

10th July 2009

VCAT President's Review
Victorian Civil & Administrative Tribunal
via email to review@vcatreview.com.au

Dear Sir/Madam

VCAT PRESIDENT'S REVIEW

The Construction Material Processors Association (CMPA) welcomes the opportunity to provide input into the VCAT President's Review.

Organisation Overview

The Construction Material Processors Association (CMPA) membership comprises a broad spectrum of small to medium enterprises (SME) located throughout Victoria. Our members are involved in construction material processing businesses, principally extracting, processing or otherwise working in quarries (hard rock, gravel, sand, masonry, clay, lime, soil and gypsum), and the expanding construction materials recycling business, as well as consultants and suppliers to the industry.

These businesses are the driving force behind Victoria's highly competitive extractive industries and they process almost half of the state's tonnage output, which in 2007/08 totalled over 52 million tonnes valued at \$740 million, excluding recycled materials.

The key points of this submission are:

- It is increasingly expensive in direct costs, lost production and time delays for the proponent to have their case heard by VCAT.
- The increased cost of gaining approval to operate a quarry, including the cost of the VCAT process, is proving a barrier to entry for new players and a deterrent to existing operators, potentially leading to decreased competition in the market place and increased end-user pricing.
- Frivolous and vexatious objectors, including those with identified links to market competitors, can considerably delay projects and must be deterred.
- Objections submitted to VCAT need to be limited in their scope and relevance to the project issues under consideration by the Tribunal and not be sweeping generalisations.
- VCAT needs to make timely, expertly based decisions that are unambiguously delivered and that do not require rehearing.

Case Study Attachment

A copy of the Appendix that accompanies the complete CMPA report *An Unsustainable Future: The Prohibitive Costs of Securing Extractive Industry Access in Victoria, 2009*, is attached for your information. Please note that the Case Study Appendix is provided to the Inquiry on a CONFIDENTIAL basis due to the commercial nature of the information provided. The complete report will be provided shortly when it has been finalised.

The President's Review has asked for comments on a whole range of issues. The CMPA has limited its comments to those areas where its experience can add value.

The CMPA appreciates the role VCAT plays in the planning appeals process and supports the Tribunal's aims of improving access to justice via cost effective practices.

High Cost of Representation at VCAT

Members experience at VCAT over recent times has been that it is not a low cost exercise. The relatively high cost is due to the need for experienced legal representation as well as numerous technical specialists and consultants in the relevant field to present expert evidence to the Tribunal.

The high cost of the planning appeals process has been highlighted and quantified in the recently commissioned CMPA report, *An Unsustainable Future: The Prohibitive Costs of Securing Extractive Industry Access in Victoria, 2009*. The attached appendix from this report details a series of case studies from quarry operators of actual time and costs in establishing new, or extending existing quarry operations.

This report clearly demonstrates the high level of costs associated with establishing a new or extending an existing quarry. One example quoted in the study reveals costs of \$1.25 million to date, the application has been in the planning process for 5 years and the Work Authority is yet to be granted. Compounding the frustration of this application is the VCAT/Supreme Court appeals process which has taken over 3 years, equating to about \$1.8 million worth of lost production. This is not an isolated experience.

The high level of cost inherent in such application appeal processes is clearly against the stated objective of VCAT to provide cost effective justice. It also places the proponent at a commercial disadvantage compared to his competitors.

To assist in limiting costs for all participants, a more rigorous set of protocols to limit the duration of the hearings should be encouraged. Lawyers currently presenting at VCAT have a vested interest in prolonging proceedings. This practice should be discouraged in the future.

A more proactive policy to ensure issues are resolved at mediation should also be investigated. This could be facilitated by conducting a closed mediation with just the objector, proponent and limited legal representation present. Regulators such as the Department of Primary Industries (DPI) and the Environment Protection Authority (EPA) should also be available to provide technical advice to the parties. The endorsed Work Plan should be accepted by VCAT as a valid and reliable document without the need of VCAT to seek additional studies or opinions when these issues have been adequately addressed in the Work Plan endorsement process.

