A History of Land Use Planning Legislation and Rights of Objection in Victoria

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The purpose of this article is to examine the development of Victorian land use planning legislation from 1921, in light of the objectives claimed for it in parliamentary debates, and changing nuances in the judicial interpretation of it, with particular attention to rights of objection. The earlier parliamentary contemplations reveal a dialogue between, on one hand, concerns to preserve rights for private land owners to use and develop their land, and on the other hand, to preserve standards of development for the benefit of neighbours. These benefits were thus perceived as oriented to property value, by maintaining the affluence of a residential area through the preservation of minimum block and building areas for example, while others were concerned with the minimisation of potential interference posed to residential land uses by nuisances which then commonly emanated from other land uses. Judicial interpretation of the relevant statutory instruments moved from unwavering concern for preservation of the use and development rights of private land owners to judicial acceptance of urban planning as a legitimate public regulatory activity, and a consequent judicial concern with inconsistencies, particularly with existing user rights, and problems on the boundaries of zones where potentially inconsistent land uses had been *placed.*

The intentional *placement* of urban land uses in order to avoid interference in the enjoyment of neighbouring land has a very long history stretching back to Ancient Rome where, Juvenal indicates,[1] industries posing a nuisance were located on the other side of the River Tiber. When the free Hanseatic trading city of Hamburg was laid out in the Middle Ages,[2] inconsistent land uses were spatially separated through the land title registration system which was maintained in conjunction with a city plan. Beside deeds conveyancing, which focuses exclusively on individual land parcels, the Hamburg-Hanseatic system enjoyed advanced spatial and cadastral advantages. Not all of these advantages were carried over into the Torrens system which the Hamburg-Hanseatic system largely inspired.[3] Nevertheless, in the early years of the implementation of the Torrens system in Australia, the idea of restricting the

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[1] O F Robinson, *Ancient Rome — City Planning and Administration* (1992) 40.

[2] See J Bracker (ed), *Die Hanse — Lebenswirklichkeit und Mythos* (1989).

[3] S Robinson, *Transfer of Land in Victoria* (1979) Ch 1.

uses to which land might be put by imposing a reservation on the title to relevant land was employed to lay out the development of some early country towns in a similar way to that employed in Hamburg.[4]

The most important and most consistently held aim of the 19th century pioneers of public town planning was to plan for an improved urban environment, by spatially defining areas where the advantages of city life could be enjoyed without the urban disadvantages of interferences such as smoke.[5] The underlying objective was public health and an aesthetic contentedness for the work force, and ultimately a 'safety of property' which was broadly conceived.[6]

Between *strategic planning* and *statutory planning* a demarcation is now drawn, in which the respective roles of environmental considerations remain uncertain in particular instances. The preservation and enhancement of the amenity of an area nevertheless remains a fundamental policy of town planning law.[7] With this demarcation no doubt in mind, Professor Sandercock expressed the view that:

> Although Victoria shared with other states the enthusiasm and reforming zeal of the early town planning movement, it has been tardy in giving legislative support to planning ideas. Victoria waited until 1944 for its first planning legislation, until 1954 for its first plan, and until 1968 for this plan to be given statutory force.[8]

This view is correct when planning is conceived as 'prescriptive land-use control of the whole metropolis.'[9] However, as Professor Sandercock acknowledged,[10] the zoning of land, with consequent permitted and prohibited uses, commenced in Victoria in 1921.[11]

A SMALL INSTALMENT TOWARD TOWN PLANNING — THE *LOCAL GOVERNMENT ACT* 1921 (VIC)

The 1921 reform was legislated by amending s 197 of the *Local Government Act* 1915.[12] The intentions surrounding this reform are very significant, especially when one considers the development of avenues for citizens to raise

[4] Law Reform Commission of Victoria, *The Torrens Register Book*, Discussion Paper No 3, October 1986, 12.

[5] R Freestone, *Model Communities — The Garden City Movement in Australia* (1989). Reference was made in Victorian parliamentary debates of this period to the growing town planning movement as a justification for reforms. See infra fns 15, 23.

[6] L Sandercock, *Cities for Sale — Property, Politics and Urban Planning in Australia* (1975) 12, 16, 21.

[7] D J & K H Gifford, *Town Planning Law and Practice* (1987–) §3–1.

[8] L Sandercock, op cit (fn 6) 55.

[9] Id 64.

[10] Id 62–3.

[11] It should be pointed out that by-laws made before the 1921 and 1924 reforms were still being challenged well into the new century. A related example is provided by *O'Keefe* v *City of Caulfield* (1945) 51 ALR 306 which concerned a by-law made in 1902, thus drawing authorisation from the *Local Government Act* 1890 (Vic). The by-laws quashed in *Shire of Swan Hill v Bradbury* (1937) 43 ALR 194 were made in 1922 and 1923.

[12] *Local Government Act* 1921 (Vic), s 10.

objections to development plans. Parliamentary debates show clearly that in the future a more positive approach to town planning was to be taken, with the primary goals of improving health and the environment. Safeguards for private property rights were considered necessary, and various avenues for opposition to council planning initiatives were conceived as protection of these rights. Subject to such safeguards it was generally considered that land use planning carried wider benefits to which private property interests generally should yield.

The new power vested in municipal councils by the amendment was to make by-laws

> prescribing areas within the municipal district as residential areas and prohibiting or regulating within the whole or any part of any such residential area the erection ... or the use of any building for the purposes of such classes of trades, industries, manufactures, businesses or public amusements as are specified in the by-law.

Such a by-law was to be approved by the Governor in Council, and could not preclude the continuance of the existing use of any building, or the rebuilding or extension of such a building.

This enacted provision was not in the original Bill actually introduced into the Legislative Assembly on 28 September 1921. Its insertion followed a motion by Mr Eggleston (St Kilda) that some proposed new clauses be considered in Committee.[13] The provision proposed to amend s 197 was generally supported. It was widely regarded as an interim measure which would lead to preparation of a more comprehensive scheme for the metropolitan area:[14]

> The clause is a small instalment in connexion with the new movement of town planning, and it deserves support. There is a growing opinion in support of this movement, not only in regard to buildings but in regard to reserves and recreation grounds.[15]

Some opposition was raised to the text of the amendment proposed by Mr Eggleston on the ground that land owners with existing use rights would not be able to extend their existing and protected land uses. Indeed, some honourable members found themselves in this very position. The Premier, Mr Lawson, acknowledged that there could be individual cases of hardship, but these would be ameliorated to some extent at least in the commonsense exercise of the discretion which the Councils would hold, and the necessity for proposed by-laws to be scrutinised by the Public Works Department before obtaining approval from the Governor in Council. With these checks and balances in place, the balance between private right and public good was tipped in favour of the wider benefit.[16] In any case, the proposed clause was

[13] *Parliamentary Debates*, Legislative Assembly (Vic), 23 November 1921, 1292, and 30 November 1921, 1382.
[14] Mr Eggleston in *Parliamentary Debates*, Legislative Assembly (Vic), 30 November 1921, 1383.
[15] Mr McLachlan, id 1387.
[16] Mr Lawson, id 1384.

later amended by Mr Eggleston to extend the existing use rights already protected in the proposal to include 'enlargement rebuilding or extension'.

Beside the issue of private property rights ran a dialogue about the essential purpose of land use zoning. Mr Snowball argued:

> It is desirable ... to allot trades to various portions of a municipality, and to encourage the residential area to come out of the midst of factories and shops. The home life of the people would not then be affected by the influences that hang around factory localities and workshop districts.[17]

And later:

> It will have the effect of freeing the residential population from what cannot be considered healthy conditions surrounding homes set in the midst of factories and industrial establishments, where there is no proper room for the recreation of children or the home life which we desire to see amply provided for in residential areas.[18]

Mr Snowball's point of view was to some extent adopted by the member for Fitzroy, Mr Billson. However, Mr Billson identified the motive behind the Bill as the protection of the newer 'aristocratic' areas from the disadvantages explained by Mr Snowball at a time when it was too late to organise properly the industrial and residential activities conducted in the established inner suburbs such as Fitzroy. In his view the reform measure should have gone on to create an industrial centre in a new area without residences.[19] Mr Eggleston pointed out that the measure would authorise the zoning of a residential area in Fitzroy. Mr Billson saw that as a difficult undertaking:

> But if factories were taken out to an established industrial area ... and a two-penny ride would take the workers there or bring them back again, we could have much better surroundings in the solely residential areas.[20]

Thus the measure was quickly disposed of in the Assembly. The issue which actually kept members so late in the night that they feared missing the last tram[21] was the difficult issue of striking rates and property valuation for that purpose, and not this first step toward developing rational urban spatial relations.

In the Legislative Council,[22] the issue was introduced briefly in the second reading speech as an interim measure preceding a Bill devoted to the 'very large and increasingly important subject of town planning and town zoning.'[23] Mr Clarke saw the issue as a building matter, and pointed out that municipal by-laws would have to be approved by the Minister before submission to the Governor in Council, enabling inquiry, and satisfaction that no injustice was being done, at that point. Debate of the issue was postponed[24] and finally

[17] Mr Snowball, ibid.
[18] Id 1385.
[19] Mr Billson, id 1386.
[20] Ibid.
[21] Mr Prendergast, id 1416.
[22] Received and first read on the 13th December 1921, id 1779.
[23] The Hon F Clarke, Minister for Public Works, id 1780.
[24] Id 1804.

overlooked by the Upper House.[25] This apparently passing interest in the issue displayed by the Upper House, traditionally viewed as defending landed interests, renders problematic the view that urban planning is a concern of *the people* foisted upon *the propertied.*[26]

Legislation to establish a Metropolitan Town Planning Commission was passed in the following year. Its first *duty* was to:

> Inquire into and report upon the present conditions and tendencies of urban development in the metropolitan area and ... in such report set out -
> (a) general plans and recommendations with respect to the better guidance and control of such development.[27]

SUPREME COURT CHALLENGES TO THE NEW SYSTEM

Council by-laws made under the new power contained in s 197 of the *Local Government Act* 1915 (Vic)[28] were subjected to challenge on the grounds of unreasonableness and uncertainty. In not one of the reported challenges did a by-law prescribing a residential area, and restricting trade and industry in that area, survive judicial review.

The challenges were initiated as motions to quash the by-laws under s 232 of the Act. There appears to have been no standing requirement apart from status as a ratepayer. No doubt, at that time, one's status as a ratepayer was also the source of one's franchise to vote in municipal elections. A suggestion that the qualification of being a ratepayer was intended as an implicit property requirement for *locus standi* is discounted by the availability of the same action to *any person* under s 48 of the *Evidence Act* 1890 (Vic).[29] It seems just as likely that the requirement of being a ratepayer was philosophically linked to one's status as a citizen of one's city or other local municipal district; a constituent member of the local government corporation;[30] and entitled

[25] Id 1934.

[26] The circumstances surrounding the 1924 amendment indeed suggest a contrary conclusion. See text at fn 41 infra.

[27] *Metropolitan Town Planning Commission Act* 1922 (Vic), s 10(1)(a).

[28] As amended by s 10 of the *Local Government Act* 1921 (Vic), as related above.

[29] Originally enacted in s 8 of the *Evidence (By-laws) Act* (No 521) (Vic). See *Victorian Trotting Club; Ex parte Coleman* (1888) 14 VLR 271, where a member of the public was not to be excluded from challenging a trotting club by-law, on the ground of inconsistency between the by-law and the lease of the trotting course: per Williams J, 279. The two actions seem to have been almost interchangeable: see *Merrett* v *Shire of Tungamah* [1912] VLR 248.

[30] *Local Government Act* 1915 (Vic), s 8 constituted local government corporations in the following familiar way:

> The inhabitants of every shire borough town and city ... shall under the name of the president councillors and ratepayers of such shire, the mayor councillors and burgesses of such borough, the mayor councillors and burgesses of such town, or the mayor councillors and citizens of such city as the case may be, be a body corporate with perpetual succession and a common seal.

Contrast the local government electoral property franchise in s 71. Property franchise was abolished by the *Local Government (Municipal Council Elections)* Act 1983.

to participate in its public affairs. This observation is supported by the recurrence of references in reports to the applicant's status as a ratepayer, thus satisfying s 232, with no further inquiry which would have been relevant to establishing affectation, such as the location of the ratepayer's property in the challenged zone.

In *King* v *City of Footscray*[31] the Full Court considered a by-law requiring that council permission be obtained before premises could be constructed for a range of non-residential uses and concluded that it was *ultra vires* the powers purportedly relied upon, including the recently amended s 197 of the *Local Government Act* 1915. In the Court's view the by-law regulated nothing. It did not purport to control building, but rather behaviour:

> Under the guise of controlling buildings, and so far as the disguise will extend it, the by-law in effect forbids the citizens of Footscray to carry on their lawful vocations in any place not approved by the Council.[32]

The report provides no account of Mr King's standing to initiate the motion apart from his status as a ratepayer.

The by-law's uncertainty was more subtle in *Stewart* v *City of Essendon*.[33] Areas of the municipality were prescribed residential by setting out in a schedule the streets in which 'properties' could not be the sites of buildings for non-residential purposes. Weigall AJ considered that the by-law did not prescribe an 'area' as required by s 197. The word 'properties', which the by-law employed, may have various meanings. Further, the terms used in the by-law, 'trades, industries, manufactures, businesses or public amusements' were not specific enough. The by-law was thus invalid. The applicant, Charlotte Ann Stewart, was a ratepayer and also owned relevant land on which she had permission to erect a villa and a shop. The villa was in the course of construction when the by-law was made, but the shop had not been commenced.

Corless v *City of Richmond*[34] was taken on appeal to the Full Court, apparently in an effort to overturn the judgment of Weigall AJ in *Stewart*.[35] Mr Dixon KC appeared for the City of Richmond, arguing that 'properties' is an ordinary expression for land parcels. The Full Court approved *Stewart*. The report provides no account of Mr Corless' standing to initiate the motion apart from his status as a ratepayer.[36]

The judgment of Schutt J in *Wansborough* v *City of Camberwell*[37] stimulated a legislative response. That case concerned a by-law which sought to impose a minimum area of 1500 square feet for the ground floor of a dwelling built in any of the relevant scheduled streets, and a minimum of 1000 square feet for dwellings in the rest of the municipality. Schutt J considered that the wording of the relevant provision in the *Local Government Act* 1915 (Vic)[38]

[31] (1923) 30 Argus LR 8.
[32] Id 11.
[33] [1924] VLR 219.
[34] [1924] VLR 408; (1924) 30 Argus LR 303.
[35] [1924] VLR 408, 410 per Cussen ACJ.
[36] On the significance of ratepayer status see text above at fn 29.
[37] (1924) 30 ALR 435. The judgment was delivered on 18 November 1924.
[38] Section 198.

was not wide enough to support the by-law. The by-law also claimed to be made under s 10 of the 1921 amendment, but Schutt J did not 'think it necessary ... to go any further into those matters.'[39] Again, the report provides no account of Mr Wansborough's standing to initiate the motion apart from his status as a ratepayer.[40]

The legislative response to Justice Schutt's judgment, the *Local Government Bill (No 4)* 1924 (Vic), originated in the Upper House.[41] It was first read in the Council on 17 December 1924, within one month of Schutt J delivering his decision. The Bill was received in the Assembly and first read on 18 December 1924. The Bill was treated as an urgent measure in response to the court decision and passed through its remaining stages in the Assembly later the same day.[42] There was virtually no debate of the matter in the Assembly.[43] The debate in the Legislative Council revolved mainly around the intention behind by-laws prescribing minimum floor areas to exclude small houses, and thus the less wealthy owners of them, from affluent municipalities. The solution to this was for all municipalities to set aside areas for smaller houses. The Honourable H F Richardson, who led the second reading debate, proposed that this should be pursued at the local government level:

> We are only getting over the difficulty [of the Supreme Court decisions]. The municipalities always recognized that they have this right, and they framed by-laws that have been upset. By-laws are framed by the councils, and they are gazetted and advertised, and then if ratepayers do not object the by-laws have to go to the Minister for confirmation.[44]

And later:

> If there is a strong feeling that areas should be set aside for the smaller class of buildings, sufficient influence would be brought to bear on the council to see that that was done. Any sensible Minister, when the matter was put before him, would say, 'Here is a council proclaiming a by-law that makes it impossible for the smaller buildings to be put up.' Such a Minister would say that there should be some provision made.[45]

No doubt was expressed in the Parliament that the power of councils to prohibit all classes of trade in a residential area should be made clear. Many municipalities had already adopted by-laws on the model of those quashed by the Supreme Court. The Bill would save municipalities the expense of extensively specifying areas and prohibited activities.[46] The Bill passed through its remaining stages in the same session.

