Fishermans Bend Planning Review Panel
Proposed Amendment GC81 to the
Melbourne and Port Phillip Planning Schemes

Submissions on behalf of
202N Pty Ltd

202-214 Normanby Road, Southbank
1. Preliminary matters

1.1 These submissions are made on behalf of 202N Pty Ltd (Client).

1.2 Our Client is the owner of 202–214 Normanby Road, Southbank (Subject Land).

1.3 This matter involves Proposed Amendment GC81 to the Melbourne and Port Phillip Planning Schemes. The Subject Land is located within the Montague Precinct and the City of Port Phillip (Council), at the eastern end of Fishermans Bend. It has a frontage to Normanby Road at its south boundary and Munro Street at its north boundary.

1.4 It is our Client’s submission that the Review Panel ought to recommend the inclusion of transitional provisions to ensure that landowners who have the benefit of a planning permit are not subject to the controls and requirements that are introduced to the Planning Scheme by Proposed Amendment GC81.

2. Background relating to 202 Normanby Road, Southbank

2.1 Planning Permit 201535404-1 (the Planning Permit) was issued on 22 August 2016 and amended on 14 July 2017. The Planning Permit allows:

- demolition of the existing buildings;
- development of a multi storey building;
- use of the land for accommodation (serviced apartments); and
3.2 Pursuant to the Montague DDO, the Subject Land is also identified for a 20 storey height limit. The Review Panel will note that our Client currently has the benefit of the Planning Permit, which allows a 40 storey building.

3.3 The Review Panel is referred to Hearing Document 66 (Part E) - Combined CCZ Schedule (Combined CCZ Schedule), which includes the following requirements:

- a permit must not be amended to construct a building or carry out works in respect of land shown as a new road, street or laneway until a 173 Agreement has been executed that provides for the construction and transfer of the road, street or laneway at no cost to the relevant authority;

- a permit must not be amended to construct a building or carry out works in respect of land shown as public open space until a 173 Agreement has been executed that provides for the transfer of the public open space at no cost to the Council;

- a permit must not be amended to construct a building or carry out works where the vehicle access points and crossovers are located on roads designated as 'no cross overs permitted'; and
• a permit must not be amended (except where the amendment does not increase the extent of non-compliance) to construct a building or carry out works with a Floor Area Ratio (FAR) in excess of the Floor Area Ratios in Table 1, except where a 173 Agreement has been executed that provides for a public benefit.

3.4 Accordingly, the proposed CCZ provides a variety of circumstances where a planning permit cannot be amended without the provision of significant public infrastructure, with the expectation that a landowner will not be reimbursed except through the Floor Area Uplift arrangements.

4. What specific concerns are raised by the prospect of a permit amendment?

4.1 The Review Panel will note that the provisions of the Combined CCZ Schedule specifically provide for the amendment of a permit as a trigger to impose various requirements.

4.2 It is submitted that the amendment of a planning permit in relation a large scale development is an ordinary and common process. VCAT has recognised on numerous occasions that large scale developments have a different character and different requirements in relation to flexibility, both in terms of their need for amendments and extensions of time.¹

4.3 It is acknowledged that the Draft Fishermans Bend Framework does not currently identify the Subject Land as providing a laneway or public open space. Nevertheless, it is submitted that our Client is entitled to certainty that any amendment of the Planning Permit will not trigger requirements for the transfer of significant public infrastructure at no cost to Council.

4.4 It is submitted that the Panel should not recommend the imposition of the requirements of the Combined CCZ Schedule in relation to existing planning permits. In this regard we support and adopt the submissions of Mr Canavan QC and Mr Morris QC in relation to the Proposed Amendment's attempt to avoid the ordinary processes for public infrastructure provision and land acquisition that are provided for by the Planning and Environment Act 1987 and the Land Acquisition and Compensation Act 1986.

4.5 In addition it is submitted that there are aspects of the Combined CCZ Schedule that raise specific concerns for our Client.

Is the scope of a 'public benefit' sufficiently clear?

4.6 It is submitted that the Combined CCZ Schedule does not adequately outline the 'public benefit' that might allow an exemption to compliance with the FAR. For example, the Review Panel is referred to the Decision Guidelines at page 10 of the Combined CCZ Schedule, which relevantly provide that:

¹ See for example Hotel Windsor Holdings Pty Ltd v Minister for Planning (Red Dot) [2016] VCAT 351 at [7] and Coburg Quarter Holdings Pty Ltd v Moreland CC [2017] VCAT 879.
"If a public benefit is proposed:

- The appropriateness of the value of the public benefit(s) commensurate to the increase in floor area ratio sought".

4.7 While a definition of 'public benefit' is included at page 17 of the Combined CCZ Schedule, it is unclear how this is intended to interact with the existing requirements in the Planning Permit for:

- the transfer of the pedestrian link to Council; and
- the provision of the publically accessible community room.

4.8 The provision of a public benefit is also required to be determined "to the satisfaction of the Responsible Authority". The Combined CCZ Schedule does not adequately prescribe the ambit of the Responsible Authority's discretion in determining whether a public benefit under an existing permit is sufficient.

4.9 Accordingly it is not clear whether our Client would be required to provide additional public benefits above those that are already required to be provided by the Planning Permit if an amendment to the Planning Permit were to be sought.

How does the FAR work in relation to an amendment?

4.10 The Review Panel will also note that the Combined CCZ Schedule includes the words "except where the amendment does not increase the extent of non-compliance".

4.11 In our submission the above phrasing is too restrictive. Having regard to the prescriptive nature of the FAR, it is submitted that this provision is inadequate to protect the interests of those landowners who have the benefit of a planning permit.

4.12 For instance, any increase in height above our Client's approved 40 storey proposal would represent an increase in the extent of non-compliance, given that the Subject Land is proposed to be limited to 20 storeys under the Proposed Amendment. However, it is submitted that not all increases in height would necessarily represent an inappropriate planning outcome.

4.13 For example, increases in the ceiling height of lower levels to improve the building's interaction with the public realm could result in a modest overall height increase. Likewise, building elements such as lift overruns could add to the approved building height while adding no perceptible visual bulk.

4.14 It is also conceivable that a nuanced design approach that might, in some respect, decrease a podium setback could cause the amendment of the Planning Permit to be prohibited, even if that amendment is generally in accordance with what is already approved under the Planning Permit.

4.15 It is submitted that the above controls do not adequately protect landowners who have the benefit of a permit and might need to make minor amendments.
5. How should the Review Panel address these concerns?

5.1 It is submitted that the Review Panel should recommend that effective transitional provisions are included in the CCZ to ensure that Proposed Amendment GC81 does not affect landowners such as our Client who have the benefit of an existing planning permit.

5.2 It is submitted that, in an amendment scenario, if our Client cannot be said to be 'transforming' the ambit of its permit, then the infrastructure contribution and public benefit arrangements that apply to the Subject Land should also not be altered.

5.3 The Minister has presented to the Review Panel Document 227, which sets out a proposed amendment to Clause 4 of the CCZ as it applies to existing buildings:

A permit [other than a permit authorising alterations and additions to an existing building used for a purpose which was lawful before the commencement of this provision] must not be granted or amended to construct a building or carry out works in respect of land shown as a new road, street or laneway...

(Emphasis in Minister's Document 227)

5.4 The Review Panel will note that the amendment that is outlined in Document 227 applies only to existing buildings. It does not have any bearing on those landowners with the benefit of a planning permit who have not yet constructed an approved building.

5.5 Accordingly it is submitted that overarching transitional provisions are required to adequately protect the interests of those landowners who have completed the planning process.

What is the effect of transitional provisions?

5.6 It is submitted that clear transitional provisions are the most effective manner in which to signal that the requirements of the Proposed Amendment GC81 do not apply to existing planning permits.

5.7 The Review Panel is referred to the Better Apartment Design Standards at Clause 58 of the Planning Scheme. The introduction of Clause 58 represented a substantial and potentially onerous additional requirement for permit holders.

5.8 Clause 58 has corresponding transitional provisions in each relevant zone the following form:

**Transitional provisions**

Clause 58 does not apply to:

- An application for a planning permit lodged before the approval date of Amendment VC136.
An application for an amendment of a permit under section 72 of the Act, if the original permit application was lodged before the approval date of Amendment VC136.

5.9 It is noteworthy that the above transitional provisions do not expressly provide that an amendment pursuant to section 87A of the Act is exempt from the requirements of Clause 58. In this regard, the Review Panel is referred to the Victorian Civil and Administrative Tribunal’s (VCAT) decision in *W Property Group Pty Ltd v Boroondara CC* [2017] VCAT 740, where the Tribunal was called upon to determine the following questions of law relating to the application and relevance of Clause 58:

- Do the provisions of clause 58 apply to an application to amend an existing permit brought in the Tribunal’s original jurisdiction under section 87A?
- If the answer to question 1 is “yes” and the provisions of clause 58 do apply, do they apply only the extent of the amendments sought by the application made under s.87A, or do the provisions apply to the building as a whole?
- If the provisions of clause 58 do not apply to an application made under section 87A, are the provisions relevant at all in the assessment of whether or not a permit should be amended?
- Are the provisions of clause 58 relevant at all to an application to amend an existing permit brought pursuant to section 72 of the Act where the original application for the existing permit was made before the coming into operation of clause 58?

5.10 In finding that Clause 58 is not relevant to an application to amend a permit that was applied for prior to the gazettel of Amendment VC136, Deputy President Gibson stated:

> 38. ...I find there is a clear legislative intent that clause 58 is not intended to apply retrospectively to any permit applications lodged before the approval date of Amendment VC136 or to the amendment of any permits if the original permit application was lodged before the approval date of Amendment VC136.

5.11 It is submitted that Deputy President Gibson’s findings provide certainty on the scope of the transitional provisions that relate to Clause 58 of the Planning Scheme, and represent a definitive finding in relation to the application of new controls to issued permits in the context of amendment applications.

5.12 VCAT’s decision in *W Property Group Pty Ltd v Boroondara CC* was followed in *Gagliano v Moreland CC* [2018] VCAT 527 in relation to the relevant factors to be considered when extending a planning permit.

5.13 In *Gagliano v Moreland CC*, VCAT found that, as the planning permit was issued prior to the gazettel of Amendment VC136, there was a clear legislative
intention arising from the transitional provisions that the weight to be afforded to
Clause 58 is significantly reduced for the purpose of the Kantor\(^2\) principles.

5.14 Critically, Member Deidun made the following findings:

20. While the transitional provisions do not refer to requests to extend time, I
note that if I do decide to extend the expiry date on this permit, that the
approved development will then continue to enjoy the transitional provisions in
respect of any future application to amend the endorsed plans or the permit. It is
also relevant to identify that Clause 58 would not be a relevant consideration in
a decision to grant a permit for this development today, if the application were
lodged with Council prior to 13 April 2017, as is the case with many of the
proceedings that are presently being heard by the Tribunal.

21 It is for these reasons that I find it appropriate to reduce significantly the
weight given in my assessment to the changes in planning policy that relate to
the introduction of the Better Apartment Design Standards. I make this finding
as these standards, including those at Clause 58 of the Moreland Planning
Scheme, are accompanied with transitional provisions which seek to ensure
that they are not applied retrospectively to existing approvals, or applications
current at the gazettal date. In short, as the new provisions at Clause 58 are
not intended to apply to existing approved buildings, I consider it
inappropriate to use those provisions as a basis for refusing to extend the
expiry date on an existing approval.

(Emphasis added)

5.15 The Review Panel is also referred to the transitional provisions that were
incorporated into the Planning Scheme at the time the new residential zones
were adopted. It is submitted that, similar to Clause 58, the residential zone
transitional provisions are a good example of a time at which the Planning
Scheme properly dealt with a significant change to the statutory planning fabric.

5.16 Accordingly it is submitted that the Review Panel should conclude that strong,
simple transitional provisions would produce a fair and equitable outcome in
relation to those landowners who have the benefit of a planning permit.

\(^{2}\) Kantor v Murrindindi Shire Council (1997) 18 AATR 285.
6. Conclusions

6.1 Having regard to the matters raised above, and our Client's adoption of Mr Canavan QC and Mr Morris QC's submissions, it is submitted that our Client's Planning Permit should not be subject to the requirements of the Proposed Amendment GC81.

6.2 In particular, it is submitted that the Review Panel should recommend that transitional provisions are incorporated in the CCZ in the following terms:

Transitional provisions

Clause 37.04 (Capital City Zone) of this scheme, as in force immediately before the approval date of Amendment GC81, continues to apply to:

* An application for a planning permit lodged before the approval date of Amendment GC81.

* An application for an amendment of a permit under section 72 of the Act, if the original permit application was lodged before the approval date of Amendment GC81.

* A request to amend a permit under section 87 or 87A of the Act, if the original permit application was lodged before the approval date of Amendment GC81.

Alex Gelber
HWL Ebsworth Lawyers
On behalf of 202N Pty Ltd
PLANNING PERMIT

ADDRESS OF THE LAND:
202-214 NORMANBY ROAD
SOUTHBANK

THE PERMIT ALLOWS:
Demolition of the existing buildings, and development of the land for the construction of a multi-storey building, and use of the land as accommodation (serviced apartments), and alteration of access to a Road Zone Category 1 in accordance with the endorsed plans.

THE FOLLOWING CONDITIONS APPLY TO THIS PERMIT

Amended Plans required

1. Before the development and/or use starts (including demolition, bulk excavation and site preparation), amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and three copies must be provided. The plans must be generally in accordance with the plans prepared by Rothe Lowman, Project No.214176, marked “Revision D” and dated 21 June 2016 but modified to show:

   a) Any changes necessary to meet the requirements of VicRoads (Condition 3).
   b) Any changes necessary to meet the requirements of the Facade Strategy (Condition 11).
   c) Any changes necessary to meet the requirements of the Wind Mitigation Report (Condition 15).
   d) Any changes necessary to meet the requirements of the Sustainable Management Plan (Conditions 23 and 24).
   e) Any changes necessary to meet the requirements of the Water Sensitive Urban Design Response (Conditions 25 and 26).
   f) Any changes necessary to meet the requirements of the Traffic Management Report (Condition 27).
g) Bin storage for all separate uses within the development clearly allocated on the drawings along with any changes necessary to meet the requirements of the Waste Management Plan (Condition 28).

h) Details of dual reticulation and a connection point to connect to a potential future precinct scale alternative water supply via a third pipe network (Condition 30).

i) Plan notations for lighting to main building entries, pedestrian areas and car parks.

j) All plant, equipment and services (including air conditioning, heating units, hot water systems, etc.) which are to be located externally.

k) All plan and elevation drawings to be fully dimensioned, including natural ground level, floor levels, and incremental and total wall and building heights and lengths, with heights to be expressed to Australian Height Datum (AHD) and/or reduced levels (RL).

l) A schedule of the materials, colours and finishes to be used on the main external surfaces, including roofs, walls, windows, doors of the proposed building, consistent with the materials referred to in the Sustainable Management Plan (Conditions 23 and 24).

m) The detailed design of the through block pedestrian link as specified by condition 35 including the plaza to Normanby Road, including materials and finishes, furniture and landscaping. The plans must eliminate unsafe recesses or places of concealment. Plans shall be fully dimensioned at a scale of 1:50.

n) The detailed design of the communal open space on the podium rooftop, including access points, materials and finishes, furniture, landscaping including any wind mitigation features and details of maintenance. Plans shall be fully dimensioned at a scale of 1:50 and notated to clearly identify the communal open space areas.

Layout Not Altered and Completion

2. The use and development as shown on the endorsed plans must be completed and the layout of the site and the size, levels, design and location of buildings and works, and external materials, finishes and colours shown on the endorsed plans must then not be modified for any reason without the prior written consent of the Responsible Authority, unless the Port Phillip Planning Scheme exempts the need for a permit.

VicRoads

3. All disused and redundant vehicle crossings along Normanby Road must be removed and the area reinstated to kerb, channel and footpath to the satisfaction of and at no cost to VicRoads (the Roads Corporation) prior to the occupation of the buildings hereby approved.

Vehicle Crossings

4. Prior to the occupation of the building(s) allowed by this permit, vehicle crossings must be constructed in accordance with Port Phillip City Council's current Vehicle Crossing Guidelines and standard drawings and all disused or redundant crossings must be removed and the footpath, nature strip, kerb and channel road reinstated as necessary at cost of the applicant/owner and to the satisfaction of the Responsible Authority.

Alteration/Reinstatement of Council or Public Authority Assets

5. Prior to the occupation of the building(s) allowed by this permit, the Applicant/Owner shall do the following things to the satisfaction of Port Phillip City Council:

a) Pay the costs of all alterations/re reinstatement of Council and Public Authority assets necessary and required by such Authorities for development.
b) Obtain the prior written approval of the Council or other relevant Authority for such alterations/reinstatement.

c) Comply with conditions (if any) required by the Council or other relevant Authorities in respect of reinstatement.

Public Services

6. Before the occupation of the development allowed by this permit, any modification to existing infrastructure and services within the road reservation (including, but not restricted to, electricity supply, telecommunications services, gas supply, water supply, sewerage services and stormwater drainage) necessary to provide the required access to the site, must be undertaken by the applicant/owner to the satisfaction of the relevant authority and Port Phillip City Council. All costs associated with any such modifications must be borne by the applicant/owner.

Building Appurtenances

7. All building plant and equipment on roofs and public thoroughfares must be concealed to the satisfaction of the Responsible Authority. The construction of any additional plant machinery and equipment, including but not limited to all air-conditioning equipment, ducts, flues, all exhausts including car parking and communications equipment shall be to the satisfaction of the Responsible Authority.

Landscaping and Public Realm Plan

8. Before the development starts, including demolition, bulk excavation and site preparation, unless otherwise agreed to by the Responsible Authority, a Landscape and Public Realm Plan must be submitted to and be approved by the Responsible Authority in consultation with Port Phillip City Council. When approved, the plan will be endorsed and will then form part of the permit. The plan must include:

a) A schedule of all soft and hard landscaping treatments and soil depths for podium rooftop landscaping. A planting schedule of all proposed trees, shrubs and ground covers, including botanical names, common names, pot sizes, sizes at maturity, and quantities of each plant, and all hard landscaping treatments.

b) Urban design elements including, but not limited to, paving, lighting, bicycle parking, seating and public art.

c) Clear demarcation of public realm and private spaces, including arrangements for pedestrian, bicycle and vehicular circulation.

d) Details of how the project responds to water sensitive urban design principles, including how storm water will be mitigated, captured, cleaned and stored for onsite use and the location and type of irrigation systems to be used including the location of any rainwater tanks to be used for irrigation.

9. Before the building is occupied, or by such later date as approved in writing by the Responsible Authority, the approved landscaping and public realm plan must be completed. Once completed, the landscaping and public realm works must be maintained in accordance with the endorsed plan to the satisfaction of Port Phillip City Council by:

a) Implementing and complying with the provisions, recommendations and requirements of the endorsed Landscape Plan.

b) Not using the areas set aside on the endorsed Landscape Plan for landscaping for any other purpose.

c) Replacing any dead, diseased, dying or damaged plants.
Construction Management

10. Before the demolition starts, a detailed Demolition and Construction Management Plan must be submitted to and approved by Port Phillip City Council (Development Permits Group). This Demolition and Construction Management Plan may be staged and is to be prepared in accordance with Council's Local Laws and is to consider the following:
   a) Staging of construction;
   b) Public safety, amenity and site security;
   c) Any works within the adjoining street network road reserves;
   d) Operating hours, noise and vibration controls;
   e) Air quality and dust management;
   f) Stormwater and sediment control;
   g) Waste and material reuse;
   h) Site access and traffic management; and
   i) Street trees.

Façade Strategy

11. Before the development starts, including demolition, bulk excavation and site preparation works, a Façade Strategy must be submitted to and be to the satisfaction of the Responsible Authority. When approved this will form part of the endorsed plans. All materials, finishes and colours must be in conformity with the approved Façade Strategy to the satisfaction of the Responsible Authority. The Façade Strategy for the development must be generally in accordance with plans prepared by Rothe Lowman, Project No.214176, marked "Revision D" and dated 21 June 2016, but updated to address the plans referred to in condition 1, and detail:
   a) A schedule of colours, materials and finishes, including the colour, type and quality of materials showing their application and appearance. This can be demonstrated in coloured elevations or renders from key viewpoints, to show the materials and finishes linking them to a physical sample board with clear coding.
   b) (b) Elevation details generally at a scale of 1:50 illustrating typical podium details, entries and doors, typical privacy screening and utilities, typical tower detail, and any special features which are important to the building's presentation.
   c) (c) Information about how the façade will be accessed and maintained and cleaned, including planting where proposed.
   d) (d) Example prototypes and/or precedents that demonstrate the intended design outcome indicated plans and perspective images to produce a high quality built outcome in accordance with the design concept.

12. Except with the consent of the Responsible Authority, all external materials must be of a type that does not reflect more than 20% of visible light when measured at an angle of incidence normal to the surface.

Noise Attenuation

13. Before the building allowed by this permit is occupied, the applicant/owner must ensure that external noise intrusion into bedroom and living areas (upon completion; with furnishing within the spaces and with windows and doors closed) and measured in accordance with AS/NZS2107/2000 Acoustics - Recommended Design Sound levels and Reverberation Times for Building Interior shall comply with the following:
a) Between 10pm and 7am in bedrooms areas must not exceed LAeq (9 hour) 40dB(A).
b) Between 7am and 10pm in living rooms must not exceed LAeq (15 hour) 45dB(A).