Another option to reduce time and costs is to ensure the objector has to provide specialist advice to support their claim rather than rely on high level legal representation and legal argument aimed at destroying the proponent's specialist advice. This would assist the VCAT decision being based on the weight of proven scientific evidence rather than adversarial legal argument and help to reduce the legalistic focus and adversarial tone of the Tribunal.

Cost of delays in approvals process

CMPA member interaction with VCAT is generally as a result of a planning permit appeal regarding a new, or extension of an existing, quarrying operation. This may happen after the proponent has conducted significant site and environmental studies that satisfy the key regulatory authorities such as the DPI, EPA and Department of Sustainability & Environment that the proposed activity can operate within the prescribed legislative requirements.

The CMPA believes VCAT should place greater weight and recognition upon the validity of the regulatory endorsement of the Work Plan. There are many examples of the Work Plan being referred to regulatory bodies several times, with new issues being raised each time. In this situation there is no certainty of process, time or costs for the proponent.

There should be a better delineation of the Work Plan and Planning Permit processes and VCAT should have a much greater regard for the DPI Work Plan endorsement process. To assist this, DPI should where necessary, be involved in VCAT hearings to support their endorsement of the work plan and assist in harmonizing any Planning Permit conditions with any Work Plan/Authority conditions.

The CMPA supports the importance of environmental regulation and the community's expectation of industry to be environmentally sustainable; however the attached case studies provide an overview of the cumulative impact and the increasingly costly and restrictive nature of some regulatory tools. Nonetheless, the capacity for companies to continue to absorb these additional and escalating costs in their efforts to establish a new quarry, or extend the life of

an existing operation to supply a cost effective product is limited and in numerous instances is a tipping point to withdrawal from the industry.

The ultimate loser under this scenario is the Victorian community through the loss of locally sourced, cost effective product.

Vexatious Objectors to the Development

The ability of vexatious objectors to considerably delay projects is an issue for many CMPA Members. Whilst it is recognised that legislation covering this issue is available and that people should be able to exercise their democratic right, members also have the right to conduct their business in a legal manner without unreasonable interference from people or organisations with a questionable relationship or real standing in the issue at hand. Objectors must also support their claims with evidence based material.

Along a similar theme, members suggest there should be systems in place to ensure that objectors linked to commercial competitors to the proponent are limited in their ability to deliberately frustrate or unnecessarily delay the proponent's project.

Objections to be limited to relevant issues

The CMPA suggests that submissions by objectors should be contained to only address relevant matters and further, there should be a system within VCAT that does not allow an objection to be considered if it does not address issues relevant to the matter under consideration.

An example of such an irrelevant issue is an objection to a quarry based on the commercial viability of the operation. This issue is not a planning concern and should not be considered by VCAT as it is a commercial matter for the operator. The operator's long term viability should be determined in the market place where they operate. The CMPA submits it is not an issue that should be resolved by Government in the approvals process. In a worst case scenario were an operator has to prematurely close a quarry due to adverse market forces, there is security in place through the DPI rehabilitation bond system to ensure the appropriate rehabilitation of the site occurs in the public interest.

Timeliness of decisions

Certainty of process and timeframes are important aspects of any approvals system. Hence it is important for VCAT to conduct its hearings and publish its decisions in a timely and efficient manner.

To achieve this, it is important for Government to recognise that VCAT needs to be adequately resourced and supported with appropriate numbers of competent and professional staff. The frequency and locally available access to regional VCAT hearings is also an important aspect of this timeliness issue.

Unnecessary resubmission to VCAT

VCAT should exhaust all options to ensure that a reapplication to VCAT is not necessary. VCAT should, where ever possible strive to deliver a finding (regardless of any applicable conditions) that encompasses the approval of the relevant regulator. For example, if it is an issue regarding a rehabilitation plan, it should be resolved to the satisfaction of DPI.

I would be more than happy to expand on any of these issues in person to the Review team if required

Yours sincerely



Roger Buckley
Executive Director
M: 0434 692618
E: roger.buckley@cmpavic.asn.au