Planning Panels Victoria
Department of Environment, Land, Water and Planning

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As addressed

Melbourne Planning Scheme Amendment C258: Heritage Revisions

Panel Advice, Ruling and Directions

1. This Panel document provides a record of recent procedural hearings and provides Panel rulings concerning whether natural justice might be afforded to those late submitters whose submissions were referred to the Panel in recent months, and whether the Panel should recuse itself.

BACKGROUND

2. The background and Directions provided in the Panel's Advice and Directions of 21 September 2018 (Doc 104) remain relevant.

3. The Panel's written Advice and Directions of 21 September 2018 set out matters raised at a Directions Hearing on 19 September 2018 and the Panel response, including:
   - The Panel made no finding as to the correctness or otherwise of the original notice given of the Amendment under section 19 of the Act.
   - The Panel noted that there was a measure of agreement by those present at the 19 September 2018 Hearing that further notice should be given of the Amendment.
   - The Panel view was that a fair hearing could be afforded to the late submitters at the Hearing – assuming they might make their own submissions and call evidence, all previous documents were made available to the would-be submitters, Council witnesses were recalled, and other procedures implemented as recommended in the decision in *Thomson v Stonnington CC [2003] VCAT 813* (30 June 2003).
   - In considering fairness in the context of the Panel Hearing, the Panel's view was that the interests of both potential new submitters and those of existing Hearing participants who had presented over the 13 days of Hearing were to be taken into account.
   - The Panel considered that the correct balance of those interests would be struck by continuing the Hearing rather than abandoning it in favour of a new process.
   - The Panel placed no constraints on the responses which might be made to the further notice in terms of matters which might be addressed by late submitters and timeframes for presentations that might arise (other than scheduling a Directions Hearing on 7 November).

4. As a result of the above Panel and subsequent exhibition processes, by email on 20 November 2018, the Council referred the following late submissions to the Panel:

17-21 Bennetts Lane	Received 26 October 2018	Rigby Cooke Lawyers
23 Bennetts Lane	Received 26 October 2018	Rigby Cooke Lawyers
134-144 Little Lonsdale Street	Received 26 October 2018	Rigby Cooke Lawyers
146-148 Little Lonsdale Street	Received 26 October 2018	Rigby Cooke Lawyers
134-136 Flinders Street	Received: 26 October 2018	Natalie Ann Reiter (for herself & JP Hanney and BD Prewett)
577-583 Little Collins Street	Received 26 October 2018	Best Hooper Lawyers
263-267 William Street	Received 31 August 2018	Best Hooper Lawyers
31-35 Flinders Lane	Received 15 November 2018	Planning & Property Partners
96-98 Flinders Street	Received 15 November 2018	Planning & Property Partners
243-249 Swanston Street	Received 15 November 2018	Planning & Property Partners
146-158 Bourke Street	Received 15 November 2018	Ryder Commercial
139 Little Bourke Street	Received 15 November 2018	Ryder Commercial

(Corrected version as set out in Council second email to Panel on 20 November 2018 (Doc 109)).

5. A Directions Hearing was held on 7 November 2018 to consider how to further progress the remainder of the Panel Hearing.

6. At the 7 November Directions Hearing, the Council reported on the process and results of the further notice (Doc 91) and indicated that a number of late submissions were being referred to the Panel (Doc 93). Submissions were then made on behalf of Metro Pol (Doc 94) and Bennett's Lane (Doc 97), supported by others, that the current Hearing should not proceed at all. This was argued on the basis that the Panel obligations to afford natural justice, as is required by section 161(1)(b) of the Act, would not be met.

7. It was submitted by **Metro Pol** that the Panel should rule on whether *'a complete hearing will be conducted'* or whether *'only a limited hearing will be allowed'.*

8. Metro Pol, relying on *Kioa v West* (1985) 159 CLR 550 at 582-585 in defining natural justice (or more particularly the 'hearing rule' component of it), argued that a 'full hearing' was necessary to give Metro Pol what was described as '*a fair go*.' The importance of the Panel component of the planning process was stressed. It was said that this was particularly the case, as here, where site specific interests are proposed to be affected. Metro Pol submitted that its interests were prejudiced by the Amendment over and above those of a submitter who may have a general or passing interest in the Amendment. Reliance was placed on the direct reference made by the Council to an earlier Metro Pol application for its land - said by the Council to be a form of development which was sought to be avoided by the new policy at Clause 22.04 (Doc 34).

