

**Submission
No 170**

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

Organisation: Australia ICOMOS

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31 January 2022

The Secretary
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By email: planninginquiry@parliament.vic.gov.au

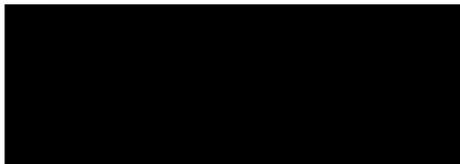
Dear Secretary

Inquiry into the Protections within the Victorian Planning Framework

I write to provide Australia ICOMOS' submission to this inquiry, as attached.

We would be happy to provide further information if requested.

Yours sincerely



**Professor Tracy Ireland MICOMOS, FSA
President**

Australia ICOMOS Submission
Inquiry into the Protections within the Victorian Planning Framework

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Introduction

Australia ICOMOS is grateful for the opportunity to provide a submission to the Parliamentary inquiry into the adequacy of the *Planning and Environment Act 1987* and the Victorian Planning Framework established by the Planning and Environment Committee of the Legislative Council.

ICOMOS – the International Council on Monuments and Sites – is a non-government professional organisation that promotes expertise in the conservation of cultural heritage. ICOMOS is also an official Advisory Body to the World Heritage Committee under the World Heritage Convention. Australia ICOMOS (<https://australia.icomos.org/>), formed in 1976, is one of over 100 national committees throughout the world. Australia ICOMOS has over 750 members in a range of heritage professions. We have expert members on a large number of ICOMOS International Scientific Committees, as well as on expert committees and boards in Australia, which provides us with an exceptional opportunity to see best-practice nationally and internationally.

Australia ICOMOS does not generally engage in advocacy for or against a particular development unless there is reason to question the adequacy of the planning process to achieve proper consideration of heritage issues. However, we have a particular interest in the broader development of policies and processes that have the potential to either enhance or prejudice a best-practice approach to the conservation and management of Australia's cultural heritage places. We are also committed to the application of the principles of the *Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance 2013* (<https://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf>). The Charter is the nationally recognised guideline for achieving appropriate heritage outcomes, which is also acknowledged as best-practice internationally.

This submission mostly provides responses to the Terms of Reference which relate specifically to heritage (Section 4), and some responses relate to other references which impact heritage. The submission also provides some general comments regarding the identification, protection, utilisation and promotion of the cultural heritage of Victoria.

This submission has been informed by a survey undertaken jointly by the National Trust of Australia (Victoria) and Australia ICOMOS.

As an initial comment, Australia ICOMOS notes that the heritage system in Victoria is generally in a very good state and is amongst the best jurisdictions for the management of cultural heritage in Australia. Although there are several key improvements that could be undertaken to the system, as detailed below, the principles of the existing system are sound. The separation of the management of places of state and local heritage significance, through the *Heritage Act 2017* and *Planning and Environment Act 1987* respectively, is an appropriate system, and the continuation of this approach is supported by Australia ICOMOS.

Australia ICOMOS also supports the recommendations set out in the *State of Heritage Review: Local Heritage* (Heritage Council of Victoria 2020) and believes that this report is of particular relevance to this inquiry.

Reference (3)(e) the role of Ministerial call-ins

The current trend for the Minister for Planning to 'call in' decisions at both local and state level is extremely disturbing from a heritage perspective. Some of these are done through the Priority Projects Standing Advisory Committee, pursuant to Part 7, section 151 of the *Planning and Environment Act* and some relate to *Heritage Act* matters.

While Australia ICOMOS respects the right of the Minister to determine an issue, we are particularly concerned where this is done without a public forum or the input of heritage experts at local and state levels. We would like to see the Minister receive the best possible input into decision-making, including from his own appointed Victorian Heritage Council, and believe the current trend and process weakens the system where decisions do not allow for systemic review.

This trend should also be seen in a wider context, where Ministers in other states are also using call-in powers which appear to undermine the standard and expert heritage processes for development/heritage approvals. There is a perception that such powers are being used more often, and that an increasingly lower threshold for special treatment is being applied.