The main thrust of the 1924 amendment against the interpretation adopted by the Supreme Court was to declare certain aspects of by-laws sufficient. For

[39] (1924) 30 Argus LR 435, 437.
[40] On the significance of ratepayer status see text above at fn 29.
[41] *Parliamentary Debates*, Legislative Council (Vic), 17 December 1924, 1942.
[42] *Parliamentary Debates*, Legislative Council (Vic), 18 December 1924, 2253.
[43] Id 2305–6.
[44] *Parliamentary Debates*, Legislative Council (Vic), 19 December 1924, 2330.
[45] Ibid.
[46] *Parliamentary Debates*, Legislative Council (Vic), 18 December 1924, 2328.

example, it was sufficient to describe a residential area by reference to the names of streets or roads.[47]

The judgment of the Full Court in *Righetti* v *City of Essendon*[48] was handed down on 11 March 1926. The challenged by-law had been made before the 1924 amendment, so, as we would expect, could not be saved by it. The by-law sought to prescribe minimum sized allotments in subdivisions of land. In particular it sought to maintain a minimum size of 5000 square feet for trade and industrial sites, largely through council discretions, related to light and ventilation for example. Mr Eager of Counsel, who was also the advocate for invalidity in all of the challenges cited above, urged that the by-law interfered with a freedom to subdivide land which he identified in the *Statute Quia Emptores* 1290 (Eng).[49] Mr Lowe responded that the by-law did not regulate subdivision, but allotment size. Irvine CJ construed the by-law as a limitation of subdivision without statutory authorisation. Mann J added that in his view there was statutory power for a by-law prescribing allotment sizes. MacFarlan J agreed with the Chief Justice and declined to express a view on the comment of Mann J.[50] Again, the report provides no account of the standing of the applicant, Ethel Rose Righetti, to initiate the motion apart from her status as a ratepayer.[51]

In *Maggs* v *City of Camberwell*[52] Irvine CJ considered a by-law made by the City in October 1923 which sought to prescribe the whole municipality residential, except for certain streets scheduled to it. The by-law also provided that the council could by resolution exempt further streets or remove streets from the exempting schedule. The Chief Justice considered that a by-law prescribing an entire municipality residential could be valid under s 10 of the 1921 reform if the exempted streets were fixed in the by-law. A discretion in the council to alter the prescription by resolution could not, however, be supported. The applicants, Messrs Magg and Wood, held the land as executors and had applied for permission to subdivide it. Several allotments were to be shop sites.

The Full Court reached a similar conclusion with respect to a power of dispensation, reserved to the same council in one of its by-laws, in *Olsen* v *City of Camberwell*.[53] The relevant by-law had also been made in October 1923, before commencement of the 1924 amendment. Another by-law made in April 1925, after commencement of the 1924 amendment, containing a power of dispensation with respect to prescribed minimum floor areas was found valid. Again, the report provides no account of the standing of the applicant, Mary Olsen, to initiate the motion apart from her status as a ratepayer.[54] In *Dewar* v *Shire of Braybrook*[55] another dispensation power was

[47] *Local Government Act* 1924 (Vic), s 2(a)(i).
[48] (1925) 31 Argus LR 91.
[49] Re-enacted in *Imperial Laws Application Act* 1922 (Vic), s 9.
[50] (1925) 31 Argus LR 91, 93.
[51] On the significance of ratepayer status see text at fn 29 infra.
[52] (1925) 31 Argus LR 226.
[53] (1925) 32 Argus LR 40.
[54] On the significance of ratepayer status see text at fn 29 infra.
[55] (1926) 32 Argus LR 184.

quashed. It was in a general building by-law, the relevant clause of which prescribed a minimum number of rooms for dwellings. In this case the clause was held severable, which is unique for the cases considered to this point. Again, the report provides no account of the standing of the applicant, William Dewar, to initiate the motion apart from his status as a ratepayer.[56]

We can therefore observe in the early development of the local government land zoning power, first, a broad acknowledgment of the necessity for more comprehensive urban planning, and secondly, in particular, that the discussions surrounding adoption of even this minimal and interim initiative assumed citizen rights to object to land use plans formulated at a municipal level. From the sources discussed above we might identify the following avenues of objection:

(1) The citizens of Victorian municipalities could have voiced their views about the urban spatial relations within their local government areas through their council representatives.
(2) After gazettal and advertisement of a by-law creating or amending a plan, ratepayers could object to the by-law before it was sent to the Minister for Public Works for confirmation.[57]
(3) Before submission of the by-law to the Governor in Council for approval, aggrieved citizens of the municipality could no doubt have made representations directly or through their parliamentarians to the Minister for Public Works for the Minister's consideration while the by-law was being scrutinised.
(4) A motion for an order *nisi* to quash the by-law was a legal avenue available to ratepayers under s 232 of the *Local Government Act* 1915 (Vic), or to any person under s 48 of the *Evidence Act* 1890 (Vic).[58] Judging by the reported cases described above, there was a very high chance of success, as my summary below indicates.[59] Further, a Supreme Court hearing was financially within the reach of ratepayers with relatively modest assets, such as Charlotte Ann Stewart who wished to erect only a shop and dwelling in Essendon in the 1920's.[60]

The legal challenges discussed above all concerned by-laws created to implement urban plans through land use zoning, equivalent in present parlance to creation or amendment of a planning scheme. Only the by-law challenged in *Righetti* v *City of Essendon*[61] appears to have involved an exercise of discretion resembling the deliberations which precede the issue of a planning permit in later parlance. Thus wider opportunities to object at the planning approval stage of implementing a plan were not tested. Nevertheless, one might speculate that wide social and political opportunities to object

[56] On the significance of ratepayer status see text at fn 29 infra.
[57] See the speech of the Honourable H F Richardson at text at fns 44–5 infra.
[58] On the significance of ratepayer status see text at fn 29 infra.
[59] See text at fn 75 infra.
[60] *Stewart* v *City of Essendon* [1924] VLR 219, considered in text at fn 33.
[61] (1925) 31 Argus LR 91, discussed above in text at fn 48 infra.

through local council representatives would have been available in that event.

SUPREME COURT DECISIONS AFTER THE 1924 AMENDMENT

Amendment of the municipal zoning power in 1924[62] was accompanied by a change in judicial consideration of challenges to the validity of land use zoning by-laws. The points initially made by advocates against validity suggest that the amended text was considered penetrable by the same legal arguments. One might only speculate about the possibility of a change in the judicial view of the legitimacy of public *placement* of urban land uses taking place behind interpretation of the clarified legislation, but we may certainly note the change of court personnel and observe that the urgent manner of enactment of the 1924 Amendment would have signalled Parliament's multi-partisan resolve on the issue.

Gill v *City of Prahran*[63] was the first reported case to test directly the 1924 amendments. It is remarkable for the eminence of the court personnel involved. Lowe QC and Menzies appeared for the applicant, arguing that the relevant by-law, made in 1925, was uncertain on the basis of the Supreme Court cases decided before the 1924 amendment, and was not saved by that amendment. Fullagar appeared for the City, arguing that the only uncertainty involved was a difficult question of fact which might arise in the course of a prosecution for breach of the by-law, and that was not a reason to quash the by-law itself. Eager appeared for another ratepayer, Lumley, by leave in support of the by-law. The by-law prescribed a residential area and prohibited the construction or adaptation of buildings in the area for use in trade and industry, except for business usually carried on in a shop. Dixon AJ presided. He considered the 1924 amendment:

> Having considered the language of the Act itself, I have come to the conclusion that the Act does not mean to require the municipality to resort to any well-known classification which accords with common understanding, but to permit the municipality to devise any system of classification which it thought fit.[64]

Dixon AJ upheld the by-law:

> There are difficulties of definition familiar in other branches of law as to when particular instances come within some general conception in whatever language it may be expressed. It is no doubt unfortunate that general language and general expressions are resorted to, but it was not intended to impose upon municipal authorities any greater degree of precision than is customary in the draftsmanship of ordinary legislation. Here the necessary criteria are given, and, although open to criticism, they are sufficient to enable a tribunal of fact to determine whether in any particular case the

[62] Promulgation of the 1924 amendment is discussed in the text following fn 41 infra.
[63] [1926] VLR 410.
[64] Id 413.

facts requisite to bring the case within the prohibition of the by-law are or are not established.[65]

The status of the applicant, T S Gill, and that of the intervener W B Lumley, is reported merely as ratepayers.[66]

The same by-law, and wider efforts to create a town planning system, struck a real problem however when the Attorney-General, at the relation of one Lumley, sought an injunction to restrain a breach of this by-law.[67] The company had laid the foundations for a factory in a prescribed residential area. A Full Court composed of Irvine CJ, Mann J and Dixon AJ held that the interest of the general public in enforcement of the by-law was not sufficiently analogous to a proprietary right, even a restrictive covenant, to justify a Court of Equity granting an injunction in favour of the Attorney-General. Presumably, the company was to be penalised by prosecution for a fine.

The High Court followed this approach in *Ramsay & Attorney-General for Victoria* v *Aberfoyle Manufacturing Co (Aust) Pty Ltd.*[68] Miss Ellen D Ramsay sought to restrain the Aberfoyle Manufacturing Co from erecting a factory on land adjoining her home contrary to a by-law of the City of Essendon prescribing the land as residential. The Attorney-General was joined as a plaintiff at a later stage. The majority (Latham CJ, Rich and McTiernan JJ) declined both Miss Ramsay and the Attorney-General an injunction.

Starke J, in dissent, pointed out that the activity was actually illegal and the penalty available under the by-law had proven ineffectual. Dixon AJ had described the equitable jurisdiction too narrowly in *Attorney-General and Lumley* v *T S Gill & Son Pty Ltd.*[69] In this case there was a clear invasion of public right and the Attorney-General was entitled to an injunction, in the view of Starke J.

These cases underline the distinction in judicial conceptions of *locus standi* with respect to applications for injunction, on one hand, and with respect to cases concerning planning by-laws initiated under statutory heads on the other. The High Court later revised its view of the equitable jurisdiction in *Cooney* v *Ku-ring-gai Municipality.*[70]

Other cases decided in this phase suggest that the Supreme Court regarded its role in judicial review as *closely supervisory.*[71] However, the Court seems also to have recognised the legitimacy of urban planning under the pressures of *modern* urbanity in *R* v *City of St Kilda; Ex parte Rodd.*[72] In *Attorney-General (ex rel Jackman)* v *Griffith*[73] the Full Court had already considered that a proposal to construct a building comprising five flats, with a common portico, was not a proposal to construct five separate dwellings, each of which could otherwise be required to comply with set-back and minimum site

[65] Id 413–14.
[66] On the significance of ratepayer status see text at fn 29 infra.
[67] *Attorney-General and Lumley* v *T S Gill & Son Pty Ltd* (1926) 33 Argus LR 223.
[68] (1936) 42 Argus LR 6.
[69] (1926) 33 Argus LR 223.
[70] [1964] Argus LR 98.
[71] See eg *Attorney General (ex rel Jackman)* v *Griffith* (1934) 40 Argus LR 436.
[72] (1936) 43 Argus LR 119.
[73] (1934) 40 Argus LR 436.

requirements. In *Ex parte Rodd* the City of St Kilda had refused a proposal to build in a residential area an eleven storey block of 228 flats, with four lifts and continuing cleaning services, on the ground that it was a proposal for a business pursuit in a residential area. Mann CJ agreed that this was a conclusion open to the City. In his view the proposal suggested a large private hotel.[74]

My survey of the early Victorian 'planning and environment cases' to this point affords a limited basis for empirical analysis of judicial treatment of the first Victorian land use plans.[75] This survey shows that in the 23 year period 1921 to 1943, following the 1921 Reform, seventeen court actions challenging council planning by-laws or their enforcement were reported: on average, one every sixteen months. All of the eight challenges to by-laws made pursuant to the 1921 Reform were successful. Of the nine challenges following the 1924 Amendment, five were successful. This figure includes, however, two cases concerning the equitable jurisdiction to grant an injunction in the public interest to restrain breach of a by-law which was not otherwise impugned. A further case interpreted a proposal to construct a dwelling so as to exclude an individual flat. If these cases are removed, two out of six of the reported challenges successfully impugned council planning by-laws made after the 1924 Amendment.

[74] (1936) 43 Argus LR 119, 121.

[75] The Argus Law Reports, published by *The Argus* newspaper (Melbourne) until 1959 (vol 66), and thenceforth by Butterworths, were used to obtain the widest possible coverage of cases considered most relevant to practitioners. I have omitted from my commentary above only four of the relevant Victorian cases found through systematic examination of each yearly volume. They are:
(1) *In re a By-Law of the Borough of Ringwood; Ex parte Ingwersen* (1926) 32 Argus LR 444: Schutt J recognised a municipal power in the *Local Government Act* to make a by-law prescribing the materials from which the external walls of buildings in specified areas had to be built, but held invalid a range of by-laws specifying construction details for vagueness, uncertainty and being beyond the ambit of that statutory power.
(2) *Templar* v *City of Prahran* (1934) 40 Argus LR 133: the Full Court upheld a by-law prescribing specified areas residential, making particular reference to the High Court's views on powers of prohibition and regulation expressed in *Country Roads Board* v *Neale Ads Pty Ltd* (1930) 43 CLR 126.
(3) *Shire of Swan Hill* v *Bradbury* (1937) 43 Argus LR 194: the Full High Court affirmed the Full Supreme Court's decision to quash a by-law which provided that council approval had to be obtained before erecting a building or other structure, and requiring that certain information about the construction proposal be submitted. Councils were empowered to make by-laws 'regulating and restraining' construction by s 198(1)(a) of the *Local Government Act* 1915 (Vic). Because this provision did not include the power to *prohibit* construction, the Council did not have the power to reserve to itself a discretion within the High Court's decision in *Country Roads Board* v *Neale Ads Pty Ltd* (1930) 43 CLR 126: 'restraining' did not have the same meaning as *prohibiting*.
(4) *City of Footscray* v *Maize Products Pty Ltd* (1943) 49 Argus LR 221: the Full High Court upheld a by-law prohibiting in defined areas the use of furnaces consuming pulverised fuel in such a way that dust, grit or ash might escape into the air, although there was no known technology to prevent such escapes.

CENTRALISED COORDINATION OF MUNICIPAL TOWN PLANNING AND THE CONVERSION OF RIGHTS TO OBJECT 1944–1960

The Town and Country Planning Board was constituted by the *Town and Country Planning Act* 1944 (Vic). The Board was intended to coordinate the production of Planning Schemes by municipalities through this procedure:

(1) The relevant municipality adopted a planning scheme.
(2) The adopted planning scheme was submitted to the Commissioner of Public Works.
(3) The Commissioner obtained a report on the planning scheme from the Town and Country Planning Board.[76]
(4) After considering the planning scheme and the Board's report, the Governor in Council could approve it.
(5) The planning scheme would take effect when notice of approval was published in the *Government Gazette*.[77]

Ultimately, the Board had duties and powers to prepare Planning Schemes for the Commissioner of Public Works if a municipality would not. Upon approval, responsibility for enforcement of the scheme lay with the relevant municipality.[78]

Pending approval of their planning schemes, municipalities were empowered to promulgate interim development orders, with the approval of the Board and the Governor in Council, prohibiting development on any land which may have been included in the proposed planning scheme.[79] A copy of an interim development order was to be served upon every owner, lessee and occupier of land proposed to be affected, and published in the *Government Gazette* and in a newspaper circulating in the neighbourhood.

