VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2165/2007

CATCHWORDS

Planning and Environment Act 1987 section 39 & Part 8; principles of natural justice applicable to planning panel hearing submissions in relation to planning scheme amendment.

APPLICANT	Winky Pop Pty Ltd and Or Australia Pty Ltd
RESPONDENT/ PLANNING AUTHORITY	Hobsons Bay City Council
OTHERS	Minister for Planning and Community Development Planning Panels Victoria
SUBJECT LAND	Amt C33 to the Hobsons Bay Planning Scheme
WHERE HELD	55 King Street, MELBOURNE
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	14 November 2007
DATE OF ORDER	7 February 2008
CITATION	Winky Pop Pty Ltd v Hobsons Bay CC [2008] VCAT 206

ORDER

1 Leave is granted to the applicant to withdraw that part of the application under s 39 of the *Planning and Environment Act* 1987 in relation to grounds 1(c) and (d) and the relief sought in paragraphs 2(a)(iii), (iv) and (v), and that part of the application is withdrawn accordingly.

2 In relation to grounds 1(a) and (b) and the relief sought in paragraphs 2(a)(i) and (ii) of the application under s 39 of the *Planning and Environment Act* 1987, the application is dismissed.

3 The costs of the respondent/planning authority are reserved. Any application for costs must be made within 60 days of the date of this order.

Mark Dwyer

Deputy President

APPEARANCES:

For the Applicant	Mr Adrian Finanzio and Mr Miguel Belmar Salas of counsel, instructed by Best Hooper, Solicitors.
For the Respondent/ Responsible Authority	Mr Ragu Appudurai, solicitor, of Russell Kennedy.
For Minister for Planning and Community Development	No appearance
Planning Panels Victoria	No appearance (excused from attendance)

REASONS

1 This application arises under section 39 of the *Planning and Environment Act* 1987 in relation to Amendment C33 to the Hobsons Bay Planning Scheme.

2 Amendment C33 seeks, amongst other matters, to endorse and/or implement certain findings of the *Hobsons Bay Industrial Land Management Strategy*, including setting the planning policy framework for existing and preferred future industrial land use across 21 precincts within the area affected by the Amendment.

3 The applicant owns land in one of these precincts, which it desires to develop for residential purposes. The policy framework in Amendment C33 therefore has implications for the applicant's future land use, and the applicant had made a public submission in relation to the Amendment under section 21 of the *Planning and Environment Act* 1987 and was represented at the panel hearing convened to consider submissions.

Preliminary matter – Supreme Court proceedings in relation to subject matter of part of application

4 The application initially comprised two quite separate grounds, namely:

- An alleged failure by a panel to afford the applicant procedural fairness and/or a reasonable opportunity to be heard; and
- An alleged bias by the Council, on the basis that a Councillor voting on the adoption of the Amendment had a conflict of interest.

5 After the application was lodged, the second ground became the subject of separate proceedings in the Supreme Court, subsequently decided by Justice Kaye in *Winky Pop Pty Ltd & Anor v Hobsons Bay City Council*[1].

6 At the hearing before me on 14 November 2007, I was requested (by consent of both parties) not to hear or determine the second ground, and to essentially adjourn that part of the application to an administrative mention when the outcome of the Supreme Court proceeding or any appeal was known. In later correspondence from the parties dated 24 January 2008, it was confirmed that this second ground no longer required determination by the Tribunal and leave was sought to withdraw that part of the application.

What issues still require determination by the Tribunal?

7 The hearing before me therefore concerned only the first ground in the application, relating to the panel hearing process. The allegation relevant to

[1] [2007] VSC 468 (Judgment 16 November 2007). His Honour found that there was no conflict of interest, but quashed the Council resolutions adopting the Amendment on the basis that the Councillor was affected by apparent bias in participating in the vote "in the sense that a fair minded and informed member of the public might entertain a reasonable apprehension that he might not have brought an impartial and unprejudiced mind to the resolution …". It was therefore held that the resolutions were passed in breach of the rules of natural justice.

this ground, as set out by the applicant in the 'reasons' for its application, is as follows:

> (a) The Panel appointed to consider Amendment C33 failed to afford the applicant procedural fairness and or a reasonable opportunity to be heard in that the Panel, in reaching its conclusions and recommendations:
>
> (i) Relied upon submissions made by Mobil affecting the applicant's land which were not made available to the Applicant at any time throughout the hearing or public consultation process;
>
> (ii) Relied upon submissions with respect to the Mobil land to support conclusions adverse to the applicant's interests without at any time providing the applicant with an opportunity to respond to those submissions;
>
> (iii) Relied upon submissions with respect to the Mobil land to support conclusions adverse to the applicant's interests without at any time bringing the fact of those submissions to the attention of the applicant or the applicant's representatives;
>
> (b) The matters referred in paragraph (a) above amount to a failure to comply with Division 2 of Part 3 and Part 8 of the Act.