Incorporation of Noise attenuation Measures

14. Prior to the occupation of the building(s) allowed by this permit, the project must incorporate the noise attenuation measures listed in the endorsed Acoustic Report and shown on the endorsed plans to the satisfaction of the Responsible Authority.

Wind Mitigation

15. Before the development starts (including demolition, bulk excavation and site preparation), an amended comprehensive wind tunnel testing and environmental Wind Climate Assessment report of the development by a suitably qualified engineering consultant must be undertaken to achieve:
   a) walking comfort criteria on footpaths;
   b) standing comfort criteria at building entrances; and
   c) walking comfort criteria on balconies/terraces including communal open space.

The Wind Assessment must be submitted to and be to the satisfaction of the Responsible Authority. This report must be generally in accordance with that prepared by Vipac Engineers & Scientists and dated 29 June 2015.

Any further modifications required to the development in order to ensure acceptable wind conditions to the surrounding streets and public areas must be carefully developed as an integrated high quality solution with the architectural and landscape design to the satisfaction of the Responsible Authority.

16. Prior to the occupation of the building(s) allowed by this permit, the recommendations and requirements of the endorsed Wind Assessment Report must be implemented at no cost to and be to the satisfaction of the Responsible Authority.

Development Contributions

17. Before the development starts, excluding demolition and site preparation works, the owner of the land must enter into an agreement(s) pursuant to Section 173 of the Planning and Environment Act 1987 with the Responsible Authority and make an application to the Registrar of Titles to have the agreement(s) registered on the title to the land under Section 181 of the Act, to the satisfaction of the Responsible Authority. The agreement(s) must:
   a) Require the developer to pay a development contribution of:
      (i) $15,900 per dwelling.
      (ii) $18,000 per 100 square metres of gross commercial floor area.
      (iii) $15,000 per 100 square meters of gross retail floor area or other amount outlined within an approved development contribution plan to the satisfaction of the Responsible Authority.
   b) Require that development contributions are to be indexed annually from 1 July 2015 using the Price Index of Output of the Construction Industries (Victoria) by the Australian Bureau of Statistics.
   c) Require registration of the Agreement on the titles to the affected lands as applicable.
   d) Include a schedule of the types of infrastructure to be delivered by the Metropolitan Planning Authority or their successor.
e) Confirm that contributions will be payable to the Metropolitan Planning Authority or their successor.

f) Confirm that the contributions will be used by Metropolitan Planning Authority or their successor, to deliver the schedule of types of infrastructure.

g) Require that payments of 10% is at the time of building permit issue and 90% made prior to the issue of a statement of compliance for the development in accordance with the Subdivision Act 1988.

h) Confirm the procedure for refunding monies paid if an approved development contribution plan for the area is less than the amount stipulated in the Section 173 agreement.

i) The agreement must make provision for its removal from the land following completion of the obligations contained in the agreement.

The owner of the land to be developed must pay all reasonable legal costs and expenses of this agreement, including preparation, execution and registration on title.

Agreement under Section 173 of the Planning and Environment Act 1987 Re: Community Room Provision and Management and Through Block Pedestrian Link

18. Before the development starts (other than demolition or works to remediate contaminated land), the applicant must:

a) enter into an agreement under Section 173 of the Planning and Environment Act 1987 with the City of Port Phillip;

b) register the agreement on the title(s) for the land in accordance with Section 181 of the Planning and Environment Act 1987; and

c) provide the City of Port Phillip with the dealing number confirming the registration of the agreement.

The agreement must be in a form to the satisfaction of the City of Port Phillip, and the applicant must be responsible for the expense of the preparation and registration of the agreement, including the City of Port Phillip’s reasonable costs and expenses (including legal expenses) incidental to the preparation, registration and ending of the agreement. The agreement must contain covenants to be registered on the title of the property so as to run with the land, and must provide for the following:

(i) prior to the commencement of the use of the land, the owner must prepare, for endorsement to the satisfaction of the City of Port Phillip, a Community Room Provision and Management Plan which provides for the following:

* the provision of the ground floor community room as generally described in the plans endorsed pursuant to Condition 1:
* the community room must incorporate a kitchenette and access to storage and toilet facilities;
* the community room must be available for public access use, subject to booking and security arrangements;
* arrangements concerning the days and hours of use of the community room;
* maintenance of the community room at the owner’s cost.

(ii) prior to the commencement of the use of the land, the owner must prepare, for endorsement to the satisfaction of the City of Port Phillip, a Through-block Pedestrian Link Plan that includes requirements that the link:
be publicly accessible at least between 6am and 10pm each day or otherwise to the satisfaction of the responsible authority and City of Port Phillip;

* remain partially open to the sky;
* have an active frontage for most of its length;
* be well lit at night;
* have a minimum width at ground level of 3m and a minimum height clearance of 3m;
* be maintained by the owner (at its cost) to the satisfaction of the City of Port Phillip in accordance with the Maintenance Plan approved under this permit.

Serviced Apartments

19. Prior to the commencement of the use/development permitted the applicant must:

a) Enter into an agreement under Section 173 of the Planning and Environment Act 1987 with the Port Phillip City Council;

b) Register the Agreement on the Title for the land in accordance with Section 181 of the Planning and Environment Act 1987; and

c) Provide the Port Phillip City Council with the dealing number confirming the registration of the Title.

The agreement must be in a form to the satisfaction of the Port Phillip City Council, and the applicant must be responsible for the expense of the preparation and registration of the agreement, including the Port Phillip City Council’s reasonable costs and expense (including legal expenses) incidental to the preparation, registration and enforcement of the agreement. The agreement must contain covenants to be registered on the Title of the property so as to run with the land, and must provide for the following:

(i) All serviced apartments must be held within a single ownership.

(ii) The serviced apartments must be used for the exclusive purpose of providing accommodation in serviced rooms for persons away from their normal place of residence, in accordance with the endorsed plans.

(iii) The serviced apartments must not be subdivided, or sold separately for any reason without the prior consent of Port Phillip City Council.

Environmental Audit

20. Before the development starts, excluding demolition and bulk excavation, the applicant must undertake an environmental assessment of the site to determine if it is suitable for its use. This assessment must be carried out by a suitably qualified environmental professional who is acceptable to Port Phillip City Council. The recommendations and requirements of this assessment, if any, must be implemented prior to the occupation of the building, to the satisfaction of Port Phillip City Council and the Responsible Authority. Should the environmental assessment reveal that an Environmental Audit of the site is necessary then prior to the occupation of the building the applicant must provide either:

a) A Certificate of Environmental Audit in accordance with Section 53Y of the Environment Protection Act 1970; or

b) A Statement of Environmental Audit under Section 53Z of the Environment Protection Act 1970. This Statement must state that the site is suitable for the intended uses.
21. Where a Statement of Environmental Audit is provided, all the conditions of the Statement must be complied with to the satisfaction of Port Phillip City Council and the Responsible Authority prior to the occupation of the building. Written confirmation of compliance must be provided by a suitably qualified environmental professional or other suitable person acceptable to Port Phillip City Council. The written confirmation of compliance must be in accordance with any requirements in the Statement conditions regarding verification of required works.

22. If there are any conditions of a Statement of Environmental Audit that Port Phillip City Council or the Responsible Authority, acting reasonably, consider require a significant ongoing maintenance and/or monitoring, the owner of the land must enter into a Section 173 Agreement under the Planning and Environment Act 1987 with the Council. This Agreement must be executed on title prior to the occupation of the building. The owner must meet all costs associated with the drafting and execution of the Agreement including those incurred by Council.

Remediation Works Plan

23. Before any remediation works are undertaken in association with the environmental audit, a 'remediation works plan' must be submitted to and approved by Port Phillip City Council. The plan must detail all excavation works as well as any proposed structures such as retaining walls required to facilitate the remediation works. Only those works detailed in the approved remediation works plans are permitted to be carried out before the issue of a Certificate or Statement of Environmental Audit.

Environmentally Sustainable Design

24. Before the development starts, excluding demolition, bulk excavation and site preparation works, a Sustainability Management Plan, generally in accordance with the plan prepared by Wood & Grieve Engineers and dated 29 June 2015, or as otherwise to the satisfaction of the Responsible Authority, shall be submitted to the satisfaction of the Responsible Authority, and must address the plans referred to in Condition 1.

25. The performance outcomes specified in the Sustainability Management Plan for the development must:
   a) Demonstrate that at least a 4 star Green Star rating assessed against the Design and As Built rating tool requirements would be achieved or alternatively demonstrate that a BESS “Best Practice” score would be achieved.
   b) Be implemented before the development is occupied at no cost to the Council and be to the satisfaction of the Responsible Authority. Any change during design, which affects the approach of the endorsed Sustainability Management Plan, must be assessed by an accredited ESD professional. The revised statement must be endorsed by the Responsible Authority before the development starts.
   c) Prior to the occupation of the building(s) allowed by this permit, the development must incorporate the sustainable design initiatives in the endorsed Sustainability Management Plan.

Water Sensitive Urban Design Response

26. Before the development starts, including demolition, bulk excavation and site preparation works, a Water Sensitive Urban Design Response must be submitted to and approved by the Responsible Authority. The Response must:
   a) Set out proposed stormwater treatment measures for the development and demonstrate how they would meet the relevant stormwater quality objectives of
Clause 22.12 Stormwater Management (Water Sensitive Urban Design) of the Port Phillip Planning Scheme.

b) Demonstrate that runoff from 100% of the roof would be captured and that at least 50% of the runoff volume from a 5 year 72 hour storm event would be successfully retained.

c) Incorporate and provide details of stormwater runoff storage with a capacity of at least 0.5 cubic metres per 10 square metres of roof area equipped with power and water management telecommunications.

d) Incorporate and provide details of grey water collection and reuse.

27. Prior to the occupation of the building(s) allowed by this permit, the development must incorporate water sensitive urban design initiatives listed in the endorsed Water Sensitive Urban Design Response.

Traffic, Car Parking and Loading Facilities

28. Before the development starts, including demolition and bulk excavation, the applicant must submit a revised traffic management report to Port Phillip City Council. The report must be generally in accordance with the report prepared by Cardno and dated 29 June 2015, and must be to the satisfaction of the Council. The revised traffic management report and plans must address:

a) The dimensions of the loading area to be generally in accordance with the requirements of Clause 52.07 of the Port Phillip Planning Scheme, or to the satisfaction of the Council.

b) All access ways are to be a minimum 3 metres wide.

c) The width of the parallel car parking spaces to be a minimum of 2.3m.

d) Access and egress to parking space 103 to be demonstrated with swept path diagrams.

e) Provision of a minimum height clearance of 2.8 metres above all ramps in the car parking areas.

f) Access grades of no steeper than 10% within 5 metres of site frontages.

g) Vehicles can satisfactorily enter and exit the site in a forward direction.

h) Columns at the south-eastern end of the car park do not encroach on the access door opening envelope.

i) Convex mirrors are located at the north-eastern vehicle access point.

j) The roller door and loading bay height to be a minimum of 4 metres high.

Waste Management

29. Before the use and development starts, including demolition, bulk excavation and site preparation works, an updated Waste Management Plan (WMP) shall be prepared and submitted to Port Phillip City Council Waste Management Services. The WMP must be generally in accordance with the report prepared by Leigh Design and dated 29 June 2015. The WMP must comply with Council’s ‘Community Amenity Local Law No. 3’. Waste storage and collection arrangements must not be altered without the prior approval of the Council.

3D Model

30. Before the development starts (other than demolition or works to remediate contaminated land in accordance with an Auditors direction, or site preparation works), a 3D digital
model of the overall development and its immediate surrounds, as appropriate, must be submitted to the Responsible Authority and the City of Port Phillip and be to the satisfaction of the Responsible Authority and the City of Port Phillip in conformity with the Department of Environment, Land, Water and Planning Advisory note 3D Digital Modelling.

In the event that substantial modifications are made to the overall development a revised 3D digital model must be submitted to and be to the satisfaction of the Responsible Authority and the City of Port Phillip.

The 3D model must be accompanied by a signed statement declaring that by submitting the model, the applicant/owner grants, and warrants they are authorised to grant, the State of Victoria and the City of Port Phillip free of charge a sub-licensable, irrevocable, non-exclusive worldwide licence to use the model for any planning related purpose, and that further the applicant/owner indemnifies the State of Victoria and the City of Port Phillip against any loss, damage, claim, action or expense which the State of Victoria and the City of Port Phillip (including their officers, employees and agents) suffer as a direct result of a breach of this warranty.

Dual Water Reticulation

31. Before the occupation of the development allowed by this permit, the development must include dual reticulation and a connection point to connect to a potential future precinct scale alternative water supply via a third pipe network to the satisfaction of the relevant water authority and the Responsible Authority.

Services to be underground

32. All new services to the property including water, gas and sewerage must be installed underground and located in a position approved by the Responsible Authority and unless otherwise agreed or required by the relevant service authority. All costs associated with any such works must be borne by the applicant/owner.

Walls on or facing the boundary

33. Before the occupation of the development allowed by this permit, all new or extended walls on or facing the boundary of adjoining properties and/or a Janeway must be cleaned and finished to a uniform standard to the satisfaction of the Responsible Authority. Unpainted or unrendered masonry walls must have all excess mortar removed from the joints and face and all joints must be tooled or pointed also to the satisfaction of the Responsible Authority. Painted or rendered or bagged walls must be finished to a uniform standard to the satisfaction of the Responsible Authority.

Parking and Loading Areas Must Be Available

34. Car and bicycle parking and loading areas and access lanes must be developed and kept available for those purposes at all times and must not be used for any other purpose such as storage to the satisfaction of the Responsible Authority.

No Damage to Existing Street Tree(s)

35. The proposed development and works must not cause any damage to any existing street tree. Root pruning of any adjacent street tree must be carried out to the satisfaction of the Responsible Authority prior to the construction of any crossover/works.

All adjacent street trees will require a tree protection zone which complies with AS 4970-2009 at all times throughout the demolition and construction phase of the development. A tree protection fence is to be installed around any tree that is likely to be impacted by construction. The fence is to be constructed in a diamond or square position around each tree trunk from 4 panels of a minimum height 1.8m x minimum length 2.1m, interlocking
by bolted clamps and concrete pads. No entry to this area is permitted without the consent of the Responsible Authority.

**Through Block Pedestrian Link**

36. The through block pedestrian link must:
   
a) be publicly accessible at least between 6am and 10pm each day or otherwise to the satisfaction of the responsible authority and City of Port Phillip;
   
b) remain partially open to the sky;
   
c) have an active frontage for most of its length;
   
d) be well lit at night;
   
e) have a minimum width at ground level of 3m and a minimum height clearance of 3m;
   
f) be maintained by the owner (at its cost) to the satisfaction of the City of Port Phillip in accordance with the Maintenance Plan approved under this permit.

**Maintenance Plan for Through Block Pedestrian Link**

37. Before the development starts (including demolition or works to remediate contaminated land in accordance with an Auditors direction or site preparation works), a maintenance plan for the through block pedestrian link must be submitted to and approved by the Responsible Authority. The plan must detail the type and frequency of the key maintenance tasks to be carried out to ensure that the laneway is maintained to a satisfactory standard in terms of appearance and safety at all times.

**Permit Expiry**

38. This permit will expire if:

   a) The development is not commenced within two years of the date of this permit.
   
b) The development is not completed within four years of the date of this permit.
   
c) The use is not commenced within two years of the completion of the development.

The Responsible Authority may extend the periods referred to if a request is made in writing:

   (i) before or within 6 months after the permit expiry date, where the use or development allowed by the permit has not yet started; and
   
   (ii) within 12 months after the permit expiry date, where the development allowed by the permit has lawfully started before the permit expires.

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**Date Issued: 22 August 2016**

Note: Under Part 4, Division 1A of the Planning and Environment Act 1987, a permit may be amended. Please check with the responsible authority that this permit is the current permit and can be acted upon.

**Signature for the responsible authority**

[Signature]

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Page 12 of 15
**THIS PERMIT HAS BEEN AMENDED AS FOLLOWS:**

<table>
<thead>
<tr>
<th>Date of amendment</th>
<th>Brief description of amendment</th>
<th>Name of responsible authority that approved the amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>14/7/2017</td>
<td>• Permit preamble amended from dwellings to accommodation (serviced apartments)</td>
<td>Minister for Planning</td>
</tr>
<tr>
<td></td>
<td>• Condition 13 amended by the deletion of ‘apartment’</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Condition 19 added</td>
<td></td>
</tr>
</tbody>
</table>

**NOTE:** This permit has been issued in accordance with the Victorian Civil and Administrative Tribunal (VCAT) Order P730/2015 dated 22 July 2016.

**PERMIT NOTES:**

These notes are provided for information only and do not constitute part of this permit or conditions of this permit.

**Building Approval Required**

This permit does not authorise the commencement of any building construction works. Before any such development may commence, the applicant must apply for and obtain appropriate building approval.

**Building Works to Accord With Planning Permit**

The applicant/owner will provide a copy of this planning permit to any appointed Building Surveyor. It is the responsibility of the applicant/owner and Building Surveyor to ensure that all building development works approved by any building permit is consistent with this planning permit.

**Days and Hours of Construction Works**

Except in the case of an emergency, a builder must not carry out building works outside the following times, without first obtaining a permit from Council’s Local Laws Section:

- Monday to Friday: 7.00am to 6.00pm; or
- Saturdays: 9.00am to 3.00pm.

An after hours building works permit cannot be granted for an appointed public holiday under the Public Holidays Act, 1993.

**Drainage Point and Method of Discharge**

The legal point of stormwater discharge for the proposal must be to the satisfaction of the responsible authority. Engineering construction plans for the satisfactory drainage and discharge of stormwater from the site must be submitted to and approved by the responsible authority prior to the commencement of any buildings or works.

**Permit required for signs**

This permit relates only to the use and development of the land and does not comprise an approval for the erection of any advertising signs. The location and details of any advertising signs to be erected on the land and not exempt pursuant to the Port Phillip Planning Scheme, must be the subject of a separate planning permit application.

**Waste Collection**

The applicant must consult with Council’s Waste Management Department regarding the location of waste bins and collection options. Waste management must be in accordance with Council’s Community Amenity Local Law No. 3.

**Roads and laneways to be kept clear**

During the construction of the buildings and works allowed by this permit, the roads and laneway(s) adjacent to the subject land must be kept free of parked or standing vehicles or any other obstruction, including building materials, equipment etc. so as to maintain free vehicular passage to abutting benefiting properties at all times, unless with the written consent of the Responsible Authority.
VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION
PLANNING AND ENVIRONMENT LIST

CATCHWORDS
Question of law – application of clause 58 to request to amend permit pursuant to section 87A Planning and Environment Act 1987

APPLICANT
W Property Group Pty Ltd

RESPONSIBLE AUTHORITY
Boroondara City Council

RESPONDENT
Sotheary En

SUBJECT LAND
18-20 & 22 Lyldeale Grove
HAWTHORN EAST VIC 3123

WHERE HELD
Melbourne

BEFORE
Helen Gibson, Deputy President

HEARING TYPE
Practice Day Hearing

DATE OF HEARING
19 May 2017

DATE OF ORDER
25 May 2017

CITATION
W Property Group Pty Ltd v Boroondara CC [2017] VCAT 740

ORDER

1. Deputy President Helen Gibson is nominated pursuant to Clause 66(1)(b) of Schedule 1 of the Victorian Civil and Administrative Tribunal Act 1998, as the member who is a legal practitioner to determine the question of law or of mixed fact or law set out below.

QUESTION OF LAW

2. The questions of law to be determined are:
   1. Do the provisions of clause 58 apply to an application to amend an existing permit brought in the Tribunal’s original jurisdiction under section 87A?
   2. If the answer to question 1 is “yes” and the provisions of clause 58 do apply, do they apply only the extent of the amendments to
the existing permit sought by the application made under s.87A, or do the provisions apply to the building as a whole?

3. If the provisions of clause 58 do not apply to an application made under section 87A, are the provisions relevant at all in the assessment of whether or not a permit should be amended?

4. Are the provisions of clause 58 relevant at all to an application to amend an existing permit brought pursuant to section 72 of the Act where the original application for the existing permit was made before the coming into operation of clause 58?

DETERMINATION

3. The questions of law set out above should be determined pursuant to Clause 66(1)(b) of Schedule 1 of the Victorian Civil and Administrative Tribunal Act 1998 by the Tribunal constituted for the purposes of the proceeding as follows:

1. No.
2. No, not applicable.
3. No.
4. No.

Helen Gibson
Deputy President

APPEARANCES:

For W Property Group Pty Ltd Mr Finanzio SC and Mr Andrew Walker of counsel, by direct brief

For Boroondara City Council Mr John Rantino, solicitor, of Maddocks

For Sotheary En Ms Sotheary En, in person
REASONS

WHAT IS THIS PROCEEDING ABOUT?

