

INDEPENDENT PLANNING PANEL
APPOINTED BY THE MINISTER FOR PLANNING
PLANNING PANELS VICTORIA

IN THE MATTER of Amendment C258 to the Melbourne Planning Scheme

BETWEEN:

MELBOURNE CITY COUNCIL

Planning Authority

-and-

VARIOUS SUBMITTERS

AFFECTED LAND: All land within the Melbourne municipal area affected by a heritage overlay and particular properties in West Melbourne

HEARING 12 NOVEMBER 2018

APPLICATION THAT THE PANEL OUGHT RECUSE ITSELF

I. INTRODUCTION

1. The City of Melbourne (**Council**) is the Planning Authority for Amendment C258 (the **Amendment**) to the Melbourne Planning Scheme (the **Scheme**).
2. On 7 November 2018, at a further directions hearing for the Amendment, Metro Pol Investment Pty Ltd (the **Applicant**) orally foreshadowed its intention to make an application that the Panel for the Amendment (the **Panel**) ought recuse itself (the **Application**).
3. On 8 November 2018, the Applicant circulated in writing the basis of the Application. The letter provides, in part:
 6. *The first basis of the application is that the hearing of the matter before the presently constituted Panel has progressed too far to enable the hearing rule to be accommodated – it is no longer possible for the current members of the Panel to undo what has occurred to date and to provide a fair hearing before them.*

7. *The second basis upon which the Panel ought recuse itself is that continuing with the panel hearing with the presently constituted panel would give rise to an appearance of bias, (i.e. ostensible bias), in that a fair-minded lay observer might reasonably apprehend that the panel might not bring an impartial mind to the matters for recommendation:*
 - i. *Because the panel could not “put out of its mind” the evidence and submissions that have been made in the absence of new submitters; and*
 - ii. *Because of the current past association of members of the Panel with the National Trust, which is a submitter to the Panel that supports the proposed amendment. This apprehension also relates by association to all members of the Panel.*
4. The Applicant seeks that the Panel recuse itself from the hearing of the Amendment on the following basis:
 - a) the hearing rule; and
 - b) the apprehended bias rule, due to:
 - i. the Panel already having heard from numerous submitters; and
 - ii. membership of Panel members of the National Trust.

II. SUMMARY

5. With regard to the hearing rule, Council submits that a review of previous cases supports the proposition that:
 - a) it is unnecessary for the Panel to recuse itself in order to ensure that a late submitter receive a fair hearing; and
 - b) a fair hearing will be provided in circumstances where the Panel has provided late submitters with an opportunity to make submissions, lead expert evidence and cross-examine Council witnesses.
6. With regard to apprehended bias, Council submits that the test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question to be tried. The test required two steps: identification of what might lead a decision-maker to decide a case other than on its merits; and articulation of the logical connection between the matter and the feared derivation from deciding the case on its merits.

7. The content of the obligation depends on the facts and circumstances but there is a clear distinction between the application of the principle to a judicial officer as opposed to a decision made outside the courts. Specific considerations are particularly relevant to planning panels.
8. With regard to the assertion that the Panel could not put previously received submissions out of its mind, there is no identified necessity for the Panel to do so, or elaboration of how a failure to do so will lead to a reasonable apprehension of bias.
9. With regard to past and current association with the National Trust, an associational interest, without more, has been held to be insufficient to substantiate a claim of apprehended bias. The panel is an expert panel, significantly removed from the judicial paradigm. While the National Trust is a submitter, it is one of over 25 submitters and in the context of a 14 day hearing, presented for less than one hour. Panel members declared this association at the initial directions hearing for the Amendment. Panel members did not contribute to the submission made by the National Trust.
10. The Council submits that the test for apprehended bias is not satisfied.

