

# **Local Government for a Better Victoria:**

## **An Inquiry into Streamlining Local Government Regulation**

**A draft report for further consultation and input**

**April 2010**



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## About the Victorian Competition and Efficiency Commission

The Victorian Competition and Efficiency Commission, which is supported by a secretariat, provides the Victorian Government with independent advice on business regulation reform and opportunities for improving Victoria's competitive position.

VCEC has three core functions:

- reviewing regulatory impact statements, measurements of the administrative burden of regulation and business impact assessments of significant new legislation
- undertaking inquiries referred to it by the Treasurer, and
- operating Victoria's Competitive Neutrality Unit.

For more information on the Victorian Competition and Efficiency Commission, visit our website at: [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au)

## Disclosure of interest

The Commissioners have declared to the Victorian Government all personal interests that could have a bearing on current and future work. The Commissioners confirm their belief that they have no personal conflicts of interest in regard to this inquiry.

## Opportunity for further comment

You are invited to examine this draft report and provide comment on it within the Commission's public inquiry process. The Commission will be accepting submissions commenting on this report and will be undertaking further consultation before delivering a final report to the Government.

The Commission should receive all submissions by **22 June 2010**.

Submissions may be sent by mail, fax, audio cassette or email.

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## Terms of reference

I, John Lenders MP, Treasurer, pursuant to section 4 of the *State Owned Enterprises (State Body — Victorian Competition and Efficiency Commission) Order* (‘the Order’), hereby direct the Victorian Competition and Efficiency Commission (‘the Commission’) to conduct an inquiry into streamlining local government regulation.

### Background

Local government authorities in Victoria have a significant impact on businesses, both through the regulations they impose and/or administer on behalf of the State, as well as through direct engagement with business. In recognition of this, the Victorian Government’s \$4.7 million Councils Reforming Business initiative was launched in 2007 with the aim of supporting councils to improve services, reduce costs and reduce red tape for businesses through best practice law making and smarter procurement practices.

Reforms across the local government sector are consistent with the Victorian Government’s broader commitment to promoting efficient and effective regulation by removing unnecessary administrative requirements through the Reducing the Regulatory Burden initiative. In the current challenging economic situation, these initiatives are increasingly important in promoting Victoria’s competitiveness and economic prosperity over the medium term.

It is now timely for a comprehensive inquiry to examine the scope for further streamlining of regulation and processes administered by local government and that impact on business. This inquiry will build upon - and examine the scope for further rolling out of - existing reform initiatives, with a view to continuing to improve Victoria’s regulatory system.

### Scope of the inquiry

The Commission is to inquire into and report on:

- 1) impacts of regulations administered by local government on business, including small businesses such as home based businesses;
- 2) scope for streamlining and harmonising the practices adopted by local government to administer State Government regulation, and options for both levels of government to support best regulatory practice;
- 3) inconsistencies between councils in local government regulations and in practices for their administration, and options for greater streamlining and harmonisation of regulations and their administration;

- 4) regulatory impediments to small and medium enterprise (SME) access to procurement associated with major infrastructure projects and options for removing these impediments;
- 5) the extent of costs incurred by local government in administering regulation, and options for councils to reduce these costs; and
- 6) an estimate of overall economic impact (including reductions in the regulatory burden on business) of options identified in this inquiry, including any incremental benefits to existing reforms being progressed at Commonwealth or State level.

The emphasis in the inquiry should be on administration of regulations by local government rather than on a direct evaluation of legislative frameworks themselves.

The structure of local government and performance of individual local governments are outside the scope of this inquiry.

The Commission should take into account any substantive studies or developments undertaken in Victoria and elsewhere — including by the Commonwealth and other States, and international best practice — that may help it provide advice on this Reference.

## **Inquiry process**

In undertaking this inquiry, the Commission is to have regard to the objectives and operating principles of the Commission, as set out in section 3 of the Order. The Commission must also conduct the inquiry in accordance with section 4 of the Order.

The Commission is to consult with key interest groups and affected parties, and may hold public hearings. The Commission should also draw on the knowledge and expertise of relevant Victorian Government departments and agencies.

The Commission is to release an issues paper at the beginning of the inquiry process and produce a draft report, outlining proposed recommendations for consultative purposes. A final report is to be provided to me within twelve months of receipt of this reference.

**JOHN LENDERS MP**  
**Treasurer**  
**24 August 2009**



## Preface

The release of this draft report gives interested participants the opportunity to comment on the Commission's analysis in relation to its inquiry into streamlining local government regulation. The Commission will consider comments received prior to developing and presenting the final report to government.

In preparing this draft report, the Commission invited public submissions and consulted widely with a range of individuals, businesses, organisations, government departments and local councils.

The Commission invites written submissions on the draft report. These submissions may address any of the issues covered by the terms of reference. In light of the submissions received, the Commission will hold further consultations as necessary.

At the conclusion of consultation on the draft report, the Commission will prepare a final report to be presented to the Victorian Government by 24 August 2010. The Order in Council establishing the Commission says that the Treasurer should publicly release the final report and that the Victorian Government should publicly release a response to the final report within six months of the Treasurer receiving the report.

The Commission looks forward to receiving feedback on the draft report.

Dr Matthew Butlin  
Chair

Graham Evans AO  
Commissioner

Robert Kerr  
Commissioner



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## Abbreviations

ACG	Allen Consulting Group
AHURI	Australian Housing and Urban Research Institute
BCA	Building Code of Australia
BCC	Business Cost Calculator
CCF	Civil Contractors Federation
CCIQ	Chamber of Commerce and Industry Queensland
COAG	Council of Australian Governments
CPP	Collaborative Procurement Programs
CRB	Councils Reforming Business
DAC	Development Assessment Committee
DAF	Development Assessment Forum
DHS	Department of Human Services
DIIRD	Department of Innovation, Industry and Regional Development
DOJ	Department of Justice
DOT	Department of Transport
DPCD	Department of Planning and Community Development
DPI	Department of Primary Industries
DSE	Department of Sustainability and Environment
DTF	Department of Treasury and Finance
EPA	Environmental Protection Authority
ESC	Essential Services Commission
ESD	Ecologically Sustainable Development

ETS	Emissions Trading Scheme
GAA	Growth Areas Authority
HBB	Home-Based Business
IGA	Intergovernmental Agreement
LBRO	Local Better Regulation Office
LGV	Local Government Victoria
LLCIS	Local Law Community Impact Statement
MAV	Municipal Association of Victoria
MBAV	Master Builders Association of Victoria
MBS	Municipal building surveyor
MoU	Memorandum of Understanding
NOFRI	No Requests for Further Information
NSWBC	New South Wales Business Chamber
OECD	Organisation for Economic Co-operation and Development
OH & S	Occupational Health and Safety
PBS	Private building surveyor
PC	Productivity Commission
PIA	Planning Institute of Australia
PPAR	Planning Property Activity Report
PSP	Precinct Structure Plan
RALF	Registration and Licensing Finder
RIA	Regulatory Impact Analysis
RIS	Regulatory Impact Statement
SCM	Standard Cost Model

SDS	Sustainable Design Statement
SEWL	South East Water Limited
SDAPP	Sustainable Design Assessment in the Planning Process
SPEAR	Streamlined Planning through Electronic Applications and Referrals
SPPF	State Planning Policy Framework
SMEs	Small and Medium Enterprises
UK	United Kingdom
VAFI	Victorian Association of Forest Industries
VAGO	Victorian Auditor-General's Office
VCAT	Victorian Civil and Administrative Tribunal
VFF	Victorian Farmers Federation
VGC	Victorian Grants Commission
VGPB	Victorian Government Purchasing Board
VGR	Victorian Guide to Regulation
VLGA	Victorian Local Governance Association
VSBC	Office of the Victorian Small Business Commissioner
VSLGA	Victorian-State Local Government Agreement



# Glossary

<b>administrative costs</b>	Costs incurred by business to demonstrate compliance with regulation
<b>amenity</b>	A subjective term that is used in land-use and building planning regulation to refer to features and advantages of a place or buildings that are considered desirable to protect or enhance, including features such as visual quality, safety, and the ability for people to access services or use spaces or buildings
<b>business cost calculator (bcc)</b>	An IT-based tool developed by the Commonwealth Government to help identify and calculate the compliance costs of regulatory proposals. It provides an automated and standard process for quantifying compliance costs of regulation on business using an activity-based costing methodology
<b>code assess track</b>	A streamlined assessment track proposed by the draft Planning and Environment Act Amendment Bill for straightforward, low impact classes of applications that can be assessed against criteria set out in the planning scheme
<b>credentialed local law</b>	A model local law, subjected to an impact assessment process akin to the RIS process required by the <i>Subordinate Legislation Act 1994</i> . The aim of this process is to ensure the law is well structured, complements relevant State government or national laws and regulations, and contains the most appropriate regulatory model to address the problem to which the model local law is directed. The model local law would be assessed using accepted best practice regulatory assessment methods such as those described in <i>The Victorian Guide to Regulation</i>
<b>delay costs</b>	Includes standby costs (capital and labour down time) and holding costs (interest on loans, rent, material procurement, builder contract costs, additional consultancies, lost business opportunities). May also include costs from not being able to deliver on time

and being perceived as an unreliable supplier

**local law community  
impact statement**

A statement that documents the analysis undertaken in the development of a local law

**planning scheme**

A statutory document that sets out objectives, policies and provisions relating to the use, development, protection and conservation of land in the area to which it applies. Each municipality in Victoria has its own planning scheme

**procurement**

All the business processes associated with purchasing, spanning the whole cycle from the identification of needs to the end of a service contract or the end of the useful life and subsequent disposal of an asset. It does not include stores management and logistics that are aspects of the wider subject of Supply Chain Management. Procurement is often used interchangeably with purchasing

**small and medium  
enterprises**

Businesses that employ less than 200 people

**substantive  
compliance costs**

Costs incurred to achieve compliance with regulation. Within this category, the Commission has attempted to distinguish between monetary costs directly incurred and costs arising from delays

**value for money**

The optimum combination of quality, quantity, risk, timeliness and cost, which should be determined on a whole-of-contract and whole-of-asset-life basis

## Key messages

- Local government is central to Victoria's capacity to respond effectively to major challenges such as population growth, climate change adaptation, and economic development.
- Victoria's heterogeneous population of 79 local councils rank amongst the most important regulators in the State. They implement 29 State Government Acts, with land-use planning and building regulations being the main two areas affecting Victorian businesses. They can also create local laws, with those applying to the management of building sites the most important. The efficiency of local government in these areas of regulation has cost impacts on business and local communities.
- In some areas of regulation, particularly land-use planning, legitimate tensions exist between the state-wide objectives of the Victorian Government and the local interests of the communities that councils represent. A key objective is to reconcile these tensions, without imposing unreasonable and significant costs on business in the process.
- The responsibility for reconciling these tensions falls to both the State and local governments. The State has a responsibility to make its regulatory objectives clear, to support councils as necessary, and to ensure outcomes are measured. Local government, in accepting the State's broad objectives, needs to understand its own costs, improve its regulatory processes, and avoid adding to State regulation on issues where there is no net benefit.
- The principal concerns of business (and indeed, the broader community) regarding local government regulation relate to land-use planning. The Victorian Government and councils are putting a lot of effort into improving land-use planning, which should reduce business burdens.
- The Commission has focussed on the central importance of achieving a greater consensus between state and local governments on the strategic land-use planning framework.
- There is also further scope to streamline land-use planning and enhance the capacity of local councils by permitting accredited private assessors to decide on simple planning applications, setting clearer timeframes, and by strengthening the incentives for councils to implement best practice planning processes.
- A number of other draft recommendations relate to the regulation of local laws covering building sites and to procurement. Improvements to regulatory architecture can complement process changes.
- The Commission considers that if its draft recommendations on land-use planning, building and construction, and procurement regulations, were adopted, there would be annual cost savings to business of between \$30 to \$60 million, without any degradation of regulatory outcomes.



## Overview

Victoria faces significant challenges, including its capacity to respond to continued strong population growth, ease infrastructure bottlenecks, and adapt to climate change. Well designed and implemented regulation can play an important role in dealing with these challenges.

While Victoria's regulatory performance has been relatively strong in recent years (OECD 2010), the Commission has previously highlighted deficiencies in a number of areas where local government implements regulations on behalf of the State Government. Councils rank amongst the most important regulators in Victoria, and the consequences of not addressing these deficiencies are significant, including unnecessary costs to business. This report looks at both short and long term opportunities for improving local government regulation.

The governance relationships between different tiers of government, and the consequent service delivery and regulatory responsibilities, will be central to the effectiveness and efficiency of government in Australia in the 21st century. The central issue between the state and local governments in Victoria, which has one of the largest impacts on business costs, is land-use planning regulation. Responsibility for delivering the State's land-use planning objectives, and particularly managing the contentious issues relating to growth in Melbourne and regional areas, rest in significant part with local government.

This draft report recommends improvements in current arrangements relating to local government's involvement in land-use planning in particular, but also building and construction, and procurement. If accepted, these draft recommendations would save businesses between \$30 million and \$60 million per year, without undermining the outcomes of regulation. But there are also long term issues relating to the broader institutional arrangements between state and local governments that need to be addressed. Improving these arrangements could enhance Victoria's competitiveness and economic development and liveability generally.

## Background to local government regulation

Victoria's 79 local councils are an integral part of Victoria's regulatory system, administering 29 Victorian Acts and many local laws. These regulations provide economic, social and environmental benefits to individuals, communities and businesses but also impose costs on the community and business. This inquiry is about finding ways to reduce these costs, without undermining the benefits that the regulations provide.

The main areas of council regulation affecting Victorian businesses are land-use planning laws (under the *Planning and Environment Act 1987*), building regulations

(under the *Building Act 1993*) and a variety of local laws relating to the management of building sites. These are not the only areas of State regulation administered by local government, but recent research highlights that they rank as the most important areas for many businesses (see below).

Councils also make local laws, which are designed to address community needs, regulate activities within a municipality, protect community amenity or set out council procedures. Most local laws relate to council meeting procedures, the local environment, road management, council assets, building and construction, litter, noise, waste, activities on council land and facilities, control of animals, livestock, and vehicles and equipment.

The separation of the roles and responsibilities of State and local government reflects the principle of subsidiarity which, in essence, is that a higher level of government should only perform those functions that cannot be performed effectively and efficiently at a more local level.<sup>1</sup> While the principle of subsidiarity is widely understood, the reality is that acceptance of the principle brings with it inherent tensions. State Government objectives and local government judgements about their communities' best interests may not coincide. The challenge for both levels of government is to manage these legitimate tensions.

Consistent with the principle of subsidiarity, one reason why councils are involved in regulation is their proximity to the communities and entities they are regulating, and their capacity to be sensitive to local circumstances. There is a trade-off, however, between the benefits of local decision-making and the transactions and other costs that people and businesses incur if they need to find out about and comply with requirements that differ across councils. The skills and capacity of local councils to design, administer and enforce regulation also need to be considered in determining when councils are best placed to provide regulatory services.

Achieving efficient and effective regulation that is consistent between councils will not happen as a matter of course. Local community considerations can result in councils placing less weight on harmonising regulation and processes than the State Government might wish. Councils must have primary regard for people in their municipalities. This strong local focus, together with differences in councils' attitudes to risk, can lead to councils putting less weight on consequences for people in other areas. These tensions are illustrated by the debate between some councils and the State Government over recent changes to the rules restricting parking in peak periods along major parts of the road network.<sup>2</sup> These changes

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<sup>1</sup> The subsidiarity principle is also discussed in the Commission's report on *A State of liveability: An inquiry into enhancing Victoria's liveability* (VCEC 2008).

<sup>2</sup> This issue discussed in the Commission's report on *Making the right choices: options for managing transport congestion* (VCEC 2006).

are designed to improve the flow of traffic in Melbourne during peak periods, but have been opposed by local traders and some councils, due to concerns about the impact on local businesses. As well, councils' incentives to find more efficient ways to regulate business may not be particularly strong, particularly when the benefits of improved regulatory processes accrue to individuals and businesses in other parts of the State.

The assessment of opportunities to improve the administration of regulation must take into account the wide range of issues and the constraints facing councils. The local government sector is extremely diverse in the communities it serves, the challenges it faces, and the resources that are available to it. To illustrate the diversity, the smallest council serves 3200 people and the largest 238 000. Councils' annual budgets vary from as little as \$6 million per annum to \$312 million. Municipalities range in size from 8 square kilometres to 22 000 square kilometres. Some are experiencing population declines and others rapid population growth. The structure of local government in Victoria is specifically outside the Commission's terms of reference.

The institutional arrangements that govern the relationships between the two levels of government are intended to provide incentives to improve regulation and to help manage the tension between local sensitivity on the one hand and concerns about inconsistency on the other. For example:

- councils have a statutory obligation to take account of the needs of other communities and have to comply with best value principles enshrined in legislation
- an inter-governmental agreement provides for specific funding agreements between state and local governments that could encourage delivery of particular regulatory services consistently and at least cost
- there is some performance reporting that should provide similar incentives
- the obligation to prepare regulatory impact statements should improve the design of new State Government regulations administered by councils and the Government's recent decision to extend its target for reducing regulatory burdens on business to local government regulation may motivate councils to look for cost reductions.

While these features of the institutional arrangements perform an important role, the inquiry has identified ways that they can be strengthened, both in specific areas (land-use planning and building construction), and across the local government sector as a whole.

A second way in which the efficiency and effectiveness of regulation can be enhanced is through ensuring that local councils have sufficient resources to perform their regulatory functions, particularly where they are administering State regulations. The capacity of councils to fund the administration of State regulations through rates, regulatory fees and charges varies. The State

Government previously accepted a recommendation regarding the need to provide adequate resources, training and performance monitoring where councils are charged with administering State regulations.<sup>3</sup>

## Impact of local government regulation on business and councils

Previously not a lot was known about the nature and extent of the impact of local government regulation on Victorian businesses. Consequently, on the Commission's behalf Roy Morgan Research surveyed Victorian businesses about their regulatory interactions with councils and their views about what councils are doing well and what they can improve. The survey contacted around 1900 business of which 605 reported having a regulatory dealing with local government in the previous three years:

- Around one-third of Victorian businesses are likely to have had regulatory dealings with local government in the previous three years, with the two most common areas of interaction being building and construction and land-use planning regulation (figure 1). One-third of the businesses that had a recent regulatory dealing with local government also reported dealing with multiple councils. Extrapolating these results suggests that around 11 per cent of all Victorian businesses are likely to deal with multiple councils on regulatory issues of some sort.
- Overall, businesses were generally satisfied with their interactions with local government, particularly those dealing with food safety regulations.
- Land-use planning and building and construction regulations featured prominently as areas for potential improvement, with over half the businesses dealing with land-use planning regulations reporting that their most recent dealing with local government had a negative impact on their business (figure 2).
- Application and approval processes, together with consistency in the provision of information across councils, were the issues of most concern to business. Almost half of the relevant firms surveyed indicated that they were uncertain about how long approvals and decisions made by local government would take.

The results of the survey, together with submissions and input from other stakeholders, suggested that land-use planning regulation and building and construction regulation are likely to be the major areas of regulation affecting business. Thus, these areas are a major focus of this report.

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<sup>3</sup> This recommendation was made in the Commission's report on *Regulation and regional Victoria: opportunities and challenges* (VCEC 2005).

Figure 1 Most recent business interaction with local government regulation, by area of regulation

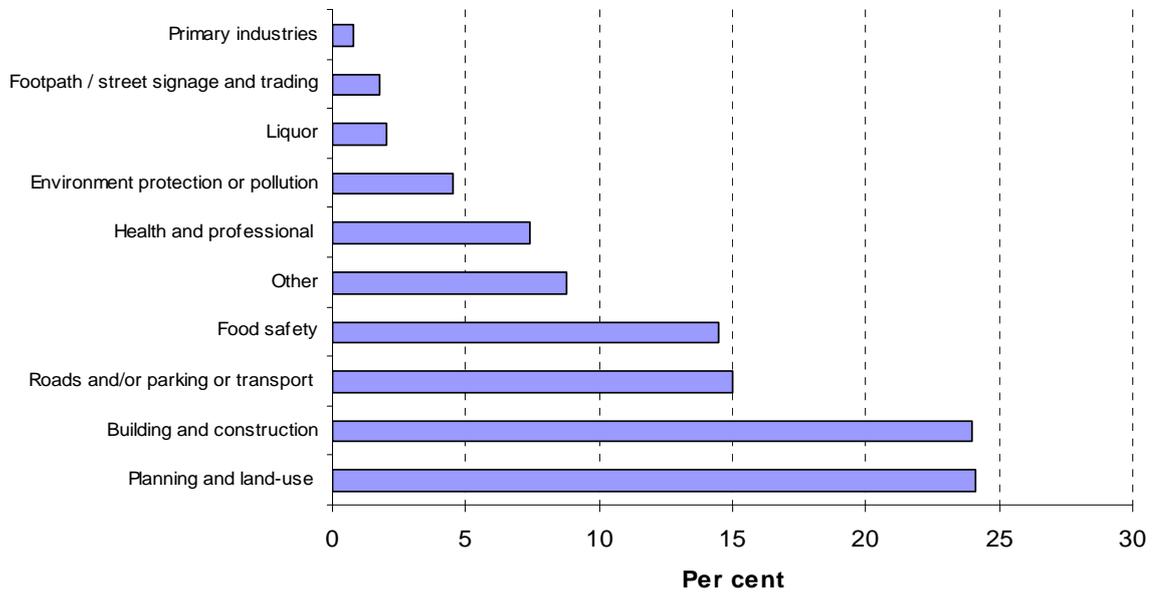
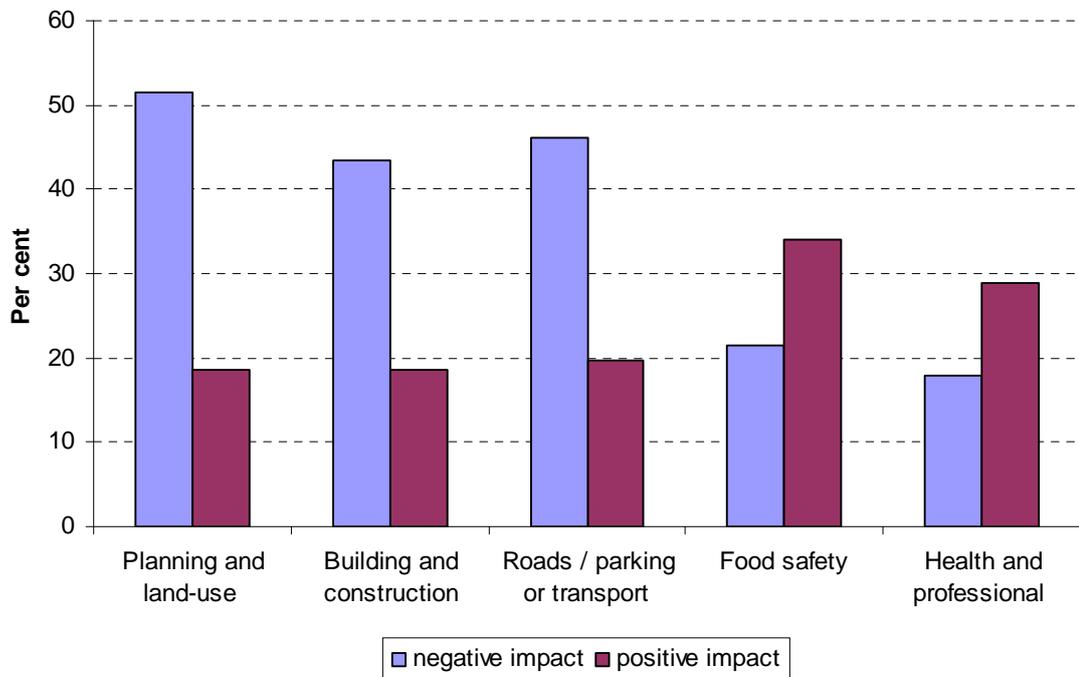


Figure 2 Perceived impact on business of local government regulations, main areas of regulation



## **Costs to business of land-use planning, and building and construction regulations**

Research by the Allen Consulting Group and the Commission for this inquiry suggests that the cost to business of land-use planning and building regulations administered by councils is likely to be between \$502 million and \$875 million per year with a mid-point of \$688 million. The costs to business of complying with land-use planning regulations accounted for the largest share (around 75 per cent) of these costs.

Key components of the mid-point estimates of the costs to business of land-use planning regulations administered by councils were paperwork associated with preparing permit applications (\$179 million per year), and costs to business of unexpected delays in the processing of permit applications (\$124 million per year). For building regulations, the key drivers were the costs to business of complying with local laws covering the management of building sites, such as builders refuse (\$44 million per year), noise and hours of operation (\$25 million per year), site fencing (\$23 million per year) and asset protection (\$11 million per year).

Not all of the estimated regulatory costs are directly attributable to local government. In some cases, costs result from the regulatory framework that has been developed by the State Government. Only those costs associated with building and construction local laws could be directly attributed to local government.

## **Costs to councils of State and local regulation**

The terms of reference require the Commission to examine councils' costs in administering State and local regulations. Administering regulation involves a wide range of activities, ranging from planning, training, providing guidance, undertaking investigations or assessments, undertaking enforcement actions, and monitoring and reporting on implementation of the regulations. These activities require labour and overhead costs (such as expenditure on accommodation, and communications and information technology support).

There is little publicly available information on councils' costs of administering State and local regulations. To try to estimate the aggregate cost, the Commission used a variety of sources, including nine case studies, Victorian Government data and input from submissions. Based on these sources, the Commission considers that the regulatory costs of councils are around 10 per cent of their total expenditure. The available sources suggest that land-use planning regulation is the largest area of regulatory expenditure for many councils. There is, however, wide variation in councils' regulatory costs, suggesting that councils face significantly different challenges and have different priorities concerning the administration of regulation.

It appears that many councils do not collect and report detailed and consistent information on their regulatory costs. Councils that do not measure costs will have difficulty managing them as well as difficulties in setting cost-reflective fees and charges for land-use planning and other areas of regulation. The apparently limited internal systems for tracking regulatory costs would also impede assessments of the financial benefits and costs of regulatory improvement initiatives and performance benchmarking of local government regulation.

## **Opportunities to reduce regulatory costs**

In response to submissions and the survey of businesses, the Commission looked at specific opportunities to improve the administration of land-use planning regulation, and building and construction regulation. The Commission also reviewed councils' processes for creating, administering and reviewing local laws as well as opportunities to improve these processes and to make local laws more accessible. Reflecting a specific requirement in the terms of reference, the Commission also examined the scope to improve the efficiency of local government procurement, in order to produce cost savings for councils and businesses, including small and medium enterprises (SMEs). Finally, drawing on previous Commission inquiries on issues such as liveability, food safety and the environment, the Commission also has identified a number of systemic regulatory issues facing State and local governments.

## **Land-use planning regulation**

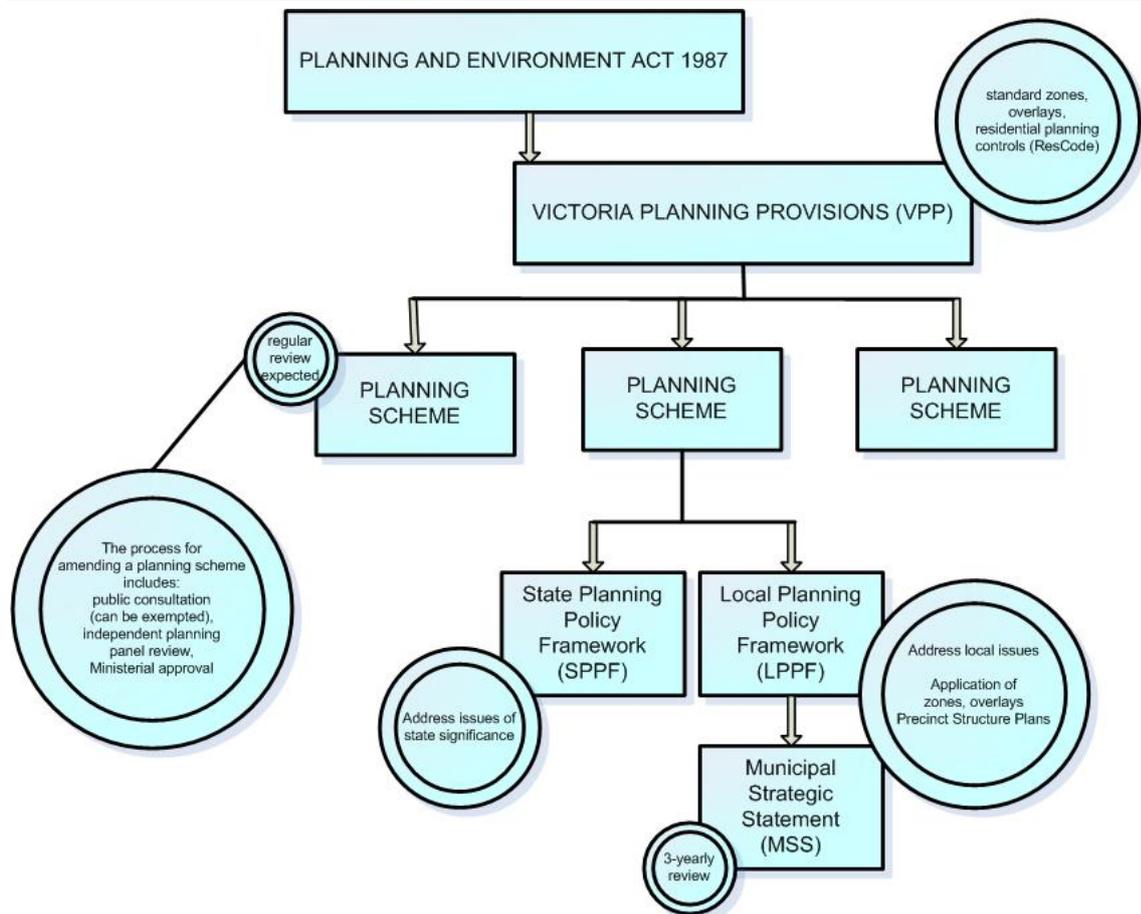
Land-use planning regulation is the body of controls on the use of land, and what can be built on that land. As such, land-use planning regulation has the capacity to shape the development and growth of cities to enable society to exploit the gains from urbanisation, while managing some of the costs of more intensive forms of land-use, such as noise, transport congestion and pressures on the environment.

Land-use planning regulation is at the coal face of many of the challenges facing Victoria. The latest Government projections suggest that Melbourne's population may grow by 31 per cent by 2026, and if the trend to smaller household sizes continues, there may be a 38 per cent growth in the number of households. The work underway to develop a regional strategic planning blueprint (Victorian Government 2009) recognises that the growth in Melbourne's population may encourage more people to move to regional centres, placing additional pressures on regional transport links and services. Clearly, the way in which Victoria's land-use planning system is designed and administered by the State Government and councils can affect housing affordability, transport congestion, the natural environment, and liveability in Victoria generally.

## The role of councils in administering land-use planning regulation

In Victoria, the State Government sets the policy and regulatory framework for land-use planning, but councils also have significant policy-making and regulatory functions (figure 3).

Figure 3 The land-use planning framework



The survey of Victorian business perceptions, together with submissions, indicated that business are concerned about uncertainty, inconsistency, time delays and unnecessary paperwork costs arising from councils' administration of land-use planning regulation. Feedback also suggests that the key issues from a local government perspective are the alignment of State and local government objectives for land-use and development; the growing State involvement in the administration of land-use planning regulation; coordination with the State Government (particularly around transport infrastructure); and the tendency to look to the land-use planning system to address an increasing number of other policy issues.

In approaching these issues, a number of stakeholders made the point that it is important to look at all of the elements of Victoria's land-use planning system,

not just councils' role. Brimbank City Council, for example, stated that there is a need to recognise:

... that local government administers a planning system under State legislation and regulation. Improvements to the efficiency of the planning and approvals process will therefore rely on improvements to State legislation and regulation. (sub. 6, p. 2)

In principle, the efficiency and effectiveness of any regulatory system is influenced by the human and financial resources available to regulators, the processes for decision making and the overarching governance architecture. Deficiencies in one or more of these three facets of an efficient and effective regulatory system can give rise to ongoing problems such as those identified by inquiry participants. In examining land-use planning regulation, the Commission has concentrated its analysis, and also made draft recommendations, on the areas of processes and resources. The Commission has also examined how aspects of the governance architecture have affected the administration of planning regulation by councils and contributed to participants' concerns about the uncertainty, time, and cost of complying with land-use planning regulation.

## **Improving the governance of land-use planning in Victoria**

A key issue underpinning many of the concerns about land-use planning regulation is that the objectives of the State Government and councils for land-use and development often fundamentally diverge. A key area of divergence is views about the relative priority to be accorded to protecting neighbourhood character and encouraging more intensive residential development, especially in the established areas of Melbourne and the regional centres. These divergent interests are played out in the public debate on matters such as urban boundaries, inner city development, the effective integration of land-use planning with public transport, and the use of Ministerial 'call-in' provisions.

The legitimate tensions between State and local objectives for land-use and development have long been the subject of debate in Victoria. But the rapid current and projected population growth in Victoria, and other complex policy issues, such as housing affordability, climate change, water availability, bushfire risks, transport congestion and biodiversity make it essential that these differences be better resolved.<sup>4</sup>

This issue of conflicting State and local interests stems, in part, from councils considering that their primary obligations under the *Local Government Act 1989* are to reflect the views of their communities, as well as the reality of councillors' political imperative to have regard to the views of those who elect them.

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<sup>4</sup> In saying this, the Commission means that there is a robust mechanism for settling and integrating these issues, in the specific context of land-use, so that councils have greater clarity about their regulatory task.

The failure to resolve adequately the differing objectives of State and local governments results in the need to resolve conflicting objectives on a case-by-case basis through the land-use planning permit process. Not surprisingly, this can result in uncertainty, inconsistency, lengthy time delays and high costs, both to planning applicants and councils. The resulting effect on development costs and house prices can detract from the State's capacity to meet the complex policy challenges facing Victoria.

Strategic planning by the State Government and councils has a role in addressing the divergent interests of governments. In principle, strategic planning benefits the community, including business, by providing certainty about development constraints applying to land use and by providing a means for coordinating land-use planning with planning for the provision of social and economic infrastructure. If done well, strategic planning helps to resolve many of the trade-offs between community objectives for economic development, housing affordability, environmental sustainability, preservation of neighbourhood amenity, and other policy issues.

The feedback from inquiry participants indicates that in practice, the mechanisms for resolving the different objectives of State and local governments have often not succeeded in reconciling differing objectives.

- State planning policy is often unclear, and contains competing objectives without sufficient guidance on how trade-offs are to be resolved. This adds to the complexity and cost of administering the land-use planning system for councils and business: for example, the draft State Planning Policy Framework refers to 73 different objectives that planning officers may be required to consider when assessing a permit application, with no guidance as to the weighting of objectives, except that the result should be 'net community benefit' and 'sustainable development'.
- The land-use planning framework is becoming overly complex, with more controls being added to the Victorian Planning Provisions, and an obligation to consider more policy issues in the land-use planning process:
  - Frankston City Council, for instance, noted the 'continual shift' towards the insertion of additional controls into the Victorian Planning Provisions, such as Best Practice Water Quality Offsets and the need for Cultural Heritage Management Plans under the provisions of the *Aboriginal Heritage Act 2006*.
  - There are pressures also to deal with significant policy issues such as the environmental performance and accessibility of buildings, liquor licensing, gambling, and rooming houses through the land-use planning system, leading to additional complexity, uncertainty and, in some cases, to duplication and conflicts with State regulations.
- Councils may be required to deal with complex land-use planning issues with limited expertise and funding. Moyne Shire noted, for example, that while

applications for large wind farms (with output above 30 megawatts per year) are a State responsibility, it was still heavily involved in the pre-lodgement of applications, and the monitoring and enforcement of permit conditions.

- There are also State-imposed caps on land-use planning fees, which when combined with the limited revenue bases available to a number of councils, make it more difficult for councils to deal efficiently and effectively with increasingly complex land-use planning regulations.

The State Government and some councils have recognised the challenges of resolving different State and council perspectives on land-use planning issues. The State has sought to address the issue by reviewing and amending State planning policy and by working with councils to develop improved strategic plans:

- The State Government has developed and released various strategic policy statements including Melbourne 2030 and Melbourne@5 million in an attempt to clarify how it expects the land-use planning process to meet the challenge of Melbourne's growing population through planning for growth areas and inner areas of Melbourne.
- To deal with the issues in Melbourne's growth areas it has also established the Growth Areas Authority to co-ordinate the differing views of State and local governments, to develop land-use planning instruments (such as precinct structure plans) and development controls that provide greater certainty for development and streamline permit approval processes.
- Recognising the land-use planning challenges in established areas of Melbourne, the Government is working with the relevant councils to produce a series of structure plans for major activity centres that will concentrate residential and commercial development into areas that are well served by transport infrastructure. The State Government is intending to establish several Development Assessment Committees, in partnership with the local government sector, to make land-use planning permit decisions in relation to areas and matters of metropolitan significance, including activity centres.
- The development of a statewide blueprint for managing growth in regional Victoria, which will lead eventually to a series of regional strategies that are aligned with the statewide blueprint. The regional planning is being undertaken by a number of regional groups with representation from Commonwealth, State and local governments with an early focus on the major regional centres (Geelong, Ballarat and Bendigo) and coastal areas.

The Commission supports these initiatives, particularly the increasing emphasis on supporting strategic land-use planning by councils.

The benefits of good strategic planning often accrue beyond local residents to future residents and businesses in other municipalities. The wider benefits to

business include greater certainty about land use options, which is particularly contentious in inner-city Melbourne. Protections for heritage and environmental assets potentially benefit all Victorians, not just those living in a particular location. In the absence of State Government involvement, councils may tend to focus their strategic planning too narrowly, with insufficient regard for what may be optimal for the State as a whole.

The Commission is seeking feedback from inquiry participants on the major issues that will arise as State and local governments develop strategic plans for Melbourne and regional areas. These issues are addressed in turn.

- The Commission considers that there is a case for the State to review its objectives for land-use planning regulation with a view to simplifying the State Planning Policy Framework and clarifying the outcomes that the State Government expects from the administration of land-use planning by councils.
- The Commission considers that it is likely that the State Government will need to reconsider the governance arrangements and accountabilities for undertaking and reviewing strategic plans covering multiple councils, such as the regional plans that are being developed to support the statewide planning blueprint. There are several potential organisational options ranging from the use of existing mechanisms such as regional development forums through to establishing independent entities (based on the Growth Areas Authority model or the proposed Development Assessment Committees).
- Finally, the Commission considers that there is a case for the State Government to report publicly on the success of its various land-use planning reform initiatives to help identify whether the anticipated efficiency benefits are being realised. Reporting on the performance of the land-use planning system would also logically cover the State Government's performance in administering elements of the land-use planning system (see below).

In addition to addressing these strategic planning issues, there is also a case for looking at other aspects of land-use planning regulation in Victoria that are potentially affecting the performance of the system.

The State Government may need to reconsider whether land-use planning regulation is an appropriate instrument for achieving some important community objectives. As discussed below, the Commission is suggesting the State Government clarify that building regulation, not land-use planning regulation, is the appropriate regulatory tool for addressing the environmental performance of buildings. There may also be opportunities to re-examine the role of land-use planning regulation in addressing policy issues where alternative regulatory regimes or policy instruments exist, such as housing accessibility, management of gambling venues and premises selling liquor to the public.

Longer term, there would also be benefits in reassessing the capacity to use market-based measures to support or achieve objectives presently pursued mainly through land-use planning regulation. There is increasing interest in using pricing mechanisms to manage some of the consequences of urbanisation, such as significant increases in demand for infrastructure and other community services, and to provide a revenue source to fund the expansion in infrastructure and services that are necessary to support growing communities. The growth areas infrastructure charge is an example of a funding mechanism but such pricing systems could, in theory, also be used to provide price signals to encourage development in areas with good access to infrastructure and services or fewer concerns about adverse amenity and other impacts of development. The use of pricing and direct funding mechanisms is controversial because of the historical reliance on land-use planning regulation.

## **Improving land-use planning processes**

As noted, the State Government has outlined improvements that will assist in addressing the uncertainty, consistency, delays and costs associated with land-use planning in Victoria. There is scope to build on these initiatives by:

- improving performance reporting, and evaluation and benchmarking by extending the reporting regime beyond its current focus on the planning permit process to cover the planning scheme amendment process, and the State Government's role in land-use planning, such as authorising and approving planning scheme amendments, and use of the 'call-in' process (where the Minister takes on the responsibility for assessing particular permit applications)
- the State Government, in collaboration with councils, developing and reporting on implementation of a best-practice permit assessment model
- developing a regime to permit private assessors to assess relatively simple planning permits
- making better use of pre-application meetings, and pre-lodgement certification to speed up the assessment of planning permits
- encouraging councils to adopt a consistent and high level of delegation of decision-making on planning permits
- encouraging more councils and applicants to use online tools for lodging planning permits
- streamlining processes for referring planning applications for technical assessment by State agencies and encouraging the adoption of a 'deemed to comply' approach, whereby the assessment of referred applications must proceed when a referral authority has not responded within the statutory timeframe.

The Commission considers that implementing these planning process improvements could yield cost savings to business of between \$20 million and \$40 million per year, particularly if the Government addresses the issues relating to State and local government coordination on land-use planning.

In addition, the Commission is seeking further information and views of participants on the scope to use financial incentives to strengthen councils' incentives to administer planning processes efficiently and effectively.

## **Improving the resources of councils**

The capacity for councils to administer land-use planning regulation also hinges on whether they have the financial resources and skills needed to undertake the work that is required. It appears that the State Government's cap on planning fees is having some undesirable consequences, and it is not clear why a cap is necessary, especially if the Government decides to allow competition to assess more straightforward permit applications.

Many councils submitted that they are experiencing significant difficulties in attracting and retaining skilled planning staff. Despite this, very little is known about the planning workforce in Victoria, and its use by councils. Some councils have responded to skill shortages by reallocating some of the less technical work to para-planners or administrative staff but it is unclear whether this practice is widespread, and whether it is affecting (positively or negatively) councils' performance. To address the skills issues facing the sector, the Commission considers that the State Government could further develop its strategy to identify the workplace problems facing councils and identify solutions, such as better use by councils of existing staff, greater collaboration among councils, and increased State Government assistance to train more skilled staff.

## **Building regulation**

The key components of building regulation in Victoria are set by the State Government through the Building Act, and the Building Regulations 2006. At the national level, the Commonwealth Government has established a nationally consistent set of building standards specified in the Building Code of Australia (BCA). These standards are given effect in Victoria through the Building Regulations.

Within this harmonised national system, councils have broad powers to make local laws on matters such as the design and siting of buildings, the construction of buildings and the preparation of land for building work. These powers are limited, however, by the Local Government Act, which provides that a local law must not be inconsistent with any Act or Regulation (including the Building Act and Regulations) or with a planning scheme.

The role of councils in building regulation has diminished over time with the introduction of private building surveyors. Recent figures suggest that over 80 per cent of all building permits are issued by private surveyors (up from just over 60 per cent in 1999-2000). Hence, the major issues raised in relation to building and construction regulation related to:

- inconsistencies in the nature, form and effect on business of local laws applying to building and construction activities
- concerns that some councils are using the land-use planning system to impose standards on some new buildings that exceed the nationally-agreed requirements set out in the BCA.

### **Consistency of building and construction local laws**

Construction site management is a key issue for businesses, councils and residents. Councils have put in place a wide range of local laws designed to manage:

- permitted working hours
- parking fees for workers
- traffic management plans
- council asset protection
- disposing of waste material
- rubbish bins and skips on-site
- noise abatement
- site fencing
- crane usage
- fire prevention plans
- demolition activity.

From the perspective of councils and residents, building and construction local laws impose burdens on builders to protect public health, safety, amenity and the environment, in effect to moderate the adverse effects of some building activities. Some laws, such as those relating to the protection of council assets, exist in order to ensure that builders reinstate or protect roads and footpaths from unnecessary damage during construction. There is a trade-off between tailoring local laws designed to address the adverse impact of building activity, and the costs to the community and business of identifying and complying with tailored local laws. The specific concern identified in this inquiry is that, for certain activities, the balance has swung too far in the direction of tailored local laws and that gains might be achieved through greater harmonisation.

Submissions and research by the Commission highlighted the importance of consistency in the form and application by councils of building and construction local laws. The survey of business perceptions, for example, found that

64 per cent of businesses in the building and construction sector interact with multiple local councils, suggesting that the consistency of local laws and their administration is likely to be an important issue for relevant businesses. Likewise, the key local laws impacting on business are in areas such as builders' refuse requirements, restrictions regarding hours of operation, council asset protection and site fencing and identification requirements.

Closer analysis of the substantive provisions of local laws for 30 councils revealed variation in the prevalence of local laws applicable to building and construction activities, terminology used, and the specific requirements of the local laws. The analysis found variations in local laws covering:

- the hours that a person must not, except with a permit, carry out or allow to carry out any building works on site
- requirements to erect fencing around the perimeter of a building site, and to provide site information to enable the identification of the persons responsible for the management of the site (e.g. owner, builder, appointed agent)
- avoiding damage to local assets and infrastructure (such as footpaths, drains and roads) as a result of building activities.

There is limited information on the business impact of variations in building and construction local laws. In some cases the relevant local laws appear to impose significant costs on a small number of businesses. Work on the costs of building and construction local laws, for example, found that a very small number of large developments had incurred large costs due to restrictions on working hours, but that overall, restrictions on working hours imposed compliance costs on business of around \$25 million per year.

To improve the nature and consistency of building and construction local laws, the Commission is recommending that the Government develop a set of credentialed local laws covering site identification and fencing, working hours, and noise restrictions. These credentialed local laws should be developed in consultation with councils, business associations and relevant state regulators, such as the Environment Protection Authority and the Building Commission.

### **What role for councils in sustainable building design?**

With the growth of concern about climate change and water scarcity, all levels of government have been looking at ways of improving the environmental performance of buildings. In Victoria, some councils assist planning permit applicants to examine the environmental performance of proposed buildings by providing information and assessment tools. The provision of information by councils may be an efficient means for helping to raise awareness about the environmental performance of buildings, given that councils are already

performing regulatory functions in respect of building and construction local laws and planning regulation.

Some participants argued, however, that some councils are going beyond this information-provision role to require that new buildings incorporate features to improve their environmental performance. The concern is that such requirements go beyond those laid out in national building standards, and that councils are using the wrong instrument, namely land-use planning regulation, to take on this role.

The use of land-use planning regulation to introduce new building standards raises questions about what is the most effective and efficient way to improve the environmental performance of building, where this goal is desired. There is an existing apparatus for developing standards for the environmental performance of buildings, through the Building Codes Board, which councils and the State Government can seek to influence. Allowing councils to introduce their own building standards through the land-use planning system is likely to undermine what is a more transparent and robust national building standards framework.

To ensure there is a clear and consistent set of state-wide building standards relating to the environmental performance of buildings, the Government should clarify that accountability for developing and promulgating such standards resides with the State through the BCA. The Victorian Government should also clarify that councils' role under the land-use planning system does not extend beyond voluntary schemes and the provision of information and advice to applicants about the environmental performance of buildings.

The Commission emphasises that sustainable design is only one of many other areas in building and construction regulation in which costly inconsistencies may exist not only between councils but also between local, state and Commonwealth governments. Other areas include, for example: noise regulations, accessible housing, and occupational health and safety. It is therefore critical for the State Government to address interface and coordination issues between local government regulation and laws administered by other levels of government.

The Commission estimates that implementing its draft recommendations would reduce the costs to business of complying with building and construction local laws by between \$6 million and \$13 million, without undermining their objectives.

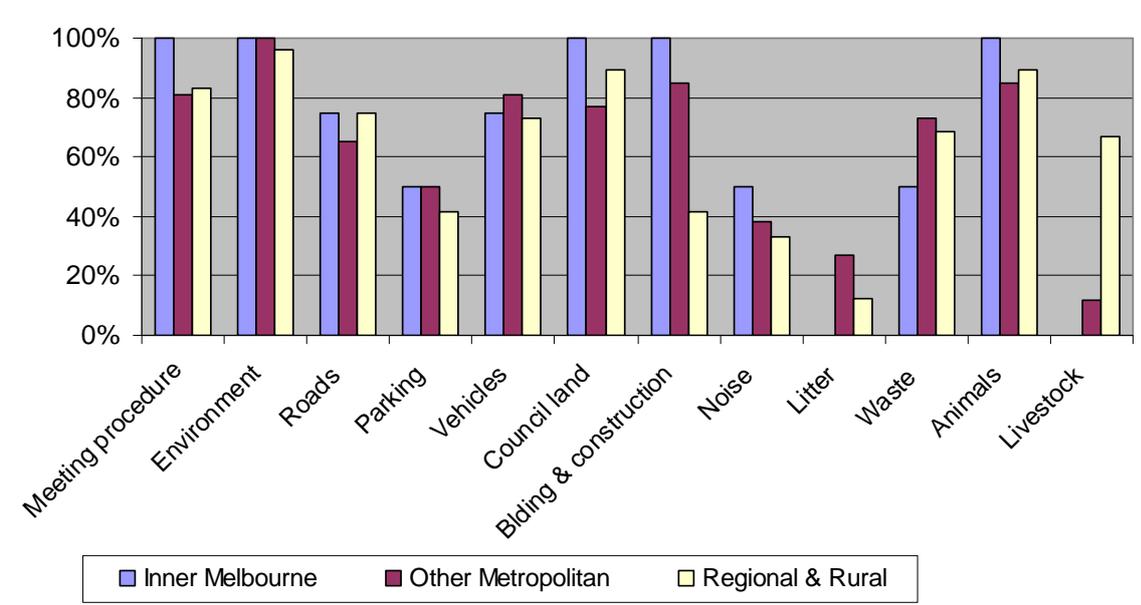
## **Improving local laws**

Councils have used their powers to enact local laws about a diverse range of issues in addition to building and construction.

Research undertaken for the Commission by Stenning and Associates identified a wide range of local laws that can affect Victorian businesses. Local laws relating to areas as diverse as the environment, road management, activities on council

land and facilities, control of animals, livestock, and vehicles and equipment have the potential to impact on business (figure 4). The nature and extent of local laws in these areas vary between councils. For example, almost all councils have local laws about environmental issues, but laws relating to livestock are most common in regional and rural councils.

Figure 4 Nature and incidence of local laws



The main concerns raised by stakeholders about local laws related to problems with their quality, accessibility and consistency. In particular, a number of participants noted that local laws in Victoria are not currently subject to any formal review practice during or after their making, but automatically sunset 10 years from the date of operation (unless remade).

To address issues around the quality, accessibility and consistency of local laws, the *Better local laws strategy* provides a mechanism for subjecting local law-making to greater scrutiny. The State Government has introduced voluntary guidelines for preparing local laws (including an impact assessment process), and voluntary protocols for publishing local laws on websites. This seems to be a proportionate response to the challenge of improving the quality, accessibility and consistency of local laws. When sufficient experience in applying this approach has accumulated, it will be important to evaluate the success of the local law guidelines to consider whether a mandatory approach is warranted. To facilitate accessibility and inform the assessment of the impact of the *Better local laws strategy*, options such as central databases could be considered.

## Improving access to procurement opportunities

The terms of reference require the Commission to inquire into and report on regulatory impediments to small and medium enterprise (SME) access to procurement associated with major infrastructure projects, and options for removing these impediments. The Commission also examined the scope for improving the efficiency of local government procurement, recognising that this has an impact on the resources available more generally to councils.

Council expenditure on goods and services is an important source of income for many businesses. Councils in Victoria spend over \$2.7 billion on procuring goods, services and works each year covering areas such as road maintenance, construction of buildings, purchase and leasing of plant and equipment and waste collection and disposal. One study suggests that 80 per cent of the businesses supplying goods and services to councils are small businesses and that they account for around 20 per cent of councils' total procurement expenditure.

Reflecting the importance of local government procurement to the economy, and the issues of transparency, competition and probity, a large amount of State Government regulation and policy guidance supports the procurement activities of councils.

The Local Government Act specifies that for contracts above a certain threshold (currently \$150 000 for goods and services or \$200 000 for the carrying out of works), a council must give public notice and invite tenders or expressions of interest. The Act also requires councils to have regard to a broad set of 'best value' principles, to publish a procurement policy, and to publish lists of projects valued at more than \$100 000 that councils entered into without first engaging in a competitive process. Guidance on procurement developed by DPCD provides that councils are to consider a range of objectives in undertaking procurement, including value for money, open and fair competition, accountability, risk management, probity and transparency. Neither the Act nor the procurement guidelines require councils to give preference to contracts with SMEs or spell out how councils are to prioritise the various procurement objectives.

Local Government Victoria, the Local Government Investigations and Compliance Inspectorate (DPCD), the Victorian Auditor-General, the Victorian Ombudsman, and the Victorian Small Business Commissioner provide support to, and oversight of, council procurement.

Some councils and businesses argued that improving council procurement would lower costs for both councils and businesses. The specific issues identified by participants were:

- the multiple objectives that councils must consider in undertaking procurement
- impediments to councils collaborating on procurement

- possible over-design of major infrastructure such as roads and footpaths in new developments
- inconsistencies in procurement practices between councils covering issues such as tender documentation, engineering standards, insurance requirements, and tender prequalification criteria
- the costs to councils and businesses of complying with probity requirements such as tender documentation and thresholds
- the costs to councils and businesses of meeting risk management requirements such as public liability insurance and occupational health and safety requirements.

Some of the issues raised reflect the trade-off between finding a cost-efficient procurement process, and the need to ensure competition and transparency in public procurement. Some participants argued that the imposition of regulatory as well as internal controls on councils' procurement practices is resulting in a red tape burden on business, which falls most heavily on SMEs because of their inability to spread these costs across a large customer base. On the other hand, some SMEs are better placed to tender for smaller contracts if they are located close to where the contracted work is to be performed, and have better local knowledge.

Tendering for local government contracts cost Victorian businesses approximately \$100 million per year, which appears unnecessarily high when compared to industry and interstate benchmarks. Added to this is the cost to councils of conducting public tender processes, which could amount to between \$36 million and \$55 million per year (equivalent to a cost of between \$10 000 and \$15 000 per public tender).

The State Government, working in cooperation with councils, has developed a number of initiatives to reduce the costs to councils and businesses. For example, under the *Councils Reforming Business* initiative, councils have been funded to develop regional procurement clusters; common best-practice procurement standards, documents, processes, and financial structures; and information sharing and e-tendering.

The Commission has suggested that a number of improvements could be made, which build on existing strategies, to help reduce procurement costs to councils and businesses, including SMEs. The State Government could:

- clarify in legislation or guidance the objectives that councils must have regard to when undertaking procurement, by emphasising that 'value for money' is the most important principle for local government procurement. Councils should also be required to report publicly any instances where they have not prioritised 'value for money' over other principles in undertaking procurement or service delivery, and the reasons why

- encourage councils to undertake collaborative procurement (such as joint purchasing) by removing regulatory impediments to councils accessing contracts conducted by procurement agents
- encourage councils to implement procurement harmonisation initiatives being developed under the *Councils Reforming Business* program
- support the Victorian Auditor-General's recommendation to clarify the circumstances under which a council must tender, including whether the tender thresholds should apply to works or services provided by in-house teams.

The Commission estimates that encouraging council uptake of harmonisation initiatives may save Victorian businesses around \$6 million per year in tendering costs, including savings of about \$5 million per year for SMEs. In addition, clarifying councils' procurement objectives, and removing impediments to joint contracts conducted by procurement agents, would yield additional savings for councils.

The Commission is considering whether the current thresholds for tendering should be raised, provided there is adequate transparency about councils' procurement activities and decisions. It is also considering whether the effects of councils' risk management requirements on business, including SMEs, can be reduced without undermining efficient risk management by councils. These changes could further reduce tendering costs for businesses and councils. The Commission is seeking further information and comment from participants on these issues.

## **Embedding improvement in the administration of regulation**

This inquiry, as well as previous Commission inquiries on areas of regulation administered by councils, has found a number of instances where the outcomes of regulation have been affected by the differing priorities of State and local governments, or by relatively weak incentives for councils to improve the administration of regulation.

To address the specific issues in particular areas of regulation, the Commission has suggested a combination of resource, process and governance improvements in land-use planning and building and construction regulation, and procurement. The Commission has, however, also attempted to take a broader, system-wide approach to the issues of divergent State and local interests and strengthening incentives for improvement.

Councils are more likely to enforce regulations consistently and reduce the burden of regulation if they work within a well-designed 'architecture' of government. This requires that they:

- regulate when they are the right level of government for the task
- have clearly defined purposes and objectives that they aspire to achieve, and which do not conflict with State Government objectives
- have clear accountabilities, roles and responsibilities, so that they know exactly what they need to do to achieve the objectives
- have guidance from the State Government about how to enforce State regulation
- have sufficient resources to undertake the role, with funds provided in a form that encourages good performance
- have staff with the competencies needed to enforce relevant regulations effectively
- possess appropriate powers and a toolkit of sanctions that enable proportionate and effective responses to regulatory non-compliance
- are transparently assessed through performance reporting about how well they are performing their role
- are encouraged to pursue continuous improvement through processes for reviewing current practice, and encouraging cooperation between councils.

Improving the design of the ‘architecture’ within which councils operate is only part of the story. Improvements to the design of the architecture need to be implemented effectively, with regard for the different capabilities of individual councils.

The Commission is making draft recommendations in a number of these areas. In others, it is seeking more information before deciding whether to make recommendations in the final report:

- There is scope to clarify the objectives of state legislation that councils administer on behalf of the State Government, because if the objectives are not clear, councils will define them for themselves and may reach different conclusions about what they are trying to achieve and how they should achieve it.
- To assist councils manage competing State and local priorities, the State Government could develop a clear list of agreed priorities for regulatory services that councils administer on its behalf.
- There is a need to ensure that roles and accountabilities are clearly defined, particularly where outcomes depend on the actions of both councils and State agencies. Consideration could be given to introducing a formal process for councils to nominate when they need clarification. There is also a strong case for ensuring councils are consulted before new legislation that affects them is introduced.
- International experience points to benefits in providing consistent guidance to councils about the enforcement of regulation. The Commission is recommending that the State Government, in consultation with councils,

- develop and incorporate enforcement principles in the *Victorian Guide to Regulation*, and provide training to help councils apply the guidance.
- There is scope to strengthen the current requirement that departments consult with councils before new regulatory obligations are imposed on councils. This guidance could, for example, be strengthened by specifying that consultation is to occur early in the process of developing regulation, rather than when decisions about design and implementation have already been made. Moreover, the relevant lead department could document its consultations with councils in an implementation plan. This plan would guide councils' administration and enforcement of the new obligation and outline how the department will help councils to deliver it.
  - The United Kingdom's primary authority scheme is an important initiative for encouraging consistent enforcement of regulation, and the Commission is seeking information about whether a similar scheme might be trialled in Victoria.
  - Performance assessment and reporting is an integral part of good regulation and the Commission supports the proposed local government benchmarking regime being developed by the Essential Services Commission. The proposed regime should eventually be expanded to include other key areas of local government regulation impacting on business, and to look for opportunities to reduce or streamline reporting requirements imposed on councils by state government agencies.
  - By extending the regulatory burden reduction target to local government, the Government has created a potentially important process for streamlining regulation. Careful consultation with councils will be needed to secure maximum benefit from this initiative.
  - More comprehensive evaluations during the regulatory impact statement process of State Government regulations enforced by councils would provide information about whether regulations have been enforced consistently, effectively and without unnecessary burden.

## Next steps

The Commission's draft recommendations are intended to reduce costs to business and councils without undermining the objectives of regulations. The Commission conservatively estimates that specific improvements in the areas of land-use planning regulation, building and construction regulation, and local government procurement could, if implemented, reduce business costs by between \$30 million and \$60 million per year, without undermining outcomes (table 2). In addition, a number of the Commission's draft recommendations are intended to produce longer-term benefits to business and the community by making State regulatory objectives and priorities clear, ensuring councils have the guidance and resources required, whilst ensuring that councils are accountable for agreed outcomes.

Table 2      **Potential Cost savings (\$ million per year)**

<i>Source of savings</i>	<i>Indicative cost savings</i>
Planning process and resource improvements	20–40
Reduced regulatory costs in local building and construction regulations	6–13
Improvements to council procurement processes	6
<b>Total (range)</b>	<b>32–59</b>

The Commission invites responses to the draft recommendations and information requests that are listed in the next section.

Submissions are invited by **22 June 2010**.

## Draft recommendations and information requests

The 27 draft recommendations and information requests are listed in the order they appear in the report, and they need to be understood in the context of the discussion in the body of the full report.

### Impact of local government regulation on business

#### *Information request*

*Are the estimates of the costs to business of complying with planning and land-use and building and construction regulations reasonable? Are there other studies or reviews that the Commission should consider?*

*What other sources of data could the Commission draw upon to further improve the estimates arrived at by ACG?*

### The planning framework

#### *Information request*

*The Commission is seeking feedback from inquiry participants on the major issues that will arise as State and local governments develop strategic plans for Melbourne and regional areas, and how they are best addressed.*

#### *Information request*

*The Commission is seeking further information from participants on the adequacy of existing guidance provided to councils by the State on how to apply the current and revised State Planning Policy Framework.*

#### *Information request*

*Has the Commission adequately summarised the issues contributing to improving strategic planning? What are the key differences between councils that do strategic planning well and those that do not? How can the State Government help to ensure that strategic planning processes more successfully resolve the tensions between State and local government?*

#### *Information request*

*Are the current governance frameworks adequate for delivering the State's intended outcomes for planning regulation? What incremental improvements could assist with delivering these outcomes? How could market mechanisms, such as pricing, more efficiently or effectively meet planning objectives?*

## Planning processes

### Draft recommendation 5.1

That the Victorian Government develop and publish a performance reporting and evaluation strategy for Victorian planning regulation by July 2011, and that the strategy be developed in consultation with councils and users of the planning system, and include the following components:

- A clear statement of the Government's priorities for the administration of planning regulation by State agencies and local governments. The priorities need to relate to outcomes, such as the number of new dwellings to be approved and desired timeframes for assessing certain types of application.
- A range of indicators that cover the State Government's priorities for the administration of planning regulation, such as the number of new dwellings approved and benchmark timeframes for certain types of application.
- Performance indicators and benchmarks for planning processes administered by the State Government such as approving planning scheme amendments, and the administration of the call-in provisions.
- Outcome-based measures such as surveys to measure and track users' experience with planning regulations.
- Indicators relating to the processes adopted by councils, covering the elements of the best practice assessment process advocated in draft recommendation 5.2.
- A process for making the information available to councils and the general public so as to facilitate its widespread use.

### Draft recommendation 5.2

That the Victorian Government develop in consultation with councils, a model best practice planning assessment process. The best practice model would provide guidance on pre-application meetings, the delegation of decision-making to council officers, use of online tools, notifications and objections, and dealing with incomplete applications. The Department of Planning and Community Development, with involvement from the local government sector, to report annually on the uptake of the best practice model by councils as well as the costs and benefits of improvement initiatives.

#### **Draft recommendation 5.3**

That the Victorian Government develop an accreditation scheme for private technical-planning officers, which may build on or draw from existing professional accreditation schemes. These technical planning officers be permitted to assess planning permits under its proposed code assess track. Private technical-planning officers be subject to the same reporting requirements as councils (via the Planning Permit Activity Reporting System), and have their assessments audited by councils with the results of audits published. Mechanisms for ensuring accountability and liability (such as fines, removal of accreditation) be written in legislation.

#### **Draft recommendation 5.4**

That the Victorian Government outline, in consultation with councils, the characteristics of an effective pre-application meeting process, including pre-lodgement certification, and incorporate this guidance in a best practice model for planning permit assessments (outlined in draft recommendation 5.2).

#### **Draft recommendation 5.5**

That the Victorian Government provide guidance on best practice delegation processes in regard to the roles of councillors and council staff as part of the best practice model for planning permit assessments (outlined in draft recommendation 5.2).

#### **Draft recommendation 5.6**

That the Victorian Government grant councils the right to reject incomplete or poorly prepared applications (subject to transparent reporting on the use of this power).

#### **Draft recommendation 5.7**

That the Victorian Government streamline referral processes by:

- developing standard agreements for all councils to use when dealing with referral authorities. Councils would remain able to negotiate amendments to the agreements if circumstances required.
- amending the Planning and Environment Act to introduce a deemed to consent provision if no response to a referral is received in 21 days.

#### **Draft recommendation 5.8**

**That the Victorian Government removes the cap on fees for code assess applications with the introduction of private planning assessments.**

**That for merit assessments, the Victorian Government replaces the cap on planning fees with a default fee. The default fee must reflect the estimated costs facing councils and involve an explicit judgement as to the appropriate level of cost recovery.**

**That the Planning and Environment Act be amended to allow councils to adopt self-set fees, which councils would be required to assess against the Department of Treasury and Finance's Cost Recovery Guidelines, and test through public consultation.**

**That the Planning and Environment Act be amended to allow the self-set fee to be revoked, if necessary.**

#### **Draft recommendation 5.9**

**That the Victorian Government, in consultation with local government, develop a strategy to help Victorian councils meet their planning recruitment and retention challenges by July 2011. The strategy would provide:**

- information on the extent to which strategic planning is accorded the highest staffing priority**
- information on the different types of work that planners currently do, and the appropriate skill-sets for different categories of work, including those tasks that can be undertaken by non-planners**
- information on the extent of shortages and the nature and impact of recruitment and retention challenges facing councils**
- options for fast-tracking planning qualifications, or allowing for more specialised, restricted qualifications to carry out a lesser scope of work**
- an evaluation of the impacts of various councils' strategies for dealing with skill shortages in order to promulgate successful strategies.**

#### *Information request*

*The Commission seeks the views of participants on the need for and most appropriate arrangements for providing stronger financial incentives for councils to improve the administration of planning regulation.*

## Building and construction regulation

### Draft recommendation 6.1

That Local Government Victoria in conjunction with councils, identify variations in terminology across councils in their building and construction local laws and in the relevant State Acts and remove them.

### Draft recommendation 6.2

That Local Government Victoria, in consultation with councils, the Building Commission and the EPA, develop a credentialed local law covering working hours that provides a low-cost process for allowing businesses to undertake work outside the specified hours, where such flexibility would provide demonstrable benefits to business without impacting on community amenity. This includes identifying a list of building activities that create little or no amenity problems (such as painting) for which exceptions to working hour restrictions will be made available.

### Draft recommendation 6.3

That Local Government Victoria coordinate the development of credentialed site-fencing and identification requirements that provides flexibility for builders about how they manage site litter but provide for a 'deemed to comply' solution for those businesses that want certainty about the performance-based requirements.

### Draft recommendation 6.4

That Local Government Victoria, in consultation with councils, develop a credentialed asset protection local law and a process for enabling builders to apply for council asset protection permits in parallel with the processing of the building permit. The validity of this permit could be conditional on there being no substantive changes in the building permit which would affect the council asset protection permit being issued.

## **Draft recommendation 6.5**

**That the Victorian Government clarify that building regulation is the most efficient means of addressing the environmental performance of buildings, through changes to national building standards or via changes to State building regulations.**

**That the Victorian Government also clarify that councils' role under the planning system does not extend beyond voluntary schemes and the provision of information to applicants about the environmental performance of buildings and tools to assist applicants make informed decisions.**

### *Information request*

*The Commission invites further input on the analysis above. What other building and construction local laws are likely to benefit the most from harmonisation or streamlining? (For example, are there opportunities to reduce business burdens associated with local laws regarding builder's refuse without compromising the objectives of the local laws)? What is the best harmonisation vehicle — amongst the range of options outlined (box 6.3) — for building and construction local laws addressed in this chapter and other specific local laws? What should be the scope of exceptions or variations for particular local laws? For which local laws would a credentialed local law be less appropriate than other (more or less centralised or voluntary) arrangements or processes?*

## **Local laws**

### *Information request*

*Are participants aware of any instances of local laws being revoked? What are the constraints (legal or otherwise) on the Minister using such a power? Are there local laws which participants consider should be revoked? Would further guidance or clarification of this power be useful?*

### *Information request*

*What are the key areas where variations occur across jurisdictions that could be easily harmonised? What are the impacts (positive and negative) of the current variations in these areas?*

*Should the Victorian Government develop a legislative process for making credentialed local laws that could be incorporated in the Local Government Act 1989? If so, should the process for making a credentialed local law be the same as for State subordinate legislation?*

### *Information request*

*What are the key areas not addressed in the draft report where local governments make local laws that 'add-on' to State regulation? What are the principal causes of these add-ons — for example, are State regulations considered to be inadequate? Should the State Government define 'no-go' areas for local laws?*

### *Information request*

*Is the Government's current initiative to encourage improved and more harmonised website protocols sufficient to address the problems in finding information on local laws? Would there be greater benefits from a consolidated website of all local laws, or should efforts be focussed on improving the websites of individual councils?*

## **Procurement**

### **Draft recommendation 8.1**

**That the Victorian Government strengthen the incentives to councils for efficient procurement by clarifying the objectives that councils must have regard to when undertaking procurement, by:**

- **clarifying that 'value for money' is the most important principle for local government procurement, consistent with the Victorian Auditor-General's guidance for public sector procurement, through:**
  - **amending the Best Value Principles in the Local Government Act to state that 'value for money' is the most important principle, or**
  - **amending the Procurement Best Practice Guidelines to state that 'value for money' is the most important principle**
- **requiring councils to report publicly instances where, and the reasons why, they have not prioritised 'value for money' over other principles in undertaking procurement or service delivery**
- **reviewing the requirement for procurement policies in the Local Government Act one year after these changes are implemented.**

### **Draft recommendation 8.2**

**That the Victorian Government, through the Department of Planning and Community Development, strengthen the incentives to councils for efficiency through more collaboration in procurement, where value for money exists, by:**

- **clarifying that 'value for money' is the most important principle for local government procurement (draft recommendation 8.1)**
- **removing any impediments to councils undertaking collaborative procurement through agents, in consultation with agents, by amending the Local Government Act to allow:**
  - **agents that meet a set quality standard to become 'prescribed procurement entities', in line with other Australian jurisdictions**
  - **councils to access existing tenders and contracts that are conducted by agents without the need for Ministerial approval.**

### **Draft recommendation 8.3**

**That the Victorian Government seek to remove the unnecessary costs that councils impose on tenderers, including small and medium enterprises, by strengthening the incentives for councils to adopt the improvement initiatives being developed under the Councils Reforming Business program, including best practice standards for contract documentation and infrastructure technical specifications. This should be done by:**

- **amending the Local Government (General) Regulations to require that councils, subsequent to the current transition phase:**
  - **adopt the improvement initiatives being developed under the Councils Reforming Business program, including best practice standardised contract documentation and infrastructure specifications, or**
  - **publicly report their reasons for not adopting the improvement initiatives.**

### **Draft recommendation 8.4**

**That Local Government Victoria implement the Victorian Auditor-General's recommendation to amend the Local Government (General) Regulations to prescribe more precisely the circumstances under which a council must tender. As part of this exercise, the Commission recommends that Local Government Victoria clarify whether the thresholds for tenders in s 186 of the Local Government Act apply to works or services (such as roads and streets works) that are currently allocated to in-house teams.**

#### *Information request*

*The Commission seeks further information on the relationship between risk management and efficiency considerations in local government procurement. What are the impacts of councils' risk management requirements (such as insurance, occupational health and safety, quality assurance etc.) on small and medium enterprises' access to local government procurement? To what extent, and how, could these impacts be reduced without councils undermining their objective to properly manage the risks of procurement?*

### *Information request*

*The Commission seeks further information on the relationship between probity and efficiency considerations in local government procurement. To what extent could the probity objectives of the legislative thresholds for public tenders be achieved by other less costly means, for example, through public reporting of procurement outcomes? What impacts would higher thresholds have on small and medium enterprises' access to local government procurement?*

## **Costs of administering local government regulation**

### **Draft recommendation 9.1**

**In order to improve the capacity of local government to manage the costs of administering regulation, to provide a better basis for user pays charging, and to measure the net cost to local government of administering major regulations, Local Government Victoria, in collaboration with the Municipal Association of Victoria, undertake a project with selected councils to measure better the costs attributable to the administration of major State and local regulations with a view to this being eventually employed by all councils.**

## **Systemic issues**

### **Draft recommendation 10.1**

**That the Government develops a clear list of agreed priorities for regulatory services that councils administer on its behalf.**

### **Draft Recommendation 10.2**

**That the Department of Treasury and Finance re-writes the best practice principles in the Victorian Guide to Regulation so that they cover the implementation and enforcement, as well as the development, of regulation. The Department should consult with councils in developing the principles and develop a training program to help councils to apply them.**

### **Draft Recommendation 10.3**

That the Department of Treasury and Finance amend section 4-6 of the Victorian Guide to Regulation, to specify that where the Victorian Government intends for local government to administer or enforce new primary legislation, or new or revised regulation, it is a requirement that the relevant lead department consult with local government. This consultation needs to:

- take place when the proposal is still formative
- enable the department to understand councils' capabilities and weaknesses, and to develop ways to build on the strengths and overcome limitations
- consider how a new obligation affects other council functions.

That the amendments to the Victorian Guide to Regulation require the relevant lead department to document its consultations with councils about new or revised regulations in an implementation plan. This plan would guide councils' administration and enforcement of the new obligation and outline how the department will help councils to deliver it.

### **Draft Recommendation 10.4**

That the Essential Services Commission, as it refines the performance reporting framework, adds further indicators of regulatory services where there are estimated net benefits and looks for opportunities to reduce or streamline reporting requirements imposed on councils by State Government agencies.

### **Draft Recommendation 10.5**

That the Department of Treasury and Finance, in conjunction with other relevant departments, consults actively with local government about the methodology for extending the regulatory burden reduction target to local government, and has particular regard to:

- the burden on councils of complying with the target
- whether councils need incentives to develop and implement regulatory burden reduction targets
- how and by whom councils' progress in implementing any proposals for reducing the regulatory burden will be monitored and enforced.

#### **Draft Recommendation 10.6**

That the departments responsible for State Government legislation or regulations implemented by councils fund and coordinate evaluations of regulations that impose significant costs on the regulated parties and/or on councils that enforce the regulations. The evaluations would assess (amongst other issues) whether the regulations have been implemented consistently, effectively, and without unnecessary burden on business and councils.

#### **Draft Recommendation 10.7**

That the Minister for Local Government has overall responsibility for:

- coordinating the implementation of those recommendations from 10.1 to 10.6 that the Government accepts, and
- reports progress on implementation to the Local Government Ministerial Forum.

#### **Draft Recommendation 10.8**

That if the Victorian Government accepts the Essential Services Commission's proposal that it prepare an annual comparative report based on the performance reporting framework, it directs the Essential Services Commission to use this report to present and comment on data about whether councils are implementing regulations effectively, consistently and without unnecessary burden.

#### *Information request*

*Which areas of regulation are experienced by councils as being in conflict with each other? Would clarification of the objectives of Acts through which councils enforce regulations contribute to more consistent enforcement? Which Acts should receive initial attention? What form could a process take for developing priorities for the remaining Acts? What would be the most effective way for more clarity to be provided?*

#### *Information request*

*Which of the options outlined above would be the most appropriate for discussing the setting of priorities for regulatory services that councils administer on behalf of the Victorian Government? What would be the scope for considering the associated question of funding options, especially where there are claims of cost shifting?*

*Information request*

*In which areas of regulation do councils experience unclear or overlapping accountabilities? Would clarification of roles and responsibilities for enforcing regulations contribute to more consistent enforcement? Which areas should receive initial attention? What form could a process take for developing priorities for the remaining Acts? What would be the most effective way for more clarity to be provided?*

*Information request*

*Do the current arrangements for setting regulatory fees cause any problems for councils or for those who are regulated? Are any of the options outlined above superior to the current arrangements and, if so, why? Is there a better option that is not listed above?*

*Information request*

*Which area of regulation would be the most appropriate regulatory area to trial a primary authority scheme?*

*Information request*

*Do councils have available an adequate range of sanctions which operate as effective deterrents and yet are flexible in their application and proportionate in their effect? If not, which sanctions are most needed? Alternatively, are the available sanctions adequate but councils lack the resources to make best use of them? Do the courts fail to appreciate the need for penalties that reflect the seriousness of the misconduct in question?*

*Information request*

*Would improved information on the number and distribution of penalties be useful? What costs would be involved in improving this information and are there any barriers?*

*Information request*

*The Commission can see merit in the Government establishing one or more of these peer review processes, and welcomes views about the advantages and disadvantages of these and other options.*

*Information request*

*What would be the advantages and disadvantages of creating an express legal power for councils in Victoria to act jointly?*

# 1 Introduction

This chapter provides background to the inquiry, outlines the approach taken by the Victorian Competition and Efficiency Commission in preparing this report, and describes the report structure.

## 1.1 Background to the inquiry

Local government is an important level of government in the Australian Federal system. Local government in Victoria comprises 79 municipal councils. Councils are area-based, representative governments with a legislative and electoral mandate to manage local issues and plan for the community's needs. Each council varies in size, population, rate base and resources but all must operate in accordance with the *Local Government Act 1989* (Vic.).

Local government has a significant impact on the lives of all Victorians. It delivers many services and facilities for the community and manages significant infrastructure and the resources of the district.

Local government is responsible for implementing many diverse programs, policies and regulations set by State Government. Councils also procure goods and services such as maintenance of roads and council buildings, and important social services. Councils have to respond to local community needs and have powers to make their own regulations and local laws and provide a range of discretionary services.

Councils spend around \$5.6 billion annually to provide more than 100 different services to the communities they represent. Local government is also responsible for managing assets valued at around \$55 billion (VGC 2009c).

Councils in Victoria have a significant impact on businesses, both through the regulations they administer and enforce on behalf of the State, as well as through direct engagement with businesses. Indeed Victoria's local councils rank amongst the most important regulators of business. Improving the efficiency by which councils administer regulations can reduce uncertainty, time and cost to business as well as to ratepayers, thereby improving Victoria's position as an attractive location to invest, work and live. Likewise, improving the effectiveness of their procurement processes can help councils deliver services to the community at a lower cost.

Reforms across the local government sector are consistent with Victorian Government's broader commitment to promoting efficient and effective regulation by removing unnecessary administrative requirements through the Reducing the Regulatory Burden initiative (Lenders 2009). In the current

challenging economic environment, these initiatives are increasingly important in promoting Victoria's prosperity over the medium term.

## **1.2 Scope of the inquiry**

This inquiry is about how to streamline and harmonise local government regulation and procurement processes in order to reduce the cost to businesses and not-for-profit sectors without undermining government objectives.

Specifically, the Treasurer has directed the Commission to inquire and report on:

- (1) impacts of regulations administered by local government on business, including small businesses such as home based businesses
- (2) scope for streamlining and harmonising the practices adopted by local government to administer State Government regulation, and options for both levels of government to support best regulatory practice
- (3) inconsistencies between councils in local government regulations and in practices for their administration, and options for greater streamlining and harmonisation of regulations and their administration
- (4) regulatory impediments to small and medium enterprise (SME) access to procurement associated with major infrastructure projects and options for removing these impediments
- (5) the extent of costs incurred by local government in administering regulation, and options for councils to reduce these costs
- (6) an estimate of overall economic impact (including reductions in the regulatory burden on business) of options identified in this inquiry, including any incremental benefits to existing reforms being progressed at Commonwealth or State level.

In undertaking the inquiry, the Commission is directed to focus on the administration of regulations by local government rather than on a direct evaluation of legislative frameworks themselves. Further, the structure of local government and performance of individual councils are outside the scope of this inquiry.

## **1.3 Past and current reform initiatives**

The Commission is conducting this inquiry against the backdrop of other reform initiatives, past and current, aimed at improving the efficiency and effectiveness of local government regulation, including the following:

- Cutting the red tape in planning: 15 recommended actions for a better Victorian planning system (Government of Victoria 2006a).
- Planning and Subdivision Fees Review (DPCD 2010k).

- The proposed changes to the *Planning and Environment Act 1987* (Vic.) (DPCD 2009c).
- Making Local Policy Stronger (MWGLPP 2007).
- Local government planning process improvement project (sub. 19, p. 6).
- The Auditor-General's review of Victoria's land-use planning framework (VAGO 2008).
- The discussion paper on setting future directions for provincial Victoria (Government of Victoria 2009a).
- Better Practice Local Laws Strategy (LGV 2008a).
- Local Government Procurement Strategy (LGV 2008b).
- Local Government Procurement Best Practice Guidelines (LGV 2008c).
- Model Procurement Policy (MAV 2009a).
- Victorian Government's Councils Reforming Business (CRB) initiative (LGV 2010a).
- Local Government Performance Monitoring Inquiry (ESC 2010c).

The Commission has taken these and other initiatives into account in undertaking this inquiry.

The Commission has also taken into account the findings of previous inquiries that have dealt with regulatory functions of Victorian councils. These previous inquiries, together with the relevant Government responses and progress reports, have helped shape the focus of this inquiry. They have also informed the analysis of specific areas of regulation (such as land-use planning and building regulation), as well as the system wide issues relating to State and local government interaction and cooperation on regulatory issues. The relevant Commission inquiries are:

- *Regulation and regional Victoria: Opportunities and Challenges* (VCEC 2005b)
- *Housing construction regulation in Victoria: Building better outcomes* (VCEC 2005a)
- *Making the right choices: options for managing transport congestion* (VCEC 2006b)
- *Simplifying the Menu: food regulation in Victoria* (VCEC 2007b)
- *A state of liveability: an inquiry into enhancing Victoria's liveability* (VCEC 2008a)
- *A sustainable future for Victoria: Getting environmental regulation right* (VCEC 2009a).

## 1.4 Conduct of the inquiry

After receiving the terms of reference, the Commission advertised the inquiry in the daily press and made direct contact with interested parties inviting them to make submissions. The terms of reference and inquiry particulars were also listed on the Commission's website ([www.vcec.vic.gov.au](http://www.vcec.vic.gov.au)).

The Commission released an issues paper in October 2009 explaining the scope of the inquiry and calling for submissions from individuals and organisations with an interest in local government regulation. The Commission also wrote to a number of key stakeholders to seek their input.

The Commission received over 30 written submissions from interested parties, including community organisations, government departments, councils, businesses and private individuals. In addition, the Commission met with 46 individuals and organisations to identify and assess issues relevant to this inquiry. Commissioners visited 10 metropolitan, regional and rural councils and spoke to a number of others.

As part of the consultation process, the Commission held two roundtables on specific topics involving 18 participants.

The Commission also undertook or commissioned several major new pieces of analysis to fill gaps in knowledge about the nature and impact of local councils' administration of regulation:

- Roy Morgan Research conducted an extensive survey to examine how Victorian businesses interact with local councils on regulatory issues and how they view the impact of these interactions.
- The Allen Consulting Group undertook a study to estimate the costs to business of complying with land-use planning and building regulations administered by local councils.
- Stenning and Associates prepared a report identifying the nature and extent of local government regulations impacting on business.
- The Commission surveyed nine councils about the costs incurred in administering State and local government regulations.

The Commission consulted closely with key State Government agencies and with representative bodies such as the Municipal Association of Victoria, Local Governance Association of Victoria and the Department of Planning and Community Development (including Local Government Victoria). The Commission also worked collaboratively with the Essential Services Commission which had been asked to undertake a separate but concurrent inquiry into local government benchmarking.

During the inquiry, the Commission undertook extensive desk-based research, drawing on published reports and papers, academic studies and web-based information sources, including the Organisation for Economic Co-operation and Development (OECD) reports, to ensure that the Commission was aware of relevant international work and experience. In order to gain more insight about local government regulatory experiences overseas, the Commission sponsored a visit by Mr Phillip Preece of the United Kingdom's Local Better Regulation Office to share information on local regulatory reform issues.

Generally speaking, the Commission's approach, as in previous inquiries, was to treat issues raised with the Commission through the consultative process as direct evidence of matters of concern to participants. A number of these issues fell outside the terms of reference and have not been considered. Where an issue has not been raised, the Commission has taken this to indicate that a particular matter is not material, unless information to the contrary is available.

The Commission also took account of the *Charter of Human Rights and Responsibilities Act 2006* (Vic.) in undertaking this inquiry and considers that this report is consistent with the human rights set out in the Charter.

## **1.5 The Commission's approach**

This inquiry addresses the role of local government in administering regulation. Local government works in most respects in a context set by its authorised role and, where relevant, by the policies and regulations of the Victorian, and to a limited extent, the Commonwealth Governments.

In approaching its task, the Commission focused on identifying opportunities for improving the efficiency of councils' regulatory processes (without compromising policy objectives), and on addressing matters of adequate council resources. The Commission identified significant opportunities for further improvements in both areas which would build on the existing initiatives and efforts of the Victorian Government and local councils. Recommendations and information requests relating to process and resources form a major part of the draft report.