Reference (4)(a) the adequacy of current criteria and processes for heritage protection

Criteria

The existing criteria used for heritage listing in Victoria, at both a state and local level are based on the nationally recognised HERCON criteria. These are a well-established and an appropriate set of criteria to establish heritage significance for the purpose of imposing statutory controls to a place. Within Victoria there is also a hierarchy of heritage protection with places of state value protected under the *Heritage Act* and places of local value managed under the *Planning and Environment Act*. A further level of protection exists for places of national and world significance through the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth).

It is appropriate that a hierarchy remains in place for the management of heritage places, as places have differing values and management considerations.

It is noted that this is not the case for places of Aboriginal cultural heritage significance, where values should always be self-determined, although these considerations could be better integrated in the existing system. We draw your attention to the recently released *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia* (HCOANZ 2020).

At a state level, the application of the criteria is supported by the *Victorian Heritage Register Criteria Threshold and Guidelines* (Heritage Council of Victoria, 2012, amended 2020, https://www.heritage.vic.gov.au/__data/assets/pdf_file/0024/512961/VHRCriteriaandThresholdsGuidelines_2020.pdf). Acknowledging that the application of the criteria at a local level can be somewhat uneven and is often a highly contested issue at planning panels, it is recommended that similar guidelines be established for the application of a heritage overlay (HO). This could be incorporated into an updated Planning Practice Note 1 Applying the Heritage Overlay August 2018 (PPN01, https://www.planning.vic.gov.au/__data/assets/pdf_file/0030/96555/PPN01-Applying-the-Heritage-Overlay.pdf) or be a standalone document.

At both a state and local level, there is a need for greater integration of other values including Aboriginal cultural heritage, natural values and places of historical or social value only. Recent projects such as the Shared Values (<https://heritagecouncil.vic.gov.au/research-projects/past-projects/recognition-of-shared-values/>) and LGBTIQ+ projects (<https://www.heritage.vic.gov.au/about-us/our-programs-and-initiatives/a-history-of-lgbtq-victoria>) undertaken by the Heritage Council with the Aboriginal Heritage Council and Heritage Victoria respectively are important steps in addressing these issues, but more support for such projects at all levels of government are needed.

Another weakness of the system is that often local values of state listed places are not adequately recognised in the system, particularly where they form part of a precinct. There needs to be greater integration of local and state heritage values.

Process

A significant gap in the system is the inability for the community to easily nominate places of local heritage value for protection. This often leads to nominations to the Victorian Heritage Register for places that are of clearly of local value but unlikely to meet the threshold of state significance.

While the *Heritage Act* allows for places which do not meet the threshold of state significance to be referred to local government for protection, it is usually difficult for municipalities to engage in amendments for single places. This creates a situation where communities strive for state listing because the more appropriate local level can be hard to achieve. Australia ICOMOS suggests that this situation is behind some of the community's greatest disappointments and frustration. It can partly be addressed by more comprehensive local heritage studies, however as the field of heritage protection continues to develop and change, a mechanism is also needed to facilitate the once-off assessment of locally significant places.

There may be an opportunity to establish a system that allows for the easier application of the heritage overlay to places that have been recommended for inclusion by the Heritage Council of Victoria, or to establish a process for the nomination of places of local significance by members of the public.

Reference (4)(b) possible federal involvement in heritage protection

The Commonwealth Government is involved in the protection of places of National Heritage and Commonwealth Heritage value through the *Environment Protection and Biodiversity Conservation Act* (EPBC Act) which establishes the National Heritage List and Commonwealth Heritage List. This ensures the protection of places of national significance, however it remains appropriate that places of state and local value are managed by the relevant jurisdictions.

Under the EPBC Act, the Commonwealth also has responsibility for Australia's places on the World Heritage List.