8 The reference to Division 2 of Part 3 and Part 8 of the Act is a reference to the public submission and panel process under the *Planning and Environment Act* 1987 in relation to a planning scheme amendment. In particular, section 24(a) requires that:

> The panel must consider all submissions referred to it and give a reasonable opportunity to be heard to:
> (a) any person who has made a submission referred to it;
> …

Also, section 161(1)(b) requires that:

> In hearing submissions, a panel:
> …
> (b) is bound by the rules of natural justice"
>
> …

9 The issue before me is therefore essentially whether the panel afforded natural justice to the applicant, and a reasonable opportunity to be heard. As Mr Finanzio for the applicant conceded in his submission, the law is clear that what constitutes the rules of natural justice in any one case is not fixed or inflexible. The applicant's contentions as to what constitutes a 'reasonable opportunity to be heard' (as section 24(a) requires) must be measured against the circumstances of the case, the legislative framework, and the subject matter of the hearing.

RELEVANT FACTS

10 The circumstances of this case are complex, and a proper consideration of the material required me to consider a range of documents relevant to the history of Amendment C33 to the Hobsons Bay Planning Scheme, and the conduct of the submission and panel hearing process, as well as the panel report. The applicant provided me with a detailed Statement of Facts, together with a CD and folder of supporting documents. The Council provided me with a response to that Statement (although many facts were not in issue), and both parties relied upon detailed written submissions. I have had regard to all of that material.

11 For present purposes, the main facts may be summarised as follows:

- The applicant's land is in Williamstown North, in the northern part of a precinct known generally as the Akuna Drive precinct. It comprises Lots A and B on Plan of Subdivision LP 221219C being land generally north of Violet Street, and south of the rail line, other than the existing Akuna Drive Industrial Estate. The combined area of Lots A and B is 7.645 hectares.
- The land (then owned by a predecessor-in-title, Adamco) was included in an earlier planning scheme amendment known as Amendment C1 to the Hobsons Bay Planning Scheme. This amendment proposed a re-zoning from an industrial zone to a residential zone, but was abandoned in 2001 following a panel report indicating a lack of strategic support for the amendment, including insufficient strategic work on the extent of the buffer required from the nearby Mobil refinery.
- Subsequently, the Council undertook a strategic review of industrial areas within its municipality, culminating in the *Hobsons Bay Industrial Land Management Strategy, February 2006* (ILMS).
- Amendment C33 to the Hobsons Bay Planning Scheme was exhibited in 2006. As the explanatory report noted, the Amendment sought to endorse the ILMS and add a broad strategy to the planning policy framework in the planning scheme that reflects the direction of the ILMS, including incorporation of the ILMS in the planning scheme. Importantly, Amendment C33 does not seek to specifically re-zone land – rather it states a land use policy preference intended to guide future re-zoning proposals.
- The applicant's land is within Precinct 13 in the ILMS, which broadly covers the Akuna Drive Precinct.
- The initially released ILMS in February 2006, and exhibited as part of Amendment C33, sought to designate the applicant's land within a "Secondary Industrial Area" within the policy framework, although

some other land in Precinct 13 was proposed as a "Strategic Redevelopment Area" where the longer term strategy was to promote residential development[2].

- The EPA did not object to the Amendment as exhibited, and Mobil did not make any submission within the exhibition phase. As one of many landowner and community submissions, there was a submission made by the applicant in April 2006, via its solicitors, seeking strategic support for future residential development of its land.
- By October 2006, there had been around 60 submissions in relation to Amendment C33. It is apparent from the Council report considering submissions in October 2006 that some of these submissions were in petition form with, for example, approximately 800 signatures received in relation to Precinct 13 – 300 supporting industrial development, and 500 preferring the area to be earmarked for residential.
- At its meeting in October 2006, the Council resolved to amend the ILMS so that most of Precinct 13, including the applicant's land, was proposed to be included as a "Strategic Redevelopment Area" rather than the "Secondary Industrial Area".
- On 6 November 2006, Mobil wrote to the Council seeking an assurance that its land at the corner of Maddox and Kororoit Creek Roads (at the southwest corner of Precinct 13) remain in its current industrial zone, and that it had no intention of changing the use of that land. The Mobil letter made no comment on the applicant's land further to the north. The Council treated this letter as a late submission to the Amendment.
- On 22 December 2006, the EPA lodged a further submission expressing concern at the possible further "residential encroachment" by re-zoning land at the corner of Maddox and Kororoit Creek Roads. The EPA indicated it was not in a position to guarantee that future residential uses within the buffer would not be impacted by odour or noise from the Mobil refinery. The EPA letter made no specific comment on the applicant's land further to the north.
- On 13 November 2006, a Panel had been appointed to consider submissions in accordance with the *Planning and Environment Act* 1987. The applicant and several other submitters, including the EPA, lodged forms requesting to be heard at the Panel hearing. Mobil did not seek to be heard by the Panel, although its letter was referred to the Panel along with all other submissions. A directions hearing was

[2] The applicants' statement of facts indicated that the ILMS in February 2006 had designated the applicant's land as being in the "Strategic Redevelopment Area". This is not the case, by reference to the ILMS and the colour plans provided at the hearing. The Council's Statement of Facts contested the applicant's view on this issue and is to be preferred.

held by the panel, and several submitters (including the applicant and Council) subsequently filed expert reports as evidence.