While it was apparent that significant improvements to councils' regulatory processes and their resources could be made, the Commission concluded that the potential value of those changes would be significantly increased by reconsidering some of the fundamental features of the relevant regulatory system, particularly in the areas of land-use planning regulations administered by councils.

Some of the relevant features of the regulatory systems examined in this draft report include the roles and accountabilities of the Victorian Government and local government, and the institutional arrangements that are in place to manage

inherent tensions between these two levels of government. The Commission has collectively termed these aspects the ‘architecture’. The Commission has made a number of draft recommendations in the area of architecture that are aimed at improving the efficiency of the administration of regulation by councils, without compromising the intended policy outcomes of those regulations. These occur through the relevant subject chapters, and some broader reflections are brought together in the final chapter.

## **1.6 Structure and focus of the report**

To set the scene for the rest of the report, chapter 2 describes the role of local councils in Victoria's overall regulatory system. The chapter also identifies the key features of the institutional architecture that governs the complex relationships between the local and State governments.

To look at the impact of local government regulation on businesses, chapter 3 presents the results of new research on how Victorian businesses interact with local government regulators, business perceptions about the regulatory performance of local government, and the costs to business of complying with key areas of local government regulation. This research assists in identifying key areas of local government regulation impacting on business, highlighting the importance of building regulation and land-use planning regulation.

Chapters 4 to 6 focus on these two key areas of local government regulation. Chapter 4 focuses on the statewide framework that governs land-use planning regulation and councils’ role. It focuses on identifying opportunities to improve the governance and overall policy-making framework within which councils operate. Chapter 5 then examines opportunities for improving local government administration of land-use planning regulation by improving the processes administered by councils and addressing the resource constraints they face. Chapter 6 describes the role of the local government in administering state and local laws relating to building and construction, and identifies opportunities to streamline and harmonise these regulations. Drawing in part on the analysis of building and construction local laws, together with a review of local laws more generally, chapter 7 examines the processes for creating, administering and reviewing local laws as well as opportunities to improve these processes.

Chapters 8 and 9 deal with two specific requirements of the terms of reference relating to councils' procurement processes and councils’ regulatory costs. Chapter 8 examines potential impediments to access by small and medium sized enterprises to local government procurement and opportunities to improve the efficiency of procurement more generally. Chapter 9 reports on the extent of costs incurred by local government in administering regulation, as well as some of the key cost drivers.

The Commission's review of land-use planning regulations and local laws relating to building and construction and other activities, together with previous Commission inquiries on issues such as liveability, food safety and the environment, help to highlight a number of systemic regulatory issues facing State and local governments. Chapter 10 examines ways to strengthen ongoing incentives for improvement in local government administration of regulation through changes to the regulatory architecture.



## 2 Regulatory and institutional framework

### 2.1 Introduction

The outcomes of the regulatory processes that councils administer, especially those they administer for the Victorian Government, are the result of a complex ‘*architecture*’ of government, which includes regulatory objectives, together with accountabilities, *processes* for achieving objectives, and the adequacy of resources. Effective, sustained improvement of regulatory performance must have regard to all of these architectural elements, and ensure they support each other. This perspective is applied throughout this draft report, starting with the review in this chapter of the current institutional and regulatory framework, extended further in the chapters addressing specific areas of regulation and culminating in chapter 10, which identifies system wide improvements to this architecture aimed at improving the administration of regulation by local governments.

This chapter sets the scene for the rest of the report by:

- explaining that while councils as a group are amongst the most important regulators in Victoria, this is only one of their roles. Councils are very diverse in terms of the challenges they face, their resources, and their capabilities (section 2.2)
- outlining the growing challenges facing councils as regulators (section 2.3)
- explaining why streamlining and harmonising regulation is important, and why councils have mixed incentives to pursue them (section 2.4)
- examining how Victoria’s institutional arrangements promote consistency and streamlining (section 2.5).

### 2.2 Local government in Victoria

Councils are a distinct level of government, have a wide range of functions, including regulation, and vary enormously in the challenges they face and in their size and capabilities. The State Government’s dealings with councils need to be, and generally are, mindful of this diversity.

## 2.2.1 Councils are a distinct level of government

Victoria's *Constitution Act 1975* recognises local government as a 'distinct and essential level of government' (s 74A). But councils are also statutory bodies created by Parliament, and operate under state legislation: the *Local Government Act 1989* (Vic). (Apart from Melbourne City Council, which has its own legislation.)

The relationship between the two levels of government is complex. Councils enforce regulation for the Victorian Government under 29 State Acts.<sup>1</sup> But they are also an elected level of government, with responsibilities under the Local Government Act to endeavour to achieve the best interest for *their* communities. So councillors, and the officials who report to them, need to respond to their local communities while being mindful of their regulatory obligations under State Acts. While councillors also have to take into account the interests of other communities, their perspective is narrower than that of the State Government.

## 2.2.2 Councils are diverse

Victoria's 79 councils are extraordinarily diverse, with the smallest serving 3200 people and the largest 238 000. Municipalities range from 8 to 22 000 square kilometres. Population is declining in some rural shires, but growing by as much as 7 per cent per year in some growth areas. These differing population growth rates lead to different age profiles, and the populations differ in other respects as well. For example, some rural areas have few recent overseas migrants or residents with low English proficiency, while 16 per cent of the population has these characteristics in Maribyrnong and Brimbank, and 25 per cent in Greater Dandenong.<sup>2</sup>

The smallest council has an annual budget of \$6 million per annum while the budget of the largest is \$312 million. In 2008-09, the Borough of Queenscliffe employed 44 staff, while the City of Melbourne employed 1211 people, of whom 930 were full-time (Borough of Queenscliffe, 2009a, p.30; City of Melbourne 2009, p.12). Such large variations are likely to bring with them different

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<sup>1</sup> A full list of the Acts is available on the Commission's website ([www.vcec.vic.gov.au](http://www.vcec.vic.gov.au)). The City of Stonnington identified 39 Acts and 5 Regulations (sub. 7, pp. 1-3). The Commission's view is that councils' role in 10 of these Acts is very limited.

<sup>2</sup> Data from Municipal Association of Victoria (sub.19), Victoria Grants Commission (VGC 2009a) Annual Report 2008-09: English proficiency pp. 49, 54; population and growth pp. 50, 55.

capabilities and it will be more difficult for smaller councils to implement systems or processes that involve significant fixed costs.

The composition of funding sources varies between councils, as does their financial sustainability.<sup>3</sup> The Victorian Auditor-General rated eight councils as medium risk and 68 as low risk in 2008-09<sup>4</sup> (Victorian Auditor-General 2009, p.xi). Based on analysis of data over the last decade, the Municipal Association of Victoria (MAV) believes that about 12 councils (those with a low rate base and large geographic size) ‘face some form of financial stress’ (Municipal Association of Victoria sub.19, p.5).

### 2.2.3 Councils provide many services

Councils’ functions are diverse and include:

- advocating and promoting proposals which are in the best interests of the local community
- planning for and providing services and facilities for the local community
- providing and maintaining community infrastructure in the municipal district
- undertaking strategic and land-use planning for the municipal district
- raising revenue to enable the council to perform its functions
- making and enforcing local laws
- exercising, performing and discharging the duties, functions and powers of councils under the Local Government Act and other Acts
- any other function relating to the peace, order and good government of the municipal district (Local Government Act s 3E (1)).

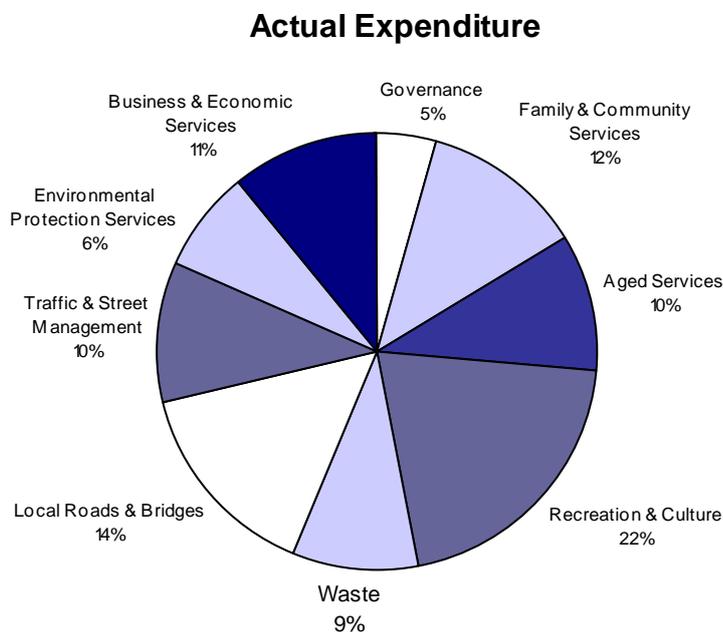
Most council expenditure goes towards providing services, such as local roads, waste removal and management and recreation and aged care (see figure 2.1). The demand for these services is likely to grow significantly if projections that Victoria’s population will both grow rapidly and age prove to be correct.

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<sup>3</sup> To be financially sustainable, councils should have sufficient financial capacity to meet future expected requirements and be able to absorb financial risks and shocks without radically altering their expenditure and revenue policies (Victorian Auditor-General 2009, p.x).

<sup>4</sup> Three council reports were not available at the time the report was completed.

Figure 2.1 Main areas of council activity based on expenditure



Source: Victorian Grants Commission 2009, p 14.

## Regulatory services

Councils also provide regulatory services,<sup>5</sup> often on behalf of the Government of Victoria, although they can also make their own local laws. Advantages of local enforcement of regulation include:

- councils' proximity to firms and residents should give them a better understanding of local conditions and preferences
- there may be cost savings if councils already have resources on the ground.

This report focuses on councils' regulatory services, not on the other services that councils provide and which take up the bulk of their expenditure. (Chapter 8, which discusses regulatory impediments to small and medium-term access to procurement, is the one part of the report that addresses councils' role

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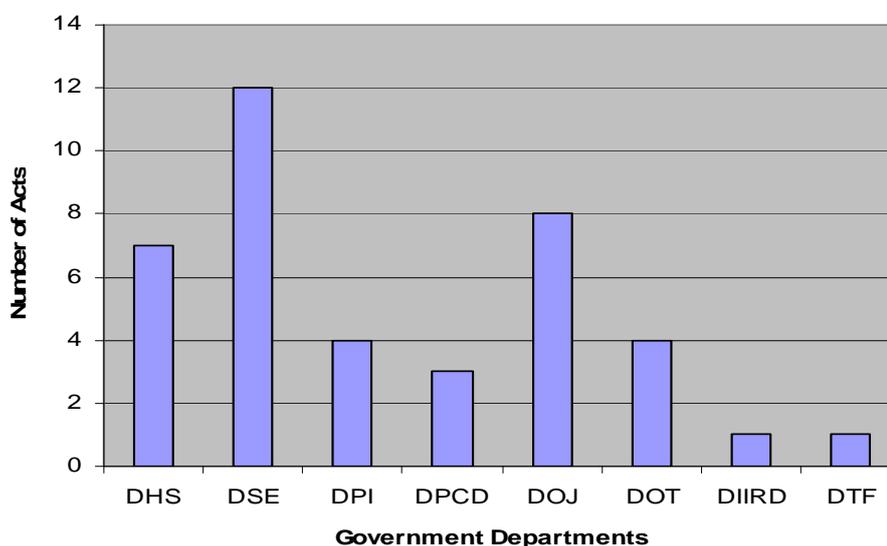
<sup>5</sup> There are many different definitions of regulation. For this inquiry, the Commission uses the definition in The Victorian Guide to Regulation: 'Regulation involves the imposition of rules or principles intended to influence the behaviour of people and/or businesses, supported by the authority of Government' (Government of Victoria 2007, p. ii). This definition excludes provision of services such as roads, or aged care services from the inquiry, although it would include regulations enforced by councils that cover the use of those roads or how they are provided.

in areas other than regulation.) Aggregate data on councils' expenditure on regulatory services is not available (chapter 9). The MAV advised that about 1.5 per cent of councils' total expenditure in 2007–08 was on local laws and the costs of administering State regulation are 'far higher' (sub.19, p.5).

The 29 State Acts that councils administer, at least in part, cover areas including the environment, native vegetation, building and construction, planning, food and liquor, public health and infrastructure. Figure 2.2 shows that nine of the ten state government departments are responsible for Acts administered by local government, with the Department of Sustainability and Environment responsible for 12 of the 29 Acts. The relationships between state government departments and councils influence the effective administration of these regulations, and are therefore considered in this report.

With such wide ranging regulatory responsibilities, councils are an important part of the regulatory fabric in Victoria. Victoria has 65 regulators of business<sup>6</sup>, which between them administer 188 Acts (VCEC 2009c, pp. 27–28). Councils' involvement in 29 of these Acts highlights both their regulatory importance and the significance of their relationships with other government regulators.

Figure 2.2 **Departments responsible for State Acts administered by local government**



Source: Commission analysis of Victorian Acts sourced from state government websites.

<sup>6</sup> Excluding councils and entities such as water authorities, which have some regulatory roles.

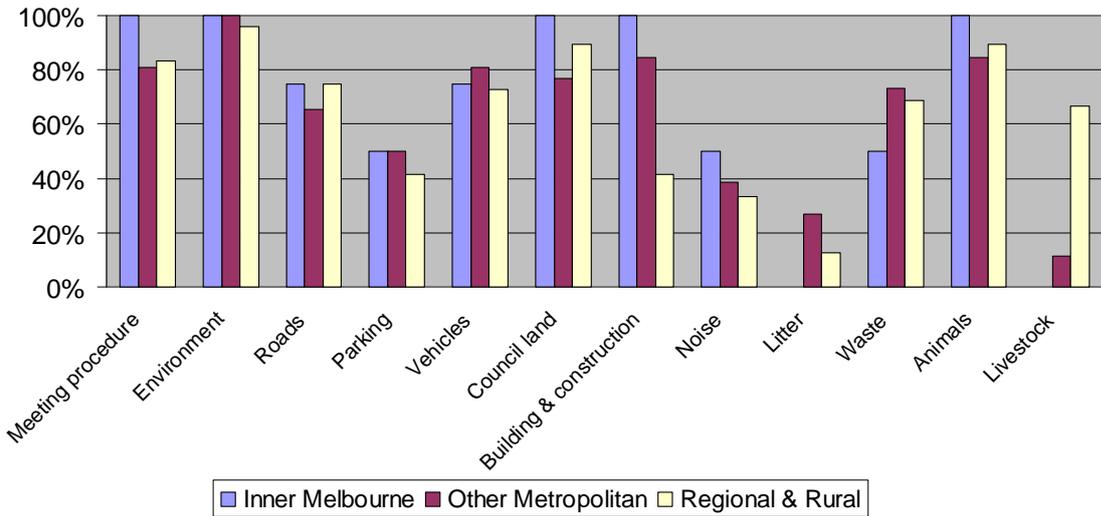
**Local laws**

Councils also make local laws that are intended to benefit their communities by either complementing or covering perceived gaps in State regulation. As discussed in chapter 7, local laws can be classified into three categories:

- (1) Local laws that relate to specific issues in the community. These often relate to amenity.
- (2) Local laws where there is scope for harmonisation across municipalities, but which are unrelated to existing Victorian Government regulations. These relate to areas where councils make varied laws about issues that are common across municipalities. An example of this is asset protection issues in relation to building regulation.
- (3) Local laws that are connected with, or complementary to State laws, where the State Government already regulates in a policy area, and local government through local laws adds additional requirements. An example is liquor regulation. Many building and construction local laws, also fall into this category

Figure 2.3 shows that the areas and extent of local laws vary between councils. For example, almost all councils have local laws about environmental issues, but laws relating to livestock are most common in regional and rural councils.

**Figure 2.3 Frequency of local laws among councils**



Source: Commission analysis of local laws sourced from local government websites.

Local laws must not be inconsistent with any state or federal legislation, are inoperative to the extent of any inconsistency, and can be revoked by the Governor in Council at the request of the Minister for Local Government.<sup>7</sup> The Commission is not aware of any instances where this has happened. Local laws in Victoria are not subject to any formal review practice during or after their making, but are revoked 10 years from the date of operation (chapter 7).

## 2.3 The challenges facing councils as regulators are changing and growing

The Commission has not been able to collect evidence to demonstrate whether the number and coverage of regulations and local laws administered by councils is growing. There is no central register of local laws nor accessible data base of new regulatory obligations that the State Government delegates to councils (chapter 7). It is indicative, however, that since 2005 the Commission has reviewed 11 regulatory impact statements involving new or amended regulatory obligations for councils or which involve local government in some other role.<sup>8</sup> In addition, the Commission's survey of business perceptions indicated that many business people believe regulation is becoming more complex and demanding (see chapter 3).

The breadth of the areas that councils regulate shows that how they perform this role has a significant impact on Victoria's attractiveness as a place to live and to do business. There has been considerable debate within the community recently about planning, native vegetation and liquor regulation in particular, and it is difficult to disagree with the view that:

Community expectations of local government are rising at an exponential rate. Communities are increasingly looking towards municipalities to meet their expectations of government as a whole, even in areas that councils have traditionally not tackled (Dollery et al 2006, p. 28).<sup>9</sup>

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<sup>7</sup> The Governor in Council may revoke a local law in whole or part on the recommendation of the Minister (s 123(1)). This could be based on a range of factors, including that the Minister considers it does not comply with the requirements under Schedule 8 of the Local Government Act. The validity of a local law can also be disputed in the Supreme Court (s 124).

<sup>8</sup> Aboriginal Heritage Regulations 2007; Building Amendment Regulations 2007; Domestic (Feral and Nuisance) Animals Regulations 2005; Environment Protection (Residential Noise) Regulations 2009; Liquor Control Reform Regulations 2009; Public Health and Wellbeing Regulations 2009; Prevention of Cruelty to Animals (Domestic Fowl) Regulations 2006; Prostitution Control Regulations 2005; Residential Tenancies (Caravan Parks and Movable Dwellings Registration and Standards) Regulations 2010; Tobacco Regulations 2007; Transport (Tow Truck) Regulations 2005.

<sup>9</sup> Dollery et al (2006, p.29) note also a general national trend in council spending away from services to property towards services to people and a larger focus on environmental issues.

Similarly, the MAV points out that:

Victoria faces a range of challenges, including: the unprecedented bushfires in early 2009, continued recovery from the recent global economic crisis, mitigation and adaptation to climate change, and the state's growing population.

These challenges will require cooperation between the State and local government to ensure Victoria's status as one of the most liveable places is maintained (MAV 2009e, p.3).

The challenges that the MAV identified are significant. Consider population growth, for example. Australian Treasury projections suggest that Melbourne's population could increase to 7 million by 2050 (Henry 2010, p. 3). The community expects that this growth will be accommodated while, for example, maintaining urban amenity, avoiding an increase in transport congestion, and protecting the environment. The Secretary of the Australian Treasury points out that cooperation between the three levels of government will be needed, to achieve good outcomes:

Government has an important role to play in enabling planning and providing a coordination and organising function. For example, governments and their institutions can coordinate the delivery of a city's infrastructure assets by ensuring that projects with high positive externalities are constructed, with land set aside in advance...

Infrastructure Australia<sup>10</sup> will be complemented by reforms that help the three tiers of government to work together so that they can deliver quality infrastructure outcomes. And while, in the future, reforms to governance structures may be necessary, the establishment of Capital City Strategic Plans provides a way forward; promising to facilitate cooperation between tiers of government while enhancing accountability and transparency in state planning processes. (Henry 2010, p.5)

Common features of the challenges facing councils are that their causes and consequences extend far beyond local municipalities and that policy responses are developed and implemented at a state, national, or in some cases international level. Yet the impacts are also evident at the local level, and require a response that is both local and consistent with state-wide objectives. There may well be growing pressures on councils to regulate.

A central issue for this inquiry is whether the institutional arrangements that govern the relationships between state and local governments will help them to

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<sup>10</sup> Infrastructure Australia has been established to advise governments, investors and owners of infrastructure concerning issues such as nationally significant infrastructure priorities and policy and regulatory reforms desirable to improve the efficient utilisation of national infrastructure networks.

meet the challenges that both levels of government face, while avoiding any unnecessary increase in the cost of regulation and, as the inquiry terms of reference require, ‘promoting Victoria’s competitiveness and economic prosperity over the medium term.’

## 2.4 Streamlining and harmonising regulation and processes

The terms of reference focus on streamlining and harmonising regulation. They also direct the Commission to inquire into inconsistencies between councils in local government regulations and in practices for their administration. This section defines these terms and discusses the extent to which a good regulatory system should achieve them. It defines harmonising regulation as reducing unnecessary inconsistencies and streamlining regulations as reducing any other unnecessary costs of regulation. Inconsistent enforcement of state regulations and local laws can impose costs. But sometimes there are benefits. Similarly, measures to reduce the costs of regulation need to recognise any consequent loss of benefits. The goal is to improve regulation by finding ways to reduce its costs without losing the benefits that regulation can bring.

### 2.4.1 What is inconsistency?

Inconsistency may occur at three different levels, with respect to:

- *outcomes*: if regulation contributes to different outcomes with respect, for example, to public health or environmental amenity
- *legislative requirements*: if they differ between jurisdictions
- *interpretation of legislative requirements*: if the same requirements are interpreted and/or enforced differently within or between jurisdictions.

### 2.4.2 How much inconsistency is desirable?

Concern that inconsistencies between councils add to costs faced by individuals and businesses was evident both in submissions and in the Commission’s survey. For example, the Master Builders Association’s Builders Trends survey found that 22 per cent of residential builders and 11 per cent of commercial builders stated that inconsistencies in planning decisions were their largest business-related planning concern. South East Water Limited (SEWL) (sub.12, p. 1) submitted that ‘there have been instances where a council will issue a planning permit including local conditions which directly conflict with SEWL requirements and the State Planning Policy Framework.’. The Victorian Farmers’

Federation suggested that variations between the regulatory cultures and methods of councils ‘can impose regulatory burdens, create uncertainty and increase costs to businesses operating in more than one municipality’ (sub. 17, p. 3).

But while the word ‘inconsistency’ has negative connotations, there can also be cases when some variation is desirable (box 2.1). The MAV points out that there are both costs and benefits:

The differences between councils in terms of their priorities and their geographic size, population density, social demographics, resources and capacity mean that some level of inconsistency between councils is both desirable and inevitable. Consistency should not then be considered an end goal in itself. Indeed much of this inconsistency is demanded locally, reflects local priority and circumstances and is not a problem to the overwhelming majority of constituents, citizens and customers who only deal with a single council....

The MAV accepts that high levels of variation between councils may, in some cases, lead to undesirable additional burden for businesses or, alternatively, reduced compliance by business, which in turn leads to increased compliance costs for councils. (sub.19, p.10)

As a general rule of thumb, regulators might be expected to treat similar people or businesses they are regulating similarly in similar circumstances. Inconsistent treatment in such situations seems undesirable. But this rule of thumb might be difficult to interpret in practice, because circumstances are not usually identical between municipalities. Consequently, there can be cases of apparent inconsistency which are in fact responses to varying circumstances. Apparent inconsistencies in such cases can impose some costs, but these might be outweighed by the benefits of an approach that has regard for local needs, costs and characteristics of those who are regulated. For example, there may be a case for stricter enforcement of noise regulation in residential areas. Inconsistencies are undesirable only when their costs exceed their benefits, and the transition costs involved in removing these inconsistencies are lower than the resulting gains. When these two conditions are satisfied, there is a case for harmonisation.

## Box 2.1 The costs and benefits of inconsistencies

There are at least six sources of potential costs from differences between jurisdictions in their regulations or the way they administer them:

- *Increased administrative burden:* For example, there is significant overlap between mandatory Commonwealth and Victorian Government environmental reporting requirements and scope to reduce the costs without undermining benefits (VCEC 2009a, pp. 248-249).
- *Increased compliance costs:* If councils impose different obligations, firms that operate across jurisdictions will need to create systems, training programs and so on that enable them to comply with all sets of obligations.
- *Reduced respect for the law:* Inexplicable inconsistencies between regulations can undermine respect for those regulations and compliance with them.
- *Regulatory arbitrage can reduce the effectiveness of regulation:* When regulations impose different costs, those who are regulated have an incentive to migrate to the regulations or regulators with lower costs. This can undermine the effectiveness of the regulations. For example, movement of some businesses to a municipality that enforces food safety regulation less rigorously could undermine health outcomes.
- *Reduced innovation:* If coping with regulations diverts managers from their core tasks, or reduces opportunities for trade, it may reduce their capacity to introduce new products or processes.
- *Market distortions:* Inconsistent enforcement can distort the competitive position of different firms.

There can also be benefits when jurisdictions adopt different approaches to enforcing and administering regulation:

- *A less prescriptive approach can encourage innovation:* State Government prescription of how local government should administer regulations may discourage councils from searching for better ways to achieve outcomes.
- *Different approaches may suit local needs:* for example, stricter local laws or enforcement strategies may be supported in more densely populated areas where local nuisance impacts affect more people.
- *Reducing the capacity of regulators to impose excessive burden:* regulatory arbitrage can reduce the capacity for regulators to abuse their monopoly position (for example, if councils are concerned that businesses will move and this will reduce their rate base).

### 2.4.3 How strong are incentives to achieve the 'right' amount of consistency and harmonisation?

The answer to this question will depend on whether it is in the interests of state and local governments, separately or together, to pursue regulatory consistency and harmonisation. This section argues that councils have weaker incentives than the state government to pursue harmonisation because of:

- spillovers between councils
- competition between councils
- different attitudes towards risk
- political incentives.

#### Spillovers between councils

Councils' decisions sometimes affect people in other municipalities. While the Local Government Act (s3D(e)) provides for councils to take into account the needs of other communities, the Victorian Government is likely to have better information about and hence more regard for these broader impacts. When such situations arise, the interests of state and local government may diverge. Following are three examples.

First, a council which satisfies local preferences may impose costs on people who live in other areas. For example, some councils may oppose State Government requirements for clearways due to concerns about potential adverse impacts on local traders, even though clearways reduce travel times for people from other municipalities.<sup>11</sup>

Second, councils have little incentive, acting individually, to reduce inconsistencies between them in how they administer regulation because the costs are borne by businesses which operate in multiple jurisdictions. Businesses cannot normally attribute these additional costs to any particular council and an individual council will not benefit from reducing inconsistencies, since most of the benefits go to businesses and councils in other jurisdictions.

Third, councils have little incentive to disseminate new ways to reduce regulatory costs. With 79 councils in Victoria, there will be different approaches to

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<sup>11</sup> Thus it is not surprising that inner-city councils are reported to be 'split' over a VicRoads plan for a 'road use hierarchy' that gives priority to cars, cyclists, pedestrians and public transport at different times of the day to improve travel times (Sunday Age, p.1, February 7, 2010). The Commission also discussed clearways in its report into options for managing transport congestion (VCEC 2006, pp. 295-296).

regulation, and opportunities for new approaches that work well to be widely applied. Councils, however, have muted incentives to promote improvements across the sector because they will individually gain little from doing so. The State Government, on the other hand, has a stronger incentive to spread best practice, as this may improve the effectiveness of state government regulation and contribute to improved living standards and reduced cost of local government in the state as a whole.

### **Competition between councils**

Decentralisation fosters innovation. But there is a risk that ‘the healthy process of competition can become damaging and a race to the bottom [can occur] among sub-national authorities’ (Charbit and Michalun 2009, p.14). If some councils enforce regulation less rigorously, others may do the same to avoid losing businesses. Countervailing pressures (for example, from citizens who oppose the relaxed standards) may discourage such behaviour and many local government regulations may not be important enough to influence location decisions. How these countervailing pressures play out, how much inconsistency develops and whether there is a risk to the outcomes the State Government is seeking through regulation, will depend on the circumstances.

Few participants raised this issue in submissions, which may indicate that it is rare in Victoria. However, the issue concerned the Macedon Ranges Residents Association Inc, which:

... has already seen some appalling decisions made chasing the ‘business/employment/development/economic dream’ to the exclusion of other (perhaps more) relevant issues. (sub. 16, p. 1)

### **Different attitudes towards risk**

Attitudes towards risk will affect how councils enforce regulation and their attitudes towards probity requirements in their tendering procedures. The pressures to ensure probity can be stronger than incentives to improve efficiency and reduce costs. This may be a particularly significant issue in local government procurement (chapter 8).

Councils may be more or less risk averse than the Victorian Government. Their attitudes will be influenced by factors such as who bears the cost of regulatory failure and who is held accountable.<sup>12</sup> South East Water, citing a recycled water main project which was delayed for three months by a ‘protracted process of referral and advertising’, believes that ‘Councils have become increasingly “risk averse” and, rather than exercise their discretion, have resorted to protecting against the “worst case”.’ (sub. 12, p. 2). The City of Greater Bendigo also implied that the community expects to be exposed to very low levels of risk in some areas:

Risk based approaches are effective in dealing with many issues...However, risk based approaches often do not align well with community expectations or a customer focused approach to problem solving. (sub. 23, p. 5)

Different attitudes towards risk may lead to different approaches to enforcing regulation. Some may see such differences not as undesirable inconsistencies but as a desirable reflection of local preferences.

### **Political incentives**

At present there is little performance reporting by councils about regulatory services, and so limited community awareness of the relative efficiency of councils, and the consequent costs to councils of inefficiency. The strongest political incentive for most councils will remain their accountability and responsiveness to local constituents.

#### **2.4.4 How strong are councils’ incentives to streamline regulation?**

The terms of reference refer to streamlining as well as harmonising regulation. While harmonising regulation focuses on reducing or removing inconsistencies, the Commission has interpreted streamlining regulation as reducing the costs of administering regulation for any given level of harmonisation. The distinction is somewhat artificial, since harmonisation initiatives will also reduce costs. Nevertheless, drawing out this distinction highlights differences in the motivations to undertake the two kinds of activities.

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<sup>12</sup> For example, if state governments bear the costs of hospital services but not the cost of regulating to prevent foodborne illness, they may favour a lower risk of foodborne illness than would local government. And if councils can shift accountability to a Victorian minister, they may accept a higher risk of failure than the minister would choose. On the other hand, if constituents hold councils accountable, the reverse could be the case.

Councils provided many examples of successful regulatory process innovations. (See, for example, the submission by the City of Port Phillip (sub. 14, pp. 9–10).) This is evidence that councils do have incentives to cut the costs of regulation; for example, they have a general obligation to run themselves efficiently and can be voted out. Several factors, however, could weaken the incentives for efficiency:

- If councils believe that their costs are outside their control. This is the view of the City of Greater Bendigo (sub. 23, p. 8), and the City of Stonnington commented that processing complexity, one of its three cost drivers, is outside its control (sub. 7, p. 21). Presumably these councils believe that the Victorian Government is accountable for the complexity.
- If regulation of the fees councils charge for regulatory services does not permit councils to retain the cost savings from innovations in the way they deliver these services, or only until the fees are reset, incentives to innovate will be diminished.
- If innovation reduces the costs of the entities councils are regulating, rather than their own costs.<sup>13</sup>
- If process improvements involve significant economies of scale that can only be secured through collaboration between councils. As the City of Greater Bendigo points out, ‘technology provides opportunities to streamline processes across the State, although there is significant cost in establishment’ (sub. 23, p. 5). There could be cost savings from centralised databases or research into regulatory approaches, or from joint procurement (see chapter 8). Individual councils may be unable to provide facilities where there are significant economies of scale, even though such facilities if jointly provided might reduce costs for the sector as a whole. It may be sensible therefore for the State Government to provide or facilitate such facilities.
- Councils’ incentives to promote their innovations across the sector are weak. An innovative council may gain some kudos from being recognised as an innovation leader, but receive little if any financial benefit.

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<sup>13</sup> This would not affect incentives if councils could charge for these benefits, but this is not normally possible. For example, the City of Stonnington argued that the Planning and Environment (Fees) Regulations prevent councils from charging a higher fee for a faster service in this area (sub. 7 p. 25).

## 2.5 Current institutional arrangements between state and local governments

While several factors weaken councils' incentives to harmonise their regulations and reduce the burden of regulation, their incentives are also affected by their institutional environment. This section describes this environment, focusing on aspects that affect incentives:

- legislation and related instruments
- inter-governmental agreements
- funding
- performance reporting
- processes for review
- mechanisms to achieve more coordination and spread best practice.

It argues that these factors have only a limited effect on councils' incentives to harmonise and streamline regulation.

### 2.5.1 Legislation and related instruments

#### Best value principles

As noted earlier, the Local Government Act gives councils eight functions. The Act says little about how councils should administer state government regulations, except that it includes a set of best value principles, introduced to replace the compulsory competitive tendering requirements previously imposed on councils and to ensure that councils obtain value for money in the delivery of council services (Cameron 1999, p. 351). While these principles were primarily designed for services that could be put out for tender, section 208B of the Local Government Act, which twice refers to 'all' services and once refers to 'each' service, implies that the principles apply to regulatory services as well as other services that councils provide.

Some of the principles are relevant to regulation (for example, they require that the services provided by a council must meet quality and cost standards, be responsive to community needs, be accessible, and must achieve continuous improvement). They do not, however, include principles that the Government believes should be associated with best practice regulation, such as proportionality, transparency, accountability, and — particularly relevant to this inquiry — consistency (Government of Victoria 2007c, p. 3–1). Thus the

principles do not appear to promote harmonising and streamlining of regulation (see chapter 10).<sup>14</sup>

## Council plans

With so many functions to undertake and needs to meet, and different levels of financial capacity, councils' effectiveness as regulators will be influenced by the quality of their processes to set priorities. Councils have a legal obligation to produce a Council Plan, which outlines strategic objectives, strategies for achieving the objectives, and strategic indicators for monitoring the achievement of the objectives (s125(2)). A strategic resource plan identifies the resources required to achieve the objectives (s126(1)). These plans provide an opportunity for councils to explain their priorities for regulatory and other services, and for particular regulatory services.

The Commission reviewed council and strategic plans for 20 councils, to assess how they developed their priorities for regulatory services and monitor their success in achieving these priorities. The councils were randomly selected and are representative of all council types: inner Melbourne, outer Metropolitan, and regional and rural.

This review showed that:

- the plans did not demonstrate how councils set their priorities between general and regulatory services or between regulatory services
- there was little evidence of State Government guidance about these priorities
- each council developed strategic objectives, which were broadly centred on themes of environment, liveability, governance, economic prosperity and community, but the plans did not indicate how they chose between these objectives

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<sup>14</sup> At the time the principles were introduced, the Government required councils to undertake best value reviews and implement the outcomes within 5 years, by December 2005. It also required councils to report their progress annually and to subject all of their services to a best value review every 5 years. The Government established the Best Value Commission to advise the Minister for Local Government on issues such as the implementation by councils of the Best Value Principles and any changes to the Best Value Framework that might be required to meet the Government's objectives (Quest Consulting (Australia) Pty Ltd) 2007, p.1). The Commission's last term ended on 31 December 2007 and it was dissolved as recommended by a review commissioned by the Minister for Local Government (Quest Consulting (Australia) Pty Ltd. 2007, p. 15)

The Civil Contractors' Federation noted that:

It is very difficult to find any recent "Best Value" reports and the CCF believes this is an area where regulation at the State level is required to ensure that the performance of councils is both monitored and reported upon (sub. 21, p .20).

- strategic indicators predominately focused on non-regulatory activities, particularly in relation to community satisfaction ratings of council performance and initiatives
- all sampled councils published strategic indicator results in their Annual Report. Four councils supplemented this data with quarterly performance reports published on their municipal websites.

## Other legislation

When councils regulate on behalf of the Victorian Government or through local laws, this should be designed to achieve specific objectives. While the Commission has not reviewed all of the 29 Acts that give councils a regulatory role, it previously observed ambiguity in the objectives of legislation about food safety (VCEC 2007b, pp. 168–172), housing construction (VCEC 2005b, pp. 260–265) and native vegetation (VCEC 2009a, pp. 141–144). Ambiguous objectives increase the risk of inconsistent enforcement by councils. The Government supported or supported in principle its recommendations to clarify objectives in each of these areas (Government of Victoria 2006b, p. 13; 2008a, p. 11; 2009, p. 30).

## 2.5.2 Inter-governmental agreements

### The Inter-governmental Agreement between the Commonwealth, state and local governments

This establishes a framework for the three levels of government, when services are delivered at the local level. Part I outlines principles such as achieving an open and productive relationship between the three spheres of government (p. 4) and states that one purpose of the Agreement is to ‘encourage the conduct of positive and productive relations between the three spheres of government in a spirit of respect’ (p. 4). Part III provides further guiding principles and Part IV allows for further agreements between local government and other spheres of government. Part V requires the Agreement to be reviewed in 2011.

### Victorian-State Local Government agreement (VSLGA)

#### *General provisions*

In May 2008 the Minister for Local Government and the MAV entered into the VSLGA, which gives effect to the national Intergovernmental Agreement and serves as the basis for continuing relations between state and local government in Victoria. The VSLGA aims to:

strengthen state-local government relations, improve co-ordination of government services, strengthen the capacity of local government, improve consultation, and promote greater transparency and accountability between the two spheres of government (Local Government Victoria 2008d, p. 3).

The agreement is not legally binding, and does not alter existing agreements between the levels of government. It recognises that local government is accountable to its local communities and supports its operational autonomy, and recognises that the Victorian Government is accountable to the people of Victoria and has state-wide obligations. No council that the Commission spoke with cited this agreement as an influence on regulatory harmonisation or streamlining.

*Provisions relating to new or revised legislation and regulation*

Giving effect to a recommendation in the Commission's first inquiry report<sup>15</sup>, the Agreement notes that where the Victorian Government wants local government to administer or enforce new primary legislation, or new or revised regulation, the relevant lead department shall, subject to exceptional circumstances, consult with local government in accordance with Section 4.6 of the Victorian Guide to Regulation. This section requires that the consultation covers resource requirements; how those resources will be funded; training and assistance; how local government's performance will be assessed and reported; and how the responsible state minister will account for local government performance.

The Commission wrote to Departments about their experience in implementing this recommendation. The Secretary of the Department of Health reported that for Acts that involve additional obligations for councils, the department is:

- funding MAV to enable it to manage the upgrade of IT data bases
- developing a comprehensive education program to ensure that councils understand and can administer all the changes to the Acts
- funding a full time project officer to work with the MAV to create a professional development program for councils

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<sup>15</sup> The Commission recommended that:

... the Victorian Government, where it intends to require local government to administer or enforce a new or reviewed state regulation, commit to first discuss with local government how the regulation will be funded, what training or assistance will be provided, and how ongoing performance will be monitored. The funding, training and performance monitoring arrangements should be published, as should the performance of local government against the agreed monitoring regime (VCEC 2005b, p.424).

- funding a service agreement with the MAV to fund councils' tobacco education and enforcement activities under the Tobacco Act 1987 (Department of Health 2009).

The Department of Primary Industries (DPI) responded that the department's main interface with councils is in relation to the Domestic Animals Act 1994 and that there have been several changes to the Act since the Government accepted the Commission's recommendation. The Department consulted extensively with councils before implementing these changes:

Many changes have not required additional resourcing or support, but where they have, DPI has taken steps before implementation to ensure that councils are in a position to implement regulations effectively. For example, the creation of a requirement for all councils to prepare a Domestic Animal Management Plan saw DPI work with councils to develop support materials including templates, instruction booklets and CDs, specific timelines, and training seminars. All 79 councils have been able to submit plans as requested (DPI 2010).

The responses from other Departments provided little evidence that the recommendation had been implemented. And the City of Bendigo pointed out that while it:

... welcomes and supports the Victorian Guide to Regulation and Intergovernmental agreement, it judges it to be of only minimal effectiveness. Most State Government bureaucrats dealing with council staff are not aware of its existence. (sub. 23, p. 6)

The Commission heard similar comments from other councils. Chapter 10 returns to this issue.

#### *Provisions relating to service agreements*

The VSLGA promotes the use of intergovernmental agreements to ensure that roles and responsibilities are clearly articulated and commits state and local government to consulting the Negotiating Guidelines for State–Local Government Funding Agreements when establishing service agreements (box 2.2). These guidelines provide a framework that the State Government could use to encourage harmonisation and streamlining of regulations.

## Box 2.2      **Negotiating Guidelines for state–local government funding agreements**

Key features of these guidelines are:

- *outcome or output focus*: agreements should state the overall policy purpose of the program and clearly define the broad program outcomes or outputs. All reporting should be based on achievable outputs and outcomes. Agreed benchmarks should provide clarity and direction without being unduly prescriptive
- *clear responsibilities*: agreements should clearly define the responsibilities of state and local government. For example: agreements should specify whether the state government is contributing to a local government program, whether local government is running the program as a shared responsibility with the state government or whether local government is acting as an agent contracted to run the program on behalf of the state government in an area of state government policy responsibility. ...Agreements should specify policy setting and operational responsibilities. Duplication should be avoided wherever possible
- *clear funding mechanisms*: funding agreements should provide predictability and stability, to enable forward planning to be undertaken by state and local governments
- *incentives and sanctions*: One way to ensure good programs and the fulfilment of all obligations is through the use of incentives. Agreements can also include sanctions, including withholding funds or imposing financial penalties for non-performance.

*Source*: Local Government Victoria 2008d, pp.6-8

The Commission is not aware of any agreements covering regulatory services that have been negotiated using these guidelines.<sup>16</sup> The Tobacco Service Agreement, negotiated in 2006 before these guidelines existed, illustrates the use that could be made of such agreements (box 2.3)

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<sup>16</sup> Service agreements are used in service delivery areas such as community care, maternal and child health and public libraries (MAV, sub.19, p.16).

### Box 2.3 The Tobacco Services Agreement

Under this agreement between the MAV and the Department of Human Services, in exchange for funding, councils were required to undertake education visits to tobacco retailers, eating establishments, licensed premises and gaming venues. These activities related to implementing amendments to the Tobacco Act, which were intended to reduce smoking rates in all age groups, address high smoking rates among children and protect Victorians from unwanted exposure to tobacco smoke.

The agreement specified the proportion of the venues in each municipality that councils needed to visit, and visit duration. Councils received payments for reporting the results of their visits and for enforcement activities.

The Department supported councils by:

- developing enforcement protocols and other guidance materials
- offering tobacco enforcement training
- providing advice on interpretation of the Act
- undertaking enforcement where necessary to obtain rulings on the legislation through the courts, particularly when a new reform is implemented
- developing memoranda of understanding with other agencies that also have power to enforce the Tobacco Act, such as Victoria Police and Worksafe Victoria.

*Source:* MAV (2006b); Department of Health (2009)

### 2.5.3 Funding

Participants argued that the resources available to councils and the effectiveness and efficiency with which they deliver regulatory services are linked. The level of funding affects councils' capacity to undertake regulation, while the structure of funding can affect how councils approach the task.

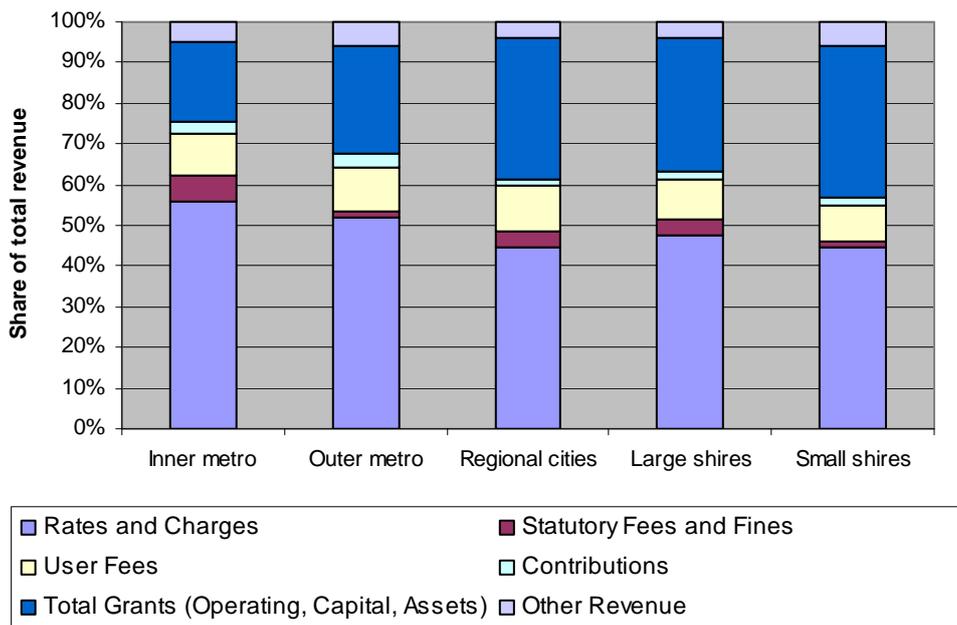
Councils receive funding from several sources (figure 2.4). While the composition of funding varies between councils, rates and grants are the two most important sources.<sup>17</sup> Neither the amount nor structure of these sources of

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<sup>17</sup> Grant funds (from the Commonwealth Government) totalled \$454 million in 2009-10, comprising \$332 million in general purpose grants and \$122 million in local roads grants. Both grants are untied, meaning that the Commonwealth neither directs how grants are spent by councils, nor requires specific reporting on their expenditure. Grants are based on an estimate of the expenditure of a council, and an estimate of its capacity to raise revenue. The Victorian Grants Commission develops allocations using a range of indicators - such as population, land values, socio-economic status, and geographic isolation. Based on the expected shortfall (or excess) between the estimated expenses and revenue, a 'raw grant' is developed. This is then adjusted according to the total available grants. The key national distribution principle appears to be 'fairness'. It is explicitly recognised in the criteria that the policies of a council - in terms of expenditure and revenue efforts - will not influence the allocation of a grant (Victorian Grants Commission 2009, pp. 11-24).

funds is related to the amount of councils' regulatory activities or how they carry them out. Councils also receive funds from user fees and statutory fees and fines (see chapter 9). There are usually financial penalties for breaches of regulations, and figure 2.4 shows that they provide between 1 per cent and 5 per cent of councils' revenue.

Figure 2.4 Revenue patterns of Victoria's councils (2007-2008)



Source: VCEC analysis based on data provided by Local Government Victoria.

Common themes in submissions are that councils' revenue from some regulatory services is less than their costs (chapter 9) and that councils have inadequate resources to carry out their required tasks. It was not only councils that made these points. For example, the Macedon Ranges Residents' Association Inc. argued that:

One of the key issues facing most Councils is the on-going shift of State and Federal responsibilities to local government. It is all very well handing over funding, but these responsibilities often require additional capacity that places additional burdens on local government. Funding often falls behind costs, leaving local ratepayers to pick up the tab for the shortfall, or facing reduced services (sub. 16, p. 2).

There is a number of reasons why councils may not increase fees for regulatory services to address the funding shortfall.

- Some fees are themselves regulated by the State Government
- Some councils may be concerned that increasing fees will deter investment and erode their rate base.
- There may be wider community benefits from regulation. The City of Greater Bendigo commented that: fees need to recognise the overall community benefit of regulation and therefore full cost recovery from applicants is generally not appropriate (sub. 23, p. 8).
- Fee increases may have adverse political consequences.

#### 2.5.4 Performance reporting

The extent and structure of performance reporting affects incentives. There is already extensive reporting.

- Councils' annual reports must also contain performance statements, identifying key strategic objectives and performance targets, and measuring results.
- The Minister for Local Government publishes an annual benchmarking report that provides a state-wide perspective on the performance of councils.
- Councils are also benchmarked in the *Local Government National Report* published by the Commonwealth Department of Infrastructure, Transport, Regional Development and Local Government.
- The Essential Services Commission has identified over 100 council reporting requirements of various frequencies, and about 1200 indicators drawn from measures reported in council annual reports, the Community Satisfaction Survey, the Victorian Grants Commission and elsewhere (ESC 2010c, pp.8-10).

Notwithstanding this extensive reporting:

- a review by Victoria's Auditor-General, focusing on the audited performance statements in annual reports, concluded that '... much of the performance data reported is not useful, and the effort put into its production is therefore largely wasted. It also concludes that important data on the cost-efficiency and quality of council services, and on the achievement of outcomes is not being reported' (Victorian Auditor-General 2008, p. v).
- the Civil Contractors' Federation criticised the 'lack of performance reporting on both the administration of State regulation and the performance of councils themselves (sub. 21, p. 14).

- the City of Greater Bendigo commented that ‘It is disappointing that most required reporting is based on levels of activity, not the degree to which the desired outcome is achieved’ (sub. 23, p. 4).
- Frankston City Council submitted that reporting on the administration of state legislation is only carried out where specifically provided; for example, the number of licensed food premises, rooming houses, and the number of infringements and official warnings issued and withdrawn under the Local Government Act and Environment Protection Act 1970 as per the requirements of the Infringement Act 2006 (sub. 25, p. 2).

To improve performance reporting, the Victorian Government has commissioned the Essential Services Commission (ESC) to develop a performance assessment and benchmarking framework for local government in Victoria. The ESC released its draft report in March 2010, which amongst other things documented the extent of existing reporting requirements on councils (ESC 2010c). Chapter 10 discusses how an improved performance reporting framework for councils’ regulatory services could improve Victoria’s institutional arrangements.

## 2.5.5 Processes for review

Processes for reviewing aspects of councils’ involvement in regulation include:

- regulatory impact statements
- the administrative burden reduction target
- performance audits
- the Local Government Investigations and Compliance Inspectorate.

### Regulatory Impact Statements (RISs)

Subject to a threshold test, RISs are prepared for new state government regulations that are administered by councils, or when existing regulations sunset. This process is intended to ensure that new regulations are implemented only when they are the best option to address an identified problem. RISs could analyse costs councils face and impose when administering new regulations. Indeed, the Government’s expectation is that this will happen:

Furthermore, the costs associated with the administration and enforcement of the regulation, along with the costs of the training and assistance that would need to be provided to local governments, would be included in the cost-benefit analysis undertaken as part of an associated RIS and Business Impact Assessment (and subject to scrutiny by the VCEC). (Government of Victoria 2005a, p. 21)

RISs could also explore different options for delivering regulatory services, such as by one of Victoria's 65 regulators rather than by councils.

As well as identifying the costs that councils face to administer state regulations, the incentives for councils to enforce regulation also need to be considered. Box 2.4 gives an example of a RIS which estimated councils' administrative costs, but notes that the absence of a mechanism to ensure that councils will enforce the regulations.

### **The regulatory burden reduction initiative**

RISs focus on new regulations. In 2007, the Victorian Government imposed a target for reducing the regulatory burden of existing regulation and in September 2009 it included local government regulation within the target (Lenders 2009, p.7). In what is believed to be a world first, it has also included substantive compliance and delay costs in the target. Given the large delay costs reported in the Commission's analysis of planning regulation (chapter 3), this target has the potential to make a significant contribution to reducing regulatory burdens. The Department of Treasury and Finance has developed a new methodology to measure the cost savings (DTF 2010), but it does not address issues that are specific to councils.

### **Performance audit arrangements**

The Victorian Auditor-General undertakes different types of reviews of local government:

- annual report audits (see, for example, Victorian Auditor-General 2009)
- general reviews, such as the review of performance reporting in local government (Victorian Auditor-General 2008)
- reviews of particular areas, such as the review of management of food safety in Victoria (Auditor-General Victoria 2002 and 2005).

### **Local Government Investigations and Compliance Inspectorate**

This inspectorate was established in August 2009, to focus on compliance with the Local Government Act, by investigating alleged breaches of the Act, implementing a rolling audit program and conducting spot audits of councils' compliance.

## Box 2.4 Caravan park registration and standards

Under the Residential Tenancies (Caravan Parks and Movable Dwellings Registration and Standards) Regulations 1999 (due to sunset in June 2010), caravan parks must register with their local council, which processes the applications for registration and for renewal of registration, and maintains a register of caravan parks. By making councils aware of the caravan parks operating in their area, the registration process helps councils to enforce the Regulations.

As part of the registration process, councils must be satisfied that each park meets and will continue to meet the standards specified in the Regulations throughout the registration period. To this end, councils are expected to review the fire safety and emergency management plans of each caravan park, and inspect parks to assess compliance with the amenity and safety requirements of the Regulations. The Regulations also specify the fee that councils can levy for registration.

The RIS prepared in 2010 for these Regulations noted stakeholder feedback that councils were not consistently inspecting caravan parks, with councils suggesting this was due to the registration fee being insufficient to cover the associated costs.

The RIS estimated the cost of all aspects of the registration process to Councils, and proposed a new tiered fee structure—specified as maximum fees for caravan parks of different sizes—that would allow councils to fully recover registration costs on average. Extending the registration period from one to three years was seen as a way to reduce the burden on councils, as well as on caravan park operators. The aggregate cost to councils of a three-yearly registration process was estimated to be about \$517 000 every three years.

Although the proposed 2010 Regulations specify that, in determining the fee, councils must consider the cost associated with registration, there does not appear to be a mechanism to ensure that councils will undertake enforcement activities.

*Source: DPCD 2010, Residential Tenancies (Caravan Parks and Movable Dwellings Registration and Standards) Regulations 2010 RIS.*

## 2.5.6 Mechanisms for achieving more coordination and spreading best practice

Various agencies in Victoria encourage coordination between the Victorian Government and councils and the Government also sponsors consultation forums involving Ministers and senior officials from departments and councils. While these forums' agendas are broader than regulation, they provide a way to encourage coordination and consistency in the administration and enforcement of regulation.

## The agencies

Councils are supported by several bodies, in particular by Local Government Victoria, and by associations such as the Municipal Association of Victoria (MAV), LGPro and the Victorian Local Governance Association.

Local Government Victoria, within the Department of Planning and Community Development, supports councils in a number of ways, for example, by developing partnerships between the State Government and councils, and by supporting and encouraging best value and continuous improvements in local government service delivery, organisational performance and governance.

The MAV is the peak representative and advocacy body for Victoria's councils, seeing its role as to represent and advocate the interests of local government, lobby for a 'fairer deal' for councils, raise the sector's profile, ensure its long-term security and provide policy advice, strategic advice, capacity building programs and insurance services to local government (box 2.5).

### Box 2.5 The Municipal Association of Victoria

The purpose of the MAV is defined under the Municipal Association of Victoria Act 1907:

The Municipal Association of Victoria was established to promote the efficient carrying out of municipal government throughout the State of Victoria and to watch over and protect the interests, rights and privileges of municipal corporations. (Municipal Association Act, 1907, preamble)

The MAV's website outlines its six key functions:

- *Advocacy*: represent the needs and interests of the sector with other levels of government and with stakeholders.
- *Capacity Building*: work actively with councils to support them to improve how they operate in communities, particularly where there is significant change or new requirements.
- *Networking*: coordinate, host and/or sponsor opportunities for the sector to share knowledge and plan responses.
- *Policy development*: set standards for the sector and developing the policies and sector-wide regulations and codes
- *Professional Development*: human resources support and training and education programs that develop the understandings and skills of both councillors and staff.
- *Awareness raising*: research and analysis leading to information dissemination and awareness raising promotions and campaigns.

(continued next page)

## Box 2.5 The Municipal Association of Victoria (continued)

The MAV has identified opportunities for both levels of government to support best regulatory practice in a number of areas (sub. 19, p. 8). It supported the continuation of the MAV's shared services program to assist councils to achieve greater efficiencies through improved collaboration and sharing of resources

*Source:* MAV (sub. 19, pp. 8, 14); MAV 2010a

LGPro is the peak body for Local Government professionals in Victoria. It provides professional development activities and services, facilitates communication between the sector and State and Federal Governments, and represents the views of officers in consultation processes on legislation and policy and program development (LGPro 2010, p1).

The Victorian Local Governance Association is a peak body of local government, councillors and community leaders working to build and strengthen their capacity to build progressive social change. Its activities include promoting affordable housing, community engagement and mitigation and adaptation to climate change.

In addition, the Australian Local Government Association is a federation of state and territory local government associations that represents more than 600 councils across Australia and has undertaken a variety of projects in areas such as cultural diversity and the environment (including climate change).

### **Government sponsored consultation forums**

There are several state and local government forums that provide an avenue for coordination between governments on regulation and other issues.

#### *Local Government Ministerial forum*

The Minister for Local Government hosts an annual forum of mayors and chief executive officers from councils and presidents and chief executive officers of LGPro, the Municipal Association of Victoria and the Victorian Local Governance Association. Other ministers from within the Department of Planning and Community portfolios and the Victorian Government, as well as officials from the Department, also attend. The forum does not make decisions or set priorities. Rather, it provides an opportunity for mayors and chief executive officers to bring issues to ministers' attention; for ministers to announce or test new initiatives; and for councils to share examples of best practice.

### *Regional management forums*

These were established in 2005 to facilitate collaboration between Victorian Government departments and local government in each of Victoria's eight administrative regions. A review of the forums in 2007 suggested some modifications, all of which were accepted by the Government (State Services Authority 2007). Chaired by departmental Secretaries, and comprising councils' chief executive officers and senior representatives from departments, the forums:

- identify and address critical issues facing the region
- encourage cooperation between departments and councils
- work with statutory authorities, businesses and local communities to deliver key priorities (Wear 2008, p.1) (box 2.6)

#### **Box 2.6 The Role of Regional Forums**

Each Forum works with regional stakeholders to identify and understand key issues that would benefit from an integrated approach to planning and service delivery. It then identifies and develops proposals to address the issues. To maximise their effectiveness, the Forums have been expected to prioritise activities in the following order:

- initiatives identified under *A Fairer Victoria*;
- providing additional support for disadvantaged places; and
- taking a broader view of regional issues and priorities (if time permits).

The Forums were required to develop work plans for the first one to two years of operation, including activities that:

- identify opportunities for departments, councils and businesses to work together;
- focus on better service planning and delivery;
- illustrate and test new ways of working with communities;
- create innovative and efficient use of existing resources rather than new funding proposals; and
- have a significant effect on tackling disadvantage.

*Source:* Wear 2008, p.3.

## **2.6 Concluding comments**

Councils are significant regulators and have a part to play, along with other levels of government, in responding to challenges such as those posed by population growth. Councils are significant regulators. While the system as a whole is coping, there is varying capability between councils, whose capacity to enforce regulation depends on the available resources; the incentives to undertake

process improvements; and the institutional arrangements within which councils operate.

These institutional arrangements contain features that could encourage councils to streamline regulations and reduce inconsistencies in the way regulation is administered. The arrangements have not, however, been designed for this express purpose, and features such as the current best practice principles that apply to councils, the clarity of the objectives they are required to achieve through regulation, performance reporting, and mechanisms for achieving coordination and spreading best practice, all have shortcomings. Subsequent chapters discuss how to strengthen these arrangements both in particular areas and more generally.



## 3 Impact of local government regulation on business

The Victorian Competition and Efficiency Commission's (the Commission) terms of reference require it to report on the impacts of regulations administered by local government on business, including small businesses such as home based businesses. This chapter provides a new overall picture of how businesses perceive local government regulation, including areas of satisfaction or concerns, and the impacts of those regulations on business performance. It also provides an estimate of regulatory burdens on business<sup>1</sup> for two major areas of regulation administered by local government.

### 3.1 Approach adopted by the Commission

The issues paper indicated that the Commission would focus on those areas of State and local regulation that had the most significant potential impacts on business.

In addition to considering the views expressed to the Commission by participants, the Commission adopted an additional two stage approach to test its initial views about which regulations administered by local government are likely to have the largest impact on business. First, the Commission sought the views of Victorian businesses through a perception survey of 605 businesses which was undertaken for the Commission by Roy Morgan Research.

Second, the Commission engaged The Allen Consulting Group (ACG) to undertake a detailed estimate of the costs to business of complying with selected regulatory areas. ACG undertook detailed interviews with around 36 businesses throughout Victoria collecting information on administration, substantive compliance and delays costs incurred as a direct result of complying with State and local regulations administered by local government. This estimate of regulatory burden is used in subsequent chapters to assist in estimating the incremental benefits of draft proposals for reform. The Commission has also reviewed a number of relevant studies undertaken in other Australian and overseas jurisdictions.

Reporting on the impacts of regulations on business requires the consideration of both the benefits and costs of regulatory intervention. It is acknowledged that the benefits of regulation often accrue to society (more generally) rather than to

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<sup>1</sup> Consistent with the terms of reference, this assists the Commission to estimate the overall economic impact of options identified in this inquiry.

business (specifically) and it is often intrinsically difficult for these benefits to be quantified. Given the relative difficulty in obtaining quantitative measures of the benefits of regulations the Commission has relied on a mix of both qualitative (provided by the business perception survey undertaken by Roy Morgan Research) and quantitative data (from the ACG study) to consider the impact of regulations administered by local government. This is supplemented by the findings (including qualitative benefit data) of recent inquiries and relevant information provided by regulatory impact statements.

### 3.2 Identifying the regulatory areas of greatest impact on business

Based on a preliminary assessment of state regulations and local laws the Commission identified six key areas of regulation in an issues paper released early in the inquiry:

- *Building Act 1993* (Vic) and local laws relating to building and construction
- *Planning and Environment Act 1987* (Vic) and the *Subdivision Act 1988* (Vic)
- *Road Management Act 2004* (Vic) and local laws relating to parking, vehicles and roads
- *Food Act 1984* (Vic)
- *Public Health and Wellbeing Act 2008* (Vic)
- *Environment Protection Act 1970* (Vic) and local laws relating to waste management, noise and other environmental issues.

The issues paper sought comment on the impact on business of these regulatory areas. Submissions generally agreed that the preliminary list represented the main regulations impacting on business (City of Stonnington, sub. 7, p. 1; Frankston City Council, sub. 25, p. 1; City of Greater Bendigo, sub. 23, p. 2). Wodonga City Council (sub. 10, p. 1) believed that the *Aboriginal Heritage Act 2006* (Vic) should also be considered. Commenting on the relative impact of regulations the Department of Health suggested that

relative to other business related compliance costs, such as those of WorkCover or building permits and the like, the costs to business associated with public health regulation will be minimal. (sub. 27, p. 2)

Notwithstanding this feedback a key issue was that there was no objective assessment of which regulations were impacting the most on business. To address this information gap the Commission commissioned research on business' views about their recent interaction with local government and the types of regulations encountered.

This research was informed in part by previous work undertaken by the Local Better Regulation Office (LBRO) in the United Kingdom which commissioned a

survey of businesses in England and Wales about their interaction with local authority regulators. The LBRO sought to:

- measure business satisfaction with local government regulatory service, where they have had direct experience of them
- ascertain businesses' views on the consistency of advice provided where they deal with several local authorities
- gauge how easy it is for businesses to comply with different areas of regulation. (Ipsos MORI 2008, p. 1)

Business New Zealand (BNZ 2008), in conjunction with KPMG, has also undertaken surveys of business to assist in understanding business compliance cost trends and priority areas, as well as collecting data regarding the perceived helpfulness of government (including local government).

### **3.3 Business perception survey**

Drawing on these international surveys of business, the Commission engaged Roy Morgan Research to undertake a survey of Victorian businesses' interactions and perceptions of local government regulations. The aims of this research were to:

- identify the areas of state and local government regulation that are administered by local government and that have the largest impact on business
- identify the major challenges that businesses face in complying with state and local regulations administered by local government (such as inconsistent administration, time delays, uncertainty, and other costs)
- provide a framework for the ongoing measurement of business perceptions about regulatory services delivered by local government.

The telephone-based survey was undertaken between 1 December and 11 December 2009. The key findings of the survey are highlighted in the following section. A copy of the Roy Morgan Research report (RMR 2010a) is located on the Commission's website [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au)

The survey was developed by Roy Morgan Research with input from the Commission.<sup>2</sup>

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<sup>2</sup> In developing the survey the Commission also sought comment from the Department of Treasury and Finance, the Essential Services Commission, Local Government Victoria, and the Municipal Association of Victoria.

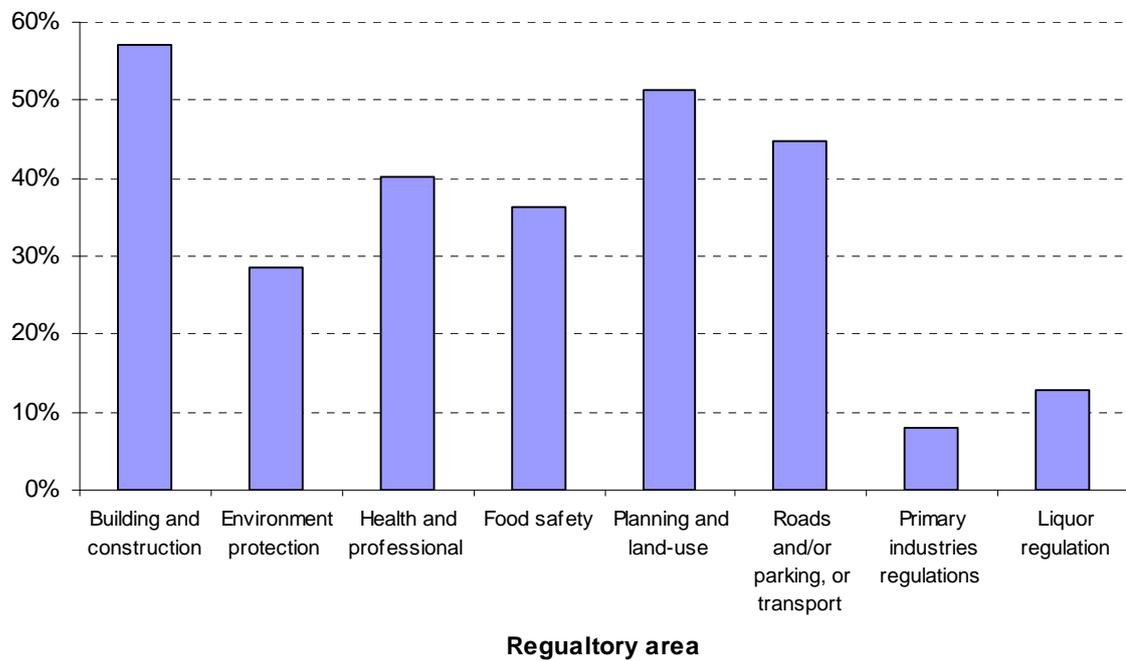
### 3.3.1 Key findings

The survey focused on Victorian businesses that had a recent interaction with a local government (on a regulatory issue) in the preceding three years. Over 600 businesses including home-based businesses were surveyed and the results provide a unique picture of both the nature of business interactions with local government and their perceptions about the quality of these dealings.

The survey results suggest that around one third of Victorian businesses have had a recent (within the past three years) regulatory interaction with local government. Businesses in the accommodation and food services sector, agriculture forestry and fishing sector, construction sector, property and business services sector, and cultural and recreation services sector were the most likely to have had recent regulatory interaction with local government. The survey results also help highlight the relevance of consistency for Victorian businesses. While the majority of businesses deal with just one council, the survey results reveal that around 30 per cent of businesses deal with more than one council, with around five per cent reporting that they have dealt with most or all councils in Victoria.

The results also indicated that the most common areas of business interaction with local government were in relation to planning and land-use, and building and construction regulations. Figure 3.1 shows that, of those businesses that have dealt with local government in the past three years, 57 per cent have dealt with building and construction regulations and around 50 per cent have dealt with local government on a planning issue. Less than 10 per cent of businesses have dealt with local government regarding primary industries regulations over the past three years.

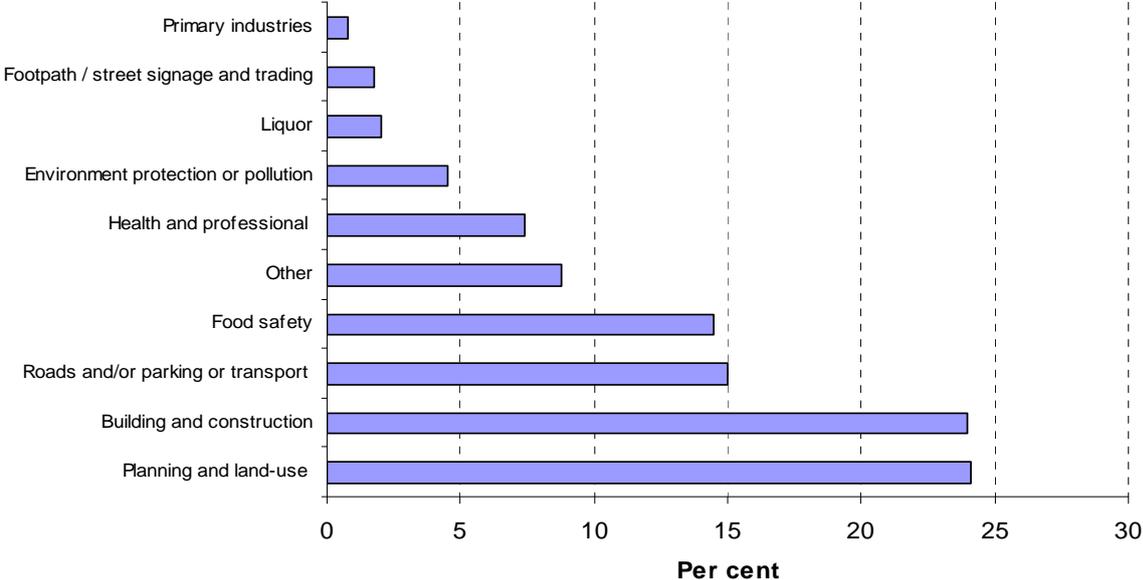
Figure 3.1 Regulatory interactions with local government over past three years — by area of regulation



Source: Roy Morgan Research 2010b.

Similarly, businesses indicated that their most recent interaction with local government was regarding building and construction regulations and planning and land-use regulations (figure 3.2).

Figure 3.2 Most recent interaction with local government — by area of regulation

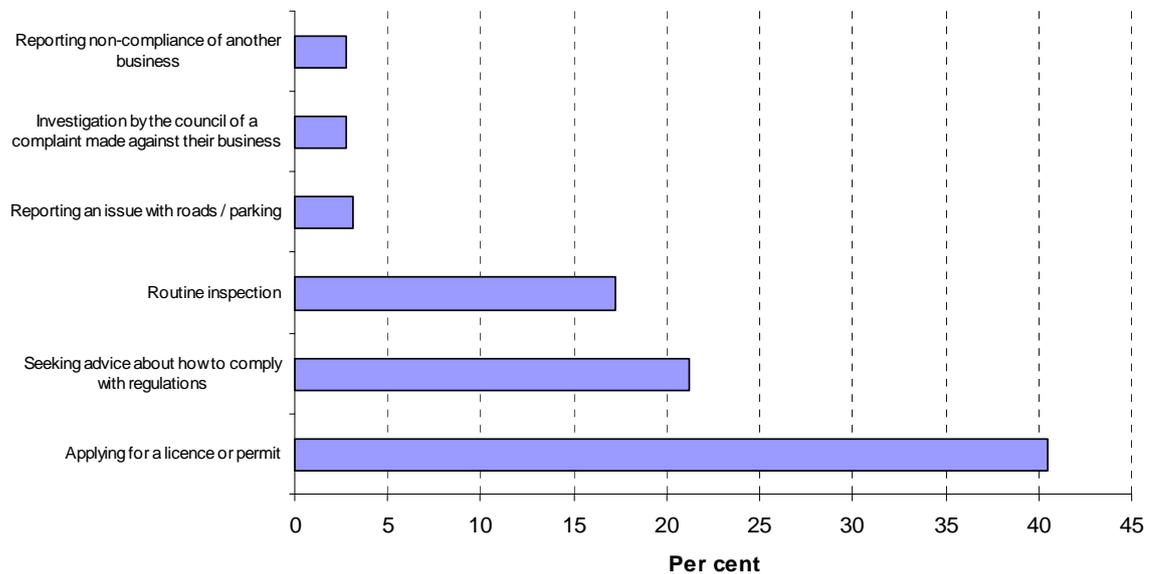


Source: Roy Morgan Research 2010b.

Around two thirds of businesses indicated that the purpose of their most recent regulatory interaction was to apply for a licence or permit, or to seek advice about how to comply with rules and regulations (figure 3.3).

The businesses that participated in the survey were asked to comment on various aspects of their interaction with councils, including their overall satisfaction with councils, key reasons for satisfaction/dissatisfaction, the consistency of advice both within councils and between different councils, and the overall impact on their business. Overall the survey results suggested planning and building regulations administered by local government together with their associated assessment and approval processes (including information provision) are areas where the Commission should focus its analysis.

Figure 3.3 Most recent interaction with local government — by type of interaction



Source: Roy Morgan Research 2010b.

### Areas of satisfaction

Businesses indicated that they were generally satisfied with how local government performed in the administration of various regulations with around 56 per cent indicating that they were satisfied or very satisfied with their most recent local government dealing. A further 10 per cent of respondents indicated that they were neither satisfied nor dissatisfied. Businesses dealing with food safety regulations expressed relatively greater levels of satisfaction with how council had dealt with their most recent case.

The levels of overall business satisfaction did not vary significantly across the different types of councils (inner/outer Melbourne, regional city, small/large rural shires).

### Areas of dissatisfaction

Around 28 per cent of businesses indicated that they were dissatisfied or very dissatisfied with their most recent dealing, with 'time delays by council' cited as the most common reason for this dissatisfaction.

The satisfaction ratings reflected, in part, the nature of businesses' interaction with councils. For instance:

- Almost half of the businesses indicated that they felt uncertain about how long approvals/decisions made by local government would take. This uncertainty was more pronounced in areas where the most recent contact related to planning and land-use regulations (65 per cent), and building and construction regulations (63 per cent).
- Around 50 per cent of businesses dealing with planning and land-use regulations and 48 per cent of businesses dealing with building and construction regulations disagreed that ‘the timeliness of council approval or assessment processes is much better than it was two years ago’.
- Forty-six per cent of businesses felt that council rules and guidance regarding planning and land-use, and building and construction regulations were too complex.
- Overall about 50 per cent of businesses felt that local government regulations were more demanding than two years ago (a view held across most areas of regulation administered by local government).

### **Consistency of advice**

The results indicate that 55 per cent of businesses felt that the advice they received from various councils was consistent while 31 per cent felt that they had received inconsistent advice. Perceptions of inconsistency were highest when businesses had dealt with councils on the following areas of regulation within the past three years:

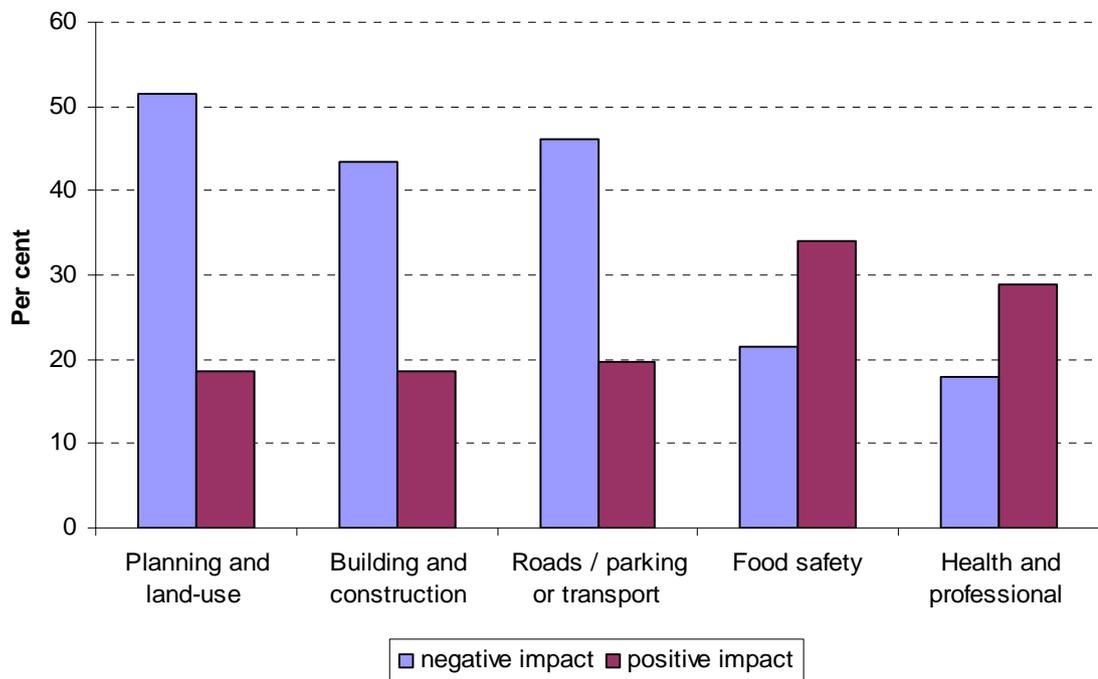
- Primary industries (including fisheries, forestry or livestock) — 42 per cent
- Planning and land-use regulations — 41 per cent
- Building and construction regulation — 38 per cent
- Liquor regulation — 35 per cent
- Roads, and/or parking regulations — 35 per cent

The results also indicated that around 42 per cent of businesses interacting with planning and land-use regulations and around 40 per cent of businesses dealing with building and construction regulations believed that advice from staff within the same council was either inconsistent or always inconsistent.

### **Impact on business**

Over half the businesses dealing with planning and land use regulations reported that their most recent dealing with local government had a negative impact on their business. They were also more than twice as likely (34 percent) to indicate that their most recent dealing had a large negative impact on their business (when compared to the average). Businesses dealing with food regulations were around 1.5 times more likely (compared to the average) to report a positive impact on their business resulting from their interaction with local government.

Figure 3.4 Perceived impact on business — by area of regulation



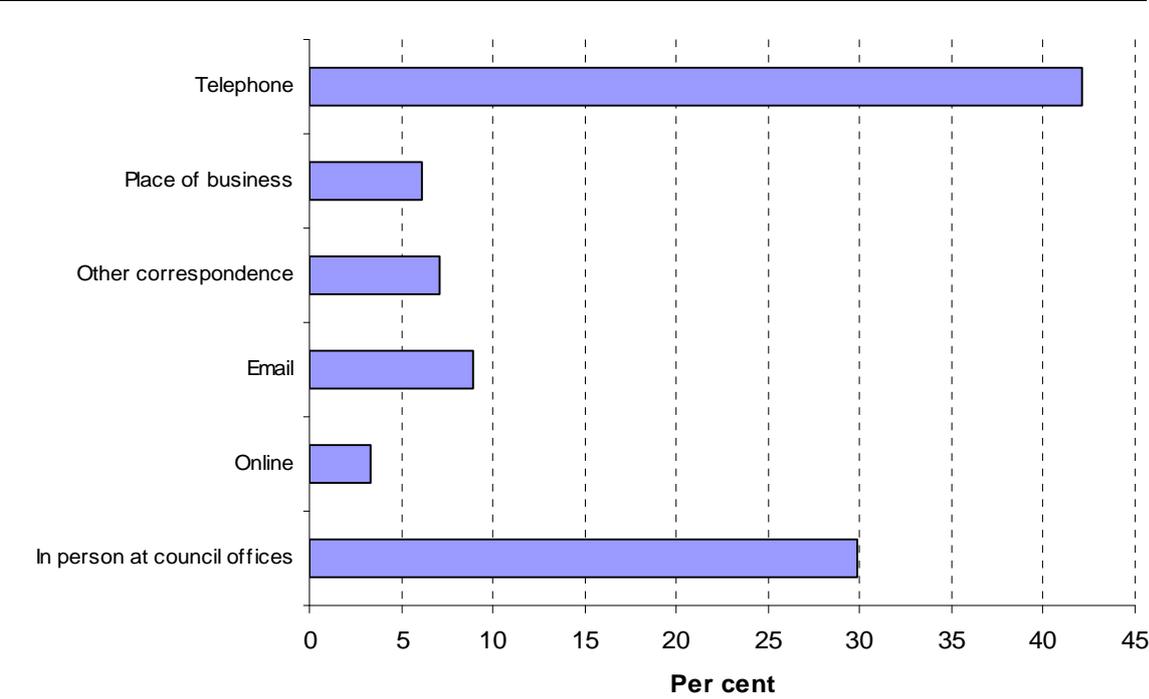
Source: Roy Morgan Research 2010b.

The results also highlighted that non-employing businesses were significantly less likely than other sized businesses to indicate that their most recent dealing with local government had a positive impact on their business.

### How businesses deal with local government

The survey provides some insight into how businesses primarily deal with local government. As shown in figure 3.5 a majority of businesses deal with local government over the telephone or face to face. Only three per cent of businesses indicated that they mainly deal with local government online, with nine per cent stating that they use email.

Figure 3.5 Primary method of dealing with local government



Source: Roy Morgan Research 2010b.

### 3.3.2 Strengths and limitations of the survey

In many instances the survey results represent the *perceptions* of those individuals responding to various questions and as such may be subject to a range of biases. A business' responses may, for example, be affected by recent outcomes (such as refusal of a planning permit), which may lead to negative reported perceptions of their local government interaction, even when the *actual* quality of regulatory service delivered by a council was high.

To account for possible systemic sources of bias the Commission focused on differences in the results rather than absolute levels. Parts of the survey also sought information regarding a business' 'most recent' interaction, to avoid generalised views regarding the regulatory services delivered by local government. Lastly, the survey targeted the person(s) within the business that normally dealt with local government to ensure that perceptions were based on actual experience.

### 3.3.3 Other studies

The survey undertaken by Roy Morgan provides one perspective on the impact that regulations (administered by local government) are having on Victorian

businesses. The Commission also reviewed several other studies that provide additional insights into regulatory areas or processes administered by local government (table 3.1).

While these surveys differ in terms of design and relative strength of results, they highlight that many of the issues around local government regulations facing Victorian businesses are common to other jurisdictions. Common problem areas experienced by business include planning and approval processes, inconsistency of advice, dealing with licences and permits, and government communication.

**Table 3.1 Other relevant surveys**

<i>Source</i>	<i>Relevant findings</i>
Local Government Community Satisfaction Survey (DPCD 2008b, 2009b)	A recent survey by DPCD revealed that residents' satisfaction with 'town planning, policy and approvals' declined (relative to 2008) across all Victorian councils. Falling levels of resident satisfaction were also reported in 2008 (DPCD 2008) for inner and outer metropolitan and regional centre councils. While these studies focus on residents, it does highlight that town planning and approvals are an important issue and satisfaction is falling.
Research into Local Government Administrative Burden (DITR nd)	Research for the Australian Government's Office of Small Business found that planning issues and licensing and permits are key areas of compliance burden for small and home-based businesses. It also found that with many businesses working across different council areas 'the duplication and inconsistency of permit requirements creates additional red tape and fees' (DITR nd, p. 3).
Business Perceptions of Local Authority Regulatory Services (Ipsos MORI 2008)	A survey of businesses in the United Kingdom undertaken for the Local Better Regulation Office found that the consistency of advice between councils was an issue for those businesses that had contacts with three or more different councils, with over a third of these businesses indicating they received inconsistent advice. While the structure of local government in the United Kingdom is different this is a similar finding to that reported by Roy Morgan Research for businesses in Victoria.
Red Tape Survey (NSW Business Chamber 2009) and Blueprint for Fighting Queensland's Over-regulation (Chamber of Commerce and Industry Queensland 2009)	Business respondents to a Queensland survey believed that building approvals and amendments and dealing with licences and permits are imposing large financial costs on their business. Both the CCIQ and NSWBC survey highlighted that respondents felt that there was a moderate to high level of red tape in dealing with local government. The NWSBC survey also suggests that local government communication with business is inadequate.

## 3.4 Further examination of building and planning regulations

The previous section outlined the Commission's approach to identifying areas of local government regulation with the largest impact on Victorian businesses. The results show that planning and land-use regulations together with building regulations appear to have a large impact on business, in comparison with other areas of regulation administered by local government.

This section describes some of the benefits of building and planning regulations prior to discussing the nature and magnitude of the regulatory costs<sup>3</sup> associated with businesses complying with specific planning and building regulations administered by local government, including those costs associated with delays in permit application and/or approval processes.

### 3.4.1 Benefits of building and planning regulations

While regulations can (and do) impose costs on society, the adoption of good regulatory design principles should ensure that the expected benefits of the regulations outweigh these costs — and that there is no feasible alternative that could yield a higher net benefit while achieving the stated objectives.

In considering the benefits of planning and building regulations it is apparent that there is limited information available regarding the intended and actual benefits. This experience has been noted in previous inquiries undertaken by the Commission in which the quantification of estimated or actual benefits associated with regulations is either difficult to obtain or unavailable. A regulatory impact statement (RIS) prepared by the Building Commission reflected the difficulty associated with calculating the benefits of State building regulations:

...with a few exceptions it has proved impossible to quantify the benefits associated with the Regulations either because the nature of those benefits is not amenable to being quantified or because there has been no research conducted in those areas. (BCV 2006, p. 3–4)

The RIS did, however, provide some qualitative information on the benefits of building regulations which included: reduced search costs and improved consumer protection, reduced health and safety risks, enhanced consumer confidence (potentially leading to higher demand for building works) and increases in the amenity of local areas. Building regulation may also increase

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<sup>3</sup> The term 'regulatory cost' refers to any cost that a business incurs as a result of the regulations covered by the Commission's analysis. The term specifically excludes any imposts that a business may choose to incur as part of its own business strategy.

certainty (decrease uncertainty), and allow economies of scale to be realised for builders faced with a consistent set of standards.

