

**IN PLANNING PANELS VICTORIA
MELBOURNE PLANNING SCHEME
AMENDMENT C326**

Metro Pol Investment Pty Ltd

Submittor

and

Melbourne City Council

Planning Authority

and

Others

Submitters

**SUBMISSIONS ON BEHALF OF THE METRO POL INVESTMENTS PTY LTD AS TO
FUTURE CONDUCT OF HEARING – 7 NOVEMBER 2018**

Introduction

1. These submissions are made on behalf of Metro Pol Investment Pty Ltd which is the owner of land at 263-267 William Street, Melbourne. This land is developed with an established hotel known as the Metropolitan Hotel (Metro Pol).
2. Metro Pol has a permit application that is currently before VCAT that proposes to retain the Metropolitan Hotel and construct a building above the hotel.

Background

3. The following background has been collated based upon documents and understandings of event that have come to the attention of Metro Pol since the Planning Panel for C326 commenced¹.
4. Based upon a preliminary review of the Council's Part A submission:

¹ Because Metro Pol was not present during the hearing of C326, it may be that some of this background is not complete.

- i. Public consultation took place with the owners and occupiers of properties within the West Melbourne SP area and the owners of occupiers of site-specific and precinct Heritage Overlays within the municipality (paragraph 70);
 - ii. Notice was given directly to the owners and occupiers of properties including within the Heritage Overlay (paragraph 72);
 - iii. The Council re-exhibited the amendment to owners and occupiers of the corrected C258 (paragraph 81-87);
 - iv. Extensive information consultation took place with affected owners and other stakeholders (paragraph 88).
5. The Panel held a directions hearing on 4 June 2018.
 6. On 6 August 2018, a Planning Panel hearing into amendment C258 commenced. Version 5 of the timetable for the Panel hearing is dated 17 August 2018. Presumably there were 4 versions of that timetable before version 5. Based upon the version 5 timetable, 14 hearing days for scheduled for the hearing.
 7. It is unknown whether any declarations were made by Panel members either at the Directions hearing, at the start of the hearing, or during the hearing.
 8. Until 16 August 2018, the Metro Pol land was not included in the heritage overlay.
 9. Without notice, on 16 August 2018 the Minister approved amendment C326 to apply an interim heritage overlay over the land². The land is designated as 'significant' and the statement of significance ascribes significance to the building and the use.
 10. Metro Pol were not given notice of C258, even after the application of the interim controls. Metro Pol became aware of C258 late in August 2018.
 11. On 13 August 2018, the National Trust made a submission before the C326 Panel in support of the proposed Amendment³.

² It is stated in the Minister's Reasons for Invention 24 July 2018:

1. *Melbourne City Council has requested that the Minister for Planning use the powers of intervention under section 20(4) of the Act to prepare, adopt and approve Amendment C326 to the Melbourne Planning Scheme without notice.*

³ Document 23.

12. On 27 August 2018, Metropol's solicitors lodged a submission in relation to C258 with the Council⁴.
13. On or about 29 August 2018, it is understood that the Council referred the Metropol submission to the Planning Panel for C326.
14. On or about 28 August 2018, it is understood that the Planning Panel heard submissions from the Council in relation to the Metropol submission and made certain determinations⁵.
15. On 30 August 2018, legal representatives for Metro Pol advised that counsel would appear before the Planning Panel on the morning of Friday 31 August 2017 in relation to the matter raised in the PPV email dated 29 August 2018.
16. On 31 August 2018, Metro Pol appeared before the Planning Panel. It made written and oral submissions. Written submissions are recorded in Panel document 53.
17. On 31 August 2018, Metro Pol's legal representatives wrote to PPV in response to various requests from the Panel during the hearing on the morning of Friday 31 August 2018. Amongst other things, the letter related to expert evidence, lay evidence, time estimates, requests in relation to recalling of Council witnesses, timetable, availability, the breadth of matters upon which Metro Pol seeks to make submission and rejecting any suggesting that there ought be constraint placed upon Metro Pol in terms of the submissions and evidence that it makes/calls.
18. On 3 September 2018, the Panel published procedural rulings and version 6 of the Panel timetable. The procedural rulings included a ruling that '*the Panel is not adjoining or abandoning the matter and it will proceed today*⁶.' It is noted that Metropol was not heard from in relation to the dates set out in the Version 6 timetable.
19. On 4 September 2018, Metro Pol's legal representatives wrote to PPV to enquire as to whether the 3 September 2018 rulings from the Panel was a response to the

⁴ Panel document 47.