1 This proceeding is an application by W Property Group Pty Ltd (the Applicant) to amend planning permit PP13/00311 (as amended on 5 May 2017) (the permit) pursuant to section 87A of the Planning and Environment Act 1987. A hearing of this proceeding commenced before Senior Member Hewet, which was adjourned until 30 May 2017 to allow additional time and to enable the following question of law to be determined at this practice day hearing prior to the further adjourned hearing.

QUESTION OF LAW

2 A question of law has arisen as to whether the provisions of clause 58 of the Boroondara Planning Scheme apply to this proceeding. Clause 58 was introduced into the planning scheme by Amendment VC136 on 13 April 2017. The amendment introduced a requirement in various zones that an apartment development must meet the requirements of clause 58. Clause 58 sets out requirements for apartment developments and is based on the Better Apartments Design Standards December 2016 (BADS).

3 The operation of clause 58 is subject to the following transitional provisions in each of the zones where an apartment development is required to meet the requirements of clause 58. Thus in the Commercial 1 Zone (C1Z), which applies to the subject land, clause 34.01-4 provides as follows:

34.01-4 Buildings and works

A permit is required to construct a building or construct or carry out works.

... An apartment development must meet the requirements of Clause 58.

Transitional provisions

Clause 58 does not apply to:

- An application for a planning permit lodged before the approval date of Amendment VC136.
- An application for an amendment of a permit under section 72 of the Act, if the original permit application was lodged before the approval date of Amendment VC136.

4 The parties agreed on the following four questions for determination:

1. Do the provisions of clause 58 apply to an application to amend an existing permit brought in the Tribunal’s original jurisdiction under section 87A?
2. If the answer to question 1 is “yes” and the provisions of clause 58 do apply, do they apply only the extent of the amendments to the existing permit sought by the application made under s.87A, or do the provisions apply to the building as a whole?

3. If the provisions of clause 58 do not apply to an application made under section 87A, are the provisions relevant at all in the assessment of whether or not a permit should be amended?

4. Are the provisions of clause 58 relevant at all to an application to amend an existing permit brought pursuant to section 72 of the Act where the original application for the existing permit was made before the coming into operation of clause 58?

PARTIES’ POSITIONS

Responsible Authority

5. The council submits that the answer to each question is:

1. Yes.
2. They apply to the building as a whole.
3. If the provisions of clause 58 do not apply, they are nonetheless a relevant matter in assessing whether or not a permit should be amended.
4. The provisions of clause 58 are a relevant matter in assessing whether or not a permit should be amended pursuant to s.72 of the Act.

Applicant

6. The applicant submits that the answer to each question is:

1. No, but if the answer is yes, the Applicant would withdraw its current application under section 87A, on condition that the proceeding listed for 29 May 2017 [sic] could be conducted on the basis that the application is one to review the Council’s refusal to grant an amendment under section 72 to which clause 58 does not apply.
2. No.
3. No; and
4. No.

TRIBUNAL RESPONSE

Does clause 58 apply to an application to amend a permit under section 87A?

7. I find that clause 58 does not apply to an application to amend an existing permit under section 87A for the following reasons.
8 The planning scheme states when and in what circumstances clause 58 applies. Clause 34.01-4 provides that a planning permit is required to construct or carry out works. It also provides that an apartment development must meet the requirements of clause 58.

9 Under the heading Application, clause 58 states as follows:

**Application**

Provisions in this clause apply to an application to construct or extend an apartment development, or to construct or extend a dwelling in or forming part of an apartment development, if ... 

10 This clause must be interpreted in the context of the planning scheme. I find that reference to an application in this provision refers to an application for a permit as required under clause 34.01-4 or any other relevant zone provision, which requires a permit for buildings and works and provides that an apartment development must meet the requirements of clause 58.

11 An application for such a permit is an application made pursuant to section 47 of the Planning and Environment Act 1987. Section 47(1) sets out certain requirements relating to applications for permits if a planning scheme requires a permit to be obtained for a use or development of land.

12 The provisions of section 47 apply to an application made pursuant to section 72 of the Act for amendment of a permit by reason of section 73(1).¹

13 An application to amend a permit pursuant to section 87A of the Act is not an application for a permit (or amendment of a permit) within the meaning of the planning scheme or section 47. When we refer to an application to amend a permit pursuant to section 87A of the Planning and Environment Act 1987, this is a short hand way of referring to an application made pursuant to the Victorian Civil and Administrative Tribunal Act 1998 in its original jurisdiction to consider a request to cancel or amend a permit pursuant to section 87 or 87A of the Act.

14 Division 3 of Part 4 of the Act, which deals with cancellation and amendment of permits by Tribunal, does not use the word application in any of its provisions. Rather, it refers throughout to a request that may be made to the Tribunal to cancel or amend a permit. Thus:

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¹ Section 73(1) provides as follows:

**73 What is the procedure for the application?**

(1) Subject to this section, sections 47 to 62 (with any necessary changes) apply to an application to the responsible authority to amend a permit as if—

(a) the application were an application for a permit; and

(b) any reference to a permit were a reference to the amendment to the permit.
• Section 87(3) provides that the Tribunal may cancel or amend a permit at the request of various persons.

• Section 87A(2) provides that the Tribunal may only cancel or amend a permit under this section at the request of various persons.

• Section 89(1) provides that various other persons may ask the Tribunal to cancel or amend the permit in various circumstances. Section 89(2) provides that the request must be made in writing in accordance with the regulations. Section 89(3) provides that the Tribunal may refuse to consider a request under this section or section 87 unless it is satisfied that the request has been made as soon as practicable after the person making it had notice of the facts relied upon in support of the request.

• Section 90 provides that the Tribunal must or may hear from various people at the hearing of any request.

• Section 90A sets out matters which the Tribunal must take into account in determining a request.

• Section 91 provides for determination by the Tribunal after hearing a request.

15 The reference throughout Division 3 to a request to cancel or amend a permit contrasts to the provisions elsewhere in Part 4 of the Act, which deals with permits, and refers throughout to applications for permits or applications for review by the Tribunal under various provisions.

16 Under the *Victorian Civil and Administrative Tribunal Act 1998* the Tribunal has two types of jurisdiction – original jurisdiction and review jurisdiction. Section 43 of the *Victorian Civil and Administrative Tribunal Act 1998* provides for how the original jurisdiction of the Tribunal is invoked:

43 **How is original jurisdiction invoked?**

The original jurisdiction of the Tribunal is invoked—

(a) by a person who is entitled by or under an enabling enactment to do so applying to the Tribunal in accordance with section 67; or

(b) by a matter being referred to the Tribunal under an enabling enactment in accordance with section 69; or

(c) in any other way permitted or provided for by the enabling enactment.

17 Section 67 sets out how to make an application to the Tribunal.

18 Thus an application to the Tribunal under section 67 to invoke the Tribunal’s original jurisdiction to amend a permit pursuant to section 87A is
not an application pursuant to the *Planning and Environment Act 1987*. Rather, it is an application pursuant to the *Victorian Civil and Administrative Tribunal Act 1998* to consider a request under the *Planning and Environment Act 1987* to amend a permit.

19 Thus in my view, based on the statutory interpretation of clause 58, there is no justification to find that it applies to a request to amend a permit pursuant to section 87A of the *Planning and Environment Act 1987*.

20 I am not persuaded by the council’s argument that because there is no definition in the planning scheme or the *Planning and Environment Act 1987* of the word *application*, there is no reason why the use of this word in clause 58 is limited to applications for permits (or amendments to permits under section 72) made to the responsible authority and that an *application* can equally include applications made to the Tribunal.

21 For the reasons I have set out, I consider that reference to the word *application* in clause 58 must be read contextually. It must relate back to the relevant zone provisions, which impose a requirement to apply for a permit to construct or extend an apartment development, or to construct or extend a dwelling in or forming part of an apartment development.

22 I therefore conclude that the answer to the first question is that the provisions of clause 58 do not apply to an application to amend an existing permit brought in the Tribunal’s original jurisdiction under section 87A of the *Planning and Environment Act 1987*.

If the provisions of clause 58 apply, do they apply to the extent of the amendments or to the building as a whole?

23 In light of my findings in respect of question 1, this question of law does not arise or require determination.

If clause 58 does not apply to an application under section 87A, is it relevant in the assessment of whether or not a permit should be amended?

24 In considering a request to amend permit under section 87A, the Tribunal may amend a permit that has been issued at its direction if it considers it appropriate to do so. There are various other matters set out in Division 3 that it must consider. Section 90A provides as follows:

90A Matters which Tribunal must take into account

(1) In determining a request, the Tribunal must take into account the matters set out in section 84B(2) as if the request were an application for review.

(2) The matters set out in section 84B(2) are in addition to any other matters which the Tribunal can properly take account of or have regard to or is required to take account of or have regard to in determining a request.
Section 84B(2) sets out various matters that the Tribunal must take into account. It includes the following:

**84B Matters for Tribunal to take into account**

In determining an application for review under this Act, in addition to the matters referred to in subsection (1), the Tribunal—

(a) must take into account any relevant planning scheme;

(b) must have regard to the objectives of planning in Victoria;

...

The planning scheme, of course, includes clause 58 as well as the transitional provisions in the C1Z and other relevant zones where clause 58 applies. In addition, the planning scheme also includes clause 65, which provides as follows:

**65.01 Approval of an application or plan**

Before deciding on an application or approval of a plan, the responsible authority must consider, as appropriate:

- The matters set out in Section 60 of the Act.
- The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
- The purpose of the zone, overlay or other provision.
- Any matter required to be considered in the zone, overlay or other provision.
- The orderly planning of the area.
- The effect on the amenity of the area.
- The proximity of the land to any public land.
- Factors likely to cause or contribute to land degradation, salinity or reduce water quality.
- Whether the proposed development is designed to maintain or improve the quality of stormwater within and exiting the site.
- The extent and character of native vegetation and the likelihood of its destruction.
- Whether native vegetation is to be or can be protected, planted or allowed to regenerate.
- The degree of flood, erosion or fire hazard associated with the location of the land and the use, development or management of the land so as to minimise any such hazard.

This clause does not apply to a VicSmart application.
27 Section 60(1A)(j) provides that before deciding on an application, the responsible authority (and the Tribunal), if the circumstances appear to so require, may consider any other relevant matter.

28 The question is whether clause 58 is a relevant matter in all the circumstances, particularly having regard to the transitional provisions relating to the consideration of clause 58 in the planning scheme.

29 The applicant takes the view that clause 58 is not a relevant matter, whereas the council considers that it is.

30 Both parties rely on the following provision from the High Court decision in Minister for Aboriginal Affairs v Peko-Wallsend Pty Ltd (per Mason J).[^3]

[15] ...

(b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider - are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard (see Reg. v. Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd [1979] HCA 62; (1979) 144 CLR 45, at pp 49-50, adopting the earlier formulations of Dixon J. in Swan Hill Corporation v. Bradbury [1937] HCA 15; (1937) 56 CLR 746, at pp 757-758, and Water Conservation and Irrigation Commission (N.S.W.) v. Browning [1947] HCA 21; (1947) 74 CLR 492, at p 505). By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act.

[^3]: 1986 (162) CLR 24 at 39; [1986] HCA 40
31 The important principle identified in this decision relevant to this matter is that the factors the decision maker is bound to consider, where not expressly stated, must be determined by implication from the subject matter, scope and purpose of the Act or, in this case, the planning scheme.

32 The council says that because the transitional provision only provides that clause 58 does not apply to a permit application lodged before the approval date of Amendment VC136 and an application for an amendment of a permit under section 72 if the original permit application was lodged before the approval date Amendment VC136, makes no express mention of amendment of a permit under section 87A, there is no reason why clause 58 should not apply to the amendment of a permit under section 87A. The council relies upon *Popular Pastimes Pty Ltd v Melbourne CC* in support of its position that the transitional provision does not include reference to amendment of a permit pursuant to section 87A and there is no clearly stated planning policy, rationale or contextual basis for reading words into the transitional provision that are simply not there.

33 I agree with the council that there is no justification for reading into the transitional provisions any reference to an amendment of a permit pursuant to section 87A. However, whether clause 58 is a relevant matter to consider in the context of a request to amend a permit pursuant to section 87A by virtue of section 60(1A)(j) of the *Planning and Environment Act 1987*, will depend on the purpose and intent of clause 58 itself and the transitional provision.

34 In my view, the purpose and intent of the transitional provisions in clause 34.01-4 (and other relevant zone provisions) is to exclude the application of clause 58 to *any* permit applications where the current permit application or original permit application, in the case of an application for amendment under section 72, was lodged before the approval date of Amendment VC136. In respect of amendments of permits under section 72, there is no time constraint on how long prior to the approval date of Amendment VC136 the exemption applies. The clear intent is to exclude the application of clause 58 from the amendment of any permit issued before Amendment VC136.

35 Whilst the amendment of a permit pursuant to a request made under section 87A (or indeed, under section 87 or 89) is different in its nature to an amendment of a permit pursuant to section 72, the Tribunal has held in various cases that the ambit of changes that may be made to a permit under each provision of the *Planning and Environment Act 1987* are the same. Thus in *Fosters Group Ltd v Mornington Peninsula SC* the Tribunal said:

[53] In various cases the Tribunal has emphasised that what can be done by way of amendment under each of these provisions (sections 72, 87 and 87A) is the same. No distinction should be

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4 2008 (VCAT 1184)
5 [2010] VCAT 104
drawn between a permit issued at the direction of the Tribunal and a permit issued by the responsible authority (in the absence of an application for review) in terms of the type of amendment that can be made (eg. amendment to a condition, plans, drawings and other documents approved under a permit).  

[54] Each of the three mechanisms for amending a permit entails a different process even though what might be done by way of amendment is the same.

[55] An amendment under section 72 requires the same process as the grant of a permit. The procedure for amending a permit under sections 87 or 87A is set out in Division 3 of Part 4 of the Act. It entails a different process.

36 It is relevant to note in this context that the Fosters Group case found that it would be possible to amend permit under section 87A in a way that could not be considered under the current provisions of the planning scheme, but the permit could not be amended to introduce a new prohibited use.

37 I have already noted in my response to question 1 that a request under section 87A is not the same as an application for a planning permit or to amend a planning permit under section 72. It is therefore not an application to which clause 58 applies. Consequently, it would not have been relevant to include any reference to a section 87A permit amendment in the transitional provisions of the various zones. On the other hand, if the outcomes of a permit amendment under section 87A would be the same as a permit amendment under section 72, it would be anomalous if clause 58 did not apply to a permit amendment under section 72 (if the original permit application was lodged before the approval date of Amendment VC136), but it could apply and could be a relevant consideration to a permit amendment under section 87A in identical circumstances (where the original permit application was lodged before the approval date of Amendment VC136). In my view, this would be contrary to the objectives of planning in Victoria to provide for the fair use and development of land.  
It would not be fair to consider clause 58 in the context of amending a permit under one process and not under the other process where the outcomes are the same. This cannot have been intended. It is also a perverse outcome that could be stymied by the applicant choosing to pursue an amendment pursuant to section 72 and not proceeding with its application under section 87A.

38 In conclusion, I find there is a clear legislative intent that clause 58 is not intended to apply retrospectively to any permit applications lodged before

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6 See Jolin Nominees Pty Ltd v Moreland CC (Red Dot) [2006] VCAT 467; Zazek v Boroondara CC (Red Dot) [2007] VCAT 2174; Bestway Group Pty Ltd v Monash CC (Red Dot) [2008] VCAT at 60

7 Section 4(1)(a) Planning and Environment Act 1987

8 Indeed, I was advised that the applicant has already lodged such an application with the council. However, to abandon the section 87A application in the present proceeding would be a waste of resources.
the approval date of Amendment VC136 or to the amendment of any permits if the original permit application was lodged before the approval date of Amendment VC136.

39 Having regard to the principles of relevance identified in *Peko-Wallsend*, whilst the exercise of discretion to amend a permit under section 87A might appear to be unconfined, I find that having regard to the subject matter, scope and purpose of the planning scheme so far as it applies to clause 58, there is an implied limitation on the factors to which the Tribunal may legitimately have regard, in terms that it may not apply clause 58 to a consideration of an amendment of a permit under section 87A, if the original permit application was lodged before the approval date of Amendment VC136.

40 It follows that my response to question 3 is no, the provisions of clause 58 are not relevant at all in the assessment of whether or not a permit should be amended under section 87A.

**Is clause 58 relevant at all to an application to amend an existing permit pursuant to section 72?**

41 For similar reasons to my finding in response to question 3, I find that the provisions of clause 58 are not relevant to an application to amend an existing permit pursuant to section 72 of the Act where the original application for the existing permit was made before the coming into operation of clause 58.

42 The transitional provisions mean what they say: clause 58 does not apply to an application for an amendment of a permit under section 72 of the Act, if the original permit application was lodged before the approval date of Amendment VC136. There is no qualification on the exemption, no partial exemption, and no additional policy basis within the legislative framework which might be read to qualify the phrase *does not apply*.

43 I agree with the applicant that the effect of that phrase is such that if a planning decision maker were to use clause 58 as a tool in the assessment of whether or not an application for an apartment development achieves an acceptable outcome within the meaning of clause 65 of the planning scheme, the decision maker would take into account an irrelevant consideration.

44 Absent the express words to the contrary in the transitional provisions, clause 58 would apply to an application under section 47 for an amendment under section 72, which was to be decided after the introduction of clause 58, on the basis that planning decisions have to be made in respect of applications for a permit on the basis of the planning scheme in force at the time of the decision. This principle was established by *Ungar v City of Malvern* and confirmed by the Supreme Court in *Sisters Windfarm Pty Ltd*.

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99 [1979] VR 259
v Mayne Shire Council\textsuperscript{10}. However, there are express words to the contrary in the planning scheme that negate this principle.

45 The only meaning that can be given to the phrase \textit{does not apply} in the transitional provisions is that applications in the categories set out in the transitional provisions must be assessed without regard to clause 58. For the reasons set out in response to question 3, this also applies to consideration of a request to amend a permit under section 87A.

46 This does not mean that the internal amenity of apartments is not a relevant matter to consider, but in assessing internal amenity the decision maker cannot refer to clause 58 in forming a judgement or exercising its discretion. Factors that may have been relevant in assessing internal amenity of apartments prior to the introduction of Amendment VC136 will continue to be relevant. However, the introduction of clause 58 does not mean that apartment development approved pursuant to an original permit application lodged before the approval date of Amendment VC136 now become unacceptable or substandard.

47 It follows that my response to question 4 is no, clause 58 is not relevant at all to an application to amend an existing permit pursuant to section 72.

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\textbf{Helen Gibson}

\textbf{Deputy President}

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\textsuperscript{10} [2012] VSC 324 at [56]-[58]
ORDER

1. The decision of the responsible authority is set aside.

2. Pursuant to section 85(1)(f) of the Planning and Environment Act 1987, I direct that:
   
   - the time within which the development described in Permit No MPS/2010/872 is to be started is extended to 6 September 2019.
   - the time within which the development is to be completed is extended to 6 September 2021.

Michael Deidun
Member
APPEARANCES

For applicant
James Lofting, Solicitor of HWL Ebsworth and Leo Pappas of Fusion Project Management

For responsible authority
Fiona Slechten, Town Planner of Calibre Consulting

INFORMATION

Description of proposal
Seven storey building comprising basement car park with two levels of car parking behind a ground floor shop front to Lygon Street with Mezzanine floor. The effective height of the building is 6.5 storey (21.5m). Upper levels comprise five levels of dwellings, recessed above the fourth floor by 4 metres to Lygon Street and 10.5 metres to the rear of the site. The car park is accessed via a crossover to Lygon Street with provision for this to be relocated to the rear upon construction of a laneway across the rear 4 metres of the site.\(^1\)

Nature of proceeding
Application under section 81(1) of the Planning and Environment Act 1987 – to review the refusal to extend time to commence and complete a development.

Planning scheme
Moreland Planning Scheme

Zone and overlays
Commercial 1 Zone
Development Contributions Plan Overlay Parking Overlay Design and Development Overlay 19

Land description
The land has an area of 594 sqm with 12.2m frontage to Lygon Street. It has an existing commercial building on site that is two storey to the front of the site, extending the length of the site to approximately 1m from the rear boundary where it has a rear wall height of approximately 4 metres.\(^2\)

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\(^1\) This is the description of the proposal from the Tribunal decision of 368 Lygon St v Moreland CC [2011] VCAT 1591

\(^2\) Also from the previous Tribunal decision.
REASONS

WHAT IS THIS PROCEEDING ABOUT?

1 Pino Gagliano (the ‘Applicant’) seeks a review of the decision of the Moreland City Council to refuse to extend time for a permit that allows the construction of a seven storey building on land at 368 Lygon Street, Brunswick West (the ‘review site’). The Council’s grounds for refusing the extension of time relate to the subsequent approval of new apartment design standards, and the failure of the current approved design to comply with those standards.

2 The planning permit was issued on 6 September 2011 at the direction of the Tribunal in the decision of 368 Lygon St v Moreland CC [2011] VCAT 1591. Under the terms of Condition 30 of the permit, the permit originally expired if the development did not commence by 6 September 2013, or be completed by 6 September 2015. Two extensions of time have since been granted, each for a further period of two years, such that the permit now expires when development is not commenced prior to 6 September 2017, or be completed by 6 September 2019. The current request for an extension of time was received by the Moreland City Council prior to the expiry date of 6 September 2017.