Building and construction laws developed and administered by local government may also lead to benefits. For instance local laws concerning site fencing can reduce the incidence of building materials being blown off site and obstructing drains. Similarly building refuse requirements established by local government may reduce the amount of dust, litter, runoff and rubbish escaping from building sites and into public and private space.

In relation to planning regulations the efficiency of good planning were recognised by the Commission in its inquiry into enhancing Victoria's liveability which stated:

well planned land use encourages more efficient use of land and infrastructure by identifying optimal use of land (economically, socially and environmentally) in an environment characterised by competing demands, and facilitates more resources for other liveability enhancing initiatives...well planned community infrastructure can improve community safety and connectivity, and enhance social capital while reducing the costs incurred in maintenance and staffing. (VCEC 2008, p. 119)

While the Commission is aware of some of the broader qualitative (society wide) benefits of planning and building regulations, it has found it difficult to isolate and report on quantitative benefits directly flowing to business of those regulations administered by local government.

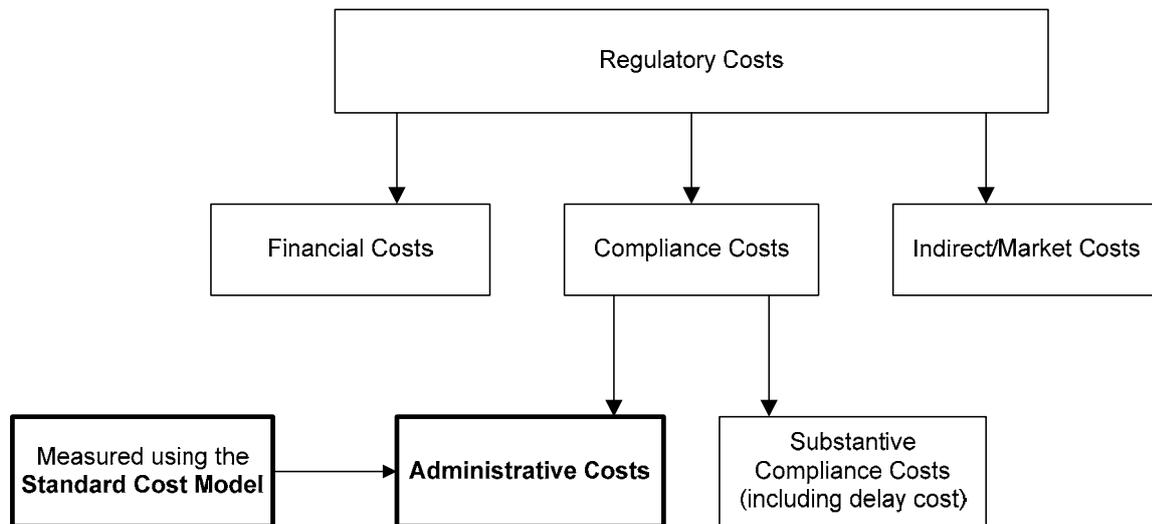
In the absence of quantitative data the Commission has relied on qualitative benefit data (where possible) and quantitative cost data (section 3.5) to highlight the likely impact on business of those building and planning regulations administered by local government.

### **3.4.2 Types of costs**

Regulatory costs incurred by Victorian businesses may be grouped into broad categories: administrative costs, substantive compliance costs (including delay costs) financial costs, and indirect (or market costs). This categorisation is taken from the Victorian Guide to Regulation (Government of Victoria 2007c) and is consistent with the framework used in the Commission's previous inquiries (figure 3.6).

The focus of the Commission's analysis is on administrative, substantive compliance costs and delay costs. Financial costs have also been captured.

Figure 3.6 **Business regulatory cost framework**



Source: Government of Victoria 2007c, p. F-6.

### Box 3.1 **Costs of regulation**

The costs of regulation comprise:

- Administrative costs, which are incurred by business to demonstrate compliance with the regulation or allow government to administer the regulation. Often referred to as ‘red tape’ it includes those costs associated with familiarisation with administrative requirements, record keeping and reporting including inspection and enforcement of regulation.
- Substantive compliance costs, which are the costs incurred to achieve compliance with the regulation. Within this category, the Commission has attempted to distinguish between monetary costs directly incurred and costs arising from delays. Substantive compliance costs are often associated with regulations that specify particular requirements for businesses, which may include purchasing new equipment, maintaining the equipment and undertaking specified training in order to meet government regulatory requirements. They may comprise of one-off/start-up costs and recurring or ongoing costs.
- Financial costs, which are payments to the government or relevant authority and include administrative charges, taxes and licence fees. For example, the fees paid by a business to apply for a planning or building permit or approval process would be categorised as a financial cost of regulation.
- Indirect/market-related costs, which arise from the impact of regulation on market structure or consumption patterns. For example, the costs of seeking and obtaining certain planning approvals may discourage new firms from entering an industry, thereby discouraging competition.

Source: Government of Victoria 2007cb, p. F-7, and VCEC commentary.

As noted in its inquiry into environmental regulation (VCEC 2009a, p. 67) regulations that involve an approval or assessment process may impose costs on business due to delays in decisions. The cost to business of delays may be minimal where timeframes for decisions can be anticipated or where businesses seek to slow down the approval or assessment process for commercial reasons. However, delay costs can be significant where timeframes for decisions are unclear or unnecessarily long or when a business encounters an approval process timeframe that is greater than agreed or expected. Delay costs may comprise:

- holding costs (such as interest on loans, rent, material procurement, lost business opportunities)
- standby costs (such as capital and labour down time)
- costs resulting from increased uncertainty.

The measurement of delay costs with a high degree of precision is a difficult exercise. Previous experience has highlighted that this is particularly the case where multiple parties (business, community, local government, state government) are able to influence timeframes required for an appropriate level of assessment to be undertaken. Delays reported by business may also reflect poor project management or tardiness in responding to information requests made by local government (or other agencies).

Attribution of delay costs to those who administer the regulations is complex and needs to acknowledge the various inter-relationships that may impact on approval timeframes.

### **3.4.3 Measurement approach**

The Commission engaged The Allen Consulting Group (ACG) to estimate the costs to business of planning and building requirements administered by local government consistent with the approach outlined in box 3.2.

#### **Box 3.2 Summary of measurement approach**

The measurement of regulatory costs confronts a number of methodological issues, some of which were identified by the Commission in its inquiry into Environmental Regulation (VCEC 2009a, pp. 68–69) – including identifying and quantifying the incremental costs of regulation (establishing the counterfactual), attributing costs to a specific law or regulation and designing appropriate questionnaires and surveys.

(continued next page)

### Box 3.2 Summary of measurement approach (continued)

The approach adopted by the Commission to estimate the administrative and compliance costs associated with planning and building regulations is broadly consistent with the Victorian Standard Cost Model (SCM) (Government of Victoria 2007c)<sup>4</sup> and the Commonwealth Business Cost Calculator (BCC) (DFD 2009). The approach involved:

- mapping the various regulations to identify the drivers of both administrative and compliance costs (with assistance from relevant government departments and industry experts)
- developing a survey (questionnaire) to collect time and cost information from businesses in relation to the activities they undertake to comply with the regulations
- identifying relevant businesses to undertake the survey
- identifying and obtaining relevant population and other data (such as number of planning permits issued and the value of property development)
- inputting the survey information and other inputs into the SCM/BCC cost models
- testing the estimates derived from the SCM/BCC cost models with independent experts, government departments and agencies and estimates reported in other studies.

## 3.5 Cost estimate results

The following section presents cost estimates associated with planning and building regulations that are administered by local government. This includes regulations made by the State Government and local laws passed by local government. It is, therefore, important to note that not all of the costs mentioned below are directly attributable to local government, as some of the costs may result from regulatory frameworks or obligations created by the State Government. Those costs which can be directly attributed to local government are those associated with local laws.

The ACG study estimates that the total annual administrative, substantive compliance and delay cost to Victorian businesses resulting from planning and building regulations administered by local government is around \$640 million per year. This result does not include financial costs (such as permit application fees) incurred by business under planning and building regulations administered by local government. The Commission estimates these financial costs to be in the

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<sup>4</sup> The approach to measuring costs (including delay costs) followed by ACG was finalised prior to the development of the Victorian Regulatory Change Measurement Manual (DTF 2009).

order of \$48 million per year, comprising \$25 million per year in planning permit application fees<sup>5</sup> and \$23 million per year in building fees<sup>6</sup>, leading to an overall cost of \$688 million.

A breakdown of these costs and the confidence ranges is shown in tables 3.2 and 3.3.

**Table 3.2 Estimated costs to business of selected areas of regulation administered by local government**

	<i>Administrative and substantive compliance cost (including delay costs) per year (point estimate)</i> \$ million	<i>Administrative and substantive compliance cost (including delay costs) per year (range)</i> \$ million
Planning	491	360–622
Building	149	94–205
Total (excluding financial costs)	640	454–827
Total (including financial costs)	688	502–875

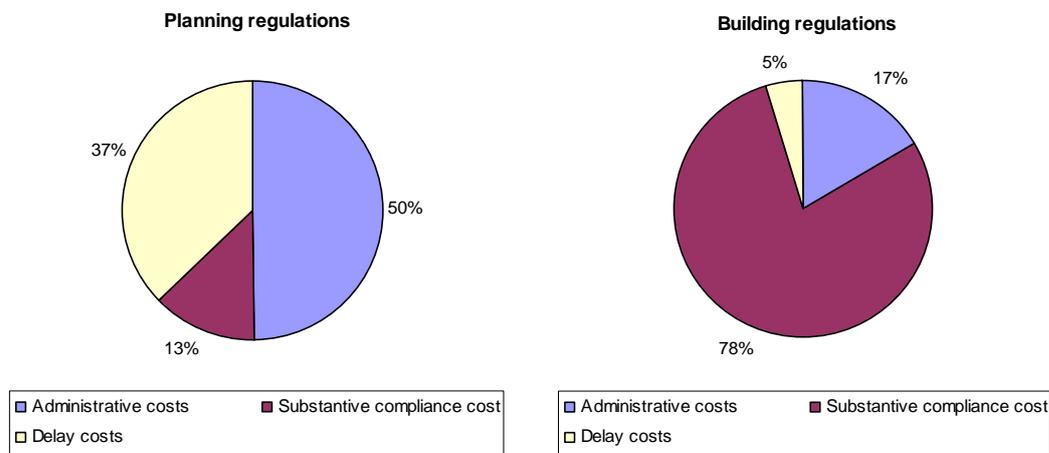
**Table 3.3 Regulatory cost components**

	<i>Administrative cost</i> \$ million	<i>Substantive compliance cost per year</i> \$ million	<i>Delay costs per year</i> \$ million	<i>Total cost per year</i> \$ million
Planning	244	64	183	491
Building	25	117	7	149
Total	269	181	190	640

<sup>5</sup> This figure is taken from the Planning Permit Application Reporting System (DPCD 2010). Only planning permit application fees are included in this total and is therefore likely to represent a conservative estimate of financial costs associated with planning and land-use regulations.

<sup>6</sup> Includes permit lodgement, property information, dispensation lodgement, asset protection, hoarding, and council surveyor fees. Averages for these fees were calculated based on data published across a sample of local government websites (inner Melbourne, outer metropolitan, and regional and rural) and does not include building levies resulting from regulations administered by the State Government.

Figure 3.7 Share of major cost components



Source: ACG 2010

Figure 3.7 shows that the relative contribution of each of the major cost components varies greatly between the two regulatory areas. For instance, substantive compliance costs represent close to 80 per cent of the total cost estimate for building regulations, with administrative costs contributing around 17 per cent. However, the estimate for planning regulations shows that around half of the estimate comprises administrative costs with substantive compliance costs accounting for only 13 per cent of the total. Delay costs are a much larger component of planning costs, which is consistent with the findings of the business perceptions survey, submissions by participants, and other information reviewed by the Commission (chapter 5 and appendix B).

### Planning and land-use regulations

The estimated regulatory cost associated with planning and land-use regulations administered by local government represents around 2.7 per cent of the total value of planning work in Victoria.

As shown in figure 3.7 a large proportion of the regulatory cost estimate for planning and land-use regulations is administrative. Key drivers of this administrative cost relate to:

- preparation and lodgement of permit applications (which includes subdivision applications)—\$178.5 million per year
- appeal against decision to refuse permit—\$32.7 million per year
- amendments to the planning scheme—\$21.3 million per year.

ACG report a high level of confidence<sup>7</sup> in the estimate of administrative costs associated with preparing the permit application and appeals against decisions to refuse permit ( $\pm 5$  per cent), but only a moderate level of confidence in its estimate of costs associated with amendments to the planning scheme ( $\pm 50$  per cent).

Delay costs attributable to the costs to business of waiting (unexpected delays) for permit application decisions (\$123.7 million) and applications to amend planning schemes<sup>8</sup> (\$59.4 million) are estimated to be \$183.1 million per year. While reasonably confident in its estimate of delays associated with permit application decisions ( $\pm 25$  per cent), ACG were only moderately confident regarding its estimate of delays associated with applications to amend planning schemes ( $\pm 50$  per cent).

The Commission notes that the estimate of substantive compliance costs is relatively small (\$64.3 million per year), and that ACG have low confidence in this estimate ( $\pm 75$  per cent). ACG reported that

The degree of confidence was low for the compliance cost estimates as the number of businesses that incurred compliance costs was relatively low (leading us to make assumptions about costs incurred for lower value projects) and the estimates that were provided varied widely.

[and]

... the associated [substantive compliance cost] range is from \$16.1m through to \$112.5m ... In our view, the actual figure would be closer to the upper end of this range. (ACG 2010, p. 15)

In its inquiry into environmental regulation the Commission estimated the cost to Victorian businesses of meeting native vegetation requirements under the Planning and Environment Act 1987 (VCEC 2009a, p. 86). It was found that the main contributor to the estimated total cost were substantive compliance costs (\$41 million per year), with the purchase (or maintenance) of native vegetation offsets being the key driver (\$22.8 million per year). Given that the costs associated with native vegetation offsets represents only one of many possible substantive compliance costs resulting from planning permit conditions, the Commission tends to agree that the actual costs are likely to be found towards the upper end of the range as presented by ACG.

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<sup>7</sup> Confidence bands are subjective assessments made by ACG, and are therefore not statistically based.

<sup>8</sup> Planning approval timeframes and variations in approval timeframes area considered in more detail in chapter 5 and appendix B.

These estimates and underpinning assumptions have been used as a major input into the establishment of net benefits associated with reform options developed in chapters 4 and 5 of this report.

## **Building regulations**

The estimated regulatory cost associated with building regulations administered by local government represents around 0.8 per cent of the total value of building work in Victoria.

Almost 80 per cent of the estimated costs to business of building regulations administered by local government is associated with substantive compliance costs. A large part of these costs are associated with:

- builders refuse requirements — \$44.1 million per year
- restrictions regarding noise and hours of operation — \$25 million per year
- site fencing and identification requirements — \$23 million per year
- asset protection — \$11.4 million per year.

In relation to administrative costs the largest single contributor to this category are those costs incurred by businesses dealing with building inspections by councils (\$11.3 million per year). Of the estimated delay costs, property information requests represent the single largest component accounting for \$6.4 million per year.

While ACG express a high level of confidence in their estimates of administrative costs ( $\pm 5$  per cent), they indicate less confidence in their estimate of compliance costs. This is most evident in their estimate of costs to business of complying with noise and hours of operation requirements where a  $\pm 75$  per cent confidence band has been applied.

Building regulations administered by local government are considered in greater detail in chapter 6.

### **3.5.1 Qualifications to the results**

The estimates of business costs associated with regulations administered by local government are subject to a number of important qualifications. A small number of businesses were surveyed and the costs provided by them were not audited by ACG. In addition, various technical assumptions were made in order to 'scale up' the results for individual businesses to produce state-wide estimates. These features of the study lead to some imprecision in the aggregate estimates which has been reflected in the wide confidence bands that have been assigned to many of the cost components.

To the extent possible, measures have been undertaken to ensure that the cost estimates presented in this draft report meet a commonsense test. This has included discussions with industry experts, government departments and agencies and through the Commission’s own research. Notwithstanding these measures, there are several points that need to be made which may influence the overall usefulness of the estimates for policy formulation.

- Not all of the estimated regulatory costs are directly attributable to local government, as in some cases the regulatory framework administered by local government has been developed by the State Government. Only those costs associated with local laws could be directly attributed to local government.
- The relatively small sample size means that the estimates have a high margin for error. Businesses were chosen from a cross section of each of the sectors impacted by planning and building regulations, however, the use of a larger sample may have produced different results.
- Some businesses found it difficult to identify and estimate the additional costs of complying with regulations over and above what they would have incurred as a result of normal business practice. This was a greater issue for those businesses impacted by planning regulations where compliance costs are surprisingly small relative to administrative costs.

Studies previously undertaken by the Commission and others were also reviewed to test the reasonableness of the ACG estimates (table 3.4). These studies provide some guidance as to the likely magnitude (or range) of the costs of planning and building regulations to business.

**Table 3.4 Other relevant studies**

<i>Source</i>	<i>Relevant findings</i>
Reports for the Australian Housing and Urban Research Institute (AHURI)	A positioning paper for AHURI (Gurran et al. 2008, p. 6) comments that there exists mostly anecdotal information regarding the costs of meeting planning requirements. Estimates of between 6 and 10 per cent of total construction costs are noted. A final report for AHURI (Gurran et al. 2009, p. 11) state that 'the few studies examining the impact of design requirements (above minimum health and safety standards) on construction costs suggests that additional physical controls for subdivision and dwelling construction add around 5–15 per cent to development costs'.

Table 3.4 **Other relevant studies** (continued)

<i>Source</i>	<i>Relevant findings</i>
Residential Development Council (2006, p. 6)	The Residential Development Council of Australia commissioned Urbis JHD to review the current cost structures for the development of new housing. The report estimates that the costs of complying with building regulations (including the cost of hiring consultants) accounted for 5.4 per cent of the total development cost of the medium density development and 6.4 per cent of the cost of the broad hectare development.
Residential Development Council (2007, p. 24)	The report provides a case study of a typical housing estate in Sydney's north-west growth corridor located about 30 kilometres from the city, where a typical new four bedroom house and land package costs \$570 240. The reports states that compliance and red tape costs contribute \$34 000 to the total purchase price, which equates to nearly 6 per cent of the purchase price.
Master Builders Association Victoria (sub. 24, p. 5)	MBAV state that planning delays translate to an additional \$18 000 in costs for an average residential project.
VCEC inquiry into housing regulation (VCEC 2005a, p. 461)	The VCEC estimated that the costs to industry of complying with Victorian building regulation (both State and local government) were at least 4 per cent of the value of housing construction in Victoria.
Building Commission Victoria (BC 2006, p. 5)	The RIS estimated that the costs for building owners of all building industry regulation (including local laws) in Victoria were 2.25 per cent of the cost of a \$300 000 house. For illustrative purposes, applying this percentage to the current total value of building work in Victoria would lead to an estimated cost of \$434 250 000.  The cost estimate provided in the RIS covers a broader range of building regulations than those considered by ACG. This information is useful in establishing a reasonable range in which costs attributable to local government regulation may lie.
Housing Industry Association (HIA 2003) submission to the Productivity Commission inquiry	The Housing Industry Association estimated that selected state regulation and local laws cost \$17 700 for an average new house, which at the time equated to 11 per cent of a \$150 000 house.

### *Information request*

*Are the estimates of the costs to business of complying with planning and land-use and building and construction regulations reasonable? Are there other studies or reviews that the Commission should consider?*

*What other sources of data could the Commission draw upon to further improve the estimates arrived at by ACG?*

## **3.6 Impact of other regulations on business**

The Commission has focused its attention on planning and building regulations administered by local government. It has estimated that the costs of these regulations to business are in the order of \$688 million per year, which are likely to represent a large proportion of the costs imposed by regulations administered at the local government level. The Commission acknowledges that other regulations impose costs on business (as well as on local governments) which have not been specifically captured as part of this study. Some of these costs, estimated as part of recent RISs are highlighted below:

- Councils have a role in administering State public health and well-being regulations (Department of Health 2009). These regulations aim to protect the public from the risk of contracting certain infectious diseases and the RIS estimated that the costs to business were about \$15.7 million per year. For those parts of the regulations that impact on business the costs to local government were estimated to be \$7.6 million per year. While the RIS was not able to quantify the benefits of the selected regulations, a qualitative assessment was undertaken to ensure that the preferred option yielded the greatest net benefit.
- *Environment protection (residential noise) regulations 2008* prescribe items and the times during which noise resulting from their use is deemed to be unreasonable. Local government play a key role in the implementation and enforcement of the regulations. From the RIS (EPA 2008) the Commission estimates that the costs to business associated with restrictions on hours of operation are in the range of \$16–39 million over 10 years.
- Tobacco regulations aim to reduce tobacco related harm through restricting certain types of promotion and providing consumers with health related information. Local government are responsible for education and enforcement activities under the regulations. As discussed in the RIS (Department of Health 2007) the benefits include improved health and quality of life to the Victorian community and reduced mortality and morbidity levels associated with smoking. The RIS estimated the direct cost to business to be around \$3 million over a 10 year period or around \$30 per business per year.

- Residential tenancies (caravan parks and movable dwellings registration and standards regulations) — the (proposed) regulations focus on protecting the health and safety of caravan park users. Local government play a central role in administering and enforcing the regulations. The costs to business of the preferred option highlighted in the RIS (DPCD 2010l) are \$4.6 million over the life of the regulations (10 years).

Other inquiries undertaken by the Commission have also highlighted the costs to business of specific regulations where local government play a key part in their implementation, for example:

- Inquiry into food regulation (VCEC 2007b). Councils play a key role in administering the *Food Act 1984* (Vic.). The inquiry found that for the business sector as a whole the ongoing costs of food regulation in Victoria was estimated to be \$138 million per year in 2007, comprising mainly administrative costs.
- Inquiry into Victorian environmental regulation (VCEC 2009a). The inquiry estimated the costs associated with several areas of environmental regulation, including regulations applying to the removal of native vegetation where local government plays a key role. The inquiry noted that regulation to limit clearing is designed to ensure that landholders consider a range of public benefits (such as protecting biodiversity, reducing risks of land degradation and salinity, and improving water quality in catchments) when deciding how to manage their native vegetation. Native vegetation requirements imposed under the Planning and Environment Act were estimated to cost business around \$41 million per year to comply (which included the purchase of native vegetation offsets).

The review of recent RISs highlights that the magnitude of costs incurred by business are relatively small in comparison to the estimates provided earlier for planning and land use regulations, and building regulations. With the exception of food safety regulations and native vegetation regulations, it may be reasonable to assume that the \$688 million per year reflects the majority of costs incurred by business in complying with regulations administered by local government. This cost estimate needs to be considered against the range of benefits that the regulations seek to achieve. However, as discussed earlier, the inclusion of quantitative benefits as part of the impact assessment is constrained by limited available data.

### **3.7 Conclusion**

This chapter has considered the impact of local government regulations on business. It has done this through analysing the results of a business perception survey which highlighted that councils' administration of planning and building regulations are having the greatest impact on business. The regulatory burden of these regulations was estimated to be between \$502 million and \$875 million per year or around 0.2 to 0.3 per cent of Victorian gross state product. The paucity of information on the quantified benefits of planning and building regulations (administered by local government) has limited the capacity of the Commission to fully assess the impact that key regulations administered by local government are having on business. This is consistent with findings in previous Commission inquires and underscores the need for rigorous ongoing performance reporting and post implementation evaluation.



## 4 Planning regulation: The planning framework

### 4.1 Introduction

Victoria is facing a number of major economic, environmental and social challenges that are placing significant pressures on the State's planning architecture, both in Melbourne and throughout Victoria.

Provincial Victoria is at the sharp end of the major challenges facing the whole state over the next ten years. Climate change, an ageing population and workforce, the world economy and population growth will impact on where people live, what work they do, what is produced and how it is distributed. (RDV 2009, p. 6)

The response of Victoria's planning system to these challenges will, in turn, have an effect on economic development, population growth, the natural environment, housing affordability, transport congestion and liveability generally. In this context, councils' administration of land use planning regulations has been highlighted as a key area of regulation impacting on business, the community more broadly, and also as the largest contributor to councils' total regulatory costs (chapters 3 and 9).

A number of indicators help to evaluate the performance of Victoria's planning system. The *Local Government Victoria Community Satisfaction Survey 2009* shows that planning is one of the highest areas of dissatisfaction (LGV 2009a), and has 'the strongest growth in dissatisfaction over the past five years' across the various categories (LGV 2009b, p. 23). The Commission's survey of business perceptions indicated that delays in the administration of planning regulations are a major concern for business (chapter 3). Businesses are more likely to report problems with planning regulation than other areas of regulation administered by councils, even though councils are very unlikely to reject planning permit applications (around 4 per cent of all applications are rejected) (appendix B). Estimates of the costs to business of planning regulation, though indicative, also highlight its significant impact and the potential gains from reducing costs (chapter 3).

The Commission considers that improving the efficiency of processes under the existing framework is central to this inquiry, and could produce significant cost savings to business of between about \$20 and \$40 million per year (chapter 5). However, it is clear to the Commission that addressing issues within the broader planning framework will help to address a number of the significant problems that arise in the planning process.

## 4.2 The Commission's approach

The terms of reference require the Commission to focus on the councils' administration of regulation rather than the legislative frameworks.<sup>1</sup> In relation to planning regulation, one of the main areas of regulation affecting Victorian businesses (chapter 3), it was clear that it is not possible to look at opportunities for streamlining and harmonising the administration of planning regulation without looking at some aspects of the broader planning framework. Councils and other stakeholders recognised that many of the issues raised about planning regulation reflected aspects of the regulatory framework for planning as well as administration by councils. According to Brimbank City Council, for example:

In regard to delays in the planning and approvals process ... Council submits that recognition should be made that local government administers a planning system under State legislation and regulation. Improvements to the efficiency of the planning and approvals process will therefore rely on improvements to State legislation and regulation. (sub. 6, p. 2)

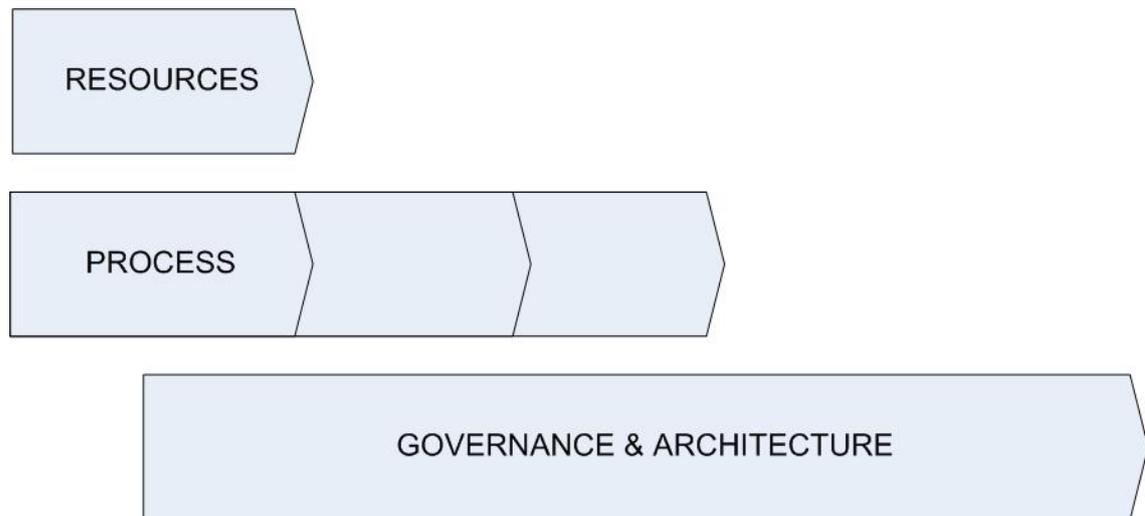
The Commission has formed the view, based on its accumulated experience over many inquiries into specific regulatory matters, that an effective regulatory system is the product of the resources available to regulators, the processes they administer, and the governance frameworks and institutional architecture within which regulators operate (figure 4.1). To make enduring improvements to the administration of regulations, it may be necessary to address all three elements. In the Commission's experience, while the gains from reforms to the governance frameworks and institutional architecture are often not realised in the short term, this is often where the biggest long-term gains can be made.

Appropriate governance structures play an important role in ensuring that the benefits of changes to councils' resources and processes are fully achieved. The Commission has focused in chapter 5 on specific facets of the planning framework, which broadly consist of incentive arrangements, council processes for decision making and councils' resources. The Commission has, in the draft report, limited the scope of its draft recommendations to these issues. The remainder of this chapter looks at how concerns about aspects of the governance and institutional architecture are contributing to the concerns about councils' administration of planning regulation.

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<sup>1</sup> The terms of reference state that '[t]he emphasis in the inquiry should be on administration of regulations by local government rather than on a direct evaluation of legislative frameworks themselves.'

Figure 4.1 Key elements of effective regulatory systems



Source: VCEC analysis

### 4.3 Issues with the governance and institutional frameworks

A number of specific aspects of the governance and institutional architecture can affect local government administration of planning regulation. These include:

- the alignment of State and local government objectives for planning regulation
- the complexity and quality of local government strategic planning
- the institutional arrangements for giving effect to State and local government objectives for planning regulation.

#### 4.3.1 Better aligning State and local government objectives in planning

A number of participants noted that the objectives of State and local governments in relation to planning regulation can often diverge, leading to significant tensions over planning regulation. A key area of divergence, for example, relates to views about the relative priority to be accorded to protecting neighbourhood character and encouraging more intensive residential development, especially in the established areas of Melbourne and the regional centres. Another source of tension relates to coordination of land-use and transport planning.

Key stakeholders noted the tensions that can arise between local and State objectives:

Tensions remain with regard to the basis upon which matters are deemed to be of state significance and reasons for Ministerial or other intervention leading to significant tension in the relationship between state and local government and more uncertainty as state and local interests are ‘played off’. (MAV 2009c, p. 7)

When inquiries are made as to why [an application had been rejected] ... especially in light of compliance with local planning frameworks and/or State planning aspirations, local political pressures are regularly cited. (Master Builders Association Victoria, sub. 24, p. 8)

... the council can and does tailor its administration of state regulation and development of further local regulation to its local community and their needs and preferences. (City of Port Phillip, sub. 14, p. 5)

The tensions between State and local objectives for planning regulation were also identified and discussed in the Commission’s report on *A State of liveability: An inquiry into enhancing Victoria’s liveability* (VCEC 2008a).

The tension between State and local government objectives for planning regulation stems, in part, from local government having clear obligations under the *Local Government Act 1989 (Vic)* to reflect the views of their communities, as well as the reality of their political imperative to have regard to the views of those who elect them.<sup>2</sup>

The tensions also stem from differences in views about how the administration of planning regulation should be governed. The Commission’s Liveability report noted that applying the principle of subsidiarity to planning is particularly challenging. In essence, the subsidiarity principle holds that a central authority should only perform those tasks that cannot be performed effectively at a more local level (VCEC 2008a, p. 19). The Government agreed that the drivers of liveability can be strengthened by ‘... governance architecture, which applies the principle of subsidiarity and ensures that the development and implementation of planning and other policies are as well integrated as possible’ (Government of Victoria 2009b, p. 4).

Given Victoria’s future major challenges (box 4.1), there is a debate about whether the State Government should be taking on more of a role in administering planning regulation. The Premier, for example, recently stated that planning regulation has undergone:

... a gradual rebalancing between the two major partners in planning—State and local government. Provided the capacity is there, I believe the administrative decisions are best taken by the level of government closest to the coalface.

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<sup>2</sup> Section 3C1 of the Local Government Act provides that ‘The primary objective of a Council is to endeavour to achieve the best outcomes for the local community having regard to the long term and cumulative effects of decisions.’

However, the complexities of some planning decisions needed to manage Melbourne's population challenge have meant some decisions have had to be made at a State rather than a local government level. (Brumby 2010, p.6)

This leaves open the question of the appropriate dividing line between the State Government and local government, which is discussed later in this chapter.

#### Box 4.1 External changes influencing planning

The discussion paper on *Modernising Victoria's Planning System* noted that planning in Victoria must confront a number of key challenges:

- Changes in the local and global economy have seen, up to 2008, wide prosperity in Australia, with increased demand for housing, for consumer goods, and for recreational opportunities.
- These changes have been associated with structural changes in the economy such as a decline in traditional manufacturing industries, growth of employment in emerging sectors of the economy, changing requirements for workplace buildings with different location and land requirements and changing personal and freight movement patterns at State and Metropolitan levels.
- Melbourne's increasing population combined with escalation of real property prices (relative to income) have seen significant numbers of people having difficulty accessing housing which is affordable and within reasonable transport distance of work opportunities.
- Melbourne's population growth has increased demand for open space and recreational facilities and for transport infrastructure.
- Population, transport and housing pressures all have implications for liveability.
- Prolonged drought has long been a feature of Victoria's weather patterns, but indications are that climate change may be changing rainfall patterns on a long-term basis. Protecting land in open catchments from inappropriate development which may compromise harvested water quantity and quality and managing urban areas to minimise water demands are but two issues arising from climate change.
- The combination of efforts to minimise Australia's contribution to climate change and to mitigate the environmental social and economic effects of inevitable climate change raise emerging planning issues, such as defining appropriate locations for future settlement.
- The need to develop movement systems and urban forms that will work in a period of increasing energy costs and with minimising atmospheric carbon discharges pose new challenges to integrating land and transport planning.
- New commercial, franchise and partnership arrangements for delivering what used to be seen as public utilities raise new land management and planning as well as economic challenges.
- Economic issues associated with the 2009 global financial climate set their own challenges to planning, but in any case demonstrate the need for the planning system to be resilient to fluctuations in the economy.

Source: DPCD 2009m, p. 12

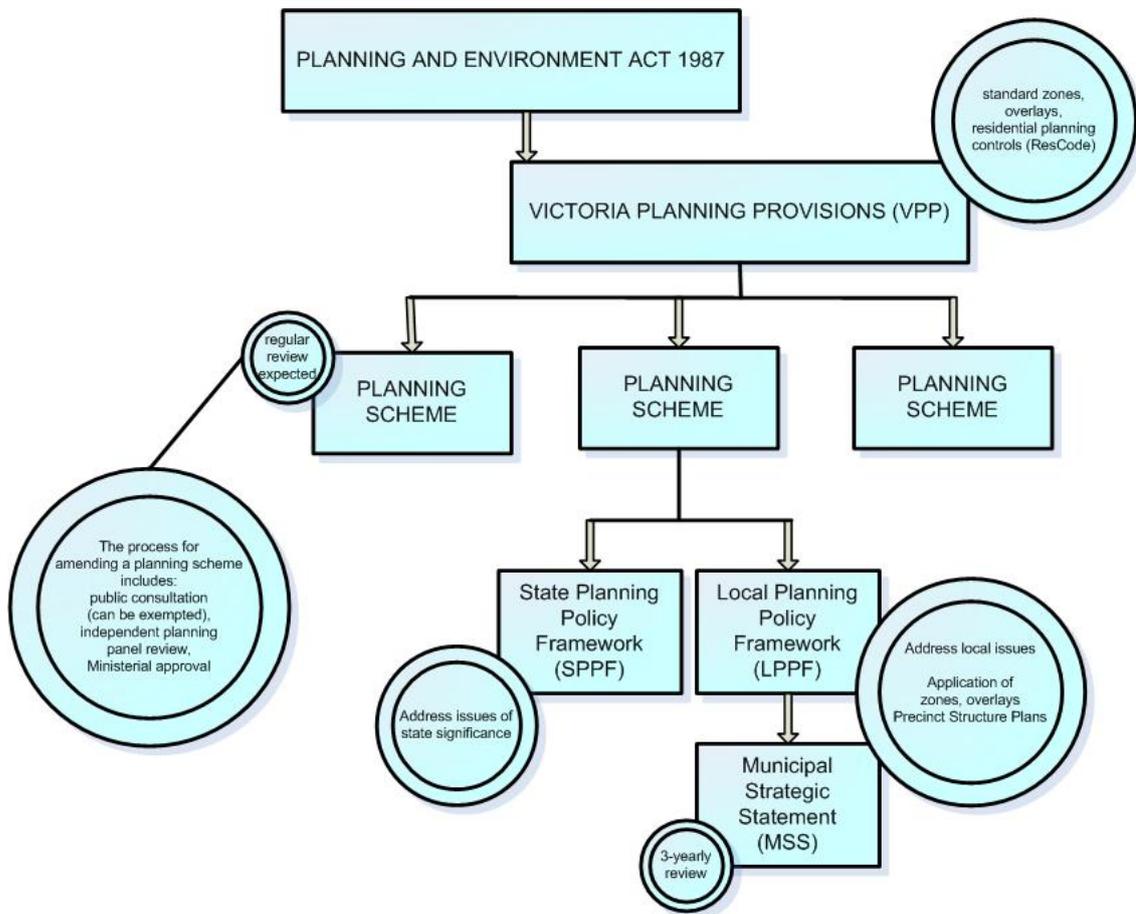
### 4.3.2 Strategic planning

Shortfalls in managing the differing objectives of State and local governments adequately at an early stage can result in the need to resolve significant policy issues on a case-by-case basis through the planning permit process. Not surprisingly, this can result in uncertainty, inconsistency, lengthy time delays and high costs, both to planning applicants and councils.

In principle, the divergent interests of State and local governments should be resolved through the strategic land-use planning process. In a planning regulation context, strategic planning is often understood to mean the process of developing and articulating controls on the use and development of land, which are then incorporated into planning schemes. The outputs of strategic planning include Municipal Strategic Statements and application of zones and overlays to specific areas of the municipality. Councils can also develop precinct structure plans (PSPs) that specify a variety of controls on land use in all or part of their municipalities.

Every municipality has its own planning scheme (figure 4.2). A planning scheme contains statements of State and local planning objectives, and describes the zones, overlays and other controls that dictate how areas of land can be used and developed. The planning scheme will indicate if a planning permit is required to change the use of land, or to construct a building or make other changes to the land, as well as uses that are permitted without a permit, or prohibited. The State Planning Policy Framework (SPPF) comprises general principles for land use and development in Victoria and specific policies dealing with settlement, environment, housing, economic development, infrastructure, and particular uses and development. The Local Planning Policy Framework sets a local and regional strategic policy context for a municipality. It comprises the Municipal Strategic Statement and specific local planning policies (DPCD 2010n, p. 7). The council must take both the State and local planning policies into account in planning decisions.

Figure 4.2 The planning framework



Source: VCEC analysis of planning framework

In principle, the strategic planning process should deal with complexities by resolving policy trade-offs at the front end, thereby avoiding much of the need for detailed case-by-case assessments of the planning framework. It is relevant that in its inquiry into Victorian environmental regulation, the Commission advocated that strategic planning be undertaken across the State to identify important vegetation assets and clearly identify those areas where the clearing of native vegetation is prohibited, and the areas where such clearing will be allowed subject to the meeting of permit conditions, in advance of potential land-use changes (VCEC 2009a, pp. 149-150). This approach is applicable to other issues in land-use planning.

Strategic planning is also vital to ensuring that land-use planning decisions are informed by an understanding of infrastructure and other potential constraints on development, particularly transport infrastructure and community services, such as schools and hospitals. Councils do not have responsibility for providing much of the social and economic infrastructure that is required to service major

new developments and, therefore, it is vital that strategic planning is coordinated with infrastructure planning by State agencies and other groups.

Previous reviews have raised concerns about the clarity and usefulness of strategic planning by State and local governments. These have led to calls for the State Government to clarify its policy objectives and assist councils to give effect to these objectives. The Ministerial Working Group on Local Planning Policy, for example, argued that councils need assistance from the State Government to address ‘recurrent strategic planning challenges ... such as urban consolidation and rural subdivision’ (MWGLPP 2007, p. 6). According to the Working Group, the characteristics of the State component of planning schemes (the State Planning Policy Framework) make it difficult for local government to develop their own local planning policies.

A key issue identified in this inquiry is the capacity of some councils to undertake strategic planning to a standard that will deliver the necessary outcomes. Councils face a number of challenges in this respect, which they cannot deal with in isolation:

- The State policy and priority of objectives are often unclear, and overly complex. This adds to the complexity and cost of administering the planning system for councils and business. The current SPPF refers to 73 different objectives that planning officers may be required to consider,<sup>3</sup> with no guidance as to the weighting of objectives, except that the result should be ‘net community benefit’ and ‘sustainable development’.
- The land-use planning framework is becoming overly complex, with more controls being added to the Victorian Planning Provisions, and an obligation to consider more policy issues in the land-use planning process. Frankston City Council (sub. 25) noted the ‘continual shift’ towards the insertion of additional controls into the Victorian Planning Provisions, such as Best Practice Water Quality Offsets and the need for Cultural Heritage Management Plans under the provisions of the *Aboriginal Heritage Act 2006*. It is now common for planning schemes to exceed 700 pages in length. This is about 40 per cent longer than the average length reported in a study by Buxton et al (2003, appendix 4).
- Councils may be required to deal with complex planning issues where they have limited expertise and funding. A number of councils have started to grapple with the planning challenges arising from climate change adaptation. Moyne Shire (sub. 20), for example, noted that while applications for large wind farms (with output above 30 megawatts per year) were a State

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<sup>3</sup> This is based on counting the elements to be considered under the identified ‘objective/s’ in the State Planning Policy Framework.

responsibility, council was still heavily involved in the pre-lodgement of applications, and the monitoring and enforcement of permit conditions.

- There are also State-imposed caps on land-use planning fees, which when combined with the limited revenue bases available to a number of councils, make it more difficult for councils to deal efficiently and effectively with increasingly complex land-use planning regulations.

### 4.3.3 Institutional arrangements

While the process of undertaking strategic planning can help to resolve the differing views of State and local governments, and achieve better coordination between councils and infrastructure and service providers, success depends on having clear lines of responsibility and accountability, effective coordination between State and local governments, and transparency about decision making.

Local governments are primarily responsible for the preparation and administration of planning schemes, while the State Government, through its crucial roles in approving planning scheme amendments and intervening in planning processes through the exercise of the Ministerial ‘call-in’ function also plays a significant role. In practice, this means that State and local governments should work together to ensure that planning schemes deliver the intended outcomes. Other key players include referral bodies (such as VicRoads, and the Department of Sustainability and Environment), and the Victorian Civil and Administrative Tribunal (which can consider disputes relating to planning permit decisions).<sup>4</sup>

The Commission’s liveability report argued that transparency and performance monitoring are vital to clarifying the expectations of governments and improving the planning interface between State and local governments. One aspect of this issue is Ministerial ‘call-ins’. ‘Call-ins’ are a subject of comment on almost a weekly basis in Melbourne newspapers, reflecting at the very least, a lack of community understanding of the circumstances in which this power can be used. The liveability report commented that:

From discussions with stakeholders, and through examination of Ministerial decisions on interventions, the Commission considers that reasons cited for calling in a decision often provide limited insight into specific actions that local governments can implement to improve their processes – the reasons cited are often couched in broad terms with reference to policy statements and election commitments. The Commission has been unable to gauge the extent to which the advice prepared for the Minister provides enough information for local

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<sup>4</sup> The responsibilities of the key players in planning regulation in Victoria are discussed in more detail in the Commission’s liveability report (VCEC 2008, pp. 133-139).

governments to implement change and suggests that more information is required to address this issue. (VCEC 2008a, p. 149)

A further issue raised in submissions, discussions with stakeholder and previous reviews of planning regulation is the extent to which land use planning and transport planning are well integrated. Previous Commission inquiries, for example, on transport congestion (VCEC 2006b) and liveability (VCEC 2008a) identified concerns about the integration of land use and transport planning in Victoria. The Commission's report on liveability, for example, stated that:

Stakeholder discussions and inquiry submissions suggested that there is concern with the level of integration of land use and transport planning occurring in Victoria. It was suggested that greater coordination of transport and land use planning would help ensure governments were better able to meet challenges in a proactive and strategic manner, and introduce improvements in transport and land use which maximise social and economic benefits. (VCEC 2008a, p. 139)

## **4.4 Addressing the governance and institutional frameworks**

The State Government has clearly recognised the issues identified in the previous section and has put in place a number of actions to address them. Actions include reviewing and proposing amendments to the Planning and Environment Act, providing support for strategic planning by councils, and by establishing institutional arrangements to promote better coordinated decisions. As discussed below, there are remaining questions about whether these changes and initiatives, important as they are, can deliver all of the intended benefits.

### **4.4.1 Changes to planning legislation**

The State Government has proposed a number of changes to the planning system (as set out in a draft Bill to amend the Planning and Environment Act) that are intended to streamline planning processes and help improve the administration of planning regulation by councils. The proposed changes to legislative processes for amending planning schemes, assessing planning permits, and assessing state-significant projects are intended, primarily, to streamline processes, and provide greater clarity around Ministerial 'call-ins' and the definition of state-significant projects, a matter previously considered by the Commission in its environmental inquiry (VCEC 2009a). The Commission supports the intent of the proposed amendments, which address several problem areas for State and local government co-operation in planning. The proposed changes are summarised in appendix B.

## 4.4.2 Improving strategic planning

State and local governments have also been progressively responding to the need for a more comprehensive strategic planning framework for Victoria by:

- reviewing the Planning and Environment Act
- developing policy guidance such as Melbourne 2030 (Government of Victoria 2003), Planning for all of Melbourne (Government of Victoria 2008), and Melbourne @ 5 million (Government of Victoria 2008), and the Victorian Coastal Strategy (VCC 2008)
- developing arrangements and providing resources to facilitate coordinated regional strategic planning in areas outside Melbourne
- reviewing key elements of State and local policy frameworks such as residential zones, car parking and heritage controls.

Some key initiatives are discussed below.<sup>5</sup>

### Reviewing the State Planning Policy Framework

The Commission has previously recommended that the SPPF be the subject of a ten-yearly review, with more frequent reviews where warranted (VCEC 2005b). The Government supported this recommendation, stating:

Where the Government develops new policy that requires expression in the planning system or believes that a component of the Framework becomes outdated between the ten-year review periods, the Department of Sustainability and Environment will undertake a review of the relevant component and recommend changes to Government. A broader review will be undertaken on a ten-year basis to ensure the State Planning Policy Framework operates effectively within the planning system and with planning schemes. (Government of Victoria 2005a, p. 3)

The SPPF is currently being revised, and a draft has been released for public consultation (available on the DPCD website). The draft SPPF is a policy neutral translation of existing policies, removing repetition and unnecessary information and has been modernised and restructured to accommodate new and emerging state policies, improve policy expression and help strengthen its links with the Local Planning Policy Framework (DPCD 2010m).

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<sup>5</sup> A number of the planning initiatives for Melbourne (such as Melbourne 2030 and Melbourne@5 million) have been extensively discussed in other reports, and are not covered in this report.

## Development of a regional planning blueprint

The State Government has signalled that it intends to provide more extensive support for strategic planning in regional Victoria in the future. According to a recent housing strategy, the Government is developing plans for the growth of large regional cities, particularly Geelong, Ballarat and Bendigo (Government of Victoria 2010c). The Government is also supporting the development of a Regional Strategic Planning Initiative, to develop a state-wide blueprint and integrated regional plans for growth and change in provincial Victoria (RDV 2009, p. 4). A discussion paper on directions for provincial Victoria sets out the Government's intended direction for regional strategic planning:

In collaboration with its partners, the Government will support more inclusive approaches to regional development. Regional strategic planning involves joining up processes across government, partnering with industries and communities, and giving local leaders a greater role in planning and priority setting. (RDV 2009, p. 15)

The discussion paper was developed by a Ministerial Taskforce for Regional Planning comprises six Ministers, representing a wide range of portfolios, and reports to the Premier. The Government's approach to developing these regional strategies indicates that a co-ordinated approach is being taken, involving State and local governments, and the various arms of the State Government that are responsible for delivery of infrastructure and services to communities.

The Commission supports the re-examination of institutional and funding support structures for undertaking regionally-based strategic planning in major regional centres, particularly as Melbourne's growing population and pressures on infrastructure and land prices encourage people and businesses to look at locations in adjacent areas. The Commission's report on liveability supported the development and publication of a broad long term framework for the planning and development of provincial Victoria and for various regional 'clusters' of councils:

The challenge of ensuring good planning decisions for the Melbourne metropolitan region applies in a similar way to variously defined regions in provincial Victoria. The provincial challenge tends mainly to apply to clusters of local governments surrounding the larger regional cities. Good planning decisions for these 'cluster' regions require both:

- collaboration among the local governments concerned to ensure that decisions of one local government, likely the central city, have proper regard to the interest of the wider provincial community
- collaboration with the State Government to ensure that the interests of the wider community are taken into account where a matter is of regional or state significance, that is, having regard for the regional community and the wider state community. (VCEC 2008a, p. 145)

## Guiding development in urban areas

In an effort to provide greater certainty for development some councils are leading by developing clear policies that attempt to reconcile broad state objectives around facilitating urban consolidation with local issues of protecting neighbourhood character. For example, the Glen Eira City Council has developed a policy framework, which is incorporated in its planning scheme, that identifies areas where ‘housing diversity’ should be encouraged (housing diversity areas) and areas where the existing low intensity, low-rise character should be protected and enhanced (minimal change areas). The clear intention behind the Glen Eira approach is to provide greater certainty to residents and developers by identifying areas where higher-density developments will or will not be permitted.

The Melbourne City Council’s current review of its planning scheme is considering ways of increasing development certainty within the municipality and improving the coordination between land use and transport planning. The process has involved detailed discussions with the State Government and the community. The publicly available details are set out in box 4.2.

### **Box 4.2 Melbourne City Council: Guiding principles for growth**

In the context of a continually growing and changing municipality, the City of Melbourne is seeking ways to enhance its liveability, sustainability and economic vitality, while protecting its valued heritage, culture and assets. A key part of the process of planning for Melbourne’s future growth is through reviews of the City’s Municipal Strategic Statement and planning scheme.

Community consultation has been a major focus of developing its new Municipal Strategic Statement and planning scheme. The City of Melbourne has run a number of ‘Future Melbourne’ forums with its diverse community, as well as using a web-based forum (wiki) to allow people to contribute on what they view as important.

The City of Melbourne has access to good data on its municipality, because it undertakes its own research on demographics and its own census. This helps them to plan more effectively as to the volume and type of growth needed in its strategic plan.

The team tasked with developing the new planning scheme for Melbourne has been working closely with State Government departments, in order to ensure a close relationship between the key growth areas and the availability of new and existing infrastructure, particularly transport.

The new planning scheme will set out key precincts, serviced by public transport, with detailed depictions of where high growth will be accommodated. This helps to provide certainty to developers seeking where to invest.

*Source:* City of Melbourne 2010b

The development of strategic guidance by councils is occurring in advance of several related State Government initiatives. The Government's proposed new residential zones (box 4.3), may assist councils to improve the strategic guidance for business about where more intensive forms of development will be encouraged. These new zones are intended to 'assist councils in planning for housing growth and give communities greater certainty about the type of development they can expect in their neighbourhoods' (DPCD 2009g, p. 1). If implemented, the introduction of new residential zones offers the potential for improved certainty, but the overall outcome will still depend on their implementation by councils (including, for example, identification by councils of locations where the new zones will apply, and the processes to be followed in considering permit applications).

The Government also recently announced that it intends to establish a new urban development zone to apply to brownfield sites (former industrial sites and underutilised urban land). According to the Government:

This zone will be available for large redevelopment sites and precincts in existing urban areas. It will operate in a similar way to the urban growth zone in Melbourne's fringe by clearly designating sites suitable for redevelopment and accelerating development in existing urban areas. (Government of Victoria 2010a, p. 10)

#### **Box 4.3 New residential zones for Melbourne**

The State Government is contemplating reforms to residential zoning in Victoria. The changes are outlined in a consultation document *The new residential zones for Victoria* (DPCD 2009g). The consultation draft proposes to introduce three new types of residential zones:

- (1) The Substantial Change Zone is to apply to neighbourhoods identified as appropriate areas for housing growth because of access to community services, public transport or employment. As such, a mix of housing types, including medium and high density housing, is to be permitted.
- (2) The Incremental Change Zone is designed to allow medium density housing consistent with the character of the neighbourhoods.
- (3) The Limited Change Zone applies to neighbourhoods where opportunity for change is restricted, due to a variety of factors such as heritage or environmental concerns. Limited change zones will seek to preserve the specific characteristics of a neighbourhood through greater control over housing (such as minimum lot size for subdivision and the maximum number of dwellings permitted on a property).

(continued next page)

### Box 4.3 **New residential zones for Melbourne** (continued)

According to the consultation draft, each of these new zones is to be tailored for a specific planning purpose and prescribes the type of housing and/or development permitted in an area. It appears that the new zones will contain some default provisions but allow council variations. Each new zone will specify a maximum building height and councils retain the discretion to vary the default height limit if appropriate for particular neighbourhoods. Also, councils will be able to apply different housing development requirements to different areas within a neighbourhood, to reflect neighbourhood character and design outcomes. Councils will also be able to protect neighbourhood character by applying development requirements as set out in the local schedule to the relevant zone. For example: for an area categorised as a substantial change zone, a council can increase the maximum height limit of 4 storeys, where appropriate. Councils therefore retain significant control over housing decisions within their municipalities.

Finally, the new zones will protect existing notice and appeal provisions unless councils decide to reduce or waive requirements, having consulted with the local community. Furthermore councils will be empowered to set planning permit application notice, objections and appeal provisions for new housing developments, in partnership with the local community and DPCD.

The independent Advisory Committee has conducted public hearings, considered submissions and has finalised its report on the proposed residential zones. Its recommendations are currently being considered by Government.

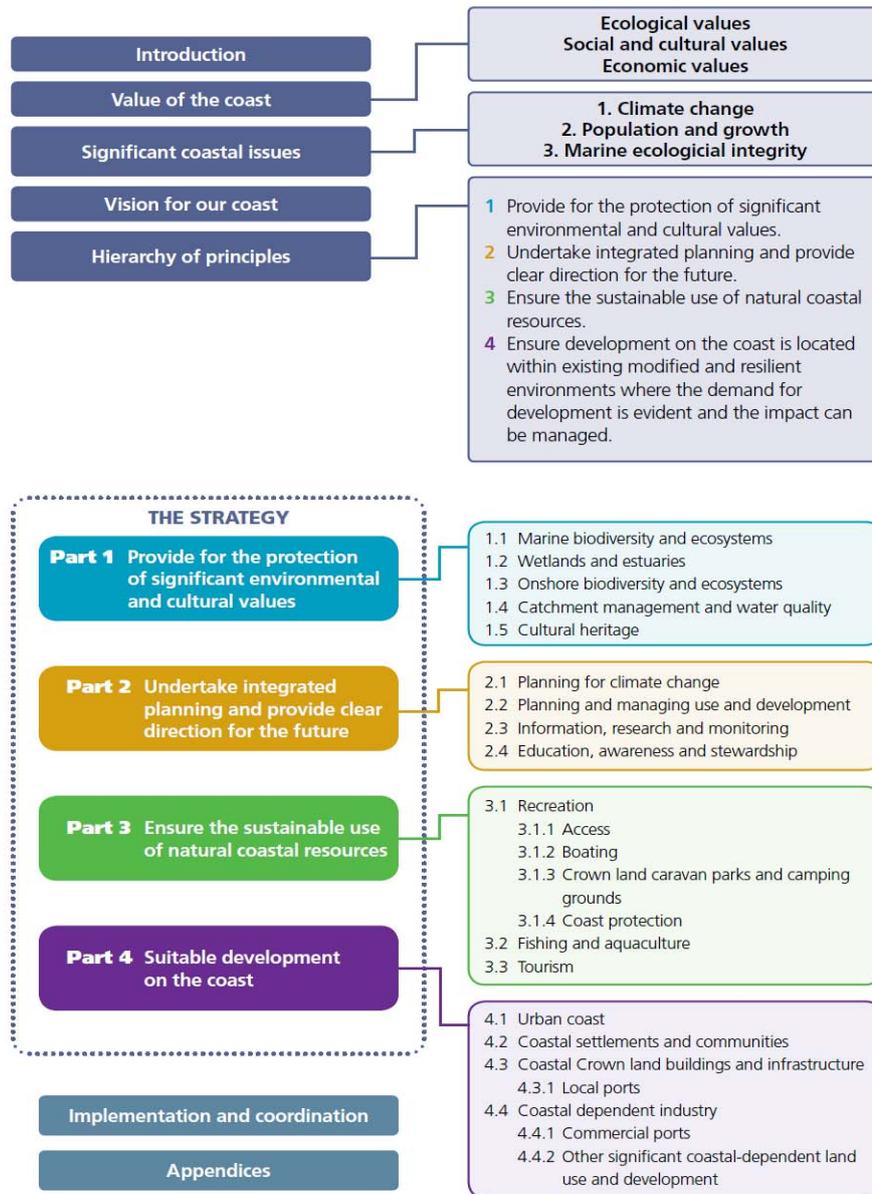
*Source:* DPCD 2009b.

### **Responding to climate change challenges**

The development of the Victorian Coastal Strategy (VCC 2008) provides a further example of how the State Government can assist councils to respond to major challenges facing Victoria through providing clear policy guidance.

The Strategy provides information to councils on the complex issues of how to deal with rising sea levels in the context of significant population growth pressures along the coast. The Strategy provides a combination of specific guidance on the rise in sea levels that should be planned for (0.8 metres by 2100), and the principles that should guide future coastal development (figure 4.3).

Figure 4.3 Victorian Coastal Strategy



Source: VCC 2008

### 4.4.3 Changes to institutional arrangements

In an effort to improve clarity about roles and responsibilities and to promote improved coordination between State and local governments on planning issues, the State Government has introduced several changes to the institutional arrangements governing planning.

Key changes include establishing the Growth Areas Authority (GAA) to facilitate strategic planning and more efficient approval processes in the growth areas of Melbourne (box 4.4).

#### **Box 4.4 Strategic planning for a growing Victoria**

The Growth Areas Authority (GAA) is an independent statutory body with a broad, facilitative role to help create greater certainty, faster decisions and better coordination for all parties involved in the planning and development of Melbourne's growth areas. It was established in 2006 as part of the Victorian Government's plan for outer urban development, and reports directly to the Minister for Planning.

The GAA works in partnership with local councils, developers and State departments and agencies with an aim of developing socially, environmentally and economically sustainable communities in growth areas; ensuring economic, employment and housing priorities are achieved in growth areas; and improving the operation of regulatory and administrative processes to increase efficiency.

The GAA is primarily funded through the State Government budget, but has also received Commonwealth Government funding. The proposed Growth Areas Infrastructure Contribution, which was to levy a charge on the purchaser of land in growth areas, was expected to contribute to the ongoing funding of the GAA. The legislation for the proposed charge was defeated in the upper house in February 2010.

In its inquiry into environmental regulation the Commission noted that the GAA's contribution, including the development of precinct plans, grassland reserves and strategic assessments had the potential to reduce uncertainty, timeframes and costs for business by:

- identifying important native vegetation assets before land is rezoned for development or purchased by property developers
- reducing administrative burdens and delays by removing the need for individual project assessments for every action under the plan or assessment
- facilitating regulatory decision-making because a key step in the assessment process (deciding whether clearing can be avoided or minimised) is made at the front end rather than for individual clearing applications
- providing a source of offsets for landholders that are permitted to clear vegetation in accordance with PSPs.

The Commission recommended that the Government should deliver planning instruments for managing native vegetation outside of the Melbourne metropolitan area, and the Government supported this in principle, stating:

Following the example of the approach recently adopted for expansion of Melbourne's urban growth boundary, circumstances may arise outside metropolitan Melbourne where a collaborative approach with the Commonwealth Government will be useful to enable both matters of national environmental significance and State interest to be jointly addressed. (Government of Victoria 2010a, p. 11)

*Source:* Growth Areas Authority 2009a; Growth Areas Authority 2009b; VCEC 2009a; Government of Victoria 2010a.

The Government is also creating a framework to establish Development Assessment Committees (DACs). The DACs will be made up of two standing State Government nominees and two local government nominees with an independent and mutually agreed chair (DPCD 2008a). The DACs will make planning permit decisions in relation to areas and matters of metropolitan significance, including Melbourne's 26 Principal Activity Centres. By doing this, State and local governments will work together in making significant decisions which have shared state-local interest and have an impact on the wider region (Government of Victoria 2008c). However, these have not yet been established.

Another change includes the role of VicUrban, the State Government's sustainable urban development agency, which has expanded its operations over the last three years to include medium density infill and developments in regional Victoria (VicUrban 2010). The Government's recent integrated housing strategy announced that:

VicUrban's mandate will be refocused towards supporting more housing in established areas, particularly along major public transport routes, in activity centres in metropolitan Melbourne and in large regional centres. These new residential developments will demonstrate high quality, affordable and sustainable housing. VicUrban will be given a mandate to:

- assemble, consolidate and prepare land in existing urban areas for higher density housing development
- encourage a diverse range of housing types, including smaller dwellings
- supply competitively priced lots to the housing construction industry
- work in partnership with housing providers to develop more inclusive residential estates
- encourage the delivery of affordable, accessible and sustainable high density housing. (Government of Victoria 2010a, p. 9)

A prerequisite for more effective collaboration and consistent administration of planning regulation by State and local governments is that governments have access to sufficient skills and resources. A recurring theme in previous Commission inquiries is that the administration of regulation has been adversely affected as a result of a failure to ensure that governments (especially local governments) have sufficient financial resources, skills and training (VCEC 2008a, p. 148). The importance of improving the capacity of local government is discussed in chapter 5.

## **Will the recent and proposed reforms address the issues?**

The Commission considers that while the various reform measures discussed above will assist in addressing concerns about the uncertainty, time and costs of planning decision-making (to business and councils), key issues surrounding the framework do not appear to have been resolved. The impact of the strategic planning reforms to processes and guidance will rely on implementation by councils. This in turn will depend on the capabilities of councils, the resources available to them and the alignment of their incentives with the State. For instance, some stakeholders have reported that the anticipated efficiency gains from the implementation of growth area planning (including the use of PSPs) have not been fully achieved due to some councils continuing to seek changes to proposed developments that comply with the PSPs. This example highlights that the effective and efficient administration of planning by councils depends on the incentives and constraints facing councils. A major potential gap in the reform initiatives is the need to address the incentives facing councils to administer planning regulation in an efficient and effective manner. (This issue is discussed in chapter 5.)

## **4.5 Further opportunities for improvement**

The Commission broadly supports many of the State Government's initiatives, which will play an important role in improving the efficiency and effectiveness of the planning framework that is administered by councils, particularly the increasing emphasis being placed on supporting strategic planning by councils.

The remainder of this section discusses some of the implementation challenges facing State and local governments in giving effect to better metropolitan and regional strategic planning and to some of the longer term issues for the planning framework and its administration by councils.

### **4.5.1 Implementing strategic planning effectively**

The key challenge to be addressed, if the Victorian planning framework is to operate most effectively, is to provide adequate precision and certainty on the nature of decisions. To achieve this, the key issues are first, to reconcile the different perspectives of State and local governments on planning issues, and second, to ensure that the organisational arrangements for administering planning regulation support efficient and effective decision-making.

#### *Information request*

*The Commission is seeking feedback from inquiry participants on the major issues that will arise as State and local governments develop strategic plans for Melbourne and regional areas, and how they are best addressed.*

## Clarifying the outcomes that planning is to achieve

There is a case for the State in its current review of the SPPF to clarify the outcomes that the State Government expects from the administration of planning by local councils. One approach suggested to the Commission by a metropolitan council was setting targets. For example, this might involve the State Government specifying the amount of housing to be approved by those councils responsible for major activity centres, which in turn, are based on planned State investments in transport and other vital infrastructure and services.

Setting clear objectives as part of an amended SPPF is a pre-requisite for an effective and efficient performance monitoring system, to ensure that the information collected is creates the right incentives for achieving the Government's objectives, and provides a mechanism for checking the extent to which they have been achieved. It also helps to ensure that council resources are not spent unnecessarily collecting information that is not a priority (chapter 5).

It will also be important that the review of the SPPF ensure that clear guidance is provided to resolve the inevitable trade-offs between competing objectives<sup>6</sup>. Such guidance is important to achieving transparent and consistent decision-making. An example of the State Government providing such guidance is the Victorian Coastal Strategy's hierarchy of principles for assessing development applications around Victoria's coastline (VCC 2008, pp. 20-23). While there are examples where the State has provided implementation guidance to councils, in general, the approach embodied in the framework for planning in Victoria:

... emphasises process and has in place checks and balances. It is a system which does not attempt to define in advance which social, environmental or economic factors are the most important. This allows the most important factors to be determined within the framework and to evolve to reflect the changing policy agenda. (Government of Victoria 2010a, pp. 4-5)

While this flexibility has benefits, it also has costs such as uncertainty about how planning permits will be assessed and approval times. This point was acknowledged by the Victorian Government in its response to a previous Commission inquiry:

The Government is also conscious that certainty around planning policy and planning provisions is important to maintaining the confidence of the community and the private sector in the planning system. Continual investment in Victoria is dependent on this certainty. (Government of Victoria 2005a, p. 3)

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<sup>6</sup> In saying this, the Commission means that there is a robust mechanism for settling and integrating these issues, in the specific context of land-use, so that councils have greater clarity about their regulatory task.

In determining its most important objectives for planning regulation, the State Government may also need to reconsider whether planning regulation is the best instrument for achieving some important community objectives. As discussed in chapter 6, the Commission is suggesting the Government clarify that building regulation is the appropriate regulatory tool for dealing with the environmental performance of buildings. There may also be opportunities to re-examine the role of planning regulation in addressing policy issues where alternative regulatory regimes or policy instruments exist, such as housing accessibility, management of gambling venues and premises selling liquor to the public.

#### *Information request*

*The Commission is seeking further information from participants on the adequacy of existing guidance provided to councils by the State on how to apply the current and revised State Planning Policy Framework.*

### **Ensuring effective implementation**

While a large amount of work is being undertaken at the State Government level to achieve these outcomes, there remain questions around the pace of change in regard to strategic planning at the local level. To an extent, the rate of change will depend on whether councils have sufficient resources and guidance to undertake, implement and review the strategic planning necessary to achieve these outcomes at the local level. Currently, councils face a number of State obligations to undertake strategic planning and review planning schemes regularly, and many are expected to bear the costs of strategic planning, with limited funding mechanisms. In Melbourne's growth areas, extensive support is provided by State and Commonwealth governments for strategic planning (box 4.4).

The benefits of good strategic planning often accrue beyond local residents to future residents and businesses in other municipalities. The wider benefits to business include greater certainty about land use options, which is particularly contentious in inner-city Melbourne. Protections for heritage and environmental assets potentially benefit all Victorians, not just those living in a particular location. In the absence of State Government involvement, councils may tend to under invest in strategic planning, compared to what may be optimal for the State as a whole.

The main benefit of improved strategic planning is the ability to reduce uncertainty, inconsistency, time and cost through improving the alignment of State and local government objectives. Without such an alignment, the proposed improvements to statutory processes and councils' resources that are outlined in chapter 5 are unlikely to deliver the potential benefits. Specifically, benefits of implementing stronger strategic planning in inner-Melbourne and in parts of regional Victoria could include:

- enhancing councils capacity to respond to the key state-wide challenges of accommodating population growth, adapting to climate change, and providing the necessary infrastructure and services to growing communities
- providing for coordinated decisions between local councils and State agencies so that land-use planning is informed by an understanding of the capacity for transport and other infrastructure to cope with new development, which could reduce congestion costs to the State
- facilitating development in a timely and less costly manner by identifying and resolving key policy issues early. This facilitates technical assessment of applications against fewer and clearer criteria, which reduces the cost of development in the State
- providing greater clarity and certainty to applicants, thus improving the quality of applications and reducing speculative applications, resulting in more timely, less costly processes
- engaging communities in the strategic policy development process instead of debating policy issues arising from individual applications, thus reducing overall transaction costs.

The advantages of stronger strategic planning to local communities are recognised. For example, in arguing that Geelong should be given GAA status or its equivalent, the Committee for Geelong said ‘that Geelong should have been part of the Melbourne 2030 Strategy and that Geelong’s growth is inextricably linked to Melbourne’s growth’ (sub. 18, attachment 2).

A potential disincentive to undertaking improved strategic planning could be the timeline in which the potential benefits are realised. Improved strategic planning takes time, involves direct costs to government and produces benefits over the longer term, in some cases making it difficult to see the immediate benefits.

The Commission notes that a number of councils appear to undertake strategic planning well, and in a way that contributes toward the State’s objectives, and meeting state-wide challenges. There are some factors that appear to be prominent in those councils that undertake high quality strategic planning – such as being well-resourced (both in terms of finances and in terms of having capable planners) and having council objectives that are consistent with the State’s objectives for economic development and population growth.

Although there are significant benefits to Victorian businesses and the community to be realised by improving strategic planning, there would also be costs. Improving strategic planning requires an ongoing financial commitment from the State Government, which would need to be funded from some combination of direct budget funding, reprioritisation of existing expenditure, or new funding mechanisms. The Victorian Government, for example, has

contributed more than \$30 million to the GAA since its inception to support Melbourne's major growth areas (Government of Victoria 2010c, p. 7).

#### *Information request*

*Has the Commission adequately summarised the issues contributing to improving strategic planning? What are the key differences between councils that do strategic planning well and those that do not? How can the State Government help to ensure that strategic planning processes more successfully resolve the tensions between State and local government?*

## **4.5.2 Institutional arrangements**

The State Government will need to reconsider the governance arrangements and accountabilities for undertaking and reviewing strategic plans covering multiple councils, such as the regional plans that are being developed to support the state-wide planning blueprint. There are several potential organisational options ranging from the use of existing mechanisms such as regional development forums through to establishment of independent entities (for example, based on the GAA model, or the concepts behind DACs).<sup>7</sup>

The Commission's report on liveability considered a number of institutional options for dealing with the tensions between State and local governments on planning issues, and for facilitating improved strategic and better integrated land-use and transport policies within Victoria, including:

- 1) a new overarching statutory authority for Melbourne, and separate authorities for regional clusters
- 2) retaining the current arrangements with some improvements (including greater coordination and integration of strategic planning and infrastructure delivery; performance monitoring; and co-ordinating the views of DACs to promote consistency)
- 3) the same as option two, but also establishing regional facilitating authorities for metropolitan Melbourne and regional clusters of provincial councils.

While the Commission did not express a strong preference, it indicated that the third option 'would merit careful consideration' (VCEC 2008a, pp. 145-152). The report also stated that the Commission 'has not seen evidence to warrant such a radical change' as the option of establishing an overarching statutory authority for Melbourne, and that such a model 'is not informed by an adequate regard to the principle of subsidiarity' (VCEC 2008a, pp. 146-147). The Commission has not been presented with evidence in this inquiry that would cause it to change its view.

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<sup>7</sup> The Commission's terms of reference state that the structure of local government and performance of individual councils are outside the scope of this inquiry.

Longer term, there would be benefits in reassessing the capacity of market-based measures to support or achieve objectives presently pursued mainly through planning regulation. There is increasing interest in using pricing mechanisms to manage some of the consequences of urbanisation, such as significant increases in demand for infrastructure and other community services, and to provide a revenue source to fund the expansion in infrastructure and services that are necessary to support growing communities. The growth areas infrastructure charge is an example of a funding mechanism. In future, pricing systems could also be used to provide price signals to encourage development in areas with good access to infrastructure and services or fewer concerns about adverse amenity and other impacts of development. The use of pricing and direct funding mechanisms is controversial because of a historical reliance on planning regulation, and questions about how these mechanisms could work in practice.

#### *Information request*

*Are the current governance frameworks adequate for delivering the State's intended outcomes for planning regulation? What incremental improvements could assist with delivering these outcomes? How could market mechanisms, such as pricing, more efficiently or effectively meet planning objectives?*

### **4.5.3 Performance reporting and evaluation**

Finally, there is also a case for the State Government to report publicly on the success of its various planning reform initiatives to help identify whether the anticipated efficiency benefits are being realised.

Some reporting already occurs. Some direct indicators of performance in strategic planning include the number of PSPs completed (six) in 2008-09 and the number of housing lots with zoning completed within growth areas (18 420). There was underperformance against targets in these areas, with complexity cited as a key reason for not meeting targets (DPCD 2009l, pp. 34-35). The performance of the system at the permit end of the process provides some indication of the effectiveness of strategic planning. Recently released information on the performance of the planning system indicated that the average and median timeframes for local councils deciding permit applications increased from 116 days and 70 days in 2007-08 to 123 days and 78 days in 2008-09. This occurred despite a nine per cent reduction in the number of planning permit applications lodged (DPCD 2009d, pp. 14-15).

A comprehensive report on the performance of the planning system would logically cover the State Government's performance in administering elements of the planning system that have been outlined in chapter 5.

## **4.6 Key issues for the Victorian planning system**

To address some of the broader issues in planning, the Commission has focussed on improving strategic planning (by clarifying its objectives, being clear about how trade-offs should be addressed and by considering what is optimally addressed by planning regulation), ensuring effective implementation (by resourcing councils appropriately and aligning objectives), designing appropriate organisational arrangements, and monitoring and reporting on its success. Working on these could have significant benefits in the longer term to local communities, businesses, and the State as a whole. The Commission welcomes feedback from participants on these issues.



## 5 Planning regulation: The planning process

### 5.1 Introduction

The previous chapter examined key aspects of the state-wide framework and architecture governing land-use planning in Victoria and how these aspects impact on local government administration of the regulations. This chapter examines potential improvements to the permit application phase, looking specifically at:

- ways to strengthen councils' incentives to implement process improvements
- specific changes to processes, including through changes to legislation or current practices
- addressing resourcing and skill constraints facing councils.

The evidence that the Commission has gathered suggests that there is scope to improve the efficiency of planning regulation to reduce uncertainty, improve consistency, and reduce time delays and costs to business. Although there has been a large amount of work done to date on improving planning regulation and councils' administration, there appears to be scope for making further improvements.

#### 5.1.1 Key issues

The views of inquiry participants can be summarised as follows:

- Businesses are concerned about the unnecessary uncertainty, time delays and costs associated with complying with planning regulations. Businesses are also concerned that the advice provided by councils is often inconsistent (both within individual councils and across councils), which adds to uncertainty, time and cost.
- Councils considered that the costs to business of planning regulation reflect a number of factors, but that key drivers are the growing State Government involvement in planning policy and its administration (such as the cap on planning permit fees), combined with applicants' limited understanding of, or disregard for, planning requirements.
- Some community groups have also argued that the main issues for the administration of planning regulation are the growing State involvement in planning decisions, State-imposed constraints on councils (in areas such as planning fees and environmental sustainability), and a lack of State consultation with the community and councils on planning policy and its implementation (figure 5.1).

Figure 5.1 Perspectives on planning regulation

<p><b>Uncertainty</b></p>	<p>Time taken to reach decisions &amp; unwillingness of some councils to commit to timeframes          'Back door' use of planning to introduce regulation that goes beyond national standards and State requirements          Uncertainty about how new planning requirements such as native vegetation &amp; aboriginal heritage regulations are to operate          Inconsistency between council decision making and State Government strategies          Councils refusing to hold pre-application meetings          Perceptions of unnecessary political interference in permit decisions          Uncertainty about the circumstances where the State Government may call-in planning applications          The ability of councils to review and alter local planning policies without adequate assessment of impacts</p>
<p><b>Timeliness</b></p>	<p>Councils are failing to meet statutory timeframes and use information requests to stop the clock          Lack of incentives or penalties for councils to make timely decisions          Applicants providing incomplete or incorrect documentation is causing delays          Lengthy referral processes to State agencies combined with some 'unnecessary' referrals          State constraints on planning fees inhibit innovation such as 'fast track' permit assessment          Lack of clarity regarding when amendment process can be modified or truncated, leading to unnecessarily outlay of time and resources          'Vexatious' objectors triggering decision-making delays          Some businesses submitting 'ambit' claims to encourage an earlier VCAT appeal and decision</p>
<p><b>Cost to business</b></p>	<p>Councils imposing unnecessary permit requirements through use of overlays          Lack of risk-based application/amendment processes: eg the procedure to correct a mistake is the same as for a broad strategic amendment          Lack of consistent advice &amp; decision making within councils          Councils unwilling to make difficult decisions resulting in matters going to VCAT          Inefficient subdivision arrangements where separate approvals are required for planning scheme amendments, planning permits (including referrals) and engineering development plans          Unnecessary duplication between council required documents &amp; ResCode responses</p>
<p><b>Cost to councils</b></p>	<p>Council planning departments are under resourced and overburdened with applications          The ability to retain skilled staff in the face of competition from the private sector          Inadequate resources for councils to undertake strategic &amp; statutory planning work in complex areas (such as renewable energy &amp; native vegetation)          State restrictions on councils' ability to impose planning conditions (in areas such as sustainability, liquor licensing and gambling)          Complexity of planning scheme adds administrative costs to councils but is largely outside their control</p>
<p><b>Governance issues</b></p>	<p>Policy and administration functions are combined within many councils          Various State Government reviews have been underway for extensive periods of time with no outcomes finalised to date          Planning regime does not allow councils to address business growth in context of their economic situation          Increased State control in planning schemes has unnecessarily constrained council flexibility and local responsiveness (such as aboriginal heritage controls)</p>

Source: Various submissions.

Having regard to the purpose of the inquiry, submissions to the Commission, examination of data and evidence, and the reviews into aspects of planning regulation that are underway, the Commission has focused on the following issues:

- costs arising from unexpected delays in issuing planning permits
- continuing concerns about the consistency of administration by councils, particularly in areas where the State Government could regulate (if deemed necessary)
- the relative influence of local government on the overall timeframes for planning decisions
- the skills and financial capacity available to councils to administer planning regulation efficiently and effectively the expected business impacts of proposals to reform planning regulation.

In relation to these issues, participants suggested that a number of changes can be made in the short to medium term that will improve councils' administration of planning regulation. Recognising the considerable amount of work that is already underway to improve planning regulation, the Commission has focused on three areas of improvements:

- (1) Strengthening incentives for ongoing improvements in the administration of planning regulation by:
  - improving performance reporting, and evaluation and benchmarking
  - developing and reporting on compliance with a 'best practice process' model
  - use of financial incentives for achieving (clearer) State targets/outcomes.
- (2) Improving the statutory and internal processes followed by councils by:
  - establishing targets for a new fast-track permit process
  - allowing private assessors for some planning permits
  - making better use of pre-application meetings, and pre-lodgement certification
  - improving processes for delegating decision-making
  - improving use of online tools
  - improving processes for dealing with notifications and objections
  - reducing the impact of submission of incomplete applications
  - streamlining referral processes.
- (3) Addressing the resourcing and skills issues facing councils by:
  - revising fees to allow greater cost recovery
  - increasing state support for the training, attraction and retention of planners.

In examining these opportunities for improvement the Commission has relied on analysis of Planning Property Activity Report (PPAR) data, provided by the Department of Planning and Community Development (DPCD), as well as submissions, and other reports. Relevant findings from the Commission’s analysis of planning data are outlined throughout the chapter, with further information available in appendix B.

### 5.1.2 The Commission’s approach for assessing efficient and effective processes

The broad approach followed by the Commission in this inquiry is consistent with the methodology adopted in a number of previous Commission inquiries. Business concerns about the effectiveness and efficiency of regulatory approval processes have been examined in several previous Commission inquiries. During the Commission’s inquiry into Victorian environmental regulation (VCEC 2009a), for example, concerns were expressed by business about the uncertainty, time and cost associated with the administration of environmental assessment and native vegetation removal regulations (under the *Environment Effects Act 1978* and the Victorian planning provisions respectively). The Commission made a number of recommendations that were designed to address the resources available to regulators, the processes they administer, and the governance frameworks and institutional architecture.

The Commission has used many of the principles that were outlined in the inquiry into environmental regulation to inform its assessment of the issues in planning regulation (table 5.1). All of these principles are relevant to the design and operation of the land-use planning system.<sup>1</sup>

Table 5.1 Principles for efficient and effective approval processes

<i>Principle</i>	<i>Outcome</i>
Clear guidance about the policy outcomes or objectives that the relevant government wishes to achieve.	Facilitates early withdrawal of unsound proposals, early identification by business of potential development constraints, avoids unnecessary design and development costs.
Clear separation, where possible, in accountabilities for developing policy and for administering policy.	Improves accountability and reduces complexity, regulatory creep, regulatory capture and compromised independence.

<sup>1</sup> These principles are broadly consistent with the development assessment principles produced by the Development Assessment Forum (appendix B).

**Table 5.1 Principles for efficient and effective approval processes (continued)**

<i>Principle</i>	<i>Outcome</i>
Clear accountability, public monitoring and reporting, and independent oversight.	Incentives to deliver quality outcomes.
Successive reductions in uncertainty about the overall outcome combined with a progressive sharpening of the focus on the key issues about which there is uncertainty.	Facilitates early withdrawal of unsound proposals, better targeting of effort at the key issues.
Risk-based processes that match the rigour and steps involved in assessment processes to the scale and risk of proposals.	Better use of scarce resources, both of administrators and regulated parties.
Some certainty about the timeframe for assessment, with binding or negotiated limits and with public reporting against these limits.	Minimise the time required to reach a well-informed decision, minimise unexpected delay costs, and discourage strategic behaviour by regulators and proponents.
A whole-of-government approach to approvals, particularly when multiple government agencies have a role in the approval process.	Achieve outcomes that meet whole-of-government objectives.
Independent checks or steps in processes and accountability mechanisms.	Achieve more predictable and consistent outcomes.
Sufficient numbers and skill of policy makers and administrators.	Necessary to achieve all of the above.

*Source:* VCEC 2009a and VCEC 2005a, pp: 304-305.

## 5.2 Strengthening councils' incentives

Based on the understanding that there are many opportunities for councils to improve the efficiency and effectiveness of planning processes that do not require legislative change, the Commission has focused on ways to strengthen the incentives for councils to improve their own processes.

Councils face several potential incentives to adopt process improvements in planning and other areas of regulation:

- A desire to attract business investment – increasing the economic vitality of communities and producing higher rate income to help fund extra services.
- External pressures – such as pressures from the Commonwealth and state level, and from businesses and individuals.

- Internal pressures – the desire of councillors and managers to improve processes in order to minimise rate increases and to show residents and others that resources are being used efficiently.

A number of councils have recently implemented improvements to their decision-making processes. However, a number of factors suggest that there are weaknesses in the incentives for councils as a whole to improve the efficiency and effectiveness of planning regulation:

- The cap on councils’ planning fees at a level that appears to be below their costs (chapter 9) discourages investment in the efficient and effective delivery of planning regulatory services. Faced with a combination of rising demand for services and financial constraints, the low cap on fees creates an incentive for councils to reduce the quality and timeliness of planning assessments (which can impose costs on applicants due to increased delays and other costs).<sup>2</sup>
- Councils cannot capture all of the benefits that result from process improvements. Chapter 3 reported that unexpected delays in planning decisions may impose costs of around \$180 million on Victorian businesses each year. If most of the benefits of delay-reducing process improvements accrue to businesses and others located outside municipal boundaries, there is likely to be under-investment in process improvements by councils (particularly when fees are capped).
- The institutional arrangements for land-use planning in Victoria are also not conducive to providing strong incentives. Some councils argued that the responsibility for inefficiencies in planning such as delays largely rests with the State Government, and with applicants that have submitted incomplete applications that have or attempted to ‘game’ the system. Conversely, many businesses perceive that councils are responsible for problems such as delays.
- Some participants argued that councils are too slow to adopt innovations in planning processes, or may need additional support. The Victorian Employers’ Chamber of Commerce and Industry (VECCI) supported initiatives to encourage the wider and more rapid uptake of existing online systems for planning, noting that 40 per cent of councils are participating in a project for online planning applications (sub. 22, p. 3).
- The lack of information about the benefits and costs of process improvements makes it difficult for council planning officers to mount a strong business case to invest, particularly when there are so many demands

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<sup>2</sup> It should be acknowledged that if councils put less effort into assessing permits this could lead to applications receiving less scrutiny and being processed more quickly, potentially reducing costs to applicants.

on council resources, and when any savings to councils are likely to be small in relation to their total expenditure (chapter 2).

The State Government's current approach focuses on improving State planning policy and regulation (for example, by introducing a more risk-based approach to permit assessments), providing information and guidance, and direct support through the provision of funding and staff support. While these initiatives can provide significant benefits, the Commission considers that there is a need to look at further ways to strengthen councils' incentives to improve the administration planning regulation.