⁵ See email from Project Officer, Planning Panels Victoria dated 29 August 2018 and Planning Panels Victoria C258 Panel procedural rulings dated 3 September 2018, paragraph 1, first bullet point, second bullet point.

⁶ Second page of 3 September 2018 Panel ruling.

letter from Metro Pol's legal representatives on 31 August 2018. This letter also pointed out that the dates set out in the Version 6 timetable were not suitable as the relevant expert was on leave at that time.

20. On 4 September 2018, the Project Officer, PPV emailed Metro Pol's legal representatives to confirm that the Panel ruling on 3 September 2018 was not in response to the Metro Pol correspondence dated 31 August 2018. That email also disclosed that *'Council advised at the hearing this morning that they intend to provide a reply to your letter to be tabled and distributed to parties today. The Panel advises that they will wait to consider this letter and your reply before dealing further with the Hearing schedule.'*
21. On 4 September 2019, the Council wrote to PPV (and provided a copy to Metro Pol's legal representatives. Amongst other things, the letter disclosed that on the morning of 4 September 2018, the Panel indicated that additional hearing dates might be listed with reference to certain dates. Metro Pol was not present when this apparent discussion of hearing dates took place. The Council letter also submitted that the matters that Metro Pol could raise ought be confined and that the Council opposed recalling all of its expert witnesses.
22. On 7 September 2018, the Panel received correspondence from Planning and Property Partners on behalf of Notron Nominees PL, the owner of 243-249 Swanston Street seeking to be heard.
23. On 7 September 2018, the Panel received correspondence from Rigby Cooke Lawyers on behalf of various land owner interests around Bennett's Lane and Little Lonsdale Street seeking to be heard.
24. On 18 September 2018, Metro Pol wrote to the Council. In that letter, it is explained that when Metro Pol appeared previously before Planning Panel, it had not been appreciated that the Metro Pol land was being used by the Council to advance its cases in relation to C258 and that it was now understood that the Council had referred specifically to the Metropol land and the permit application that was made for that land before the application of interim heritage controls. This included cross examination of experts during the hearing of C258 specifically in relation to the Metropol land and also that submissions to the Panel had been made in relation to the Metropol land (again in the absence of Metropol). The letter sought

confirmation that Metropol's understanding of what the Council had done was correct. This was subsequently confirmed at the hearing on 19 September 2018. It is understood that submissions were made in relation to document 34⁷ which was a portfolio of '*Proposed cantilevering examples that the new policies in Amendment C258 are seeking to avoid*' which specifically includes an image of the Metro Pol permit application was designed before the application of the heritage overlay.

25. On 18 September 2018, requests to be heard were received by the Panel from 3 land holders represented by Planning and Property Partners.
26. On 19 September 2018, a directions hearing was held before the Panel.
27. On 21 September 2018, the Panel issued Advice and Directions. One of the matters contained in this document is the finding that:

38. *The Panel does not considerate (sic) appropriate at this stage to constrain the responses to further notice in terms of matters which can be addressed, particular timeframes beyond a Directions Hearing to progress the matter etc.*

39. *The Panel nevertheless agrees with the Council submissions that the primary matter of concern to would-be submitters logically must be the revised policy at Clause 22.04. The Panel has, however, not confined submissions to this component of Amendment C258.*

28. The 21 September 2018 Advice and Directions also refers to submissions that were made at the hearing in the absence of Metropol (and some other parties) – at paragraph 39:

The Panel also observes that while it was suggest that the notice should refer to the revisions made to the policy by the Council Committee in February 2018, this is a matter about which submissions were made at the Hearing which suggest that the change reflected removal of a duplicated provision rather than an intent to remove a component of policy entirely. A link to the Council Committee report and minutes would suffice.

