RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P337/2019

IN THE MATTER OF ID-FLK Gisborne Pty Ltd v Macedon Ranges SC

BEFORE Mark Dwyer, Deputy President

NATURE OF CASE	Whether VCAT has the power to amend and/or consider a version of a Development Plan that differs from the Development Plan that formed the basis of the responsible authority's decision.
POTENTIAL GUIDELINE DECISION	Yes
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
LEGISLATION – interpretation or application of statutory provision	*Victorian Civil and Administrative Tribunal Act 1998* s 127; whether a 'a document in the proceeding' includes a document that existed prior to the proceeding; relevance to a 'secondary consent' review under *Planning and Environment Act 1987* s 149; decision in *TC Rice Pty Ltd v Cardinia SC (*Red Dot) considered and distinguished.

SUMMARY.

The Council failed to indicate whether it was satisfied with a Development Plan submitted by the applicant, leading to a review under s 149 of the *Planning and Environment Act 1987* (PE Act). As a result of a partial resolution of the matter at a compulsory conference, and to facilitate the final determination of the remaining issues at a hearing, the applicant sought to file and serve an amended Development Plan.

Section 127(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) provides that, at any time, VCAT may order that any document in a proceeding be amended. Following the VCAT decision about s 127 in *TC Rice Pty Ltd v Cardinia SC* (Red Dot) [2019] VCAT 64, some doubt had been cast over whether the Tribunal had the power to amend or substitute a Development Plan in a proceeding for review of the plan. Section 149 does not have the benefit of the power of amendment in Clause 64 of Schedule 1 to the VCAT Act that applies to most other applications for review in the Planning and Environment List.

This decision confirms that:

- VCAT's review jurisdiction under s 51 of the VCAT Act includes the power to vary a decision, or set aside the decision and substitute a new decision. If VCAT can vary or substitute a different version of a Development Plan when determining a review under s 149 of the PE Act, common sense would suggest that it also has the power to receive and consider a varied or substituted version of the Development Plan during the review process to assist in that task.
- Accordingly, without needing to consider s 127 of the VCAT Act, a version of the Development Plan that is different to the version determined by the responsible authority can therefore be filed at any time in a proceeding, as part of VCAT's general procedures, to assist the Tribunal in exercising its review functions under s 51 of the VCAT Act, subject to the usual principles of procedural fairness.
- Despite this, if a formal amendment to the Development Plan is warranted during the course of the proceeding, there is no impediment to the use of s 127 of the VCAT Act. A Development Plan is 'a document in a proceeding' relating to its review under s 149 of the PE Act, and is capable of amendment under s 127, notwithstanding that the document came into existence before the review proceeding was commenced.
- The nature of the secondary consent process is different to the primary statutory approval considered in *TC Rice*. That case was concerned with amendment of an application to the original decision-maker, which does not arise here.
- Given its power to vary the Council's decision about a Development Plan, or set aside the decision and substitute a new decision, VCAT may endorse a Development Plan subject to conditions about the amendments or variations required to the plan before its endorsement. In this sense, the conditions are 'conditions precedent' to VCAT being satisfied about the Development Plan.. They are therefore of a different character to conditions commonly placed on planning permits, which are 'conditions subsequent' to the issue of the permit and relate to its implementation or operation, and which may therefore rely on the specific condition-making power in s 62 of the PE Act.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
PLANNING AND ENVIRONMENT DIVISION

VCAT REFERENCE NO. P337/2019

PLANNING AND ENVIRONMENT LIST

APPLICANT	ID-FLK Gisborne Pty Ltd
RESPONSIBLE AUTHORITY	Macedon Ranges Shire Council
SUBJECT LAND	39 Willowbank Road, GISBORNE 3437
WHERE HELD	Melbourne
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Preliminary Hearing
DATE OF HEARING	28 August 2019
DATE OF ORDER	2 September 2019
CITATION	ID-FLK Gisborne Pty Ltd v Macedon Ranges SC (Red Dot) [2019] VCAT 1336

ORDER

1 For the purpose of the review under s 149 of the *Planning and Environment Act 1987*, I hold that VCAT has the power to consider a version of the Development Plan that differs from the Development Plan that formed the basis of the responsible authority's decision under review, including:

(a) as a matter of general procedure, by allowing the filing and/or production of an alternative version of the Development Plan; or

(b) by amending the Development Plan by order under s 127 of the *Victorian Civil and Administrative Tribunal Act 1998*.

