STONNINGTON CITY COUNCIL v LEND LEASE APARTMENTS (ARMADALE) PTY LTD BC201312937

Unreported Judgments Vic · 97 Paragraphs

Supreme Court of Victoria — Common Law Division

Emerton J

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Stonnington City Council v Lend Lease Apartments (Armadale) Pty Ltd [2013] VSC 505

Headnotes

PLANNING AND ENVIRONMENT — Appeal from an order of VCAT setting aside the decision of the responsible authority to refuse a planning permit and ordering that a planning permit issue — Whether VCAT erred in failing to have regard to all the statements of grounds filed by the parties — Whether the extent of resident opposition to the proposal as evidenced by the number of objections received was an irrelevant consideration — Whether VCAT erred in misconstruing policies in the Stonnington Planning Scheme — Macedon Ranges Shire Council v Romsey Hotel Pty Ltd (2008) 19 VR 422 — Minawood Pty Ltd v Bayside City Council [2009] VCAT 440 — Planning and Environment Act 1987 (Vic) ss 52, 57, 60, 84B — Appeal dismissed.

Emerton J.

Introduction

[1] The Stonnington City Council appeals against the order of the Victorian Civil and Administrative Tribunal made on 10 July 2012, by which the Tribunal set aside the Council's decision to refuse a permit to undertake a significant residential development on a large site on Orrong Rd, Armadale, and ordered that a permit issue.

[2] The proposed development is on a large site abutting the railway line with frontage to Orrong Rd to the west and parkland to the south. The surrounding area is predominantly residential, comprising mainly one and two storey attached and detached Victorian and Edwardian era houses. The neighbourhood is generally leafy and pleasant, although the site itself is currently occupied by a large office building, constructed in 1959, which is about 160 metres long and five storeys high in most places. It has surface car parking for about 300 cars.

[3] The proposal is for a total of 19 buildings, ranging between two and 12 storeys and containing 448 apartments and 18 townhouses. It also includes a convenience shop, café and maternal health centre and ancillary facilities for residents, such as a pool, gym and multi-purpose rooms.

[4] The proposal attracted more than 600 objections. The Council refused a permit for the development on a range of grounds, including its scale and design.

[5] The Tribunal carried out a thorough and conventional merits review having regard to such matters as design response, amenity impacts, traffic and parking. It concluded that the design response was an acceptable planning outcome, subject to appropriate changes and conditions.[1]

[6] In its Reasons, the Tribunal identified a tension between two policy themes: the first supporting high density

residential development on a large site in the inner suburbs on a main road and well served by public transport; the second, embodied in policies moderating development outcomes by seeking designs reflecting and complementing built form character in the broader surrounding area. It said:

> We resolve that tension in this proceeding by giving more weight to the first policy theme for two main reasons. First, the land has a unique, almost island-like, location given the dominance of its main road, path, park and railway abuttals. Second, there are very few identified large sites for higher density residential development in Stonnington and the opportunity should not be dissipated. A positive response on this land will help ensure implementation of the broad local policy to insulate most established neighbourhoods from significant change.[2]

[7] The Tribunal therefore ordered that a permit issue.[3]

Grounds of Appeal

[8] The proposed grounds of appeal give rise to three issues:

(a) whether the Tribunal failed to have regard to all of the statements of grounds filed by the parties to the Tribunal proceeding;

(b) whether the extent of resident opposition to the proposal (as evidenced by the number of objections received) was an irrelevant consideration; and

(c) whether the Tribunal erred in its interpretation of the "large sites policy" in cl 22.02–3 of the Stonnington Planning Scheme.

[9] I deal with each question in turn.

Failure to consider statements of grounds

[10] The Council submits that the Tribunal erred in law in failing to have regard to all of the statements of grounds filed in the Tribunal. According to the Council, the Reasons reveal the Tribunal to have ignored over 200 statements of grounds filed in the proceeding.

[11] There were more than 600 objectors to the proposal. This required some management by the Tribunal. On 3 April 2012, Deputy President Gibson made interlocutory orders for the management of a number of objectors who, despite having lodged statements of grounds in the proceeding, indicated that they were unable to attend the hearing but wished their statement of grounds to be considered (the "3 April Order"). The Tribunal listed all of the objectors who fell into this category in an appendix to the 3 April Order and ordered that they be advised that "[t]heir statement of grounds [would] be considered when the Tribunal comes to make a decision". The appendix to the 3 April Order contains the names and addresses of some 376 people.[4]

[12] When the Tribunal's decision was handed down, the cover page of the Reasons listed the respondents to the application for review as "[t]he persons listed in Appendix A". Appendix A listed the names of only 94 people, 65 of whom were represented or appeared in person at the Tribunal hearing and 29 of whom did not appear.

[13] The Tribunal was aware that a number of people lodged statements of grounds in the proceeding but did not appear at the hearing. Footnote 1 in the Reasons states:

> We have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and **all the statements of grounds filed by parties that did not appear**. We do not recite or refer to all of the contents of those documents in these reasons.[5]

[14] Then, in para 37 of its Reasons, the Tribunal said:

> The Council and many residents submitted the proposal failed to respond to neighbourhood character policy. They argued it did not "reinforce special characteristics of [the] local environment and place" because it did not "[emphasise] … the built form that reflect[s] community identity [and] the values, needs and aspirations of the community". They relied on the broad resident opposition to the proposal (about 600 objections to the Council and **about 100 statements of grounds in this**

proceeding) and the Council's unanimous refusal.[6]

[15] The Council points out that there is a discrepancy between the number of statements of grounds referred to in para 37 of the Reasons (approximately 100) and the 376 persons who, according to the 3 April Order, lodged statements of grounds in the proceeding. According to the Council, the Reasons reveal that the Tribunal failed to consider the statements of grounds lodged by the individuals who were listed in the 3 April Order, contrary to the terms of that Order.

[16] For its part, Lend Lease points to footnote 1, in which the Tribunal expressly stated that it had considered all the statements of grounds filed by parties who did not appear. Lend Lease submits that the Tribunal's reference to "about 100 statements of grounds" in para 37 is nothing more than loose language and does not reveal any error in the Tribunal's reasoning, particularly when viewed in the context of the whole proceeding. Accordingly, Lend Lease submits that the Tribunal was aware of, and took into account, all of the statements of grounds that were filed, including those referred to in the 3 April Order.