Within this newly centralised co-ordination of the production of planning schemes, there were a number of avenues available for objection:

(1) Participation could be sought at the local government level, perhaps through local government representatives, to influence the form a proposed plan would take.
(2) A description of a proposed planning scheme was to be published twice in a newspaper circulating in the neighbourhood and in the *Government Gazette*, and a copy of the scheme was to be made available for inspection. A published notice was to call upon 'all persons affected by the scheme' to lodge objections with the relevant municipal clerk or the Secretary of the Town and Country Planning Board within three months of publication in the *Government Gazette*.[80]
(3) At the next ordinary meeting of the responsible council any person affected by the scheme could appear in support of any written

[76] Section 14(2).
[77] Section 14(5).
[78] Section 17.
[79] Section 12.
[80] Section 13(2)(c).

objections, or in support of any other objections. The council was obliged to take all objections into consideration.[81]

(4) A submission to the Town and Country Planning Board was quite possible, at least in written form.

(5) After approval by the Governor in Council, a planning scheme was to be laid before both Houses of Parliament and was subject to revocation by either House within 24 days of its last sitting.[82] Approaches to Members of Parliament could influence events at this point.

(6) On the application of a person appearing to him to be interested, the Governor in Council could revoke the whole or any part of a scheme which he thought should be revoked in the special circumstances of the case.[83]

Additionally, a planning scheme could be varied or revoked by a subsequent scheme prepared and submitted as provided in the Act and Regulations. The position of this power within the provisions for participation and objection[84] suggests that it was intended to have a remedial function.

In 1946 the power to make interim development orders was amended specifically to extend avenues for public participation. Section 12(5) was added to permit 'any person who feels aggrieved' by refusal to grant a permit, or by the conditions attached to any permit granted, to appeal to the Minister (in effect the Commissioner). In relation to public works proposed contrary to an interim development order, s 12(6) was added to require that agreement be reached between the responsible council and the relevant public authority. In the event of failure to reach agreement, the matter was to be submitted to the Governor in Council who could by Order prohibit or regulate the works or undertakings.

Section 12(7) was also added empowering the Governor in Council, at the request of the relevant council or the Town and Country Planning Board, to revoke an interim development order.

Following the institution of this centralised co-ordination of town planning, with its avenues for participation and objection, the grounds for judicial review which were pursued in the reported Supreme Court cases became more limited, focussing particularly on the preservation of existing user rights. In *R* v *City of Moorabbin; Ex parte Kahn*[85] a food cannery had operated just outside a residential area, but the owner, Kahn, acquired adjoining land inside the residential zone for the purpose of extending the factory by six feet onto it, for a length of 65 feet. The council refused a building permit and Kahn sought mandamus on the ground that the *Local Government Act* prohibited by-laws

[81] Section 13(2)(c) & (d).
[82] Section 14(6)(a) & (b).
[83] Section 14(8).
[84] Section 14(7).
[85] (1947) 54 Argus LR 142. For the five year period from 1944 to 1949, *The Argus Law Reports* contain only one other relevant Victorian case. In *Brown* v *Thomson* (1948) 55 Argus LR 596, O'Bryan J rejected a defence based on existing user rights because only part of the land, which was situated in a residential zone, had been used for the relevant business.

which precluded the extension of a building for a purpose for which the building had been used before commencement of the purported by-law.

The original by-law had been made in 1944. It was replaced in 1947 by a by-law which prescribed the adjoining land residential in the same terms. Kahn acquired the neighbouring land in 1946. The Full Court (Herring CJ, Lowe and Fullagar JJ) held that Kahn was entitled to the building permit because his proposal was for extension of a building for a pre-existing purpose and the land had been in the same ownership before the by-law of 1947 commenced. This approach to rights under by-laws remade in a similar form is at variance with the later approach of the High Court in *Ferrum Metal Exports Pty Ltd* v *Lang*.[86]

Although it is difficult to do anything with a sample of two, half the reported cases were successful, but neither impugned the validity of the relevant planning by-law. With an average of one case every thirty months, the rate of reported challenges in the supervisory jurisdiction had almost halved in the period following introduction of a limited statutory system for objection and merits appeal.[87]

CENTRALISED DRAFTING OF THE GREATER MELBOURNE PLAN

In 1949 urban planning for the Melbourne Metropolitan area was centralised to the Melbourne and Metropolitan Board of Works (the 'MMBW'), which was required to submit to the Minister (in effect the Commissioner) 'a planning scheme in respect of the whole metropolitan area' within three years, or such further period as the Minister authorised.[88] In effect the MMBW was only established as a responsible authority for the purpose of preparing and submitting planning schemes for approval in the manner that municipalities had been. In the approval of municipal planning schemes it was now necessary for the Minister to obtain a report from the MMBW,[89] as it had been necessary, and continued to be, with respect to the Town and Country Planning Board. It was also necessary to submit interim development orders to the MMBW within 12 months after publication, with a difficult proviso with respect to republication.[90]

Nevertheless, an effort was made to preserve citizen rights of participation and objection. Proposed plans were to be deposited at the offices of the MMBW as well as at the office of the relevant council as already provided. With respect to MMBW plans, objections were to be lodged with the Secretary of the MMBW rather than the relevant municipal clerk, but the same rights of objection otherwise persisted.[91]

[86] [1960] Argus LR 342. Considered at fn 102 supra.
[87] Compare the period 1921–1943 at fn 75.
[88] *Town and Country Planning (Metropolitan Area) Act* 1949 (Vic), s 3(2).
[89] Section 3(4).
[90] Section 3(6).
[91] Section 4.

Dean J considered the new planning arrangement in *R* v *City of Moorabbin; Ex parte Kans Food Products Pty Ltd*[92] and clearly treated planning schemes as a fact of life. Mr Kahn Junior wished further to extend the factory[93] onto land which already formed part of the company's premises. The City refused a building permit on the ground that the proposed building would have insufficient set-back from the street alignment. Dean J concluded that the set-back which the City sought to enforce applied to buildings of a different class, and in any case, due to some confusion between 'street alignment' and 'frontage', the relevant by-law would have been *ultra vires*. The City also argued that the proposal was to erect a non-residential building on land zoned residential. Dean J accepted that the proposed site was part of 'premises' to which existing use rights attached. These rights were protected by the *Local Government Act* and by a clause in the planning scheme which the City had adopted pursuant to its powers under the *Town and Country Planning Act* 1944 (Vic) as amended by the 1948 Act. His Honour was, however, troubled by the lack of an express power in the *Town and Country Planning Act* to create an exemption for existing use rights:

> But I do not think this invalidates the scheme. I would be reluctant to attribute such a result to a provision designed to achieve a fair and just operation of the scheme upon lines adopted by the Legislature when dealing with similar matters. The exemption is of a very limited kind. Thus it allows the continuance of any existing use of land and the enlargement, rebuilding or extension of existing buildings — matters which cannot affect the character of the scheme.[94]

Dean J was thus prepared to deal with the City's planning scheme on the basis that an express power would be required in the *Town and Country Planning Act* to terminate the right to use buildings 'in the manner and for the purpose for which they had been heretofore used.'[95] The City was thus justified in adopting a clause in its planning scheme which preserved existing use rights.

In *R* v *City of Richmond; Ex parte E B May Pty Ltd*[96] O'Bryan J considered the interrelationship of planning schemes, interim development orders and building permission. He concluded that if the requirements of the *Uniform Building Regulations* were satisfied the City was obliged to issue *building permission*. This was a matter separate from the issue of *planning permission*. With respect to planning, both the MMBW and the City had planning schemes which were not yet operative. The initiatives in these proposed schemes were supported by interim development orders. The City's interim development order prescribed the land on which the applicant conducted a butchery business as residential land. The MMBW's interim development order reserved one part of the land for a future main road. The other part of

[92] [1954] Argus LR 940.
[93] See *R* v *City of Moorabbin; Ex parte Kahn* (1947) 54 Argus LR 142 discussed at fn 85 supra.
[94] [1954] Argus LR 940, 946.
[95] Ibid.
[96] [1955] Argus LR 917.

the land was also reserved for a road, but a dwelling could be built on it. As the interim development orders could operate together there was no need to resolve the inconsistency. When the planning schemes were adopted the MMBW plan would prevail.

A ratepayer sought to have some ten council by-laws quashed in *Medcraft* v *City of Box Hill*,[97] including by-laws made to zone residential areas pursuant to a power in s 197 of the *Local Government Act* 1946 (Vic), which basically reproduced the 1921 and 1924 reforms. Pape J found the applicant unsuccessful. Mr Medcraft is attributed no other status in the report than ratepayer, and there are no reported facts indicating his reasons for making the challenge.[98] In *Poltieri* v *City of Prahran*[99] an application was dismissed which in the period 1921–4 would certainly have attracted quashing of the relevant by-law. A ratepayer challenged the City's exercise of the same power in prescribing the whole of Prahran residential and providing exceptions. Adam J dismissed the application and the Full Court dismissed a further appeal. The Full Court noted that there was some support for the application in *Stewart* v *City of Essendon*[100] but found it unnecessary to express an opinion. There is no explanation for Mr Poltieri's application for the by-law to be quashed. He is described merely as a ratepayer.[101]

An appeal against conviction for conducting a business in a residential area was taken to the High Court in *Ferrum Metal Exports Pty Ltd* v *Lang*.[102] In 1941 the City of Melbourne had made a by-law under s 197 of the *Local Government Act* 1928 (Vic) prescribing an area and prohibiting scrap metal dealing there. In 1948 the defendant's predecessor had commenced business as a scrap metal dealer. The by-law was replaced by a substantially similar by-law in 1949, and again in 1958. The defendant had acquired the business in 1955 and carried it on since then. It was argued for the defendant that the same business had been carried on before the 1949 by-law took effect, so it was a protected existing use under s 197 of the *Local Government Act* 1946 (Vic). The High Court (Dixon CJ, Fullagar, Kitto, Taylor and Menzies JJ) unanimously dismissed the appeal against the decision of Sholl J in the Supreme Court of Victoria that the scrap metal dealer's argument could not be supported. The activity was already unlawful when the by-law of 1949 was made. One might detect a shift in the balance of judicial view in favour of land use planning when one compares this conclusion with the Supreme Court decision in *R* v *City of Moorabbin; Ex parte Kahn*.[103]

This analysis reveals that in the eighteen year period from 1950 to 1968, when the Town Planning Appeals Tribunal was established, six planning cases in the supervisory jurisdiction were reported in *The Argus Law Reports*

[97] [1959] Argus LR 1345.
[98] On the significance of ratepayer status see text at fn 29 supra.
[99] [1959] Argus LR 1337.
[100] [1924] VLR 219.
[101] On the significance of ratepayer status see text at fn 29 supra.
[102] [1960] Argus LR 342.
[103] (1947) 54 Argus LR 142. See outline in text at fn 85 supra.

— an average of one every 36 months.[104] Two of the actions were successful. This count includes, however, only one direct, and unsuccessful, challenge to the validity of council planning by-laws. Two of the other cases concerned existing user rights, two of the cases dwelt on the correct interpretation of business or trade in the relevant by-law, and the other was to resolve the apparent inconsistency between council and central land use plans.

CENTRALISATION OF TOWN PLANNING AND THE FORMAL CREATION OF RIGHTS OF OBJECTION 1960–1987

The MMBW had commenced preparation of the Metropolitan Plan in 1950. It placed the plan on exhibition in 1954 and received approximately 4000 objections. The MMBW completed its scheme for the metropolitan area, and adopted it on 20 October 1959. The plan had then been submitted to the Town and Country Planning Board for appraisal and the reconsideration of objections. The Board was expected to report to the Minister in early 1961.[105]

To prepare the way for implementation of the plan, the *Town and Country Planning (Amendment) Act* 1960 (Vic) was enacted. It is clear that the formal avenues of objection provided in this amending Act were seen as a necessary response to the centralisation of planning. The central concern of the Act was to place rights of objection to planning scheme restrictions and the issue of permits on a rational and comprehensive footing.

Section 14 of the *Town and Country Planning Act* 1958 was substantially amended to provide the following permit application procedure:

(1) Applications for permits under interim development orders were to be made in writing.
(2) When the responsible authority formed the opinion that grant of the permit would cause *substantial detriment*, notice of the application was to be given to the relevant person.
(3) Any objections received were to be considered and the objector was to be notified of the decision.

Appeal rights were made available to:

(1) Anyone feeling aggrieved by refusal or failure to grant a permit, or conditions attached to it.

[104] Two further Victorian cases were reported in *The Argus Law Reports* over this period which have not been surveyed above. They were:
(1) *Grimsley* v *Hunt* (1952) 59 Argus LR 665: Dean J held that a used car dealer who parked cars around his residence, situated in a residential zone, was a single worker carrying on business in a private dwelling within an express exception to the prohibition of trade in the area.
(2) *Campbell* v *Bethke* [1957] ALR 1079: Sholl J held that an interstate carrier who parked and maintained his trucks in the yard of his residence, situated in a residential zone, was carrying on business contrary to the prohibition in the relevant by-law.

[105] Mr Porter in *Parliamentary Debates*, Legislative Assembly (Vic), 17 May 1960, 2947–8.

(2) An objector feeling aggrieved by a determination to grant the permit.
(3) Any person feeling aggrieved by any restriction on the use or development of land or the construction of buildings or works on the land resulting from a by-law made under s 197 of the *Local Government Act* where the relevant land use was not prohibited by a relevant interim development order.

The Minister was to decide these appeals, after providing all parties with a reasonable opportunity to be heard. The Minister could then determine the appeal and direct that the permit should or should not issue and what conditions should be attached to it. In relation to a by-law the Minister could direct that it would have no force or effect to the extent that it purported to restrict a relevant land use. The Minister's decision was to be final.

The Minister was empowered to delegate the function of hearing the appeal, and the delegate was to prepare a report and make a recommendation. The final determination was, however, to be made by the Minister.[106]

That this amendment was intended to facilitate what was seen as the last step in promulgation of the MMBW Master Plan for the entire Melbourne metropolitan area, is clear from the debates which surrounded its adoption.[107] The particular amendments were seen as urgently required to precede this centralisation. The amendments were incorporated very soon afterwards in the consolidating and reforming *Town and Country Planning Act* 1961 (Vic),[108] which had been foreshadowed in the second reading speech of the Minister for Local Government, Mr Porter.[109]

Consistently, the wider formal avenues of objection provided in the amendment were seen as a necessary response to the centralisation of planning and consequent removal of the direct avenues for making representations which had existed to local council representatives. With regard to the rights of the wider community, Mr Holland objected that the test of 'substantial detriment' was an unjustified hurdle, on the meaning of which two minds could differ. Further, it was a new hurdle. Mr Holland maintained that the existing right to object to the grant of a permit under local government procedure was 'the right at the moment to object not only in writing, but in person.'[110] This was not contradicted.

The rights of objectors were viewed as important on both sides of the House. The Minister stated:

> The purpose of this clause is to widen the grounds of appeal to enable any aggrieved person to object and, if he is not satisfied with the decision, to lodge an appeal. In widening the provision, I realize that I am letting myself

[106] Section 14(3D).
[107] *Parliamentary Debates*, Legislative Assembly (Vic), 17 May 1960, 2945 ff.
[108] Largely in s 19.
[109] *Parliamentary Debates*, Legislative Assembly (Vic), 17 May 1960, 2945.
[110] Mr Holland in *Parliamentary Debates*, Legislative Assembly (Vic), 26 May 1960, 3352.

> and my successors in for a lot of work. However, I believe it is in the interests of the public in general that it should be done.[111]

Mr Porter was letting himself in for a lot of work because hitherto the negotiation of objections to council building permits under council planning by-laws had been done at the local government level, not because it had never been done before.

