

**Submission
No 15**

**INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN
PLANNING FRAMEWORK**

Name: Name withheld

Date Received: 16 January 2022

Name
withheld

**A SUBMISSION TO THE VICTORIAN LEGISLATIVE COUNCIL
ENVIRONMENTAL AND PLANNING COMMITTEE INQUIRY
2022**

Inquiry into Protections within the Victorian Planning Framework



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A brief preamble and context to this submission based on a community Case Study 2020.

This submission is mainly based on a recent community documented Case Study, arising from the perspective of individual and group participation in a Victorian planning and heritage process in the period 2017-2021. It includes perceptions of a recent VCAT Conditions Appeal, and Heritage Victoria submission process affecting, three prominently situated, landmark state heritage sites in Brunswick St and Victoria Parade, Fitzroy/Yarra city.

These matters may be useful to the Committee as a recent illustration of the multiple concerns affecting some planning matters and iconic heritage sites, of wide historical and cultural association and as recently encountered in the Victorian Heritage and Planning System.

Such was the concern about this process that the original Case Study, consisting of a Covering Letter and seven documents variously titled and numbered 1-7 and additional communications, details of which were forwarded to the Planning Minister, the Executive Director of Heritage Victoria, and the former Chair of the Heritage Council, in 2020.

This submission wishes to summarise concerns as experienced as a participant/public submitter and as part of community group and planning appeal respondent[s], in a three-stage planning and heritage sequence, [at Yarra Council, a VCAT Appeal and a Heritage Victoria application process].

The community group was assisted by the Fitzroy Resident's Association, limited legal representation, one commissioned document and a voluntary cohort of historians and researchers, some with a long involvement in heritage or planning advocacy and foundational contributions to knowledge bases and other established heritage and planning matters. Conservatively, at least \$10,000 was spent by the community, and many hundreds of hours of voluntary community work on the attempt to defend the public interest of heritage and planning impacts.

The process was largely finalised in 2019, with Heritage Victoria issuing a permit to substantively develop the state heritage cluster site area.

This decision, with many unresolved matters of process and transparency, is still being monitored in 2022 by community members, to the best of their ability.

The Committee may wonder why community members continued to monitor the site if the statutory processes are largely finalised?

Four main reasons:

1. **The lack of transparency** in heritage applications for a permit to develop state registered sites in Victoria, on a site of iconic significance, part of a **palimpsest** of heritage. The birthplace allotment site of St Mary Mackillop is presently in a form of 'Heritage Limbo,' as it was discovered after the permit was decided at Heritage Victoria, that the state **significance** of the site has been questioned for **possible revision/removal of significance** [in unadvertised applicant documents], and that numerous applicant documents detailing

heritage impact material, and of apparent relevance, such as private plans for the site, were **not advertised** for public scrutiny or referred to Yarra Council [as reported in the HV **Report**].

Therefore some private applicant heritage submissions were concealed in the Heritage Victoria application process, but were accepted [**‘accepts’**] by HV in its **Edensor /Dodgshun House Report and recommendation to the Executive Director on application for a permit of 27 March 2019**, but have not been supplied by the Department of Environment, Land Water and Planning [DELWP], of which Heritage Victoria is a part, to either successive FOI or OVIC inquiries in 2021. [Further summarised below].

This matter of site significance has not been transparently clarified by Heritage Victoria, is **not resolved**, and affects the historical understanding and integrity of the site, given its wide and traditional association by a substantial group of people.

2. This cluster heritage site of rich and iconic history, was viewed as a **litmus test of planning and heritage protections in Victoria**. Currently it is considered by the community as a failed test case of heritage protection in Victoria.
3. The application site[s] and setting also contained places of **intangible significance, of specific site association, origination significance, or connected to pre-eminent cultural heritage significances**, to reformative and progressive events and persons, which have marked or shaped Australian social, spiritual, religious or governmental history.
4. The cluster site is a vital reminder of the distinctive historical identity, and of the notable social, political and cultural history of **Fitzroy, early Melbourne and Victoria**, and of landmark and significant architecture, and which also consists of a rare cultural/spiritual/religious site [post initial invasion/settlement of Victoria].

Cultural heritage sites may be intangible, but since the recent Inquiry into the treatment of the **46,000 year old Caves destruction at the Juukan Gorge in Western Australia**, the treatment of cultural sites are now understood from **greater cultural, legal, societal, political, and corporate perspectives**.

This submission calls for an **inquiry into the particular concerns outlined in this Case Study**, by an independent process separate from Heritage Victoria, **as an example of the unsatisfactory state of heritage protection in Victoria**, and as illustrated by this already detailed Fitzroy Case Study, documented and notated over the past four years including the cluster of three state heritage sites. This includes substantive loss of area, setting and sense of place, of an iconic and unique, woman’s cultural and religious heritage site - its authentic, existential, historic delineation, as recorded in submitted primary document **Memorial of 1842 of the Colony of New South Wales and other detailed documents**. These submitted documents were not acknowledged and comprehensively assessed in the cursory reporting of the heritage site[s] in the planning and heritage process.

This Committee Inquiry could assist in highlighting some form of **restorative justice process** required to address such an impact on a cultural heritage site, on what is revered as a spiritual site to Catholics and a place of cultural value to admirers of Mary, and to prevent such further destruction.

This originating site of a great Australian, St Mary Mackillop who was an inclusive, leading, female historical figure-and her state registered 1842 birthplace allotment, is described in the **Heritage Victoria statement of cultural significance** extracts as following:

‘Dodgshun House and its surrounding land is of historical, social, and architectural importance to the state of Victoria’

‘The site on which Dodgshun House (formerly Edensor) now stands is of great historical and social significance as the birth place of Mary Mackillop.....’