The Commission examined three complementary options for strengthening incentives:

- Improving performance reporting.
- Introducing a best practice process model, with reporting against compliance with the model.
- Introducing financial incentives for improved performance.

### **5.2.1 Improved reporting on the administration of planning**

A consistent theme of previous Commission inquiries has been the need to strengthen monitoring, reporting and evaluation frameworks around the implementation of regulation. The Commission has found that performance reporting and evaluation are important for accountability and for strengthening incentives for improving the efficiency and effectiveness of regulation (VCEC 2007, VCEC 2009a). Within the planning sector, the importance of performance monitoring and reporting has been recognised, with a study for the Development Assessment Forum (DAF) observing that:

Comparative performance measurement and benchmarking, with its potential to bring greater levels of accountability and ideas for better ways, can provide one of the most effective drivers for improvement in areas of governance where the forces of competition are difficult to apply. (Walsh and UTS 2002, p. i)

The introduction of Planning Permit Activity Reporting (PPAR) improved the availability of information about the administration of planning regulation in Victoria and strengthened incentives to improve performance. DPCD has a consultative process for looking at improvements in the reporting framework, and has made incremental improvements over time, including adding new fields in May 2009 relating to applicant details, the preparation of cultural heritage management plans, the number of new dwellings (yield) arising from the planning permit and VCAT lodgement date (DPCD 2009a, p. 3). This information was not available for the Commission's analysis of PPAR data for 2008-09 (appendix B).

An area of relative weakness in Victoria's reporting, however, has been the evaluation of changes to planning regulation. The many reviews of planning that have occurred have been largely qualitative in nature. The Commission previously recommended in its 2005 report *Regulation in regional Victoria: opportunities and challenges*, that the Victorian Government, in consultation with councils, develop a set of target performance indicators that they would expect the *Better Decisions Faster* reforms to deliver. The Government supported this recommendation responding that DSE would develop a set of performance indicators and use information from projects funded under the *Better Decisions Faster* program (such as process auditing and planning permit activity projects) to undertake an assessment of how the *Better Decisions Faster* reforms are working (Government of Victoria 2005a, p. 4). The Commission understands that this commitment has not yet been met.

Reflecting measurement difficulties, the current reporting framework mostly covers inputs and processes steps, rather than outcomes. A key impediment to better reporting on outcomes is the number of objectives of planning regulation, as well as the lack of clarity and specificity of these objectives (chapter 4).

The scope for improved performance monitoring and reporting by councils is the subject of a broad review underway by the Essential Services Commission (ESC). The ESC's draft report proposes that councils report annually on a suite of indicators covering a wide range of services, not just planning regulation. The planning-related performance indicators proposed by ESC focus on councils' compliance with statutory timeframes, rather than the overall performance of the system. This is understandable, given that the ESC's proposed reporting regime is not intended to look at the overall performance of the planning system in Victoria.

There is scope for performance monitoring and reporting to play a greater role in encouraging improved performance by councils, outside the proposed reporting framework being proposed by the ESC. This could be achieved by:

- the State Government making a clear statement about its short-term priorities for councils in the administration of planning regulation. For example, these could include reduced timeframes for assessing applications of a particular type (against statutory timeframes as well as total days from submitting an application to a decision), and the number of new dwellings approved, particularly in established areas
- the State Government developing (with input from local councils) a range of indicators that relate back to the intended outcomes (such as the area within municipalities that is available for residential and other types of development, the target timeframes for different types of application, and the performance against both of these indicators)

- undertaking regular surveys of residents, objectors and applicants to better understand users' experience with the planning system and to track changes in their experience over time
- publishing all of the above so that State and local governments are accountable for the performance of the planning system, and parties, including individuals, businesses and academics can undertake independent analysis of trends in the performance of the planning system.

While there are benefits from improving the nature and extent of performance reporting and evaluation, there are costs as well, which need to be considered within the context of the existing burden of reporting on councils. As noted by the ESC (2010c, p. v), councils already report a large amount of information to the State Government and their communities. The Commission supports a review of existing reporting burdens on councils, as proposed by the ESC.

Recognising that the performance of the Victorian planning system depends on the activities of the Planning Minister and DPCD as well as councils, there is a strong case for broadening existing reporting to cover explicitly the State Government. For instance, the Planning Minister is increasingly the responsible authority for planning permits within planning schemes (DPCD 2009d, p. 9), and has called-in a number of planning applications. The Minister also initiates and approves some amendments to planning schemes. The Commission found it difficult to identify publicly available data on the timeframes for approving planning scheme amendments and for administration of the call-in provisions. Given the concerns about the lengthy timeframes for approving planning scheme amendments and for making decisions on applications that have been called-in, the Commission considers that there is justification for the current public reporting to also include major state-administered components of the planning system.<sup>3</sup> The Commission understands some of this information is already collected, suggesting that the incremental costs of reporting this information would be low.

While the current reporting system provides some good information, a clear statement of the outcomes that the government wishes to achieve in planning, and consideration of how the current reporting system captures and tracks progress against these outcomes, could help to improve accountability and planning policy development at a low incremental cost. Particularly if changes made to systems coincided with other required changes to systems, such as

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<sup>3</sup> A recent article on the proposed changes to the Planning and Environment Act identified there are often lengthy delays in key steps in the amendment process (such as approval of amendments, and council responses to requests to prepare an amendment). Despite this, the author commented there is an 'absence of any meaningful timelines for decision making' in the draft Bill to amend the planning scheme process (Walker 2010, p. 13).

responding to the proposed changes to the Planning and Environment Act, and also included reductions in unnecessary or less important information.

A good reporting system helps to provide the incentives for improvements, as it makes performance transparent. It also helps policy-makers in councils and State Government, as well as other stakeholders, evaluate the success of reforms to the planning system, and develop opportunities for improvement.

#### **Draft recommendation 5.1**

**That the Victorian Government develop and publish a performance reporting and evaluation strategy for Victorian planning regulation by July 2011, and that the strategy be developed in consultation with councils and users of the planning system, and include the following components:**

- **A clear statement of the Government’s priorities for the administration of planning regulation by state agencies and local governments. The priorities need to relate to outcomes, such as the number of new dwellings to be approved and desired timeframes for assessing certain types of application.**
- **A range of indicators that cover the State Government’s priorities for the administration of planning regulation, such as the number of new dwellings approved and benchmark timeframes for certain types of application.**
- **Performance indicators and benchmarks for planning processes administered by the State Government such as approving planning scheme amendments, and the administration of the call-in provisions.**
- **Outcome-based measures such as surveys to measure and track users’ experience with planning regulations.**
- **Indicators relating to the processes adopted by councils, covering the elements of the best practice assessment process advocated in draft recommendation 5.2.**
- **A process for making the information available to councils and the general public so as to facilitate its widespread use.**

#### **5.2.2 Reporting on a best practice assessment process**

Participants suggested that there is scope to streamline and harmonise key internal decision-making processes of councils, such as whether councils’ hold pre-application meetings with applicants or whether council staff possess decision-making powers, under delegations from the councillors. The Commission’s analysis of planning data indicate that internal processes have a large impact on timeframes, and that there are significant differences between councils in terms of the extent to which they undertake particular processes, and

the associated timeframes (appendix B). While differences in processes may reflect local characteristics and resources, there also appears to be significant differences in decision-making performance, which could be contributing to businesses' concerns about uncertainty, inconsistency, time delays and costs.

A joint MAV-DPCD process improvement project has been initiated to test different approaches, and to collect and disseminate performance improvement information. While still at an early stage, the results of this project will depend on the uptake by councils of any resulting improvement initiatives (appendix B). As noted, experience has shown that many councils are reluctant or do not have the incentives or resources to adopt process improvements.

A high rate of uptake of improvement initiatives could be achieved by mandating the adoption of specific process improvements. An alternative approach is to provide councils with the guidance and tools to enable them to identify and implement process improvements. This is consistent with the approach that the State government has taken in providing councils with the tools to improve local laws (chapters 6 and 7) and procurement practices (chapter 8).

Given the diverse challenges facing councils and differences in capacity, and the potential for self-initiated improvements by councils (appendix B), the Commission is attracted to a process improvement approach that encourages rather than mandate particular process changes, underpinned by transparency about the choices that are made. Such a model could involve the State Government, working with councils, to define a set of best practice processes which councils can choose whether to implement, provided they have assessed the advantages and disadvantages, with the requirement that councils report publicly on their approach and rationale. Such an approach is consistent with strengthening councils' incentives to adopt improvement initiatives, and achieving a greater level of consistency and efficiency of internal process, whilst still enabling innovation amongst councils.

To assist in the development of a best practice permit process, the Commission has outlined some key elements, drawing on its best practice principles for approval processes (table 5.2), existing guidance and information, and stakeholders' views on the potential benefits of particular process improvements. In particular, the Commission considers that the following processes should be included in a best practice model:

- pre-application meetings (including pre-application certification)
- delegated decision-making
- use of online permit processes
- processes for dealing with notifications and objections
- assessment of incomplete applications.

These important aspects of councils' processes are examined individually in section 5.3.

The benefits to councils and business of introducing a best practice permit assessment model depend on what is actually included in the model, as well as the extent of uptake of the model. Key potential benefits include:

- cost savings and reductions in uncertainty for businesses resulting from shorter processing times, fewer unnecessary information requests, and the de-politicisation of more decisions
- savings to councils from better quality applications and freeing up key staff to focus on major matters
- benefits to communities resulting from greater certainty and consistency in planning decisions
- less re-visiting of decisions resulting from objections and appeals to VCAT (by applicants, councils or objectors).

The investment required to develop and implement a best practice permit assessment model will be justified if there are significant benefits to applicants, including businesses. While it is difficult to value some benefits, such as greater certainty for business, the direct cost savings to business are more amenable to measurement. The Commission's analysis suggests that there are significant cost savings for business that could be realised as a result of this initiative of between \$12 and \$23 million.<sup>4</sup>

Notwithstanding these benefits to business, councils would experience both costs and benefits in moving towards best practice. The costs to councils associated with modifying systems and processes may also be significant, reinforcing the importance of re-examining the State Government cap on planning fees (section 5.4).

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<sup>4</sup> The key assumptions are that uptake by councils is between 30 and 60 per cent, and that those who took up the process reduced delay costs for business of 25 per cent, and reduced administrative costs for business by 2.5 - 5 per cent (due to upfront agreement between councils and business on information to be included)

### **Draft recommendation 5.2**

**That the Victorian Government develop in consultation with councils, a model best practice planning assessment process. The best practice model would provide guidance on pre-application meetings, the delegation of decision-making to council officers, use of online tools, notifications and objections, and dealing with incomplete applications. The Department of Planning and Community Development, with involvement from the local government sector, to report annually on the uptake of the best practice model by councils as well as the costs and benefits of improvement initiatives.**

### **5.2.3 Financial incentives for local government**

Improving performance monitoring, reporting and evaluation can support incentives for improving the administration of planning regulation by councils. Some participants suggested that consideration should also be given to strengthening financial incentives for councils to improve the administration of planning regulation.<sup>5</sup>

Interest in the role of financial incentives stems from their use in other areas of public policy to encourage regulatory reforms. Under the National Competition Policy formulated in the mid-1990s, Australian governments agreed to review and reform regulations that were unnecessarily restricting competition. In recognition of the wider benefits of competition reform, the Commonwealth agreed to make a series of payments to the states for performance against agreed reform measures. The National Competition Council was tasked with tracking and assessing reform implementation and making recommendations to the Commonwealth Government about whether jurisdictions should receive the full payments. Victoria chose to direct a portion of its payments to Victorian local governments, provided councils implemented agreed reforms in areas such as competitive tendering and contracting, and competitive neutrality policy.

There is also some international experience with the use of financial incentives to achieve particular outcomes from the administration of planning regulation. In response to concerns about the efficiency of planning regulation, the United Kingdom (UK) Government established an incentive fund to encourage councils to meet housing growth targets (box 5.1).

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<sup>5</sup> For example, the Master Builders Association of Victoria called for the imposition of financial penalties on councils by the State Government where councils 'deliberately breach or consistently ignore their own planning frameworks and regulations' or 'exceed their planning authority on sustainability or accessibility issues' (sub. 24, p. 8).

## Box 5.1 Housing incentive funding in the UK

The Housing and Planning Delivery Grant was established in 2007 to reward local authorities for improved delivery of housing and other planning outcomes as part of their strategic, place shaping role and to provide more support to communities and local councils who are actively seeking to deliver new homes. Key principles underpinning the scheme are:

- strengthening the incentive for local authorities to respond to local housing pressures by returning the benefits of growth to communities
- incentivising efficient and effective planning procedures.

Under the program, £510 million in funding will be provided over three years to 2011. The grants are focused on areas of planning and housing delivery, and will go exclusively to local authorities.

The housing element currently goes to all local authorities with net additional housing completions above 0.75 per cent of their existing housing stock. The data is taken from a rolling average of the previous three years. For each net addition above the threshold, the local authority receives one unit of housing grant. The amount per unit is calculated by the total amount of money for the year divided by the total number of units above the threshold.

There are some controls on how local authorities can use grants obtained. Authorities must allocate 32.5 per cent of the total grant paid to capital spending to ‘encourage investment for the future’. The remainder can be spent on resource or capital budgets.

A recent review of UK planning regulation highlighted the potential perverse consequences of the scheme. The Killian Pretty Review (2008), noted the potential for:

- pressure from local planning authorities on applicants to withdraw applications or face refusal if they go over the target deadline
- a lack of flexibility for negotiation to improve schemes because of time constraints
- a focus of energy and resources on the period between submission of application to decision to the detriment of pre-application and post decision stages
- the ‘Bermuda Triangle’ syndrome, where applications which are out of target are given very low priority and are lost in the system.

The review recommended that the Government consider providing financial incentives for councils that deliver high levels of satisfaction, particularly in the pre-application stage. ‘This recommendation will overcome the perverse consequences of the current time-based targets without losing the benefits that the incentives to improve timeliness have delivered.’

*Sources:* Beckett 2008; Killian Pretty 2008, p. 127.

A system of financial incentives for councils is consistent with the Commission's view that there is scope to strengthen the incentives for councils to deliver planning regulation more efficiently. Planning process changes implemented by councils can deliver a range of wider benefits such as reduced delays and costs to business. Councils are likely to under invest in process improvement projects that generate wider benefits to individuals and businesses located outside municipal boundaries, especially under the current State-imposed cap placed on planning fees. Introducing mechanisms to enable councils to obtain some of the wider benefits of locally implemented planning reforms therefore has the potential to strengthen councils' incentives to undertake such improvement projects.

An argument against developing an incentive program for improving the administration of planning regulation is that a number of State-funded initiatives are already in place to strengthen the capacity and incentive for councils to undertake planning process improvement initiatives. These include:

- the joint DPCD and MAV process improvement project (appendix B)
- the development of a performance benchmarking regime (covering a range of services including planning regulation) by the ESC
- ad hoc trials and improvement projects jointly funded by councils and the State Government.

There are also critical design issues that would need to be resolved. Amongst these is the importance of the State Government specifying clear benchmarks for assessing the performance of councils. The UK experience shows that financial incentives can have a significant influence on behaviour but that perverse effects can be created if there is insufficient clarity about, and monitoring of, desired outcomes.

That said, there may be opportunities to trial the use of incentives or to evaluate the scope for financial incentives once there is more experience with the implementation of an improved performance monitoring and reporting framework for planning regulation. To compare the effectiveness of any incentive scheme with the Government's current approach of providing targeted financial and other support to councils, better information is also needed on the effectiveness of current strategies.

#### *Information request*

*The Commission seeks the views of participants on the need for and most appropriate arrangements for providing stronger financial incentives for councils to improve the administration of planning regulation.*

## 5.3 Improving councils' processes

This section discusses a number of specific improvements to the permit process that have been raised by participants, which impact on delays and other costs experienced by business. These process improvements are expected to deliver significant cost savings for businesses (table 5.1).

### 5.3.1 Fast track permits

The current process for assessing permit applications does not differentiate between higher and lower-risk proposals. Many participants were supportive of the Government's proposal to introduce a fast-track pathway for simple permits, with a statutory timeframe of 15 days. Although a number of councils already assess simple planning matters in a shorter timeframe, this change will assist all councils to move towards the goal of risk-based assessments, and improve certainty and consistency for applicants about how simple matters will be assessed. However, some inquiry participants were concerned that very few matters would be eligible for consideration under a fast track pathway, thereby lessening the potential benefits of this reform. In addition, some participants argued that there is scope to deregulate the assessment of planning permits.

The proposed Planning and Environment Act amendments will introduce a fast-track process called 'code assess' for permits that are based on largely objective criteria, and which will have a shorter statutory time period of 14 days. The current available guidance explains that the code assess track will include permits that can be considered against clearly defined codes and requirements, and cover matters such as industrial development where specific building setback, height and materials, landscaping, car parking and loading and unloading standards can be set, against which applications can be assessed (DPCD 2009i, p. 4). The key issue in determining what is suitable for code assess, is whether the decision can be made on objective criteria requiring technical knowledge, rather than policy judgements (DAF 2005). Based on discussion with DPCD the Commission understands that criteria will be introduced through a planning scheme amendment, thus subject to community consultation before introduction. It is unclear what proportion of applications are likely to be part of the code assess track.

In a submission to the Act review, the Municipal Association of Victoria (MAV) stated that "The changes proposed are useful in starting to tailor the process to the nature and impacts of the proposal. This reflects the practice of many councils for minor matters currently and is consistent with the Development Assessment Forum Leading Practice model." However the MAV also expresses concern that some of the changes are too prescriptive, and that councils can introduce code assess through their existing practices. They state "The MAV

planning process improvement project has shown that it is difficult to identify types of application for “code assess” and that it is better to tailor responses to local circumstances and specify outcomes sought’ (MAV 2010d, p. 9).

The Commission views the introduction of a code assess process as an important innovation with the potential to produce significant benefits to councils and business, depending on how it is designed and implemented.

To better understand the likely impacts of a code assess process on business, the Commission examined PPAR data (appendix B). According to the PPAR data, about 38 per cent were considered ‘simple’, 61 per cent required no public notification, and 29 per cent required no public notification, and were considered ‘simple’. Using a 29-38 per cent range as a proxy for the proportion of permits that could be suitable for code assess, if the initiative reduced administrative costs for business of about 25 per cent and reduced delay costs for business of about 50 per cent, the savings from introducing code assess could be between \$15 and \$19 million.

In addition to the savings to business, there are potential benefits to councils from the introduction of a code assessment path. The principal benefit is that identifying and streamlining assessment of ‘simple’ planning permits frees up qualified planning staff to focus on more significant planning issues, including strategic planning. It therefore has the potential to assist in addressing the resourcing issues facing many councils (section 5.4).

The time and cost savings arising from code assess will depend on the number of permits that can be processed through code assess. In the short term, this will be determined by the number of permits identified as being suitable for code assess. In the longer term, this will rely on better strategic planning to increase the number of permits that can be assessed using objective criteria (because policy trade-offs will have been decided during the strategic planning stage) and zones and overlays will be targeted where they are needed to ensure appropriate risk-based assessments (chapter 4). Using the assumptions above, the Commission’s analysis suggests that a 20 per cent increase in the number of permits in the code assess track could provide additional savings of between \$3 million and \$4 million.

To the extent that the processes for identifying permits suitable for assessment under a code assess track, in both the short and longer term, depend on the actions of local councils, there is a case for the State Government to provide guidance to, and some oversight of, councils. There are various options including providing information and support to councils, requiring councils to report publicly on implementation (under the performance reporting framework discussed above), through to the development of State Government targets (voluntary or mandatory).

Given the evolving nature of the proposed code assessment process and the limited input from participants, the Commission has not formed a view about the best way to support the implementation of the proposed code assessment pathway to ensure cost savings. The Commission is seeking further information and views of participants to assist in forming a view about this issue and will be consulting with DPCD.

### **5.3.2 Competition reforms**

The development of the code assess track for planning permits will formalise a stream of permits where technical rather than policy judgements are required. Where assessments are purely technical, there may be scope to allow private assessors to make assessments, provided the system is supported by appropriate safeguards and governance arrangements. The Master Builders Association of Victoria (MBAV), for example, suggested that certified third parties be allowed to perform planning approvals, mirroring the building surveyor model (MBAV, sub. 24, p. 11).

Notwithstanding differences between building and planning regulation, especially around the issues of neighbourhood character and heritage, the experience of introducing competition into Victoria's registered building surveyor system provides insights into relevant considerations for any deregulated model for planning permit assessments.

#### **What has been the impact of permitting private providers to perform building surveying?**

A key driver for introducing the private sector competition into building surveying was to improve the efficiency and effectiveness of the previous building approval system (Warrington Fire Research 2004, p. 4). There have been a number of commissioned studies and government inquiries that have commented on the performance of the private building surveying system in Victoria, including previous work by the Commission (VCEC 2005a).<sup>6</sup> These reports have been, on the whole, positive about the impact of deregulation arguing that it has led to efficiency improvements in the relevant building approvals processes. The perceived benefits have included:

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<sup>6</sup> See also CSIRO (1999), Warrington Fire Research (2004), Productivity Commission (2004) and ACIL Tasman (2006).

- benefits to business and consumers from streamlined approval processes<sup>7</sup>
- improved dialogue between industry and regulators
- cultural change in the building industry
- upskilling in parts of the industry and improved industry productivity.

The main areas of concern, however, relate to oversight of the activities of private surveyors, and whether private certification has reduced regulatory compliance costs, or improved building quality (PC 2004, p. 55).<sup>8</sup>

In its inquiry into housing regulation, the Commission stated that ‘...the reform that allows inspections by private as well as council building surveyors, to ensure compliance with minimum standards, has been a success’ (VCEC 2005a, p. xxviii). Consultations in this inquiry have reaffirmed this view.

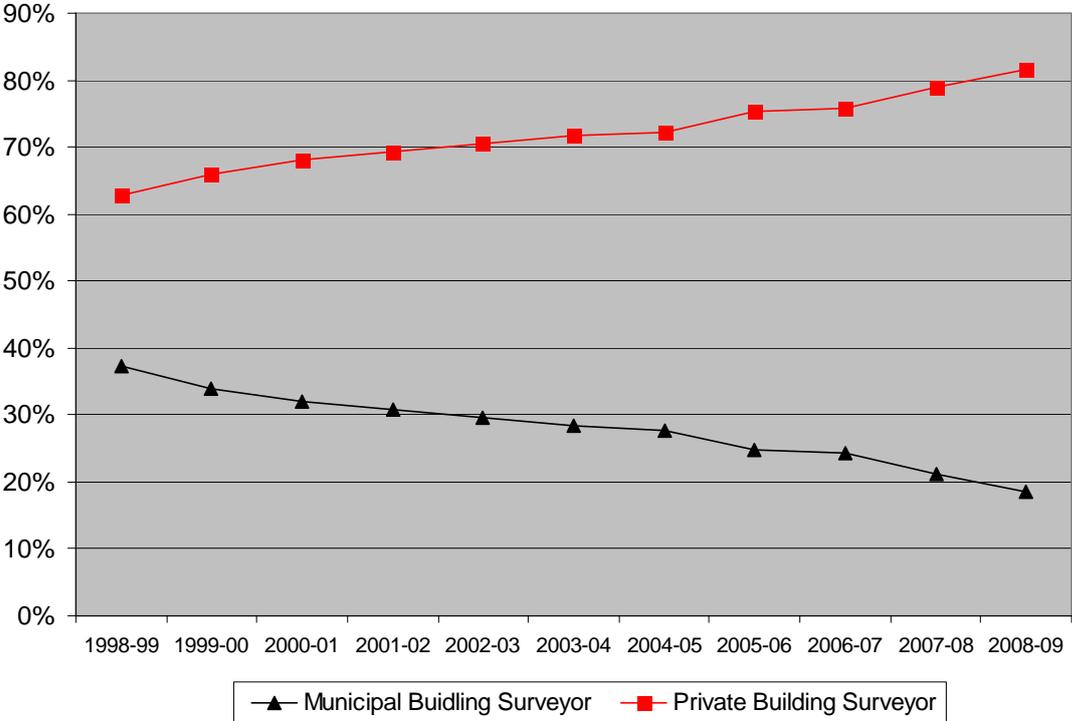
The Commission’s consultations with businesses on building regulation indicated that businesses felt that the building permit process is ‘relatively quick’ and ‘straightforward’, and this was often attributed to the availability of private building surveyors. None of the builders interviewed by ACG reported any delay costs resulting from their dealings with private surveyors (ACG 2010, p. 30). The preference for using private surveyors is highlighted by data showing that since the introduction of competition into building surveying, the proportion of building permits issued by private surveyors has steadily increased (figure 5.2) In February 2010, private building surveyors issued 84 per cent of the building permits in Victoria, with 93 per cent of the value of permits (BCV 2010a).

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<sup>7</sup> The Chair of the Australian Building Code Board, for example, argued that ‘To date, there have been clear benefits for the Victorian building industry and consumers. Generally, private certification has resulted in streamlining the process of obtaining building approvals and inspections. This has been driven by a demand for greater contestability and a more transparent and accessible opportunity for broader participation in the marketplace.’ (VCEC 2005a, sub. 9, p. 3)

<sup>8</sup> This is based on a survey, which suggested that participants views were mixed on the issues of whether the introduction of private building surveyors had reduced compliance costs (41 per cent agreed, 49 per cent disagreed, 10 per cent don’t know), and improved building quality (34 per cent agreed, 44 per cent disagreed, 22 per cent don’t know). (PC 2004, p. 55)

Figure 5.2 Proportion of building permits issued by building surveyor type



Source: VCEC based on BCV 2010a

As noted, there are significant ongoing concerns about the oversight of private building surveyors and the impact on building quality. The particular concern is that private surveyors may face a conflict between their obligations to require builders to comply with relevant building standards, and their desire to offer a competitively-priced service. This is highlighted by recent cases of improper conduct on the part of private building surveyors. Most recently, police investigated a Melbourne surveying company that was deregistered for issuing 1100 building permits in 2007-08 that were never reported: ‘Nearly all were issued without the surveyor having conducted site inspections’ (Dobbin 2010, p. 2).

Given the high costs of rectifying problems after the fact, the users of building surveyors also have an interest in ensuring that they receive high quality services. Recent surveys indicate that most users are satisfied with services of private building surveyors. For example:

- In 2008, 78 per cent of consumers perceived there was a high degree of independence of building surveyors from the builder.

- A similar proportion, 75 per cent, of consumers were highly satisfied with the overall standard of knowledge and service provided by the building surveyor in their project. Commercial consumers were more satisfied with building surveyors than domestic consumers (BCV 2008, p. 6).

### **Lessons from the building experience**

The evolution and institutional reform of the building system provide important lessons when thinking about allowing an element of private provision in aspects of planning. Successful implementation would require identifying the technical, rather than policy-based elements of planning, and backing these up by a strong supporting institutional framework, with:

- transparent and clear standards for policy outcomes and roles of relevant parties
- a well resourced body to provide advice, monitoring and enforcement
- professional, competent private providers
- performance reporting and scrutiny, which could compare outcomes in public and private service provision
- clear accountability and liability.

A mix of ex-ante and ex-post mechanisms (for example, accreditation, standards, training, regulation, auditing/evaluation) may be required to identify competency levels, and to build confidence in private certifiers.

### **Private sector service providers for certain categories of planning approvals**

Creating a separate track for technical assessments enables technical decisions to be made about issues that do not require a policy or community-reflective viewpoint on individual cases (community consultation would occur instead in the development of the technical assessment standard). There is no evidence to suggest that, provided the code assess track is well-designed, that private planners could not provide this service.

Private planners already have a role in the planning system. For example, they currently develop and certify applications for a council to make a decision; and they are sometimes employed by councils to perform permit assessments for the council. The key difference in allowing private planners to carry out assessments, is the accountability for the decision on the permit.

It should be acknowledged that private planners would have reputation incentives to complete work that complied with the requirements. A regulated regime around the accreditation of private planners, including penalties for misconduct, auditing of permits, and reporting requirements, could also help to reduce the risks of improper conduct.

The lessons from permitting private service providers to deliver building surveyor services have shown that a well-designed system could have significant benefits. Based on the experience of the building sector, and the estimates of the costs of planning regulation (chapter 3), and the PPAR data the Commission's analysis suggests that substantial delay and administrative cost savings could accrue to business from allowing a set of permits that required only a technical assessment (that is, code assess) to be opened to private assessment. The building experience suggests that some of these savings would be offset by the fees that private providers would charge. Without information on the potential efficiency gain from private provision, it is difficult at this point to determine a reasonable estimate of the net impacts on business.

#### **Draft recommendation 5.3**

**That the Victorian Government develop an accreditation scheme for private technical-planning officers, which may build on or draw from existing professional accreditation schemes. These technical planning officers be permitted to assess planning permits under its proposed code assess track. Private technical-planning officers be subject to the same reporting requirements as councils (via the Planning Permit Activity Reporting System), and have their assessments audited by councils with the results of audits published. Mechanisms for ensuring accountability and liability (such as fines, removal of accreditation) be written in legislation.**

### **5.3.3 Pre-application meetings and pre-lodgement certification**

Under a more efficient regulatory approval process there should be successive reductions in uncertainty about the overall outcome combined with a progressive sharpening of the focus on the key issues about which there is uncertainty (table 5.1). As noted above, many businesses consulted during this inquiry argued that councils' planning processes contributed to significant uncertainty and time delays for applicants. The key areas of uncertainty included the key planning issues to be addressed in an application, the likely outcome of an application, and the timeframes for assessment. Some suggested that pre-application meetings can be an important means for reducing such uncertainty.

Pre-application meetings can take a number of forms, from informal meetings between applicants and council staff through to a more formal process such as the pre-lodgement certification system adopted by the City of Glen Eira (appendix B).

Analysis by the Commission of planning data is equivocal about the time reductions achievable from pre-application meetings. According to the PPAR

data, about 20 per cent of applications have a pre-application meeting. This varies from 'none' in some councils, up to 71 per cent. Across all councils, having a pre-application meeting does not make a big difference to approval timeframes, although the results vary considerably across councils – in 17 councils, median timeframes for applications with pre-application meetings were more than 10 days shorter than for those applications without pre-application meetings. On the other hand, in 28 councils those applications that had pre-application meetings took more than 10 days longer than those without. The average difference that a pre-application meeting makes, in terms of timeframes, remains small even when controlling for the complexity of applications (appendix B).

Consultations with users of the planning system suggest, however, that it is important to consider the 'quality' of pre-application meetings in assessing their value to applicants. Based on discussions with planning consultants and councils, differences in how councils institute pre-application meetings can make a big difference to outcomes. Feedback suggests that factors such as whether pre-application meetings are held with the same planner that will be assessing the application, and whether the required information for the application is agreed upon upfront, can influence the impact. According to one planning consultant interviewed by the Commission, the pre-certification system implemented by Glen Eira provides a number of benefits to applicants:

- early identification of issues likely to be raised by the Council and by residents (due to the requirement for on-site meetings involving the applicant, council staff and local residents)
- greater clarity about the issues that need to be addressed in an application, which enables applicants to purchase sites with greater certainty about the likelihood of receiving a permit
- improved consistency of advice (a single senior council planner deals with the application from beginning to end)
- reduced likelihood of appeals to VCAT (based on a failure to make a decision by the Council or by objectors)
- time savings to applicants from faster advertising (5 days compared to 2-3 weeks in many councils), reduced numbers of objections (which could otherwise trigger a requirement for the full council to consider an application).

According to the planning consultant, the timeframe from lodgement to decision using the pre-lodgement certification system is, on average, around 45 calendar days, compared to an average elapsed time of between 60 to 90 days for similar applications that do not go through the pre-certification system (that is, a reduction in the average timeframe of between 33 per cent and 50 per cent). Constraints on the use of the pre-lodgement certification system are that the

proposal must be consistent with the planning scheme and council policy, and the extra time and cost that may be involved in the pre-lodgement stage.

While the Commission has not formed a view about how the pre-application meetings (including pre-certification systems) should be designed, it considers that there is sufficient anecdotal evidence about their importance and differences in councils' practices, to warrant developing further guidance for councils in the form of a best practice process. The development of such guidance would need to account for differences in the circumstances facing Victorian councils and, therefore, is best developed with significant input from councils.

#### **Draft recommendation 5.4**

**That the Victorian Government outline, in consultation with councils, the characteristics of an effective pre-application meeting process, including pre-lodgement certification, and incorporate this guidance in a best practice model for planning permit assessments (outlined in draft recommendation 5.2).**

### **5.3.4 Delegated decision-making**

The Commission's consultations with councils and planning applicants suggested that councils' practices for delegating decision-making to staff varies and that timeframes and outcomes are much more uncertain when decisions are made by councillors. Participants submitted that councils' rules for delegating decisions vary markedly. Some councils, for example, have a policy that where there is one objection the application must be decided by the full council or a council sub-committee. Others require full council assessment only when there are multiple objections. Some processes are also based on an 'opt-in' option for councillors, rather than specific referrals.

The Commission's analysis of planning data (appendix B) shows that although councillors make decisions in a small proportion (7.5 per cent) of cases, the median timeframes are considerably longer (161 days compared to an average of 73 days where the delegate makes the decision). The extent of delegation varies considerably between councils - from no decisions being delegated up to 98 per cent - but over 70 per cent of councils (representing about 70 per cent of permits) delegate over 80 per cent of decisions. Applications are more likely to be decided by councillors rather than council staff where there are objections. In half of those permits determined by council, there was at least one objection. Appeals to VCAT are also more likely when the councillors make decisions (21 per cent of cases compared to 2 per cent when the decision is made by the delegate).

Best practice principles such as those advocated by the Development Assessment Forum (appendix B) support the separation of policy and administrative decisions in planning. The Commission has supported this principle in other areas of regulation (VCEC 2009a, pp. 292-295), as has the Victorian Government (Government of Victoria 2006b, p. 20).

The main perceived benefits of councils making decisions appears to be that it enables objectors and applicants to discuss applications in a public forum, and also enables elected community representatives to make decisions on important matters affecting their municipalities. But councillors have the opportunity for shaping decisions in other ways. For example, councillors have the opportunity to shape local policy through their municipal strategic statement and council plans required under the *Planning and Environment Act 1987 (Vic)* and the *Local Government Act 1989 (Vic)* respectively. Processes such as pre-application meetings involving local residents also provide a means for direct engagement in the development and assessment of planning permits.

Encouraging amenity-based policy judgements to be made earlier, preferably through planning schemes, rather than on an ad hoc basis for individual permits, is consistent with better practice processes, and likely to reduce costs (chapter 4). Using delegation effectively can reduce case-by-case political judgements and focus efforts toward the upfront policy, thereby leading to more consistency and certainty in decision-making. While some guidance on delegation is already available, incorporating best practice criteria for delegation into a best practice model would help to provide further incentives for a well-designed approach to delegation. This would assist in improving certainty, and reducing time delays and costs to both applicants and councils.

#### **Draft recommendation 5.5**

**That the Victorian Government provide guidance on best practice delegation processes in regard to the roles of councillors and council staff as part of the best practice model for planning permit assessments (outlined in draft recommendation 5.2).**

### **5.3.5 Online processes**

The State Government has supported the development of a number of online initiatives through its *Reducing the Regulatory Burden* work, with the 2008 progress report estimating that online solutions in planning and other areas of regulation are expected to produce administrative burden savings to business valued at \$29 million (DTF 2008).

In the planning area, a number of initiatives have been developed under the ‘e-planning roadmap’ system, with a number rolled out since 2007. The roadmap

includes electronic Planning Permit Activity Reporting (PPAR) by councils, the SPEAR (Streamlined Planning through Electronic Applications and Referrals) program for dealing with subdivision and other planning applications online (box 5.2), as well as Planning Maps and Planning Property Reports online, which provide free online access to planning maps and associated information for all 28 million properties in Victoria. They have proved popular resources with over 22 000 reports and 230 000 maps being viewed every month by more than 20 000 users (DPCD 2009j, p. 3). The latest update (DPCD 2009j) flags the rollout of new initiatives and improvements to existing initiatives over the next two years, including a Planning Portal and an Electronic Planning Provision System planning scheme and amendments system.

There is a number of potential benefits arising from increasing the availability of online services:

- Time savings for businesses, councils and referral authorities in the application process by reducing the need for a number of actions in the process, such as photocopying, postage, payments.
- Improved reliability of the processes by introducing standardised procedures, and tracking systems for applications.
- Improved availability of information to the general public and to prospective applicants to make the system more accessible.
- Reduced variability within the system by having greater alignment in information required in different council areas, and in the processes for compliance.
- Time savings for applicants and councils by ensuring forms are filled in completely, and correctly, which reduces the need for further information requests later in the process.

#### **Box 5.2 SPEAR implementation experience**

SPEAR (Streamlined Planning through Electronic Applications and Referrals) commenced in 2007 is open to subdivision applications. SPEAR Planning is now being rolled out across Victoria and initial meetings with councils and planning consultants commenced in June 2009.

SPEAR can be used by all parties involved in the subdivision and planning processes, but in differing capacities:

- Applicants use SPEAR to lodge and manage their application and track its progress.
- Councils use SPEAR to receive, manage, refer and approve applications.
- Referral Authorities use SPEAR to receive and respond to referrals.

(continued next page)

## Box 5.2 **SPEAR implementation experience** (continued)

- Members of the public can use SPEAR to find out basic information about an application and lodge and view objections.

A Standard Cost Model (SCM) measurement prepared to measure the savings attributable to SPEAR use in subdivision was finalised in August 2009, which estimated savings of \$1.6 million per annum. As far as the Commission can gather, the benefits arising from rolling SPEAR out to all planning permits has not been estimated. The SCM explained that the take-up rates for SPEAR have been lower than expected; approximately 12 per cent of subdivision applications were made using SPEAR in 2007-08, and 26 per cent in 2008-09 (the 2007 RIS estimated 20 per cent and 70 per cent in both years respectively). This may be due to slower-than-expected council take up. Land Victoria expects that take up will continue to increase given efforts to improve the SPEAR system, and to promote the benefits of SPEAR. The SPEAR website currently shows that 101 applicants, 38 councils and 195 referral authorities have registered to use SPEAR.

*Source:* DSE 2009; Land Victoria 2010

However, not all online processes realise the potential benefits. As the experience with SPEAR highlights, the potential benefits depend on the take-up rates by businesses and councils. The Roy Morgan survey (chapter 3) showed that businesses dealing with councils on planning regulation mainly deal over the phone (41 per cent) or in person at council offices (34 per cent). Fewer mainly dealt with councils online (4 per cent) or via email (10 per cent) (Roy Morgan Research 2010b). This may be reflective of the current take-up by councils of online services, or the ease of use of these services for the business's purposes.

Take up rates may be low because businesses or councils are unaware of the benefits of SPEAR, or do not believe that, given transition costs, they will receive net benefits. One way of getting higher take-up rates, and thus realising higher benefits from the schemes, is to actively promote the benefits of schemes.

Another way of increasing take up rates is to make improvements to the schemes to reduce the costs of taking up the scheme (for example, by helping businesses and councils make changes to their existing processes to adjust to the new scheme), and/or increasing the benefits that businesses and councils received from using the scheme. The Commission's consultations with businesses to date have suggested opportunities for increasing the benefits associated with SPEAR. One business, for example, suggested that 'read only access to SPEAR should be provided so that developers can check the current status of an application' (ACG 2010, p. 28). The Commission understands that this capacity is available through SPEAR, so it may be the case that councils are not updating this regularly, or that businesses are unaware of the full functionality.

The costs and benefits of using online processes would vary across councils. Where councils have relatively few planning applications, the likely internal benefits are lower. About 95 per cent of planning applications are processed by the 70 per cent of councils that process more than 350 applications. Focussing on uptake from these councils would help to make planning online a standard feature.

### 5.3.6 Notification and objections

Consultation with the community plays an important role in helping to identify the potential adverse effects of land use and development on the community. Consultation can occur at the stage where councils are developing or reviewing planning controls, and it can also occur during the permit assessment stage. Consultation can provide many benefits, but also involves some costs to those involved in consultations, to councils and to permit applicants. In administering planning processes, councils have some flexibility about when and how they consult the public, and in exercising their discretion, they need to consider both the benefits and the costs of undertaking consultation. Participants considered that councils adopt differing but often risk-averse approaches to notifying and consulting the public on planning applications, which led to increasing timeframes and uncertainty.

The Planning and Environment Act states that planning applicants are required to notify the public where there could be a material detriment to a member of the public arising from the proposed planning permit (s 52). Specific rules and processes for notification are determined through the council's planning scheme, and vary depending on the zone, with some decisions at the discretion of council officers. Analysis of planning data shows that notification influences the likelihood of objections, with very few objections received where the council has determined that no notification is required.<sup>9</sup>

Any person can object to a planning application, and councils must consider all objections, even if the objection is 'misguided, ill-informed or obstructive'. The council can only disregard an objection if it considers it has been made to gain a commercial advantage (s 57(2)(a)), or if the application was exempt from notice under the Act or the council's planning scheme (DPCD 2007, p. 24). Thus, although an objector is encouraged to demonstrate when placing their objection that the application will cause them material detriment (DPCD 2008c, p. 16), the council cannot reject the application on these grounds.

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<sup>9</sup> According to the PPAR 2008-09 data, there was at least one objection in 2 per cent of applications that did not have a notification process. This compares with 35 per cent of applications where notification occurred.

An issue raised by participants covered the impact of ‘vexatious’ objectors. The Master Builders Association of Victoria, for example, stated that:

... it is important for the community to have input into the future development of their local area. However, it is critical to note that this important process can often descend into a vexatious farce if opponents to the proposed development are creative enough. Objectors can force major changes to the structural and aesthetic components of the development, and can even have the construction delayed further should the project be forced into VCAT. Whilst some observers may see this as the natural rigour of the planning process, the end result is often a final product which does not resemble or operate as originally intended (and is usually a bad outcome for all sides) (sub. 24, p. 9).

The PPAR data shows that objections have a major influence on timeframes, even where just a single objection is raised. Objections do not occur in 86 per cent of applications (39 per cent of applications are subject to public notification). Of the 15 per cent of permits receiving objections, 42 per cent receive a single objection. Objections are very common in some council areas (in one council area, 40 per cent of applications have objections), and are very common for large developments (44 per cent of large developments have objections). Where there is a single objection, the median processing time is significantly longer, adding 109 days to the expected timeframe. The magnitude of this difference occurs even when controlling for other key factors such as the complexity of the application, the value of the application, further information requests and referrals (appendix B). It is possible, however, that objections lead to better outcomes (such as beneficial conditions being imposed, or poor applications being rejected), and therefore the available data do not enable conclusions to be drawn about the frequency and impact of vexatious objections.

There may also be a direct relationship between the number and likelihood of objections and the behaviour of applicants. In discussions, a number of participants referred to instances of businesses submitting what were clearly viewed as ‘ambit’ or speculative proposals in the sense that the proposed development would clearly not comply with a planning scheme. Objections to such ‘ambit’ applications are therefore not surprising, and any extra time involved in considering objections to ambit proposals represents a cost to councils and objectors, rather than a cost to the business.

The Commission does not have any data indicating the frequency of ambit or speculative proposals by applicants, but it is widely acknowledged that such behaviour occurs. The issue highlights the importance of providing clear guidance in planning schemes about the types of development activity that are allowed, and those that are prohibited.

Objections have been raised in past reviews and inquiries into planning. The *Cutting red tape in planning review* recommended changes to notification and objection; specifically that:

Notification requirements will be based on the likely impact of the proposal and be set out clearly and consistently in planning schemes.

- Examine legislation to clarify consideration of objections so that objections that do not relate to the purpose of the application can be disregarded.
- Introduce a new class of notification, to give three classes of notification, and specify the class of notice to be given for all applications.
- Prepare guidelines that set out best practice notification procedures (Carbines 2006, p. iv).

The progress report indicates that some progress is being made on the second and third of the above recommendations (with consultation and reports being considered), which will improve guidance around notification, and facilitate new residential zones. This will provide the opportunity for robust consultation with the community during the development of a planning scheme as to planning requirements in a zone, with fewer notification requirements on individual permits. The application of the new residential zones is explained in chapter 4.

Objectors bear a cost, in terms of the time taken to make an objection, which may include time spent familiarising oneself with the planning system, discussing the issue with neighbours, and attending meetings with the council and planning applicant. It could also include financial costs if an objection ends up at VCAT. However, it has been suggested that imposing a nominal fee for objections could be a market mechanism to reduce the number of frivolous or vexatious objections. In theory, if a potential objector had only a minor concern, even a small fee may deter them from making an objection. Conversely, if a potential objector had a significant concern, their interest in the planning issue would outweigh the small fee and they would proceed with an objection. In practice, there is also a risk that potential objectors with legitimate concerns would be deterred; and that a fee would not deter objectors with frivolous or vexatious concerns at all. Nominal fees are used in some other areas of legislation to deter potentially vexatious requests, even where it is acknowledged that a public right exists.

There are also equity concerns when imposing a fee as a fee would be likely to deter fewer wealthier objectors than those with less means. There are also equity considerations between a developer and an objector – for example, if a developer made an ‘ambit’ claim in their application with the view of negotiating down to an acceptable agreement, an objector could bear costs where an application was clearly inconsistent with a planning scheme. One view is that if a fee for objectors were to be implemented, a fee should also be levied on planning applicants that submitted ambit applications. Consequently the design of any fee

for objections would be important, to ensure that a fee would be set at a level that would not deter genuine objectors, and that a fee could be waived where such equity issues were apparent.

Another option could be to clarify, or tighten the grounds for objections. The short guide for planning produced by DPCD refers to ‘reasonable’ concerns being the grounds for objections (DPCD 2008c, p. 16), though councils must consider every objection (DPCD 2007, p. 24). Clearer guidance provided for community members about reasonable grounds for objections, including the ability for councils to reject objections that are clearly without grounds, could enable councils to deal more effectively with meritorious objections and prevent wasted time for both council and the planning applicant where the objection has no grounds.

Importantly, objections are likely to lead to fewer disruptions in the planning process where there are clear requirements under a planning scheme as to the activities that are allowed, and those that are not; and better defining the circumstances under which notification is required, and how public comments should be sought. Thus, many of the costs of objections could be prevented through better strategic planning processes (chapter 4) rather than using other instruments.

The key issue to try to address is to reduce the impact of vexatious and frivolous objections on delays, while continuing to have a planning system that encourages public consultation and supports legitimate objections that lead to improvements. It is difficult to address this issue given that we do not have data on the extent of vexatious objections, frivolous objections; the extent of ambit claims made by applicants that lead to objections; or the extent to which objections change planning outcomes.

### **5.3.7 Incomplete applications**

Under s58(1) of the Planning and Environment Act, Responsible Authorities *must* consider every permit application subject to subsection (2) which exempts Development Assessment Committee (DAC) applications (Part 4AA). Incomplete applications are said by councils and DPCD to be a major cause of delays. The analysis of planning data shows there was a request for further information in 36 per cent of decided permits. This ranged from 1 per cent to 100 per cent across different councils. The PPAR data suggests that where applications are incomplete, the median number of days increases by 70, however when comparing a set of like applications, the difference was lower.

The PPAR data do not detail the time that these applications spend with a council before a further information request is issued, or how long the application spends with the applicant.

Some businesses argued that a large proportion of information requests are unnecessary or arise due to the complexity and lack of clarity of planning regulations and guidance materials.

There is a reciprocal responsibility on both parties: on councils to provide adequate guidance as to what is required and to request only the information that is necessary to make a decision; and for applicants to provide complete applications that they expect to meet the requirements.

Councils currently have different ways of dealing with incomplete applications. Some councils do not accept planning applications that are not complete. For example, a City of Greater Dandenong information guide states: 'An incomplete application for a planning permit will not be accepted by Council.' Dandenong provides a checklist with all necessary items to help applicants ensure that the application is complete, and also holds pre-application meetings with the applicant (City of Greater Dandenong pp. 2-3). The City of Glen Eira provides a positive incentive for applicants that provide full information with their application, by providing two fast track processes – pre-lodgement certification and No Requests for Further Information (NORFI). These processes commit the council to not request further information and commit to completing the assessment in a certain timeframe; however, the council may still reject the application. Pre-application meetings feature prominently in these assessment tracks.

Another mechanism for reducing incomplete applications is technological. With a greater number of permits processed through online systems, there will be fewer information requests covering mandatory information, as online systems do not allow the submission of incomplete applications. As more councils adopt these, the number of further information requests is likely to reduce.

Giving councils the explicit option of rejecting applications that are incomplete could help to make sure that applicants put an adequate amount of effort into their applications. While planning officers may still need further information throughout the process to make a decision, a submitted application should still meet an adequate standard. The City of Dandenong's system of requiring a checklist may assist in ensuring that submitted applications are complete.

A risk in giving councils an explicit power to reject incomplete applications would be if this power were used inappropriately, for example, rejected for missing trivial information. Some transparency would be required around this power, such as reporting on the number of applications that were rejected on this basis, could mitigate this risk.

#### **Draft recommendation 5.6**

**That the Victorian Government grant councils the right to reject incomplete or poorly prepared applications (subject to transparent reporting on the use of this power).**

### **5.3.8 Referral processes**

The Act sets out a process for councils to refer applications to referral authorities under section 55. The relevant referral authorities and triggers for seeking the approval of a referral authority are set out in the planning scheme.

Under the Act, referral authorities can object to an application, require that certain conditions are met, or consent to an application. Referral authorities can also make comments, such as information or advice. If the referral authority objects to an application, the council must reject the permit. If council refers an application to a referral authority under section 55, it is obliged to wait until the referral authority makes a decision, or up until 28 statutory days. The Commission has heard from councils that there is uncertainty about exercising this power, and that they would benefit from a more explicit acknowledgement that following the expiration of the statutory period that they are able to decide on the application.

Some participants considered that delays to deciding planning permit applications are often caused by slow responses or information requests from referral authorities. The City of Greater Bendigo, for example, submitted that ‘In many instances in planning and environmental regulation, it is the required referral to State Government departments and/or agencies that most delays an approval process.’ (sub. 23, p. 1). There is some support for the view that current referral processes are contributing to planning delays. About 25 per cent of applications are sent to referral authorities. The median timeframe for referred applications is 102 days, compared with 69 days for applications that are not referred.

The issue of delays in the referral process was examined under the *Cutting red tape in planning* review (Carbines 2006). The review proposed a number of options for dealing with delays due to referral provisions and processes, recommending that:

In consultation with relevant authorities, examine options to:

- review all referrals in planning schemes and decide whether a standard agreement can be put in place to reduce the need for some referrals in each case
- introduce a deemed to consent provision if no response to a referral is received in 21 days

- provide for prior consent from referral authorities before submission of an application for specified types of applications. (Carbines 2006, p. 11)

The most recent update on implementation of the *Cutting red tape in planning* review noted that a number of changes are being made to referral arrangements, including standard referral forms, removal of non-statutory referral provisions, updates to a practice note on referrals, and planning applications online (DPCD 2010g; appendix B).

Hence, it appears that there is no intention to introduce a deemed to consent provision (where a referral response is not received within the statutory timeframe). It is not clear why such a measure has not been introduced. The *Cutting Red Tape in Planning* report noted that such a measure has been introduced in the Australian Capital Territory (Carbines 2006, p. 11).

The Commission understands that there is some reluctance on the part of referral authorities to introducing a deemed to comply provision based on concerns about resourcing, particularly in regional offices. The lack of an explicit deemed to comply provision provides the flexibility for councils and referral authorities to negotiate this into referral agreements, based on local circumstances. However, this approach means that there may be different approaches across the State to handling referrals, uncertainty for applicants about timeframes (where there are resourcing issues), and additional costs for applicants. Essentially, the lack of a deemed to comply provision means that applicants bear the costs of inadequately resourced referral authorities.

The Commission is aware that some councils have developed standard agreements to simplify referral processes. For example, the City of Greater Bendigo provided the Commission with an example of a standard agreement they had with VicRoads. The agreement provides for a range of matters that do not need to be referred to VicRoads, with standard conditions for applications with certain characteristics. Interestingly, the agreement does not outline how the council deals with a delayed response from VicRoads (that is, whether the Council will continue to wait for a response beyond the statutory period or whether it will proceed with processing an application on the basis that there is no objection).

The Commission considers that there is scope to reduce delays by introducing a deemed to consent provision for referrals if no response to a referral is received in 21 days. It is important, however, to ensure that there are no perverse consequences from the introduction of such a provision. There is the risk, for example, that with such a provision referral authorities may make additional information requests in order to prevent the statutory timeframe from expiring. This risk could be managed by introducing better reporting on referrals (section 5.2.1) and developing a model referral agreement for councils and

referral authorities, to reduce the costs associated with councils negotiating agreements with individual referral authorities.

#### **Draft recommendation 5.7**

**That the Victorian Government streamline referral processes by:**

- **developing standard agreements for all councils to use when dealing with referral authorities. Councils would remain able to negotiate amendments to the agreements if circumstances required.**
- **amending the Planning and Environment Act to introduce a deemed to consent provision if no response to a referral is received in 21 days.**

## **5.4 Skills and capacity issues**

Reflecting concerns about the skills and capacity of councils to administer aspects of planning regulation, participants suggested a number of improvements to planning that related to increasing the funds available for councils, and addressing skills shortages. Two options in relation to this are examined in this section:

- the level and type of cost recovery of fees for planning permits
- improving the training, attraction and retention of planners.

### **5.4.1 Cost recovery**

The Victorian Government's general policy for setting fees and charges by State agencies is full cost recovery. This promotes efficiency objectives by sending price signals about the value of resources being used in the provision of the regulatory activity or service; and equity objectives, by ensuring that those that benefit from the provision of the regulatory service pay the associated cost. The Cost Recovery Guidelines are the basis for setting regulatory fees for State government regulations (Government of Victoria 2007a, p. 6).<sup>10</sup>

The guidelines note that there may be situations where it may be desirable to recover less than full cost, or not to recover costs at all, including where there are benefits to unrelated third parties; and where full cost-recovery might adversely affect the achievement of other government policy objectives (Government of Victoria 2007a, p. 6).

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<sup>10</sup> For example, the Government's cost recovery guidelines state that 'The importance of cost recovery extends beyond the recuperation of the costs of government-provided or funded products, services or activities. When undertaken carefully, cost recovery can deliver both equity and efficiency benefits to the community. However, when poorly-designed, cost recovery arrangements may create inappropriate incentives, and could potentially undermine the achievement of other government objectives' (Government of Victoria 2007, p. i).

The *Planning and Environment (Fees) Regulations 2000 (Vic)* set out the maximum fees for planning services, for all councils in Victoria. They vary according to the application category and the value of the development, ranging from \$102 to \$16 130 (although councils can choose to waive fees or reduce fees).

The *Cutting red tape in planning* report raised councils' concerns that the current fee structure did not enable them to adequately recover the costs for their services, and recommended an examination of planning fees so that they were fairer for all stakeholders (Carbines 2006, p. 28). A scoping study was prepared for the Department of Sustainability and Environment (DSE), which recommended that more detailed activity-based costing needed to be undertaken to determine appropriate fees, but suggested that current cost recovery ranged across councils from 11 to 50 per cent, and averaged 27 per cent. The report stated that 'some councils expressed the view that they would be satisfied with recovering at least 40 per cent of planning related costs, whereas others would like to be able to recover all of their costs' (PWC nd, p. 80). The information that the Commission has collected for this inquiry, also suggests that the costs of administering planning regulation are much higher than that which councils are able to recoup through fees (chapter 9).

Setting a fee below full cost recovery may have some efficiency and equity impacts (depending on the extent to which it is considered that planning services deliver private, rather than public benefits), but also affects the incentives of councils to deliver good quality regulatory services, as well as to innovate to provide differentiated services. Where there is under-recovery of costs and councils face budget pressures across all of their services, councils have an incentive to under-invest in planning services. This underinvestment can affect the timeliness of services, given that applicants, rather than councils, primarily bear the costs of delays.

A number of councils have indicated that the cap on planning fees constitutes a constraint, which affects their ability to perform their tasks efficiently. For example, the City of Stonnington stated:

Due to constraints on Council in pricing its services, in this case imposed through the *Planning and Environment (Fees) Regulations 2000*, Stonnington had to end its fast-track model despite it having proved popular with customers, particularly business customers. (sub. 7, p. 14)

The City of Greater Bendigo stated:

Fees need to recognize the overall community benefit of regulation and therefore full cost recovery from applicants is generally not appropriate. However, in the most complex area (planning) fees able to be charged fall far short of the cost of the service. (sub. 23, p. 8)

In principle, allowing a higher level of cost recovery, can provide financial benefits to councils and reduced delay costs for planning applicants, if service quality improves as a result of better resourcing. The business perceptions survey undertaken by Roy Morgan indicated that businesses dealing with planning regulation were more likely to feel that fees were reasonable than the average (49 per cent compared with 43 per cent) (Roy Morgan Research 2010b). One business that took part in the Allen Consulting Group research on costs suggested that ‘Councils need to be properly resourced, the current fees charged do not adequately cover council costs (for example, a fee of \$1000 for a 1000 lot subdivision)’ (ACG 2010, p. xi).

Arguments against full cost recovery may be legitimate in planning, where ultimately communities benefit from having a sound planning system, and where there are considerable rights for third parties to input into and object to the planning process. These arguments would need to be explored in a manner consistent with that pursued for other areas of government regulation. For example, the regulation of liquor sales is designed to improve community outcomes, and there are rights for communities and individuals to have a role in the licensing process; and the costs associated with liquor licensing are fully cost recovered (DOJ 2009).

The Victorian Government is reviewing costs recovery arrangements for planning regulation. The current planning fees regulations were due to sunset in 2010, however the Government has delayed remaking the regulations until the process of amending the Planning and Environment Act has been completed. The process of remaking the fees regulations provides an opportunity to examine a number of options, including deregulating planning fees completely.

Removing a fee cap from State legislation to allow councils to charge their own fees, may also be a viable option. The MAV has previously recommended that ‘the review of planning fees allows for all models, including the deregulation of fees’ (MAV 2006a, p. 3). There is a number of potential advantages to allowing councils to set their own fees. For example, costs vary considerably across council areas, and self-set fees could allow councils to recoup their actual costs. It would also allow them to recoup the costs of providing differentiated regulatory services that planning applicants value, such as a ‘priority paid’ service, a service with ‘no requests for further information’, or pre-application meetings with senior council staff or residents.

Estimates developed by the Commission suggest that substantial delay cost savings could accrue to business by removing fee caps, but it is not clear how these savings would interact with a potential increase in fees. While removing a fee cap could increase financial costs in some cases, both councils and planning applicants could end up better off if it leads to improvements and innovations in service quality.

If the Commissions' recommendation to allow private providers to assess permits in the code assess track were adopted, it would be expected that the effect of competition would be sufficient to ensure efficient prices. For example, if a council charged excessively high prices, planning applicants could choose to have their permit assessed by another provider. Given that there would no longer be a monopoly provider of planning regulatory services for code assess, the Commission considers that there would be no need to regulate the fees that councils charge for code assess permits.

The main argument against removing restrictions on planning fees, is that councils may abuse their current exclusive role by charging fees that exceed the cost of service delivery, either to raise revenue or to deter development. Councils have the capacity to set their own fees for local laws, as well as under the *Food Act 1984 (Vic)* and the *Public Health and Wellbeing Act 2008 (Vic)*.<sup>11</sup> They also have the power to charge rates on a needs basis. The Commission does not have evidence that these powers have been abused by councils, and it is not clear that councils would behave differently with regard to planning.

A second argument against allowing councils to set fees is concern that it could increase the risks of regulatory capture—that is, the risk that councils may feel obliged to grant permits to applicants that have paid high fees, even though an application does not comply with their planning scheme. Given that some planning decisions (such as land rezonings) can result in large changes in the value of land, this risk may be more pronounced for some types of planning decisions.

A cap on fees is only one way to deal with concerns about misuse of power, and regulatory capture. With 79 councils administering planning regulation, transparency, for example, could be an effective tool for managing such risks. Active benchmarking of fees combined with information on the efficient costs of planning regulatory services could be used to highlight instance of excessive fee-setting by councils or high one-off fees paid by developers to councils.

A further option may be to allow councils to set their own planning fees but subject to preparing a regulatory impact assessment, as is required for State Government regulatory fees. State agencies may be required to prepare and publish a regulatory impact statement (RIS) to establish that their costs are efficient, that fees are representative of these costs, and to test the justification for the proposed fees with the community.

Preparing a RIS involves some costs. In 2005-06 the Commission collected data which suggested that the RIS process cost about \$40 000 (including to

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<sup>11</sup> Under these Acts, fees can be restricted via Order in Council or by an Order published in the Victorian Government Gazette.

departments, stakeholders, and the Commission) over and above the standard costs of making regulation (VCEC 2006a, p. 138). This cost has almost certainly increased since that time. The costs of a RIS-type process may exceed the benefits to some councils of setting their own fees, but it may have net benefits in other councils. One option available to the State Government in making the new Planning and Environment (Fees) Regulations is to develop a 'default' fee, which councils could adopt or vary, provided variations were justified, documented and involved community consultation through a RIS-type process, such as that being developed by the Government for local laws (chapter 7).

The Commission's analysis in chapter 9 suggests that councils do not currently undertake costing of their regulatory activities. For this reason, the Commission considers that a default fee is important. It would ensure that councils that do not currently have the capacity or processes in place to enable them to accurately set a cost-reflective fee are able to charge a reasonable fee for their activities. Those that had the processes and capacity to undertake costing of their processes would, however, not be bound by the current cap. This option would be complemented by the Commission's draft recommendation in chapter 9, which is aimed at improving councils' capacity to undertake activity-based-costing. To allay any additional concerns, a safeguard could be built into fees regulations to enable the Planning Minister to revoke fees in excess of the default fee, where inadequate justification is provided by a council.

Chapter 10 discusses some of these issues further as they relate to other fees that councils impose, and the range of options available as to how controls are exercised on councils' monopoly power.

#### **Draft Recommendation 5.8**

**That the Victorian Government removes the cap on fees for code assess applications with the introduction of private planning assessments.**

**That for merit assessments, the Victorian Government replaces the cap on planning fees with a default fee. The default fee must reflect the estimated costs facing councils and involve an explicit judgement as to the appropriate level of cost recovery.**

**That the Planning and Environment Act be amended to allow councils to adopt self-set fees, which councils would be required to assess against the Department of Treasury and Finance's Cost Recovery Guidelines, and test through public consultation.**

**That the Planning and Environment Act be amended to allow the self-set fee to be revoked, if necessary.**

## 5.4.2 Skill shortages

A number of submissions to the Commission's inquiry and other recent reviews have identified that skill shortages and financial constraints on councils are adversely affecting councils' administration of planning regulation.

The following issues were raised in submissions and recent reviews (see PIA 2004, for example):

- Some councils are facing shortages of qualified planners with unfilled positions placing added workloads and stress on existing staff.
- Shortage combined with competition from the private sector is placing upward pressures on the salaries of council planners.
- The growing complexity of planning regulation is adding to workloads and complexity of development assessment, compounding the effect of shortages.
- Some participants argued that difficulties in recruiting and retaining qualified planning staff are most acute in regional councils.
- In a recent survey by Workforce Victoria, all organisations recruiting urban or regional planners reported difficulties in filling positions (Workforce Victoria 2008, pp. 10-11).

There seems little doubt that many councils, particularly rural and remote shires, are experiencing difficulties in attracting and retaining staff with the requisite skills to undertake strategic and statutory planning work.

To address the recognised skill shortages, councils and the State Government have developed a number of different measures. For example, the Government established an Education Pathways Planning Committee to advise on strategies to encourage more people to undertake planning studies. In 2005, the Victorian Government (Government of Victoria 2005b, p. 26) announced that it would create five new planning cadetships and five new planning assistant traineeships in regionally based councils (under a program to be administered by the Planning Institute of Australia).

Councils are also trying a variety of strategies to address skill shortages. In consultations with councils the Commission heard of approaches such as:

- investing in the training and development of other staff to provide them with relevant planning skills
- hiring consultants, especially to clear backlogs
- sharing planning staff with nearby councils
- using planning students to assist with assessments
- encouraging qualified planners to migrate to Australia, with urban and regional planning being a profession eligible for skilled migration

- redesigning processes to use non-qualified and trainee planners to undertake planning-related tasks of a non-technical nature.

Some councils have also reported that broader planning process reforms, such as those implemented by Glen Eira, have provided workplace benefits such as freeing up planning staff to tackle more challenging and interesting work thereby encouraging staff retention (appendix B).

While there is some evidence that there is a shortage of planners, there appears to be little publicly available information on the drivers of this shortage, or the effectiveness of these council- and State-led strategies to address the shortage of planners. This lack of information makes it difficult to determine the best approach for addressing the shortage of planning staff.

A number of the measures proposed by the Commission will indirectly address the problem of skill shortages in councils. Addressing the issue of the low cap on planning permit fees, for example, will assist in better resourcing councils to address skill shortages. Similarly, the extent to which improvements in strategic planning can help to make the planning process less contested, and help to clearly distinguish between the different types of skill sets required for different types of assessments, may help to reduce turnover and attract more skilled planners, and allow for the certain work to be carried out by non-planners.

There is the risk, however, that other reforms to planning, such as the proposal to allow authorised private planners to undertake some permit assessments will exacerbate the shortage of council planning staff in the short term by encouraging more to move to the private sector. Any increase in private sector demand for planners may lead to higher salaries as the supply of new planners will take time to adjust. It is difficult to draw any major lessons from the experience with private building surveyors. Data on the building industry over time shows that building wages have generally increased at a higher rate than for all-industry wages since 2000 (building wages were 105 per cent of the all-industry wage in 2000, compared with 121 per cent of the all industry wage in December 2009) (BCV 2010b), and the number of building surveyors has risen since 2007 by 4.7 per cent (BCV 2010d). However, this is in the context of significant industry growth.

If the Government opens up some planning permits to competition it may need to consider measures to enhance the supply of planners and to assist councils in meeting the longer term challenges of attracting and retaining staff with skills appropriate to the work. This is particularly the case with strategic planners, as in many instances the benefits extend beyond individual councils. Alternatively, privatisation may encourage a more efficient split of work, between technical and complex policy-based assessments.

A major impediment to the development of policies for addressing skill shortages in councils is lack of information about the planning workforce in Victoria and the use of these skills by councils. Councils face few regulatory impediments to reorganising their internal processes to making the most of their scarce planning skills. The Planning and Environment Act does not, for example, require that planning processes be performed by qualified or accredited planners. As noted, councils have tried various approaches to overcoming the shortage of planners, including allocating some tasks to non-planners. Provided tasks are matched to an appropriate skill set, there seems no reason why an accredited planner is required to carry out very simple assessments.

The lack of information on the effectiveness of these strategies, however, means that the uptake of successful strategies by councils may be lower than it could be. Due to the public good nature of this information there is a role for industry bodies (such as the MAV and the Victorian Local Governance Association) or the State Government to facilitate the collection and dissemination of such information. This could be achieved by the State Government taking the lead to develop, in close consultation with the local government sector, a strategy for addressing the planning recruitment and retention challenges facing Victorian councils.

The focus in developing the strategy should be based first on better understanding the different types of work that planners currently do, and the appropriate skill-sets for different categories of work – including where more generic tasks could be undertaken by non-planners. Secondly, on developing a better understanding of the extent of shortages and the nature and impact of recruitment and retention challenges facing councils. Thirdly, estimating the impacts of the lessons learned from various councils' strategies for mitigating these challenges and sharing successful strategies.

Some options for addressing skills shortages, building on the work that the State Government and councils are already doing, include: promoting the sharing of planners across municipal boundaries, working with the Commonwealth Government to further increase and promote further skilled migration passages for planners, and better matching different planning skills to different types of planning assessments (including exploring options for 'fast-tracked' or specialised planners). The Commission's analysis suggests that the potential gains from reducing the impact of skill-shortages could be significant, between \$4 million and \$13 million dollars if it reduced delays by between 4 and 12 per cent. However, developing a strategy would not be costless, and the net saving would be less than this amount.

#### **Draft recommendation 5.9**

**That the Victorian Government, in consultation with local government, develop a strategy to help Victorian councils meet their planning recruitment and retention challenges by July 2011. The strategy would provide:**

- **information on the extent to which strategic planning is accorded the highest staffing priority**
- **information on the different types of work that planners currently do, and the appropriate skill-sets for different categories of work, including those tasks that can be undertaken by non-planners**
- **information on the extent of shortages and the nature and impact of recruitment and retention challenges facing councils**
- **options for fast-tracking planning qualifications, or allowing for more specialised, restricted qualifications to carry out a lesser scope of work**
- **an evaluation of the impacts of various councils' strategies for dealing with skill shortages in order to promulgate successful strategies.**

## **5.5 Estimated cost savings**

The Commission's savings estimates fall broadly into three groupings:

- planning process improvements
- reducing resource constraints
- reducing complexity by better strategic planning.

There is a number of recommendations within the first two headings, each of which could be expected to yield gross savings to businesses. The Commission regards the quantified savings as probably being conservative for reasons set out in the earlier sections. The Commission's analysis suggests that the potential annual savings to business are likely to be in the range of \$20 million - \$40 million. The main drivers of this estimate are outlined in table 5.2.

In every case the estimates should be regarded as, at best indicative, and do not include the costs incurred by the Victorian Government (and others) to implement the changes. The Commission intends to undertake further work to improve the robustness of the methodology and estimates, including developing an overall picture of net benefits from the proposed changes. That said, the estimates are set out for comment and suggestions to refine them in order to provide the best guidance for decision makers.

Table 5.2 Summary of indicative cost savings to business  
(\$ million per year)

	<i>Low</i> (\$ million)	<i>High</i> (\$ million)	<i>Mid-point</i> (\$ million)
<i>Planning process improvements</i>			
Administrative costs	3.6	7.1	5.3
Delay costs	8.0	16.0	12.0
<i>Reducing resource constraints</i>			
Administrative costs			
Delay costs	4.3	12.8	8.6
<i>Reducing complexity by better strategic planning</i>			not quantified

Source: VCEC analysis

## 6 Building and construction regulation

Building and construction is a large, multi-disciplinary industry that is subject to a wide range of regulations and is overseen by numerous regulatory bodies with different functions and jurisdictions. Local government regulation forms one part of this matrix of regulations. This ‘regulatory framework hierarchy’ was summarised in the Commission’s report *Housing Regulation in Victoria: Building Better Outcomes*:

Regulation of the building process in Victoria is embodied in three main instruments: the Building Code of Australia (the minimum requirements for building practices and for aspects of building performance); state legislation, Regulations and variations to the Building Code of Australia; and local government laws. (VCEC 2005a, p. xx)

Given the importance of the construction industry to the economy, and to meeting Victoria’s population, environmental and infrastructure challenges, it is appropriate that governments take actions to reduce unnecessary regulatory burdens on the building and construction sector. This includes unnecessary costs caused by inconsistencies between councils and between local, state and national governments.

Inquiry participants identified the administration of building and construction regulations as one of the key areas of local government regulation impacting on business. This focus was supported by the results of research on business perceptions about local government regulation, which found that 43 per cent of businesses that had building and construction regulatory dealings described the council as having a negative impact on their business (chapter 3).

An earlier inquiry by the Commission focussed on ‘the core building regulation established by state legislation’ (VCEC 2005a, p. xx), identifying a number of opportunities to improve building and construction regulation. Reflecting the terms of reference of this inquiry, the Commission has focused on the impact on business of councils’ administration of building regulations, including Victorian Government regulation and local laws affecting building and construction activities. The chapter:

- briefly describes Victorian building and construction regulations with a focus on the role and responsibilities of local government
- identifies and examines the key issues raised about councils’ administration of building and construction regulations, focusing on: the issues of consistency in building and construction local laws between councils; issues around local governments potentially setting standards that may not be

consistent with others set at the state or national level; the accessibility and transparency of information on building and construction local laws.

- suggests a number of improvements to streamline and harmonise local government regulation that the Commission estimates would save business \$6–13 million annually, without compromising policy objectives.

## 6.1 The role of councils in building regulation

The Commission has summarised the extensive building and construction regulatory framework elsewhere — most recently in its report on *Housing Regulation in Victoria: Building Better Outcomes* (VCEC 2005a). This section outlines some of the key elements of this framework, focusing on local governments' role.

### 6.1.1 Legislative framework

The key components of building regulation in Victoria are set by the State Government through the *Building Act 1993* (Vic), and the *Building Regulations 2006* (Vic). At the national level, Australian governments have established a nationally consistent set of building standards specified in the Building Code of Australia (BCA). These standards are given effect in Victoria through the Building Regulations (box 6.1).

#### BOX 6.1 Victoria's building legislative framework

The key state legislation includes:

- *Building Act 1993* (Vic) which sets out the legal framework for the regulation of construction of buildings, building standards and maintenance of specific building safety features. It is enforced and administered by building surveyors, local government and the Building Commission. It contains provisions on building permits, inspection of building works, occupation of buildings, private building surveyors, the building appeals board, registration of building practitioners, and record keeping.
- *Building Regulations 2006* (Vic) (the Regulations) outlines specific requirements relating to building permits, building inspections, occupancy permits, enforcement of the Regulations and maintenance of buildings. The Regulations give the Building Code of Australia legal status by referencing it as a technical reference that must be complied with. They are enforced and administered by building surveyors, local government and the Building Commission.
- Building Code of Australia: All building work must comply with the Act, Building Regulations 2006 and the Building Code of Australia (the BCA) unless specifically exempted. The BCA also refers to relevant Australian Standards.

(continued next page)

### Box 6.1 Victoria's building legislative framework (continued)

- *Domestic Building Contracts Act 1995* (Vic) covers a wide range of consumer protection measures such as implied warranties, cooling-off periods, builders warranty insurance, circumstances when builders need to be registered, limits on the amount of deposit and progress payments payable by the owner.

Key regulatory entities include local governments as well as the Minister for Planning, the Building Commission, Building Advice and Conciliation Victoria, statutory bodies (Building Advisory Council, Building Appeals Board, Building Practitioners Board, Building Regulations Advisory Committee), and private building surveyors.

The Commission (2005) highlighted the complexity of the framework impacting on housing construction: 12 other relevant Acts (administered by five ministers); wide range of organisations that administer the Building Act (including those above) that have 50 statutory functions among them; more than 1000 standards called up by the Building Code of Australia; Consumer Affairs Victoria administering the Domestic Building Contracts Act. (VCEC 2005a, p. xxii)

*Sources:* VCEC 2005a; BCV (2004, p. 15–16); BCV(2006); Australian Institute of Building Surveyors (nd).

## 6.1.2 Role of local government

Part 12, Division 5 of the Victorian Building Act sets out the role of councils under the Act, with section 212 providing that council has the responsibility for administering and enforcing building provisions in various parts of the Act. Specifically, this includes: Part 3 — Building Permits; Part 4 — Inspection of Building Work; Part 5 — Occupation of Buildings and Places of Public Entertainment; Part 7 — Protection of Adjoining Property; and Part 8 — Enforcement of Safety and Building Standards; and the building regulations in its municipal district.

Councils are also empowered under the Building Act to make local laws with a range of matters as set out in Part 1 of Schedule 1 (s 8), including the design and siting of buildings, the construction of buildings and the preparation of land for building work.

Councils' power to make local laws generally is restricted by s111(2), (3) and (4) of the *Local Government Act 1989* (Vic), which provide that a local law must not be inconsistent with any Act or Regulation (including the Building Act and Regulations) or with a planning scheme. A local law is invalid to the extent of the inconsistency with any Act or regulation.

The Local Government Act allows for non-binding guidelines for councils in setting fees for applications and permits. Section 113(1)(a) of the Act deals

generally with fee setting by councils. It provides that a local law may provide that a council may determine a fee for any act, matter or thing — terms wide enough to include fees for issuing permits.

Through the provisions of local planning schemes, councils have limited powers to impose building controls that are unique to a municipality. The *Planning and Environment Act 1987* (Vic) provides for planning schemes to promote the objectives of planning in Victoria within the area covered by a scheme (s 6(1)(a)). These objectives include securing ‘a pleasant, efficient and safe working, living and recreational environment for all Victorians’ (s 4(1)(c)). Planning schemes thus have an impact on building and construction activities.

An important feature of building regulation in Victoria is that councils’ regulatory role is increasingly focused on local laws. The direct role of councils in enforcing some provisions of the Building Act and Regulations has diminished due to the introduction of private building surveyors (PBS). Since the mid-1990s it has been possible for landholders to use a municipal building surveyor (MBS) employed by councils or a PBS to undertake the regulatory functions of issuing building permits and ensuring compliance with the permit. Increasingly, building permits are being issued by private building surveyors, with some councils withdrawing from or contracting out this activity or doing so in exceptional cases (figure 5.2).

Councils and commentators have also noted the shift in the type of work conducted by MBSs towards more labour-intensive, administrative tasks, as PBSs competed away larger, more profitable types of work (Wallace 2006; MAV, sub. 19, p. 14). PBSs issued higher value building permits, with the average value during 2009 at \$224 933 per permit compared to \$94 802 for municipal Building Surveyors (BCV 2010a). Some councils have argued that privatisation of building certification and the fall in building site standards has created a need for stronger local laws regulating building activities to maintain the amenity of their local communities.<sup>1</sup>

Reflecting the growth of the private surveyor market, many businesses consulted during this inquiry focused on councils’ role in developing and administering local laws affecting building and construction, rather than the process of issuing building permits. In discussions with the Commission, builders and developers argued that the building approval process generally works well and is relatively straightforward (chapter 5). Most businesses also reported using private building surveyors rather than municipal surveyors. Estimates of the costs to business of building and construction regulations administered by councils therefore largely

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<sup>1</sup> See for example, preambles to the Hume City Council’s *Building Code of Practice* (Attachment to General Local Law No.1– 2004, clause 1.1, p. 3) and the Shire of Campaspe’s *Building & Works Code of Practice*, clause 1, p. 1.

reflect the costs of meeting local laws requirements around matters such as restrictions on noise and hours of operation, council asset protection, builders refuse, and site fencing and identification requirements (chapter 3). Victoria's councils have enacted a wide array of local laws affecting building and construction activities with examples covering

- permitted working hours
- parking fees for workers
- traffic management plans
- council asset protection
- disposing of waste material
- rubbish bins and skips on-site
- noise abatement
- site fencing
- crane usage
- fire prevention plans
- demolition activity controls.

In the rest of this chapter these controls are referred to collectively as building and construction local laws. There are also certain areas in which local government's planning processes impacts upon building and construction.

### **6.1.3 The Commission's focus**

The Commission has focused on three main issues relating to councils' involvement in building and construction regulation:

- (1) Variations between councils' building and construction local laws and opportunities for improvement and harmonisation (section 6.2).
- (2) The pursuit of sustainable building design by some councils and the potential for inconsistency with state and or national building standards and harmonisation initiatives (section 6.3).
- (3) The accessibility and quality of information on building and construction local laws and opportunities for improvement (section 6.4).

This focus reflects input from submissions and the results of the commissioned work on business perceptions about local government regulation, and on the costs to business of building and construction regulations.

## 6.2 Variations in building and construction local laws

Construction site management is a key issue for businesses, councils and residents. Councils have put in place a wide range of local laws designed to manage the impacts of building activities. From the perspective of councils and residents, building and construction local laws impose burdens on builders in order to protect public health, safety, amenity and the environment — to moderate the negative externalities imposed on the community by building activities. Some laws, such as those relating to the protection of council assets, exist in order to ensure that builders reinstate or protect council assets such as roads and footpaths from unnecessary damage during construction.

Research for the Commission suggest that the key local laws impacting on business are in areas such as builders refuse requirements, restrictions regarding hours of operation and site fencing and identification requirements (chapter 3). Differences between councils in the nature and administration of building and construction local laws can have an adverse and unnecessary impact on business. Compared to businesses in some other sectors of the economy, building and construction businesses may face greater costs due to variations in local laws between councils. The Roy Morgan survey showed that 64 per cent of construction sector respondents dealt with several councils in Victoria, and nine per cent dealt with most or all councils (Roy Morgan 2010b).

Regulatory outcomes — such as the reduction of environmental impacts of construction sites — can also suffer if unnecessary or confusing variations reduce compliance with local laws. The Keep Australia Beautiful Victoria audits of construction site practices in 12 municipalities in Victoria's urban growth corridors (a total sample size of 4200 sites between 2005 and 2008) highlighted compliance problems in this area: 'Overall, 55% of sites complied with local laws. Regional areas had 54% compliance with local laws whilst metropolitan sites had 55% compliance with local laws.' (KABV 2008, p. 22) This raised concerns about the negative environmental impact. It was suggested that local law inconsistency is partly responsible for this non-compliance:

To ensure best practice site management is achieved, greater consistency of local laws is required, including the interpretation and application of those that already exist both within and between municipalities.

Compliance with local laws remains a major challenge for both the residential building industry and local government. Greater uniformity of local laws will assist with achieving improved compliance.

Many builders and trades people work across a number of municipalities. They perceive the lack of consistency as confusing, unnecessary and unproductive. They send mixed messages about the importance of such measures if they are

required by some councils but not by others. Resultant breaches are often perceived by builders as nothing more than a ‘grab for cash’ when fines are imposed. (KABV 2008, p. 26–27)

Removing unnecessary variations in building and construction local laws can therefore be beneficial from the perspective of potentially improving outcomes as well as reducing unnecessary business burdens.

As noted in Chapter 2, harmonisation of diverse local laws may be justified if differences in local laws create unnecessary costs; that is, costs that do not have sufficient offsetting benefits. To examine the issue of variations in building and construction local laws the Commission examined the nature of variations in building and construction local laws between councils (referred to as ‘horizontal variations’). Variations exist in terms of both their *prevalence*, that is, the existence of certain types of laws across councils (section 6.2.1) and *substance*, that is, the differences in the content of the laws (section 6.2.2).

### 6.2.1 Variations in prevalence

Building and construction businesses operating in multiple council areas may face costs associated with identifying and understanding relevant local laws.<sup>2</sup> On a per business and once-off basis these search costs may be small, but in aggregate and over time such costs may be large. The magnitude of search costs is also likely to be related to the degree of variation in the existence or prevalence of local laws.

To look at the extent of variations in building and construction local laws the Commission drew upon two studies conducted by Stenning and Associates (‘Stenning’) for the Commission and for Local Government Victoria (LGV) respectively. Data from the Stenning study (for LGV) allows for an examination of the prevalence of local laws and/or codes of practice pertaining to the conduct of building activities in municipalities (for example, construction sites).

These include rules in the following categories and sub-categories (Stenning & Associates 2009a, p. 6):

- Environmental impact management: Site fencing and identification; builders' refuse; septic tanks; storm water; vegetation (tree preservation and protection); air pollution; sanitary facilities; noise abatement (including building site working hour restrictions).
- Public safety and amenity management: blasting (blasting control, explosives); fire prevention.

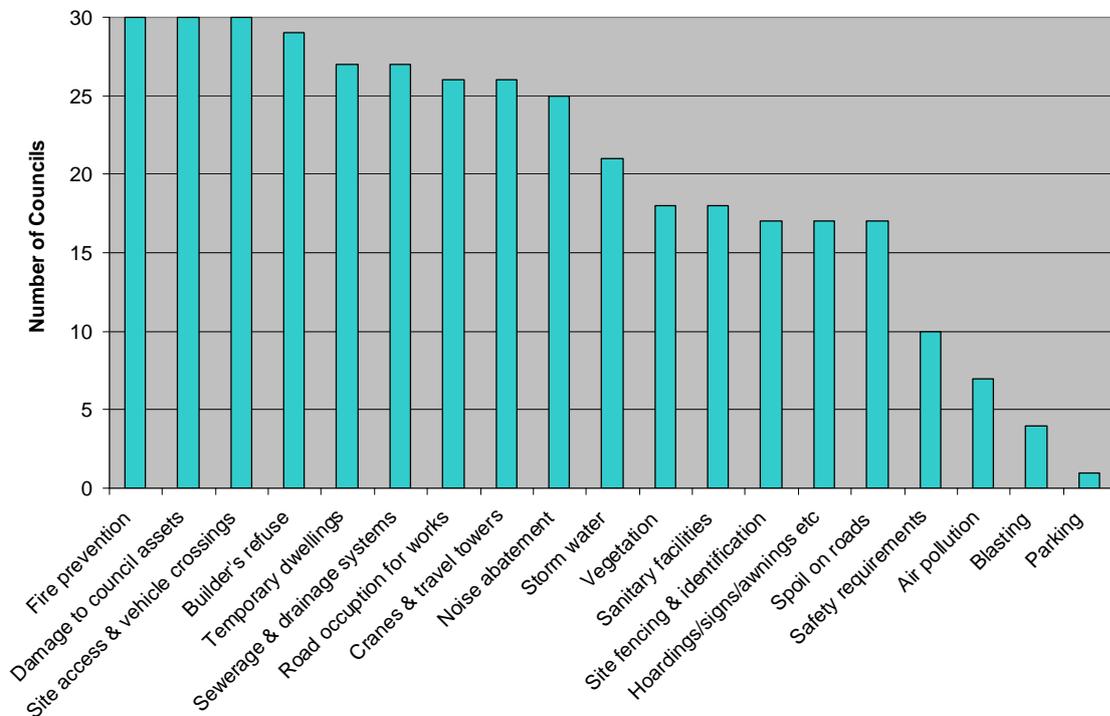
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<sup>2</sup> The costs to business of complying with local laws will also be determined by the frequency of transactions and costs per transaction (that is, search costs as well as other administrative and compliance costs)

- Traffic impact management; road occupation for works; safety requirements; hoardings/signs/awnings etc; cranes and travel towers; parking.
- Council asset impact management: damage to council assets, land or vegetation; site access and vehicle crossings; temporary dwellings; sewerage and drainage systems.