Mark Dwyer
Deputy President

APPEARANCES

For Applicant	Jeremy Gobbo QC and Jennifer Trewhella of counsel, instructed by Norton Rose Fulbright.
For Responsible Authority	Darren Wong, Solicitor of Planology

REASONS

What is this preliminary hearing about?

1 Clause 43.04-2 of the Development Plan Overlay effectively provides that a permit must not be granted to use or subdivide land, or for development, '*until a Development Plan has been prepared to the satisfaction of the responsible authority*'.

2 The applicant submitted the Gisborne Area 4B Development Plan to the Council, but the Council failed within a reasonable time to indicate whether it was satisfied with the Development Plan. Accordingly, the applicant sought to review that failure at VCAT under s 149 of the *Planning and Environment Act 1987* (**PE Act**)[1].

3 As a result of a partial resolution of the matter at a compulsory conference, and to facilitate the final determination of the remaining issues at a hearing, the applicant sought to file and serve an amended Development Plan.

4 By email dated 22 August 2019, a VCAT officer expressed a view that VCAT had no power to amend or substitute a Development Plan under s 127 of the VCAT Act. This view was based on the decision in *TC Rice Pty Ltd v Cardinia SC*[2].

5 Section 127(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**) provides that:

> At any time, the Tribunal may order that any document in a proceeding be amended.

6 An urgent preliminary hearing was convened before me to consider this issue. The issue has implications for other pending matters before VCAT and, with the assistance of the parties' advocates, the hearing proceeded as a mini test case. Given this, I propose to discuss the issue a little more broadly than might otherwise be the case.

The decision in *TC Rice*

7 The decision in *TC Rice* concerned an application for a gaming premises approval under the *Gambling Regulation Act 2003* (**GR Act**)[3]. Part way through the VCAT hearing, the applicant sought to amend the gaming application to change the proposed hours of operation. The legal member ruled that VCAT did not have jurisdiction to amend the application to the original decision maker (i.e. the Commission[4]) under either s 51(1) or s 127 of the VCAT Act. It was considered that, the absence of a particular provision to the contrary, VCAT's review jurisdiction is limited to a review of the application that had been the subject of the decision under review.

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1 For present purposes, it does not matter that the review arises out of a 'failure' rather than a refusal of the responsible authority to be satisfied with the Development Plan.

2 *(Red Dot)* [2019] VCAT 74; Senior Member Naylor & Member Djohan.

3 The decision also concerned an application under the PE Act, which is not directly relevant here.

4 Victorian Commission for Gambling and Liquor Regulation

8 In the specific context of s 127 of the VCAT Act, the legal ruling in *TC Rice* was that the application to the original decision-maker under the GR Act was not 'a document in the proceeding', and not capable of being amended under that section. It was considered that s 127 does not apply to any relevant document that may have been filed in the proceeding, but is limited to those documents brought into existence once the jurisdiction of VCAT has been invoked, and for the purpose of the proceeding – e.g. the review application, statement of grounds etc.

9 I do not need to consider the correctness of the decision in *TC Rice.* As will be seen, I do not believe that the decision applies to the circumstances here. In any event, it is not binding upon me, and can be distinguished on its facts.

10 Despite this, it is perhaps worth recording that the decision in *TC Rice* reflects a commonly held view that the power in s 127 of the VCAT Act is not unlimited. It would be absurd if s 127 could be used to amend *any* document belonging to a party that was brought into evidence in a proceeding, irrespective of the nature of the document. It would be problematic, for example, if the power was used to amend documents in a manner that conferred or removed jurisdiction, or to amend government or regulatory documents, or to amend documents such as contracts creating substantive rights between the parties or others – just because those documents were relevant to a review proceeding and had been filed 'in a proceeding'. There are perhaps differing views on whether these are actual or implied jurisdictional limits on the power in s 127 (and what comprises 'a document in a proceeding'), or whether they are just examples of where a very broadly conferred power should not be exercised as a matter of discretion.

11 I am not aware that the breadth of the power in s 127 of the VCAT has been judicially considered.

Relevance to review proceedings under the PE Act

Clause 64 of Schedule 1 to the VCAT Act

12 Fortunately, for the vast majority of review proceedings under the PE Act, any issue with s 127 and the decision in *TC Rice* does not arise.