Both government and opposition members saw the extension of rights of appeal to objectors as the preservation of other rights to use of property:[112]

> At the present time if a person applies for a permit to develop a certain area of land as a petrol station and obtains approval, that is the end of it. If he is refused a permit, he and he alone has the right of appeal. However, a number of other parties are interested in the project — for instance local residents, and the operators of other petrol stations within a quarter of a mile, half a mile or even 30 feet of the proposed site. Under this proposal, such people will be given the right of objection first, and, if they are not satisfied with the decision of the planning authorities, the right of appeal to the Minister.[113]

The new formal right of objection was specifically linked to the overriding of council planning by-laws by the centralised scheme. The opposition objected to this. It maintained that local councils *should* be able to frustrate central plans with contrary by-laws. This municipal power was seen as a veto power which would bring both central and local planning authorities responsible for a particular area to a negotiating position. The government, on the other hand, saw an unclear hierarchy as irrational. However, the reduction of municipal opportunities to participate was also to be ameliorated by the third party right of objection:

> Councils have, in some cases, opposed the issue of permits by the Melbourne and Metropolitan Board of Works, possibly on sound grounds. Under the appeal procedure, both the appellant and the council will have an opportunity to state their views.[114]

When we considered the pre-war planning system we saw that at least four opportunities were assumed for citizens to object to plans formulated at a municipal level. Clearly, removal of local government from this system would impact significantly upon these avenues available for objection. As Mr Holland had intimated, the statutory rights of objection to permit applications under the centralised scheme were not as open as the avenues at the local government level. However, the centralised scheme boasted, in addition, a right of appeal on the merits to the Minister.

[111] *Parliamentary Debates*, Legislative Assembly (Vic), 17 May 1960, 2947.
[112] *Parliametary Debates*, Legislative Assembly (Vic), 26 May 1960, 3350 per Mr Wiltshire (Mulgrave), 3352 per Mr Holland (Flemington). The idea of rights to use property was no doubt broadly conceived.
[113] Mr Porter in *Parliamentary Debates*, Legislative Assembly (Vic), 17 May 1960, 2947.
[114] Id 2946.

It is an understatement to say that there was a dramatic decrease in the number of reported local government appeals to the Supreme Court following the creation of these rights of appeal. After 1960[115] not one Victorian planning case in the supervisory jurisdiction was considered to be of sufficient moment for practitioners as to warrant being reported in *The Argus Law Reports.* One might speculate that attention had shifted to the conduct of merits appeals. The supervisory jurisdiction became a forum of last resort.

The decision in *S S Constructions Pty Ltd* v *Ventura Motors Pty Ltd*[116] was handed down by Gillard J in 1963. A bus company applied for a permit to establish a bus depot on land zoned residential under the relevant interim development order. S S Constructions Pty Ltd objected to the MMBW, which was the responsible authority. It had developed a residential estate on neighbouring land in reliance upon the existing residential zoning and would not have done so if it had contemplated that a bus depot would be established in the vicinity. The MMBW determined to grant the permit and the plaintiff appealed to the Minister. At the hearing conducted by delegates of the Minister, the plaintiff submitted that the permit application was invalid. This submission was rejected and the appeal dismissed.

S S Constructions Pty Ltd then sought review in the Supreme Court. Gillard J noted that s 18(2) of the *Town and Country Planning Act* required notice of the application to any person who the MMBW considered would suffer *substantial detriment* if the permit were to be granted. His Honour held that if the MMBW formed the view that substantial detriment would be caused the requirement to give notice then applied with mandatory force. Section 18(3) then required that the notice set out the purpose and effect of the proposal in the application. Gillard J found that the proposal to establish a bus depot was the purpose of the application, but its effect had been left to inference and thus the notice, and consequently the proceedings which followed, were invalid.

In reaching this decision his Honour made some important observations about *substantial detriment* and the role of objectors. First, he noted that permission to use one's land would not affect the title to neighbouring land. The relevant detriment thus contemplated by the Act was to enjoyment and value of the neighbouring land:[117]

> Generally, in a residential area, the authority would primarily consider owners and occupiers of the property in the neighbourhood. But pupils at an educational establishment might well be affected by some proposed activity, particularly if the activity involved noise.... One of the matters [to be considered under the interim development order] is the preservation of the amenity of the neighbourhood. This would be the kind of consideration to determine whether any person could be caused a substantial detriment by the grant of a permit.[118]

It seemed quite clear to Gillard J that the legislature intended those who might be substantially affected to have the opportunity of expressing their views

[115] See survey at fn 104 supra.
[116] [1964] VR 229.
[117] Id 231, 236.
[118] Id 237.

before the permit was granted, and hence a tight procedure had been laid down to protect their interests:[119]

> The fundamental function of an objector in such circumstances generally would be to inform the mind of the Board in carrying out its function as a responsible authority.[120]

Thus it is important to provide objectors with adequate information about the proposal.[121] Gillard J plainly considered and rejected a direct connection between *substantial detriment* and proprietary interests. The role of the objectors as persons assisting the inquiry was more closely related to their presence in the locality and membership of a potentially affected community.[122]

A PLANNING APPEALS TRIBUNAL

The Town Planning Appeals Tribunal was established in 1968 in place of the Minister as an avenue of appeal against the grant of a permit.[123] This Tribunal later became the Planning Appeals Board, which was the predecessor of the Planning Division of the Victorian Administrative Appeals Tribunal.

The growth in importance of merits appeal is indicated by the doubling and redoubling of applications received by the Planning Appeals Board and the Administrative Appeals Tribunal between 1982 and 1990.[124] In 1982 just over 1000 applications were received. In 1984 they were nearing 2000. In 1989 over 4000 applications were received. Since 1990 the number has been declining. Various explanations have been advanced for this. They include the introduction of a filing fee and the reduction of planning discretions actually exercised at the local government level,[125] thus reducing the decisions from which there could be merit appeals.

This remarkable growth in initiation of merits appeals has not been accompanied by significant growth in the volume of major reported Supreme Court cases concerning planning. However, very few of the cases reported over the period have been freshly initiated in the supervisory jurisdiction. Indeed, these are now the rare exception. Rather, the reported cases have generally been, earlier in the period, applications for review of the relevant merits appeal body, and later in the period, appeals on questions of law. This institutional delineation of the two roles is explored below.

[119] Id 239, 240.
[120] Id 242.
[121] Id 243.
[122] Compare the early requirement that one be a ratepayer to challenge by-laws. See text at fn 30 supra.
[123] Sections 18B & C, and s 19A inserted by the *Town and Country Planning (Amendment) Act* 1968 s 12.
[124] Statistics for this period have been generously provided by the Registry of the Planning Division of the Administrative Appeals Tribunal and the Courts and Tribunals Division of the Department of Justice.
[125] Mining, for example, no longer needs a planning permit following amendment of the State section of all Victorian planning schemes: *Amendment S26* which took effect on 24 November 1994.

DELINEATION OF MERITS APPEAL AND SUPERVISORY ROLES

The bald statistics of burgeoning merits appeal applications received do not reveal anything about the balance and importance of issues dealt with in merits appeal on one hand and in the Supreme Court's supervisory jurisdiction on the other. An attempt has therefore been made to gauge the relative balance of important issues handled by surveying the cases which have been identified as of such significance to warrant publication in law reports.

In view of the great expansion of the planning field overall, analysis will be made of Victorian cases reported in all sources at five year intervals commencing from 1969, the year following establishment of the Town Planning Appeals Tribunal.[126] Establishment of the Town Planning Appeals Tribunal was accompanied by change in the volume and nature of planning cases. We have already noted the dramatic fall away of reported supervisory cases challenging the validity of town plans, and an increasing tendency to challenge the interpretation of Planning Schemes.[127] This tendency firmed into a clear trend after 1968. The importance of interpretative decisions made by the Tribunal is underlined by the emergence in 1969 of the *Victorian Planning Appeal Decisions*[128] devoted to reporting them. The *Australian Planning Appeal Decisions*[129] first appeared in 1980.

The 1969 Volume of the *Victorian Reports* contains two relevant planning cases. Both *Grand Central Car Park Pty Ltd* v *Tivoli Freeholders*[130] and the *Dajon Investments Pty Ltd* v *Talbot*[131] concerned the right of a third party to seek an injunction to restrain activity pursued without a valid planning permit without joining the Attorney-General.[132] The first required joinder and the second did not. The *Local Government Reports of Australia* contain eight judgments of the Supreme Court and the High Court, which emanated from

[126] This method tends to overstate the number of reported Supreme Court decisions because the yearly volume of the *Victorian Reports* generally contains cases decided over a broader time span. There are no reports of Victorian planning cases in the supervisory jurisdiction in *The Argus Law Reports* after 1968. *The Argus Law Reports* ended in 1973. The *Australian Law Reports* which appeared to fill their place report State Supreme Court cases only so far as they involve federal jurisdiction. *The Local Government Reports of Australia* had already appeared from 1956. They are published by the Law Book Company. They contain reports of relevant State Supreme Court cases, and from time to time appeals to State planning appeal tribunals. In earlier times they also reported some appeals to Ministers. They are now published as the *Local Government & Environment Reports of Australia.*

[127] See text at fn 104 supra.

[128] Published by Law Book Company until 1982. The cases were selected by Mr K H Gifford QC. In 1973 the coverage of these reports was extended to the Environment Protection Appeal Board. In 1982 the Planning Appeals Board, and later the Victorian AAT assumed responsibility for publication of its own decisions in the *Planning Appeals Board Decisions* series, which after 1988 appears as the *Administrative Appeals Tribunal Reports (Victoria).*

[129] Law Book Company.

[130] [1969] VR 62.

[131] [1969] VR 603.

[132] *Gross* v *Shire of South Barwon* [1969] VR 815 concerned the correct regime for the calculation of compensation due to a land owner upon reservation of relevant land as a road under a planning scheme and thus is not directly relevant.

Victoria, delivered in 1969. None are directly relevant.[133] In contrast, the 1969 Volume of the *Victorian Planning Appeal Decisions* contains reports of 111 merits appeals to the Town Planning Appeals Tribunal and the *Local Government Reports of Australia* contain one further such appeal.

The 1974 Volume of the *Victorian Reports* contains no relevant planning cases.[134] *The Local Government Reports of Australia* contain ten judgments of the Supreme Court and the High Court, which emanated from Victoria, delivered in 1974.[135] Of these cases two are directly relevant. In *271 William Street Pty Ltd* v *City of Melbourne*[136] the appellant obtained a planning permit under the relevant interim development order to erect a 13 storey building on the corner of William and Little Lonsdale Streets, Melbourne, subject to a condition that the corner of the building be splayed, allowing pedestrians to cut the corner by passing through a walkway. After construction of the building, it was asserted, undesirable types habituated the walkway and befouled the area outside business hours. The appellant sought a variation of the permit. The City of Melbourne substituted the relevant condition with one allowing installation of a glass sliding door to be left open during designated (business) hours. The appellant appealed unsuccessfully to the Town Planning Appeals Tribunal and then sought review of the Tribunal's decision. Justice Harris dismissed the application, finding that the condition was reasonably related to the purpose for which the planning authority exercised its function. It was contrary to the notion of town planning that the attention of town planners be confined to the particular land parcel under consideration and regard might properly be had to pedestrian traffic. Interference with

[133] *Phillipon* v *Housing Commission* (1969) 18 LGRA 254 (SC — compensation); *Feiglin* v *Housing Commission* (1969) 18 LGRA 261 (SC — compensation); *Thomas* v *Anstis* (1969) 18 LGRA 273 (SC — parking prosecution); *Keogh* v *Housing Commission* (1969) 18 LGRA 289; *Keogh* v *Housing Commission [No 2]* (1969) 18 LGRA 295 (SC — compensation); *McMaster* v *Giles* (1969) 19 LGRA 394 (SC — prosecution for sale of adulterated food); *Hamer* v *City of South Melbourne* (1969) 19 LGRA 422 (SC — amalgamation of municipalities) and on appeal to Full Supreme Court, *City of South Melbourne* v *Hamer* (1969) 19 LGRA 428; and *Claude Neon Pty Ltd* v *MMBW* (1969) 20 LGRA 1 (HC — compensation).

[134] *Taylor* v *Town & Country Planning Board* [1974] VR 173 originated in the alleged wrongful dismissal of the Board's Director of Planning.

[135] *Riley* v *Penttila* (1974) 30 LGRA 79 (SC — extinguishment of registered easement by disuse); *Stoneman* v *Lyons* (1974) 30 LGRA 188 (Full SC — collapse of neighbouring building through removal of lateral support — see also *Stoneman* v *Lyons* (1973) 30 LGRA 409 (SC) and *Stoneman* v *Lyons* (1975) 33 LGRA 156 (HC)); *Ballard* v *Body Corporate Strata Plan No 1492* (1974) 30 LGRA 225 (SC — use of common property in strata subdivision); *Marks* v *Shire of Swan Hill* (1974) 30 LGRA 273 (SC — refusal to grant septic tank desludging permit); *Banger* v *Drift Fruit Juices Pty Ltd* (1974) 30 LGRA 433 (SC — weights and measures); *R* v *Registrar of Titles; Ex parte Assets Australian Holdings Pty Ltd* (1974) 31 LGRA 154 (SC — whether compulsory acquisition effects a 'subdivision' under Torrens system legislation); *271 William Street Pty Ltd* v *City of Melbourne* (1974) 31 LGRA 189 (SC — power of responsible authority to place a condition on a planning permit not related directly to use of the relevant property); *Protean Enterprises (Newmarket) Pty Ltd* v *Randall* (1974) 33 LGRA 53 (SC — trade usage to obtain a lien over carcasses for slaughtering fees); *Nancy Shetland Pty Ltd* v *MMBW* (1974) 34 LGRA 151 (whether subdivision, development and sale of land can amount to a non-conforming use); and *City of Heidelberg* v *Baptist Union of Victoria* (1974) 34 LGRA 328 (SC — valuation and rating of charitable institutions).

[136] Ibid.

proprietary rights does not itself show *ultra vires* in a permit condition. In *Nancy Shetland Pty Ltd* v *MMBW*[137] a land owner was progressively subdividing land and releasing it for sale in stages when the relevant planning restrictions were changed. The landowner sought a Supreme Court declaration that the subdivision could be continued as a non-conforming use. The High Court held that the purpose for which the land was being subdivided was the relevant 'use' and not subdivision itself. The staged project could not therefore amount to a non-conforming use which would be preserved despite the change of restrictions.

In contrast to these applications to the supervisory jurisdiction, the 1974 volume of the *Victorian Planning Appeal Decisions* contains the reports of 160 planning merits appeals.

The 1979 volume of the *Victorian Reports* contains three relevant planning cases.[138] In *Ungar* v *City of Malvern*[139] a land owner had sought a permit to use land as a commercial vehicle park. Anticipating an amendment of the Planning Scheme which would make such land use a prohibited use, the City of Malvern rejected the application and the land owner appealed to the Town Planning Appeals Tribunal. By the date of hearing the amendment was in force and the Tribunal rejected the appeal. The Full Supreme Court held that the Tribunal was bound to give effect to the Planning Scheme as it stood at the time of decision, and thus to the amendment as well. The existence of an earlier zoning had conferred no right or privilege on the land owner.[140] In *Addicoat* v *Fox (No 2)*,[141] after some initial procedural issues,[142] the Court reviewed a decision of the Town Planning Appeals Tribunal in an appeal which had been initiated by objectors. The relevant permit application, to use land as a shopping centre, had not contained an application for development permission, and the application had been amended three times after public notice was given. The Supreme Court held that amendments are in order as long as the final application could not be considered a new application, but conditions could not be attached to planning permission requiring *development* if the original application had been for approval of a land *use*. *Commonwealth of Australia* v *O'Donohue and MMBW*[143] concerned the right of the Commonwealth, as an objector, to specify an 'address for service' of a notice of determination to grant a permit, and the resulting invalidity of the issued permit when the notice was sent elsewhere.

[137] Ibid.
[138] *Ungar* v *City of Malvern* [1979] VR 259, *Addicoat* v *Fox (No 2)* [1979] VR 347, and *Commonwealth of Australia* v *O'Donohue and MMBW* [1979] VR 441.
[139] [1979] VR 259.
[140] Id 265–6 per Young CJ, Menhennitt & Crockett JJ.
[141] [1979] VR 441.
[142] *Addicoat* v *Fox (No 1)* [1979] VR 209.
[143] Supra fn 138.