None the less, many of the Commonwealth functions under the EPBC Act have been or are proposed to be devolved to the states by way of bilateral agreements. While this may be beneficial in theory, avoiding the need for separate Commonwealth and state heritage approval processes where places are also on the state register, there is a concern that the state may not be adequately resourced to undertake this role under the EPBC Act. This review should ensure that the relevant state bodies are appropriately resourced to fulfill this important function in addition to their existing responsibilities.

What is important at a federal level is increased leadership in facilitating cooperation and knowledge sharing between states and territories with an aim to promoting better heritage practice nation-wide.

This could include the strengthening and better resourcing of Australian Heritage Council (AHC) and the Heritage Chairs and Officials of Australia and New Zealand. The development of national guidelines and process documents by a body such as the AHC would be of great help to all jurisdictions.

Reference (4)(c) separating heritage protection from the planning administration

The removal of heritage considerations from the planning administration is not supported. In the interest of orderly planning outcomes, heritage needs to be considered holistically with other planning objectives to ensure well-balanced and considered outcomes. Rather than removing heritage from the broader planning system, better training and resourcing should be provided to planning authorities for the management of local heritage. This could include the establishment of specialist local heritage advisors at a state level (within DELWP) as recommended by the State of Heritage Review, as well as the development of tool kits and specialist training resources. This is further explored in response to References (e) and (f) below.

Australia ICOMOS notes ongoing support for the separation of the management of places of state heritage value under the *Heritage Act*. The *Heritage Act* was amended in 2017 and while there are still improvements to be made to this system, it generally operates well and the Heritage Council of Victoria and Heritage Victoria provide leadership in this space, noting the significant resource demands on both bodies.

Reference (4)(d) establishing a heritage tribunal to hear heritage appeals

The establishment of a separate heritage tribunal to hear heritage related cases at the local level is not supported. At the state level, an independent body has already been established for the hearing of cases through the *Heritage Act* (the Heritage Council) and this separation for the consideration of state listed places should be retained.

At the local level, the existing Victorian Civil and Administrative Tribunal (VCAT) and Planning Panels Victoria are already well-established. Rather than removing the consideration of heritage from these systems, the existing system should be strengthened and supported to promote best-practice heritage outcomes. This could include the consistent appointment of members with substantial heritage expertise and/or the creation of a heritage specific list at VCAT to ensure that hearings of particular heritage sensitivity were heard by such members. If particular cases required specific knowledge, for example Indigenous cultural heritage or World Heritage (eg. within the Royal Exhibition Building and Carlton Gardens buffer zone), sessional members with expertise could be appointed to ensure that these matters were given appropriate weight and consideration.

Australia ICOMOS believes that there are currently some exceedingly poor heritage outcomes from VCAT decisions with facadism, cantilevered new developments dominating heritage places and other examples where the *Burra Charter* process which starts by understanding the heritage values of the place has been ignored. Inclusion of members with substantial heritage expertise would assist to address these and also assist in addressing community heritage concerns.

In addition, there are generally a number of improvements that could be made to the appeals system including:

- better resourcing and financial support for all parties;
- increased support for mediation; and
- the tribunal being resourced to appoint independent experts rather than parties funding experts.

These issues may be more appropriately considered under other terms of reference.

Reference (4)(e) the appointment of independent local and state heritage advisers

Independent local heritage advisers are important for the appropriate protection and management of heritage places by local government, allowing for expert advice within strategic and statutory environments. Resourcing, however, is critical to the success of this. With respect to funding, some local Councils in Victoria fund these roles to an appropriate level, however, this is not consistent across the state with some Councils not able to fund these roles at all and others providing inadequate contact time for advisers (for example, one day a month as opposed to weekly). This can have an enormous impact on the quality of heritage outcomes. As noted above, the inclusion of heritage considerations within the broader planning administration is important and greater support for the appointment of independent local and state heritage advisers would help to support this outcome.

While funding local heritage advisory roles should remain a local municipality responsibility, as recommended in the *State of Heritage Review: Local Heritage 2020* report there should be assistance at the state level in relation to staff education and associated resources, establishment of consistent local advisory standards, and assistance with the sharing advisers across municipalities. This would require additional funding to Heritage Victoria to encourage a state-wide approach.