13 Clause 64 of Schedule 1 to the VCAT Act applies to a proceeding for review of a decision under the PE Act in respect of an application for a permit, and thus covers all of the common review proceedings under Part 4 of the PE Act – such as under ss 77, 79, 80, 82 etc. It expressly empowers VCAT, at any time in a proceeding, to make any amendment it thinks fit to the permit application, including a change to the use and development, or the land to which it relates. It thus also empowers VCAT to amend documents forming part of the application, such as plans – and underpins the process in VCAT Practice Note PNPE9 – Amended Plans.

14 Clause 64 is expressed to operate in addition to, and without affecting, s 127. Given the nature of the amendments to which Clause 64 applies, the clause is expressly empowering VCAT to amend the application to the original decision-maker, being a document that existed prior to the commencement of the proceeding.

15 Clause 64 thus clearly removes the impediment that arose in *TC Rice* for VCAT reviews arising from a permit application. It is arguable that the very existence of Clause 64 bolsters the view that, but for Clause 64, it would not be possible to amend a permit application at VCAT. If the power in s 127 was sufficient, Clause 64 would be unnecessary.

16 It is unnecessary to discuss here the policy basis for Clause 64. It forms part of a suite of broad administrative powers that give VCAT's specialist Planning and Environment List the means to deal with the real matters in dispute, and to facilitate an appropriate merits outcome in the ultimate determination of a planning permit application under the PE Act. The exercise of power under Clause 64 is nonetheless discretionary, and it has been commonly held that it should be exercised carefully, having regard to principles of procedural fairness, and that it should not be used to effectively substitute a very different planning proposal to that considered by the original decision-maker.

17 As I have said, Clause 64 applies to the vast majority of review proceedings under the PE Act. However, it does not apply to the small number of review proceedings under the PE Act that do not arise from a permit application. These include, for example, reviews under s 97P, ss 184A-F, and s 149. We are here concerned with this latter provision.

Review proceedings under s 149 of the PE Act

18 Section 149 of the PE Act effectively provides a right of review to a specified person in circumstances where a matter must be done '*to the satisfaction of*' a specified body under a planning scheme, permit, section 173 agreement, or enforcement order, and where the specified body has decided it is not satisfied or has failed to make a decision[5].

19 The matters to which s 149 applies are what are often described in the planning industry as 'secondary consent' matters. They are not matters for which a primary consent is required under the governing legislation, such as an application for gaming premises approval under the GR Act, or an application for a planning permit under the PE Act. Both of these primary consent applications are highly regulated under their respective Acts in terms of application and notice requirements, third-party interests, decision

[5] There are variations in the wording in the subsections of s 149 (e.g. it applies in some circumstances where something 'must not be done without the consent or approval of' the specified body), but it is sufficient here to consider it in the context of something 'to the satisfaction of' a responsible authority.

considerations etc. For a permit application under the PE Act, the ability to amend the application during the process is also regulated.

20 A common form of secondary consent, at least in terms of review proceedings to VCAT under s 149 of the PE Act, is the requirement in the Development Plan Overlay for a Development Plan to be prepared to the satisfaction of the responsible authority.

21 For a secondary consent such as this:

- There is no formal application under a governing Act, leading to a formal process or decision under that Act.
- There is nothing in the PE Act or the *Planning and Environment Regulations 2015* that provides for an application for secondary consent. The closest one gets to this is that the *Planning and Environment (Fees) Regulations 2016* provide for 'a fee for determining if a matter has been done satisfactorily', payable by the person who seeks that determination[6].
- In the specific context of a Development Plan, the Development Plan Overlay does not require an application, or mandate any formal process, to obtain a responsible authority's 'satisfaction'.

22 There is thus no formal application to the original decision maker under an Act that might later be sought to be amended at VCAT. The impediment highlighted in *TC Rice* simply does not arise in relation to a Development Plan satisfaction process. For similar reason, no additional power is required to authorise an amendment of the original application, such as in Clause 64 of Schedule 1 to the VCAT Act. The fact that review proceedings under s 149 of the PE Act are not covered by Clause 64 is therefore of no consequence.

23 This position also accords with common practice. For a Development Plan, a proponent prepares a plan and submits it to the Council to determine if it is to the Council's satisfaction. If not, there may be discussions and further iterations of the Development Plan prepared to meet Council requirements. There may thus be variations or 'amendments' to the plan along the way to the Council being satisfied, but there is no formal amendment to any formal application.