III. THE HEARING RULE

11. The hearing rule is concerned with ensuring that a person knows both the case they have to answer and is provided with a fair opportunity to put their own case. It is important that the extent of this obligation is understood in the context of the obligations of the Panel to submitters throughout the panel hearing process.
12. Part 8 of the *Planning and Environment Act 1987* provides that a panel:
 - a) may give directions about the times and places of hearing, matters preliminary to hearings and the conduct of hearings (section 159(1));
 - b) may refuse to hear any person who fails to comply with a direction of the panel or of the directions panel (section 159(2));
 - c) must act according to equity and good conscience without regard to technicalities or legal forms, is bound by the rules of natural justice, is not

required to conduct a hearing in a formal manner and is not bound by the rules or practice as to evidence but may inform itself on any matter in any way it thinks fit, without notice to any person who has made a submission (section 161(1));

- d) may prohibit or regulate cross-examination (section 161(3));
- e) may hear evidence and submissions from any person whom this Act requires it to hear (section 161(4));
- f) may 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 (section 165);
- g) may continue to hear submissions and make its report and recommendations (or adjourn the hearing of submissions and make an interim report) despite any failure or irregularity in 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 (section 166(1) and 166(2));
- h) may regulate its own proceedings (section 167);
- i) may take into account any matter it thinks relevant in making its report and recommendations (section 168).

13. Section 161(1)(b) of the Act provides that in hearing submissions, a panel is bound by the rules of natural justice. While section 166(1) of the Act provides that a panel may continue to hear submissions and make its report and recommendations despite failure or irregularity in the preparation of a planning scheme amendment, this has been held not to apply to a failure to afford natural justice (see *Thomson v Stonnington City Council* [2003] VCAT 813, discussed further below).

14. *Winky Pop Pty Ltd v Hobsons Bay CC* [2008] VCAT 206 was tendered to the panel and extracts were read from it and relied upon on 7 November 2018. That case concerned an application to the Tribunal under section 39 on the basis that the panel failed to afford natural justice and a reasonable opportunity to be heard to the applicant. In

that case the applicant had elected not to attend the entire length of the relevant panel hearing and alleged *inter alia* that the panel had failed to afford natural justice in neglecting to bring to the applicant's attention all submissions made that were contrary to its position.

15. The Council submits that *Winky Pop* provides the following analysis:
 - a) The rules of natural justice are not fixed or inflexible and what is required must be measured against the circumstances of the case, the legislative framework and the subject matter (paragraph 9).
 - b) In a site specific proposal the panel may take on an adversarial process such that each party is fully aware of all matters in issue well before the hearing, attend for the entire duration of the hearing and the rules of natural justice will take on a greater degree of formality. In a broad strategic or policy review, where there are multiple submitters across a range of topics and interests, the panel will take on more of an inquiry function or advisory role and the opportunity to be heard is essentially an opportunity to appear and expand on a written submission where many submitters are not represented and do not attend for the entire panel hearing (paragraph 26).
 - c) A panel must put in place reasonable processes on a case-by-case basis to ensure that all submitters get a fair go (paragraph 33).
16. *Thomson v Stonnington City Council* [2003] VCAT 813 was also the subject of submissions on 7 November 2018. This case concerned a panel hearing in which, on the first day of the hearing it became apparent that a number of affected persons had not been notified of the proposed amendment. Nevertheless, at the urging of the planning authority, the panel hearing continued. One such affected person brought an application for a declaration pursuant to section 39(4) that he had been denied natural justice and an interim order that the panel be stayed or adjourned pending the hearing and determination of the Tribunal.
17. Mr Thomson specifically sought that the amendment not be adopted or approved unless the panel hearing was abandoned, a new panel differently constituted was appointed and a new hearing was conducted by the reconstituted panel; or

alternatively, that all evidence called on behalf of the planning authority be reheard and any other party was afforded the opportunity to cross-examine all such witnesses and reply to all such submissions.

18. The Tribunal in this case found:

- a) By continuing with a panel hearing in circumstances where the panel was aware that there were persons who were required to be notified and were not so notified, the panel applied the rules of natural justice to one group of objectors, but ignored until late in the hearing the existence of another group who were entitled to the same rights (paragraph 29).
- b) The matter should have been adjourned at the outset and time given to investigate the irregularities, which would have avoided the difficulties later faced by the panel (paragraph 30).
- c) The reference in section 166 of the *Planning and Environment Act 1986*, which enables a panel to continue to hear submissions and make a report despite any defect, failure or irregularity in the preparation of an amendment, does not apply to a failure to accord natural justice to a person whose interest has been affected such that it could deny such a person a right to a hearing (paragraphs 32 and 33).
- d) 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 it would amount to a denial of natural justice, however the panel's offer was an unfettered right to cross-examine witnesses (paragraph 41).
- e) As the panel provided the applicant with all of the written material and extended an offer to cross-examine witnesses, what the applicant had potentially lost was:
 - i. elaboration by witnesses in evidence-in-chief of their written material;
 - ii. the benefit of having answers given by witnesses when cross-examined by other parties; and

- iii. the right of the applicant to rely on any prior inconsistent statement.

