

**Submission  
No 175**

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

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# Inquiry into Protections within the Victorian Planning Framework

Submission to the Inquiry with particular reference to heritage  
planning and permits and Heritage Victoria with a case study

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# 1 Executive Summary

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- 1.1 This submission is made to the **Inquiry into Protections within the Victorian Planning Framework** with particular reference to building sector heritage planning and heritage permit applications, assessments and appeals. It also addresses the complexities of other legislation that necessarily must interact with the Heritage Act 2017 and associated regulations, property ownership and third-party rights with respect to notifications of permit applications, rights of review and appeals, regulatory oversight and consumer protection.
- 1.2 Heritage permit applications vary in their nature from minor works to some of the largest building projects in Victoria. Many are for small to medium works, but these deserve no less attention than major works, particularly if the place has the highest level of listed protection. Unfortunately, advice, assistance and support from Heritage Victoria at those lesser levels is not adequate or necessarily correct. The efficacy of applications is in the hands of the applicant, but authorities can do better and assist at this early stage to mitigate later difficulties (Section 3).
- 1.3 Heritage permit applicants seek predominantly to satisfy their self-serving objectives and minimize their obligations. This is well evidenced by media reports, community experiences, and the all too frequent loss of built heritage. It is the unfortunate nature of many people that they will use devious or even dishonest means to achieve their goals, and unless permit systems and their review and assessment processes are significantly improved these systemic failures will continue. Permit reviews and appeals are at the core of these problems, as outlined in section 4.
- 1.4 There are also complexities that are not well known or understood, but which proponents exploit to their benefit. Proposed building works involve a complex array of legislation, all of which interacts – the left hand doesn't know what the right hand is doing. Unless authorities and assessors are aware and knowledgeable about this and work together better to deal with what otherwise falls through the cracks, heritage places particularly remain at risk (Section 5).
- 1.5 Regulatory oversight is the key, but it is also arguably one of the most difficult problems facing governments today. Section 6 discusses systemic problems and failures, possible alternatives and the important question of personal accountability through best practice, best people and professional registration of assessors.
- 1.6 Consumer protection and community satisfaction are essential, but heritage protection is the ultimate goal. Nowadays many would say that consumer protection and heritage protection are at an all-time low. Only lip-service is paid to community participation and feedback, and authorities cannot keep up with emerging social structures (in the context of this submission, multi-unit community living) and lifestyles. (Section 7).
- 1.7 Section 8 is a case study of a heritage listed property in St Kilda East where, in 2017, a heritage permit was issued and works undertaken that resulted in the demolition of important building parts of primary and secondary significance as clearly defined under a Conservation Management Plan. The case study demonstrates something about all of the preceding sections, some of it in detail, to illustrate factual failures in the processes of Heritage Victoria, and which un-necessarily led to the destruction of part of a heritage place that everyone thought was safe due to its highest level of heritage protection available in Victoria.
- 1.8 The important take-aways for resolution are:
  - Improvements to guide and assist in preparing heritage permit applications;
  - More rigorous, accountable and transparent assessments, with appeal rights;
  - Understand the effects of legislative interaction, and multi-owner property rights;
  - Overhaul regulatory oversight, rationalise authorities, engage only skilled assessors;
  - Protect and respect consumers, provide active support, work to avoid disputation.
  - Learn and better understand from complaints and failures and change accordingly.

## 2 Introduction

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- 2.1 This submission has been prepared by a property and building sector professional practitioner with over 50 years' relevant experience, predominantly in Victoria but also internationally.
- 2.2 The submission is primarily concerned with heritage planning and Heritage Victoria, but is applicable in the wider context of property, planning and the built environment. It also concerns the complexities of interacting legislation across those sectors, the growth of community living environments with co-ownership and their multiple and often conflicting levels of governance.

### **Case study**

- 2.3 Most importantly, this submission is coupled with a case study which illustrates the difficulties faced by property owners of heritage listed places, as consumers of the public governance services. The issues raised are important also in the context of wider public interest in the protection of heritage places.

## 3 Heritage Permit Applications

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### **Nature of applications**

- 3.1 Permit applications are usually well prepared, researched and presented by qualified and experienced professionals with knowledge and experience in the relevant area of planning (e.g. heritage). Applications submitted by professional architects and planners will likely (but not always) be prepared with honesty and without embedded devious motives or intentions.
- 3.2 Some applications are not well prepared or researched. They are often prepared by practitioners who are not qualified, experienced or sufficiently competent in specialist areas such as planning and heritage matters.
- 3.3 For small projects individual property owners may submit applications for permits by simply following forms and checkboxes provided. The responsible agency is usually obliged to accept the application, and may have provided support in doing so, or they may encourage such applicants to seek professional advice.
- 3.4 Permit applications from any source may be flawed. Some are simply lazy in their approach; others are incomplete or even deliberately devious or dishonest in their content. Such applications often pass through the assessment process undetected.
- 3.5 The consequences of less than professional applications can be very serious, not least in wasting time and valuable resources, and in the difficulties of assessment and on-going management of works. And some result in errors that are unacceptable by any measure, often with unlawful outcomes that cannot be recovered.

