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[2010](#) >> [\[2010\] VCAT 1807](#)

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**Coastal Estates Pty Ltd v Bass Coast SC &
Ors (includes Summary) (Red Dot) [2010]
VCAT 1807 (9 November 2010)**

Victorian Civil and Administrative Tribunal

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Ors (includes Summary) (Red Dot) [2010]
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Last Updated: 18 November 2010

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

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO.
P1373/2010

IN THE MATTER OF

Coastal Estates Pty Ltd v Bass Coast Shire
Council & Ors

BEFORE

Mark Dwyer, Deputy President

NATURE OF CASE	Review of panel hearing under s 39
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
LEGISLATION – interpretation or application of statutory provision	Planning and Environment Act 1987 s 39(1) ; extent of Tribunal jurisdiction under s 39 ; whether it allows broader administrative law review of substantive errors made by panel or only procedural defects;
PRACTICE OR PROCEDURE – consideration of individual instance or systemic issues	panel obligation to provide fair hearing; principles of natural justice applicable to planning panel; role of panel in s 39 proceedings before Tribunal

SUMMARY

The applicant was a submitter to Amendment C93 to the Bass Coast Planning Scheme. It claims it was substantially and materially affected by a failure of the panel to comply with [ss 24\(a\)](#), [25\(1\)](#) and [161\(1\)\(b\)](#) of the [Planning and Environment Act 1987](#) in considering and hearing submissions and in reporting its findings on a variety of issues.

Some of the applicant's concerns were that the panel that took into account irrelevant considerations, or made findings or recommendations not open on the evidence, wrong in law, or manifestly unreasonable. The decision concludes that the jurisdiction of the Tribunal under [s 39](#) of the [Planning and Environment Act 1987](#) does not enable a review of substantive errors by the panel, but is limited to procedural defects. [The Tribunal makes no

finding as to whether the panel in this case misdirected itself on the material before it.]

Some of the applicant's concerns raised issues of natural justice, and whether the panel provided a fair hearing. The Tribunal held that it did have jurisdiction to consider these matters under [s 39](#) but, after examining the specific allegations, found no breach to have occurred. In reaching this conclusion, the Tribunal makes some observations on the principles of natural justice applicable to panel hearings.

The Tribunal also makes comment on the panel's participation in the [s 39](#) proceedings, and expresses concern at the risks to panel impartiality if it becomes a protagonist in its own cause or seeks to defend its position through counsel or affidavit evidence.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

**PLANNING AND
ENVIRONMENT LIST**

VCAT REFERENCE NO.
P1373/2010

CATCHWORDS

Planning and Environment Act 1987 s 39 & Part 8; Bass Coast Planning Scheme; extent of Tribunal jurisdiction under [s 39](#); whether it allows broader administrative law review of substantive errors made by panel or only procedural defects; panel obligation to provide fair hearing; principles of natural justice applicable to planning panel; role of panel in proceedings before Tribunal

APPLICANT
PLANNING AUTHORITY /
RESPONDENT
OTHER RESPONDENTS

Coastal Estates Pty Ltd
Bass Coast Shire Council

Minister for Planning
Bass Coast Amendment C93 Panel

SUBJECT LAND	Agar Road CORONET BAY VIC 3984
WHERE HELD	55 King Street, Melbourne
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Hearing
DATES OF HEARING	23 August & 6 October 2010
DATE OF ORDER	9 November 2010
CITATION	Coastal Estates Pty Ltd v Bass Coast SC & Ors (includes Summary) (Red Dot) [2010] VCAT 1807

ORDER

1. The application under [s 39](#) of the *Planning and Environment Act 1987* is dismissed.

Mark Dwyer
Deputy President

APPEARANCES:

For the Applicant	Mr Jeremy Gobbo QC with Mr Jason Pizer of counsel, instructed by Norton Rose Australia
For the Planning Authority	Mr Greg Tobin, solicitor, of Harwood Andrews
For the Minister for Planning, and the Amendment C93 Panel	Mr Nicholas Tweedie of counsel, instructed by the Victorian Government Solicitor's Office. (Mr Emrys Nekvapil assisted as junior counsel to Mr Tweedie on 6 October 2010).

REASONS

What is this proceeding about?

1. Through Amendment C93, Bass Coast Shire Council (as planning authority) proposes to introduce into the Bass Coast Planning Scheme a series of structure plans for coastal townships, including the township of Coronet Bay on Western Port Bay.

2. The applicant owns a large parcel of land to the south of Coronet Bay, often referred to as the “Sporting Village” land, which it seeks to develop. The structure plan for Coronet Bay proposes that this land would be rezoned in the ‘intermediate’ term to a Comprehensive Development Zone. Following the exhibition of Amendment C93 in July 2009, the applicant made a submission seeking that the structure plan provide instead for the rezoning of its land in the ‘short’ term.
3. A 3-member panel was convened to consider submissions in relation to Amendment C93, in conjunction with two other Amendments[1]. A panel hearing was conducted over 9 days in December 2009. The applicant attended or was represented on some (but not all) days of the panel hearing. On 15 December 2009, the applicant was represented by counsel and a solicitor and presented its case in support of its submission, including calling 3 witnesses[2].
4. The panel published its report in April 2010[3]. It notes that there were 99 submissions in relation to Amendment C93[4]. In addition to the applicant’s submission, there were nine other submissions that specifically referred to Coronet Bay and the applicant’s land[5]. The panel did not support either the Council’s proposal that the applicant’s land be rezoned in the intermediate term, nor the applicant’s submission that it be rezoned in the short term. Instead, it recommended that the structure plan for Coronet Bay be modified to completely delete the proposed extension area to the south comprising the applicant’s land[6]. It appears that its rationale was that the proposal was inconsistent with the State Planning Policy Framework and the *Victorian Coastal Strategy*[7].
5. The applicant claims that it is substantially and materially affected by a failure of the panel to comply with [ss 24\(a\)](#), [25\(1\)](#) and [161\(1\)\(b\)](#) of the [Planning and Environment Act 1987](#) in considering and hearing submissions and in reporting its findings on this issue. These alleged failures variously arise in relation to purported findings by the panel (and the manner in which those findings were arrived at) on six matters[8]:
 - a. the absence of a rezoning request by the applicant;
 - b. the Victorian Coastal Strategy;
 - c. ‘special circumstances’ that may justify a rezoning;
 - d. development contributions;
 - e. likely visitation rates; and

- f. the impact on views from Agar Road across the applicant's land.
6. As a consequence, the applicant has referred the matter for determination under [s 39](#) of the *Planning and Environment Act 1987*, seeking an order that the planning authority be restrained from adopting that part of Amendment C93 that relates to Coronet Bay, unless or until a freshly constituted panel re-hears submissions and makes recommendations in respect of that part of the Amendment.
7. The proceeding raises a number of issues:
 - a. the extent of the Tribunal's jurisdiction under [s 39](#), and whether it allows for broader administrative law review of a panel's findings;
 - b. specifically, the panel's obligation to provide a fair hearing, and whether, within the limits of the Tribunal's jurisdiction under [s 39](#), there has been a failure by the panel to comply with the *Planning and Environment Act 1987* in relation to any of the six specific matters raised by the applicant;
 - c. the role of the panel in proceedings before the Tribunal under [s 39](#).
8. I will deal with these issues in turn.