However, even if the panel were to accede to the application and a new hearing took place, the applicant would still be in the position of not knowing what was said in cross-examination by a witness in the earlier hearing. In that situation, there has been no prejudice to the applicant (paragraphs 42 and 43).

- f) The real question for the Tribunal whether the steps taken by the panel would effectively overcome any prejudice suffered. The offer of the panel to provide all written material and cross-examine witnesses, coupled with a further requirement that the panel not rely upon any fact, opinion or submission adverse to the applicant, without the panel having drawn it to the applicant's attention and provided the opportunity to respond was viewed as effectively overcoming this prejudice. Such a requirement may be greater than what is required by law (paragraphs 44-46).
19. Council maintains its position as set out in submission made on 19 September 2018 that there was no requirement under the Act to notify the Applicant of the Amendment at the time of exhibition or subsequently, as the notice obligation is not ongoing, and that accordingly there has been no failure or irregularity in the preparation of the Amendment.
20. In any event, the Panel has elected to afford the Applicant the right to appear before the Panel, make submissions, call evidence, hear from Council expert witnesses and cross-examine those witnesses. This is in accordance with the orders ultimately made in *Thomson* where an actual procedural defect was established.
21. There is no requirement in the context of late submissions for the Panel to undo what has already occurred in order to provide a fair hearing.

IV. APPREHENDED BIAS

A. RELEVANT CASELAW

22. The test of apprehended bias in Australia was described by the High Court in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 as follows:

6 *Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.*

7 ...

8 *... Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed. [Emphasis added]*

23. This test was applied by the High Court in *Michael Wilson and Partners v Nicholls* [2011] HCA 48.

24. In *Minister for Immigration v Jia Legeng* [2001] HCA 17, the High Court had to decide whether the Minister for Immigration and Multicultural affairs was disqualified from exercising a statutory power under the Migration Act 1958 (Cth) by reason of actual or apprehended bias, on the basis of a letter written by the Minister to the President of the Administrative Appeals Tribunal, remarks made during a radio broadcast and statements in a briefing paper.

25. Hayne J discussed the distinction between the application of the principles of apprehended bias in relation to a judicial officer, as opposed to decisions made outside the courts:

179 *Importantly, the rules about judicial prejudgment recognise that, subject to questions of judicial notice, judges, unlike administrators, must act only on the evidence adduced by the parties and must not act upon information acquired otherwise. No less importantly, the rules about judicial prejudgment proceed from the fundamental requirement that the judge is neutral...*

180 *Decisions outside the courts are not attended by these features...*

181 *The analogy with curial processes becomes even less apposite as the nature of the decision-making process, and the identity of the decision-maker, diverges further from the judicial paradigm. It is trite to say that the content of the rules of procedural fairness must be "appropriate and adapted to the circumstances of the particular case".*

What is appropriate when decision of a disputed question is committed to a tribunal whose statutorily defined processes have some or all of the features of a court will differ from what is appropriate when the decision is committed to an investigating body. Ministerial decision-making is different again.

26. In *Rajendran v Tonkin & Ors* [2002] VSC 585, the applicants brought proceedings seeking judicial review of a decision of the Permit Committee of the Heritage Council to affirm the decision of the executive director of the Heritage Council, Mr Tonkin, not to grant a permit for redevelopment of a property on the Victorian Heritage Register. The applicants alleged, inter alia, that the Chairman of the Permit Committee should have disqualified himself on the ground of apprehended bias due to his membership of the National Trust.
27. Smith J found, while making no suggestion of actual bias, the Chairman should have disqualified himself:
 - a) While the legislation did envisage that at least some members of the Heritage Council could and would be members of the National Trust, it did not follow that such members were entitled to sit on appeals where the National Trust had been involved in supporting one of the parties as there was nothing in the legislation which sought to modify common law rules relating to apprehended bias and natural justice.
 - b) There was more than a bare association between the Chairman and the National Trust. He had been closely involved at a high level and was likely therefore to have strongly identified with its objectives and causes such that a fair minded observer might not bring an impartial mind to the resolution of the matter.
 - c) The Committee's own reasons for dismissing the objection included that the Heritage Council's functions were so aligned with those of the National Trust such that the issue of apprehended bias did not arise. These reasons did not address the fact that the Heritage Council, in discharging their statutory duty are commonly required to balance the competing considerations of bodies such as the National Trust on the one hand and permit applicants on the other. The result of the reasons was such that, independently of any