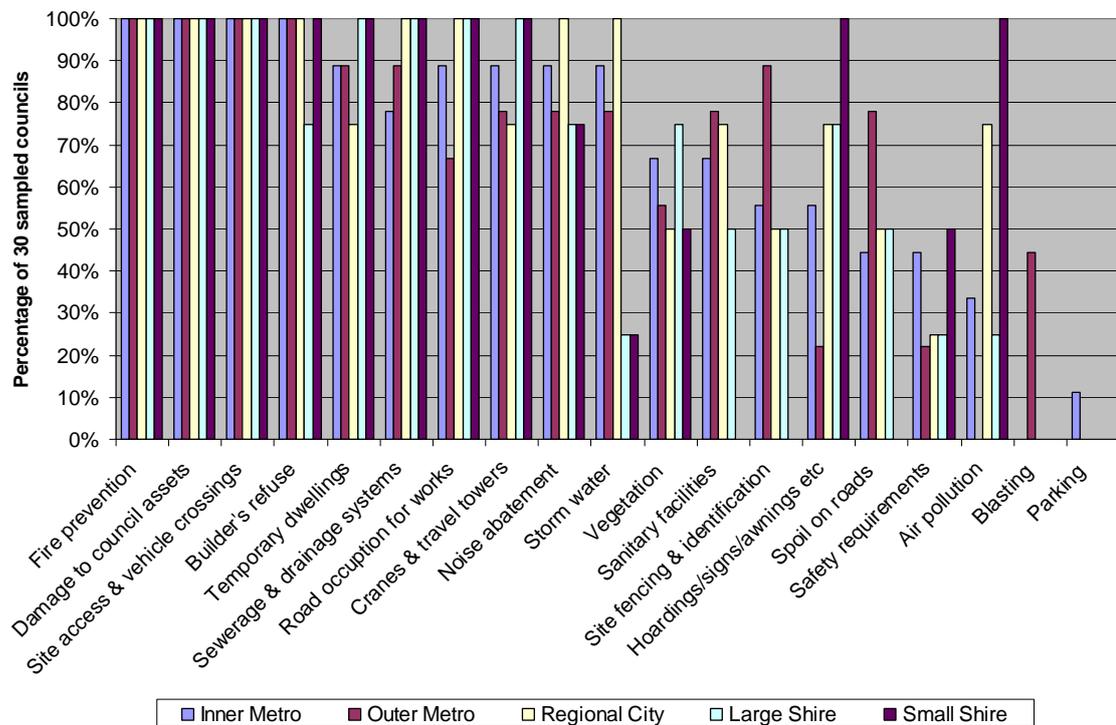
The Commission analysed the raw data collected by Stenning — based on a sample of 30 councils (nine inner metro; nine outer metro; four regional city; four large shire; four small shire) — and identified the prevalence of local laws targeting building and construction activities in each of the category areas (figures 6.1 and 6.2).

Figure 6.1 **Prevalence of building and construction local laws in sample (30)**



Source: Based on data from Stenning & Associates 2009a.

Figure 6.2 Prevalence of building and construction local law by council type<sup>a</sup>



Source: Based on data from Stenning & Associates 2009a.

This analysis helps to identify areas where variations in local laws may have the biggest impact on business. Search costs are likely to be greater for those local laws that are relatively less common. Based on the available data, relevant local laws can be categorised into those that are:

- Near universal (90–100%): local laws for managing the impacts on (or protecting) council assets are virtually universal across councils.<sup>3</sup> Similarly almost all councils have controls on builder's refuse.
- Very common (75–90%): local laws governing noise abatement, road occupation for works, cranes and travel towers are very common.
- Common (50–75%): local laws governing site fencing and identification; storm water; vegetation; sanitary facilities; hoardings/signs/awnings etc; spoil on roads are relatively common.

<sup>3</sup> One hundred per cent of sampled councils had local laws and/or codes of practice governing 'Damage to council assets, land or vegetation' and 'Site Access & Vehicle Crossings'. Ninety per cent of sampled councils had local laws and/or codes of practice governing 'Temporary Dwellings' and 'Sewerage and Drainage Systems'.

- Rare (approximately 33% or less): some local laws seem quite rare. For example, only about a third of the councils sampled had regulations pertaining to ‘safety requirements’<sup>4</sup> and ‘air pollution’ (interestingly, all these were small shire councils). Only 4 councils in the sample have rules regulating blasting (all outer metro councils). Only one council had a code of practice that addressed parking in relation to construction sites or tradespeople specifically.

For those local laws that are relatively common, the major determinant of the search costs to business may be variations in the substantive requirements of the law, rather than whether a local law exists or not.

## 6.2.2 Variations in substance

The extent of unnecessary costs to business from variations in building and construction local laws depends also on whether there are substantive variations between councils’ local laws addressing the same issue. If there is little variation in the substance or content of common local laws, any differences in cost are likely to be related to the administration and enforcement of the local laws. One type of variation involves inconsistent terminology between common local laws (box 6.2).

### Box 6.2 Variations in terminology

Stakeholders have also complained about different terminology or definitions used by different councils for essentially the same thing. For example, ‘protective works permits’, ‘asset protection permits’, ‘asset management permits’, are often used for the same thing in councils — mechanisms to prevent and mitigate the effect of construction activity on council assets (for example, roads, footpaths, ‘crossovers’).

Harmonisation should therefore address terminology as well as substantive provisions and processes. Variations in terminology — without different substantive standards — merely causes confusion, and is unambiguously an unnecessary cost. By comparison, the cost of variations in substantive standards might feasibly be necessary to extract or maximise benefits across heterogeneous local preferences or circumstances.

(continued next page)

<sup>4</sup> Stenning’s ‘Safety Requirements’ category include a mix of public safety (for example, pedestrians and vehicular) and traffic impact local requirements relating to construction.

## Box 6.2 Variations in terminology (continued)

The Municipal Association of Victoria (MAV) noted a need to reduce multiple and conflicting definitions across state Acts and local laws, citing examples in housing:

The bushfires highlighted the disparity in definitions for ‘temporary dwellings’ across the Planning and Environment Act, the Building Act, the Office of Housing (DHS), the Environment Protection Act and within council local laws. The various definitions of rooming house has caused problems in terms of determining the class of building (Building Act), land use planning provisions, Health Regulations and Residential Tenancies. (MAV, sub. 19, p. 9)

Unclear and inconsistent terminology in housing regulation is therefore not restricted to local laws between different councils, but also exist between laws imposed by the State Government itself. These problems at the State level inevitably flow down to local government when they are delegated administrative responsibilities. Harmonisation of terminology therefore needs to be done at both a local and state level to reduce this source of inconsistency, confusion and cost to business and councils.

*Source: VCEC*

There appears to be no effectiveness or efficiency-based justification for variations in terminology across councils in their local laws and in State building legislation and regulation. The Commission considers it would be appropriate that the Victorian Government, in conjunction with local government, identifies — in the context of the current harmonisation initiatives — all instances of these variations in terminology and removes them, regardless of the harmonisation option adopted. The priority regulations should be the local laws commonly found across councils (see section 6.2.1 above).

### **Draft recommendation 6.1**

**That Local Government Victoria in conjunction with councils, identify variations in terminology across councils in their building and construction local laws and in the relevant State Acts and remove them.**

To examine the nature and potential impact of variations in the substance of local laws more closely, the Commission examined in more detail three local law areas. The Commission sampled nine Victorian councils<sup>5</sup> to compare local laws covering:

- (1) building site working hours
- (2) site-fencing requirements
- (3) council asset protection.

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<sup>5</sup> The sample included two inner metro, four other metro, and three rural/regional councils.

## Building site working hours

These local laws stipulate the hours that a person must not, except with a permit, carry out or allow to carry out any building works on site. Based on reviewing a sample of local laws regulating this area, the Commission concluded that:

- restrictions on working hours for construction appear to be rare in rural and regional councils (although some of these have general noise restrictions)
- some councils impose only noise restrictions whilst others impose both noise and working hours controls and others explicitly use working hours restrictions as a noise control<sup>6</sup>
- there is high consistency between councils of working hours on weekdays (7am start time across all sampled councils; small variation in finishing times 6pm-8pm)
- there is higher variability for weekends (start times 8-9am and finishing time 3-8pm)
- some councils prohibit building works on Sundays and/or public holidays
- some allowances/exemptions exist to operate outside stipulated working hours (e.g. permits under local or state laws).<sup>7</sup>

According to the MBAV, working hour restrictions are an important irritant for builders (especially among commercial builders):

In Victoria, there are a plethora of different rules and standards governing what are appropriate working hours on building sites. According to our recent Building Trends survey, 28 per cent of commercial builders and six percent of residential builders rated council imposed restrictive working hours as the local government law which has the greatest negative impact upon their business. (MBAV, sub. 24, p. 13)

The specific problems highlighted by the MBAV included:

- There is often a discrepancy between weekend council start times (Saturdays, generally 9am) and the start times stipulated in enterprise bargaining agreements (e.g. workers are paid from 7am–3.30pm), leading to higher costs for builders who want to work on the weekend, and their clients.
- There are conflicts between local noise restrictions and noise abatement regulations enforced by the Environment Protection Authority.
- Imposing start times is a blunt way of addressing noise issues because they treat quiet forms of construction work the same as noisy activities.

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<sup>6</sup> Noise controls for some councils apply specifically to commercial and industrial building work.

<sup>7</sup> Exemptions are a source of variation between councils. Some of the exemptions also do not appear to have a logical basis; for example, some councils providing longer work hours for owner-builders.

The MBAV claims that weekend work hours force builders to pay overtime rates to workers when work cannot begin under local laws. They argue that ‘this type of outcome is causing employers in commercial construction to shift away from Saturday work, leading to projects taking 15 per cent longer to complete.’ (MBAV, sub. 24, p. 14). However, the Commission considers that is indicative of a problem between the parties to the enterprise bargaining agreements rather than an inconsistency inherent in the local government working hour restrictions themselves. Businesses also suggested that start times affect the timing of construction tasks in weather dependent activities (such as pouring and setting of concrete), movement of heavy vehicles, availability of weekends as an ‘emergency’ or ‘buffer’ day to catch up on unexpected delays, and for managing over-manning/over-time.

There is limited evidence on the number of businesses or projects that have incurred costs due to complying with local laws relating to working hours. The only specific evidence available to the Commission comes from the Allen Consulting Group (ACG) work on the costs of building and construction local laws which reported that a very small number of large developments had incurred large costs due to restrictions on working hours. ACG found that the restrictions on working hours imposed compliance costs on business of around \$25 million per year (chapter 3). The options for resolving this issue include either adjusting industrial agreements, or focussing local laws more specifically on the issue (e.g. noise early in the morning on weekends), or both.

However, local laws on working hours exist to manage nuisances and protect public health and safety. These include the abatement of noise, dust, vibrations, obstructions to pedestrians or traffic and conditions that pose a risk to public safety. Working hours (and related laws such as noise restrictions) have to strike a balance between competing interests of nuisance sufferers and builders. Working hours regulation is one way of allocating rights (or entitlements to hours of the day, a scarce resource) between locals (to enjoy peace and quiet) and builders (to conduct work). Noise limits (controls on sound levels) are another way of managing some of these impacts.

Some of the councils provide exceptions that allow builders to work outside stipulated hours.<sup>8</sup> This is a potential mechanism for ameliorating the effects of working hours restrictions, particularly for those instances where such restrictions can have a large cost to business. For example, half of the four ‘other metropolitan’ councils referred to permits issued under, or are otherwise qualified by the *Environment Protection Act 1970* (Vic), Planning and Environment Act and/or regulations under these.

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<sup>8</sup> For example, the City of Melbourne may grant exemptions in emergencies or in accordance with a permit. Similarly, Monash City Council’s local law exempts building work performed on the council’s behalf, and work done by any employee or agent of a permit holder (City of Melbourne 2009b).

To reduce the costs to business of local laws relating to working hours, the MBAV proposed that the State Government, in conjunction with local governments, review the EPA's noise abatement regulations to ensure that local governments cannot restrict 'audibly insignificant building activity' (such as painting, sub. 24, p. 18) and 'That the State Government introduce uniform allowable start times for the building industry across different zones in Victoria' (MBAV, sub. 24, p. 14).

In considering these and other options for reducing the costs associated with local laws covering working hours, the gains to business, extra costs to business and councils from the options, and the impact on residents, must be weighed up. Given the diversity of local governments and their municipalities, the gains and losses to business, councils and residents are also likely to vary.

There is a number of reform options for providing more flexibility, reducing costs to business, whilst maintaining the policy outcomes intended by the local laws.

One approach is to use outcomes-based measure(s) that target the nuisance itself (for example, noise or pollution levels) such that building work that can demonstrate a low adverse impact on local residents would no longer be prohibited or restricted by time. A disadvantage of performance-based measures, compared to the current simple time-based rules, is that it could be more difficult and costly for both residents and businesses to determine their entitlements, potentially leading to more disputes and/or non-compliance. It could also be more costly for councils to monitor and enforce. From a community-wide point of view, the current blunt but clear and simple rule might be a more cost-effective way of managing the immediate impacts and any disputes.

Another approach is to specify the types of building activities (e.g. painting) that are likely to have a low adverse impact on local residents and allow these to be undertaken outside the specified hours. This would preserve the simplicity and clarity of time-based rules, whilst providing a more targeted solution that will reduce costs to businesses without compromising the intended outcomes of the local law.

A further option is to ensure that there is a process for allowing exemptions to limits on working hours where builders can demonstrate that they will obtain significant cost savings relative to amenity benefits. In practice, there may already be some flexibility for builders either through direct negotiation with local residents, or through the sort of exemptions noted above. An exemption could be provided where the business provides written consent from adjoining properties. Alternatively, the discretion to grant an exemption could reside with councils, based on an assessment of individual circumstances.

Providing scope to seek exemptions increases the complexity of the rules, and therefore costs to business, councils and residents. However, businesses would only need to incur the costs associated with seeking an exemption if there were offsetting benefits. As noted, the available evidence suggests that current local laws impose costs on businesses in a relatively small number of cases. Hence, ensuring that business can obtain an exemption is potentially a low-cost way of obtaining the flexibility that business is seeking, without imposing significant costs on residents.

To reduce the costs to business of complying with local laws relating to working hours the Commission suggests that the Victorian Government, in consultation with councils, develop a ‘credentialed local law’ covering working hours that provides certainty to business and flexibility, while achieving the intended outcomes of relevant local laws (see box 6.3). The Commission is suggesting that this should take the form of a credentialed local law, based on the wider considerations discussed in section 6.2.3 and chapter 7.

### **Box 6.3 The ‘credentialed local law’ option**

A credentialed local law is one harmonisation option in a spectrum of harmonisation options. The spectrum includes:

- ‘softer’ more decentralised options such as provision of guidance, ‘best practice principles’, clarification of roles, encouraging collaboration and sharing of information
- ‘intermediate’ more coordinated and binding options such as unified model local laws (voluntary or compulsory), mutual-recognition schemes and other agreements or ‘quasi-integration’ of functions
- ‘harder’ options involving greater centralisation such as structural amalgamation or State take-over via legislation and regulatory body.

As discussed in more detail in chapter 7, a credentialed local law is a model local law that is subjected to an impact assessment process akin to the Regulatory Impact Statement (RIS) process required by the *Subordinate Legislation Act 1994*. The aim of this process would be to ensure the law was well structured, complemented relevant State government or national laws and regulations, and contained the most appropriate regulatory model to address the problem to which the model local law was directed. The model local law would be assessed using accepted best practice regulatory assessment methods such as those described in the Victorian Guide to Regulation.

*Source:* VCEC, see also Brown & Furneaux 2007.

### **Draft recommendation 6.2**

**That Local Government Victoria, in consultation with councils, the Building Commission and the EPA, develop a credentialed local law covering working hours that provides a low-cost process for allowing businesses to undertake work outside the specified hours, where such flexibility would provide demonstrable benefits to business without impacting on community amenity. This includes identifying a list of building activities that create little or no amenity problems (such as painting) for which exceptions to working hour restrictions will be made available.**

### **Site fencing and site identification requirements**

Many councils have local laws requiring builders to erect fencing around the perimeter of a building site, and to provide site information to enable the identification of the persons responsible for the management of the site (e.g. owner, builder, appointed agent). These laws generally specify the required height and functionality of fencing and often form part of a suite of construction site controls that include sanitary facilities and receptacles for building refuse. Some of these rules are presented in council-specific codes of practice for building and works sites.

The review of a sample of site fencing local laws revealed that there are some variations in the specifics of the requirements:

- The main difference between councils' local laws related to how fencing requirements were specified. Some councils simply mandate that 'adequate' perimeter fencing must be erected to the 'satisfaction of an authorised officer'. Others impose specific height and material requirements (box 6.4).
- There are slight variations in height requirements, with the majority of councils requiring fences of at least 1500mm in height. A few councils sampled required a minimum of 1800mm.
- There are slight variations in the required width of access openings, with the majority of councils requiring the opening to be no greater than 2800mm.
- There are common and consistent provisions relating to the need for fencing to prevent litter from being transported from a building site by wind, and that fence structures must only have one access opening.

## Box 6.4 Site fencing regulation

The following examples illustrate the main differences in local laws relating to site fencing.

Melbourne City Council imposes some of the most detailed fencing requirements. There are requirements covering the height of fences (1.8m to 2.4m), fence materials (closely boarded timber or plywood required, also noting that chain wire or corrugated iron are 'unsuitable'), colour (painted in a uniform colour preferably white), wind resistance (must withstand AS 1170.2 wind loads), and need for safety lights operational from sunset to sunrise.

Kingston City Council specifies that the fence has to be at least 1500mm high, and also that it has a 'diamond size no greater than 80 millimetres x 80 millimetres' so that it is 'capable of preventing litter from being transported from the building site by wind...' (Kingston City Council nd., p. 2)

The City of Yarra did not specify exact requirements but indicated that a scale drawing of proposed fencing indicating height and materials to be used in construction is required for an appointment with Yarra Building Services.

Maribyrnong City Council also has a non-prescriptive approach:

Where building work is being carried out on any land, Council or an authorised officer may issue a notice to the owner builder or appointed agent to ensure that temporary fencing is erected to contain the building activities to the building site and further that such temporary fencing is properly erected in accordance with the applicable building standards. ('General Purposes Local Law', Maribyrnong City Council, clause 34)

Preventing the spread of windblown litter is a common objective of site fencing requirements across sampled councils. Where fencing is the most effective way of controlling building litter, there is a strong case for specifying such requirements and placing the compliance burden on the party best placed to control the externalities, namely builders. If however, there are alternative, less-costly measures for containing litter the regulations may be creating unnecessary costs without commensurate benefits.

Consultations suggested that builders may have commercial reasons to erect some kind of fencing: for example, in densely populated areas site fencing may protect the site from vandalism, or theft of building materials, and also help to manage public safety/liability risks. In some cases, the incremental costs to business of site fencing local laws will be very low. In other cases, for example, in a more remote location or on a large greenfield site, fencing may be deemed by businesses to be unnecessary. In such cases businesses would view the need to provide fencing to meet a local law requirement as a compliance cost of the regulations.

The costs to business of site fencing requirements may also depend on how fencing requirements are specified by councils. For example, variations in these

requirements may generate unnecessary costs for businesses such as the time spent identifying the different local requirements and sourcing fencing that complies with local requirements.

Taking the diverse situations of builders into account, chapter 3 reported that the total cost to business of current site fencing local laws (which included site identification requirements), are around \$23 million per year.

Designing a site fencing local law that was flexible enough to cater for the different commercial incentives facing builders could be administratively challenging both for business and councils. To some extent this occurs already because not all councils have a local law requiring site fencing (figures 6.2 and 6.3). Nevertheless, one approach to reduce the costs of site fencing requirements is to enable builders to choose an appropriate method of managing building litter, but with site fencing standards specified as part of a ‘deemed to comply’ solution (LGV 2010c, p. 67).

The Commission considers that providing additional flexibility to builders — with the options of installing fencing as a way to comply with the local law objective of managing site litter — provides a good balance of certainty for builders seeking ‘black or white’ clarity and flexibility for innovative builders seeking alternative effective methods. This dual-track approach is already used in the BCA’s system of ‘Deemed-To-Satisfy’ (traditional prescriptive requirements) and ‘Alternative Solutions’ for achieving performance-based building standards. As is the case under the BCA however, additional regulatory mechanisms (assessment methods) may be required to verify that a builders proposed solution meets the performance requirements of the council. Under the BCA this involves, for example, certification or report by a qualified expert (such as a building inspector). The Commission considers a model local law relating to site fencing and identification requirements that combines specific guidance for those builders that desire certainty, but that also allows businesses to develop tailored solutions to the problem of litter from building sites, would provide net benefits. The Commission suggests that this takes the form of a model local law, based on the wider considerations discussed in section 6.2.3.

### **Draft recommendation 6.3**

**That Local Government Victoria coordinate the development of credentialed site-fencing and identification requirements that provides flexibility for builders about how they manage site litter but provide for a ‘deemed to comply’ solution for those businesses that want certainty about the performance-based requirements.**

## Council asset protection (protective works permits)

Local laws relating to council asset protection are used by councils to ensure that local assets and infrastructure are not damaged as a result of building activities (including demolition). Council's assets include vehicle crossings, footpaths, nature strips, drains and pits, kerb, road pavement, trees, signs, poles and hydrants. Many Victorian councils require builders to obtain an asset protection permit (sometimes called a protective works permit) before they commence work. Councils may also require the applicant for a permit to lodge a bond (refundable on providing evidence that no damage has been caused to council property).

A review of a sample of relevant local laws found that councils' asset protection local laws vary considerably:<sup>9</sup>

- There is considerable variability in how much information is provided on council websites about the process of obtaining a permit, any bond requirements, the inspection process, and the conditions attached to permits, including their duration.
- Variability in the cost of obtaining an asset protection permit, with fees ranging from \$75 to \$249 for those sampled councils.
- Most councils require builders to lodge a bond, in amounts ranging from \$600 to \$5000. Some councils specify that a bond may be required but do not list price ranges/percentages, stipulating instead that builders should contact council building services. Some councils also state that the bond amount must be 'proportionate to the likely cost of repairing any damage'. Hume Council, however, has done away with bonds (box 6.5).
- The triggers for requiring asset protection permits also vary. Some are quite general. For example one council specified that 'if Council determines that works have the potential to damage community owned assets...' Others link the need for a permit to the value of building works, the type of building work (for example, demolition works and swimming pools), the use of vehicles exceeding two tonnes on building sites, to occupying a road for works, to connections to stormwater drains, and to storing material on land.
- Councils also differ in whether they attach conditions on permits. Some councils require a public liability insurance certificate (such as insurance cover to a minimum of \$5 million). Some require permit holders to undertake certain asset protection works (such as installing temporary crossings), to adhere to an inspection regime, or to repair/replace damaged assets within a specified time.

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<sup>9</sup> The sample comprised 14 councils and also drew on the submission by MBAV (sub. 24).

- Half of the asset protection local laws sampled stipulated the notice period required before building commencement, with the majority requiring notice of somewhere between five and 10 days.
- Areas where there was a good deal of consistency included the requirement to obtain a permit before building work commences, and flexibility for the council to increase the amount of any bond ‘where Council determines it is warranted’.

### **Box 6.5 Hume City Council – asset protection permit**

Hume City Council removed the bond requirements for asset protection:

... because of the significant workload associated with administering and refunding a deposit system. The current system is a more cost-effective system and avoids tying up Builder's money in Council trust funds. (Hume City Council 2010)

Builders are required to make an application for asset protection, and declare the extent of any pre-existing asset damage adjacent to their building site. Council must issue the asset protection permit before any building works are commenced. Council's building assets officers audit and record the condition of infrastructure assets prior to the commencement and following the completion of the building works. Failure to give the council notice of pre-existing damage gives rise to the assumption that adjacent land was damage-free prior to the building work commencing. The owner may therefore be held accountable for damage that already existed prior to the work being conducted.

Hume has a relatively high permit fee (\$290, the highest in the Commission's sample). Hume also charges \$75 extra per unit in multi-domestic unit construction works. The focus seems to be on damage caused by builders' heavy vehicles and machines:

Builders' vehicles and machines cause most footpath damage in Hume City. The \$[290] fee paid by builders contributes to the costs associated with administering and enforcing [the] Council Asset Protection Program. If these fees were not levied on builders the costs associated with administering and enforcing the program would be borne by ratepayers. If this were to occur services to residents and capital works programs would suffer reductions in expenditure. (Hume City Council 2010)

The asset protection permit fees are ‘non-refundable fees designed to cover Council's administration costs.’ Builders can apply for exemptions if no heavy vehicles are entering the building site.

*Source:* Hume City Council (2010).

The MBAV expressed concerns about the variability of asset protection requirements. The main concerns were the costs of the permits (including the bond amounts) and the unnecessary delay associated with those councils that stipulated asset protection permits would only be issued after a building permit had been issued (MBAV, sub. 24, p. 16). Chapter 3 reported that the estimated cost to business of councils' asset protection local laws is around \$11 million per year.

To reduce the costs to business of asset protection requirements, MBAV proposed that a consistent fee structure and application process be developed for asset management permits across all local governments. It also suggested that the application and payment process for protective works permits should be conducted at the same time as the building permit application process (sub. 24, p. 16). One of the businesses surveyed as part of the research on the costs of building and construction regulation also suggested that the building and asset protection permit processes be better aligned (ACG 2010, p. 29).

The Commission considers that it is entirely appropriate for councils to take action to address the risk of damage to their assets. The issue is whether the large variations in asset protection requirements are imposing unnecessary costs on business. The Commission's sample highlighted some of the many variations in councils' permit requirements. Whereas some council requirements are very specific others are much more flexible (performance or risk-based) approaches. Whereas flexible rules have the benefit of being potentially more performance-based, there can be greater uncertainty for business about how to comply.

While the variations increase the costs to business of understanding and complying with councils' asset protection requirements, there are few compelling explanations brought to the attention of the Commission for the observed extent of variation in councils' approaches. It is also unclear why the processes of applying for asset protection and building permits could not occur in parallel. In practice, any delays between issuance of a building permit and the asset protection permit may be short (assuming that councils generally issue permits quickly). However, the uncertainty created by these processes occurring sequentially can be significant for business particularly if there is a risk that businesses may incur standby costs for labour, and plant and equipment. The main argument for a sequential process is that councils potentially are better placed to make a judgment about the potential damage a building project might create once a building permit has been issued. This is most beneficial to councils that want the flexibility to set asset protection fees, bonds or other conditions based on the risks to their assets.

On balance, the Commission considers that the costs to business of variations in asset protection local laws could be reduced without undermining councils' interests in protecting or reinstating assets damaged as a result of building activities. This could be achieved by the Government, in cooperation with local government, developing a model local law for asset protection. In addition, the Government should investigate and work with councils to develop a common process for allowing the parallel processing of asset protection and building permits.

#### **Draft recommendation 6.4**

**That Local Government Victoria, in consultation with councils, develop a credentialed asset protection local law and a process for enabling builders to apply for council asset protection permits in parallel with the processing of the building permit. The validity of this permit could be conditional on there being no substantive changes in the building permit which would affect the council asset protection permit being issued.**

### **6.2.3 Harmonising building and construction local laws**

The preceding discussion has examined the issue of consistency in the prevalence and substance of local laws, both at a general level and in specific areas that have been identified as imposing significant costs on business. To help lower costs to business without undermining the objectives of local laws, the Commission has proposed that the Government develop more consistent and streamlined local laws relating to site fencing, working hours and asset protection.

However, this is only a subset of local laws in this area (section 6.2.1). There may be additional opportunities to harmonise building and construction local laws. For instance, chapter 3 reported that businesses incur significant costs (around \$44 million per year) complying with local laws relating to builders refuse. The discussion on the prevalence of local laws applying to building and construction activities identified other common types of local laws, such as fire prevention, temporary dwellings and road occupation for works.

The Victorian Government has recognised business concerns about the quality and consistency of local laws. Through the Councils Reforming Business (CRB) Program, Local Government Victoria is leading a project in partnership with other State Government Department and agencies, and council and industry representatives to harmonise local laws and associated activities governing building site management. The project entitled 'Better Practice Building Site Management' emerged from the Better Practice Local Laws Strategy (LGV 2010d).

The Commission understands that the project, and the strategy more broadly, is considering several potential approaches to harmonisation. Options being examined include creating a shared service platform and communication channels to streamline business access to information on the regulation of construction sites,<sup>10</sup> as well as options for bringing about greater consistency.

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<sup>10</sup> An example of this is the EasyBiz project which is one of several e-services initiatives aimed at improving businesses' access to harmonised online smartforms. The forms are 'harmonised to achieve a common form across councils, resulting in businesses receiving a consistent, clear experience.' (DPCD/MAV 2009, p. 6).

According to LGV:

The regulatory reform package to be further developed by LGV will include a state-wide industry Code of Practice for building and construction site management, a Credentialed Local Law and associated training and communications. Amendments to legislation may also be explored to support and embed the reforms. A focus of the project will be close collaboration with Councils and industry to develop and implement the reforms (LGV 2010b).

The MBAV, while supportive of the CRB strategy proposal to create model local laws, argues that the ‘program in its current form does not go far enough as it allows too much scope for local municipalities to have different standards where differences have no reason to exist’ (MBAV, sub. 24, p. 18).

While the details of the building and construction local laws project are yet to be finalised, an alternative to the proposed creation of model local laws is for the State Government to legislate for a set of uniform regulatory requirements covering issues that are currently dealt with under local laws. The MAV, for instance, suggested that the State Government could:

... take those local law provisions that are common to all councils out of the local law framework and make them regulations under the relevant State Act. The benefit of this would be that the same controls would apply across the State and, as long as the State invested in the training of councils, policy and procedure would be streamlined throughout municipal districts. (MAV, sub. 19, p. 11)

Legislating for consistent building and construction local laws would establish one set of rules across the state. This would provide greater certainty for business and minimise the costs to business of finding out about and complying with different local laws. There may, however, be costs, the most obvious cost of which is the reduction in flexibility. For example, some councils do not have site fencing and identification local laws and costs to businesses operating in those areas would rise. Thus there are potential advantages to councils and businesses in allowing the flexibility for councils to opt-out of applying some controls on building sites. Thus the MAV also suggested that:

It should be noted however that despite the intent of the Strategy it is likely that the physical differences relating to some councils will mean that even a harmonised local law will need to be tailored to deal with different areas and site contexts. This flexibility is appropriate and expected by local businesses. (MAV, sub. 19, p. 11)

Furthermore, harmonisation efforts to increase consistency can sometimes run the risk of a so-called ‘race to the bottom’, leading to the lowest mutually agreeable standard being chosen. This was also a concern raised by the MAV:<sup>11</sup>

It is also imperative that streamlining across the sector does not become an excuse to adopt the lowest common denominator as the accepted standard. A perverse outcome of standardisation can sometimes be the stifling of policy and regulatory innovation or settling for a minimum standard of performance. (MAV, sub. 19, p.11)

Given the wide array of building and construction local laws, LGV will ultimately need to balance the costs and benefits of harmonisation for different types of local laws and prioritise its efforts. The Commission considers that this should take into account the degree of the variation in prevalence and substance, and whether a uniform standard is feasible with or without exceptions. Exceptions should be limited to preserve flexibility for specified cases where local variations are likely to generate net benefits, after factoring in business impacts and costs of creating inconsistency between municipalities, and there are no alternatives other than a variation in a local law to achieve this.

The Commission considers that an approach that balances business' interests in achieving greater consistency, with the need for some tailoring in the nature and application of local laws, is to develop a set of credentialed local laws covering building and construction local laws with a high prevalence (such as fire prevention, builders refuse, asset protection, road occupation for works, temporary dwellings, sewerage and drainage system, cranes and travel towers, and working hours). For some building and construction local laws, there may be little justification for variations (for example, council asset protection) while in others there may be more compelling reasons (for example, blasting). The reform initiative should focus on the former and limit scope for exceptions accordingly.

To ensure that the resulting credentialed local laws do not impose unnecessary costs on business, and do not neglect justifiable differences in standards, they could be subject to a regulatory impact assessment prior to finalisation. This will provide an opportunity publicly to test business and community concerns about the likely impact of the credentialed local laws.

The Commission considers it would be desirable to require councils that are seeking changes to justify their preferred variations to local laws through the proposed local law impact statement process (discussed in chapter 7). In addition, the Local Government Minister could exercise powers to recommend the disallowance of variations to the model local laws (Local Government Act,

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<sup>11</sup> A similar point was submitted by VicRoads in VCEC 2009c, p. 14; and Brown & Furneaux (2007, p. 3).

s 123). Currently, the Local Government Minister has broad powers to recommend the revocation of local laws (chapter 2).

#### *Information request*

*The Commission invites further input on the analysis above. What other building and construction local laws are likely to benefit the most from harmonisation or streamlining? (For example, are there opportunities to reduce business burdens associated with local laws regarding builder's refuse without compromising the objectives of the local laws)? What is the best harmonisation vehicle — amongst the range of options outlined (box 6.3) — for building and construction local laws addressed in this chapter and other specific local laws? What should be the scope of exceptions or variations for particular local laws? For which local laws would a credentialed local law be less appropriate than other (more or less centralised or voluntary) arrangements or processes?*

### **6.3 Consistency of State and local government regulations**

The Commission's survey of business perceptions about local government regulation, previous reviews and some submissions, highlighted the issue of potential inconsistencies between State and local government regulation. The survey of business perceptions highlighted business concerns about overlap between state and local regulation. Forty-three per cent of the construction sector respondents to the Roy Morgan survey felt that there was too much duplication with State Government regulations (compared to 26 per cent who disagreed with this statement).<sup>12</sup>

Previous inquiries into building regulation in Australia by the Productivity Commission (PC 2004) and in Victoria by the Commission (VCEC 2005a) identified concerns about councils using planning controls to impose conditions on the construction of new buildings exceed the requirements of building regulations.<sup>13</sup> More recently, the Australian Building Codes Board (ABCB) presented analysis showing that local government interventions, including in relation to building regulation and development assessments, can significantly impact on housing affordability (ABCB 2008). A recent review commissioned by the Australian Government Department of Innovation, Industry, Science and Research (DIISR) of the joint Commonwealth, State and Territory

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<sup>12</sup> For comparison purposes, 28 per cent of all respondents agreed that there was too much duplication with State Government regulations, and 37 per cent disagreed with this statement.

<sup>13</sup> In its Housing Regulation Inquiry, the Commission noted that some councils were seeking to introduce accessible housing requirement into building designs via planning controls. The Commission argued against such an approach to accessible housing stating that '...other initiatives are underway and such regulation may not be the most cost-effective approach. Further, the piecemeal approach of local government regulation is unlikely to be an efficient or effective path for improving the level of accessible, visitable and adaptable private housing.' (VCEC 2005a, p. xxx and p. 71)

Intergovernmental Agreement (IGA) for the ABCB also argued that local government interventions could be a greater threat to national consistency than State and Territory variations. They found that ‘Stakeholder concern is less about Local Government variations to the BCA, but more about the use of planning schemes and local laws to introduce building requirements that are above minimum standards established in the BCA.’ (ACG 2009, p. 21)

The issue was raised again in this inquiry. The Property Council of Australia, for example, submitted that:

A number of local governments have developed or are developing tools to aid in sustainable development, which while not ‘required’ or mandatory, are certainly encouraged. Many local councils have attempted to include these sustainable tools in their planning requirements. Recently, councils have attempted to use the planning system to introduce a number of building regulations, such as those pertaining to disability access and sustainability criteria. However, the planning system should only resolve planning policy issues, and should not be used as a ‘back door’ through which councils introduce additional building regulations, above and beyond the Building Code of Australia. As such, the Victorian Government through the Minister for Planning should discourage local government from using the planning system to regulate building construction. (sub. 5, p. 11)

The scope for local governments to set standards that deviate from those intended by higher levels of government can compromise the benefits of harmonisation reforms at a national level (such as the Building Code of Australia — see section 6.3.1). This also raises broader questions about the need for local, state and national governments to coordinate and address inconsistencies between levels of government — whether this be in ESD implementation, measures to address climate change, and many other areas in building and construction that face potentially inconsistent regulations and policy directions at different levels of government (section 6.3.2). The issues for this inquiry are whether there is sufficient clarity about the role of councils in seeking to improve the environmental performance of buildings, whether the planning system is the most efficient tool for the purpose, and whether this is a prime example of a broader inter-governmental coordination problem.

### **6.3.1 How are sustainable design issues considered in planning approvals and building regulations?**

As noted, the framework for building regulation in Australia is based around a nationally consistent set of performance-based building standards outlined in the Building Code of Australia. The benefits of this approach include providing certainty to businesses about the applicable standards for buildings and lower

costs to business, compared to the alternative approach of each jurisdiction developing a separate set of building standards.

Under the national framework, state and territory governments have the capacity to adapt the national standards to suit local conditions and circumstances. Victoria has previously done so in relation to the energy efficiency standards for new buildings. But the costs of ‘too much’ scope for variation has been recognised by governments including the Victorian Government (‘variation reduction strategy’ in ABCB 2009). It is reflected in the IGA which calls for the ‘consistent application of the BCA across and within each State and Territory’ (ABCB 2008, p. 3), the Joint Building Planning Working Group (JWG) established to develop a framework to delineate planning and building, and other lines of work at the COAG level.<sup>14</sup>

Reflecting the environmental challenges facing Australia, there has recently been a push to increase the stringency or expected performance of national building standards, especially in relation to the energy efficiency of new buildings (box 6.6).

#### **Box 6.6 Building Code of Australia 2010 Revised Energy Efficiency Provisions**

The Australian Government, announced on 22 January 2010 that new provisions for greenhouse pollution reduction would be included in the national Building Code of Australia (BCA) for 2010.

The new provisions were developed at the request of the Council of Australian Governments (COAG) as part of the National Strategy on Energy Efficiency (signed by all COAG members). The new provisions enhance and expand the existing energy efficiency provisions in the BCA. The updated BCA will include requirements to deliver 6-Star energy rating or equivalent performance in all new residential buildings and significantly increase the energy efficiency of commercial buildings, subject to a Regulatory Impact Statement (RIS).

Some of the key changes include (ABCB 2010):

- revised objective, functional statements and some performance requirements to recognise that the goal is greenhouse gas emission reduction rather than energy efficiency alone and in doing so, give further credit for renewable energy sources
- an increasing roof insulation performance with recognition given for light coloured roofs

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<sup>14</sup> The JWG includes officials from the Ministerial Council on Energy, the Planning Officials Group, the ABCB, the Australian Local Government Association, and industry.

### Box 6.6 **Building Code of Australia 2010 Revised Energy Efficiency Provisions (continued)**

- new provisions for artificial lighting within dwellings and associated Class 10a buildings with the allowance for the dwelling able to be increased if control systems are installed
- other specific lighting provisions such as separate switching for high and low efficiency lamps.

‘Under the COAG agreement, all jurisdictions have undertaken to adopt the enhanced provisions in 2011. However, because of the policies of States and Territories and the different transitional arrangements in State and Territory law, not all jurisdictions will adopt the new provisions on 1 May 2010.’ (ABCB 2010)

*Source:* ABCB (2009b, 2010).

In its previous inquiry into Housing Construction Regulation (VCEC 2005a), the Commission supported the national framework for regulating the performance of buildings. The advantages of the system noted by the Commission included delivering consistent building standards that are easily understood by business, and providing for a rigorous process for assessing proposals to vary building standards. The process of developing the BCA, for example, seeks to ensure that there is a rigorously tested rationale for the regulation and that the regulation generates benefits to society greater than the costs (that is, net benefits), and that there is no regulatory or non-regulatory alternative that would generate higher net benefits.

Some Victorian councils, however, believe that the existing national standards are inadequate in that they do not achieve a sufficient level of environmental performance of new buildings, that the BCA sets the minimum standards, and that local communities should demand additional requirements to achieve a higher level of performance. The City of Stonnington, for example, suggested that state and Commonwealth government policy failures created a need for councils to take actions to address sustainability issues at a local level:

In the case of Ecologically Sustainable Development [ESD], the burden of environmental regulation upon businesses is greater through the failure of state and Federal governments to agree upon and enact suitable legislation. This has resulted in Councils being forced to develop programs individually, or in collaboration with other councils, to address ESD. Hence, a builder or developer is forced to deal with different requirements in different municipalities, rather than a uniform code across all municipalities. This situation causes confusion and increases the frustration of business. Also the ability of Councils to achieve good ESD outcomes is limited as the legislation/guidelines created by individual Councils have no real enforcement mechanisms to deal with businesses that do not wish to comply. (sub. 7, p. 4)

The approach of some councils is understandable because the State Government may have been providing mixed signals about how it expects councils to administer planning regulation and how this relates to building regulation. On the one hand, the State Government has been funding projects under the Victorian Local Sustainability Accord to examine and roll out ways to use planning regulation to influence the environmental performance of buildings (DSE 2010).<sup>15</sup> More recently, the proposed Planning and Environment Bill provided that the objectives of the Planning and Environment Act are to be amended to include the objective ‘to achieve high quality and sustainable design in public and private places in Victoria’ (proposed s 4(1)(e)). On the other hand, the State Government is a party to the IGA to reduce variations to the building standards set out in the BCA and undertook to review the ‘complementarity’ of climate change mitigation measures in the state that might be redundant if nationally applicable measures (such as the Carbon Pollution Reduction Scheme) are put in place (box 6.7).

### **Box 6.7      Role of local government in addressing climate change**

Sustainability assessment in the planning process, to the extent that it imposes additional environmental performance requirements, also runs the risk of duplication with future national approaches to tackling climate change.<sup>16</sup> Namely, whether they are ‘complementary’ or ‘supplementary’ measures to other policy mechanism such as a Carbon Production Reduction Scheme. The Productivity Commission’s submission to the Garnaut Climate Change Review argued that: ‘With an effective ETS, much of the current patchwork of climate change policies will become redundant and there will only be a residual role for state, territory and local government initiatives.’ (PC 2008, p. x) More specifically, the Productivity Commission argued that:

State, territory and local government initiatives are best confined to:

- research on climate change impacts, adaptation and structural adjustment, where geographic location is an important consideration
- providing general information on energy efficiency where there might not necessarily be benefits from national coordination or where regional variations are relevant (for example, heating in the southern states)

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<sup>15</sup> Moreland City Council recently received a grant of \$251 825 for a project to roll-out sustainable design assessments in the planning process. This was the largest grant in the fourth round of the Victorian Local Sustainability Accord (Jennings 2010)

<sup>16</sup> A key finding of an evaluation of the council approaches to sustainability assessment in the planning process was that ‘...using the full legislative framework to reduce the environmental impacts of developments through the implementation of Ecologically Sustainable Development (ESD) initiatives is the key to meeting targets for reducing emissions and creating a healthy living environment.’ (Sustainability Victoria n.d., p. 1; Hansen/SBE 2007, p. i)

### Box 6.7 **Role of local government in addressing climate change** (continued)

- removing regulatory or other impediments to adoption of low-emissions technologies
- ensuring that expected future [greenhouse gas] emissions prices and ETS-related increases in energy prices are factored into planning and investment. (PC 2008, p. 43)

For consistency across local government and between governments at all levels, and to minimise Victoria's costs of meeting any emissions targets, it is crucial for the state and national governments to provide guidance on the intended and appropriate role of local government in the broader scheme of measures and what local measures would be consistent and complementary.

*Sources:* VCEC analysis; PC 2008.

In this somewhat ambiguous situation, some councils have sought to use the planning system to introduce additional requirements designed to improve the environmental performance of buildings.

#### **Current council approaches**

Victorian councils are adopting different approaches to improving the environmental performance of buildings. Some councils see their role as 'leading by example'; that is, improving the way they design, build and operate council-owned buildings, infrastructure and facilities. As a result, some councils have installed rainwater harvesting and stormwater capture systems, and installed energy efficient lighting in council buildings and facilities.

Some councils are trying to influence the design and siting of buildings requiring planning approval. The Cities of Port Phillip and Moreland, for example, have developed the Sustainable Design Assessment in the Planning Process (SDAPP) program (box 6.8). The SDAPP Programme currently operates in seven Victorian local governments and is being implemented in another five, with other councils expressing an interest in being involved (City of Port Phillip 2010a).<sup>17</sup> There is acknowledgement by some councils that this could lead to a less consistent approach to ESD implementation via planning than a state driven approach, but it is hoped that inconsistencies might be alleviated with wider adoption by Victorian councils of tools like the Moreland Sustainable Tools for

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<sup>17</sup> Victorian councils that have adopted STEPS and SDS tools include: City of Ballarat; Bayside City Council; Darebin City Council; Hobsons Bay City Council; City of Knox; Maribyrnong City Council; Manningham City Council; Moreland City Council; Nillumbik Shire Council; City of Port Phillip; Whitehorse City Council; City of Yarra. (Moreland City Council 2009, p. 64).

Environmental Performance Strategy (STEPS) and the Sustainable Design Scorecard (SDS).<sup>18</sup>

Port Phillip Council also provides positive incentives via their planning approval process. They waive planning permit application fees for solar hot water systems, rainwater tanks, small-scale wind turbines, grey water systems, skylights, bicycle storage and other sustainability initiatives (City of Port Phillip 2010b). ‘Where a permit for a sustainable design initiative such as a rainwater tank is required, Council has a policy to fast track these applications, waive fees and provide free technical advice.’ (City of Port Phillip 2010c).

### **Box 6.8 Sustainable design assessment in the planning process — Port Phillip Council**

The City of Port Phillip promotes ESD in the planning process by using a programme called Sustainable Design Assessment in the Planning Process (SDAPP). As part of its sustainable design policy, planning permit applicants are asked to submit a ‘Sustainable Design Statement’ that outlines their development’s sustainable design initiatives. These are judged against Council’s expectations as expressed in the Sustainable Design Scorecard (SDS) (non-residential) and STEPS (residential) assessment tools. The council’s webpage on the SDAPP provides information on the process itself, including the process triggers (‘where works exceed 50 square metres and/or are determined by the responsible town planner to be significant’), and various supporting information such as templates and assessment tools.

The City of Port Phillip states on its website that its approach is consistent with State Government policy:

The SDAPP Programme is intended to be fully consistent with the purpose and objectives of planning in Victoria as expressed in the [Planning and Environment] Act. The submission of Sustainable Design Statement or similar as part of SDAPP enables a Council, as responsible authority under its planning scheme, to fulfil its duties as required under Section 60 of the [Planning and Environment] Act, in particular its requirement to consider: ‘Any significant effects which the responsible authority considers the use or development may have on the environment or which the responsible authority considers the environment may have on the use or development: (60|1|e).’

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<sup>18</sup> For example, the Kingston City Council website states that:

A State Government ESD framework is preferable for consistency and extent of application, but following some years of development, the timeframe for rollout is not clear. In the absence of a State system, Council has adopted SDAPP which includes the use of STEPS and SDS tools to improve the performance of the built form to be used during the planning process. (Kingston City Council 2010)

See also Bayside City Council (2010), Knox City Council (2010).

## Box 6.8 Sustainable design assessment in the planning process — Port Phillip Council (continued)

The Council recognises that there is potentially an issue of overlap with building regulations:

The majority of VCAT decisions relating to ESD are based on *Hasan v Moreland City Council* (2005), *Jolin Nominees v Moreland City Council* (2006), and most recently *Robert Polizzi v Darebin CC* (2009). Through these decisions it was determined that ESD considerations are supported provided they are appropriate. It was stressed that a Council's expectations must be proportionate and specific overlap with other legislative requirements (such as building regulations) not occur.

The Council considers, however, that the program is consistent with existing building regulations:

SDAPP is intended to facilitate environmental performance outcomes that are above the minimum requirements under building regulations, principally the Building Code of Australia (Victoria), with care taken to ensure no inconsistencies with these regulations. The SDAPP Programme has developed to be fully consistent with these directions and continues to be reviewed in light of relevant decisions, standards and precedents.

Clearly, the City of Port Phillip considers that there is a need for the SDAPP program because of perceived inadequacies in existing building standards:

Council does not consider meeting minimum legal standards (such as the 5 Star standard and Section J of the BCA) to be a 'sustainable design feature' or as examples of 'excellent' environmental performance. Applicants who include such unreasonable claims in any part of their planning application, including their Sustainable Design Statement will be asked to remove them before any permit is issued.

*Sources:* City of Port Phillip, 2010a. See also: Moreland City Council 2010; City of Darebin 2010.

There is uncertainty about the extent to which councils can require changes to buildings that require a planning permit, for the purpose of improving the environmental performance of the buildings. The Commission understands that, while the submission by project proponents of environmental performance information (such as a 'Sustainable Design Statement' or similar) is voluntary, councils using the SDAPP process typically encourage both their submission and the development of environmental commitments which lead to conditions in a planning permit (CASBE 2009). Recent VCAT cases have considered challenges to sustainability conditions imposed via the planning process and provided some general guiding principles (box 6.9). It would appear based on this case and Port Phillip's interpretation of this and similar cases before it (box 6.7) that there remains substantial scope in Victoria for the line between building regulation and planning to be blurred by some councils, along with what is voluntary or mandatory. What is considered 'best practice' performance might be determined by the SDAPP tools, however it is unclear to what extent this exceeds 'minimum

standards’ (as set out in the BCA) in different cases, and to what extent this leads to a real, perceived obligation.

The amended objectives proposed by the Planning and Environment Bill appears likely to encourage the imposition of sustainability requirements in planning schemes and approval processes, and by extension the potential for overlap with building regulations.<sup>19</sup>

### **Box 6.9 Recent VCAT planning cases on sustainable design**

Several recent VCAT cases have considered the validity of planning permit conditions relating to sustainability features to be installed in buildings.

In *Poližnj v Darebin CC* [2009] VCAT 1573, the applicant challenged two (of 23) permit conditions imposed by the Darebin City Council. These conditions required the applicant to modify the building design in accordance with the Sustainable Design Statement (‘SDS’), and that the SDS be submitted to the Responsible Authority. The SDS was to detail rather specific sustainable design strategies that would be incorporated into the building development.

Member Philip Martin found that the conditions which Darebin City Council was seeking to impose were not valid and that they should be deleted from the permit. Member Martin expressed concerns about the overlap between existing building approval processes and the [planning] permit system, and overly detailed prescriptions. He cited the Tribunal in *Poulos v Darebin City Council* VCAT Ref P2678/2008, and also *Hasan v Moreland City Council* [2005] VCAT 1931, which provided some support for the inappropriateness of highly prescriptive planning permit requirements. Member Fong in the Tribunal in *Poulos v Darebin City Council* stated that:

The Tribunal endorses the principle of a sustainable development statement, and that sustainable development is central to the Scheme. It is the implementation by a permit condition in the form of a statement specifying detailed construction methods, building materials, appliances and fixtures, that the Tribunal is troubled with. A careful examination of this condition reveals the extent of details that can be required, one that is impractical in the planning approval stage and one that may overstep the details warranted for the purpose of a planning permit.

(continued next page)

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<sup>19</sup> The objectives of the Planning and Environment Act are to be amended to expand the sustainability objectives by a new objective ‘to achieve high quality and sustainable design in public and private places in Victoria’ (proposed s.4(1)(e)).

## Box 6.9 Recent VCAT planning cases on sustainable design (continued)

Member Martin argued that councils needed to consider permit conditions on a case-by-case basis, to determine what should apply. Member Martin also supported other tribunal decisions that have upheld similar conditions but stressed the importance of accounting for proportionality and relevance. These previous Tribunal decisions were for larger developments for which ‘the additional costs are more proportionate to and can be readily factored into the project budget’ (at [6]) Member Martin commended the Darebin, Moreland, and Port Philip Councils for seeking to promote more sustainable housing. Also, he argued that it may be appropriate for planning permits to be used to promote sustainable design because relevant design features may be settled before the building permit stage commences.

*Sources: Polizzi v Darebin*[2009] VCAT 1573; Environmental Law Online 2010.

### The Commission's view

The Commission believes that local government can be a source of policy innovation, demonstrational schemes, and a sound platform for responding to local preferences in a timely way. Use of the planning system by some councils to influence the environmental performance of buildings may deliver some benefits by encouraging innovation and experimentation with different approaches and tools for assessing the environmental performance of buildings. It can also be a way of encouraging people to be more aware of, and responsive to, environmental issues (where they are not already). The development of SDAPP might also be viewed as filling a gap left by the State and Commonwealth governments in providing tools for ESD implementation and ‘day to day planning decision-making’ (Hansen/SBE 2007, p.1), and their roll-out could reduce some inconsistencies if different councils are currently using different approaches.

However, there are persistent and increasing concerns about significant problems associated with the use of the planning system to improve the environmental performance of buildings. Generally, these include creating other inconsistencies across councils, potential for overriding state building regulations and eroding the benefits of national consistency. More specifically:

- It undermines the rationale and benefits of having a nationally consistent set of building standards. Under the IGA, jurisdictions (including Victoria) have agreed to restrict any new variations to the BCA by, as far as practicable:
  - limiting variations to those arising from particular geographical, geological or climatic factors, as defined in the BCA
  - requiring that any variations be subject to a regulatory impact assessment

- requiring that any variation be approved by the State or Territory Minister
  - take reasonable steps to consolidate all of their mandatory requirements affecting the design, construction and performance of buildings into the BCA (ABCB 2009a, p. 2).<sup>20</sup>
- It creates uncertainty for business due to the lack of clarity about roles and responsibilities.
  - It adds to business costs due to the need to identify and comply with different standards adopted by councils and these are not identified through a RIS.
  - It can reduce consumer choice in building (for example, to specific building design features preferred by a particular council).
  - It can give rise to delays and other costs, particularly if the basis for councils' requiring particular conditions is unclear or disputed.
  - Increased construction costs can potentially have a negative impact on housing affordability (ABCB 2008).

There are also significant questions over whether the use of planning controls to improve the environmental performance of building is the best tool for achieving this objective. Many new buildings do not require a planning permit but all new buildings do require a building permit. For example, the ratio of new planning applications lodged versus building permits issued in Victoria was 47 per cent in 2008–2009 (DPCD 2009d, p. 11). While it is suggested that those buildings that do require planning approval (for example, more complex and larger developments) are likely to have greater impacts on the environment, it is also true that not all planning permits cover new buildings (for example, applications to clear native vegetation or to put up signs).

State governments including Victoria can make variations to the BCA, thus if the Victorian Government considered that standards for the environmental performance of new buildings are too low, it could seek to enact regulatory changes that would give effect to its objectives. Local government variations may be more widely felt than State variations because 'While most building practitioners operate in only one State or Territory, they generally operate across two or more Local Government areas. They are thus more likely to come in contact (and be required to manage) inconsistent Local Government interventions than State and Territory variations to the BCA.' (ACG 2009, p. 26).

Compared to using building regulations, the alternative approach of allowing councils to impose (explicitly or implicitly) additional requirements is likely to be

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<sup>20</sup> The IGA also commits states and territories to take reasonable steps to consolidate all of their mandatory requirements affecting the design, construction and performance of buildings into the BCA.

a much less transparent and efficient means for achieving the goal of raising building standards.

On balance, the Commission considers that debate about the need to lift the environmental performance of buildings should occur at the national/state level. If it is appropriate to raise building standards, then corresponding changes to building regulations are the right means, not the planning system. The role for councils in improving the environmental performance of buildings should be limited to voluntary schemes and the provision of information to applicants about tools and options for improving performance of buildings, with the uptake of such information at the discretion of applicants.

#### **Draft recommendation 6.5**

**That the Victorian Government clarify that building regulation is the most efficient means of addressing the environmental performance of buildings, through changes to national building standards or via changes to State building regulations.**

**That the Victorian Government also clarify that councils' role under the planning system does not extend beyond voluntary schemes and the provision of information to applicants about the environmental performance of buildings and tools to assist applicants make informed decisions.**

### **6.3.2 Broader inter-governmental coordination problems**

The Commission emphasises that sustainable design is only one of many other areas in building and construction regulation in which costly inconsistencies may exist not only between local governments but also between local, state and national government. Other interface areas include for example: noise regulations, accessible housing, and occupational health and safety. It highlights why it is critical for the State Government to address interface and coordination issues between local government regulation and laws administered by other levels of government. It underscores the need for:

- better coordination between state and local government — it is especially important to consult effectively with local government in developing state and national policy and to promote consistency between different arms of the State Government to avoid mixed messages
- clarity of accountability and function of local government — to reduce confusing regulatory ‘gaps’ and overlaps, and scope for unintended local variations
- the State Government to consider local government capacity and invest in capacity-building where they intend for local governments to have a role

- an economic approach that finds the least-cost way of achieving the joint objectives and regulatory outcomes.

The relationship between planning regulation and the environmental performance of buildings also raises broader issues about the role of councils in implementing ESD across a wider range of issues. As noted above this includes their role in addressing climate change (box 6.7).

The Commission's recent inquiry into environmental regulation identified the central problem for future environmental regulation of ensuring consistency and predictability in the interpretation and implementation of ESD objectives and principles. To address these issues the Commission recommended that the bodies responsible for implementing state environmental regulation develop tools and guidance for staff (including case studies) on how to address ESD principles in decision-making (VCEC 2009a). It is clear that councils are looking for similar guidance on how to incorporate ESD principles into their regulatory processes.<sup>21</sup>

The environment inquiry also made the point that it is possible, and highly desirable in some cases, to address ESD principles in the design and development of policy. The Commission advocated, for example, that the Victorian Government should adopt a more strategic approach to the administration of native vegetation regulation involving the early identification of sites where clearing would not generally be permitted and areas where clearing will be permitted subject to meeting standard conditions (VCEC 2009a, p. 149). One advantage of this approach is that subsequent decisions are simplified, becoming more of a technical assessment than a full assessment of the issues (including how ESD principles are to be applied). Chapters 4 and 5 consider the broader role of councils in the overall planning system.

## 6.4 Quality of regulatory information provision

Unclear rules are often worse for firms than 'wrong' or sub-optimal rules because unclear rules or application of rules introduce regulatory risks to projects.<sup>22</sup> They increase the (transaction) costs of accessing, interpreting and complying with regulatory requirements. They also contribute to perceptions of variability, inconsistency, and arbitrariness. This can, as discussed in 6.2, reduce actual compliance and compromise the achievement of intended regulatory outcomes.

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<sup>21</sup> For example, Moonee Valley City Council's 'Environmental Sustainability Plan 2007-2012' includes interim targets to: 'Incorporate environmental sustainability principles into the review of the planning scheme'; and for 'Council to investigate innovative measures such as the STEPS/SDS models to advocate, encourage and promote ESD principles to developers and [the] general public' (Moonee Valley City Council 2007, p. 28)

<sup>22</sup> See discussion about coastal management and climate change adaptation in the Commission's inquiry into environmental regulation: VCEC 2009a, p. 354.

The Commission's consultations strongly suggested that most builders and developers consider that the building approval process generally works well and is 'relatively straightforward'. Surveys undertaken periodically by the Building Commission suggest a high level of understanding of the applicable building standards and adequacy of the supporting information and advice (box 6.10).

### **Box 6.10 Transparency of building standards and supporting information**

In the 2008 practice survey:

- Only 5% of domestic builders and 3% of commercial builders responded that building standards were difficult or very difficult to apply (c.f. 63% and 59% indicated that standards were easy or very easy to apply)
- Only 7% of private building surveyors and 8% of municipal building surveyors responded that building standards were difficult or very difficult to apply (c.f. 70% and 65% respectively that indicated that standards were easy or very easy to apply)
- Only 5% of the domestic builders and 4% of the commercial builders consider the practice notes<sup>23</sup> difficult or very difficult to understand (c.f. 61% and 61% respectively that indicated that the practice notes were easy or very easy to understand)
- Only 7% of the private building surveyors and 0% of the municipal building surveyors consider the practice notes difficult or very difficult to understand (c.f. 76% and 70% respectively that indicated that the practice notes were easy or very easy to understand).

*Source:* BCV 2008d

By comparison, local laws and approval processes are a source of more angst. For example, MBAV submitted that 'Sourcing Local Government Laws' is an important problem for their members:

Sourcing information on local government building laws can be a time consuming and frustrating exercise for many builders. With many builders regularly operating in different municipalities, keeping track of local by-laws and recently altered administrative procedures attached to those laws can be difficult. (MBAV, sub. 24, p. 19)

The MBAV reported that information on local laws (such as working hours for the construction industry) could not be located on some council websites, arguing that: 'In a modern and dynamic economy like Victoria, level of service delivery is simply unacceptable.' (MBAV, sub. 24, p. 19) The Roy Morgan survey also showed that those businesses who interacted with local government administered building and construction regulations had a higher likelihood

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<sup>23</sup> Registered Building Practitioners (RBPs) use Building Commission practice notes to apply and interpret the building standards.

(65 per cent) of indicating that they felt uncertain about how long approvals/decisions would take than businesses on average (50 per cent).

The contrasting perceptions of the building standards and the building permit process versus local law requirements can be partly explained by differences in perceptions of the quality of information provided by the respective regulators.

The quality of information provision — including comprehensibility, consistency, completeness, accessibility and timeliness — all affect certainty and concomitant administrative, compliance and delay costs. For example, ACG found that the bulk of the estimated delay costs attributed to councils stemmed not from delays in obtaining a building permit but from processing of property information requests (ACG 2010, p. 19).

The Commission's consultations highlighted a number of areas for improving the quality and accessibility of information on building and construction local laws. For example, some of the businesses interviewed about the local government regulation in Victoria suggested that:

- Administrative costs could be reduced by introducing a robust online system with electronic forms for typical requests, e.g. requests for property information or asset protection permits.
- Information regarding what is required to obtain building approvals or dispensations should be clear and provided all in one go, not incrementally as is often the case with some councils.
- [Businesses] shouldn't have to pay fees for information held by councils that could easily be made freely available to the public. (ACG 2010, p. 29)

Much of the feedback called for better use of information and communications technology to alleviate perceived problems. Some private building surveyors have developed their own proprietary systems to streamline their interactions with builders. It is not clear to what extent local governments have done likewise, or would have done it with consistency across councils in mind.

Results of the Roy Morgan survey provide a snapshot of the current usage of online services provided by councils and difficulties encountered by those in the construction sector and/or had dealings with council about a building and construction regulation issue.<sup>24</sup>

First, of those respondents who had a local building and construction regulation issue in the last three years, 75 per cent indicated that they have accessed council websites. About a third of the respondents (34 per cent) indicated that they had had no problems with the websites while others encountered problems including: difficulty in finding information relevant to their situation (17 per cent); difficulty

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<sup>24</sup> In interpreting the Roy Morgan results, consideration of the relativities are perhaps more important and appropriate than absolute numbers between the different questions.

navigating the site due to poor structure (18 per cent); information provided is often incomplete (six per cent); information provided is often outdated (three per cent); sites often have dead or broken web links (1.4 per cent); and other problems (three per cent).

Second, in terms of the method(s) adopted to seek out information on building and construction regulation, respondents were most likely to ring the relevant department (51 per cent) but searching the official website (39 per cent) was also popular, ahead of visiting the council enquiry centre (28 per cent). However, in terms of ‘dealing with councils’ (implies more than obtaining information) respondents showed very low reliance on electronic modes of communication (two per cent online, six per cent other correspondence, 10 per cent via email, 35 per cent in person at council offices, 41 per cent on telephone).

The results suggest a healthy level of demand for council websites as a source of building and construction regulatory information, but that these are hampered by a number of problems. They also suggest significant opportunities for increasing the use of information and communications technologies (ICT) to facilitate council interactions, and reducing the burden on traditional methods.

There appears to be significant scope for improvements in the quality of information provided at the local government level.<sup>25</sup> The Commission considers that these service improvements are potentially ‘big, easy wins’ for reducing regulatory burdens and reducing real and perceived inconsistencies in local government regulation of building activities. The current initiatives being undertaken by the Victorian Government, by Local Government Victoria (DPCD) and Small Business Victoria (DIIRD), to develop an online platform for building and construction local law information should address some of these issues, and promote more timely and cost-effective channels for local government-builder communications. The current initiatives can create additional value if the systems were integrated with existing information gateways such as that of the Building Commission. For example, the MAV suggests that priority should be given to cost-reducing systems for councils to maintain their register of all building permit plans and documentation, as required by the state:

While the business benefits of an e-lodgement system for applying for a building permit does not justify its development, the remittance of building permits and associated documents to councils electronically, where councils systems support an electronic DMS, should be explored. (MAV, sub. 19, p. 14)

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<sup>25</sup> Although not within the control of councils, respondents also identified other opportunities for using ICT to streamline the permit process: ‘The timeliness of the process of obtaining compliance certificates from subcontractors (necessary to obtain a permit from a building surveyor) could be improved if it was facilitated through an electronic system.’ (ACG 2010, p. 29)

Improvements in the local law information and communications systems have the potential to reduce costs for businesses and councils and can further assist regulators (both councils and the Building Commission) in monitoring compliance and in their enforcement actions.

## 6.5 Estimated cost savings from proposed reforms

This chapter has proposed a number of changes designed to reduce the costs to business of dealing with building and construction local laws without undermining their objectives. The cost savings fall into three broad groups:

- Reduced search (and therefore administrative) costs arising from the harmonisation of selected building and construction local laws under all recommendations other than draft recommendation 6.5 (see below)
- Reduced substantive compliance and delay costs arising from more streamlined and targeted building and construction local laws covered in draft recommendations 6.2 to 6.4
- Reduced uncertainty to businesses and potential compliance costs from clarifying the role of local government under draft recommendation 6.5.

Table 6.1 below sets out the estimates. The Commission considers they are conservative, partly because they exclude any savings arising from clarifying the role of local government under draft recommendation 6.5. The Commission was unable to estimate cost savings from implementing this recommendation due to uncertainty about the number of planning permits containing conditions covering the environmental performance of buildings, and the costs to business of meeting these conditions. The Commission broadly characterises the potential annual savings to business as being in the range of \$6–13 million.

Table 6.1 **Summary of indicative cost savings to business (\$m per year)**

	<i>Low</i>	<i>High</i>	<i>Midpoint</i>
Reduced search costs (draft recs 6.1–6.4)	0.6	1.0	0.8
Reduced compliance and delay costs			
– working hours (draft rec 6.2)	1.3	2.5	1.9
– site-fencing (draft rec 6.3)	2.0	3.4	2.7
– council asset protection (draft rec 6.4)	1.9	5.9	3.9
<b>Total (range)</b>	<b>6</b>	<b>13</b>	<b>9</b>

The Commission has attempted to estimate the potential cost saving to business of these changes (where possible) using cost information gathered by ACG (2010). The ACG cost estimates are subject to wide confidence bands which are, in turn, reflected in the Commission's high and low estimates of cost savings to business. The Commission also had to make a number of simplifying assumptions to develop the estimated cost savings. These assumptions reflect the uncertainty about the final nature of credentialed local laws and their uptake by councils, which in turn, would affect the amount of savings to business from reduced search costs, uncertainty and substantive compliance costs.

The primary purpose of putting these savings forward is to encourage feedback on the assumptions from stakeholders. The Commission will investigate further the key assumptions for these estimates to improve their reliability and invites further input from stakeholders.

### **Reducing search costs**

The ACG report (2010, p. 19) estimated that 'gathering information — due to differences between councils' imposes administrative (search) costs of around \$1.9 million per year on business. The Commission's draft recommendations 6.1, 6.2, 6.3, and 6.4 aim to improve consistency in building and construction laws relating to working hours, fencing and signage and asset protection, and reduce variations in terminology across building and construction local laws and regulations more generally.

The Commission has assumed that implementing its draft recommendations achieves a reduction in these search costs of between 30 and 50 per cent. This assumption is based on the Commission's analysis of the prevalence and consistency of selected local laws. This translates to a potential administrative cost saving to business of between \$0.6 million and \$1 million per year. Additional savings might be achieved by developing credentialed local laws for other building and construction local laws, and improvements to the accessibility and quality of regulatory information provision.

### **Greater flexibility and reducing compliance costs**

Some of the Commission's draft recommendations are designed to reduce the costs to business of complying with particular building and construction local laws, without undermining outcomes.

The ACG report estimated that the working hours local laws (defined by ACG as 'noise and hours of operation') imposed a cost businesses of \$25 million per year (ACG 2010, p. 19). The ACG report noted that this estimate is driven by a relatively small number of large inner city projects.

The Commission's draft recommendation is intended to reduce compliance costs by enabling more (low nuisance) building work to be undertaken outside of working hours specified under current working hours. The savings to business will depend on:

- the types of building work which would be exempted (for example painting, others)
- the impact on construction sector work practices and productivity.

The Commission has assumed that providing greater flexibility may lead to a five to 10 per cent reduction in the compliance costs incurred by larger inner city projects, yielding cost savings of between \$1.3 to \$2.5 million per year. There may also be some additional (unquantified) benefits for other businesses involved with smaller projects undertaken throughout other areas of the State.

The ACG report (2010, p. 19) estimated that the costs to business of complying with 'site fencing' local laws are around \$23 million per year, divided between domestic (\$17.5 million) and non-domestic (\$5.5 million) builders. The Commission has proposed that under a credentialed local law for site fencing builders should have additional flexibility in how they can meet the requirements of councils, with a 'deemed to comply' approach providing certainty.

To estimate the potential cost savings, the Commission assumed that larger non-domestic builders are more likely to take advantage of any additional flexibility. The Commission has assumed that non-domestic builders can reduce the costs of complying with existing site fencing requirements by 20 to 30 per cent and that domestic builders may access a relatively smaller cost saving of between five and 10 per cent. Under these assumptions the substantive compliance cost saving are between \$2 and \$3.4 million per year. The estimate assumes that there are negligible offsetting costs to business and councils from needing to demonstrate and assess proposed alternative solutions.

### **Parallel processing and reducing delay costs**

The Commission's draft recommendation concerning parallel processing of building and asset protection permits has the potential to reduce delays in the commencement of building work. The Commission has based its saving estimate on the following information and simplifying assumptions:

- In 2009 there were 105 568 building permits with a total value of \$21.4 billion (BCV 2010c) leading to an average value of a building project of \$202 950 per permit.
- An interest rate of seven per cent per annum to reflect the holding cost of capital.
- That parallel processing will bring forward building project completion times by an average of five days.

- That delays are reduced for 10 to 30 per cent of all building permits (implying that in most cases delays do not occur or do not impose any costs on builders).

Under these assumptions adopting parallel processing of building and asset protection permits could lead to a cost saving to business of between \$1.9 and \$5.9 million per year.

*The Commission invites feedback on the preliminary cost estimations above and would welcome further input on the key assumptions.*

## 7 Improving the administration of local laws

As explained in chapter 2, local governments are able to make local laws to enable them to address local issues. Most local laws relate to amenity issues, which are often in form or content specific to individual councils. This is consistent with councils' role, described in the Local Government Act, which states 'The role of a Council includes acting as a representative government by taking into account the diverse needs of the local community in decision making' (s 3D(2)(a)). Whether there is case for further harmonisation or other intervention requires a demonstration of net benefit, including transition costs. The quantitative data on this is limited, and the Commission has focussed on that which is available.

This chapter addresses opportunities to reduce unnecessary burdens on business from local laws by local government, other than local laws relating to building and construction and local variations relating to planning (which was discussed in chapter 6).

The key issues discussed in this chapter are reducing unnecessary burdens on business:

- (1) within a council's own jurisdiction
- (2) due to unnecessary variations across jurisdictions.

The next section provides an overview of local laws, including the characterisation of these regulations that the Commission has found useful for its analysis. Section 7.2 sets out the issues raised by participants and in the Commission's various consultations. Section 7.3 outlines the various initiatives by the Victorian Government to improve local laws. Section 7.4 sets out the Commission's provisional views on areas for further improvements, and areas where it is seeking further information.

### 7.1 Nature and extent of local laws

This section illustrates the nature and extent of local laws in order to evaluate options for improvement.

The Commission engaged Stenning and Associates to collect information on the licences and permits, and non-licence local laws that local government administer. Most local laws focus on maintaining or improving amenity in a local area. A selection of the categories of local laws, and the proportion of councils that regulate in the area, are listed in Table 7.1.

**Table 7.1 Type and incidence of local government laws: selected examples**

<i>90–100% of councils</i>	<i>20–29% of councils</i>
Permit to establish outdoor eating facility	Dilapidated premises/buildings
Permit to keep animals	Chimneys
Permit to display or place an exhibition of goods for sale on a footpath or road	Substances from vehicles animals and livestock
<i>80–90% of councils</i>	Permit to store dangerous substances
Animal excrement	Sale of vehicles
Overhanging and encroaching trees	<i>10–19% of councils</i>
<i>70–79% of councils</i>	Permit for film, television or photography
Itinerant trader permit	Fencing (animals)
<i>60–69% of councils</i>	Droving of livestock (same property)
Permit to graze livestock on road verges	Noise from vehicles
Permit to move or drive livestock on roads	Fencing of vacant land
<i>50–59% of councils</i>	<i>5–9% of councils</i>
Animal nuisance/noise	Permit to coach/instruct at council facilities
Fencing (livestock)	Pest animals - food to be securely stored
Repairing vehicles	<i>Less than 5% of councils</i>
<i>40–49%</i>	Beekeeping
Noise	Livestock - uncontrolled
Permit to use a heavy vehicle on a restricted or public road	Pest plants - to be removed
<i>30–39%</i>	Burning of vegetation (fire danger period)
Permit to erect minor structures or temporary dwellings	Asbestos removal and transport
Burning of offensive material	Cigarette vending machines
Vermin and noxious weeds	Advertising of tobacco products
Transportation of waste	Food premises waste disposal
	Commercial parking permit

Source: Stenning and Associates 2009b, tables 6 and 8.

The report allows for comparison of the prevalence of local laws for different types of councils – for example, a permit for film, television or photography, is higher in inner metropolitan councils (47 per cent) than small shires (5 per cent). A permit to move or drive livestock on roads is required in 90 per cent in small shires, and 18 per cent of metropolitan councils (Stenning and Associates 2009b, table 6). Given that local laws are designed to respond to local needs, much variance is expected.

The Allen Consulting Group report undertaken for the Commission, *The cost of planning and building requirements administered by local government*, estimates the costs to businesses of local laws relating to building and construction at \$116.8 million in compliance costs (noting a low level of certainty). The costs of finding out about differences in local laws between councils was \$1.9 million (ACG 2010, table 3.8). The report suggests that the local laws relating to building and construction have fairly substantial costs at a state-wide level, but it does not provide insight into the costs of local laws in other policy areas. Building has been consistently identified by participants as an area where local laws have a high cost.

Another measure of the impact of local laws is the resources devoted to their administration and enforcement. The Municipal Association of Victoria suggests that this equates to about 1.5 per cent of all council expenditure (sub. 19, p. 5). The Commission's analysis in chapter 9 also suggests council expenditure on local laws is low, at about 1–2 per cent of council expenditure. This suggests that local laws are a relatively small component of council activity, and one would expect the costs of the local laws on business and the community to be proportionately low.

The Commission's analysis suggests that local laws can be thought of in terms of three broad categories:

- (1) Local laws that relate to specific issues in the community. These often relate to amenity. Many of these would have no, or very little, impact on business. While these local laws should have a net benefit on the community overall, it is unlikely that the impact, in many cases, would necessitate a rigorous justification. Local laws of this nature do not appear to generally result in material concerns for businesses. Improvements in the processes for developing local laws in general (section 7.4.1) would help to test whether these (and all other) local laws do have net benefits.
- (2) Local laws where there is scope for harmonisation across municipalities, but which are unrelated to existing Victorian Government regulations. These relate to areas where local governments make varied laws about issues that are common across municipalities. An example of this is asset protection

issues in relation to building regulation. Options for dealing with these issues are discussed in section 7.4.2.

- (3) Local laws that are connected with, or complementary to, State laws, where State government already regulates in a policy area, and local government through local laws adds additional requirements. Examples are gaming and liquor regulation. Many building and construction local laws, also fall into this category and have been the area of local laws that attracted the most comment from participants. Building and construction local laws have been discussed in Chapter 6. The general issues relating to these local laws are discussed in section 7.4.3.

This chapter examines some of the concerns raised regarding local laws, current government initiatives aimed at addressing these concerns, and other considerations for government in addressing concerns.

## 7.2 Concerns about local laws

In December 2008 the State Government released a *Better Practice Local Laws Strategy*, stating that:

The need for a more robust and consistent process for [developing] local laws has been identified in a number of key reports, and has been confirmed through consultation with the local government sector and key stakeholders. (DPCD 2008d, p. 6)

The submissions received as part of this inquiry, as well as evidence from the Commission's research, are consistent with the view that there are some areas for improvement (see Box 7.1 below).

The key issues appear to fall into three main categories. That, in at least some cases, local laws:

- (1) do not comply with 'best practice' principles (specifically, the impacts on businesses and the community may not have been properly considered, the local law may be unnecessary, or disproportionate to the problem)
- (2) are not well communicated to the public on an ongoing basis
- (3) add to business costs because of variations across municipalities, and variations with state laws.<sup>1</sup>

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<sup>1</sup> The legislation provides that where there are inconsistencies between local laws and state laws, the state law prevails (s 111 (3)). However, it is not clear that this provision covers 'gold plating' of state laws – where councils require a standard above what the State law requires.

## Box 7.1 Submissions raising local law concerns

Some examples of submissions that raise concerns regarding local laws are below.

The Victorian Farmer's Federation claimed:

There are laws that put undue burden of cost and regulation on agricultural businesses. An example is stock movement local laws (eg where stock is being shifted to a new paddock or the dairy). In some shires, it is cheaper to move animals by truck, than walk them over the road. (sub. 17, p. 4)

The Civil Contractors Federation also highlighted some concerns:

Many councils are attempting to use their powers under the local law provisions of the Local Government Act 1989 to "lift the bar" on environmental requirements over those provided under the planning scheme provisions. Recent examples include the requirement for consent under a local law for the removal of topsoil and regrading of allotments, notwithstanding the relevant planning provisions. (sub. 21, p. 24)

The Master Builders Association of Victoria perceived problems in the communication of local laws, and the difficulty of understanding obligations when operating across jurisdictions.

Sourcing information on local government building laws can be a time consuming and frustrating exercise for many builders. With many builders regularly operating in different municipalities, keeping track of local by-laws and recently altered administrative procedures attached to those laws can be difficult. (sub. 24, p. 19)

Sources: Subs. 17, 21 and 24.

Data collected through the Roy Morgan Research survey of the perceptions of local government highlighted general concerns, with 50 per cent of respondents stating that local government regulation in their industry was more demanding now than it was two years ago.<sup>2</sup>

The survey undertaken by Roy Morgan Research suggested that businesses viewed a number of regulations as inconsistent across council areas. Around 55 per cent felt that the advice they had received from various local councils was consistent, and 31 per cent felt the advice they had received was inconsistent. Perceptions of inconsistency were the highest when businesses had dealt with councils on the following areas of regulation within the past three years:

- Primary industries (including fisheries, forestry or livestock) (42 per cent)
- Planning and land-use regulations (41 per cent)
- Building and construction regulation (38 per cent)

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<sup>2</sup> It is likely that participants' responses relate to local government administration of state regulation, as well as locally-made regulation

- Liquor regulation (35 per cent)
- Roads, and/or parking regulations (35 per cent) (Roy Morgan Research, 2010b).

However, the survey data do not identify the extent to which these responses relate to local laws as opposed to other sources of variation.

The Commission's consultations have suggested that local government variations to State regulations (other than building and construction, which is discussed in chapter 4) exist principally in the following areas:

- Gaming
- Liquor licensing
- Roads and clearways
- Sidewalks and footpaths
- Stock movement and livestock
- Energy and climate change.

However, some of these variations are implemented through planning schemes and other local government powers, rather than local laws.

### 7.3 The Government's proposed approach

The Victorian Government has recently put in place reforms that appear likely to address a number of the concerns highlighted by participants, and reduce unnecessary burdens on businesses. Based on the submissions received by the Commission for this inquiry, the strategy appears to have the broad support of stakeholders, including councils and business (subs. 6, 7, 10, 14, 21 and 24), in some cases with reservations.

The progress of three key elements of the State Government's proposed approach is summarised below.

#### Guidelines for making local laws

The amendments to the *Local Government Act 1989 (Vic)* in November 2009 provide for the Minister to make and publish guidelines with respect to: (a) the preparation, content and format of local laws; and (b) details to be included in any explanatory documents for a proposed local law (s 111A). The purpose of the guidelines is to assist Victorian councils to achieve better practice when considering, making, implementing, enforcing and reviewing their local laws.

A manual for non-mandatory guidelines for making local laws was completed in February 2010. The manual states that the guidelines 'do not seek to impose rigid uniformity in local laws', and that they 'recognise local government as a distinct and essential tier of government empowered and best placed to make local laws in the interests of Victorian communities' (DPCD 2010h, p. 7).

The manual explains: (a) how councils can ensure they comply with their legislative obligations; (b) how councils can achieve better practice; and (c) what material should be included in a Local Law Community Impact Statement<sup>3</sup> (LLCIS). Councils are advised to publish the LLCIS alongside the relevant local law on their council's website.

The guidelines in the manual are based on principles of good regulation, with reference to the *Victorian Guide to Regulation* (the guidelines for State regulations). The guidance addresses a number of the concerns raised by stakeholders, by encouraging councils to consider: whether the local law is necessary; the legal authority and existing legislative framework related to the proposed local law; and laws in neighbouring and like jurisdictions.

Figure 7.1 summarises the *Guidelines for Making Local Laws Manual* and the key steps to be included in an LLCIS.

### **Credentialed local laws**

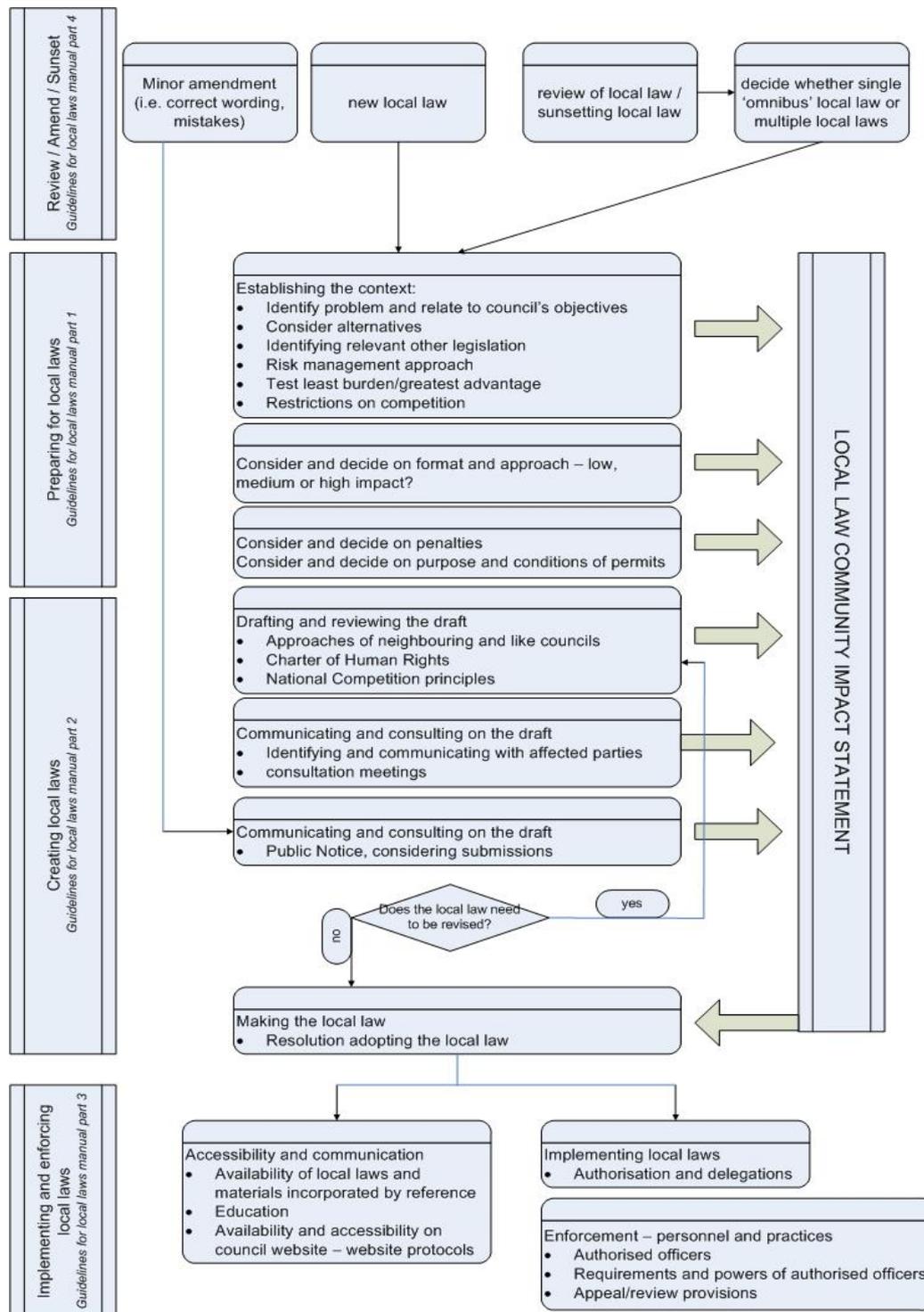
The *Better Practice Local Laws Strategy* proposed the use of a credentialed local law process, however the latest amendments to the Local Government Act did not facilitate a process for credentialed local laws. It is unclear at this stage how the initiative will proceed, but a pilot project for local laws relating to building and construction (see chapter 6) will likely serve as a model for improvements in other priority areas for harmonisation.

