

Planning and Environment Act 1987

Land Use Terms Advisory Committee Report

18 May 2018

Planning and Environment Act 1987

Advisory Committee report pursuant to section 151 of the Act

Land Use Terms Advisory Committee

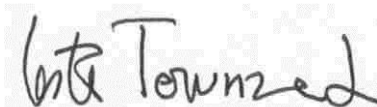
The Advisory Committee consists of:

- Lester Townsend, chair
- Katherine Navarro.

The Committee has been assisted by Cazz Redding who has provided input in to the Discussion Paper, interim report and final report, and Greta Grivas who has provided project officer support.

Due to travel commitments and other timing constraints Ms Navarro has not been in a position to formally endorse this report.

18 May 2018

A handwritten signature in black ink that reads "Lester Townsend". The signature is written in a cursive style and is positioned above the printed name.

Lester Townsend, Chair

Contents

Executive summary	i
1 Background	1
1.1 The role of the Committee	1
1.2 Reforms to date.....	3
1.3 What are the issues.....	3
2 About land use terms	5
3 Principles and business rules	6
3.1 Introduction.....	6
3.2 Proposed principles.....	6
3.3 Proposed business rules.....	10
3.4 Providing better guidance.....	11
4 Possible changes to land use terms	12
4.1 Accommodation.....	12
4.2 Agriculture.....	20
4.3 Child care centre group.....	29
4.4 Earth and energy resources group.....	31
4.5 Education.....	31
4.6 Energy generation and the Renewable energy group.....	31
4.7 Industry.....	33
4.8 Leisure and recreation.....	37
4.9 Office.....	41
4.10 Place of assembly.....	43
4.11 Recreational boat facility.....	50
4.12 Retail premises.....	51
4.13 Transport terminal group.....	55
4.14 Utility installation group.....	57
4.15 Warehouse group.....	62
4.16 Other issues.....	64
5 Practical implications	67
Appendix A Appointment and Terms of Reference	
Appendix B About land use terms	
Appendix C List of submitters	

List of Tables

Table 1:	Bed and breakfast definition	12
Table 2:	Dependent person's unit definition.....	13
Table 3:	Group accommodation definition	14
Table 4:	Comparison of selected Accommodation use terms.....	14
Table 5:	Residential village and Retirement village definitions.....	17
Table 6:	Camping and caravan park definition.....	18
Table 7:	Primary produce sales definition	21
Table 8:	Animal husbandry definitions.....	22
Table 9:	Recommended Animal husbandry definitions	27
Table 10:	Comparison of plants referred to in Crop raising and Horticulture	28
Table 11:	Education centre definition	31
Table 12:	Winery and Rural industry definition	34
Table 13:	Waster transfer, recycling and disposal definitions	36
Table 14:	Sports and recreation facility definitions.....	38
Table 15:	Indoor recreation facility and Restricted recreation facility definitions	39
Table 16:	Outdoor recreation facility definitions showing possible changes.....	40
Table 17:	Indoor recreation facility definition.....	41
Table 18:	Medical definitions	42
Table 19:	Cinema type definitions.....	43
Table 20:	Art gallery definition	45
Table 21:	Nightclub definition	45
Table 22:	Place of assembly definition	47
Table 23:	Function centre definition	48
Table 24:	Extract of Green Wedge Zone Section 2 Permit required	49
Table 25:	Sale of food definitions.....	51
Table 26:	Railway station definition	55
Table 27:	Utility definitions	57
Table 28:	Possible change to Earth and energy resources industry.....	62
Table 29:	Car park definition	65
Table 30:	Display home definition.....	65
Table 31:	Extract of Clause 74	73

List of lists

List 1:	Undefined land use terms listed in Clause 74	7
List 2:	Undefined land use terms that a submitter felt should be defined.....	8
List 3:	Head land use terms.....	74
List 4:	Unnested land use terms.....	75

Executive summary

Introduction

The government has initiated the Smart Planning program to reform and modernise the Victorian planning system, and to increase the effectiveness and efficiency of the operation of planning schemes. In October 2017 the discussion paper, *Reforming the Victoria Planning Provisions: A discussion paper* was released which sought comment on a range of proposals to improve the system.

Proposal 5.2 of the Smart Planning discussion paper was to review and update the land use terms section of the Victoria Planning Provisions (VPP). The Advisory Committee was appointed following feedback from the Smart Planning consultation to address the submissions received.

This is the Report of the Land Use Terms Advisory Committee.

This Committee has been specifically asked to provide advice and present findings and recommendations on the following matters:

- Principles and business rules for including land use terms in Clause 74.
- Existing land use terms in Clause 74 that should be removed or modified.
- New land use terms that should be included in Clause 74.
- Legal and practical implications of any recommended changes to land use terms and their definitions. These include:
 - existing use rights implications
 - consequential changes to the VPP (such as changes to zone land use tables, general terms and nesting diagrams)
 - potential impacts on users of the planning system.
- With regard to the identified legal and practical implications, a recommended approach to implement the proposed changes.

The Advisory Committee consists of:

- Lester Townsend, chair
- Katherine Navarro.

The Committee has been assisted by Cazz Redding who has provided input in to the Discussion Paper interim report and final report, and Greta Grivas who has provided project officer support.

The Committee released a Discussion Paper on 27 February 2018 for input via the Engage Victoria website, with submissions closing on 3 April 2018. Fifty-four submissions were received.

The Committee presented an interim report with short-term recommendations on 16 April 2018. This Report incorporates those recommendations.

General observations

Concerns about individual definitions are often triggered by specific circumstances – a thwarted development proposal, a contested hearing in Victorian Civil and Administrative Tribunal (VCAT), or an enforcement action by a local government. These specific circumstances may have only limited general applicability, nonetheless they are worth addressing so that they can be avoided in the future.

A number of calls for a 'definition' turn out to be policy or zone issues that require a policy change. These matters are beyond the Terms of Reference of the Committee.

This Report deals with a range of issues, many of which have no real common thread, apart from an effort to make planning schemes easier to use. There are however, some issues that have implications under a number of land use terms:

- The need to cater for small scale food production which can be prohibited in certain zones because of the operation of Clause 52.10.
- The need to simplify controls over shop front activities that fall outside of the shop definition and hence need a permit such as small gyms.
- The need to better cater for arts venues and cultural activities.
- The need to better cater for small scale tourism facilities in rural areas.
- The restrictive nature of Green Wedge Zones that leads to creative interpretation of uses.
- The need to reform car parking provisions to remove the temptation to, as one submitter put it, game the system through creative use of definitions.

Not all of these issues can be dealt with by this Committee, and some issues, such as shared and temporary housing, are matters that are already subject to review by other processes.

Recommendations

The recommendations are presented as:

- Short-term recommendations that have already been presented in the Committee's interim report, and can be implemented immediately
- Medium-term recommendations that while seemingly straight forward would benefit from a review within the Department or with selected stakeholders
- Longer-term recommendations that may require further research and public consultation
- Other observations that flow directly from submissions and are worth recording but are beyond the Terms of Reference of the Committee.

The Committee recommends:

Short-term recommendations

- S1 Adopt the following principles for drafting Land Use Terms:**
- a) Focus on what needs control
 - b) Use everyday terms
 - c) Don't define everything
 - d) Avoid planning controls in definitions
 - e) Use facilitatory controls and guard against restrictive interpretations
 - f) Define terms using other Acts where suited for the planning scheme but otherwise define for the planning scheme
 - g) Avoid general definitions in land use terms
 - h) Be clear about distinguishing features
 - i) Cater for emerging uses.
- S2 Replace 'closet pan' with 'toilet' in the definition for [Dwelling](#).**
- S3 Rename [Animal boarding](#) as [Domestic pet boarding](#) and change the definition to read:**
- 'Land used to board domestic pets, such as boarding kennels and a cattery. [It includes domestic pet day care](#)'.
- S4 Change Restricted recreation facility to read:**

- 'Land used by members of a club or group, ~~members' guests, or by the public on payment of a fee,~~ for leisure, recreation, or sport, such as a bowling or tennis club, ~~gymnasium and fitness centre.~~ It may include food and drink for consumption on the premises, and gaming. It may also include use by members' guests, or by the public on payment of a fee.
- S5 Change Informal outdoor recreation to read:
'Land open to the public and used by non-paying persons for leisure or recreation, such as a public plaza, public park, cycle track, picnic or barbecue area, playground, and walking or jogging track'.
- S6 Change Open sports ground to read:
'Land used for organised games of sport, but which is available for informal outdoor leisure or recreation when not being used or prepared for an organised game. It may include lights, change rooms, pavilions, and shelters'.
- S7 Change Outdoor recreation facility to read:
'Land used for outdoor leisure, recreation, or sport. It does not include an Open sports ground or Informal outdoor recreation.
- S8 Change Motor racing track to read:
'Land used to race, rally, scramble, or test, vehicles, including go-karts, motor boats, and motorcycles, and includes other competitive motor sports. It may include training facilities.
- S9 Change Function centre to read:
'Land used, by arrangement, to cater for conferences or private functions, and in which food and drink may be served. It may include entertainment and dancing'.
- S10 Change Place of assembly to read:
'Land where people congregate for religious, spiritual or cultural activities, entertainment, or meetings'.
- S11 Change Restricted place of assembly to read:
'Land used by members of a club or group, or by members' guests, for religious, spiritual or cultural activities, entertainment, or meetings. It may include food and drink for consumption on the premises, and gaming'.
- S12 Rename Tavern as Bar.
- S13 Change Shop to read:
'Land used to sell goods or services, or to hire goods. It includes the selling of bread, pastries, cakes or other food or beverage products baked or produced on the premises. It does not include food and drink premises, gambling premises, landscape gardening supplies, manufacturing sales, market, motor vehicle, boat, or caravan sales, postal agency, primary produce sales, or trade supplies'.
- S14 Change the condition next to Industry in Section 2 of the Table of Uses to the Commercial 1 Zone to read:
'Must not be a purpose listed in the table to Clause 52.10 except Food or Beverage production not otherwise specified in the table to Clause 52.10.
- S15 Change Restricted retail premises to read:
'Land used to sell or hire:
a) automotive parts and accessories;
b) camping, outdoor and recreation goods;
c) electric light fittings;
d) animal supplies including equestrian and pet goods;

- e) floor and window coverings;
- f) furniture, bedding, furnishings, fabric and manchester and homewares;
- g) household appliances, household electrical goods and home entertainment goods;
- h) party supplies;
- i) swimming pools;
- j) office equipment and supplies;
- k) baby and children's goods, children's play equipment and accessories;
- l) sporting, cycling, leisure, fitness goods and accessories;
- m) [remote controlled equipment](#);
- n) [musical instruments, equipment and accessories](#); or
- o) goods and accessories which:
 - Require a large area for handling, display and storage of goods; or
 - Require direct vehicle access to the building by customers for the purpose of loading or unloading goods into or from their vehicles after purchase or hire'.

It does not include the sale of food, clothing and footwear unless ancillary to the primary use'.

- S16 List [Self-storage facility](#) in Clause 74 and nest it under [Store](#) without a definition.
- S17 Change [Car park](#) to read:
'Land used to park motor vehicles. [It may include charging of electric vehicles](#)'.
- S18 Rename [Display home](#) as [Display home centre](#) and change the definition to read:
'~~A building~~ [One or more buildings](#) constructed as a dwelling, but used for display, to encourage people to buy or construct similar dwellings. [It may include a sales office and cafe](#)'.
- S19 Rename [Brothel](#) as [Sex work service provider](#) in Clause 74 and change the definition to read:
'Land made available for [sex work](#)~~prostitution~~ by a person ~~carrying on the business of~~ providing [sex work services](#) ~~prostitution~~ services at the business's premises'.
- S20 Replace 'Prostitution' with 'Sex work' in Clause 72.

Medium-term recommendations

- M1 Audit VPP zones and list all land use terms used in VPP zone tables in Clause 74.
- M2 Update Practice Notes to make it clear that the uses listed in special purpose zones are limited to terms listed in Clause 74.
- M3 Update Practice Notes to make it clear that unlisted land use terms or activities can form part of conditions in land use tables.
- M4 Change [Group accommodation](#) to read:
'Land, in one ownership, containing a number of [self contained buildings dwellings](#)~~—~~ used to accommodate persons away from their normal place of residence'.
- M5 Remove [Apiculture](#) from the nesting under [Animal husbandry](#) and nest it directly under [Agriculture](#).
- M6 Split the current definition of [Animal keeping](#) into [Domestic pet husbandry](#) and [Racing dog husbandry](#).
- M7 Introduce the term [Horse husbandry](#) and nest [Horse riding school](#) and [Horse stables](#) under this term.

- M8 Change the **Animal husbandry terms** and nest them as shown in Table 9.
- M9 Update Clause 52.11-1 to read:
- ‘The net floor area used in conducting the business including the storage of any materials or goods must not exceed 100 square metres or one-third of the net floor area of the dwelling, whichever is the lesser. This does not apply to Family day care. The net floor area of the dwelling includes out-buildings and works normal to a dwelling’.
- M10 Nest **Child care centre** under **Education centre**.
- M11 Create a definition of **Energy generation facility** as follows:
‘Land used to produce energy for sale off site’.
- M12 Create a new definition of **Waste-to-energy facility** as follows:
‘Land used for the combustion, treatment or bio-reaction of waste to produce energy for sale off site. It includes the activities to collect, temporarily store, process, or transfer waste materials for energy production’.
- M13 Create a new **Energy generation group** with the definition ‘Land used to produce energy’ that includes:
- **Energy generation facility**
 - **Renewable energy facility**
 - **Waste-to-energy facility.**
- M14 Change **Transfer station** to read:
‘Land used to collect, consolidate, temporarily store, sort or recover refuse, ~~or~~ used or surplus materials before transfer for disposal, recycling or use elsewhere’.
- M15 Change **Materials recycling** to read:
‘Land used to ~~collect~~, dismantle, treat, process, store, recycle, or sell, refuse, used or surplus materials’.
- M16 List **Gym**, **Pilates studios** and **Yoga studio** in Clause 74 as undefined terms, nested under **Indoor recreation facility**.
- M17 Change **Dancing school** be changed to **Dance studio**.
- M18 Change **Medical centre** to read:
‘Land used to provide health or surgical services (including preventative care, diagnosis, medical and surgical treatment, pathology services, and counselling) to out-patients only’.
- M19 Nest **Cinema based entertainment facility** under **Place of assembly**.
- M20 Change **Cinema** to read:
~~‘Land~~ Building with auditorium or theatre spaces used solely to provide screen based entertainment or information to the public’.
- M21 Change **Art gallery** to read:
‘Land used to display works of art, including ceramics, furniture, glass, paintings, screen based art, sculptures, and textiles’.
- M22 List **Cafe** in Clause 74 and nest it in **Restaurant** without a definition.
- M23 Change the definition of **Take away food premises** to read:
‘Land used to prepare and sell food and drink for immediate consumption off the premises. It may include up to 10 seats available for consumption on the premises’.
- M24 Change the definition of **Shop** to include:

It includes demonstrations of products including music performances in shops selling recorded music.

- M25 List **Animal grooming** in Clause 74 nested under **Shop**, but not defined.
- M26 Amend Minor utility installation to read:
‘It includes any associated flow measurement device or a structure to gauge waterway flow, and any siphons, water storage tanks, disinfection boosters stations and channels’.
- M27 Amend **Utility installation** to read:
‘Land used:
a) for telecommunications;
b) to transmit or distribute gas, or oil, or power;
c) to transmit, ~~or~~ distribute gas, or oil, or power, including battery storage;
~~e~~d) to collect, treat, transmit, store, or distribute water; or
~~e~~e) to collect, treat, or dispose of storm or flood water, sewage, or sullage.
It includes any associated flow measurement device or a structure to gauge waterway flow’.
- M28 List **Data centre** in Clause 74 without a definition and nest it under **Utility installation**.
- M29 Define **Reservoir** to be:
A natural or artificial lake used as a source of water supply that is owned or managed by a public authority.
- M30 Reproduce the definition of **Road** from the *Planning and Environment Act* in Clause 74.

Longer-term recommendations

- L1 Consult with rural councils on the need for a definition for **Rural workers’ accommodation** and whether the accommodations should be: permanent or temporary, movable or fix, self contained or not self contained, just for the specific farm or for a wider rural area.
- L2 Consult further with water authorities to confirm the specific limit for pumping stations in **Minor utility installation**.
- L3 Make it explicit in the VPP that no permit is required for water extraction
- L4 Determine a definition for **Interpretation centre** based on an assessment of the policy for listing the use in the Public Conservation and Resource Zone.

The Committee suggests:

- S1 Draft a Practice Note or similar on how on how practitioners should approach interpretation of land uses drawing on VCAT cases.
- S2 Review whether the prohibition on **Caravan and camping park** in the Rural Conservation Zone, and hence the prohibition of small scale glamping operations in the zone is consistent with broader policy objectives.
- S3 Review whether there is merit in broadening the definition of **Primary produce sales** to support agritourism.
- S4 Review the need for section 2 conditions in Green Wedge Zones for a **Hall**.
- S5 Explore options for development controls on water extraction.
- S6 Review the need to better control powerlines associated with dispersed generation activities.

- S7** Consider particular provision to specify building and works requirements for a **Minor utility installation** similar to 52.19 Telecommunications facility.
- S8** Explore the need for particular provisions related to the use of land for a **Contractor's depot**.

1 Background

1.1 The role of the Committee

The government initiated the Smart Planning program to reform the Victorian planning system and increase the effectiveness and efficiency of the planning system. As part of that program, a discussion paper – *Reforming the Victoria Planning Provisions* – was released in October 2017. That discussion paper sought comment on a number of proposals to improve the system. Proposal 5.2 of that discussion paper was to review and update the land use terms section of the VPP, to achieve the following objectives:

- *Increase use of everyday terms that the community understands.*
- *Remove or modernise obsolete terms and provide for new or emerging land uses.*
- *Distinguish between similar land uses where treated differently in land use tables.*
- *Remove unnecessarily specific terms and broaden terms, where appropriate.*
- *Provide definitions for undefined terms where appropriate (except for terms that are sufficiently captured by an ordinary dictionary meaning or defined in the Act).*

This Committee has been appointed to provide advice and present its findings and recommendations on the following matters:

- Principles and business rules for including land use terms in Clause 74.
- Existing land use terms in Clause 74 that should be removed or modified.
- New land use terms that should be included in Clause 74.
- Legal and practical implications of any recommended changes to land use terms and their definitions. These include:
 - existing use rights implications
 - consequential changes to the VPP (such as changes to zone land use tables, general terms and nesting diagrams)
 - potential impacts on users of the planning system.
- With regard to the identified legal and practical implications, a recommended approach to implement the proposed changes.

Method

The Terms of References stated that the Committee was to conduct the review generally according to the following methodology:

- preparation of a concise Discussion Paper
- an on-line submission process
- targeted consultation to explore the issues or other matters, including up to two workshops or forums.

On 27 February 2018, consistent with paragraph 9 of the Terms of Reference, the Committee wrote to all Councils, organisations represented on the Smart Planning Reform Advisory Group, and referral authorities and government agencies which interface with the planning system, and invited them to make a submission to the Discussion Paper. Submissions closed on 3 April 2018. A total of 54 written submissions were received from

Councils, government agencies, organisations and individuals (including some late submissions).

An invitation to make a submission was also placed in the Planning Matters newsletter on 2 March 2018.

Submissions were made via the Engage Victoria Land Use Terms Advisory Committee website at: <https://engage.vic.gov.au/land-use-terms-advisory-committee>.

The Committee met with Department of Environment, Land, Water and Planning (DELWP) Planning Group representatives including from Planning Systems, Statutory Planning Services and the Smart Planning program on 29 March 2018.

The Committee also met with and undertook consultation with several individuals and organisations including Kate Shaw and members of the Victorian Government's Live Music Roundtable, Registered Accommodation Association of Victoria, Investment and Economic Projects Division of Department of Economic Development, Jobs, Transport and Resources, and the Large Format Retail Association.

Scope of the Committee

Clause 4 of the Terms of Reference states that the Committee is not expected to:

- *Review land use terms which are currently under consideration by the Department of Environment, Land, Water and Planning (DELWP) through other projects.*

The Committee has been advised that the following terms¹ do not need to be considered by the Committee:

- **Residential building**
- **Residential aged care**
- **Rooming house**
- **Community care accommodation**
- **Extensive animal husbandry, Intensive animal husbandry, Cattle feedlot, Broiler farm**
- **Earth and energy resources industry, and Stone extraction.**

Clause 4 of the Terms of Reference also states that the Committee is not expected to:

- *Review land use permissions in zones, with the exception of identifying and having regard to the consequential impacts of proposed changes in land use terms on the functioning of zones.*
- *Recommend changes that would have major implications for the operation and purposes of the existing zones.*
- *Review Clause 72 (General Terms), unless there is a consequential change that flows from a change to a land use term.*

¹ In this Discussion paper we have identified **Existing land use terms**, **Proposed or unlisted land use terms** and **Obsolete land use terms**.