- From at least 14 December 2006, all submissions (including the letter from Mobil) were available on the Council's on-line register. A folder containing copies of all submissions (including the Mobil letter) was also available for inspection throughout the Panel hearing.
- The Panel hearing commenced on 7 March 2007, and continued over 14 scheduled hearing days during March and April 2007.

12 The applicant was represented at the panel hearings by Mr Cicero of Best Hooper (who had also represented the predecessor-in-title in Amendment C1). Mr Cicero however only attended for half an hour on the first day, where he collected a copy of the Council's opening written submission, but apparently without the appendices. He also attended for 1½ hours on 21 March 2007, and presented the applicant's submission on 22 March 2007, including the calling of evidence from the three experts on behalf of the applicant – a planner, acoustic engineer, and traffic engineer. [The panel report reflects the fact that Mr Cicero also separately represented two other submitters[3] at the Panel at other times, and also presented and called expert evidence on behalf of those submitters.]

13 The Council's opening written submission to the Panel dealt specifically and separately with Precinct 13. Within the submission, the Council noted that:

> The majority of land in the central and southern part of the precinct is owned by Mobil and is used as a buffer to the refinery. This land is vacant and used as a pony club.

The first of several key issues identified was "buffer distances to the Mobil refinery" and an acknowledgment that "Mobil does not propose any changes to their land holding and proposes that the currently vacant land continues to be a buffer between sensitive uses and the refinery". The main strategic directions noted by the Council included:

- Recognise the majority of precinct as a Strategic Redevelopment Area that should be developed for residential purposes [*ie incorporating the October 2006 amendments to the ILMS*].
- Ensure that any future redevelopment of the site respects the interfaces with the adjoining residential and industrial areas.
- Include adequate buffer distances/techniques to the Mobil refinery …
- Include the southern part of the precinct in Residential 1 Zone.

14 The Council's opening written submission also summarised relevant submissions although, unfortunately, this was done by reference to

[3] The Tasman Group, and Buja Pty Ltd. It appears that these submitters had interests in other precincts, and neither party raised this matter as being of relevance in the proceeding before me.

submission numbers rather than by identifying the actual submitters by name in this part of the document. The summary does however refer to three of the submissions as being late submissions, and "Late Submission 4" for Precinct 13 is summarised as seeking an assurance that the land remains within an industrial zone, objects to rezoning, and indicates (the owner) has no intention of selling. The identity of these late submitters (including Mobil as "Late Submission 4") can be easily ascertained by reference to the appendix to the opening submission. It is clear from these summaries of some 31 submitters relevant to Precinct 13, that there was a range of views both supporting and opposing residential development within Precinct 13. Many of these submitters did not appear at the panel hearing in support of their submissions, but simply relied upon their written submissions.

15 The Council's opening written submission to the Panel then responded to the matters raised in the submissions. This section commenced as follows:

> The main issues that arise from the submissions are type of land uses to be developed on the presently vacant or under-utilised land, and the access arrangements for industrial traffic. The submissions indicate that there are strongly held views regarding the preferred land uses … The preferred land use is dependent on whether residential uses are appropriate within the buffer of the Mobil refinery.
>
> In response to the concerns regarding development within the recommended 2km buffer area, Council advise that this is a long-term strategy and at this stage does not propose any re-zoning. The strategy clearly states that long-term it is Council's preference that this site be redeveloped for residential purposes if all the site restraints including the 2km buffer distance can be overcome …

16 The appendix to the Council's opening submission notes the late submissions, including identifying Late Submission L4 as being from Mobil and paraphrasing the Mobil Letter. The Council's response to this submission in a table in the appendix includes the following:

> There is no proposal to change the zone at this stage. This amendment proposes to change the classification of this precinct from secondary industrial area to strategic development area which will change its potential future use and may allow future applications for re-zoning.
> …
>
> Recommendation: This submission has not formally been considered by Council. No change [to Amendment] required.

17 So as to avoid unduly complicating matters, I have excluded from the summary of facts, thusfar, any reference to a submission from a Mr Hemphill to the Council on 8 October 2006 in relation to Amendment C33. Mr Hemphill is the councillor whose later conduct in relation to the adoption of the panel report was the subject of the second ground in this proceeding (now withdrawn) and called into question in the Supreme Court proceeding. Shortly prior to the October 2006 Council meeting, Mr

Hemphill had made a submission to the Panel essentially supporting the February 2006 version of the ILMS. [This was the version that would have much of the land in the north of Precinct 13 (including the applicant's land) remain designated as a "secondary industrial area"]. In his Council capacity, Cr Hemphill however excused himself from the October 2006 meeting where the ILMS was sought to be amended contrary to his submission, based on the possible conflict of interest. It appears from the Statement of Facts filed with the Tribunal in this proceeding that the applicants were well aware of Mr Hemphill's position, as he had filed a form requesting to be heard at the panel hearing, and the applicants in fact attended at the panel hearing to argue that he be treated as a private submitter rather than in his capacity as a councillor.

18 As indicated, Mr Cicero presented the applicant's submission to the panel on 22 March 2007, including the calling of evidence from the three experts.