### **Assistance with applications**

- 3.6 It is appropriate and important that relevant authorities and agencies assist applicants, particularly where applicants are self-represented, for small to medium projects. It is essential that such assistance be current and correct in the context of regulations, policies, and procedures, so those providing assistance must have a strong understanding of legislative requirements and planning/heritage controls relevant to their work.
- 3.7 Agencies must provide carefully prepared and readily available written guidelines that are up to date and written in simple language. "Application systems and processes must be adequately resourced to facilitate fully considered, independent decision making" (Victorian Ombudsman). Incomplete or erroneous advice leads to bad outcomes that cannot be easily undone or rectified, sometimes resulting in

serious financial and emotional consequences for both the community and the applicant.

## 4 Heritage Permit Assessments and Appeal

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### Problems with Assessments

- 4.1 When a professionally prepared application is submitted the reviewing role of the assessor and subsequent approval process is made easier and with more confidence. It is also unlikely (but still possible) that the application is not contaminated by embedded devious motives or dishonesty.
- 4.2 Flawed applications mean that assessors must apply greater rigour in their review and approval process. This is time consuming, expensive and more likely to cause un-necessary disputation.
- 4.3 Applications that are lazy, with careless mistakes have consequences because approvals may be given on incorrect information.
- 4.4 Deliberately devious or dishonest applications can lead to serious consequences, often measured by the devastating outcomes so well evidenced and reported in the media. They also result in personal life-changing effects on innocent bystanders and communities. The real dilemma is that these applications often pass through the assessment process by stealth and defects and irregularities go undetected due to inadequate scrutiny.
- 4.5 Good processes and decision making necessarily require effective review systems. Effective review systems require a strong understanding of legislative requirements and planning imperatives, and most importantly, transparency at every step along the way with well documented analysis, reasoning and rationale that demonstrates that the decisions or actions taken are reasonable of justifiable.
- 4.6 Best practice assessment relies upon the accountability of the assessor (personally) and their preparedness to acknowledge and repair any shortcomings or errors. Unfortunately, this is not human nature, and more often people will retreat to a position of defence or un-accountability if something goes wrong, even in the face of overwhelming evidence. Reviewers must have the highest competencies in their tasks so that errors are minimised. But additionally, reviewers must be trained and supported to acknowledge mistakes and deal with them co-operatively and transparently.

### Integrity of assessments

- 4.7 Mistakes have consequences and it is incumbent on approval authorities and their assessors to fulfil their responsibilities and duty of care to all parties in their decision making processes and outcomes, and avoid any conflict of interest, perceptive or real.
- 4.8 Assessment and assessor obligations must be clear and unequivocal. They must be obliged to follow guidelines of the Victorian Ombudsman including:
  - Regular training and awareness raising in relation to conflict of interest issues to support good decision making and ensure no adverse perceptions;
  - Ensuring records of decisions include sufficient detail of the analysis, reasons, considerations or rationale to enable a clear understanding of decision making processes and demonstrate the decisions or actions are reasonable or justifiable with all relevant documentation is collected, and files demonstrate an accurate representation of what has occurred;
  - Assessors must demonstrate a strong understanding of legislative requirements, and must recognise the importance of demonstrating

transparency, particularly if the usual checks and balances or opportunities for objection are minimised.

- 4.9 Without integrity in the approval process, and in the end, the community appears to have the worst of both worlds: the proponent does not adhere to their obligations and the community has no chance to object.
- 4.10 There are times when assessors may be entitled to use some discretion, but always with caution. “Failing to exercise discretion fairly, not giving reasons for decisions, failing to offer a right of review – these can all damage public trust in those who make decisions, and ultimately, in government.” (Victorian Ombudsman)
- 4.11 Integrity in public matters is a responsibility of all sides – the public themselves and those in public service who deal with them. “Corruption is not the only explanation for poor or incomprehensible decision-making in planning, in which communities feel let down by those who are supposed to act in the public interest”. (Victorian Ombudsman)

### **Consequences**

- 4.12 A lack of oversight and discipline by authorities and assessors effectively allows applications to be approved in line with the applicant objectives rather than in accordance with the applicant’s obligations.
- 4.13 Defective assessments inevitably have similar serious consequences, not least in wasting valuable time and resources. Again, they lead to lost heritage that is unacceptable by any measure, including unlawful outcomes that cannot be recovered.
- 4.14 Failures of the assessor or the approval authority generate increasing dissatisfaction and a higher level of complaints.
- 4.15 Lack of transparency and accountability destroys public confidence.
- 4.16 The final straw is the loss of heritage; communities deserve better.