consideration of association of the Chairman and the National Trust, the reasons might reasonably apprehend that the Chairman and the Committee might not bring an impartial mind.

28. The principles discussed in *Jia* were applied by Morris J in *Mildura Rural City Council v Minister for Major Projects* [2006] VCAT 623 in relation to the constitution of a planning panel. The panel in question was tasked with considering a containment facility for hazardous waste. The Mildura Rural City Council initiated a proceeding pursuant to section 39 of the Planning and Environment Act 1987 seeking a declaration that one panel member, Dr Russell, would not hear submissions in accordance with the rules of natural justice as required by section 161 of the Act. The circumstances relied upon included Dr Russell's close association with State Government.

29. At paragraph 7:

10 *The present case is not about a judicial officer. This may be significant, because the requirements of natural justice depend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth...*

...

12 *It is true that the principle articulated in Ebner has been applied to bodies not based upon the judicial model, such as Victoria's Heritage Council, a body exercising statutory decision making powers pursuant to the Heritage Act 1995. But in Minister for Immigration and Multicultural Affairs v Jia the High Court of Australia made it clear that the application of the Ebner principles concerning bias will depend on the circumstances. The court pointed out that the application of the principles will not be the same when a decision is vested, not in a judicial officer, but in a minister...*

...

The application of the apprehension of bias principle in respect of panels

22 *In my opinion, the apprehension of bias principle to be applied to panels under the Act must have regard to the administrative and policy role of a panel, the source of its authority, the procedure it may follow, and the fact that it makes recommendations, not decisions. It is also relevant that both a panel and PPV lack any significant degree of institutional independence. A panel appointed under the Act diverges significantly from the judicial paradigm. Thus the apprehension of bias principle (which forms part of the requirements of natural justice) ought not be applied to a panel as if it were a court. In particular, it ought not be applied in a manner that requires the exclusion of persons as panel members because they have had extensive experience in advising the incumbent government, or had associations with the*

incumbent government, without more. This is so even if the proponent of the amendment to be considered is the government of the day.

30. Morris J found that while government appointments suggested that Dr Russell had the confidence of the State Government as an advisor, it was a huge step to then infer that this confidence meant that he would act other than impartially. The appointments and associations did not support any notion that he was a ‘yes’ man to governments. Accordingly, Morris J found that a fair minded person, informed of both Dr Russell’s associations and the nature of a panel hearing, would not reasonably apprehend that he might not bring an impartial mind to the task of panel member.
31. In *Jinshan Investment Group Pty Ltd v Melbourne CC* [2015] VCAT 635, an application was made seeking the reconstitution pursuant to section 108 of the *Victorian Civil and Administrative Tribunal Act 1998* (the **VCAT Act**) of a division of the Victorian Civil and Administrative Tribunal (the Tribunal), Deputy President Gibson, on the basis of her originally undeclared membership of the National Trust.
32. The case concerned an application to demolish the Palace Theatre, a heritage listed property. The applicant sought reconstitution of the Tribunal on the basis that both the National Trust and Melbourne Heritage Action were parties to the proceeding and had made allegations of unlawful conduct against the applicant, which gave rise to a concern that the Tribunal might not bring an impartial mind to the application. Deputy President Gibson was not, and had never been, a board member of the National Trust.
33. Garde J determined to exercise his discretion under section 108(2) of the VCAT Act to order a reconstitution of the Tribunal on the following basis:
 - a) the proceeding was fundamentally about heritage matters and the National Trust is the leading heritage body that stands for the preservation of heritage buildings;
 - b) the submissions made went beyond the heritage value of the Palace Theatre and the merits of the proposed development, relating to alleged illegal works performed by the applicant;

