage in a use or development which would be otherwise restricted by the Legislation.

The recognition of existing use rights by the Act and planning schemes will tend to restrict competition in Final Product Markets in the following ways:

- by discriminating in favour of an incumbent competitor in a Final Product Market over both existing and potential new competitors, to the extent that the incumbent competitor is able to engage in a use or development of land which would otherwise be prohibited by the Legislation; and

- the fact that an incumbent competitor has the benefit of an existing use right may operate as a barrier to entry to new market entrants. For example, although a prospective new entrant may not be prohibited outright from engaging in the same use or development as a competitor who has the benefit of an existing use right, if the prospective new entrant requires a permit, and accordingly is exposed to compliance costs and delay associated with that process, it may be dissuaded from entry.

(4) **Cost/Benefit Analysis**

Existing use rights potentially confer significant benefits to several parties within the community. For instance, the investment certainty created by an existing use right can reduce the risk associated with site or business development and, hence, can reduce financing costs. By granting a business greater freedom to choose their preferred method of production, existing use rights also can lead to lower unit production costs in some situations. Importantly, Responsible Authorities and, ultimately, taxpayers benefit from significant savings in administration, monitoring and enforcement costs because activities deemed lawful before a change in planning law are allowed to continue without reapplication.

Existing use rights also can impose costs on the community. They can impose minor to moderate costs on consumers if they deter the entry of new businesses into Final Product Markets. However, the most significant cost is likely to be borne by the general public in situations where the existing use right allows businesses to generate a higher level of negative externality that would otherwise be permitted by planning laws.

If the planning system had always been effective at regulating activities that generate negative externalities this may not be a problem. However, if the system was not previously effective in this regard, there is a risk that existing use rights could perpetrate the long term generation of moderate to major negative externalities and provide a disincentive for businesses to adopt technologies and production methods that minimise these externalities. There is some scope under existing use right provisions for the impact of negative externalities to be reduced over time through the issue of less detrimental use permits under alternative use provisions.

Although the process of seeking a permit under the alternative use provisions must be initiated by the land owner/business, often they are in effect obliged to initiate the process due to, for example, the redundancy of their current use (eg derelect service station).

(5) **Conclusion/Recommendation**

While the nature and extent of benefits and costs will vary on a case by case basis, on balance it is likely that the benefits associated with existing use rights will outweigh the costs, except perhaps where they allow a major negative externality (eg health or safety risk, or pollution of air, land or waterways) to continue at a level higher than would otherwise be permitted under planning controls.

Governments can reduce the potential for this situation to occur by giving careful consideration to the issue of all permits for alternative use rights. One option to make alternative uses potentially less restrictive is to set a sunset clause by way of permit condition in all permits issued under Clause 63.08 in new planning schemes. This would allow alternative uses to be reviewed after a period sufficient to allow a business to generate a normal rate of return (eg 10 to 20 years, depending on the business activity). In this way, businesses that generated a major negative externality could have their alternative use right terminated in future. This could restore their incentive to avoid generating negative externalities. Care would need to be taken that this sunset clause did not remove all certainty for the business in question. This could be achieved by ensuring that alternative use rights were only terminated if a business activity is found to generate a major negative externality upon the community.

Table 12: Cost benefit matrix for existing use rights [a]

	Benefit		Cost	
Affected party	Description	Order of magnitude	Description	Order of magnitude
Land owners	*For owners of land subject to existing use right, value of land increases relative to land not subject to existing use right.*		*For owners of land that is not subject to existing use right, value of land decreases relative to land subject to existing use right.*	
Businesses that occupy land subject to existing use right	Certainty created by existing use right leads to lower financing cost than otherwise.	Moderate		
	Lower unit production costs due to increased flexibility in production or marketing method conferred by existing use right.			
	Higher profit if business is able to capture market share from rivals with higher cost structures because they do not have an existing use right.	Moderate		
Businesses that compete in the same market as businesses that benefit from an existing use right or would like to compete but planning laws prevent them from doing so			*Loss of profit as competitors with existing use rights may be able to capture greater market share, with lower unit production costs.*	
Taxpayers	Savings in administration, monitoring and enforcement costs as activities deemed lawful before a change in planning law are allowed to continue	Moderate		
Consumers			Reduced number of suppliers if existing use right deters entry of businesses into market.	Minor to Moderate
General public			Businesses that would not otherwise be allowed to generate negative externalities are allowed to continue to do so.	Minor to Major

[a] *Note: Italics denote a reference to a transfer.*

APPENDIX 1

VICTORIAN DEPARTMENT OF INFRASTRUCTURE

DISCUSSION PAPER

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PLANNING AND ENVIRONMENT ACT NCP REVIEW DISCUSSION PAPER

1. Introduction

As a signatory to the *Competition Principles Agreement* (CPA) 1995, the Victorian Government has made a commitment to review all existing legislation under the following guiding principle:

> **Legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:**
> - **the benefits of the restriction to the community as a whole outweigh the costs; and**
> - **the objectives of the legislation can only be achieved by restricting competition.**[1]

In June 1996, the Victorian Government published a timetable for reviewing legislation in accordance with the agreement. The timetable included the *Planning and Environment Act 1987*, the *Planning and Environment Regulations 1988* and the *Planning and Environment (Fees) Regulations 1988* and planning schemes. The *Planning and Environment Regulations 1988* and the *Planning and Environment (Fees) Regulations 1988* have since been revoked by the *Planning and Environment Regulations 19981988* and the *Planning and Environment (Fees) Regulations 1998* respectively. Hence the review will consider the new Regulations made in 1998.