[17] I am not persuaded that the Tribunal did not consider all of the statements of grounds filed by the objecting parties or that any failure to do so would have constituted a vitiating error. No objector has appealed the Tribunal's decision on the grounds that his or her objection was not taken into account, having regard to the Tribunal's Reasons. Nor has the Council identified any ground that ought to have been but was not considered by the Tribunal. The Reasons show the Tribunal to have comprehensively considered the merits of the proposal based on proper planning considerations.

[18] In these circumstances, I must accept the submission that the Tribunal's reference to "about 100 statements of grounds" is loose language.

[19] Furthermore, even if the Tribunal failed to consider all of the statements of grounds filed in the Tribunal, this would not be a vitiating error in circumstances where no complaint was made that any particular ground had not been considered, the Tribunal took into account the 600 objections made to the Council and, in its own words, all submissions and statements of grounds filed by parties that did not appear, and then carried out a comprehensive review of the proposal on its merits.

[20] In *Australian Broadcasting Tribunal v Bond*,[7] Mason CJ held that a decision does not "involve" an error of law unless "the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different".[8] Toohey and Gaudron JJ also held that the error must have contributed to the decision in some way or, at the very least, it must be impossible to say that it did not so contribute. According to their Honours, it is necessary, at the very least, to show that the decision may have been different if the error had not occurred.[9]

[21] Assuming for the sake of argument that there was an error of the kind alleged, it seems likely that, given the large number of statements of grounds considered by the Tribunal along with the 600 objections made to the Council, the Tribunal was exposed to every possible argument that could possibly be made as to why a permit should not issue for the development. As discussed, no particular ground has been identified as not having been dealt with by the Tribunal and it has not been seriously suggested that the Tribunal's decision might have been different had the error not been made. In these circumstances, any error made by the Tribunal was not a vitiating error.

[22] This ground (ground 2A) is not made out.

Extent of resident opposition

[23] There was evidence before the Tribunal of broad opposition to the proposal in the form of about 600 objections to the Council and what the Tribunal (mistakenly) identified as about 100 statements of grounds in the Tribunal proceeding.

[24] The Council submits that the Tribunal erred in holding that the extent of resident opposition to the proposed development was an irrelevant consideration and by failing to have regard to the extent of resident opposition as a relevant consideration. These grounds are based on the following passage in para 38 of the Reasons:

> We are exercising an administrative review power. It must be exercised in accordance with law. We must not have regard

> to irrelevant considerations. The extent of resident opposition per se is one of these.[10]

[25] The Council contends that the Tribunal was required to take account of all objections to the grant of the permit (based on ss 60(1)(c) and 84B(1) of the Planning and Environment Act 1987 (Vic) (the "Planning Act")) and was required to take account of the extent to which any person residing or owning land in the vicinity of the subject land was able to "and in fact did" participate in the objection process (based on s 84B(2)(f)). This required consideration not only of the substance of the objections, but the number of objections. Further, the Council submits that in considering any significant social and economic effects of the proposal pursuant to s 60(1A)(a) of the Planning Act, the Tribunal could properly have taken into consideration the level of opposition to the proposal (as evidenced by the number of objections) and that it erred in treating this as an irrelevant consideration. In this respect, the Council described the decision of the Court of Appeal in *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd*[11] as "decisive". In *Romsey*, the extent of community opposition to the installation of gaming machines at the local hotel was held to be a relevant consideration that the decision-maker[12] was bound to consider under s 3.3.5 of the Gambling Regulation Act 2003 (Vic) (the "Gambling Act").

[26] The Tribunal took into account the substance of the objections received, but it declined to take into account — as a discrete consideration — their raw number. It supported this refusal by reference to the Tribunal's decision in *Minawood Pty Ltd v Bayside City Council*,[13] in which the Tribunal held that the principles in *Romsey* concerning the consideration of social impacts were inapplicable to the consideration of social effects under the Planning Act.

[27] Paragraph 38 of the Reasons forms part of the Tribunal's consideration of the neighbourhood character policy in the Stonnington Planning Scheme (cls 15 and 15.01–5) and the Council's (and objectors') submission that the proposal failed to respond to neighbourhood character policy because, among other reasons, it did not "[emphasise] … built form that reflect[s] community identity [and] the values, needs and aspirations of the community". The Tribunal, having stated that the extent of opposition per se was irrelevant, then went on to consider how to assess the "values, needs and aspirations" of the community, concluding that the Council was best placed to express these matters on behalf of the community.[14] It further observed that the "values, needs and aspirations" provision was an implementation strategy and not the policy itself and said:

> community aspirations cannot be established by objections per se, even if there are many of them. Rather, if an objector wishes to establish how a particular design fails to reflect community aspirations, he or she must identify a particular community aspiration and explain how the design fails to reflect it.[15]

[28] The Tribunal's statements about the irrelevance of the number of objections per se (or the extent of resident opposition per se) were therefore made in the course of the Tribunal's consideration of State policy relating to neighbourhood character.[16] The Tribunal did not state that the number of objections (or the extent of community opposition) would be irrelevant for all purposes, for example, to its consideration of significant social effects under s 60(1A)(a) of the Planning Act. Nonetheless, the Tribunal's reliance on *Minawood* suggests that the Tribunal also considered the number of objections to the proposal to be irrelevant for the purposes of considering social effects under s 60(1A)(a) of the Planning Act.

[29] *Minawood* involved an application for a permit to demolish a famous "watering hole", Khyat's Hotel, which attracted in excess of 4,300 statements of grounds to the Tribunal vehemently opposing the loss of the hotel. The Tribunal identified as a key issue the weight that should be given to the volume of objections and answered the question under two headings: "Decisions not based on popularity" and "Does community opposition constitute a social effect?"