24 Indeed, in the specific context of a Development Plan, the only document that exists is the Development Plan that a proponent has 'prepared' and is seeking to satisfy the responsible authority about. Sure, the seeking of that satisfaction might be considered to be an informal 'application', but it is of a very different character.

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6 Regulation 18. By contrast, other fees under those Regulations are tied to applications.

Can VCAT consider a different version of the Development Plan?

25 I return then to the key issue before me. Can VCAT amend a Development Plan or otherwise consider a version of the Development Plan that differs from the Development Plan that formed the basis of the responsible authority's decision that is under review?

26 I believe that the answer is clearly 'Yes'.

27 In my opinion, there are at least two approaches open to VCAT to consider a version of a Development Plan that differs from the Development Plan considered by the responsible authority. The first does not require recourse to s 127 of the VCAT Act.

Use of general powers and functions on review

28 The first approach is by reference to VCAT's general powers and functions on review.

29 Under s 51 of the VCAT Act, in determining a proceeding for review, VCAT can (amongst other things) vary the decision under review or set aside the decision and substitute another decision. VCAT is clearly not undertaking an 'all or nothing' review where it can only endorse or reject the version of the Development Plan that was determined by the responsible authority.

30 Moreover, in exercising its review function, VCAT is not sitting in appeal from the original decision maker, considering only what was before the original decision maker. As was stated by Emerton J. in *Mond v Perkins Architects Pty Ltd*[7]:

> When exercising its review jurisdiction, the Tribunal reviews a decision on the merits. Its task is to 'stand in the shoes' of the original decision-maker and make the 'correct' or 'preferable' decision having regard to the material before it. The tribunal's review must take place without any presumption as to the correctness of the decision under review and it must conduct its own independent assessment and determination of the matters necessary to be addressed. While the Tribunal may have to consider the factual findings upon which the decision under review was based in order to decide whether that decision was the correct or preferable one, it must make its own findings of fact and is not bound by the original decision-maker's findings of fact

31 Implicit in this review function then is the potential for VCAT to consider a varied or 'amended' or substituted version of the Development Plan that it might be independently satisfied with, having regard to the multitude of complex issues and policies inherent in any planning decision. If VCAT has this function in ultimately determining the review proceeding, then

[7] [2013] VSC 455, at [10]

common sense would suggest that it has the procedural power to get itself to that point[8].

32 Simply expressed, VCAT has the power to consider an alternative version of a Development Plan in order to properly exercise its functions on review. This means that it can allow, in its discretion, a party to file or produce an alternative version of the Development Plan at any time in the proceeding as part of that process.

33 In reality, this does not involve any formal 'amendment' of the Development Plan that was before the responsible authority. There is just another version being tabled as part of the review process.

34 What I have just said is consistent with s 149 itself. Section 149 refers to the review of a decision in relation to a 'matter' where the 'matter' must be done to the satisfaction of the responsible authority. The matter in dispute is whether the responsible authority (or VCAT on review) is satisfied with a Development Plan in order to meet the requirements of the Development Plan Overlay. The subject matter of the review is therefore the Development Plan itself. Read in the context of the specific review power in s 149 of the PE Act, and the matters that VCAT must take into account on a review under the PE Act, VCAT's functions on review under s 51 of the VCAT Act clearly envisage the tabling of a varied or amended or substituted version of a Development Plan for its consideration.

35 It will of course be a matter of VCAT discretion as to whether an alternative version can or should be tabled. The exercise of that discretion may involve consideration of the extent or timing of the changes to the Development Plan from the version that was determined by the responsible authority. In particular, there will be a need to ensure, as a matter of procedural fairness, that that the responsible authority has adequate time to consider any alternative Development Plan that an applicant is seeking to have VCAT endorse.

36 Lest there be any doubt, I consider that VCAT's general power to receive an alternative version of a Development Plan arises not just in the lead up to a final determination under s 51 of the VCAT Act, but at any time in the proceeding. This includes as part of a compulsory conference process where VCAT is exercising the functions (amongst other things) of promoting a settlement and/or identifying and clarifying the real issues in dispute. There is no reason, in principle, why a party could not file or produce a new version of a Development Plan following a discussion, or partial settlement, or narrowing of the issues in dispute, at a compulsory conference. Indeed, such a course of action ought to be encouraged.