The terms of reference for the review are attached at Appendix 1. The main tasks are to:

- assess the objectives of the legislation and its subordinate instruments in relation to National Competition Policy;
- identify the nature of restrictions on competition;
- analyse the likely effect of the restrictions on competition and on the economy in general;
- assess and balance the costs and benefits of the restrictions;
- consider alternative means of achieving the same result, including using non-legislative means; and
- assess the findings of:
  - the December 1999 report of the Victorian Auditor-General (Performance Audit No.62), titled *Land Use and Development in Victoria – the State's Planning System*;
  - the NCP reviews of planning legislation undertaken in other States, particularly South Australia and Queensland; and
  - planning reforms currently underway in Victoria.

The review will identify potential restrictions on competition arising from:

- the State Planning Policy Framework (SPPF);
- the Municipal Strategic Statements (MSS) and local policies in the new planning schemes;
- the application of the zones, overlays and particular provisions; and
- the administration of the schemes by way of decisions on permit applications, consideration of requests for scheme amendments, and the use of other instruments such as section 173 agreements.

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[1] Clause 5 (1) of the *Competition Principles Agreement* signed by the Australian Commonwealth, State and Territory Governments on 11 April 1995.

Without limiting the scope of the review's recommendations, the review will consider means of reforming restrictions on competition where the costs to the community exceed the benefits, including:

- amending the State Planning Policy Framework;
- amending the municipal planning schemes (including the MSS and local policies in the new planning schemes);
- providing advice on the application of the Victoria Planning Provisions, decision-making in respect of permit applications and scheme amendments, and the use of other instruments such as section 173 agreements; and

amending the Act and Regulations if the preceding measures are deemed not likely to remove the restrictions.

Public comment will be sought as part of the review process. This discussion paper has been prepared to assist people wishing to make a submission on the review.

The Government welcomes submissions to this review from community groups and interested parties.

Submissions should relate to the objectives, role and impact of the planning and environment legislation as it relates to the impact on competition.

Submissions need not be limited to the issues canvassed in the discussion paper, but they should be relevant to the terms of reference for the review.

It would be helpful if submissions commented on community benefits and costs associated with any restriction on competition and put forward alternative ways of dealing with the issue.

It would also be desirable if submissions take into account what effect the new planning schemes will have on any restriction that may have arisen from earlier planning schemes.

Section 2 of this paper discusses National Competition Policy (NCP) principles and the need for planning legislation in terms of market failures. It also discusses the relationship between planning and NCP objectives. Section 3 describes Victoria's legislation, which comprises the Act, regulations and planning schemes. Section 4 outlines potential restrictions on competition arising from the implementation and administration of the legislation. It describes how case studies will be used to illustrate the community costs and benefits associated with restrictions on competition.

2. General principles

2.1 National Competition Policy

All Australian governments have made a commitment to adopt a consistent national approach to fostering greater economic efficiency and improving the overall competitiveness of the Australian economy. Reviewing existing legislation to remove unwarranted restrictions on competition is a key component of NCP reforms. The underlying rationale is that the free operation of competitive markets will promote community welfare by ensuring that:

resources flow to the production of those goods and services for which consumers are most willing to pay;
best use is made of the community's scarce resources by forcing out all but the most efficient/lowest cost suppliers of a given standard of good or service; and
technological innovation is fostered as producers vie for custom through the development of new or improved quality products.

Many regulations have evolved in the past to serve broad public policy objectives, including protection of the consumer, the environment or the wider public from unscrupulous, unsafe or environmentally destructive practices, processes or products. The guiding legislative principle established under the Competition Principles Agreement does not imply that competition objectives should take precedence over these important public policy objectives. However, the form which regulation takes often creates unwarranted barriers to entry to relevant markets, limiting consumer choice, stifling innovation and generating monopoly rents for existing producers which result in higher prices to consumers.

There are a number of general principles that apply in NCP reviews:

There must be a presumption against statutory intervention and the onus of proof should be on the proponent of intervention.
The direct costs of the regulation should be borne by the immediate beneficiaries of the regulation.
Co-regulation, self regulation and codes of conduct are all valuable regulatory mechanisms but potentially subject to capture.
There are regulations with minimal statutory support which are very targeted and cost effective.
Information is important and ordinary market mechanisms should generally not be inhibited, subject to active enforcement of the ordinary fair trading and other law.

The *Competition Principles Agreement* lists a wide range of matters which can be taken into account when reviewing restrictions on competition. These matters include:

government legislation and policies relating to ecologically sustainable development;
social welfare and equity considerations, including community service obligations;
government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
economic and regional development including employment and investment growth;
the interest of consumers generally or a class of consumers;
the competitiveness of Australian business; and

the efficient allocation of resources.[2]

2.2 Market failures

The guidelines state that the need for regulations should be assessed according to the extent to which they address market failures and improve upon the outcomes of an unfettered market. Moreover, the type of regulation which imposes the least costly solution should be sought.

The presence of market failures is the principal rationale for government intervention in a market economy. Although open and unrestricted competition is generally seen as an efficient means of allocating the community's resources, markets do not always provide the best possible economic and social outcomes. Nor are the conditions always present for competition to thrive. Markets may fail to operate competitively or efficiently because of the occurrence of public goods, externalities, natural monopolies and information asymmetries. Of these, externalities and public goods are particularly relevant to planning legislation.