[30] Under the first heading, the Tribunal said:

> Clearly public opinion cannot dictate a decision because popular views may be contrary to factors that the decision maker must properly consider. There may be room for popular opinion to influence the establishment or amendment of planning controls or policy, but numbers for or against a proposal are not relevant per se in administrative decision making. Rather, it is the substance or merits of the views expressed, viewed through the prism of planning relevance, that must guide the decision maker. Thus 100 objections based on an irrelevant consideration will not outweigh a single good objection based on a relevant consideration.[17]

[31] Under the second heading, the *Minawood* Tribunal considered whether community opposition was relevant to the social effects of the proposal under s 60(1A)(a) of the Planning Act. It distinguished *Romsey* on the basis that the Court of Appeal had clearly identified that it was the provisions of the Gambling Act that made relevant the subjective perceptions of community members about their community. According to the *Minawood* Tribunal, the Planning Act established a different framework and a different set of considerations with the emphasis on "community"' rather than "individual" social effects.[18] It held that for social effects to be relevant, there must be demonstrable social impacts on the community (as distinct from individuals) of an identifiable scale or extent[19] and rejected the proposition that the number of objections alone created a significant social effect or that the number of objections alone should be given any weight.[20]

[32] In the present case, the Council and objectors argued before the Tribunal that concern about the loss of certain features, damage to local urban character and failure to respond to community aspirations (as reflected in the urban design framework) could be seen from the extent of opposition to the proposal and measured by the number of objections received, the number of parties who had lodged statements of grounds against the application and the number of submitters who had presented to the Tribunal.[21] In its written submissions, the Council submitted as follows:

> The strong message emerging from the community, reflected in the records from the community consultation and in Council's recent decision making, is that this community wants a residential development of this Site with a density of living closer to that of the surrounding neighbourhood, a scale comparable to that presently existing on the Site and a generosity of open space which meaningfully supplements the much valued parkland. Denial of this aspiration is both a significant social effect within the meaning of section 60 of the Planning and Environment Act 1987 and contrary to policy at clause 15.01.[22]

[33] According to the Council, therefore, the relevance of community opposition was clearly put to the Tribunal as a significant social effect for the purposes of s 60(1A)(a) of the Planning Act and the holding of the Tribunal in para 38 of the Reasons that the extent of community opposition per se was an irrelevant consideration effectively provided a "road block" for the consideration of the Council's case. According to the Council, the Tribunal was required to take into account the number of objections and then to make a decision as to the weight to be given to that factor. *Romsey* could only be understood as articulating the principle that a large number of objections, even on grounds that would otherwise be irrelevant, became a relevant consideration as a potential social effect.

[34] The Council therefore submitted that while the responsible authority would not have an obligation under ss 60(1)(c) and 84B(2)(f) of the Planning Act to consider an objection that was plainly based on an irrelevant ground, if there were are enough objections on an irrelevant ground, that may be evidence of an adverse social effect if the development is approved. The objection then becomes a relevant consideration, not under ss 60(1)(c) or 84B(2)(f), but under s 60(1A)(a) and, if it matters, in considering the policy in cls 15 and 15.01–5 of the Stonnington Planning Scheme.

Romsey and social effects

[35] The question is then whether, on the authority in *Romsey*, the Tribunal was bound to take into account the extent of community opposition in the form of the number of objections to the proposal for the purpose of considering social effects and community aspirations.

[36] *Romsey* involved a proposal to install gaming machines in the only hotel in the town of Romsey to which there was significant community opposition, evidenced by a survey in which 79% of respondents said that they did not support the installation of gaming machines in the hotel. Pursuant to s 3.3.7 of the Gambling Act, the Victorian Commission for Gambling Regulation was required to be satisfied that the net economic and social impact of approval would not be detrimental to the wellbeing of the community of the municipal district in which the gaming machines were to be located. The Commission refused to approve the hotel premises as suitable for gaming because it did not consider the "no net detriment" test to have been satisfied. It said that it had gained the overwhelming impression that members of the local community found the prospect of gaming at its only hotel so disconcerting that it would have a significant effect upon that community.[23]

[37] On review by the Tribunal, the parties did not seek to lead the survey evidence, although the Tribunal was informed of its existence. The Tribunal found the "no net detriment" test to have been satisfied, set aside the Commission's decision and approved the hotel premises as suitable for gaming.

[38] The Court of Appeal held that the Tribunal erred in law when it disregarded the evidence of community opposition to the introduction of gaming machines when applying the "no net detriment" test in s 3.3.7 of the Gambling Act. The court held that community opposition was a relevant consideration, that is, a matter which the Tribunal was bound to take into account, having regard to the statutory scheme.[24]

[39] In this context, the Court of Appeal held that the "wellbeing" of a community was a broad concept to be measured (at least) by the extent to which the community was healthy, happy, contented and/or prosperous.[25] If the approval of gaming at particular premises was likely to cause unhappiness or discontent in the community, that was a "social impact of approval" which would be "detrimental to the wellbeing of the community" because it would diminish the citizens' sense of happiness with, or contentment in, their community. Evidence tending to show a detriment of that kind as the likely or probable consequence of approval had, therefore, to be taken into consideration by the decision-maker in determining whether the statutory "no net detriment" test was satisfied.[26]

[40] The Court of Appeal, focusing on the impact of the proposal on the "social character" of a community, continued:

> Further — and perhaps, in some cases, more significantly — evidence of community attitude, together with other evidence as to the character of a community, may give rise to an inference as to the impact that a gaming proposal is likely to have upon the social character of that community. If satisfied that the impact would involve substantial change, the decision-maker is less likely to be satisfied that approval of the proposal will not result in net detriment. In the present case we take the Commission to have reasoned in this way, namely that the particular factors which were distinctive of the social character of Romsey, in a positive way, were at unacceptable risk of change if the gaming proposal were approved.[27]

[41] As to the scope of social impact, the Court of Appeal held that there was no basis for treating as irrelevant objections based on moral or religious grounds. If members of the relevant community found the prospect of gaming so disconcerting that it would have a significant effect upon that community, it was immaterial whether such concerns were founded on philosophical or moral or religious views (or some combination of these) or simply reflected unarticulated views about the kind of community in which people wished to live.[28]

[42] In this regard, the court referred to a series of planning decisions in which it was held that the subjective perceptions of residents about the character of a neighbourhood may be relevant to determining a planning permit application.[29] The Council submits that these decisions show the *Romsey* principles to be applicable in the planning sphere.