37 There is one further issue that I will note for completion. Section 51 of the VCAT Act provides that, in exercising its review jurisdiction, VCAT has all

[8] This is consistent with the decision (at least on this point) in *Bakers Arms Hotel Pty Ltd v VCGLR & Maribyrnong CC* [2014] VCAT 1192; Senior Member Code & Member Nelthorpe

the functions of the decision maker. After reviewing a number of authorities, it was considered in *TC Rice* that this did not mean that VCAT acquires all of the powers of the decision maker in an unlimited way, but only those relevant to the decision under review. The power in s 51(1) is expressly limited to VCAT's exercise of its review functions. It does not therefore include powers and discretions vested in the decision-maker for another purpose. In *TC Rice*, this led the Tribunal to a view that VCAT did not acquire the decision-maker's pre-review powers and discretions under the GR Act in relation to the application for the gaming premise approval.

38 As I have indicated earlier, satisfaction about a Development Plan arises through a secondary consent process. VCAT does not need to exercise any pre-review function of the responsible authority under the PE Act in order to consider an alternative version of a Development Plan within a s 149 proceeding. VCAT is not accepting an amended application for primary consent under the PE Act, but is receiving an alternative version of the Development Plan for its consideration. This aspect of *TC Rice* is therefore not relevant to, and does not provide any impediment to, the general procedural power I have outlined.

Amendment of a Development Plan under s 127 of the VCAT Act

39 It will be apparent from the above that I do not consider that it is necessary to resort to s 127 of the VCAT Act to formally amend a Development Plan as part of a review under s 149 of the PE Act. A simpler process of filing or producing an alternative version of the Development Plan, commensurate with the secondary consent process itself, will often suffice.

40 However, the second approach open to VCAT to consider a version of a Development Plan that differs from the Development Plan considered by the responsible authority is in fact to use s 127.

41 In some cases, it may be considered appropriate to formally 'take off the table' the Development Plan that was determined by the responsible authority, and to have the proceeding focus solely on an alternative Development Plan. This will sometime be easier when expert evidence is being called in relation to a particular plan, or (as in the present case) where the parties have reached a partial settlement and wish to have the hearing of the remaining disputed matters resolved on the basis of an amended plan.

42 I have already discussed the many differences between *TC Rice* and a secondary consent matter under s 149 of the PE Act that would suggest that, bar one issue, the principles outlined in *TC Rice* do not provide an impediment to this outcome.

43 However, for s 127 of the VCAT Act to be available, given the wording of the provision, the Development Plan must still be 'a document in the proceeding'. Pizer's '*Annotated VCAT Act*' (6th ed) notes that, it is by no means clear that Parliament intended that VCAT could amend documents brought into existence before a proceeding commenced. In *TC Rice*, the

comment is made that, if Parliament had intended otherwise, such intention would likely be expressed in a specific provision in either the enabling enactment or in Schedule 1 to the VCAT Act (as has occurred for example in Clause 64 of Schedule 1)

44 In my opinion, read both literally and contextually, s 127 does not impose a temporal limitation on what might comprise 'a document in a proceeding'. The key is whether the document is properly characterised as a document in the proceeding, rather than the timing of when it was created. Whilst it may be a rare circumstance where an antecedent document could be 'a document in a proceeding', I think it a significant step to suggest that this could *never* be the case.

45 Here, the very subject matter of the review – indeed the only matter in dispute – is the Development Plan. The version considered by the responsible authority was clearly created before the review proceeding commenced. But until a decision-maker is satisfied with it, it is in reality little more than a draft document awaiting endorsement[9]. By its very nature, a Development Plan will often be an evolving document that may have more than one iteration, and it can still be amended even after a decision maker is initially satisfied with it. The satisfaction process includes the opportunity for review under s 149, and the opportunity for the Development Plan to be varied (or a new Development Plan substituted) as part of the outcome of that process. Given all of this, I cannot see why the Development Plan should not be characterised as 'a document in the proceeding'. On one view, it is *the* document in the proceeding. The timing of its creation is irrelevant to this characterisation.

46 It follows that, as a document in the proceeding, the Development Plan can be amended under s 127 of the VCAT Act. There is no anomalous outcome that arises from this. Amending the Development Plan is a procedural matter within the proceeding. It does not alter VCAT's jurisdiction nor affect substantive rights. It simply facilitates the proper exercise of VCAT's review functions.