THE EXTENT OF THE TRIBUNAL'S JURISDICTION UNDER [SECTION 39](#)

'Failures to comply' raised in applicant's Statement of Claim

1. The applicant's Statement of Claim raises numerous alleged failures by the panel to comply with [ss 24\(a\)](#), [25\(1\)](#) and [161\(1\)\(b\)](#) of the *Planning and Environment Act 1987*.
2. Some of these alleged failures claim that the panel denied the applicant a fair hearing or breached the rules of natural justice. I will deal separately with these specific allegations later in these reasons.
3. However, a large number of the alleged failures raise more substantive questions about the panel's findings and reasoning, including the following (as paraphrased by me from the Statement of Claim):
 - whether it was open to the panel to find that there had been no prior rezoning request by the applicant, or whether such a finding was manifestly unreasonable[\[9\]](#);
 - whether the panel misdirected itself on the proper interpretation of the *Victorian Coastal Strategy* and made a finding not legally

- open to it or a finding that was manifestly unreasonable;
 - whether the panel took into account an irrelevant consideration in considering a submission by another submitter that raised an issue that was (arguably) legally incorrect;
 - whether the panel misdirected itself on whether ‘special circumstances’ were required to support the rezoning of the applicant’s land, or made such a finding in a manner not legally open to it or a finding that was manifestly unreasonable;
 - whether the panel misdirected itself on the matter of ‘development contributions’, or made such a finding in a manner not legally open to it or a finding that was manifestly unreasonable;
 - whether the panel misdirected itself in relation to the evidence on visitation rates, or made a finding not legally open to it on the evidence or other material before it, or a finding that was manifestly unreasonable
 - whether the panel misdirected itself on the draft concept plan for the applicant’s land and views from Agar Road, or made a finding not legally open to it on the evidence or other material before it, or a finding that was manifestly unreasonable.
4. A key issue in this proceeding is whether such matters constitute a ‘failure to comply’ for the purposes of [s 39](#), or whether they fall beyond the Tribunal’s jurisdiction under [s 39](#).

Relevant provisions of the [Planning and Environment Act 1987](#)

1. It is useful to set out [s 39](#) of the [Planning and Environment Act 1987](#) in full:

1. **Defects in procedure**

(1) A person who is substantially or materially affected by a failure of the Minister, a planning authority or a panel to comply with Division 1 or 2 or this Division or [Part 8](#) in relation to an amendment which has not been approved may, not later than one month after becoming aware of the failure refer the matter to the Tribunal for its determination.

(2) In addition to any other party to the proceeding the parties to a proceeding before the Tribunal under this section are —

- (a) the person who referred the matter to the Tribunal; and
- (b) the Minister; and

(c) the planning authority.

(3) If a matter referred to the Tribunal under this section involves a failure by a panel to comply with Division 2 or this Division or [Part 8](#) the panel (or a member of the panel authorised by the panel to act on its behalf) is entitled to make a written or oral submission to the Tribunal before the Tribunal completes the hearing of the matter.

(4) The Tribunal may determine a matter referred to it under this section and may do any one or more of the following—

(a) make any declaration that it considers appropriate;

(b) direct that—

(i) the planning authority must not adopt or approve the amendment or a specified part of the amendment; or

(ii) the Minister must not approve the amendment or a specified part of the amendment—

unless the Minister, planning authority or a panel takes action specified by the Tribunal.

(5) In exercising its jurisdiction under this section the Tribunal cannot vary a decision made in relation to a matter referred to it or set aside that decision and make a decision in substitution for the decision so set aside.

* * * * *

(7) An amendment which has been approved is not made invalid by any failure to comply with Division 1 or 2 or this Division or [Part 8](#).

(8) Except for an application under this section, a person cannot bring an action in respect of a failure to comply with Division 1 or 2 or this Division or [Part 8](#) in relation to an amendment which has not been approved.

1. It is common ground that, if there is a ‘failure’ for the purpose of [s 39\(1\)](#), the applicant would be substantially and materially affected by

it. It is also common ground that this [s 39](#) application was made within a month of the applicant receiving the panel report.

2. As indicated, the applicant alleges a failure by the panel to comply with [ss 24\(a\)](#), [25\(1\)](#) and [161\(1\)\(b\)](#) of the [Planning and Environment Act 1987](#).

3. [Section 24\(a\)](#) provides:

1. **Hearing by panel**

The panel must consider all submissions referred to it and give a reasonable opportunity to be heard to—

(a) any person who has made a submission referred to it;

...

1. [Section 25\(1\)](#) provides:

1. **Report by panel**

(1) The panel must report its findings to the planning authority.

...

1. [Section 161\(1\)\(b\)](#) provides:

1. **General procedure for hearings**

(1) In hearing submissions, a panel—

...

(b) is bound by the rules of natural justice;

...

1. All three sections fall within Division 2 of [Part 3](#), or [Part 8](#), of the [Planning and Environment Act 1987](#), and thus fall at least within the range of sections expressly nominated in [s 39\(1\)](#).

Original or review jurisdiction?

1. Counsel for the Minister and Panel initially contended that a [s 39](#) proceeding fell within the ‘review’ jurisdiction of the Tribunal. However, despite the Tribunal’s jurisdiction under [s 39](#) having been described as being akin to ‘judicial review’[\[10\]](#), it is not strictly within the review jurisdiction of the Tribunal for the purposes of the [Victorian Civil and Administrative Tribunal Act 1998](#).

2. Having regard to [ss 41](#) and [42](#) of that Act, I prefer the applicant's submission that a [s 39](#) proceeding is within the Tribunal's 'original' jurisdiction. The Tribunal is not here undertaking a merits-based review of a decision by a decision-maker, where the Tribunal 'stands in the shoes' of the decision maker and can substitute its own decision. Indeed, [s 39\(5\)](#) of the *Planning and Environment Act 1987* precludes that outcome. Moreover, a panel is not a decision-maker, but an entity empowered only to make findings and recommendations. Here, the Tribunal is called upon to make a first-instance determination on whether the panel has complied with relevant provisions of the *Planning and Environment Act 1987*.
3. Despite the debate on this issue at the hearing before me, I do not consider that anything really turns on this finding in this proceeding.

Substantive error vs. procedural defect

1. Although [s 39](#) is headed "Defects in Procedure", there is no reference to that expression in the wording of the section that follows. The actual wording of [s 39\(1\)](#) contains the expression "failure to comply with Division 1 or 2 or this Division or [Part 8](#)" of the *Planning and Environment Act 1987*.
2. The applicant contends for a broad interpretation of this expression and what may constitute a 'failure to comply'. The allegations it has raised fall into three main categories:
 - i. failing to accord procedural fairness;
 - ii. taking into account irrelevant considerations;
 - iii. making findings or recommendations:
 - i. not open on the evidence; and/or
 - ii. wrong in law; and/or
 - iii. manifestly unreasonable in the *Wednesbury* sense.
3. I have set out earlier the primary allegations raised by the applicant under categories (b) and (c). However, I agree with the respondents that errors by the panel under these two categories, even if proven, are not open to challenge before the Tribunal, and fall outside of the limited jurisdiction of the Tribunal under [s 39](#).
4. [Section 39](#) is clearly intended to address whether the Minister, planning authority or (as here) a panel has followed the correct procedures in processing a planning scheme amendment. Conferring this jurisdiction on the Tribunal allows for timely intervention before

the amendment is approved. If, for example, a planning authority has failed to notify someone about an amendment, or the panel has failed to consider a submission at all, then the Tribunal may direct that these procedural defects be remedied before the amendment is adopted or approved.