‘...9 Brunswick St has become historically and socially significant as a site of great religious pilgrimage.’

Do these words stand for anything in the Victorian Heritage system?

The above citation raises the question of whether any emphasis of *significance* and *greatness*, is sufficient to ensure a site is protected from substantive development in Victoria, under the current administrative processes?

To further explain this recent Case Study from 2020:

Due to the necessary division of workloads of voluntary community attempts to participate in a planning/heritage and VCAT appeal process, and the prolonged stages of a three- stage decision process, it was necessary for members of the community group to divide the tasks and largely concentrate on one of the critical aspects or heritage sites under threat.

This submitter was designated to the St Mary Mackillop [St Mary of the Cross] birthplace allotment, and so this submission comment is concentrated there, but could be adjusted to other impacts on the other registered buildings and settings on the site.

I will therefore summarise the myriad concerns arising from this heritage application as far as possible with dot points, which are further detailed in the available documents if needed.

Therefore,

With reference to the Legislative Council’s Inquiry Terms of Reference:

(3) delivering certainty and fairness in planning decisions for communities including but not limited to –

(c) community concerns about the VCAT Appeal process

The Case Study example of Planning Application No PLN 16/0925 Yarra Council.

This submission describes the perceived role of the VCAT, as perceived from this Case Study example, specifically as experienced by the community, in supporting the Yarra Council protective conditions it imposed, in granting a planning permit on the **cluster of three state registered heritage sites**, and also through a VCAT Conditions Appeal, brought by the applicant, to remove the heritage protective conditions on state heritage.

Some background:

Heritage protective conditions were imposed in 2017 by Yarra Council, to protect three Victorian state registered sites and settings -

The former Eastern Hill Hotel 1854-1856, HO816 landmark site, notable surviving architecture of

the Gold Rush period and site of significance of planning for the Eight-Hour Day reforms. Edensor/ Dodgshun House 1866-1899, H1706, notable architecture, the site connected to Melbourne's first Lord Mayor, the celebrations and Royal Visit for the Opening of the First Parliament of Australia, and the adjacent south garden which is the area of the birth allotment area of Mary Mackillop 1842.

The surviving heritage buildings or sections will be **engulfed by development impacts.**

The Yarra Council and community respondents attempted to prevent the development proposal's various demolitions, excavation and development from impacting on the state heritage sites and also a locally significant site **Easthill House, Victoria Parade, a surviving example of Art Deco Spanish Baroque style in Fitzroy/Yarra.** [The VCAT decided to protect the façade structure from demolition].

The following concerns are attempted to be summarised for the Inquiry-

1. The VCAT appears to have precedence and a predominant role, in influencing development decisions on state registered heritage sites.

- In regards to the VCAT and state heritage – the apparent sequentially pre-emptive role, of the VCAT, in a sequence of planning and heritage applications, whereby the development applicant can first attempt to gain the removal of heritage protective conditions [which were imposed by a local Council on state registered heritage sites], and before a subsequent Heritage Victoria application process and decision
The subsequent Heritage Victoria slight modifications but general acceptance/acquiescence to considerable heritage demolitions and spatial impacts on the setting, has resulted in the looming **excavation, removal and development of parts of the sites, including the Mackillop birthplace allotment**, which will be substantively impacted with this iconic heritage cluster and part of early historic Melbourne.
- The VCAT removed the **protective conditions** imposed by Yarra Council protecting the three state sites, thus allowing development, and Heritage Victoria granted a permit for substantive development or spatial intrusion of the sites.
- There is also an inefficient and confusing duplication of opportunity/costs, and heritage submissions/processes, as required at **two decision forums, VCAT and Heritage Victoria**, for applicants and respondents/submitters.
- The application raised the matter of the need to clarify the confusion on whether a planning permit could or should allow development that would impinge **on or over**, the state registered site[s]-
- The Case Study suggests that state registered heritage sites, appear **to lack sufficient protections**. Critical protective heritage conditions were removed at the VCAT. **The state registered Mary Mackillop birthplace allotment cultural site will be substantively excavated to be built over and under, despite the mention of exclusion of the site 'exclude' by the VCAT to Heritage Victoria , which allowed substantive excavation and removal to accommodate hospital basements, construction pylons for cantilevering and multistorey private development.**
- The lack of demonstrated, transparent, heritage expertise of VCAT Members, making important planning decisions on state and cultural heritage, before the Heritage Victoria process has properly assessed and considered the matter, needs review.

2. The VCAT appears to be in conflict with state heritage.

- The VCAT Tribunal's apparent use of the argument in favour of a private applicant's [private hospital] '**market share**' prerogative, as opposed to upholding any statutory obligations of protecting state heritage.
- The selective use of planning scheme clauses and the lack of quantification of nebulous terms such as '**background hum**' quoted by the VCAT Tribunal to support other activities/developments, at the expense of a state heritage protection and amenity.

3. The VCAT'S use of obfuscatory, confusing language and equivocation in relation to the state registered heritage sites and which also impacted the Mackillop birthplace allotment.

- A need for accuracy of language and **unequivocal language** in Legal Rulings, and VCAT and Heritage Victoria Reports. The writing standards for plain and accurate English language should be reviewed, given the instances of the use of **legalese, doublespeak, contradictory, obfuscatory justifications and strange euphemisms**. [Examples below].
- There needs to be greater clarity of planning and heritage language - more '**musts**' to replace **the conditional verbs in the non-definite 'get out' words and options, in planning clauses** .

VCAT Textual Examples of equivocatory reporting from the Case Study:

- ***Our finding is that the proposal fails to meet this decision Guideline as its bulk, form and appearance with or without the contested conditions, is not in keeping with the character and appearance of the two buildings on the Victorian Heritage Register para 104,However we do not find this fatal to the proposal para 105,*** [this submitter's underlining].