### **Other parties with authority**

- 4.17 An assessor must never assume that other parties to the approval process (e.g. affected property owners, owners corporation committees, etc.) who may be required to pre-approve or give their authority to an application have the understanding, knowledge or experience to act appropriately. Many are un-informed laypersons.
- 4.18 Similarly, it should never be assumed that all third parties who are interested and entitled to be aware of an application and who may wish to object have been properly notified and consulted.
- 4.19 Most importantly, it should never be assumed that an application has been supported with good intentions, in good faith, with honesty, and lawfully. There must be a knowledgeable and experienced level of independent assessment to identify and scrutinise such flaws in any approval process, particularly if they become shared or public knowledge – not least because such flaws are often not exposed until after the event and it is too late for any remedial action.

### **Obligations**

- 4.20 Relevant authorities and agencies are obliged to adequately assist applicants, particularly where they are self-represented for minor projects. It is also essential that such assistance be up to date and correct and in the context of current regulations, policies, and procedures. Ideally, agencies should have carefully prepared, readily available and current written guidelines written in simple language.
- 4.21 If consistent and acceptable standards of assessment and approval are to be achieved a system-wide competency framework must be developed. This requires candidates with tertiary qualifications in an appropriate discipline to undertake a mandatory program of mentoring and relevant working practice with a senior peer, then achieve

registration before they can act as an assessor of applications under the auspices of the relevant legislated agency.

- 4.22 Assessors must have a defined duty of care. This is a pre-requisite to accountability. At times their task may be difficult because, other than at the highest professional levels, the content and quality of application documentation may be inadequate, not least because industry standards tend to deteriorate over time. This is often due to developers and project proponents demanding lesser fees because of competitive commercial conditions. For this reason submissions become lazy or incomplete, or the content of a submission may be devious or even dishonest in order to achieve an outcome that would not otherwise be possible.
- 4.23 Independent peer certification may be considered acceptable, but it must be transparent. This approach can be a cost-effective, not least because the latent costs of failure can be significant but are often ignored. Understandably, professional practitioners associate with each other for good reasons (e.g. sharing of professional information, new industry developments, etc.), so any such peer reviewer should also provide a certificate of their own independence when undertaking a peer review.
- 4.24 Assessors must therefore be well qualified and experienced if they are to be vigilant and rigorous in their reviews, and to do this they must be supported by a stronger and broader regulatory framework that resolves the conflicting demands of interacting legislation.

## **Appeals**

- 4.25 Appeals to deal with heritage permits are so narrowly constrained under the current legislation that they are all but impossible for any third party to carry through and likely meaningless in any outcome.
- 4.26 This is well evidenced in the case study attached to this submission. Having confirmed the rights of a co-owner of the subject property to object to a permit having been issued, the Heritage Council could only conclude that they have no authority to deal with any objections other than to confirm the inclusion of the Heritage Victoria standard “. . . Condition 6 as a condition of (the) Permit . . .”.
- 4.27 That is to say, an appeal can only be made after a permit has been issued. But once a permit is issued, it cannot be undone, even though the permit was given on incorrect information.
- 4.28 Standard condition 6 of a heritage permit simply states that “The development approved by this permit is to be carried out in accordance with the endorsed drawings, unless otherwise agreed in writing by the Executive Director, Heritage Victoria.”
- 4.29 But even if the approved drawings and the attendant application are shown and acknowledged to be fundamentally flawed and incomplete, defy the heritage principles of the building and the place (by reference to a Conservation Management Plan) to the extent that elements of primary and secondary significance are to be demolished, nothing further can be done.
- 4.30 The Executive Director’s submission to the case study appeal acknowledged a range of concerns and issues but did not act further, leaving it to the Heritage Council to resolve.
- 4.31 In the words of an experienced barrister who later reviewed the case study in the context of completed hearings, “. . . they ducked the issue . . .”.
- 4.32 In the words of the Victorian Ombudsman, this failure is another example in “. . . poor or incomprehensible decision-making in planning, in which communities feel let down by those who are supposed to act in the public interest”, and that “. . . failing to offer a right of review can damage public trust in those who make decisions, and ultimately, in government.”