⁷ Which was said to be part of the appendices to the Council's Part B submissions but was not included amongst the on-line materials.

29. It was not disclosed by the Panel who made these 'submissions', when they were made, and what this paragraph means.
30. The 21 September 2019 Advice and Directions directed the Council in its notice to advise of a *'preference by the Panel for further Hearing Days commencing at the end of November 2018.'*
31. On 3 October 2018, the Council wrote to Metropol. Amongst other things, the letter outlined that at the directions hearing on 7 November 2018, that the Council would request that the hearing resume on 26 November 2018 for 5 days with additional reserve dates on 3-4 December 2018. Attached to that letter was clause 22.05.
32. On 18 October 2018, amendment C327 was gazetted. This amendment applied heritage controls to 50 individual places and six precincts.

Relevant statutory provisions

33. Under the provisions of the *Planning and Environment Act 1987* ('the Act'):
 - i. A planning authority must give notice of its preparation of an amendment to a planning scheme to the owners and occupiers of land that it believes may be materially affected by the amendment (section 19(1)(b));
 - ii. 1 month of notice is the minimum time available for the notice period (s19(4)(b));
 - iii. the Panel must consider all submissions referred to it and give a reasonable opportunity to be heard to any person who has made a submission referred to it (section 24);
 - iv. S157 – Panels with more than one member, quorums and ability of Minister to appoint another member if there is a vacancy.
 - v. a Panel may make directions about the times and places of hearings, matters preliminary to hearings and the conduct of hearings (section 159(1)).
 - vi. a Panel may regulate its own proceedings (section 167);
 - vii. in hearing submissions, a panel:

- S161(1)(a) must act according to equity and good conscience without regard to technicalities or legal forms; and
 - S161(1)(b) is bound by the rules of natural justice.
- (iv) Section 161(4) - A panel may hear evidence and submissions from any person whom this Act requires it to hear.
- (v) Section 161(5) - Submissions and evidence may be given to the panel orally or in writing or partly orally and partly in writing
- (vi) Section 165 – a panel may from time to time adjourn a hearing to any times and places and for any purposes it thinks necessary and on any terms as to costs or otherwise which it thinks just in the circumstances.
- (vii) Section 166(2) – a panel may adjourn the hearing of submissions and make an interim report to the planning authority if it thinks there has been a substantial defect, failure or irregularity with the preparation of a planning scheme or amendment or any failure to comply with Division 1, 2 or 3 of Part 3 in relation to the preparation of the planning scheme or amendment.

Impact of proposed Amendment on Metro Pol

34. It is beyond fair debate that the proposed amendment will have a direct impact upon the Metro Pol land and the interests of its owner.
35. If there is any doubt about that, reference is made to document 34 which is a portfolio that specifically cites the Metropolitan Hotel as a 'Proposed cantilevering examples that the new policies in Amendment C258 are seeking to avoid'.
36. Paragraphs 241-245 of the Council's Part B submissions provide a further example.
37. The Panel should be left in no doubt that the Planning Authority is aware of the implications of this Amendment and the effect of the interim heritage control for which the Planning Authority advocated⁸.
38. The Panel should be left in no doubt, that Metro Pol is materially and specifically affected by the proposed amendment in a way that those with a passing or general interest in heritage matters are not – that is because large elements of this

⁸ See Minister's Reasons for Intervention relating to amendment C326.

amendment are directly specifically at the development potential of the Metro Pol interests. If the Council has its way, this amendment will effectively strips the Metropolitan Hotel of its redevelopment potential.

39. Metro Pol's interests are prejudiced over and above a submitter who may have a general or passing interest in the amendment. It's interests are specifically targeted by this Amendment.

Future conduct

40. It is understood that the purpose of today's directions hearing is:

To consider how to further progress the remainder of the Panel Hearing⁹.

41. The position of Metropol is that the framework for the remainder of the hearing ought be as follows.

42. It is submitted that if a hearing is to continue, the Panel needs to rule as to whether:

- i. A complete hearing will be conducted; or
- ii. Whether only a limited hearing will be allowed – in this respect, it is noted that on earlier occasions, the Council has advocated for constraints to be placed upon submissions that can be made and also that the Council would only recall two of its expert witnesses.