This language conjures up the staggering Black Knight of Monty Python.

QUESTION. What are the criteria for '**fatality**' in VCAT decisions - implying that a heritage site impacted by multistorey development has only suffered a proverbial '**flesh wound**'?

- ***In terms of the Edensor/ Dodgshun House as an adjacent building, we have found the proposal is not in keeping with the building as the decision guideline encourages. However we find that its impact on the adjacent building is acceptable for the following reasons'*** para 142, [this submitters underlining].

4. The perception of legal inequalities and community resourcing inequalities at the VCAT.

VCAT was meant to be a non-legal dominated, and non-intimidating forum for laypersons, under previous reviews of the VCAT.

- The increasingly formidable, bureaucratic and legalistic atmosphere at the VCAT, for ordinary respondents or submitters, opposed by SC's and legal teams, without adequate community resourcing.

An example from the Case Study – a VCAT Legal Ruling process in a VCAT Appeal.

An unadvertised and suddenly requested Legal Ruling process in the VCAT Appeal process.

- This example included the ploy, by a 'legalised-up' applicant's SC to request a **Legal Ruling** process by a separate legal member of the VCAT, during a planning appeal, and the lack of assistance to laypersons/respondents, such as a community legal briefing regarding the finer points to preparing the **Legal Questions to be proposed to the Legal Member**, and to assist the Legal Ruling – [made by the **Deputy President of the VCAT**, who then left the Tribunal Members to interpret the Ruling] for their Appeal decision.
- The community perceived the Appeal process was legally '**checkmated**' by the **Legal Ruling** process, even though the Legal Member was not present for the Appeal Proceedings.
- The need for a plain English language version of the Legal Ruling given during a VCAT Appeal, especially obtuse Rulings regarding heritage matters and Case Law, a Ruling best described as a 'difficult read'.
- Without community legal support the Legal Ruling process leaves laypersons feeling '**completely at sea**' in the planning and heritage process.

The increasing inequality of legal versus laypersons in VCAT Appeals.

- For example, the need for legal resourcing of laypersons at Appeals on Major Cases of public interest such as state heritage and cultural heritage sites under threat.[In this example 13 days of attendances/part- attendance].
Such as the need for a handbook or advice sheets on the organisation of participation in a VCAT Appeal, what to expect, group organisation, documentation, note keeping of progress of hearing and cross- examination of expert witnesses, how to manage potential legal 'intimidation' and ploys, Legal Rulings, Rights of Reply.
- Laypersons in this Appeal had to suddenly come up to speed with both unpredictable/overnight preparation of the Legal Ruling questions, cross examination of expert witnesses and Rights of Reply, as the Appeal ran out of time.
- Where was Heritage Victoria and state level defence of state heritage as a **Council and community** members were left to attempt to defend state heritage at the VCAT?

5. Clarification and clear identification of '*State policies*', state heritage policy and other policies and their connection to formal '*State Precincts*', as asserted by, or at, the VCAT.

- Inadequate identification and clear documentation, relevance criteria and the evidentiary basis, of ***State policy*** as asserted in the submissions and VCAT decision in this case study.
- Clarification of the hierarchy and status of the confusing array of policies- as applied at the VCAT and affecting state heritage.
- State policy maps, policy documents and delineations were nebulous, inadequately defined, or not tabled as evidence, but used in the VCAT decision, and favoured the private applicant.

- Clarification is needed of Victorian State Heritage Policy, in relation to other **State policies**, asserted at the VCAT.
 - If **State policy** was dominant on such distinguished landmark heritage sites, why was the application not called in by the Minister or referred first to Heritage Victoria or the Victorian Heritage Council?
- 6. Heritage facadism, and questions of measurable, reasonable, proportional spatial impacts on heritage, at the VCAT and subsequently at Heritage Victoria.**
- The relevant legislation needs reform or the VCAT needs to understand and assess the **proportional impacts of a development** and assess conditions appeals on a state heritage cluster site with **precautionary principles**, ensuring proper referral of heritage sites, beyond the protection of a façade of a locally significant heritage building, [Easthill House], given the VCAT's power of removal of protections on the other state heritage sites on this heritage cluster.
 - The **Mackillop birthplace allotment** is proposed to be reduced to a **site façade** by the impacts of heritage demolition/ excavation, site removal, development impacts. And by the implications of the applicant's private, concealed, legal category documents reducing significance to a **token front section**, and as illustrated in discovered **private maps**.
- 7. Clarification of the Private development of state heritage sites- 'Right to expand'**
- The suggested right of a private business' mandated '**right to expand**' and the definition of '**higher order areas**' by the VCAT, needs clarification, in terms of heritage impacts.
- 8. Clarification of the status of state heritage sites in 'State precincts'.**
- VCAT did not elaborate the indication why a private applicant [private hospital] has an implied, **mandated right to expand, under State policy**, at the expense of severe heritage impacts on a cluster of three state registered sites.
 - Clarification needed of '**higher order areas**' as designated by the VCAT, where state heritage sites are situated in or near, ill-defined areas of State Health and Education Precincts.
 - The boundaries and limits of State Precincts need clarification. Are there formal maps for these Precincts?
 - Which appropriate authority can clarify the delineation and status of '**State Precinct**' **boundaries and official maps**?
- 9. Certification of maps used in planning processes- the need for authoritative or registered versions of maps in applications and VCAT Appeal processes.**
- The problem of unsourced or **privately devised or revised maps**, used to appropriate or assert development arguments on state heritage sites at the VCAT and in the Heritage Victoria process/decisions. This was the subject of detailed submission to the Minister for Planning, HV and the VHC by the Case Study in 2020. A response is awaited.