9. It was submitted that a 'half-hearing' or a 'constrained hearing' would be a denial of procedural fairness. Reference was made to the absence of recording of Panel hearings and the required adoption of special procedures in *Thomson* to draw attention to facts, opinions or matters adverse to the late participant. It was nevertheless submitted that it is unknown how the Panel might disclose matters adverse to Metro Pol (and other late submitters) and difficult to understand how it might be done in the absence of a full hearing.

10. Metro Pol went on to say that the Panel should direct that a 'full hearing' is to be provided and that normal directions are given about the filing and service of witness statements.

11. Submissions for **Bennett's Lane** included that the proposed policy would profoundly affect the policy attitude and development potential of Bennett's Lane's land. It was noted that the Panel had been advised by the Council Part A submission that the Hoddle Grid review was underway and that it was part of a program of heritage reviews, and that Amendment C258 was an important step in the Council's overall program to protect heritage in the municipality.

12. The Bennett's Lane submissions also said that steps should have been taken sooner in relation to notice and a reasonable opportunity to be heard must not now be informed by procedural convenience or timetabling. Bennett's Lane is entitled to participate fully in the process, it was said, and seeks to hear the full Planning Authority case in relation to the Hoddle Grid, make submissions, and call and test evidence concerning inter alia the strategic basis of the Amendment, the role of policy, and the form and content of the exhibited and post-exhibition versions of the Amendment.

13. Bennett's Lane sought a Panel ruling as to whether in a reasonable opportunity to be heard would mean that the case of the Planning Authority would be heard in full, including all evidence relied upon by the Planning Authority.

14. Supporting submissions for **577-583 Little Collins Street** also argued that the Council's full case, as it affects the Hoddle Grid, should be presented.

15. The **Council** reply included that the notice arguments had been previously made and the Panel had not made a finding on it but rather simply allowed the further notice (see para 29 of Doc 104). If the landowners are dissatisfied on this issue, they have recourse to the Victorian Civil and Administrative Tribunal (VCAT).

16. It was submitted for the Council that (some) late submitters had not reviewed the material from the previous days of Hearing in the 5-7 weeks available to them to do so. It remained clear that evidence from Ms Brady and Ms Jordan was that of most relevance to the late submitters, but they had not clearly said what other evidence they wished to hear. The Directions Hearing was an opportunity for the late submitters to provide advice as to what other material they saw as relevant but had not done so and were merely attempting to obfuscate and derail the Amendment process. It was noted that this Hearing was not about all aspects of the Hoddle Grid heritage: heritage gradings for particular properties would be addressed in the Amendment C328 process.

17. It was said that this is not a site specific Amendment but one about policy change. There is no rezoning proposed nor are overlays being applied or changed. In this way, the decision in *Winky Pop Pty Ltd v Hobsons Bay CC [2008]* VCAT 2016 (Doc 95) has relevance to consideration by the Panel of the appropriate process to adopt.

18. It was also submitted for the Council that the late submitters were setting up a false dichotomy between natural justice and convenience, and that natural justice in this case is informed not just by the rights of the late submitters, but also by the rights of other submitters and the Council, and the statutory obligations of the Panel. The Panel finding in response to submissions concerning this matter in its Advice and Directions of 21 September 2018 was noted.

19. During the 7 November Directions Hearing, as part of its submission, Metro Pol commented that the late submitters were not aware of what, if any, declarations concerning potential conflicts of interest the Panel had made at the outset of the process.

20. The Panel advised that declarations had been made at the initial Directions Hearing that Ms McKenzie and Mr Tonkin were financial members of the National Trust and that Mr Tonkin had had extensive experience with heritage in the City of Melbourne in his previous role as Executive Director of Heritage under the State heritage legislation. He had indicated, however, that he had not considered the places or issues raised by the present Amendment. The Panel also advised that the Chair had been an Alternative Member of the Heritage Council of Victoria (Heritage Council) under the *Heritage Act 1997* at the time of the declaration at the initial Directions Hearing and was now Deputy Chair of the Council under the *Heritage Act 2017*. Both the Chair and Mr Tonkin had experience with other Panels dealing with City of Melbourne heritage proposals (Amendments C186 and C207; and in the Chair's case also Amendments C240 and C270). No party at the initial Directions Hearing objected to the Panel so constituted.