1.2 Reforms to date

Amendment VC142 implemented some of the less complicated suggestions which came through the Smart Planning survey or were identified in past reviews.

Changes to definitions include the following:

- Amending the **Research and development centre** definition to include 'or test' after 'develop' to clarify that the testing of new technologies is allowable and to facilitate the development of such centres in line with State policy objectives.
- Amending the **Warehouse** definition to clarify it can include the storage and distribution of goods for online retail, but excludes in-person collection and retail sales at the premises.

Changes to land use terms include the following:

- replacing the term **Adult sex bookshop** with **Adult sex product shop**
- replacing the term **Home occupation** with **Home based business**
- replacing the term **Pleasure boat facility** with **Recreational boat facility**
- replacing the term **Pleasure park** with **Amusement park**
- deleting the term **Business college** from the VPP
- deleting the term **Cabaret** from the VPP
- deleting the term **Community market** from the VPP and making consequential changes to land use tables within Clauses 32.03, 32.07, 32.08, and 32.09 to make **Market** a Section 2 (permit required) land use
- deleting the term **Trash and treasure market** from the VPP.

1.3 What are the issues

The Smart Planning project has undertaken various public and targeted consultations, and received many submissions. The Committee was provided with the submissions relating to land use terms.

Some submissions to the Smart Planning process commented on matters that, on reflection, fall outside of the scope of the Terms of Reference of the Advisory Committee, because they relate to broader policy issues.

Many submitters made general submissions or supported general principles, such as a periodic review or consultation with Councils using real live examples; very few submissions set out the precise change they sought to definitions.

Emerging issues

This Report deals with a range of issues, many of which have no real common thread, apart from an effort to make planning schemes easier to use. There are however, a number of issues have implications under a number of land use terms:

- The need to cater for small scale food production which can be prohibited in certain zones because of the operation of Clause 52.10.
- The need to simplify controls over shop front activities that fall outside of the shop definition and hence need a permit such as small gyms.
- The need to better cater for arts venues and cultural activities.
- The need to better cater for small scale tourism facilities in rural areas.

- The restrictive nature of Green Wedge Zones that leads to creative interpretation of uses.
- The need to reform car parking provisions to remove the temptation to, as one submitter put it, game the system through creative use of definitions.

General issues

Issues which do not relate to specific terms, include:

- The relevance of terms is more important than the number of terms defined.
- Duplication and overlapping of definitions should be avoided.
- Terms should be defined enough to guide decision making, and not so broad as to lose meaning and purpose.
- VCAT cases should be used to guide and determine appropriate land use definitions.
- Obsolete and outdated terms should be removed or revised.
- All land use terms in Clause 74 should be defined, including currently undefined definitions.
- Common land use terms which are not defined should be (for example **Road**).
- Land use terms should be 'future proofed' to allow for emerging technologies, for example, carbon sequestration, microbreweries and 'pop up shops'.

2 About land use terms

Appendix B provides a more detailed explanation of this Chapter.

Land use terms are defined in Clause 74 of the VPP.²

Land use terms are ‘nested’; that is, a term can be included in another term or include terms within itself. The nesting of land use terms reduces the number of land use terms that need to be listed in a table of uses.

The definitions are set out in a table with four columns:

- the defined term
- the definition, if there is one – some terms are listed without definition
- other listed terms that are included in the definition
- the land use term in which it is included, if any.

Land use terms play a critical role in the planning system in (at least) eight places:

- Determining whether a permit is required in a zone
- Taking enforcement action against uses
- Informing affected parties of the nature of advertised uses
- Drafting zone controls, either standard or special purpose zones³
- Clause 52.06 dealing with car parking
- Clause 52.10 dealing with uses with adverse amenity potential
- Specifying exempt land uses in Clause 62.01
- In structure plans, precinct plans and development plans forming parts of planning schemes.

Land use definitions do not have a role in determining existing use rights.

Legal cases have drawn a distinction between:

- the ‘purpose of use’ and
- ‘use’ in the sense of activities, processes or transactions.

It is accepted that the activities on a site may have more than one purpose, and it is the purpose that determines how the definitions should be applied.⁴

VCAT has also noted:⁵

... it is necessary to have regard to the structure, context and purpose of the planning scheme provisions at the time of interpreting the land use terms.

² The VPP is a comprehensive set of planning provisions for Victoria that are used, as required, to construct planning schemes. Clause 74 appears in all planning schemes without variation from the VPP.

³ These Clause 37 zones can have a specifically tailored table of uses.

⁴ *Cascone v City of Whittlesea* (1993) 11 AATR 175, 190.

⁵ *Radford v Hume CC* [2006] VCAT 2662 at [2].

3 Principles and business rules

3.1 Introduction

The Committee's Terms of Reference require it to advise on:

- Principles and business rules for including land use terms in Clause 74.

The Committee sought feedback on the following principles and business rules that could underpin drafting land use terms:

- Principles:
 - Focus on what needs control
 - Use everyday terms
 - Don't define everything
 - Avoid planning controls in definitions
 - Use facilitatory terms and guard against restrictive interpretations
 - Define terms using other Acts where suited for the planning scheme but otherwise define for the scheme
 - Avoid general definitions in land use terms
 - Be clear about distinguishing features
 - Cater for emerging uses.
- Business rules:
 - List in Clause 74 any term that applies in a VPP zone
 - Only use listed terms in the 'use' column of zones
 - Allow unlisted land use terms in conditions in zones.

In setting out these principles and business rules we have been mindful of the Smart Planning objectives.

3.2 Proposed principles

The Discussion Paper asked whether the proposed principles were appropriate.

Submitters supported the principles proposed by the Committee. The Committee has made one amendment to the principles in relation to definition of terms based on other Acts. Land use terms should be defined to suit the planning scheme; where a suitable definition is contained in another Act, this should be used.

The Committee recommends in the short-term:

Adopt the following principles for drafting Land Use Terms:

- a) Focus on what needs control
- b) Use everyday terms
- c) Don't define everything
- d) Avoid planning controls in definitions
- e) Use facilitatory controls and guard against restrictive interpretations
- f) Define terms using other Acts where suited for the planning scheme but otherwise define for the planning scheme
- g) Avoid general definitions in land use terms
- h) Be clear about distinguishing features
- i) Cater for emerging uses.

(i) Focus on what needs control

Land use definitions should draw distinctions based on the anticipated impacts of the use. Land use terms are not a typology of human activities, but a tool for managing impacts to achieve planning objectives. It doesn't matter if a land use term covers a miscellany of uses provided those uses have a common set of impacts.

It is particularly important to be clear on the difference between similar land uses where they are treated differently in land use tables. If uses are treated in the same way in land use tables, there is less of need to distinguish between them.

(ii) Use everyday terms

It is not always possible to use everyday terms for land uses, but the aim should be to use an everyday term where possible. This often involves listing everyday terms without definition so it is clear where they fall.

Most planners and non planners will know what a **Bar** is, but planning schemes use the term **Tavern**, which is not in common usage. This is an example of where a contemporary, everyday term should replace the current term.

(iii) Don't define everything

Some terms are listed in Clause 74, but are not defined. A number of stakeholders called for definitions of these terms.

List 1: Undefined land use terms listed in Clause 74

Airport	Drive-in theatre	Kindergarten	Racing dog training
Amusement park	Employment training centre	Library	Real estate agency
Backpackers' lodge	Equestrian supplies	Market garden	Reception centre
Bank	Freezing and cool storage	Mooring pole	Reservoir
Beauty salon	Golf course	Nurses' home	Residential college
Boarding house	Golf driving range	Nursing home	Rice growing
Boat ramp	Hairdresser	Paintball games facility	Road freight terminal
Bus terminal	Hall	Party supplies	Secondary school
Car sales	Heliport	Pier	Slipway
Car wash	Horse riding school	Pontoon	Supermarket
Conference centre	Horse stables	Postal agency	Tertiary institution
Dancing school	Hostel	Primary school	Travel agency
Department store	Jetty	Race course	Zoo
Dog breeding		Racing dog keeping	

Clause 74 lists 54 terms without definition: this aids interpretation as it shows, for example that a **Hairdresser** is nested within a **Shop** without the need to define **Hairdresser**. Some stakeholders found this lack of definition frustrating, but the Committee sees no need to define commonly accepted terms.

Submissions suggested that a number of terms required definition. These are listed below and discussed in the relevant part of this Report. Not all issues are discussed. In some cases, the definitions are clear, but submitters feel aggrieved by a VCAT decision or seek more control over the use. There were also suggestions for a range of new terms. These are

generally addressed in the relevant part of the Report, however, some submissions presented complicated schemes for new definitions that do not meet the principles identified in Smart Planning or this Report. The general issues raised in these submissions are discussed in this Report, but not all of the proposed terms are discussed.

List 2: Undefined land use terms that a submitter felt should be defined

Backpackers' lodge	Employment training centre	Horse stables	Nursing home
Beauty salon	Golf course	Hostel	Party supplies
Boarding house	Hall	Jetty	Reservoir
Bus terminal	Heliport	Kindergarten	Residential college
Conference centre	Horse riding school	Market garden	Road freight terminal
Department store		Nurses' home	Supermarket

The Committee considers that it is appropriate to continue the practice that a land use listed in Clause 74 does not need to be defined, provided it has a well-defined common usage.

(iv) Avoid planning controls in definitions

Some submitters to the Smart Planning process sought restrictions as part of a definition, for example, one stakeholder suggested:

*Include a more specific definition for **Caretaker's dwelling** which ensures that they are attached to business as there has been decisions by VCAT that has approved a five bedroom dwellings which is significant in size with a large family in residence. In this case, parameters on the size, buffer considerations relating to amenity impacts for occupants, number of occupants etc would have been useful.*

Using Victoria's Planning System is a detailed guide for people who use the planning system on a regular basis. Chapter 9 of the guide deals with plain English. It provides clear advice to avoid placing control in definitions.

It is true that that some definitions embody restrictions on the scale of the use, for example:

***Convenience shop:** A building with a leasable floor area of no more than 240 square metres, used to sell food, drinks, and other convenience goods. It may also be used to hire convenience goods.*

This makes sense when the restriction relates to the likely impacts of the use, and not the planning merits of the permission.

Such restrictions could be included as a condition in the table of uses with a reference to a particular provision if required.

(v) Use facilitatory terms and guard against restrictive interpretations

A number of definitions specifically guard against overly restrictive interpretations, for example, a **Restaurant** allows for “*entertainment and dancing*”. The Committee sees merit in this approach, and has made recommendations to broaden a number of uses.

(vi) Define terms using other Acts where suited for the planning scheme but otherwise define for the scheme

While definitions should seek to be consistent, the Discussion Paper supported definitions tailored for the planning system.

The Committee notes that this principle has not been applied for **Geothermal energy exploration, Geothermal energy extraction, Greenhouse gas sequestration, Greenhouse gas sequestration exploration, Mineral exploration, Mineral extraction, Petroleum Exploration, Petroleum extraction** and some uses listed under **Utility installation**.

All of these terms are defined by reference to their primary legislation, rather than being adapted to incorporate a land use or planning perspective as one would ordinarily expect. There may be a reason the Committee is not aware of for this approach and the Committee invited submissions in relation to land use planning based definitions for these terms.

Submissions did not provide any clear guidance on this issue, and the current practice seems to be to adopt definitions from other Acts when they are entirely suited to use in planning schemes, or where the point of the definition is to remove control of that activity from the planning system, but otherwise define them for the planning system. The Committee thinks that the most practical approach is to continue this practice.

(vii) Avoid general definitions in land use terms

Some stakeholders called for definitions, for example, **Affordable housing**, which are not so much a land use term but a general term. The cost of a house does not change the use. The Committee is only concerned with land use terms. Clause 72 would be a more appropriate place to put this definition. The Committee notes that other processes have defined Affordable housing and Social housing.

(viii) Be clear about distinguishing features

Part of understanding how definitions work is understanding what the distinguishing features of a use are compared to similar nested uses.

(ix) Cater for emerging uses

Over time new technology and trends drive new types of uses. Presently we are seeing new uses emerging relating to areas such as renewable energy, waste treatment, small scale specialist food and beverage producers and retailing formats which were not imagined 20 years ago.

As a principle, land use terms should be nimble enough to enable emerging uses to be assessed on their merits. Using the small scale integrated food and beverage producers as an example, (for example microbreweries, gin distilleries). They may for all intents and purposes appear as a shop, but under the current land use terms fall within an industry definition.

3.3 Proposed business rules

(i) List in Clause 74 any term that applies in a VPP zone

The Committee has not had the opportunity to cross check all the terms listed in zone tables (including schedules to special purpose zones) are listed in Clause 74. The Committee notes, for example, that **Contractor's depot** appears in the Public Park and Recreation Zone, but is not listed in Clause 74. **Railway** and **Road** are used in zones but not defined.

The Committee recommends in the medium-term:

Audit VPP zones and list all land use terms used in VPP zone tables in Clause 74.

(ii) Only use listed terms in the 'use' column of zones

Planning Practice Note 10, *Writing Schedules* (January 2018), says of land use tables:

Tables of uses should use the land use terms and follow the nesting diagrams in Clauses 74 and 75. If the head of a nested group of land use terms is intended to be a Section 2 use and there are no exemptions anywhere else in the table, then it does not need to be listed. (Page 4)

If a nested land use term is used in a Section, the head of the nest and an exemption must also be listed in the table. (page 9)

The Committee notes that as land use terms change special purpose zone schedules are not routinely updated and now contain many outdated land use terms.

Update Practice Notes to make it clear that the uses listed in special purpose zones are limited to terms listed in Clause 74.

(iii) Allow unlisted land use terms in conditions in zones

It is one thing to restrict the 'use' column in land use tables to listed terms, it is a different issue to apply the same restriction to the 'condition' column.

Drafting practice seems to vary on applying this restriction to the 'condition' column. For the Collingwood Arts Precinct a Special Use Zone was exhibited as part of the Fast Track Government Land Service process. The exhibited zone included:

Section 1 – Permit not required (as exhibited)

Use	Condition
Office	Must be used in conjunction with the use of the site for arts and creative industries.

Following the public consultation process, but before approval this was changed to:

Section 1 – Permit not required (as approved)

Use	Condition
Office	Must be used in conjunction with the use of an arts and craft centre, a Place of assembly (other than Amusement parlour or Nightclub), and Leisure and recreation (other than Major sports and recreation facility and Motor racing track).

The Committee understands that this was because it was felt within the Department that a condition in a table of uses could not refer to a land use activity. This will have implications for other proposed Special Use Zones such as the following extract of a proposed zone:

Section 2 – Permit required

Use	Condition
Accommodation (other than Dwelling)	Must be for tourists
Dwelling	Must be for guest or staff accommodation
Industry	Must be a brewery
Market	
Manufacturing sales	Must be a brewery
Mineral, stone or soil extraction (other than Mineral exploration, Mining, and Search for stone)	
Winery	

The Committee can see no reason why it would not be appropriate to include unlisted and potentially undefined uses or activities as condition in the table of uses in a special purpose zone. A permit can be issued for a 'brewery' for example and so there does not seem to be any good reason why a condition could not control this.

Update Practice Notes to make it clear that unlisted land use terms or activities can form part of conditions in land use tables.

3.4 Providing better guidance

One option to deal with definitional issues is to provide informal guidance.

Niche Planning Studio submitted:

... it is recommended that guidelines (for informational purposes only and not constituting legal advice) to interpret land uses be prepared to add an additional layer of assistance similar to New South Wales' Planning Circular, 'How to Characterise Development'. An approach to this guideline could include descriptions on how a user can approach interpretation of a land use that is unlisted. For example, tests to identify the principle activity and pathways to determine land use characterisation based on a practical approach to 'nesting' or theming of uses currently listed in the planning scheme.

This is a good suggestion and would provide a mechanism to read VCAT decisions in relation to uses definitions.

The Committee suggests:

Draft a Practice Note or similar on how on how practitioners should approach interpretation of land uses drawing on VCAT cases.

4 Possible changes to land use terms

The Committee's Terms of Reference require it to advise on:

- Existing land use terms in Clause 74 that should be removed or modified.
- New land use terms that should be included in Clause 74.

4.1 Accommodation

Issues raised in relation to **Accommodation** uses included:

- Update closet pan to toilet
- Student housing where a living or kitchen space is shared
- Short-term accommodation
- Bed and breakfast
- Group accommodation
- Health and wellness retreat
- Rural workers' accommodation in rural zones
- Caravan and camping park
- Dependent person's unit and tiny houses
- Retirement village and Residential Village.

4.1.1 Dwelling changes

(i) Update closet pan to toilet

The definition of dwelling states it must include:

d) a closet pan and wash basin

The Discussion Paper asked whether this should be updated to:

d) toilet and wash basin

Submitters agreed that this makes sense.

The Committee recommends in the short-term:

Replace 'closet pan' with 'toilet' in the definition for Dwelling.

(ii) Bed and breakfast

Some submitters to the Smart Planning process thought the term **Bed and breakfast** was no longer used publicly in the way the VPP intended, and was outdated.⁶

Table 1: Bed and breakfast definition

Land use term	Definition	Includes	Included in
Bed and breakfast	A dwelling used, by a resident of the dwelling, to provide accommodation for persons away from their normal place of residence.		Dwelling

⁶ The Committee understands the 'bnb' in the popular online travel service 'Airbnb' is a contraction of bed and breakfast.

A **Dwelling** includes “... *out-buildings and works normal to a dwelling*” and so a **Bed and breakfast** can be delivered in an outbuilding. If the outbuilding is capable of being classified as a separate **Dwelling** but is not used as a residence then the shared housing provisions of 52.23 would seem to apply.

As the Committee understands it **Bed and breakfast** allows people to use part of their dwelling for paid accommodation without an issue that the use is ancillary to the use of the land as a **Dwelling**. It is separately listed so that limits can be placed on the number of people and car parking, for example in the General Residential Zone:

Section 1 – Permit not required

Use	Condition
Bed and breakfast	No more than 10 persons may be accommodated away from their normal place of residence. At least 1 car parking space must be provided for each 2 persons able to be accommodated away from their normal place of residence.

The Committee received some submissions related to the issue of the use of out-buildings for a **Bed and breakfast** or a ‘dwelling’ that was rented out by a person who was not resident of the dwelling. These are matters that have wider implication than the **Bed and breakfast** definition and relate to issues of short-term accommodation in general. They go beyond land use terms and scope of the Committee.

(iii) Dependent person’s unit and tiny houses

It was submitted that there was a need for a definition of **Tiny house** or **Removable dwelling** as distinct from caravan.

Concern was also expressed about **Dependent person’s units** which it was said were a problem, because there is no clarity regarding what ‘dependent’ means. These issues relate to general issues around small secondary dwellings that go beyond land use terms and the scope of the Committee.

The Committee understands that the issue of secondary dwellings is being considered by other Smart Planning processes.

Table 2: Dependent person’s unit definition

Land use term	Definition	Includes	Included in
Dependent person’s unit	A movable building on the same lot as an existing dwelling and used to provide accommodation for a person dependent on a resident of the existing dwelling.		Accommodation

(iv) Group accommodation

The issue with this definition is that **Dwelling** refers to people ‘residing’ but this term refers to people away from their normal place of residence. This is an inherent contradiction as a **Dwelling** is used a ‘residence’, that is not temporary accommodation. There was broad support to change this definition.

Table 3: Group accommodation definition

Land use term	Definition	Includes	Included in
Group accommodation	Land, in one ownership, containing a number of dwellings used to accommodate persons away from their normal place of residence.		Accommodation

The Committee recommends in the medium-term:

Change [Group accommodation](#) to read:

‘Land, in one ownership, containing a number of [self contained buildings dwellings](#), used to accommodate persons away from their normal place of residence’.

4.1.2 Shared housing and temporary accommodation

The control of domestic scale short-term accommodation and self contained accommodation are determined not so much by the definition in Clause 74 but by the provisions of Clauses 52.23.

52.23 SHARED HOUSING

A permit is not required to use a building, including out-buildings normal to a dwelling, to house a person, people and any dependants or 2 or more people if the building meets all of the following requirements:

- *Is in an area or zone which is used mainly for housing.*
- *Provides self contained accommodation.*
- *Does not have more than 10 habitable rooms.*

Table 4: Comparison of selected Accommodation use terms

Accommodation	Dwelling	Residential building
Land used to accommodate persons.	A building used as a self contained residence which must include: a) a kitchen sink; b) food preparation facilities; c) a bath or shower; and d) a closet pan and wash basin. It includes out-buildings and works normal to a dwelling.	Land used to accommodate persons, but does not include camping and caravan park, corrective institution, dependent person’s unit, dwelling, group accommodation, host farm, residential village or retirement village.