10. Duplication of processes on state heritage sites and the resulting contradictions affects community trust in these administrative authorities.

- It appears the VCAT Tribunal can simultaneously refer a Victorian state heritage site to Heritage Victoria, and also make a decision to allow substantive development and destruction on the same state registered site, by removing protective conditions, namely the cultural site, birthplace allotment of Mary Mackillop - to illustrate from the Case Study:

'We exclude the respondent's submissions regarding the birthplace of Saint Mary Mackillop and its pilgrimage function because these are matters for Heritage Victoria. The birthplace is within the curtilage Edensor/Dodgshun House and its pilgrimage function relates to that place'. Para 29.

Nevertheless the Yarra Council protective conditions were removed by the VCAT, leaving the heritage sites apparently unprotected.

11. Jurisdictional and legal confusion between Planning and Heritage processes.

- Increasing community confusion of jurisdictions of Heritage/planning decisions, Planning Legislation, Heritage legislation, Case Law and Legal Ruling at the VCAT.

12. VCAT jurisdiction and 'materials'

- The lack of clarity for rigorous design standards and aesthetic responses to heritage sites and also of responsibility/process for inappropriate/dangerous materials such as **alucubond**, which was proposed in or adjacent to heritage sites, precincts and overlays.
- The need to clarify the responsibility for decision on materials, before removing protective conditions, on or near state heritage. ['Where does the buck stop?']

13. Heritage Victoria and the VCAT

Victoria needs an independent custodian and authority on state heritage

- Heritage Victoria must be reviewed to allow it to strenuously defend state heritage at the VCAT, otherwise it is left to the under-resourced local councils and the community.

14. The VCAT and the use of the nebulous term '*net community benefit*' by the VCAT to justify development.

- The ***net community benefit*** concept is meaningless, unless it has been objectively quantified by independent lead agencies in relation to a specific category of development.
- For example, a private hospital entity was decided to be of greater benefit than a state heritage site of wide national association. There was also a failure of formal 'community benefit' analysis, when considering that public funds support private hospitals through the Commonwealth subsidy of private health insurance.
- Private hospitals, assessed as **NOT A PUBLIC AUTHORITY** in the HV **Report**, appear to have ***carte blanche*** to develop on state heritage sites.
Unfortunately Australia does not seem to have formal, transparent, ***net community benefit***

criteria for private hospitals as compared to the USA, implemented by the Obama Administration with the Affordable Care Act.

- VCAT also does not have demonstrated, transparently devised, specific criteria for measuring **'community benefit'** appropriate for categories of private/business applications
- How are private hospitals, making private business decisions and largely a Federal Government oversight responsibility, weighed against Victorian irreplaceable state cultural sites] of wide community, international association and pilgrimage?

15. Concern about perceived appropriate levels of specialist expertise to weigh planning considerations, heritage and private hospital business assertions and implied private health needs, impacting state heritage - a matter for PLAN MELBOURNE or the VCAT?

There is a disconnect between private business planning such as a **private hospitals, and the public planning and heritage system in terms of required expertise to assess private[hospital] business and privately commissioned witness statements. There was no peak, oversight hospital/health expert review of the private hospital witness statements or public licence to expand on state heritage.**

- The VCAT Tribunal members did not profess any specialist heritage or health/hospital expertise.
- The VCAT forum is adversarial rather than problem solving.
- Local Councils are at a disadvantage [Yarra could not afford to counter the six [6] expert witnesses afforded by the private hospital].
- The VCAT decision and Heritage Victoria relied on the applicant-employed private health expert witnesses, to decide in favour of the removal of heritage protections for private hospital expansion, in a heritage-rich, inner-area of Melbourne.
- The current planning and heritage system is discombobulated in this example via a heritage conditional Council permit and VCAT Appeal, which allowed the expansion of a private hospital to substantively impact state heritage sites without a recognised, specialised, qualified, independent, peak hospital and health organisation examining the health and hospital implications, or providing a perspective in a **wider context of Victorian Health needs and the implications on the Public Hospital Precinct.**
- The theoretical elaboration of the role of PLAN MELBOURNE 2017-2050 to provide high level integrated planning solutions for a highly contested application, remains to be implemented
- Why was PLAN MELBOURNE or the Minister for Planning, not brought in to assist a more considered solution on such a planning impact and in tens of millions of dollars?

16. Further VCAT concerns:

- Implied justification for demolition **'if not highly visible, cannot be seen from the street'**, needs clarification as does not accord with approved heritage criteria.
- VCAT decisions disregarded **important historic streetscapes** in favour of development - example Brunswick St, Victoria Parade and landmark area Eastern Hill.
- The time-opportunity-workload- cost burden, of third party public interest submissions on Major Cases at the VCAT, on state heritage sites, is unsustainable, onerous and a wasteful process for all parties- and of duplication and confusion of jurisdictions.

(d) protecting third party appeal rights

- These rights are absolutely essential in a democratic framework and to counterbalance the domination of the development and property interests, who are largely profit driven.

(e) the role of Ministerial call-ins

- There was a **lack of independent scoping for alternative solutions, transparently explored and evaluated**, including alternative use of available space on the hospital precinct site to protect heritage, in this private hospital development.
- This application process was an example of the need for more consistent use of high-level **state oversight of planning processes** and decisions and how PLAN MELBOURNE or such body, may have brought a greater range of needed perspectives, skills and solutions to this process

(4) protecting heritage in Victoria, including but not limited to:

(a) the adequacy of current criteria and processes for heritage protection

1. **The need for the mandatory incorporation and the application of approved, identified, formal heritage criteria in heritage assessments-Australia ICOMOS.**

There are concerns about examples of administrative mistakes, both the **omission and inappropriate application, of heritage criteria**, in the Case Study example and which have already been detailed and notated to the Minister, the Executive Director of Heritage Victoria and the then Chair of the Victorian Heritage Council, in 2020.