Externalities arise where an activity results in spillover benefits or costs to third parties. For example an industrial discharge into a river is a negative externality, since it imposes costs on other users of the river. If these spillover costs are not borne by the factory, there is little market incentive for the factory to reduce the negative externality. Government may have to take steps to reduce the incidence of such negative externalities (eg, by imposing regulation in the case of waste discharges).

Conversely, an activity may result in positive benefits for third parties for which the initiator receives no compensation. For example establishing a native timber plantation on cleared agricultural land can provide positive externalities in terms of enhancing the landscape, reducing erosion, protecting water quality in streams and reducing potential salinity problems. The plantation owner does not normally receive financial rewards for the spillover benefits.

Where the costs and benefits of actions are purely private (ie do not affect third parties), the market mechanism can deliver an efficient allocation of resources. However, where there are additional social costs and benefits which are not taken into account, markets may not allocate resources efficiently.

Public goods are also important considerations in planning legislation. Public goods occur when the supplier is unable to economically exclude or technically prevent those who do not pay for the good from enjoying its benefit. It is unlikely that public goods would be provided at the socially desired level if governments did not intervene in the market to secure their provision.

2.3 Rationale for planning legislation

A case for planning legislation can be demonstrated by the market failures from the unrestricted use and development of land.

In the absence of planning legislation, land development could result in many negative externalities. A few examples are:

effects on public health and safety when housing is too close to hazardous industry;

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[2] *Competition Principles Agreement* Clause 1(3)

noise, water and air pollution from industry affecting more sensitive land uses in surrounding areas;
car parking generated by commercial development spilling into residential areas;
loss of amenity where a building prevents natural light or unreasonably imposes on the privacy available to a neighbouring property;
aesthetic or visual amenity problems, where the design or look of a building imposes costs on those in surrounding areas (possibly reflected in lower property values for surrounding areas).

Positive externalities from some forms of land use or development control are also possible. For example people in surrounding areas may benefit from:

conserving historical buildings in an area;
applying urban design principles in commercial areas;
retaining vegetation or providing landscaping on development sites.

Some desirable community assets, such as public open space, protected floodways and quality urban design may have public good characteristics. Normally these would be under-provided by markets in the absence of planning legislation.

History provides insights into the need for government intervention in land use and development because of market failures. Planning legislation has evolved to supplement the common law, largely because of the high transaction costs and the difficulties ordinary people had in taking private court action in order to resolve externality problems. Australian planning law originally derived from concepts established in England during the early part of this century.

The UK Government's role in town and country planning developed from concerns about public health and housing policies.

> Together with the increase in medical knowledge, the realisation that overcrowded insanitary urban areas resulted in an economic cost (which had to be borne at least in part by the local ratepayers) and the fear of social unrest, this new urban growth eventually resulted in an appreciation of the necessity for interfering with market forces and private property rights in the interest of social well-being.[3]

The UK *Housing, Town Planning, Etc., Act 1909* empowered local authorities to make a

> "town planning scheme....as respects any land which is in course of development or appears likely to be used for building purposes, with the general object of securing proper sanitary conditions, amenity and convenience in connection with the laying out and use of the land, and of any neighbouring lands".

The 1909 Act went beyond addressing public health issues in planning by including in the legislative purpose the principles of "amenity and convenience".

> It is at this point that planning comes to assume its multi-functional role. No longer concerned with fitting the largest number of people into the smallest possible space with the least possibility of ill health, it becomes concerned with highways, recreational areas, smoke abatement, water and air pollution, advertisement control, road safety regulations, the preservation of woodland areas, "beauty

[3] Cullingworth, Barry J and Nadin, Vincent, *Town and Country Planning in Britain*, 11th Ed., 1994, p.1.

> spots", and historic buildings, house designs, commuting patterns, local transport, and a host of other aspects of human activity.[4]

The above historical references highlight the potential for market failures from unregulated development that are still relevant today.

Planning legislation contributes to achieving a range of social, economic and environmental objectives that are recognised in the Competition Principles Agreement, in particular:

implementing policies relating to *ecologically sustainable development* (eg by controlling the removal of native vegetation);
social welfare and equity considerations (eg by promoting activity centres in locations which are accessible to people without a car);
the efficient allocation of resources (eg by coordinating infrastructure provision with new residential subdivision).

In summary, the rationale for planning legislation is that it:

- **directly addresses the negative externalities arising from the unrestricted use and development of land;**
- **reinforces the positive externalities from land use and development;**
- **assists the provision of desirable public goods;**
- **delivers a large and diverse range of economic, social and environmental benefits for the community.**

2.4 Impact of planning legislation on competition

Although market failures provide a sound case for planning legislation, there are clearly limits on the extent to which intervention in a market economy can be justified in the public interest. Some landmark cases in the administration of Victorian planning legislation demonstrate that the legislation should not be used to stifle competition.

In 1982 in the case of Shell Company of Australia Ltd & Others v. City of Frankston & Another the Planning Appeals Board[5] stated:

> "Town planning is not concerned with general economic regulation or rationalisation of product markets, rather it is concerned with the pattern of land use and with promoting consistency between various land uses. Town planning provides a fetter on our free enterprise market system, but is not designed to replace that system with a form of centralised economic decision making. Moreover, competition is an essential ingredient of the market system. consequently, the principle of "need" should not be used as a planning tool to stifle competition..."

In 1987 in the case of Vernia Pty Ltd & Others v. City of South Melbourne the Administrative Appeals Tribunal (AAT) said:

> "...I have reached the conclusion that the intention of the Act is not to stifle competition. In other words it is not meant to operate in such a way as to prevent a business commencing in an area even if that commencement was to make another

[4] Pooley, Beverley J., *The Evolution of British Planning Legislation*, 1982, p.8.