Student housing where a living or kitchen space is shared

Submissions to the Smart Planning process requested a definition for shared student housing where a living or kitchen space is shared. The critical aspect to this issue is whether the accommodation is ‘self contained’.

On one reading a shared kitchen might mean that accommodation is not self contained and hence the establishment is a **Residential building**. But if the accommodation determined to be self contained, because the building as a whole provided self contained accommodation, then (provided it is for permanent accommodation) it is a **Dwelling**.

Short-term accommodation

Some stakeholders sought a definition to distinguish between long term and short-term or temporary forms of accommodation.

This issue has been addressed by VCAT. The definition of dwelling provides that it is a building used as a self contained **residence**. Residence means a place where people live or reside either permanently or for a considerable period of time.⁷

VCAT has noted:⁸

It is also important when considering whether the land is used as a dwelling not to be distracted by the form of buildings on the land. Just because there is a house on the land does not necessarily mean that it is being used as a dwelling. The house on the subject land may well be used as a residence in other circumstances, but it is not being so used at present. The use of land for planning purposes is not determined by the style of development but the purpose for which the land is actually used. Thus it is fallacious to say that because there is a house on the land ipso facto the land is being used as a dwelling.

If no one resides at a house and people only stay there temporarily over the weekend or for very short periods of time, then house is not a building used as a residence and therefore the land cannot be said to be used for the purpose of a dwelling. However, Clause 52.23 means that a permit is not required.

VCAT said:⁹

I find that it is possible to interpret Clause 52.23 as being applicable to any situation where accommodation is provided in a building for any person or people if the building meets each of the three specified requirements. It is ... "a very general provision indeed". However, ... an examination of the history of the introduction of the planning scheme provisions now in Clauses 52.22, 52.23 and 52.24 makes it evident that this was the intention, that is, that it be a very general provision.

If people choose to let out a holiday house or other single accommodation unit, a planning permit for the use of land for this purpose is not generally sought or required by councils, probably on the erroneous basis that such accommodation is a **Dwelling**. As VCAT has determined, it is probably not the correct characterisation because the land is not being used as a residence. But the question arises as to whether any good planning purpose would be served by requiring a planning permit for a domestic scale accommodation use, which in other circumstances might well be used as a dwelling.

Herbert Smith Freehills submitted that:

⁷ See *Derring Lane Pty Ltd v Port Phillip City Council* [1999] VSC 269; *Merrett v Moira SC* [2005] VCAT 242 at [16] – [17]

⁸ *Armato v Hepburn Shire* [2007] VCAT 603 at [13]

⁹ *Armato v Hepburn Shire* [2007] VCAT 603 at [47]

... since the decision in Armato, the Tribunal has on a number of occasions considered the application of Clause 52.23 in relation to apartment buildings, concluding that Clause 52.23 would not apply to an apartment “building”.¹⁰

The Committee understands that this is because the ‘building’ would have more than the 10 habitable rooms specified in Clause 52.23.

Herbert Smith Freehills went on to say:

That is, a Dwelling in an apartment building could not take the benefit of the Clause 52.23 exemption and would, in most zones, if using the land for short stay accommodation, require a permit to use the land for Accommodation (being how Deputy President Gibson characterised short-term accommodation in Armato).

The result of these cases is that the application of Clause 52.23 is different, depending on the form of the building which houses the relevant Dwelling.

The Committee has been advised that the following terms do not need to be considered by the Committee:

- Residential building
- Residential aged care
- Rooming house
- Community care accommodation.

The issue of controlling short-term accommodation on a domestic scale is not a change in the definition of **Dwelling**, but in a change to 52.23. Changes to these provisions raise a number of policy issues, including the impact on the rooming house sector.

The Department has recently consulted on changes to Clause 52.23 and any changes to Clause 52.23 should be addressed through that process.

4.1.3 Other Accommodation uses

(i) Retirement village and Residential village

The Discussion Paper asked whether **Retirement village** and **Residential village** should be combined as they are very similar. It was submitted that **Retirement village** allows for multiunit developments in zones that would normally not allow such density.

Concerns were expressed that **Retirement village** might be used to circumvent Clause 55 requirements where the residents are ‘aged’, being over 55 years.

Mornington Peninsula Shire Council encapsulated a common view:

There may be merit in combining the terms, as raised within the Discussion Paper, provided this does not jeopardise the operation of either use under the Residential Tenancies Act 1997 and Retirement Villages Act 1986. That being said it is not considered an immediate necessity.

¹⁰ See the decisions in Johnson v Knox CC [2009] VCAT 1769, March v Melbourne CC [2014] VCAT 546 and Boroondara CC v Dugdale (Includes Summary) (Red Dot) [2015] VCAT 721

The key issue is that a **Residential village** requires ‘land in one ownership’, and that it would not be appropriate to remove this restriction, yet applying the restriction to a **Retirement village** may not be warranted. Based on submissions the Committee does not recommend any changes to these definitions.

Table 5: Residential village and Retirement village definitions

Land use term	Definition	Includes	Included in
Residential village	Land, in one ownership, containing a number of dwellings, used to provide permanent accommodation and which includes communal, recreation, or medical facilities for residents of the village.		Accommodation
Retirement village	Land used to provide permanent accommodation for retired people or the aged and may include communal recreational or medical facilities for residents of the village.		Accommodation

(ii) Rural workers’ accommodation in rural zones

The issue of rural workers’ accommodation in rural zones would seem to be a matter for the zone controls and not land use terms. There is a range of views on the benefit in defining **Rural workers’ accommodation**.

On the one hand the accommodation is seen as being temporary and not self contained. Cardinia Shire Council explained:

Within Cardinia, there are a number of asparagus farmers that utilise foreign workers from countries such as Vanuatu. They come to the farms during picking season, and accommodation is provided on the farms for these workers. The accommodation is not self contained, but rather provides sleeping areas for the workers, with the farmers also providing cooked meals, and transport to other services. The accommodation is generally seasonal in use. Council’s main concern is that the ability for farmers to provide this accommodation is not taken away, as this provides an important service to the asparagus farmers. Cutting asparagus requires particular skill, and is performed at night. These famers find it difficult to recruit Australian based workers to perform this work, and therefore, it is vital that rural accommodation can be sufficiently provided to ensure the ongoing viability of the farms.

It is important, in the case of Cardinia Shire, that the definition is clear that the accommodation is not self contained, and that it must only be used by workers on that farm to ensure that this accommodation is not then used as a dwelling later on.

Matthew Cameron pointed out that the decision of VCAT in *Dulgaran Pty Ltd v Swan Hill RCC* [2008] VCAT 1457 is relevant. Although VCAT ultimately refused the application on grounds that it would not produce an acceptable planning outcome, paragraphs 7 to 19 of the decision highlight the difficulty in defining the proposed use, which sought to accommodate workers required for the Swan Hill Abattoir. The Tribunal stated:

In the current case, I consider it arguable that the use is better described as “residential building”, or “accommodation”, both of which are prohibited in the Farming Zone, but I will accept the Applicant’s submission that the use could be categorised as a “residential hotel” and therefore continue to the next step in my assessment.

The difficulties with applying this definition to rural workers’ accommodation include:

- although a **Residential hotel** accommodates persons away from their normal place of residence, the accommodation would seem to be the workers’ normal place of residence for as long as they are employed in the work
- the word ‘hotel’ in the definition appears to imply a shorter term stay than would often be expected for rural workers’ accommodation
- the definition of a **Residential hotel** includes significant elements relating to entertainment or hospitality that appear to be incongruous with rural workers’ accommodation.

Other submitters were in favour of more permanent accommodation. Accommodation for seasonal workers may well be ancillary to the agricultural use the farm use if the workers work on land in the same ownership.

A critical issue is how the ‘workers’ are tied to a particular farm operation, or area.

The Committee recommends in the longer-term:

Consult with rural councils on the need for a definition for **Rural workers’ accommodation and whether the accommodations should be: permanent or temporary, movable or fix, self contained or not self contained, just for the specific farm or for a wider rural area.**

4.1.4 Caravan and camping park

(i) Low impact tourism uses

It was submitted that **Caravan and camping park** needs to be expanded to deal with glamping and long term accommodation on park sites.

Table 6: Camping and caravan park definition

Land use term	Definition	Includes	Included in
Camping and caravan park	Land used to allow accommodation in caravans, cabins, tents, or the like.		Accommodation

In respect of glamping – glamorous camping – the quality of the tents would seem to be irrelevant to the purpose of the use. The Committee sought feedback on whether there were impacts associated with ‘glamping’ that needed to be controlled, that were not already controlled under the **Camping and caravan park** term. There may be issues associated with sewage disposal and how properties are rated in relation to sewage disposal, but this is not a matter for planning scheme definitions.

The issue appears to be that in the Rural Conservation Zone, a small scale glamping operation would be prohibited because it is a **Caravan and camping park**, even though a permit could be sought for a **Residential hotel**.

Terrain Consulting Group described such a prohibited eco-friendly low impact tourist facility comprising:

- 8-12 tents mounted on removable footings so the construction is minimal, accommodating 16 to 24 people if all were full
- amenities either through an approved septic similar to the National Park has at Pound Bend Tunnel or compost toilets with grey water being appropriately treated
- solar assisted power for tent lighting where feasible.

The Committee concludes there is no need to define a ‘glamping’, but a review of zone controls might address the concerns raised in submissions.

The Committee suggests:

Review whether the prohibition on [Caravan and camping park in the Rural Conservation Zone](#), and hence the prohibition of small scale glamping operations in the zone is consistent with broader policy objectives.

(ii) Permanent accommodation

VCAT¹¹ considered an application for 67 self contained cabins in the Green Wedge Zone. The Tribunal had to determine whether the 67 cabins each with two ancillary car spaces, additional visitor parking and communal multipurpose facilities comprise:

- a [Camping and caravan park](#), which was one of few permissible [Accommodation](#) uses in this zone, or
- multiple [Dwellings](#) or a [Residential village](#) both of which are prohibited [Accommodation](#) uses, or
- some other form of accommodation use.

It is significant that unlike other uses nested under [Accommodation](#) (for example [Motel](#) and [Residential hotel](#)) which refer to accommodation being provided for persons away from their normal place of residence, a [Camping and caravan park](#) is not subject to a requirement that it is a use which can only accommodate persons on a temporary basis.

VCAT found that while a [Camping and caravan park](#) may include some permanent residents the proposal was not a [Camping and caravan park](#):

41 The Tribunal was advised that the project is intended as permanent housing although a proportion (undefined) would be available for non-permanent use. There is no mix proposed of caravans, cabins, tents and the like. There are no common ablution or cooking facilities. This is not a tourist location and there is no tourist attraction. There is no feature that makes this appear like a camping and caravan park. Thus, it is not accurately characterised as a camping and caravan park.

42 It is not solely tenure or shared facilities or common amenities that distinguish camping and caravan park from other forms of “dwelling” but instead a range of factors which are difficult to pin down. The Tribunal finds that tourist or holiday accommodation is one of those factors, as is some

¹¹ Willbow Corporation v Kingston CC (Red Dot) [2005] VCAT 2699 (20 December 2005).

measure of impermanence, albeit not a completely transient population as recognised in the Dromana¹² case.

4.2 Agriculture

Issues raised in relation to **Agriculture** uses included:

- What is agriculture?
- Primary produce sales
- Animal husbandry – Animal keeping, Animal boarding and Animal training
- Horticulture and Crop raising.

In addition to these submissions, a number of submitters indicated that terms within **Agriculture** need to reflect current practices and future proof them to allow for adaptation of agricultural practices. An example of this was the interaction of free range farming and animal husbandry definitional issues. These are being considered by a separate process and fall outside the remit of this Committee.

(i) What is agriculture?

The first observation to make about **Agriculture** is that it includes a number of uses that most people would not think of as **Agriculture**, such as boarding domestic pets. These are uses that are found in industrial areas in cities as well as in rural areas.

The Committee sought feedback on whether there was a better term than **Agriculture** to capture the complete range of nested uses. No better term was suggested, and most feedback wanted to keep the term **Agriculture**.

The Committee does not recommend a change to the term **Agriculture**.

(ii) Primary produce sales

It was submitted that **Primary produce sales** should allow for some ancillary goods. For example, a cheese shop in a rural zone may also sell crackers and bottled drinks to be consumed with the primary produce (cheese). This would seem to shift the use to a regular **Shop** which is prohibited in the Farming Zone.

Other issues seem to relate more to the condition applied in zones than the definition. In the Farming Zone, Green Wedge Zone, Green Wedge A and Rural Activity Zone, the conditions are:

- Must not be within 100 metres of a dwelling in separate ownership.
- The area used for the display and sale of primary produce must not exceed 50 square metres.

There are no conditions to be met in the Rural Living Zone or the Rural Conservation Zone.

The Committee notes that the produce does not have to be from the land where the **Primary produce sales** use is located.

¹² Dromana Tourist Park Holdings Pty Ltd v Mornington Peninsula SC [2005] VCAT 1439 (20 July 2005).

Table 7: Primary produce sales definition

Land use term	Definition	Includes	Included in
Primary produce sales	Land used to display and sell primary produce, grown on the land or adjacent land. It may include processed goods made substantially from the primary produce.		Retail premises

The Committee asked:

*Should ancillary goods be permitted to be sold in **Primary produce sales**?*

*Should the conditions for **Primary produce sales** in the Farming Zone, Green Wedge Zone, Green Wedge A Zone and Rural Activity Zone be amended? What should they be?*

There were mixed views with concerns raised about de facto shops establishing in rural areas, but with some support for changes from a tourism perspective. For example, Whittlesea City Council submitted:

There would be some advantage for regional economic development if ancillary goods that are produced within the region (as opposed to just within the site and from adjacent land) could be sold within the definition of primary produce sales. This would benefit agritourism and make farm gate sales operations more of a 'destination'. The extent of ancillary goods sold could be controlled within the following parameters:

- *largest percentage of sales by volume to be from the farm where the sales are conducted*
- *regional produce defined as that produced within a 50 kilometre radius.*

These are not so much definitional issues as policy issues. It is one thing to allow 'farm gate sales', which the current definition facilitates, opposed to allowing rural tourism activities.

The Committee suggests:

Review whether there is merit in broadening the definition of **Primary produce sales to support agritourism.**

(iii) Apiculture

The Committee sought feedback on whether **Apiculture** be removed from the nesting under **Animal husbandry** and be nested directly under **Agriculture**

Most feedback did not support this change, but some submissions pointed out that bees are an important component of pollination and so part of many crop raising systems. Because **Apiculture** is listed in Clause 62.01 its nesting under **Animal husbandry** has no practical effect, and only serves further complicate an already complicated nest.

The Committee recommends in the medium-term:

Remove **Apiculture from the nesting under **Animal husbandry** and nest it directly under **Agriculture**.**

(iv) Animal husbandry – Animal keeping, animal boarding and animal training

The Committee found the **Animal husbandry** set of definitions to be one of the most problematic. Leaving aside farm animals which are included under **Extensive animal husbandry** and **Intensive animal husbandry** and subject to a separate review process there are a number of obvious difficulties with these definitions:

- **Animal keeping** does not cover all animals, only domestic pets and racing dogs.
- **Animal keeping** does not involve the keeping of domestic pets. **Animal husbandry** refers to “*keep, breed, board, or train*”, but **Animal keeping** does not include “*keep*” in respect of domestic pets, though it does for racing dogs.
- **Animal boarding** does not cover all animals, only domestic pets.
- A **Horse riding school** is under animal training, but it is not likely that the horses are being trained, rather it is the humans riding them that are being trained.

What the terms actually cover

The definitions embody four different animal related activities:

- ‘keep’ which the Committee takes to mean keeping your own animals
- ‘breed’
- ‘board’ look after other animals on a temporary basis for a fee
- ‘train’.

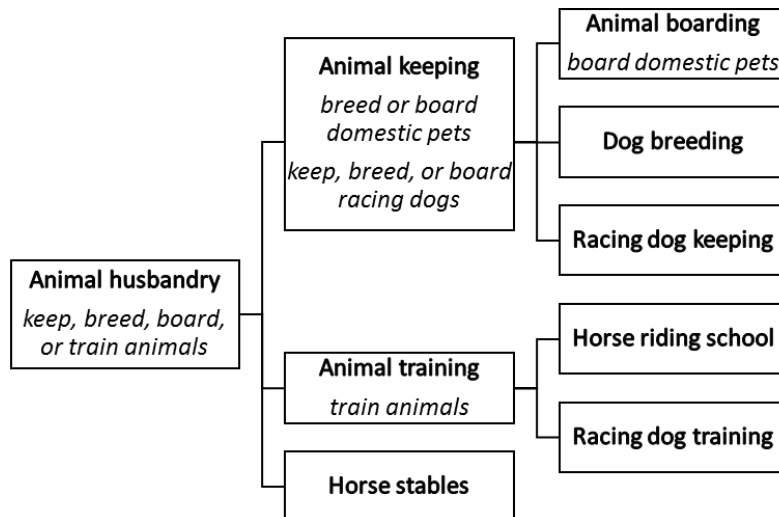
Table 8: Animal husbandry definitions

Land use term	Definition	Includes	Included in
Animal husbandry	Land used to keep, breed, board, or train animals, including birds.	Animal keeping Animal training Horse stables	Agriculture
Animal keeping	Land used to: a) breed or board domestic pets; or b) keep, breed, or board racing dogs.	Animal boarding Dog breeding Racing dog keeping	Animal husbandry
Animal boarding	Land used to board domestic pets, such as boarding kennels and a cattery.		Animal keeping
Dog breeding			Animal keeping
Racing dog keeping			Animal keeping
Animal training	Land used to train animals.	Horse riding school Racing dog training	Animal husbandry
Horse riding school			Animal training
Racing dog training			Animal training
Horse stables			Animal husbandry

The definitions distinguish:

- farm animals in **Extensive animal husbandry** and **Intensive animal husbandry**
- racing dogs
- dogs in general
- domestic pets
- horses
- other animals.

Figure 1: Understanding the non-farm animals covered by Animal husbandry terms



In a recent VCAT case of *Living Streets Designs Pty Ltd v Strathbogie SC (Red Dot) [2016]* VCAT, the VCAT considered a number of issues, namely whether the defined use of training (which is as of right) would be caught up in the other defined use of **Animal keeping** and therefore the whole enterprise required a planning permit. As the facility involved a separate and distinct use (**Animal keeping**), this second use required a planning permit. The Tribunal noted a high level review of these definitions was required, including determining whether both definitions needed to be retained, noting that no actual definitions of these two defined uses are provided in Clause 74. The Committee notes that these uses are covered by Clause 52.40¹³ introduced into the VPP on 29 August 2017.

In that case, the impact of the differences between the two definitions resulted in **Racing dog training** (a Section 1 use in the Farming Zone) did not require a planning permit, but **Racing dog keeping** which is nested under **Animal keeping** was only a Section 1 use in the Farming Zone if there were fewer than 5 animals under **Animal keeping**.

It is worth noting that keeping a domestic pet would seem to fall under **Agriculture** and would be a Section 2 use permit required in a General Residential Zone if it were not ancillary to the **Accommodation** use. This is likely to be managed by way of local laws.

¹³ 52.40-1 Requirement:

An application to use land, or construct a building or construct or carry out works, for racing dog keeping or racing dog training under a provision of a rural zone must comply with *Planning requirements for racing dog keeping and training* (Department of Environment, Land, Water and Planning, August 2017).

This requirement does not apply to an application to construct a building or construct or carry out works associated with a use that is a Section 1 use in the Table of uses of the zone.

In the General Residential Zone a person without a permit can:

- breed domestic pets, provided there are no more than two animals
- keep, breed, or board racing dogs provided there are no more than two racing dogs.

It is not clear to the Committee how a successful breeding operation can take place with no more than two animals.

In the General Residential Zone a person can seek a permit to:

- breed domestic pets, provided there are no more than five animals
- keep, breed, or board racing dogs provided there are no more than five racing dogs.

A number of submissions addressed the fact that confusion is often created with whether the animals are 'domestic' or 'livestock' and whether animals are pets or not (some people claim to have horses, cows, bulls, goats etc as pets).

Doggy day care

Some submitters sought a specific clarification around **Doggy day care**. The Committee thinks that this is simply a form of animal boarding and the definition could make this clear.

Equine related definitions

A number of submissions suggested that equine related uses should be removed from **Agriculture** to better manage the impact on productivity and amenity.

Submissions called for a definition of **Horse Stables** and **Horse riding school**.

The City of Warrnambool advised that horse related activities are increasingly popular in the rural areas of the city. It submitted that while the VPP currently provides a land use term for Horse stables, the lack of definition for this term can cause ambiguity in decision making.