19 Contrary to the applicant's submissions and evidence to the panel, and the Council's support for a change to the exhibited Amendment in relation to Precinct 13, the panel recommended that the bulk of Precinct 13 (including the applicant's land) be designated as a "Secondary Industrial Area". The panel report made reference to the applicant's submission, the Mobil late submission, other submissions for and against residential development in the precinct, the EPA submission, and the Council's view. The panel then noted as follows (at paragraph 8.6.2 of the panel report):

> Based on the material provided to it by the planning authority and the submissions made at the hearing, the panel has identified the following issues which it considers have not been adequately addressed in considering the preferred future zoning and use of this land:
>
> - Advice from Mobil that its land was purchased specifically to provide the required buffer between its refinery to the southwest and residential land to the northeast and that it has no intention of changing the current use of the land. Furthermore, it seeks assurance from the council that its Industrial 3 zoning will be maintained.
>
> It was Dr Wolinski's view [ie the Council's expert] that the Mobil land is no longer required to provide this buffer between its refinery and residential land. If however Mobil intends retaining its land for this purpose, and, given the planning authority's advice that land would not be rezoned against an owner's wishes, the re-zoning of land owned by Or Australia and Winky Pop [*ie the applicants in this proceeding*] to residential in the short term would result in it would be [sic] surrounded by industrially zoned land.
>
> - The relocation of the industrial/residential zone boundary simply moves the point of potential conflict. If, as the planning authority suggests, measures can be taken to address potential conflict if the zone boundary is relocated, the panel sees no

reason to suggest why this would not be achievable at the existing zone boundary. The panel was also advised that there are any number of examples of the Industrial 3 Zone abutting the Residential 1 Zone throughout the metropolitan area, without causing amenity issues.

- The fact that there are only three landowners in the northern section of this precinct provides an opportunity to extend the existing planned industrial estate in Akuna Drive. In fact, it appears that this was what was originally intended given the layout of Akuna Drive. The same opportunity does not always exist where there is a larger number of homes.
- Even if the land to the west of the Akuna Drive industrial estate could be developed for residential purposes in a way that deals with the interface with the existing industrial area, the panel was not persuaded that the various raised by the C1 panel had been addressed, including the extent of the buffer required for the Mobil refinery to the southwest, the use of Violet Street as the principal access to the land, and whether the land is redundant to industrial needs.

  The panel is of the view that without the buffer issues being resolved for the Mobil land and it being an active participant in any change in the zoning of this precinct, with the exception of the two parcels on the east side of the unformed Hygeia Avenue, the area should remain as a secondary industrial area. The direct abuttal of the land occupied by the caravan park (a residential use) and adjoining vacant site to the Residential 1 Zone and its separation by a drain and road reserve from the Mobil land provides the opportunity to investigate the potential to re-zone these sites to residential. This would however be subject to this land not forming part of the required buffers to the Mobil refinery and tank "farm" on the south side of Koroit Creek Road. If, in the future, all or part of the Mobil site is not required as a buffer, its future zoning and that of the adjoining industrial land (if still undeveloped) could be reviewed. Until such time the panel has formed a view that it should be retained as a secondary industrial area.

20 It is this conclusion, and the consequential Panel recommendation, that the applicants contest on the grounds set out earlier in these reasons – essentially that the panel relied upon submissions by Mobil or in relation to the Mobil land not made available to the applicant, and that these were used to support conclusions adverse to the applicants without that material being brought to the attention of the applicants or affording it an opportunity to respond.

21 Given that this proceeding arises under s 39 of the *Planning and Environment Act* 1987, s 39(3) provides that the panel (or a member of the panel authorised by the panel to act on its behalf) is entitled to make a written or oral submission to the Tribunal before the Tribunal completes the

hearing of the matter. In this regard, the Chair of the Amendment C33 panel, Gaye McKenzie, wrote to this Tribunal on 24 October 2007, with a copy to both parties. The substance of the letter was as follows:

> The panel report at paragraph 3 of s 8.6.2 in the first dot point and the following comments refers to the Mobil land in Precinct 13. I advise that in describing the Mobil land and, in particular, in referring to buffers and zoning intents, the panel combined various pieces of information put to it at the hearing by the planning authority and submitters. The panel was not advised directly by Mobil on this matter at the hearing.
>
> In preparing its report and in describing this land, the panel also drew on material in other written submissions referred to it by the planning authority, including the late written submission of Mobil and the Environment Protection Authority.
>
> The panel was also referred to the panel report to Amendment C1 to the Hobsons Bay Planning Scheme. Relevant matters in that report were also considered.

22 The panel otherwise abides the decision of the Tribunal. It is perhaps also worth noting that the Chief Panel Member, Kathryn Mitchell, had responded to the applicants' solicitors in an earlier letter of 6 August 2007, in reasonably similar terms, and noted then that (as the panel report was then with the Council) the applicants may have the opportunity to pursue any additional issues directly with them.

CONSIDERATION OF ISSUES

Approach of the Tribunal

23 Despite the circumstances of this case being somewhat complex, I am not convinced that the conclusions to be drawn from those circumstances are necessarily as complex as the applicant contended, nor support the relief sought. Indeed, I believe much of the applicant's case on this ground is disingenuous to a panel process that the applicant well understands, and where it was given a reasonable opportunity to express its views and comment on the views of others.