As explained in chapter 6, a credentialed local laws process would allow the Minister for Local Government to 'credential' a local law that has been subject to an impact assessment process 'akin to the RIS process required by the *Subordinate Legislation Act 1994*' (DPCD 2008d, p. 15, p. 18). Councils could then choose to adopt the credentialed local law with confidence that regulatory issues had been addressed. Given that the model has not been implemented, it is not clear as to how the impact assessment process would function. One model could be the current process for State regulation (including independent assessment by the Commission, public consultation, and scrutiny from the Scrutiny of Acts and Regulations Committee of Parliament). The responsibility for developing the credentialed law, including the preparation and finalisation of an impact assessment, could be the responsibility of the State Government, in consultation with local governments.

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<sup>3</sup> A Local Law Community Impact Statement (LLCIS) is an internal tool/template for Council to step through the local law making process, and is also an explanatory document for the community to understand the nature and content of the local law and processes that the Council has worked through to develop it. It is envisaged to be similar, but less onerous, than a formal Regulatory Impact Statement (RIS) process at a State level (DPCD 2010, p. 9).

Figure 7.1 Key steps in local laws



Source: VCEC analysis, adapted from DPCD 2010h and DPCD 2010i

Credentialed local laws would differ from model laws, for which there would be no burden of proof to adopt a variation of a harmonised law, or to adopt no harmonised law at all. Credentialed local laws would also differ from State regulation, which would mandate adoption of a harmonised law across all councils. In this way, a credentialed law strikes a balance between rigid harmonisation and complete variation, by allowing variations where they are justified.

### **Increased standards and guidance for consultation**

The amendments to the Local Government Act in November 2009 increase the requirements on councils to make local laws accessible to the public, by requiring that councils make local laws available on their website (*Local Government Amendment (Offences and Other Matters) Bill 2009*, clause 56).

The Commission's searching of local government websites showed that while most local laws were available on councils' websites, in many cases they were difficult to find, and that it was sometimes difficult to identify key information relating to regulation in a timely way. In some cases, while a local law was able to be found easily, important supplementary information was difficult to locate. For example, a Melbourne City Council local law prohibits the consumption of alcohol in certain prescribed public places. While the local law itself was relatively simple to find online, the description of the prescribed public places was not co-located with the local law (City of Melbourne 2010a). The *Guidelines for Local Laws Manual* contains protocols for councils relating to the format, search functions, and locations of local laws so that they are easier for the public to locate (DPCD 2010h, pp. 92–95).

These initiatives will go some way toward reducing unnecessary burdens on businesses, but it is too early to tell how effective they will be. Section 7.4 reviews key elements of the framework around local laws, and opportunities for improvements.

## **7.4 Scope for improvements**

This section discusses opportunities to enhance the effectiveness of the government's proposed measures, and whether there are other mechanisms the government could consider to improve the quality, accessibility and consistency of local laws.

A key question is whether the proposed approach strikes the right balance, namely, to reduce unnecessary burdens on business, without imposing unnecessary costs on councils and their communities. Any new requirements

should be justified by expected improvements (reduced costs and/or increased benefits) to local laws in the state.

## 7.4.1 Quality of local laws

### Impact analysis

The local law guidelines introduce the key aspects of an impact analysis process into council's development of local laws, including identifying the problem, options, and costs and benefits of the proposed approach. The OECD notes that there is nearly universal agreement among regulatory management offices that regulatory impact analysis (RIA), when done well, improves the cost-effectiveness of regulatory decisions and reduces the number of low-quality and unnecessary regulations (OECD nd, p. 7). Box 7.2 summarises the key benefits of regulatory impact analysis.

#### Box 7.2 Benefits of regulatory impact analysis

Governments that use impact analysis for regulation have identified four main objectives concerning regulatory costs and impacts:

- (1) Improve understanding of the real-world impacts, including both the benefits and the costs, of action, which helps to establish regulatory priorities
- (2) Integrate multiple policy objectives in order to reveal linkages and weigh trade-offs
- (3) Improve transparency and consultation: exposes the merits of decisions and the impacts of actions
- (4) Improve government accountability: improve the involvement and accountability of decision-making at ministerial and political levels

Source: OECD 1997, pp. 17-18.

The Commission is unaware of quantitative analysis of the benefits of the RIS process in other jurisdictions. However, its own analysis shows considerable benefits in Victoria. For example, the Commission estimated that in 2007-08, the RIS process had resulted in regulatory savings that exceeded the costs of the process by a ratio of almost 30 to one (VCEC 2008b, p. 7).

The Commission recognises that it is important to consider the guidelines as part of a process of continuous improvement in local law making. The OECD notes:

The process of implementing RIA is a long-term one, as shown by the experience of all countries that have adopted it, both within the OECD and within the developing world. RIA programs can and should be progressively developed over time and will yield increasing benefits in terms of better regulatory quality if this is done. (OECD 2008b, p. 24)

*Should the impact analysis be voluntary or mandatory?*

The Victorian Farmers' Federation (VFF) raised concerns about the voluntary nature of the guidelines:

The VFF want to highlight that best practice in regulatory local laws should be mandatory to all councils in Victoria. It is inappropriate to offer voluntary guidelines as this will not in any way counteract the inconsistencies that occur through interpretation at council level. (sub. 17, p. 4)

The key disadvantage of a voluntary scheme is that compliance could be low, and application could be inconsistent. While councils that already strive for best practice may take up the guidelines, there do not appear to be any strong incentives for those councils that do not prioritise achieving best practice in local laws – 'buy-in' from parties to a voluntary agreement is an important element of success in voluntary agreements (Hargroves and Smith 2005).

Furthermore, a mandatory scheme could involve significant costs and would need to be supported by a strong training program and support for council officers – enforcement mechanisms, a body to enforce them and confidence that the guidelines could work consistently with the processes for every council.

While a voluntary scheme should also be adequately supported, a longer learning process may be allowed where the guidelines are not mandatory. A voluntary scheme provides councils pursuing better practice the opportunity to pursue innovative techniques to its local law making, and LLCIS. Local Government Victoria could then draw on the experiences of councils to develop better guidance and support.

Imposing a mandatory scheme would be more costly to both state and local governments, and it is not clear that the impact of the majority of local laws on business is sufficient to warrant such a step. The Commission considers that a voluntary scheme is an appropriate mechanism for introducing the guidelines to local governments, but considers that the effectiveness of this voluntary scheme will need to be evaluated to ensure that it is meeting its objectives. Given that the Minister for Local Government has been given the authority to introduce mandatory guidelines under legislation, mandated guidelines could be introduced relatively quickly if the voluntary scheme was considered ineffective.

*Are the requirements in the guidelines rigorous enough?*

The principle of proportionality encourages the allocation of resources to the areas where they are best used. In the context of regulatory impact analysis, this means targeting government efforts (and public resources) toward the projects where they will add the most value. There are specific policy areas where local laws appear to have a much more significant impact, such as in building and construction regulation (chapter 4). The LLCIS process is envisaged to be less

onerous than a RIS process, and there is some flexibility in its application, suggesting an informal assessment can take place where there is unlikely to be a quantifiable cost impact:

A formal assessment is not always required and an informal assessment will not necessarily measure burden and advantage in monetary terms... where the proposed local law is likely to have a significant impact – particularly a quantifiable cost impact – on business or another identifiable section of the community, a more formal assessment may be appropriate. (DPCD 2010h, p. 29)

The weaker standards seem appropriate for most local laws, given their likely impact. A key question is whether it is more important to have high quality analysis or nothing at all. According to the OECD (2002, p. 47), ‘...RIA’s most important contribution to the quality of decisions is not the precision of the calculations used, but the action of analysing – questioning, understanding real-world impacts and exploring assumptions.’ This implies that using the impact assessment process is still worthwhile, even where the standards of the evidence and analysis may be low. An informal approach to low-impact LLCIS could help to embed a culture of good regulatory principles in the decision-making process, while directing the bulk of local government resources toward preparing a formal LLCIS when the local law is likely to have a significant impact.

If LLCIS and RIS processes were the same, the Commission considers that there is no reason why the same, mandatory, threshold should not apply – however, it would be unlikely that many LLCISs would be prepared.<sup>4</sup> Given the low costs associated with most local laws, it would appear to be more appropriate to rely on more informal analysis in LLCIS. Local laws that appear to have a significant impact, such as some of those local laws in the building and construction area, should be identified by Local Government Victoria as areas for formal analysis, and local governments should be supported to develop LLCIS for these regulations.

*Will the guidelines provide incentives for harmonisation?*

As well as explaining what councils need to do to comply with their obligations with respect to local laws under the Local Government Act and other legislation (such as the Charter of Human Rights and Responsibilities Act, the

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<sup>4</sup> The *Subordinate Legislation Act 1994* specifies a threshold as to when a RIS needs to be prepared (an appreciable economic or social burden on a sector of the public). The State government is proposing to add greater specificity to interpreting the appreciable burden test, noting in a discussion paper proposing changes to the Subordinate Legislation Act that: ‘While there is still uncertainty, and where the impacts of the proposed instrument are quantifiable, an appreciable burden is considered to be imposed where the total impact of the legislative instrument on a sector of the community is likely to be more than \$500 000 per annum’ (DPC 2009, p. 32).

Infringements Act, the Interpretation of Legislation Act), the guidelines provide advice as to how councils can achieve better practice in local law making.

As part of how councils comply with their obligations, they are required to think about the context of their local law in relation to relevant areas of State regulation (DPCD 2010h p. 25). This could help councils to think more explicitly about where they are imposing vertical inconsistencies between their own regulation and State regulation. For example the guidelines state that 'If a council genuinely believes that a matter would be better dealt with by an Act and publicises this fact, then it is probably precluded from making a local law about the same matter' (DPCD 2010h, p. 25).

As part of better practice, councils are encouraged to think about the local laws of similar and neighbouring jurisdiction (DPCD 2010h, p. 30), which would help them to think explicitly about the costs they impose through variations and perhaps reduce unnecessary variation.

The guidelines are voluntary. Thus it is not clear the extent to which councils will adopt these opportunities to review their local laws in the context of other State and local regulations. Further, it can be costly, in terms of time to carry out these reviews, particularly in looking at the relevant legislation in other municipalities, where these are sometimes difficult to locate and understand.

A review of the effectiveness of these provisions, and the level of support given to councils in implementing them, should be undertaken to ensure that areas that are simple and relatively costless to harmonise are identified and acted upon.

*Will there be adequate training and support for councils?*

Training is particularly important in the early stages of introducing an impact analysis program, when both technical skills and the cultural acceptance of the policy tool need to be cultivated.

A high level of investment is often required to assist in developing the broader cultural changes that must be achieved across entire organizations. RIA manuals and other guidelines have been important complements to training, but not a substitute for it. (OECD nd, p. 7)

To support the launch of the new *Guidelines for Local Laws Manual*, Local Government Victoria funded LGPro, the peak body for local government professionals in Victoria, to develop a new local laws website and to conduct a state-wide training program, in which 115 council officers participated (LGV 2010). Based on consultations with councils and Local Government Victoria, this project appears to be well-supported by relevant tools and training. It is not clear how many resources will be available for training, helping councils prepare LLCIS, identifying and sharing data sources, and encouraging better practice analysis on an ongoing basis, but the Commission understands that options for

ongoing support are being considered. This will be vital to ensuring that the guidelines have the desired benefits.

The *Better Practice Local Laws Strategy* (DPCD 2008, p. 15) signals that the extent of compliance with the guidelines will be subject to review after three years, and that the Minister will consider whether it is appropriate to regulate or continue to rely on guidelines. Overall, the voluntary guidelines appear to be a good approach for encouraging improvements in the quality of local laws and addressing the specific problems raised by stakeholders. The extent to which the guidelines are adopted, and to which higher impact local laws are subjected to more formal impact analysis, will determine the extent of the benefits. It will be important to evaluate the costs and benefits of the guidelines, and to test opportunities for improvements.

The Commission considers that Local Government Victoria's evaluation of the *Guidelines for Local Laws Manual* should be published. In the evaluation it will be important to consider the following aspects of the project:

- the extent of compliance with the local law guidelines, and appropriateness of the level of analysis compared with the impact of the local laws
- whether the current level of training and guidance given to councils to improve their local law making is adequate
- whether the guidelines adequately encourage councils to look for opportunities to harmonise local laws
- whether mandating the guidelines would further improve local law making and administration without imposing high costs.

## Review of local laws

Local laws sunset every 10 years, so there is a built-in review mechanism through this process. The City of Bendigo noted that:

City of Greater Bendigo always carefully reviews local laws before they sunset. Most recently, the traffic and parking local law was significantly reduced in scope, as many issues were now addressed in the Road Management Act (sub. 23, p. 7).

Having a local law that could be inconsistent or redundant for up to 10 years before it sunsets could create problems for business and communities and increase the incidence of negative perceptions of local laws. However, introducing a more regular review requirement could be onerous for councils.

The recently reviewed *Local Government Act 2009 (Qld)* contains a requirement for local governments to 'regularly review' their local laws (s 33.). It is not clear what the impact of this provision is – whether it makes councils more aware of the importance of reviewing their local laws more often than when it sunsets,

particularly for higher-impact local laws. There is currently no such requirement at a State level for more regular review of its laws and regulations, although the Commission has previously suggested that the ex-post evaluation of regulation could have benefits, particularly for those regulations with larger impacts (VCEC 2008b, p.17). The voluntary local law guidelines do suggest that councils ‘will periodically need to review the ongoing need for and success of local laws, and the need for additional local laws’ (DPCD 2010h, p. 104). The Commission considers that this is good practice, and that the incoming local law guidelines would be a good opportunity for councils to review the stock of their local laws.

## Checks and balances

As discussed in chapters 2 and 6, the Governor in Council has the authority under the Local Government Act to revoke a local law on the recommendation of the Minister (s 123). The Minister must consider among other matters, whether there has been a substantial breach of the provisions with respect to local laws set out in schedule 8. This includes requirements, for example, that the local law must ‘adopt the means of achieving those objectives which appear likely to involve the least burden or greatest advantage on the community’ (schedule 8, (1)(d)).

The Commission is not aware of any instances where this power has been used. However, if there are significant concerns about local laws, for example where they conflict with State objectives, this power may be useful.

### *Information request:*

*Are participants aware of any instances of local laws being revoked? What are the constraints (legal or otherwise) on the Minister using such a power? Are there local laws which participants consider should be revoked? Would further guidance or clarification of this power be useful?*

## 7.4.2 Promoting harmonisation of local laws between councils

### *Areas where inconsistencies occur*

Based on submissions and the Commission’s consultations, concerns about consistency are the largest in relation to building regulation. The Commission’s view on dealing with variations in building regulation are explained in chapter 4, with recommendations relating to the key issues. Building appears more likely to be an area where variations are imposing high costs, because of the size of the sector, the nature of the sector (businesses are likely to deal with multiple councils) and the impact of the regulations.

The report completed for the Commission by Stenning and Associates provides some guidance as to how prevalent local laws are across jurisdictions. While the

report did not collect information on the number of permits in each jurisdiction, or the cost associated with complying with the local law, the report provides useful information about how many councils regulate in a policy area. This is helpful in suggesting where harmonisation could be appropriate. The report coded permits to indicate the expected impact of the local law. This tool is indicative only and does not look in detail at the likely costs or merits of variations. Table 7.2 shows areas that were judged by Stenning and Associates to be ‘high impact’, that are regulated via local laws by more than 75 per cent of councils (Stenning and Associates 2009b).

**Table 7.2 Areas where greater harmonisation may be warranted: Stenning and Associates findings**

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*Areas where more than 75% of councils require a permit (High impact)*

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Itinerant trader permit

Permit to establish an outdoor eating facility

Permit to keep animals

Permit to construct, install, remove or alter a vehicle or livestock crossing

Permit to display or place an exhibition of goods for sale on a footpath or road

Permit to place a storage container or bulk rubbish container on a road or reserve

Permit to occupy a road to undertake works

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Source: Stenning and Associates 2009b, table 6.

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Submissions received for this inquiry help to highlight potential areas of inconsistency – for example, building and construction local laws are mentioned (sub. 24, p. 17), as well as local laws relating to livestock (sub. 17, p. 4), and a submission from VicSport highlights inconsistencies between councils in areas relating to: lease and licence agreements; public liability insurance; water restrictions; risk management; reporting – financial, membership, business/strategic planning (sub. 8, p. 7).

Better information on the impacts of local laws and variations across municipalities may become more available as LLCIS are adopted. Harmonisation may also be encouraged, as local governments are encouraged to compare their local laws to neighbouring and like jurisdictions, and to justify differences.

#### *Options for addressing inconsistencies*

Where variations are imposing high costs, options such as model local laws, credentialed local laws, or State government regulation can increase consistency. The *Better Practice Local Laws Strategy* signalled an intent to promote harmonisation through the use of credentialed local laws. The advantage of credentialed local

laws is that they allow for variations where they have been justified through the local law guidelines; whereas model laws often require no justification for variations, and State regulation may allow for no variation.

Given that individuals councils do not have incentives to make their local laws consistent with other councils – the costs fall largely on businesses that must search for and comply with multiple laws – it is not likely that this issue will be addressed by individual councils. That said, the *Guidelines for Local Laws Manual* may support some low-cost harmonisation.<sup>5</sup> Given a lack of incentives, there is some role for the State Government in facilitating the development of credentialed and model local laws, and even making State regulation, in areas where it considers that these are appropriate (i.e. when the benefits of variations do not exceed the costs). The Commission does not have sufficient evidence at this stage to recommend the areas to be addressed, or the appropriate response for each area, but welcomes further information on these matters to consider for its final report.

*Information request:*

*What are the key areas where variations occur across jurisdictions that could be easily harmonised? What are the impacts (positive and negative) of the current variations in these areas?*

*Should the Victorian Government develop a legislative process for making credentialed local laws that could be incorporated in the Local Government Act 1989? If so, should the process for making a credentialed local law be the same as for State subordinate legislation?*

### **7.4.3 Promoting consistency between State and local regulation**

As well as variations between local laws, an issue raised by submitters has been variations between State and local legislation. This may relate to local governments ‘filling the gaps’ or ‘improving’ upon State regulation, or regulating in an area where the State may have decided not to regulate.

The Local Government Act requires that local laws must not be inconsistent with State regulation. However, it is unclear how broadly ‘inconsistency’ should be interpreted. For example, if a council decided to make a local law that ‘improved upon’ State regulation, would the local law be ‘inconsistent’?

It is unclear whether, particularly when State regulations have been through a rigorous impact assessment process, local government could reasonably argue

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<sup>5</sup> For example, under section 2.1.1, councils are encourage to consider the approaches in neighbouring or like councils, and explain any differences in their approach (DPCD 2010, p. 30).

that their local law had greater net benefits than the State regulation. If this were the case, there should be some burden of proof to demonstrate the appropriateness of the local law.

In some cases, local laws may be introduced to deal with genuine variations across local government areas – for example, because community preferences relating to liquor, or gaming, are genuinely different across local government areas. If there are genuine differences in preferences, these need to be balanced against the costs that these variations impose. At the very least, variations between State and local regulation may be confusing and impose additional costs for those that need to comply with multiple sets of regulations.

Sometimes councils introduce local laws because the regulations at a State level are considered inadequate. For example, the City of Bendigo stated:

In some instances, it is changes to State Government legislation that has led to increased local regulation. The most notable example is the decriminalization of public drunkenness. As that meant the police had to charge and prosecute offenders, significant pressure was applied to local government to introduce local laws to manage this behaviour. Issuing an on-the-spot fine is a much simpler process for police than a prosecution. (sub. 23, p. 1)

Greater consultation between State and local governments on State laws that affect local government issues may prevent subsequent ad hoc local laws, or inconsistent local laws.

Where local governments wish to make a local law on an issue that has relevance to the State, it may be more appropriate to influence change at a State level, rather than develop a local law. Schedule 8(2)(e) of the Local Government Act states that a local law shall not ‘embody principles of major substance or controversy or contain any matter which principles or matter should be properly be dealt with by an Act and not by subordinate legislation’.<sup>6</sup> The guidelines suggest that if a council genuinely believes that a matter would be better dealt with by an Act, it is ‘probably precluded from making a Local Law about the same matter’ (DPCD 2010h, p. 25). It instead suggests that local government can play a role in facilitating policy change by collaborating with relevant state or federal departments or agencies, and working with local government peak bodies (DPCD 2010h, p. 25). While this guidance is useful for encouraging councils to think about the appropriate forum for laws, the guidelines are not binding and rely on the Minister to monitor local laws and recommend revocation.

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<sup>6</sup> Schedule 8 relates to matters that the Minister must consider when deciding to revoke a local law, rather than the validity of the local law (Payne v Port Phillip City Council [2007] VSC 507)

One option is upfront guidance for councils on when the State Government does not want councils to make a local law in an area, as recommended by the Commission in relation to certain building standards (chapter 6). *The Local Government Act 2009 (Qld.)* sets out areas where local governments are not allowed to make local laws (s 28). Another option is using better consultation practices, both including State governments when introducing a law that affects local governments, and local governments when introducing a local law in an area where there is State regulation. However it is not clear what additional mechanisms would be of benefit, given the apparent patchy take-up of the *Victorian State Local Government Agreement* (chapter 10).

#### *Information request*

*What are the key areas not addressed in the draft report where local governments make local laws that 'add-on' to State regulation? What are the principal causes of these add-ons – for example, are State regulations considered to be inadequate? Should the State Government define 'no-go' areas for local laws?*

### **7.4.4 Accessibility of local laws**

Adopting protocols for the publication of local laws is a welcome step. Provided these are adopted by councils, they could address a number of concerns from stakeholders about the time taken to identify relevant local laws.

In looking at practice in other Australian states, Victoria lags behind the information on local laws that is available in some other states. For example, Queensland and Western Australia have a register of all local laws, with searching capacity. For example, one can enter the search term 'building', and all of the local laws that mention building, across municipal areas, are shown (DIP 2010; DLG 2010).

Current initiatives like EasyBiz and the Registration and Licensing Finder (RALF) seek to simplify processes, and improve consistency and the accessibility of information. The EasyBiz initiative standardises a number of forms and allows greater information to be provided online, across council areas. Membership of the EasyBiz initiative is voluntary. RALF provides information for businesses on requirements related to permits at a State and local level – including both local government's administration of State laws, and of permit-related requirements of local laws (RALF 2010). It does not currently provide non-permit information on local laws.

The Commission understands that LGPro has developed a website to help councils to identify and share best practice, which will include the publication of LLCIS. This will be a very useful enhancement. However there is still room to improve, in providing information on local laws in a more accessible,

consolidated form for the community and business. For example, it would be useful if all local laws and LLCISs were shared in a consolidated form on a public website, to provide better information to communities on different local laws, and their rationale; the approaches of neighbouring and like jurisdictions; and enable ‘competition by comparison’ to encourage better LLCIS over time.

Providing information on local laws and their impacts in a consolidated form would primarily benefit businesses that operate across jurisdictions, as they have a responsibility to be aware of the local laws of a number of jurisdictions. The Roy Morgan Research survey of businesses suggests that around a third of businesses interact with more than one council, and that interactions with multiple councils are more commonplace when dealing with primary industries, building and construction, environmental protection, and planning and land-use regulation. The most common sectors to interact with multiple local governments were: electricity, gas, water and waste; construction; and property and business services (Roy Morgan Research 2010b).

In addition to businesses, making local laws available in a consolidated accessible form could assist policy-makers (both in councils and in State governments) to analyse better the stock and type of local laws, and to take up more harmonised approaches to dealing with various policy issues. It may also enable more informed consultation with stakeholders, as people affected by local laws could contribute in an informed way to public debate on approaches used elsewhere, and their costs and benefits.

Increased functionality of a local laws database would likely increase costs, but the increase may not be significant if it built on existing online databases such as RALF. The databases used in Queensland and Western Australia allow searching by topic areas, which allows a wider usage of the system, and a better customer experience.

*Information request:*

*Is the government’s current initiative to encourage improved and more harmonised website protocols sufficient to address the problems in finding information on local laws? Would there be greater benefits from a consolidated website of all local laws, or should efforts be focussed on improving the websites of individual councils?*

Improving the quality, accessibility and consistency of local laws must be supported by leadership from State government, by being clear about its objectives and the anticipated role of local government, and by providing adequate support and guidance for compliance. The *Guidelines for Local Laws Manual* appears to be a move in this direction.

## 8 Local government procurement

### 8.1 Introduction

The terms of reference require the Commission to inquire into and report on regulatory impediments to small and medium enterprise (SME) access to procurement associated with major infrastructure projects, and options for removing these impediments. The Commission has also analysed efficiency in local government procurement more broadly, and identified opportunities for improvements. Many councils and businesses consulted during this inquiry stated that there is scope for improvements in council procurement, which would lower costs for both councils and businesses. Creating the right incentives for efficient, effective and transparent local government procurement practices is extremely important, and can help to minimise costs to councils, ratepayers and businesses.

This chapter:

- (1) interprets the terms of reference (section 8.2)
- (2) describes the nature and size of local government procurement (section 8.3)
- (3) outlines the regulatory framework and key bodies (sections 8.4 and 8.5)
- (4) describes best practice procurement (section 8.6)
- (5) outlines participants' views on local government procurement (section 8.7 and 8.8)
- (6) examines the costs of local government procurement (section 8.9)
- (7) analyses recent and current improvement initiatives (section 8.10)
- (8) estimates potential cost-savings from further improvements (section 8.11).

### 8.2 Terms of reference

The Commission has interpreted the key terms in the terms of reference in the following way:

- *Procurement*: all the business processes associated with purchasing, spanning the whole cycle from the identification of needs to the end of a service contract or the end of the useful life and subsequent disposal of an asset. It does not include stores management and logistics that are aspects of the wider subject of Supply Chain Management. [Procurement is] often used interchangeably with purchasing (VGPB 2009).
- *Regulatory impediments*: the legislation and policies governing procurement by councils (principally under the *Local Government Act 1989* (Vic) (the Act)), and the procurement and tendering requirements of individual councils (such as the standards and specifications embodied in tenders). A number of non-

regulatory factors may influence SME access to procurement. These include procurement strategies, such as aggregating contracts or forming alliances with suppliers, that are designed to reduce councils' costs but can affect the ability of SMEs to secure contracts. That is, there is no presumption that the impediments are unnecessary.

- *Small-medium enterprise*: a business that employs less than 200 people (ABS 1998, p. 53). There are about 502 000 SMEs in Victoria of a total of about 503 000 businesses (ABS 2007).
- *Access*: the ability of a business to tender for a council contract based on the requirements and regulatory costs in the tendering process.
- *Major infrastructure projects*: construction, maintenance and renewal of roads and streets. Councils spend \$630–690 million, or about 25 per cent of total procurement expenditure, on major infrastructure projects each year (Ernst & Young 2008a, p. 19).

In addition to analysing regulatory impediments to SME access to procurement associated with major infrastructure projects, the Commission has considered broader efficiency in council procurement. The Commission has considered broader efficiency based on input from stakeholders and because broader efficiency affects all potential suppliers and the cost base and revenue needs of councils.

### **8.3 Nature and size of local government procurement**

Councils in Victoria spend over \$2.7 billion on procuring goods, services and works each year (Ernst & Young 2008a, p. 2). Much of this is spent on major infrastructure projects such as road and street works and facilities construction. Table 8.1 details the seven largest areas of local government procurement.

Table 8.1 **Annual local government procurement in Victoria (above \$100 million per year)<sup>a</sup>**

<i>Category</i>	<i>Sub-categories</i>	<i>Estimated spend (\$ million)</i>
Roads and streets	Construction, maintenance and renewal	630–690
Facilities	Building and construction	258–285
Parks or trees	Maintenance, sports grounds	133–147
Facilities	Maintenance	125–140
Waste management	Collection	120–130
Health and community	Health, food services	112–124
Equipment	Plant and equipment, lease, minor equipment	106–117
<b>Total</b>		<b>1484–1633</b>

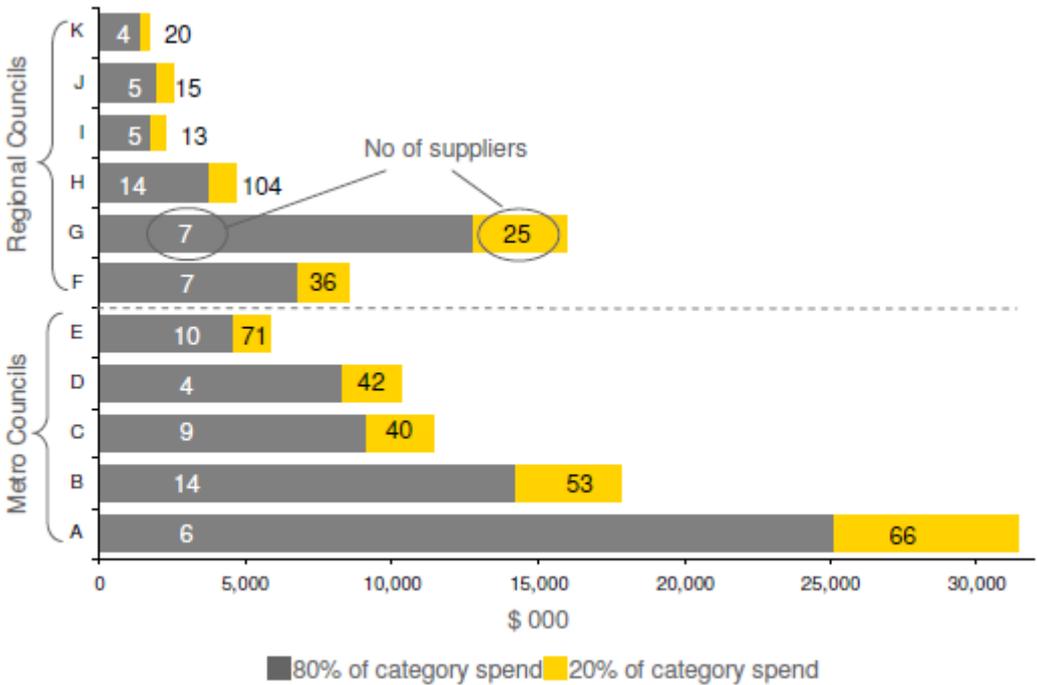
<sup>a</sup> Ernst & Young stated that these estimates are based on councils' 2007 (financial year) accounts payable data, interviews with 15 councils and Ernst & Young Analysis (Ernst & Young 2008b, p. 34).

Source: Ernst & Young 2008a, pp. 18–19.

Ernst & Young found that a few large suppliers typically account for 80 per cent of local government procurement of roads and streets construction, maintenance and renewal. It also found that a large number of 'small' suppliers typically account for the remaining 20 per cent of procurement (Ernst & Young 2008b, p. 37). This concentration of small suppliers was also similar for other categories of council procurement, such as facilities management (Ernst & Young 2008b, p. 42). Figure 8.1 shows supplier concentration for five metropolitan and six regional councils. It suggests, for example, that 25 out of 32 (78 per cent) of 'Council G's'<sup>1</sup> suppliers are small businesses. The Ernst & Young analysis suggests that, on average, about 80 per cent of suppliers to councils are small businesses.

<sup>1</sup> Councils were assigned a letter to ensure anonymity.

Figure 8.1 **Supplier concentration by council: Roads and streets construction, maintenance and renewal**



Source: Ernst & Young 2008b, p. 37.

Given the size of local government procurement in Victoria, it is unsurprising that the sector is covered by a range of legislation, policies and guidelines.

## 8.4 Regulatory framework

Local government procurement in Victoria is covered by Victorian, Local and Commonwealth legislation and policies.

### 8.4.1 Local Government Act and regulations

The *Local Government Act 1989* (Vic) (the Act) is the main legislation pertaining to local government procurement in Victoria. The Act also establishes the Local Government (General) Regulations 2004 and the *Local Government (Finance and Reporting) Regulations 2004*, which also impact local government procurement.

#### Local Government Act 1989

The Act sets out general principles for council procurement and service provision, and provides specific restrictions and requirements for procurement.

Section 208 of the Act sets out Best Value Principles that councils must comply with in undertaking procurement and providing services. The purpose of the

Best Value Principles was to ‘remove the inflexibility and rigidity of compulsory competitive tendering’ and to ensure ‘that councils remain accountable for their expenditure and obtain value for money in the delivery of council services’ more broadly (Cameron 1999, p. 351). Sections 186 and 186A of the Act restrict the power of councils to enter into contracts and require councils to prepare, approve and periodically review a procurement policy. The purpose of procurement policies is to help ‘improve transparency, accountability and functioning of councils’ (Wynne 2008, p. 3645). Box 8.1 summarises the key provisions relating to procurement in the Act.

### **BOX 8.1 Procurement in the Local Government Act 1989**

#### *Best Value*

Section 208A of the Act provides that councils must comply with the Best Value Principles. Section 208B of the Act provides that the Best Value Principles are:

- all services provided by a council must meet the quality and cost standards required by section 208D<sup>2</sup>
- all of a council’s services must be responsive to the needs of its community
- each council service must be accessible to the intended users
- a council must continuously improve its service provision to its community
- a council must regularly consult with its community in relation to its services
- a council must publicly report regularly on achievement of these principles.

Section 208C provides that in applying the Principles councils may take into account:

- reviewing services against the best on offer in the public and private sectors
- assessing value for money in service delivery
- community expectations and values
- balancing affordability and accessibility of services to the community
- opportunities for local employment growth or retention
- the value of partnerships with other councils and other levels of government
- potential environmental advantages for the council’s municipal district.

(continued next page)

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<sup>2</sup> Section 208D provides that (1) a council must develop quality and cost standards for any of its services; (2) the standards must set out performance outcomes for each service; (3) in developing the standards a council must take into account the factors listed in sections 208C (a)–(e); and (4) a council may develop different standards for different classes of services.

*Restriction on power to enter into contracts and Procurement Policies*

Section 186 of the Act:

- sets the contract value threshold above which a council must give public notice and invite tenders, or expressions of interest from any person interested in undertaking the contract or all, or any part of, the project<sup>3</sup>
- requires councils to register invited expressions of interest, and invite tenders from some or all of those who registered their interest
- requires public notices, tenders and expressions of interest to be in the prescribed form (if any)<sup>4</sup>
- provides that councils do not have to accept the lowest, or any, tender
- exempts councils from s186 for various reasons<sup>5</sup>
- states when s186 does not apply in respect of a contract<sup>6</sup>
- requires councils to, whenever practicable, give preference to contracts for the purchase of Australian or New Zealand products.

Section 186A of the Act provides that:

- a council must prepare and approve a procurement policy<sup>7</sup> that must include any matters, practices or procedures which are prescribed for the purposes of s186A
- the Minister may make guidelines with respect to the form or content of a procurement policy<sup>8</sup> which councils must have regard to in preparing a procurement policy and which must be published in the Government Gazette
- councils must review their procurement policy
- a copy of the current procurement policy must be publicly available
- councils must comply with their procurement policy.

*Source:* Local Government Act 1989.

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<sup>3</sup> The August 2008 Order in Council for the Act fixes the value of contracts for which public notice must be given and public tender or expressions of interest are invited by local councils. The tender threshold is \$150 000 for contracts for the purchase of goods and services and \$200 000 for contracts for the carrying out of works.

<sup>4</sup> Forms for the public notice of the public tender, the tender itself and any expressions of interest have not been prescribed to date (DPCD 2008e, p. 2).

<sup>5</sup> These include if the council resolves that the contract must be entered into because of an emergency; or the contract is entered into with a council acting as the agent for a group of councils and the council has otherwise complied with this Act; or the contract is entered into in accordance with arrangements approved by the Minister for the purposes of this subsection; or the contract is a type of contract that has been exempted from this section by the regulations (currently contracts for legal services).

<sup>6</sup> These include if the contract is a novated contract; and the original contract was entered into in accordance with this section; and the council has undertaken a due diligence in respect the new party to the contract.

<sup>7</sup> These had to be prepared and approved by 19 November 2009.

<sup>8</sup> The Minister has not made guidelines for local government procurement policies to date (DPCD 2009h). The Municipal Association of Victoria, however, released a Model Procurement Policy to assist councils prepare or update their procurement policy (see section 8.4.3).

These provisions must be interpreted in light of more general principles that are codified throughout the Act, including: the Preamble (s1), the Local Government Charter (ss3A–3F) and the Principles of Sound Financial Management (s136).

While s208C provides factors that councils may take into account when applying the Best Value Principles, the Act does not specify how councils should prioritise the various Principles. And while s208B of the Act requires councils to publicly report regularly on achievement of the Best Value Principles, the Commission has seen limited evidence of recent reporting by councils.

The Act does not require councils to give preference to contracts with SMEs, but does require councils to give preference to contracts for locally manufactured or produced products whenever practicable. Also, s186(1)(b) of the Act allows for expressions of interest from any person interested in undertaking all or any part of the project. Inviting bids for parts of projects may aid the competitiveness of firms that may not offer scale economies, such as SMEs.

### **Regulations under the Act**

The Local Government (General) Regulations 2004 specify exemptions from s186 of the Act<sup>9</sup> and require councils to make available for public inspection a list of contracts valued at \$100 000 (or such higher amount as is fixed from time to time under s186(1) of the Act) or more, which the council entered into during the financial year without first engaging in a competitive process; and which are not contracts referred to in s186(5) of the Act. The Local Government (Finance and Reporting) Regulations 2004 require councils' annual reports to list the documents specified above, and the places where those documents can be inspected or obtained.

### **8.4.2 Procurement Best Practice Guidelines**

The Department of Planning and Community Development's (DPCD) *Local Government Procurement Best Practice Guideline* (the Guidelines) seek to assist councils to understand their obligations under the Act, and better prepare for and undertake procurement. The Guidelines were released in August 2008, before s186A was inserted into the Act. While the Guidelines are not legally binding, they provide advice on achieving best practice procurement and also interpret some provisions in the Act.

The Guidelines state that councils must use the Best Value Principles to determine the most effective means of providing services, but also outline an additional set of procurement principles. The Guidelines state that the basic principles that should be applied to all procurement, irrespective of value and

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<sup>9</sup> Part 4 reg10 provides that a contract for legal services is exempt from s186 of the Act.

complexity, include value for money; open and fair competition; accountability; risk management; and probity and transparency (DPCD 2008e, p. 8). The Guidelines do not specify how councils should prioritise these principles, but state that:

The tender must be awarded on the basis of the best quality and value for money for the community. The Local Government Entity must have regard to the tender evaluation report<sup>10</sup> and may also have regard to other factors impacting on the best quality and value for money outcome. The Local Government Entity must clearly document the other factors which were taken into account and the extent to which these influenced the decision to award the tender. (DPCD 2008e, p. 18)

Currently, documenting the factors that councils take into account when awarding tenders is not a legislative requirement. The Commission is not aware of any public reporting by councils on the factors that they have taken into account in awarding tenders. In addition, the Guidelines do not specifically advise councils to support SMEs<sup>11</sup>, or to have consideration for the costs of tendering to potential suppliers.<sup>12</sup>

The Guidelines also seek to clarify the tendering thresholds in s186(1) of the Act, and the restrictions on councils appointing procurement agents. With respect to tendering thresholds, the Guidelines (DPCD 2008e, p. 1) state that:

- The thresholds are inclusive of goods and services tax and must represent the value for the whole of the term of the contract, i.e. the initial term plus any options to extend the contract, which is consistent with the rules for the State Government.
- Best endeavours must be used when estimating the value of a proposed rates-based contract. It would be unlikely that a council would be found in breach of the Act if the final payment on the contract exceeds \$100 000 where, with best endeavours, the value of the proposed contract was initially estimated at less than \$100 000.
- Section 186 does not generally apply to leases. However, s186 may apply in the case of finance leases where under the terms of the lease, the council will acquire the goods under lease.

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<sup>10</sup> This is a pre-determined evaluation methodology and criteria.

<sup>11</sup> The Guidelines refer to the Victorian Government Purchasing Board's policy for SMEs, without suggesting it as best practice.

<sup>12</sup> The Guidelines state that councils should not request a tender deposit, but may impose a fee for tender documentation related to the cost of printing the tender documentation.

With respect to councils appointing procurement agents, the Guidelines (DPCD 2008e, p. 4) state that prior to appointing the agent, councils must:

- make the initial decision to procure goods, services or works, which will include the determination of the specifications for that procurement
- understand that whilst it may appoint an agent, it remains wholly responsible for the probity of the conduct of that tender
- make the decision to appoint the agent.

### **8.4.3 Council procurement policies**

Councils must prepare, approve and comply with procurement policies under s186A of the Act. Councils currently have discretion as to the form and content of their own policies. The Commission scanned ten council procurement policies and found varying objectives (value for money, local development, legal compliance, among others) and lengths (1–60 pages). A number of councils also reported to the Commission that they have varying procurement objectives (section 8.8.2).

The Municipal Association of Victoria (MAV) released a model procurement policy (Model Policy) to help councils meet the requirement of s186A of the Act. The Model Policy (MAV 2009a, p. 7) states that the purpose of council procurement policies is to:

- provide policy and guidance to the council to allow consistency and control over procurement activities
- demonstrate accountability to rate payers
- provide guidance on ethical behaviour in public sector purchasing
- demonstrate the application of elements of best practice in purchasing
- increase the probability of obtaining the right outcome when purchasing goods and services.

The Model Policy outlines a set of procurement principles that differ slightly from the Best Value Principles and the principles in the DPCD Guidelines (see box 8.2).

## Box 8.2 The MAV model procurement policy

The Model Policy sets out a range of principles for procurement. It states that the elements of best practice applicable to local government procurement incorporate:

- broad principles covering ethics, value for money, responsibilities and accountabilities and guidelines giving effect to those principles
- a system of delegations
- procurement processes, with appropriate procedures covering minor, simple procurement to high value, more complex procurement
- a professional approach.

The Model Policy also states that councils' contracting, purchasing and contract management activities should:

- support the council's corporate strategies, aims and objectives including, but not limited to those related to sustainability, protection of the environment, and corporate social responsibility
- span the whole life cycle of an acquisition from initial concept to the end of the useful life of an asset, including its disposal, or the end of a service contract
- achieve value for money<sup>13</sup> and quality in the acquisition of goods, services and works by the council
- can demonstrate that public money has been well spent
- are conducted and seen to be conducted in an impartial, fair and ethical manner
- seek continual improvement including embracing innovative and technological initiatives such as electronic tendering processes to reduce activity cost
- generate and support business in the local community.

*Source:* MAV 2009a, pp. 6–7.

The Model Policy does not seek to specify how councils should prioritise procurement principles. Additionally, while it has a number of provisions relating to internal monitoring and performance reporting (MAV 2009a, pp. 11 and 21), the Model Policy does not include any provisions relating to public reporting of procurement outcomes.

The Model Policy includes provisions for supporting local businesses and SMEs that councils may choose to adopt (MAV 2009a, pp. 25 and 35). The Commission scanned 10 council procurement policies<sup>14</sup> and found that seven

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<sup>13</sup> Value for money involves taking into account both cost and non-cost factors including: advancing the council's priorities; fitness for purpose, quality, service and support; and whole-of-life costs and transaction costs associated with acquiring, using, holding, maintaining and disposing of the goods, services or works (MAV 2009a, p. 9).

<sup>14</sup> The City of Greater Bendigo, City of Boroondara, City of Greater Dandenong, City of Greater Geelong, Glen Eira City Council, City of Melbourne, Moyn Shire Council, City of Port Phillip, Warrnambool City Council and City of Whittlesea.

included provisions for supporting local businesses and three stated that SMEs should be encouraged to compete for council work. The Model Policy has some regard to the costs of tendering for potential suppliers. For example, it states that registrations of interest may be appropriate where tendering costs are likely to be high for some suppliers (MAV 2009a, p. 13).

#### **8.4.4 Other legislation, policies and guidelines**

Other State and Commonwealth legislation, policies and guidelines that have some bearing on local government procurement in Victoria, but about which stakeholders to this inquiry did not raise issues, include:

- the *Goods Act 1958* (Vic): this regulates the sale of goods in Victoria and provides for the formation of contracts and specifies various undertakings and warranties, such as fitness for disclosed purpose, to be implied in contracts. It also regulates the performance of contracts and specifies remedies for breach of contract.
- The *Fair Trading Act 1999* (Vic): this is designed to promote fair trading practices and a competitive and fair market by protecting consumers, regulating trade practices, consumer contracts and the safety of goods and services supplied in trade and commerce. The Act also prohibits behaviour classified as ‘unfair practices’, including unconscionable conduct, misleading or deceptive conduct and false representations.
- The *Trade Practices Act 1974* (Cth): this supplements the Goods Act and contains important provisions relating to the procurement of goods and services, particularly by prohibiting misleading and deceptive conduct, and various forms of unfair trading.
- Competitive neutrality requirements under the National Competition Policy: this requires councils to apply competitive neutrality to internal or external tenders, including fully costing staff bids, offsetting any net competitive advantages that a government business may enjoy as a result of its public sector status, and making any council subsidy equally available to both in-house and external tenderers (DPCD 2008f, p. 20).

### **8.5 Key bodies in local government procurement**

A number of government and non-government bodies currently have a role in regulating or supporting local government procurement in Victoria (table 8.1).

**Table 8.1 Key bodies in local government procurement**

<i>Body</i>	<i>Purpose</i>	<i>Key responsibilities</i>	<i>Recent activities</i>
Local Government Victoria (DPCD)	Ensure responsive and accountable local government services	Support best value and continuous improvements, develop a strong partnership between state and local government, facilitate and support good governance in local government	Currently delivering the Councils Reforming Business (CRB) Procurement Strategy with MAV and industry bodies (see section 8.10)
Local Government Investigations and Compliance Inspectorate (DPCD)	Ensure councils meet the highest standards of accountability and transparency	Investigate alleged breaches of the Act, implement a rolling audit program, conduct spot audits of councils' compliance, undertake prosecutions for breaches	No investigations, audits or prosecutions relating to council procurement to date
Victorian Auditor-General (Independent officer of the Victorian Parliament)	Provide independent assurance to the Victorian Parliament on the accountability and performance of local government	Undertake financial statement and performance audits of local government. Evaluate whether objectives are achieved effectively, economically, efficiently, and in compliance with legislation	Undertook an audit of tendering in local government (see section 8.10.3)
Victorian Ombudsman (Independent officer of the Victorian Parliament)	Promote fairness, integrity, respect for human rights and administrative excellence in local government	Inquire into or investigate administrative actions taken by a government department or public statutory body or by any member of staff of a municipal council	Investigated allegations concerning the procurement practices of officers at the City of Port Phillip
Victorian Small Business Commissioner (Independent officer of the Victorian Parliament)	Promote a competitive and fair operating environment for small businesses	Provide information and education, review government practices, investigate small business complaints and conduct dispute resolution	Investigated complaints about inconsistency and lack of transparency and innovation in council procurement

*Sources:* DPCD 2008g; DPCD 2009f; DPCD 2010p; VAGO nd; VAGO 2010; Victorian Ombudsman nd; Victorian Ombudsman 2009; VSBC nd; and VSBC sub. 26.

In addition, a number of non-government bodies provide procurement services and products that can yield savings to councils. These services and products include aggregated purchasing of goods and services, on-line tender facilities and quotes, on-line contractor compliance systems, and contracts standards. Various organisations act as agents for local government procurement, including Procurement Australia (formerly Strategic Purchasing), MAV Procurement and Ipro Solutions. For example, MAV reported that in 2008 it helped to deliver estimated cost savings of \$1.8 million over three years by working with councils to negotiate a \$13 million whole-of-local government enterprise agreement with Microsoft (MAV 2009b). In addition, Standards Australia offers standard conditions of contract for construction materials and building, which some councils currently use voluntarily. For example, the AS4000 standards comprise a single set of general conditions of contract suitable for a wide variety of civil engineering, building, electrical and mechanical engineering and other types of construction contracts (SAI Global 2009).

## 8.6 Best practice procurement

Various government and non-government bodies have produced a large body of work on what constitutes best practice procurement.<sup>15</sup> The Victorian Auditor-General's Office (VAGO) stated that all procurement should follow four phases: (1) plan the procurement; (2) implement the procurement approach; (3) monitor and evaluate contractor performance; and (4) evaluate and improve procurement processes (VAGO 2007). The VAGO outlined several principles for procurement in the Victorian public sector including value for money, open and fair competition, risk management, transparency and probity. However, it stated that:

achieving value-for-money<sup>16</sup> is the principal objective of public sector procurement. (VAGO 2007, p. 3)

Best practice procurement is important for Government agencies, including councils, given the significant volume of the outlays involved, the impact of purchasing on the delivery of government programs and services, and the achievement of government outcomes. For example, the VAGO (2007, p. 1) stated that poor procurement practices give rise to several types of risk including:

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<sup>15</sup> DPCD Local Government Procurement Best Practice Guideline; Victorian Government Purchasing Board procurement policies; Department of Treasury and Finance guidance statements; Partnerships Victoria guidance on public-private partnerships; VAGO Public Sector Procurement - Turning Principles into Practices; MAV, Institute of Public Works Engineering Australia & Civil Contractors Federation 2007, Best Practice Guide for Tendering and Contract Management.

<sup>16</sup> The VAGO defines 'value for money' as 'the optimum combination of quality, quantity, risk, timeliness and cost, [which] should be determined on a whole-of-contract and whole-of-asset-life basis' (VAGO 2007, p. 3).

- the process may not be fair or transparent
- there may be inadequate competition, leading to less value for money for the Government and the community
- suppliers and agencies may face unnecessary costs from poor processes
- the process, and the subsequent management of the purchase, may fail so thoroughly that the goods and services or projects are not provided at all.

The VAGO acknowledged the impacts that government procurement can have on businesses, and identified the importance of removing unnecessary costs to potential suppliers. The VAGO stated that:

Each procurement exercise should be conducted so that each supplier's need to minimise the cost of competing for the procurement opportunity, and ultimately providing the goods, service or asset is balanced against the public sector agency's need to ensure that probity standards are maintained, and that value-for-money is achieved. The need for predictable, streamlined procurement processes, and the need to provide conditions attractive to potential suppliers, place a responsibility on public sector agencies to review their practices and to remove unnecessary steps, while still protecting the integrity of the process. (VAGO 2007, p. 5)

The VAGO also stated that the level of risk associated with the procurement should affect the procurement approach. For example, a project that presents a high risk to the public requires more detailed documentation than procurement of general stationery items (VAGO 2007, p. 4). Capturing performance data about the procurement process is important to support innovation.

## **8.7 Previous issues raised about local government procurement**

Local Government Victoria (LGV) recently reported a number of burdens to businesses associated with local government procurement. In addition, the DPCD's Local Government Procurement Strategy revealed a number of impediments to efficient procurement by councils. These are outlined in box 8.3 below.

### Box 8.3      **Previously identified issues with council procurement**

The LGV reported that all businesses supplying or potentially supplying goods and services to councils are impacted by the burdens resulting from current procurement practices, including:

- Inconsistencies in the regulation and enforcement of State policy regarding tendering and procurement processes and requirements, including areas such as occupational health and safety (OH&S), risk and environmental management requirements and, in particular:
  - Inconsistent application of standards for infrastructure projects across local government authorities including design requirements and engineering standards required by state regulations
- Inefficiencies in the tendering processes put in place by councils to meet their obligations under State laws. This is particularly burdensome for businesses in rural and regional areas where lack of access to skilled procurement resources and services limits council's abilities to develop and deploy best practice procurement and tendering approaches
- Poor contract management practices and reduced quality of contracts due to lack of standardised general contract requirements
- Opportunities for aggregated procurement not realised as a result of each council having developed its own approach to procurement. This limits the scope for businesses to reduce the tender development and account management costs when providing similar services to multiple local government authorities.

In addition, the Local Government Procurement Strategy assessed existing procurement practices employed by councils, and identified opportunities for councils to work in partnership to improve these practices. The Strategy found that:

- initiatives remain relatively uncoordinated, with no clear overall strategy across the sector or significant focus on lifting procurement capability
- there has been a lack of rigorous assessment of local government practice and of the real financial and other benefits of improved procurement
- some legislative and process constraints may be forcing councils to operate inefficiently when seeking to obtain best value for money. For example, some councils indicated that the s186 threshold creates additional work without significantly impacting the cost of goods and services. In addition, enabling access by local government to Whole of Victorian Government contracts may require either ministerial approval under s186(5)(c) of the Act; prescribing these contracts under s186(5)(d) of the Act; or an amendment to the Act.

*Sources: DPCD 2010f; Ernst & Young 2008a.*

The DPCD is seeking to address these issues through the initiatives outlined in section 8.10. Participants to this inquiry raised very similar issues to those identified by the DPCD.

## **8.8 Participants' views on local government procurement**

The Commission received comments on local government procurement from two main sources: submissions and questionnaire responses from councils. Most of the submissions commented on SME access to council procurement. The Commission also sent a procurement questionnaire to 10 councils that it met with at the early stages of the inquiry.<sup>17</sup> Eight councils provided responses to the survey.<sup>18</sup> Input from submissions and questionnaire responses are outlined below.

### **8.8.1 Submissions**

Ten submissions to this inquiry commented on local government procurement.<sup>19</sup> Most responded to the questions raised in the Commission's issues paper about SME access to local government contracts, although some raised broader concerns about local government procurement.

#### **SME access to local government procurement contracts**

In its issues paper, the Commission asked:

Are there any regulatory impediments to small and medium enterprise (SME) access to procurement contracts of local councils? How significant are these regulatory impediments compared to other factors that can influence the capacity of SMEs to access procurement such as the scale of contracts?

What are the options for removing any impediments to SME access to procurement and what are the likely benefits and the costs of any changes for SMEs, councils and the broader community? (VCEC 2009, p. 24)

Some councils stated that they do not believe there are any regulatory impediments to SMEs accessing council contracts (sub. 6, p. 8 and sub. 25, p. 5).

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<sup>17</sup> Councils were selected by the Commission to give a representative sample of inner metropolitan, outer metropolitan and regional municipalities. The procurement questionnaire is available at [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au).

<sup>18</sup> These included the City of Greater Bendigo, City of Boroondara, City of Greater Dandenong, City of Greater Geelong, Glen Eira City Council, City of Melbourne, City of Port Phillip and City of Whittlesea.

<sup>19</sup> Sub. 4, Victorian Association of Forest Industries; sub. 6, Brimbank City Council; sub. 7, City of Stonnington; sub. 14, City of Port Phillip; sub. 19, Municipal Association of Victoria; sub. 21, Civil Contractors Federation; sub. 23, City of Greater Bendigo; sub. 25, Frankston City Council; sub. 26, Victorian Small Business Commissioner; sub. 29, Ipro Solutions.sub.

Frankston City Council stated that small business has been particularly adept at tendering and winning contracts and even more successful in annual supply-type contracts (sub. 25, p. 5). However, most participants identified aspects of council procurement that can impose costs on SMEs and impede SME access to local government procurement contracts. The main issues raised related to:

- (1) inconsistencies between councils
- (2) probity requirements
- (3) risk management requirements.

Some participants also commented on opportunities for reducing costs and impediments to SMEs accessing council procurement contracts.

#### *Inconsistencies between councils*

Some participants stated that inconsistencies in councils' procurement processes and product specifications are imposing costs on businesses, particularly SMEs. Frankston City Council stated that some small businesses are concerned about differences in documentation between councils, such as insurance (sub. 25, p. 5). The Victorian Small Business Commissioner (VSBC) stated that several SMEs have raised complaints and concerns about inconsistency in council tendering processes and contract management (including liability arrangements for civil construction) (sub. 26, pp. 18–19). Ipro Solutions (sub. 29, p. 8) stated that businesses must currently supply dramatically different tender prequalification information to each council. It contended that the result of this additional work is that SMEs can only respond to limited tenders, and that this results in higher costs to contractors, suppliers and ultimately rate payers.

The Civil Contractors Federation (CCF) raised concerns that the standardisation of contractual forms and infrastructure engineering standards has been slow despite strong demand by industry (sub. 21, p. 21). It stated that if benchmarking and standardisation of specifications and drawings were in place, there would be greater effort on innovation, productivity opportunities and safer work practices (sub. 30, p. 7). Frankston City Council added that some inconsistency reflects differing local preferences. It stated that 'rarely are two contracts even in adjoining municipalities identical because each council is endeavouring to respond to its own community, which may place different expectations on price, quality, service, environment and a host of other factors' (sub. 25, p. 5).

#### *Probity requirements*

A number of participants commented on the impact of thresholds for public tenders and formal quotes on SME access. The City of Greater Bendigo stated that the requirement for formal tenders over \$150 000 or \$200 000 impedes SME access to procurement contracts as this involves more red tape for SMEs (sub. 23, p. 7). The City of Port Phillip and Frankston City Council stated that

some small businesses are concerned about the need to submit formal tenders (sub. 31, p. 1; sub. 25, p. 5), while the VSBC reported that SMEs have raised complaints and concerns about the complexity and costs of council tender processes (sub. 26, pp. 13 and 18–19). The MAV stated that ‘anecdotally it has been reported that the nature of local governments’ prescribed tender processes is a barrier to SMEs’ (sub. 19, p. 13). In acknowledgement of the costs to suppliers of tendering, in 2008 the Victorian Government Purchasing Board (VGPB) increased the thresholds for quotes and tenders that apply to Victorian Government Departments. Based on a survey of a small number of suppliers, the VGPB estimated that increasing the tender threshold from \$102 500 to \$150 000 would save Victorian businesses about \$3 million (2338 days) per year (VGPB 2010).<sup>20</sup>

The MAV stated that prescribed tender processes may favour those firms most proficient in preparing tender documentation rather than those firms best able to provide the service (sub. 19, p. 13). The City of Greater Bendigo similarly argued that a high quality Response to Tender does not necessarily signal a business’s ability to provide high quality goods and services (sub. 23, p. 7). A related issue is that formal tenders can impose net costs on councils. Two responding councils to the Commission’s questionnaire stated that formal tenders and quotes impose additional costs on councils but sometimes yield no additional benefits (see section 8.8.2).

On the other hand, the City of Port Phillip, Procurement Australia and the CCF stated that thresholds for public tendering can have a positive impact on businesses accessing council contracts. The City of Port Phillip stated that the requirement for public tendering can increase SME access to council contracts in cases where the council would not otherwise have gone through a competitive process (sub. 31, p. 1). The City of Port Phillip stated that it is further reducing barriers by voluntarily tendering some projects that are under the thresholds (sub. 14, p. 13). Procurement Australia stated that the tendering thresholds promote equal opportunities for interested suppliers (PA 2010). The MAV stated that some view prescribed tendering processes as providing a mechanism for SMEs to further develop their business skills (sub. 19, p. 13). The CCF stated that the major impediment encountered by contractors is the practice of councils to award large works and services to in-house teams without any competitive process (sub. 21, p. 17). It stated that s186 of the Act does not apply to works or services that are allocated to in-house teams, and thus that works of any value

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<sup>20</sup> The VGPB stated that a conservative approach was used in estimating the savings, and that suppliers indicated that the savings also depend on the quality of the tender documentation and the competence of departmental staff managing the process (VGPB 2010).

can be given directly to in-house teams without any public accountability (sub. 30, p. 5).

#### *Risk management requirements*

A number of participants (including two respondents to the Commission's procurement questionnaire - see section 8.8.2) stated that requirements relating to risk management such as insurance, OH&S and quality assurance can impose costs on SMEs and impede their access to local government procurement. The City of Greater Bendigo stated that 'good governance' processes can cause 'red tape' that make it more difficult for SMEs to access council spending (sub. 23, p. 7). It stated that requirements for levels of insurance and standard of safety procedures in council procurement policies impede SME access to procurement contracts (sub. 23, p. 7). Ipro Solutions (sub. 29, p. 7) stated that businesses currently have to demonstrate compliance for every tender they respond to, which imposes a cost on and can impede businesses, particularly small businesses.

The CCF argued that local government's application of risk management tends to be very limited, particularly in relation to insurances for civil construction works. It stated that some councils ask for types of insurance that may no longer be available or only at an extreme premium, setting levels of insurance that do not relate to the risk, for example, \$20 million for professional indemnity insurance for simple non-design engineering tasks (sub. 21, p. 15). The City of Stonnington similarly noted that some SMEs are unable to fully conform to specifications requiring evidence of adequate insurance, bank guarantee, and safety and quality assurance systems. However, it stated that these requirements are prudent risk management and should not be reduced or removed (sub. 7, p. 20). In acknowledgement of the costs to suppliers of insurance indemnities, the VGPB issued a policy on insurance provisions and liability capping. It stated that this resulted in more suppliers being able to use their existing insurance policies and provisions, which reduced both the costs associated with increasing coverage and the potential exposure of suppliers to uninsurable risk (VGPB 2010).

The Commission considers that councils may be imposing disproportionate risk management requirements on contractors, such as insurance, OH&S, quality assurance, which increases costs and can impede SME access. Councils are held accountable for, and bear the costs of, not achieving value for money, or the procurement process failing 'so thoroughly that the goods and services or projects are not provided at all' (VAGO 2007, p. 1). Councils may not have strong incentives to minimise the costs of procurement if they are averse to the risk of achieving a poor procurement outcome.

*Information request:*

*The Commission seeks further information on the relationship between risk management and efficiency considerations in local government procurement. What are the impacts of councils' risk management requirements (such as insurance, occupational health and safety, quality assurance etc.) on small and medium enterprises' access to local government procurement? To what extent, and how, could these impacts be reduced without councils undermining their objective to properly manage the risks of procurement?*

*Opportunities to increase SME access*

Several participants stated that opportunities may exist to reduce the costs of SMEs accessing procurement contracts of local councils, including through information provision, centralised procurement models and supplier panels.

The VSBC (sub. 26, p. 8) and the City of Port Phillip stated that SME access could be improved by councils providing information to businesses on how to tender. The City of Port Phillip stated that it is investigating developing a tender preparation guideline for tenderers which could improve SME access (sub. 14, p. 13). The MAV noted that at least one council is conducting information sessions for local traders on responding to tenders, although the impacts remain to be seen (sub. 19, p. 13).

The MAV and the City of Port Phillip stated that SME access could be improved by councils centralising their procurement functions, rather than having these functions spread out across the organisation. The MAV stated that this would improve the consistency of information provided to SMEs (sub. 19, p. 13) and the City of Port Phillip stated that SMEs would benefit from a more structured tendering approach (sub. 14, p. 13). The VAGO recently found that the lack of central oversight in the five councils that it audited resulted in inadequate and inconsistent practices, including insufficient monitoring of both expenditure levels and adherence to probity standards, and insufficient reviewing of effectiveness (VAGO 2010, pp. 17–19) (see section 8.10.3).

The City of Greater Bendigo (sub. 23, p. 7) and the City of Port Phillip (sub. 14, p. 13) stated that SME access could be improved by councils using panels of preferred suppliers. The City of Greater Bendigo stated that SMEs will particularly benefit from a process that allows businesses to tender for a panel of suppliers and, once on the panel, to receive a share of the work without an additional process (sub. 23, p. 7).

Participants made other suggestions for improving SME access, including:

- developing model templates for tender documentation and risk and size based levels of documentation and safety procedures (sub. 23, p. 7)

- standardising compliance and prequalification requirements across local governments, and introducing a common evaluation/monitoring portal for online tendering (sub. 29, pp. 7–8)
- enhancing the knowledge and skills of local government staff through education, such as the CRB local government procurement training program (sub. 19, p. 13)
- developing internal guidelines to help officers consistently implement the procurement policy, developing web based purchase order transactions to streamline administration, and strengthening support for local suppliers in the Procurement Policy (sub. 14, p. 13)
- establishing a task force to develop a framework for level of insurance required and any special requirements for the civil construction sector (sub. 21, p. 15)
- extending public tender thresholds to ensure competitive testing of all works and services with a value over \$250 000 (including those that could be provided by an in-house team) or requiring councils to publicly release in a prescribed form why that should not occur (sub. 21, p. 3)
- regularly reviewing the thresholds for public tendering, and clarifying their intent and coverage (PA 2010).

The VSBC (sub. 26, p. 8) recommended that councils should:

- publish procurement policies on their websites<sup>21</sup>, and provide information on how businesses can access and win local government work
- commit to assisting SMEs and regional suppliers to access and win tenders
- commit to complying with the Victorian Government’s Fair Payments policy
- respect the rights of both contractors and sub-contractors.

The CCF made a number of recommendations for improving procurement through standardisation that are outlined in box 8.4.

#### **Box 8.4 Improving procurement through standardisation**

The CCF made a number of recommendations to improve local government procurement, most of which related to standardising processes and achieving best practice. It recommended that the Commission consider the need for regulation to achieve appropriate standardisation in the delivery of civil infrastructure, including:

- (1) adoption by all councils of the principles embodied in the MAV/IPWEA/CCF Best Practice Guide for Tendering and Contract Management

(continued next page)

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<sup>21</sup> This is now a requirement of s186A of the Act.

- (2) adoption by all councils of AS4000 as the General Conditions of Contract for all infrastructure contracts
- (3) development and adoption of a common tender evaluation tool
- (4) development and adoption of a common electronic tendering platform
- (5) reduction of the volume of material required to be submitted with tenders in the interest of meeting the Government's environmental objectives
- (6) resolution of contract disputes by mediation, where possible, rather than costly arbitration
- (7) standardising all aspects of the processes for the approval and final 'sign-off' of subdivisions including provision for private certification, where appropriate, similar to the administration of the building regulations
- (8) importantly, ensure that the standardisation of technical specifications does not contribute to the considerable over-design of some elements of infrastructure currently endemic throughout local government (i.e. pavements in residential streets that could accommodate 747s!), nor the capacity for councils to unilaterally prescribe higher standards of design and construction.

*Source:* Sub. 21, p. 21.

## **Broader concerns with local government procurement processes**

Participants raised a number of broader concerns with local government procurement relating to objectives, delays and infrastructure design and investment.

### *Councils have complex procurement objectives*

Councils have a range of complex and potentially competing procurement objectives. These are set out in the Local Government Act and regulations, DPCD Procurement Best Practice Guidelines and council procurement policies. For example, the City of Port Phillip (sub. 14, p. 13) stated that its procurement objectives include achieving value for money and quality, demonstrating that public money has been well spent and that procurement has been conducted in an impartial, fair and ethical manner, and giving consideration to generating and supporting business in the local community. Many councils seek to both minimise life cycle costs subject to quality requirements (value for money) and to engage local businesses. These objectives compete where local businesses cannot offer the best value for money for a particular product. The MAV commented that 'Councils are faced with the difficult task of considering local business whilst still realising economies of scale, reduced costs and other efficiencies' (sub. 19, p. 12).

The Commission considers that because the Victorian Government's objectives for local government procurement, both in the Act and Guidelines, are wide-ranging, they provide limited guidance on the balance between criteria to be

applied in procurement decision-making. This includes, for example, the relationship between procurement probity and efficient procurement. While probity clearly has benefits in terms of increasing the probability of councils achieving best value, fair and accountable procurement, it currently involves costs for councils and businesses by adding complexity to the procurement process, and can impede SME access. On the other hand, the incentives for ensuring compliance with probity standards are currently greater than for ensuring efficiency in procurement practices.

#### **Draft recommendation 8.1**

**That the Victorian Government strengthen the incentives to councils for efficient procurement by clarifying the objectives that councils must have regard to when undertaking procurement, by:**

- **clarifying that ‘value for money’ is the most important principle for local government procurement, consistent with the Victorian Auditor-General’s guidance for public sector procurement, through:**
  - **amending the Best Value Principles in the Local Government Act to state that ‘value for money’ is the most important principle, or**
  - **amending the Procurement Best Practice Guidelines to state that ‘value for money’ is the most important principle**
- **requiring councils to report publicly instances where, and the reasons why, they have not prioritised ‘value for money’ over other principles in undertaking procurement or service delivery**
- **reviewing the requirement for procurement policies in the Local Government Act one year after these changes are implemented.**

#### *Impediments to collaborative procurement*

The MAV, Procurement Australia and CCF stated that there are currently impediments to collaborative procurement between councils. The MAV stated that current restrictions on councils appointing procurement agents in Victoria is adding costs to, and therefore inhibiting, collaborative procurement between councils (sub. 32, p. 1). It stated that the requirement that councils appoint a procurement agent like MAV or Procurement Australia prior to the tender process being conducted makes it difficult for councils to access joint contracts:

... if a council misses out on this process and does not complete the agency agreement they cannot access the resulting contract, regardless of the potential benefits of that contract to their council (unless the Minister for [local government] provides an exemption to s186 of the Act for the relevant contract). (sub. 32, p. 1)

For example, MAV Procurement conducted a telecommunications contract in 2009 that initially involved 40 councils. As the benefits of the contract became clear across local government, an additional 35 councils accessed the contract, but had to incur the administrative costs of getting a Ministerial exemption under s186 of the Act (sub. 32, p. 1). Procurement Australia stated that the current restrictions on councils accessing joint contracts can force councils to undertake individual procurement. It stated that this increases tendering costs for councils and suppliers, including SMEs, and potentially precludes councils from achieving value for money (PA 2010). It also stated that as long as Ministerial exemptions are required in cases where councils want to access pre-existing tenders, guidelines are needed to minimise any potential competitive neutrality issues between funded government and commercial procurement agents (PA 2010). The MAV noted that Victoria is the only state that has a process of agency appointment. It recommended that Victoria should allow agents that meet a set quality standard to become 'prescribed procurement entities' (like in New South Wales), which would allow councils to access any contracts that are negotiated for the local government sector (sub. 32, p. 1). The CCF stated that 'the industry will need incentives or regulatory control to make regional procurement a reality' (sub. 21, p. 16).

#### *Responsiveness of councils*

The CCF stated that since the abolition of compulsory competitive tendering councils have become less responsive to requests and tenders submitted by contractors, which imposes additional costs on contractors and consumers. Particular areas of concern include: responses to requests not addressing all issues raised; letters and calls not being responded to promptly or at all; prescribed timelines for tender processing not being honoured; and inadequate advice and feedback to tenderers on the outcome of their tenders (sub. 21, p. 20). The CCF (sub. 21, p. 21) and VSBC (sub. 26, p. 8) both noted the benefits to contractors of councils adopting common service standards based on the VSBC's Small Business Service Charter. The CCF also called for annual reporting on councils' performance at achieving the standards.

#### *Councils are 'over-designing' infrastructure*

The CCF stated that 'considerable over-design of some elements of infrastructure [is] currently endemic throughout Local Government', particularly in pavement design and asphalt requirements (sub. 21, p. 4). The CCF reported that, in some instances, the subdivision construction costs for a typical house allotment could be reduced by upwards of \$8000 (10 per cent) per allotment (sub. 21, p. 3). While the CCF estimated that some of these savings (\$3100) would come from removing delays to outlays and returns, it estimated that removing over-design (including asphalt, pavement, footpaths and pits) would yield savings of about \$2600 per allotment (sub. 30, p. 2). The CCF noted that

councils are probably minimising the life cycle costs of infrastructure by imposing high costs at the construction phase, but said this has a direct impact on housing affordability (sub. 30, p. 4). It argued that the only reasons for variance are traffic and land-use variances (that is, domestic, commercial etc) or if recycled materials or different characteristics are in use, and that design should be based on a minimum standard, unless evidence or research allows for a modification and is certified by an accredited professional (sub. 30, p. 4).

*Councils are under-delivering infrastructure*

The CCF raised concerns that councils are under-delivering capital works programs, in some instances by 30 per cent (sub. 21, p. 19). It argued that most councils are unable to publish and implement rolling capital works programs and that this is inhibiting the efficient delivery of infrastructure projects. The CCF stated that this is contributing to multiple tenders being invited in clusters; inadequate scoping of projects; contract periods being unrealistic; construction being required to be undertaken in adverse weather conditions; lumpiness in cash flows; and little incentive to invest in skills formation, innovation and long-term planning (sub. 21, p. 19). The CCF recommended that a task force develop a framework for the efficient planning and delivery of capital works, and that all councils be required by regulation to prepare, publish and update annually a detailed forward three year capital works programs (sub. 21, pp. 19–20). The Commission considers that under-delivery of infrastructure by councils is beyond the scope of this inquiry.

*Councils have inconsistent environmental policies*

The Victorian Association of Forest Industries (VAFI) stated that it is concerned that there is not a consistent set of procurement policies covering all councils that recognise both the environmental and life-cycle benefits of timber products. It stated that councils should source timber products certified to internationally recognised certification schemes for responsible forest management (sub. 4, pp. 3–4).

## 8.8.2 Council procurement questionnaire

The Commission sent a procurement questionnaire to 10 councils that it met with at the early stages of the inquiry. Eight councils<sup>22</sup> provided responses to the survey and highlighted a number of important points:

- Councils have a range of potentially competing procurement objectives and are using procurement policies to implement these objectives.
- Councils do not monitor the value of their procurement from SMEs.
- SMEs are not frequently raising concerns with councils about procurement, but have raised concerns about risk management requirements.
- Tender thresholds in the Act impact most councils' procurement practices and outcomes, but sometimes yield no additional benefits.
- The CRB initiatives will likely yield savings for councils and contractors, but costs to councils and quality of standards may impact council participation.
- Procurement approaches are not standardised because of the costs and complexity of standardisation, and investment in current processes, but councils believe standardisation will decrease business and council costs.
- Some councils monitor and benchmark procurement performance, but this is inhibited by a lack of good metrics and the costs of monitoring.

Table 8.2 outlines councils' responses in more detail.

**Table 8.2 Procurement questionnaire responses<sup>a</sup>**

<i>Question</i>	<i>Responses</i>
What are your council's procurement objectives?	<ul style="list-style-type: none"> <li>• 5/8 probity (ethics, transparency)</li> <li>• 4/8 Best value/Value for money</li> <li>• 3/8 support local firms (1/8 has weighting criteria for local businesses)</li> </ul>
How does your council prioritise and implement these objectives?	<ul style="list-style-type: none"> <li>• 4/7 through procurement policy</li> <li>• 2/7 through standard evaluation criteria:               <ul style="list-style-type: none"> <li>– 1/7 weightings are 60% financial and 40% non-financial</li> </ul> </li> </ul>
How much does your council procure from SMEs and home-based businesses (HBB)?	<ul style="list-style-type: none"> <li>• 7/7 data not available</li> <li>• 1/7 estimate 10–15%</li> </ul>

<sup>22</sup> These included the City of Greater Bendigo, City of Boroondara, City of Greater Dandenong, City of Greater Geelong, Glen Eira City Council, City of Melbourne, City of Port Phillip and City of Whittlesea. Councils were selected by the Commission to give a representative sample of inner metropolitan, outer metropolitan and regional municipalities. The procurement questionnaire is available at [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au)

<i>Question</i>	<i>Responses</i>
To what extent have SMEs and HBBs raised concerns about access to procurement?	<ul style="list-style-type: none"> <li>• 3/7 business has not raised concerns with council</li> <li>• 2/7 requirements for insurance and systems for quality, OH&amp;S and risk management</li> <li>• 2/7 council offers advice/guidelines for SMEs</li> </ul>
What legislation, regulations and policies have the biggest impact on procurement?	<ul style="list-style-type: none"> <li>• 7/8 s186 of the LG Act: <ul style="list-style-type: none"> <li>– 5/8 thresholds for tenders or quotes</li> <li>– 2/8 tenders and quotes costly and sometimes unnecessary</li> </ul> </li> <li>• 3/8 Trade Practices Act, Procurement Policy or Best Practice Guidelines</li> <li>• 2/8 National Competition Policy</li> </ul>
To what extent has your council improved procurement recently?	<ul style="list-style-type: none"> <li>• 3/8 improvements through training, through electronic tendering</li> <li>• 2/8 council only has a compliance focus</li> </ul>
What are the impacts of Councils Reforming Business (CRB) and Collaborative Procurement Programs (CPP)?	<ul style="list-style-type: none"> <li>• 6/8 CRB and CPP have benefits <ul style="list-style-type: none"> <li>– 3/8 increased awareness, joint procurement savings</li> <li>– 1/8 instrumental to change</li> </ul> </li> <li>• 1/8 CRB and CPP should have benefits; not a lot of impact; costly for councils, standard documents not best practice; depends on implementation, but one approach won't fit all e.g. regional resourcing constraints</li> </ul>
What are the incentives for/barriers to your council improving procurement?	<p>Incentives:</p> <ul style="list-style-type: none"> <li>• 5/8 savings (e.g. for councils, ratepayers and contractors)</li> </ul> <p>Barriers:</p> <ul style="list-style-type: none"> <li>• 2/8 effort required</li> <li>• 1/8 lack of leadership, savings hard to forecast, resistance to change, there are no barriers, only benefits</li> </ul>
How standardised is your council's procurement approach with other councils?	<ul style="list-style-type: none"> <li>• 3/8 not standardised</li> <li>• 3/8 standardisation forced by e-tendering, council is looking at adopting CPP document standardisation</li> <li>• 2/8 council uses Standards Australia standards, council doesn't know or has not assessed level of standardisation</li> <li>• 1/8 regulations could bring standardisation</li> </ul>
What are the incentives for/barriers to standardisation for your council?	<p>Incentives:</p> <ul style="list-style-type: none"> <li>• 4/8 decreases firm costs, which increases competition, which lowers product costs for councils</li> <li>• 2/8 eliminates response errors, enables collaboration, reduces council preparation costs</li> </ul>

<i>Question</i>	<i>Responses</i>
	<p>Barriers:</p> <ul style="list-style-type: none"> <li>• 2/8 high investment in current process</li> <li>• 2/8 different standards <ul style="list-style-type: none"> <li>– 1/8 different technical specifications and works schedules; differing standards, objectives and priorities</li> </ul> </li> <li>• 1/8 reluctance to relinquish control, time and effort of collaboration, lack of guidance by LGV, no large benefits, regional issues may reduce benefits so standardisation should be voluntary</li> </ul>
To what extent does your council measure and benchmark its procurement performance?	<ul style="list-style-type: none"> <li>• 4/8 quite developed monitoring – for example, benchmarking against region, Whole of Victorian Government contract or best practice checklist</li> <li>• 3/8 currently basic (compliance) but being developed</li> </ul>
What are the incentives for/barriers to monitoring procurement performance for your council?	<p>Incentives:</p> <ul style="list-style-type: none"> <li>• 2/7 increased businesses interest and savings</li> </ul> <p>Barriers:</p> <ul style="list-style-type: none"> <li>• 3/7 finding suitable performance measures</li> <li>• 2/7 costly and labour intensive, lack information technology system</li> </ul>

<sup>a</sup> In some cases only seven councils responded to the question. This is because one council undertook a pilot questionnaire that did not include all of the questions in the final questionnaire.

*Source:* Commission questionnaire.

## 8.9 The costs of local government procurement

### 8.9.1 Types of procurement costs

Local government procurement can impose costs on councils and businesses, and thus the broader community.

#### *Costs to councils*

Costs to councils can include:

- Process costs<sup>23</sup>: the time and costs of going through the four procurement phases and associated steps (planning the procurement, implementing the

<sup>23</sup> The MAV Model Procurement Policy refers to these as ‘activity’ costs (MAV 2009a).

procurement approach, monitoring and evaluating contractor performance and evaluating and improving the procurement processes)

- Product costs: the financial cost of the goods, services or works purchased, over their entire life cycle
- Opportunity costs: the difference between the product costs of the goods, services or works purchased and the cheapest alternative (if any). Opportunity costs can be caused by, among other things, a lack of competition for, and in, the market for the product the council is buying.
- Contravention costs: the costs to a council of breaching its legislative procurement obligations in the form of investigations, prosecutions and audits. High expected contravention costs incentivise councils to increase probity standards, which can increase regulatory costs for potential suppliers.

#### *Costs to businesses*

Costs to businesses can include:

- Regulatory costs, including:
  - Administrative costs: the time and costs of tendering for council contracts, including reading and reviewing tender documents, meeting with council/tenderer, developing approach/working model/program, estimating own costs and sub-contract costs, design work (if required), completing tender forms, sales and marketing materials, submission and other (internal approvals), appointment and further questions and follow-up
  - Compliance costs: meeting requirements of the contract process such as certification, licences or certain levels of insurance
- Opportunity costs: the difference between the net benefits of tendering for a council contract and the net benefits of the most profitable alternative activity.

Regulatory costs can originate from:

- requirements in legislation, regulations, policies or government procurement documentation or processes
- differences in procurement practices between councils. This can increase regulatory and opportunity costs to businesses that operate in multiple municipalities.

Businesses may absorb regulatory costs through lowering their profit margins, or impose regulatory costs back on councils through increasing their prices. High regulatory costs may inhibit some businesses from tendering for, or winning, council contracts. For example, the Victorian Ombudsman found in a recent council investigation that tender documentation and requirements were overly

onerous and potentially, this contributed to a fewer number of tenders being lodged (Victorian Ombudsman 2009, p. 12).

The costs of local government procurement can be particularly burdensome for small businesses. The Victorian Guide to Regulation states that:

While governments need to minimise the regulatory burden on the business sector as a whole, the impact on small business requires specific scrutiny. With the compliance burden of regulation often a fixed cost, small businesses disproportionately feel its effects as they have fewer resources than larger firms to absorb these costs. Small businesses also have limited resources to interpret and implement compliance requirements and to keep pace with the cumulative burden of regulation and the changing regulatory environment. (Government of Victoria 2007c, p. 1-8)

SME contractors can provide some relative benefits to councils. Ernst and Young found that, in addition to supporting local industry, the reasons why some councils have a large number of small local suppliers include that SMEs have more responsive customer service and are more willing than larger suppliers to service smaller contracts (Ernst & Young 2008b, p. 38).

### **8.9.2 Estimating the costs of local government procurement**

In order to estimate the costs to councils and contractors of local government procurement, the Commission considered previous Victorian and NSW estimates, and consulted with the civil construction industry and MAV. Based on these sources, the Commission estimates that tendering for local government contracts costs Victorian businesses approximately \$100 million per year. In addition, the Commission estimates that undertaking public tender processes costs Victorian councils approximately \$36–55 million per year. Table 8.3 shows the tendering costs to businesses.