5. But what of the substance of the panel's findings? It is clear that [s 39](#) is not intended to allow for the Tribunal to conduct a merits review of the panel's findings and recommendations. Equally, in my view, [s 39](#) is not intended to facilitate a broader administrative law review of the panel's findings and recommendations. If the panel has failed to take into account relevant considerations, or taken into account irrelevant considerations, or misdirected itself on the application of the law, or reached a seemingly untenable conclusion on the evidence, these are more substantive errors that stem from the panel's reasoning or use of the information before it rather than defects in the procedures followed by the panel in gathering that information or preparing its report. In my view, substantive errors of this nature are not reviewable under [s 39](#).
6. An example applicable to this case is whether there has been a 'failure to comply' with [s 25\(1\)](#) of the *Planning and Environment Act 1987* – the panel's obligation to report its findings to the planning authority. If a panel failed to report its findings to the planning authority at all, then this may constitute a procedural defect, and the Tribunal could direct that the panel report its findings, as required by [s 25\(1\)](#), before the planning authority considered the report under [s 27](#) and adopts or abandons the amendment. But if the panel did report its findings, but those findings contained errors of fact or legal reasoning that undermined the basis for its recommendations, those errors are not in my view reviewable by the Tribunal. There is no 'procedural defect' because the panel has procedurally reported its findings as required by [s 25\(1\)](#). Whilst I agree with the applicant that the panel's obligation under [s 25\(1\)](#) is implicitly to make only findings that are reasonably open on the evidence, the panel's errors under this scenario are substantive errors intended to be reviewable only by a court under established administrative law principles.
7. There are three primary reasons for holding the view that [s 39](#) covers only procedural defects or non-compliance, but not substantive

errors.

8. First, there is recent case-law support for this view. In *East Melbourne Group Inc v Minister for Planning*, the Court of Appeal^[11], (whilst allowing the appeal on other grounds) endorsed the trial judge's^[12] interpretation of what was meant by the expression "failure to comply..." etc in [s 39\(7\)](#). The trial judge had essentially held that:
 - i. the provision was concerned with procedural non-compliance, and not with jurisdictional error or substantive ultra vires; and
 - ii. by reference to the history of the provision, [s39](#) was plainly directed to 'defects in procedure' as the heading to the section states.

The majority judgement of the Court of Appeal concluded that "substantially for the reasons stated by His Honour", [s 39\(7\)](#) "only addresses non-compliance with procedural requirements" and "does not apply to decisions that are tainted by jurisdictional error".

1. The *East Melbourne* decision related to a decision by the Minister, as planning authority, rather than a recommendation by a panel. However, I do not consider that the factual differences in that case distinguish or undermine the general principle from its applicability to the case before me. Moreover, although the Court of Appeal in the *East Melbourne* decision was concerned with the expression "failure to comply..." etc used in [s 39\(7\)](#), I consider that its conclusion applies equally to the same expression where it is used in [s 39\(1\)](#). Indeed, the trial judge had held that the expression was intended to have the same meaning where used in each of [ss 39\(1\)](#), (7) and (8).
2. At a Tribunal level, there is also a prior decision that suggests that [s 39](#) is limited to procedural defects and does not allow a review of a defect in the substantive recommendation of the panel, nor to review the failure of a panel to make a particular finding – see *First Jodrian Pty Ltd v Bayside City Council*^[13].
3. Secondly, quite apart from the *East Melbourne* decision, I agree with the respondents that [s 39](#), when read as a whole and properly construed, is intended to distinguish between 'procedural defects' that can be dealt with by the Tribunal under [s 39](#), and 'substantive errors' that fall outside [s 39](#).
4. Unfortunately, although there are reasonably well-established

principles for administrative law review, the terminology used to broadly classify the various bases for review in administrative law texts and in the case law often differs. The applicant in this case referred to 4 types of reviewable error – errors of fact or merits (conceded not to fall within [s 39](#)), errors of law within jurisdiction, errors of a dual character (comprising a ‘failure to comply’ and jurisdictional error), and jurisdictional error that did not constitute a ‘failure to comply’. It was contended that the *East Melbourne* decision did not deal with the errors of a dual character which could, under the applicant’s argument, include *Wednesbury* unreasonableness.

5. I consider that the applicant’s arguments on this issue ‘muddy the waters’, but do not provide a convincing argument to counter the more common administrative law distinction between substantive ultra vires or jurisdictional error on one side and procedural error or non-compliance on the other. That more common distinction sits more neatly with the way [s 39](#) has been drafted and applied.

Moreover:

- a procedural non-compliance does not render the decision or recommendation invalid, but the non-compliance is capable of remedy by the Tribunal under [s 39](#). This view is bolstered by the wording of [s 39\(7\)](#). On the other hand, a substantive error may lead to invalidity;
 - if the applicant’s view is correct, and [s 39](#) covers ‘substantive errors’, the effect of [s 39\(8\)](#) would seemingly be to oust the jurisdiction of the Supreme Court from considering whether a Minister, planning authority or panel had fallen into jurisdictional error. There was no evidence provided to me that indicated that this was Parliament’s intent.
6. I disagree with the applicant that this interpretation leads to a less preferable outcome, having regard to the [Charter of Human Rights and Responsibilities Act 2006](#), in that it infringes the right to a fair hearing or the right to participate in public life. Quite apart from the fact that the applicant in this case is a corporation without individual human rights, the distinction does not in any way dilute a panel’s obligation to act fairly. The distinction simply acknowledges that procedural non-compliance can be remedied before the Tribunal under [s 39](#). More substantive errors are still reviewable by a court.

7. Thirdly, I agree with Counsel for the Minister and Panel that the legislative history and context of [s 39](#) supports the view that it is intended to be limited to procedural non-compliance rather than substantive error. In particular:
- [s 39](#) existed in the original 1987 [Planning and Environment Act](#) (when first enacted) in a somewhat different form, along with the then [ss 150\(1\),\(2\) and \(3\)](#) that allowed for a broader based review of the decisions of planning authorities;
 - the legislative history of [s 39](#) has previously been used by the court and Tribunal to support the view that it is limited to procedural defects rather than substantive error[\[14\]](#);
 - the review provisions of [s 150](#) were substantially repealed, and [s 39](#) substantially amended, in 1989. The explanatory memorandum to the 1989 Bill[\[15\]](#) (that introduced s 39(1) as it now stands) refers to a new provision “... to review whether a planning authority or panel has followed correct procedures in preparing and considering an amendment, and allows the Tribunal to give directions if it finds that correct procedures have not been followed”. A similar position arises under the relevant Second Reading speech where it is stated that the Tribunal is not intended to be placed in the role of the planning authority, but “The Tribunal does have an important role in resolving disputes of a procedural nature...”[\[16\]](#).
 - whilst the section heading “Defects in Procedure” is not formally part of s 39 or the Act, it remains an ‘aid to interpretation’ that bolsters this interpretation.

Conclusions and consequences of interpretation of s 39 for this decision

1. It follows from the above analysis, and a proper construction of s 39, that much of the applicant’s Statement of Claim in this proceeding falls outside the Tribunal’s jurisdiction. I have no jurisdiction to decide, and do not therefore make any determination on those claims, set out earlier in these reasons, that arise from the panel allegedly:
 - taking into account irrelevant considerations; or
 - making findings or recommendations, not open on the evidence, wrong in law and/or manifestly unreasonable in the *Wednesbury* sense.

2. In saying this, it will be apparent that I express no view on whether there are any substantive errors in the panel's findings or recommendations. Unless impugned through an administrative law proceeding in a court, the panel's report and recommendations stand. However, I note in passing that a planning authority must, under s 27(1), consider the panel's report before deciding whether to adopt the planning scheme amendment, but is not bound by it. The planning authority may adopt the amendment with or without changes. If the applicant believes there is an error in the panel's findings or reasoning that undermines the integrity of the panel's recommendations for future development at Coronet Bay, it remains open to the applicant to put that view (or to at least attempt to put that view) before the planning authority or Minister prior to adoption or approval of the amendment.