The community awaits constructive responses to the problems of the mis-application or omission of updated **Australia ICOMOS** heritage criteria, in a heritage assessment of state registered sites, and their importance to **'comprehensive heritage assessment'** in relation to the impacts on the Edensor/Mary Mackillop birthplace allotment heritage site[s]

It is of concern:

- There appears to be **no consistent obligation in a Heritage Victoria Report**, to apply updated **Australia ICOMOS** criteria in the assessment of heritage permits and this is apparent in the case study example of the Mackillop site.
- The Executive Director appeared to have ultimate discretion, which can be unrelated to heritage concerns under the Section of the Heritage Act allowing decision under **'ANY OTHER RELEVANT MATTERS'**.
- This was a great 'get out' Section of the Act. It suggested any commercial or business applicant could develop state heritage, without compliance with up-dated heritage assessment and heritage relevance.
- The application of empirical methods and formal criteria to the examination of the various assertions, generalisations and revisionary heritage implications and to examine heritage impacts of development, in the Heritage Victoria **Report**, was not rigorous.
- The **evidentiary basis** of the later revealed **side-letters and concealed documents** of heritage impact on the state registered sites, as accepted by HV in its **Report, only some of which**, could be obtained by the OVIC Complaint process and **OVIC Inquiry** to the **DELWP** in

2021, were not transparently available in complete copy, [as part- transposed by HV], or available for public submission, in regard to the heritage assertions impacting the heritage site area.

- **Late, concealed, unadvertised, applicant submissions to HV** in a heritage application for a permit, or submitted under **loose HV RFI protocols**, prevented timely, transparent heritage accountability on important heritage sites.
 - **Unadvertised applicant submissions** to HV, transposed as applicant summaries in the HV **Report** are unavailable at the DELWP in 2021, despite community FOI applications and OVIC Inquiry, so are presently perceived as **secret or concealed documents** in a heritage process on a state heritage cultural site.
 - An Inquiry into transparency protocols for heritage and legal category documents submitted in a heritage process should be conducted by an independent process, as requested above.
2. **Further Transparency concerns in the heritage system due to the discovery of numerous concealed applicant submissions to Heritage Victoria in a permit application, after an FOI application by the Fitzroy Resident's Association in 2019.**

There are ongoing concerns about the purpose and efficacy of the mandatory advertising of heritage applications, and the transparency of the applicant's heritage impact submissions to Heritage Victoria, in applications for a permit.

This submission asserts the right of the community to understand the significance and existential parameters of a state registered cultural heritage site of public association, and any complete copies of HV transpositions of applicant summaries of unadvertised documents but concealed from public scrutiny, detailing heritage impact proposals and heritage theories affecting a site, as included in an application for a permit to Heritage Victoria or HV Report.

There is continued concealment of legal category documents connected to a state registered cultural heritage site:

Nearly three years after the HV decision on Edensor and the Mackillop site, neither the OVIC, nor the community under FOI Application, has been able to obtain by formal release from the DELWP/HV, two non-advertised, legal category documents of heritage impact relevance which were transposed as applicant summaries in the Heritage Victoria *Report* on Edensor and the Mackillop site [titled - *Report and recommendation to the Executive Director on application for a permit of 27 March 2019.*] These retained/concealed documents are described as *Restrictive covenant and legal instruments [lease]*

As these applicant documents appear to apply to a site of the most widely associated and originating cultural heritage site of the Roman Catholic Church's first Australian saint, and place of pilgrimage for the various international and Australian, Mackillop pilgrimage routes, including the Aussie Camino, something is seriously amiss.

The transparency of applicant submissions would enable these DELWP/HV documents, to be compared in complete copy, with similar documents at Landata, attached to the title of the Dodgshun House and the adjacent former Mackillop birth allotment, [later Edensor south garden area described as '*surrounding land*' '*significant*' in the Statement of cultural significance].

Complete copies of matching legal category documents, attached to the title of Dodgshun House were located in 2020, by a community search at Landata

Complete copies of these plans and intentions by the applicant/private entities, were kept from every level of the public statutory process - at the Yarra Council, the VCAT Appeal and the HV public advertising periods.

The applicant did not inform the large community attendance at the '60 minute Public Consultation Meeting' at Yarra Council in 2017, that the applicant intended to apply to reduce and downgrade [AMEND OR REMOVE] the state significance of this pre-eminent woman's cultural site, as part of the sequence of the permit application, nor any evidentiary material to support this revision of significance of the site of a great woman.

If this had been revealed, this should have required a separate statutory process under section 62 of the *Heritage Act* to *AMEND OR REMOVE* a place or object under the Heritage Act before a permit to develop.

There is significant public interest in this cultural site.

Applicants need to put their 'development cards on the table' at the beginning of the statutory process.