21. The Panel reserved its ruling concerning the applications made for Metro Pol and Bennett's Lane.

22. Metro Pol then requested a further Directions Hearing concerning the outcome of the applications. The Panel declined to set such a hearing at that stage.

23. Following this, Counsel for Metro Pol foreshadowed orally that Metro Pol wished to make application for the Panel to recuse itself.

24. The recusal application was set down for Monday 12 November 2018. Grounds were circulated by Metro Pol on 8 November 2018. Supporting written submissions were received on 12 November 2018 from Best Hooper, the solicitors for Sydney Road Holdings Pty Ltd, the owner of 577-583 Little Collins Street (Doc 106); and Rigby Cooke lawyers, for Bennett's Lane as owner of 17-21 and 23 Bennett's Lane; and 134-144 and 146-148 Little Lonsdale Street (Doc 107). Neither of these late submitters were represented at the Directions Hearing concerning the recusal.

25. The recusal application by Metro Pol (Doc 99) and a Council reply (Doc 100) were heard by the Panel following a preliminary matter raised by the Panel. The written ruling on the recusal follows below.

26. The preliminary matter raised by the Panel on 12 November 2018 was whether there might be another way to progress this Amendment which would both respond to the concerns about procedural fairness raised by Metro Pol and other late submitters, and at the same time afford fairness to others who had presented over the 13 Hearing days commencing on 6 August.

27. The alternative course (involving exclusion of the properties owned by the late submitters from the operation of the revised policy as part of this Amendment) was set out in written Panel Advice and Directions dated 14 November 2018 (Doc 108). Parties were invited to respond to the alternative course by 26 November 2018.

28. No late submitter supported the alternative course as described by the Panel (some opposed the course, some did not respond at all and others proposed different exclusions from the Scheme) (Docs 110, 112, 113 and 114). Neither did the Council support an alternative course (Doc 111). There was general support for the Panel making a ruling on the procedural issues already heard and the Council requested that the further Hearing should be set for seven days between 11 and 19 February 2019.

PROCEDURAL FAIRNESS AND RECUSAL APPLICATIONS

29. It is convenient to deal with the matters raised at the Directions Hearing of 7 November and the subsequent recusal application jointly. In both cases, arguments were advanced about whether the 'hearing rule' of natural justice could be met by the present Hearing continuing, with the recusal application also suggesting perceived bias in relation to all Panel Members. The obligation for the Panel to afford natural justice in hearing submissions is found in section 161(1)(b) of the Act.

30. The Panel agrees with the submissions by the Council that the issue of the adequacy of notice, which was reventilated on behalf of Bennett's Lane, was earlier considered by the Panel with the Panel response set out in its 21 September 2018 ruling. The Panel made no finding as to whether there had been a failure in relation to section 19. This matter is not further addressed.

31. The issue of whether procedural fairness could be afforded to submitters was also addressed by the Panel in its 21 September 2018 ruling. This responded to the relatively limited submissions already made by 19 September 2018. The matter was more extensively addressed by Metro Pol, Bennett's Lane and others, including the Council, during the 7 and/or 12 November Directions Hearings. It is appropriate that the more comprehensive arguments be considered.

32. By way of letter dated 8 November 2018, Best Hooper Lawyers on behalf of Metro Pol, provided the basis for the application that the Panel ought recuse itself.

33. The application sought the recusal of the Panel on two grounds:
    - The Hearing had progressed in the absence of Metropol to such a point where the hearing rule of natural justice could not be accommodated.
    - The Hearing continuing with the presently constituted Panel would give rise to an apprehension of bias, such that a fair minded informed observer might reasonably apprehend that the Panel might not bring an impartial mind to the matter. This was due to:
        - The matter's progress to date not allowing Panel members to come to the further Hearing with a fresh mind given the evidence and submissions made in the absence of the late submitters.
        - The current and past association of two Members of the Panel with the National Trust, who made submissions in support of the Amendment.

The hearing rule

34. **Metro Pol**'s submissions (Doc 99) in relation to the hearing rule were:

- While what is procedurally fair, and the content of natural justice depends on the facts and circumstances of a particular case, it is often said there is an element of '*I know it when I see it'* in determining a breach.
- The progress of the matter to date means that oral and written submissions have been received, evidence has been called and examined and the Panel has deliberated together, all in the absence of the late submitters.
- The progress of the Hearing in the absence of the late submitters is such that it is not possible to cure the injury to procedural fairness with the presently constituted Panel.