For example, if a horse activity falls under **Horse stables**, it is a Section 1 use (no permit required use) in the Farming Zone. However, if it does not fall under this term, it can fall under **Extensive animal husbandry** (Section 1 use – no permit required use) or **Intensive animal husbandry** (Section 2 use – permit required use) in the Farming Zone.¹⁴

Part of this concern was that farms in the Green Wedge Zone were being "overtaken" by hobby farms and horse agistment where previously they were used for agricultural purposes such as cattle grazing, and cropping. These concerns extended to the loss of valuable farming land to pursuits that are not traditionally 'agricultural' and do not contribute to food production.

This is not primarily a definitional issue but a policy issue, though there seems to be merit in identifying **Horse husbandry** and a separate definition. For example, Patrick Dubuc spoke of:

... the ongoing "investment" and boarding of horses (where people keep horses of city people) which seems to become a constant on green wedge property. Or maybe horse stables and horse riding school need to be merged or nested more closely together.

Defining **Horse husbandry** as a broader term capturing **Horse Stables** and **Horse riding school** would seem to address the issues that give rise to calls for definitions for these terms.

¹⁴ see Vaughan v Warrnambool CC [2015] VCAT 1039 (14 July 2015)

A way forward

The Committee sought feedback on a number of possible changes:

- Divide **Animal husbandry** into terms dealing with farm animals (**Extensive animal husbandry** and **Intensive animal husbandry**), domestic pets, racing dogs, and other animals.
- Split the current definition of **Animal keeping** into **Domestic pet husbandry** and **Racing dog husbandry**.
- Replace the definition of **Animal keeping** with a broad definition that applies to animals other than farm animal, domestic pets and racing dogs.
- Rename **Animal boarding** to **Domestic pet boarding** and revise it to include domestic pet day care.
- Move **Horse riding school** to be nested under **Animal Keeping** rather than **Animal training**.

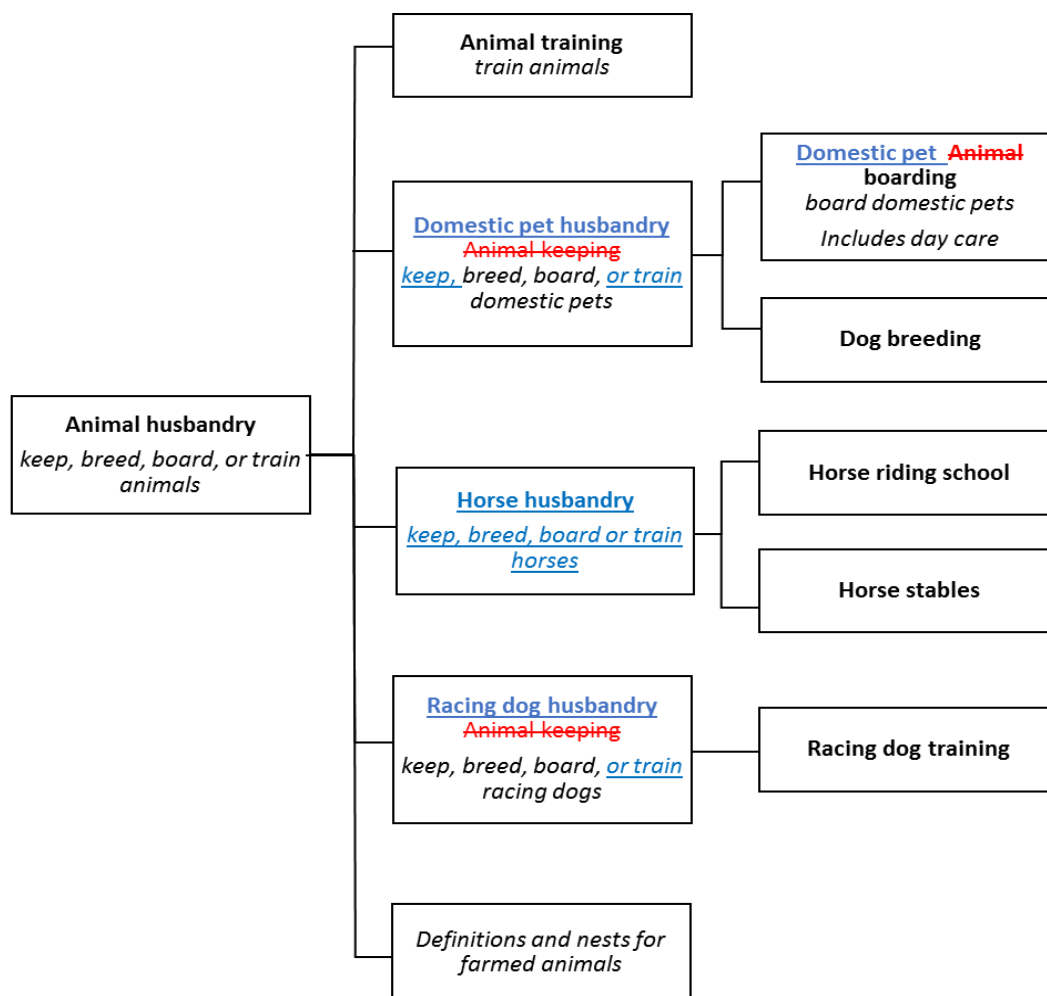
There was general support for the thrust of the changes proposed in the Discussion Paper, but some refinements suggested. The Green Wedge Protection Group provided a succinct response to the question ‘Is there merit in renaming the Animal husbandry terms to make them clearer?’: *“Absolutely!!!”*

Based on the submissions the Committee proposes a refinement of the Discussion Paper proposal. This is shown in Figure 2.

The main change from the Discussion Paper are:

- the introduction of **Horse husbandry** and the nesting of **Horse riding school** and **Horse stables** under this term
- the deletion of a generic **Animal keeping** definition, as these uses can be dealt with under Animal husbandry.

Figure 2: Proposed re-nesting and renaming of selected Animal husbandry terms, excluding farm animals



The Committee considers that most decisions around **Animal husbandry** should wait until the **Intensive animal husbandry** and **Extensive animal husbandry** definitions have been resolved. However, there was strong support immediate changes to **Animal boarding** given the current term is misleading and the inclusion of ‘Doggy day care’ (domestic pet day care).

The Committee recommends in the short-term:

Rename **Animal boarding as **Domestic pet boarding** and change the definition to read:**

‘Land used to board domestic pets, such as boarding kennels and a cattery. [It includes domestic pet day care](#)’.

Split the current definition of **Animal keeping into **Domestic pet husbandry** and **Racing dog husbandry**.**

Introduce the term **Horse husbandry and nest **Horse riding school** and **Horse stables** under this term.**

Change the **Animal husbandry terms and nest them as shown in Table 9.**

Table 9: Recommended Animal husbandry definitions

Land use term	Definition	Includes	Included in
Animal husbandry	Land used to keep, breed, board, or train animals, including birds.	Animal keeping Animal training Apiculture Domestic pet husbandry Extensive animal husbandry Horse stables husbandry Intensive animal husbandry Racing dog husbandry	Agriculture
Animal training	Land used to train animals, other than domestic pets, horses, or racing dogs.	Horse riding school Racing dog training	Animal husbandry
Animal keeping Domestic pet husbandry	Land used to: a) keep, breed, or board or train domestic pets; or b) keep, breed, or board racing dogs.	Animal boarding Dog breeding Domestic pet boarding Racing dog keeping	Animal husbandry
Dog breeding			Animal keeping Domestic pet husbandry
Animal Domestic pet boarding	Land used to board domestic pets, such as boarding kennels and a cattery. It includes domestic pet day care.		Animal keeping Domestic pet husbandry
Horse husbandry	Land used to keep, breed, board or train horses.	Horse stables Horse riding school	Animal husbandry
Horse riding school			Horse keeping Animal training
Horse stables			Horse keeping Animal husbandry
Animal keeping Racing dog husbandry	Land used to: a) breed or board domestic pets; or b) keep, breed, or board or train racing dogs.	Animal boarding Dog breeding Racing dog keeping Racing dog training	Animal husbandry
Racing dog keeping			Animal keeping
Racing dog training			Animal training Racing dog husbandry

(v) Horticulture and Crop raising

A number of submitters to the Smart Planning process contended the differences between **Crop raising** and **Horticulture** was not clear, but it is not clear to the Committee how these difficulties play out in practice.¹⁵ **Horticulture** is nested under **Crop raising**.

Table 10: Comparison of plants referred to in Crop raising and Horticulture

Crop raising	Horticulture
Land used to propagate, cultivate or harvest plants, including:	Land used to propagate, cultivate, or harvest:
- cereals	-
- flowers	- flowers
- fruit	- fruit
- seeds	-
- trees	-
- turf	-
- vegetables	- vegetables
-	- vines
-	- or the like

There was a submission to Smart Planning in relation to “*intensive horticulture*” which may be undertaken within the structures or buildings such as greenhouses, specifically as structures for the cultivation or protection of plants.

One option is would be to create new definitions under **Horticulture** to differentiate between **Protected horticulture** and **Open air horticulture**. It seems that the issue relates primarily to the horticultural structure and rather than the use as such. If there is a policy reason to control these structures then it might be better to address it a building and works issue rather than a land use issue. This would potentially allow control (if it were justified) under overlay controls and well as zone controls. Alternatively, clear guidance should be given that a permit is not required.

The Committee did not receive responses to the Discussion Paper seeking changes to **Horticulture** or **Crop raising**.

(vi) Community gardens

A number of submissions sought a definition of “*market garden/streetscape garden/edible garden*”. *Plan Melbourne* says:

Policy 5.4.2 Support community gardens and productive streetscapes

Melbourne has more than 50 community gardens, with more planned. Establishing more community gardens will give Melburnians opportunities to share skills and learn from their neighbours’ food-growing knowledge, increase social interaction and community partnerships, produce local food for

¹⁵ As an aside, it is not clear to the Committee that a mushroom is a plant, except in the broadest of taxonomies and so would not be covered by these definitions.

personal consumption or sale at local farmers' markets, and promote healthy eating.

The Discussion Paper stated that there may be merit in defining a **Community garden** if there is a policy position to reduce controls on this sort of community activity. Submissions pointed out that

'Community Garden' could be identified in Clause 62.01 as 'gardening' is already included in Clause 62.02-1.

The issue is not so much the activity of gardening but the associated infrastructure and, potentially the desire to hold events that seems to be the issue. These are separate issues to the primary use of the land for gardening.

The Committee concludes that there is no need to define community garden, but if the establishment and management of community gardens is being hindered by the planning system the solution may be a particular provision.

4.3 Child care centre group

(i) Family day care

The Discussion Paper asked:

*Should the VPP define **Family day care** and make it as of right where **Home based business** is as of right for fewer than, say, five children?*

Family day care is a regulated service. A family day care use would be a **Home based business** but would probably not meet the floor area requirements of Clause 52.11 to be as of right in residential zones:

- *The net floor area used in conducting the business including the storage of any materials or goods must not exceed 100 square metres or one-third of the net floor area of the dwelling, whichever is the lesser. The net floor area of the dwelling includes out-buildings and works normal to a dwelling.*

A permit can be granted but only if the following condition is met:

- *Which has a floor area not exceeding 200 square metres or one-third of the net floor area of the dwelling, whichever is the lesser.*

Family day care might be analogous to **Home based businesses** or **Bed and breakfast**, both of which are permitted subject to certain limitations.

There was broad support for the thrust of defining **Family day care** and making it as of right where **Home based business** is as of right.

Mornington Peninsula Shire Council, encapsulated a common concern:

Yes, Family day care should be defined given Child care centre only can be applied if it is accommodating five or more children and the planning scheme is currently silent on child care with fewer than five children.

Warrnambool City Council agreed that **Family day care** should be defined. It is suggested that it could also be referred to within the **Home based business** provisions at Clause 52.11 but exempt from the floor area limitations.

Coliban Water expressed concern over it being a sensitive use and it might create encroachment issues in some areas.

On reflection the Committee does not see the need for a separate definition, as the term is generally well understood and as the use is regulated there is little role for planning. The Committee does see a need to update Clause 52.11 to make it clear that family day care can operate as a **Home based business**. The term has a well-defined meaning and the use is controlled by other Acts and regulations.

The Committee recommends in the medium-term:

Update Clause 52.11-1 to read:

- **‘The net floor area used in conducting the business including the storage of any materials or goods must not exceed 100 square metres or one-third of the net floor area of the dwelling, whichever is the lesser. This does not apply to Family day care. The net floor area of the dwelling includes out-buildings and works normal to a dwelling’.**

(ii) What is the role of a Kindergarten?

The Committee sought feedback as to whether **Kindergarten** should be moved from **Child care centre** and placed under the **Education centre**. Alternatively, **Child care centre** could be nested under **Education centre**.

There was broad support for nesting **Child care centre** under **Education centre**. For example, the Whittlesea City Council said:

Child Care Centre (including Kindergarten) should be nested under Education centre for the following reasons:

- *they provide a government recommended early years education service*
- *Sessional Kindergartens provide government and subsidised 3 year and 4 year kinder programs*
- *Child care centres are increasingly offering 4 year and sometimes 3 year kinder programs (also government recognised and subsidised), within their broader child care responsibilities*
- *they employ qualified early years/primary school teachers to facilitate this.*

In addition, recognising Child Care Centres as an Education centre will enable these land uses to benefit from similar positive locational outcomes as primary schools, including locating them outside the buffer distances of high voltage electricity infrastructure and not siting them on arterial roads.

The Committee recommends nesting **Child care centre** under **Education centre** but does not imply this should mean a change in permissions under zones:

- where **Child care centre** and **Education centre** are listed in the same section of a zone without conditions **Child care centre** can be deleted from the zone tables
- where **Child care centre** is in a different section of the zone or has a condition ‘Education centre’ can be replaced with ‘Education centre (other than Child care centre)’.

The Committee recommends in the medium-term:

Nest Child care centre under Education centre.

4.4 Earth and energy resources group

There were general submissions stating an overhaul of this Earth and energy resources group was required in order to incorporate or manage changes within the industry. **Earth and energy resources industry** and **Stone extraction** definitions are being considered through a separate process and fall outside of this review.

4.5 Education

Concerns were expressed in the Smart Planning consultation that the definitions of education delivery models too narrow.

Education centre is a broad definition, and while the nested terms are narrow, it is not clear that what additional term ought to be listed. The Committee sought feedback as to what new **Education centre** terms are needed and why.

Table 11: Education centre definition

Land use term	Definition	Includes	Included in
Education centre	Land used for education.	Employment training centre Primary school Secondary school Tertiary institution	

In many cases education will be ancillary, or take place in what would otherwise be a **Place of assembly**. For example, training courses in a conference or function centre. This would not seem to be a normal part of that other use and a separate permission would not need to be sought.

It was suggested in Smart Planning consultation that there needs to be a distinction between private, public and not for profit providers, but it not clear why this is relevant from a planning perspective. The overwhelming majority of submissions did not see the need for any change.

One Council provided the example:

... of wanting to teach people/educate on organic food-growing in a Green Wedge area where the use was found to be prohibited. This is nonsensical as this is the ideal location to teach people how to grow food, or it could be any agricultural learning. Either the definition of education needs more subcategories that would alleviate any concerns with other educational uses being located in those areas (although I'm not sure I see what the issue is when you can have a school) but they may be an aside around the allowable uses within the zone.

The issue does not seem to be of definitions but zone controls.

4.6 Energy generation and the Renewable energy group

(i) Energy generation

There is no definition for **Energy generation**. The Committee's attention was drawn to the approval for the Morwell Diesel Generators that did not have a land use definition. The

generation of power from a variety of sources is likely to be an emerging issue in a diversified electricity grid.

The Committee recommends in the medium-term:

Create a definition of Energy generation facility as follows:

‘Land used to produce energy for sale off site’.

(ii) Renewable energy group

There were a number of submissions made in Smart Planning consultation stating that this nesting group should have sufficient definitions that are flexible enough to provide current but future proofed definitions of the kind of facilities for evolving energy resources. This would have the result of the focus being on the impact rather than the form, which is consistent with one of the broader principles of considering the purpose of the use.

The Committee notes that the term **Renewable energy facility** is being examined under the Statewide Waste and Resource Recovery Plan to include further aspects to the definition.

(iii) Solar farm

There was a submission stating that the term solar farm required definition in order to future proof this form of **Renewable energy facility**. There was a recent Advisory Committee established to consider a call in of a VCAT case relating to the expansion of the Countrywide Energy Solar Farm in Wangaratta North, however, that matter did not appear to raise any issues in the land use definition of a solar farm. The Committee did not propose to introduce a definition for solar farm, however, it invited submissions as to whether it should consider introducing a new definition of solar farm that could be drawn on the current **Wind energy facility** definition.

A number of submissions said there should be a definition, but no clear reasons why were presented. There does not seem to be any doubt that a **Solar farm** would be a **Renewable energy facility**.

(iv) Waste-to-energy facility

At present a waste-to-energy plant would seem to fall under the term **Refuse disposal** in Clause 74. Sustainability Victoria pointed out that a definition for **Waste-to-energy facility** would be worthwhile. Waste-to-energy facility is captured in Clause 52.10 as “*Combustion, treatment or bio-reaction of waste to produce energy*”.

Waste-to-energy clearly does not fall into the definition of a **Renewable energy facility**, and while there may be environmental benefits from a waste-to-energy plant it is not a renewal resource. It is tempting to think of waste-to-energy as incineration, but it covers a wide range of technologies.¹⁶

¹⁶ *Turning waste into energy: Join the discussion*, Department of Environment, Land, Water and Planning 2017. EPA publication 1559.1 *Guideline: Energy from Waste* (July 2017) also provides an overview of the different forms of Waste-to-energy and outlines how the *Environment Protection Act 1970* and associated statutory policies and regulations are applied to the assessment of proposals that recover energy from waste.

Coliban Water, for example submitted that it would be beneficial to have a waste-to-energy definition, and suggested that sewage treatment plants, or wastewater treatment plants, have significant future potential to be classified as waste-to-energy facilities.

Yarra Valley Water advised that it developed its first waste-to-energy facility in Wollert, in 2017. The success of the facility has led Yarra Valley Water to look at development opportunities for further waste-to-energy facilities.

It was submitted that there is a need to distinguish a waste-to-energy facility that is primarily servicing a use of land on which it is located from a facility that is used to service the National Electricity Market. The Committee agrees with this.

Baw Baw Shire Council contended that **Utility installation** should be amended to include the 'generation' of power. From a practical point of view, it probably makes no difference whether **Waste-to-energy facility** is nested as part of **Utility installation** or is unnested; it would be a Section 2 use in zones. On balance the Committee thinks that it would be better not to nest the term as opposed to changing the definition of **Utility installation** which at present is much more oriented around transmission facilities.

The Committee recommends in the medium-term:

Create a new definition of **Waste-to-energy facility as follows:**

'Land used for the combustion, treatment or bio-reaction of waste to produce energy for sale off site. It includes the activities to collect, temporarily store, process, or transfer waste materials for energy production'.

(v) A new energy generation group

There were suggestions that a new group could be created that included all energy generation. This makes sense given there will now be a number of related energy generation uses.

Baw Baw Shire Council contended that **Utility installation** should be amended to include the 'generation' of power. As outlined above, the Committee thinks that it would be better not to create a new nest as opposed to changing the definition of **Utility installation** which at present is much more oriented around transmission facilities.

Create a new **Energy generation group with the definition 'Land used to produce energy' that includes:**

- **Energy generation facility**
- **Renewable energy facility**
- **Waste-to-energy facility.**

4.7 Industry

Issues raised in relation to **Industry** uses included:

- General submissions to Industry
- Small scale food production
- Research and development centre
- Materials recycling, Transfer station and Refuse disposal
- Waste-to-energy facility
- Motor repairs.

(i) General submissions to Industry

The Discussion Paper recorded general submissions made in Smart Planning consultation in relation to the **Industry** nesting group including:

- Deleting the industrial uses from Clause 74 and inserting them into Clause 52.10.
- Whether Industry could be compartmentalised to be more narrowly defined to be more prescriptive of “heavy” and “light” Industry as currently occurs in New South Wales.

These submissions require a policy decision that falls outside the scope of this review.

(ii) Breweries and tourist oriented industry

Micro-brewing is a new and emerging industry that could benefit from definition in the planning scheme. Currently it is an undefined use that falls within **Industry** or potentially **Manufacturing sales**.

In Clause 52.10 it would be categorised as ‘Food and Beverage Production other than those listed within this group’. As such, it would be prohibited in the Commercial 1 Zone and Township Zones. It would be subject to permit in the Farming Zone, and prohibited in the Green Wedge Zone.