The *Local Government Reports of Australia* contain eight relevant judgments of the Supreme Court and the High Court, which emanated from Victoria, delivered in 1979.[144]

The volumes of the *Victorian Planning Appeal Decisions* containing 1979 decisions report 333 merits appeals to the Town Planning Appeals Tribunal decided in that year.

The 1984 Volume of the *Victorian Reports* contains three relevant decisions.[145] In *Walker* v *Shire of Flinders*[146] the Shire had refused a planning permit for development of land on which a midden, containing relics from past generations of Aboriginal people, was situated. This had been appealed to the Planning Appeals Board which determined that a permit should be issued. Review of the Board's decision was sought in the Supreme Court. Kaye J held that the purpose for which the permit would be issued was unlawful because it would have involved interference with relics contrary to s 21 of the *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic). A permit should therefore have been refused. In *Body Corporate Strata Plan No 4166* v *Stirling Properties Ltd*[147] the City of Melbourne had refused a planning permit for construction of a 13 storey apartment building in East Melbourne.

[144] *Grasso* v *Love* (1979) 39 LGRA 101 (Full SC — successful application for *quia timet* injunction, on the basis of potential nuisance, to restrain construction of a drive-in theatre on land with respect to which the Governor in Council had revoked the relevant planning scheme and otherwise permitted it); *Kentucky Fried Chicken Pty Ltd* v *Gantidis* (1979) 40 LGRA 132 (Full HC — review of Town Planning Appeals Tribunal treatment of objections made on the basis of the economic viability of a neighbouring shopping centre and adequacy of reasons given for decision); *City of Heidelberg* v *MMBW* (1979) 42 LGRA 21 (SC — whether a letter from a local planning authority amounted to an objection availing it of rights to appeal to the Town Planning Appeals Tribunal); *Soil Conservation Authority v Read* (1979) 42 LGRA 33 (SC — interlocutory injunction sought by SCA to restrain extension of building pursuant to a planning permit allegedly in breach of the *Soil Conservation and Land Utilization Act* 1958 (Vic)); *Shire of Sherbrooke* v *McDougall* (1979) 42 LGRA 151 (SC — review of Town Planning Appeals Tribunal decision on issue of whether land was held as 'separate tenements' as required by the planning scheme); *Blount* v *Gianevsky* (1979) 42 LGRA 294 (Full SC — review of conviction in the Magistrates Court of fish shop proprietor for opening an amusement parlour without written approval from the council when he installed two amusement machines in his fish shop. The proprietor had obtained a planning permit for the machines following appeal to the Town Planning Appeals Tribunal from the council's refusal); *Oppe* v *Shire of Lillydale* (1979) 43 LGRA 221 (SC — refusal by local authority on grounds of public interest to seal a plan of subdivision for which a planning permit had been obtained 13 years beforehand); and *Pacific Seven Pty Ltd* v *City of Sandringham* (1979) 43 LGRA 395 (SC — review of deliberations of Town Planning Appeals Tribunal about whether premises would be 'service premises' or 'take-away food premises' within the meaning of the planning scheme). Three other decisions not considered relevant are *Rex Tyre & Auto Services (Richmond) Pty Ltd* v *Country Roads Board* (1979) 42 LGRA 274 (SC — compensation); *Attorney-General for Victoria (ex rel Australasian Realty Corporation Pty Ltd)* v *Housing Commission* (1979) 44 LGRA 258 (SC — whether an agreement entered by the Housing Commission was within its powers under the *Housing Act* 1958 (Vic)); and *Blackburn* v *Y V Properties Pty Ltd* (1979) 44 LGRA 291 (SC — resulting trust for hotel developer which purchased land in the name of another in order to fortify the legitimacy of its objection to an application for planning permission by a competitor).

[145] *Walker* v *Shire of Flinders* [1984] VR 409; *Body Corporate Strata Plan No 4166* v *Stirling Properties Ltd* [1984] VR 903; and *Davey* v *Brightlite Nominees Pty Ltd* [1984] VR 957.

[146] [1984] VR 409.

[147] [1984] VR 903.

The Planning Appeals Board determined that a permit should issue subject to conditions. Objectors, including residents of neighbouring buildings, sought review of the Board's decision. Ormiston J held that the Board's decision was vitiated by a failure to take account of relevant considerations in interpreting a relevant clause of the planning scheme, demonstrated by the paucity of reasons provided and an uncertain and impractical condition imposed on the permission. *Davey* v *Brightlite Nominees Pty Ltd*[148] was an application for review of a Magistrates Court conviction for use of premises contrary to the planning scheme. The defendant had a showroom displaying light fittings in an area zoned 'light industrial' but argued that no retail sales were made there. Nicholson J held that the display of light fittings, even if not for retail purposes, did not fall within the definition of 'light industrial' even if no sales were made to the public.

To these decisions could be added three further Supreme Court decisions reported in the relevant volumes of the *Local Government Reports of Australia.*[149] Two interesting related Supreme Court decisions are reported in the *Planning Appeal Board Reports (Victoria)* but are not considered directly relevant.[150]

Conclusion of the *Victorian Planning Appeal Decisions* series creates difficulties in consistent noting of the volume of reported merits appeals. Nevertheless, the *Planning Appeal Board Reports (Victoria)* reported or noted some 74 merits appeals concluded by the Planning Appeals Board in 1984. A newer series, the *Australian Planning Appeal Decisions*, reported a further 151 merits appeals concluded by the Board in 1984 which were considered sufficiently important to warrant national attention.

The 1989 volume of the *Victorian Reports* contains one relevant decision: *Shire of Kilmore* v *Dally.*[151] It was an appeal on a point of law from the Victorian Administrative Appeals Tribunal. Justice Southwell held that the Shire had been correct in the first place in refusing permission for subdivision into

[148] [1984] VR 957.

[149] *City of Melbourne* v *Silverton Ltd* (1984) 54 LGRA 144 (SC — application for review of a Planning Appeals Board decision that the City could not require payment of a public open space contribution of $135 000 as a condition of planning permission for subdivision of land on which two historic buildings stood); *Thorne* v *Doug Wade Consultants Pty Ltd* (1984) 57 LGRA 41 (SC — declaration sought of invalidity of a planning permit granted by the City of Melbourne for substantial remodelling of a Victorian house in an urban conservation area — this decision was later appealed to the Full Court, see text at fn 174 infra); and *McIver* v *Shire of Mansfield* (1984) 59 LGRA 108 (SC — review sought of a decision made by a single member of the Planning Appeals Board who had no legal qualifications on the ground that the member had made a decision on legal points). The decisions not regarded as relevant are *Stack* v *City of Collingwood* (1983) 54 LGRA 383 (Full SC — valuation for rating purposes); *McLaughlin* v *Halliday* (1984) 55 LGRA 18 (SC — whether waste paper, cardboard and cartons are offensive or waste matter); *Goddard* v *Collins* (1984) 55 LGRA 57 (SC — pest control operator's licence); and *Clarke* v *Shire of Gisborne* (1984) 57 LGRA 135 (SC — liability for defects in house constructed on a damp site).

[150] *Karco Nominees Pty Ltd* v *Diane Morrison* (1984) 2 PABR 362 (SC — cross-applications for injunctions, by one applicant to restrain, and by the other to compel, concerning the appointment of a panel to consider a proposed amendment of a planning scheme) and *ACT Nominees Ltd* v *Diane Morrison* (1984) 2 PABR 366 (SC — application for injunction to restrain panel hearing on the ground of actual or apparent bias).

[151] [1989] VR 314.

lots smaller than permitted by the Planning Scheme. The *Local Government Reports of Australia* report six relevant Supreme Court decisions handed down in 1989.[152] The *Administrative Appeals Tribunal Reports (Victoria)* contain two further relevant Supreme Court decisions handed down in 1989.[153]

Merits appeal decisions handed down by the Administrative Appeals Tribunal in 1989 reported and noted in the *Administrative Appeals Tribunal Reports (Victoria)* numbered 157, and a further 134 considered to warrant national attention were reported in the *Australian Planning Appeal Decisions.*[154]

The 1994 volumes of the *Victorian Reports* contain three relevant decisions.[155] In *J & C Cabot* v *City of Keilor*[156] an application had been made for a permit to rebuild an existing bottle shop. An appeal to the Administrative Appeals Tribunal was lodged in view of the City's delay in dealing with the application. The City approved it with conditions before the matter was heard by the AAT. Some objectors however continued their objections, the grounds of which were found to be 'hopeless' by the AAT which imposed legal costs on

[152] *Semple* v *Kilmore Shire Council* (1988) 68 LGRA 223 (SC — appeal from Planning Division of the Administrative Appeals Tribunal concerning a direction to issue a planning permit for the removal of clay as an 'extractive industry'); *Eltham Shire Council* v *Tosch* (1989) 68 LGRA 361 (Full SC — appeal from the Administrative Appeals Tribunal concerning a power to grant planning permission for a detached house); *Camberwell City Council* v *Hermitage Holdings Pty Ltd* (1989) 69 LGRA 150 (SC — application for injunction to restrain use of premises as a brothel pending decision of an appeal from the Administrative Appeals Tribunal, which had declined jurisdiction to cancel the relevant planning permit for alleged breach of a condition); *Park Street Properties Pty Ltd* v *South Melbourne* (1989) 69 LGRA 231 (Full SC — appeal from the Administrative Appeals Tribunal on the question of whether a planning permit granted in 1969 had been abandoned or continued in force); *Lyster* v *Camberwell City Council* (1989) 69 LGRA 250 (SC — application by the Minister for Local Government to quash a City by-law directed against brothels for inconsistency with Victorian law involving, particularly, the issue of whether the by-law prohibited or regulated); and *Andrews* v *Milenkovic* (1989) 70 LGRA 158 (SC — application for review of a Magistrates Court dismissal of a prosecution for use of land in contravention of a planning scheme, on the question of whether stripping soil from land and replacing it with other soil was an activity in 'animal husbandry'). One further reported decision not considered relevant is *Australian Shipping Commission v City of Port Melbourne* (1989) 69 LGRA 1 (SC — whether a hard paved area for storing shipping containers was exempted from rates as a 'tenement erected').

[153] *City of St Kilda* v *Mandalay Gardens Pty Ltd* (1989) 2 AATR (Vic) 287 (SC — application for stay of a decision of the Administrative Appeals Tribunal to grant a permit for demolition of a building pending appeal to the Supreme Court) and *J P Mannix Nominees Pty Ltd* v *City of Wangaratta* (1989) 3 AATR (Vic) 353 (SC — appeal from a decision of the Administrative Appeals Tribunal allowing a permit for use and development when the application on its face was only for development, and also concerning failure to transmit complete plans to a referral authority). One reported decision considered not relevant is *City of St Kilda* v *Evindon Pty Ltd* (1989) 3 AATR (Vic) 361 (Full SC — whether undisclosed telephone discussion between senior counsel for one party and a Tribunal member concerning the constitution of the Tribunal for the pending hearing compromised apparent impartiality).

[154] The *Australian Planning Appeal Decisions* appear to end at volume 42 toward the end of the period in which 1989 decisions would be expected to be reported.

[155] *J & C Cabot* v *City of Keilor* [1994] 1 VR 220; *Shire of Gisborne v King* [1994] 1 VR 364; and *Dale Park Pty Ltd (Receiver and Manager Appointed)* v *Roads Corporation* [1994] 2 VR 524.

[156] [1994] 1 VR 220.

them. Gobbo J concluded that it was open to the Tribunal to find that the objectors' opposition was frivolous and vexatious, and thus make an order for legal costs against the objectors.[157] In *Shire of Gisborne* v *King*[158] the defendant felled hundreds of indigenous trees on land which he owned and rearranged its topography without any planning permission. Both the state and local sections of the relevant planning scheme contained controls on the removal of native vegetation which overlapped. Justice Nathan found no difficulty in reading both sections of the planning scheme together and went on to consider definitions of 'track' and 'natural conditions or topography'. *Dale Park Pty Ltd (Receiver and Manager Appointed)* v *Roads Corporation*[159] concerned a claim for compensation upon refusal of an application for planning permission.[160] Permission was refused on the ground of the Roads Corporation's objection that the land was required for public purposes. The validity of the claimant's attempt to remove the application from the Land Valuation Board of Review and into the Supreme Court was in question.

The *Local Government Reports of Australia* report no further relevant Supreme Court decision handed down in 1994.[161] The *Administrative Appeals Tribunal Reports (Victoria)* contain six further relevant Supreme Court

[157] This point is considered in more detail, fn 241 infra.
[158] [1994] 1 VR 364.
[159] [1994] 2 VR 524.
[160] *Planning and Environment Act* 1987 (Vic), s 98(2).
[161] *South Melbourne City Council* v *Hallam* (1994) 83 LGRA 231 (Full SC — concerning the constitutional validity of the *City of Melbourne Act* 1993). Note the possibility that at the time of writing not all reports of 1994 cases had been published.

decisions handed down in 1994.[162] The *Environmental Law Reporter*[163] contains no further 1994 Victorian Supreme Court decision.

The *Administrative Appeals Tribunal Reports (Victoria)* report or note 119 merits appeal decisions handed down by the Administrative Appeals Tribunal in 1994. The *Environmental Law Reporter* contains a further 37 relevant merits appeal reports.

This survey indicates that the number of concluded applications to the Supreme Court's supervisory jurisdiction, and later appeals on points of law, with significant legal issues involved has remained relatively stable despite the enormous expansion of applications initiating merits appeal. The pattern quickly emerged that issues before the Supreme Court which had not already been refined and dealt with in merits appeal would be a very small exception in the volume of cases which the court would be called upon to consider. In this respect it could be postulated that the presence of a merits appeal body in planning and environmental issues has saved considerable Supreme Court resources. To calculate this would require projection of the likely scenario if such a body had not existed.

THE NATURE OF REPORTED ADMINISTRATIVE APPEALS TRIBUNAL CASES

To gain some insight into the nature of appeals handled by the Administrative Appeals Tribunal, and considered worthy of being reported, 29 of the 1994

[162] *Eastcoast Properties Pty Ltd* v *City of Fitzroy* (1994) 12 AATR 274 (SC — appeal from Administrative Appeals Tribunal concerning change of local government areas in which authority over the land, for which a townhouse development was proposed, was reassigned from the City of Melbourne to the City of Fitzroy, and issues stemming from the introduction of *Vic Code 2* four days before the Tribunal's determination); *Northcote Wholesalers Pty Ltd* v *City of Northcote* (1994) 13 AATR 175 (SC — appeal from Administrative Appeals Tribunal concerning whether retail sales could be ancillary to 'wholesale store and food distribution', and an application to the AAT for a declaration under s 14 of the *Planning Appeals Act* 1980 (Vic)); *Melbourne City Council* v *Silver Top Taxi Service Ltd* (1994) 13 AATR 275 (SC — appeal from Administrative Appeals Tribunal on whether the removal of commercial car parking spaces in the course of constructing median strips in a street was an issue of 'amenity'); *Triform Pty Ltd* v *City of Croydon* (1994) 13 AATR 279 (SC — appeal from Administrative Appeals Tribunal questioning sufficiency of reasons given, the weight accorded to different considerations and the sufficiency of evidence supporting the Tribunal's conclusion on amenity with respect to an application for permission for residential subdivision of land neighbouring a major supermarket and adjoining land zoned commercial and industrial); *Joseph El Alam* v *Byard and City of Northcote* (1994) 13 AATR 355 (SC — appeal from, and application for judicial review of a ruling made by the Administrative Appeals Tribunal that dismissal by a Magistrates Court of a prosecution for use of land contrary to a planning scheme, on the ground of a non-conforming use right, did not raise an *issue estoppel* or *res judicata* against the AAT making an enforcement order with respect to the same land use); and *Vegas Nominees Pty Ltd* v *Werribee Sports and Community Club Inc and City of Werribee* (1994) 14 AATR 73 (appeal from Administrative Appeals Tribunal by objectors against direction that a permit should issue for redevelopment of a hall with drinking and gambling facilities subject to the condition that neighbouring land be developed for use as car parking; an aspect not included in the original application).