- There is no administrative review process for such an unsatisfactory situation.
- The matching Landata lodged documents appear to indicate the complete detail of the applicant's concealed heritage impacts, as **accepted** by Heritage Victoria in its **Report**, and contain underlying heritage assumptions or assertions about intended revision and downgrading of the Mackillop site significance, and privately devised maps of the site indicating revision of significance, which have been concealed from public scrutiny, including apparently from Yarra Council.
- By what **protocols** does the action of a private applicant/agent, in the submission of concealed legal category documents to HV, also have the stated right to **retain 'the evidence'** in a state heritage application, and meet best practice, heritage transparency standards?
- The dating of these copies at Landata indicates their pre-meditation, preparation and existence in the parallel period of the planning and heritage, and advertising process, but with the planned intentions [and evidence ?] for the **future amendment of the birthplace allotment**, and which align with permits and destructions, as allowed by the permitted development footprint of the private hospital redevelopment.
- Does Victorian heritage legislation intend or allow **removal of cultural significance in order to align with private development impacts?**
- Does it allow acceptance by HV, of an applicant's privately decided, non-transparent amendment plans of the [downgraded] significance of a registered site in a permit application ?
- Do current transparency protocols at Heritage Victoria have to examine and assess complete copies of applicant submission documents or does an applicant's summary version of a submission document, suffice for Heritage Victoria's acceptance?

3. The need for mandatory updated Conservation Management Plans and comprehensive heritage assessments before application for a permit

The omission of comprehensive heritage assessments and the untimely availability of updated, site specific, Conservation Management Plans.

- This omission appears to be caused by the lack of a mandated requirement for an up-dated site-specific, **conservation management plan**, before a permit application affecting Victorian state registered sites is commenced.
- Up- dated CMPs are an essential for **comprehensive heritage assessments**.
- This further affects a timely **Heritage Interpretation Plan** of a site, if a permit is granted.
- The timely availability of an **updated Conservation Management Plan** on a state heritage site, before the process commences should be mandatorily available for:
the early scoping,
the public consultation process,
the delegate's Report,
the heritage consultant's Report,
a Council Heritage Advisory Committee,
a Council Heritage Advisor,
the Council Planning Committee,
public objectors.
- And be timely available for further processes, including to:
Appellants/Submitters/respondents to the VCAT,
Council
Council heritage consultants
legal counsels,
expert witnesses,
the VCAT
Heritage Victoria
the Victorian Heritage Council
the Minister.
in assisting a comprehensive heritage assessment for informed decision.

[3] The over-application of Freedom of Information requirements and non-transparency needs to be investigated.

The restricting Freedom of Information requirements and costs affecting information of public interest in this this Case Study-

- the Heritage Victoria **Report and recommendation decision rationale and detail** on a permit decision,
- on unadvertised applicant heritage submission documentation, under the DELWP/HV administration.
- Currently HV should issue a **caveat** to public submitters, with the public advertising of applications for a permit, regarding its current practice of acceptance of late, concealed applicant information, 'letters' or 'commentary'.

(b) possible federal involvement in heritage protection

Federal Government oversight of corporate responsibility for cultural heritage

The destruction of the Juukan Gorge Caves W.A. has drawn many parallel matters which also affect Victorian cultural heritage sites. This Inquiry could draw lessons from the Federal Senate Inquiry into the Juukan Gorge destruction.

- In this Case Study also, there is a question of **corporate responsibility to cultural heritage**. Even if a corporate [or public-juridic entity], has a permit, there is corporate risk and reputational risk.
The application of ESG obligations would assist possible Federal government oversight, given private hospitals/private businesses, are under the responsibility of the Federal Government and gain some of their funding sources.
This raises the need for greater government responsibility for ensuring state cultural heritage is not impacted.
- Any Federal funding sources which allowed the private hospital to fund the high profile legal firms to apply various methods to apply to manipulate the process or detrimentally impact or develop state heritage and cultural sites, and conceal heritage impacts of information either at the VCAT Appeal and or, at Heritage Victoria, should be investigated, and development proposals should also be subject to specifically designed **Community Benefit Tests** and corporate **Environmental Social Governance Framework** obligations.
- The Federal Heritage System needs complete renewal to protect state sites of national importance, [these three Victorian sites should be considered for inclusion on the National Heritage Register].
- **A State and Federal Government audit** is needed of State and National heritage and **also women's heritage** given the number of sites being significantly impacted recently.

(c) separating heritage protection from planning administration

1. Heritage Victoria should be an independent, highly skilled heritage authority.

- This Case Study perceives that principles of high quality administrative independence are compromised and potential conflicts of interest are created by Heritage Victoria being under the administration or referred to as a 'business unit' [?] of the DELWP and its current development prerogatives, and needs to be investigated further.
- The community has perceived the process under the Heritage Victoria/DELWP administration and the Minister for Planning to be largely **unresponsive** to the detailed concerns and communications about the **dismemberment** of important Victorian cultural heritage, including **existential site integrity/ authenticity** and the quality of heritage custodianship.
- This also affects the **future usage and potential** of the sites as heritage and pilgrimage sites
- The level of appropriate erudition, cultural understanding and analysis of impacts on heritage sites, for example the HV Edensor **Report**, requires review and probable up-skilling.

- The comprehensive requirements of heritage administration, as originally constituted, required specialised knowledge, skills and understanding beyond the cursory assessments of a heritage site[s] as evidenced in this Case study.
- All the above are contributing to the growing community disillusion with the inadequate standards of design and development, impacting the distinctive areas of Melbourne, increasingly resulting in a hard-edged, generic city.
- Refer comments above (c) on the VCAT.

2. The need for an impartial and professional analysis of heritage

- The standard of heritage report writing should be reviewed and not allow dominant **transpositions of applicant and development/ business oriented material** such as in the Heritage Victoria **Report Case Study example**, which gives the appearance of ‘the tail wagging the dog’.

3. Non transparency, imbalance of heritage consideration- concerns at Heritage Victoria/DELWP.

- The dominance of concealed, transposed applicant summaries of documents, in the HV **Report** on the Case Study sites, has been detailed to Heritage Victoria in 2020 and noting there was a lack of balanced acknowledgement/analysis of the numerous public submissions including Peak Representative Organisations, expressing heritage concerns.