43. Upon the delivery of a written¹⁰ Statement of Reasons¹¹ in respect whether a complete or partial hearing will be provided, submissions in relation to future conduct of the hearing can be made and considered. In the meantime, the Panel should adjourn.

- Provide with reasons then adjourn

⁹ Panel Direction 4, 21 September 2018 Panel Directions.

¹⁰ In the context of a forum where there is no recording or transcript, it is submitted that in this matter, a written Statement of Reasons ought ~~not~~ be provided. If the Panel is not prepared to provide a written Statement of Reason, it is submitted that a recording device ought be arranged so that the Panel's reasons can be accurately recorded and later transcribed.

¹¹ In *Osmond v Public Services Board* [1984] 3 NEWLR 447 at 463, Kirby P explained the benefits of a duty to provide reasons – firstly, it enables the recipient to see why any appealable or reviewable error has been committed, with a view to informing the decision whether to appeal, challenge or let the matter lie. Secondly, it answers the frequently voiced complaint that good and effective government cannot win support or legitimacy unless it accounts for itself to those whom it affects. Thirdly, the prospect of public scrutiny will provide officials with a disincentive to be 'arbitrary'. A separate, but related point is that the discipline of giving reasons can made administrators more careful and rational. Finally, providing reasons can give guidance for future cases.

Submissions in support of a full hearing

44. The Panel is under a statutory obligation to afford natural justice¹².
45. A convenient summary of relevant principles is set out in Mason J's statement in *Kioa v West* (1985) 159 CLR 550 at 582-585:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. . . .

Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. . . . What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting

In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations. . . .

¹² Section 161(1)(b) of the *Planning and Environment Act* 1987.

When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?

46. As outlined previously, there ought be no doubt that Metro Pol would be seriously affected by the proposed amendment. It is an amendment that has been drafted specifically to target interests such as those of Metro Pol.
47. It is submitted that the interests of completing the hearing according to a predetermined timetable, or the inconvenience of repetition, are not factors that outweigh the Panels obligations to afford Metro Pol a fair go.
48. In this case that means Metro Pol should get the same opportunity that was given to the Planning Authority and other submitters.
49. These other participants in the previous part of the hearing:
- had several months leading into the hearing to take advice, consider and prepare for the Panel hearing including to be able to have time and advance notice of hearing dates and the ability to arrange advocates and expert witnesses;
 - able to attend the Directions Hearing and make submissions as to the proper conduct of the hearing and to hear any disclosures that were made at the directions hearing¹³;
 - filed and were served with expert evidence;
 - were able to read and consider the pre-circulated expert evidence;
 - were able to call lay and expert evidence;
 - were able to hear the Council's case including submissions and expert evidence;

¹³ Or during the course of the hearing.

- were able to hear submissions that are not recorded in writing;
- were able to understand the content of and context of documents that were provided to the Panel;
- was able to understand what it is that the Panel is referring to at paragraph 39 of its 21 September 2018 directions in relation to certain 'submissions that were made at the Hearing';
- were able to listen to evidence-in-chief of all witnesses;
- were able to listen to any questions that were asked by the Panel or other parties;
- were able consider and determine whether to cross-examine the Council's witnesses and any other experts in the hearing. In this respect, it is noted that the Panel adopted a process of allowing expert witnesses and cross-examination¹⁴;
- were able to listen to any comments, submissions or observation that were made during the hearing variously by the Panel or other participants;
- were able to observe the Panel, the witnesses and other participants in the hearing;
- were able to choose what submissions they made, which witnesses they called, and how they ran their case.