35. The supporting written submissions by **Bennett's Lane** made some general contextual comments which included that the ability for Bennett's Lane to participate in Amendment C258 occurred much later than it should have and that the Panel should have not overlooked its interests when advised prior to the commencement of the Hearing that a review of affected properties was current.

36. It was submitted that the Panel should identify the opportunity that will be afforded Bennett's Lane to participate in the Hearing and then allow submissions on further procedural orders. Related to this, concern was expressed that the Panel had indicated a preference or a determination to proceed with the Hearing without first making findings as to the opportunity to be heard. It was unfair to ask Bennett's Lane to identify questions for particular witnesses without a finding on the opportunity to be heard which would be afforded.

37. Bennett's Lane submitted that the Panel had made an invalid and prejudicial 'balance' between convenience of the Planning Authority and those persons who were properly notified, and the 'reasonable opportunity to be heard' that must be provided to those who were not.

38. Specifically, in relation to recusal, Bennett's Lane submitted that late joined submitters are entitled to fresh eyes and ears when they would make submissions and test evidence. This is especially so in that evidence will be heard for a second time or will be part heard.

39. The written submission for **Sydney Road Holdings** supported the Metro Pol application and submissions.

40. The **Council** opposed the recusal application and the submissions made by Metro Pol. In relation to the hearing rule, the Council submitted (Doc 100) that a review of previous cases supports the proposition that:
    - It is unnecessary and unfair for the Panel to recuse itself in order to ensure that the late submitter receive a fair hearing.
    - 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.

41. The Council referred to *Winky Pop* (Doc 95), submitting that this case provided the following analysis:

- The rules of natural justice are not fixed and inflexible and must be measured against the circumstances of the case, the legislative framework and the subject matter (paragraph 9).
- A contrast was drawn between Panel processes involving site specific proposals and broad strategic or policy reviews. In the former, an adversarial process may occur, with all matters in issue known before the Hearing, the parties in attendance for the duration of the Hearing, and the rules of natural justice taking on a degree of formality. In the latter, 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 that there is an opportunity to appear and expand on a written submission, and many submitters are not represented and do not attend for the entire Panel Hearing (paragraph 26).
- A Panel must put in place reasonable processes on a case by case basis to ensure all submitters get a fair go (paragraph 33).

42. The Council also referred to *Thomson*. It was noted by the Tribunal that the Panel in that case had continued the hearing despite being advised of the failure to give notice to all beneficiaries of the covenant to be varied or removed. The Tribunal commented that if the Panel had later denied the applicant the opportunity to cross-examine certain witnesses at the continued hearing, this would amount to a denial of natural justice, however the Panel had offered an unfettered right to cross-examine. It was noted that the applicant had potentially lost access to oral elaboration of evidence and answers by witnesses under cross-examination together with knowledge of any prior inconsistent statement. The Tribunal nevertheless noted that if there were a new hearing, the applicant would still be in the position of not knowing what was earlier said. The Tribunal concluded that there would be no prejudice to the applicant (paragraph 42-43).

43. The Tribunal said that the real issue was whether the steps taken by the Panel would effectively overcome any prejudice suffered. As summarised in the Council submission, it was held (paragraphs 44-46) that:

> *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 is required by law.*

44. The Council submission noted that the Panel for the present Amendment had elected to allow Metro Pol to appear, make submissions, call evidence, hear from Council expert witnesses and cross-examine those witnesses. This is in accordance with the orders made in *Thomson* where an actual procedural defect was established. It was submitted that there is no requirement in the context of the late submissions for the Panel to undo what has already occurred.

The bias rule

45. It was submitted for **Metro Pol** that a fair-minded lay observer might reasonably apprehend that the Panel might not bring an impartial mind to the matters for recommendation (based

on the test set out for a judge or judicial officer in *Ebner v Official Trustee in Bankruptcy [2000]* 205 CLR 337 @344). It was said that this was because:

- The Panel could not put out of its mind the submissions and evidence presented in the absence of the new submitters; and/or
- Two Members of the Panel had a current or past association 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.

46. It was said in relation to the first ground relating to perceived bias, that the Hearing had travelled too far without the involvement of the late submitters.

