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In-House Memorandum
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Significant Social Impact and Planning

With the introduction of *Planning and Environment Amendment (General) Act 2013 (No.3 of 2013)* ('the P&E Amendment'), which commenced 28 October 2013, uncertainty as to whether "significant social effects and economic effects" must be considered in planning permit applications has been removed. Social and economic effects are now a mandatory consideration in every permit application under s 60(1)(f).

This change reinforces an increased understanding of the importance of social, cultural and community elements in planning for the future. It evokes a paper given earlier this year by Simon Molesworth QC to the National Environmental Law Association conference concerning ESD[1]:

> *"Insufficient understanding and consideration of the human dimension, in social and cultural terms, is preventing full and proper assessments of activities whilst concurrently undermining the opportunity to have the community-at-large identify with and embrace the goal of ESD that is directed at improving the total quality of life, for both now and in the future, whilst sustaining ecological process on which life depends."*

Victorian case law concerning "social effects" contains divergent elements.

Cases before Oct 2013 P&E Act Amendment

In early cases, such as *Kentucky Fried Chicken Pty Ltd v Gantidis* [1979] 140 CLR 675, the possibility that community facilities might be jeopardised, physically or financially, by a proposed development, was regarded as a proper consideration alongside economic impact[2]:

> *"the mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration."*[3]

Returned Services League (Vic Branch) Inc Glenroy Sub-Branch v Moreland City Council & Carlton Cricket & Football Social Club Ltd [1998] 2 VR 406 saw the Supreme Court considering a permit to refurbish a venue for gaming. The appeal concerned the original failure of the Tribunal to hear evidence of social and economic effects. It had originally rejected as relevant evidence of the Glenroy Sub-Branch which demonstrated 'major socio-economic disadvantage' in the area and which contended that the establishment of a new gaming venue would seriously and adversely affect fundraising by the Glenroy RSL.

In *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd & Anor* [2008] VSCA 45 ('*Romsey*'), the sheer number of objections to the installation of gaming machines at the local hotel was regarded, by the Supreme Court, as a relevant consideration.

[1] Ecological Sustainable Development. See *Environment Protection and Biodiversity Conservation Act 1999* (Cth), particularly s 3A(a), and *National Strategy for Ecologically Sustainable Development* 1992.
[2] Stephen J at [17]
[3] Ibid.

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In that case, the Court of Appeal was concerned with objections on moral and religious grounds. It found "*no basis for treating as irrelevant, objections based on moral or religious grounds*" holding that evidence of social opposition must be taken into account despite the basis from which that opposition springs:

> *"If … members of the relevant community 'find the prospect of gaming so disconcerting that it would have a significant effect upon that community', it is immaterial whether such concerns were founded on philosophical or moral or religious views (or some combination of these) or simply reflected unarticulated views about the kind of community in which people wished to live"* at [58].

In *Minawood Pty Ltd v Bayside CC* [2009] VCAT 440 the Tribunal reiterated its position that "aversion to a proposal that is otherwise a lawful activity on moral grounds is not a relevant social effect". In *Blue & Ors v Casey CC* [2011] VCAT 1968 at [21], the Tribunal considered that planning law should not be used to restrict liturgical practices, such as ringing bells, singing hymns, burning candles or incense.

More recently, the Supreme Court, in *Stonnington City Council v Lend Lease Apartments (Armadale) Pty Ltd* [2013] VSC 505 ('*Stonnington*'), rejected as relevant the sheer raw number of community objections in the absence of other evidence:

> *"[n]othing was put forward to transform the raw number of objections into evidence of social impact on or evidence of the aspirations of the community"* at [45].

In *Arber v Glen Eira CC* [2013] VCAT 1900[4], heard just before the P&E Amendment, Member Glynn relied on a quite formal approach to a local Council's "Use of Rights of Way" policy finding that, where such policy was "not articulated in the Planning Scheme"[5], it was not policy that the Tribunal **must** have regard to. However it confirmed that it **may** give consideration to an *adopted* Council policy, although this remains only discretionary[6].

A search of the VCAT and Supreme Court online case registers reveals no cases since 28 October 2013 that consider s 60(1)(f). It will be interesting to see how the case law evolves into the future.

[4] *Arber v Glen Eira* was heard four days before the Amendment came into effect and was decided on 11 November, eighteen days after. In its written decision, it does not consider the 2013 Amendment. However, it discusses the relevance of the two sections under Amendment.

[5] *Arber v Glen Eira CC* [2013] VCAT 1900 at [18(a)].

[6] Ibid. For discussion of such discretionary power, as expressed by the phrase 'if the circumstances appear to require' consider see *Returned Services League (Vic Branch) Inc Glenroy Sub-Branch v Moreland City Council & Carlton Cricket & Football Social Club Ltd* [1998] 2 VR 406.