[43] In my view, the court must guard against too readily transposing the principles in *Romsey* to cases such as the present, where the fundamental objection was to the scale and density of the development. In *Romsey,* the Court of Appeal went to considerable trouble to explain why the introduction of gaming machines in Romsey was capable of constituting a relevant social impact.[30] Its careful analysis involved an explanation of how the apprehension of community members about the advent of gaming machines in the township could constitute a social impact for the purposes of the Gambling Act. The social impacts of approval were bound to be considered under s 3.3.7 of the Gambling Act and, having regard to the formulation of the "no net detriment" test under s 3.3.7 of the Gambling Act, "social impacts" were tied to the wellbeing of the community of the municipal district in which the gaming machines were to be installed. The wellbeing of the community, so the Court of Appeal held, related to citizens' sense happiness with or contentment in their community. Accordingly, unhappiness or discontent in the community resulting from an approval of premises for gaming would constitute a 'social impact of approval'.

[44] In *Romsey*, the "objector community" was a semi-rural community based around a small town with a single pub. The approval involved the introduction of gaming machines into the township. It therefore involved a significant and controversial change in the use of the town's only hotel and therefore, potentially, to the social character of the town itself. The survey evidenced community concern about the proposal, as did a video that had been prepared. The Court of Appeal took the Commission to have reasoned, consistently with its own analysis, that the particular factors that were distinctive of the community of Romsey were at unacceptable risk of change if the gaming proposal were approved.[31] It therefore held that community opposition was a "salient fact" giving shape to the matter of social impact. It was of such importance that the Tribunal's failure to address it meant that social impact had not been properly considered.[32]

[45] For the fact that there were 627 objections to the Lend Lease proposal be a "salient fact" giving shape to the matter of social impact (assuming for the moment that "social impact" is coterminous with a "significant social

effect"), there must be something to make it so. Mere evidence of opposition by a section of the public is not, in and of itself, evidence of social impact or social effect. In order to constitute such evidence, the number of objections must say something about the detrimental effect on the community of approving the development. However, nothing was put forward to transform the raw number of objections into evidence of social impact on or evidence of the aspirations of the community.

[46] Indeed, the context would suggest that the number of objections had little or nothing to say about the social impacts of or social effects of the proposal. The proposal is for a residential development in an inner urban municipality of over 100,000 residents. The site itself is, as the Tribunal found, an "island" site of considerable size that is ripe for redevelopment in accordance with the "large sites policy" in the Stonnington Planning Scheme. The 627 objections were directed largely to the scale and density of the proposal. This was not a case where a new use was proposed that might be offensive or upsetting to some residents based on their particular beliefs or adherences or where the proposal, on its face, was capable of having a significant adverse effect on the health, happiness or prosperity of the residents of Stonnington. In its submission to the Tribunal, the Council pointed to a "strong message from the community" that the community wanted lower density, lower scale development with a generosity of open space and it asserted that denial of or failure to respond to this "aspiration" was a significant social effect. In my view, the "effect" described is that more than 600 people disagreed that the proposal produced an acceptable planning outcome. That is a difference of opinion. It is not a significant social effect or social impact of the type recognised in *Romsey.*

[47] Furthermore, the "significant social and economic effects" to which consideration may have to be given pursuant to s 60(1A)(a) of the Planning Act are not the same as "social impacts" that must be identified and weighed in satisfying the "no net detriment" test in the Gambling Act, although they may in some cases coincide or overlap. Social impacts are impacts affecting the wellbeing of the community of the municipal district in which the gaming machines are to be located. They are therefore localised, and related to a particular activity which is recognised as having a potentially damaging effect on a section of the community. In contrast, the "significant social and economic effects" in s 60(1A)(a) of the Planning Act may be assessed by reference to a much larger community or geographic area. The sweep of relevant considerations under the Planning Act is broad: under the State planning policy framework decision-making must endeavour to integrate the range of policies relevant to the permission sought and balance conflicting objectives in favour of "net community benefit and sustainable development for the benefit of present and future generations".[33] In a planning appeal, the Tribunal may be called upon to assess more generally the social effects of a proposal, having regard to such matters as adopted strategic plans, policy statements, codes and guidelines,[34] as well as any relevant State environment protection policies.[35] A refusal to allow an intensive development in one area may have a positive social impact in the immediate neighbourhood (for example, by retaining the low density character of the neighbourhood) but may generate less desirable planning outcomes in other areas with significant adverse economic and social consequences for other communities and, potentially, for the State as a whole. Ultimately, it is a matter for the Tribunal to determine the geographic area or community for the consideration of social impacts or effects, having regard to all relevant matters.[36]

[48] In this case, the Tribunal found there were very few identified large sites for higher density residential development in Stonnington and that the opportunity for higher density residential development should not be lost. Permitting higher density residential development of the land in question would help to ensure implementation of the broad local policy to insulate most established neighbourhoods from significant change. The Tribunal therefore saw approval of the development as a means of protecting the low scale and density of other areas in Stonnington. This was an approach that was clearly open to the Tribunal.

[49] In my view, insofar as the Tribunal's refusal to take account of the extent of community opposition responded to the submission that the raw number of objections was a salient fact giving shape to a significant social effect for the purposes of s 60(1A)(a) of the Planning Act, the Tribunal was not in error. The extent of community opposition as evidenced by the number of objections was not a salient fact giving shape to social impact or social effect in the absence of something to make it so. Unlike in *Romsey*, the evidence of community attitude (the number of objections) did not combine with evidence as to the character of the community to give rise to an inference of detrimental impact or significant social effect based on citizens' diminished happiness with or contentment in their community.

[50] Apart from *Romsey*, the Council relied on the decisions in *City of Camberwell v Nicholson*[37] and *New Century Developments Pty Ltd v Baulkham Hills Shire Council*,[38] each of which was referred to in *Romsey* on the question of the scope of social impacts. In *Nicholson*, there were some 1,984 objections and three petitions opposing the use of premises as a brothel and the court considered the relevance of the community's "perceptions of incompatibility"

of the proposed land use with the character of the neighbourhood. Justice Ormiston accepted the submission that the Tribunal had not failed to take these perceptions of incompatibility into consideration and that it had merely given them substantially less weight than the Council and objectors might have desired. His Honour's reasoning was therefore based on the Tribunal having taken the relevant perceptions into account. However, one argument before his Honour turned on whether it was necessary to test whether the perceptions were reasonably held on proper town planning grounds. Justice Ormiston rejected the submission that it was merely the fact of the community's perceptions that should be considered and not whether these perceptions were reasonable, stating:

> In every decision, in which discretions are exercised of the kind required to be exercised in town planning applications, the responsible authority or the Tribunal must assess as best it can the weight of all the relevant considerations and seek to evaluate them in order to reach a conclusion. As a matter of fact an opinion held by a large number of residents may be given greater weight than the views of a few cranks, but it is for the relevant body to assess that in each case and, if it reaches a conclusion that a particular perception is unreasonable, then surely it does not have to give it substantial weight or indeed any weight.[39]

[51] *Nicholson* is not authority for the proposition that evidence of community opposition is always a relevant consideration and that the only issue for the Tribunal is how much weight, if any, to give to that evidence. It was not argued in *Nicholson* that the community perceptions were not a relevant consideration and the court proceeded on the basis that they were. Importantly, the court rejected the submission that it was merely the fact of the community's perceptions that should be considered and that whether the perceptions were reasonable lay outside the scope of relevant considerations. According to his Honour, the Tribunal was required to assess the weight of all the relevant considerations and seek to evaluate them in order to reach a conclusion. Justice Ormiston observed that *Broad's case*,[40] which was referred to with approval in *Romsey*, suggested no different conclusion. There, it was also held that the relevant individual perceptions had to be "evaluated" in the course of ascertaining what the effect of a proposal was on the amenity of a neighbourhood.

[52] Evaluating perceptions plainly means more than simply having regard to their number; it requires consideration of their substance. In this case, the Tribunal took account of the 600 plus objections in the sense that it evaluated the substance of those objections and gave them the weight that it considered appropriate.

[53] In *New Century*, Lloyd J in the Land and Environment Court of New South Wales considered whether a permit should issue for a mosque in the face of 5,170 objections. His Honour held that in analysing the substance of contributions from the public, issues of taste and morality were not necessarily set aside and it was not difficult to envisage a development which caused such great offence to a large portion of the community that for that reason it ought not to be permitted on town planning grounds. Such antagonism would amount to a detrimental social impact.[41]

[54] However, Lloyd J also held that the consent authority should not blindly accept the subjective fears and concerns expressed in the public submissions and held that there had to be evidence that could be objectively assessed before a finding could be made of an adverse effect upon the amenity of the area. Whilst the authority was entitled to have regard to the views of residents of the area, those views would be accorded little, if any, weight if there was no objective, specific, concrete, observable likely consequence of the establishment of the proposed use.[42]

[55] Once again, the question was not whether the number of objections, as opposed to their substance, was a relevant or irrelevant consideration. Like *Nicholson*, *New Century* was concerned with whether the subjective perceptions of community members, even if based on factors outside of planning considerations, could be a relevant consideration. Both decisions require the evaluation of the views in question. They say nothing about the relevance or otherwise of the raw number of objections as a discrete consideration divorced from the substance of the objections.

[56] The Council further submitted that the Tribunal was required consider the extent of community opposition to the proposal in respect of the policies in the Stonnington Planning Scheme concerning the aspirations of the community, particularly in cls 15 and 15.01–5. It submitted that in considering such aspirations, the number of persons who held a particular feeling about a development could not be excluded.

[57] The Tribunal correctly observed that the "community" in cl 15 did not expressly refer to "local community" and that State policy required the Tribunal to integrate policies in favour of "net community benefit" which, at State level, had to mean something broader than the local community. In this context, it held that opposition per se to the grant

of a permit was not an expression of "values or needs" and that the Council was best placed to express values, needs and aspirations on behalf of its community.[43] If an objector wished to establish that a particular design failed to reflect community aspirations, he or she was required to identify a particular community aspiration and explain how the design failed to reflect it.[44]

[58] I see no error in the Tribunal's reasoning. I am not persuaded that the number of objections was evidence of the aspirations of the local community that had to be taken into account by the Tribunal in its consideration of neighbourhood character policy.

Other statutory signposts

[59] Section 60(1)(c) of the Planning Act requires the Tribunal to consider all objections. The Council submits that while it does not expressly require the number of objections to be taken into account, having regard to the whole of the Planning Act and the purpose of ensuring that the planning system is one that embraces public participation,[45] the number of objections is a relevant consideration.

[60] In my view, the requirement in s 60(1)(c) to consider all objections and other submissions received but not withdrawn does not, without more, require the number of objections to be taken into account. The Council as good as conceded so much when it submitted that s 60(1)(c) would not require the responsible authority or Tribunal to take into account an irrelevant consideration.

[61] However, s 84B(2)(f) imposes a further obligation upon the Tribunal on review, namely, where appropriate, to "take account of the extent to which persons residing or owning land in the vicinity of the land which is the subject of the application for review were able to and in fact did participate in the procedures required to be followed under this Act before the responsible authority could make a decision in respect of the application for a permit".

[62] According to the Council, where the Planning Act directs the Tribunal to take into account the extent to which persons did participate in the procedures required to be followed by the Planning Act, it can only be understood as making relevant the number of persons who so participated.

[63] Section 84B(2)(f) is not, in my view, directed to requiring consideration of the number of objections received in every case. It requires, where appropriate, the Tribunal to take account of the ability of a particular category of persons to participate in what is described as "the procedures required to be followed under this Act" and to then consider whether those persons 'in fact did' participate in those procedures. The procedures in question can only be the "third party" procedures for giving notice and receiving and considering objections in Pt 4 of the Planning Act. However, s 84B(2)(f) does not expressly require the number of objections to be taken into account, as it could have done. It would have been a simple matter for the legislature to so provide. Instead, the legislature has used a convoluted phrase that focuses on the "ability" of persons to participate and whether they "in fact did" participate in the process leading up to the decision made by the responsible authority under s 61 of the Planning Act to grant or not to grant a permit. To construe s 84B(2)(f) to mean simply that the numbers of objections must be considered (where appropriate) is to ignore the words actually used by the legislature. While the words "were able to and in fact did participate" refer to the power to object, they do so in a way that raises the effectiveness of the notice and objection procedures in a particular case.

[64] It follows that the number of objections may be a relevant consideration under s 84B(2)(f) of the Planning Act, but in the context of considering more broadly the ability of third parties to participate in the planning process. In this context, the words "(where appropriate)" may refer to circumstances where there has been a restriction on participation, for example, because the application was not made available to the public as required or where notice has been given only to owners and occupiers of adjoining allotments or lots but the application is likely to be of interest or concern to the community more generally, or where there has been an irregularity or non-compliance with the requirements. In those circumstances, it might be very relevant for the Tribunal to understand the extent of community participation in the planning process when determining an application for review.