[5] The Planning Appeals Board and the Administrative Appeals Tribunal were the bodies established under earlier legislation to decide appeals on planning legislation in Victoria. This role is now undertaken by the Victorian Civil and Administrative Tribunal.

> business of a similar nature unviable. I consider that it would have to find that the proposed use would have some effect on the broader community rather than on a mere competitor. In this appeal, I was unable to conclude that the proposed use would have the effect of forcing the cessation of any other similar business. Even if I had been able to reach such a conclusion, I do not believe there would have been any adverse effect on the broader community and that the only effect would have been on the competitor whose business ceased to operate."

In 1990 in the case of Cardran Pty Ltd & Another v City of Springvale the AAT stated:

> "Moreover (council) failed to establish any convincing nexus between his argument and community benefit. It was simply contended that, if one enterprise failed, the community would suffer detriment. This quite ignores the fact that Australian society has its very foundations in entrepreneurial activity which goes beyond mere price competition. Non-price competition, for example, the range of goods to be sold, their quality, even courtesy of service are all factors which play an important role in consumer decision making. It is highly arguable and, indeed, the tribunal believes more likely than not, that competition between similar outlets results in a net community benefit."

The general principle that emerges from the above cases is that a potential adverse impact on a competitor is not a relevant factor in deciding applications for planning permits, unless there is likely to be an overall adverse impact on the community.

National competition policy is generally compatible with the objectives of planning legislation. In the context of this review, national competition policy is primarily concerned with ensuring that the objectives of planning are delivered in an efficient manner and that any restriction on competition is necessary and in the public interest.

3. Victoria's planning legislation

3.1 Planning and Environment Act 1987

The *Planning and Environment Act 1987* (the Act) establishes the legislative framework for regulating the use and development of land in Victoria in order to achieve broad social, economic and environmental objectives. The primary objectives of the Act are set out in section 4(1) as follows:

(a) to provide for the fair, orderly, economic and sustainable use and development of land;

(b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;

(c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;

(d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;

(e) to protect public utilities and other assets and enable the orderly provision and coordination of public utilities and other facilities for the benefit of the community;

(f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);

(g) to balance the present and future interests of all Victorians.

Section 4(2) of the Act provides further elaboration on these primary objectives by enunciating the "objectives of the planning framework established by this Act". Those objectives are:

(a) to ensure sound, strategic planning and coordinated action at State, regional and municipal levels;

(b) to establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land;

(c) to enable land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels;

(d) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land;

(e) to facilitate development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes;

(f) to provide for a single authority to issue permits for land use or development and related matters, and to coordinate the issue of permits with related approvals;

(g) to encourage the achievement of planning objectives through positive actions by responsible authorities and planning authorities;

(h) to establish a clear procedure for amending planning schemes, with appropriate public participation in decision making;

(i) to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice;

(j) to provide an accessible process for just and timely review of decisions without unnecessary formality;

(k) to provide for effective enforcement procedures to achieve compliance with planning schemes, permits and agreements;

(l) to provide for compensation when land is set aside for public purposes and in other circumstances.

Under the Act, planning schemes are the main subordinate instruments for regulating land use in order to achieve the legislative objectives. The schemes contain zones which set out: the uses and developments which do not require a planning permit; those which are permitted, with or without conditions; and those which are prohibited on land.

The Act sets out procedures for obtaining a planning permit for the development of land, where this is required by the relevant planning scheme. The "responsible authority" (usually the municipal council) must consider a wide range of criteria in deciding the application and can impose any conditions it thinks fit on the planning permit (subject to section 62 of the Act). There are provisions for the applicant and third parties to apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review the responsible authority's decision. The Act also includes provisions for the Minister to call in and decide the application, and any applications to VCAT, under certain circumstances.

If a proposed use of land is prohibited under the relevant planning scheme, the scheme must be amended before the use can commence. The Act empowers "planning authorities" (usually the municipal council or Minister) to prepare an amendment to the scheme. The Act outlines the procedures to be followed in preparing and exhibiting the amendment and considering public submissions. Where there are objections which cannot be accommodated by modifying the amendment, the planning authority can abandon the amendment or request that the Minister appoint an independent panel to consider the submissions. The planning authority must consider the panel's report and other matters before seeking the Minister's approval of the amendment to the planning scheme.

3.2 Planning and Environment Regulations 1998

These regulations prescribe:

the manner and form of giving notice;

methods of serving notices or other documents;
times for doing anything required;
regions;
forms;
information to be included in any applications, notices, permits and requests;
the manner of keeping a register of permit applications;
ensuring information is made available by responsible authorities;
verification of information given to a responsible authority;
the penalty for offences; and
particulars of a planning infringement notice.

3.3 Planning and Environment (Fees) Regulations 1998
These regulations prescribe fees for:

determining whether anything has been done to the satisfaction of a responsible authority or a referral authority;
considering applications for permits;
amendments to planning schemes; and
planning certificates.

The regulations also empower a responsible authority, a planning authority or the Minister to waive or rebate the payment of a fee in specified circumstances. A regulatory impact statement is currently being prepared for new fees regulations. The statement will separately consider NCP issues in the process of making new regulations.

3.4 Planning Schemes
A planning scheme for an area must seek to further the objectives of planning in Victoria, and it may make provisions which relates to the use, development, protection or conservation of any land in the area.

