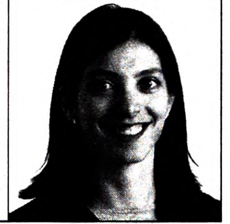
Melbourne 2030: Reloaded



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Planning is one of the most politically loaded issues affecting Victorians, regardless of their street address. It comes as no great surprise, therefore, that the Minister for Planning launched the Government's "Melbourne 2030- planning for sustainable growth" policy ("the Metro Strategy") in the lead up to the last Victorian election.

The Metro Strategy came with a series of draft implementation plans. Based on projected population growth and the anticipated reduction in household sizes over the next 30 years, the Metro Strategy seeks to curb Melbourne's urban sprawl by encouraging medium and high-density residential development in or near designated "activity centres", which are said to offer good access to services and transport.

Despite the Government's adoption of the Metro Strategy, as launched in October 2002, it has not yet been incorporated into the Victorian Planning Provisions (which constitute part of every Victorian planning scheme). More than 1300 submissions were received by the Department of Sustainability and Environment by mid-February this year, in response to the Government's call for public comment. The Department is currently evaluating these and a response is expected later this year.

The role of this policy document and the weight to be given to it by responsible authorities has been vigorously debated. "Responsible authorities" are usually municipal councils and the Victorian Civil and Administrative Tribunal (the "Tribunal") on review (when exercising its discretion to grant or refuse planning permits).

Although the Tribunal has referred to the Metro Strategy regularly since its adoption,[1] it was the decision in the case of *Ashlyn Enterprises Pty Ltd v Yarra City Council*[2] (more infamously known as 'the cheese-grater case') that would ultimately call into question the weight the Metro Strategy should be given at this stage.

Ashlyn Enterprises Pty Ltd v Yarra City Council

The position of Yarra City Council and resident objectors in the *Ashlyn case* was that the policy expressed in the Metro Strategy should not override other important local planning policy objectives, such as heritage, residential amenity and neighbourhood character, which had already been incorporated in the planning scheme and had the status of law.

The Tribunal in considering these submissions noted that:

> *"...While Melbourne 2030 does not provide any particular priority in favour of its housing related directions and policies, and while as a consequence it remains necessary in a each case to strike a balance between competing policy objectives including those relating to neighbourhood character and heritage significance, we are nevertheless of the view that the introduction of Melbourne 2030 does have an effect on how these competing policies should be assessed on a case by case basis."*

O'Connell Street Developments Pty Ltd v Yarra City Council[3]

Less than a month later, the controversial *Ashlyn* decision was revisited in the *O'Connell* proceedings.

This time the legal status of the Metro Strategy was challenged by the City of Yarra as a question of law. The scene was set for a showdown, as senior counsel were briefed to appear on behalf of the developer, the City of Yarra and the Minister for Planning.

Submissions made on the Minister's behalf focused on the status of Melbourne 2030 under s 60(1)(b)(ii) of the *Planning and Environment Act 1987* ("the Act") which provides that the Tribunal:

> *if the circumstances appear to require, may consider- ...*
>
> > *(ii) any strategic plan, policy statement, code or guideline which has been adopted by a Minister, government department, public authority or municipal council; and*
> >
> > *(iii) any other relevant matter.*

If the Tribunal did not consider the Metro Strategy to be a strategic plan for the purposes of sub-section 60(1)(b)(ii) of the Act, the Minister submitted that, in line with the long-settled principle of Victorian planning law, the Tribunal should still have regard to it as a "seriously entertained planning proposal."[4]

The City of Yarra countered that the Metro Strategy was not incorporated into the Yarra Planning Scheme and that "it would be inherently unjust and inappropriate [for] a 'law' which has not been finalised in form and content and which is still the subject of consultation...to be regarded as decisive of the acceptability of a proposal." [5]

The Tribunal applied the relevant tests set out in the cases of *Lyndale and Black Pty Ltd and Black v MMBW*[6] and *Australian Aluminium Shop Fitters and Glazing Contractors Pty Ltd v City of Fitzroy*[7], and ultimately held the Metro Strategy[8] to be a "final Strategy adopted by the Minister which the Tribunal may consider if the circumstances so require and must consider under s 60(1)(b)(ii)" [9].

In doing so, the Tribunal confirmed its approach in the *Ashlyn* case. However, it also managed to resolve much of the uncertainty caused by the *Ashlyn* decision by confirming that:

> *"The primary obligation of a responsible authority and the Tribunal when deciding on a permit application is to apply the existing law, being the appropriate legislation and the planning scheme currently in force, and whilst it is desirable that discretion be exercised in a way that does not compromise the Metropolitan Strategy, until it is incorporated in the planning scheme, it should not be the basis for the approval of a proposal that is inconsistent with or contrary to the controls or policies of the existing planning scheme."*[10] ■

1 See *Premier Projects Pty Ltd v Maroondah City Council* [2002] VCAT 1295; *Archtistic Designs Group Pty Ltd v Hobsons Bay City Council* [2002] VCAT 1447; and *River Street Developments v Yarra City Council and Ors* [2002] VCAT 1347.

2 [2003] VCAT 87

3 [2003] VCAT 448.

4 See *Shire of Sherbrooke v McDougall* [1980] VR 395; *Albury-Wodonga Development Corporation Fitzpatrick* [1982] VR 165.

5 Mr Anthony Hooper QC's submission to the Tribunal, 17 March 2003 at p9.

6 (P82/1729 and P82/1730) [1983] 7 APAD at 470.

7 (P82/1162) 30 December 1982.

8 As opposed to the Implementation Plans which relate to it.

9 As indicated in para 49 of the decision, the Tribunal will treat the word 'may' as 'must' in situations where the "circumstances so require" criterion is satisfied. The Supreme Court case of *RSL (Victorian Branch) Inc., Glenroy Sub-Branch v Moreland City Council* [1998] 2 VR 406, 413-4 is authority for the proposition that if the Tribunal finds that "the circumstances so require", then the Tribunal *must* consider the relevant plan or other matter.

It should also be noted that owing to the Tribunal's finding that the Metro Strategy constituted a final Strategy adopted by the Minister, it was held at para 51 of the Tribunal's reasons that it was not necessary to consider whether the Metro Strategy was a "seriously entertained planning proposal".

10 [200] VCAT 448 at [58].