- c) the existence of substantial allegations of illegal demolition by the National Trust, in the circumstances of a primarily heritage case, provided a sufficient logical connection between membership of the National Trust and feared deviation from the course of deciding the case on its merits;
 - d) it was unfortunate that the disclosure of membership occurred following the conclusion of the hearing rather than at its commencement due to oversight; and
 - e) it was regarded as imperative that the impartiality and independence of the Tribunal be, and be seen to be, above reproach.
34. In *Little Projects Pty Ltd v Stonnington CC* [2016] VCAT 698, Deputy President Dwyer heard an application under section 108(2)(a) of the VCAT Act for reconstitution of the Tribunal after five days of hearing. The circumstances of the case were that the applicant had become aware that one of the members hearing the case had, immediately preceding the hearing, been an objector in a case that was highly similar on its facts and had expressed detailed personal and professional views on issues common to both cases.
35. Deputy President Dwyer was taken to the decisions of *Jinshan* and *AJH Lawyers* and elected to order the reconstitution of the Tribunal:
- 8. *As I have said, this is an unusual matter and my decision is made 'on balance'. I do not find any actual bias on the part of Member Chase. Moreover, a member of the Tribunal is not precluded from exercising his or her rights as a private citizen, including the right to participate as an objector in a proceeding at the Tribunal under the Planning and Environment Act 1987. VCAT has protocols in place to deal with this scenario. Equally, it must be recognised that non-lawyer expert members of the Tribunal are appointed for their professional experience and expertise that they necessarily bring to bear in their decision-making role. Sometimes, those members may take a robust role, and even express tentative views, on a point of importance in a proceeding. They will also express opinions on matters of principle in their decision, which may have implications in other proceedings. Sessional members utilised only from time to time by the Tribunal may also engage in other professional work away from the Tribunal. None of these matters of themselves satisfy the test for apprehended bias, subject to compliance with internal protocols to avoid any conflict of interest, and subject (where appropriate) to considerations of disclosure and procedural fairness. The test is really whether a fair-minded observer would apprehend that the member was incapable of bringing an impartial mind to bear in determining an issue of substance in a proceeding.*

9. *As I indicated at the hearing, having regard to each of the issues raised by Mr Townshend in isolation, I would likely not have reconstituted the Tribunal. A reconstitution, particularly late in the hearing, should be avoided where possible given the costs and delay to the parties, and to avoid 'forum shopping' where a party might seek a reconstitution of the Tribunal as a tactical manoeuvre where it thinks that the decision is likely to be adverse to it. A reconstitution should arise only in rare and exceptional circumstances...*

B. PRINCIPLES

36. The Council submits that the following principles can be discerned from the cases discussed above:
- a) The test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the judge (or decision-maker) might not bring an impartial mind to the resolution of the question to be tried. The test is founded in the necessity for public confidence in the judiciary.
 - b) Two steps are required:
 - i. identification of what might lead a decision-maker to decide a case other than on its merits; and
 - ii. articulation of the logical connection between the matter and the feared derivation from the course of deciding the case on its merits.
 - c) The actual state of mind of the decision-maker in question is irrelevant to the consideration of apprehended bias.
 - d) Apprehension refers to an apprehension of a decision-maker not deciding a case impartially, as opposed to an apprehension that a case will be decided adversely to one party.
 - e) The question is one of possibility (real and not remote) and not probability.
 - f) The bare assertion that a decision-maker has an 'interest' in a matter, or a party to it, will be insufficient.
 - g) There is a clear distinction between the application of the principles in relation to a judicial officer as opposed to decisions made outside the courts. The

content of the obligation depends on the facts and circumstances, but the degree of divergence from the judicial paradigm is relevant.

- h) The notion of an ‘expert’ tribunal assumes that a decision-maker will utilise experience and knowledge, in contrast to a judicial officer who must only act on the evidence adduced by the parties. The application of the rule requires consideration of how the decision-maker may properly go about their task and what degree of neutrality is expected of them.
- i) Specific considerations with regard to panels are:
 - i. a panel and Planning Panels Victoria lack any significant degree of institutional independence;
 - ii. a panel appointed under the *Planning and Environment Act 1987* differs significantly from the judicial paradigm;
 - iii. a planning panel differs significantly from the Tribunal where: members are appointed for fixed terms, rather than on an ad hoc basis; members are assigned to matters by a Supreme Court Judge, as opposed to the Minister; the Tribunal is managed by its President and Vice Presidents – Planning Panels Victoria is part of the Department of Environment, Land, Water and Planning; the Tribunal makes decisions, while a panel makes recommendations; the Tribunal exercises both an original and review jurisdiction, while a panel exercises neither judicial power nor a power to determine substantive rights; the task of the panel is essentially that of a government advisor; and these characteristics do not support a strict application of the bias principle on the basis of association.
 - iv. the rule against bias should not be applied in relation to panels such that it requires the exclusion of panel members because they have extensive experience in advising government or associations with government, without more.