24 In his submission, Mr Finanzio for the applicant suggested that the application "raises issues of critical importance to the manner in which planning panel hearings are conducted broadly, as well as in this case". Given section 39 applications arising from panel hearings are relatively rare, he invited me in effect to treat the matter as something of a test case where some broad guiding principles might be stated. Attractive though that proposition might be, I have refrained from taking up that invitation other than to establish the principles relevant to deciding the particular matter on

the facts before me. I am conscious of the observation of Lord Russell in *Fairmount Investments Ltd v Secretary of State for Environment*[4] that:

> All cases in which principles of natural justice are invoked must depend on the particular circumstances of the case. I am unable … in the instant case to generalise.

The range of panel hearings – natural justice within a continuum

25 As discussed at the hearing before me, the nature of the "reasonable opportunity to be heard" by a panel under s 24(a) of the *Planning and Environment Act* 1987 is inevitably to be assessed within something akin to a continuum. At one end of this continuum, there are various site-specific development proposals occasionally considered through a planning scheme amendment process. In these instances, there may be a single identifiable proponent with valuable commercial rights at stake, and a key objector to the specific proposal. In these circumstances, the panel hearing takes on something of an adversarial process "inter-partes" such that each party is fully aware of all matters potentially in issue, well before the hearing. The rules of natural justice take on a degree of greater formality with directions for exchange of contested material, with each party equally represented and in attendance for the entire duration of the hearing, and approaching the matter as if it were before a court or tribunal.

26 At the other end of the continuum, there are very broad strategic or policy reviews occasionally considered through a planning scheme amendment process – even sometimes for an entire new planning scheme – where there are a multitude of submitters across a range of topics or interests. In these circumstances, the panel hearing takes on more of an inquiry function or advisory role (rather than an adversarial process) and the opportunity to be heard is essentially an opportunity to appear at a hearing to expand on a written submission made during the exhibition phase of the process. Many submitters in such circumstances are not legally represented, and do not attend for the whole panel hearing, but only to present their own submission or for other limited parts of the hearing that may interest them.

27 As with most panel hearings, the matter before me lies somewhere within this continuum, with a mixed adversarial/inquiry/advisory process. It is perhaps closer to the second end of the continuum I have described, and even the applicant described the amendment in its written material as a "sweeping strategic-type amendment".

28 Amendment C33 is a strategic amendment incorporating local planning policy for industrial land use and development across a broad area of the Hobsons Bay municipality – and there were many submitters raising issues of a general nature or specific to their land ownership or development aspirations. Some submitters were legally represented at the panel hearing,

[4] [1976] 1 WLR 1255, 1265, applied by Brooking J. in *Torrington Investments Pty Ltd v Penny & Ors* (1981) 1 PABR 384, also referred to by Mr Finanzio in his submissions.

including the applicants, although not in attendance for the whole hearing which lasted several days. The panel was not chaired by a lawyer. Despite this, the planning policy framework had potential implications for the applicants. It sought to create policy preference for a future land use pattern that would either promote industrial or residential land use on or proximate to the applicants' land, albeit not of itself implementing any particular zoning change that would create actual development or use rights.

29 Any current textbook on administrative law will reveal many cases on natural justice and procedural fairness, in many different circumstances. The applicants referred me to only a few, such as *Freedman v Petty*[5] and *Kanda v Government of Malaya*[6]. However, these cases seem to relate to what I have indicated is the more adversarial end of the continuum where there are references to plaintiffs or accused, or where the proceedings were clearly "inter-partes" concerning the rights and liberties of particular individuals. At most, these cases simply re-state the limb of the rules of natural justice that entitle a person to know the case he has to answer. They are not in my view directly relevant to a panel proceeding in the nature of an inquiry into a proposed change of public policy – albeit affecting the future development aspirations of some landowners. In a broad sense the applicants here clearly knew the matters upon which they were entitled to make a submission and be heard, namely the subject matter of Amendment C33 and the ILMS that had been publicly exhibited, and the subsequently amended version of the ILMS supported by the Council.

30 In addition to applying the rules of natural justice in s 161(1)(b) of the *Planning and Environment Act* 1987, a panel:

- must consider all submissions, not just those of parties attending the hearing (s 24);
- must consider late submissions referred to it (through a combination of s 22(2), s 23(1)(b) and s 24);
- may make any recommendations it thinks fit (s 25(2));
- must conduct its hearings in public, subject to limited exceptions (s 160(1));
- must act according to equity and good conscience, and without regard to technicalities or legal forms (s 161(1)(a));
- is not required to conduct the hearing in a formal manner (s 161(1)(c));
- is not bound by the rules or practices to evidence but may inform itself on any matter in any way it thinks fit, and without notice to any person who has made a submission (s 161(1)(d));

[5] [1981] VR 1001, particularly at 1021
[6] [1962] AC 332, in particular at 337.

- may regulate its own proceedings (s 167);
- may take into account any matter it thinks relevant in making its report and recommendations (s 168).