The Department of Infrastructure and municipal councils are involved in a major planning reform program to replace earlier planning schemes with new schemes prepared in accordance Part 1A of the *Planning and Environment Act 1987.* The intention is to replace the myriad of existing prescriptive controls with standard performance-based zones and overlays. A key feature is the strong emphasis on strategic planning and policy to form the basis for the implementation of the specific controls.

Each new planning scheme must contain:

the state planning policy framework (SPPF);
a local planning policy framework (LPPF);
zone and overlay provisions;
particular provisions;
general provisions; and
definitions.

Apart from the LPPF, all the above components of the planning scheme must be drawn from the *Victoria Planning Provisions*.

3.4.1 State planning policy framework
The State Planning Policy Framework (SPPF) sets out the matters of state policy which planning authorities and responsible authorities are to take into account and give effect to in planning and administering their respective areas. "It is the Victorian

Government's expectation that those authorities will endeavour to integrate the range of policies relevant to be determined and balance conflicting objectives in favour of net community benefit and sustainable development".[6]

The SPPF contains seven general principles which describe the factors that influence good decision making in land use and development planning:

Settlement: (Planning is to anticipate and respond to the needs of existing and future communities through provision of zoned and serviced land for housing, employment, recreation and open space, commercial and community facilities and infrastructure.);
Environment: (Planning is to contribute to the protection of air, land and water quality and the conservation of natural ecosystems, resources, energy and cultural heritage.);
Management of resources: (Planning is to assist in the conservation and wise use of natural resources including energy, water, land, flora, fauna and minerals to support both environmental quality and sustainable development over the long term through judicious decisions on the location, pattern and timing of development.)
Infrastructure: (Planning for development of urban physical and community infrastructure should enable it to be provided in a way that is efficient, equitable, accessible and timely.)
Economic well being: (Planning is to contribute to the economic well-being of communities and the State as a whole by supporting and fostering economic growth and development by providing land, facilitating decisions, and resolving land use conflicts, so that each district may build on its strengths and achieve its economic potential.)
Social needs: (Planning is to recognise social needs by providing land for a range of accessible community resources, such as affordable housing, places of employment, open space, and education, cultural, health and community support (mental, aged, disabled, youth and family services) facilities.);
Regional cooperation: (Municipal planning authorities are required to identify the potential for regional impacts in their decision-making and co-ordinate strategic planning with their neighbours and other public bodies to achieve sustainable development and effective and efficient use of resources.)

Under each of these principles, the SPPF contains a range of specific policies in clauses 14 to 19. Planning and responsible authorities must consider the overarching and interlocking principles and the specific policies.

3.4.2 Local planning policy framework

The Local Planning Policy Framework (LPPF) sets a local and regional strategic policy context for the application of land use and development controls in a municipality. It comprises the municipal strategic statement (MSS) and specific local policies. Each council must prepare an MSS for its municipality and review it regularly. Generally, the role of the MSS is to provide a vision for the future development of a municipality and to express overall strategic directions. The MSS should be a clear, concise statement of the key strategic land use and development issues and directions for the municipality, as set out in section 12A of the Act.

Local policies focus on specific areas or issues. Their purpose is to set out the basis on which responsible authorities will exercise their discretionary decision making under the scheme.

3.4.3 Zones and overlays

[6] *Victoria Planning Provisions*, section 11.

The VPPs contain 25 standard zones which can be used in the new planning schemes, covering residential, industrial, business, rural and other uses. The first purpose of every zone is to implement the State Planning Policy Framework (SPPF) and the local planning framework. The controls over the use of land in each zone are divided into three sections:

Section 1 sets out uses that do not require a permit, though conditions may be attached.
A use in section 2 requires a permit and may require conditions to be met.
Section 3 uses are prohibited.

The VPPs also contain 19 standard overlays that can be used in planning schemes. An overlay generally applies to a single issue and is concerned with controlling development on land rather than the use of land. An overlay indicates when a permit is required for development for a particular reason. The matters addressed by overlays include environmental significance, landscape significance, heritage, erosion, salinity, flooding, wildfire, land contamination, airport environs and design and development.

An overlay contains specific objectives and the decision guidelines by which permit applications are to be assessed. Schedules attached to overlays can include specific requirements relating to matters relevant to the overlay. For example, a schedule to the design and development overlay could specify the design or built form of any new development, including building setbacks, building height or landscaping.

3.4.4 Particular provisions

Particular provisions apply to specified categories of use and development and other additional matters. They include: advertising signs, car parking, mining, home occupation, native vegetation, telecommunications facilities, gaming, licensed premises and freeway service centres, wherever these uses may seek to locate across the State

4. Potential restrictions on competition

4.1 Methodology

The guidelines describe a step-by-step approach to reviewing legislation in accordance with national competition policy. There are four basic steps:

Step 1 Describe the industry and existing legislative framework. (This step requires a description of the market and its geographic and functional dimensions.)

Step 2 Identify the restrictions on competition. (The restrictions can arise from: barriers to market entry; increased costs of doing business; limits on the number of industry participants or locations; restrictions on business structure, form or ownership; prescriptive regulation of product or service standards.)

Step 3 Show that the restriction is necessary to the objective. (This requires a statement on how the restriction on competition is necessary in terms of market failures and the consideration of alternatives.)

Step 4 Assess the costs and benefits to the community of the restriction. (This assessment must not only economic costs and benefits but also social, environmental, public health and consumer safety considerations. The guidelines

quantitative analyses, but recognise that a more qualitative approach may be more practical in some cases.)