- j) A decision-maker should not accept recusal simply because it has been requested.
- k) A reconstitution, particularly late in a hearing, should be avoided where possible given the costs and delay to the parties and to avoid ‘forum shopping’.
- l) A reconstitution should only arise in rare and exceptional circumstances.

C. APPLICATION TO THE FACTS OF THE CASE

37. The Applicant relies upon the following factors as giving rise to a reasonable apprehension of bias:
- a) the Panel could not ‘put out of its mind’ the evidence and submissions that have been made in the absence of the new submitters; and
 - b) current and past association with the National Trust.
38. With regard to the assertion that the Panel could not put previously received submissions out of its mind – this satisfies the first step of the two-step test identified by the court in *Ebner*. The written basis of the application circulated by the Applicant has not attempted to satisfy the second test, namely articulating the connection between the matter and the feared derivation from deciding the case on its merits.
39. Late submissions to a panel would appear unlikely to constitute a ‘rare and exceptional circumstance’ and there is no requirement upon panels to seek to put prior submitters out of their minds when considering a late submission. Even in circumstances where procedure has not been appropriately followed, this has not mandated that a panel hearing could not proceed (as discussed above).
40. With regard to the second ground, namely, current and past association with the National Trust (step one of the test in *Ebner*) who is a submitter to the panel that supports the proposed amendment (step two).
41. An associational interest, without more, has been held to not substantiate a claim of apprehended bias. The written basis of the application does not provide that the

panel members have a strong association, or participation at a high level, akin to the considerations in *Rajendran*.

42. The website of the National Trust provides that membership provides the following benefits:
- *Free entry into all Victorian National Trust properties.*
 - *Free entry into National Trust properties across Australia and throughout the world, including hundreds in the United Kingdom.*
 - *Regular editions of our National Trust magazine.*
 - *A 10% discount on purchases at National Trust shops throughout Australia.*
 - *Free or heavily discounted prices to our events and exhibitions.*
 - *Exclusive member-only events.*
 - *Access to our e-News providing competitions and special offers to movies, events and exhibitions throughout Victoria.*
 - *Special offers and discounts at The O'Brien Group Arena, ACMI, Australian National Academy of Music, Melbourne Arts Centre, Puffing Billy, Melbourne Sea Lift Aquarium, The Drain Man, Diabetes Victoria, Sovereign Hill and Kryal Castle.*
43. The panel is an expert panel, appointed by the Minister for Planning and significantly removed from the judicial paradigm. It may only make recommendations and has no ability to determine substantive rights.
44. While the National Trust is a submitter to the Panel, it is one of over twenty-five submitters participating in the hearing and in the context of a 14 day hearing, presented for less than one hour. The National Trust made submissions regarding the gradings review, the proposed policies and the statements of significance, but it did not make detailed submissions regarding specific properties.
45. Members of planning panels have an obligation to fulfil their statutory responsibilities in terms of considering submissions and making recommendations. They also have an obligation not to recuse themselves without a proper basis, simply because a recusal has been requested. The cases detailed above make clear that a recusal should only arise in rare and exceptional circumstances and this is in no small part to avoid the cost and delay to all of the other parties who have elected to participate in the

panel process to date, and to avoid ‘forum shopping’ as a tactical manoeuvre of a submitter. The Panel has already sat for 15 days. There are many submitters who have spent a great deal of time and energy presenting their submissions and evidence to the Panel, and it would appear beyond question that many, if not most, would not wish to have to undertake the process yet again.

46. In the circumstances, the Council submits that the test for apprehended bias is not satisfied.

Susan Brennan

Carly Robertson

Counsel for the Planning Authority

12 November 2018