Table 8.3 **Annual costs to Victorian businesses of tendering for local government contracts<sup>a</sup>**

<i>Activity</i>	<i>Non<sup>b</sup></i>		<i>Small<sup>c</sup></i>		<i>Medium<sup>d</sup></i>		<i>Large<sup>e</sup></i>	
	Days <sup>f</sup>	Cost (\$)	Days <sup>f</sup>	Cost (\$)	Days <sup>f</sup>	Cost (\$)	Days <sup>f</sup>	Cost (\$)
Read and review tender documents	-	-	1.0	470	1.0	470	1.0	470
Meet council and travel	-	-	0.3	120	0.5	240	1.0	470
Develop approach	-	-	1.0	470	1.0	470	2.0	940
Estimate own costs	-	-	1.0	470	1.5	710	3.0	1410
Design work	-	-	1.0	470	1.5	710	3.0	1410
Estimate sub-contract costs	-	-	0.5	240	2.0	940	4.0	1890
Complete tender forms	-	-	1.0	470	2.5	1180	4.0	1890
Sales and marketing	-	-	0.5	240	0.5	240	1.0	470
Submission and other	-	-	0.5	240	0.5	240	1.0	470
Appointment	-	-	0.5	240	0.5	240	0.5	240
Questions and follow-up	-	-	1.0	470	1.0	470	3.0	1410
<b>Total per tender submitted<sup>k</sup></b>	15	<b>7070</b>	8.3	<b>3800</b>	12.5	<b>5890</b>	23.5	<b>11080</b>
<b>Cost all tenders submitted<sup>k</sup></b>		<b>18m<sup>g</sup></b>		<b>24m<sup>h</sup></b>		<b>32m<sup>i</sup></b>		<b>26m<sup>j</sup></b>
<b>% of contract value<sup>l</sup></b>		-		≥1.9		1.7		≤2.2
<b>Total costs to businesses<sup>km</sup></b>								<b>101m</b>

<sup>a</sup> Estimates of time allocation are based on standard procurement modelling undertaken in the civil construction industry, which was adjusted based on consultation with the CCF and then confirmed directly with industry representatives (DPCD 2010f). The CCF more recently commented to the Commission that these estimates are based solely on price, and do not take account of differences in the complexity of works, for example, between urban and rural environments (sub. 30, p. 7). <sup>b</sup> Non-infrastructure contracts <sup>c</sup> Small infrastructure contracts <\$200k. <sup>d</sup> Medium infrastructure contracts \$200k-\$500k. <sup>e</sup> Large infrastructure contracts >\$500k. <sup>f</sup> The average number of days an individual business spends on the activity. <sup>g</sup> Calculated as days \* hours per day \* hourly rate \* number of submitted tenders = days \* 8 \* 58.91 \* 2608. <sup>h</sup> Calculated as days \* hours per day \* hourly rate \* number of submitted tenders = days \* 8 \* 58.91 \* 6258. <sup>i</sup> Calculated as days \* hours per day \* hourly rate \* number of submitted tenders = days \* 8 \* 58.91 \* 5476. <sup>j</sup> Calculated as days \* hours per day \* hourly rate \* number of submitted tenders = days \* 8 \* 58.91 \* 2347. <sup>k</sup> Totals may not add due to rounding. <sup>l</sup> Calculated as cost per tender / average contract value. <sup>m</sup> Calculated as \$18m+\$24m+\$32m+\$26m.

Source: DPCD 2010f.

Table 8.3 suggests that the cost to businesses of tendering for council contracts range from about \$4000 (small infrastructure contracts) to \$11 000 (large infrastructure contracts) per tender submission. The largest costs to businesses of tendering for local government infrastructure contracts arise from completing tender forms (1–4 days), estimating sub-contract costs (0.5–4 days), and estimating own cost (1–3 days) and undertaking design work (1–3 days). This would appear to strengthen the case made by various participants for achieving cost reductions by standardisation of tender documentation. Similarly, it would appear to strengthen the case for initiatives aiming at reducing time spent on design work, for example through standardised best practice design standards.

The CCF argued that 0.8 per cent of the contract value represents an efficient level of tendering costs for businesses (DPCD 2010f). This is consistent with inter state analysis, which found that businesses in New South Wales typically incur tendering costs of 1 per cent of the contract value (DLG 1999, p. 23). The above estimates suggest that costs to Victorian businesses of tendering for local government infrastructure contracts are at least 1.9 per cent, about 1.7 per cent and at most 2.2 per cent of the value of small, medium and large contracts respectively (table 8.3). These costs to business appear to be unnecessarily high when compared to industry and interstate benchmarks. In addition, the costs of tendering for small contracts as a proportion of contract value would, on average, exceed both the costs of tendering for medium contracts and the costs of tendering for large contracts with a value above \$585 000.<sup>24</sup> Assuming that SMEs are more likely to tender for and win small contracts (see Ernst & Young 2008b, pp. 37–38) the costs of tendering are proportionately higher for SMEs.

Table 8.4 estimates the annual costs to councils of undertaking public tenders.

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<sup>24</sup> The cost of tendering for a large infrastructure contract with a value of \$585 000 is 1.9 per cent (\$11 080) of the contract value. As the value of the contract increases, the relative costs of tendering decrease.

Table 8.4 **Annual costs to councils of undertaking public tenders<sup>a</sup>**

<i>Average cost per contract (\$)</i>	<i>Average number of contracts issued by each council per year</i>	<i>Number of contracts issued by all councils per year</i>	<i>Total annual cost per council (\$ million)</i>	<i>Total annual cost all councils (\$ million)</i>
10 000–15 000 <sup>b</sup>	46 <sup>c</sup>	3651 <sup>d</sup>	0.46–0.69 <sup>e</sup>	36.3–54.5 <sup>f</sup>

<sup>a</sup> Costs include preparing the tender documentation, advertising, responding to inquiries, evaluating tenders, making and documenting the decision. <sup>b</sup> Indicative estimates provided by MAV (MAV 2010c). <sup>c</sup> Calculated as the number of contracts issued by all Victorian councils per year (3651), divided by the number of councils (79). <sup>d</sup> The total number of small, medium and large infrastructure contracts, and non-infrastructure contracts, issued by Victorian councils per year (DPCD 2010f). <sup>e</sup> Calculated as 46 \* \$10 000–\$15 000. <sup>f</sup> Calculated as \$460 000–\$690 000 \* 79.

Sources: DLG 1999, p. 23; DPCD 2009f.

Table 8.4 shows that undertaking public tenders involves a significant cost for councils, and that the expected cost savings to councils from public tenders must exceed \$10 000–\$15 000 for public tenders to be efficient.

## 8.10 Current initiatives

Some current initiatives to improve local government procurement may reduce the costs and impediments to business of tendering for council contracts, and increase the efficiency of council procurement more broadly. However, the success of these initiatives will largely depend on voluntary uptake by councils.

### 8.10.1 DPCD Councils Reforming Business – Procurement

The Victorian Government’s Councils Reforming Business (CRB) initiative seeks to improve local government procurement. The CRB led to the development of the Local Government Procurement Strategy (the Strategy), which assessed existing procurement practices employed by councils.

#### Local Government Procurement Strategy

The Strategy found that:

- initiatives remain relatively uncoordinated, with no clear overall strategy
- insufficient assessment of current practice and the benefits of improvements
- some legislative and process constraints may be forcing councils to operate inefficiently when seeking to obtain value for money (see box 8.3).

The Strategy also identified opportunities for councils to work in partnership to improve these practices. The research concluded that adopting better procurement practices (primarily aggregated purchasing) across the sector has the potential to yield annual savings in the region of \$180–350 million for councils. Table 8.5 below outlines the top five cost savings opportunities identified in the Strategy, which account for \$100–199 million of the total potential savings to councils.

**Table 8.5 Annual cost savings to councils of improved procurement practices<sup>a</sup>**

<i>Category name</i>	<i>Sub-categories</i>	<i>Primary category strategy</i>	<i>Ease of implementation</i>	<i>Estimated savings potential (%)</i>	<i>Estimated savings potential (\$ million)</i>
Roads and streets	Construction, maintenance and renewal	Regional cluster	Difficult	7.5–15	50–100
Facilities	Building and construction	Improved capability	Medium	7.5–15	20–40
Parks/trees	Maintenance, sports grounds	Improved capability	Medium-Difficult	7.5–15	10–20
Facilities	Maintenance	Regional cluster	Medium	7.5–15	10–20
Waste management	Collection	Regional cluster	Medium-Difficult	7.5–15	10–19
<b>Total</b>					<b>100–199</b>

<sup>a</sup> Ernst & Young stated that these estimates are based on councils' 2007 (financial year) accounts payable data, interviews with 15 councils and Ernst & Young Analysis (Ernst & Young 2008b, p. 34).

*Source:* Ernst & Young 2008a, p. 30.

These estimates are based on all councils fully adopting the identified joint procurement opportunities.

The Strategy also found that aggregating demand for selected categories of external expenditure can assist local economic activity and development and reduce procurement costs (Ernst & Young 2008a, pp. 34–35). This can be done through investing the savings in local infrastructure and services, leveraging buying power to include contract arrangements that support local businesses, and planning aggregated purchasing with a focus across a region rather than council-by-council.

The strategy recommended four stages of improvements:

- (1) Awareness raising: of the significant potential to lift procurement capability and generate significant savings to councils and communities
- (2) Setting foundations: establishing a representative body to oversee and drive the Strategy; building upon existing and new pilot category strategies, aligning processes, accounts and technology; establishing a major program of procurement capability building; negotiate access to State contracts
- (3) Sector-wide collaboration: extending pilots across the whole sector; sector-wide strategies for areas of greatest potential benefits, including where regional infrastructure and financial gaps exist; and delivering aggregation strategies that reduce costs and aid local and regional development
- (4) Sector transformation: extending procurement collaboration into sharing and collaboration of service provision, assets and other infrastructure.

The Commission considers that councils are not capturing the full extent of the savings available from greater collaboration in procurement because of weak legislative incentives for procurement efficiency, including joint initiatives, and regulatory impediments to councils accessing existing contracts that are conducted by procurement agents. The Act and Guidelines require councils to gain a Ministerial exemption if they wish to access existing joint procurement contracts. This results in additional costs for councils and their communities, for which there is limited transparency.

#### **Draft recommendation 8.2**

**That the Victorian Government, through the Department of Planning and Community Development, strengthen the incentives to councils for efficiency through more collaboration in procurement, where value for money exists, by:**

- **clarifying that ‘value for money’ is the most important principle for local government procurement (draft recommendation 8.1)**
- **removing any impediments to councils undertaking collaborative procurement through agents, in consultation with agents, by amending the Local Government Act to allow:**
  - **agents that meet a set quality standard to become ‘prescribed procurement entities’, in line with other Australian jurisdictions**
  - **councils to access existing tenders and contracts that are conducted by agents without the need for Ministerial approval.**

## CRB Procurement Projects

The Procurement Strategy Implementation Committee<sup>25</sup> was formed to oversee the implementation of the first two stages of the strategy. This has involved raising local government awareness of procurement opportunities, and overseeing three main projects:

- (1) Collaborative Procurement Programs
- (2) Procurement training
- (3) Access to State contracts and the Construction Suppliers Register.

### *Collaborative Procurement Programs (CPP)*

Through the CPPs, grants of up to \$150 000 were awarded in 2008 for 13 projects involving 53 councils to deliver collaborative procurement initiatives. The CPPs focus on developing: regional procurement clusters; common best practice procurement standards, documents, processes, and financial structures; and information sharing and e-tendering. For example:

- (1) Wyndham City Council lead the ‘Driving the Infrastructure Dollar Further’ program, which aimed to develop a range of best practice joint infrastructure procurement standards and processes including associated training programs for engineering procurement (DPCD 2010b).
- (2) Greater Dandenong City Council lead the ‘Victorian Councils E-Portal and Information Hub’ program, which aimed to develop a procurement hub (with MAV) to provide a centralised information-sharing facility and enable joint procurement projects and access to a common e-tendering platform (DPCD 2010b). Fourteen councils have committed to participate in the e-portal and hub, but it is hoped the number of participating councils will be substantially increased (DPCD 2010e).
- (3) Hobsons Bay City Council lead the ‘Standardisation of Tender Documentation Project’ program, which aimed to develop and implement a set of best practice sourcing forms as standardised procurement templates accepted by both councils and contractors (DPCD 2010b).

The CPPs have concluded and are currently in the evaluation stage. The LGV states that results and conclusions about broader implementation will be ready in early 2010.

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<sup>25</sup> The Local Government Procurement Strategy Implementation Committee was formed in early 2009 to help implement the Collaborative Procurement Projects and training initiatives. The Committee is chaired by LGV with representatives from the MAV, DTF, Fin Pro, IPWEA, Regional and Metropolitan Procurement groups and LGPro (DPCD 2010o).

### *Procurement training*

The CRB program involves two procurement training modules for councils which seek to address skill shortages in local government procurement. The Procurement Professional Program commenced in October 2009 and is an ongoing extensive procurement training course for local government professionals. It is the first of its kind in Australia and leads to an internationally recognised qualification. The Towards Better Tendering was a one day training course that was held throughout Victoria in September and October 2009.

### *Access to State contracts and the Construction Suppliers Register (CSR)*

Since the release of the Strategy, 14 contracts including State Purchase Contracts (SPC) and Whole of Victorian Government Contracts (WoVG) contracts have been made available to councils (DPCD 2009a). The Minister for Local Government exempted SPCs, WoVGs and the CSR from s186 of the Act. Access to the CSR requires an application process and the payment of an access fee.

## **Reducing burdens on businesses**

Based on the CRB initiatives, the DPCD identified a range of savings from reducing regulatory burdens in council procurement. This included introducing:

- best practice tender documentation
- standardised tender documentation
- e-tendering
- standardised design requirements
- uniform engineering standards
- best practice infrastructure tendering and contract management.

Table 8.6 outlines the DPCD's estimates of the potential annual administrative cost savings that would be achieved from about two-thirds of councils adopting the above improvements.

Table 8.6 Estimated annual administrative burden reductions<sup>ab</sup>

<i>Contract</i>	<i>Contractors impacted (%)</i>	<i>Contractors Impacted (no.)</i>	<i>Reduction (days)</i>	<i>Reduction (%)</i>	<i>Reduction (\$m)<sup>c</sup></i>
Small contracts <\$200k	50	3129	1.6	19	2.4
Med. contracts \$200k–\$500k	80	4381	2.4	19	5.0
Large contracts >\$500k	80	1877	4.0	17	3.5
Other tenders	80	2086	1.5	10	1.5
<b>Total</b>			<b>9.5</b>		<b>12.3</b>

<sup>a</sup> Based on standard procurement modelling undertaken in the civil construction industry, then adjusted based on consultation with the CCF, then confirmed directly with industry representatives (DPCD 2010f). The Commission asked the CCF if it agrees with these estimates. The CCF stated that it believes that these estimates are in the right order, and may be as high as 25%, however a more detailed analysis would need to be undertaken to produce results that stand up to close scrutiny (sub. 30, p. 7). <sup>b</sup> The DPCD commented that these savings (from reducing 'administrative' costs) are only a subset of the total savings to businesses (including from reducing delays) that it expects will be achieved from the listed improvements (DPCD 2009c). <sup>c</sup> Calculated as reduction (days) \* hours per day \* hourly rate \* contractors impacted. This is based on the current hourly rate of \$58.91, which is slightly higher than the rate used in the original DPCD estimates and leads to a higher savings estimate.

Source: DPCD 2010f.

The willingness of councils to adopt these improvements, and the rate at which they adopt them, will impact the final level of savings that are achieved. The DPCD stated that about 25 councils are currently in the process of adopting best practice standardised design requirements and uniform engineering standards, and that it expects about 50 councils (two-thirds) will be in the process of adopting the standards by mid-2011 (DPCD 2009c). It also stated that about 35 councils are currently in the process of adopting e-tendering and best practice and standardised tender documentation. The DPCD has received funding to roll-out the various improvements under the CRB initiative across Victorian councils, which it will do through the Procurement Excellence Program.

### 8.10.2 Procurement Excellence Program

The LGV are working with the Procurement Strategy Implementation Committee to develop a Procurement Excellence Program, which will provide:

- (1) an evidence-based understanding of the regulatory burden on business
- (2) a framework for the transformation of procurement in the local government sector

- (3) a comprehensive suite of best practice procurement tools for the local government sector, involving evaluation of current initiatives
- (4) implementation of sustainable sector-wide reform of procurement.

The Procurement Excellence Program involves two key components, a Procurement Excellence Framework and Procurement Capability Development.

#### *Procurement Excellence Framework*

The Procurement Excellence Framework will seek to drive improvement in Local Government procurement practices by:

- developing best practice procurement tools and techniques
- developing technology enablers
- developing governance process, policies and procedures
- developing training and skills development
- enabling collaboration.

The Procurement Excellence Framework will be developed with the long term goal of supporting the establishment of a Procurement Excellence Centre for Local Government into the future (DPCD 2010d).

#### *Procurement Capability Development*

The Procurement Capability Development program will seek to raise the procurement capability of individual councils and regions through a targeted and comprehensive state-wide program that will:

- provide expert procurement advice for the development of a ‘roadmap’ for improvement of procurement practices, based on facilitated assessments of current procurement capability
- integrate key elements of the Procurement Excellence framework into Councils through the supported implementation of the roadmaps (DPCD 2010d).

The Commission considers that aspects of local government procurement such as contract documentation and technical specifications for infrastructure are inconsistent across councils. This imposes costs on businesses and impedes SME access to council contracts. Inconsistencies also impose costs on councils and their communities by impeding competition for contracts and joint procurement. The Commission recognises that the intent of the DPCD Procurement Excellence Program is to encourage local councils to take the initiative with both more collaborative procurement and greater standardisation, and to provide a range of support, including capacity-building in procurement. The Commission supports both the approach and the intent of these initiatives. However, it considers this work could be enhanced by giving the initiatives legislative backing subsequent to the current transition phase.

### **Draft recommendation 8.3**

**That the Victorian Government seek to remove the unnecessary costs that councils impose on tenderers, including small and medium enterprises, by strengthening the incentives for councils to adopt the improvement initiatives being developed under the Councils Reforming Business program, including best practice standards for contract documentation and infrastructure technical specifications. This should be done by:**

- **amending the Local Government (General) Regulations to require that councils, subsequent to the current transition phase:**
  - **adopt the improvement initiatives being developed under the Councils Reforming Business program, including best practice standardised contract documentation and infrastructure specifications, or**
  - **publicly report their reasons for not adopting the improvement initiatives.**

The Commission also considers that any over-design of infrastructure by councils will be addressed by councils adopting the best practice standards for infrastructure technical specifications being developed under the CRB program.

### **8.10.3 VAGO audit of tendering in local government**

The VAGO recently released the report of an audit into tendering and contracting in five Victorian councils.<sup>26</sup> The objective of the audit was to examine whether policies, guidelines and procedures for tendering and contracting were adequate, had been complied with and had resulted in value for money (VAGO 2010, p. vii). The VAGO concluded that while all five councils had engaged in competitive procurement processes:

... the absence of systematic and documented evaluations of procurement outcomes means that they are unable to demonstrate that best value is being achieved. (VAGO 2010, p. 19)

The VAGO found that there was significant scope at the councils examined to achieve better value for money in procurement, as councils were paying insufficient attention to strategic procurement and the statutory obligations for aggregate payments that exceed the tender thresholds were unclear. It also found that while council procurement policies were adequate, there was generally less than desirable assurance that probity standards had been consistently applied,

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<sup>26</sup> The City of Casey, the City of Greater Bendigo, Mount Alexander Shire Council, Colac-Otway Shire Council, and the City of Yarra.

and that conflicts of interest were avoided. The VAGO (2010, pp.ix–x) recommended that:

- (1) Councils should strengthen the application of probity standards in procurement by providing better training to staff; requiring documentation of conflicts of interest; ensuring sufficient detail and analysis in tender evaluation reports to justify awarding of tenders; and maintaining detailed records of all procurement activities and decisions.
- (2) Councils should strengthen oversight and monitoring of procurement by monitoring cumulative payments to suppliers to identify opportunities for greater value for money through competitive and/or collaborative procurement arrangements; establishing procedures for ensuring compliance with statutory requirements and probity standards; and systematically reviewing the effectiveness of procurement activities and associated controls.
- (3) The LGV should review and enhance guidance to councils on strategic procurement, including amending the Local Government Regulations to: clarify the circumstances under which a council must tender (including where cumulative spend with suppliers exists); and require councils to set the scope, timeframe and value of works to be covered by a contract entered into because of an emergency and to report this publicly.

The Commission considers that there is a lack of clarity in the Act and regulations about the range of circumstances under which a council's statutory obligations to tender apply. It supports the VAGO's recommendation that LGV should amend the Local Government Regulations to better prescribe the circumstances under which a council must tender. The Commission considers that, as part of this exercise, LGV should clarify whether the thresholds for tenders in s186 of the Act apply to works or services (such as roads and streets works) that are currently allocated to in-house teams.

#### **Draft recommendation 8.4**

**That Local Government Victoria implement the Victorian Auditor-General's recommendation to amend the Local Government (General) Regulations to prescribe more precisely the circumstances under which a council must tender. As part of this exercise, the Commission recommends that Local Government Victoria clarify whether the thresholds for tenders in s 186 of the Local Government Act apply to works or services (such as roads and streets works) that are currently allocated to in-house teams.**

The Commission considers that current requirements for probity impose significant costs on councils and businesses through the legislative requirement for formal public tender processes. SMEs are particularly burdened from having to undertake formal tender processes, and sometimes discouraged from

tendering, because of their inability to absorb the relatively large time commitments and costs of the process. In addition, several councils indicated that the requirement to go out for public tenders is costly (about \$10 000–\$15 000 per contract) and sometimes yields no additional benefits or savings. The Commission considers that there may be less costly ways than low tender thresholds to achieve probity in procurement, for example, through public reporting of procurement outcomes by councils. The Commission supports the VAGO’s recommendations that councils should both provide sufficient detail and analysis in tender evaluation reports to justify awarding of tenders, and maintain detailed records of all procurement activities and decisions. In addition to the VAGO’s recommendation, the Commission is considering whether the Victorian Government might:

- (1) require councils to publicly report their procurement decisions and outcomes; and
- (2) increase the legislative thresholds for public tenders to reduce costs to businesses, including SMEs, and councils.

*Information request:*

*The Commission seeks further information on the relationship between probity and efficiency considerations in local government procurement. To what extent could the probity objectives of the legislative thresholds for public tenders be achieved by other less costly means, for example, through public reporting of procurement outcomes? What impacts would higher thresholds have on small and medium enterprises’ access to local government procurement?*

## **8.11 The Commission’s view on potential cost savings**

Creating the right incentives for local council procurement in Victoria is very important given the size (in absolute and relative terms) of local government procurement. Councils spend about \$2.7 billion per year on procuring goods, services and works. In addition, tendering for local government contracts costs councils about \$36–55 million per year (\$10 000–\$15 000 per public tender) and Victorian businesses about \$100 million per year (\$4000–\$11 000 per tender submission). The Commission has found a number of issues with local government procurement including unclear objectives, foregone savings from limited collaboration in procurement by councils and unnecessary costs for tenderers, including SMEs. The costs of procurement for both local government and businesses can be reduced by addressing these issues.

The DPCD’s current initiatives aimed at improving local government procurement should address some of these issues and yield savings, but there is scope for further improvements and savings both from clarifying procurement

objectives and strengthening councils' incentives to adopt improvements. The Commission considers that the annual savings of \$12 million from the DPCD's ongoing standardisation initiatives can be increased by strengthening the incentives for councils to adopt the improvements. Where most of the costs of inconsistent procurement, and therefore the benefits of standardisation, go to businesses rather than councils, councils will have less incentive to participate.

The State funding of the DPCD improvement initiatives recognises this issue. However, introducing regulatory requirements on councils to either adopt best practice standards or to publicly report their reasons for not adopting them, subsequent to the current transition phase (draft recommendation 8.3), will strengthen local government incentives for adopting best practice standards. The Commission considers that this will save Victorian businesses an additional \$6 million per year, including savings of about \$5 million per year for SMEs (table 8.7). In addition, the Commission considers that greater harmonisation will facilitate more collaborative procurement between, and yield savings for, councils.

**Table 8.7 Additional annual savings to businesses from regulating council uptake of DPCD improvements**

<i>Contracts</i>	<i>Improvements</i>	<i>Uptake by mid 2011 (%)<sup>a</sup></i>	<i>Savings by mid 2011 (\$m)</i>	<i>Additional savings from mid 2011 (\$m)<sup>b</sup></i>
Small contracts <\$200 000	<ul style="list-style-type: none"> <li>• best practice tender docs</li> <li>• standardised tender docs</li> </ul>	67	2.4	<b>1.2</b>
Med. contracts \$200 000–\$500 000	<ul style="list-style-type: none"> <li>• e-tendering</li> <li>• standard design requirements</li> <li>• uniform engineering standards</li> </ul>	67	5.0	<b>2.5</b>
Large contracts >\$500 000	<ul style="list-style-type: none"> <li>• best practice infrastructure tendering and contract management</li> </ul>	67	3.5	<b>1.8</b>
Other tenders	<ul style="list-style-type: none"> <li>• best practice tender docs</li> <li>• standardised tender docs</li> <li>• e-tendering</li> </ul>	67	1.5	<b>0.7</b>
<b>Total savings all businesses<sup>c</sup></b>			12.3	<b>6.2</b>
<b>Total savings SMEs<sup>cd</sup></b>			9.9	<b>4.9</b>

<sup>a</sup> Based on estimates of council uptake by LGV (DPCD 2009c). <sup>b</sup> Assumes that, as a result of regulating council uptake of improvements in accordance with recommendation 8.3, all 79 councils would adopt the improvements. <sup>c</sup> Totals may not add due to rounding. <sup>d</sup> Assumes that 80 per cent of businesses that tender for local government contracts are SMEs (Ernst & Young 2008b, p. 37).

*Source:* Commission estimates.

Similarly, the annual savings of \$180–350 million from greater collaboration in procurement estimated in the DPCD Procurement Strategy will not be fully achieved unless all councils participate fully in the improvements. Transition arrangements are likely to be necessary, including improving procurement skills in local government. Ultimately, however, there is likely to be a need for strengthened legislative incentives for procurement efficiency and reduced regulatory impediments to procurement agents.

## 9 Costs to local government of administering regulation

### 9.1 Introduction

The terms of reference require the Commission to inquire into and report on the costs incurred by local government in administering regulation, and options for reducing these costs. There is little publicly available information on this issue and the Commission has attempted to develop broad estimates of councils' regulatory costs. Options for reducing costs are addressed in other parts of the report, including chapters 4 and 5 (planning), chapter 6 (building and construction), chapter 8 (procurement) and chapter 10 (institutional arrangements).

Identifying the costs incurred by local government in administering State and local regulation is important for several reasons. Information about regulatory costs is needed by councils to identify opportunities to improve the efficient and effective administration of regulations by councils. It also helps to shed light on the issue of cost impact to councils of State Government imposed regulatory obligations (which may impact on the overall financial position of councils).

Importantly the identification of council regulatory costs helps to understand councils' incentives to improve their efficiency. The strength of councils' incentives can have important flow-on effects for business either through inappropriate fees, charges or delays. Councils and the State government also require information on the costs of administering regulations for the purpose of setting regulatory fees and charges, noting that a number of Victorian councils appear to be under financial stress (chapter 2). Understanding councils' regulatory costs may also help to indicate where there may be opportunities for cost sharing across councils, and whether the level and structures of fees as well as the level and type of grants to councils are appropriate.

Currently, information on costs incurred by local government is generally available only in a highly aggregated form. A better understanding of local government costs and cost drivers in relation to their regulatory function is difficult because of:

- a lack of activity-based costing by local government
- regulatory fees and charges being historically determined and not necessarily based on costs
- limited contracting-out of regulatory services which reduces the ability to observe market prices that can be used as a proxy for efficient costs.

To meet its terms of reference, the Commission has drawn together a variety of partial information gathered using a top-down and bottom-up approach to:

- provide an estimate of aggregate regulatory cost for Victorian councils
- identify the major cost drivers (such as the types of regulations and key input costs)
- examine the variability in regulatory costs across councils.

## 9.2 Participants' views

The issues paper sought comment from stakeholders on the costs incurred by local councils in administering State and local laws and on the principal drivers of these costs. Views were sought on which of the different cost drivers were within the control of local councils and the practical and regulatory constraints on the ability of councils to recover the costs of providing regulatory services.

Participants' views in response to the issues paper can be grouped into three broad categories:

- capacity of some local government to administer regulations
- the impact of State Government regulatory frameworks
- regulatory costs and cost drivers.

### 9.2.1 Capacity of local government to administer regulations

In meetings with the Commission, representatives of several councils emphasised that they have an obligation to perform efficiently across all areas of responsibility, including in the administration of regulatory functions. They noted that the local community can play an important role in ensuring good performance through their ability to vote councillors out of office if they failed to meet this general obligation.

Importantly a number of submissions queried whether all councils have access to sufficient financial and other resources to administer regulation in an efficient and effective manner.

As noted in chapter 2, the Municipal Association of Victoria (MAV) believes that about 12 councils 'face some form of financial stress' (sub. 19, p. 5). The MAV argued that financial risk borne by local government relates to the capacity of councils to meet future liabilities, that is, the inability to repay debts or source funding from other levels of government and that a majority of risk for Victorian councils' financial strength generally relates to infrastructure renewal. Financially stressed councils are those in rapidly growing areas or those with a low rate base and large geographic size. Their major challenges include meeting rapidly

growing needs of maintaining roads and other infrastructure while delivering services to scattered communities.

Furthermore the MAV stated that:

The underlying financial position of local government is particularly critical. For local councils that are financially challenged, there is often limited capacity to:

- match resources to the requirements of administering and enforcing regulations
- attract and retain suitably qualified staff
- implement change management programs. (sub. 19, p. 9)

A number of submissions stated that the difficulty of attracting skilled staff was a major problem for many councils. A lack of skilled staff can adversely affect the efficiency and effectiveness of local government by contributing to mistakes, delays in processing, and a lack of clarity and consistency in the advice provided to businesses.

## **9.2.2 Impact of State Government regulatory frameworks**

Several submissions argued that many of the regulatory costs to local government arise from the State government's regulatory framework.

Macedon Ranges Residents' Association pointed to the ongoing transfer of State and Federal responsibilities to local government. In their view, these responsibilities often require additional capacity, the provision of which places additional burdens on local government. The association argued that:

Funding often falls behind costs, leaving local ratepayers to pick up the tab for the shortfall, or facing reduced services. Some in the community see new positions created as a result of State and Federal funding as frivolous, especially when they see getting on with fixing roads, footpaths and drainage – things that physically affect them – as being more important and warranting priority. (sub. 16, p. 2)

Port Phillip Council also suggested that

Often the process of complying with state legislation can add significant cost but this is seen as a cost of following due process and properly administering the council's responsibilities. (sub. 14, p. 4)

They also stated that the length of time and cost of defending a council's decision or amending the council's planning scheme are considerable and reflect the complexity of the state planning framework and appeal processes.

The planning system was also referred to by the City of Greater Bendigo, which argued:

The planning system in particular is becoming more and more complex, as the State Government seeks to implement an ever-increasing range of policy imperatives through the planning system. (sub. 23, p. 1)

A similar point was raised by Wodonga City Council who submitted that their regulatory costs have been increasing due to State Government placing additional controls into the Victorian Planning Provisions (Planning Schemes). Examples cited included the introduction of the Native Vegetation Net Gain requirements, the need for Aboriginal Culture Heritage Management Plans (under the *Aboriginal Heritage Act 2006*), Best Practice Water Quality Offsets, and proposed Acid Sulphate assessments and new Wildfire Management Overlays over large areas of the municipality (sub. 10, p. 2).

### 9.2.3 Regulatory costs and cost drivers

In general, the costs incurred by councils are dependent on the efficiency of the administrative processes used, labour costs, and the complexity of the regulatory issues facing local government.

For example, the City of Stonnington considered the principal drivers of their regulatory costs to be largely outside of their control. Stonnington considered that their main cost drivers are:

Labour market effects, especially where highly qualified / highly skilled workers are required to effectively discharge the regulatory role assigned to local government and there is insufficient supply of suitably skilled workers ...

Application volumes, especially where application fees are regulated and currently set at levels below cost recovery.

Processing complexity, especially where regulated application fees inadequately account for the recovery of the additional time and materials cost burden attached to regulating some activities (e.g. planning permit applications for highly complex proposals, assessment of complex food business operations, investigation of complex environmental impacts, etc). (sub. 7, p. 22)

The City of Greater Bendigo also stated that few of the regulatory cost drivers are within their control. They submitted that the cost of professional staff (who are in short supply), including the professional development and ongoing training of those staff, is the greatest cost. They also argued that application volumes and the timing of receiving them are not under council's control and are not possible to manage efficiently (sub. 23, p. 8). It was suggested that in planning regulation, the ability of applicants to modify fundamentally an application between a Council decision and VCAT appeal, results in a duplication of process and higher costs for councils (sub. 23, p. 2).

The MAV argued that the costs to councils of administering State regulation are far higher than the costs of administering local laws. It considered that this is largely due to the difference in workload that State regulation entails compared with local regulation. They also stated that, although cost data is unavailable, Victorian Grants Commission data indicates that the costs to councils of administering local regulation (local laws) is a very small proportion, about 1.5 per cent, of councils' total expenditure (sub. 19, p. 5).

## **9.3 Estimating total regulatory costs**

The previous section highlights the types of issues and pressures faced by local government in the delivery of a range of regulatory services under State and locally developed laws. These are important issues which may impact on the extent to which councils are able to deliver regulatory services efficiently within councils' financial constraints.

This section focuses on the availability of information on councils' regulatory costs, which is needed to assist in analysing the issues raised by participants.

### **9.3.1 Availability of cost information**

In seeking to estimate the costs to local government of administering State and local regulation it is apparent that there is limited information available from public reports or previous studies. The few studies of local governments' costs that are available focus on particular areas of policy, and do not provide detailed accounts of the total costs of regulation incurred by local government.

Several reports provide partial information on regulatory expenditures by local government. Following a review of these sources it is evident that current data does not adequately reflect the costs incurred by local government in administering regulation. For example, in many council annual reports, broad expenditure shares are disclosed without reference to regulatory service categories. In addition the Victorian Grants Commission (VGC 2009b) reports that local government in Victoria spends around \$5.6 billion annually to provide services and facilities to their local communities. This figure is based on costs reported by councils to the VGC, broken into a number of separate categories. There is, however no specific category for regulatory services.

### **9.3.2 Estimating total regulatory costs from council survey data**

Given the lack of data on the cost to councils of administering regulation, the Commission developed a questionnaire which was provided to a sample of councils covering inner metropolitan, outer metropolitan, regional and rural

areas. The questionnaire sought a range of indicative information on councils' regulatory costs.

All nine councils included in the sample responded to the questionnaire, however, some councils were unable to provide all of the information requested.<sup>1</sup> It is not clear whether this was a result of the cost information being unavailable or whether there were sufficient resources available at the time to assemble the requested information.

Participating councils were asked to provide information on their total regulatory cost, total labour costs, total other direct costs and total overhead costs for their regulatory activities. Based on the information received from councils it appears that the main driver of the total regulatory cost base is labour cost, accounting for between 55 to 75 per cent of total regulatory cost.

The second part of the questionnaire asked councils to estimate the total cost of administering four areas of regulation – *Planning and Environment Act 1987*, *Building Act 1993*, *Public Health and Wellbeing Act 2008* and relevant local laws. The general aim was to estimate the individual cost of administering these particular regulations and understand any variations that might exist in these costs between local government areas.

The results of the survey highlight that the administration of the Planning and Environment Act consumes a large share of local government's resources.

Based on the survey results, the Commission is of the view that administering the Planning and Environment Act and the Building Act account for the majority of regulatory costs incurred by councils relative to other regulatory areas. However, it is important to note that other areas such as public health and food regulations also feature prominently as a proportion of total regulatory costs for some councils. The costs of planning regulation were also raised in a submission by Frankston City Council which suggested that:

The daily administration of planning, building, local laws and health is a costly business in the order of \$2,325,000 per annum (over half of this cost is in the planning area alone). (sub. 25, p. 6)

Based on the results of the survey the Commission is of the view that administering local laws accounts for a relatively small proportion of local government expenditure (around one to two per cent). This finding is generally consistent with views expressed by MAV who submitted that:

Specific data on the cost of local government regulation to councils is still unclear. Victorian Grants Commission data indicates that the costs to councils

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<sup>1</sup> Staff from the Commission visited several councils to provide assistance in completing the questionnaire.

of administering local regulation (local laws) is a very small proportion, about 1.5 per cent, of their total expenditure (sub. 19, p. 5).

The final part of the cost template asked local governments to estimate their functional allocation. The regulatory function of local governments can be broadly divided into:

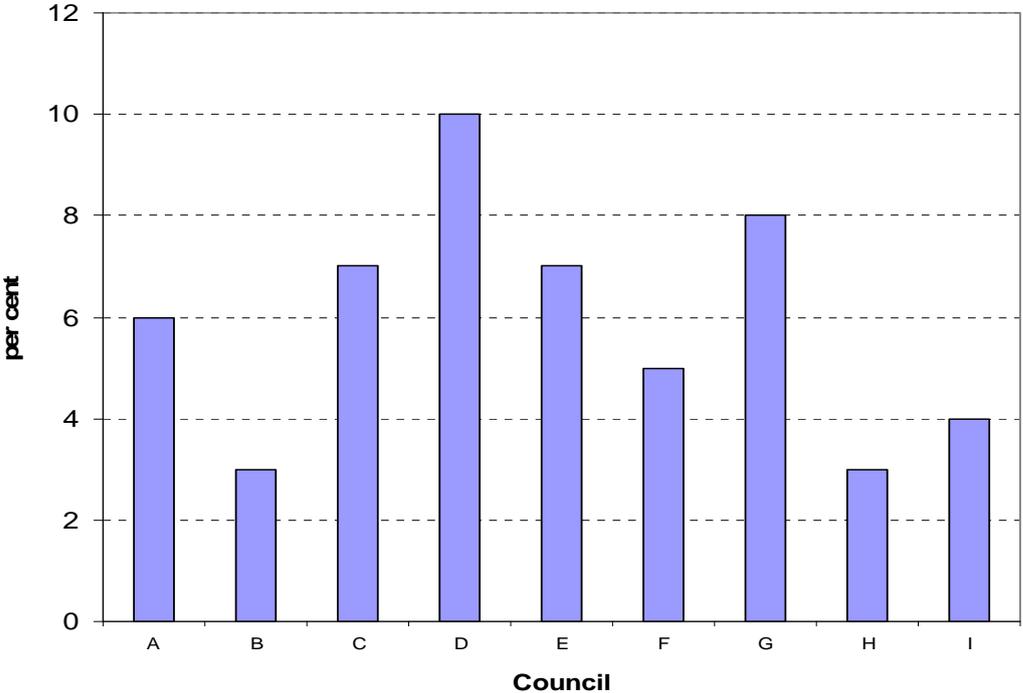
- policy and strategy
- advisory
- pre-lodgement discussions
- assessment and decisions
- monitoring and enforcement
- reporting.

The aim was to estimate the relative importance and costs of the above regulatory functions. The survey results showed significant variation between councils with different functions being important for different areas of regulation. For example with regard to planning, assessments and decisions accounted for 40 per cent of planning regulatory costs in one council to over 70 per cent of resources in another council. In the case of public health, monitoring and enforcement accounted for 45 per cent of regulatory costs relating to public health regulations in one council and 70 per cent in another.

The results of the survey show that the nine councils spent around \$83 million on administering regulations, representing about seven per cent of their total expenditure. It can also be seen from figure 9.1 that the regulatory cost as a proportion of total expenditure varies quite significantly across the nine councils, ranging between three and 10 per cent. In its submission to the issues paper MAV reported a total regulatory cost of around 13.5 per cent of total expenditure for the regulatory areas of planning, building, waste management and public health. (sub. 19, p. 13)

Planning Permit Activity Report (PPAR) data (see appendix B) provided by the Department of Planning and Community Development (DPCD) to the Commission also suggests large variation between councils in terms of their output (number of applications assessed). For the nine councils, there was significant variation in their total planning applications received per year ranging from 411 applications in one council to 1698 in another. There was also a large variation in the median days taken to assess total planning applications, ranging from 48 to 101 days. This variation exists even when controlling for differences in the level of complexity of planning permit applications. The median number of days to assess complex applications of an average level of complexity ranged from 75 to 149 days.

Figure 9.1 Regulatory costs as a proportion of total expenditure 2009-2010



Source: VCEC 2010.

To better understand relative performance, the Commission sought to measure labour productivity using information on the total number of applications assessed together with the number of planners employed by each council. The results of this analysis suggest a range between 31 to 139 applications per staff member. When controlling for the complexity of applications the analysis suggests a range of between 25 and 122 applications per worker.

While there appear to be significant differences in the regulatory costs of the nine councils it is difficult to identify the reasons for these differences. There may be multiple factors behind the variability in performance of councils such as differences in the complexity of regulatory work (for example, planning approvals) resource endowment, skill levels, management systems, and cultures and priorities. Other factors include differences in maturity of management processes, procedures and practices, as well as organisational capacity and capability. These need to be taken into account when measuring relative performance between specific councils or local government areas.

In summary, current information available to the Commission, such as the PPAR data and other cost data is not sufficient to assess the reasons for differences in councils' costs of providing regulatory services.

### 9.3.3 Estimating total regulatory costs from aggregate expenditure data

The previous section estimated the costs to local government of administering regulations from the results of a survey administered by the Commission (a 'bottom-up' approach). The results indicate that around seven per cent of council's total expenditure is directed towards administering regulations.

The Commission has also sought to test this result by identifying likely regulatory components from VGC expenditure data and comparing this to total annual expenditure (a 'top-down' approach).

It is important to note that the VGC data does not directly identify expenditure associated with 'regulatory services' provided by councils. It does, however, provide data on aggregate expenditure that is divided into various high level cost categories which can be disaggregated into smaller cost components. For example, one high level category is 'business and economic services' which can be broken down into the following sub-components:

- labour market program funding
- community development
- building control
- tourism and area promotion
- community amenities
- markets and saleyards
- community development
- aerodromes
- other economic affairs
- business undertaking
- local roads and bridges
- general administration

Given the aggregated nature of the data, an attempt was made to isolate those components which relate to one or more regulatory activities undertaken by councils. For example it was considered reasonable to exclude 'tourism and area promotion' as these activities were not judged to be regulatory in nature. Other expenditure items were judged to be related to service delivery and not regulatory services as such.

Major sub-components of expenditure under the high level category of Governance are Council operations, Local laws and law enforcement. In this case, under Local laws and Enforcement all the line items below the heading were judged to be regulatory in nature. Finally, under the high level category of

Community Health only one line item, expenses associated with compliance with the *Health Act 1958* and *Food Act 1984*, was judged to be regulatory in nature.

While this approach relies on some subjective assessment of the types of cost categories which are likely to be 'regulatory' in nature, the Commission has consulted with staff from DPCD, and councils to test the reasonableness of the assumptions made. The results of this exercise suggest that council's regulatory costs could represent around 11 per cent of the total annual expenditure of Victorian councils.

Combining these results, with the findings from the Commission's survey of councils and submissions suggests that that councils regulatory costs may represent between seven to 13 per cent (or around 10 per cent) of total local government expenditure. In undertaking this estimation exercise the Commission has formed a view that councils have significant difficulty identifying and extracting regulatory cost data from their various information systems. This difficulty leads to estimates of regulatory costs that are subject to (in some cases) considerable variability and imprecision.

## 9.4 Net costs

Councils incur costs from administration of regulations but they also derive revenues. To understand the capacity of, and incentives for, local government to regulate efficiently it is therefore important to look at their net costs. Several local councils as well as MAV highlighted the disparity between the revenue from fees and the resources required to administer regulations, providing data to support their concerns. For example, Port Phillip stated that the cost of running the planning service is approximately four times the fee income (sub. 14, p. 14). Table 9.1 provides data on the net cost in administering State and local laws in 2008-09 for the City of Stonnington (sub. 7, p. 22). According to MAV, only 25 per cent of the costs of providing planning regulatory services are recovered through fees (sub. 19, p. 14).

These sources suggest that for many of the most significant regulations, fee income is well below costs incurred. In short, local government has had to finance the net cost by either reducing the scope and quality of regulatory administration or reducing services elsewhere, or by increasing property rates or other revenue sources.

**Table 9.1 Net costs incurred by the City of Stonnington**

<i>Regulatory service</i>	<i>Income (\$)</i>	<i>Expense (\$)</i>	<i>Net surplus / (deficit) (\$)</i>
Environmental health	559 810	775 489	(215 675)
Environmental law	459 634	278 450	181 184
Parking control	13 117 575	6 418 853	6 698 722
Statutory planning	2 750 734	3 360 245	(609 510)
Strategic planning	146 690	1 371 921	(1 225 232)
Building control	1 133 686	1 594 372	(460 686)

*Source:* Sub. 7, p. 22.

### **9.4.1 Cost shifting**

Cost shifting in this context occurs when the State Government seeks to shift the financial costs of providing services to local government without a commensurate level of funding support. Cost shifting and net cost to councils are interdependent, involve a host of complicated issues, and are likely to affect the incentives facing councils to be efficient.

There is evidence that cost shifting, as conveyed to the Commission by councils, does occur. Further, cost shifting has been recognised at a Commonwealth level, for example, the House Standing Committee on Economics, Finance and Public Administration Hawker Inquiry 2003 report into Local Government and Cost Shifting concluded that cost shifting to local government by the States has occurred over many years. The inquiry found 'that cost shifting is ultimately a symptom of what has become dysfunctional governance and funding arrangements.' (Hawker Report 2003, p. 140)

The report also found that cost shifting occurs in circumstances where:

- Local government is required to provide services that had been previously provided by the other spheres of government.
- Services are formally referred to, and/or are assigned to local government through legislative and other State and/or Federal instruments without corresponding funding.
- Government policies are imposed that require local government to undertake costly compliance activity.
- Fees and charges that local government is permitted to apply, for services prescribed under state legislation or regulation, are not indexed (related to increase in costs of provision) (Hawker Report 2003, p. 25).

The major areas of cost shifting were identified as:

- the withdrawal or reduction of financial support once a program is established, therefore leaving local government with the choice of continuing a program or suffering the political odium of cancelling the service
- increased regulatory and compliance requirements
- failure to provide for indexation of fees and charges for services prescribed under state legislation or regulation.

The Hawker Report proposed 18 recommendations aimed at clarifying roles and responsibilities of the different levels of government and addressing the issue of cost shifting.

The problem of cost shifting from higher tiers of government to councils in Australia is widely recognised and has been investigated by several official inquiries. However, it is difficult to gather reliable estimates of the magnitude of the problem. Quite apart from definitional and data problems associated with the phenomenon, these difficulties have been compounded by the fact that very few attempts have been made to measure the impact of specific instances of cost shifting in Victoria.

These issues have been examined in previous Commission inquiries (see for example VCEC 2005b). Existing mechanisms for addressing these issues and opportunities for strengthening them are examined in chapter 10.

#### **9.4.2 Net cost and the Victorian guide to regulation**

Section 4.6 of the Victorian Guide to Regulation (Government of Victoria 2007c) recognises the important role local government plays in administering and enforcing state regulation. It also recognises the importance of local government having enough resources and capability to administer state regulation. Following the Commission's inquiry into regulatory barriers to regional economic development (VCEC 2005b), the Guide was amended to state that in circumstances where the Victorian Government intends for local governments to administer State regulation, the relevant lead department should consult with local government on:

- the resources required for the efficient administration and enforcement of the regulation
- how those resources will be funded
- the training and assistance which will be made available to local governments
- how the performance of councils in the efficient administration and enforcement will be assessed

- how the responsible state minister will account for local government performance
- an appropriate mechanism to publish the agreed resourcing, funding, training and performance monitoring arrangements (Government of Victoria 2007c, p. 50).

Further, the Guide states that 'the costs associated with the administration and enforcement of the regulation, along with the costs of the training and assistance would need to be provided to local governments' (Government of Victoria 2007c, p. 50).

### 9.4.3 Revenue generated from fees

One way local government can generate revenue to cover its regulatory expenditure is through statutory charges and fees.

Government guidelines on fees are presented in a Cost Recovery Guideline (the Guideline) issued by the Department of Treasury and Finance (DTF 2007). In summary, there are different arrangements for setting fees and charges (box 9.1). Some fees are set by legislation or regulations (such as planning and subdivision fees). Some fees are capped to an index such as the consumer price index (CPI). In some cases councils are able to set the level and structure of fees as they see appropriate.

#### Box 9.1 Fees setting examples

A number of fees for planning regulatory services are set by the *Planning and Environment (Fees) Regulations 2000* and are fixed. For example, the fee for considering a request to amend a planning scheme currently is \$798 (reg 6(1)). The fees have been amended from year to year to reflect CPI changes. In 2008 the corresponding fee was \$775 and in 2007 it was \$752.

Fees under the *Subdivision Act 1988* are set by the *Subdivision (Permits and Certification Fees) Regulations 2000*. The fees are fixed in accordance with a formula, for example the fee for processing an application to certify a plan of subdivision is \$100 per application plus \$20 per lot (reg 3(a)) and the fee for an engineering plan prepared by council is 3.5 per cent of the estimated cost of constructing the works proposed in the engineering plan (reg 4).

Source: VCEC analysis

With regard to certain regulations, councils can set their own fees but are required to take into account the Guidelines issued by the relevant Minister. For example, the *Building Act 1983* (Vic) provides that the Minister may from time to time issue guidelines on the fees to be charged by local government for dealing with applications for building permits and applications and other matters (s 188(1)).

On the other hand, under the *Building Regulations 2006* (Vic), reg 312(2), there is a maximum fee set of \$217.50 payable for consideration by the relevant council of an application for a building permit referred to under certain parts of the regulations.

With regard to the *Environment Protection Act 1970* (Vic), most permits and licenses are the responsibility of the Environment Protection Authority (EPA). Nonetheless, councils have specified functions, for example, to issue permits for septic tanks on receipt of applications accompanied by a fee determined by the relevant council, subject to the maximum fee prescribed in the regulations (s 53M). Regulation 19 of the *Environment Protection Fees Regulations 2001* provides that the maximum fee for septic tank permits is 46.35 fee units. (The value of one fee unit is currently \$11.35).

The *Public Health and Wellbeing Act 2008* (Vic) provides that councils have the function of dealing with applications for the issue, transfer or renewal of registration of certain premises. The fees may be set by the relevant council (s 72(1)(a)).

Similarly, under the Food Act, councils are responsible for assessing applications for registration, renewal of registration and transfer of registration of food premises. The fees may be set by the relevant council and may vary according to the size or nature of the food premises and must not exceed the amount (if any) for the time being fixed by the Governor in Council published in the Government Gazette (s 41A).

There is a question as to whether the multiplicity of fee setting arrangements for State government regulation implemented by local government adds to the complexity and costs of the acquittal of these responsibilities by local government.

#### **9.4.4 Cost recovery guidelines and incentives**

In general, Government policy requires that regulatory fees and user charges should be set on a full cost recovery basis to ensure that the objectives of efficiency and equity are met.

As noted in section 2.3 of the Guideline

- Full cost recovery promotes the efficient allocation of resources by sending the appropriate price signals about the value of all the resources being used in the provision of government goods, services and/or regulatory activity.
- From a horizontal equity point of view, full cost recovery ensures that those that have benefited from government-provided goods and services, or those that give rise to the need for government regulation, pay the associated cost.

Those parties that do not benefit or take part in a regulated activity do not have to bear the costs (DTF 2007, p. 6).

The Guideline outlines that while the general policy is for costs to be recovered on a full cost recovery basis, there are nevertheless situations where it may be desirable to achieve less than full cost recovery, or to not recover costs at all.

Section 3.4 of the Guideline (DTF 2007, p. 12) states that there is no optimal charging formula that applies to every case and that the charging approach that is ultimately adopted will depend on many factors, including:

- the relative weights given to the different efficiency and equity objectives of cost recovery charges
- practical implementation and legal issues
- consistency with other government policy goals.

For some areas of regulation, revenue collected may be greater than cost; for example the City of Stonnington Council generated \$13.1 million from parking control fees and fines relative to administrative costs of around \$6.5 million (sub.7 p. 21).

The Commission is also cognisant that whilst for a particular service, costs may be greater than revenue, there are other sources of revenue available to councils such as grants and property rates.

The Commission accepts that some cross-subsidisation of regulatory costs is inevitable in local government because the goods and services provided are not private goods but quasi-public goods, merit goods and goods with positive spill-over effects. As noted in the Cost Recovery Guideline, for various type of goods and services it may not be efficient or feasible to seek to recover all costs. As noted, section 3.4 of the Guideline states that there is no optimal charging formula that applies to every case.

## **9.5 Industry-wide cost drivers**

Given the structure and level of cost to local governments, it is important to identify the cost drivers of regulation because this will reveal the cost items that local government can address. Secondly, it will test the view of councils that state regulations are the primary driver of their regulatory costs.

Administering regulation is understood to be labour-intensive, and as local governments often find it difficult to employ and attract skilled staff, changes in the cost of administering regulation are generally directly related to increases in wages and salaries.

In assessing the movement in costs for an industry over time, an important variable is the development of a cost index to identify the underlying movement in the industry's input costs. While the Consumer Price Index (CPI) broadly reflects movements in household consumer spending, it is not applicable to industries with significantly different input costs, such as local government. Given this, MAV has developed an alternative cost index, the Local Government Cost Index, to reflect the movement in costs incurred by councils. The weighted index generally reflects the broad breakdown of local government expenditure. It is also used to forecast cost movement in the local government sector (MAV 2008).

Table 9.2 shows the movement in the consumer price index and local government cost index between 2001 and 2008.

**Table 9.2 Movement in the local government cost index (per cent change per year)**

	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
Consumer price index	3.1	2.2	2.3	2.7	2.9	3.3	3.2
Local government cost index	6.3	5.9	5.0	4.7	4.4	3.5	5.2
Average weekly earnings	7.2	6.6	4.9	4.4	2.8	2.9	5.0

*Source:* ABS (2009) and MAV (2010b)

The Local Government Cost Index indicates that for the local government sector, costs have been rising by around five per cent per annum on average for the last seven years. This compares with the CPI which has grown by just under three per cent per annum over the same time period. This may have implications for councils if a large proportion of their revenue stream is linked to changes in the CPI.

## 9.6 The Commission's view

This chapter has considered the costs to local government of administering regulations. It has done this through examining publicly available information, undertaking a survey of a sample of councils, and analysing cost information held by the Victorian Grants Commission. These sources suggest that regulatory costs may lie between seven and 13 per cent of total local government expenditure, thereby representing a relatively small part of total council activity.

In attempting to estimate the costs to local government the Commission found that there is a lack of publicly available data, and is also of the view that councils' capacity to report on these costs is limited. This limitation is likely to impact on

the degree to which councils can effectively manage and minimise their regulatory costs and the corresponding cost to business. The following draft recommendation is intended to address this issue.

**Draft recommendation 9.1**

**In order to improve the capacity of local government to manage the costs of administering regulation, to provide a better basis for user pays charging, and to measure the net cost to local government of administering major regulations, Local Government Victoria, in collaboration with the Municipal Association of Victoria, undertake a project with selected councils to measure better the costs attributable to the administration of major State and local regulations with a view to this being eventually employed by all councils.**



## 10 Improving the institutional arrangements

### 10.1 Introduction

A recurring theme in preceding chapters has been the Commission's view that local government will be an integral part of Victoria's capacity to address through regulation, the major liveability challenges of responding to strong population growth, managing growing demand for infrastructure and other services, and adapting to climate change. While the stresses on councils' regulatory capacity appear largely related to planning and building and construction, the Commission's view is that these pressures will intensify, and that current structures and processes, at their best relying on goodwill to navigate ambiguities and conflicts, will no longer suffice.

The Commission acknowledges and supports the efforts, in some cases very substantial, of the Victorian Government and councils to improve a number of areas of regulation. These actions are aimed at achieving State-wide objectives, whilst broadly having regard to the diverse nature of councils, including the differences in capacity, and the characteristics of their communities.

Stepping back from the details of preceding chapters, the Commission has made specific recommendations that are intended to address the three primary facets of effective and efficient regulatory systems, namely:

- the availability of resources, especially skilled labour
- the efficiency of processes, without compromising the policy objectives
- the institutional architecture within which regulators operate.

These facets of an effective and efficient regulatory system are interdependent; in order to make enduring improvements to a regulatory system it is necessary to address all three elements. Ensuring councils have the capacity to direct planning permit applications into simple and complex assessment paths is an example of a process change that helps to address problems relating to the availability of resources (such as skilled planners). This can occur because the most capable planning staff can focus on the complex matters, with other activities being handled by staff with different skills. While such changes would produce quicker decisions, it may be possible to produce much larger gains by addressing elements of the institutional architecture, such as the incentives facing councils to adopt process improvements, or for State and local governments to agree on a clear set of priorities for planning that enables complex policy trade-offs to be resolved early (chapter 5).

The Commission believes that improving resources and processes in planning and building and construction (and procurement) provide opportunities for

significant short-term efficiency gains that can be implemented most quickly. That said, the benefits that can be realised from these changes will depend on the extent to which the institutional architecture governing the relationship between State and local governments is also addressed.

A challenge here is that because the changes to the institutional architecture can take longer to develop, there is a case for starting on them as soon as possible. And because the architecture changes will usually be implemented later, any resourcing or process changes that are implemented earlier should be implemented in a way that does not constrain subsequent changes to the architecture.

It is within this context of the need to address all three facets of efficient and effective regulatory systems, that this chapter argues that councils are more likely to enforce regulations with appropriate consistency, reap the benefits of improving the efficiency of the administration of regulations, and reduce the burden of regulation if they work within a well-designed ‘architecture’ of government. This requires that they:

- regulate when they are the right level of government for the task (section 10.2)
- have clearly defined purposes and objectives that they aspire to achieve, and which do not conflict with State Government objectives (section 10.3)
- have clear accountabilities, roles and responsibilities, so that they know exactly what they need to do to achieve the objectives (section 10.4)
- have guidance from the Victorian Government about how to enforce regulation (section 10.5)
- have sufficient resources to undertake the role, with funds provided in a form that encourages good performance (section 10.6)
- have staff with the competencies needed to enforce relevant regulations effectively (section 10.7)
- possess appropriate powers and a toolkit of sanctions that enable proportionate and effective responses to regulatory non-compliance (section 10.8)
- are transparently assessed through performance reporting about how well they are performing their role (section 10.9)
- are encouraged to pursue continuous improvement through processes for reviewing current practice (section 10.10), and encouraging cooperation between councils (section 10.11).

Improving the design of the ‘architecture’ within which councils operate is only part of the story. Just as an architect needs builders to bring a design to life,

improvements to the design of the government architecture need to be implemented effectively. Section 10.12 discusses implementation issues.

The Commission is recommending changes in several areas. In others, it is seeking more information before deciding whether to make recommendations in the final report.

## **10.2 Allocation of roles between levels of government**

Chapter 2 explained that by addressing local community needs, councils sometimes impose costs on other communities. If such effects are pervasive, regulation should be assigned to a higher level of government. So the first question is whether responsibility for regulation has been allocated to the right level of government.

Answering this question is difficult: ‘there is no uniformity of practice in the world with regard to division of powers and responsibilities’ (Charbit and Michalun 2009, p. 139). A good implementation principle is that a role should not be assigned by a higher to a lower level of government without consultation and the support of the lower government. Adherence to this principle makes it more likely that duplication will be avoided and that the role will be performed effectively. According to the Mayor of the City of Queenscliff, Mr Bob Merriman, this does not always happen:

There’s acres of duplication...Any consultation before these demands are made of us is sadly missing and there is no explanation at all as to why they are needed (Egan 2010, p. 3).

And it is too simple to think only in terms of role allocation. Even when the State Government assigns a regulatory role to local government, it sometimes retains a reserve power to over-rule council decisions which it believes have insufficient regard for state-wide issues. The call-in power of the Minister for Planning under the Planning and Environment Act 1987 (Vic.) is an example.

General principles can inform the allocation of responsibilities between levels of government (box 10.1), but implementation requires case by case analysis. The Commission has not been presented with compelling evidence to support reallocating roles in any areas of regulation for which local government is responsible, but rather a need for closer definition of the respective roles.

### Box 10.1 Subsidiarity principles

According to the Productivity Commission, responsibility for a function should, where practicable, be allocated to the lowest level of government. Nevertheless, there is broad support for assigning responsibility to the highest level of government when there are:

- interjurisdictional spillovers from a function being allocated to a lower level of government
- economies of scale or scope from central provision
- high transaction costs without offsetting benefits from a diversity of rules and regulations
- risks that mobility across jurisdictions could undermine the fiscal strength of sub-national government.

*Source:* Productivity Commission 2005, pp. 3-4.

## 10.3 Clarity of purpose and objectives

This section argues that the Victorian Government could encourage consistent enforcement of the regulations it assigns to councils by:

- clarifying the objectives of the state legislation that councils administer on its behalf, because if the objectives are not clear, councils will have to define them for themselves, and may reach different conclusions about what they are trying to achieve and how they should achieve it
- providing more guidance about the Government's priorities and about areas where it does not expect councils to regulate. Otherwise councils will establish their own individual priorities and allocate their effort accordingly.

### 10.3.1 Clarifying the objectives of State legislation

State and local governments pursue many objectives through state regulation and local laws. The Commission observed ambiguity in the Government's objectives in previous inquiries into regulation of food safety (VCEC 2007b, pp. 168-173), housing construction (VCEC 2005a, pp. 257-265) and native vegetation (VCEC 2009a, pp. 141-145). The Government supported or supported in principle its recommendations to clarify objectives in each of these areas (Government of Victoria 2006b, p. 13; 2008a, pp. 11-12; 2010, p. 30).

Ambiguous objectives increase the risk of inconsistent enforcement by councils. This problem will be compounded if there are tensions between the objectives of various Acts. For example, Commissioner Susan Pascoe commented in the Bushfire Royal Commission that councils face a 'morass of regulatory requirements' (Pascoe 2010, p. 15698) when balancing difficult questions

concerning the protection of native vegetation on the one hand and rules covering bushfire risks and vegetation removal on the other:

I think the disappointing thing is that over time we layer and layer up regulation and legislation without thinking of the unintended consequences of it and it biases things. There is no doubt that native vegetation is important, the habitat is critical, but also the safety of humans is critical. Getting that balance right requires I think a stripping back of the legislation and a rethink of the whole model. (Pascoe 2010, pp. 15698 -15699)

The President of the Municipal Association of Victoria, Mr Bill McArthur, makes a similar point:

It is layer upon layer of legislation and regulations and they are often in conflict with each other (Egan 2010, p. 3).

Interpretation will be still more difficult if terminology is inconsistent between Acts. The Municipal Association of Victoria believes there are many examples of ‘multiple and conflicting’ definitions across Acts:

The bushfires highlighted the disparity in definitions for ‘temporary dwellings’ across the Planning and Environment Act, the Building Act, the Office of Housing (DHS), the Environment Protection Act and within council local laws.

The various definitions of rooming house has caused problems in terms of determining the class of building (Building Act), land use planning provisions, Health Regulations and Residential Tenancies. (sub. 19, p. 9)

Reviewing the objectives and terminology of the 29 Acts administered by Councils is too big a task for this inquiry. Based on its previous inquiries and the focus areas of this draft report (planning, building and construction, and procurement), the Commission suggests attention focus initially on the Local Government Act and the Planning and Environment Act. After that, there could be a process for councils to nominate when they need clarification. Departments should be proactive in seeking councils’ views. One option, but one that would be resource-intensive, would be for the departments responsible for the Acts administered by councils, after consultation with councils, to prepare a report, which could be published, describing each Act’s objectives and the outcomes sought. This would clarify objectives for each Act, but would not signal the Government’s priorities between various objectives.

#### *Information request*

*Which areas of regulation are experienced by councils as being in conflict with each other? Would clarification of the objectives of Acts through which councils enforce regulations contribute to more consistent enforcement? Which Acts should receive initial attention? What form could a process take for developing priorities for the remaining Acts? What would be the most effective way for more clarity to be provided?*

### 10.3.2 More guidance about the Government's priorities

As well as interpreting the objectives of specific Acts, councils have to decide how to allocate effort between them. Councils could be expected to infer priorities from interactions with the State Government and from its announcements. This is unlikely, however, to yield an overall sense of priorities. They might also look at the severity of penalties associated with different Acts as an indicator of the importance that the State Government attaches to them.

These indicators lend themselves to different interpretations and different councils may attach different priorities to enforcement in different areas of regulation in response to their different individual circumstances. This would not necessarily indicate a problem if the Government had decided that local priorities should dominate. In some cases, however, State Government guidance would help councils to set priorities that are consistent with state-wide objectives rather than pulling against them.

Ways to establish priorities include:

- establishing a Victorian version of the Council of Australian Governments for state and local governments
- expanding the existing Local Government Ministerial Forum (described in chapter 2), so that it is used to develop a shared understanding of priorities, funding, implementation strategies, reporting and evaluation
- using the existing Regional Ministers' Forums to cover a similar set of issues
- setting up a new, non-ministerial, consultative process to establish enforcement priorities. The United Kingdom Government, for example, set up a review to establish national enforcement priorities for local authorities in England<sup>1</sup>
- make it an explicit responsibility of the role of the Minister for Local Government to convey priorities that the Minister would need to establish, drawing on processes within the State Government
- build on the networking functions of the Municipal Association of Victoria.

An approach that would utilise an existing forum is to use the Local Government Ministerial Forum to develop a set of agreed priorities. These

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<sup>1</sup> This review, which involved consultation with government departments, regulators, local authorities, citizens and businesses will '... help local authorities plan their resources and prioritise their activities. This will help ensure the most critical of central government's regulatory objectives are delivered consistently and effectively throughout England while, at the same time, better enabling local authorities to deliver local priorities that respond to the needs of local citizens and businesses. This, in turn, should help local authority regulatory services highlight to local political leaders, and those they serve, the value they deliver in their communities' (Rogers 2007, p.8). This process appears to have been resource intensive, although the Local Better Regulation Office has since developed priorities for Wales, using a less extensive approach (see <http://wales.gov.uk/consultations/improving/nepwales/?lang=en&status=closed>)

priorities could be expressed as specific targets (such as the number of new dwellings approved or communities with Safer Neighbourhood Places). However, attendance at the Forum would need to be expanded to include ministers with the authority to establish policy priorities.

Alternatively, the Forum could provide general guidance about the relative importance of different areas, and specify good processes that it expects councils to follow in responding to these priorities. Local Government Victoria (LGV) could be directed to report publicly on councils' progress, drawing on the performance reporting framework that the Essential Services Commission (ESC) is developing.

The Regional Ministers' Forum also has the advantage of being already established, but its focus would need to be changed if it was required to take a state-wide perspective, probably requiring the addition of a higher level process for bringing together regional perspectives.

Given that local government will play a central, practical role in responding at the local level to the future challenges facing Victoria, there is a good case for a Victorian version of the Council of Australian Governments (COAG). If representation were at the most senior levels, including the Premier, it could have the authority to set priorities, agree on funding mechanisms, and ensure there is an understanding of best practice in areas such as those currently being supported by LGV. A key issue, however, would be the involvement of all 79 councils, given the significant costs that would be involved.

The Commission believes there would be significant benefits if the State Government provided more guidance about its priorities in respect of the areas that councils regulate on its behalf. It is, however, seeking more information about the best mechanism for developing these priorities before making a recommendation in the final report.

#### **Draft recommendation 10.1**

**That the Government develops a clear list of agreed priorities for regulatory services that councils administer on its behalf.**

#### *Information request*

*Which of the options outlined above would be the most appropriate for discussing the setting of priorities for regulatory services that councils administer on behalf of the Victorian Government? What would be the scope for considering the associated question of funding options, especially where there are claims of cost shifting?*

## 10.4 Clear accountabilities, roles and responsibilities

How clearly councils understand their roles and accountabilities influences how they carry out delegated regulatory responsibilities. For example, if they share responsibilities with other agencies and their respective roles are ambiguous, this can lead either to tasks not being performed—because each agency believes the other is carrying out the task—or to duplication.

Consider a situation in which an agency or department shares responsibility with councils for an area of regulation and responsibilities are not clear. Different councils may settle at different points on the spectrum between leaving regulation to the agency and duplicating what the agency is doing, leading to inconsistent administration of regulation between councils as well as a higher than necessary burden of regulation when duplication occurs.

The Municipal Association of Victoria pointed to a number of examples, such as:

... rooming houses are regulated under multiple Acts and regulations that create obligations for a range of agencies and across different teams within councils. The relationship between agencies—through legislation and through operational processes—is complex. This complexity has increased with the recent appointment by Consumer Affairs of 12 officers to enforce rogue rooming house premises. (sub. 19, p. 8)

The Commission has observed other examples in previous inquiries. For example, the Victorian Farmers Federation told its inquiry into environmental regulation that overlaps between councils, catchment management authorities and the Department of Sustainability and Environment is the most important issue to address in improving regulation. Indigo Shire Council also pointed to duplications between councils and the same agencies, extending also to native vegetation responsibilities (VCEC 2009a, pp. 29–30).

Similarly, the Commission's inquiry into food safety regulation found ambiguous responsibilities. The Government agreed that governance of Victoria's food regulatory system needs to be strengthened to clarify that councils are the primary regulators of food premises within their municipalities and the State Government has responsibility for matters of state-wide significance (for example, coordinating food recalls).<sup>2</sup>

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<sup>2</sup> The Government decided to: clarify the roles and responsibilities of the Minister for Health, the Department of Human Services, and local councils; introduce a directions power into the Act to enable the Minister for Health to direct local government (recommendation 8.9); and require all councils to collect and submit data to the Department of Human Services about their activities under the Food Act (recommendation 8.10). Under the enhanced Food Act governance framework, the Minister for Health, the Department of Human Services and local government will be publicly accountable for the matters for which they have been given statutory responsibility (Government of Victoria 2008, pp. 12-13).

Chapters 4, 5, 6 and 7 pointed to ambiguous accountabilities in planning and building regulation and procurement practices, and suggested improvements. The Commission has not reviewed accountabilities for other council regulatory services, except in a number of earlier inquiries including into food safety regulation (VCEC 2007b) and environmental regulation (VCEC 2009a).

Ways to clarify accountabilities include giving responsibility to a single agency, establishing a coordinating committee, and developing memorandums of understanding (MOU) between regulators. The Commission compared the merits of these approaches for food safety regulation (VCEC 2007b, pp. 176-181). These options are already implemented in some areas; the Municipal Association of Victoria (MAV) gave the example of the MOU that it has entered into with Victoria Police to pilot improved information sharing and coordinate enforcement action of illegal brothels (MAV, sub. 19, p. 8).

The Commission believes the State Government departments administering Acts are responsible for ensuring that roles and accountabilities for these areas of regulation are clear and understood, particularly when they are introduced. As in the case of clarifying objectives, there could be a process for councils to nominate when they need clarification. There is also a strong case for ensuring councils or MAV are consulted before new legislation that affects them is introduced. Departments should be proactive in seeking councils' views. It is highly likely that such consultation will lead to better understanding of how to implement regulatory processes and, as a result, to better definition of roles and responsibilities of local government regulators.

#### *Information request*

*In which areas of regulation do councils experience unclear or overlapping accountabilities? Would clarification of roles and responsibilities for enforcing regulations contribute to more consistent enforcement? Which areas should receive initial attention? What form could a process take for developing priorities for the remaining Acts? What would be the most effective way for more clarity to be provided?*

## **10.5 Guidance on enforcement**

Government guidance about how it expects regulations to be enforced in general or in specific areas can promote consistency (by setting out a framework or general principles) and streamlining (by providing advice about how to enforce regulation while reducing its costs).

Good practice principles for regulation guide the approach to regulation in many countries (see OECD 2005, p. 1). And as Charbit and Michalun, in a report prepared for the OECD, note:

Evidence from OECD countries shows that there is a need to improve the effectiveness of the relations between levels of government in terms of the quality of regulation. There is a growing understanding of the importance to apply principles of high quality regulation at all levels of government (Charbit and Michalun 2009, p. 137).

Charbit and Michalun use the principle of transparency to illustrate the particular importance of applying best practice principles to lower levels of government. Transparency:

can address many of the causes of regulatory failures, such as regulatory capture and bias towards concentrated benefits, inadequate information in the public sector, rigidity, market uncertainty and inability to understand policy risk, and lack of accountability. In lower levels of government, these problems tend to be more acute as the interaction with more actors and the diversity of roles and responsibilities increase the complexity of the system...Transparency can therefore improve the choice of regulatory policy options and avoid arbitrary decisions in regulatory implementation (Charbit and Michalun 2009, p. 154).

### 10.5.1 General guidance

#### **Current guidance is about developing, not enforcing, regulation**

The Victorian Government has established principles of best practice regulation in the Victorian Guide to Regulation (VGR) (box 10.2).<sup>3</sup> It believes that ‘once a positive argument for government regulation has been established, it is important that the nature of the regulation meets’ these characteristics (Government of Victoria 2007c, p. 3-1). Two relevant issues are whether the principles apply to local government and whether they provide helpful guidance about how to enforce regulation.

With respect to the first issue, local laws are excluded from the *Subordinate Legislation Act 1994* (Vic.), which implies that the VGR does not apply to them. But the VGR does apply to the development of regulations under the State Acts administered by councils.

Turning to the second issue, the principles in box 10.2 focus mainly on the design of regulation, rather than implementation and enforcement, which is the stage of the regulatory process in which councils are principally involved. The Premier’s foreword to the VGR states that it is the ‘definitive guide to developing regulation’ (Government of Victoria 2007c, p. i), rather than a guide to enforcing regulation, and the VGR’s only section on enforcement is short (Government of Victoria 2007c, p. 3-12). The principles in the VGR seem

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<sup>3</sup> As noted in chapter 2, the Local Government Act requires councils to comply with best value principles. But these were developed to guide procurement rather than regulation.

unlikely to influence councils' approach to enforcement, particularly given that chapter 2 reported that councils' awareness of the VGR is not high.

### **Box 10.2 The Victorian Government's criteria for good regulation**

- Effectiveness. Regulation must be focused on the problem and achieve its intended policy objectives with minimal side-effects. The regulatory system should also encourage innovation and complement the efficiency of markets.
- Proportionality. Regulatory measures should be proportional to the problem that they seek to address.
- Flexibility. Government departments and agencies are encouraged to pursue a culture of continuous improvement, and regularly review legislative and regulatory restrictions.
- Transparency. The development and enforcement of government regulation should be transparent to the community and the business sector.
- Consistent and predictable. Regulation should be consistent with other policies, laws and agreements affecting regulated parties to avoid confusion. It should also be predictable in order to create a stable regulatory environment and foster business confidence.
- Cooperation. When appropriate, regulation must be developed with the participation of the community and business and in coordination with other jurisdictions, both within Australia and internationally.
- Accountability. The Government must explain its decisions on regulation and be subject to public scrutiny.
- Subject to appeal. There should be transparent and robust mechanisms to appeal against decisions made by a regulatory body that may have significant impacts on individuals and/or businesses.

*Source: Government of Victoria 2007c, pp. 3-1 3-2.*

### **But enforcement is also important**

Yet the effectiveness and burden of regulation is dependent on how it is enforced:

The enforcement of regulations affects businesses at least as much as the policy of the regulation itself. Efficient enforcement can support compliance across the whole range of businesses, delivering targeted, effective interventions without unreasonable administrative cost to business. Inflexible or inefficient enforcement increases administrative burdens needlessly, and thereby reduces the benefits that regulations can bring (Hampton 2005, p. 1).

This quotation is taken from a report commissioned by the United Kingdom Government, which proposed improving enforcement through, for example, basing enforcement programs on risk assessment; having no inspections without a reason; reducing and simplifying forms; and coordinating data requirements (Hampton 2005, p. 1). Following this report, the Government implemented a

statutory Regulators' Compliance Code to provide guidance about how it expects regulators to enforce regulation. Some regulators have also developed more detailed enforcement guidance identifying how they would give effect to these requirements (box 10.3). By doing so, they would be looking for ways to reduce regulatory burden and inconsistencies, taking enforcement in the direction that the Victorian Government also wants to go.

### **Box 10.3 The United Kingdom's Guidance for Enforcing Authorities**

The Regulators' Compliance Code, which has statutory force, requires regulators to plan regulation and inspections in a way that causes least disruption to the economy. Its purpose is to promote efficient and effective approaches to regulatory inspection and enforcement which improve regulatory outcomes without imposing unnecessary burdens on business, the Third Sector and other regulated entities. Regulators must have regard to the Code when determining policies, setting standards or giving guidance in relation to their duties.

The Code requires regulators to:

- support economic progress by performing regulatory duties without impeding business productivity
- provide information and advice in a way that enables businesses to clearly understand what is required by law
- only perform inspections following a risk assessment, so that resources are focused on those least likely to comply
- collaborate with other regulators to share data and minimise demand on businesses
- follow principles on penalties outlined in Macrory (2006) when undertaking formal enforcement actions, including sanctions and penalties
- increase transparency by reporting on outcomes, costs and perceptions of their enforcement approach.

In addition, some regulators have set out principles and implementation standards to which enforcing authorities (EAs) should adhere. For example, the Health and Safety Executive and local authorities have developed a joint standard covering systems and infrastructure, capacity, performance management, enforcement policy, how the agencies will work together, and how they will promote sensible risk management.

*Source:* Department for Business Enterprise and Regulatory Reform 2007, Health and Safety Executive 2008, Macrory 2006.

The absence of general enforcement principles is a gap in Victoria's regulatory architecture. One option is to develop a regulators' compliance code, possibly modelled on the United Kingdom's code. A less extensive option is to re-focus the best practice principles in the VGR so that they cover enforcement as well as development of options (see box 10.4 for one approach). A third option is for

the government not to establish any guiding principles, but require councils to publish enforcement strategies.

### Box 10.4 Five principles of good enforcement of regulation

#### *Proportionality*

- The impact on all those affected by the regulation should clearly establish the right balance between risk and cost; without unnecessary demands on those being regulated.
- Enforcement action (for example, inspection, sanction) must be in proportion to the seriousness of the offence.

#### *Accountability*

- Regulators must be accountable to stakeholders.
- There must be well publicised, accessible, fair and efficient appeals procedures.

#### *Consistency*

- There must be consistent enforcement by relevant authorities across the country.

#### *Transparency*

- Regulations must be simple and clear.
- Those regulated must be made aware of their regulation and helped to comply.
- Proposals must be published and ample time for consultation must be given before decisions are made.
- Regulatory failures must be handled openly by Government.

#### *Targeting*

- The approach is aimed at the problem and not scatter-gun or universal.
- Flexible targets should be preferred to rigidity. Regulators and those who are regulated must be given scope to decide how best to achieve those targets.
- Regulations should be reviewed from time to time to test whether they are still necessary and effective.

*Source:* Better Regulation Executive 2009, pp. 94–95.

Guidance about enforcement would help councils to enforce regulation consistently and to reduce regulatory burden, while focusing on the desired regulatory outcomes. Such principles could be used by other Victorian regulators, as well as councils.

In the longer term, there is a good case for a statutory code of the type implemented in the United Kingdom. Imposing this code on councils at the same time as the new reporting arrangements may, however, create implementation problems. The Commission therefore favours an intermediate

position, involving the Government re-writing the best practice principles in the VGR so that they also cover enforcement, and supporting this with a training program.

**Draft recommendation 10.2**

**That the Department of Treasury and Finance re-writes the best practice principles in the Victorian Guide to Regulation so that they cover the implementation and enforcement, as well as the development, of regulation. The Department should consult with councils in developing the principles and develop a training program to help councils to apply them.**

### 10.5.2 Guidance about how to administer particular areas of regulation

The objectives of legislation are often expressed generally, and may need to be supplemented by more specific guidance. The Macedon Ranges Residents Association Inc. suggested that the absence of such guidance, combined with the movement away from prescriptive regulation, causes inconsistent administration of regulation:

... one of the greatest time- and money- wasting factors associated with local government is lack of clear requirements (i.e. the current ephemeral 'performance based' principle, at both State and local levels). ...Our Association supports greater prescription in principle, including in planning schemes. This would give clearer guidance about requirements and what is possible and what is not, and would set the 'starting point' at a level that reflects what is acceptable in a local context. This in turn would calm community concerns and likely produce more effective and efficient decisions for business. The current trend of de-regulation and 'generic' policy produces an excess of inconsistency and an ability for apparently endless interpretation – the answer depends on who gives it. (sub. 16, p. 2)

While the Commission has not generally supported prescriptive approaches to regulation, it has supported government guidance to councils to improve consistency; for example, in relation to food safety regulation. The Government agreed in that case, noting that:

... in a devolved regulatory system, such as Victoria's, it is important to have a statutory mechanism that can be invoked (if required) to ensure significant policy issues are addressed in a consistent way (Government of Victoria 2008a,p. 16).

Subsequent amendments to the *Food Act 1984* (Vic) in 2009 gave the Department of Human Services a statutory role to provide guidance and leadership to councils about the regulation of food businesses and to promote the consistent

administration of this Act by providing guidance to councils and others (*Food Amendment (Regulation Reform) Act 2009*, s1, s7B).

There is an opportunity for departments to use consultation with councils to develop guidance about how a new obligation should be enforced. As discussed in chapter 2, the VGR (section 4-6) specifies that departments should consult with councils when implementing new or amended regulation (box 10.5). ‘Should’ has a number of meanings, but implies that a course of action is an obligation or advisable, rather than a requirement. Indeed, in the Commission’s experience this is how some departments have interpreted section 4-6 when preparing regulatory impact assessments. Yet this interpretation seems inconsistent with the Government’s intent, as expressed in its response to the Commission’s recommendation in its first report that led to the inclusion of section 4-6 in the VGR:

In this context, the resources available to, and capability of, local governments, particularly the availability of staff with appropriate training and skills, to efficiently administer and enforce state regulation is of utmost importance (emphasis added) to the Government. (Government of Victoria 2005a, p. 21)

#### **Box 10.5 Consultation with local government**

The Victorian Guide to Regulation (section 4-6) requires that where the Victorian Government intends for local government to administer or enforce new primary legislation, or new or revised regulation, the relevant lead department should consult with local government on:

- the resources required for the efficient administration and enforcement of the regulation
- how those resources will be funded
- the training and assistance which will be made available to local governments
- how the performance of the local governments in the efficient administration and enforcement will be assessed
- how the responsible State Minister will account for local government performance
- an appropriate mechanism to publish the agreed resourcing, funding, training and performance monitoring arrangements.

*Source:* Government of Victoria 2007c, pp. 4-50.

Given the significance that the Government attaches to this issue, the Commission believes that the VGR needs to be amended to clarify that it is a requirement that departments consult with councils when implementing new or amended regulation.

For consultation to be effective, it should:

- take place when the process is still formative, rather than when decisions about design and implementation have already been taken
- be designed to enable departments to understand councils' capabilities and weaknesses, and to develop ways to build on the strengths and overcome limitations
- consider how a new obligation affects other council functions.

Recording the issues covered in this consultation in an implementation plan would encourage a shared understanding of the outcomes of the consultation and commitment to achieving them. Developing the plans should involve little additional cost beyond documenting the results of consultation that are already required. The MAV's *Public Health and Wellbeing Act 2008 Information Toolkit* provides a useful example of the type of plan that could be developed more widely.

### **Recommendation 10.3**

**That the Department of Treasury and Finance amend section 4-6 of the Victorian Guide to Regulation, to specify that where the Victorian Government intends for local government to administer or enforce new primary legislation, or new or revised regulation, it is a requirement that the relevant lead department consult with local government. This consultation needs to:**

- take place when the proposal is still formative
- enable the department to understand councils' capabilities and weaknesses, and to develop ways to build on the strengths and overcome limitations
- consider how a new obligation affects other council functions.

**That the amendments to the Victorian Guide to Regulation require the relevant lead department to document its consultations with councils about new or revised regulations in an implementation plan. This plan would guide councils' administration and enforcement of the new obligation and outline how the department will help councils to deliver it.**

## **10.6 Funding and financial incentives**

Funding and financial incentives are two sides of the same coin. Funds provide the resources for councils to deliver regulatory services, but the scale and form in which the funds are provided sets up financial incentives that influence the way in which councils deliver the services.

As reported in chapter 9, councils' fees for most regulatory services do not usually cover costs, and the deficit is covered from other revenue sources. This raises complicated issues. Councils argue that the State Government is shifting the costs of regulation onto them and they have inadequate resources to undertake the role, let alone fund better ways of doing the job:

...local government has the appetite to engage in reform of regulatory burdens. However, the biggest impediment to continued reform and productivity gains is the lack of available capital to implement programs (MAV 2009e, p. 5).

On the other hand, councils often face little competition as regulators, leading to concerns that their fees could become excessive. (Although the fact that councillors are elected officials is likely to constrain fees.)

This section discusses ways that funding and financial incentives could strengthen councils' capability to enforce regulation. The options discussed are:

- changing the way in which councils' regulatory fees and charges are themselves regulated
- introducing competition in the provision of regulatory services
- providing direct financial incentives to encourage good practice
- funding research to support innovation
- funding new regulatory obligations.

### **10.6.1 Regulation of councils' fees and charges**

As noted in chapter 9, councils' regulatory fees and charges are set in many different ways. Some are specified in legislation. Others are established by councils but subject to Ministerial guidelines. Others are linked to the consumer price index and still others are set by councils.