One of the challenges in undertaking the NCP review of the planning legislation is to identify the markets affected by the legislation. The planning schemes made under the Act regulate the use and development of all land in Victoria, except that in Commonwealth ownership. Accordingly the legislation potentially has some form of direct or indirect effect on all commercial activities in the State.

At the system level, it is possible to describe the community costs and benefits of planning legislation. For example the community benefits of planning legislation include:

- reducing externalities from adjoining incompatible land use;
- providing certainty for landowners and investors;
- ensuring that public goods such as open space are provided;
- enhancing efficiency of the provision and utilisation of infrastructure;
- conserving the environment and socially valuable buildings and sites.

The community costs include:

- the costs incurred in administering the planning system;
- compliance costs incurred by land-owners and developers;
- increasing product costs if producers cannot use their preferred locations;
- lower incentives for technical innovation pollution control if producers rely on buffers in planning schemes;
- effects on equity when zoning provides windfalls for some property owners while others have lower land values.

It is not possible to make definitive conclusions about the balance of the community costs and benefits at the general system level because of the difficulty in defining a distinct market and undertaking a meaningful cost/benefit analysis.

It could be argued that the planning legislation could restrict competition in any market under one of the following scenarios:

- A zone prevents a particular parcel of land from being used for a specific commercial purpose, and there are no alternative sites available for that purpose in the relevant market.

- A planning permit application for developing land for a commercial purpose is rejected; alternatively a planning permit is granted, however the conditions in the permit impose significant additional costs, or operating restrictions, on the applicant making it difficult to compete with established operators in the market.

- The process involved in amending the scheme or deciding appeals on a permit application leads to protracted delays, and the "window of opportunity" is lost for successful market entry.

In all these situations there could be valid reasons (taking into account the balance of social, economic and environmental factors) for an outcome which effectively prevents a commercial venture from proceeding. In order to apply the NCP methodology outlined in the guidelines, it is necessary to examine specific cases and the particular markets that are affected in such cases.

In this review, it is proposed to conduct case studies which will illustrate the balance of costs and benefits at various levels of potential restriction in the planning system. This work will then form the basis for deriving general principles for ensuring that the implementation and administration of the planning legislation complies with national competition policy.

4.2 Levels of restrictions

In this review, potential restrictions will be considered at three levels:

- policy level, where the state and local planning policies require deliberate intervention in the market;
- specific control level, where zones, overlays and particular provisions are used in new planning schemes to achieve the policy objectives, or where section 173 agreements are used to control the use and development of land;
- administrative level, where the decisions affect the ability of companies to enter a market or to be able to compete effectively.

4.3 Restrictions from policies

Policies in the SPPF and LPPF have two effects which are relevant to competition. Firstly, they provide the basis for specific controls in the planning schemes, hence they directly influence the extent and location of land zoned for particular uses in a municipality, eg the size and location of business and industrial zones. Secondly the policies must be considered when a proponent requests an amendment to a planning scheme or submits a planning permit application.

Some policies in the SPPF which could lead to restrictions on competition in specific markets are:

- Metropolitan development (clause 14.02 in SPPF)
- Activity centres (clause 17.01)
- Business (clause 17.02)
- Industry (clause 17.03)
- Agriculture (clause 17.05)
- Ports (clause 18.05)

The metropolitan development policy provides that outward metropolitan growth must be confined to designated areas in accordance with Minister's Directions. Consolidation of residential and employment activities is encouraged within existing urban areas and designated growth areas.

The objective of the activity centres policy is to encourage the concentration of major retail, commercial, administrative, entertainment and cultural developments into activity centres (including strip shopping centres).

The objective of business policy is to encourage developments which meet the community's needs for retail entertainment, office and other commercial services. It provides that a five year time limit for commencement should be attached to the planning approval for all shopping centres or expansions of over 1,000 square metres in floor space. It provides further that cinema based entertainment facilities should be located within or on the periphery of existing or planned activity centres and should not require a permit for use in activity centre zones. Such facilities are not encouraged on free-standing sites distanced form activity centres.

The industry policy provides that industrial activity in industrial zones should be protected from the encroachment of unplanned commercial, residential and other sensitive uses which would adversely affect industrial viability. It provides that responsible authorities should not approve non-industrial land uses which will prejudice the availability of land for future industrial requirements in industrial zones.

The agricultural policy provides that permanent removal of high quality productive agricultural land from the State's agricultural base must not be undertaken without consideration of its economic importance for the agricultural production and processing sectors. Planning should support effective agricultural production and processing infrastructure, rural industry and farm-related retailing and assist genuine farming enterprises to adjust flexibly to market changes.

The ports policy provides that the land resources adjacent to ports should be protected to preserve their value for uses which depend on or gain significant economic advantage from proximity to the ports' particular shipping operations.

The above policies in the SPPF seek to achieve planning objectives concerning the economic use and development of land and the provision for orderly development. The State policies are also reflected in local policies, a number of which potentially restrict competition by specifying, in more detail, how those policies are to be effected at the local level.

It could be argued that planning policies can provide a framework within which competition can take place by clearly specifying the boundaries of acceptable practice and facilitating appropriate development. Where the policies apply equally to both incumbent firms and potential entrants, they are unlikely to restrict competition. However if the effect of a policy is to prevent the entry of a new competitor into a market then the policy effectively results in a restriction in competition. For this reason it is important to carefully examine the manner in which policies are implemented in the planning schemes.

The review will examine a number of new planning schemes to ascertain whether the implementation of policies in the new planning schemes are the direct cause of restrictions on competition. Case studies will be undertaken to demonstrate the benefits and costs associated with any restrictions arising. It is intended to examine case studies involving the activity centre, business and industry policies. Submissions are invited on how particular policies are restricting competition through their implementation in planning schemes.