[65] In this case, there is no suggestion that the application was not made available to the public, that the notice requirements were too restricted or were not complied with, or that there was any irregularity in the consultation process carried out by the Council. It received over 600 objections, which have been duly considered by the Tribunal, along with other material that was before the Council. In my view, s 84B(2)(f) did not impose a requirement on the Tribunal to separately consider the actual number of objections that were made. I am therefore not persuaded that the Tribunal erred for this reason.

Conclusion on community opposition

[66] The Tribunal declined to take into account the number of objections to the proposal as a significant social impact or as evidence of the aspirations of the community for the purposes of the neighbourhood character policy. It stated that the extent of community opposition per se and the number of objections per se was irrelevant.

[67] Having regard to the foregoing analysis, I see no error on the part of the Tribunal in refusing to consider as a discrete matter the fact that there were more than 600 objections to the proposal.

[68] This is not to say that evidence of the extent of resident opposition to a proposal will never be a relevant consideration in a planning matter. It may be relevant as a salient fact giving shape to a significant social effect in some circumstances, but its status as such must be established in each case. This depends on identifying the significant social effect resulting from the proposal to which objection has been taken and linking resident opposition to that effect. In other words, it is insufficient to merely assert that any particular number of objections must be taken into account on the question of significant social effects.

[69] It would be an error for the Tribunal to hold that there was a blanket prohibition on taking account of the extent of community opposition to a development or that the number of objections could never be a salient fact giving shape to the matter of social impact or social effects. However, in this case the Tribunal made no error in declining to have regard to the extent of community opposition as evidenced by the raw number of objections.

[70] Furthermore, had the Tribunal taken account of the number of objections and considered what weight was to be given to that fact, I am not persuaded that its decision would have been, or might have been, different.[46] In my view, in the context of the detailed, well reasoned and comprehensive examination of the planning merits of the proposal, there is no reasonable argument to be made that the Tribunal's decision would have been any different had it considered the extent of resident opposition. No weight could be given to the raw number of objections if the number of objections was not capable of evidencing a significant social effect. Any error made by the Tribunal in this regard was not a vitiating error.

[71] Grounds 1 and 2 are not made out.

Large sites policy

[72] By grounds 3, 4, 5 and 6, the Council challenges the Tribunal's interpretation of the large sites policy, which is the eighth dot point in cl 22.02–3 of the Stonnington Planning Scheme. By ground 3, the Council challenges the Tribunal's statement that it was not bound to consider built form character when evaluating whether the proposed development was consistent with the "character of the area"; by grounds 4, 5 and 6 it challenges the Tribunal's approach to interpreting the term "complement" in the expression, "Buildings are designed to reflect and complement the built form character of the surrounding area" and the finding that the site created its own character.

[73] It is common ground that a misconstruction of the terms of a relevant policy can represent a failure to take into account a relevant consideration and for that reason may result in an improper exercise of statutory power.[47]

[74] The large sites policy forms part of the urban design policy in cl 22.02 of the Stonnington Planning Scheme. The urban design policy encourages all new development to generally respect the one to two storey built form character of the City in residential areas and most commercial areas, and directs higher scale development to particular land designated in the Strategic Framework Plan, which includes large sites.[48] The objectives of the urban design policy include, relevantly, ensuring that "the design and scale of new development makes a positive contribution to the built form of the area and is respectful to the existing character and streetscape" and encouraging "the development of large sites that is consistent with the role and character of the surrounding area and commercial and residential strategies".[49]

[75] The general policy expressed in cl 22.02–3 is that use and development maintain the character of the area and that development achieves a high standard of urban design. The large sites policy follows policy relating to "new buildings", which requires them not to be significantly higher or lower than the surrounding buildings, for forms and materials to "reflect and complement" the character of nearby buildings, for development to be of a height and scale that is "consistent with" its particular setting and location and "generally respect" the one to two storey built form character of the City's residential areas and most commercial and industrial areas.

[76] By contrast, the large sites policy provides:

> On large sites, over 0.5 of a hectare in commercial areas and 1 hectare in residential areas, in business, industrial,

residential or public land zones, higher scale development [is] encouraged if the applicant has demonstrated satisfactorily that:

- The proposed development is consistent with the role and character of the area or will stimulate restructure of surrounding land.
- Buildings are designed to reflect and complement the built form character of the surrounding area.
- Buildings are scaled down to integrate with any abutting residential properties.

[77] The large sites policy therefore encourages higher scale development than the "new buildings policy", which contemplates that development will generally respect the one to two storey build form character in the municipality.

[78] It will be observed that the words "consistent with" (as in consistent with setting and location, consistent with role and character of the area, setbacks being consistent with those of adjoining buildings) and "complement" (as in 'complement' the character of the area; "reflect and complement" the built form character of the surrounding area/the character of nearby buildings in the street; and "match or complement" the form of existing buildings when alterations are made) are peppered throughout the urban design policy, and these terms are not necessarily used in the same way in each case. The word "respect" also appears in relation to the existing built form character of the City and, where materials and form of construction are concerned, in relation to the "character of the area". Design and scale of new development must also be "respectful" to existing character and streetscape. Generally, the character of the City is to be "recognised and enhanced" and design and scale of new development must make "a positive contribution" to the built form of the area.

[79] It would be futile, and indeed, contrary to the purpose of the policy qua policy or guideline for decision-making, to endeavour to pin to these words definite and precise meanings.