31 Mr Finanzio referred me to *Wajnberg v Raynor and MMBW*[7]. That case concerned a matter before the former Town Planning Appeals Tribunal which was subject to the then s 21(1) of the *Town and Country Planning Act* 1961 providing that the Tribunal "subject to the requirements of justice, may inform itself in such manner as it thinks fit". The court held that this still required parties to be informed of material upon which the Tribunal proposed to inform its mind, and to give the opportunity to make submissions and adduce countervailing evidence.

32 In my view, *Wajnberg* is not directly applicable to a panel proceeding, certainly not a panel proceeding more in the nature of an inquiry where the process is less adversarial and not deciding a dispute between parties. The facts in *Wajnberg* related to an adversarial dispute between two parties before a Tribunal as to the proof of ownership of land – very different to a variety of different opinions being expressed in a broad public policy review. I also note that s 21(1) of the then *Town and Country Planning Act* 1961 did not have a provision corresponding to s 161(1)(d)(ii) of the present *Planning and Environment Act* 1987, allowing a panel to inform itself "without notice to any person who has made a submission". Indeed, it is possible that this additional proviso was intended to overcome the possible application of the principle in *Wajnberg* to panel proceedings, although I express no concluded view on that. The proviso does however appear to fetter the way in which the principles of natural justice should be interpreted in panel proceedings.

33 If the principle contended by Mr Finanzio, stemming from *Wajnberg*, was applied strictly to a multi-submitter panel hearing considering a range of opinions relevant to a broad policy review affecting a broad area, it would make the whole panel system unworkable. The panel would have to know in advance all of the material that it intended to rely upon, and expressly put to each submitter all of the other submissions and other material, and recall all submitters if 'new' issues were raised by a later submitter. I do not think a panel is required to "spoon feed" all submitters in this way, particularly those represented by experienced advocates on behalf of applicants who have chosen not to attend the whole public hearing nor to review all available material. A panel in such circumstance simply needs to put in place reasonable processes on a case-by-case basis to try to ensure that all submitters get a fair go, and to ensure that the planning authority has fulfilled its obligations to make all relevant material (including submissions) available for inspection throughout the process.

[7] [1971] VR 665, particularly at 678-9

34 Mr Finanzio also referred me to *Thomson v Stonnington City Council*[8]. That case is also different in that a late submitter, who had not received any notice and had not therefore had an opportunity to attend earlier parts of a panel hearing (and had therefore not had an opportunity to cross-examine witnesses, or hear oral submissions or evidence) was found to be unfairly disadvantaged by that outcome[9]. The applicants here voluntarily chose to be part-time participants in the panel process, and cannot claim a disadvantage on this basis.

35 I would not wish it to be taken from this comment that, by not attending full time, the applicants had in some way lost their rights to procedural fairness or natural justice. These principles still of course apply. It is simply that the nature of this panel proceeding, the governing legislation, and the circumstances of this case need to be taken into account in determining how those principles and rules should properly be applied. As will be apparent, having considered these matters and circumstances in an overall context, I do not believe that there has been any denial of natural justice or procedural fairness to the applicants in this matter. I certainly do not believe this a case, as the applicants assert, that there has been an issue specifically raised against the applicants in its absence, without it being given an opportunity to respond.

Access to material

36 Turning to the specifics of the grounds advanced by the applicants, the applicants assert that the panel relied upon submissions made by Mobil affecting the applicants' land which were not made available to the applicant at any time throughout the hearing or public consultation process.

37 It is not at all clear to me from a reading of the Mobil letter that it purports to "affect the applicants' land" in any direct sense. Mobil was simply seeking that *its* land (ie Mobil's own land) was not re-zoned from an industrial zone to a residential zone. The letter does not refer to the applicant's land, or to Precinct 13 generally.

38 Putting this issue to one side, the *Planning and Environment Act* 1987 does not require that each submitter to a planning scheme amendment be provided expressly with a copy of the submissions of each other submitter. In some cases, this is directed by a panel, but it does not appear to have been sought by any party or directed in this case. In similar fashion to objections to planning permit applications, the responsible authority or planning authority is simply required under the Act to maintain a register of submissions and make these available for public inspection. This inspection period is not only for the duration of the exhibition phase, but the submissions must be available for any person to inspect during office hours

[8] [2003] VCAT 813

[9] Even in *Thomson*, the Tribunal declined to make a declaration under s 39 of the *Planning and Environment Act* 1987, but the panel was still proceeding and able to take on board the Tribunal's views.

free of charge until the end of two months after the amendment comes into operation or lapses[10]. It is not uncommon for major submitters, or their advocates or expert witnesses, to undertake such an inspection in the course of preparation for a panel hearing. As I have indicated earlier, the Council in this case made this task even simpler by maintaining an on-line register.

39 From the Statement of Facts and documents provided to me, it is not apparent that the applicants availed themselves of the opportunity to inspect all submissions. The statement of evidence to the panel prepared by the planner, Mr McGurn, noted that he had considered a number of documents, but does not refer to submissions of other parties. Indeed, the Statement of Facts tendered to me creates an inference that the applicants may have relied primarily on dealing only with those submitters that had filed requests to be heard at the panel hearing. This is somewhat naïve, as the panel has an obligation to consider all submissions (whether or not the submitter appears at the panel hearing) and it appears that there were many written submissions and/or petitions for and against industrial and residential development in Precinct 13.