4.4 Restrictions from specific controls

The specific controls in new planning schemes comprise the zones, overlays and particular provisions which are taken from the VPPs and applied to land in a municipality.

Zoning is the main means by which land use is controlled. The problem zoning seeks to address is that some land uses are incompatible. For example, manufacturing industry which is noisy and emits odour may be incompatible with housing, a hospital or school. Zoning is integral to achieving the objectives of fair and orderly development of land, and securing a pleasant and safe working, living and recreational environment.

Zoning has a number of efficiency and equity effects as a form of land use regulation:[7]

- The creation of zones can ***increase*** efficiency where incompatible land uses result in externalities (eg. factory emissions) being imposed on some parties by others, and zoning is able to prevent such incompatible uses being located too close to each other.
- The use of zoning can ***reduce*** efficiency where firms are restricted from using preferred locations (eg. where to site a factory), imposing higher costs on that firm and all of its outputs.
- Zoning affects equity where externalities become capitalised into land prices (eg. land surrounding a polluting factory will be relatively cheaper than similar land with no factory). Similarly, changes to zoning which allow for greater density of housing will commonly benefit that landowner who takes advantage of these changes (who receives a higher price for his land), but cause detriment to surrounding landowners (who may experience greater congestion, less parking or less light than before).

Overlays place controls on the development of land, affecting subdivisions, buildings and works. An overlay is shown on the planning scheme map and applies in addition to the provisions of the zone. The overlays generally address directly environmental and conservation objectives including sustainable use, protection of natural resources, safety and cultural issues.

Particular provisions apply in addition to any zone or overlay. They apply to a specific category of use and development such as gaming, licensed premises, freeway service centres, convenience food shops in residential areas, and to the preservation of native vegetation. They set out specific conditions in relation to them, including permit requirements.

An important aspect of the specific controls is the extent to which they are performance-based rather than prescriptive. One of the main objectives in the planning reform process has been to allow more discretion in what uses are permissible, rather than prohibited, in zones. In general performance-based provisions will reduce undue impacts on competition and efficiency where explicit objectives are sought to be achieved by the controls and to underpin and justify decisions made. The overlays and particular provisions are intended to deal directly with market failures.

Submissions are invited on the extent to which zones, overlays and particular provisions in new planning schemes result in restrictions that cannot be justified in the public interest.

It would be desirable if submissions suggested suitable alternatives which are less restrictive and effectively address market failures.

Apart from the specific controls in new planning schemes, agreements made under section 173 of the Act can also be used to regulate the use and development of land. An agreement may provide for any one or more of the following matters:

[7] Fischel, W, in "Introduction: Four Maxims for Research on Land-Use Controls", *Land Economics*, Vol. 66, No. 3, August 1990, concludes that zoning confers benefits on some and costs on others, but it is impractical to systematically attempt to weigh them.

(a) the prohibition, restriction or regulation of the use or development of the land;
(b) the conditions subject to which the land may be used or developed for specified purposes;
(c) any matter intended to achieve or advance -
  (i) the objectives of planning in Victoria; or
  (ii) the objectives of the planning scheme or any amendment to the planning scheme of which notice has been given under section 19;
(d) any matter incidental to any one or more of the above matters.

It has been claimed that section 173 agreements can be used to control the size, conduct and pricing structure of a market. For example, section 173 agreements struck for car parks can be used to control the quantity of short-term and long-term parking available in an area and to regulate the pricing structure.

As part of the review, a case study will be undertaken on the use of section 173 agreements to restrict competition in a market. Submissions are invited on examples of where section 173 agreements have resulted in a restriction on competition. Information on the benefits and costs of the restrictions would be desirable.

4.5 Restrictions from administering planning system

4.5.1 Decision making processes

The Act sets out processes for amending planning schemes and for considering permit applications, which include giving notice requirements and considering submissions and appeals. It has been claimed that these processes "can impose significant additional costs through delays in decision making as well as direct costs".[8]

In 1990 the then Ministry for Planning and Environment produced guidelines[9] to help decision-makers and others involved in the planning process in considering the environmental, social and economic impacts of proposals. The emphasis is on community rather than individual social effects.

The planning guidelines note that one of the biggest challenges for authorities when considering effects can be the question of commercial objection. They indicate that matters of private economic competition cannot be regarded as relevant planning considerations. Economic effects on competing commercial interests are considered to be relevant only if there is a prospect of a resultant overall adverse effect on the extent and adequacy of facilities available to the local community.

While the Act seeks to prevent vexatious objections and appeals by allowing for costs and damages to be awarded, this does not appear to provide a sufficient disincentive to commercial objectors seeking to block the entry of a competitor to a market. Often commercial objectors will dress economic concerns in legitimate planning clothing, which makes detection of the true intent difficult.[10]

4.5.2 Planning permit conditions

[8] *Retailing Victoria*, the Report of the Retail Development Policy Review Panel, May 1996, p. 9.
[9] *Social, Economic and Environmental Effects, Guidelines for Dealing with Planning Permits and Amendments*, Ministry for Planning and Environment, February 1990.
[10] *Yen Binh Hua v City of Yarra and Anor* 1995/10030.

Section 62 of the Act requires a responsible authority to include in a planning permit any condition which the planning scheme or a relevant referral authority requires to be included. It also provides that "the responsible authority may include any other condition that it thinks fit".