4. Thus equity/transparency concerns:

These comments also apply to the DELWP.

- These Representative organisations included the **National Trust of Victoria, Royal Historical Society of Victoria, the Victorian Women’s Trust and the Fitzroy Resident’s Association**, all detailed their concerns about various impacts on various heritage sites.
- These and other public submissions received inadequate analysis and transposition, given their representative concerns and the great cultural sensitivities of the sites.
- The use of applicant late side-‘*letters*’ and ‘*commentary*’ to HV, as a heritage submission practice by private applicants, was revealed, after **community FOI applications and OVIC inquiry to the DELWP in 2019-2021**. This needs to be examined and disallowed unless the application is fully re-advertised.
- The need for a review of HV ‘s **Request for information** [RFI] processes and protocols to ensure it is not a conduit for the applicant to provide **late, concealed and different heritage impact information**, compared to the advertised heritage impact documents Heritage Impact Statement and advertised plans, as experienced in this case study.[described by HV as a late ‘*letter/ commentary*’ by the applicant]
- HV does not have to provide a complete copy of its decision- **Report and recommendation to the Executive Director on application for a permit** [unlike the VCAT], to public submitters, who have to apply under FOI to the DELWP and pay \$29.50 for a complete copy, despite their heritage participation via submission, in response to public advertising.
- The question of whether the **Yarra Council has been transparently and fully informed of the concealed applicant heritage impact material** in the Heritage Victoria application process and **Report** on three iconic heritage sites in its municipality, or unless it also initiated FOI/OVIC applications, has not been clarified.
- Whether the Yarra Council was also denied referral comment on the concealed heritage submissions by Heritage Victoria, has not been clarified, and requires investigation as to the

extent of such a practice, in not referring late, concealed, applicant heritage impact material to Councils.

- Under current arrangements, even the Victorian Heritage Council seems to be out of the picture on such an important cluster of sites.
- The Heritage Council should have reviewed the sites before the application proceeded
- In this Case Study the complete HV **Report** revealed further unknown, unadvertised, applicant heritage submissions, which were dated up to 7 months after the mandatory advertising of the *Heritage Impact Statement*, necessitating further cost and FOI applications for copies of documents for public information.
- These late submissions were not available for public scrutiny.
- Heritage applications on state registered sites should not become **quasi-privatised**.
- Public scrutiny of potential heritage impacts is denied by such practice and creates the perception of a **private process on state heritage sites** or undue favouritism to a private applicant's submissions.
- This affects the integrity of Victorian state heritage and **can facilitate unscrutinised heritage revision or denialism**.

(d) establishing a heritage tribunal to hear heritage appeals

This submission conclusions from the extended experience over the last five years of the planning and heritage process stages in the subject Case Study:

- Victoria needs an independent, culturally inclusive, dedicated, user- friendly, highly informed Heritage Authority.
- It needs an organisation without the monolithic and conflicted/ bureaucratized features of the DELWP and the legalistic, expensive features of the VCAT.
- Various models of a heritage Tribunal would have to be proposed and put to public exhibition for thorough consideration, before further comment.

(e) the appointment of independent local and state heritage advisers

- Agree with the above.
- They need to be properly recognised as important to the **tourism and economic development** of the state, making important and skilled contributions to the reason why visitors are often attracted to areas of human scale, harmonious and distinctive urban design, special interest, sites of memory and aesthetic qualities.
- The advisors also need to be more available to assist with heritage restoration and revitalised **heritage interpretation** programs across Victoria.
- These need to be co-ordinated at State level to enable an **educated custodianship** of the Victoria's heritage and to counter anti- heritage attitudes.
- Indigenous heritage legislation needs to be compared and contrasted for some better models of heritage requirements e.g. mandatory conservation management plans.
- Heritage Victoria should also be enlarging the potential of Victoria's heritage **to revitalise Victoria**, protect heritage in the metropolitan and Regional Victoria. This is for the contribution heritage makes to education and civics, cultural understanding, the tourism and

visitor attractions, local employment and business, local identity and pride and the aesthetics and amenity of place.

- Heritage Victoria could be further enhancing our understanding of our history by developing interpreted and themed **heritage and cultural maps and routes** across the state.
- The Mary Mackillop site highlighted the treatment of a **rare woman's site** from which multiple **pilgrimage routes** emanate.
- An economic and social analysis of such interpreted routes is needed, given the increasing popularity and already recognised benefits of pilgrimage, religious or secular.
- This submission requests the Committee or an independent heritage authority to facilitate the greater emphasis on women's history and memorialisation, including **women's maps and routes of historic interest, to educate and counter the current disregard for authentic preservation of heritage and a pilgrimage site, as detailed in the Case Study.**
- **Also for equality and cultural respect**
- Similarly themed interpretation paths of history open up **multiple perspectives** of our history.
- **Properly resourced heritage funding**, restoration loans and financing models need to be introduced or re-iterated to conserve the reminders of the Victorian story.
-

(f) the role of Councils in heritage protection

This Case Study illustrates that the Yarra Council attempted to protect state heritage with protective conditions but the VCAT removed the protections before the Heritage Victoria application process.