40 The legislative framework under the *Planning and Environment Act* 1987 also specifically contemplates late submissions[11]. In the case of the Mobil and EPA letters, these were treated as late submissions and referred to the panel. They were also made available for inspection (and referenced in the on-line register) along with all of the other submissions, in accordance with s 21(2) of the *Planning and Environment Act* 1987. I might add that the fact of these late submissions in November and December 2006 ought not to be considered unduly surprising, given that the Council had resolved to amend the ILMS only in October 2006 to designate a much greater area of Precinct 13 as a "Strategic Redevelopment Area" (ie a change from the exhibited version).

41 I am satisfied that the applicants had an experienced team that well understood the normal processes through which a Council made submissions and late submissions available for inspection, and had the opportunity to inspect submissions throughout the process. This would have revealed to the applicants the existence of the Mobil letter. I do not believe the panel has denied the applicants natural justice in not directly referring the Mobil letter or the EPA's submission to the applicants. Whilst it may obviously have been better if the planning authority or panel had alerted all submitters to the existence of late submissions, either generally or specifically, I do not believe that the failure to do so created a departure from the rules of natural justice applicable to a proceeding of this type.

42 Moreover, as contended by Mr Appudurai, at the very latest, the applicants ought to have become aware of the late submissions on the opening day of the panel hearing. It is unfortunate that the applicants' legal counsel

[10] s 21(2) of the *Planning and Environment Act* 1987
[11] s 22(2) of the *Planning and Environment Act* 1987

attended for only half an hour and collected a copy of the Council's opening submission without appendices. The material before me suggests that he was furnished with the appendices shortly afterwards in any event. A careful reading even of the opening submission without the appendices would reveal that there were late submissions in relation to Precinct 13, and these should have alerted the applicants that there might be additional material that should be inspected. Furthermore, in addition to its on-line register and the making of available submissions in accordance with s 21(2) of the Act, the Council maintained a folder containing all submissions (including late submissions) at the panel hearing itself – presumably along with other relevant documents available for public inspection and intended to assist those submitters and their representatives not available to attend at the panel hearing full time. The applicant's representatives would have been aware that this is a common panel practice.

43 Having regard to the governing legislation and the circumstances of this case, I am satisfied that the applicants were provided with reasonable access to relevant documents, including the Mobil letter. In my view, they cannot blame the panel for not having availed themselves of the opportunity to inspect all relevant documents to which access was provided by the planning authority, and there was sufficient material for them to be aware of the relevant issues likely to be raised or considered by the panel.

44 A similar situation prevails in relation to the EPA submission. Moreover, as I have indicated above, I do not believe that the Mobil letter, either alone or in combination with the EPA submission, provided the sole determinant for the panel's conclusions and recommendations in relation to Precinct 13.

The Panel's reliance on submissions, and its conclusions

45 The second and third matters relied upon by the applicants to support their ground of review is essentially that the applicants were not provided with an opportunity to respond to the submissions of others, or the fact of opposing submissions was not brought to the attention of the applicants or the applicants' representatives. Given the discussion above, it will be apparent that I have formed a view that the applicants were well aware of the general matters before the panel and had the opportunity to inspect all relevant documents pertaining to the proposed future policy directions for Precinct 13. They were well aware of issues stemming from Amendment C1 in relation to the Mobil land and cannot really claim to be surprised by the Mobil letter.

46 Within a 14-day hearing covering a multitude of issues across a number of precincts in the municipality, the applicants were allocated a significant time period to present their case and called three expert witnesses. It cannot seriously be contended that the applicant was not given a reasonable opportunity to be heard or to respond to the written submissions made by other submitters, or the presentations made by other parties. In the circumstances of this case, comprising a broad public policy review, it is

not the panel's role to indicate to each submitter appearing before it all of the nuances of all of the material that might have been discussed over preceding hearing days when the submitter was not present. Indeed, it does not appear from the evidence that there was any specific discussion about the applicant's land in its absence – the panel report, and its letter to the Tribunal, would suggest that the panel's broad views on Precinct 13 arose from the consideration of a variety of matters.

47 In this particular case, I believe the panel could reasonably hold the view that the applicants were represented by experienced advocates and expert witnesses, had access to relevant material, and well understood the primary issues before the panel in considering whether or not areas of Precinct 13 should be designated as "Secondary Industrial Areas" or "Strategic Redevelopment Areas". This was certainly not a case where the applicant could claim not to have known that were others holding opposing views as to the future policy for development and use of land in Precinct 13. The applicant needed to carefully advocate its argument for a change from the status quo having regard to the comments of the previous Amendment C1 panel. On any examination of the material, quite apart from the Mobil letter, there were competing submissions for and against residential development in Precinct 13, or in specific parts of that precinct. I believe that the applicants have (with hindsight) placed too much significance on the Mobil letter in an attempt to justify the basis for a section 39 application to this Tribunal. I agree with Mr Appudurai for the Council that the Mobil letter is not the "smoking gun" that the applicants make it out to be.