Permit conditions can include a condition that the owner of the land enter into an agreement with the responsible authority under section 173 within a specified period or before the use or development or a specified part of it starts.

As part of the review, case studies will be undertaken on the planning permit decisions on a variety of commercial projects to identify any restrictions on competition, conduct a cost/benefit analysis of such restrictions and consider alternative less restrictive approaches. The review will use the case studies to recommend appropriate corrective action to ensure that decisions are consistent with NCP principles. Submissions are invited on examples of where the decision making process and permit conditions have resulted in a restriction on competition. Information on the benefits and costs of the restrictions would be desirable.

5. **Submission details**

The **closing date** for submissions is **6 October 2000.**
Submissions may be made by mail, fax or email, addressed to the attention of:

Ms Eileen Cleary
Corporate Planning
Department of Infrastructure
Level 14, Nauru House
80 Collins Street
Melbourne Vic 3000

Phone: (03) 9655 6066
Fax: (03) 9655 6752
Email: eileen.cleary@doi.vic.gov.au

Any queries relating to the review should be directed to the above contact.

Copies of the *Guidelines for the Review of Legislative Restrictions on Competition* are available from:

- the Internet at: http://www.vic.gov.au/ncp/default.html
- Information Victoria, 356 Collins Street, Melbourne 3000
  Phone: 1300 366 356

Copies of the Planning and Environment Act and the Regulations, as well the Victoria Planning Provisions, are available from:

- Information Victoria, 356 Collins Street, Melbourne 3000
  Phone: 1300 366 356

APPENDIX 1

NATIONAL COMPETITION POLICY

Review of the Planning and Environment Act 1987,

its Regulations and Planning Schemes

TERMS OF REFERENCE

In the context of the National Competition Policy (NCP), the Minister for Planning has commissioned a review of the *Planning and Environment Act 1987* and its subordinate instruments, to be conducted in accordance with the Victorian Government *Timetable for the Review and Reform of Legislation that Restricts Competition.*

Background

As part of their commitment to the National Competition Policy, the Council of Australian Governments (COAG) is signatory to three inter-governmental agreements. One of these agreements is the 1995 *Competition Principles Agreement,* which requires the review and, where appropriate, reform of all legislative restrictions on competition by the year 2000. This agreement constitutes a commitment to achieve a consistent national approach to fostering greater economic efficiency, and improving the overall effectiveness of the Australian economy.

The agreements are linked by the guiding legislative principle that legislation should not restrict competition unless it can be demonstrated that firstly, the benefits of the restriction to the community as a whole outweigh the costs and secondly, that the objectives of the legislation can only be achieved by restricting competition.

Scope

The review of the Planning and Environment Act will:

- assess the objectives of the legislation and its subordinate instruments in relation to National Competition Policy;
- identify the nature of restrictions on competition;
- analyse the likely effect of the restrictions on competition and on the economy in general;
- assess and balance the costs and benefits of the restrictions;
- consider alternative means of achieving the same result, including using non-legislative means; and
- assess the findings of:
  - the December 1999 report of the Victorian Auditor-General (Performance Audit No.62), titled *Land Use and Development in Victoria – the State's Planning System*;
  - the NCP reviews of planning legislation undertaken in other States, particularly South Australia and Queensland; and
  - planning reforms currently underway in Victoria.

The review will examine the Victoria Planning Provisions (VPPs), a representative sample of new planning schemes using the VPPs, and the administration of new planning schemes in terms of National Competition Policy principles.

The review will identify potential restrictions on competition arising from:

- the State Planning Policy Framework (SPPF);
- the Municipal Strategic Statements (MSS) and local policies in the new planning schemes;
- the application of the zones, overlays and particular provisions; and
- the administration of the schemes by way of decisions on permit applications, consideration of requests for scheme amendments, and the use of other instruments such as section 173 agreements.

The review will consider the following means of reforming restrictions on competition where the costs to the community exceed the benefits:

- amending the State Planning Policy Framework;
- amending the municipal planning schemes (including the MSS and local policies in the new planning schemes);
- providing advice on the application of the Victoria Planning Provisions, decision-making in respect of permit applications and scheme amendments, and the use of other instruments such as section 173 agreements; and
- amending the Act and Regulations if the preceding measures are deemed not likely to remove the restrictions.

Review Arrangements

The review is to be conducted in accordance with the *Guidelines for the Review of Legislative Restrictions on Competition* (Model 2 - semi public).

NOTE: THE CLOSING DATE FOR THE SUBMISSION OF COMMENTS IS 6 OCTOBER 2000

APPENDIX 2

LIST OF SUBMISSIONS RECEIVED

1. Submission from Janelle House.
2. Letter from City of Greater Geelong .
3. Submission by The Lend Lease Group, prepared by F R Perry & Associates Pty Ltd.
4. Submission by City of Manningham.
5. Submission by The Gandel Group Pty Ltd.
6. Submission by Queensland Investment Corporation.
7. Submission by The Institution of Surveyors Victoria.
8. Submission by the Australian Competition and Consumer Commission.
9. Submission by the Shopping Centre Council of Australia (with two Attachments comprising report entitled "Victorian Shopping Centre Industry" prepared by Jebb Holland Dimasi (January 2000) and report entitled "Shopping Centres: The Changing Face of the Community" prepared by Dangar Research Group (April 2000).
10. Submission by the Mornington Peninsula Shire Council.
11. Submission by William Albon.
12. Submission by Housing Industry Association.
13. Submission by Environmental Resources Management Australia Pty Ltd on behalf of Centro Properties Group.
14. Submission by AMP Henderson Global Investors Limited.