HAS THE PANEL FAILED TO COMPLY WITH ITS OBLIGATION TO PROVIDE A FAIR HEARING?

Tribunal jurisdiction

1. As indicated, apart from the alleged 'substantive errors' that I consider fall outside the Tribunal's jurisdiction under s 39, there remain a number of allegations in the Statement of Claim and submissions that allege that the panel has failed to provide the applicant a fair hearing or a reasonable opportunity to be heard, failed to consider the applicant's case in a fair way, or breached the rules of natural justice. I will deal with the specific allegations later in these reasons.
2. The Tribunal has on many past occasions accepted, seemingly without argument, the proposition that a breach of the rules of natural justice is a relevant 'failure to comply' or procedural non-compliance that the Tribunal can review and determine under s 39. My own decision in *Winky Pop Pty Ltd (No.2) v Hobsons Bay City Council*[\[17\]](#) is an example of this, but there are others.
3. A potentially vexing factor is that a breach of the rules of natural justice is often regarded, under established administrative law principles, as amounting to a substantive error that may invalidate a decision. Does my view on substantive errors, earlier in these reasons, therefore lead necessarily to the view that a panel's failure

to comply with the rules of natural justice is also not reviewable by the Tribunal under s39? I do not believe that this is the case for the following reasons:

- no party advocated such an outcome;
 - Counsel for the Minister and Panel contended that the ordinary distinction between substantive error and procedural non-compliance is subject to a limited exception where a breach of natural justice is alleged, because it is potentially both a ‘procedural’ failure to comply (for the purposes of s 39) and a jurisdictional error;
 - the exception is limited because the obligation to provide a reasonable opportunity to be heard (under s 24(a)) and to accord natural justice (under s 161(1)(b)) only arise in relation to a panel making findings and recommendations within the amendment process, rather than the actions of a planning authority or Minister making the ultimate decision;.
 - the obligation to provide a reasonable opportunity to be heard and to accord natural justice is also limited, in context, by the other statutory provisions governing panel procedures (discussed further below).
4. I accept these contentions. Applying modern principles of statutory interpretation, I believe it also best accords with the underlying intent of the provision. It follows that I consider I have jurisdiction to determine the allegations of a failure to comply with the fair hearing obligation.

Ambit of the fair hearing obligation in this case

1. In *Winky Pop (No.2)*, I discussed at some length the principles of natural justice and the fair hearing obligation relevant to a panel hearing, and I adopt them as part of my reasoning in this case. All parties referenced relevant parts of this decision, and it is therefore unnecessary to restate the principles discussed in that decision, save to acknowledge the following:
 - the rules of natural justice applicable in a particular situation depend on the particular facts and circumstances, and on the statutory context in which the decision or recommendation is made. It is therefore difficult (and potentially dangerous) to generalise; and

- a single site-specific planning scheme amendment with an identifiable proponent may lead to a more adversarial process ‘inter partes’, and a more formal panel hearing, than a broad strategic policy-based amendment where there are a range of submitters across a range of topics and the panel hearing is more inquisitorial. Within the range (or ‘continuum’) of panel hearings, what is required of a panel to comply with the principles of natural justice may differ.
2. Having said this, [s 161\(1\)\(b\)](#) of the *Planning and Environment Act 1987* clearly requires the panel to comply with the rules of natural justice. But there are other relevant provisions. For example, [s 161\(1\)\(d\)](#) provides that the panel may inform itself as it sees fit, and without notice to a submitter. There was much debate upon whether [s 161\(1\)\(b\)](#) is subservient to [s 161\(1\)\(d\)](#) or vice versa. In my view, neither is necessarily subservient to the other. However all of the statutory provisions that establish the powers and obligations of a panel assist in informing how the rules of natural justice may be applied in a particular case. In *Winky Pop (No.2)*, in addition to the requirement to accord natural justice in [s 161\(1\)\(b\)](#), I identified provisions that a panel:
- must consider all submissions, not just those of parties attending the hearing ([s 24](#));
 - must consider late submissions referred to it (through a combination of [s 22\(2\)](#), [s 23\(1\)\(b\)](#) and [s 24](#));
 - may make any recommendations it thinks fit ([s 25\(2\)](#));
 - must conduct its hearings in public, subject to limited exceptions ([s 160\(1\)](#));
 - must act according to equity and good conscience, and without regard to technicalities or legal forms ([s 161\(1\)\(a\)](#));
 - is not required to conduct the hearing in a formal manner ([s 161\(1\)\(c\)](#));
 - is not bound by the rules or practices to evidence but may inform itself on any matter in any way it thinks fit, and without notice to any person who has made a submission ([s 161\(1\)\(d\)](#));
 - may regulate its own proceedings ([s 167](#));
 - may take into account any matter it thinks relevant in making its report and recommendations ([s 168](#)).
3. As I have said, the totality of these provisions helps inform the rules

- of natural justice that may apply in the context of a panel hearing.
4. The applicant argued that an intention to circumscribe the rules of natural justice cannot be assumed, nor generated from indirect references, uncertain inferences or equivocal considerations^[18]. In my view the provisions I have referred to above are neither indirect, uncertain or equivocal, but clear in their wording and intent. Whilst a panel is, importantly, bound by rules of natural justice because of the importance of the issues before it and the potential consequences of its recommendations for orderly planning in Victoria, it is given some latitude in how it filters and analyses the information laid before it, including the application of its own expertise. But it is not unfettered in that latitude, and must provide a fair hearing in the context of the particular planning scheme amendment before it.
 5. Amendment C93 is a broad strategic policy-based amendment where there are a range of submitters across a range of topics across the coastal regions of the Bass Coast Shire. Despite this, to the extent particular proposed structure plans affects the future planning and development opportunities and expectations of particular landowners, there were some elements of an adversarial process within the panel hearing. Amendment C93 was however, in my view, primarily inquisitorial. The purpose of the panel hearing was not to decide rights, but to allow for an expert panel to hear and consider submissions in order to make recommendations on planning policies and structure plans that would, in turn, guide the exercise of discretion in future decision making, including the timing of future rezoning. The purpose of the panel hearing was also to give submitters the opportunity to clarify, explain or support (with evidence) their prior written submissions in relation to the amendment.
 6. The applicant was aware there were other submitters opposing the inclusion of its land within the structure plan for Coronet Bay, and it had experienced planning counsel, solicitor, and expert witnesses (all of whom were familiar with the usual process of panel hearings) who were given a reasonable opportunity to present detailed material in support of the applicant's submission and to contradict the submissions of others. In a broader sense, the applicant was clearly given a reasonably opportunity to be heard in support of its submission.

7. The applicant referred me to *Norville Nominees Pty Ltd v Strathbogie Shire Council*[\[19\]](#), where the court, in reviewing a decision of this Tribunal, had observed:

[24] It is well accepted that an expert tribunal is intended to utilise its expertise in evaluating the evidence before it, but if it identifies a material consideration, not identified by the parties, but bearing on its probable decision, it must give the parties an opportunity to address the matter.

[25] In *Keller v Drainage Tribunal*, Murray J described the underlying expert role of a predecessor to the Tribunal as follows:

“It is well established that a tribunal, of which some or all of the members are experts in a particular field, may use its expertise in interpreting and weighing evidence and reaching conclusions on technical matters...”

[26] Thus when an expert tribunal does no more than utilise its general expertise, that will be in the contemplation of the parties. If, however, it goes beyond this and uses specialist knowledge of particular factors of relevance, these must be disclosed to the parties.