The broader issue is whether breweries, distilleries or chocolate factories could be defined and treated the same way as a **Winery**, on the basis these uses have a tourism orientation as much as an industry orientation.

Table 12: Winery and Rural industry definition

Land use term	Definition	Includes	Included in
Winery	Land used to display, and sell by retail, vineyard products, in association with the growing of grape vines and the manufacture of the vineyard products. It may include the preparation and sale of food and drink for consumption on the premises.		
Rural industry	Land used to: <ol style="list-style-type: none"> handle, treat, process, or pack agricultural produce; service or repair plant, or equipment, used in agriculture; or manufacture mud bricks. 	Abattoir Sawmill	Industry

A **Winery** is different to these types of uses because it occurs “*in association with the growing of grape vines and the manufacture of the vineyard products*”. One submitter suggested there should be a definition of **Cellar door sales** but this would just seem to be a **Winery**.

The Discussion Paper asked whether there was merit in defining **Brewery**, **Distillery** or **Chocolate factory** and other similar uses.

There was broad support for a definition of these uses to address:

- small scale food production in commercial area
- tourism oriented establishments in rural areas.

Mornington Peninsula Shire Council submitted:

*Breweries and distilleries have in the past years been approved and proposed as **Rural industry** under the 'handle, treat, process or pack agricultural produce' component of the land use term. In order to satisfy this definition Breweries and Distilleries have been proposed with an associated agricultural arm such as the substantial hops, grain, orchards and/or other ingredients of the alcohol they wish to produce. The issue with this is determining the extent of the ingredients required and essential to the production of the product. This has created ambiguity both within Council and the Tribunal as to a clear understanding what constitutes rural industry.*

VCAT found in *Rainsbury v Bass Coast SC* [2009] it was not considered that hops alone, despite the proposal supplying 50 to 100 per cent of the hops required for beer production on the land, was so central to the process of making beer. Greater clarity on the ingredients would be critical to ensuring that productivity of agricultural land within the Green Wedge is not unnecessarily wasted.

DEDJTR Invest Assist submitted that:

Our experience with microbreweries and chocolateries is that they are similar in operations and amenity impacts to wineries which are section 2 uses in Green Wedge Zones. We support the ability for microbreweries, distilleries and chocolateries to locate in peri-urban areas where land is often a superior choice for these businesses due to the access to markets, infrastructure and landscape features. If relying on the industry and Manufacturing sales definitions the issue of what constitutes 'incidental' sales is often debated. This may require a land use definition change and possibly a consequential change to the table of uses in relevant zones. We also support the ability for businesses such as microbreweries to locate in established urban areas and near high street shopping precincts which may require a land use definition change to differentiate them from other manufacturing facilities.

The Environment Protection Authority (EPA) recognises the growth in these industries in recent years and supported separately defining **Brewery**, **Distillery** and **Chocolate factory** and nesting them under **Industry**. The EPA said this was consistent with their inclusion at Clause 52.10 – *Uses with adverse amenity potential under Food or beverage production other than those listed within this group*. As a Determining Referral Authority for these industries, EPA notes that Councils are not always aware that these uses fit under an industry group at Clause 52.10. Definition and nesting would assist in addressing this level of ambiguity and allow for appropriate consideration of potential amenity impacts.

While EPA acknowledged that these industries are similar to **Wineries** in that they have both a tourism and industry basis, the key difference between them is their location; **Wineries** are generally situated within a Farming Zone, many breweries, distilleries and chocolate factories are situated within urban areas, and therefore within proximity to sensitive land uses.

The Committee has made recommendations elsewhere about the impact of Clause 52.10 on food manufacturing, in Commercial zones. Whether **Breweries** and the like should be supported in rural areas raises issues beyond the scope of the Committee's Terms of Reference. They are essentially policy issues around rural land use and tourism.

(iii) Materials recycling, Transfer station and Refuse disposal

The EPA submitted that **Landfill** and **Composting facility** be specifically defined as land use terms, on the basis that both of these types of facilities pose specific planning and regulatory issues which require active management, and consideration of planning matters involving them is increasing.

The EPA advised there is a Statewide Waste and Resource Recovery Plan amendment process currently under way. This process will examine, among other issues, a land use and waste planning framework and will consider definitions relating to **Materials recycling**, **Transfer station** and **Refuse disposal**.

The EPA considered there to be merit in establishing a consistent approach to defining landfills and composting facilities across the Regional Waste and Resource Recovery Implementation Plans and the VPP as well as the *Environment Protection (Scheduled Premises) Regulations 2017*, given the connectivity of the documents within the planning system.

The Committee confines itself to specific issues with the current definitions.

Table 13: Waster transfer, recycling and disposal definitions

Land use term	Definition	Includes	Included in
Transfer station	Land used to collect, consolidate, temporarily store, sort or recover refuse or used materials before transfer for disposal or use elsewhere.		Industry
Materials recycling	Land used to collect, dismantle, treat, process, store, recycle, or sell, used or surplus materials.		Industry
Refuse disposal	Land used to dispose of refuse, by landfill, incineration, or other means.		Industry

It is not clear to the Committee why a **Transfer station** deals with “*refuse or used materials*”, but a **Material recycling** deals with “*used or surplus materials*”. Could both deal with “*refuse, used or surplus materials*”?

The Discussion Paper pointed out that it was clear what the practical differences are between “*temporarily store*” in **Transfer station** and “*store*” in **Materials recycling**. Sustainability Victoria submitted:

... the inclusion of ‘temporarily store’ may still be worthwhile here. Stockpiling of materials can become an issue and create fire risks, by including ‘temporarily store’, this might create awareness about the issues for decision makers and environmental enforcement regulators.

Generally the difference between the uses seems clear, with the **Transfer station** being a stop on a journey, whereas **Material recycling** is a facility where material is processed. Deleting “*collect*” from the **Material recycling** definition might make this distinction clearer without having any practical implications.

Clause 52.45, Resource recovery, sets out application requirements and decision guidelines for these uses with the purpose:

To facilitate the establishment and expansion of a Transfer station and/or a Materials recycling facility in appropriate locations with minimal impact on the environment and amenity of the area.

The Committee recommends in the medium-term:

Change Transfer station to read:

'Land used to collect, consolidate, temporarily store, sort or recover refuse, ~~or~~ used or surplus materials before transfer for disposal, recycling or use elsewhere'.

Change Materials recycling to read:

'Land used to ~~collect~~, dismantle, treat, process, store, recycle, or sell, refuse, used or surplus materials'.

(iv) Pod based motor repairs

The Discussion Paper raised the issue of self contained pods being used for minor repairs on cars and whether this needs to be considered in the definition of **Motor repairs**. These pods were submitted as being capable of being placed anywhere, including as an ancillary use on land where the dominant use is a shop, carpark or warehouse. It was contended that there was no need for land use planning control for such a proposition, whereas it may unnecessarily be caught by **Motor repairs**.

If there is merit in supporting this type of activity it may need to be managed by a set of particular provisions. While it may be unworkable to require a permit for each operation there may still be a need to manage the use.

Port Phillip City Council submitted that in an inner-city environment with declining levels of industrial land, pod based services and other types of light industrial uses could be useful (including for urban manufacturing uses). However, more consideration would need to be given to any potential amenity and land contamination impacts of pod based motor repairs. It may also be difficult to reconcile this with prohibition on motor vehicle repairs in **Home based business**.

The EPA advised that it was requested to determine if 'PODs' – defined as self contained, minor autorepair modules – should be scheduled under the Environment Protection (Scheduled Premises) Regulations 2017. EPA determined that such facilities do not trigger the requirement for works approval or licensing. However, the EPA supports the development of a new definition and particular provision in order to ensure environmental risks associated with their operation, including human health and amenity impacts, are appropriately considered. EPA is not aware of other pod based businesses that require the same approach.

If planning schemes were to facilitate this type of operation there would be a need to exempt such uses from a permit. The Committee considers this is a broader policy issue than a definitional issue.

4.8 Leisure and recreation

Issues raised in relation to **Leisure and recreation** uses included:

- Major versus minor
- Restricted recreation facility v Indoor recreation facility

- What’s going on outside?
- Specific terms
- Indoor versus outdoor
- Motor racing track.

(i) Major versus minor

The terms **Major sports and recreation facility** and **Minor sports and recreation facility** do not really communicate their purpose: the distinction is whether where there is substantial provision made for spectators, such as a grandstand, and whether spectators are usually charged admission.

Table 14: Sports and recreation facility definitions

Land use term	Definition	Includes	Included in
Major sports and recreation facility	Land used for leisure, recreation or sport, and where there is substantial provision made for spectators, such as a grandstand, and to which spectators are usually charged admission.	Racecourse	Leisure and recreation
Minor sports and recreation facility	Land used for leisure, recreation, or sport, without substantial provision for spectators, and which is usually open to non-paying spectators.	Indoor recreation facility Informal outdoor recreation Open sports ground Outdoor recreation facility Restricted recreation facility	Leisure and recreation

The Committee sought feedback on whether **Major sports and recreation facility** be renamed **Spectator sports facility**, and **Minor sports and recreation facility** be renamed **Community sports and recreation facility**. Fewer submissions supported this change than opposed it, even though it seems to make good sense to the Committee. Concerns were expressed that the proposed change it would bring its own confusion. The Committee does not recommend any change.

(ii) Restricted recreational facility

The issue here is if a person pays a fee to learn to dance it is an **Indoor recreation facility**, but if they pay a fee to learn yoga it is potentially a **Restricted recreation facility**.

It seems the intent of the **Restricted recreation facility** is to capture clubs, but because it refers to “*Land used ... the public on payment of a fee*” it could be taken to cover a range of small commercial operations that would otherwise fall under **Indoor recreation facility**. Submissions called for this distinction to be clear.

Table 15: Indoor recreation facility and Restricted recreation facility definitions

Land use term	Definition	Includes	Included in
Indoor recreation facility	A building used for indoor leisure, recreation, or sport.	Dancing school	Minor sports and recreation facility
Restricted recreation facility	Land used by members of a club or group, members' guests, or by the public on payment of a fee, for leisure, recreation, or sport, such as a bowling or tennis club, gymnasium and fitness centre. It may include food and drink for consumption on the premises, and gaming.		Minor sports and recreation facility

The Committee recommends in the short-term:

Change Restricted recreation facility to read:

'Land used by members of a club or group, ~~members' guests, or by the public on payment of a fee,~~ for leisure, recreation, or sport, such as a bowling or tennis club, ~~gymnasium and fitness centre.~~ It may include food and drink for consumption on the premises, and gaming. It may also include use by members' guests, or by the public on payment of a fee.'

(iii) Informal outdoor recreation, Open sports ground and Outdoor recreation facility

The Committee was asked to consider and clarify public parks and plazas. The Committee's review of **Informal outdoor recreation**, **Open sports ground** and **Outdoor recreation facility** reveals an overlap in the definitions that could be removed:

- *"Land used for outdoor ... sport"* would seem to include *"Land used for sport, but which is available for informal outdoor leisure or recreation when not being used or prepared for an organised game"*.
- Similarly *"Land used for outdoor leisure"* would seem to include *"Land open to the public and used by non-paying persons for leisure"*. The issue is the relevant definitions are not nested.

Most submitters supported the suggested changes as they would improve clarity.

Table 16: Outdoor recreation facility definitions showing possible changes

Land use term	Definition	Includes	Included in
Informal outdoor recreation	Land open to the public and used by non-paying persons for leisure or recreation, such as a public plaza , public park , cycle track, picnic or barbecue area, playground, and walking or jogging track.		Minor sports and recreation facility
Open sports ground	Land used for organised games of sport, but which is available for informal outdoor leisure or recreation when not being used or prepared for an organised game. It may include lights, change rooms, pavilions, and shelters.		Minor sports and recreation facility
Outdoor recreation facility	Land used for outdoor leisure, recreation, or sport. It does not include an Open sports ground or Informal outdoor recreation.	Amusement park Golf course Golf driving range Paintball games facility Zoo	Minor sports and recreation facility

The Committee recommends in the short-term:

Change [Informal outdoor recreation](#) to read:

‘Land open to the public and used by non-paying persons for leisure or recreation, such as a [public plaza](#), [public park](#), cycle track, picnic or barbecue area, playground, and walking or jogging track’.

Change [Open sports ground](#) to read:

‘Land used for [organised games of](#) sport, but which is available for informal outdoor leisure or recreation when not being used or prepared for an organised game. It may include lights, change rooms, pavilions, and shelters’.

Change [Outdoor recreation facility](#) to read:

‘Land used for outdoor leisure, recreation, or sport. [It does not include an Open sports ground or Informal outdoor recreation](#)’.

(iv) Specific Indoor recreation facility terms

It was submitted that the terms generally needed updating to better reflect contemporary terms, including, for example, a virtual reality recreation centre.

There was a concern that [Dancing school](#) was no longer needed. The Committee observes that dance studios are a surprisingly popular land use, and the term could be renamed to [Dance studio](#) to better reflect current terminology.

A number of stakeholders called for new definitions for [Gym](#), [Personal training](#), [Pilates](#) and [Yoga studios](#). These uses fall clearly in the definition of [Indoor recreation facility](#).¹⁷ Listing them could help remove confusion about how they are defined. The Committee

¹⁷ At least they do if the [Restricted recreation facility](#) is made more focused

understands that there may be implications in a number of zones, but definition seems quite unambiguous.

Many of these uses take up shop fronts in a Commercial 1 Zone; they need a permit for this. Rather than provide new definitions, the critical issue would seem to be greater flexibility in zone controls to allow these uses to establish in shop fronts.

Table 17: Indoor recreation facility definition

Land use term	Definition	Includes	Included in
Indoor recreation facility	A building used for indoor leisure, recreation, or sport.	Dancing school	Minor sports and recreation facility

The Committee recommends in the medium-term:

List Gym, Pilates studios and Yoga studio in Clause 74 as undefined terms, nested under Indoor recreation facility.

Change Dancing school be changed to Dance studio.

(v) Indoor versus outdoor

Most **Outdoor recreation facilities** will have a club house, and many **Indoor recreation facilities** will have some outdoor areas. The Discussion Paper enquired as to whether this was an issue. The Committee can report that it is not.

(vi) Motor racing track

Motor racing track does not include ‘training’; and it was submitted that it should. A **Motor training track** falls under **Leisure and recreation**. Submissions said that provision of training at motor racing tracks was a reasonable use to occur. While one submission noted the impacts a training facility would be different to a motor racing track, most considered that the impacts would be the same.

The Committee recommends in the short-term:

Change Motor racing track to read:

‘Land used to race, rally, scramble, or test, vehicles, including go-karts, motor boats, and motorcycles, and includes other competitive motor sports. It may include training facilities’.

4.9 Office

(i) Medical centre and Hospital

There were limited submissions made in Smart Planning consultation in relation to this nesting of terms, with the only submissions received relating to the definition of **Medical centre**. Some specific submissions sought clarification around the “*provide health service*” aspect of the definition and whether this included nurses. It is not apparent to the Committee why this distinction in relation to nurses needs to be made.

Table 18: Medical definitions

Land use term	Definition	Includes	Included in
Medical centre	Land used to provide health services (including preventative care, diagnosis, medical and surgical treatment, and counselling) to out-patients only.		Office
Hospital	Land used to provide health services (including preventative care, diagnosis, medical and surgical treatment, and counselling) to persons admitted as in-patients. It may include the care or treatment of out-patients.		

One submitter to Smart Planning suggested framing **Medical centre** to be a “consultative service” so as to encompass similar “non-medical” purposes such as naturopathy, although this may be redundant as the definition of **Office** references “professional” activity and a planning permit can describe the use as ‘Naturopathy (**Medical centre**)’. A more basic issue is that not everyone would consider naturopathy to be medicine, but the planning impacts do not depend on the nature of the consultation. Because the definition includes ‘counselling’ the Committee thinks it would cover a broad range of services where health related advice is given even if that advice did not have a strong evidence base.

Most submitters did not see a need to change the definition.

Yarra Ranges Shire Council submitted that the definition warrants better clarification of where physiotherapy, osteopathy, chiropractor and the like sit, and whether consideration should be given as to whether it is associated with related medical qualifications. The Committee does not see that the impact of the use varies with the qualifications of the person delivering the service.

Whittlesea City Council submitted that **Medical centre** should include pathology on the basis that pathology might be categorised as industry (any process of testing or analysis) and is prohibited within residential areas. The Committee agrees with including pathology to avoid any confusion.

Moreland City Council was concerned that definitions needed to differentiate between **Beauty salon** and a **Medical centre**, presumably on the basis that cosmetic surgery was not seen as a ‘health’ issue. The Committee thinks that the definition could specifically include surgical procedures.

The Discussion Paper noted that the difference between a **Hospital** and a **Medical centre** hinges on whether the facility treats ‘in-patients’ or ‘out-patients’. The Committee understands that in the medical world:

- some in-patients, while admitted, are not present at a facility – they may be treated by way of a ‘hospital in the home’ service
- some outpatients may stay overnight at a facility.

No submitters were troubled by this.

The Committee recommends in the medium-term:

Change **Medical centre** to read:

‘Land used to provide health or surgical services (including preventative care, diagnosis, medical and surgical treatment, pathology services, and counselling) to out-patients only’.

4.10 Place of assembly

There were a number of submissions made in Smart Planning consultation about Place of assembly. Some submitters contended the term was too broad, but others thought it was too limiting. Submissions raised issues about:

- Cinema Based Entertainment Facility
- Commercial art galleries
- Amusement parlour
- Carnival and Circus
- Festival – Music and Arts Festival
- Function centre – Conference centre – Reception Centre
- Place of Worship
- Live Music – Live Music Venue.

(i) Cinema based entertainment facility

A submission suggested shifting **Cinema based entertainment facility** from an unnested use to **Place of assembly**. This makes sense given the nature of the use.

Table 19: Cinema type definitions

Land use term	Definition	Includes	Included in
Cinema	Land used to provide screen based entertainment or information to the public.		Place of assembly
Cinema based entertainment facility	Land used to provide screen based entertainment or information to the public, in association with the provision of meals or sporting, amusement, entertainment, leisure or retail facilities.		
Drive-in theatre			Place of assembly

Drive-in theatre is not defined but is nested under **Place of assembly**. **Drive-in theatre** seems to be a redundant term considering the broad definition of **Cinema** and **Cinema based entertainment facility**, but the Committee recognises that drive-in theatres do still exist and as a concept may still be pursued. A **Drive-in theatre** will have a vastly different impact to a **Cinema**.

The Discussion Paper asked whether the definitions of **Cinema** and **Cinema based entertainment facility** specifically exclude a **Drive-in theatre**. This was not seen as necessary by almost all the submitters who addressed this issue.

There was broad support to nest **Cinema based entertainment facility** under **Place of assembly**. This is logical place for this use and will make use of planning schemes easier, because a **Cinema based entertainment facility** is clearly “*Land where people congregate for ... entertainment ...*”.

Modern technology has resulted in video art, the augmentation of live music performances with video, screen based entrainment in **Hotels** (Fox sports) and even the provision of screen based information at tram stops. It was submitted that there was a need to break the “*tight nexus between moving image display and Place of assembly definition ...*”

While it is appropriate that a ‘picture theatre’ remains in **Place of assembly** there should be no planning restriction between the display of a static visual art or moving image in an **Art gallery, Hotel, Tavern** or **Bar**. Concerns were also raised about the difficulties of conducting small scale art screenings, especially screenings that may occur in shop galleries.

The definition of **Cinema** should make it clear that it refers to a particular type of building, that is theatre or auditorium like in its construction and management.

The Committee recommends in the medium-term:

Nest Cinema based entertainment facility under Place of assembly.

Change Cinema to read:

‘~~Land~~ Building with auditorium or theatre spaces used solely to provide screen based entertainment or information to the public’.

Change Art gallery to read:

‘Land used to display works of art, including ceramics, furniture, glass, paintings, screen based art, sculptures, and textiles’.

(ii) Amusement parlour

It was submitted that **Amusement parlour** is too specific and outdated. The Committee understands that the function of this definition is to establish planning control over establishments with more than two pinball machines, making it clear that three or more machines are not ancillary to another use. This was once a significant planning issue. There is a risk that if the definition and related controls are deleted the issue will re-emerge.

(iii) Carnival and Circus

There was a submission to the Smart Planning process that the definitions for **Carnival** and **Circus** should be updated to apply to non-public land. The Committee understands that the definitions do apply to non-public land, but that:

- Clause 62.01 states that any requirement in this scheme relating to the use of land, other than a requirement in the Public Conservation and Resource Zone, does not apply to the use of land for a **Carnival** or **Circus** if the requirements of A ‘*Good Neighbour*’ Code of Practice for a Circus or Carnival, October 1997 are met.
- These uses are currently exempt from planning permission on public land because of Clause 62.03.

No change is recommended.