## 5 Complexities of Legislation Interaction

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### Several Acts and Regulations collide

- 5.1 The interaction between multiple Acts, Regulations, and other legislative requirements (e.g. Australian Standards, national codes, etc.) are complex and not well understood even by professional advisors, particularly those who specialise in only one or two disciplines. For example, heritage advisers are often not familiar with building regulations, and building professionals and practitioners are not familiar with heritage regulations or their underlying principles.
- 5.2 Furthermore, authorities or agencies responsible for the administration of those separate areas of legislation do not, or will not, co-operate in their understanding or seem willing to integrate or resolve their competing interests.
- 5.3 These difficulties have become particularly relevant and fraught with problems in multi-owner, multi-unit and/or multi-level properties. Those rapidly growing community living and communal property arrangements are subject to wide-ranging planning, building, land, water and other associated legislation and regulation.
- 5.4 In recent times these issues have extended to social structures and human rights, creating an even more tenuous complex of relationships and expectations. Conflicting and cross-regulatory breaches are common but not easily reconciled. This is a minefield for property owners, authorities, permit applicants, public and private assessors, and in most importantly in dispute resolution processes.

### Interacting legislation

- 5.5 The key legislation that is relevant in the context of this submission includes, but is not necessarily limited to the following:
- Planning and Environment Act 1987
  - Heritage Act 2017
  - Building Act 1993
  - Subdivision Act 1988
  - Owners Corporations Act 2006
- 5.6 There are many cross-referenced obligations between these Acts together with their formidable and wide-ranging regulations and other associated obligations under national building codes, Australian Standards, and so on. This multi-faceted dilemma is not well understood and seldom acknowledged by authorities.
- 5.7 For example, this group of legislation creates difficulties in the alteration of common property where multiple owners have proven third party rights which must be respected. The effect on approvals processes, insurance obligations, rights to quiet enjoyment etc. are problems not easily resolved.
- 5.8 A careful reading of current legislation reveals the many corresponding requirements to assess and integrate these Acts, associated regulations and other subordinate legislation. The wide ranging cross-referencing of obligations and their consequences are significant in their effect on the approval processes and the obligations of all project participants, often including the end-users over the longer term.
- 5.9 Experience is that the separate agencies or authorities ignore these conflicts by deferring to another to resolve or avoiding participation by frustration. This is a somewhat circular method of evasion and cannot be easily resolved.

### Property ownership issues

- 5.10 Property ownership in community living models (e.g. owners corporations, retirement villages) is well defined by legislation, but it is not well understood. For example, the concept of “tenants in common” is a form of ownership where two or more people share the ownership of the same property with proportionate interests.

It is often construed that an owners corporation is the “owner” of the common property, but that is incorrect. An owners corporation is only the vehicle established to manage, repair and maintain that property on behalf of all owners in accordance with the shared rights and duties of all owners.

### **Third party rights**

- 5.11 Third party rights of multiple owners of common property are often attacked when a minority or individual property owners seek to alter common property for their own self-interest and avoid their obligations to advise or consult with the other co-owners. Such attacks are seen by such proponents as an easier pathway towards their goal.
- 5.12 These attacks often succeed by using tangled legal mechanisms to shut down legitimate concerns or cover up devious or dishonest applications. Legal challenges to the standing of other parties or separate proceedings to have matters of dispute struck out are common ploys. By assembling a powerful legal team, proponents with inevitably larger resources can achieve those self-serving objectives in jurisdictions such as VCAT, cutting across the VCAT charter encouraging self-representation.

### **Problems with owners corporations**

- 5.13 The Owners Corporations Act 2006 sets out the rights and obligations of all members as co-owners of common property. However, the case study illustrates a case where those rights and obligations were discarded by collusive and devious means by a very small group of 5 owners with covert motives within a much larger cohort of 92 property owners. This unlawful action which was for the benefit of another lot owner culminated in the demolition of heritage listed building elements defined as both primary significance and some of secondary significance under the Conservation Management Plan for the property.
- 5.14 There are a number of published dispute resolution outcomes that have considered and upheld the principles of these the co-owner rights and responsibilities, including decisions from Supreme Court, VCAT and the Heritage Council. These rights must therefore be recognised for permit applications in multi-owner properties by their referral to all owners for information and concerns to be heard.
- 5.15 It should be noted that recent changes (1 December 2021) to the Owners Corporations Act 2006 now explicitly prevent any lot owner from altering common property. However, this may not preclude evasion by some new form of legal gymnastics, and the earlier intervention by advertising and circulating planning permit applications will be essential particularly to protect heritage property and places.