3 The Council submits that since the grant of a permit, there have been substantial changes to the Moreland Planning Scheme. Most notably these include the insertion of the Better Apartment Design Standards at Clause 58 of the Victorian Planning Provisions, and implementation of the Moreland Apartment Design Code at Clause 22.07 of the Moreland Planning Scheme. The Council submits that as the approved development does not comply with these new provisions, a further extension of time should not be granted.

4 The issues or questions for determination are:

   a. To what extent should the changes in planning policy impact the proposed extension of time?

   b. How do I balance the changes in planning policy against other relevant considerations?

5 The Tribunal must decide whether the time in which the development could be commenced and completed under the permit should be extended. Having considered all submissions presented with regard to the applicable policies and provisions of the Moreland Planning Scheme, I have decided to set aside the Council’s decision, and grant an extension of the expiry date on the permit. My reasons follow.

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3 The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.
TO WHAT EXTENT SHOULD THE CHANGES IN PLANNING POLICY IMPACT THE PROPOSED EXTENSION OF TIME?

6 In *Kantor v Murrindindi Shire Council* (1997) 18 AATR 285, Justice Ashley set out the following factors to be considered in a request to extend the expiry date of a permit.

   a. Whether there has been a change of planning policy;
   b. Whether the land owner is seeking to “warehouse” the permit;
   c. Intervening circumstances bearing on the grant or refusal of the extension;
   d. The total elapse of time;
   e. Whether the time limit originally imposed was adequate;
   f. The economic burden imposed on the land owner by the permit; and
   g. The probability of a permit issuing should a fresh application be made.

7 Since the *Kantor* decision, there have been subsequent decisions in which the Tribunal has found that it should not be limited to these considerations, and that there may be other factors relevant to a decision.

8 In the decision of *Hotel Windsor Holdings Pty Ltd v Minister for Planning* (Red Dot) [2014] VCAT 993 the Tribunal remarked:

   [9] These factors are not definitive or exclusive. They provide guidance on the matters to consider in light of the circumstances applying to the application in question, but they also allow for other relevant matters to be taken into consideration.

9 Further, in the decision of *AMV Homes Pty Ltd v Moreland CC* (Red Dot) [2015] VCAT 1699 the Tribunal remarked:

   [7] It is important to appreciate some additional relevant principles:
   
   An applicant should advance good reasons as to why an extension should be granted; a request should not be approved simply because it has been asked for.
   
   The *Kantor* “tests” are not mandatory nor exhaustive.
   
   There may be other relevant considerations to those articulated in *Kantor*, including matters of natural justice and equity.
   
   That the approved development is now prohibited does not mandate a decision refusing to extend the time to commence a development. However, it is something that would usually be expected to be one factor weighing against an extension of time.
   
   Each case needs to be decided on its own facts and circumstances including whether and how the development in question would undermine or offend the changed policy or planning control regime.
The Council outlined that in this proceeding there have been a number of relevant changes to the Moreland Planning Scheme since the grant of a permit. Those identified by the Council in their submissions are:

a. Amendments GC09 & GC10, which changed the zoning of the land from the Business 1 Zone to the Commercial 1 Zone on 13 June 2014.

b. Amendment C71 which implemented Clause 22.08 Environmentally Sustainable Development on 19 November 2015.

c. Amendment C134 which implemented the Brunswick Structure Plan via Schedule 19 to the Design and Development Overlay on 18 August 2016.

d. Amendment VC136 which implemented the Better Apartment Design Standards via Clause 58 on 13 April 2017.

e. Amendment C142 which implemented the Moreland Apartment Design Code through Clause 22.07 Apartment Development of Five or More Storeys on 14 December 2017.

The Council adopted a very sensible and pragmatic approach to each of these planning scheme amendments. In relation to the first three of these amendments, they submit that:

a. The change in zoning to the Commercial 1 Zone brought about no real change to the purpose of the zone or the outcome of proposed development on the review site, and so is not a change that should act against an extension of the expiry date.

b. While the policy under Clause 22.08 would require additional considerations for a development of this nature, this issue is not considered substantive enough to warrant a refusal of the request to extend time.

c. While the proposal exceeds the preferred height under DDO19 by 3.2 metres, the draft Brunswick Structure Plan was considered by the Tribunal at the time that the decision was made to grant a permit for the proposed development on the review site. As such, the Council does not seek to argue for a reconsideration of the proposal against DDO19 and the Brunswick Structure Plan at this time.

However in respect of the other two changes listed above, the Council submits that these represent important changes in planning policy, with which the proposal does not comply. As such, it argues that the proposed development would be unlikely to receive support for a planning permit if considered today.

Clause 58 of the Moreland Planning Scheme contains the apartment design standards for developments of more than 5 or more storeys in height. Clause 58 contains 26 standards, of which the Council argues that the
endorsed plans depict a layout which do not comply with the following four standards:

a. D17 Accessibility
b. D19 Private open space
c. D24 Functional layout
d. D26 Windows

14 In relation to these Standards, the Council continued to take a pragmatic approach, by submitting that the extent to which the proposal failed to comply with Standards D17 and D19 alone is not considered to warrant a refusal of the request to extend time. In respect of Standard D17 I note that three apartments within the development have been designed to comply with the Council’s Liveable Housing Design Standards that applied at the time of the grant of a permit. The proposal therefore does provide floor layouts for people with limited mobility, just not to the standard that now applies. In respect of Standard D19, I agree with the Council’s approach that the balconies are of good dimensions and overall area, even though they do not all meet the minimum 1.8 metre width that now applies to one bedroom apartments, and the 2.0 metre width that now applies to two bedroom apartments. Despite this, I am satisfied having regard to the design that is before me that the balconies will continue to provide an acceptable level of amenity for future occupants.

15 Instead the Council’s submissions focussed on an assessment of the proposal against the other two standards, as well as the policy relating to the sizes of light wells at Clause 22.07-3 of the Moreland Planning Scheme. The Council’s concerns in relation to these provisions focusses on the amenity to be delivered to the bedrooms of the proposed development. As a result of discussions that occurred during the course of the hearing, and my own subsequent review of the plans, the following is a reasonable summary of the shortfalls identified by Council:

a. None of the main bedrooms within the 28 approved apartments meet the dimensions of 3.0 by 3.4 metres set out under Standard D24;

b. Of the 14 approved two-bedroom apartments, five of the apartments have second bedrooms that clearly do not meet the dimensions of 3.0 by 3.0 metres set out under Standard D24, three additional apartments appear to marginally fall below these dimensions, and six apartments appear to meet these dimensions.4

c. Three main bedrooms that form part of two bedroom apartments have a ‘snorkel’ arrangement to gain access to daylight, through windows that are 700mm wide, and some 7.0 metres from a light

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4 Noting that dimensions of the bedrooms had to be scaled off plans, with the endorsed plans having a scale of 1:200, which provides for a margin of error in scaling.
source. Both the sizes of the windows and the distance to a light source do not comply with Standard D26.

d. Three second bedrooms to two bedroom apartments also have a 'snorkel' arrangement to gain access to daylight, through windows that are 700mm wide, and some 5.0 metres from a light source. These second bedrooms are also the narrowest of those within the building, at approximately 2.7 metres wide. Again, both the sizes of the windows to these bedrooms and the distance to a light source do not comply with Standard D26.

e. A light court of 1.45 metres in width and 3.13 metres in depth serves three main bedrooms in two bedroom apartments, at levels 1, 2 & 3.\(^5\) This light court is well under the minimum 4.5 metre width and 29 square metres in area that policy at Clause 22.07-3 encourages.

f. A further light court of 1.5 metres in width and 2.64 metres in depth serves three second bedrooms in apartments at levels 1, 2 & 3. The same minimum width and area applies under the policy at Clause 22.07-3 to these second bedrooms.

16 Council submits that the introduction of the Better Apartment Design Standards (Clause 58), along with the Moreland Apartment Design Code (Clause 22.07) represents a significant shift in policy that should weigh against the application to extend time, particularly given the extent to which the proposal falls short of these provisions. Council further submits that the manner in which the proposal stands in relation to these provisions, means that it is unlikely that a planning permit would issue today for the approved development of the review site.

17 I am persuaded by the Council’s submissions that the approved development would be unlikely to gain a permit today if it were assessed against Clause 58 of the Moreland Planning Scheme, or at least that I would be very reluctant to grant a permit if it were a live proceeding before me. While Mr Lofting submits that the shortfalls against Clause 58 affects only a few of the apartments, the analysis at paragraph 15 above does not support that submission.

18 However I am not persuaded by the extent of weight that Council has placed on the changes in planning policy that are encapsulated in Clause 58. The introduction of the Better Apartment Design Standards via Amendment VC136 to the Victorian Planning Provisions was accompanied by fairly broad and generous transitional provisions inserted into various zones. The effect of those provisions is that Clause 58 does not apply to any applications for planning permits made before the gazetted date of 13 April 2017, and further that Clause 58 does not apply to any application to amend

\(^5\) It should be noted that the second storey of the building has been called the 'mezzanine floor' on the plans, even though it is a full floor level, with a void to part of the retail floorspace. As such, level 1 is the third storey, and the top floor is level 5, which is the seventh storey.
an existing permit, if the original permit application was lodged before the same date. The effect of the Tribunal decision of *W Property Group Pty Ltd v Boroondara CC* [2017] VCAT 740 is to clarify that these transitional provisions also extend to apply to requests to amend permits under s87 or 87A of the *Planning and Environment Act 1987*.

19 The intent of these transitional provisions is to mark a clear ‘line in the sand’, that all applications lodged on or after 13 April 2017 will be assessed subject to Clause 58, while those lodged prior to this date will benefit from the transitional provisions. This is made clear in the *Planning Advisory Note 66, New Planning Provisions for Apartment Developments* (April 2017):

**How does Amendment VC136 affect existing planning permit applications?**

Clause 58 and the amended Clause 55 do not apply to applications lodged before the introduction of Amendment VC136 on 13 April 2017.

The transitional arrangements also apply to an application lodged for an amendment of a permit where the original permit application was lodged before the introduction of Amendment VC136 on 13 April 2017.

20 While the transitional provisions do not refer to requests to extend time, I note that if I do decide to extend the expiry date on this permit, that the approved development will then continue to enjoy the transitional provisions in respect of any future application to amend the endorsed plans or the permit. It is also relevant to identify that Clause 58 would not be a relevant consideration in a decision to grant a permit for this development today, if the application were lodged with Council prior to 13 April 2017, as is the case with many of the proceedings that are presently being heard by the Tribunal.

21 It is for these reasons that I find it appropriate to reduce significantly the weight given in my assessment to the changes in planning policy that relate to the introduction of the Better Apartment Design Standards. I make this finding as these standards, including those at Clause 58 of the Moreland Planning Scheme, are accompanied with transitional provisions which seek to ensure that they are not applied retrospectively to existing approvals, or applications current at the gazetted date. In short, as the new provisions at Clause 58 are not intended to apply to existing approved buildings, I consider it inappropriate to use those provisions as a basis for refusing to extend the expiry date on an existing approval.

22 Clause 22.07 of the Moreland Planning Scheme does not contain any transitional provisions. As such, it is intended to apply retrospectively to both current permit applications at the time of its introduction, and to amendments to existing permits. The proposal fails to provide light wells
that comply with the 'standard' set out in this policy. The 'standard' at
Clause 22.07-3 is as follows:

<table>
<thead>
<tr>
<th>Table 4 Light well dimensions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 4 storeys or 12 metres</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>5-8 storeys or up to 25 metres</td>
</tr>
<tr>
<td>9 or more storeys or over 25 metres</td>
</tr>
</tbody>
</table>

23 While the approved building on the review site has a height of seven
storeys, the bottom two floors contain car parking. As such, the light wells
that serve the habitable floors extend for five storeys, or a height of 15.65
metres. There are four light wells that serve the approved apartments,
which have the following dimensions:6

<table>
<thead>
<tr>
<th>Light well</th>
<th>Minimum width</th>
<th>Minimum area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Light well A</td>
<td>1.5 metres</td>
<td>3.96 square metres</td>
</tr>
<tr>
<td>Light well B</td>
<td>3.1 metres</td>
<td>24.92 square metres</td>
</tr>
<tr>
<td>Light well C</td>
<td>1.45 metres</td>
<td>4.53 metres</td>
</tr>
<tr>
<td>Light well D</td>
<td>2.67 metres</td>
<td>31.02 metres</td>
</tr>
</tbody>
</table>

24 I consider that light wells B & D substantially complies with the policy
noting that:

a. Clause 22.07 provides a policy position, as opposed to a standard at
Clauses 55 or 58, and therefore carries a different weight;

b. The policy provides different 'standards' for light wells of up to 12
metres tall, and those up to 25 metres tall. It would seem
unreasonable to apply without some consideration for variation the
'standard' for 25 metre tall light wells, to a light well that is 15.65
metres tall; and,

c. The dimensions of these two light wells substantially exceeds the
'standard' that applies to light wells of up to 12 metres tall.

25 Light wells A & C fall significantly short of the 'standards' for light wells
at both 12 and 25 metres tall respectively. Each of these light wells service
three bedrooms, one on each of levels 1, 2, & 3 of the building. A relevant
assessment is how these affected apartments receive daylight as a whole. In

6 I have started with the light well adjacent to Apartment 101 as light well A, and continued my
referencing moving clockwise around the building. As areas of the light wells are not shown on
the endorsed plans, these have been calculated to the best of my ability.
each case the light wells service two bedroom apartments, with the other bedrooms to each apartment having large windows to either the front or rear elevation, and open to a balcony. Also the living areas in each of these six apartments will also receive a very good level of daylight, with full height and full length windows facing balconies to the front or rear of the building.

26 For these reasons, while I agree with the Council that these light wells are undersized compared to that sought by policy, I am not necessarily persuaded that the proposal is such that it would be unlikely to receive a permit today, having regard to the application of policy at Clause 22.07.

27 There is a further relevant consideration to this part of my assessment. The Kantor principle of changes to planning policy at least in part has reference to a consideration as to whether the outcome that would occur if the permit is extended and acted upon, would result in an undesirable planning outcome. That could often be the case if for example height limits were introduced, which would make an approved taller building incongruous with the desired future character of an area identified for change.

28 Here, there is no external impact from the changes in planning policy that have occurred through the implementation of Clauses 22.07 and 58. That is, if this permit is extended and acted upon, when one in the future views this completed building from any vantage point, there will be no discernible component of the building that will stand in contrast to the changes in planning policy that have occurred since the grant of a permit. Instead, the significant or contested changes in planning policy have all occurred in relation to matters of internal layout and amenity.

29 It is for these reasons that while I concede that there have been changes to planning policy since the grant of a permit, that I do not give those changes the same weight as afforded by the Council in this proceeding. To the extent that I give these changes some weight, they now need to be balanced against the other relevant considerations.

HOW DO I BALANCE THE CHANGES IN PLANNING POLICY AGAINST OTHER RELEVANT CONSIDERATIONS?

30 While in the above assessment I have given some weight to the changes in planning policy and provisions that have occurred since the grant of a permit, that is not a deciding factor in an assessment of this nature. It is now my task to balance the changes in planning policy, against the other relevant considerations, which I set out below.

Warehousing

31 The Council did not submit that the Applicant is seeking to warehouse the existing permit. Mr Pappas made a compelling submission as to the extent of apartment development that has occurred in the recent years in this part of Lygon Street, and the crowded market conditions that have resulted in a delay to the commencement of this project. I am satisfied that it is these
market conditions which have most likely resulted in a delay to the commencement of the development, rather than an intent to warehouse the permit. As such, this is a factor in favour of the grant of an extension of time in my consideration.

Intervening circumstances

32 The Council did not submit that there were any intervening circumstances that bear in favour of a refusal to grant an extension of time. Mr Lofting submits that the approved development provides a significant community benefit by providing to the Council, free of charge, land at the rear of the review site for a future laneway. I am informed that the creation of this laneway is sought in the Brunswick Structure Plan, but that no planning mechanism applies to the review site to require its provision. I consider the community benefit to be provided by the approved development to be a weighty consideration in favour of the grant of an extension of time.

Total lapse of time

33 While some 6.5 years have elapsed since the grant of the permit, that is not exceptional or remarkable for a project of this size, in an activity centre such as this which has experienced considerable competition in the marketing of new apartment developments. As such, this is a neutral factor in my consideration.

Was the time limit adequate?

34 In all the circumstances, it is not contested that the original time limit, along with the two extensions of time already granted, was adequate to complete the development. This is a factor against the request to extend time, but was not a matter relied upon by the Council.

Economic burden

35 The development of the review site with a seven storey building is not a trivial economic matter, particularly when one considers that:

a. The existing lease on the building would need to be finalised in order to construct a sales suite inside the existing building, to market and sell the approved apartments;

b. Given the nature of construction of the existing building on the review site, the existing building would then need to be completely demolished, before the site assessment can be completed to determine whether any soil on the review site is contaminated;

c. The original approval includes the application of cladding external to parts of the building, which we now understand to be highly flammable. The owner has to undertake a process of amending the proposed cladding, which apparently requires input from the Metropolitan Fire Brigade, although I am unfamiliar with the details of this process.
36 In these circumstances, the economic burden faced to date by the Applicant, in a crowded market, is a factor in favour of the grant of an extension of time.

**Why an extension should be granted**

37 The Applicant submits that it would be a significant delay to have to redesign the approved apartment development, and proceed through the planning process again, when they are now ready, with favourable market conditions, to proceed through to commencement of the development. This is a factor that supports the grant of an extension of time.

**CONCLUSION**

38 While I acknowledge that there has been a significant shift in planning policy around the standard of internal amenity in apartments, this has been accompanied with a clear intent that existing approvals and current planning permit applications are not subject to these new provisions retrospectively, particularly insofar as Clause 58 is concerned. As a result I find it appropriate to significantly reduce the weight given to the change in planning policy to introduce the Better Apartment Design Standards.

Insofar as Clause 22.07 is concerned, I have not been persuaded that this proposal is so out of step with that policy, that a permit would not issue for this development today having regard to that policy.

39 These considerations are to be weighed against those in favour of the grant of an extension of time, including the finding that this permit is not sought to be warehoused, the intervening circumstances of the community benefit provided by the existing permit, the economic burden faced by the land owner to date, and the readiness with which the current land owner is now in a position to proceed with the approved development.

40 Having weighed the various considerations, I have determined that the balance lies in favour of granting an extension of time in which to commence and complete the development. After considering the submissions made as to the desirable dates for commencement and completion, I consider that the following dates provide a fair and reasonable opportunity to undertake the approved development in a timely manner:

a. 6 September 2019 to commence the development

b. 6 September 2021 to complete the development

41 For the reasons given above, the decision of the responsible authority is set aside. An extension of time to the permit expiry dates is granted.

**Michael Deidun**

**Member**
**RED DOT DECISION SUMMARY**

The practice of VCAT is to designate cases of interest as ‘Red Dot Decisions’. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO. P1804/2015 & P1805/2015

PERMIT NO. 2009/001687A

**IN THE MATTER OF**

Hotel Windsor Holdings Pty Ltd v Minister for Planning

**BEFORE**

Mark Dwyer, Deputy President

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<table>
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<tr>
<th>NATURE OF CASE</th>
<th>Application for extension of time to complete development</th>
</tr>
</thead>
<tbody>
<tr>
<td>LOCATION OF PASSAGE OF INTEREST</td>
<td>Part 3 – paragraph [49] onwards</td>
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<td>REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE</td>
<td></td>
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<tr>
<td>LAW – issue of interpretation or application</td>
<td>Relevance and application of principles in <em>Kantar v Murriadindi</em> SC and other relevant criteria to a request for an extension of time to complete development, as opposed to starting development</td>
</tr>
<tr>
<td>PRACTICE OR PROCEDURE – consideration of individual instance or systemic issues</td>
<td>Adequacy of standard 2 x 2 permit (with two years to start development and two years to complete) for a major central city development; desirability of permit having a reasonable construction timeframe to allow contractual certainty for builders and financiers</td>
</tr>
<tr>
<td>APPLICATION – significant and interesting development</td>
<td>Public interest in decision about Windsor Hotel redevelopment</td>
</tr>
</tbody>
</table>

**Summary**

VCAT has twice previously considered extensions of time for the Windsor Hotel redevelopment - but both primarily related to the commencement of development. Having started development shortly before the expiry of its planning permit, albeit to a limited degree, the Windsor Hotel sought an extension of time to complete development. The current permit effectively only allowed two years for construction, whereas the evidence suggests that a major development of this nature and complexity requires a 36 to 42 month construction timeframe.