50. The considerations, report and recommendations of the Panel are very significant in the planning process. It has a statutory function. Its function has a serious impact upon participants in the process. It is submitted that the obligation and content of the provision of natural justice ought be elevated, rather than reduced in light of the significance of a Panel process in the planning process and the serious and material impacts that the Panel process can have on interested parties. This is particularly so in this case, where site specific interests are proposed to be

¹⁴ Noting that this is not a hearing where the Panel has elected, as it was entitled to do, to exclude cross-examination despite being bound to observe the rules of natural justice – see paragraph 39 of *Thomson v Stonnington* [2003] VCAT 813 citing *Supreme Court of Victoria v King & Ors, ex parte Westfield Corporations (Victoria) Limited*, a decision of Southwell J on 29 May 1981.

affected by this amendment – this is a situation where site specific considerations are at play and where an amendment has been specifically designed to seek to prevent certain outcomes with reference to specific sites, including the Metropolitan Hotel¹⁵.

51. It is submitted that providing for a 'half-hearing' or a 'constrained hearing' would be a denial of procedural fairness.
52. It is submitted that it is for Metropol to determine what matters it seeks to put to the Panel and that the Panel's ruling at paragraph 39 of its 21 September 2018 is a troublesome determination from the Panel as to future conduct.
53. In the context of a town planning system which requires integrated decision making, it is obvious that more than the mere consideration of clause 22.04/22.05 is required. This is particularly so in light of what is now understood to be the Council officer position that the distinction between clause 22.04 and 22.05 ought be abandoned in favour of a single policy.
54. In any event, it is submitted that these are matters for Metropol to determine in terms of which matters it seeks to put to the Panel – it is submitted that it would deny Metropol natural justice for the Council to seek to dictate, or for the Panel to constrain what matters Metropol seeks to argue at the hearing or what witnesses it proposes to question. In *Thomson v Stonnington* [2003] VCAT 813, per Judge Higgins/Member Rickards at paragraph 41, the Tribunal stated:

41. *If the Panel were to deny the applicant the right to cross-examine certain witnesses in circumstances where that right was extended to other parties involved in the hearing, it would, in our view, amount to a denial of natural justice. However, we do not interpret the Panel's offer as anything other than an unfettered right to cross-examine witnesses.*

55. In the context of an obligation to afford natural justice, the duty of disclosure is similar to but distinct from the requirement to give adequate notice¹⁶. A fair hearing presumes that the parties to it are fully informed of, and able to respond to, the

¹⁵ Section paragraph 25 of *Winky Pop Pty Ltd v Hobsons Bay City Council* [2008] VCAT 206. Also see document 23.

¹⁶ *Kioa v West* (1985) 159 CLR 550 at 587 per Mason J.

relevant issues. Proceedings before Planning Panels Victoria tend not to be recorded. It is understood that this hearing has not been recorded. There is no transcript of what has occurred. As stated in *Thomson v Stonnington* [2003] VCAT 813, per Judge Higgins/Member Rickards at paragraph 45:

In the absence of a tape-recording of the Panel's hearing or a transcript of what was said, in determining the nature of the recommendation to the Minister, no fact opinion or submission should be relied upon or used adverse to the applicant unless he has had such material drawn to his attention and he be allowed to express a view or make a submission on that material. Having regard to the history of this matter it is essential that the panel pay due regard to and strictly observe this requirement. Whether such material be contained within the notes of the Panel or the recollection of individual members is not to the point, the applicant must be given an opportunity to meet any adverse material which the Panel proposes to rely upon when reaching its recommendation.

56. Here, the Panel has receives material in the form of oral and written submissions, expert evidence both written and oral, oral questions and answer and has also observed events in person – this has all be in the absence of Metro Pol (and now other parties). It is unknown how it is proposed that this material is to be disclosed to Metro Pol – in the circumstances, it is difficult to understand how it could be said to be possible to discharge this obligation in the absence of a full hearing.
57. It is submitted that the disclosure of this material cannot be discharged by a form of hearing that is anything other than complete.
58. It is submitted that anything less than full and fair participation in these proceedings ought trouble the Panel in light of its obligations.
59. It is submitted that the Panel ought direct that a full hearing is to be provided and that if any party seeks to rely upon expert evidence in support of its position, that the normal directions are given in terms of filing and service of witness statements and the calling of witnesses in the ordinary course.

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Instructed by Best Hooper Lawyers

7 November 2018