(iv) Arts venue

It was submitted that the planning system does not deal well with arts venues and part of the mismatch is due to arts and cultural spaces becoming smaller and more casual in their offerings. For example, small ‘do it yourself’ screen cinemas did not exist in the 1960s. Spaces are also becoming more hybrid: a small **Bar** may host occasional art exhibitions,

poetry readings, comedy acts, live music and film screenings. Concerns were expressed over how a small hybrid venue would be treated in the planning system.

The Committee observes that a **Bar** is a **Tavern** which is defined as:

Land used to sell liquor for consumption on the premises. It may include accommodation, food for consumption on the premises, entertainment, dancing, amusement machines, and gambling.

Poetry readings, comedy acts, live music and film screenings are presumably entertaining and should not be an issue in a **Bar**.

The Committee accepts that display of art work if not ancillary would be a separate use. An **Art gallery** is **Exhibition centre**, which is a **Place of assembly**. If the art is for sale then presumably the premises is a **Shop**.

Table 20: Art gallery definition

Land use term	Definition	Includes	Included in
Art gallery	Land used to display works of art, including ceramics, furniture, glass, paintings, sculptures, and textiles.		Exhibition centre

Comedy or live music performances could require the place be classified as **Nightclub (Place of assembly)** or **Tavern (Retail Premises)**. Under current definitions, film screenings might make a use a **Cinema (Place of assembly)**, but the Committee has made recommendations to address this.

Table 21: Nightclub definition

Land use term	Definition	Includes	Included in
Nightclub	A building used to provide entertainment and dancing. It may include the provision of food and drink for consumption on the premises. It does not include the sale of packaged liquor, or gaming.		Place of assembly

Kate Shaw and others submitted that:

The logic behind the introduction of a Small arts venue definition is:

- *First, that it includes all arts and cultural uses, thereby capturing the growing hybridity of creative expression.*
- *Second, it allows other land uses under 500 square metres that are not categorised as Place of assembly (class 9b) in the [Building Code of Australia] BCA, such as shops and retail premises (class 6) to be used for arts and cultural activities.*
- *Third, the definition of Small Arts Venues aligns with the BCA to allow venues under 500 sqm with arts and cultural uses to be class 6 rather than class 9b.*

While perhaps not a matter directly for this Committee, the practical outcome we seek is coordination between planning and building definitions, and for the following uses Hotel, Restaurant, Small Arts Venue, Live music venue (under 500 square metres), Art Gallery and Hall (under 500 square metres if for Arts and Cultural Uses) to be categorised in the BCA as Class 6 buildings.

The issue of live music is dealt with below and **Cinema** has been dealt with earlier.

These submissions raise a fundamental issue about the best way to support art and cultural activity. The Committee agrees that the planning system may not handle these issues well, but the solution would appear to lie more in broadening a range of existing definitions and as of right uses to provide flexibility, than to seek to define a particular venue as an 'arts venue'. The Committee notes that in a Commercial 1 Zone there would be no permit required for either an **Art gallery**, whether or not is sold the art.

This broadening or relaxation of permissions is beyond the role of this Committee, noting we have made recommendations in respect to a number of issues raised in submission on arts related activities elsewhere in this Report.

(v) Live music – Live music venue

There is a *Planning Practice Note 81 (May 2016)* which specifically provides guidance in relation to the planning controls relating to Live Music and Entertainment Noise, managing the agent of change principle and Clause 52.43. The Planning Practice Note provides examples of some of the various venues that can be turned into a live music venue. Detailed submissions were made on this topic that seemed more concerned with building regulations than planning controls.

The Advisory Committee invited submissions whether **Live music venue** should be listed in Clause 74, and if so how would it be defined. The City of Melbourne provided a thoughtful submission on this issue:

The more pertinent question for the purposes of this Advisory Committee is what is the purpose of defining a live music venue in the planning scheme? If it is so that the cultural importance of live music venues to Melbourne is clearly recognised and acknowledged in the planning scheme, then the land use definitions is not the most appropriate place for this. Rather, the State Planning Policy Framework (SPPF) should be updated to adequately acknowledge and recognise the cultural importance of live music to the State of Victoria, in particular to its capital – Melbourne.

However, it would be useful to include a definition for Performance Venues that would capture a number of different types of performance art such as live music performance, theatre, comedy etc. This would be a clearer, and more useful way of defining live music venues than what currently exists (currently the closest land use terms for live music venues are under Nightclub or Tavern). A live music venue is more accurately defined as a performance venue rather than a Nightclub or Tavern because it is the performance of live music (rather than selling liquor or providing entertaining and dancing) that is its primary purpose.

Furthermore, existing 'live music venues' in metropolitan Melbourne regularly host other types of performances such as comedy/theatre etc so it would seem to be most logical to include a definition in the scheme that encompasses all of these types of performance. In terms of the management of amenity impacts from different types of Performance Venues, it may be useful to distinguish different uses based on amplification of sound, rather than the type of

performance taking place? Though this might best dealt with via conditions in the zone?

A live music venue is a **Place of assembly**. A number of uses “may include entertainment and dancing”:

- **Function centre**
- **Hotel**
- **Nightclub**
- **Residential hotel**
- **Restaurant**
- **Restricted place of assembly**
- **Tavern** (or **Bar**).

Table 22: Place of assembly definition

Land use term	Definition	Includes	Included in
Place of assembly	Land where people congregate for religious or cultural activities, entertainment, or meetings.	Amusement parlour Carnival Cinema Circus Drive-in theatre Exhibition centre Function centre Hall Library Nightclub Place of worship Restricted place of assembly	

It is not clear to the Committee what advantage there is in defining **Performance venue**, rather than having it simply be a **Place of assembly**. The only advantage it that the definition could be used to relax the planning controls over a small **Place of assembly** that supported live performance. This is a broader policy issue. If there is a separate definition for **Performance venue** it may present issues where other uses want to provide entertainment, for example, it may begin to be seen that a band room in a pub is no longer simply part of the **Hotel** use. This would not be a good outcome for live music.

‘Live music entertainment venue’ is defined in Clause 52.43 for the purpose of that clause.

The Committee concludes there is no benefit in defining **Live music venue** or **Performance venue** and it may be counterproductive to the live music and performance scene.

(vi) Festival – Music and arts festival

There was a submission that there should be a further nested term called **Events** and music and arts festivals could fall under them.

In *MAMF Functions Pty Ltd v Buloke SC (Red Dot) [2016] VCAT 289* the Tribunal considered the proposal to hold a music and arts festival on public land and whether a planning permit

for **Place of assembly** was required to be sought or whether the music festival could be characterised as an innominate use.

Clause 62.03 was discussed as this provides an exemption to allow for temporary events on public land provided the public land manager authorises the event and this could arguably have applied in this case.

VCAT considered what was the real and substantial purpose of the use that a planning permit was being sought and determined that the description in the planning permit of 'Music and Art Festival (Place of assembly)' was accurate and proper, with there being no benefit in removing **Place of assembly** from the planning permit description. This premise was based on the view that the use was properly characterised as **Place of assembly** or as an innominate use still generally falling within the broader land use definition of a **Place of assembly** having regard to the hierarchy and nesting of land use terms within the planning scheme¹⁸.

VCAT determined the general definition of **Place of assembly** could comfortably accommodate music and arts festival as **Place of assembly** encompasses a variety of specific land uses that can either be defined or are innominate, with the common criteria being the congregation of people for a cultural or entertainment activity. VCAT noted that the Council would not inadvertently grant the applicant a general permission by simply stating **Place of assembly** in the preamble of the planning permit. Rather Council would seek to further specify what use has been given permission under the planning permit, in this case arts and music festival.

VCAT also considered whether the use of the land for an arts and music festival amounted to an ancillary or separate use of the land when the factor of camping was also included as a use of the land. The Tribunal formed the view that this combination did not create a new or unusual innominate use and remained an appropriate **Place of assembly** use.

The Committee does not see the need to introduce art and music festival as a land use term to be nested under **Place of assembly**.

(vii) **Function centre – Conference centre – Reception Centre**

Conference centre and **Reception centre** are undefined and nested under **Function centre**.

Table 23: Function centre definition

Land use term	Definition	Includes	Included in
Function centre	Land used, by arrangement, to cater for private functions, and in which food and drink may be served. It may include entertainment and dancing.	Conference centre Reception centre	Place of assembly
Conference centre			Function centre
Reception centre			Function centre

¹⁸ [6]

The Discussion Paper invited submissions as to whether **Conference centre** is now the more generic term and should replace **Function centre** as the head term under **Place of assembly**. Nobody thought this was a good idea. There was no support for combining the terms to be **Function and conference centre**, but support to leave the current terms used as they are.

Submissions supported the addition of ‘conferences’ in the definition for **Function centres** to clarify the range of activities that may take place in a **Function centre**.

The Committee recommends in the short-term:

Change Function centre to read:

‘Land used, by arrangement, to cater for conferences or private functions, and in which food and drink may be served. It may include entertainment and dancing’.

(viii) Hall

A number of submissions called for the definition of **Hall**. **Hall** is nested under **Place of assembly**. As one submitter observed:

On a side note, a Hall is not defined ... what’s the purpose of a hall if not to cater for function (Hall does not state it has to be a public hall).

This observation matters because **Hall** and **Function centre** are treated differently in the Green Wedge Zone and Green Wedge A Zone.

There would seem to be merit in defining **Hall**, but it is not clear to the Committee whether Hall was originally intended to be just a public hall or might also include a church hall, or a hall operated by a not for profit group such as the Scout Association or a cycling club. These facilities might be quite large.

Table 24: Extract of Green Wedge Zone Section 2 Permit required

Use	Condition
Function centre	<p>Must be used in conjunction with Agriculture, Natural systems, Outdoor recreation facility, Rural industry or Winery.</p> <p>The number of patrons present at any time must not exceed the number specified in a schedule to the zone or 150 patrons, whichever is the lesser.</p> <p>The lot on which the use is conducted must be at least the minimum subdivision area specified in a schedule to this zone. If no area is specified, the lot must be at least 40 hectares.</p>

Hall

Perhaps the simplest approach is to put parameters around Hall in the Green Wedge Zones.

The Committee suggests:

Review the need for section 2 conditions in Green Wedge Zones for a Hall.

(ix) Place of worship

Submissions were made in Smart Planning consultation that claimed the definition of **Place of worship** is too limiting and should be expanded to include other activities where a number of people may practice that common faith.

The Committee acknowledges that there are activities which bring people together that do not necessarily have a religious basis to it, but may be more akin to being a spiritual one.

However, others may form the view that the inherent meaning of this term is for the use and development of the land to construct structures that readily relate to a recognised religion, as opposed to a spiritual event that can be held in a library or local hall.

The Committee notes the recent Supreme Court judgement of Justice Emerton in *RSSB Australia Pty Ltd v Ross* [2017] VSC 314, in which VCAT had to consider the nature of the activities and their purpose to ascertain the correct land use term to determine the appropriate planning controls. One of the questions considered was whether the RSSB was a “religion” and could rely on the land use term **Place of worship**. Justice Emerton accepted the submission that noted a liberal approach to the interpretation of this land use may be warranted.¹⁹

The Committee recommends in the short-term:

Change **Place of assembly to read:**

‘Land where people congregate for religious, spiritual or cultural activities, entertainment, or meetings’.

Change **Restricted place of assembly to read:**

‘Land used by members of a club or group, or by members’ guests, for religious, spiritual or cultural activities, entertainment, or meetings. It may include food and drink for consumption on the premises, and gaming’.

4.11 Recreational boat facility

(i) Jetty

The Warrnambool City Council advised that access to waterways involving a **Jetty** is increasingly popular. A recent audit undertaken by the council identified that over 40 jetties have been established within the city’s waterways, with growing pressure for additional jetties. Many of the existing jetties have been established illegally due to a lack of understanding in the community that a **Jetty** is a land use in the VPP that may require a permit.

Council would like this undefined land use term defined so to assist with community education, planning applications, and enforcement.

The Committee can see the need for the community education program proposed by Warrnambool City Council, but don’t think that a definition is necessary to achieve it. Any campaign can simply say words to the effect that:

A permit is required for a Jetty. A Jetty is not defined in the planning scheme so its common usage applies – a horizontal walkway providing access from the land out into water at which boats can dock or be moored.

¹⁹ [47]

4.12 Retail premises

Issues raised in relation to **Retail premises** uses included:

- Food and drink:
 - New definitions
 - Tables in a takeaway
 - Deliveroo and Uber eats
 - Bar, Nightclub or venue.
- Shop:
 - Small performances in shops
 - Small food manufacturing
 - Personal services – days spaces and massage parlours.
- Restricted retail premises.

4.12.1 Food and drink premises

(i) New definitions

Many submissions made in Smart Planning consultation said there should be new or refined definitions to:

- define **Cafe**
- define **Bar**
- address food trucks.

There are three definitions that relate to primarily to the sale of food:

Table 25: Sale of food definitions

Land use term	Definition	Includes	Included in
Take away food premises	Land used to prepare and sell food and drink for immediate consumption off the premises.		Food and drink premises
Convenience restaurant	Land used to prepare and sell food and drink for immediate consumption, where substantial provision is made for consumption both on and off the premises.		Food and drink premises
Restaurant	Land used to prepare and sell food and drink, for consumption on the premises. It may include: <ul style="list-style-type: none"> a) entertainment and dancing; and b) the supply of liquor other than in association with the serving of meals, provided that tables and chairs are set out for at least 75% of patrons present on the premises at any one time. It does not include the sale of packaged liquor.		Food and drink premises

Clause 62 says any requirement in this scheme relating to the use of land²⁰, does not apply to the use of land in a road to trade from a stall, stand, motor vehicle, trailer, barrow or other similar device. It would seem planning schemes only apply to food trucks if they are

²⁰ Other than a requirement in the Public Conservation and Resource Zone.

parked on private land. The Committee does not see the need, or merit, to change this arrangement.

(ii) Tavern

The Committee expressed the view in its Discussion Paper that **Bar** clearly falls within **Tavern**. Submissions said that that a **Tavern** was a **Bar**, and the term **Tavern** was archaic and misleading. The term **Tavern** does not relate to any liquor licence category. Submissions supported this updating of the term.

The Committee recommends in the short-term:

Rename Tavern as Bar.

(iii) Cafe

Submissions disagreed as to whether a **Cafe** would be a **Convenience restaurant** or a **Restaurant**. While some earlier submissions to Smart Planning took issue with **Convenience restaurant**, on the basis that it was not needed, it appears to the Committee to be clearly aimed at suburban fast food establishments. Nesting **Cafe** under **Convenience restaurant** might limit a small **Cafe** in a residential zone where a **Convenience restaurant** must have access to **Road Zone**.

Nesting **Cafe** under **Restaurant** would avoid confusion on how treat this use. In terms of planning impacts the main difference would seem to be that a **Restaurant** may be expected to trade later than a **Cafe**. Simply changing trading hours should not be a reason to be placed in in a different land use term. The Committee notes that many 'cafes' are licensed to sell liquor, and not all 'restaurants' are licensed.

The Committee recommends in the medium-term:

List Cafe in Clause 74 and nest it in Restaurant without a definition.

(iv) Tables in a takeaway

It was submitted that a takeaway should be allowed to have up to six tables. In the Discussion Paper the Committee said that this seem appropriate, and that the Committee did not see that this would change the fundamental purpose of the use.

One submitter considered:

... that if such premises began to include tables and seats they would simply no longer be considered a Take away food premises and instead become a Restaurant or Convenience Restaurant

This seems to be the issue that prompted the original submission. Just including a few seats should not change the use from a **Take away food premises** when the purpose of the use is considered. The Committee is persuaded by submissions that said setting a number of table or seats would provide clarity for the community. The Committee notes that two submissions suggested a floor area limitation, with 25 per cent of the floor area suggested. The Committee does not know what such a limit would mean in practice, and detailed research would be required to assess the practical implications.

The Committee recommends in the medium-term:

Change the definition of [Take away food premises](#) to read:

'Land used to prepare and sell food and drink for immediate consumption off the premises. [It may include up to 10 seats available for consumption on the premises](#)'.

(v) Deliveroo and Uber Eats

An emerging issue is the increasing proportion of some restaurants takeaway food trade with online delivery services. A degree of takeaway food has always been part of a restaurant business, but at some point the proportion of takeaway service could increase until it was no longer ancillary. Such an establishment might then be seen as a **Convenience restaurant**.

It is not clear to the Committee if this is causing practical or legal difficulties for operators.

It is not clear to the Committee that there are any zones where this would make an as of right use require a permit. In the Commercial 1 Zone neither **Restaurant** nor **Convenience restaurant** require a permit. It appears to the Committee that there would be no change or a reduction in the car parking requirement.

A 'dark kitchen'²¹ would seem to be a **Take away food premises**. It does not seem relevant whether the person picking up the takeaway is picking it up for their own consumption or someone else's.

4.12.2 Shop

(i) Small performances in shops

A submitter stated that musicians performing in record stores are being shut down because according to council officers, separate planning permission is required. Demonstrating products, including music, should not be controversial in a shop. It is not much different to a book launch or book signing in a book store. If the basic purpose changes from selling goods to providing entertainment then a separate planning permission may well be appropriate. This would be addressed by the proper application of legal principles pertaining to uses.

The Committee recommends in the medium-term:

Change the definition of [Shop](#) to include:

[It includes demonstrations of products including music performances in shops selling recorded music.](#)

(ii) Small food manufacturing

An emerging issue is the manufacture and sale of bespoke food and beverage items. These can be classed as Industry and by dint of Clause 52.10 prohibited in a Commercial 1 Zone.

Submitters agreed that sale of food and beverage items produced at a small scale from a shop was reasonable, and that the definitions should be adjusted to allow for this.

²¹ A take away food premises that aimed solely at internet orders, without a visible street presence.

The Committee considers that changes should be made to the definition of shop to accommodate small sale production of bespoke food and beverage items, and the condition beside Industry in the Commercial 1 Zone table of uses changed to enable responsible authorities to consider these types of uses.

The Committee recommends in the short-term:

Change Shop to read:

‘Land used to sell goods or services, or to hire goods. It includes the selling of bread, pastries, cakes or other food or beverage products baked or produced on the premises. It does not include food and drink premises, gambling premises, landscape gardening supplies, manufacturing sales, market, motor vehicle, boat, or caravan sales, postal agency, primary produce sales, or trade supplies’.

Change the condition next to Industry in Section 2 of the Table of Uses to the Commercial 1 Zone to read:

‘Must not be a purpose listed in the table to Clause 52.10 except Food or Beverage production not otherwise specified in the table to Clause 52.10’.

(iii) Animal grooming

The Committee sought feedback on whether the VPP should list **Animal grooming** in Clause 74 nested under **Shop**, but not defined. There were no objections to this proposal.

The Committee recommends in the medium-term:

List Animal grooming in Clause 74 nested under Shop, but not defined.

4.12.3 Restricted retail premises

It was submitted that provision needs to be made for **Model shop** or **Hobby shop**. It was explained that these shops sell large remote-control equipment and could have a specific listing in the **Restricted retail premises**.

The definition of Restricted retail premises includes:

m) goods and accessories which:

- *Require a large area for handling, display and storage of goods; or*
- *Require direct vehicle access to the building by customers for the purpose of loading or unloading goods into or from their vehicles after purchase or hire.*

While it would seem these uses should already be captured by the **Restricted retail** definition submitters spoke of enforcement action against some operators.

The Large Format Retail Association supported the inclusion of remote controlled equipment in the definitions and also submitted musical instruments, equipment and accessories should be included. It provided suggested wording which the Committee supports.

The Committee recommends in the short-term:

Change [Restricted retail premises](#) to read:

'Land used to sell or hire:

- a) automotive parts and accessories;
- b) camping, outdoor and recreation goods;
- c) electric light fittings;
- d) animal supplies including equestrian and pet goods;
- e) floor and window coverings;
- f) furniture, bedding, furnishings, fabric and manchester and homewares;
- g) household appliances, household electrical goods and home entertainment goods;
- h) party supplies;
- i) swimming pools;
- j) office equipment and supplies;
- k) baby and children's goods, children's play equipment and accessories;
- l) sporting, cycling, leisure, fitness goods and accessories;
- [m\) remote controlled equipment;](#)
- [n\) musical instruments, equipment and accessories;](#) or
- [om\) goods and accessories which:](#)
 - Require a large area for handling, display and storage of goods; or
 - Require direct vehicle access to the building by customers for the purpose of loading or unloading goods into or from their vehicles after purchase or hire'.

It does not include the sale of food, clothing and footwear unless ancillary to the primary use'.

4.13 Transport terminal group

(i) Railway

The Committee sought feedback on whether [Railway](#) should be defined as an unnested term and include [Railway station](#)?