The decision in this matter turns largely on the particular circumstances stemming from its complex background history. However, it contains a useful examination of the relevant criteria for assessment of an extension of time to complete development, as opposed to starting development, and the adequacy of a standard 2 x 2 permit (with two years to start development and two years to complete) for a major central city development where builders and financiers want the certainty and security that a planning permit will not expire before the development is completed.
VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1804/2015 & P1805/2015
PERMIT NO. 2009/001687A

CATCHWORDS

Planning and Environment Act 1987 s 81(1) – application to review refusal of extension of time to complete development; Windsor Hotel redevelopment; relevant principles where alleged minimal commencement, relevance and application of Kantor principles to completion of development (as opposed to starting development); adequacy of permitted timeframes; adequacy of a standard 2 x 2 permit (with two years to start development and two years to complete) for a major central city development; desirability of having permit reflect a reasonable construction timeframe to allow contractual certainty for builders and financiers

APPLICANT
Hotel Windsor Holdings Pty Ltd

RESPONSIBLE AUTHORITY
Minister for Planning

SUBJECT LAND
103-137 Spring Street & 1-17 Bourke Street
Melbourne Vic 3000

WHERE HELD
Melbourne

BEFORE
Mark Dwyer, Deputy President

HEARING TYPE
Hearing

DATE OF HEARING
15 February 2016

DATE OF ORDER
9 March 2016

CITATION
Hotel Windsor Holdings Pty Ltd v Minister for Planning (Red Dot) [2016] VCAT 351

ORDER

In proceeding P1804/2015 (section 81 application):

1 The decision of the responsible authority dated 10 July 2015 is set aside.

2 Pursuant to s 85(1)(f) of the Planning and Environment Act 1987, I direct that the time within which the development described in Permit No: 2009/001687A is to be completed is extended to 31 March 2020.
In proceeding P1805/2015 (section 87 application):

3  As a consequence of the orders in proceeding P1804/2015, the application in proceeding P1805/2015 is dismissed.

Mark Dwyer  
Deputy President

APPEARANCES

For Applicant  
Chris Canavan QC and Peter O'Farrell of counsel, instructed by Norton Rose Fulbright.
They called the following witness:
- Brae Sokolski, Chief Investment Officer, MaxCap Group Pty Ltd

A witness statement was also been filed for Michael Kerr, consultant, of Rider Levett Bucknall.

For Responsible Authority  
Susan Brennan SC and Ian Munt of counsel, instructed by DELWP Legal

INFORMATION SCHEDULE

Description of Proposal  
Extension of time for completion of development under Permit No. 2009/001687A for redevelopment of the Windsor Hotel, Melbourne

Nature of Proceedings  
P1804/2015 - Application for review under s 81(1) of the Planning and Environment Act 1987
P1805/2015 - Application to amend permit under s 87 of the Planning and Environment Act 1987

Zone and Overlays  
Zone: Capital City Zone - Schedule 1 (CCZI)
Overlays:
- Design and Development Overlay - Schedule 1 (Area 2), 3 & 10, and Schedule 62 (Bourke Hill Precinct - Areas 2, B1, B2 & B3)
- Heritage Overlay – Schedule 500 (Bourke Hill Precinct), and Schedule 739 (Hotel Windsor)
- Parking Overlay – Precinct 1 (Capital City Zone, Outside the Retail Core)
REASONS

PART 1: INTRODUCTION AND SUMMARY OF CONCLUSIONS

What is this proceeding about?

1 Hotel Windsor Holdings Pty Ltd (‘Hotel’) is seeking an extension of time to complete the development authorised under a planning permit (‘Permit’) for the redevelopment of the Windsor Hotel, Melbourne. The redevelopment includes refurbishment of the existing heritage-listed hotel, but also includes the construction of a new 26-storey (93-metre) tower and north wing extension.

2 The Minister for Planning (‘Minister’) is the responsible authority under the Melbourne Planning Scheme for this development, and opposes the extension of time.

3 It is perhaps worth emphasising at the outset that this proceeding does not comprise a review of the original decision to grant the Permit in 2010 or the underlying merits of the development, nor is the proceeding about the commencement of the development in 2015. It is essentially only about whether the date for completion should be extended.

4 The Permit will expire if the development is not completed by 10 January 2017. The Hotel claims that it is keen to undertake the substantive development and has already spent more than $9 million on the project, but that it is caught in somewhat of a ‘Catch-22’ situation, with its various planning, heritage and building permits out of sync, and with an inability to secure a builder or mortgage-financing without valid on-going permits that provide for a clear 36 to 42-month construction timeframe. The Hotel effectively seeks an extension of time of about three years under the Permit (or about four years from now) to complete the development. If allowed, this would lead to an extended completion date in early 2020.

5 The Minister accepts that development under the Permit has lawfully started within time (albeit to a very minor extent), but contends that relevant planning scheme policies and controls have changed significantly since the Permit was first issued in 2010, and that the development would now be prohibited but for the Permit. The Minister says that the Hotel has already had one extension of time, and has had a clear deadline and sufficient time to complete, and it is the Hotel’s fault if it is not now able to undertake the substantive development within that time. The Minister also says that there have been no material intervening circumstances to warrant a further extension of time.

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1 Planning Permit 2009/00167A, first issued on 4 November 2010 and amended on 22 February 2013
2 There were various estimates referred to in submissions, up to $14.3 million.
Summary of Conclusions

6 I have decided that the time for completion of the development under the permit should be extended from 10 January 2017 until 31 March 2020.

7 Although the following short summary of conclusions does not comprise all of the reasoning for this decision, the key basis for the decision can be summarised as follows:

- the development was initially authorised under what is sometimes referred to as a standard ‘2 x 2 permit’ (i.e. with two years to start development and a further two years to complete, reflecting the default position then in the Planning and Environment Act 1987). This timeframe was never adequate for a major central city development such as the Windsor Hotel redevelopment - particularly given the added complexity of issues arising with the refurbishment of the existing heritage-listed hotel. Many central city developments are initially approved with much longer timeframes for the completion of development, once started.

- the VCAT proceedings in 2012 and 2014 were concerned primarily with an extension of time to start the development. Neither adequately addressed an appropriate timeframe to complete the development - in large part because the parties themselves focused only on commencement issues. The extension of time granted in 2012 (to start the development) maintained the standard 2 x 2 permit arrangement for completion.

- with the development now having started, albeit only to a minor extent, this proceeding is the first occasion to address an appropriate and realistic timeframe to complete the development. It thus falls to the application of appropriate and recognised principles, including the Kantor principles3 and other relevant criteria, to decide whether an extension of time to complete the development should be granted.

- different principles and factors may apply where an extension of time is sought to complete a development that has already started. Where an extension of time is being sought to complete a development, an intervening change to the planning controls will often carry less weight than if the development has not yet started. That is the situation here. The change to the height controls in the Bourke Hill precinct, introduced through Amendment C240, contains transitional provisions that protect development already authorised under an existing permit. The potential for an on-going permit for the Windsor Hotel redevelopment was expressly considered by the Amendment C240 panel.

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3 See Part 3 of this decision for a statement of these principles and criteria.
the change in planning controls must be counterbalanced against other relevant considerations.

although the planning permit was first issued in November 2010, the total elapsed time since then is not of great significance to the consideration of a reasonable completion date. Five years is, in any event, a relatively short time in town planning terms for the gestation of major central city development. More particularly, it has been previously determined by VCAT on two occasions that the time authorised to start the Windsor Hotel redevelopment was inadequate. The development did not in fact start until December 2014. It is the time since then that is more relevant to the consideration of a realistic timeframe to complete the development. A two year timeframe under the planning permit, from December 2014 until January 2017, to complete the development was never adequate or realistic.

the largely uncontested evidence is that a project of this size and complexity requires a construction timeframe of 36 to 42 months. The current permit does not allow for this, and never has.

here, the complex background history of this matter, particularly in more recent times, serves to highlight a frustrating impasse that has arisen, but with both the Hotel and the Minister seeing it through their own prism of understanding. There is a ‘Catch-22’ situation, with an apparent conflict between the anticipated regulatory process outcomes and the commercial exigencies of a major development project. The Minister wants to see some substantial progress on the ground, with both he and his Department clearly implying that there is no precedent for refusing an extension of time for the completion of a major development once it is in mid-construction. Yet the Hotel says that it cannot undertake that substantial progress – and never could. The planning permit and heritage permits for the development are out of sync, and there has never been a clear 36 to 42 month construction period authorised under the combined permits in order to provide the contractual certainty and security to the Hotel’s builders and financiers. A reputable lender is not going to hand over $280 million on a project, nor will a reputable builder enter into a major building contract, where the planning permit will expire before the project is due to be completed. Neither will take the contractual risk that the permit ‘may’ be extended in the future, particularly for a project where the Minister has previously opposed an extension of time.

there is no evidence that the Hotel is seeking to warehouse the permit.

a consideration of all relevant factors leads to the view that there should be an extension of time to complete the development.
Basis for application - s 81 or s 87 of the Planning and Environment Act?

8 The Hotel has filed two applications with VCAT. The first, proceeding P1804/2015, is an application under s 81 of the Planning and Environment Act 1987, seeking to review the Minister’s decision to refuse the extension of time to complete the development. The second, proceeding P1805/2015, is an application under s 87 of the Planning and Environment Act 1987, seeking to amend the Permit to insert a new completion date in the Permit and thereby achieve a similar outcome.

9 The Hotel submitted that it had filed the second (s 87) application in the alternative, to make sure that VCAT was vested with sufficient jurisdiction to deal with the matter, but that it did not pursue that application if relief could be granted under the first (s 81) application. Its submissions and evidence at the hearing were made almost exclusively in relation to the s 81 application.

10 Whilst the Minister addressed me on the s 87 application, and contested its jurisdictional basis, the Minister also based his submissions and evidence primarily in relation to the s 81 application.

11 I agree that this matter is best dealt with under s 81 of the Planning and Environment Act 1987. Given that the Hotel has succeeded in its application under that provision, I do not propose to deal with the s 87 application in these reasons, and I will summarily dismiss the s 87 application with no determination as to its merits, on the basis that it is no longer pursued by the Hotel.

PART 2 - RELEVANT BACKGROUND

12 The Minister provided a folder of background documents. The Hotel also relied on these documents, and tendered a small number of additional documents. I have had regard to all of these documents, but will only refer in these reasons to those that are most germane to my decision. In this case, I consider that it is nonetheless appropriate to set out the relevant background findings and discussion at quite some length, as they essentially explain the decision that then follows.

The period from December 2009 until August 2012

13 The following early events are relevant:

- in 2009, the Hotel made application for the Permit.
- in December 2009, the then Minister appointed a 3-person Advisory Committee to advise him on all relevant matters relating to the permit application. This included a planning assessment of the application, the adequacy of the then existing planning controls (including height
limits for the Bourke Hill precinct\textsuperscript{4}, and on economic and financial issues (including an economic assessment of the potential for economic benefit to the State, and the Hotel’s justification for exceeding the suggested height controls in the then Design and Development Overlay (DDO2) in order for the project to be economically viable). The Advisory Committee also considered a wide range of submissions and objections.

- on 8 February 2010, the Advisory Committee provided a report\textsuperscript{5} to the Minister that recommended the grant of a planning permit. The Advisory Committee made no comment on relevant conditions or expiry provisions for the permit other than to recommend that the permit be ‘subject to typical conditions to be resolved between the applicant and [the Department]’.

- on 13 March 2010, Heritage Victoria issued heritage permit P14689 (‘first heritage permit’) allowing, amongst other things, demolition of a rear section of the hotel, demolition of the 1960s corner building with construction of a new corner building, and construction of a 91-metre tower. Works were required to start by 13 March 2012, with completion by 13 March 2015.

- on 4 November 2010, the then Minister, under delegation, issued the Planning Permit 2009/001687 (i.e. the Permit relevant to this proceeding\textsuperscript{6}). The Permit allows:

\begin{quote}
Development of a residential hotel comprising part demolition of existing hotel and construction of a new 26-storey tower and north wing extension.
\end{quote}

The Permit required the development to start by 4 November 2012, with completion by 4 November 2014.

14 The plans show the approved 26-storey tower would be 93-metres high. The Advisory Committee recommended the grant of the Permit, and the Permit was issued, despite the discretionary height limit applying to the land under the Melbourne Planning Scheme then being 23-metres. Perhaps importantly, the Hotel re-development was always intended and acknowledged to well exceed the preferred height limits for the Bourke Hill precinct.

15 It can be seen already that the Permit that issued in 2010 contained a standard expiry provision (i.e. for development to start within two years of the date of the permit, and for completion within a further two years,

\textsuperscript{4} The Bourke Hill precinct is the relevant precinct within the Melbourne CBD where the Windsor Hotel is located, and where a number of very specific planning controls apply. At the relevant time, and more recently, the height controls and planning policies for this precinct have been a topical planning issue.

\textsuperscript{5} reported at [2010] PPV 6

\textsuperscript{6} Although the permit was later amended, in minor respects, on 22 February 2013, and became Planning Permit 2009/001687A

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VCAT Reference No. P1804/2015 & P1805/2015
\end{flushright}
following the default provision then in s 68 of the Planning and Environment Act 1987). This is sometimes referred to as a standard 2 x 2 permit. I will comment later on whether a standard 2 x 2 permit was ever realistic for the size and type of development proposed, but it seems that many of the problems that have ensued can be traced to this decision. No-one seems to have clearly turned their minds to this issue at the time, albeit that the Hotel had advised the Department as early as 16 April 2009 of a then forecast construction period of 30 months. The Hotel nonetheless acquiesced in the expiry dates in the Permit that was issued.

16 I return then to the chronology of events:

- in December 2010, soon after the issue of the Permit, it became apparent that the first heritage permit and the Permit were inconsistent. The Hotel apparently met with Heritage Victoria over the following six months to consider the changes necessary to the first heritage permit for it to be consistent with the planning permit.
- on 15 June 2011, the hotel formally applied to Heritage Victoria to issue a new heritage permit consistent with the Permit. In the period that followed, Heritage Victoria publicly advertised this application, with additional information being provided, and with ongoing discussions.
- on 10 January 2012, Heritage Victoria issued heritage permit P17377 (‘second heritage permit’). However, this second heritage permit stated that it relates solely to the 1960s building on the corner of Bourke and Spring Streets, and “... should be read in conjunction with heritage permit P14689 which allows for the construction of the tower behind the main facade of the hotel. ... The conditions on both permits must be satisfied at the appropriate times as stated on both permits.” Works under the second heritage permit were required to start by 10 January 2014, with completion by 10 January 2017.

17 Although the technical aspects of the heritage permits and the Permit were by this time in most respects consistent, there were now three separate dates for starting and completion that were not necessarily consistent given what would be the anticipated sequence of works, and the likely construction timeframe. Again, no one seems to have clearly turned their minds to this issue at the time.

18 I return again to the chronology of events:

- on 26 April 2012, plans pursuant to condition 1 of the Permit were endorsed by the Department. This was a necessary pre-requisite to plans being lodged for endorsement pursuant to the second heritage permit, and discussions then commenced between Heritage Victoria...
and the Hotel’s consultants about the plans that were due for
lodgement under the second heritage permit by 23 July 2012.

- on 4 May 2012, the Hotel made application to extend time under the
  Permit, pursuant to s 69 of the Planning and Environment Act 1987.
  Within its application, the Hotel referred to further detailed design and
  tender documents associated with the project requiring a further 10 to
  12 months to complete, the need for a lead time to cease forward
  bookings at the hotel, and an estimated construction timeframe of 30
  months following the endorsement of plans by Heritage Victoria.

- on 17 July 2012, the then Minister refused the application for an
  extension of time, noting the prevailing height controls then applying
  in the Bourke Hill precinct. The Hotel made application to VCAT for
  review (‘first VCAT proceeding’).

- on 13 August 2012, in Windsor Hotel Holdings Pty Ltd v Minister for
  Planning (Red Dot)9, VCAT directed that the time within which the
  development must be started under the Permit was extended to 10
  January 2015, and extended the time for completion to 10 January
  2017.

Although a number of documents were filed in the first VCAT proceeding, and
some are included in the Document Folder in this proceeding, I highlight for present purposes the statement of Glenn Coupar, the
development manager of the ‘Halim Group’ - the family entity involved in
both the ownership and redevelopment of the Windsor Hotel. Mr Coupar
set out all the preliminary matters that would be required, including
negotiations for a construction contract and funding arrangements. He
noted that, for a project of this complexity, one would normally allow a
period of 2 to 3 years for the completion of these preliminary matters, in
order for the development to even start, but that this could probably be
achieved in two years if required. Mr Coupar’s statement then also deals
with the staging of construction, including asbestos removal. He also
discusses the consequences of any ‘rushed commencement’ which would
allow the development to start more quickly, but would lead to a longer
construction period.

On a fair reading of the documents filed in the first VCAT proceeding, and
in the decision itself, it is evident that the parties and the Tribunal focused
primarily on whether an extension of time should be granted for the
development to start. By the time of the hearing of the first VCAT
proceeding, it was already August 2012 and, but for any extension of time,
the development under the permit was required to start by 4 November
2012.

9 [2012] VCAT 1203 per Rickards SM
21 In the VCAT decision, SM Rickards discussed what might be regarded as the usual principles pertaining to an extension of time, stemming primarily from the decision of the Supreme Court in *Kantor v Murrindindi Shire Council*\(^{10}\) ("Kantor"). She found, amongst other things, that there had been no relevant change in the planning controls (albeit a potential change in planning policy), and that the Hotel was not seeking to warehouse the Permit (a matter conceded by the Minister). She noted that, whilst it was in the public interest that the development be undertaken in a timely manner, given the significance of the heritage building it was also in the public interest that such development was undertaken carefully and in a proper manner\(^{11}\). Importantly, SM Rickards found that the Hotel could not have reasonably anticipated the difficulties in aligning the heritage and planning permits and that there was no evidence that the time for commencement had ever been discussed during the application process\(^{12}\). She found that, with hindsight, for such a significant project, the time allowed to start the development under the Permit was inadequate. SM Rickards also accepted that the Hotel would suffer an added financial burden if not able to properly coordinate all aspects of the development to ensure that financing of the proposal could be properly provided\(^{13}\).

22 However, despite some of these broad references in the VCAT decision, in making a direction to extend the time to *start* development until 10 January 2015 (and giving clear reasons for doing so), there is no specific discussion about the time for completion, save for a passing reference that if the development is commenced properly without being rushed, "it will in all likelihood be completed within the more realistic timeframes nominated"\(^{14}\). Therein lies the rub for the Hotel. It concedes that, at least through its formal application to VCAT in 2012, and in its submissions at the hearing, the Hotel simply asked for the extension of the standard 2 x 2 permit expiry arrangement. And that is what it got. A new development starting date of 10 January 2015 therefore led to a new completion date of 10 January 2017, without any real discussion or consideration about the latter date. No-one, perhaps apart from Mr Coupar in a small part of his statement, was then apparently concerned with the completion date (as opposed to the *start* date).

**The period from August 2012 to August 2014**

23 I return again to the chronology of events:

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\(^{10}\) (1997) 18 AATR 285 per Ashley J.

\(^{11}\) [2012] VCAT 1203, at [44]

\(^{12}\) Ibid, at [53]-[56]. Although, in the hearing before me, the Minister's advocate referred to this passage in the VCAT decision in the context of an extension of time generally (i.e. without distinguishing between the start and completion of development), the VCAT decision expressly refers at [54] to the 'time for commencement' (my emphasis), and is commenting on expert evidence at [53] that also expressly refers to the time required to facilitate 'commencement of construction' (again, my emphasis).

\(^{13}\) Ibid, at [57]

\(^{14}\) Ibid at [60]
during 2012, issues had apparently arisen with the Melbourne Fire Brigade (‘MFB’) in relation to the plans and it also became apparent that earthquake and Building Code of Australia compliance could not be achieved without intervention to the existing heritage structure. Following the VCAT decision and the extension of time to the Permit in August 2012, detailed re-design work commenced – in part, to deal with these issues.

- on 19 February 2013, revised plans were submitted to the Department for approval pursuant to condition 2 of the Permit. According to the hotel, these plans have been the subject of ongoing negotiation with the Department from November 2012.

- on 22 February 2013, the Permit was amended in a very minor respect\(^\text{15}\). The expiry dates were not changed through this process.

- on 28 March 2013, revised plans were submitted to Heritage Victoria pursuant to condition 2 of the first heritage permit and condition 1 of the second heritage permit. In particular, these revised plans incorporate the changes required by the MFB and some other matters to facilitate consistency with the Permit.

- on 8 April 2013, Heritage Victoria advised that some matters could be dealt with through the endorsement of plans but that, due to the potential level of impact on the heritage fabric of the Windsor Hotel, a fresh heritage permit application was required for some matters.

- on 12 April 2013, the Department endorsed the revised plans under the Permit, and on 9 May 2013, Heritage Victoria endorsed the revised plans under the first heritage permit and second heritage permit. According to the Hotel, this was the first time in the whole process that the planning and heritage plans were all consistent – but a further heritage permit was still required.

- on 10 May 2013, the Hotel applied for the further heritage permit. Heritage Victoria determined that this application must be advertised, and further additional advertising was later required due to Heritage Victoria’s concerns about the availability of the application documents on its website.

- on 3 September 2013, Heritage Victoria issued heritage permit P19951 (‘third heritage permit’) for the additional works to meet the MFB requirements. Works under the third heritage permit were required to start by 3 September 2016, with completion by 3 September 2018.