There is also a role for state heritage advisers on an as-needed basis rather than a panel. Heritage Victoria performs some of this role already, however they would require further resourcing where additional skills, inputs or staff are required to carry this out.

There are some good guidance documents and policies for independent heritage advisers, for example the Australia ICOMOS *Burra Charter* (<https://australia.icomos.org/publications/burra-charter-practice-notes/>) and Australia ICOMOS Ethical Principles (<https://australia.icomos.org/about-us/australia-icomos/ethical-principles/>).

A key recommendation in the *State of Heritage Review: Local Heritage* that relates to the appointment to local and state heritage advisers is:

- the establishment of dedicated local heritage roles within DELWP Planning to provide necessary focused leadership and direction.

Reference (4)(f) the role of Councils in heritage protection

Local councils have a statutory obligation to ensure that the planning schemes 'conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value'.¹ They do so by undertaking heritage studies or assessments of places thought to be of heritage value. Councils then use the information in these heritage studies to decide if a place or area has sufficient heritage significance to warrant statutory protection at the local level. Following a planning scheme amendment process, these places are then managed in accordance with local heritage policy.

¹ *Heritage Act 2017*, Sect on 19(1), (2)

With these key actions in mind, the role of Councils in heritage protection is critical to the ongoing identification, protection, and management of the majority of the state's heritage places. This is particularly the case with the identification and management of heritage precincts, which span large portions of the state and have the largest impact on the day-to-day built environment experience of the general public. With this influence comes a huge responsibility for the protection of Victoria's heritage and a critical need for consistency in a range of areas. These include the identification, protection and management of heritage places, staff and public education, and the quality of local heritage policy, amongst other matters. Consistency, however, is dependent in part on adequate resourcing. This was a key area of concern for respondents to the Australia ICOMOS and National Trust Victoria survey, with many stating that financial support and broader resourcing is inadequate at the local level.

A key area of variation across the state is the preparation and adoption of heritage studies. As identified in the *State of Heritage Review: Local Heritage 2020*,

'Approximately one-third of all councils surveyed (34%) have undertaken a heritage study in the past three years: 61% of metropolitan councils have done so, compared to 16% of rural councils. No council from the Rural Small Group has undertaken a heritage study in the past three years'.²

This disparity may be a result of the types of studies being undertaken (some municipal wide, others suburb or site-specific) and the number of heritage places in the municipality. However, it is most certainly influenced by the ability of the Council to undertake studies. In addition to providing adequate resources to undertake heritage studies in the first place, Australia ICOMOS proposes that there be greater encouragement of local government by state government to implement the recommendations of local heritage studies. This includes following up on places recommended for the Victorian Heritage Register which commonly remain only as recommendations in a gap study report.

The above issues, as well as increased education and knowledge sharing amongst councils, may be assisted through a stronger focus on local heritage planning leadership from DELWP, but preferably from within Heritage Victoria. In the past, Heritage Victoria had a dedicated local government planning team but, after it devolved to DELWP, the influence of this group appears to have been diluted. Such a group could monitor ongoing progress across the councils, for example by the establishment of requirements to undertake gap studies and reviews within a certain timeframe.

There is a reluctance amongst some Councils to assess some types and components of heritage places, such as structures from the post-war modernist period, interiors, landscapes, gardens and trees, amongst others. There is a need for continuing education for Council staff and the broader public about the changing understanding and appreciation of heritage, a greater engagement with Indigenous people as part of these processes, and ongoing resourcing so Councils can continue to evolve with changing heritage practice.

In relation to the management of heritage places through the statutory planning system, the inclusion of expert heritage advisors within this process is vital for the appropriate function of Councils. This is discussed above under Reference (e). Further, there is a need for planners and councillors to have greater heritage education, through means such as tertiary level heritage education for planners and government support and resources such as an information pack for councillors. The Australia ICOMOS

² Heritage Council of Victoria a., author & Heritage Council (Victoria), ssuing body. 2020, *State of heritage review : local heritage 2020* Heritage Council of Victoria a, [Melbourne, Victoria] viewed 29 January 2022.