47. In relation to the second ground, it was noted that both the National Trust of Australia (Victoria) and a heritage advocacy group supported by the National Trust, Melbourne Heritage Action, made oral and written submissions to the Panel in support of the Amendment. As earlier noted, declarations were made at the initial Directions Hearing that Mr Tonkin and Ms McKenzie were financial members of the National Trust.

48. The submissions for Metro Pol referred to *Mildura Rural City Council v Minister for Major Projects [2006]* VCAT 623. That case applied the apprehension of bias principle to a Panel Member in the facts and circumstances of the particular project under consideration and Panel obligations. Closeness to the government of the day by the Panel Member had been the concern. The Tribunal considered the legal basis and obligations of a Panel - primarily as discerned from the Act but also as influenced by practice. The Tribunal found that:
    - 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.
    - While not applied in the same manner as it would to a court, the principle of apprehended bias does apply to a Panel.
    - The role of a Planning Panel in the planning process is very significant, and its independence, neutrality and impartiality are important considerations.

49. Reference was also made by Metro Pol to *Jinshan Investment Group Pty Ltd v Melbourne City Council & Ors* [2015] VCAT 635 at [30], a case concerning heritage matters in which the National Trust appeared and where the Tribunal Member, who was a financial member of the National Trust, had not declared this in advance of the hearing. It was said:

    > *Most importantly, the Tribunal has a critical decision making role in relation to planning matters in Victoria. It is an imperative that the impartiality and independence of the Tribunal be, and be seen to be, above reproach. Justice must not only be done, it must be seen to be done. The applicant's proposal is a major development proposal in the Central Business District of Melbourne. It would be of no benefit to anyone if there was ongoing concern as to the impartiality of the Tribunal, or the legality of the decision. Likewise, it would be of no benefit to anyone if there were subsequent applications to the Tribunal for recusal, or appeals to the Supreme Court concerning this issue. It is much better to make a fresh start with a differently constituted Tribunal.*

50. The oral submission for Metro Pol emphasised the following finding from *Jinshan:*

    > *While I accept, as the Council submitted, that it has not been shown that Deputy President Gibson's interest in the National Trust has ever extended beyond mere*

membership, or that she has ever had any involvement in the management of the National Trust, I am nonetheless of the view that, in the circumstances of this case, the need for the administration of justice to be seen to be above reproach is the paramount consideration in the exercise of the discretion conferred by s 108 of the VCAT Act.

51. The Metro Pol submission was that the commentary on the role of the Tribunal has overlap with that of a Panel and is helpful in defining the scope of the concerns about bias.

52. Reference was made by Metro Pol to *Rajendran v Tonkin & Ors [2002]* VSC 585 which deals with the apprehended bias problem which arose from the association of a member of a Heritage Council Permit Committee with the National Trust (which had made a written submission only about the permit application). The Committee member had previously been Chair and a committee member of the National Trust. The Court held that this extended beyond a bare association with the Trust. There were also concerns about the reasons given by the Committee for not recusing itself. This case was said to support the application for recusal of the current members of the Panel.

53. The Metro Pol submissions, in focussing on the apprehended bias arising from the two Panel Members' membership of the National Trust, said that this further taints the remainder of the Panel. It was said that a fair-minded observer may reasonably apprehend that discussions and deliberations by the Panel would have occurred, and the reasonable apprehension of bias would apply to the whole Panel as a result. In this, Metro Pol relied upon *I W v City of Perth [1997]* 191 CLR 1 @50-51 (a case about actual rather than perceived bias), where it was held by Gummow J that the bias of one or more members of a multi-member body tainted the others, even if the biased members were outnumbered.

54. It was argued by Metro Pol that the concern would also apply, as here, in a case involving perceived bias – the Panel may even unconsciously have influenced, infected or tainted each other's views.

55. It was further submitted for Metro Pol that apprehended bias would also arise from the Panel Chair's now role as Deputy Chair of the Heritage Council, which is a body that is obliged to include members of the National Trust.

56. The written submissions for **Bennett's Lane** supporting the recusal included the following in relation to perceived bias:
    - The appointment of two Panel Members who are members of the National Trust was an error of judgment. No declaration can cure the perception of bias when the Trust is a submitter to the Amendment.
    - In the above circumstances, the proximity of the Panel Chair to the National Trust (via the Heritage Council), and months of time with the other Panel Members, renders the Panel Chair's position untenable.
    - In summary, the continuation of the Panel would fail 'the pub test'.
    - Bennett's Lane otherwise supported and adopted the position of Metro Pol.