## **6 Regulatory Oversight**

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### **Agency Rationalisation**

- 6.1 Regulatory government agencies and local government responsible for specific planning, heritage and associated legislation must be responsible for the successful implementation of planning and built environment outcomes. The goals are unequivocal; they must deliver certainty and fairness in their decisions for communities, alleviate community concerns, provide transparent and accountable review and appeal processes, and protect third party rights.
- 6.2 But there are serious questions as to whether the responsible agencies and local government authorities are providing their promoted services in an effective or efficient way. This includes a responsibility to deal with conflicting legislation and the interaction of related legislation.

- 6.3 Assessment processes have been the subject of Ombudsman reports, and wide ranging guidelines are available but directed to local government. The principles in those guidelines are just as applicable to other government agencies.

### **Heritage Victoria failures**

- 6.4 Heritage Victoria is an increasingly important agency, but it has failed in many respects. Current processes are clearly inadequate (refer to the case study). These failures are regularly evidenced by the past and continuing media reports and heritage campaigns mounted by concerned groups.
- 6.5 The Heritage Victoria charter is widely spread across built, cultural, social, archaeological, marine and other heritage assignments. All of those sectors are important, and such a broad charter is difficult to resource and manage.
- 6.6 The built environment is clearly the dominant sector requiring better heritage management. It is the area where multiple authorities and agencies co-exist, where community disquiet and dissatisfaction are more widely experienced with passion and intensity, and where contention is frequent and vigorous, particularly at a community level. But Heritage Victoria is not readily accessible to or engaging with the public, and there is no evidence of any working relationship with local government with respect to planning permits for heritage listed properties. To the public, Heritage Victoria is simply not engaged or engaging.

### **Local government alternative**

- 6.7 Local government has the predominant, most accessible and more engaging planning role in Victoria. Their charter deals with the built environment in virtually all of its forms, and it already includes heritage issues where heritage overlays exist, or buildings are of historic interest; the exception is if a property is heritage listed.
- 6.8 Councils are well placed to extend their services to include core heritage protection and permitting issues including for heritage listed properties. This would provide better integration with overall planning outcomes. Of course, state government resourcing for those added functions would be essential, but the duplication of resources would be reduced.
- 6.9 Under this model Heritage Victoria should maintain an oversight and guiding role, and act as gate-keeper and repository of common heritage knowledge and resources. It could also act as the review management agency with processes and protocols for the engagement of specialised and experienced heritage consultants in the permit assessment role.

### **Practitioner registration**

- 6.10 It is worth noting that government is contemplating alternative models for the building sector generally (as distinct from planning and heritage) where design and associated practitioners be appropriately qualified and registered through one agency. This concept is ambitious because it must deal with the varying legislation; for example, enabling architects' registration to have no distinction from the Building Act registration of other building sector professionals/practitioners. It should also be noted that whilst those current registration systems establish minimum competencies and duty of care criteria, they are not without compliance, insurance and enforcement problems.
- 6.11 Professional registration for the planning and heritage sector must be put in place. It must include best practice practitioner competencies, duty of care, professional indemnity insurance, and so on. This is essential for the public interest and protection to be satisfied. Self-registration such as is provided by the Planning Institute of Australia is not adequate or appropriate because there are no legislative imperatives.

## 7 Consumer Protection

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### **There is no effective community protection**

- 7.1 Government must look to more innovative ways to better identify the systemic failures in heritage planning and control. Consumers see these failures in the current agency processes, and in particular they cannot understand why heritage protection, once in place, can be so easily lost by heritage place destruction.
- 7.2 Communities and individuals must be better represented. Heritage Victoria itself does not provide the necessary level of go-to support for consumers in heritage matters. They are seen as ineffective and inefficient, perhaps victims themselves of the complexities of their wide-ranging charter, correspondingly diffuse legislation, and lack of understanding of the other important legislation that must also be applied in the built environment.
- 7.3 Early fundamental advice, guidance and advocacy services and support to consumers as soon as questionable heritage proposals become evident would assist and would avoid much of the community agitation and disputes. Consumers are entitled to know and better understand their rights and their responsibilities as much as any proponent of a project where it affects any heritage building or place.