Table 26: Railway station definition

Land use term	Definition	Includes	Included in
Railway station	Land used to assemble and distribute goods and passengers and includes facilities to park and manoeuvre vehicles. It may include the selling of food, drinks and other convenience goods and services.		Transport terminal

There were no submissions outlining why a definition was required or what practical issue it would resolve. A number of submissions thought no change was necessary.

(ii) Airport and Airfield

There was a submission to Smart Planning that the Committee should refine and clarify the difference between [Airport](#) and [Airfield](#). These terms are used in the SPPF in the VPP. While nested under [Transport terminal](#), [Airport](#) is not defined and [Airfield](#) is not listed.

The Discussion Paper said the Committee could not see the need define the difference between an **Airport** and **Airfield**.

Baw Baw Shire Council reported that it has a current issue with a recreational airfield. It considered that the matter may be able to be resolved if **Airfield** was defined. Alternatively, **Recreational aircraft facility** (noting that **Recreational boat facility** is already defined) may also be able to resolve the matter.

There have a been a number of VCAT cases where an **Airfield** has been determined to be an ancillary use of the dominant purpose of the land. Unless there is to be a policy shift to control an ancillary **Airfield**, a definition does not seem warranted.

(iii) **Heliport and Helicopter landing site**

The Committee notes that:

- **Heliport** is nested under **Transport terminal** but is not defined in Clause 74
- **Helicopter landing site** is defined but unnested.

A planning permit is required for either use under Clause 52.15 of the VPP unless a relevant exemption applies, however, it is unclear the need for term of **Heliport**, unless this is where the term is referencing permanent facilities for the assembly and distribution of goods or passengers.

The Committee notes the Practice Note 75 December 2012 which sets out the “*Planning requirements for heliports and helicopter landing sites*”. This Practice Note acknowledges that a:

... heliport would normally have one or more helipads, with facilities for passenger handling such as a terminal building. It may also include facilities such as a hangar, refuelling and lighting.

The Committee understands these terms have recently been the subject of various reviews, such as a 2014 Helicopter Landing Site Review where submitters suggested removing the term **Heliport** and retaining **Helicopter landing site**. The Committee also notes the recent Planning Scheme Amendment GC49 relating to hospital helicopter landing sites.

While there may be some logic in nesting a **Helicopter landing site** under **Transport terminal**, the Committee does not propose such a nesting. The term has been specifically created to require planning permission for helicopter landings in the face of arguments that these landings were ancillary to the primary use of the land.²² It is not clear that such uses will always involve the activities of “*assemble and distribute goods or passengers*” and the definition is created to deal with these instances.

A number of submissions opposed deleting **Heliport**. The Committee makes no recommendation on this issue.

²² Proposals for helipads have from time to time caused angst amongst neighbours and resulted in changes to planning controls. Significant cases include *Alfred Hospital v City of Melbourne & Mirvac Pty Ltd and Ors* (1983) 1 PABR 334, *Grollo Group v City of Preston and Ors* (1986) 4 AATR 113 (editorial comment 4 AATR 113), *Mornington Peninsula SC v Fox and Ors* [2003] VCAT 772 14 VPR 130 (editorial comment 14 VPR 129) and *Bos v Manningham CC* [2004] (Red Dot) VCAT 1048 (editorial comment 20 VPR 4).

4.14 Utility installation group

Consultation to date has raised the following issues:

- Amend minor utility installation definition to define extent of ‘neighbourhood’
- Clarify the difference between ‘Utility installation’ and ‘Minor utility installation’ and potentially consolidate.

Table 27: Utility definitions

Land use term	Definition	Includes	Included in
Utility installation	<p>Land used:</p> <p>a) for telecommunications;</p> <p>b) to transmit or distribute gas, oil, or power;</p> <p>c) to collect, treat, transmit, store, or distribute water; or</p> <p>d) to collect, treat, or dispose of storm or flood water, sewage, or sullage.</p> <p>It includes any associated flow measurement device or a structure to gauge waterway flow.</p>	<p>Minor utility installation</p> <p>Reservoir</p> <p>Telecommunications facility</p>	
Telecommunications facility	<p>Land used to accommodate any part of the infrastructure of a Telecommunications network. It includes any telecommunications line, equipment, apparatus, telecommunications tower, mast, antenna, tunnel, duct, hole, pit, pole, or other structure or thing used, or for use in or in connection with a Telecommunications network.</p>		Utility installation
Minor utility installation	<p>Land used for a utility installation comprising any of the following:</p> <p>a) sewerage or water mains;</p> <p>b) storm or flood water drains or retarding basins;</p> <p>d) gas mains providing gas directly to consumers;</p> <p>e) power lines designed to operate at less than 220,000 volts;</p> <p>f) a sewage treatment plant, and any associated disposal works, required to serve a neighbourhood;</p> <p>g) a pumping station required to serve a neighbourhood; or</p> <p>h) an electrical sub-station designed to operate at no more than 66,000 volts.</p> <p>It includes any associated flow measurement device or a structure to gauge waterway flow.</p>	Water retarding basin	Utility installation

(i) Define extent of 'neighbourhood'

Minor utility installation includes:

f) a sewage treatment plant, and any associated disposal works, required to serve a neighbourhood

g) a pumping station required to serve a neighbourhood.

Submitters said that neighbourhood should be defined. The Committee asked whether a simple area extent, so many hectares, or pumping capacity, say up to 200 *litres per second*, would make the term easy to use.

VicWater – the peak body of the Victorian water industry with its membership constituted of Victoria's 19 statutory water corporations – submitted:

Some water corporations expressed a desire to retain a reference to 'serving a neighbourhood' in the land use terms on the basis that many councils have adopted the practice of treating hitherto undefined water supply assets (for example siphons, water storage tanks, disinfection boosters stations and channels) as minor utilities installations if they are satisfied that the asset's primary purpose is to "service a neighbourhood".

By removing the "service a neighbourhood" classification, there becomes a need to explicitly classify each of these assets. Otherwise, the upgrade and maintenance of these assets will become subject to more onerous and unintended planning requirements.

Some agencies do not see the need for any restriction on pumping stations. If a limit is to be applied it would appear pumping capacity would be the appropriate metric, but there is no real agreement on the capacity that should be applied. It may well be that a much higher limit than 200 *litres per second* is appropriate.

South East Water suggested that a **Minor utility installation** could include "*a sewerage pumping station that has a design capacity up to 400 litres per second or a footprint up to 3,000 square metres*". It said that any facility outside of this range is not a typical pump station and hence would require a greater level of planning and consultation. Given the lack of clear agreement in the water industry further consultation is required.

There was a call to include "*siphons, water storage tanks, disinfection boosters stations and channels*" to remove any ambiguity.

The Committee recommends in the medium-term:

Amend **Minor utility installation to read:**

'It includes any associated flow measurement device or a structure to gauge waterway flow, and any siphons, water storage tanks, disinfection boosters stations and channels'.

The Committee recommends in the longer-term:

Consult further with water authorities to confirm the specific limit for pumping stations in **Minor utility installation.**

(ii) Water extraction

Water extraction is not covered by the VPP.

In *Stanley Pastoral Pty Ltd v Indigo SC (Red Dot)* [2015] VCAT 1822, the Tribunal considered an appeal against a decision of the Responsible Authority to refuse a permit to extract groundwater:

*Both the responsible authority and the applicant contend that the proposal comes within this definition [of **Utility installation**]. The Tribunal is satisfied that the proposal accurately answers the definition of **Utility installation**.*

However, section 8(6)(b) of the *Water Act* provides:

A right conferred by this section is limited only to the extent to which an intention to limit it is expressly (and not merely impliedly) provided in—

(b) any other Act or in any permission or authority granted under any other Act; ...

VCAT found that no permit was required.

Stanley Community Incorporated, sought a review of the Tribunal's decision (*Stanley Rural Community Inc v Stanley Pastoral Pty Ltd* [2016] VSC 764). It submitted that legislation governing licences for water allocations was no different from the detailed legislation that provided for specific controls and permissions over other issues that intersect with the planning system.²³

In dismissing the appeal, the Court held:

The operation of ss 8(4) and (6) of the Water Act, combined with the absence of any express provision in the Planning and Environment Act and/or [the planning scheme] qualifying the rights conferred upon [Stanley Pastoral] by the take and use licence, was fatal to Stanley Community Incorporated's appeal.

There was support for making it clear that the VPP did not apply to water extraction, but a range of views on whether development controls were appropriate.

The Committee recommends in the longer-term:

Make it explicit in the VPP that no permit is required for water extraction

The Committee suggests:

Explore options for development controls on water extraction.

(iii) Power transmission

The Office of the National Wind Farm Commissioner pointed out that a minor utility installation includes transmission powerlines of less than 220 kilowatts (kV). Such powerlines do not currently require a planning permit approval for the actual construction, location and operation of the powerlines:

²³ Including. subdivision, building, heritage, environment, noise, dust, traffic and transport, liquor, sex work, gambling and many other matters including the extraction of other natural resources.

There have been a number of issues that have been brought to our attention recently in relation to the planning and governance processes regarding transmission lines that have been developed for the purposes of connecting wind farms to the power grid. In our view, the planning scheme would be improved by ensuring that a planning permit application for a wind farm power station includes transmission line connection options to be considered for approval as part of the overall proposed project, regardless of the capacity of the proposed transmission line.

The Committee understands that power transmission has raised issues recently. With the dispersion of generation across Victoria, the definition may not still be appropriate. The definition appears to have originally been for getting essential services to new subdivisions. However, it is now being used to export power from multiple generators (solar and wind farms) across Victoria to the electricity grid.

Residents in rural areas have been concerned about the visual impact of the structures.

The Committee suggests:

Review the need to better control powerlines associated with dispersed generation activities.

(iv) Utility installation

Battery storage

There is no definition for **Battery storage**, and it does not fit within the current definition of **Utility installation** or **Minor utility installation**.

The Committee considers that there is, and will continue to be, considerable growth in people wanting to install battery storage units to store solar and other energy, that this should be identified as a Minor utility installation use.

Data centres

Data centres were not discussed in the Discussion Paper.

Invest Assist advised that they have had several experiences with data centre proposals that have challenged responsible authorities in trying to define them as either an **Office**, **Warehouse** or as an innominate use.

This creates further challenges when assessing car parking, amenity impacts because they do not generate the same visitation as an **Office** and yet, are not a traditional **Warehouse**.

The Committee thinks it would be useful to define data centre as a **Utility installation**. This definition already applies to telecommunications. This would make them a Section 2 use in almost all zones.

Recommendation

The Committee recommends in the medium-term:

Amend Utility installation to read:

'Land used:

a) for telecommunications;

b) to transmit or distribute gas, ~~or oil, or power~~;

c) to transmit, ~~or~~ distribute ~~gas, or oil,~~ or power, including battery storage;

~~d~~) to collect, treat, transmit, store, or distribute water; or

~~e~~) to collect, treat, or dispose of storm or flood water, sewage, or sullage.

It includes any associated flow measurement device or a structure to gauge waterway flow'.

List Data centre in Clause 74 without a definition and nest it under Utility installation.

(v) Are utilities a land use issue?

While it may not be appropriate to require a land use permit for a **Minor utility installation** there may be merit in controlling buildings and works. A number of submitters suggested this approach.

Clause 52.19 Telecommunications facility requires a permit to construct a building or construct or carry out works for a Telecommunications facility, subject to certain exemption.

In response to the Committee's question on the merits of restrictions on buildings and works associated with minor utility installations VicWater stated:

... water corporations vehemently oppose the imposition of further restrictions.

On the other hand, a number of submitters supported the suggestion.

The Committee suggests:

Consider particular provision to specify building and works requirements for a Minor utility installation similar to 52.19 Telecommunications facility.

(vi) Reservoir

Coliban Water advised that **Reservoir** is not defined under the Water Act (1989); providing a definition in the VPP will provide a clear distinction of an important piece of community, and critical, infrastructure:

We suggest the following definition for Reservoir be adopted: a natural or artificial lake used as a source of water supply that is owned or managed by a public authority.

This is distinct from a 'Dam' as defined in the *Water Act (1989)*:

... anything in which by means of an excavation, a bank, a barrier or other works water is collected, stored or concentrated.

Or private dam:

... anything in which by means of an excavation, a bank, a barrier or other works water is collected, stored or concentrated but does not include —

(a) anything owned or operated by a public statutory body; or

(b) any works of an Authority; or

(c) a channel, drain or pipe; or

(d) a bore

Define Reservoir to be:

A natural or artificial lake used as a source of water supply that is owned or managed by a public authority.

4.15 Warehouse group

It was submitted that terms generally need updating to be more reflective of contemporary terms, but no specific suggestions were made.

Areas where there is confusion and request for clarification:

- Vehicle depot
- Contractor's depot
- Self-storage facilities
- Shipping containers as ancillary buildings.

(i) Clean fill storage

It was suggested that here needed to be a definition for **Clean fill storage**. If this is seen as necessary it would seem most appropriate to amend the definition of **Earth and energy resources industry** to include 'storage'. This term is subject to a separate review.

Table 28: Possible change to Earth and energy resources industry

Land use term	Definition	Includes	Included in
Earth and energy resources industry	Land used for the exploration, removal, storage , or processing of natural earth or energy resources. It includes any activity incidental to this purpose including the construction and use of temporary accommodation.	Clean fill storage Greenhouse gas sequestration Greenhouse gas sequestration exploration Geothermal energy exploration Geothermal energy extraction Mineral exploration Mineral extraction Petroleum exploration Petroleum extraction Stone exploration Stone extraction	

(ii) Contractor's depot

The Discussion Paper sought feedback on the merit of introducing a definition of **Contractor's depot** and allowing the temporary use of land for a **Contractor's depot** in certain circumstance. Part of this concern was to allow for the temporary use of land as a **Contractor's depot**.

Submissions raised a number of issues:

- The use of land for a **Contractor's depot** has been a long-standing issue for both planners and planning compliance officers.
- **Contractor's depot** raises numerous concerns regarding noise, hours of operation and the number of people coming to and from the site throughout the day.
- The lack of definition within the planning scheme results in the land use becoming as innominate use and therefore is not restricted or prohibited in relation to where it can be proposed from General Residential Zone to Industrial Zone to Green Wedge Zone.
- The principle of facilitating temporary uses of land for construction purposes is supported, but the suggested land use term could be clarified and should be subject to a permit being obtained to prevent vacant lots from being used as semi-permanent or de facto **Contractor's depots**.
- A permit exemption for a short-term use could be considered.

These issues go beyond the scope of the Committee.

The Committee suggests:

Explore the need for particular provisions related to the use of land for a Contractor's depot.

(iii) Self-storage facilities

A number of submissions supported inclusion of **Self-storage facility** in Clause 74. It was submitted the current definitions for **Warehouse** and **Store** do not adequately describe **Self-storage facility**, and that the car parking requirements and staff numbers for a **Self-storage facility** are lower than a **Store** or **Warehouse**.

Some submissions sought a definition for **Self-storage facility**, however, the Committee doesn't consider this is necessary as a short-term recommendation.

The Committee recommends in the short-term:

List Self-storage facility in Clause 74 and nest it under Store without a definition.

(iv) Shipping containers as ancillary buildings

The Advisory Committee noted the VCAT Red Dot decision of *Watson v Monash CC (In Summary) (Red Dot)* [2011] VCAT 2176 in which the Tribunal considered whether a shipping container constituted a "structure" for the purposes of the "building" definition. However, as the shipping container would be ancillary to an existing "shop" use, no "use" approval was needed.

4.16 Other issues

(i) Health and wellness retreat

Submissions called for definitions of a **Massage parlour** and a **Day spa**. Some submitters sought a specific definition for a health and wellness retreat.

In the Discussion Paper the Committee said it was not immediately clear to the Committee how such a use might have a different planning impact to an establishment where the patrons were less interested in their own health.

The Committee sought feedback on whether the VPP should list **Day spa**, **Massage parlour** in Clause 74 nested under **Shop**, but not defined.

It was pointed out that some **Massage parlours** employ medical professionals (remedial massage) and may therefore be a **Medical centre**.

Moyne Shire Council submitted:

A listing for these uses and new definitions is warranted. Within rural zones, if these uses are nested within Shop, they would become Section 3 prohibited uses. However, Day spa in particular may be an attractive use in a rural context that could be merits based.

Nillumbik Shire Council submitted:

Having these uses nested under 'Shop' is not the most logical fit [except for Animal grooming]. It is recommended that a new land use term is created that caters for the emerging wellness industry. For example the land use term could be 'Wellness Service' and nested under this are beauty salons, massage parlours, etc. They should all be defined.

The issue appears to be a desire to support tourist accommodation in areas where this is currently prohibited this raises a broader policy issue, beyond the scope of this Committee.

(ii) Road

There were call for a definition of Road and references to the *Road Management Act 2004*.

Road is defined in the *Planning and Environment Act*:

***Road** includes highway, street, lane, footway, square, court, alley or right of way, whether a thoroughfare or not and whether accessible to the public generally or not*

There does not seem to be much merit in defining Road in the VPP in a way that is different to the *Planning and Environment Act*.

The Committee recommends in the medium-term:

Reproduce the definition of Road from the *Planning and Environment Act* in Clause 74.

(iii) Car park

It was submitted that **Car park** should only apply to where there is a payment of fee, otherwise it is ancillary.

Table 29: Car park definition

Land use term	Definition	Includes	Included in
Car park	Land used to park motor vehicles.		

As the Committee understands it, the term car park is used to prevent car parking that services uses in one zone, for example the Commercial 1 Zone, spilling over into an adjoining zone where that use might be prohibited.

Whether the people using the parking pay a fee or not is largely irrelevant from a planning point of view.

There was broad acceptance that a car park could include charging for electric vehicles. The Committee thinks it is worth making this explicit in order to facilitate the development of this infrastructure to service the growth in electronic vehicles.

The Committee recommends in the short-term:

Change Car park to read:

'Land used to park motor vehicles. [It may include charging of electric vehicles](#)'.

(iv) Display village

It was submitted that [Display home](#) could be improved by defining [Display village](#).

Table 30: Display home definition

Land use term	Definition	Includes	Included in
Display home	A building constructed as a dwelling, but used for display, to encourage people to buy or construct similar dwellings.		

Several submissions supported the broadening of the definition of [Display home](#) to include multiple display homes. One council reported it receives applications for display villages/home centres containing 120–150 houses with ancillary uses including cafe, demonstration dwellings and projects, play spaces and, most importantly, a sales office (which is prohibited in residential areas).

The Committee considers that the term [Display home](#) should be broadened to allow for multiple display homes and ancillary uses including a sales office (which is prohibited in the residential zones) and cafe.

The Committee recommends in the short-term:

Rename [Display home](#) as [Display home centre](#) and change the definition to read:

'~~A building~~ [One or more buildings](#) constructed as a dwelling, but used for display, to encourage people to buy or construct similar dwellings. [It may include a sales office and cafe](#)'.

(v) Brothel

In 2010, the terms 'prostitution' and 'brothel' were repealed from the *Sex Work Act 1994* and replaced with 'sex work' and 'sex work services'. The terms should be replaced in the planning scheme and the definition for brothel amended to align with the *Sex Work Act 1994*.

The Committee recommends in the short-term:

Rename Brothel as Sex work service provider in Clause 74 and change the definition to read:

'Land made available for sex work~~prostitution~~ by a person ~~carrying on the business of~~ providing sex work services ~~prostitution~~ services at the business's premises'.

Replace 'Prostitution' with 'Sex work' in Clause 72.

(vi) Interpretation centre

The Public Conservation and Resource Zone lists an **Interpretation centre** as a land use but the use is not listed in Clause 74.

Determine a definition for Interpretation centre based on an assessment of the policy for listing the use in the Public Conservation and Resource Zone.

5 Practical implications

The Committee's Terms of Reference require it to advise on:

- Legal and practical implications of any recommended changes to land use terms and their definitions. These include:
 - existing use rights implications
 - consequential changes to the VPP (such as changes to zone land use tables, general terms and nesting diagrams)
 - potential impacts on users of the planning system.
- With regard to the identified legal and practical implications, a recommended approach to implement the proposed changes.

(i) Existing use rights

Planning Schemes control the change in use or the development of land. It is a generally accepted principle that a person can continue to use the land in a manner that was previously lawful but has become unlawful as a result of an amendment to the relevant planning scheme. This 'right' to continue existing practices is called 'existing use rights'.

Certain criteria need to be met in order for a person to be able to claim existing use rights. Under Clause 63 of the VPP if a person can demonstrate the ongoing use of land for a period of 15 years that person can claim existing use rights and can continue what may otherwise be a prohibited use under the new planning controls. These existing use rights are not extinguished by the issue of a planning permit. There may be occasions where changing the use of the land may result in 'losing' those existing use rights and triggering a need for a planning permit.