57. Best Hooper on behalf of **Sydney Road Holdings** wrote on 12 November 2018 advising that it supported the application for recusal made on behalf of Metro Pol.

58. The **Council**'s opposition to the claim of perceived bias was summarised as follows:
    - The *Ebner* test as referenced by Metro Pol was accepted as appropriate.
    - The test requires two steps, however: 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 deviation from deciding the case on its merits.
    - The content of the obligation depends on the facts and circumstances and there is a clear distinction between the application of the principle to a judicial officer as to a decision made outside the courts. Specific considerations apply to Panels. In this the Council relied on the decision in *Minister for Immigration v Jia Legeng [2001]* HCA 17.
    - With regard to the assertion that the Panel could not put previously received submissions out of its mind, there is no identified necessity for it to do so, nor an elaboration of how this would lead to a reasonable apprehension of bias.
    - Regarding 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. The National Trust is one of over 25 submitters and presented for less than 1 hour during the 13 days of Hearing. Panel Members declared the association with the Trust at the initial Directions Hearing. They did not contribute to the submission by the National Trust.

59. The Council submission also referred to *Rajendran.* It was noted that the court found amongst other things that there was more than a 'bare association' between the Chairman of the Permit Committee and the National Trust. He had been involved with the Trust at a high level and was likely to have strongly identified with its objectives and causes.

60. The Council, in quoting from *Mildura,* also referred to Morris J's comments about how Panels diverge significantly from the judicial paradigm. The part of the decision quoted by the Council included:

> *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.*

61. Reference was also made by the Council to the decision in *Jinshan* in which a reconstitution of the Tribunal under section 108(2) of the *Victorian Civil and Administrative Tribunal Act 1998* was ordered. As noted, reconstitution was sought on the basis that the chair of the Tribunal was a member of the National Trust and had not originally declared it. The Trust and others had made allegations of illegal conduct against the applicant and there was concern that the chair might not bring an impartial mind to consideration of the application.

62. Garde J set out the following bases for ordering the reconstitution (as summarised in the Council submission):
    - The case was fundamentally about heritage and the National Trust is the leading heritage body seeking to preserve heritage buildings.
    - The submissions went beyond heritage matters: illegality on the part of the applicant was alleged by the Trust.

- The existence of substantial allegations by the Trust of illegal demolition provided a sufficient logical connection between the chair's membership of the National Trust and the feared deviation from deciding the case on its merits.
- It was unfortunate that the chair's disclosure occurred after the hearing had concluded.
- It was regarded as imperative that the impartiality and independence of the Tribunal be and be seen to be above reproach.

63. The Council also relied upon the decision in *Little Projects Pty Ltd v Stonnington CC [2016]* VCAT 698. This was an application to reconstitute the Tribunal on the basis of apprehended bias after five days of hearing. The applicant has become aware that, immediately preceding the hearing, one of the members hearing the case had been an objector in a case which was highly similar on its facts and had expressed detailed personal and professional views on issues common to both cases.

64. Deputy President Dwyer made a decision to reconstitute the Tribunal 'on balance' having regard to what was described as 'a remarkable coincidence of factors' including timing. He said at paragraph 9 of his decision:

> *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.*

65. The Council then distilled principles from the case law to which it referred. These are set out in paragraph 36 of its submission. Those principles were applied to the facts of the present case at paragraph 37.

PANEL CONSIDERATION

The hearing rule

66. The Panel's obligation to afford natural justice is clear from section 161(1)(b) of the Act and section 24(a) provides that the Panel must give a reasonable opportunity to be heard to any person whose submission has been referred to it.

67. The Panel notes that it is well established that what is procedurally fair, and the content of natural justice, depend on the facts and circumstances of a particular case. The Panel considers that this Hearing is of the type described in *Winky Pop* (at paragraph 33) as '*a multi-submitter panel hearing considering a range of opinions relevant to a broad policy review affecting a broad area*'. The Panel is also far from the judicial paradigm as noted in *Mildura*.

68. *Winky Pop* provides useful guidance as to what is a reasonable opportunity to be heard in a Panel Hearing of this type:

> *A panel in such circumstance simply needs to put in place reasonable processes on a case-by-case basis to try to ensure that all submitters get a fair go, and to ensure that the planning authority has fulfilled its obligations to make all relevant material (including submissions) available for inspection throughout the process.*

69. The Panel has, by its written Directions of 21 September 2018, indicated that it considered the interests of those who had already made submissions as well as the interests of the late submitters. The Panel considered that it was appropriate to continue rather than abandon the present Hearing.