\(^\text{15}\) According to the annotated amended permit, the only change is to amend condition 1 to allow a rooftop guestroom at a reduced height, instead of its complete removal. The amendment leads to the permit being slightly re-numbered as Planning Permit 2009/00167A (i.e. the same original number, but with the ‘A’ to signify its amendment).
on 27 September 2013, Heritage Victoria extended the time under both the first heritage permit and the second heritage permit, also requiring works to start by 3 September 2016, with completion by 3 September 2018. The starting and completion dates, at least under the three heritage permits, were now all aligned. The hotel says that, by 23 December 2013, almost all of the conditions of the third heritage permit had been satisfied.

on 4 December 2013, the Hotel requested the Minister to extend the Permit to bring it into alignment with the heritage permits. Indeed, it only sought an extension of time for the development to start by 3 September 2016, with completion by 3 September 2018 (i.e. the same dates as by then in all three heritage permits). It relied upon the delays and difficulties in resolving inconsistencies between heritage and planning permits, the MFB issues, and the need to obtain the third heritage permit.

by March 2014, the then Minister had still not determined the request to extend the Permit. The Hotel therefore made application to VCAT to review the ‘failure’ of the Minister to make a decision (‘second VCAT proceeding’). The Minister’s position at the hearing was that he opposed the extension.

on 19 August 2014, in Hotel Windsor Holdings Pty Ltd v Minister for Planning (Red Dot)10, VCAT refused to extend the time within which the development must be started or completed under the Permit. The expiry dates therefore remained as they were, with development required to start under the Permit by 10 January 2015, with completion by 10 January 2017.

In its letter of 4 December 2013 to the Minister seeking the extension of time17, the Hotel’s solicitors had noted that, given the complexity of a $330 million project with a $200 million construction budget, all documentation would need to be fully resolved in advance, rather than using a design and construct methodology. It was indicated that, once a fully compliant set of plans was endorsed by Heritage Victoria, complex detailed design and tender documentation associated with the project would take 12 months to complete to be ready for tender, and the tender and contractual finalisation would take at least an additional 16 weeks. It was indicated that, once this process was complete, the Hotel planned to commence development. Discussions with industry programming experts and three Tier One construction companies had concluded that a realistic construction timeframe for the project was estimated to be 36 months.

10 [2014] VCAT 993 per Gibson DP
17 Letter at Tab 22 of Document Folder.
25 In the second VCAT proceeding, there is also a further statement from Mr Coupar, indicating that if the further extension of time to the commencement date was not granted, an 'early works package' would be implemented to facilitate some physical works on the site before the expiry of the starting date in the Permit. There would be 'rushed documentation' and 'forced commencement' that would ultimately result in the hotel being a construction site for a longer period, with further tendering and variations required after the commencement of development. Mr Coupar obviously thought that such an outcome was unsatisfactory.

26 However, on a fair reading of the documents filed in the second VCAT proceeding, and in particular in the VCAT decision itself, it is evident that the parties and the Tribunal focused again primarily on whether an extension of time should be granted for the development to start.

27 In the VCAT decision, DP Gibson also discussed the principles pertaining to an extension of time, stemming primarily from the decision in Kantor. When one has regard to the decision, including its conclusion, it is very clear that DP Gibson gave the greatest weight to the fact that the situation had materially changed since the earlier VCAT decision in terms of a very specific change in planning controls for the site and the precinct, and that a planning permit would no longer be granted for the development if a fresh application was made. She did not consider that the other relevant factors outweighed this change to the planning controls.

28 The decision that DP Gibson reached was entirely open to her on the evidence and submissions before her, and no one sought to criticise the decision in the proceeding before me insofar as it related to the starting date for development. However, as I have said, it is clear from a fair reading of the decision that it was focused on the date by which the development must start. I will deal later with the issue of whether the very specific change in planning controls for the site and the precinct is as relevant to a completion date as it may be to a starting date under a planning permit.

29 On matters other than the determinative issue of the change in planning controls, DP Gibson had found, amongst other things, that the Hotel was not attempting to warehouse the permit (a matter again conceded by the Minister). She accepted that the need to seek multiple heritage permits had been a delaying factor in enabling the development to commence, but that the potential delays in commencement were not all completely unknown at the time of the earlier request, or unexpected. She endorsed the comments in the previous VCAT decision that 'the initial time limit of two years' (which must be a reference to the start date) was inadequate for such a major project, but that 'the extended period of four years and two months

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18 [2014] VCAT 993 at [57]-[62]
19 Ibid at [31]
20 Ibid at [39]
21 Ibid at [42]
was not unreasonable\(^{22}\) (which again must be a reference to the start date). DP Gibson also comments \(^{23}\) that:

> When permit applicants failed to realistically assess the length of time they will require to commence use or development under a permit, it exposes them to the risk of changes in the political climate and changes to planning policy or controlled by the time they come to need an extension of time.” (my emphasis)

30 I have mentioned these matters because they demonstrate that the discussion in the VCAT decision was focused on a starting date.

31 I was taken to the transcript for part of the second VCAT proceeding where Mr Canavan QC for the Hotel had stated to the Tribunal, in relation to the previous request for an extension of time and the adequacy of time requested\(^{24}\):

Subsequent events have clearly established I was wrong. We should have asked for more time and, indeed, one of the things that comes out of Mr Coupar’s statement is that win, lose or draw [in relation to an extended commencement date], we should be asking you to extend the time for completion.

If we do have to start inefficiently and do this thing piecemeal, it will take longer so I’ve put on the record now that you have the power to not only extend the time for commencement, but to extend the time for completion ... If we do it wrong, it’s obviously going to take – well, I would be asking for four years to complete from the time we start. I don’t want to be back here in four years on my walking frame, asking you for a further extension for the time to complete.

32 This matter was not dealt with in any of the written submissions in the second VCAT proceeding before DP Gibson, and Mr Canavan’s comments were not picked up or referred to in her decision. Indeed, there is no material discussion in DP Gibson’s decision about a completion date at all, save for a passing reference to Mr Coupar’s evidence that a ‘forced commencement’ will compromise the efficiency, cost effectiveness and potential quality of the overall development, and mean that the Hotel will be a construction site for a longer period\(^{25}\). However, DP Gibson does not then deal with this potential for a longer construction period, and the implications (if any) for a completion date.

33 As I have said, DP Gibson clearly focused on the change in planning controls as the basis for not extending the time for the development to start. Although her order provides that neither the commencement date nor the completion date are extended, the order in relation to the completion date appears to be an implicit consequential outcome without any discussion or

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\(^{22}\) ibid at [46] 
\(^{23}\) ibid at [43] 
\(^{24}\) Exhibit A6 at P-87, lines 32-43 
\(^{25}\) ibid at [54]
reasons, and without any express consideration being given to the prospect of refusing to extend the commencement date but separately extending the completion date.

34 As will be seen, the very same planning controls that DP Gibson relied upon to refuse an extension of time to start the development contained transitional provisions to protect entitlements under existing permits. The Hotel conceded that it had not sufficiently and separately emphasised the matter of completion in the second VCAT proceeding. It, like everyone else, appears to have then still been focused on attempting to extend the date for development to start.

The period from August 2014 to the present time

35 I turn then to the start of development, which occurred after the second VCAT proceeding:

- during October and November 2014, the Hotel met with representatives of the Department, to work through pre-commencement conditions on the Permit, to facilitate the ‘forced commencement’ option. On 7 November 2014, the Hotel provided the Department with a draft building contract for the ‘North Building works’.

- on 1 December 2014, a building permit was issued for the North Building works, including demolition works and asbestos removal. By letter from the Hotel to the Department dated the same day, the Hotel noted that substantial design work for the overall project was still required and that, in line with the VCAT decision, this work would now run concurrently with the on-site construction works. The Hotel also indicated that there were in-principal arrangements with the funding provider for the overall project.

- on 11 December 2014, the Minister (under delegation) approved a structural report, demolition, and the construction management plan. On the same day, Melbourne City Council provided its approval to the construction management plan for the first stage of development, including demolition, site establishment and initial construction.

- the development started ‘just prior to Christmas 2014’. This comment is attributed to Mr Coupar, and is contained in a Planning Investigation Report prepared by two Departmental officers following an inspection on 10 April 2015. The report notes that the inspection was undertaken to check compliance with the permit and to assess whether works had commenced by 15 January 2015. The report simply concluded:

26 Letter at Tab 27 of Document Folder
27 Exhibit A1 & A2
28 Tab 28 in Document Folder
Works have commenced under permit 2009/001687A.
No further action required

36 At one level, the extent of evidence upon which the Planning Investigation Report is based is scant. Although there are photographs and some discussion in the report, the physical works relied upon to start the development comprised the erection of timber hoardings in Windsor Place, some initial asbestos removal and treatment in the north building (which was sealed off and not actually seen by the Departmental officers), some plant hazard removal, and some initial demolition through the removal of bricks to create a wall opening adjacent to Windsor Place. The inspection did not occur until April 2015. The works undertaken prior to 10 January 2015 certainly did not comprise all of the works that the Hotel had foreshadowed that it would undertake under a ‘forced commencement’ program, in its submissions and evidence in the second VCAT proceeding.

37 The Minister nonetheless accepts the Planning Investigation Report at face value, and relies upon it. Although the issue was raised by me at both a directions hearing and the hearing, in order to be certain about this issue, the Minister expressly concedes that development under the Permit had started by 10 January 2015, albeit minimally, and that the Permit did not then expire on the basis that development had not commenced by that date. In the absence of any other evidence to the contrary, and an agreement between the Hotel and the Minister on this factual issue, I accept this position. The Hotel also says that there is other evidence of the development having started by 10 January 2015, although I was not taken to evidence of any physical works other than the removal of an internal stair and the works referenced in the Planning Investigation Report. The Hotel’s evidence largely relies upon the obtaining of plans and reports and approvals, rather than physical works.

38 Accordingly, the development under the Permit had started by 10 January 2015, and there was still a live permit after that time. The Permit nonetheless contained a second operative expiry clause – i.e. that development must be completed by 10 January 2017. It is only this second expiry clause that is now relevant in the current proceeding.

39 I note that, although the Minister says that the limited nature of the works undertaken are sufficient to demonstrate that development under the Permit had started by 10 January 2015, the Minister still contends that the very limited nature of the works is insufficient to warrant an extension of time to complete the development.

40 I turn now to the most significant change in planning controls relied upon by the Minister:

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29 The issue is one of jurisdictional fact. If the works did not start by 15 January 2015, the Permit would have expired then, and VCAT would not have jurisdiction to amend the completion date.
• in October 2014, the Minister prepared and exhibited Amendment C240 to the Melbourne Planning Scheme. It was re-exhibited in December 2014. The Amendment proposed to introduce height and other design controls across the Bourke Hill precinct, including the Windsor Hotel land. A number of submissions were received, including from the Hotel, and the Minister referred these to a panel.

• on 4 May 2015, the panel for Amendment C240 lodged its report with the Minister. The report contains a detailed discussion of the Windsor Hotel land, and the Permit, that I will refer to later in these reasons. In essence, the panel supported the new mandatory and discretionary height limits within the Bourke Hill precinct, but indicated that it did not wish to be seen as making any judgement about the appropriateness or otherwise of the Permit for the Windsor Hotel having been granted.

• in July 2015, the Minister approved Amendment C240 with changes, and the approval was gazetted on 30 July 2015. The effect of approval was, amongst other things, to introduce new mandatory and discretionary height controls in the Bourke Hill precinct through a Design and Development Overlay - Schedule 62 (DDO62) in the Melbourne Planning Scheme. Importantly, under the transitional arrangements in clause 7.0, the new control does not apply to a development of land undertaken in accordance with a permit issued before the commencement of a related Amendment C262. Interestingly, also, under clause 8.0 of the schedule, the new control ceases to have effect after 4 September 2016, pending the outcome of the ‘Central City Built Form Review’ under Amendment C262 – with the expectation that this time limit may need to be extended or removed, or the controls varied, after that time.

41 For the Windsor Hotel land, the effect of Amendment C240 was to introduce new mandatory height limits of 15-metres, 25-metres and 40-metres across various parts of the Hotel’s land, at least on a continuing interim basis. It will be recalled that the development authorised under the Permit includes a 93-metre tower, which would theoretically well exceed the new height limits. However, clause 7.0 of the DDO62 schedule acts to protect any pre-approved development undertaken in accordance with the Permit. The stakes are therefore raised for the Hotel because, if the development is not completed under the Permit, and the Permit expires, the development (at least in so far as it includes the 93-metre tower) would no longer be capable of being permitted if a fresh application was lodged.

30 On 26 June 2014, through Amendment C237, the Minister had already introduced interim height controls, which were the changed planning controls relied upon in the second VCAT proceeding, and which formed the primary basis for the refusal to then extend time to start the development.

31 Amendment C262 was gazetted on 4 September 2015.
42 I turn then finally to more recent events in relation to the Permit:

- on 31 March 2015, representatives of the Hotel met with the Minister’s Chief of Staff and the Department’s Director of Development Approvals. The Department’s file note of the meeting\(^\text{32}\) indicates that the Hotel outlined its project timelines and history, tabled a new economic assessment, and requested alignment with the heritage permit until September 2018 (from January 2017). The file note indicates that the Hotel “cannot sign construction and finance contracts without guarantee of timeline”. The file note also indicates the Department’s response:

  Advised that standard practice in department is to not extend permit so far in advance, especially if there has not been an effective start to construction

  Advised that there is no precedent for refusing extension for buildings that are in mid-construction. They need to start!

  However, [the Hotel] may apply for extension as they see fit.

- on 10 June 2015, the Hotel requested the Minister to extend the completion date under the Permit to 3 September 2018 (being the completion date then in the three heritage permits). A number of reasons were provided, some of which I will deal with below.

- on 10 July 2015, the Minister (under delegation) refused the request. No reasons were then given for the refusal.

- on 24 August 2015, the Hotel filed its applications with VCAT in the current proceeding.

- on 6 November 2015, in response to a letter foreshadowing a further request for an extension of time under the heritage permits, Heritage Victoria forwarded a letter\(^\text{33}\) to the Hotel stating that any request for extension was premature, and suggested a further request for an extension be made closer to the current expiry date of 3 September 2018 if the Hotel was unable to complete the works by that date.

- on 17 December 2015, the Minister filed his statement of grounds in the proceeding, giving reasons for the refusal to extend the date for completion of the development.

43 The request to the Minister in June 2015 had relied upon a number of grounds, including a claim that the entirely reasonable position of the builder and superintendent was that the Permit should validly reflect a realistic construction period for the development. The request was accompanied by a letter dated 12 May 2015 from Built Vic Pty Ltd (the

\(^{32}\) Exhibit A4, obtained by the Hotel under FOI
\(^{33}\) Exhibit A5
company that had been awarded the early works contract) that stated, amongst other things:

Taking into account legal and financial considerations built would require a planning permit completion date beyond our nominated construction program duration of 36 months to give us the contractual certainty before we could enter into a head contract. Elapsed planning permit would make it untenable for us to be able to initially contract the project and to be able to complete the project.

The directors of Built could not enter into contractual arrangements with such uncertainty of having tower cranes, static concrete pumps, on-site staff and trades and associated facilities and not being able to progress works past 10 January 2017.

44 The request was also accompanied by a letter dated 13 May 2015 from Slattery Australia Pty Ltd, a company experienced in superintendent and cost engineering roles. That letter contained the same sentiments as in the letter from Built, and also stated, amongst other things:

... based on our experience and feedback from the market, a realistic construction duration for the main works (once contracted) would be in the order of 36 months.

In our experience, it would not be realistic for the program to be accelerated, from either a time or financial point of view, for the works to be completed within the current permit completion dates – i.e. the volume of work could not sensibly be completed between now and 10 January 2017.

On this basis, and from the construction contract perspective, we do not consider a client or contractor would be able to enter into a binding contract without certainty of completion as there would be numerous contract clauses in respect to bonuses, damages and costs etc., that would have significant financial and legal implications of the project was halted.

Similarly, from a financing point of view, it is unlikely that financial institutions would consider a project without completion certainty.

45 The request was also accompanied by a detailed economic assessment of the redevelopment by Essential Economics dated March 2015, although it is unnecessary to refer to its contents.

46 In the statement of grounds filed on behalf of the Minister in December 2015, the Minister primarily contended:

- the Hotel had not filed adequate information with VCAT to substantiate its claims that it had been unable to enter a building contract or to secure funding for the substantive development and had thereby been unable to progress the development.
there had been a significant change in planning controls applying to the land since the Permit was issued, including the approval of Amendment C240 to the Melbourne planning scheme.

there had been an evident lack of substantial progress to date in relation to the development permitted by the Permit.

there had been a passage of more than five years since the permit was issued, incorporating nearly seven years for completion of the development. In such circumstances, the time limit to complete the development was adequate, especially in the light of the VCAT decision in 2014.

47 At the hearing, in its outline of submissions, the Minister additionally contended that there have been no intervening circumstances since the Permit was issued that would warrant a further extension of time to complete the development.

48 Before I turn to a consideration of issues, I mention that, at the hearing, the Hotel played a recording of an ABC radio interview given by the Minister on 26 November 2015. I accept that the Minister’s comments ‘on the run’ in that radio interview must be taken in that context, and are not a substitute for his grounds or submissions in this proceeding. The comments nonetheless round out the relevant background. Amongst the Minister’s comments were the following:

> My department has been trying to work with Mr Halim and his group to encourage them ... to get on with the task of building this very important project. ... What we have said is, all along is that Mr Halim has an opportunity to build his project and my officers have done all that they can do. I’ve met with Mr Halim myself and encouraged him in every possible way to commence work on this important project which you of course described as iconic and indeed it is.

> Mr Halim is taking the matter before VCAT. My decision is clear. Get on with the project. There are permits in place. Mr Halim has got till 2017 to complete the project. There is plenty of time for Mr Halim to show that he wants this project to proceed. Get on with some demolition work.

> He has had all of his permits in place, every single permit since September of 2013. He’s got till 2017 to complete the work and when I met with Mr Halim... I said to him there is not a project anywhere in the city that would, where it had been half completed, where a government would not have extended it. ... If he needs more time ...

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34 Exhibit A3 - transcript of interview between Richard Wynne, Planning Minister, and Jon Faine, radio host on 774 ABC Melbourne.

35 The reference in the interview to Mr Halim is a reference to the head of the ‘Halim Group’ - the family entity involved in both the ownership and redevelopment of the Windsor Hotel.
well he has to show, he has to show goodwill and good faith and get on with it.

PART 3 - CONSIDERATION OF ISSUES AND EVIDENCE

49 The relevant background, particularly in more recent times, serves to highlight the frustrating impasse that has arisen, but with both the Hotel and the Minister seeing it through their own prism of understanding. Putting the politics to one side, this mismatch of thinking has turned into a bit of a 'Catch-22' situation, with an apparent conflict between the anticipated regulatory process outcomes and the commercial exigencies of a major development project. The Minister wants to see some substantial progress on the ground, with both he and his Department clearly implying that there is no precedent for refusing an extension of time for the completion of a major development once it is in mid-construction. Yet the Hotel says that it cannot undertake that substantial progress - and never could - without the certainty within the Permit of a sufficient construction timeframe for its builders and financiers.

50 To a degree, the impasse stems from the original decision to authorise this project through a standard 2 x 2 permit with little initial thought to appropriate construction timeframes and completion dates once development under the Permit had actually started.

51 It thus falls to the application of appropriate principles to resolve the impasse, and to decide whether an extension of time for completion of the development is appropriate.

The 'Kantor' principles, and other relevant criteria

52 I have previously mentioned what are often regarded as the usual principles pertaining to an extension of time, stemming from the decision of the Supreme Court in Kantor v Murrindindi Shire Council36. Those principles were applied in both the first and second VCAT proceedings - in particular, in relation to the extension of time to start the development.

53 In Kantor, Justice Ashley sought to identify a range of relevant factors that a responsible authority may rightly consider in response to a request to extend time under a permit37. These factors are often summarised as follows:

- whether there has been a change of planning control or planning policy since the permit was granted.
- whether the landowner is seeking to warehouse the permit.

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36 (1997) 18 AATR 285, Supreme Court per Ashley J.
37 Ibid, at p 313-314

VCAT Reference No. P1804/2015 & P1805/2015
• intervening circumstances which bear upon the grant or refusal of the extension request.
• the total elapse of time since the permit was granted.
• whether the time limit originally imposed was adequate.
• the economic burden imposed on the landowner by the permit.
• the probability of a permit issuing should a fresh application be made.

54 A number of things should first be said about the Kantor principles:

• Kantor was a proceeding involving a request to extend time to start development under a permit for subdivision – indeed, it was the seventh request for an extension of time to commence. The Kantor principles are generally accepted as being relevant to circumstances involving the start of a use or development.

• in Kantor, Justice Ashley indicated that the discretion to extend time was not fettered by the Planning and Environment Act 1987 (other than that relevant considerations would be ascertained from the subject matter, scope and purpose of that Act)\(^{38}\).

• in Kantor, Justice Ashley also emphasised that the principles he had set out were not an exhaustive list of considerations (but those he considered most relevant to the matter before him), and that what might be relevant "undoubtedly requires the closest attention to the facts of the particular case"\(^{39}\).

55 VCAT has consistently found that, in cases involving the completion of a development (as opposed to its commencement), other criteria may also be relevant.\(^{40}\) The Minister largely conceded this, but still sought to argue that the Kantor principles were highly relevant to an application to extend time for commencement and for completion, and that the additional factors in a completion case would be generally limited to matters such as whether there had been substantial commencement or significant commitment, or whether it was necessary to expedite completion due to some development impact (e.g. visual impact from an on-going construction site).