Monopoly provision of regulatory services creates a dilemma. Without regulation of their charges, councils might set them above the efficient level. But avoiding this risk through regulating council fees risks weakening their incentive and capability to pursue cost-reducing innovations. There is no simple solution to this dilemma. Possible options include:

- deregulating all fees. Concerns with this option are that councils might charge fees that exceed the cost of delivery or might feel obliged to grant permits to applicants who have paid high fees
- deregulating all fees, but requiring that they are published, including on-line, to facilitate 'competition by comparison'. This should not be difficult to implement, but on its own may not significantly affect council behaviour
- making all local government charges subject to the general cost recovery guidelines. Relying on these guidelines may require some smaller councils

with under-developed cost accounting to develop new arrangements so that they can comply with the guidelines. A central ‘price regulator’ would have to administer the guidelines

- setting up a ‘benchmark’ price for each regulatory service based on the cost recovery guidelines, to reduce the burden of administering the cost recovery guidelines. This approach, however, would not recognise differences between councils in cost structures
- allowing councils to set their own fees, after first going through a RIS-type process. Councils which did not want to go through this process could rely instead on a default fee set by the State Government, which would also have the capacity to revoke a council’s fees which the Government believed was excessive. This is what the Commission is proposing for planning fees (see chapter 5)
- increasing competition between councils where possible. Some examples are described below.

Having so many different arrangements for setting regulatory fees adds to complexity, but the Commission has received evidence neither about the size of the costs that this complexity creates, nor of the transition costs of moving to a different arrangement. Moreover, there is not a clear best alternative from those outlined above. The Commission’s proposal for planning fees may not suit smaller fees, for which a RIS-style process on a council by council basis would not be justified. Accordingly, the Commission does not at this stage propose recommending changes to arrangements for setting fees for other regulatory services.

#### *Information request*

*Do the current arrangements for setting regulatory fees cause any problems for councils or for those who are regulated? Are any of the options outlined above superior to the current arrangements and, if so, why? Is there a better option that is not listed above?*

### **10.6.2 Introducing competition into regulatory services**

Competitive provision of regulatory services within a sound governance framework is one way to escape the dilemma outlined in the previous section. Competition is doubly attractive if it improves regulatory services at the same time.

Building inspection – provided in Victoria either by councils or private inspectors – is a significant example. The United Kingdom has recently introduced a scheme (the primary authority scheme) that is particularly interesting for this inquiry because it combines competitive provision of a regulatory service with the objective of improving the consistency of regulation.

## The United Kingdom primary authority scheme

The primary authority scheme is a close relation to mutual recognition schemes. Under this scheme, a business with premises in many municipalities can form a partnership with a single council (the primary authority). The advice that the primary authority provides to the business about what it needs to do to comply with its legal obligations must then be taken into account by other councils when carrying out inspections or dealing with non-compliance by that business (box 10.6).

### Box 10.6 Key aspects of the primary authority scheme

- (1) Regardless of its size, any company operating across council boundaries has the opportunity to form a partnership with a single local authority in relation to regulatory compliance. These agreements can cover all environmental health and trading standards legislation, or specific functions such as food safety or petroleum licensing.
- (2) A central register of the partnerships, held on a secure database, provides an authoritative reference source for businesses and councils.
- (3) If a company cannot find an appropriate partner, it can ask the Local Better Regulation Office (LBRO) to find a suitable local authority for it to work with.
- (4) A primary authority provides robust and reliable advice on compliance that other councils must take into account, and may produce a national inspection plan at the request of the business, to coordinate activity.
- (5) Before other councils impose sanctions on a company, including formal notices and prosecutions, they must contact the primary authority to see whether the actions are contrary to appropriate advice it has previously issued. (This requirement to consult is waived if consumers or workers are at immediate risk.) If the proposed action is inconsistent with advice previously issued by the primary authority, it can prevent that action being taken.
- (6) Where the authorities cannot agree, the issue can be referred to the LBRO for a ruling, which is made within 28 days.
- (7) The question of resourcing the partnership is up to the councils and businesses concerned. Where necessary, a primary authority can recover its costs.

*Source:* Preece 2010.

The scheme potentially has considerable advantages:

- businesses operating in multiple jurisdictions can rely on a single source of consistent advice
- firms self-select to enter the scheme in order to receive a consistent approach to enforcement of regulation. Because the costs of inconsistency are difficult to quantify, policy makers struggle to determine how many resources should be devoted to reducing inconsistencies. The scheme solves

this problem because firms will only enter the scheme if the benefits to them from less inconsistency exceed the costs of achieving it

- the scheme can be financed through fees, without call on the public purse
- competition between councils to be a primary authority reduces concerns that councils will charge excessive fees
- councils with weak enforcement capability can rely on the advice of stronger councils.

A risk with this scheme is that firms may seek agreements with councils that are seen as ‘soft’ on enforcement, consequently undermining enforcement generally. There are three safeguards against this:

- the requirement that the local authority be suitable at the time that the partnership is first registered
- the LBRO can revoke a partnership that is not working effectively
- LBRO makes determinations when there are disputes between the primary authority and other councils and could allow enforcement action that the primary authority has blocked.

The scheme seems most suitable for regulations where subjective judgements about local conditions are less important; for example, compliance with food safety plans. It would build on the Commission’s earlier recommendation, which the Government accepted, to establish a central registry for mobile food businesses which will enable other councils to recognise the right for these businesses to operate in their municipalities (Government of Victoria 2008a, p. 20). It seems less suited to areas such as planning, where decisions are dominated by judgements about impacts on local amenity.

The primary authority scheme is a promising innovation, which offers the potential to reduce inconsistencies where they are imposing significant costs on businesses. The Commission believes that it would be useful to implement the scheme on a trial basis, for example, in an area such as the registration of food premises under Victoria’s safety regulations, to permit a subsequent judgement about extending it to other council regulatory services.

#### *Information request*

*Which area of regulation would be the most appropriate regulatory area to trial a primary authority scheme?*

### **10.6.3 Funding process improvements**

The costs of developing some process improvements to reduce regulatory burden or encourage consistency could be beyond the capability of a council acting on its own, even though the improvements might be worthwhile for the

local government sector as a whole. Moreover, individual councils would not recoup all the benefits of their investment if they developed new ideas on their own which were then copied by other councils. Hence individual councils are likely to under-invest in such initiatives and there can be a case for central funding.

The Master Builders Association of Victoria (MBAV) suggested that the Government should provide performance bonuses to councils which meet the 60 day statutory time limit for building and planning approval applications (sub. 24, p. 6). This approach could be extended to any regulation involving time-based approval. The Commission believes, however, that councils should not be paid bonuses to deliver a long-standing statutory obligation such as providing an approval within a specified period, since that obligation should be the norm rather than something that is rewarded when it is delivered. It therefore does not support the MBAV's proposal.

There is a stronger case, however, for State Government support of sector-wide improvements, which individual councils have limited incentives or capability to develop on their own. The Councils Reforming Business program is an example:

Councils Reforming Business (CRB) is a \$4.7 million Victorian Government funded initiative. The initiative is being delivered in a partnership with the Municipal Association of Victoria to support councils to improve services, reduce costs and reduce red tape for businesses through: best practice law making, smarter procurement practices, greater use of shared services; and improved processes for affordable housing. (Local Government Victoria 2010a)

There are many ideas from overseas for research projects to lift councils' performance. (Box 10.7 gives some examples from the United Kingdom.)

#### **10.6.4 Funding new or amended regulatory services**

The State Government from time to time imposes new requirements on councils to deliver new or amended regulatory services. As noted earlier, the Government has committed, through section 4-6 of the VGR, to consult with councils about the resources required and how those resources will be funded.

If the Government decides to provide additional funding, service agreements are one way that such funding could be given effect, possibly as an element of the implementation plans described in the previous section. With the VCLGA promoting the use of inter-governmental agreements, the Negotiating Guidelines for State-Local Government Funding Arrangements providing guidance on the form such agreements should take, and some experience through the tobacco services agreements, the underpinnings for increased use of such agreements are in place. Such agreements could provide councils with the resources they need

to undertake a new or expanded regulatory role, while including financial incentives to encourage good practice.

### Box 10.7 Research ideas from the United Kingdom

Initiatives being developed by the Local Better Regulation Office (LBRO) include:

- creation of a common framework for excellence, agreed and shared by local authorities, which aims to simplify and reduce the burden on local regulatory services of reporting performance and promoting excellence
- research into the impacts and outcomes of local authority regulatory services activity, to improve outcomes through better knowledge of where regulatory services can have an impact
- systematic mapping of the flows of data across the local authority regulatory system to reduce the burden of data requests, improve efficiency and service quality, and foster cooperation between national regulators, central government departments and local authorities
- creating a national enforcement actions data base, on which local authorities can record details of formal enforcement action they have taken, to provide information that will enable the authorities to improve risk-based decision making, promote consistency and inform policy development, by providing evidence about whether legislation is effective in tackling the problems it was designed to address
- developing a common risk assessment framework, to reduce duplication and encourage consistency in how local authorities undertake risk assessments of businesses
- developing a common competency framework for regulators, which will increase local authorities' awareness of any competency gaps and assist in skill development plans.

*Source:* Preece 2010.

The Commission has discussed service agreements in previous reports. In its inquiry into food safety, it proposed a trial of food safety service agreements involving a small sample of councils in Victoria. While the Government did not accept this recommendation, it agreed that service agreements may be an appropriate way to provide local governments with special project funding on a case by case basis (Government of Victoria 2008a, pp. 15-16).

Since the aim of intervention is to achieve outcomes (for example, fewer children who smoke or less foodborne illness) at least cost, service agreements should in principle reward the delivery of outcomes rather than focus on inputs (such as the number of inspections or prosecutions). Measuring the impact of regulation on outcomes is, however, more difficult than measuring inputs and research into linkages between regulation and outcomes may be needed. Box 10.8 describes one approach.

### **Box 10.8 A toolkit to assess the outcomes of regulation**

To increase the understanding of local authority regulatory services in the United Kingdom, the Local Better Regulation Office commissioned RAND Europe to develop a toolkit that local authorities could use to assess the impact of their activities. This toolkit consists of three stages:

- Stage 1: identify the impacts and outcomes of a regulatory service, and the ‘pathway’ that links the regulator’s inputs and activities to outputs, outcomes and impacts.
- Stage 2: create a list of potential performance indicators to measure the elements of the pathway.
- Stage 3: synthesise, analyse and communicate the findings in a dashboard

*Source:* Tiessen et al nd, pp. 1–21.

The Essential Services Commission (ESC) is working with councils to develop outcome indicators for the new performance reporting framework. There may be overlaps between this work and the development of performance indicators for use in service agreements.

### **10.6.5 The bottom line**

There are many different ways to use financial incentives to motivate and enable councils to improve their regulatory processes that could be considered. There is no single best option and a combination is likely to be most effective. Of the areas outlined above, however, the Commission is not inclined to support general deregulation of the fees and charges associated with local government implementation of state regulations. The Government is already funding development of cross-sector process improvements and there is a good case for it to continue doing so. It has made limited use of service agreements and could expand their coverage, particularly in cases where there is a clearly understood linkage between the funded activity and the regulatory outcome. Risks that would need to be managed include a proliferation of reporting requirements and that payment for service in these areas could distract councils from areas not funded through such agreements.

## **10.7 Staff with the competencies to enforce regulation consistently**

Councils can only enforce regulation consistently and effectively if their staff have the necessary skills. Developing, attracting and retaining people with these skills is challenging, particularly for small councils. In its inquiry into food safety regulation, for example, the Commission argued that differences in the skills of

council staff were contributing to inconsistent implementation of food regulation (VCEC 2007b, p. 272). In its response to that inquiry, the Government indicated that it would continue working with the MAV and the Australian Institute of Environmental Health on workforce strengthening activities, and amend the Food Act to enable local government to approve and appoint other suitably qualified people as authorised officers under the Act.

Many of the options which have been mentioned earlier in this chapter would improve staff competencies:

- Clearer direction about the outcomes the Government is seeking and its priorities will help to target staff recruitment and development in the most important areas.
- Clarity about councils' responsibility where different agencies are involved will also help them to focus resources.
- State Government consultation with councils about new regulatory obligations, backed up by training and development, can build relevant competencies.
- General and specific guidance material would assist council staff to know what is required of them.
- Competitive provision of regulatory services would increase the number of providers.

## 10.8 Sanctions

Councils, like other regulators, need a range of sanctions and other enforcement tools to respond to illegal activity, as well as guidance on how to enforce regulation (see section 10.5). Appropriate enforcement promotes public welfare, protects the interests of compliant businesses and streamlines regulators' compliance activities. Accordingly, councils should be able to seek from courts penalties that deter unlawful activity. They should also have available a range of tools including enforcement undertakings, infringement notices, rectification and compensation orders as well as fines and terms of imprisonment that take account both of the damage done by offenders' unlawful conduct and any financial advantage obtained by them.

The need for such sanctions was recognised by the Hampton Review following its examination of sanctions available in the United Kingdom:

Businesses and regulators have an interest in proper sanctions against illegal activity in order to prevent businesses operating outside the law from gaining a competitive advantage. At present, regulatory penalties do not take the economic value of a breach into consideration and it is quite often in a business's interest to pay the fine rather than comply. This is especially true where a business feels able to shrug off the reputational risk of prosecution. If

businesses face no effective deterrent for illegal activity, some will be tempted to break the law, and regulators will need to inspect more businesses. (Hampton 2005, p. 6)

The Hampton Review stated that it had encountered numerous examples where penalties fell far short of the commercial value of the regulatory breach. The findings of the Hampton Review were taken further in the review conducted by Professor Richard Macrory, who pointed out that many regulators relied excessively on criminal prosecutions which were sometimes inappropriate. He submitted that:

It is important for Government to ensure that regulators have a flexible and proportionate sanctioning toolkit which also ensures the protection of workers, consumers and the environment. (Macrory 2006, p. 7)

The Commission has not received submissions about the adequacy of the penalty toolkits available to local government. This may suggest that the existing range of sanctions is adequate, although the limited reporting by councils of their enforcement practices entails that firm conclusions cannot be drawn.

#### *Information request*

*Do councils have available an adequate range of sanctions which operate as effective deterrents and yet are flexible in their application and proportionate in their effect? If not, which sanctions are most needed? Alternatively, are the available sanctions adequate but councils lack the resources to make best use of them? Do the courts fail to appreciate the need for penalties that reflect the seriousness of the misconduct in question?*

Information about the number and distribution of penalties enforced by councils under local laws and State Acts could provide useful information that could:

- indicate how councils set priorities
- facilitate cross-council comparisons
- enable research into different approaches to enforcing regulation
- help councils to target effort.

Little information of this type is published in Victoria.

#### *Information request*

*Would improved information on the number and distribution of penalties be useful? What costs would be involved in improving this information and are there any barriers?*

## **10.9 Performance reporting**

Performance assessment and reporting is an integral part of good regulation. The development by the ESC of an effective performance reporting framework can complement and strengthen the measures outlined earlier in this chapter, by:

- reinforcing policy linkages and information flows between different levels of government (Charbit and Michalun 2009, p. 44)
- clarifying outcomes and outputs. The ESC observes that one of its key tasks in developing the framework is to ‘... explore how the statutory objectives required of local government ... would translate into specific objectives for the provision of each of the main kinds of services provided by councils’ (ESC 2009, p. 34)
- clarifying roles and responsibilities, since councils will want to ensure that they are not held accountable for outcomes for which they are not responsible<sup>4</sup>
- providing information that councils need to focus on continuous improvement
- encouraging useful competition between councils to improve performance
- improving accountability, because it is only possible to develop meaningful performance indicators if an organisation’s outcomes and outputs have been specified
- improving transparency, and consequently encouraging more community engagement in local politics, by informing people about what councils are doing on their behalf.<sup>5</sup>

Developing performance indicators for regulatory services will encourage discussion about the meaning of the relevant Acts’ objectives, and create pressure to clarify accountabilities, since councils will not want to be assessed against indicators of objectives for which they are either not responsible or are jointly responsible.

The ESC will have to achieve a balance between universal reporting on the one hand and partial reporting on the other. Universal reporting would impose onerous obligations on councils but avoid the risk of focussing attention on a small number of measured services. Partial reporting would be less onerous but could distort the allocation of effort. This risk will be reduced if the initial framework has sufficient regard for regulatory services (even though their

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<sup>4</sup> Councils have strong incentives to be involved in developing the performance framework. These incentives are evident in Councils’ submissions to the ESC. For example, the City of Brimbank’s view is that: ‘Performance measures should only be developed either where local government is the sole provider of services within the municipality, or where State or Commonwealth Government can provide complementary and aligned data where services are delivered by a number of providers including local government’ (City of Brimbank 2009, p. 2).

<sup>5</sup> Dollery and Wallis (2001, p. 8) argue that the difficulty of establishing accountability for local government services is one reason why citizens are apathetic about the operations of local government. They suggest that this gives councils greater scope for opportunistic behaviour than is possible at higher levels of government and explains why the latter retain statutory powers to over-ride or suspend local governments.

performance is more difficult to measure) and if priorities for regulatory services are selected carefully.

The ESC intends to report on eight service categories, of which two (development and planning, and regulation) cover regulatory services (ESC 2010c, p.7). The Commission's survey of business interactions with councils, which suggests that planning should be tackled early, is consistent with the ESC's proposed priorities. However, the ESC is also proposing a staged approach and that the framework should continue to be refined in consultation with the local government sector and with a review of the performance indicators and the reporting framework in 2013 (ESC 2010c, p. 15). This will enable it to consider the advantages and disadvantages of including other regulatory services in the performance reporting framework.

To avoid imposing additional costs on councils, about which councils are understandably concerned, the development of this new reporting framework can be used as an opportunity to streamline performance reporting as a whole. The ESC has identified more than 100 council reporting requirements of various frequencies and proposes to review opportunities to reduce or streamline reporting requirements imposed on councils by State Government agencies after completion of its final report. This should generate cost savings for councils; in another context, the Commission estimated that its proposals for streamlining environmental reporting requirements would save businesses between \$5.3 million and \$6.7 million per year (VCEC 2009a, pp. LIII- LIV), and similar considerations should apply to councils.

#### **Draft recommendation 10.4**

**That the Essential Services Commission, as it refines the performance reporting framework, adds further indicators of regulatory services where there are estimated net benefits and looks for opportunities to reduce or streamline reporting requirements imposed on councils by State Government agencies.**

### **10.10 Processes for review**

While an improved performance reporting framework will encourage continuous improvement, other mechanisms can complement this:

- Extending the reducing the regulatory burden initiative (RRBI) to local government can reduce enforcement costs.
- The regulatory impact statement process improves the quality of new (including sunset) regulation.
- Peer reviews of councils' effectiveness in enforcing regulation could provide helpful feedback.

### 10.10.1 The regulatory burden reduction initiative

The extension of this initiative to include costs associated with local government regulation (Lenders 2009, p. 7) has created a potentially important process for encouraging councils to reduce regulatory burden. The Department of Treasury and Finance has not yet publicised how it will implement this process. Issues it will need to consider in order to secure the maximum benefits from this initiative include:

- the methodology for measuring delay costs caused by regulation
- the methodology for separating the contribution to regulatory burden of state government processes from local government implementation of these processes
- whether initiatives will be developed by individual councils or sector-wide
- whether reductions in burden need to be measured for each council or for a representative council
- how business views will be gathered about the impact of proposed changes on regulatory burden
- the burden on councils of complying with the target
- whether councils need incentives to develop and implement regulatory burden reduction targets
- how, and by whom, councils' progress in implementing any proposals for reducing regulatory burden will be monitored and enforced.

Effective implementation will require consultation with local government.

#### **Draft recommendation 10.5**

**That the Department of Treasury and Finance, in conjunction with other relevant departments, consults actively with local government about the methodology for extending the regulatory burden reduction target to local government, and has particular regard to:**

- **the burden on councils of complying with the target**
- **whether councils need incentives to develop and implement regulatory burden reduction targets**
- **how and by whom councils' progress in implementing any proposals for reducing the regulatory burden will be monitored and enforced.**

## 10.10.2 Regulatory Impact Statements (RIS)

RISs focus on the design of new regulations; but since regulations in Victoria sunset every ten years<sup>6</sup>, RISs also provide a rolling review of the stock of regulation. This process will be better informed if RISs include a strategy for evaluating the effectiveness of regulations (VCEC 2005b, p. 414 and VCEC 2008b, pp.1-17). The Victorian Government recognises the importance of evaluation, with the Victorian Guide to Regulation stating that evaluation is 'highly desirable', although not mandatory (Government of Victoria 2007c, p. 5-30).

Evaluation is still developing in Victoria (VCEC 2008b, pp.7-9) and the Commission believes that it should be used more extensively to keep regulation effective and up to date. If evaluations covered councils' experience in enforcing regulations, they would provide evidence about whether the regulations have been enforced consistently, effectively, and without unnecessary burden. Consistency could be explored, for example, by assessing whether there is evidence of different approaches to enforcement under similar conditions. Analysis of whether councils can demonstrate links between regulation and the intended outcomes would provide evidence of the effectiveness of regulations. Evidence of a risk-based approach to inspection is one test of unnecessary burden.

More comprehensive evaluations will become possible once the new performance reporting framework is in place, as it will provide relevant information. Given that evaluations should be state-wide, the state department responsible for the legislation or regulation concerned seems the logical choice to fund and coordinate the evaluation.

### **Draft recommendation 10.6**

**That the departments responsible for State Government legislation or regulations implemented by councils fund and coordinate evaluations of regulations that impose significant costs on the regulated parties and/or on councils that enforce the regulations. The evaluations would assess (amongst other issues) whether the regulations have been implemented consistently, effectively, and without unnecessary burden on business and councils.**

Another important part of the RIS process that affects councils is section 4.6 of the VGR under which, as described earlier, State departments should consult with councils before imposing new obligations on them. The Commission

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<sup>6</sup> A few regulations sunset every five years.

intends to put more weight on compliance with section 4.6 in its future assessments of the adequacy of RISs and business impact assessments.

### 10.10.3 A peer review process

There is scope for Victoria's 79 councils to learn from each other's experience in enforcing regulations. This could encourage innovation, reductions in the regulatory burden and more consistent approaches to enforcement. Options for encouraging this include:

- establishing a forum of councils (either real or on line) with the aim of sharing information and experience in enforcing regulation
- encouraging secondments between councils as a way of sharing expertise
- establishing a formal peer review process, similar to the Hampton implementation reviews in the United Kingdom.

#### *Information request*

*The Commission can see merit in the Government establishing one or more of these peer review processes, and welcomes views about the advantages and disadvantages of these and other options.*

## 10.11 Mechanisms to improve coordination between councils

Charbit and Michalun suggest that:

Most OECD countries dealing with a multi-level dimension have set up co-operation and co-ordination mechanisms and permanent institutional bodies to streamline the relationship between levels of government ... co-ordination has been improved mainly by special bodies and institutional mechanisms that serve lower levels of government to submit comments, to put forward specific measures and to negotiate with the central level. (Charbit and Michalun 2009, p.145)

Options such as an increased role for the Minister's Forum, discussed earlier in this chapter, would improve coordination between state and local governments. This section considers whether further initiatives could improve coordination and cooperation between councils. More cooperation could, for example, enable councils to exploit jointly economies of scale in a particular regulatory service, or enable a council which has limited expertise in a regulatory area to improve its service, consequently addressing skill deficiencies that were discussed earlier in the chapter. Building skill levels and encouraging exchange of information between councils should also contribute to more consistent advice and foster innovation.

Victorian initiatives to encourage cooperation between councils include the MAV's shared services program, which identified six core projects, in areas such as information and communication technology, records management and front of house services (MAV 2010e).

Cooperation could be strengthened though stronger legal obligations on councils to collaborate and more Victorian Government guidance.

### 10.11.1 Express legal authority to act jointly

The Local Government Act encourages local government to focus on its community, although a council may take into account the needs of other communities and may perform its functions outside, as well as inside, its municipal district. In at least one other jurisdiction in Australia (Queensland), councils have an express power to act jointly.<sup>7</sup>

An express power of this type could be useful if there were barriers to collaboration, and there were not less onerous ways to overcome them. The Commission is not aware, however, of any legal barriers to collaboration between councils.

#### *Information request*

*What would be the advantages and disadvantages of creating an express legal power for councils in Victoria to act jointly?*

### 10.11.2 Guidance from the Victorian Government

Councils contemplating sharing regulatory services need to consider many issues. For example, the LBRO has developed guidance material to help councils in the United Kingdom understand:

- when sharing services might be useful and the benefits it can yield
- what is required to make shared services work
- the barriers that councils might face and why partnerships can fail, and governance arrangements (LBRO 2010).

## 10.12 Implementation issues

Effective implementation of the recommendations in this chapter requires:

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<sup>7</sup> Section 10(1) of the *Local Government Act 2009* (Qld) provides:

‘A local government may exercise its powers by cooperating with one or more other local, State or Commonwealth governments to conduct a joint government activity’.

- sensitivity to the differing capabilities of councils, and to their different challenges
- clearly designed accountabilities within the Victorian Government and councils for implementation and reporting back on progress
- proper resourcing
- a timetable that enables short-term gains while recognising that other fundamental tasks such as selected institutional reforms require a staged approach over a longer time.

### 10.12.1 Recognition of councils' differing capabilities and challenges

Implementation of design improvements can recognise differences between councils by:

- *consultation*: with a range of councils that is sufficiently wide to cover the range of capabilities and challenges and is undertaken early. For example, the proposed guidance material needs to help councils of all capabilities to do their jobs
- *training*: consultation is effectively an early stage of a process for training councils about how to use the new guidance material. Indeed, if they have helped to develop the material, they will be familiar with how to apply it. Follow up training is also likely to be worthwhile
- *use of case studies*: Examples of best practice should be widely available to departments and councils. For example, the MAV's *Public Health and Wellbeing Act 2008 Information Toolkit* is a model that other departments would find useful in similar circumstances
- *tailored support*: ideas for regulatory process improvements should be rolled out across the sector in a way that reflects capabilities. This may sometimes mean different levels of financial support, but differential training or technical support may be more useful.

### 10.12.2 Clear accountabilities

#### The Minister

The involvement of a number of agencies in implementing the recommendations in his chapter means that they will need to be coordinated. The Commission suggests the responsibilities for this be included in the role of the Minister for Local Government, who would take on overall responsibility for delivering the design improvements and for reporting progress to the Local Government Ministerial Forum.

#### **Draft Recommendation 10.7**

**That the Minister for Local Government has overall responsibility for:**

- **coordinating the implementation of those recommendations from 10.1 to 10.6 that the Government accepts, and**
- **reports progress on implementation to the Local Government Ministerial Forum.**

#### **Councils**

Councils have a key role in effective implementation. This is one reason why the Commission supports the use of service agreements and implementation plans, which specify obligations for councils as well as state departments. The Commission believes these instruments could be usefully supplemented by the publication of a regular report on councils' progress with improving the implementation of regulation.

The ESC proposes that it will produce an annual public comparative report comparing like councils and time series data across a range of common services, complemented by contextual information and an opportunity for councils to provide explanatory text (ESC, 2010a, p. 13). The ESC has not yet provided detailed information about what this report will contain. If, however, it were to include analysis of whether regulations have been implemented consistently, effectively and without unnecessary burden, it would provide an opportunity to review councils' progress in streamlining regulation while achieving regulatory outcomes. The coverage of this report could build on the evaluations of individual regulations proposed in section 10.10.2.

#### **Draft recommendation 10.8**

**That if the Victorian Government accepts the Essential Services Commission's proposal that it prepare an annual comparative report based on the performance reporting framework, it directs the ESC to use this report to present and comment on data about whether councils are implementing regulations effectively, consistently and without unnecessary burden.**

#### **10.12.3 Sequence of tasks**

Given the initiatives already underway and the potential for further reforms to come out of this inquiry, the Commission intends to comment in the final report on a potential sequence of reforms to improve the broad local government administration of regulation, beyond the specific recommendations relating to planning, building and construction, local laws and procurement. At this stage, the Commission suggests that the first task is to determine the most appropriate

co-ordinating body between state and local governments, as a number of the draft recommendations in this and earlier chapters could be discussed in such a body, as well as priorities.

#### **10.12.4 Conclusion**

The measures outlined in this chapter would clarify what councils are aspiring to achieve through regulation and their responsibilities for doing so. They would ensure that, through guidance from the Victorian Government and some revisions to funding arrangements, councils are better equipped to undertake their role, recognising that there is diversity between councils and in the communities that they represent. And performance reporting combined with some changes to the structure of funding and review processes would strengthen councils' incentives to adopt a continuous improvement approach to their regulatory function.

Effective implementation of the proposals outlined in this chapter requires clear responsibility for the task, adequate resources and a carefully thought out timetable for action. The outcome would be a much clearer framework for councils to operate in; one that encourages consistency by providing firmer direction and guidance from the State Government about those issues where a uniform approach is seen as mandatory, combined with clear delegation of responsibilities where a localised approach should be dominant.

# Appendix A: Consultation

## A.1 Introduction

In keeping with its charter to consult extensively during public inquiries, the Victorian Competition and Efficiency Commission advertised the inquiry into streamlining local government regulations in the Herald Sun and Weekly Times newspapers in October 2009, following receipt of the terms of reference on 24 August 2009. The Commission also published an issues paper in September 2009, which outlined:

- the scope of the inquiry
- how to make a submission
- the Commission's consultation processes
- the inquiry timetable.

The issues paper invited inquiry participants to register an interest in the inquiry and to make submissions. One hundred and twenty-two registrations of interest were received and the Commission also received 32 written submissions before the release of the draft report (section A.2).

The Commission held two roundtables. The first roundtable on local laws was held in October 2010 with the second roundtable being held in March 2010 on planning regulations. Both roundtables included participants from a range of state and local government agencies, and industry associations (section A.3).

The Commission undertook an extensive program of meeting and visiting with businesses, academics, associations and individuals (section A.4).

The Commission appointed three consultants/contractors to assist the inquiry:

- Stenning and Associates to provide data on local government regulatory provisions.
- The Allen Consulting Group to provide a report on the costs to business of local government regulation.
- Roy Morgan Research to conduct a survey of businesses regarding their experience with regulations administered by local government.

To encourage public debate on the draft report, the Commission has made these documents available on its website at [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au). The views presented are those of the consultants, and the Commission's position on the issues covered in these reports is reflected in this draft report.

## A.2 Submissions

The invitation to make submissions was open to members of the public, community groups, employees, businesses, industry associations, Victorian Government departments and agencies, and local government. The Commission received 32 submissions (table A.1.). The submissions are public documents that can be viewed on the Commission's website.

Table A.1 Submissions received

<i>Participant</i>	<i>Submission no.</i>
Michael Czajka	1
Community Child Care	2
Building Designers Association of Victoria	3
Victorian Association of Forest Industries	4
The Property Council of Australia	5
Brimbank City Council	6
City of Stonnington	7
Vicsport	8
Trees Victoria	9
Wodonga City Council	10
Golden Plains Shire Council	11
South East Water	12
Hobsons Bay City Council	13
City of Port Phillip	14
Cement Concrete and Aggregates Australia	15
Macedon Ranges Residents' Association Inc	16
Victorian Farmers' Federation	17
Committee for Geelong	18
Municipal Association of Victoria	19
Moyne Shire	20
Civil Contractors Federation	21

**Table A.1 Submissions received (continued)**

<i>Participant</i>	<i>Submission no.</i>
Victorian Employers' Chamber of Commerce and Industry	22
City of Greater Bendigo	23
Master Builders Association	24
Frankston City Council	25
Victorian Small Business Commissioner	26
Department of Health	27
Port of Melbourne Corporation	28
Ipro Solutions Pty Ltd	29
Civil Contractors Federation	30
City of Port Phillip	31
Municipal Association of Victoria	32

### **A.3 Roundtables**

The Commission held two separate roundtables on local laws and on planning regulations. Tables A.2 and A.3 outline the various participants who attended the roundtables.

**Table A.2 Roundtable on local laws**

<i>Participant</i>	<i>Position</i>	<i>Organisation</i>
Asher Judah	Manager, Policy and Communications	Master Builders Association of Victoria
Bob Sieffert	Chief Executive Officer	Civil Contractors Federation
Chris Newman	Manager, Councils Reforming Business Program	Local Government Victoria
Denis Hogan	Director, Regulatory Development	Building Commission
Graham Evans	Commissioner	Victorian Competition and Efficiency Commission

**Table A.2 Roundtable on local laws (continued)**

<i>Participant</i>	<i>Position</i>	<i>Organisation</i>
Kendrea Pope	Manager, Policy and Strategy	Department of Planning and Community Development
Matthew Butlin	Chair	Victorian Competition and Efficiency Commission
Nick McShane	Managing Director	Stenning and Associates
Peter Allen	Executive Director, Statutory Planning Systems Reform	Department of Planning and Community Development
Peter Shelton	Manager, Regulatory Services	City of Greater Dandenong
Phillip Storer	Director, Urban Planning	City of Boroondara
Robert Kerr	Commissioner	Victorian Competition and Efficiency Commission
Sara Bossard	Policy Manager	Building Commission
Stephen Hempel	Manager, Building Control Services	Stonnington City Council
Todd Blake	Chief Executive Officer	Restaurant and Catering Victoria

**Table A.3 Roundtable on local government administration of planning regulation**

<i>Participant</i>	<i>Position</i>	<i>Organisation</i>
Andrew Newton	Chief Executive Officer	Glen Eira City Council
Asher Judah	Manager, Policy and Communications	Master Builders Association of Victoria
David Turnbull	Chief Executive Officer	City of Whittlesea
David Vorchheimer	President	Planning Institute of Australia (Victoria Division)
Graham Evans	Commissioner	Victorian Competition and Efficiency Commission
Liz Johnstone	Manager, Planning Policy and Projects	Municipal Association of Victoria

Table A.3 **Roundtable on local government administration of planning regulation (continued)**

<i>Participant</i>	<i>Position</i>	<i>Organisation</i>
Matthew Butlin	Chair	Victorian Competition and Efficiency Commission
Peter Allen	Executive Director, Statutory Planning Systems Reform	Department for Planning and Community Development
Peter Seamer	Chief Executive Officer	Growth Areas Authority
Robert Kerr	Commissioner	Victorian Competition and Efficiency Commission
Tony De Domenico	Chief Executive Officer	Urban Development Institute of Australia (Victoria)

## A.4 Stakeholder consultations

The terms of reference required the Commission to consult with various employees, businesses, industry associations and key interest groups and to draw on the knowledge and expertise of relevant Victorian Government departments and agencies. Stakeholder consultations (table A.4) may include organisations that also attended one of the roundtables.

Table A.4 **Consultation participants**

<i>Organisation (or individual)</i>	<i>Organisation (or individual)</i>
Australian Hotels Association	Australian Retailers Association
Bendigo Business Council	Building Commission
City of Ballarat	City of Boroondara
City of Greater Bendigo	City of Greater Dandenong
City of Greater Geelong	City of Melbourne
City of Port Phillip	City of Stonnington
City of Whittlesea	Civil Contractors Federation
Committee for Geelong	Department of Human Services
Department of Infrastructure, Transport, Regional Development and Local Government (Cth)	Department of Innovation, Industry, Science and Research (Cth)

Table A.5: **Consultation participants** (continued)

<i>Organisation (or individual)</i>	<i>Organisation (or individual)</i>
Department of Planning and Community Development	Department of Sustainability and Environment
Department of Treasury and Finance	Essential Services Commission
Fulcrum Town Planners	Prof. Gavin Wood, RMIT
Geelong Chamber of Commerce	Glen Eira City Council
Growth Areas Authority	Housing Industry Association
Hume City Council	Ipro Live
Landlink	Local Better Regulation Office (UK)
Local Government Victoria	Master Builders Association of Victoria
Midfield Group	Minerals Council of Australia (Victorian Division)
Moyne Shire Council	Office of Victorian Small Business Commissioner
Municipal Association of Victoria	Strategem
Andrew Skewes, Latrobe University	Peter Johnstone
Paula Giles	Plantmark
Planning Institute of Australia	Procurement Australia
Port of Melbourne Corporation	Rodney Con Foo, Victoria University
Prof. John Breen, Victoria University	Restaurant and Catering Victoria
Small Business Victoria	Urban Development Institute of Australia
Toon Architects	URS Australia
Urbis	Victorian Civil and Administrative Tribunal
Victorian Auditor-General's Office	Victorian Farmers' Federation
Victorian Employers' Chamber of Commerce and Industry	Victorian Local Governance Association
Victorian Government Purchasing Board	Victorian Strategic Project Partners
VicRoads	VicUrban
Warrnambool City Council	

# Appendix B: Planning regulation – supporting information

## B.1 Introduction

This appendix provides background information on the following aspects of planning regulation:

- national development assessment forum principles and assessment processes
- planning activity data reported by councils
- recent and proposed reforms to planning regulation
- examples of process innovations and improvements.

## B.2 Development assessment forum principles

The Development Assessment Forum (DAF) was formed in 1998, responding to several reports calling for an intergovernmental approach to dealing with the building and development industry, to examine ways to speed up assessment and cut red tape, without sacrificing the quality of the decision-making or development outcomes. The DAF comprises representatives from all three levels of government, industry and professional associations (DAF 2010). It has developed a set of best practice principles to help guide jurisdictions in reviewing their development assessment processes, along with a set of assessment ‘tracks’ that give effect to the key principles. The ten best practice principles are set out in table B.1 below:

Table B.3 **Development assessment principles**

1 Effective policy development	Elected representatives should be responsible for the development of planning policies. This should be achieved through effective consultation with the community, professional officers and relevant experts.
2 Objective rules and tests	Development assessment requirements and criteria should be written as objective rules and tests that are clearly linked to stated policy intentions. Where such rules and tests are not possible, specific policy objectives and decision guidelines should be provided.
3 Built-in improvement mechanisms	Each jurisdiction should systematically and actively review its policies and objective rules and tests to ensure that they remain relevant, effective, efficiently administered, and consistent across the jurisdiction.

(continued next page)

**Table B.3 Development assessment principles (continued)**

4 Track-based assessment	Development applications should be streamed into an assessment ‘track’ that corresponds with the level of assessment required to make an appropriately informed decision. The criteria and content for each track are standard. Adoption of any track is optional in any jurisdiction, but it should remain consistent with the model if used.
5 A single point of assessment	Only one body should assess an application, using consistent policy and objective rules and tests. Referrals should be limited only to those agencies with a statutory role relevant to the application. Referral should be for advice only. A referral authority should only be able to give direction where this avoids the need for a separate approval process. Referral agencies should specify their requirements in advance and comply with clear response times.
6 Notification	Where assessment involves evaluating a proposal against competing policy objectives, opportunities for third-party involvement may be provided.
7 Private sector involvement	Private sector experts should have a role in development assessment, particularly in: <ul style="list-style-type: none"> <li>• undertaking pre-lodgement certification of applications to improve the quality of applications</li> <li>• providing expert advice to applicants and decision makers</li> <li>• certifying compliance where the objective rules and tests are clear and essentially technical</li> <li>• making decisions under delegation.</li> </ul>
8 Professional determination for most applications	Most development applications should be assessed and determined by professional staff or private sector experts. For those that are not, either: <ul style="list-style-type: none"> <li>• Option A—Local government may delegate Development Assessment determination power while retaining the ability to call in any application for determination by council.</li> <li>• Option B—An expert panel determines the application.</li> </ul> Ministers may have call-in powers for applications of state or territory significance provided criteria are documented and known in advance.
9 Applicant appeals	An applicant should be able to seek a review of a discretionary decision. A review of a decision should only be against the same policies and objective rules and tests as the first assessment.
10 Third-party appeals	Opportunities for third-party appeals should not be provided where applications are wholly assessed against objective rules and tests. Opportunities for third-party appeals may be provided in limited other cases. Where provided a review of a decision should only be against the same policies and objective rules and tests as the first assessment.

Source: DAF 2005.

In addition to these principles, the DTF has developed a set of model assessment paths to help guide the implementation of the track-based assessment principle. These tracks are:

- (1) exempt, for development that has a low impact and does not require development approval
- (2) prohibited, for developments that are inappropriate so that both proponents and consent authorities do not waste time or effort on assessing proposals that will not be approved.
- (3) self assess, for developments that will be approved if clearly specified criteria are met, enabling self-assessment (or assessment by a certified person) to occur, and with no opportunity for review of a decision
- (4) code assess, for developments that are more complex but are still able to be assessed against objective criteria by a certified person, with the opportunity for review of decisions
- (5) merit assess, for complex developments that need assessment against complex criteria or where the application raises a policy matter (or where competing policy objectives apply), and where consent may be conditional on meeting certain conditions. Opportunities for public consultation and expert (and independent) assessment may also be required and there should be opportunities for review of a decision
- (6) impact assess, for larger developments that may have a significant and uncertain impact on amenity or the environment. The process would include extensive public consultation, expert review and assessment of evidence relating to the impact of the proposal with elected representatives involved in decision-making.

## **B.3 Planning activity data**

To examine the nature and potential causes of planning system delays, the Commission examined new data on the administration of Victoria's planning system, using the 2008-09 Planning Permit Activity Report (PPAR) database.

### **B.3.1 About the use of the Planning Permit Activity Report data**

The Department of Planning and Community Development (DPCD) introduced PPAR in 2005 to provide information on the type and level of planning permit activity for each council across the State. PPAR provides quantitative information on the type and level of planning permit activity for each council. Introducing the PPAR was a significant milestone in the oversight of Victoria's planning system as it provided information on the level and type of planning activity across the State for the first time (VAGO 2008, p. 38). Apart from early work by the Victorian Auditor-General, the Commission is unaware of any other

published analysis of the performance of planning regulation using this source of information.

The information contained in the PPAR database is drawn from 80 planning schemes<sup>1</sup> administered by 77 councils and the State Government on the understanding that it will not be provided to third-parties in a form that may be directly attributable to an individual council without that council's prior consent. The data was filtered to exclude two councils, as the Commission was unable to obtain permission to use their data in its analysis. When performing comparative analysis across councils, the data was filtered to exclude three planning schemes where the Minister for Planning is the Responsible Authority for all permits. The PPAR data that the Commission received from DPCD included all permits that were finalised in 2008-09, not the entire database including active permits. For these reasons, the Commission's results differ from that published in the *Planning Permit Activity Report 2008-09*, which includes all permits, although the results are in most cases very similar (DPCD 2009d).

The PPAR data is based on responses to the PPAR system by council officers, and represents their view on the appropriate response to the category. There are some more subjective responses – such as whether an application was 'simple' to process; as well as some more objective criteria, such as whether an application received an objection or not. The differences in processes across councils may affect how some planning officers responded, thus results should be interpreted with some caution. With that limitation aside, the data provide a good foundation for analysing some of the causes of longer timeframes, and exploring opportunities for process improvements.

### **B.3.2 Key results of PPAR data**

The Commission analysed the data in order to look at how councils' processes vary, and how these difference might influence processing timeframes (table B.2).

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<sup>1</sup> The number of planning schemes is different to the number of local governments in Victoria; some planning schemes are administered wholly, or in part, by the Minister for Planning.

Table B.3 **Analysis of planning applications (2008-09) <sup>a</sup>**

	<i>No. applications</i>	<i>Share of total applications (%)</i>	<i>Median days</i>	<i>Average days</i>	<i>Council minimum (%)<sup>bc</sup></i>	<i>Council maximum (%)<sup>bc</sup></i>
<b>Overall</b>						
All councils			77	121	-	-
Inner urban	6651	11.4	86	127	-	-
Middle urban	12 665	21.8	91	126	-	-
Outer urban	11 984	20.6	82	128	-	-
Provincial	12 925	22.2	66	105	-	-
Rural	13 903	23.9	71	124	-	-
<b>Value of development</b>						
Zero (or not specified)	22 014	37.9	61	107	4.6	89.2
\$1 – \$999	2299	4.0	61	97	0.4	35.1
\$1000 – \$100 000	16 550	28.5	62	93	5.2	66.0
\$100 001 – \$500 000	12 785	22.0	119	155	2.9	37.3
\$500 001 – \$1m	2495	4.3	163	196	0.0	9.9
Over \$1million	1985	3.4	169	219	0.0	7.8
<b>Pre-application meeting</b>						
Pre-application meeting recorded	10 214	17.6	77	128	0.0	71.2
No pre-application meeting recorded	47 914	82.4	77	120	28.8	100.0
Complex and pre-application meeting recorded	1523	2.6	157	202	0.0	100.0
Complex and no pre-application meeting recorded	3862	6.6	137.5	200	0.0	100.0
Average and pre-application meeting recorded	5842	10.1	98	133	0.0	65.1
Average and no pre-application meeting recorded	24 657	42.4	98	139	34.9	100.0

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Table B.3 Analysis of planning applications (continued)

	No. applications	Share of total applications (%)	Median days	Average days	Council minimum (%) <sup>bc</sup>	Council maximum (%) <sup>bc</sup>
Pre-application meeting ( <i>continued</i> )						
Simple and pre-application meeting recorded	2818	4.8	47	77	0.0	78.2
Simple and no pre-application meeting recorded	18 998	32.7	48	77	21.8	100.0
Estimated assessment effort						
Simple (less than 1 day)	21 816	37.5	47	77	0.0	91.8
Average (2–5 days)	30 499	52.5	98	138	6.2	95.7
Complex (more than 5 days)	5385	9.3	142	201	0.0	73.0
Referral issued						
Referred	14 726	25.3	102	154	0.2	91.4
Not referred	42 936	73.9	69	110	8.6	99.8
Further information requested						
Further info requested	21 154	36.4	126	170	1.4	100.0
Further info not requested	36 759	63.2	56	93	0.0	98.6
Public notification						
Public notification	22 426	38.6	135	176	2.3	92.3
No public notification	35 155	60.5	49	86	7.7	97.7
Objections						
No objections	49 769	85.6	65	102	60.0	100.0
At least one objection	8338	14.3	192	232	0.0	40.0
1 objection	3566	6.1	174	210	0.0	14.5
5 or more objections	1792	3.1	202	246	0.0	12.9

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Table B.3 **Analysis of planning applications** (continued)

	<i>No. applications</i>	<i>Share of total applications (%)</i>	<i>Median days</i>	<i>Average days</i>	<i>Council minimum (%)<sup>bc</sup></i>	<i>Council maximum (%)<sup>bc</sup></i>
<i>Objections (continued)</i>						
Objections (of those with notification)	7689	34.3	196	236	0.0	65.4
Objections (of those without notification)	643	1.7	140	181	0.0	20.1
<i>Permit outcome</i>						
Decision issued by a delegate of the Responsible Authority	48 186	82.9	73	109	0.0	97.9
Decision issued by the Responsible Authority	4374	7.5	161	205	0.0	92.0
Application withdrawn or lapsed	5568	9.6	76	154	0.0	38.4
Application granted	48 134	82.8	71	109	60.8	100.0
Application refused	2212	3.8	175	224	0.0	19.0
VCAT <sup>a</sup>	2185	3.8	266	302	0.0	11.6

<sup>a</sup> This table excludes the data for the two councils for which the Commission was unable to obtain permission (as noted in the text above). <sup>b</sup> The calculations relating to minimum and maximum values for councils are based on planning schemes rather than assessments carried out by specific councils - in some cases these include assessments carried out by the Minister for Planning as the Responsible Authority rather than the relevant council. <sup>c</sup> This analysis excludes the Port of Melbourne, French and Sandstone Island, and Alpine Resorts planning schemes. These three schemes contain few permits, and the Responsible Authority for these schemes is solely the Minister for Planning, not local government.

*Source:* Commission analysis using PPARS 2008-09 data.

## Variability

As well as looking at the aggregate results for the sector, the Commission also examined the results across councils. The results show that, for example, while 20 per cent of applications overall have pre-application meetings with applicants, this ranges in different councils from 0 per cent to 71 per cent of applications. In one municipality there were no complex applications, in another, 73 per cent. While in some municipalities there are no objections, in one council area 40 per cent of applications have objections. While in one municipality no applications were appealed to the Victorian Civil and Administrative Tribunal (VCAT), in another, 12 per cent were appealed to VCAT.

These variations between councils show that the nature of applications varies significantly across councils, as do the practices of councils and the nature of the communities they serve.

The Commission examined several aspects of the planning data in more detail, where differences in timeframes were the greatest, and where the number of permits in the category allowed a smaller subsection of permits to be examined.

## **Objections**

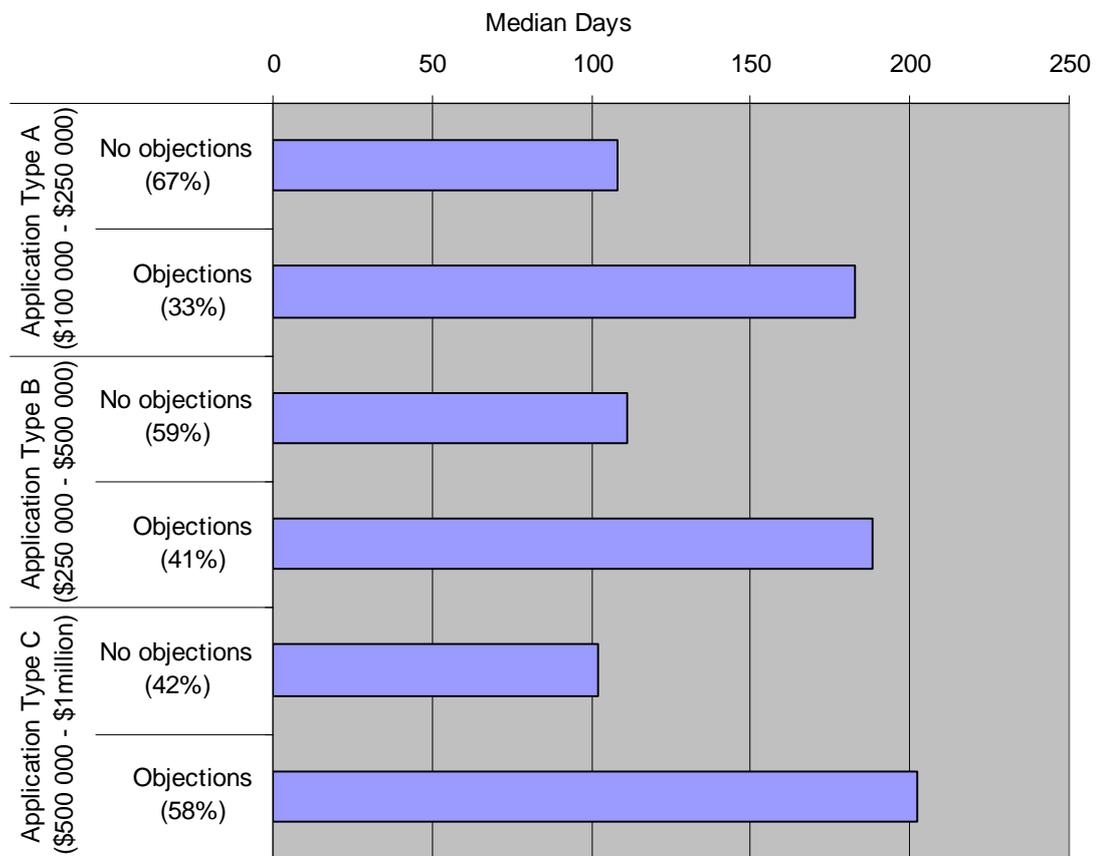
The increase in timeframes is significant even where there is a single objection. However, objections are likely to be correlated with a number of other factors. For example, objections are more likely to occur where an application is more complex – 29 per cent of complex applications contain at least one objection, compared with 18 per cent of average applications, and only 6 per cent of simple applications. Objections are also more likely to occur for applications with a higher value of works – 44 per cent of developments over \$500 000 receive objections, compared with 10 per cent of developments under \$100 000. To reduce the impact of some of these potential correlations, the Commission examined a set of ‘like’ applications to reveal the changes in timeframes when objections were added (figure B.1).

## **Information requests**

Increases in the number of days taken to process an application also occur where the council requests further information of an applicant. The fact that further information was required in 36 per cent of cases suggests that this is a key issue – for example, that guidance is not sufficiently clear as to what needs to be contained in an application or that such guidance is not followed. Information requests could be a result of behaviours by the applicant (that is inadequate provision of information, due to a lack of understanding of the requirements, or because applicants are attempting to minimise their upfront costs associated with the application process); or they could be a result of behaviours by the council (that is, some information requests are perceived by business as ‘trivial’ and are used as a way to ‘stop the statutory clock’).

Using the same application types as above, but focusing on information requests, figure B.2 below shows the effect on applications of a further information request – about 30 days for these application types. This difference is not surprising, given the time that a business would take to respond to an information request. The PPAR data is not sufficiently detailed to determine when further information requests occur, or the nature of the requests.

Figure B.1 Difference in median days taken for applications receiving objections <sup>a</sup>



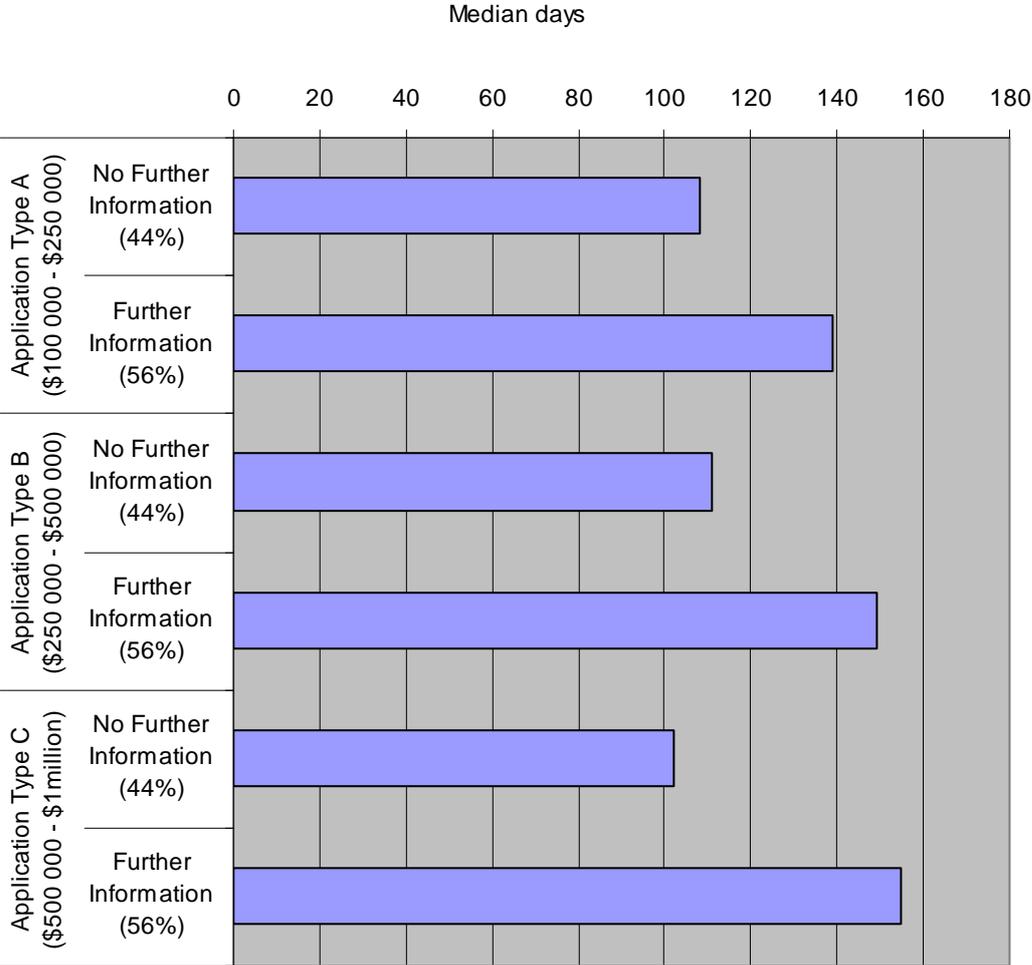
<sup>a</sup> To try to determine how timeframes differed when an objection was made to 'like' applications, the Commission developed sample application types. All application types involved average estimated effort; no further information requested; public notice given; no referral issued. Application type A had an estimated cost of works between \$100 000 and \$250 000, application type B had estimated cost of works between \$250 000 and \$500 000, and application type C had estimated cost of works between \$500 000 and \$1 million. While there are further ways of breaking down the data to ensure that like applications were compared, this resulted in comparing very small numbers of applications, and the data became less reliable.

Source: Commission analysis using PPARS 2008-09 data.

## Referrals

Interestingly, when using the same methodology for applications where a referral was made, there was very little difference in timeframes between those applications that had a referral and those without – in some cases median timeframes were lower where there was a referral. This suggests that referrals, in themselves, may not be having a significant impact on delays.

Figure B.2 **Difference in median days taken for applications requiring further information <sup>a</sup>**



<sup>a</sup> All application types involved average estimated effort; no objections; public notice given; no referral issued. See the notes under figure B.1 for an explanation of the general approach.

Source: Commission analysis using PPARS 2008-09 data.

**Summary**

The qualitative and quantitative data suggest that there are opportunities for improvements, and provide some guidance as to where those opportunities may lie. The surveys of business and the analysis of planning data indicate that there is significant uncertainty about approval timeframes, that objections have a significant impact on the approval timeframes, and that there are a number of ‘simple’ permits that could be processed more quickly. There are also a number of large developments that experience relatively lengthy approval timeframes (suggesting there may be significant economic benefits from reducing these approval timeframes).

## B.4 Recent and proposed reforms to planning regulation

A number of recent reviews of planning regulation have attempted to identify improvements to planning regulation. Several examples are summarised below:

- *Cutting Red Tape in Planning* (Carbines 2006)
- the review of the Planning and Environment Act (ongoing)
- the Municipal Association of Victoria (MAV) planning process improvement program (ongoing).

### Cutting red tape in planning

In response to concerns about the uncertainty, time and cost associated with planning regulation, the Victorian Government initiated a review of opportunities to streamline planning regulation and its administration. The *Cutting Red Tape in Planning* (Carbines 2006) review found that:

- efficient and streamlined processes are a central desire of all stakeholders and partners in the planning system
- reducing the number of matters that unnecessarily require planning approval or simplifying the assessment currently required will save scarce planning resources
- planning resources can be better used to make State and local policy more effective
- there is a shortage of planners, and councils have a variety of ways to manage scarce resources that are worth promoting
- users of the system identified new challenges and opportunities such as adjustments to processes, fee structures and new technological opportunities.

The review recommended 15 actions that have been implemented to varying degrees by the Victorian Government (table B.3).

### Proposed changes to the Planning and Environment Act

The Victorian Government has recently proposed a series of significant changes to the Planning and Environment Act which provide a partial means for addressing stakeholder concerns about the efficiency, effectiveness and transparency of planning in Victoria (figure B.3). The main changes are those proposed for the planning scheme amendment process and the planning permit application process. The proposals in the draft Bill focus on more efficient processes, faster decisions and greater accountability for the planning system. The key proposals are:

- updating the objectives of planning in Victoria
- streamlining the approval of straightforward scheme amendments

- providing for an ‘authorised person’ to carry out procedural steps in the amendment process
- changes to implement a code assess permit process
- a new approval process for State significant development
- a new process for ending and amending planning agreements
- introducing annual monitoring and reporting requirements for planning decision makers.

**Table B.3 Progress in implementing red tape reduction initiatives in planning (as at April 2010)**

<i>Action</i>	<i>Status</i>
Introduce a code assess track	Being implemented through the Planning and Environment Act Review.
Expand e-planning capacity	<p>A ‘road map’ for the development of e-planning in Victoria has been completed and a memorandum of understanding has been entered into between DPCD and MAV on its implementation.</p> <p>Planning Applications Online (SPEAR Planning), is in full production and available to all councils to use. As of February 2010, 19 councils are signed up to use SPEAR Planning.</p>
<p>Improve referrals by examining:</p> <ul style="list-style-type: none"> <li>• standard referral agreements</li> <li>• deemed to consent provision (if no response to a referral is received in 21 days)</li> <li>• prior consent from referral authorities before submission of an application for specified types of applications.</li> </ul>	<p>Only partly implemented:</p> <ul style="list-style-type: none"> <li>• A program to remove provisions that require non-statutory referrals has commenced with fast tracked amendments to facilitate early removal of these requirements.</li> <li>• A standard referral form is to be piloted prior to implementation. a practice note on referrals is being updated.</li> <li>• Referral authority requirements that can be applied across the State will be progressively written into appropriate sections of planning schemes.</li> <li>• Planning applications online will enable greater use of referrals. Web based single point of referral information is being established.</li> </ul>
Align notification and review with impact by clarifying that objections that do not relate to the purpose of the application can be disregarded.	Not implemented. This option was examined and a decision was made not to legislate.

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Table B.3 **Progress in implementing red tape reduction initiatives** (continued)

<i>Action</i>	<i>Status</i>
<p>Introduce new classes of notification, to give three classes of notification, and specify the class of notice to be given for all applications.</p> <p>Prepare guidelines that set out best practice notification procedures.</p>	<p>A new class of notice is proposed in the draft residential zones discussion paper and Planning and Environment Act review.</p> <p>To be worked out as part of the implementation of the Planning and Environment Act Review.</p>
<p>Improve council processes by:</p> <ul style="list-style-type: none"> <li>• developing model delegation instruments</li> <li>• encouraging review of delegation schedules</li> <li>• developing a model for the wider use of ‘expert’ committees early in the application process to support councils in making significant decisions</li> <li>• providing planning skills support for councillors.</li> </ul>	<p>Good progress</p>
<p>Improve planning scheme amendment process by:</p> <ul style="list-style-type: none"> <li>• publishing performance targets for amendment processes</li> <li>• improving guidance and documentation</li> <li>• improving processes for appointing panels and considering technical or minor amendments.</li> </ul>	<p>Largely implemented. Statutory changes to the amendment process have also been developed</p>
<p>Identify matters that do not need planning approval.</p>	<p>More minor matters removed from planning system by Amendment VC49, approved 15 September 2008.</p>
<p>Rewrite overlays so that only matters linked to the purpose of the control need planning approval</p>	<p>Not started – Action investigated and assessed as unfeasible without major revision of Victorian Planning Provisions.</p>
<p>Review the need for planning approval where there are duplicate processes, in consultation with relevant agencies</p>	<p>Ongoing</p>
<p>Review certain Victorian Planning Provisions (heritage, car parking, signage, definitions)</p>	<p>Reviews commenced and changes being implemented. Amendments to VPPs completed for heritage. Definitions under review.</p>
<p>Make State policy more relevant to local decision-making by:</p> <ul style="list-style-type: none"> <li>• publishing discussion paper on structure of the SPPF and its relationship to local policy</li> <li>• establish a protocol about DPCD attending VCAT and planning panels hearings</li> <li>• auditing the SPPF every four years</li> </ul>	<p>The State Planning Policy Framework (SPPF) is being reviewed and redrafted. Revised SPPF structure was released for public comment in February 2010. Submissions are currently being assessed.</p>

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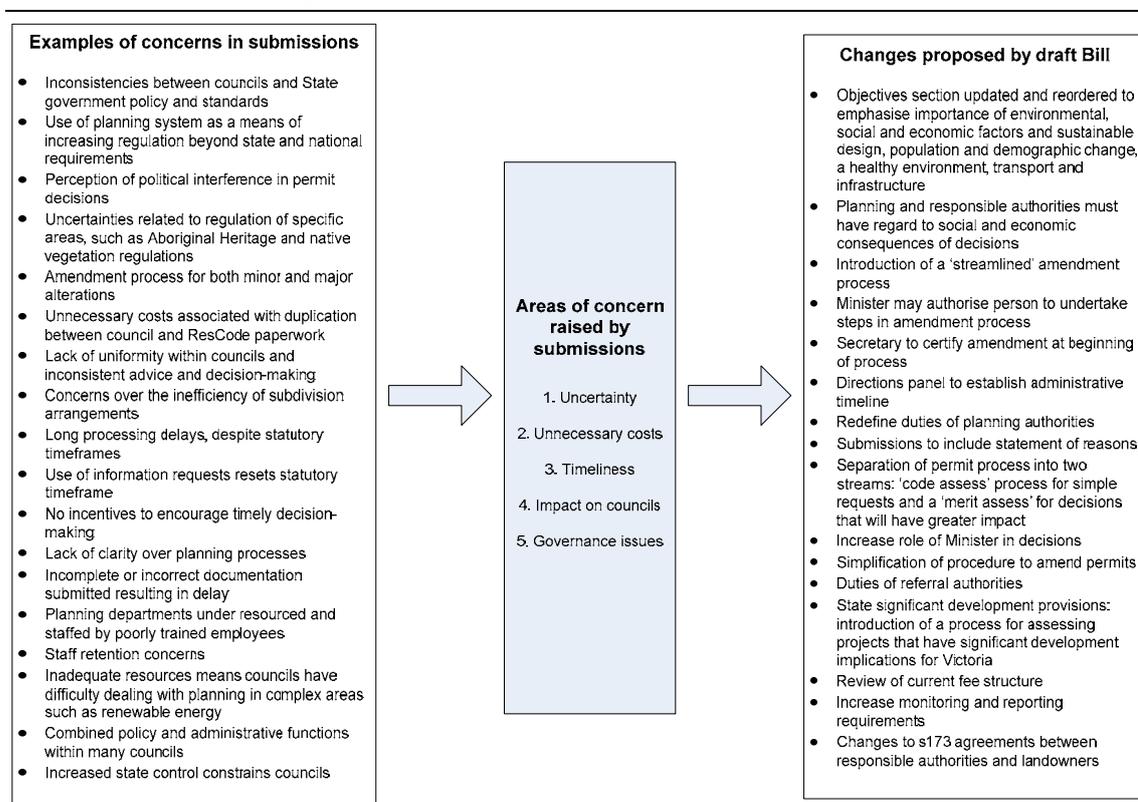
**Table B.3 Progress in implementing red tape reduction initiatives (continued)**

<i>Action</i>	<i>Status</i>
<p>Make local planning policy stronger by:</p> <ul style="list-style-type: none"> <li>• clarifying the role of local policy in decision-making</li> <li>• establishing teams to advise councils on the more effective expression of local planning policies to provide greater certainty</li> </ul>	<p>In progress. The Government's immediate priorities are to:</p> <ul style="list-style-type: none"> <li>• review the residential zones to improve the delivery of local policy outcomes</li> <li>• revise the SPPF</li> <li>• establish a Planning Policy Technical Committee to provide support, resources and assistance to councils to make local policy stronger</li> <li>• simplify the way state and local policy is presented in planning schemes</li> <li>• prepare new guidelines and procedures that make it easier to write, implement and review local policy in planning schemes.</li> </ul>
<p>Develop skills and facilitate the sharing of resources by:</p> <ul style="list-style-type: none"> <li>• establishing a structured graduate training program within the planning industry</li> <li>• using the PLANET training and professional development program to provide training</li> <li>• creating an online 'planning portal' through which information about the planning system can be easily accessed</li> <li>• implementing the MAV Planning Bank</li> <li>• sharing information about strategic work amongst regions and promote combined projects between councils</li> <li>• promoting the 'pooling' of resources for particular projects and functions</li> </ul>	<p>In progress or have been implemented. The extent of skills development and sharing by councils is unclear</p>
<p>Improve enforcement capacity by:</p> <ul style="list-style-type: none"> <li>• publishing an enforcement manual for councils</li> <li>• developing ways to implement systematic compliance inspections for planning permits</li> </ul>	<p>In-progress or complete (<i>Guide to Planning Enforcement in Victoria</i> released)</p>
<p>Update planning fees</p>	<p>Planning and Environment Fees Review is underway but delayed due to the modifications being made to the Act (which will affect councils' costs), extended to June 2011.</p>

*Sources:* VCEC view based on DPCD 2010g, DPCD 2010j.

A key issue for the inquiry is whether the changes that have been proposed will adequately address business and other groups' concerns about the uncertainty, time and cost associated with planning regulation in Victoria.

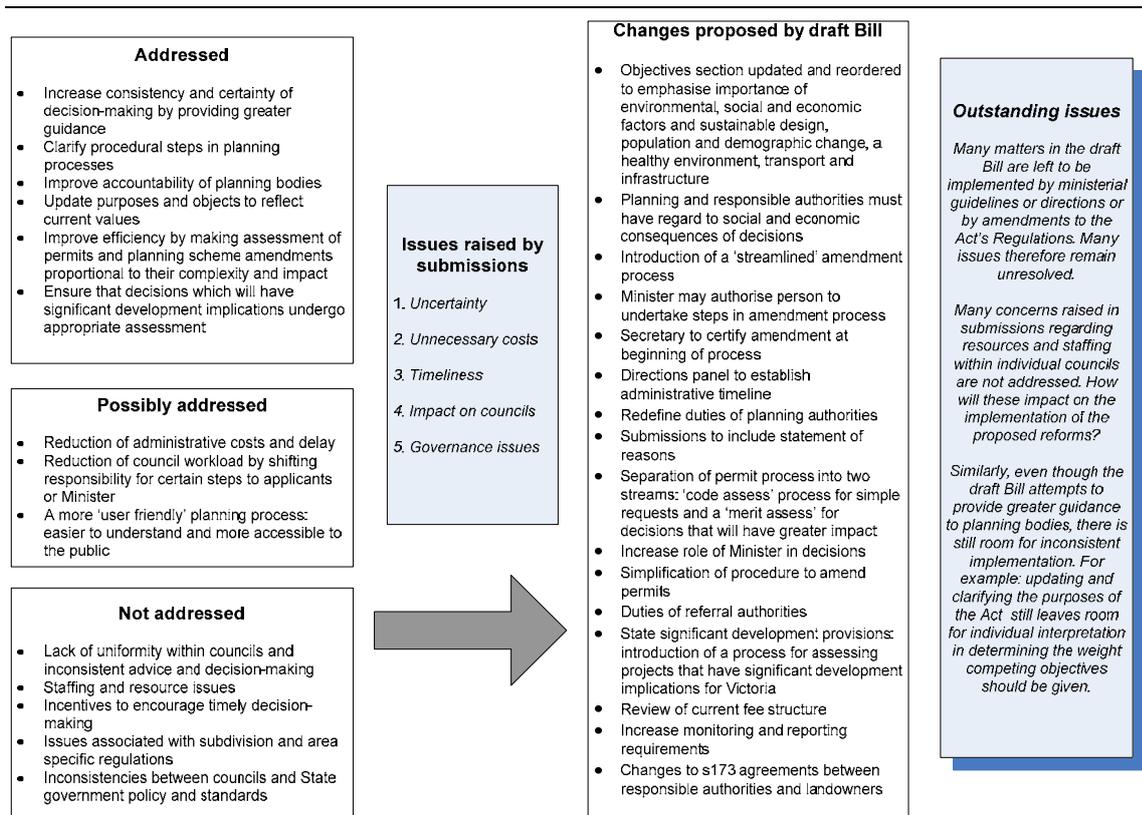
Figure B.3 Potential impact of changes to planning regulation in Victoria



Source: Commission assessment.

The Commission's preliminary assessment is that the proposed changes to the Act offer significant potential to reduce the uncertainty, time and costs to business and councils (figure B.4). The major potential gap appears to be around the implementation of the proposed changes. However, to address this issue, the Victorian Government is working in collaboration with councils to identify opportunities to improve councils' administration of planning regulation.

Figure B.4 Preliminary assessment of proposed changes to planning regulation



Source: VCEC assessment.

## Planning process improvement program

The MAV intends to launch a planning process improvement program in the second half of 2010, which will make available a proven methodology for annual process reviews and improvement by councils.

The program is based on the planning process improvement project commenced in January 2009 by the MAV to review and redesign the administration of strategic and statutory processes. The MAV and the project consultants, JW Group (John Wooles and Bob Allardice), have been assisted by a steering group of State and local government officials. This project is seen, in part, as a sector-led response to a recent Victorian Auditor General's Office (VAGO) report recommending improvements to local government planning processes.

Outcomes sought from that project were:

- a current process flow analysis for strategic planning and statutory planning at the City of Greater Dandenong, Golden Plains Shire, and City of Greater Geelong
- baseline measures, including stakeholder perceptions of performance

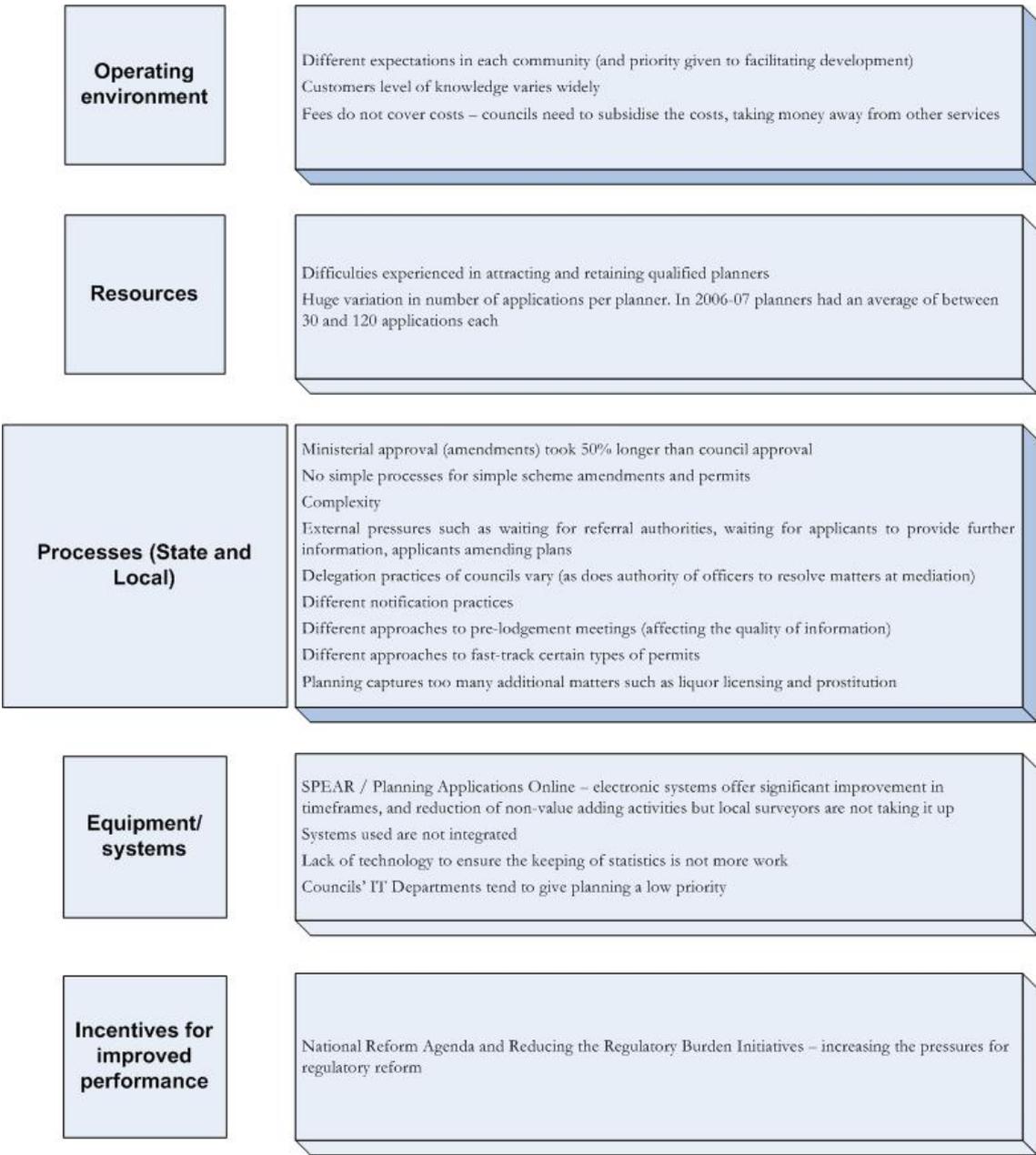
- process analysis and investigation of root causes of problems
- an improvements review
- standardisation of improvements agreed
- evaluation of project aims, resources, processes and outcomes
- an implementation plan for extending the project to a wider group of Councils if the project outcomes were deemed worthwhile.

Findings from the work of the consultants (summarised in figure B.5) include:

- there are differing community expectations about planning but with an overall poor public and industry perception of planning
- many councils are experiencing skill shortages and difficulty in recruiting and retaining skilled planning staff
- council practices vary in terms of administrative and policy responses (for example, fast-track processes, delegation, notification, pre-lodgement meetings and response to the regulation of activities such as gambling, licensed premises and rooming houses) and there are ongoing challenges in getting applicants and others to use process improvement technologies (such as online lodgement processes)
- there is a 3–7 times return on investment for councils participating depending on the volume and type of planning permits.

Interestingly, apart from a brief reference to the increasing pressures for regulatory reform emerging from the National Planning Reform Agenda, there was little discussion about the incentives for councils to invest in improving their processes for administering planning regulation. The methodology is being further tested and the benefits quantified as part of a project with the six growth area councils, the Growth Areas Authority and the DPCD. The involvement of industry groups in this project will assist in quantifying benefits for the development industry.

Figure B.5 Planning process improvement initiative



Source: VCEC, based on JW Group report for MAV/DPCD.

## B.5 Glen Eira process improvement case study

Glen Eira City Council has reformed town planning to specify better where more intensive forms of development should and should not occur. This increases certainty to the benefit of residents and developers alike.

Additionally, processing of planning applications has been streamlined. Although comprehensive data is not available, advice from councils and some

stakeholders suggest that these complementary measures are contributing to reducing the costs and increasing the benefits of town planning in Glen Eira.

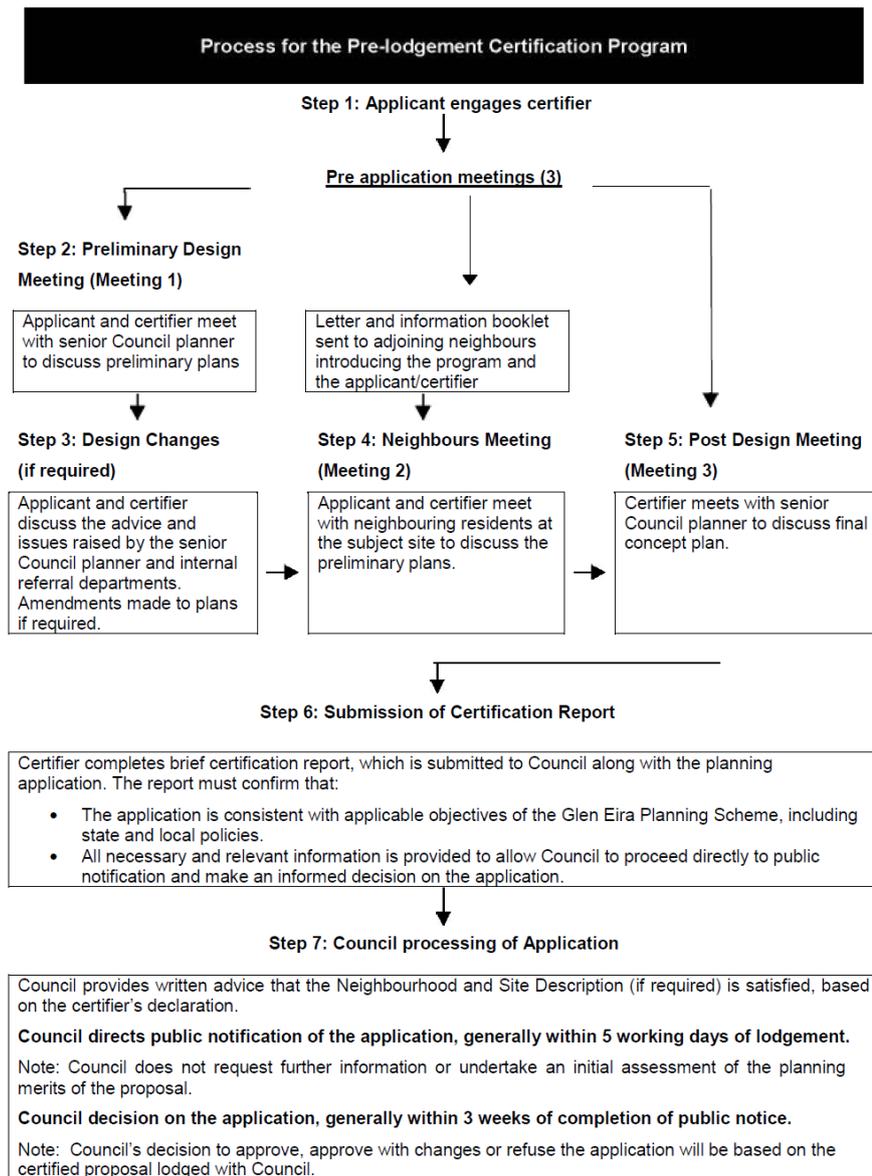
The pre-lodgement certification system aims to identify and resolve issues prior to lodgement of applications, thereby increasing certainty for participants, reducing the need for information requests, and enabling faster decisions. Under the system, applicants engage a ‘certifier’ or planning consultant to ensure the application contains all relevant information and is consistent with the Glen Eira planning scheme. Generally, certifiers are expected to hold a tertiary planning qualification and have town planning experience. Their responsibilities extend to overseeing meetings with neighbouring residents and senior council planners (figure B.6). The council remains the sole decision-maker for pre-certified applications.

Based on the Commission’s consultations, the Glen Eira staff and consultants who have used the pre-lodgement certification program considered that it provided several benefits to applicants and the council, including:

- improved quality of planning advice to applicants
- consistent advice from within the council (because one planner is responsible for dealing with the application from start to finish)
- clearer advice about the quality and level of documentation required for each planning application
- residents better informed and consulted about the project – objections more focused, more able to be addressed
- some developers have stated that their proposals were actually improved because of pre-lodgement resident feedback
- faster advertising, generally prepared within five business days of lodgement
- shorter timeframes from lodgement to decision
- most applications understandably approved, because they are certified as compliant with the planning scheme. The pre certification process is not one for applicants who wish to lodge ambit applications
- improved working environment for town planners due to the involvement of other professionals, more complete information, more compliant applications, and more informed residents – improving attraction and retention of quality town planners. This is particularly important when considering the skills shortages in planning (chapter 5).

Pre-lodgement certification is one of several integrated improvement initiatives implemented in Glen Eira (box B.1). One hundred per cent of applications can be lodged under one of the ‘fast track’ processes now available in Glen Eira.

Figure B.6 Pre-lodgement certification program



Source: Glen Eira City Council 2007.

## Box B.1 Glen Eira planning improvements

### *Strategic Planning*

The Glen Eira City Council's planning scheme clearly marks areas for development, including 'housing diversity areas' with specific development opportunities (20 per cent of area) and minimal change areas maintaining traditional residential streets (80 per cent of the area). The planning scheme provides for certainty for planning applicants as to where development will be accommodated and where it will not.

### *Statutory Planning*

Giving more certainty on what is and is not allowed, provides a good basis for Glen Eira's fast track process improvements. There are four assessment tracks (for which most applications should be eligible). All tracks feature pre-application meeting(s), the same planner throughout the process, and no further information required. Three of the tracks feature identified key issues, namely pre-lodgement, referrals carried out pre-lodgement, and a guaranteed time to make a decision, which is shorter than the required statutory timeframe.

- Pre-lodgement certification: At lodgement, a town planning consultant certifies that meetings with residents have taken place, all necessary information has been included to enable council to determine the application, and (in the opinion of the certifier) all state and council planning policies have been satisfied (no 'ambit' claims). Council guarantees that the application will be advertised immediately and determined promptly (not that it will be approved).
- No Request for Further Information (NORFI) fast-track program: Council's town planner helps the applicant to achieve applications fully compliant with the necessary information and in accordance with policy before the application is lodged. Once the application is lodged there will be no requests for further information. In its first seven months, 61 applications were decided in an average of 48 days.
- 24 Hour SBO Planning Permit Program: Where the only trigger for a planning permit is a Special Building Overlay (land prone to flooding), council aims to deliver the decision within 24 hours. This application type is exempt from public notice and review under the Glen Eira Planning Scheme (Clause 44.05).
- Heritage Fast Track Program: Where the only triggers for a planning permit are minor buildings and works on land within a Heritage Overlay, the timeframe for a decision is 10 business days. The Glen Eira Planning Scheme (Clause 43.01) enables these applications to be exempt from public notice and review.

*Source:* Glen Eira City Council 2010a; Glen Eira City Council 2010b

It is difficult to determine the costs and benefits of the Glen Eira planning improvements. While the average number of days for a decision appear to be lower with a pre-lodgement certification process, there is more time spent at the front end of the process (before lodgement), so it is unclear how much time the

applicant saves overall. That said, discussions with planning consultants that have used the Glen Eira processes have been positive about the overall savings. Likewise, the Commission heard that there are benefits to business from providing greater clarity about the areas where more intensive forms of development are preferred, and areas where such proposed developments will generally be rejected. How providing such clarity has influenced investment and redevelopment in Glen Eira is not clear, and the Commission has not formed a view about whether the application of Glen Eira's minimal change areas (which cover 80 per cent of the municipality) is an optimal outcome from a metropolitan- and state-wide perspective.

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