[27] Likewise the Tribunal is not entitled to make a finding of material fact, based on evidence collected by it on its own inquiry, not disclosed to the parties, and which none of the parties have had the opportunity of investigating, testing or answering.

1. Some care needs to be taken in extrapolating a decision relating to the obligations of this Tribunal in making a final decision on a specific development or planning proposal, and using it to consider the role of a panel in making recommendations on strategic policy direction to assist a decision by the planning authority and Minister under the statutory regime I have set out earlier. In panel hearings for a strategic policy-based amendment, there are also no clear ‘parties’ in the strict sense, nor are all submitters always collectively present before the panel. In the *East Melbourne* decision referred to earlier in these reasons, the Court of Appeal[\[20\]](#) had suggested restraint in impugning a decision where the subject matter of the decision involves an evaluation of complex evidence by an expert administrative agency, or a significant element of government policy, making it remote from the ordinary judicial experience. A panel

under the [Planning and Environment Act 1987](#) falls somewhat into that category, and cannot be equated with the role of a court or tribunal in assessing its obligation to accord natural justice.

2. In response to a similar argument in *Winky Pop (No2)*[\[21\]](#) to that put by the applicant in this case, I indicated:

[33] If the principle ... was applied strictly to a multi-submitter panel hearing considering a range of opinions relevant to a broad policy review affecting a broad area, it would make the whole panel system unworkable. The panel would have to know in advance all of the material that it intended to rely upon, and expressly put to each submitter all of the other submissions and other material, and recall all submitters if ‘new’ issues were raised by a later submitter. I do not think a panel is required to “spoon feed” all submitters in this way, particularly those represented by experienced advocates on behalf of applicants who have chosen not to attend the whole public hearing nor to review all available material. A panel in such circumstance simply needs to put in place reasonable processes on a case-by-case basis to try to ensure that all submitters get a fair go ...

1. I agree with the planning authority’s reference to cases that express a concern about the application of principles of natural justice leading to a situation where a specialist decision maker was precluded from making any expert conclusion unless it effectively showed a draft report and invited submissions on it. These cases suggest that “the application of notions of fairness in the present circumstances does not require such an extreme step”[\[22\]](#) .
2. [Section 161\(1\)\(d\)\(ii\)](#) of the present [Planning and Environment Act 1987](#), allowing a panel to inform itself “without notice to any person who has made a submission”, does appear to expressly fetter the way in which the principles of natural justice should be interpreted in panel proceedings.
3. Nonetheless, the fair hearing obligation requires that the panel do more than just listen benignly to the submissions put before it, and then apply its expertise only later when preparing its report. If there is a particularly novel or unusual specialist issue arising in the panel’s mind from a particular submission, that may be determinative to the panel’s reasoning or recommendation on that submission, and which the submitter could not reasonably expect to arise from the

normal interpretation and weighing of the material by the panel after the hearing, then the panel should make a reasonable attempt to investigate or test that issue with the submitter during the panel hearing. What is reasonable will depend on the particular issue in the context of the amendment and panel. This does not mean, though, that the panel needs to consider in advance all possible influences on its final report and recommendations on issues of strategic planning policy (or the future direction of that policy), and put all of these to a submitter. Nor does it mean that the panel is under any obligation to direct a submitter's attention to omissions in its case or to warn a submitter that some of its submissions or evidence may not be accepted[23].

4. I will turn now to look at whether there has been a failure to comply in the six factual instances raised by the applicant in its Statement of Claim on natural justice grounds.

Rezoning request

1. In dealing with the applicant's land, the panel found that "there has to date been no request for rezoning of the land"[24], with commentary that suggested uncertainty and concern over the likely form of future development of the land and the possibility of a 'standard' residential development.
2. The applicant contends that the panel denied it a reasonable opportunity to be heard on this issue and breached the hearing rule of natural justice[25]. In essence, the applicant argues that, had it been given an opportunity to be heard, it would have submitted that it had made a request for rezoning, the request had been refused by Council until after Amendment C93, and that any concerns over future development would be addressed and could be regulated within a future rezoning process.
3. The applicant concedes that the planning authority had submitted orally and in writing to the panel that a rezoning request *had* been made to it by the applicant[26]. As counsel for the Minister and Panel points out, there is no evidence that the applicant was unaware of this, or took issue with it.
4. The respondents contended that the panel's reference to "no rezoning request" was technically correct, in that the applicant's 'request' had been rejected and the fee refunded, and the planning authority had

not pursued any formal request to the Minister to authorise a rezoning amendment. That may be so, and the panel's wording is perhaps imprecise. If the alternative interpretation is taken, the panel has, at worst, made a factual error. It is not indicative of the absence of a fair hearing.

5. When the panel's "no rezoning request" finding is looked at in the context of the immediately surrounding commentary in the panel report and the material before the panel, I agree with counsel for the Minister and Panel that the panel's concern was not about the lack of a rezoning request *per se*, but about uncertainty over future development or lot supply in excess of anticipated demand, and uncertainty over the lack of formal status that could be accorded to the applicant's draft concept plan for its land at that point in time.
6. In this context, the applicant had itself indicated to the panel that it was content to await the panel's consideration of the Council's structure plan in order that the correct strategic planning parameters were established for consideration of its proposal^[27]. The applicant was therefore aware that its proposal for the future development of its land was not in a detailed or finalised form (nor could be at that stage), and that it thus bore some responsibility for satisfying the panel of its strategic merit and/or how any potential planning impediments might be managed. In responding to this, the applicant provided the panel with its draft concept plan, and called expert evidence from an experienced town planner (Mr McGurn), and expert economic evidence (from Mr Henshall).
7. In these circumstances, the applicant has clearly been given a reasonable opportunity to be heard. Moreover, it has not been denied a fair hearing in the opportunity provided to it to detail its likely development aspirations for its land.
8. If the panel has misdirected itself on whether there had been a rezoning request, or misdirected itself on the 'uncertainty' factor in assessing the likely future development of the land (and I make no finding on these matters), these are not matters indicative of the absence of a fair hearing, and are not (for reasons set out earlier in this decision) reviewable by me.

Victorian Coastal Strategy

1. The panel found that “in terms of the Victorian Coastal Strategy, the preferred direction for new development is inland rather than on the coast”, and “in principle, the proposed extension to the south [i.e. the applicant’s land] is inconsistent with this strategy”[\[28\]](#).
2. The applicant had initially contended that the panel had not raised with it at the hearing whether the *Victorian Coastal Strategy* could or should be interpreted in this way, and had thus failed to accord it a fair hearing on this issue. The applicant did not pursue this claim before me. The applicant was well aware that the proper application of the *Victorian Coastal Strategy* was a significant matter before the panel, and it had an opportunity to make submissions and call evidence on its applicability and relevance to the applicant’s proposals for its land. Given there is no natural justice or procedural fairness issue now arising from the way in which the panel addressed the *Victorian Coastal Strategy*, there is no relevant matter for me to now determine under this ground.
3. The applicant instead argued that the panel’s finding on the interpretation of the *Victorian Coastal Strategy* was not legally correct or open to it and, in making this finding, the panel took into account an irrelevant consideration – namely, the views (arguably incorrect in law) in the Coronet Bay Residents and Ratepayers submission[\[29\]](#). For the reasons set out earlier, if the panel misdirected itself on these matters (and I make no finding in this regard), these are not matters indicative of a procedural defect or the absence of a fair hearing for the purposes of [s 39](#) of the [Planning and Environment Act 1987](#), and are not reviewable by me.