[163] The *Environmental Law Reporter* has been published by the New South Wales Environmental Law Association since 1981.

decisions[164] have been surveyed. Of the 29 appeals, one was an application for a planning enforcement order, two were water drainage cases, two were applications for declarations on planning issues, six concerned the assessment of planning levies or cash payments in lieu of open space and like financial exactions, and 18 concerned planning permits involving direct planning issues, one of which also included an application for variation of a restrictive covenant which was successful.

Of the 18 relevant planning permit appeals, five resulted in a direction to issue the relevant permit, one of which was to be subject to a new condition on planning grounds, one appeal was adjourned to allow the revision of plans in the face of imminent refusal, and 12 appeals resulted in outright refusal of planning permission — one also resulting in an order for costs against the applicant for permission. Both applications for planning declarations resulted in declarations unfavourable to the purpose which the applicant wished to pursue. The enforcement order application was adjourned to allow a planning permit application to be lodged. No doubt the results in these cases were an element in the editorial assessment of their importance justifying publication.

Parties identified as *objectors*[165] were present in 16 of the 29 cases. A public interest organisation, such as a local conservation society, was one of the objectors present in two of these cases. In the one declaration case and in ten of the fifteen planning permit appeals in which objectors were present, the planning or environmental cause which the objectors supported was successful, resulting in refusal of permission — including the case in which costs were awarded against the applicant for planning permission. One of the 15 such permit appeals was adjourned to allow revision of plans in the face of imminent refusal. In four of the 15 such appeals a permit was directed to issue, but one was to contain a condition on planning grounds. The objectors' position was thus not vindicated in only three to four of these appeals sampled — appeals identified as amongst the most important for the year.

Of the 29 cases, 20 contained at least one issue resulting from urbanisation, modernisation, technical innovation or extended human control over the environment. Objectors were present in 15 of these cases. Eight of these cases (which excludes the water drainage cases) involved environmental issues, such as potential noise intrusion, which, if the activity were pursued, could result in a situation of nuisance or negligence within conventional common law conceptions. Objectors were present in five of these potential tort cases.

The results of this analysis therefore indicate that in 1994 most, by far, of the most important issues handled by the Planning Division of the

[164] All of those 1994 decisions fully reported, as opposed to merely noted, in volume 13 of the *Administrative Appeals Tribunal Reports (Victoria)*. Clearly it could never be suggested that a sample of this size and selection, random as it is on my part, represents all AAT planning decisions for that year. It is nevertheless useful for the purposes of this article.

[165] Not being the applicant for the relevant permission or declaration, or the responsible authority involved.

Administrative Appeals Tribunal, and therefore worthy of being reported in the view of the practitioners who edit the reports, involved issues related to the accommodation of technological change. A significant number of these issues concerned arresting potential common law nuisances before they arose. Objectors played an important role in them, and their involvement was more often than not vindicated by the outcome of the appeal.

THE WIDENING OF FORMAL AVENUES OF OBJECTION IN 1987

One reason suggested for the remarkable increase in merits appeals in the late 1980s is the widening of formal avenues for objection in the *Planning and Environment Act* 1987 (Vic).[166] We have seen that this trend was already well under way by 1984.[167] Other explanations could include the increase in developmental pressures during the 1980s boom years and, indeed, the community concern about environmental and planning issues which actually lent political support to initiation of the Act. Nevertheless, the Act deliberately set out to open the planning process to community involvement:

> Planning law affects all of us in our daily lives and the legislation should be widely accessible, but it has become the personal property of a handful of consultants, legal advisers and bureaucrats to interpret to an increasingly bewildered public....In drafting the Planning and Environment Bill, the Government has taken the view that planning involves many judgements of value....For these reasons, the Bill establishes a framework within which a continual process of planning for the best use of the land-based resources of Victoria can be successfully carried on.[168]

The *Planning and Environment Act* was enacted following wide community consultation. The Act was intended generally to overhaul the entire planning system. The use of plain English was not a mere gesture toward expanding public access to land use planning processes.

With respect to amendment of planning schemes (rezoning), s 19 of the Act provided that extensive notice of a proposed amendment to a planning scheme was required. *Any person* could make a submission.[169] If objections could not be accommodated the issue had to be referred to a planning panel for inquiry and report.[170] The objectives of planning and the planning framework[171] provided a context for debate of the merits of a proposal. The panel's reports were to be made public. In the end it was up to the planning authority whether or not it adopted the amendment, but the process was transparent and accessible to people in a lay capacity. Section 39 provided for appeal to

[166] See fn 194 infra.
[167] See fn 124 supra.
[168] *Parliamentary Debates*, Legislative Assembly (Vic), 18 September 1986, 667–8 per the Honourable Mr Wilkes.
[169] Section 21.
[170] Section 23(1).
[171] Section 4.

the AAT, which was amended in 1989, restricting it to defects in procedure.

In relation to permit applications, similarly, wide notification of the proposal was required.[172] Any person 'who may be affected' by grant of the permit could object. Section 60(iii) made it obligatory for the responsible authority to consider significant effects on the environment. There was an appeal to the AAT open to anyone who objected, or to 'any other person who is affected' if a written objection had been made by anyone.[173]

A major stimulant to this widening of avenues of objection and merits appeal was the Supreme Court decision in *Thorne* v *Doug Wade Consultants Pty Ltd.*[174] Mr and Mrs Wade had set about remodelling a two storey Victorian terrace house which was owned by their company and located in an Urban Conservation Area in Parkville. They intended to alter the facade substantially, particularly in contrast to the appearance of three neighbouring Victorian balcony terrace houses to which it was linked. Mr Wade showed some plans drawn by their architect to the immediate neighbours on either side. These plans did not contain elevations or any other indication of the final appearance of the facade. Substantial extensions were also planned for the rear of the house. The neighbours nevertheless signed consents. An application was then made for planning permission. The City of Melbourne did not advertise the application, apparently because of the consents, although it was thought that substantial detriment could be caused. Some permission was given and work commenced.

General consternation arose in the street when the front of the house was demolished, and injunctions were sought. At first instance, Justice O'Bryan found that the permission was invalid but denied relief and ordered that the plaintiffs pay costs.[175] At the same time, proceedings were being conducted through the Planning Appeals Board with respect to a refusal of permission concerning alteration of the facade and a fence. The Board concluded on 27 July 1984 that no permit should issue with respect to the facade, and conditions should be applied with respect to the fence.[176] Three of the parties in the case before O'Bryan J, but not the immediate neighbours, appealed to the Full Court, which handed down its decision on 21 May 1985. Kaye and Marks JJ held that s 18B of the *Town and Country Planning Act* 1961 (Vic), requiring notice to those who could suffer substantial detriment, did not create private rights.[177] In any case, in contrast to the immediate neighbours, the further

[172] Section 52(1) included the qualification that they might suffer *material detriment.* See fn 253 infra.

[173] Section 82.

[174] [1985] VR 433. See also, from the objectors' point of view, W Forge, *The Wade House Case* (1985). Many basic facts remain controverted. It could be said that the parties to the controversy were exhausted, rather than the dispute having been resolved.

[175] His Honour handed down this decision on 6 April 1984. It is reported with the judgments of the Full Court at [1985] VR 433.

[176] *Doug Wade Consultants Pty Ltd* v *City of Melbourne* (1984) 2 PABR 221.

[177] [1985] VR 433, 488. McGarvie J disagreed with the majority on this point: ibid 502. In reaching their conclusion the majority preferred *Grand Central Car Park Pty Ltd* v *Tivoli Freeholders* [1969] VR 62, to *Dajon Investments Pty Ltd* v *Talbot* [1969] VR 815: [1985] VR 433, 485–6. Justice Gillard's extensive discussion of s 18B in *S S Constructions Pty*

neighbours would not suffer substantial detriment.[178] So, even if s 18B created a private right, it had not been breached with respect to them. The appellants, who lived in the same or neighbouring streets in the same urban conservation area thus did not have standing.

One incontrovertible point can be made about the Wade house controversy — it consumed astonishing public and private resources. One major reforming intention behind the *Planning and Environment Act* was that such disputes should be disposed of quickly and fairly through, at that time, the Planning Appeals Board and not through costly legal proceedings.[179]

Without doubt, there is a myriad of both disparate and reconcilable views on desirable policy with respect to the availability of rights of objection and appeal. These policy views generally revolve around the extent to which one is entitled to assert a *liberal* democratic or a legal right to influence at formative points of design, rather than *ex post facto*,[180] the emergence of urban form and environmental factors with respect to a range of issues. The range of issues on which citizens frequently seek such advocacy rights includes:

- protection of rights to enjoy property from interferences emanating from neighbouring land uses; which we have already noted as an historical reason for the emergence of public regimes for land use *placement*, and which the common law has generally (but not entirely[181]) sought to enforce *ex post facto* through actions such as private nuisance;
- environmental and planning policy issues which are a point of debate even within relevant planning disciplines, such as the ramifications of catering for apparently bottomless demand for the expansion of private transport facilities against public alternatives;[182]
- conservation policy, in preserving nature with natural merit or built form with cultural merit;

Ltd v *Ventura Motors Pty Ltd* [1964] VR 229, was dealt with by the majority ([1985] VR 433, 485) by quoting one of the observations, among many, which Gillard J made before granting relief, that 'it may be a nice question whether the provisions ... were intended to confer any right on neighbouring landowners': [1964] VR 229, 240.

178 In *Pearce* v *City of Coburg* (1972) 28 LGRA 234, 237, Starke J said: 'It seems to me as a matter of principle that a residential C zone is created under the planning scheme and the *Town and Country Planning Act* in order to preserve the fundamental residential character of a given area. Any departure from this character obviously may cause substantial detriment to persons residing in that area.'

179 *Ellul* v *Shire of Melton* (1989) 41 APA 193, 202.

180 Involving the rather inefficient possibility of obliterating valuable investment through demolition. This was a major reason given by O'Bryan J for denying relief in *Thorne* v *Doug Wade Consultants Pty Ltd* [1985] VR 433. The point is not that such structures should or should not be saved, but that with foresight at formative design stages such situations can be minimised.

181 See, eg, the *quia timet* application for injunction in *Grasso* v *Love* (1979) 39 LGRA 101.

182 See comments of the Planning Appeals Board in *Belgrave Nominees Pty Ltd* v *City of Melbourne* (unreported, P83/654, at 11) including 'It must be acknowledged that the motor vehicle is a highly inefficient means of organising the mass transit of commuters to and from a city.' Noted at 2 PABR 13.

- preserving convenient and established ways of going about things at an individual level, such as getting to work on a railway line threatened with closure;
- plain aesthetic objections formulated at an individual level; and
- environmental and resource equity considerations of global dimensions, such as those contemplated in the *Rio Declaration* and *Agenda 21*.[183]

There are complex interrelationships between all of these issues, and many other issues defying exhaustive categorisation, which might now emerge in infinitely varied configurations with respect to the merits of a particular project. These issues generally confront issues revolving around other conventionally recognised *liberal* rights attached to property ownership, such as to use the property, to utilise the property by developing it, and to do so without having to justify oneself to one's family, friends, neighbours or the wider community.[184]

Naturally, very complex interconnections arise between all these issues in particular configurations, and frequently they emerge as planning disputes: for example, in consideration of whether residential land use includes a shared home for the de-institutionalisation of people with disabilities and what rights of objection prospective neighbours have.[185] Complex questions are involved in deciding the legitimacy to be accorded any of these issues and their permutations and combinations when they are presented to a statutory body such as the Historic Buildings Council as the basis of reasons why some recommendation or order should be made, when they are submitted to a tribunal such as the Administrative Appeals Tribunal as the ground for allowing or disallowing an appeal, when evidence about them is led in a court action for nuisance, and when a Minister's failure to consider one or more as a relevant consideration is advanced in a court with supervisory jurisdiction as a ground of judicial review. Consideration of these questions would usually involve contemplation of a range of policy positions, from the most positivistic through the economistic and rationalistic to the most communitarian. Having decided the legitimacy of particular issues in a dispute, and the weight to be accorded them, there still remains the problem of the status of the people who assert them in the forum; as parties, as expert witnesses, as interveners, or as submission writers or speakers.

That stated, without approving or disapproving of their desirability, we might venture to observe some historical symmetry between the avenues for participation and objection under the pre- and post-centralisation land use planning regimes to this point. Municipal promulgation of plans and grants of permission was open to the same inputs of public opinion as the promulgation of any other by-law or the making of many other municipal decisions. The

[183] Failure to consider an international accord might well emerge as a vitiating factor: *Minister for Immigration and Ethnic Affairs* v *Teoh* (1995) 69 ALJR 423.

[184] The right to *beneficial enjoyment* of property is the legal concept embracing this.

[185] See, eg, *Yooralla Society of Victoria* v *City of Malvern* (1978) 11 VPA 33. Generally, no permit is now required for use of a building by the Department of Health and Community Services to accommodate less than 20 people: *Amendment S38* to the state section of all Victorian planning schemes which took effect from 9 February 1995.

plans required state government approval, yielding further avenues for objection. Ultimately an application could be made to the Supreme Court to quash a by-law under conventional principles of judicial review, but with apparently minor *locus standi* requirements. One should be reluctant to construe these as the 'good old days'. For one thing, privilege probably had a part to play in influencing local and state decision makers, and mounting a Supreme Court challenge, even if the seemingly modestly endowed shop proprietor Charlotte Ann Stewart[186] succeeded. Centralisation of the land use planning process, perhaps with faith in expert or technocratic solutions to perceived urban chaos, acted to curtail public lay input at the local government level. This was recognised at the time and formal rights of objection and appeal were instituted, desirable or undesirable as they might have been, more or less in substitution.[187]

The *Planning and Environment Act* 1987 could be described as a post-centralisation initiative. It strove to institute a framework for the resolution of multi-faceted polycentric planning disputes within a hierarchy of state, regional and local plans. The fora for the resolution of these disputes, the panels to consider planning scheme amendments and the Planning Division of the Administrative Appeals Tribunal, were conceived in such a way that a meeting could take place between expert planning inputs from private and public sources, the particular configuration of mixed public and private issues which might bear on a particular issue, and the assertion of private property rights *simpliciter*. Such meetings were subject to few *locus standi* issues which could not be translated into the legitimacy or weight to be accorded to the issue itself in the course of adjudication. The possibility of judicial review remained, and had indeed already been expanded by the *Administrative Law Act* 1978. However, we have already noted that the availability of merits appeal seems, historically, to bring a dramatic fall in applications to supervisory jurisdiction.[188]

This identification of the *Planning and Environment Act* 1987 as an initiative which historically reconciled the loss of pre-centralisation public opportunities of participation and objection with the centralised orientation to expertise and technocracy[189] should not be treated as an idealisation of the government which introduced it. Behind the democratic and environmental planning ideals and the historical logic of the legislation stood Ministerial *fast tracking* and *call in* powers.[190] Nor could it be suggested that the government

[186] See fn 33 supra.
[187] See discussion at fn 107 supra.
[188] See text at fn 114 supra.
[189] See the speech of Mr Wilkes at fn 168 supra.
[190] R Leeson, 'EIA and the Politics of Avoidance' (1994) 11 EPLJ 71; *Mietta's Melbourne Hotels Pty Ltd* v *Roper* (1988) 1 AATR 354; *Antoniou* v *Roper* (1990) 70 LGRA 351; and *Grollo Australia Pty Ltd* v *Minister for Planning, Urban Growth & Development* [1993] 1 VR 627.

which introduced it was without environmental sin.[191] Nevertheless, the legislation stands, it is submitted, at the historical conjunction described.