47 In similar fashion to what I outlined earlier in relation to VCAT's general procedures, the power under s 127 is discretionary. Considerations about the extent and timing of the amendment, or matters of procedural fairness, may be relevant to the exercise of discretion.

48 There is again one further issue for completion. The decision in *TC Rice* relies, in part, for support upon the decision in *Niebeski Zamek Pty Ltd v Southern Rural Water*[10], where it was said by DP Macnamara that the correct interpretation of s 127 is constrained by the nature of the review jurisdiction, '*that is, to the consideration only of the controversy which it considered at first instance*'. In *Zamek*, DP Macnamara had moved from an

9 This is particularly the case where the responsible authority failed to determine the matter, as here.
10 [2001] VCAT 1627 at [20], Macnamara DP

earlier position in *Li Ming Wai v Boroondara City Council*[11], where he had opined that this strict rule had never applied in the planning jurisdiction.

49 The applicant drew my attention, in this context, to the High Court decision in *Shi v Migration Agents Registration Authority*[12], cited recently with approval in the Ravenhall landfill decision[13]. The High Court reinforced the position that the question for determination by the Tribunal (there, the Commonwealth AAT) was the correct or preferable one 'on the material before the Tribunal', not on the material before the original decision maker. The conduct or circumstances may have changed, and the material before the Tribunal may include new or different information. If there was a statutory limitation to the Tribunal considering new or different information, that would be found in the relevant enabling enactment.

50 A similar position prevails at VCAT. The High Court decision in *Shi* is consistent with the Supreme Court decision in *Mond* to which I earlier referred. Whilst the underlying controversy that VCAT considers on review is based on the decision at first instance, VCAT is similarly deciding a review afresh.

51 This bolsters the view that, absent any express provision to the contrary, VCAT can consider new or different material in making a decision about a Development Plan, including a varied version of the plan that reflects the different material. Section 127 must be considered in this context.

52 To the extent there is any difference in the analysis as between the VCAT decision in *Zamek* on this issue, and the decisions of the courts in *Shi* and *Mond*, I prefer the latter. I am bound to do so.

Conditions on a Development Plan

53 In the applicant's written submission, a reference is made to there being no argument that s 51 of the VCAT Act allows the Tribunal to allow the application for review 'on condition'.

54 I am not so sure that there has been 'no argument' about this. Within the broader debate about the extent of VCAT's powers in being satisfied about a Development Plan, it has been suggested (albeit not in this proceeding) that VCAT may not have the power to condition a Development Plan because there is no power akin to the condition-making power for planning permits found in s 62 of the PE Act.

55 I do not agree with this proposition, and I prefer the view of the applicant here that VCAT can endorse a Development Plan conditionally. Given its power to vary a Council's decision about a Development Plan, or set aside the decision and substitute a new decision, VCAT can clearly endorse the plan subject to conditions about certain amendments or variations required

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11 (2000) 7 VPR 76, Macnamara DP (no Austlii citation given)
12 [2008] HCA 31
13 *Melton CC v Landfill Operations Pty Ltd* (Red Dot) [2019] VCAT 882, particularly at [646] and following.

to the plan. In this sense, the conditions are essentially 'conditions precedent' to VCAT being satisfied about the Development Plan.

56 The conditions imposed on a Development Plan in this way, following a review under s 149 of the PE Act, are therefore of a different character to conditions commonly placed on planning permits following a review under Part 4 of the PE Act. Those permit conditions are more in the nature of 'conditions subsequent' that apply to the implementation or operation of a permit after it has been issued, and in some cases necessarily rely on particular components of the condition-making power on s 62 of the PE Act. In my opinion, it would be a rare case for VCAT (or a responsible authority) to seek to condition a Development Plan in this latter way, and it should be avoided.

57 If there are significant changes to be made to a Development Plan as part of its endorsement through the VCAT review process there may be a case for VCAT to require a further version of the Development Plan to be provided (incorporating such changes) prior to VCAT making a final order under s 149 of the PE Act that it is 'satisfied' with the plan[14]. There is then greater certainty about the Development Plan with which VCAT is satisfied.

Mark Dwyer
Deputy President

[14] Alternatively, VCAT could in appropriate circumstances remit the matter to the original decision-maker (i.e. the responsible authority) to undertake this task.