[80] The Tribunal correctly observed that local policy, at a broad level, sought to insulate the most established residential areas in Stonnington from significant change. The main opportunities for significant change were in higher order activity centres and on "large redevelopment sites". Though it was part of the policy to maintain the character of the area (cl 22.02–3, first dot point), the large sites policy was an exception to that policy and it contemplated a change to character.[50]

[81] The Tribunal noted that the first dot point in the large sites policy referred to "character of the area", while the second dot point referred to "built form character of the surrounding area". It concluded that the draftsperson did not intend "character" in the first dot point to embrace built form character. The Tribunal interpreted the first dot point, which encouraged "consistency" with the "role and character of the area", to encourage development that was consistent with the residential and minor commercial character of the area on the opposite side of Orrong Rd and the railway. It interpreted the second dot point to encourage "a design that reflects and complements the built form character for the surrounding area".[51]

[82] In this context, the Tribunal said:

> The meanings of "reflect" and "complement" were extensively canvassed at the hearing, with recourse to dictionary meanings. In the context of applying policy rather than statute, we adopt what was said in *Rowcliffe* that reflect and complement do not mean replicate and contemporary architecture is not precluded.[52] …
>
> We also adopt the view expressed in *Rowcliffe* that built form character comprises a broad range of factors, and not just building height or scale. There are two meanings of "complement" in dictionaries. In general terms, one is to add so as to improve or emphasise existing features and the other is to add so as to complete. In a built form assessment when other policies encourage significant change, we find neither particularly helpful and this confirms standard interpretation techniques can be unhelpful in a policy context.[53]

[83] The Tribunal then said:

> The proposal largely creates a new built form character that respects the character of the surrounding area. It is quality architecture with quality and varied finishes … It improves public access through the land to the station, to the three nearby parks, and to nearby activity centres. Residents of the surrounding area will be able to relax over coffee in or outside the

café or with a book in more than one of the open spaces.[54]

[84] As to the third dot point, the Tribunal expressed agreement with the view that to "integrate with" is synonymous with to "respect". As the policy relates to high scale development, the provision contemplates an outcome of higher built form at the interfaces, provided it respects abutting properties.

Character and built form character

[85] The Council contends that the Tribunal erred in interpreting the reference to "character" in the first dot point as excluding built form character. According to the Council, it is difficult to perceive of the character of the area without reference to its built form character. The Council submits that on its proper construction, the first dot point required the Tribunal to evaluate whether the proposed development was "consistent with" the built form character of the area.

[86] In my view, the "role and character of the area" in dot point one is a more general concept than the "built form character of the surrounding area" in dot point two. While on its face it may appear that the latter is a subset of the former, the policy is more cogent if the role and character of the area is taken to be something other than its built form character. I agree with the Tribunal's statement that the "role and character of the area" refers to the residential and minor commercial character of the area and that the built form character of the surrounding area is more specific. If it were necessary to consider whether the development was consistent with the built form character of the area, there would be little point in also considering whether the development "reflected and complemented" the built form character of the surrounding area. This suggests that the dot points are directed to different inquiries.

[87] Furthermore, given that the large sites policy is directed to encouraging higher scale development than exists or is permitted in the rest of the municipality, built form on a large site will differ from surrounding built form to an extent that would not be permitted of developments on small sites. That the policy contemplates development of different scale, and therefore built form that departs from the built form character of the surrounding area, is confirmed by dot point three requiring a "scaling down" of buildings for the purpose of integrating the development with abutting residential properties. The interrelationship between dot points one and two must therefore be understood in the context of the fact that the large sites policy encourages development that is different in scale from the scale of the surrounding areas. Difference in scale is at the heart of the large sites policy. Built form therefore receives special attention and the integration of the development with the surrounding area is to be assessed on the basis that its built form will not necessarily match or mirror the built form of the surrounding areas and will need to be scaled down at appropriate points to integrate with the surrounding area.

[88] I am therefore not persuaded that the Tribunal erred in law when it held that it was not required to consider the consistency of the development with the built form character of the area as part of its consideration of whether the development was consistent with the role and character of the area.

Complement

[89] Grounds 4, 5 and 6 challenge the Tribunal's approach to the construction of the word "complement" in the second dot point of the large sites policy. The Council submits that the Tribunal either failed to give the word any meaning (ground 4) or, in the alternative, gave it the wrong meaning (grounds 5 and 6).

[90] In para 59 of the Reasons, the Tribunal rejected dictionary definitions of "complement" involving the concepts of adding to something so as to improve or emphasise existing features or to complete. It went on to find that the proposal created a new built form character that "respected" the character of the surrounding area.[55]

[91] According to the Council, the Tribunal was in error when it declined to read the word "complement" as meaning "to add so as to improve or emphasise". Alternatively, it submits that the Tribunal's finding that the proposal creates a new built form character that 'respects' the character of the surrounding area reveals that it misunderstood the evaluation that it was compelled to undertake in accordance with dot point two of the large sites policy.

[92] I am not persuaded that the Tribunal erred in its approach to the construction of the second dot point. The Council's submission pays insufficient attention to the fact that the large sites policy is a planning policy that 'prescribes guidelines in general, and not always precise, language.'[56] The Tribunal was not bound to give the word 'complement' any particular meaning or to substitute for it any particular word or words. It was entitled to simply take the phrase 'as it found it'[57] and interpret it having regard to the context in which it is used. The Tribunal found

the dictionary definitions of 'complement' to be unhelpful given the context in which the word appeared (as part of a composite phrase in an urban design policy guiding the assessment of built form) and had regard to the purpose of the large sites policy as a whole to give the phrase 'reflect and complement' a meaning. This was an approach that was clearly open to it.

[93] An expert planning tribunal is best placed to determine whether or not a new building can be said to 'respect and complement' the built form character of the area and to understand the matters that are relevant to that assessment. Read in the context of the urban design policy as a whole, I am not persuaded that the Tribunal's approach to the construction of 'complement' reveals any error. It understood the nature of the large sites policy and construed the phrase appropriately.

Any error is not a vitiating error

[94] If I am wrong in concluding that the Tribunal made no error of law in construing of dot points 1 and 2 in the large sites policy, the errors would not be vitiating errors in any case.[58] In my view, there is no real or significant argument to be made that the Tribunal might have reached a different result had it adopted the particular definition of 'complement' advanced by the Council, having regard to the assessment carried out against the entire planning policy framework and the detailed reasons given by the Tribunal as to why the built form of the proposal was acceptable. The Tribunal noted that the development involved 'quality architecture with quality and varied finishes';[59] that it would not be overbearing or otherwise unreasonable when viewed from across adjacent parkland;[60] and that the proposed architecture was 'refined, understated and timeless'; and that, in a very broad sense, it adopted the typologies and scales already found in the immediate neighbourhood.[61]

[95] Likewise, I am satisfied that had the Tribunal considered built form character when assessing whether the proposed development was consistent with the 'role and character' of the area, it would not have reached a different decision as to whether a permit for the development should be granted. The Tribunal would have interpreted the word 'consistent' consistently with the urban design policy as a whole and with the premise that development on large sites was to have a scale that was different from the scale of the surrounding residential areas. Having found that the development reflected and complemented the built form character of the surrounding area, there would be no impediment to finding that the development was consistent with the role and character, including built form character, of the area.