NEW LIBERAL PLANNING POLICY

The *Planning and Environment Act* was amended in 1993 without change being made to its outward structure or the planning objectives with which it was originally enacted, but with a number of pragmatic initiatives which remove it from the historical conjunction which I have identified.[192] In his second reading speech in support of the amending Bill, the Minister for Planning outlined two objectives: to simplify planning documentation and to reduce the scope for objection. In support of the first objective he expressed the view that, 'Planning schemes have too many words, too many zones and too many amendments.'[193] This inhibited development and job opportunities. In support of the second objective the Minister stated that:

> The *Planning and Environment Act* 1987 incorporates processes and provisions which prevent flexibility and efficient decision-making. The balance has been tipped too far in favour of objectors who are able to hold up developments even though they may not be actually affected by the development. That type of system may have been fine for the 1980s but does not suit the community needs of the 1990s and beyond into the 21st century.[194]

The new Act thus set out to limit rights of objection to the amendment of Planning Schemes and to the issue of planning approval. This was to be achieved principally through the very pragmatic measure of restricting the notification of proposals.

With respect to the amendment of planning schemes, a planning authority no longer need notify individually the owners and occupiers of land that it believes may be materially affected, as long as it takes reasonable steps to ensure that public notice is given.[195] Further, the Minister may now exempt a planning authority from giving notice if he or she considers that exemption is appropriate in view of the interests of a part of Victoria, and not the broader *overriding interests* of the whole of Victoria as formerly conceived.[196] The Minister is a planning authority[197] and thus may exempt from notification his

[191] For example, the C3 Freeway Link between the South Eastern and Mulgrave Freeways was constructed without any Environmental Impact Assessment contrary to the recently accepted interpretation of the *Environment Effects Act* 1978 (Vic) as it then stood. See the Second Reading Speech of the Minister for Housing introducing the Environment Effects (Amendment) Bill 1994: *Parliamentary Debates* Legislative Assembly (Vic), 9 November 1994, 784, 785. See also D Adams, 'Road Protest Charges Dismissed' Melbourne *Age*, 15 March 1995, 6 and M J Raff, 'The Renewed Prominence of Environmental Impact Assessment: A Tale of Two Cities' (1995) 12 EPLJ 241.

[192] *Planning and Environment (Amendment) Act* 1993 (Vic).

[193] *Parliamentary Debates*, Legislative Assembly (Vic) 11 November 1993, 1694.

[194] Id 1695.

[195] Section 19(1)(b) as supplemented by ss 19(1)(1A)-(1C).

[196] Section 20(2).

[197] Sections 8 and 9.

or her own proposals. The amendment of s 20 also removes the former obligation of the Minister to consult responsible authorities before *fast tracking* the proposal. Exemptions under the *fast tracking power* must be notified to Parliament,[198] in both Houses of which the government has a substantial majority. The limitation of notice clearly affects the ability of all potential objectors to make submissions.

With respect to the grant of planning approval, limitation of requirements to give notice of an application has again been the pragmatic initiative to restrict objection. While a responsible authority remains obliged, in amended form, to make a copy of every application available to the public at its office for inspection,[199] there is now a power to exempt in the relevant planning scheme classes of application from all or any statutory requirements to give notice of the application.[200] Planning schemes are of course delegated legislation. Thus, ironically, a 'Henry the Eighth Clause'[201] has been enacted in the name of simplification and certainty for developers. A responsible authority need not consider an objection if *no* notice to its author was required,[202] and this seems to be directed at objectors who were not strictly entitled to notice but nevertheless became apprised of the application.[203] However, it might well be that the objection must still be considered if *some* notice had to be given — to a referral authority for example.[204]

Formerly *any person affected* could appeal to the AAT against the grant of a permit if any written objection had been received by the responsible authority. This has been repealed.[205] Further, a planning scheme may now exclude classes of application from appeal,[206] prompting the same observation about Henry the Eighth Clauses made above.

Provision has been made for any person to apply to the AAT for leave to appeal against a decision to grant a permit if any written objection was received,[207] but this does not necessarily apply if the decision is exempted from appeal, or if notice of the application was not required under s 63 and thus s 64 (both amended).[208] In the light of the history of opportunities to

198 Section 38(1A) and (1B).
199 Section 51.
200 Section 52(4)-(6).
201 A 'Henry the Eighth Clause' is a section in an Act of Parliament empowering the maker of delegated legislation (regulations, by laws, planning schemes, and so forth) to promulgate such with the effect of amending an Act of Parliament: see S D Hotop, *Principles of Australian Administrative Law*, (6th ed, 1985), 118, 146. They were criticised as 'inconsistent with the principles of Parliamentary Government' in the British *Report of the Committee on Ministers' Powers* (1932) Cmnd 4060, 59. They were also criticised by Gillard J in *Protean (Holdings) Ltd* v *Environment Protection Authority* [1977] VR 51, 55.
202 Section 60(3).
203 For an example of the problems presented to the Administrative Appeals Tribunal when objectors have not been notified, (where their submissions *should* nevertheless be considered), see *O'Brien* v *Chris Cross Garden Supplies* (unreported, Administrative Appeals Tribunal Planning Division, 3 November 1994).
204 Section 55.
205 Section 82.
206 Section 82(2)&(3).
207 Section 82B.
208 Section 82B(6).

participate in planning and to make objection examined above, it is interesting to consider the Minister's justifications of the amendments:

> Victoria has extensive rights for third parties to object to permit applications and to appeal against decisions, and experience over the past few years suggests that the cost of this process in terms of delay is excessive.[209]

This, and other statements surrounding the amendment suggest that broader rights of objection have been perceived as a recent phenomenon.

What the Minister had in mind in practice is made clearer by a proposal for the amendment of all planning schemes in the state, which he tabled, to exempt certain classes of application in the interests of certainty for applications and cutting delay. Change to the decoration of buildings in conservation areas, *minor* vegetation clearance, subdivision of land and buildings in residential zones and non-illuminated business advertising signs were all proposed for exemption in three categories — first, notice of applications, with no alternative notice, secondly, notice of the decision to grant a permit, and thirdly appeal to the AAT.[210]

The fact that planning authorities have become concerned with such very practical issues as vegetation clearance[211] might be observed as related to complex social issues, including both issues of dramatically expanded human powers of technological control, and thus interference, and wider appreciation of the need for boundaries to such control with respect to the environment. These are the issues which are the new burgeoning phenomena. Wider rights of objection are the symptoms of it, and not 'excesses' of the 1980s as perceived.[212] In fact they have a longer history. To address the issues by attempting to stem long standing concerns for participation in planning by citizens vulnerable to expanded technical capabilities, through approaches structured around 18th century conceptions of a 'sole and despotic dominion ... [over property] ... in total exclusion of the right of any other individual in the universe'[213] could be seen to be missing the point.

There is further expansion of the Minister's *fast tracking* abilities through the creation of an express *call in power* in relation to permit applications.[214] The Minister may require a responsible authority to direct an application for a permit to the Minister for decision if the application raises a major issue of policy and determination of the application may have a substantial effect on the achievement or development of planning objectives, or the application has been unreasonably delayed to the disadvantage of the applicant.[215] The Minister must refer to a panel any submissions and objections received within two weeks of the last notice required to be given. Objectors, and any other person affected, have a right to a reasonable opportunity to be heard. Submissions need not be referred to the panel if no notice had to be given and

[209] *Parliamentary Debates*, Legislative Assembly (Vic), 11 November 1993, 1694, 1696.
[210] Id, 1697.
[211] See eg *Shire of Gisborne v King* [1994] 2 VR 364.
[212] See extract from Minister's Second Reading Speech in text at fn 194 supra.
[213] Blackstone, *Commentaries on the Laws of England*, (15th ed, 1809), Book II, Chapter 1, 2.
[214] Sections 97A — 97M.
[215] Section 97B(1).

the decision is exempt from the necessity to give notice of the decision to grant a permit, or is exempted from appeal.[216] Appeal to the AAT against the Minister's decision is excluded.[217]

A further amendment inserting s 201D into the *Planning and Environment Act*, which is in a form recurring in much of the legislation of this Parliament, is the purported limitation of the Supreme Court's jurisdiction,[218] which was accompanied by the constitutionally required[219] statement by the Minister. The Minister said:

> I wish to make a statement under section 85(5) of the Constitution Act 1975 of the reasons for altering or varying that section by this Bill.
>
> Clause 35 of the Bill inserts a new section 201D in the principal Act which provides that it is the intention of that clause to alter or vary section 85 of the Constitution Act 1975. This is to limit the jurisdiction of the Supreme Court in relation to the hearing and determination of proceedings in respect of which jurisdiction has been conferred on the tribunal by the principal Act as amended by this Bill and to which section 66A of the Planning Appeals Act 1980 applies.
>
> The reason for limiting the jurisdiction of the Supreme Court is to ensure consistency with other planning proceedings arising under the principal Act which are heard and determined by the tribunal.[220]

Section 201D of the *Planning and Environment Act* now provides:

> It is the intention of this section to alter or vary section 85 of the **Constitution Act 1975** to the extent necessary to limit the jurisdiction of the Supreme Court in relation to the hearing and determination of any proceedings which may be brought before the Administrative Appeals Tribunal under this Act as amended by the **Planning and Environment (Amendment) Act 1993** and to which section 66A of the **Planning Appeals Act 1980** applies.

Section 85(1) of the Victorian Constitution confers unlimited jurisdiction on the Supreme Court. Section 85(5) entrenches the section so far as indirect repeals or amendments are concerned unless the amendment expressly refers to s 85 and a statement is made in the relevant House of Parliament by the member introducing the Bill which explains the reasons for affecting s 85 of the Constitution. This entrenchment expressly applies to provisions purporting to exclude or restrict judicial review.[221] Section 66A(1) of the *Planning Appeals Act* 1980 (Vic) claims to restrict the jurisdiction of courts to consider matters yet undetermined by the AAT, but this is not absolute. Courts may nevertheless find special circumstances justifying hearing of the matter by the court, and a decision of a court remains valid regardless of whether it makes a finding on the point of special circumstances.[222] These provisions could apply, for example, if some project proposal being entertained by the AAT on

[216] Section 97E(5)(b).
[217] Section 97M.
[218] Section 201D.
[219] *Constitution Act* 1975 (Vic), s 85.
[220] *Parliamentary Debates*, Legislative Assembly (Vic), 11 November 1993, 1700.
[221] *Constitution Act* 1975 (Vic), s 85(6).
[222] *Planning Appeals Act* 1980 (Vic) s 66A(2) and (3).

a planning appeal were also made the subject of a *quia timet* application to the Supreme Court to restrain an imminent nuisance. The Supreme Court could decline or defer the matter on the basis of s 66A of the *Planning Appeals Act* rather than dealing with issues of lack of imminence. If, however, the applicant actually had no right to press an appeal to the AAT then s 66A could not be invoked. In this way, by limiting access to the AAT, the scope for *quia timet* and other actions in the Supreme Court has actually been enlarged.

It is, however, difficult to see what the new s 201D of the *Planning and Environment Act* actually sets out to do. It expresses an intention to amend s 85 of the Constitution, but nothing in s 201D purports to amend s 85 of the Victorian Constitution. So far as other sections of the *Planning and Environment (Amendment) Act* 1993 (Vic) are concerned, certainly in the ambit of this article, there is no obvious side wind amendment of s 85. One might contemplate fertile possibilities for judicial review in many circumstances, but avenues for judicial review are not clearly restricted and the need for clarity in the exclusion of judicial review is of course a basic matter of statutory interpretation.

In addition to the restriction of formal avenues of objection outlined above, most local government councils in Victoria have been dissolved and replaced by administrators with a view to restructuring.[223] The possibility of approaching a local council representative with accountability at the ballot box has therefore been eliminated for the present.

The outward structure of the *Planning and Environment Act* has not been disrupted by these initiatives, promulgated in this latest phase of the history of land use planning legislation in Victoria. The initiatives do, however, represent a very significant legislative departure from the original reforming intention of that Act. It could be suggested that the Liberal amendment is merely a codification of discretionary practices employed from time to time by the Labor government which first introduced the *Planning and Environment Act*[224] — an Act which embodied an historical conjunction by fostering the meeting of three powerful claims to attention in land use management — private property, public objection and expertise. The validity of that suggestion can only be judged after close observation of the new planning system in practice. It remains, after all, within the powers of planning and responsible authorities to continue to give wide notice of proposals and for planning *fora* to entertain unsolicited submissions in order to take the advantages of public participation, which have been identified by the Federal Administrative Review Council[225] and the Commonwealth Environment Protection Agency.[226]

[223] *Local Government (General Amendment) Act* 1993 (Vic); *Local Government (Miscellaneous Amendment) Act* 1993 (Vic).

[224] For *call in* and *fast tracking* powers, see text at fn 190 supra.

[225] Administrative Review Council, *Environmental Decisions and the Administrative Appeals Tribunal*, Report No 36, 15 June 1994.

[226] Commonwealth Environment Protection Agency, *Public Review of the Commonwealth Environment Impact Assessment Process — Main Discussion Paper*, November 1994.

Nevertheless, as a matter of legislated planning policy, the 1993 amendment appears to suffer an internal contradiction when viewed in the light of concerns which earlier planning law initiatives have sought to address. The Liberal amendment seeks to limit objection and appeal by making discretionary the distribution of key information about development proposals — that is, notice. This has been undertaken in an attempt to make the development approval process more certain. However, the legislative devices employed to achieve certainty include those most notorious for the uncertainty which they engender, such as Henry the Eighth Clauses.

In addition, the new legislated principles, so pragmatic as they are, seem to overlook the vast complexity of planning disputes in their myriad permutations and combinations of issues, or at least to submerge them with the most simplistic possible response. The permutations and combinations also embrace, however, issues connected with private land ownership and development which a commercial developer might wish to assert[227] — such as objection to potential interferences from a later project on neighbouring land which could detract from the value of the first development, by lowering local amenity for example, thus diminishing the value of investment already made. It is difficult to locate the logic in consequence of which fertile ground for secure investment is supposed to be created for a developer where the next developer to come along could, according to the new legislated principle, obtain approval of an inconsistent land use on neighbouring land without opportunities to be informed and to object, and if necessary appeal, being afforded to the first in time. It is instructive to note that equitable principle has, in not such a very different context, always afforded protection to the first in time — *qui prior est tempore potior est jure.* The same considerations apply of course to non-commercial property, and the value and development of the state's housing stock is by no means a minor economic consideration. The motives of the commercial investor who is first in time are now, in addition, to be scrutinised for anti-competitive motives expressed in terms of seeking *direct or indirect commercial advantage.*[228] Avenues of objection are now to be the privilege of those 'actually affected by the development',[229] in a semi-proprietary sense, but not if it is in their commercial advantage.

In seeking to draw a simple line between legitimate and dispensable assertions of objection, these initiatives have effectively consolidated the centralisation of land use planning[230] which commenced in 1944 but have at the same time, in legislated principle, rendered discretionary the rights of participation and objection which were identified at that time as important safeguards for all citizens. At the same time, contemporary views about the

[227] See text at fn 183 supra.

[228] Section 57(2A) now permits a responsible authority to reject an objection which it considers has been made primarily to secure or maintain a direct or indirect commercial advantage for the objector.

[229] See Ministers Second Reading Speech in text at fn 194 supra.

[230] Further support for this observation is provided by *Amendment S40* and *Amendment S43* both of which came into effect on 8 June 1995 and created detailed prescriptions for new business and industrial zones in the state section of all Victorian planning schemes. There are, of course, advantages in uniformity.

power of markets to decide sophisticated resource management issues, and the translation of these views into political rhetoric, lead one to question whether the centralisation actually initiated by the initiatives will be accompanied by the application of central expertise. Some might see something less attractive in centralisation to open unstructured governmental discretions than to technocratic expertise which was a feature of the post-war era, and which at least admitted the possibility of persuasion on technical grounds acknowledged in relevant professional disciplines.[231] If resolution of planning issues is to be turned over to bare economic and social forces, clear rights and avenues of litigation remain necessary to protect *all* aspects of the property rights which such deregulation would set in motion, and which are generally assumed by economic analysis, such as protection from nuisances emanating from neighbouring land.[232]

VEXATIOUS CLAIMS AND LOCUS STANDI

The value of participation by objectors in the planning process has been questioned over recent years. Behind this questioning lurk the images of the obstructive objector, the busy body and the vexatious litigant. Implicit in the Minister's assertion[233] that planning objection was a luxury of the 1980s is the view that objectors play, to say the most, a dispensable role. The survey of reported 1994 cases made above[234] suggests that the involvement of objectors was largely beneficial and generally vindicated by the result in the relevant appeal. If that indication represents a general trend then it might be that the frustration expressed in policy circles about objectors is in fact symptomatic of antipathy toward land use planning itself.