### **Community participation and feedback**

- 7.4 In the final six months or so of 2021 Heritage Victoria published a range of new guidelines and information documents on their website, and they should be commended for that. Hopefully this was not just a response to this upcoming inquiry, or in response to some of the high profile and well-publicised failures in the last few years, or even the case study in this submission.
- 7.5 Digital media information systems and digital response processes are increasingly popular in the community. But they are ineffective unless they are published with accompanying fanfare and there is feedback. If there is no feedback, particularly in matters as passionate as heritage protection, it is a clear indication that the information system has failed.
- 7.6 It is not sufficient to put out such publications and assume that the job is done. Heritage protection is an organic (living) process, where community participation, assumptions, knowledge, history, and feedback must be fostered, debated and resolved. Beyond that, consumers deserve a supportive advisory service that could filter out the greater number of uncomplicated cases for attention, and those more complex go on to higher level advocacy.

### **Multi-owner communities**

- 7.7 This submission highlights the special case of growing community living and attendant multi-unit developments, which has created a whole new class of affected consumers. They are not building project participants, or permit applicants or sole owners of the “land” but are the immediate neighbours and owners as tenants-in-common of property where works are being undertaken. They represent a new cohort of consumers that will create increasing demands for support and advocacy. They cannot be dis-regarded or legislated away; they are key participants as property owners with attendant rights and responsibilities.

## 8 Ardoch Case Study – Heritage Building

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### **Ardoch heritage background**

- 8.1 Ardoch is a heritage listed property in St Kilda East. The place is known as the Former Ardoch Education Centre, the Heritage Register Number is H0969.

- 8.2 There are 15 buildings over the 2.1Ha site. Ten of those buildings (B1 to B10) were built between the 1860's and 1920's and are described in the Statement of Significance as a rare innovative and intact example of early flat development in Victoria, based on the garden suburb concept derived from England and North America, and that the complex of buildings and grounds demonstrates the physical, social and economic changes occurring in St Kilda and other inner Melbourne suburbs during the late nineteenth century and early twentieth century, through its location, sequence of functions, and patterns of occupancy over time.
- 8.3 The heritage value of Ardoch was crystallised between 1993 and 1995 when the property was returned to residential living by a major project of the Urban Land Authority (ULA) and with a special planning panel established between the ULA, the then Historic Building Council and the City of Port Phillip.
- 8.4 An Outline Development Plan for the redevelopment of what was a former school site was issued in 1993, and a Conservation Management Plan (CMP) prepared by Allom Lovell Conservation Architects in 1994. Both documents are nominated as conditions to be applied in the 1995 Deed of Covenant establishing the heritage listing. In 1995 a planning permit was also issued by City of Port Phillip which cross-conditioned those documents, all of which remain in force today.
- 8.5 None of those documents were followed in the permit application and approval referred to in this case study yet they encompass the core heritage and planning values that apply to Ardoch.

### **Primary heritage listed parts demolished**

- 8.6 In 2017 Heritage Victoria issued a permit for alteration works to an apartment in building B4, a building with some of the most intact interior heritage features at Ardoch. This case study exposes the nature of the misleading, deficient and devious permit application process. Most importantly, it also reveals that the required Heritage Impact Statement provided in support of that permit was predicated on the wrong building (B6) which had no heritage merit relevant to the application because it had been gutted during the 1977 school conversion works.
- 8.7 Vigorous and continuing attempts were made to engage with Heritage Victoria to have this mistake revisited and corrected, but these attempts failed.
- 8.8 Works proceeded and important heritage parts of building B4 which were of primary significance, and also some parts of secondary significance all as nominated in the Conservation Management Plan were demolished and the heritage values of the place were destroyed.

### **Standing to appeal against permit**

- 8.9 An appeal against the permit was made, and the first response by the solicitor for the applicant owner was to dismiss the property co-owner as "not having standing", partly on the basis that owners corporation committee had "approved" the works on behalf of all owners, and partly that a co-owner had no rights to appeal. But apart from the defective and erroneous application, there were serious concerns regarding owners corporation complicity in that defective application and the devious means by which owners corporation approval was given which neglected and disadvantaged all other co-owners.
- 8.10 This proposal to shut down the appeal was dismissed, but it was still a time consuming and expensive process that should never have occurred, particularly given the pre-established principles that supported third party co-owner rights in this situation.