Two important principles underpin existing use rights:

- The definitions in the planning scheme are not used to determine what the existing use is.²⁴
- Changes in the intensity of a use is usually not a change in the use.

(ii) Changing zones

The Committee is not proposing changes to the controls that apply to particular uses unless it specifically says so. Changes that make controls more flexible in a Commercial 1 Zone are proposed, but these are not seen to be sensitive issues and the ability to control uses through a permit will remain.

In some cases clarifying where a use is nested may have implications in particular zones, but the Committee does not see this as a policy change.

Changes that affect rural zones potentially raise more issues and would require further consultation. The Committee expects that rural zones would be adjusted to keep current permissions as they now stand.

²⁴ See Clauses 63.02 Characterisation of use 63.03 Effect of definitions on existing use rights.

Apart from the practical issues of addressing changing VPP zones there is the issue of schedules to special purpose zones. These schedules appear not to have been updated as part of VC142.

Ideally the schedules in these zones should be redrafted with the new land use terms. An alternative work around is to specify that the terms used in a specific schedule has the meaning current when the schedule was introduced. This could prevent unintended consequences.

(iii) Potential impacts on users of the planning system.

The short- and medium-term recommended changes are intended to make the planning system easier to use. The impact of these should be positive. Some of the other changes are aimed at better controlling matters that are not now controlled. The impacts of these changes will need to be assessed when the details of the changes are settled.

Appendix A Appointment and Terms of Reference

The Advisory Committee appointment and Terms of Reference

The Minister for Planning appointed Lester Townsend and Katherine Navarro as the Land Use Terms Advisory Committee (the Committee) on 21 December 2017 under section 151 of the *Planning and Environment Act 1987*.

Terms of Reference

Advisory Committee appointed pursuant to Part 7, section 151 of the *Planning and Environment Act 1987* to review and recommend improvements to land use terms and their definitions in Clause 74 of the VPP.

Name

The Advisory Committee is to be known as the Land Use Terms Advisory Committee.

1. The Advisory Committee is to have two members with the following skills:
 - Expert knowledge and experience of the operation of the VPP and planning schemes.
 - Expert knowledge and experience of statutory drafting.
 - Legal expertise about the operation of land use definitions in the planning system.

The Advisory Committee may seek additional expertise as required.

Purpose

2. The purpose of the Advisory Committee is to review and recommend improvements to land use terms and their definitions in Clause 74 of the VPP.
3. The Advisory Committee is to provide advice and present its findings and recommendations on the following matters:
 - Principles and business rules for including land use terms in Clause 74.
 - Existing land use terms in Clause 74 that should be removed or modified.
 - New land use terms that should be included in Clause 74.
 - Legal and practical implications of any recommended changes to land use terms and their definitions. These include:
 - existing use rights implications
 - consequential changes to the VPP (such as changes to zone land use tables, general terms and nesting diagrams)
 - potential impacts on users of the planning system.
 - With regard to the identified legal and practical implications, a recommended approach to implement the proposed changes.
4. The Advisory Committee is not expected to:
 - Review land use terms which are currently under consideration by the Department of Environment, Land, Water and Planning (DELWP) through other projects.
 - Review land use permissions in zones, with the exception of identifying and having regard to the consequential impacts of proposed changes in land use terms on the functioning of zones.
 - Recommend changes that would have major implications for the operation and purposes of the existing zones.

- Review Clause 72 (General Terms), unless there is a consequential change that flows from a change to a land use term.

Background

5. The Government has initiated the Smart Planning program to reform and modernise the Victorian planning system. The aim of the Smart Planning program is to increase the effectiveness and efficiency of the operation of planning schemes. As part of that program, a discussion paper (*Reforming the Victoria Planning Provisions: A discussion paper*) was released in October 2017 and comment sought on a range of proposals to improve the system. Proposal 5.2 of the discussion paper is to review and update the land use terms section of the VPP.
6. The objectives of Proposal 5.2 are:
 - Increase use of everyday terms that the community understands.
 - Remove or modernise obsolete terms and provide for new or emerging land uses.
 - Distinguish between similar land uses where treated differently in land use tables.
 - Remove unnecessarily specific terms and broaden terms, where appropriate.
 - Provide definitions for undefined terms where appropriate (except for terms that are sufficiently captured by an ordinary dictionary meaning or defined in the Act).

Method

7. The Advisory Committee may inform itself in any way it sees fit, but must consider the following:
 - The objectives of the Smart Planning program generally, with particular regard to the need to simplify the planning scheme.
 - The planning policy principles and objectives, and rational underpinning the VPP's definition system (including the operation of Clause 74) and individual land use terms and their definitions, including:
 - *A User's Guide to the new standard terms and definitions for planning schemes in Victoria (September 1996)*; and
 - *Report of the Advisory Committee on the Victoria Planning Provisions (August 1997)*.
 - The objectives of Proposal 5.2 in *Reforming the Victoria Planning Provisions: A discussion paper*.
 - All relevant submissions in relation to land use terms received DELWP as part of the consultation for the Smart Planning program.
 - The submissions and other contributions received through the project methodology outlined below.
8. The Advisory Committee is to conduct the review generally according to the following methodology:
 - Preparation of a concise discussion paper that sets out the scope of the review, the role of land use terms in the planning system, proposed principles for drafting land use terms and definitions, a summary of the issues and suggestions received through Smart Planning consultation so far and a description of how to participate in the submission process to be conducted by the Advisory Committee.
 - An on-line submission process designed to allow submitters to identify specific land use terms for deletion, modification or inclusion, to explain the reasons and to also make general comments. This should make it clear that the only changes to the zones that can be considered are consequential changes to land use tables that flow from new, modified or deleted land use terms.
 - Consideration of submissions and other investigation as necessary,
 - Preparation of a final report as set out in paragraph 16.

9. The following parties should be invited to make submissions to the Advisory Committee:

- All councils.
- Organisations represented on the Smart Planning Reform Advisory Group.
- Referral authorities and government agencies which interface with the planning system.

A general invitation for submissions should also be made through the Planning Matters newsletter. DELWP will provide assistance with identifying relevant contact details.

10. The Advisory Committee is to consult with relevant DELWP Planning Group representatives including from Planning Systems, Statutory Planning Services and the Smart Planning program.

11. Public hearings are not required. The Advisory Committee may conduct targeted consultation to explore the issues or other matters, including up to two workshops or forums. The Advisory Committee may meet and may invite others to meet with them.

12. The Advisory Committee may apply to vary these Terms of Reference in any way it sees fit before submitting its report.

Submissions are public documents

13. The Advisory Committee must retain a library of any submissions or other supporting documentation provided directly to it until a decision has been made on its report or five years has passed from the time of its appointment.

14. A copy of all submissions is to be provided to the DELWP's Planning Group.

15. Any submissions or other supporting documentation provided to the Advisory Committee must be available for public inspection until the submission of its report, unless the Advisory Committee specifically directs that the material is to remain 'in camera'.

Final report

16. The Advisory Committee must produce a written report that includes the following:

- A response to the 'Purpose' of the Terms of Reference.
- A summary and assessment of submissions to the Advisory Committee.
- Any other relevant matters raised in the course of the Advisory Committee's consultations.
- Prioritised recommendations which clearly identify:
 - Changes which can be implemented immediately because they are relatively uncomplicated, or policy-neutral.
 - Changes with more significant consequential impacts which can be implemented in the short-medium-term.
 - Potential longer-term changes which would benefit from further review or consultation.
- A list of persons and organisations that made submissions, attended a workshop, met with or otherwise informed the Advisory Committee's advice, findings and recommendations.

Timing

17. The Advisory Committee must provide a discussion paper for further consultation no later than 20 business days from the date that Planning Panels Victoria is formally notified of the Committee's appointment.

18. A period of 4 weeks is to be provided for submissions to be made to the Advisory Committee and for the Advisory Committee to conduct other targeted engagement.

19. The Advisory Committee must submit its final report as soon as practicable but no later than 15 business days from the conclusion of the consultation period.

20. The Advisory Committee is to report no later than 13 April 2018.

Fee

21. The fee for the Advisory Committee will be set at the current rate for a Panel appointed under Part 8 of the Planning and Environment Act 1987.
22. The costs of the Advisory Committee will be met by DELWP's Smart Planning program.



Richard Wynne MP
Minister for Planning

Date: December 2017

The following information does not form part the Terms of Reference.

Project Management

- 1 *Administrative and operational support to the Committee will be provided by Greta Grivas, Planning Panels Victoria, on 8392 5121 or greta.grivas@delwp.vic.gov.au*
- 2 The departmental contact person will be Tim Westcott, Smart Planning program, on 8392 5541 or tim.westcott@delwp.vic.gov.au.

Appendix B About land use terms

B.1 Defining land use terms in the Victoria Planning Provisions

Clause 74 and the nesting of terms

Land use terms are defined in Clause 74 of the VPP.²⁵

Land use terms are ‘nested’; that is, a term can be included in another term or include terms within itself. The nesting of land use terms reduces the number of land use terms that need to be listed in a table of uses.

The definitions are set out in a table with four columns:

- the defined term
- the definition, if there is one – some terms are listed without definition
- other listed terms that are included in the definition
- the land use term in which it is included, if any.

You can see from Table 31 that **Warehouse** includes **Store** that includes **Boat and caravan storage** and **Freezing and cool storage**.

Table 31: Extract of Clause 74

Land use term	Definition	Includes	Included in
Warehouse	Land used to store or display goods. It may include the storage and distribution of goods for wholesale and the storage and distribution of goods for online retail. It does not include premises allowing in-person retail or display of goods for retail, or allowing persons to collect goods that have been purchased online.	Commercial display area Fuel depot Mail centre Milk depot Store	
Store	Land used to store goods, machinery, or vehicles.	Boat and caravan storage Freezing and cool storage Rural store Shipping container storage Vehicle store	Warehouse
Boat and caravan storage	Land used to store boats, caravans, or vehicle-towed boat trailers.		Store
Freezing and cool storage			Store

It is worth noting that definitions often specify:

- what activities the term includes, for example: “... *It may include the storage and distribution of goods for wholesale ...*”

²⁵ The VPP is a comprehensive set of planning provisions for Victoria that are used, as required, to construct planning schemes. Clause 74 appears in all planning schemes without variation from the VPP.

- what activities it excludes, for example: “... *It does not include premises allowing in-person retail ...*”.

Plain English

Not all terms listed are defined, for example **Freezing and cool storage**. The VPP are drafted according to plain English principles and words have their ordinary meanings unless specifically defined. Clause 74 states:

A term listed in the first column, under the heading ‘Land Use Term’, which does not have a meaning set out beside that term in the second column, under the heading ‘Definition’, has its ordinary meaning.

Inclusive terms

Clause 74 anticipates that not all land use terms will be listed:

74 Land use terms

The following table lists terms which may be used in this planning scheme in relation to the use of land. This list is not exhaustive. However, a term describing a use or activity in relation to land which is not listed in the table must not be characterised as a separate use of land if the term is obviously or commonly included within one or more of the terms listed in the table.

A term listed in the first column:

- includes any term listed in the third column and any term included within that term
- may also include other terms which are **not** listed in the first column.
- but does not include any other term that is listed in the first column – this is sometimes made explicit in a definition.

All terms listed in the third column are also listed in the first column.

Head terms

There are 15 ‘head terms’ in Clause 74 that the majority of uses fall under. These terms are more or less self-explanatory. The exception is **Agriculture** that includes animal boarding uses that could be for domestic pets and take place in urban environments.

List 3: Head land use terms

Accommodation	Education centre	Place of assembly	Retail premises
Agriculture	Industry	Recreational boat facility	Transport terminal Utility installation
Child care centre	Leisure and recreation	Renewable energy facility	Warehouse
Earth and energy resources industry	Office		

Unnested terms

There are 20 unnested terms that do not fall under a head term²⁶.

List 4: Unnested land use terms

- Art and craft centre	- Crematorium	- Helicopter landing site	- Saleyard
- Brothel	- Display home	- Home based business	- Service station
- Car park	- Emergency services facility	- Hospital	- Tramway
- Cemetery	- Freeway service centre	- Natural systems	- Veterinary centre
- Cinema based entertainment facility	- Funeral parlour	- Research centre	- Winery.

B.2 The role of land use terms

Land use terms play a critical role in the planning system in (at least) six places:

- Determining whether a permit is required in a zone
- Informing affected parties of the nature of advertised uses
- Drafting zone controls, either standard or special purpose zones²⁷
- Clause 52.06 dealing with car parking
- Clause 52.10 dealing with uses with adverse amenity potential
- Specifying exempt land uses in Clause 62.01.

Land use definitions do not have a role in determining existing use rights.

Determining whether a permit is required

Each zone in the VPP contains a table of uses:

- A use in Section 1 does not require a permit, but any condition opposite the use must be met.²⁸
- A use in Section 2 requires a permit. Any condition opposite the use must be met. If the condition is not met, the use is prohibited.
- A use in Section 3 is prohibited.

Deciding under which land use term a proposal fits can be critical to determining whether a permit is required or whether the use is prohibited.

Legal cases have drawn a distinction between:

- the 'purpose of use' and
- 'use' in the sense of activities, processes or transactions.

It is accepted that the activities on a site may have more than one purpose, and it is the purpose that determines how the definitions should be applied.²⁹

²⁶ The Committee notes an error in Clause 74: **Wind energy facility** is nested under **Renewable energy facility** but its listing in Clause 74 does not reflect this.

²⁷ These Clause 37 zones can have a specifically tailored table of uses.

²⁸ If the condition is not met, the use is in Section 2 and requires a permit unless the use is specifically included in Section 3 as a use that does not meet the Section 1 condition.

²⁹ *Cascone v City of Whittlesea* (1993) 11 AATR 175, 190

In *Cascone v City of Whittlesea*,³⁰ Ashley J canvassed the leading authorities³¹ and summarised the following principles in characterising a proposed use:

- It is always necessary to ascertain the purpose of the proposed use.
- It is wrong to determine the relevant purpose simply by identifying activities, processes or transactions and then fitting them to some one or more uses as defined in a scheme.
- It is wrong to approach the ascertainment of purpose of proposed use on the footing that it must fit within one (or more) of the uses defined in a scheme.
- If the purpose of a proposed use very largely falls within a defined use and the extent to which it does not is so trifling that it can be ignored, then the purpose as revealed should be taken to fall within the defined use.
- More than one separate and distinct purpose can be revealed. If one is dominant, and the lesser purpose or purposes are ancillary to the dominant purpose, then, in planning terms, there is one purpose. But if one use is not dominant, each revealed purpose must be considered. The mere fact that one purpose is authorised will not prevent other revealed purposes from being prohibited.

VCAT has also noted:³²

... it is necessary to have regard to the structure, context and purpose of the planning scheme provisions at the time of interpreting the land use terms.

Giving notice and writing permits

Many planning permits are advertised. It helps people understand what has been applied for if an everyday term can be used. Some Councils advertise with an everyday term and include the defined land use term in brackets, for example 'Brewery (**Industry** or **Manufacturing sales**)'.

Advertising the everyday term with the defined term in brackets makes it accessible to the public and assists planners and lawyers to identify the defined land use term it falls under.

Drafting zones

A number of zones allow tables of uses to be drafted specific to a site or locality. These are listed at Clause 37 of the VPP and include the Special Use Zone, Comprehensive Development Zone, Capital City Zone, Docklands Zone, Priority Development Zone, Urban Growth Zone (where a precinct structure plan is in place), and Activity Centre Zone.³³ Land use terms are obviously used in the exercise of drafting these zones.

³⁰ *Cascone v City of Whittlesea* (1993) 11 AATR 175.

³¹ *Humphries v Latrobe Valley Caravans Pty Ltd* (1976) 63 LGRA 434; *Franchesini v Melbourne and Metropolitan Board of Works*(1980) 57 LGRA 284; *City of Springvale v Heda Nominees Pty Ltd* (1982) 57 LGRA 298; *Davey v Brightlite Nominees Pty Ltd* [1984] VR 957; *City of Nunawading v Harrington* [1985] VR 641; *Royal Agricultural Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305; *St Kilda City Council v Perplat Investments Pty Ltd* (1990) 72 LGRA 378; *Clare v Jeff's Bulk Appliances Pty Ltd* [1981] VR 758.

³² *Radford v Hume CC* [2006] VCAT 2662 at [2].

³³ The special purpose zones Urban Floodway Zone, Urban Growth Zone (where no precinct structure plan applies) and Port Zone have defined table of uses.

Clause 52.06 Car parking

Clause 52.06 lists parking requirements for a range of uses, most of which are listed in Clause 74. A land use term that applies to a use generally affects the number of car parking spaces that must be supplied.

Clause 52.10 Uses with adverse amenity potential

Clause 52.10 lists 'threshold distances' for a range of uses, most of which do not really align with terms listed in Clause 74. Clause 52.10 explains:

*The threshold distance referred to in the table to this clause is the minimum distance from any part of the land of the proposed use or buildings and works to land (not a road) in a residential zone, Capital City Zone or Docklands Zone, land used for a **Hospital** or an **Education centre** or land in a Public Acquisition Overlay to be acquired for a **Hospital** or an **Education centre**.*

The Commercial 1 Zone says:

Section 2 – Permit required

Use	Condition
Industry	Must not be a purpose listed in the table to Clause 52.10.
Warehouse	Must not be a purpose listed in the table to Clause 52.10.

This has the effect of prohibiting, among others, the following uses:

- Certain listed food or beverage production, including:
 - Bakery (other than one ancillary to a shop)
 - Manufacture of milk products
 - Milk depot
 - Poultry processing works
 - Smallgoods production.
- Food or beverage production other than those listed within this group.

This essentially prohibits craft breweries, coffee roasters, distilleries, cheeseries, small artisanal smallgoods and the like to manufacture in the Commercial 1 Zone.

Clause 62.01 Uses not requiring a permit

Clause 62.01 exempts certain uses from a permit. It uses land use terms from Clause 74, but also the unlisted term **Road**.

Appendix C List of submitters

No	Name	Organisation
1	Natalie Wells	City of Whitehorse
2	Derek Screen	
3	Andrew Ferris	Andrew Ferris Drafting and Design
4	Sally Wills	Small Change Design and Construction P/L
5	Sam Trowse	Sustainability Victoria
6	Darren Woodward	South East Water
7	Matthew Metaxas	Whittlesea City Council
8	Alan R. Hood	Bangholme Rural Landholders Association
9	Barry Floyd	Coliban Water
10	Col Mackin	Catholic Education Melbourne
11	Luke Cervi	Baw Baw Shire Council
12	Gillian Williamson	Moirra Shire Council
13	Jackie Bernoth	Moreland City Council
14	Rosemary Anne West	Green Wedges Coalition
15	Rosario Pacheco	VicRoads
16	Rosa Zouzoulas	Mornington Peninsula Shire Council
17	Madeleine Cheah	Yarra Ranges Shire Council
18	Ian Donald	Yarra Valley Water
19	Stephen Rowley	
20	Ben Hynes	Hobsons Bay City Council
21	Elena Pereya	Cohousing Australia
22	Jon Perring , Helen Marcou, John Wardle and Kate Shaw	
23	Anita Ransom	Cardinia Shire Council
24	Clare Somerville	Herbert Smith Freehills
25	Laura Murray	Planning Institute of Australia
26	Julie Glass	Warrnambool City Council
27	Hannah McBride-Burgess	Stonnington City Council
28	Aaron Moyne	Moyne Shire Council
29	Nicki Granek	Melbourne Water
30	Mitchell Purcell	Spiire
31	Chris Engert	MAB Corporation
32	Colin Charman	Melbourne City Council
33	John Panozzo	Invest Assist, DEDJTR
34	Kathryn Pound	Port Phillip City Council
35	Sarah de Wit	The Australian Food Sovereignty Alliance
36	Matthew Cameron	
37	Lynlee Tozer	Green Wedge Protection Group Inc.
38	Teresa Hazendonk	Casey City Council
39	Gabrielle O'Halloran	Manningham City Council

No	Name	Organisation
40	Matthew McLean	Registered Accommodation Association of Victoria
41	Cassandra Rea	Boroondara City Council
42	Fae Ballingall	Nillumbik Shire Council
43	Karen Girvan	Murrindindi Shire Council
44	Laura Bradley	Goulburn-Murray Water
45	Edwina Ryan	Creative Victoria
46	Brad Nash	Large Format Retail Association
47	Noor Syuhada Shamsul	Niche Planning Studio
48	Joanne Coupar	EPA Victoria
49	Patrick Dubuc	
50	James Cleaver	VicWater
51	Yi-Luen Tan	Department of Health and Human Services
52	Gabrielle Sesta	Terrain Consulting Group
53	Dana Kushnir	Victorian Planning Authority
54	Andrew Dyer	National Wind Farm Commissioner