Introduction to the Burra Charter video series, amongst other resources, would assist in filling this knowledge gap (<https://australia.icomos.org/resources/burra-charter-series/intro-to-the-bc/>)

Inclusion of heritage matters and support in planning programs within DELWP could also provide a useful vehicle for improving heritage delivery. For example, the Regional Planning Partnerships group which services 48 regional Councils could help those Councils which possibly have the greatest need for access to up-to-date heritage information.

Key recommendations from the *State of Heritage Review: Local Heritage* that relate to improving the role of Councils include:

- creation of a 'Heritage 101' information packs for councils, new councillors and the public;
- the creation and maintenance of a centralised, up-to date repository of clear and consistent guidance material;
- direct support and assistance to ensure base-level heritage studies are completed and translated into the planning scheme;
- advocate for a tertiary heritage planning subject; and
- local government heritage forum expansion.

Reference (4)(g) penalties for illegal demolitions and tree removals

The destruction of the locally significant Corkman Hotel in Carlton in 2016 is a primary case study for the need for meaningful penalties for illegal demolition. Despite resident complaints and a stop work order from the City of Melbourne, city inspectors were not able to reach the site in time before the hotel had been completely demolished. Amidst community outcry, there has been a significant process since to seek penalties for the developers.

We note that the Victorian Parliament passed legislation to alter the *Planning and Environment Act 1987* with the aim of preventing another scenario like this from happening. The amended law will allow existing permits to be revoked and new permits issued for specific purposes when sites are illegally demolished, powers to stop development on such sites for 10 years, and an indictable offence for builders to carry out works without a permit. Australia ICOMOS looks forward to seeing what impact this will have on this serious issue.

While Australia ICOMOS understands that the deliberate and sudden demolition of heritage places remains a key area of concern, demolition by neglect is having a wider impact on heritage places across the state. This is a phenomenon that is clearly visible in the built environment across Melbourne and the state more broadly. Example sites may include the Brunswick Brickworks and Spurling House Brighton, both of which are places of state significance on the Victorian Heritage Register.

Following the degradation of such places, it is common for the developer to then put forward an engineer's report to say that the place is unsalvageable due to its condition and its inability to meet current building regulations. Including qualified heritage advisors in decision-making at an early stage is an integral function in these scenarios. The *Heritage Act 2017* and *Planning and Environment Act 1987* must be strengthened to prevent and deter this type of illegal work, including streamlining processes for penalties for those allowing heritage places to fall into disrepair, cumulative neglect leading to impacts from fire, pests, squatters etc, as well as the illegal removal of fabric during an assessment period. It is also recommended that the National Trust *Demolition by Neglect* report is considered, and its recommendations implemented (<https://www.nationaltrust.org.au/initiatives/demolition-by-neglect/>).

Putting aside inadequate recording of significant trees in local government schedules, the illegal removal/demolition of protected trees is an area of great concern in Victoria that requires further legal enforcement. Tree conservation is by its nature complex, given that they are living, ephemeral elements that have their own life cycle and may at times require intervention or replacement. However, the penalties for illegal removal (including poisoning) of significant trees is not sufficient to prevent such occurrences. Further support is required to strengthen the abilities of local Councils to monitor such works occurring in the first place, and to then be able to follow this up with meaningful enforcement action.

The destruction of native trees and plantings across the state is having a tremendous impact on Aboriginal cultural heritage. Apart from increasing the penalties for removing such elements, further consultation must be undertaken with Aboriginal people across the state to move towards better solutions for the conservation and protection of significant native trees and plantings.

Key recommendations from the *State of Heritage Review: Local Heritage* that relate to illegal demolition include:

- development of a 'demolition by neglect' model local law; and
- facilitation of discussions to clarify demolition application processes.