Concern about obstructive objection was raised in the policy document *From Control To Performance — Future Directions for the Planning System in Victoria.*[235] That paper pointed out that there was no clear evidence of obstructive use of the objection procedures as a general pattern. Indeed, the statistics produced were ambiguous and the paper fell back on *indications* received from practitioners to support its points.[236] Perhaps with an eye to the positive aspects of planning objection the policy document concluded nevertheless that

[231] The effects of land compaction on neighbouring property is a clear example of an issue which engineers regard as requiring foresight.

[232] H Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *American Economic Review* 347.

[233] See fn 194 supra.

[234] See text at fn 164 supra.

[235] State Government of Victoria, 'From Control to Performance — Future Directions for the Planning System in Victoria', *Victorian and Residential Development Plan, Project No 7*, 70–75.

[236] The *indications* from the important cases selected for Volume 13 of the *Administrative Appeals Tribunal Reports* by the eminent practitioners who edit them are that the role of objectors is largely constructive.

> any changes must be critically examined to see whether they are solving a real problem or one that is more apparent than real and whether the solution may be worse than the problem.[237]

In contrast to this acknowledgment of complexity, the Minister's Second Reading speech dwelt mainly on a perceived need to *expedite* planning decisions, and the restriction of rights of objection as the best way to do it. When discussing the resolution of objections however, *From Control To Performance* emphasised mediation and preventing entrenchment into confrontationist positions by seeking consensus about a proposal at the earliest possible time.[238]

Who is to be considered a vexatious litigant is a question driving at issues of access to public tribunals and ultimately the rule of law. In 1992 the High Court declined to issue process at the suit of three litigants who it found to be pursuing hopeless or vexatious causes of action. In *Staats* v *United States of America*[239] Justice Deane expressed widely held ideals about access to the courts when he said:

> The rule of law which permeates our system of government requires that all persons have access to the courts of the land. That principle is at its most important in a case where proceedings against government and those exercising governmental power are involved.... Nonetheless, considerations of justice, the interests of plaintiffs themselves and the public interest combine to require that there be procedures for insuring that a court can prevent the institution or maintenance of frivolous or vexatious proceedings.[240]

The Supreme Court of Victoria considered the problem of vexatious or frivolous planning proceedings before the Administrative Appeals Tribunal in *J & C Cabot* v *City of Keilor*.[241] Gobbo J confirmed the test of vexatiousness, which had been adopted by the Tribunal, expressed by Roden J in *Attorney-General (Vic)* v *Wentworth*:[242]

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;
2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the Court adjudicate on the issues to which they give rise;
3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.[243]

[237] State Government of Victoria, op cit (fn 235) 71.
[238] Id 87–91.
[239] (1992) 66 ALJR 793.
[240] Ibid.
[241] See fn 156 supra.
[242] (1988) 14 NSWLR 481.
[243] Id 491.

Gobbo J concluded that the Tribunal's finding that the grounds of appeal were untenable and utterly hopeless was one that was open to it. Objections to the possibility of traffic being generated by the planning proposal were untenable, and no reasonable person could believe otherwise, because the proposal was for replacement of an existing facility with improvement to the existing traffic configuration, according to the evidence of a traffic consultant. Further, the appellants lived two kilometres away on a no-through road. If the plot were no thicker than that one could well hesitate about whether *utter hopelessness* had been made out. Presumably the bottle shop was being rebuilt to attract more business, which could well generate more traffic and experts can disagree on the effects of traffic treatment. If the personal detriment to be suffered is relevant to the soundness of planning arguments being advanced, then what is the status of urban planning as a discipline? In any case, traffic noise might cause substantial detriment to a person in places other than the home.[244] However, there was more. The appeal before the Administrative Appeals Tribunal had been conducted by a local councillor without the appellants being present. It was indeed found that he had sponsored the appeal. While, in his role as councillor, he had known of the traffic expert's evidence, he had offered no contrary evidence before the AAT. Seventy-five per cent of the costs were apportioned to him. Justice Gobbo held that the Tribunal had power to make the order for costs under two statutory heads.[245]

Rules of *locus standi* have also been used to discourage proceedings for equitable relief which the courts have seen as valueless, in comparison with the interests sought to be restrained, even if contrary to law.[246] The interpretation of statutory entitlements to appeal, or even to receive notice of a planning proposal, has not been that stringent. Relevant provisions in the *Planning and Environment Act* have been interpreted in the light of its legislative intention to extend public participation in planning.

Section 33B of the *Environment Protection Act* 1970 employs the test of a 'person who feels aggrieved'. This test has received a relatively wide reading. In *Australian Conservation Foundation* v *Environment Protection Appeal Board*[247] Young CJ and Murray and Marks JJ considered a vast number of cases on the expression and decided to give greatest weight to the section's statutory context in the *Environment Protection Act*. They concluded that any *interested* person was entitled to object to issuance of a licence by the Environment Protection Authority at first instance, and in context that conception was not restricted to pecuniary interests. A person who felt aggrieved was a person who had made such an objection and felt aggrieved by the outcome.

[244] For example, to a child at school.
[245] *Planning Appeals Act* 1980, s 58; *Planning and Environment Act* 1987, s 150.
[246] See eg *Australian Conservation Foundation* v *Commonwealth* (1980) 28 ALR 257; *Thorne* v *Doug Wade Consultants Pty Ltd* [1985] VR 433. Contrast the approach of McDonald J in the Alberta Court of Queen's Bench in *Reese* v *Alberta (Minister of Forestry, Lands & Wildlife)* (1992) 87 DLR(4th) 1. See also J McDonald & S Münchenberg, 'Public Interest Environmental Litigation — Chipping Away at Procedural Obstacles' (1995) 12 EPLJ 140.
[247] [1983] 1 VR 385.

In *Altona Petrochemical Company Ltd* v *City of Altona*[248] the issues were explored in relation to use of the test of a 'person who feels aggrieved' as it stood in s 19(1) of the *Town and Country Planning Act* 1961(Vic). A social club had obtained a permit for club rooms in a light industrial zone, to be located 610 metres from a large ethylene tank in the Altona petrochemical complex. The Environment Protection Authority appealed and objections were made to its standing. The Planning Appeals Board made a comprehensive review of the cases and concluded that the Environment Protection Authority had standing although it had not objected at first instance, had not suffered infringement of its legal rights, had no pecuniary interest in the issue and the matter did not concern the issue of environmental permission. The Board adopted an extensive written submission prepared by Mr S Molesworth of Counsel who appeared for the Environment Protection Authority.[249] The Board's ruling particularly undermines any idea that pecuniary interests are necessarily related to *special interest* in a planning and environmental context.

This view was largely adopted in relation to private appellants by the Environment Protection Appeal Board in *McCubbin & Others* v *Environment Protection Authority*.[250] Particularly, persons who feel aggrieved were held to include

(1) persons with a special interest in the preservation of an environment which might be affected as a result of a proposal;
(2) residents of an area which might be polluted, who might be *affected* in their enjoyment of material amenity of the area; and
(3) persons whose business or economic interest or occupation could be adversely affected by the proposal.

The test of whether a person might suffer *substantial detriment* from a planning proposal, and thus be entitled to receive notice of it, has been discussed above in dealing with *S S Constructions Pty Ltd* v *Ventura Motors Pty Ltd*[251] and *Thorne* v *Doug Wade Consultants Pty Ltd*.[252]

The *Planning and Environment Act* 1987 introduced two new concepts. A responsible authority had to ensure that notice of a proposal was given to the owners and occupiers of adjoining land unless it was satisfied that grant of the permit would not cause *material detriment* to any person, and to any other person to whom *material detriment* might be caused.[253] Any *person who may be affected* was entitled to object to a planning proposal.[254]

What amounts to *material detriment* has been discussed by the Victorian Administrative Appeals Tribunal in dealing with applications to have permits cancelled on the ground that no notice of the application had been given when

248 (1985) 3 PABR 143.
249 Id 150–5.
250 [1986] ELR 0197; (1986) 26 APA 372.
251 [1964] VR 229.
252 [1985] VR 433.
253 Section 52(1). Subsequent amendments to this provision have been discussed at fn 199 supra.
254 Section 57(1). Subsequent amendments to this provision have been discussed at fn 205 supra.

it should have been.[255] Introduction of the wider standing provisions was acknowledged to have followed as a direct consequence of the *Wade* case.[256] The reversal of the inquiry required of the responsible authority was considered important — that is, to avoid giving notice the responsible authority had to be satisfied that relevant detriment would not be caused. In *Partland* v *City of St Kilda* the detriments were material because they were 'of a real and not trivial or imaginary kind and ... not subjective to the mind of a particular person but ... detriments in an objective and reasonable sense.'[257]

Whether a person who objected to a proposal on the basis of heritage values was a *person affected* was considered in *Lowden* v *Shire of Kilmore*.[258] The Administrative Appeals Tribunal adopted a statement of Nathan J that:

> A person 'affected' ... could be one whose financial, or aesthetic interests or whose enjoyment of life is touched, whether beneficially or detrimentally, by the proposed scheme. It is wider in scope than the phrase ... 'other person aggrieved', as it encompasses those affected to their benefit or advantage; it is also narrower as it must include those upon whom a direct effect upon their interests has been wrought.[259]

Applying this view to what were described as *aesthetic interests*, the Tribunal said, 'It is unnecessary for an objector or appellant concerned with the aesthetic fabric of an area to live next door to a particular development in order to have a legitimate interest in that development.'[260] A submission that the objection made by Mr Lowden, who lived more than five kilometres from the site, was frivolous or vexatious was also rejected.

CONCLUSION

One historical justification for the involvement of public administration in the placement of land uses in an urban environment has been to limit potential interferences in rights of property enjoyment caused by nuisances emanating from inconsistent land uses. The nuisances which the life and commerce of Ancient Rome and Hanseatic Hamburg could create appear to have been rendered acceptable through the simple expedient of planned spatial separation. As our century draws to a close the destructive potential of some of our industrial technologies defies calculation within the pay-out and sell-out options of conventional economics. This situation leaves great

[255] *Planning and Environment Act* 1987, ss 87 and 89.
[256] [1985] VR 433. *Ellul* v *Shire of Melton* (1989) 41 APA 193, 202.
[257] (1989) 41 APA 178, 191. *Cowie* v *State Electricity Commission of Victoria* [1964] VR 788 provides an interesting comparison in its consideration of *material prejudice* with respect to another area of law — again no explicit connection was made between the use of 'material' and 'material interests' in their wealth-related sense.
[258] (1989) 41 APA 319.
[259] *Murragong Nominees Pty Ltd* v *MMBW* (1985) 4 PABR 73, 85.
[260] (1989) 41 APA 319, 325.

uninsured exposures at risk,[261] the value of securities over potentially affected property in doubt and the *ex post facto* solution of litigating for compensation as a mere straw in the wind. It is questionable that economic forces alone can achieve rational placement of such industrial processes when the major stakeholders themselves would find it impractical to translate the risks into costs and benefits.[262]

In the history of this exponential growth in the capacity of one land use to interfere with another the potential for dispute has also grown, stimulating transition in the English legal tradition from a common law basis of adjudication to statutory frameworks which foster prescriptive design standards. Land use zoning was an early phase in this transition. Land use planning in Victoria has followed these developmental trends, starting as a process intended to ameliorate nuisances and thus protect many values, including property, formulated at the local government level. Supreme Court decisions over the 1930s and 1940s moved to accept that local planning decisions were not to be overturned for any reason discoverable. The system of local government itself provided a number of effective opportunities for objection through municipal influence or by formal submission.

With the centralisation, or perhaps conglomeration, of planning in Melbourne around the MMBW, the Town and Country Planning Board and the Minister, some local avenues of citizen participation were closed off. Indeed the formal right of municipalities to object to developments in their own areas was almost closed off. Third party objection procedures were introduced as an urgent measure to preserve an avenue of participation for citizens and Councils in the post-war scheme. Latent difficulties in this access were revealed by the *Wade* case.[263] The *Planning and Environment Bill* 1986 initiated reforms to overcome these difficulties and restore the level of access which had probably existed under the local system introduced in the 1920s, and which many had considered to have been available under the planning system as it stood when Mr Wade sought to remodel his Victorian terrace house located in an area zoned for historical preservation. The reform initiated through the resulting *Planning and Environment Act* 1987 was, therefore, not an historical aberration. It continued and improved responses to concerns about public access and objection which were first identified when Victoria's planning system was centralised in the 1950s and 60s.

A view also emerged of the planning process as a rational process for strategically planning the use of scarce and precious resources — especially urban space. With advanced pollution control technologies the necessity for physical separation is not always so pressing, but this can be seen equally to require scrutiny and assurance to neighbours that standards of control will be maintained. Flexibility in avenues for objection and appeal advances negotiation of mutually acceptable standards of control. If it is accepted that complex technologies which magnify human productive capacities have emerged more

[261] D Collard, 'Catastrophic Risk' in D Collard, D Pearce & D Ulph, *Economics, Growth and Sustainable Environments*, (1988), 67–8, 71.
[262] Id 68.
[263] [1985] VR 433.

or less contemporaneously with legal methods seeking to minimise their similarly magnified potentially destructive impacts on other people and other property, then the costs in time and effort of coordinating diverse inputs into the decision making process can be justified by the magnified gains won by using such technologies.

This study has established that throughout the history of land use planning law in Victoria avenues have existed for wide participation and objection in the development of planning schemes. Opportunities for judicial review, and later merits appeal, have also been a persistent feature. When merits appeals were introduced the number of applications for judicial review appears to have dropped dramatically. The issues involved in judicial review also appear to have changed over the decades as judicial attitudes moved to accept urban planning as a fact of modern urban life. The movement of contended planning issues out of the formal judicial legal forum and into a merits appeal body, with its own expertise in relevant fields, is not surprising when we consider the multi-faceted polycentric nature of planning and environmental questions.

When a planning and environmental dispute is contended in a formal judicial forum in the course of judicial review the legal dimension of the issue naturally predominates. Frequently the legal issues are technical and do not reflect the actual underlying dispute between the parties. We might confidently speculate that the actual issue in dispute between Ethel Righetti and the Council which lay behind the case of *Righetti* v *City of Essendon*[264] was not whether the *Statute Quia Emptores* 1290 (Eng) guaranteed rights of urban subdivision. This shift in the nature of the issues being contended before a formal judicial forum is therefore at odds with mediation of the actual dispute between the parties inter-subjectively in accordance with norms and expectations which the parties themselves would acknowledge. At the same time the parties' negotiating positions are changed by the shift in issues, and thus their respective abilities to press each other into compromise.[265] These and other factors make formal judicial technique less appropriate for the rational organisation of future land uses and, being vitally concerned with the adjudication of present right, traditional judicial method has never contended itself to be the most appropriate decision making style for deciding the best of many possible future spatial relations in a given situation. One feasible outcome of the reduction of avenues of merits appeal could be an increase in the pursuit of formal judicial avenues through judicial review.

Environmental discharge licensing, environmental impact assessment and works approval have been later phases in the legislative transformation of a common law framework which has not proven adequate to the task of dealing with anticipated complex environmental risks. Each of these new forms of inquiry admits public participation in greater or lesser measure. Far from

[264] (1925) 31 Argus LR 91. Discussed at fn 48 supra.

[265] The desirability of mediation and preventing entrenchment into confrontationist positions by seeking consensus about a proposal at the earliest possible time was emphasised in the policy document 'From Control To Performance — Future Directions for the Planning System in Victoria', in State Government of Victoria, *Victorian and Residential Development Plan, Project No 7*, op cit (fn 235) 87–91.

being rendered obsolete by such later developments, land use planning has the potential to emerge as a more generalised rational organisational basis for these later developing specialised methods of setting prescriptive standards for development, and particularly when new digital technologies such as Geographic Information Systems are employed.