70. This decision is consistent with the comments in *Little* about avoiding reconstitution late in a hearing where possible - given the costs and delay to the parties, as well as to avoid 'forum shopping'.

71. This decision to continue the Hearing was taken in parallel with a decision that the late submitters would be afforded the opportunity to make submissions and call evidence, and to cross-examine the Council witnesses. There were no constraints imposed upon the matters which the late submitters might address. This was also set out in the Panel Advice and Directions of 21 September 2018. This approach is consistent with the Tribunal view in *Thomson*. The Council has indicated a preparedness for their witnesses to restate their earlier evidence in brief and copies of that evidence have been available electronically to the late submitters for some months now. The witnesses may also need to provide supplementary statements relating to the late submissions.

72. The late submitters' complaint is that the Panel had not clearly identified whether the Council case in relation to the Hoddle Grid would be required to be totally rerun or not.

73. The Panel called the Directions Hearing on 7 November with the intention of receiving and considering submissions by late submitters on the matter of how to progress the Hearing. As well as consideration of possible hearing dates, it was expected that this might have included submissions as to whether the Council should be required to call all of its witnesses again.

74. On 7 November 2018, the late submitters declined to clarify whether they wished all of the Council witnesses to be called, but rather expressed a wish for a 'full hearing' rather than 'constrained or partial hearing'. They said that the Panel should rule on how the Hearing should proceed and they would then consider their response. The reply to a Panel question, made it clear that at least in one case, there had been no perusal of the on-line witness statements. It was only after questioning that it became clear that a 'full hearing' referred to the Hoddle Grid aspects of the Amendment.

75. The Panel notes and agrees with the Council submission that not all heritage issues in the central city are before this Panel in an unlimited fashion and that submissions should address the components of the Amendment. In particular, the application of new policy gradings to properties are the subject of another Amendment.

76. The Panel has not been provided with material which would contradict the Council view and the Panel's earlier surmising that the component of this Amendment potentially of greatest relevance to the property interests in the Hoddle Grid is the proposed policy changes.

77. The Panel considers that in these circumstances it appears adequate to require the Council to call Ms Jordan and Ms Brady to give their evidence in chief again and add any supplementary evidence, and they be made available for cross-examination by the late submitters.

78. If the Panel has misjudged the late submitters' interest in the Amendment, and any late submitter considers that other Council witnesses should be recalled, then they are given the opportunity in the Directions below to advise of this in writing.

79. The Panel has also considered adopting a further procedural requirement in line with *Thomson*, that the Panel not rely upon any fact, opinion or submission adverse to the late submitters without first having drawn it to the late submitters' attention and providing an opportunity to respond.

80. The Panel considers that this procedural requirement is principally met by access to the written submissions and evidence. However, the Panel would expect that the Council's further Part B submissions responding to the late submitters would draw attention to matters which are adverse to the late submitters' arguments.

81. In relation to the hearing rule, the Panel considers that the application that the late submitters would be denied procedural fairness has not been not made out.

The bias rule

82. The argument that the Panel ought recuse itself for reasons of perceived bias relied on two bases:
    - The Panel had already heard from numerous submitters.
    - Panel membership and association with the National Trust - a submitter to the Amendment.

83. The *Ebner* decision held that the identification of bias is a two step test:

> *…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 (paragraph 8).*

84. Concerning the Panel already having heard from numerous parties and the Hearing having 'travelled too far', the Panel agrees with the Council submissions that there is no need for the Panel to put previously received submissions out of its mind, nor was there an elaboration of how a failure to do so would lead to a reasonable apprehension of bias. The Panel considers that the second step in the *Ebner* test has not been made out in relation to this basis for alleged apprehended bias.