56 In my view, it will commonly be the case that some of the Kantor principles will assume less relevance or significance in a case concerning the completion of a development that has already started, as opposed to a request for an extension of time to start the development. But that is not to say that the Kantor principles will be wholly irrelevant. Equally, whilst

\(^{38}\) ibid. at p 308-309
\(^{39}\) ibid. at p 314
\(^{40}\) see, for example, Juric v Banyule CC [2002] VCAT 396 per Byard SM; Tylden Nominees Pty Ltd v Macedon Ranges SC [2004] VCAT 1655 per Liston SM; Australand Holdings Limited v Yarra CC [2005] VCAT 2716 per Cimino M; Eyles v Hepburn SC [2006] VCAT 1620 per Richards SM; Transpacific Waste Management Pty Ltd v Kingston CC and EPA [2012] VCAT 693 per Gibson DP and Potts M.
whether there has been a substantial commencement or significant commitment to the development will likely be relevant factors in a completion case, I do not consider that these are necessarily the only additional criteria. As the decision in Kantor itself says, each decision to extend time will depend on its own particular circumstances.

This view is consistent with the decision in Juric v Banyule CC\(^{41}\), which I generally endorse. In that case, SM Byard had commented on the issues that might be relevant to an extension of time for the completion of a development under a permit that had already, in part, been acted upon.\(^{42}\) Drawing in substantial part upon that commentary, but with my own views interposed, I consider that the relevant principles in a completion case may include the following:

- it is not appropriate to consider a request for an extension of time to complete a development solely by reference to the Kantor principles applicable to an extension of time to start development. Those factors may still be relevant, but some of them will assume less significance.
- the particular safeguards that a limitation on the time to start development is designed to achieve (particularly in relation to the warehousing of a permit) are quite different to the purpose and objectives of a limitation on the time to complete development. If a clear purpose can be ascertained for an expiry date in a permit for the completion of development, that purpose will be relevant. Such a purpose will be harder to ascertain if the permit simply contains a standard ‘default’ timeline (e.g. as in a standard 2 x 2 permit).
- a change in planning controls or planning policy will often be less relevant to the completion of a development, as opposed to a development that is not yet started. This may however depend on the significance of the change to the planning scheme - a material change to the pattern of land-use or zoning, for example, would likely be more important in a given context than, say, a relatively minor change to development controls. It may also be relevant if there has already been a previous extension of time granted to complete the development, which post-dates the change in planning controls, and with the development still not completed within that extended timeframe.
- a relevant and often important consideration in relation to a completion case will be the fact and nature of the commencement of development – whether there has been a substantial commencement, whether significant amounts of work have been carried out, or

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\(^{41}\) [2002] VCAT 396, particularly at [12] and following.

\(^{42}\) A helpful summary of the matters discussed by SM Byard in Juric also appears in Tylden Nominees Pty Ltd v Macedon Ranges SC [2004] VCAT 1655 at [4] per Liston SM.
whether a significant commitment in terms of time and money has been demonstrated.

- if there is a reasonable explanation of why a landowner has been held up and left with insufficient time to complete the development, this will often be a compelling reason in favour of an extension.

- for a major project, the adequacy of time to complete the development must be realistic, and should take into account the need to obtain other relevant approvals, and the usual commercial requirements of builders and financiers. If an extension of time is granted, it should not be piecemeal, but should allow a sufficient time that is reasonably calculated and foreseeable in order that the permitted development can be completed within that time.

- related to the above, for a standard 2 x 2 permit with two years to start development and a further two years to complete development, it should not be automatically assumed that the contemplated construction timeframe is only two years. Theoretically, there are four years for the development to be completed from the date of issue of the permit. However, for a major project, where pre-commencement matters will foreseeably take up most (or all) of the two years allowed for the development to start, a reasonable completion date in a permit should ordinarily be calculated having regard to this factor.

- in considering a request to extend the date for completion, the critical period for consideration is the period of time allowed by the last extension (if any) and, in particular, the time that was available and has elapsed since the development started within that time. The period of time that elapsed between the issue of the permit and the start of development will be less relevant once the development has started.

- the views of a referral authority or objector are not relevant in a completion case, unless it can be demonstrated that there has been some material change of circumstance to warrant a different view to the one taken when the permit was granted.

There are some overlaps in the Kantor principles, and the additional principles I have stated above (drawn partly from Juric). All are useful, but they are still all only relevant factors and guidelines to assist in an overall holistic assessment in the exercise of discretion as to whether an extension of time for the completion of development should be granted in the circumstances of a particular case. They are not exhaustive and none are mandatory, and the fact that one or more may be satisfied in a particular way does not of itself determine the outcome.
The expert evidence

59 Before turning to the application of these principles, it is appropriate to deal generally with the expert evidence led by the Hotel in the proceeding.

60 I mentioned a little earlier that one of the Minister’s filed statements of grounds had been that the Hotel had not filed adequate information with VCAT to substantiate its claims that it has been unable to enter a building contract or to secure funding for the substantive development and has thereby been unable to progress the development. Given the expert evidence subsequently filed, the Minister did not pursue this ground with any vigour at the hearing, save to contend that, in addition to the expert evidence, it would have been appropriate for Mr Halim or a representative of the Hotel to also have given evidence (and made available for cross-examination) to better explain the Hotel’s delay in starting development, and its current difficulties (if any) in securing a building contract.

Brae Sokolski of MaxCap – project financing

61 A witness statement for Brae Sokolski was filed in the proceeding, and he was called to give evidence. Mr Sokolski is the chief investment officer with MaxCap Group Pty Ltd, an Australian commercial real estate finance and investment company that arranges institutional and syndicated financing and commercial mortgage facilities - particularly for larger projects. Whilst Mr Sokolski is an expert in his field, he is not an independent expert given his firm’s role as a commercial advisor to the Hotel, and his evidence has been weighted accordingly. Mr Sokolski’s evidence was to the effect that:

- he had first entered into discussions with the Hotel in mid-2014 about the financing of the Windsor Hotel redevelopment project. After conducting due diligence, MaxCap was retained as an advisor and broker on 7 August 2014\(^{43}\).

- he had considered that with conservative gearing in the current property market, a project of this scale would commonly be secured by two mortgages, with a first mortgage of approximately $280 million likely to be arranged through a syndicate of a minimum of three banks.

- MaxCap has had discussion with the major Australian banks, as well as offshore banks and institutions. Mr Sokolski is of the opinion that there is a very strong appetite in the market to fund a project of this type. The hotel sector is one of the strongest sectors in the Australian property market, and is therefore more attractive to lenders - including overseas sovereign funds. This adds to his confidence about securing structured finance for the project.

\(^{43}\) Exhibit A7
he believes that planning risk is one of the key considerations for a lender, and a lender must be completely satisfied that all relevant permits are in place, and that all permit conditions have or will be met. In particular, Mr Sokolski’s evidence was that:

No legitimate, reputable Lender would consider advancing funds to a project whereby the completion date is not aligned with the construction contract program as the repayment of the debt is reliant on a fully delivered project. Even if there were representations that the responsible authority would grant (or consider granting) an extension during the course of construction, this would not suffice i.e. a Lender would not proceed with funding and allow this to be a condition subsequent to be met after draw-down.

It is in fact industry practice to require all relevant permits to include a completion date that would not only a line to the construction contract program but provide an appropriate buffer beyond the program completion date to accommodate time delays.

MaxCap would require that all relevant permit and conditions allow for a viable completion date (with contingency) before it could proceed to formally submit to prospective Lenders for the provision of first mortgage development funding for the project.

the completion date nominated for completion in the Permit (i.e. 10 January 2017) is clearly inadequate for a lender given the status of the project, and a likely construction program duration of 36 months. A lender would conduct its own due diligence and legal review, and would not be satisfied with the ongoing validity and viability of the Permit given this expiry date.

Mr Sokolski conceded that he has not yet submitted formal documentation to a lender. However, once the issue about the Permit completion date is resolved, he was of the opinion that, although major project financing is always difficult, unconditional funding could be achieved for this development within approximately three months.

62 In cross examination, Mr Sokolski conceded that he had not directly given advice about the potential consequences of the permit expiry date to the Hotel when first retained, as he was then concerned with financial and commercial aspects of the project, and expected the Hotel to be aware of this. He conceded that, assuming no extension of time, a requirement to complete development by 10 January 2017, with a 36 month construction program, would theoretically mean that the development should have started by 10 January 2014 - before he was retained.

63 I accept Mr Sokolski’s evidence in its entirety. The Minister did not attack the central tenet of the evidence, namely that a reputable lender would not
proceed with mortgage financing for a project of this scale without the certainty of a valid on-going planning permit for the duration of the anticipated construction program. To my mind, this is not a controversial proposition at all. It simply reflects commercial due diligence and common sense. It is unfortunate that it is not a matter that is always taken into account in setting the expiry dates for planning permits for major projects.

**Michael Kerr of Rider Levett Bucknell - project costing and timelines**

64 A witness statement was also filed in the proceeding for Michael Kerr, although Mr Kerr became indisposed at short notice before the hearing and was unable to give evidence. The Minister took no issue with this, and indicated he could satisfactorily deal with the evidence in submissions.

65 Mr Kerr is a consultant with Rider Levett Bucknell, and a professional and long-experienced costs consultant and quantity surveyor. His expert opinion is independent, as his report indicates that he has no private or business relationship with any of the parties. Mr Kerr’s evidence was to the effect that:

- from his assessment of the complex nature of the project, including the demolition and heritage issues and the Hotel’s interface with the new tower structure, he was of the opinion that construction (including design co-ordination) would not be completed under 42 months, including allowance for a provisional period for a delay of three months.

- given a likely ‘document and construct’ building contract, the builder would likely be responsible for the design co-ordination necessary to achieve the requirements under the contract, and this had been considered in the estimate of 42 months.

- the Hotel operates as a going concern, and would need to close to enable construction works to proceed.

- based on previous project experience, it is unlikely that the Hotel would secure construction finance without an agreement with both the builder and the financiers about important matters, including the adequacy of the construction program.

- a financier would ordinarily require separate independent advice in regard to construction complexity, time and delivery processes, and an independent review of overall feasibility. In the absence of a realistic construction program (42 months), a financier would not commit to financing a project of this complexity.

- Mr Kerr was aware that works, that were required to start by 10 January 2015, had now stopped. Given that the early works contract was for demolition and installation of temporary supporting structures etc., he considered that it would be entirely within a financier’s
corporate process and responsibility to halt further works, with the Hotel continuing to trade (helping to mitigate any major loss) because of the current completion date under the Permit of only 24 months from 10 January 2015.

66 In submissions, the Minister sought to emphasise that, implicit in Mr Kerr’s evidence, was a concession that the minor works already undertaken to start the development had not really progressed the project at all, and that 42 months was now required under the permit to facilitate the whole construction period, including further design works, rather than just the completion of the development that was already partially completed. It was essentially contended that there could never have been a real commitment to attempt to complete development by 10 January 2017.

67 That may be so, but I nonetheless accept Mr Kerr’s evidence in its entirety. The Minister did not attack the central tenet of the evidence, namely that a realistic construction timeframe was in the order of 42 months, with contingency, and that a builder and lender would not proceed without the certainty of such a timeline. Indeed, although previous estimates of construction timelines have varied over the years from 30 to 36 months (sometimes exclusive of the completion of final design documentation that Mr Kerr has included in his estimate), Mr Kerr may be the first person with appropriate expertise to have properly considered the complexity of this particular project from the perspective of assessing an overall appropriate construction timeframe that would be required by a builder and financier for contractual certainty for a major project valued at more than $300 million. Again, I do not consider Mr Kerr’s evidence to be at all controversial in this context.

68 The evidence of both Mr Sokolski and Mr Kerr is of course consistent with the May 2015 letters from Built Vic Pty Ltd and Slattery Australia Pty Ltd that accompanied the current request to the Minister to extend the completion date in June 2015, albeit that the authors of those letters did not provide formal evidence in this proceeding.

Analysis of the Minister’s grounds for refusal

69 In this case, the application of the Kantor principles and other relevant principles is made a little more straightforward because the Minister relies upon some specific grounds in support of its refusal to extend the time for completion. I have already mentioned these. In its written submissions at the hearing, these grounds were condensed to three reasons why the Minister contended that the date for completion of development should not be extended:

- there has been a significant change in planning controls and policies.
  The proposed development would now be prohibited.

44 Minister’s outline of submissions at [3]
• more than five years since the permit was issued, incorporating nearly
seven years for completion of the development. The time limit to
complete the development has been adequate. There has been no
substantial progress to date in relation to the development.
• there have been no intervening circumstances to warrant a further
extension of time.

70 These three reasons effectively cover all of the matters contained in the
Minister’s filed statement of grounds, and encompass at least six of the
principles discussed above. Although I must consider all relevant matters
and there is no onus of proof in a review proceeding such as this, if the
Minister fails to persuade me about its reasons for refusal, the case for
granting an extension of time to complete the development obviously
becomes more compelling. I will therefore give some emphasis to the
Minister’s reasons for refusal in this decision.

Minister’s first reason for refusal - whether there has been a change in planning
controls, and whether the proposed development would now be prohibited

71 The Minister contended that there had been a decisive change and planning
policy and controls applying to the Hotel’s land, even more so since the
second VCAT proceeding, with the approval and gazettel of Amendment
C240 on 30 July 2015. I agree that, if the development had not yet started
at all, and if I was considering a request to extend time to start the
development, the change in planning controls would strongly militate
against such an extension of time - for similar reasons to those expressed by
DP Gibson in the second VCAT proceeding.

72 However, I consider that this factor is less significant in a proceeding
concerning the completion of development. In such a situation, it certainly
does not have the same overriding weight that DP Gibson gave it in
considering whether to grant an extension of time to start development.

73 If a development has not already started, there is in theoretical terms
nothing more than the Permit itself – an entitlement to undertake a
development, but without the permit holder having yet formally acted upon
its rights. There is the potential that the permit holder may be ‘sitting on its
rights’, without having made any material commitment to the permitted
development. There are no physical or part-constructed works yet on the
ground. The purpose of an expiry date by which a development must have
started is intended to deal with this scenario. As Justice Ashley noted in
Kantor, a permit with no such expiry date would unnecessarily open up the
prospect of a permit being ‘warehoused’, or a delayed development at odds
with changed planning policy, or be contrary to orderly development, or
perhaps even impede other proposed development on adjoining land.

74 However, once a development has started, the development takes on a
physical form and becomes a thing in itself. Subject to the extent of
development (considered in the next reason), the starting of a development will generally evidence a strong commitment to that development and create the expectation that the development is intended to be completed. The permit holder is now clearly acting on its rights under the permit. The other matters, including a change in planning controls, then necessarily assume less significance because the permitted development is actually proceeding.

75 That is not to say that a significant change in planning controls is not relevant, and that a permit holder should be given an open-ended timeframe within which to complete its development. But given the valuable rights that attach to a planning permit (particularly for a major central city development), and where the permit holder has demonstrated a commitment by acting on its rights under the permit and starting the development, there is a strong argument that it should at least be given a reasonable opportunity to complete that development after the change in planning controls, before those valuable rights are lost. Planning schemes generally envisage this, through appropriate transitional arrangements.

76 In relation to the specific change in planning controls introduced through Amendment C240:

- on its face, the change in height controls, and the introduction of some mandatory height controls, in the Bourke Hill precinct is significant. This is particularly the case given the design objectives in the Design and Development Overlay (DDO62) sought to be achieved, including maintaining visual prominence to the nearby Parliament House, and respecting the heritage significance and low scale built form of existing development, including the Victorian-era Princess Theatre and the Windsor Hotel itself.

- neither Amendment C240, nor the interim controls under Amendment C237 were in place when the permit completion date was last extended in 2012, and the effect of any such controls was not then considered. Amendment C240 is an intervening event.

77 However, against this:

- the main changes introduced through Amendment C240 are primarily controls related to built form, and do not seek to change the underlying pattern of use of land in the precinct. A major hotel is still a legitimate use in this part of the Melbourne CBD.

- the Permit, including permission for a 93-metre tower, was issued in 2010 when there was a preferred height limit of 23 metres under the Melbourne Planning Scheme. The tower was always intended to exceed the ‘ordinary’ height controls for the precinct. The fact that it now exceeds mandatory height limits that vary between 15 metres and 40 metres across the site is less relevant in this context.
the Permit was issued following a detailed and site-specific Advisory Committee report and recommendation, which included an examination of the economic and other benefits of the hotel re-development. These last two factors were considered by the panel for Amendment C240, and that panel recommended the introduction of the mandatory height controls with the express knowledge that the redevelopment of the Windsor Hotel may still proceed. There was no suggestion that development pursuant to the Permit would wholly undermine the broader design objectives sought to be introduced through the Amendment.

the controls introduced by Amendment C240 are still interim controls, which expire on 4 September 2016.

the controls introduced by Amendment C240 contain a clear transitional provision (in clause 7.0 of DDO62) that indicates that the controls ‘do not apply’ to development undertaken in accordance with a pre-existing permit.

78 I have previously mentioned that the Hotel was represented at the panel hearing in relation to Amendment C240. I was taken to several parts of the panel report, which include the following:

the panel dealt specifically with the Advisory Committee report. It noted that the DDO height controls were then a mix of mandatory, preferred and ‘trigger’ heights for a more detailed analysis against objectives, but that they did not always express a height that relates to the objectives or outcomes to be achieved. It noted the additional economic and financial issues that had supported the grant of the Permit, and the two VCAT proceedings.

the panel also dealt specifically with the Hotel’s submissions, and whether the amendment dealt appropriately with existing permits. The panel did not agree that the commencement of development under the Permit, which had by then started, meant that the proposed new height controls were redundant or irrelevant. It indicated that, if there was an operative permit then, as far as the landowner was concerned, it should make little difference what the new controls were. The panel noted that the two scenarios – completion and non-completion of the hotel redevelopment – were quite different, and that a 93-metre tower

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45 As I have mentioned, the Hotel had filed with its request for an extension of time a detailed report dated March 2015 by John Henshall of Essential Economics. The report concluded that the economic benefits of the redevelopment still exist. The report is included in the Document Folder in this proceeding (Tab 29) but was not referred to directly in evidence before me.
46 Amendment C240 panel report dated 4 May 2015, at p 8-11
47 ibid, including at p 75-77
48 ibid, including at p 101-105 and at p 134-135
would be a major element in the precinct. The panel nonetheless stated that it was not possible to resolve uncertainties about the completion of development in accordance with the Permit, and stated:

The Panel considers that it is not appropriate to be directed in our assessment of this part of the precinct by the need to protect or extend an existing permit entitlement... The Panel in coming to this conclusion should not be seen to be making any judgement as to the appropriateness or otherwise of the permit having been granted on a balance of economic and other policy considerations.

The Panel considers that the appropriate way to approach the matter of what height controls should apply to the Hotel Windsor site is to consider whether they are strategically justified and to take into account submissions on that matter presented in the normal way.

79 It follows that the Amendment C240 panel undertook a theoretical exercise in considering new height controls for the Hotel’s land and the balance of the precinct as if the Permit did not exist, but has acknowledged the reality that development under the Permit may nonetheless proceed. The panel report cannot be said to be recommending against the hotel redevelopment, nor recommending that the Amendment could not proceed (or that its broad design objectives would be wholly lost) if a development was completed in accordance with the Permit.

80 In the proceeding before me, the Minister thought it important that if a fresh application was now lodged, the development would be prohibited by reason of the mandatory height controls introduced through Amendment C240. The transitional provisions clearly protect development undertaken in accordance with a pre-existing permit. Moreover, experience would suggest that the existence of mandatory interim controls is not always fatal to a major central city development proposal if there is a strategic or political justification for an alternative outcome. As the Amendment C240 panel itself noted:49

The Panel notes that if a development outcome not in accordance with the mandatory height limit were to be sought, the landowner might apply for a combined permit and planning scheme amendment, under section 96 of the Planning and Environment Act 1987. The assessment of a proposal under this process would allow the individual merits and impacts of an alternative arrangement to be fully assessed having regard to the character of the precinct and other relevant matters.

81 It follows from all of the above that I do not consider that the Minister’s first reason for refusal is made out. In my opinion, the significance of the new planning controls and height limits introduced through Amendment

49 ibid, at p 135. A similar sentiment is expressed, with specific reference to the Windsor Hotel, at p 105.
C240 do not carry the same weight in relation to a development that has already started, and certainly do not carry the same overriding weight as was given to similar controls in the second VCAT proceeding when the development had not yet then started. The new controls were introduced with the knowledge that development under the Permit had by then started, with appropriate transitional arrangements, and with an implicit acknowledgement that the Hotel redevelopment may well be completed within a reasonable timeframe. The new controls do not carry with them, either expressly or by necessary implication, any indication that a request for an extension of time for completion of the development should be refused by reason of those controls alone, or that it should not be considered on its broader merits having regard to all relevant factors.

82 That said, the existence of the new controls – particularly if they cease to be interim controls in due course – does lead to a view that any extension of time for completion of the development should not be open-ended. The new controls under Amendment C240 only commenced operation in July 2015, after the present request for an extension of time to complete development was made to the Minister. Whilst it may be appropriate to give the Hotel a reasonable time to complete its development, notwithstanding the new controls, the longer in time it takes to complete the development after the change in planning controls, the more weight is likely to be accorded to the change in planning controls. This would certainly be the case if there was any future request to extend time for completion of the development beyond the extension granted in this proceeding.