‘Special Circumstances’

1. The panel found that “special circumstances would need to apply to any substantial extension of Coronet Bay”[\[30\]](#).
2. The applicant contends that no party made a submission indicating ‘special circumstances’ needed to be demonstrated, nor did the panel at any stage state that the applicant needed to demonstrate this. The applicant thus contends that the panel denied it a reasonable opportunity to be heard on this issue and breached the hearing rule of natural justice[\[31\]](#). In essence, the applicant argues that the panel

devised and applied a test that was not itself disclosed and tested before relevant submitters at the panel hearing. The panel did not apply a similar ‘special circumstances’ test (at least not using this terminology) to other coastal townships or structure plans under consideration in Amendment C93.

3. Despite the initial attractiveness of this argument, when considered at a simplistic level, I do not believe the applicant has made out a good case.
4. In context, the term ‘special circumstances’, where used by the panel in relation to Coronet Bay, appears to be no more than a short-form and convenient descriptor to cover other well-established policy considerations that were known (or ought to be known) to the applicant and other submitters. Indeed, this is evident from the three parts of the panel report where the term ‘special circumstances’ is used. The first reference is as follows:

Coastal planning strategies

There is a concern that the proposed north and south boundary extensions are adjacent to the coast rather than inland, and may therefore be inconsistent with the *Victorian Coastal Strategy*. Furthermore, the extent of all the proposed new areas represents about a 250 per cent increase in the area of the settlement. This does not appear to be consistent with Coronet Bay’s designation in the Coastal Strategy and the MSS as a settlement with ‘low spatial growth capacity’. This is especially so when about one third of the existing settlement remains undeveloped, and ‘infill development’ is listed as a priority for ‘low spatial growth capacity’ settlements.

In the Panel’s view, ‘special circumstances’ would need to apply to any substantial extension of Coronet Bay, including evidence of very significant new demand combined with very low environmental impacts. Each of the proposed extension areas needs to be evaluated in this context. The cumulative impact of the three extension areas also need to be considered[\[32\]](#).

...

After discussing these issues over 4 pages, the panel continues:

On all the above grounds, the Panel considers that in principle, the extension of Coronet Bay south of Cutty Sark Road is inconsistent with the principles of the SPPF and the *Victorian Coastal Strategy* 2008.

In considering whether ‘special circumstances’ should apply to the possible development of a sporting village, the Panel considers that due the uncertainty concerning the final form and viability of the proposal, the uncertainty of demand for this type of development, and the potential impact on significant viewsheds, a case has not been made to support the application of ‘special circumstances’ at this stage[\[33\]](#).

...

The panel then concludes:

Conclusions

In Coronet Bay, the Structure Plan proposes to include three substantial new areas totalling over 200 ha in the settlement boundary. This would increase the footprint of the settlement by about 200 per cent. This does not appear to be consistent with its definition in both the MSS and the *Victorian Coastal Strategy* as a settlement with ‘low spatial growth capacity’. Furthermore, evidence of demand for this scale of development in Coronet Bay, even over the long term, appears to be speculative. Nevertheless, there is capacity and demand for some growth in the settlement, and the most appropriate location for future growth is the key issue.

The Panel has assessed the two of the proposed extension areas north and south of the existing settlement and adjacent to the coast as inconsistent with the principles of the SPPF and *Victorian Coastal Strategy*. In relation to the land to the south, the proponents for the sporting village have not made a persuasive case that would lead the Panel to apply ‘special circumstances’ to the land[\[34\]](#).

1. The policy issues arising from the State Planning Framework, the Council’s Municipal Strategic Statement (MSS), and the *Victorian*

Coastal Strategy, are also dealt with by the panel elsewhere in its report, as are issues of demand and environmental considerations. There are no ‘unknown’ matters evident from this material that indicate the panel had introduced or applied a test other than the proper consideration and balancing of these relevant policy considerations. Given the designation of Coronet Bay as having ‘low spatial growth capacity’, it is not surprising that the panel would need a justification for expansion, and to ultimately consider the most appropriate location for growth as being the key issue. The applicant was aware of these matters, including ‘competing’ proposals for growth to the north and east, and had dealt with many of the same policy considerations in its expert evidence and submissions.

2. It follows that the applicant was given a reasonable opportunity to be heard on these matters, and has not been denied a fair hearing in the opportunity to provide material on relevant policy considerations that may support its submission.
3. As indicated, in context, I agree with counsel for the Minister and Panel that the term ‘special circumstances’ is simply a convenient descriptive term used by the panel to refer to relevant policy considerations that may justify a change to the status quo to support an extension of the town boundary and future rezoning. The fact that the term ‘special circumstances’ may not be used for other coastal settlements elsewhere in the report is perhaps unfortunate, but also perhaps unsurprising given a report written by three experts with different backgrounds and styles. A panel report (particularly a report written by non-lawyers) should not be construed minutely with an eye keenly attuned to the perception of error^[35].
4. The applicant also argued that the panel’s finding on ‘special circumstances’ was not legally correct or open to it and/or manifestly unreasonable. For the reasons set out earlier, if the panel misdirected itself on this matter (and I make no finding in this regard), this is not reviewable by me.

Development Contributions

1. The panel found that “The question of the nature and extent of developer contributions for this land is a matter for negotiation with the Council. The panel suggests the repair and reopening of the boat

ramp to the public should be part of this negotiation.”[\[36\]](#)

2. The applicant contends that there is no power to impose such development contributions, that the repair of the boat ramp is dependent on other approvals, and that no party made a submission on a Development Contributions Plan nor did the panel raise this with the parties. The applicant thus contends that the panel denied it a reasonable opportunity to be heard on this issue and breached the hearing rule of natural justice[\[37\]](#).
3. I agree with the planning authority and Minister that this ground stems from a fundamental misconception. The applicant’s statement of claim and submissions to the Tribunal refers to ‘*development contributions*’. This is a term having a particular connotation under [Part 3B](#) of the [Planning and Environment Act 1987](#), where there are limitations on the extent of works, services and facilities for which a contribution can be levied as a broader development or community infrastructure levy under the Act. The panel report however refers to ‘*developer contributions*’, which can take many forms and can include a variety of monetary or non-monetary contributions by developers that have a more direct nexus to their development –e.g. the provision of necessary works and services and infrastructure within and adjacent to the development. There was no Development Contributions Plan under discussion at the panel for the applicant’s land, nor did the panel make any finding in relation to development contributions.
4. The applicant’s assertion that there is no power to impose such development contributions is therefore also misconceived. The panel’s comments clearly raise the issue of developer contributions being negotiated with the Council.
5. In a panel hearing considering an amendment about the future development potential of land, an applicant/submitter would be aware (or would reasonably be expected to be aware) that developer contributions to works, services or infrastructure may be considered. Here, the applicant was aware. Its material to the panel discusses infrastructure provision and, as the panel report records, its counsel had argued that proposed contributions to upgrade the existing recreation reserve would not be viable without the development of its southern land.
6. In the circumstances, the applicant has clearly had a reasonable

opportunity to be heard, and has not been denied a fair hearing on this issue.

7. The applicant also argued that the panel's finding on 'development contributions' was not legally correct or open to it and/or manifestly unreasonable. It would seem that this ground is equally misconceived. However, for the reasons set out earlier, if the panel misdirected itself on this matter, this is not reviewable by me.