- In the Case Study, Yarra Council was further disadvantaged by the following:
- The lack of **up-dated Conservation Management Plans** thus **preventing comprehensive heritage assessments** for Edensor and the Mackillop birthplace allotment and the former Eastern Hill Hotel.
- The important, **necessary scoping and public consultation** was hindered by truncated, cursory or omitted heritage assessment, and the later discovered lack of transparency of heritage impacts and documents at Heritage Victoria.
- The Council delegate's Report predominantly emphasised the non-quantified and the asserted economic benefits for Yarra of a private hospital development. This was only partly modified by the Council decision to impose protective conditions on the state heritage sites, later removed by the VCAT after the developer/applicant's Appeal.
- Concerns about the inadequacy of some Council heritage consultant reports, also lacking timely availability and consideration of an updated CMP, and which omitted elaboration of the history significance and cultural heritage detail of the sites for Council consideration.
- Note the importance of **third party objections in the heritage process** -the later public submission process was essential to alert the Council to these important state heritage details and cultural heritage concepts which the Council delegate's report largely economic development priority emphasis and a heritage consultant's Report had omitted.
- Without the public submissions, the delegate's report would have recommended to the Council, almost **unqualified development** of state heritage sites.
- All Councils with Heritage Precincts should structure Heritage Advisory Committees and a Heritage Advisor/Conservation architect, into thorough scoping and considerations.

- Heritage advisers need to be independent sources of knowledge and equally or more influential than the planning and 'engineering' Departments of Councils.
- Conservation architects ditto, also need to be valued and available at every Council with Heritage Precincts.

(g) Penalties for illegal demolitions and tree removals

- Deterrents need to be increased considerably including punishment fitting the act of destruction to ensure the area is restored and enhanced.
The psycho-social-environmental impacts of heritage destruction need to be assessed and compensated.
- More financial, deterrent actions are needed, not apologies and business as usual resumed.

(6) Other matters the Committee considers relevant

[i] Women's sites of cultural heritage

- This subject Case Study highlights the Victorian Government must address the deficit of **women's memorialisation and cultural heritage recognition**. The Mackillop site impacts are the illustration of this disregard for protecting sites of memory, of great cultural value of a women's contribution to Australian history.

[ii] The standards of rigor and methodology in heritage analysis and Reports in the heritage and planning professions/processes.

Conflicts of interest in the heritage and planning professions

- The critical **research detail and evidentiary standards of reports** on the state registered sites in the Case Study, were found to be seriously lacking; at the Council planning process stage, the VCAT Appeal, including expert witness statements, and in the Heritage Victoria Report.
- Cultural heritage **significance** and **cultural value** was not adequately elaborated and weighed against development and destruction and **Australia ICOMOS** criteria.
- There was a perception of the apparent lack of rigor and detail or quality assurance standards in the profession, often necessitating voluntary and onerous research by the community to complete the necessary detail of a heritage site or heritage report, including thorough evidentiary examination of a heritage matter.
- The thorough application of international heritage criteria, provided by the **Australia ICOMOS** and **the Burra Charter** appears to be optional in various heritage and planning reports. This included blatant heritage assertions without evidentiary or comparative analysis.

Professional heritage/planning consultant standards - There is a need to ensure rigorous standards and ethical frameworks to correct some of the problems observed in this Case Study:

- The following questions require peak professional examination and clarification.

- What are the state and national approved qualifications for the heritage and planning professions and various specialist areas, including expert witness and advice?
- What ethical frameworks are mandated to control conflicts of interest?

-Is a 'planner' qualified to advise or provide expert witness on conservation and heritage without further qualifications?

-Likewise should heritage consultants openly providing advice/expert evidence/opinion, on planning matters?

-Should an architectural historian or consultant give evidence on cultural heritage without demonstrated cultural heritage qualifications?

-How should consultants and expert witnesses present their credentials?

-How valid is applicant-paid expert witness evidence, from an ethics and integrity perspective?

-How should conflict of interest be addressed?

- There is a need for a highly credentialed diverse group of experts for availability to a **blind pool of highly qualified and specialised heritage experts**, to counter the current perceptions of inevitable conflicts of interest which increasingly compromises the image of the profession.

[iii] The question of proportionality/reasonableness of heritage impacts.

Incremental destruction of state heritage

The proportionality of destruction or removal of state cultural heritage places and state heritage sites, needs an urgent review.

The perceived inadequate proportionality of protection of women's heritage sites and memorialisation in Victoria has been documented and is illustrated by a high profile example in this Case Study.

- The informed heritage community is aghast that just eight years after her canonisation to sainthood in 2010, as St Mary of the Cross, [Australia's first Roman Catholic saint, of state and national and religious celebrations including a parade honouring her birthplace site], that private entities were permitted to substantively apply to excavate/remove her Victorian state cultural site, part-demolish heritage fabric, intrude multi-storey development and generic hospital landscaping, leaving a token front portion to be salvaged.
- And the further application to HV, post-permit, for amendments to increase excavation on the Mackillop birthplace allotment, for basements closer to Dodgshun House in 2021 and to which **the public has no submission rights**.
- Is this a symptom of why there are so few Victorian women's cultural sites as recently documented in the media?
- The spatial engulfment of heritage sites requires review of proportionality of impact.

[iv] The accountability of heritage administration

- Accountability standards should ensure that Heritage Victoria permit *Reports* should be available to public submitters who have participated in good faith in a heritage process
- **Heritage Victoria Reports should not require a payment and FOI applications to the DELWP.** How difficult are they to email to participants?
- All applicant submissions in a heritage permit application should be transparently advertised and listed and added to the advertised **Heritage Impact Statement.**

[v] Legal Judgements, Human Rights and Cultural heritage

- This Inquiry is urged to obtain the latest heritage and legal updating on human rights and obligations affecting cultural heritage.
- This should include legal judgements on cultural heritage destruction and International legal decisions.

[vi] Restorative Justice, compensation or mediation for affected communities for destruction of cultural heritage

- What processes are, or should be, available to communities of interest to compensate for the destruction of cultural heritage sites, including the role of restorative justice?

I request the Committee and Victorian Parliament to introduce urgent action on these concerns.

[REDACTED]

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[REDACTED]

[REDACTED]

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14/01/2022