

LG Alert – Balancing COVID-19 pandemic measures against the administration of the *Development Act 1993* and the *Planning, Development and Infrastructure Act 2016*

Measures being considered by councils to manage risks posed by the COVID-19 pandemic, are raising many questions for Assessment Managers and others involved in the administration of our planning and development system. The two most significant and recurring queries (and our advice) are:

Q: Can Council Assessment Panel/Regional Assessment Panel meetings occur online?

A: Yes, subject to certain criteria being met.

Sections 83 and 84 of the *Planning, Development and Infrastructure Act* do not prescribe specific meeting requirements for CAPs and RAPs.

Rather, section 83(1)(f) (which applies to CAPs) provides that “*the procedures of an assessment panel must comply with any requirements prescribed by the regulations*”;

Section 84(1)(e)(ii) (which applies to RAPs) leaves RAP procedures to the discretion of the Minister. It is common practice for the Minister, in constituting a RAP, leaves the determination of procedures to the RAP, subject to the requirements of the *Planning, Development and Infrastructure (General) Regulations 2017*.

Regulations 12-18 of the *Planning, Development and Infrastructure (General) Regulations* are relevant in this regard. The only requirement which applies to the manner in which a CAP or a RAP meeting is convened, is regulation 13(1) which provides:

13(1) In connection with the conduct of the proceedings of an assessment panel, members of the public are entitled to attend a meeting of the panel other than as set out in sub regulation (2)

Sub regulation (2), as referenced above, provides for CAPs and RAPs to resolve to move into confidence for portion of a meeting, on the various grounds set out. It is not, therefore, directly relevant to this query.

Distinct from the requirements of the *Local Government Act 1999* (as detailed in our [LG Alert](#) of 18 March 2020), regulation 13(1) specifies only that members of the public are entitled to *attend* a CAP or RAP meeting.

This regulation does not require that CAP or RAP meetings occur at a particular location or place and does not mandate any form of physical presence. Rather, all that is required is an ability to ‘attend’ which, logically and sensibly, is satisfied by any form of ‘presence’.

On our reading of the sub regulation, there is nothing which prohibits attendance by way of electronic means. It follows, therefore, that to the extent that CAP and/or RAP meetings occur online, provided that members of the public are able to ‘attend’ (have a presence at) the meeting, via remote log-in or other means which allows them to watch and hear the meeting as they would if they were sitting in the public gallery and

all members of the CAP or RAP were in physical attendance. Relevantly, it is to be noted that public 'rights' under the PDI Act and the Development Act are of an observational nature only and do not permit participation in the meeting.

How the above is achieved is a matter for the Assessment Manager to determine, having regard to available online meeting options.

In relation to verbal representations and applicant responses, section 38(10) of the *Development Act* is relevant. This specifies that a representor is allowed a 'reasonable opportunity' to 'appear personally or by representative...to be heard in support of the representation'. Similarly, section 38(11) provides that where representors are heard on their representation, applicants are allowed a 'reasonable opportunity' to 'appear personally or by representative...in order to respond to any relevant matter'.

These provisions also do not prohibit online meeting appearances. On our reading of section 38, all that is required is that representors who wish to be heard and applicants who wish to respond, are provided with log-in details for the remote meeting or are afforded a mechanism whereby they can participate in the meeting remotely as they would do in a physical meeting. If a representor or applicant declines an offer to participate in a remote meeting, this will not compromise the ability of the CAP or RAP to determine the development application, as all that is required to fulfil the above requirements, is that they be afforded a 'reasonable opportunity' to be heard. Offering log-in or other means to participate in the meeting would fulfil this requirement;

Where online meetings are contemplated by CAPs or RAPs, we recommend that the Meeting Procedures be amended immediately to provide clear and unequivocal provisions for remote meetings to occur.

Q. Are development assessment functions able to be carried out via online or other means which avoid the need for face-to-face interactions?

A. Yes.

Councils which are contemplating the closure of their principal office (as addressed in our [LG Alert](#) of 19 March 2020) are able to carry out development assessment functions without face-to-face contact being required.

Specifically:

- neither the *Development Act* or the *Development Regulations 2008* expressly prohibit the lodgement of development applications online or via post. Lodgement of development applications under regulation 15 of the *Development Regulations* is not required to occur at a physical place. Rather, all that is required is for the application to be 'lodged' with the council. Lodgement can occur electronically, by post or by other means such as placement in a box located at a council office;
- development application documents, representations, requests for further information, applicant responses and other development application documents can be provided to the council via electronic means or via post;

- the inspection of development application documents during public notification periods pursuant to regulation 34(1) of the *Development Regulations* does expressly state that this occur by way of '*inspection (without charge) ...at the principal office of the relevant authority*'. Consistent with our [LG Alert](#), we consider it entirely reasonable and defensible in these unique times, for access to development application documents to be provided on-line (whether via email, download link or other appropriate means) or through the provision of hard copies, provided that they can reach the intended recipient with sufficient time for them to submit a representation; and
- councils' register of development applications under regulation 98 of the *Development Regulations* is required to be published online and members of the public can be asked to view it online, rather than in person. For those people who are unable to access the register through the internet, the provision of a hard-copy by post is not precluded as an alternative form of access to in-person inspection by the *Development Regulations* provided that hard copy is provided free-of-charge.

If you have any questions in relation to this Alert, please contact:

- Victoria Shute on 08 8113 7104 or vshute@kelledyjones.com.au; or
- Michael Kelledy on 08 8113 7103 or mkelledy@kelledyjones.com.au; or
- Emily Nankivell on 08 8113 7114 or enankivell@kelledyjones.com.au.