[96] None of grounds 3, 4, 5 or 6 is made out.

Conclusion

[97] The grounds of appeal are not made out. The appeal must be dismissed.

Order

Orders accordingly.

Counsel for the appellant: *Mr S Morris QC* with *Ms J Trewhella*
Counsel for the respondents: *Mr C J Canavan QC* with *Mr N J Tweedie*
Solicitors for the appellant: *Norton Rose*
Solicitors for the respondents: *Rigby Cooke Lawyers*

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1 *Lend Lease Apartments (Armadale) Pty Ltd and Larkfield (Orrong Rd) Pty Ltd v Stonnington City Council* [2012] VCAT 906 ("Reasons"), [258].

2 Ibid [255].

3 The permit allows the use and staged development of the land for dwellings, convenience shop, café and maternal health centre. It also allows a number of other things for which permission was also required, including:

• alteration to access to land in a Road Zone Category 1;

• reduction in the car parking requirement;

• variation to the car parking design standards;

• removal of native vegetation;

• waiver of loading requirements; and

• sale or consumption of liquor from the café.

4 Affidavit of Clare Louise Somerville made on 22 February 2013, [8].

5 Reasons 8 n 1 (emphasis added).

6 Ibid [37] (footnotes omitted) (emphasis added).

7 (1990) 170 CLR 321.

8 Ibid 353.

9 Ibid 384.

10 Reasons [38].

11 (2008) 19 VR 422 ("*Romsey*").

12 In an application for approval of premises as suitable for the installation of gaming machines.

13 [2009] VCAT 440, [28]–[29] ("*Minawood*"").

14 The Tribunal considered and commented upon a document prepared by the Council's community consultation group about the development of the subject land based on consultation sessions attended by approximately 100 residents. It also referred to approximately 120 responses from residents to a draft of an urban design framework for the land prepared by the Council and sent to 14,000 residents. The Tribunal found that neither of these processes resulted in a cogent expression of the aspirations of the local community and concluded that the Council was best placed to express values, needs and aspirations on behalf of its community. In this context, it also considered State policy for planning to 'achieve high quality urban design and architecture that … [r]eflects the particular characteristics, aspirations and cultural identity of the community' and observed that the policy did not expressly refer to the local community.

15 Reasons [46].

16 Stonnington Planning Scheme cls 15, 15.01–5.

17 *Minawood Pty Ltd v Bayside City Council* [29]. This is the passage to which the Tribunal referred in the present case in support of the proposition that the extent of resident opposition per se was an irrelevant consideration. It will be observed that the passage in question refers to weight as well as relevance, and it does so in answer to a question concerning the weight to be given to the volume of objections (and not the relevance of that evidence).

18 *Minawood* [34]–[36].

19 This was to be contrasted with the position under the Gambling Act where the subjective perceptions of community members about their community and their views about the likely effect of gaming machines on that community are sufficient to establish the likely social impacts of gaming machine approval for the wellbeing of the relevant community: *Minawood* [39].

20 *Minawood* [41].

21 Outline of Submissions for Responsible Authority, Ex CLS-4 to the affidavit of Clare Louise Somerville affirmed on 10 August 2012.

22 Ibid [48].

23 *Romsey* 426 [11].

24 Ibid 434 [40].

25 Ibid 434 [43].

26 Ibid 435 [44].

27 Ibid 435 [45].

28 Ibid 438–9 [58].

29 *Broad v Brisbane City Council* [1986] 2 Qd R 317; *Novak v Woodville City Corporation* (1990) 70 LGRA 233; *Venus Enterprises Pty Ltd v Parramatta City Council* (1981) 43 LGRA 67; *Perry Properties Pty Ltd v Ashfield Council (No 2)* (2001) 113 LGERA 301; *Dixon v Burwood Council* (2002) 123 LGERA 253; *New Century Developments Pty Ltd v Baulkham Hills Shire Council* (2003) 127 LGERA 303.

30 *Romsey* 436 [49].

31 Ibid 435 [45].

32 Ibid 436 [47].

33 Stonnington Planning Scheme cl 10.04.

34 Planning Act s 60(1A)(g).

35 Ibid s 60(1A)(f).

36 *Randall Pty Ltd v Willoughby City Council* (2006) 144 LGERA 119, [42].

37 Unreported, Supreme Court of Victoria, Ormiston J, 2 December 1988 ("*Nicholson"*).

38 (2003) 127 LGERA 303 ("*New Century*").

39 Ibid 26.

40 *Broad v Brisbane City Council [1986] 2 Qd R 317*.

41 Ibid 316 [60].

42 Ibid 316 [61].

43 Reasons [45].

44 Ibid [46].

45 As provided for in s 4(1)(a) and s 4(2)(h), (i) and (j), along with provisions such as ss 52 and 57 of the Planning Act.

46 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353. See also *Wilson v County Court of Victoria* (2006) 14 VR 461 at 470.

47 See, eg, *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 208.

48 Stonnington Planning Scheme cl 22.02–1.

49 Ibid cl 22.02–2.

50 The Tribunal observed that the site had been identified by the Council as a large development site since 1997, but that the Council had not been able to adopt a policy or establish in the Stonnington Planning Scheme a preferred built form outcome for the land before the applicants began preparing their proposals. Although the Council consulted the local community, the policy it ultimately adopted was unresolved and the Council was unable to follow it when deciding the permit application. A proposed amendment to the Scheme to introduce a preferred built form outcome whilst considering the permit application was belated and too inchoate to be given significant weight: Reasons [256]–[257].

51 Reasons [56].

52 *Rowcliffe Pty Ltd v Stonnington City Council* [2004] VCAT 46, [92]–[93].

53 Reasons [56], [59] (citation in original).

54 Ibid [60].

55 Ibid [60].

56 *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189.

57 *Franceschini v Melbourne & Metropolitan Board of Works* (1980) 57 LGRA 284 at 295.

58 Again, a decision does not 'involve' an error of law unless 'the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different' *: Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353 (per Mason J). See also *Wilson v County Court of Victoria* (2006) 14 VR 461 at 470.

59 Reasons [60].

60 Ibid [97].

61 Ibid [121]–[122].

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