Visitation rates

1. In relation to the evidence given on economic issues by Mr Henshall, the panel stated that it "finds it difficult to accept the estimates for potential visitation levels and associated expenditure"[\[38\]](#).
2. The applicant contends that no party made a submission that the figures relied upon by Mr Henshall were difficult to accept, nor did the panel raise this with the parties. The applicant thus contends that the panel denied it a reasonable opportunity to be heard on this issue and breached the hearing rule of natural justice[\[39\]](#).
3. In order to consider if the panel finding evidences a denial of natural justice, it should be considered in context. What the panel said was: Mr John Henshall gave evidence of the community benefits of the potential sporting village development. These included 'sense of community', better facilities for existing residents, affordable coastal housing, attracting investment, and contribution to tourism, local business viability and local employment. However, the Panel notes that the estimates for tourism, visitation levels and visitor support for local business viability all rely on figures derived from on Phillip Island Tourist Region data. In the Panel's view, Coronet Bay, even with the sporting village, could not achieve the range, depth or reputation of Phillip Island visitor attractions and its supporting commercial, retail and hospitality services, which include one of the most visited tourist sites in Australia. For these reasons, the Panel finds it difficult to accept the estimates for potential visitation levels and associated expenditure.

It was also unclear what market the sporting village would be aiming to attract. There have been various suggestions made for the 'star' rating of the motel and the price/quality of housing, but it is clear that these are yet to be determined. There was also no evidence to support the suggestion that the development would attract a higher proportion of permanent

residents than the Shire average[\[40\]](#).

1. Just because Mr Henshall's evidence was not contested by other submitters does not mean that the panel was bound to accept it. The panel is an expert body well able to assess the expert 'opinion' evidence before it and form a view on its probative weight, and whether it is sufficient to satisfy it of a particular proposition or not. The panel is not obliged to warn the applicant or witness that its expert evidence may not be accepted. I agree with the respondents that this is a risk inherent in proceedings of this nature. As was stated in *Re Minister for Immigration and Multicultural Affairs; ex parte Miah*[\[41\]](#), albeit in a slightly different context, procedural fairness does not require a judicial officer to make a running commentary upon an applicant's prospects of success, so that there is a forewarning of all possible reasons for failure.
2. In the circumstances, the applicant has clearly had a reasonable opportunity to be heard on the economic rationale for its development proposal. It called expert evidence on this issue – indeed two economists, Mr McNeill and Mr Henshall, were called by the applicant – and Mr Henshall's evidence covered likely visitation rates to Coronet Bay. The panel did not fully accept this evidence, but it did not deny an adequate opportunity for the evidence to be led and examined, nor did it fail to consider it.
3. In addition, the applicant contends that the treatment of Mr Henshall's evidence reveals that the panel misunderstood the case the applicant was seeking to put, and thus failed to consider the applicant's case in a fair way, and thus breached the hearing rule of natural justice[\[42\]](#).
4. If indeed the panel misunderstood the applicant's case, that does not of itself demonstrate that the panel did not act fairly. As I have indicated, the applicant was given a reasonable opportunity to be heard on the economic rationale for its development proposal. The panel did not accept Mr Henshall's evidence on likely visitation rates, and gave broad-form reasons for this – essentially, it did not believe visitation rates for Phillip Island could be used to project visitation rates for Coronet Bay or the applicant's "Sporting Village" development. If the panel was wrong in this finding, or misdirected itself on the relevance of Mr Henshall's evidence to the particular

case the applicant was seeking to put (and I make no findings in this regard), these are not procedural defects reviewable by me under [s 39](#) of the [Planning and Environment Act 1987](#). If the panel simply ‘misunderstood’ the applicant’s case (and I also make no finding in this regard), then the responsibility for this lies, at least in part, with the applicant for not having more clearly articulated its case to the panel. Either way, there has, in my view, been no denial of natural justice. The applicant’s ‘real’ complaint seems to me to be that the panel did not accept its argument, not that it was treated unfairly.

Views from Agar Road

1. The panel found that the applicant’s draft concept plan for its land and proposed site layout did not take into account views from Agar Road across the land towards the coast, which the structure plan identified as significant[\[43\]](#).
2. The applicant contends that no party made a submission that the draft concept plan had any status or that it did not take into account views from Agar Road. The applicant argues that the panel’s position in relation to the draft concept plan could not have been reasonably anticipated, and thus contends that the panel denied it a reasonable opportunity to be heard on this issue and breached the hearing rule of natural justice[\[44\]](#).

3. It is useful to again look at the panel’s comments in full:
The Panel also notes that the views from Agar Road across the land towards the coast are identified in the Structure Plan as significant. The ‘draft concept plan’ for the sporting village does not take this into account in the proposed layout of the site, nor was this issue addressed in the submissions or evidence given on behalf of Coastal Estates. Mr McGurn’s evidence commented that Amendment C98 (addressing significant landscapes) includes a statement in Clause 21.05 (Implementation) that *‘south of Coronet Bay, all development along the coastal strip should be avoided to retain the natural landscape character viewed from Agar Road, Soldiers Road, Phillip Island and San Remo’*

1. I must admit to some confusion, when reading the panel report and surrounding material, on the intended status of the draft concept plan. The applicant seems to rely on it to support its economic evidence (i.e. to base demand projections on its lot yield and the facilities it

will provide), yet downplay its status in not providing a detailed layout that reflects all of the requirements of the proposed structure plan. Equally, the panel seems to downplay the status of the draft concept plan, in commenting on the uncertainty of development or its final form, yet see some reason to note the lack of detail in the draft concept plan on a significant structure plan issue –i.e. the treatment of view lines.

2. These potential ambiguities (on the part of both the applicant and panel) are not however indicative of the absence of a fair hearing. What was clearly before the panel was the draft structure plan for Coronet Bay. The applicant was seeking to be included in the structure plan's proposed township boundary, indeed in the short term, and it was therefore aware (or ought reasonably be aware) that the panel would consider relevant elements of the structure plan in relation to its land. It had the opportunity to present evidence on this issue, not necessarily by detailed plans but at least by indicating how various structure plan issues could be resolved in fine tuning any development proposal at the time of rezoning. It was not necessary for the panel, in my view, to 'spoon feed' the applicant by drawing out submissions or evidence on each of these structure plan elements. The applicant was represented by an experienced team and ought reasonably to have dealt with this.
3. In context, the panel's comments on this matter are an observation that the applicant did not deal sufficiently with this issue. Indeed, the panel observes that the applicant's expert planning witness (Mr McGurn) was aware of the 'Agar Road views' issue from his comments on Amendment C98 (within the same combined panel hearing) and the policy in Clause 21.05, but had not addressed the issue in the specific context of the proposed Coronet Bay structure plan in Amendment C93.
4. In the circumstances, the applicant has clearly had a reasonable opportunity to be heard on relevant elements of the structure plan, and ought to have reasonably anticipated the need to address this issue.
5. In addition, the applicant contends that the treatment of the 'Agar Road views' issue by the panel involves a misunderstanding of the case the applicant was seeking to put, and thus failed to consider the applicant's case in a fair way, and thus breached the hearing rule of

natural justice[45].

6. For similar reasons to those discussed under the previous ground, a misunderstanding (if there be one) does not of itself demonstrate that the panel did not act fairly. I do not consider, on the material provided, that the panel acted unfairly or denied natural justice to the applicant in the way it considered the structure plan issues, including the potential impact on significant viewsheds from Agar Road.
7. The applicant also argued that the panel's finding on 'Agar Road views' was not open to it and/or manifestly unreasonable. For the reasons set out earlier, if the panel misdirected itself on this matter, this is not reviewable by me.

CONCLUSIONS

1. It follows that the applicant has not made out any of its ground upon which it seeks relief under [s 39](#) of the *Planning and Environment Act 1987*, and its application is therefore dismissed.