85. Concerning the second matter of association with the National Trust, this issue needs to be considered in the context that Panel processes and membership vary significantly from the judicial paradigm as held in *Mildura*. The Panel considers that the financial membership by Ms McKenzie and Mr Tonkin of the Trust is the 'barest of associations' (*Rajendran).* Neither have had a deeper involvement with Trust affairs as occurred in *Rajendran.*

86. Also, while *Jinshen* was a case where mere financial membership by the Tribunal member of the National Trust was claimed to potentially give rise to perceived bias, that decision is distinguished by allegations of illegal demolition against the applicant having been made by the Trust. In assessing the matter Garde J said the second step of the *Ebner* test had therefore been made out:

> *The existence of substantial allegations by the Trust of illegal demolition provided a sufficient logical connection between the chair's membership of the National Trust and the feared deviation from deciding the case on its merits.*

87. No such issue arises with the present Hearing.

88. Metro Pol's oral submission, adopting an argument from the written submission by Bennett's Lane, also included that apprehended bias would arise from the Panel Chair's membership of the Heritage Council. This was said to arise because it is a body that is obliged to include members of the National Trust. It was also said that the Chair's now role as Deputy Chair of the Heritage Council (occurring since the start of the Panel Hearing) was even more problematic in terms of apprehended bias, as the Chair was now in a leadership relationship with the National Trust members of the Heritage Council.

89. The Panel does not consider that this association by the Chair with the National Trust by virtue of their common membership of the Heritage Council, appointed under the separate *Heritage Act 2017*, can be said to give rise to perceived bias. This again is the merest of association. The National Trust member of the Heritage Council and the alternative National Trust member are appointed by a process whereby the Minister selects from a list of three persons nominated by the Trust (section 10 of the *Heritage Act*). The members recommended by the Trust are not identified, nor do they act, as delegates or representatives of the Trust. Neither are they even required to be Trust members. How this association might lead the Chair to not impartially consider the matters before the Panel was not described. The Panel considers that the second *Ebner* test limb was not made out.

90. As to the assertion by Metro Pol that the Panel Chair now being Deputy Chair of the Heritage Council, rather than an alternative member as at the time of the initial Panel Directions Hearing, aggravates the problem of association between the Chair and the National Trust, '*because the Chair is in a leadership position'* – this argument has no logical basis. If there was to be any increased influence from one to the other, it would surely be that the Chair would now have greater influence over the Trust members of the Heritage Council, rather than the Chair being more strongly influenced by them.

91. As no reasonable apprehension of bias would arise from the mere association of each Panel Member with the National Trust, the issue of tainting between Members of the Panel does not arise and does not need to be addressed.

92. The Panel considers that the argument that there would be apprehended bias if the Panel Hearing continued with the presently constituted Panel has not been made out.

PANEL DIRECTIONS

1. **By no later than 12 noon on Tuesday 11 December 2018, any late submitter who considers that Council witnesses additional to Ms Brady and Ms Jordan should be called and made available for cross-examination, must advise the Panel and copy those on the distribution**

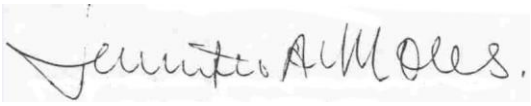
list. The witness(es) must be identified and the submitter must advise what aspects of their earlier evidence they wish to examine. If there is any dispute in relation to this matter, it can be addressed at the Directions Hearing scheduled below.

2. **By no later than 12 noon on Monday 7 January 2019, any late submitter who has not yet advised of the Hearing time requested to present their submissions and call any evidence, and any submitter wishing to alter previously provided information in this respect, must advise the Panel of their requirements by completing a request to be heard form through the Planning Panels Victoria website at:** https://www.planning.vic.gov.au/panels-and-committees/request-to-be-heard-form

3. **This matter is set down for a Directions Hearing at 10 am on Monday 14 January 2019 at Planning Panels Victoria, Ground Floor Hearing Rooms, 1 Spring Street, Melbourne. The purpose of the Directions Hearing will be to timetable the remainder of the Hearing. Subject to Direction 1, It is not intended to hear further submissions regarding the matters decided in these directions.**

4. **The Hearing is provisionally intended to run for a further 7 days, beginning 11 February 2019, through to 20 February 2019, excluding 14 February. Expert witness reports, either new or supplementary, must be circulated in line with the Distribution List (Version 5) by 12 noon 4 February 2019.**

If you have any queries, please contact Joseph Morrow at Planning Panels Victoria on 03 8392 5137 or email joseph.morrow@delwp.vic.gov.au or planning.panels@delwp.vic.gov.au.



Jenny Moles

Panel Chair

Distribution List (version 5)

Melbourne Planning Scheme Amendment C258

This list is to be used to circulate Expert witness statements and any other information as directed by the Panel.

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