### **Ardoch heritage permit application**

- 8.11 Heritage Victoria had published guidelines for permit applications, but those guidelines were all but ignored. Examples of the non-disclosure, mistakes and deceptions in the application submission include:

- Known requirement for structural modifications to common property because structural drawings and computations had been prepared and were submitted to the owners corporation but which were not submitted to Heritage Victoria (HV).
  - HV published guidelines required “full details” and works were not “minor”, but the application was minimal and missing details and documents. HV and other parties were mis-led and were not “provided with a clear understanding of precisely what works are proposed and their scope” as required.
  - HV required “site plans” but aerial photos of the whole estate were provided for this purpose. This meant that adjoining property boundaries were not shown or known, particularly the immediate adjacency of co-joining and co-owned building parts that were common property.
  - Building elevations or sections were not provided so there was no clear differentiation between existing and proposed building work or demolition, nor a clear indication that the proposed works included the removal of a window on the street façade that was of significance under the CMP.
  - Load-bearing (solid brick) walls were not differentiated although they were to be demolished and new structural works undertaken including on common property. Those walls were of primary significance under the CMP, and had a more substantial effect on the heritage place because they supported the common property roof structure shared by other co-owners.
  - There was a cascading effect of these defects because other agencies and the building surveyor relied on the correctness of the HV permit.
- 8.12 Of grave concern and a serious question, is why the CMP was ignored, given that the owners corporation manager advised the applicant’s architect in writing of the CMP and its importance, and provided a copy.
- 8.13 Accordingly, the Heritage Impact Statement prepared by the applicant’s architect could not and should not have been accepted as a genuine or reliable analysis of the heritage status and proposals; it certainly did not validate the issue of a permit.

### **Applicant’s Heritage Impact Statement**

- 8.14 The Heritage Impact Statement (HIS) accompanying a heritage permit application is arguably the most important document to be provided, but in the case study it seen to be fundamentally flawed throughout. The HIS did not attempt to address the CMP. And of the only 10 separate heritage buildings on the site, it addressed the wrong building (B6), not the subject building (B4). This is the equivalent of seeking a permit for, and basing it on, the wrong building in the street.
- 8.15 The consequence of this mistake could hardly be more extreme, given that the interior of building 6 (the wrong building) has no heritage significance because it was gutted in the 1970’s to become schoolrooms. Conversely, building 4 (the subject building where heritage was subsequently demolished) was defined as one of the most intact remaining examples of Ardoch’s heritage.
- 8.16 The HIS identifies the “subject property and overall Ardoch site” as covered by Heritage Overlay (HQ104) in the City of Port Phillip Planning Scheme; but it failed to recognise the much more important CMP. Indeed, it appeared that there was no comprehension of the CMP or what it was by the submitting architect.
- 8.17 Examples of mistaken and misleading statements in the HIS included:
- “This report has been prepared in accordance with . . . the guidelines for the preparation of Heritage Impact Statements adopted by the Heritage Council of Victoria.” No, demonstrably it was not.

- “The areas to be demolished internally do not contribute to the significance of the overall dwelling”. No; and the primary and secondary significance areas for all buildings are shown clearly by diagrammatic shading and notes on drawings included within the CMP.
- “The new works (are) without detriment to the interior features of the interior”. Clearly by the CMP written and drawing documentation this is clearly shown not to be true, and is a very serious if not devious mistake.
- Curiously, the architect used as a surrogate, heritage overlay principles as his interpretive approach of the heritage issues (not the CMP), but even then, either ignored or mis-interpreted heritage overlay guidelines as published by Heritage Victoria. As a consequence, the breaches of those guidelines were even more far-reaching (too numerous to be repeated here but were detailed over several pages in the appeal submission to the Heritage Council).
- It is difficult to distinguish whether mistakes or devious or dishonest motives lead to such an error-riddled and defective submission. But the passage of time supported grave concerns regarding the character of the motives and relationships between applicant and supporting parties, and there was no transparency so nothing could be reviewed.

8.18 The HIS was the work of a qualified architect who had no heritage knowledge or experience and given the obvious errors and other questions should have been rejected for re-work and re-submission.

### **Heritage Victoria report and recommendations for the permit**

- 8.19 The assessment of the permit application by Heritage Victoria officers, including particularly the Heritage Impact Statement (HIS), is as puzzling as the submission itself. They were dealing with a disconcertingly erroneous and deceptive submission, but the well-documented status of Ardoch’s heritage should have been evident from the outset. Interestingly and in part, the officer’s report correctly identifies the subject as building B4, but then mixes it between B4 and the applicant’s assessment based on B6.
- 8.20 The officer prepared an assessment report, and in an early statement said that “The works proposed by the applicants do initially appear to constitute a significant impact on the place. Particularly the proposal to remove walls and alter openings. (sic)” He also adds that “In most circumstances the reporting office would be vehemently against this type of intervention into a place.”
- 8.21 This statement suggests consideration of the CMP and its many detailed contra-indications to giving this permit. But the report changes in tone so radically it appears to confirm the influence and acceptance of the widely misleading and deceptive submission.
- 8.22 The officer’s report embarks on its own re-interpretation of Ardoch’s heritage status which seems to try and validate the permit application, continually defying the content of the CMP in so many respects, with statements such as follow:
- “Any consideration of impacts proposed works on the flat buildings should also take into consideration of the changes on the place since the late twentieth century. (sic)” This refers to the 1995 redevelopment when the CMP was heritage status established, and effectively, but incorrectly, says that the CMP provisions can and have been changed without due process.
  - “The Education Department had intended to demolish it Building 4 but continued to use it” (sic), referring to the 1977 school conversion. But the building was a key element in the heritage listing in 1995 . It was fortunate that the building was saved in 1977, and any possible intention that was not