POSTSCRIPT: THE ROLE OF THE PANEL IN PROCEEDINGS BEFORE THE TRIBUNAL UNDER [S 39](#)

1. Although only touched upon briefly at the hearing before me, I consider it appropriate to comment on the role of the panel in proceedings before the Tribunal under [s 39](#) of the *Planning and Environment Act 1987*.
2. In the case before me, the panel was represented by counsel (albeit in conjunction with the Minister) and thus participated in arguments and submissions on its behalf. Some of these arguments were strongly put, and in an adversarial manner. Moreover, on its behalf, its instructing solicitors had prepared and filed an affidavit by the panel chair. Objection was taken to some arguably opinion evidence in that affidavit and, as a result, an amended affidavit was filed deposing only to material background facts. The panel chair was nonetheless exposed to the potential to be called and cross-examined although, ultimately and by agreement of the parties, this did not eventuate.
3. This is not an approach I would seek to encourage. I am reminded of the oft-quoted dicta in *R v Australian Broadcasting Tribunal; ex parte Hardiman*[46] to this effect. Ordinarily, a body required to accord natural justice, whose decision (or recommendation) is

subject to challenge, should abide the decision of the reviewing court or tribunal. This is certainly the case where there are others able to act as contradictors – here the Minister and planning authority. If the panel becomes a protagonist in its own cause, it endangers its impartiality, particularly in subsequent proceedings if the complaint against it is upheld, but perhaps also in future panel hearings involving the same parties.

4. Here, had I found any of the applicant's grounds made out, the partisan stance taken by the panel in the Tribunal proceeding would have prevented the matter being remitted to the same panel. Given the interplay of the matters in Amendments C93 and C98 and the various 'competing' development proposals for Coronet Bay, the whole panel process would need to have recommenced on these issues before a freshly constituted panel.
5. [Section 39\(4\)](#) entitles the panel (or sometimes the Chief Panel Member on its behalf) to make a submission to the Tribunal. That will often be appropriate where there is no recording or transcript of the panel hearing, or where it is necessary to place appropriate background facts before the Tribunal that may not otherwise have been apparent, or material that may not have been available from the other parties. In my view, it is not an invitation to the panel to 'defend' its position, particularly where other contradictors exist to test or oppose the applicant's case. I agree with the sentiments in *Hardiman* that the presentation of a case by the panel before the Tribunal should be exceptional and, where it occurs, should ordinarily be limited to submissions going to the powers and procedures of the panel.

Mark Dwyer

Deputy President

[\[1\]](#) Amendments C53 & C98. These related respectively to a site-specific development at Cape Paterson, and coastal landscape policy and controls, and are not directly relevant in this proceeding save to the extent Amendment C98 is referred to under the ground relating to 'Agar Road views'. [\[2\]](#) For the record I note that, in the absence of transcript from the panel hearing, each party produced and relied upon affidavit evidence. The applicant relied upon affidavit evidence from Tamara Brezzi, a solicitor

with Norton Rose. Ms Brezzi was called to adopt her affidavit, but not cross-examined. The planning authority relied upon affidavit evidence from Martin Gill, the Council's development services manager. The Minister and panel relied upon affidavit evidence from Jennifer Moles, the chair of the Amendment C93 panel. By agreement between the parties, neither Mr Gill or Ms Moles were called to give oral evidence. The background facts were not materially in issue before me.^[3] The panel report is Exhibit TNB-12 to the Affidavit of Tamara Brezzi.^[4] Panel Report, page 11^[5] Exhibit JAM-13 and paragraph 22 of Affidavit of Jennifer Moles.^[6] Panel Report, page 135^[7] Panel Report, pages 133-4.^[8] As set out in the applicant's Amended Statement of Claim, as amended (with leave) and filed on 30 August 2010.^[9] By 'manifestly unreasonable', I refer to unreasonableness in the *Wednesbury* sense – i.e. a finding or recommendation that no panel, acting reasonably, could have made. ^[10] See, for example, *Australian Conservation Foundation v Latrobe CC* ^{[2004] VCAT 2029} at ^[22] per Morris J. ^[11] ^{[2008] VSCA 217} at ^[370] per Ashley and Redlich JJA^[12] ^{[2005] VSC 242} at ^[101] per Morris J^[13] ^{[2001] VCAT 2402}, particularly at [49]-[57] per Horsfall DP & Rickards M^[14] *East Melbourne Group Inc v Minister for Planning* ^{[2005] VSC 242} at ^[88]- ^[101] per Morris J; see also *First Jodrian Pty Ltd v Bayside CC* ^{[2001] VCAT 2402} at ^[49]- ^[57] ^[15] *Planning and Environment (Amendment) Bill (No. 86/1989)*^[16] Second Reading Speech, 12 October 1989 – Hansard Legislative Assembly, Vol 396 at p 1514-5^[17] ^{[2008] VCAT 206}. The 'No.2' does not appear in the official citation, but it is sometimes referred to in this way so as not to confuse it with a similarly named court decision, reported at ^{[2007] VSC 468} and sometimes referred to as *Winky Pop (No.1)*, which dealt with a different matter arising between those parties. I mention this because *Winky Pop (No.1)* was also referred to me in this proceeding.^[18] following *Commissioner of Police v Tanos* ^{[1958] HCA 6}; ^{(1958) 98 CLR 383}, 395-6 per Dixon CJ & Webb J.^[19] ^{[2008] VSC 339} at ^[24] – [39] per Osborn J.^[20] at [175]-[178], following *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002* ^{[2003] HCA 30} at ^[149] per Kirby J^[21] at [31]-[33]^[22] following *Minister for Health v Thomson* ^{[1985] FCA 208}, in turn relying upon *National Companies and Securities Commission v News Corporation* [1984] HCA 29.^[23] on this latter point, broadly adopting principles in cases provided by the respondents, including *Broussard v Minister for Immigration and Ethnic*

Affairs (1989) 21 FCR 472 at 481, *Horvath v Minister for Immigration and Ethnic Affairs* [1994] FCA 495, and *Ching Leone Lim v Minister for Immigration and Ethnic Affairs* [1995] FCA 1437 at [44]. [24] Panel Report, page 132 [25] Amended Statement of Claim at [13]-[17] [26] Applicant's written submission to Tribunal at [39] relying on affidavits of Martin Gill and Tamara Brezzi. [27] Applicant's written submission to panel, quoted in Panel Report, at page 131 [28] Panel Report, at page 130 [29] Amended Statement of Claim at [20]-[24] [30] Panel Report, at page 128 [31] Amended Statement of Claim at [25]-[28] [32] Panel Report, at page 128. [33] Panel Report, at page 133 [34] Panel Report, at page 134 [35] *Winky Pop (No2)* at [49], adopting the sentiments expressed in *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* [1996] HCA 6; (1996) 136 ALR 481, 490. See also a similar sentiment in the *East Melbourne* decision [2008] VSCA 217 at [229] per Ashley and Redlich JJA – the review court should “not be concerned with looseness in the language nor with unhappy phrasing”. [36] Panel Report, page 133 [37] Amended Statement of Claim at [30]-[35] [38] Panel Report, page 132 [39] Amended Statement of Claim at [37]-[40] [40] Panel Report, at page 132 [41] [2001] HCA 22 at [31] per Gleeson CJ and Hayne J [42] Amended Statement of Claim at [41] [43] Panel Report, at page 133 [44] Amended Statement of Claim at [44]-[47] [45] Amended Statement of Claim at [48]-[49] [46] (1980) 144 CLR 13, 35-6 per Gibbs, Stephen, Mason, Aickin & Wilson JJ

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