Minister's second reason for refusal - The total time elapsed since the permit was issued, whether the time limit originally imposed was adequate, and the absence of substantial progress in development

83 The Minister cautioned against the temptation of finding that the time limit originally imposed on the Permit was inadequate simply because the Hotel has failed to complete the development within time. I agree that more is required.

84 I do not however agree with the contention of the Minister that the total time that has elapsed since the Permit was issued is a significant factor in this proceeding. The Minister attempts to make much of the fact that it is more than five years since the permit was issued, and that the existing completion date already incorporates nearly seven years for completion of the development since the Permit was issued. Quite apart from the fact that a period of 5 to 7 years is not necessarily a large amount of time for a major project, I consider that such an argument attempts to turn the debate into a superficial mathematical exercise rather than looking properly at the context of what was actually occurring within that period.

85 The Minister says that, notwithstanding the issue of the Permit as a standard 2 x 2 permit, the initial time given in the Permit to complete the
development was four years overall, rather than two years from when the development started. This is technically correct. The Minister therefore contends that, if there was say a 36-month construction timeframe required, the Hotel was always on notice that it would need to start the development sooner than the two years technically allowed for commencement, in order to complete within the overall four years. The Minister says that the same situation arose after the first VCAT proceeding, where the Hotel had four years and five months overall for completion from the date the extension was granted. The Minister therefore contends that ‘the terrible truth of these proceedings is that [the Hotel] has simply run out of time’.

86 I consider that this again addresses the matter somewhat superficially. It presupposes that the Hotel could have truncated (into a period of a year or less) all of the pre-commencement work, including the obtaining of heritage and other approvals, detailed design work, and arrangements for construction and financing, in order to achieve this outcome. This runs contrary to the information that was before the Minister when the Permit about the extent of pre-commencement work required. It runs contrary to the evidence that was before VCAT in the first VCAT proceeding about the extent of pre-commencement work still to be undertaken. It ignores the commercial realities of planning for complex major projects. It ignores the specific reality of what occurred with delays in obtaining the heritage permits (often with lengthy notice requirements), and in addressing inconsistencies between the planning and heritage permits. And it ignores the clear finding in the first VCAT proceeding, strongly endorsed in the second VCAT proceeding, that even the two years initially granted under the Permit to start development was inadequate.

87 Although it is theoretically the case that, with a standard 2 x 2 permit, the permit holder has an overall four years to complete development, some sense must be given to the initial two years allowed to start development. For a major project, where it is already known that all or most of that initial two year period will be needed to undertake all of the pre-commencement work, the practical effect of a standard 2 x 2 permit is to allow two years for completion of development once started. [I note in passing that even Heritage Victoria may have recognised this issue (at least to a slightly better level than for the Permit), as the heritage permits all allowed two years for commencement, and an additional three years for completion.]

Unfortunately, no one seriously turned their minds to this issue when the Permit was issued, or first extended.

88 The lack of relevance of the overall time period since the Permit was issued is perhaps more pronounced having regard to the outcome of the second VCAT proceeding. At that time, in August 2014, the development had not started and, as I have found, the second VCAT proceeding was primarily concerned with that issue. It was clearly acknowledged that, if an extension of time to start the development was not granted, the Hotel would still
undertake a ‘forced commencement’ by 10 January 2015. There was evidence then that a 30 to 36-month construction timeframe was envisaged, and that a forced commencement would affect the construction timeframe. It is therefore difficult for the Minister to seriously contend that, in order to meet a 10 January 2017 completion date, the Hotel should have already started development in January 2014 (i.e. well before the second VCAT proceeding in August 2014) or sooner, and that it has simply run itself out of time. The Minister did not argue this in the second VCAT proceeding.\footnote{\textsuperscript{50}} Moreover, the Hotel had requested the further extension of time in December 2013 and, partly as a result of the then Minister’s failure to determine that request, the matter was not determined by VCAT until August 2014. Whilst there is evidence that the Hotel was continuing with some pre-commencement activities during this period, it is not unreasonable for it to have refrained from entering building and financing contracts until the uncertainty about the expiry dates for the Permit had been resolved. [Indeed, the evidence in this proceeding is that it would not have been possible to enter into the building and financing contracts at that time, with the limited expiry dates then in the Permit.]

89 As I have said elsewhere, in my opinion, the more critical period for consideration in a case concerning the completion of development is the period of time allowed by the last extension and, in particular, the time that was available and that has elapsed since the development started within that time.

90 The last extension required the development to start by 10 January 2015, and the development actually started very shortly before that date. That is now a known position. That same last extension required the development to be completed by 10 January 2017 but, in the first VCAT proceeding, it does not appear that anyone specifically turned their mind to the completion date, and a standard 2 x 2 permit arrangement was effectively continued. In practical terms, therefore, acknowledging the time that would be required in a major project for pre-commencement activities, the effect of this was to allow only two years for the completion of a development that even then was anticipated to have a 30 to 36-month construction timeframe.

91 It will be self-evident from everything that I have said so far that the expiry date in the Permit for the completion of development has never been seriously and separately considered. The Hotel concedes some responsibility for this, although there is evidence that it attempted to raise the issue – albeit obliquely – in the second VCAT proceeding. I have already referred to the relevant transcript. However, I accept that, having regard to the relevant background I have set out extensively, the Hotel needed all of the available time allocated to it under the Permit to start development (including by virtue of the first extension of time in 2012).

\footnote{\textsuperscript{50} By reference to its written submissions in that proceeding (Tab 24), and the VCAT decision itself.}
Allowing for this, the time allowed under the permit for the **completion** of development is not adequate, and has never been adequate. There are two main aspects to this:

- from very early on, the Hotel’s development manager Mr Coupar was foreshadowing a 30 to 36-month construction timeframe, after completion of other pre-commencement activities. More recently, Mr Kerr’s evidence is that a more reasonable construction timeframe, including design co-ordination, is 42 months.

- a standard completion time of two years for a major project such as the Windsor Hotel redevelopment, even with the possibility of an extension of time being granted once development has commenced, does not give sufficient commercial certainty or tenure to a builder or financier to commit to the project. No lender is going to hand over $280 million on a project where the permit will expire before the project is completed, particularly where the Minister has previously opposed extensions of time.

92 The Tribunal is aware from its own experience that there are the other permits issued under the Melbourne Planning Scheme, or by way of incorporated document under the scheme, which do include longer completion timeframes in order to provide this commercial certainty for major projects in the central city of Melbourne.\(^5\)

93 To simply contend that there is no precedent for a refusal of an extension of time to complete a major project that has already been *substantially* commenced, and that the Hotel should therefore substantially commence the development to demonstrate its good faith and then seek an extension of time, simply ignores the commercial realities of major project development and financing - particularly in an era of more conservative lending practices by the major institutional banks and financiers.

94 When one has regard to the background history in this matter, at no stage has there been a clear and sufficient period within the life of the Permit to allow for a reasonable construction timeframe. I accept the Hotel’s submission that it requires the Permit in this case, for this development, to have a clear and sufficient life to provide the necessary certainty.

95 At first blush, it may seem problematic for the Hotel that it has not substantially commenced the development. This was considered an important factor in considering whether to extend the time to complete development in cases such as *Juric*, which I have already mentioned. The Minister attempted to make much of this, in this proceeding. The Minister says that there is nothing that has really prevented the Hotel from substantially progressing the development since August 2014, and that what

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5\(^1\) As just one example, the Ministerial approval for the Melbourne Central redevelopment allowed two years for the development to start and a further eight years for completion – i.e. a 2 x 8 approval.
has happened since that time is ‘almost nothing’. His advocate at the hearing referred to ‘the statement state of the development and the stasis at the subject land’. I accept that what has occurred on the site to date is nothing more than a token commencement of development designed to avoid the permit expiring on 10 January 2015. However, in the circumstances of this case, I think that this contention misses the point.

96 Whilst evidence of ‘substantial’ commencement will certainly be a factor in favour of an extension of time being granted to complete a development, the absence of ‘substantial’ commencement is not necessarily fatal. As indicated in the cases such as Juric, and the principles I have referred to above, there may alternatively be a significant commitment in terms of time and money that can be demonstrated, or some other reasonable explanation of why the landowner has been held up and left with insufficient time to complete the development.

97 Both of those alternatives exist here. The Minister does not contend that the Hotel is seeking to warehouse the permit. The background history reflects that the Hotel has made a significant commitment in the pre-commencement work that it has undertaken. There is no evidence before me to suggest that the Hotel is not fully committed to the redevelopment project.

98 More particularly, whilst little has been done in terms of physical works in the past year, there is a reasonable explanation for that. The Hotel concedes that it did not deal adequately with the completion timeframe when it was focussed on extending the time to start development, and undertaking the ‘forced commencement’ by January 2015. However, since the meeting between the Hotel and the Minister’s chief of staff in March 2015, and the making of the request for an extension of time in June 2015, the Minister has been aware that the Hotel seeks the extension of time for completion in order to provide development certainty for its builders and financiers, and that it cannot finalise its contractual arrangements in order to substantially commence the development without the certainty of that extension of time. It is difficult for the Minister to rely upon the lack of substantial commencement within this more recent period, when the Minister is (at least in part) responsible for the ‘Catch-22’ situation that prevents substantial commencement, and where the Minister has had the power to resolve that ‘Catch-22’ situation.

99 Neither party can claim the high moral ground in relation to the lack of substantial commencement in the period since 10 January 2015. As I have said, there is simply an impasse created by an apparent conflict between the anticipated regulatory process outcomes and the commercial exigencies of a major development project.
It follows from the above that I do not consider that the Minister’s second reason for refusal is made out, having regard to the very particular circumstances of the Windsor Hotel redevelopment project.

Minister’s third reason for refusal - whether there have been relevant intervening circumstances to warrant the extension of time being granted

The Minister’s third reason for refusal was essentially based on the contention that there was nothing new that had occurred since the second VCAT proceeding in August 2014, that was not known or envisaged at that time. The Minister contended that ‘almost nothing’ had happened since August 2014 that had prevented the Hotel from substantially progressing, if not completing, the development.

Although the Kantor principle about intervening circumstances is often simply summarised, as in its headnote, as relating to ‘intervening circumstances as bearing upon grant or refusal’, the discussion in the decision is a little more sophisticated. For example:

- any ‘intervening’ circumstances are taken to be those since the permit was first granted, or the date of the last extension. Here, that would be the date of the decision in the first VCAT proceeding, in August 2012, extending the date for completion until 10 January 2017, rather than the date of the second VCAT proceeding in August 2014 upon which the Minister appears to rely. As the lengthy background history reflects, much has happened in that time.

- in the specific commentary on the ‘intervening circumstances’ principle in Kantor, Justice Ashley gives an express example. He says that, for example, an owner’s indication of intention to proceed with development, a fortiori his taking steps to develop land in accordance with the permit, could be expected to tend in favour of a grant of extension. Here, although only minor physical works have been completed, the Hotel has demonstrated a clear indication to proceed with the development, and has undertaken steps to that end.

- as I have said, Kantor related primarily to an extension of time to start development. In cases concerning the completion of development, the start of the development is itself an intervening circumstance, albeit again that only minor physical works have been completed here.

- in Kantor, Justice Ashley had referred to intervening circumstances that thereupon the grant or refusal of an extension of time. In that more general sense, there has also been a clear ‘intervening circumstance’, through the approval and gazettal of Amendment C240

The Minister relies on his expectation that it would be reasonable to expect the Hotel to demonstrate some ‘tangible sign of progress’, in order to
demonstrate an intervening circumstance that might warrant an extension of time. I have already dealt with this matter. As I have said, it is difficult for the Minister to rely upon a lack of substantial commencement when the Minister is at least partly responsible for the ‘Catch-22’ situation that prevents such substantial commencement.

104 I agree nonetheless with the Minister that one might have expected the Hotel to have demonstrated in this proceeding that it had substantially progressed the detailed design development documentation, if not actual physical works. The Hotel had indicated to the Department in December 2014 that its design team (DCM, WSP, Irwinconsult, and David Collins Studio) would continue with their work. Whilst it is potentially concerning that little seems to have occurred in this regard also, I accept that the Hotel would not wish to expend significant funds on this project in the period after its request was made for an extension of the completion date in mid-2015, until that request is determined.

105 The Minister also contends that the lack of progress is in itself being used now as a justification for a 42-month construction timeframe - a longer period than its estimate in August 2014. Conversely, the Hotel submits that no one anticipated the current problem. That is a fairly damning revelation so many years after the Permit was first issued, but it is not one that should lead to a punitive outcome against the Hotel in this proceeding. There is at least now, finally, and perhaps for the first time, some clear evidence before VCAT (through the evidence of Mr Sokolski, the statement of Mr Kerr, and the letters from Built Vic Pty Ltd and Slattery Australia Pty Ltd in the Document Folder) that relates to an appropriate construction and completion timeframe, and the commercial arrangements that pertain to it. That in itself constitutes an intervening circumstance. Whilst the Hotel must accept some responsibility for what has arisen, the Minister and experienced Departmental officers should also have been aware that a standard 2 x 2 permit arrangement was never going to be adequate for the completion of a development project of this nature.

106 Indeed, the Minister largely concedes this, and says in his written submissions

The Minister does not contend the development is anything other than large and complex and required substantial resources to carry out. The Minister accepts that [the Hotel] has already expended considerable sums of money on obtaining the relevant permissions.

107 Finally, on this issue, the Minister contends that the Hotel cannot claim, as an excuse, that it has only recently broken free from its ‘regulatory brambles’. The Minister submits that the Hotel has enjoyed close to three years of regulatory certainty since the third heritage permit was issued in 2013, and since the dispute with the MFB was resolved. Given the

53 Minister’s outline of submissions at [58]
background history I have outlined, I do not believe that this contention withstands scrutiny. Immediately after the third heritage permit was issued, the Hotel requested an extension of time to bring the Permit into line with the three heritage permits. The then Minister failed to determine that request, leading to several months of uncertainty until the second VCAT proceeding in August 2014, and with forced commencement then occurring. Amendment C240 was also progressed and gazetted within this same period, leading to further interim controls in the Bourke Hill precinct. Moreover, given that the decision in the second VCAT proceeding did not clearly or separately address the issue of the completion date, the dates in the three heritage permits and the Permit remain out of alignment, which adds to the difficulty in having certain construction timeframes for contract and funding arrangements. The Hotel remains within the ‘regulatory brambles’ to which the Minister has referred.

108 It follows from the above that I do not consider that the Minister’s third reason for refusal is made out, again having regard to the very particular circumstances of the Windsor Hotel redevelopment project. I might add that, although I have found that there are intervening circumstances that justify the grant of an extension of time for completion of the development, even if there had been no intervening circumstance, that would not of itself have been fatal to the Hotel’s request for an extension.

Conclusions on Minister’s reasons for refusal

109 It follows that I am not satisfied that the three reasons given by the Minister are sufficient to justify a refusal of an extension of time to complete the project. The only factor that strongly favours a refusal (i.e. the change in planning controls in the Bourke Hill precinct) is not sufficient to override the many other factors that explain and/or support an extension of time to complete the development in this case. Whilst that factor (i.e. the change in planning controls) may have been a strong factor to justify a refusal of an extension of time to start the development, it carries less weight in relation to the completion of development.

110 I note also that, unlike the decision in Kantor, which comprised a request for a seventh extension of time, the Hotel has had only one extension of time - and that was largely in relation to the start of the development, albeit that the completion date was also then extended consequentially by two years. In practical terms, this is really the first occasion where an appropriate timeframe for completion of the development has been considered.

111 In my opinion, the current impasse between the Hotel and the Minister needs to be broken, with the Hotel then being given an opportunity, and perhaps only one opportunity, to show its commitment to the development authorised by the Permit by substantially progressing (and ultimately completing) the development through having sufficient time and certainty.
to make appropriate contractual arrangements with its builders and financiers. If the Hotel does not do so, it takes the risk that the change in the planning controls introduced through Amendment C240, and other factors, will militate far more strongly against any further extension of time in the future.

Other considerations (to extent not discussed above)

112 I have dealt separately, and in some detail, with the three reasons that the Minister gave for refusing the request for an extension of time for completion of the development. In doing so, I have dealt with many of the Kantor principles and other relevant principles. However, it will be self-evident from the earlier discussion that there are other factors that were not raised expressly by the Minister in this proceeding, which may nonetheless bear upon whether an extension of time should be granted in the particular circumstances of this case. I will deal with these relatively summarily:

- the Minister did not contend in either the first or second VCAT proceedings, and has not contended in this proceeding, that the Hotel is seeking to warehouse the Permit. On the evidence, I agree that that is not the case. Indeed, I agree with the submission by the Hotel that the Hotel has made it known that it wants to complete the project, and the Minister has made it known that he wants the project completed. No one is trying to warehouse this Permit.

- there is nothing in the Permit itself, nor apparent from the circumstances when it was first granted, that suggests that the limitation on the completion date was specifically intended, or for a discernible purpose. It was a standard 2 x 2 permit. It cannot therefore be said that the granting of an extension of time for completion of the development will run contrary to some discernible purpose that necessitated a limited time for completion.

- whilst the Minister submits that there is a public interest in the expeditious completion of development, I agree with the sentiment expressed in the first VCAT proceeding that, given the significance of the Windsor Hotel as a heritage building, and given the nature of the overall redevelopment, it is also in the public interest that such development is done carefully and in a proper manner. The public interest is in the timely and reasonable completion of development, rather than the most expeditious.

- in town planning terms, and in the context of major development in the Melbourne CBD, the time already elapsed under this Permit is not a lengthy period.

54 [2012] VCAT 1203, at [44]
it will be apparent from everything that I have said that there is a reasonable and compelling explanation for the Hotel not having completed the development within the time stipulated in the Permit, or through the first extension of time under the Permit. I agree with the Hotel that the redevelopment project has been affected by political and administrative circumstances that have led to the reality that the current completion time is not sufficient to complete the project. Indeed, the construction timeframe effectively allowed for in the Permit was never realistic or adequate.

whilst the Minister submits that the $9 million already expended by the Hotel on preliminary matters is not disproportionate or excessive having regard to the overall value of the redevelopment project. I am satisfied that a refusal to grant a reasonable extension of time for the completion of development will place a significant economic burden on the Hotel.

a project-specific advisory committee found in 2009 that there was a strong economic and financial case for the redevelopment project, and the benefits it would provide to the state. The March 2015 report by Essential Economics (filed with the extension request) confirms that this is still the case, and the Minister did not seek to challenge or undermine that report. Indeed, as recently as November 2015, the Minister confirmed that the project was iconic and important.

Whilst it is always a question of balance, I consider that a consideration of these additional factors bolsters the view that an extension of time to complete the development should be granted.

Conclusions

For all of the above reasons, I am of the opinion that an extension of time to complete the development should be granted. Having reached that view, I am strongly of the opinion that the new completion date needs to be realistic, and must take account of the commercial requirements of builders and financiers. It should allow a ‘clear’ period of time for construction, rather than comprising a series of piecemeal extensions, so that contractual and funding arrangements can be made with appropriate security and certainty. It should allow sufficient time that is reasonably calculated and foreseeable in order that the permitted development can be completed within that time.

Having regard to the evidence of Mr Sokolski and Mr Kerr, and allowing for a period to complete documentation and a reasonable construction timeframe, I agree that 42 months is the minimum period that should be allowed for the completion of development. Allowing a short but reasonable ‘provisional’ period for unexpected delays, I consider that an
overall period of about 48 months (or four years) from the present time is reasonable. I have therefore fixed a date of 31 March 2020.

116 In terms of the extension of time for completion of the development under the Permit, this leads to an extension from 10 January 2017 to 31 March 2020 – an extension of about three years overall. In town planning terms, I do not consider that this is a significant extension for a major development in the central city of Melbourne.

117 I would not wish it to be thought that I consider the Hotel is entitled to any sort of open-ended extension, nor that it should have any great expectation of a further extension of time being granted in the future (save for the heritage permit issue mentioned in the next paragraph). I have accepted the Hotel’s evidence in good faith. The decision I have reached gives the Hotel a chance, in all probability a single chance, to demonstrate its commitment to now move forward with this development in a timely manner.

118 There is perhaps one final complicating issue. The three heritage permits expire on 3 September 2018. The Hotel has sought to extend the time under those permits. By letter dated 6 November 2015, Heritage Victoria advised that it considered the request to be premature, and that a further request should be submitted closer to the expiry date if the Hotel is unable to complete the works by that date. Unfortunately, this presents a risk that history will repeat itself, and that the heritage permits and the Permit will remain out of sync, and that this will create a further issue for the Hotel in its contractual and funding arrangements. Although it is not a matter within my jurisdiction, I would hope that Heritage Victoria might reconsider its position, and consider granting a similar and immediate extension of time under the heritage permits until 31 March 2020. Otherwise, the Minister and Heritage Victoria (both operating through the one Department) will be effectively maintaining the regulatory ‘Catch-22’ that has led in part to the current impasse, and there would be a risk of yet further extension requests in the future. That would be in no one’s interests.

Mark Dwyer
Deputy President

55 Exhibit A5