48 It is not my role to second-guess the conclusions or recommendation of the panel in this matter, save to respond to the specific assertion by the applicants before me that the panel's conclusions and recommendations somehow, of themselves, demonstrate that the applicants must have been denied procedural fairness in this matter because the conclusions were not supported by evidence or material to which the applicants were privy. I simply disagree with that assertion, having regard to the material I have discussed.

49 Although Mr Appudurai addressed me on these natural justice issues, his initial contention was that the applicants' complaint (at least in relation to the panel proceeding on the first ground before me, as opposed to the matters before the Supreme Court) was no more than that the applicants were not satisfied with the panel's recommendations insofar as they affected the applicants' land. This "disappointment" on the merits outcome of the matters before the panel was not, he contended, a proper basis for an application under s 39. I have some sympathy with this view, and for Mr Appudurai's reference to *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* [12], from which it might be stated that the panel report and

[12] (1996) 136 ALR 481, 490

recommendations should not be "… construed minutely and finely with an eye keenly attuned to the perception of error"

50 In this context, although the panel might have more clearly explained its position in the panel report, I do not accept the applicants' contention that the late submission referred to in the panel's report bears no resemblance to the manner in which it is recorded and relied upon by the panel. There is nothing sinister in the reference in the panel report to "advice from Mobil", and Mr Finanzio did not seek to contest the explanation given in the panel letter to the Tribunal – namely, that the panel had not been advised directly by Mobil and had relied on a range of material in making its comments. This included the Mobil letter (which the planning authority had made public by treating it as a late submission), and the history of the matter reflected in the earlier panel report from Amendment C1. All of the material, considered together, provides an adequate explanation for the panel's reasoning.

51 Indeed, from the reference to the panel report I have included above, it is clear that the issue of the Mobil refinery was only one of the issues considered by the panel in recommending that land in the northern part of Precinct 13 be designated as a "Secondary Industrial Area". Other matters included the original intention given to the existing layout of the adjacent Akuna Drive Industrial Estate, and the fact that the panel was simply not convinced that the various matters raised by the Amendment C1 panel had been addressed.

52 The applicants' submission to the panel through Mr Cicero, and its evidence through its planner Mr McGurn, was to the effect that residential development of the applicant's land enjoyed strong strategic support. However, the ILMS of February 2006 that was publicly exhibited with Amendment C33 had indicated policy support for this land being retained in a "Secondary Industrial Area" (with only part of the precinct, to the south, designated as a "Strategic Redevelopment Area"), and it was only the Council resolution of October 2006 that amended the ILMS to prefer a "Strategic Redevelopment Area" for the applicant's land. Mr McGurn's statement of evidence relies on this amended ILMS of October 2006 and there is no discussion of any "strategic basis" for the Council's apparent change of heart in relation to the ILMS between exhibition and the panel hearing. Again, the panel might also have articulated its views on this more clearly, but it was perhaps entitled to be sceptical about the strategic underpinning for such a change when it commented in its report:

> Even if the land to the west of the Akuna Drive industrial estate [*ie including the applicants land*] could be developed for residential purposes in a way that deals with the interface with the existing industrial area, the panel was not persuaded that the various raised by the C1 panel had been addressed, including the extent of the buffer required for the Mobil refinery to the southwest, the use of Violet

> Street as the principal access to the land, and whether the land is redundant to industrial needs.

53 A fair reading of the panel report does not suggest that the Mobil letter or the Mobil land was the sole determinant for this view. Moreover, the panel did not rule out the possibility that the applicant's development aspirations could not be realised. The panel clearly indicated that if, in the future, these issues were addressed, the future zoning of the land could be reviewed but that, until such time, it ought to remain designated as a 'Secondary Industrial Area" within the policy framework.

Conclusions – A 'fair crack of the whip"

54 In *Fairmont Investments Ltd v Secretary of State for the Environment*[13], a decision referred to earlier in these reasons, Lord Russell had considered that the principles of natural justice must depend on the particular circumstances of the case. I have therefore considered and discussed those circumstances at some length. Ultimately, Lord Russell expressed a view in *Fairmount Investments* that natural justice might be considered in the context of whether a person had had a "fair crack of the whip". In *Torrington Investments Pty Ltd v Penny*[14], Brooking J in the Supreme Court of Victoria remarked that:

> The "fair crack of the whip" to which the parties were in this case entitled [referring to the *Fairmount Investment* case] must require some regard to be had to the ordinary man's notion of common fairness and common sense …

55 It was in fact the applicants who referred me to this case extract, and I think its colloquial reference is directly applicable to this case. Applying ordinary notions of common fairness and common sense in the present case, I do not believe it can be said that the applicants have not had a "fair crack of the whip" in the opportunity given to them to present a submission in relation to Amendment C33 to the Hobsons Bay Planning Scheme, or to access relevant material in order to comment on the submissions (including the Mobil letter) by others.

56 It follows in all the circumstances that I decline to make the declarations or orders sought by the applicants.

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[13] [1976] 1 WLR 1255, in particular at 1265
[14] (1981) 1 PABR 384

57 Mr Appudurai in his written submission on behalf of the Council contended that the Tribunal should dismiss the application with costs. No formal submissions were made on costs before me, and I have simply reserved costs for the time being.

Mark Dwyer
Deputy President