carried out has no relevance in allowing damaging works in 2017, particularly when the CMP prohibits such action.

- “That the interior of this unit, and presumably the others in Building Four, have been renovated is consistent with the age of other new development on the Ardoch site along Pillely Street. Permit for this work dates back to the 1993-1994.” The presumption is wrong. The new development of 5 other new buildings (to make the redevelopment viable for a developer) were of modern construction externally and internally and the Outline Development Plan required that they be designed to be “sympathetic to the massing, materials and character of the historic building”, but not to copy them. Building 4 was particularly special because it retained the historic character, layouts, openings etc. to keep intact that historic significance and evidence (which has now been lost).
- “*Therefore, in consideration that the interior of the unit has been rebuilt . . .*”. This statement is wrong – the interiors were never re-built. The original 1922 drawings submitted at the appeal show that the layout was unchanged. This bad analysis resulted in the destruction of the original important load bearing elements of primary and secondary significance to the place.
- “Officer assessment: The applicant's statement conforms with Article 22.2 of the Burra Charter: . . .” and “The reporting officer and the applicant had a detailed conversation on site about how best to contextualise new work . . .”. The Burra Charter was effectively vandalised. The officer’s relationship with the applicant/architect was apparent, and the officer contributed to works that resulted in the destruction of heritage elements or primary significance under all of the circumstances outlined in this case study, but still declared that he had no conflict of interest.
- “In consideration of the history of neglect and long term impacts that the place has previously endured and that the current internal condition dates from the mid 1990s, the internal modification works are unlikely to have a detrimental impact on the what may remain of any original features or understanding of the places original layout” (sic). In its defiance of the CMP and other detailed historic information, reports, and the heritage commentary and status given by the expert conservation architects who developed the CMP in 1995, is difficult to see this as anything less than a contrived statement.

8.23 The Heritage Victoria officer’s assessment fails by every measure and by any standard and led to the issue of a heritage planning permit with devastating consequences.

### **Heritage Victoria Executive Director submission to appeal hearing**

8.24 The Executive Director’s (ED) submission to the Heritage Council responding to the appeal considered additional issues that emerged from the objections raised in the appeal and validated some of the concerns.

8.25 The ED report acknowledged that “There was nothing in the permit application to suggest that the walls that are proposed to be removed are structural and the impact of the proposed works would extend beyond what had been applied for by the applicant”. That is correct; it confirms the serious non-compliance of the permit application. And it also begs the question regarding the efficacy of the assessment of the permit application and validates the matters raised in the appeal.

8.26 “*The ED is concerned about the validity of this request for a hearing, particularly as this permit was approved.*” This highlights the absurdities of the heritage planning process. There is no opportunity for a legitimate third party to be aware of and/or respond to an application, and once a permit is issued there is no opportunity to overturn or amend the a flawed permit (other than an amendment sought by the applicant only).

- 8.27 “The appellant appears to not be appealing against Condition 6 so much as questioning the applicant's ability to comply with it”. This is correct. On enquiry, Heritage Victoria advised that Condition 6 was the only path for appeal and should be used. Furthermore, that condition could not be complied with based on the information contained permit application; if the permit information was relied upon, and unless structural work was to be done on someone else’s property, the roof structure would collapse. This was the devious nature of the application to avoid exposing the need for works “. . . beyond what had been applied for . . .” (in the earlier words of the ED).
- 8.28 “The appellant indicates that they are an owner in the heritage place but as far as Heritage Victoria is aware the proposed works are confined to the applicant's freehold property. If, as the appellant believes, the works will require modifications to the roof structure, this will impact common property, which is in the 'ownership' of the Owners Corporation.”. That statement is wrong (see also above). An owners corporation does not own common property; the members (owners) in the owners corporation are the co-owners as tenants-in-common, and all have individual third party rights.
- 8.29 “There is nothing in the proposed works that would suggest to Heritage Victoria that any load bearing walls will be impacted or that the roof structure will be affected by the proposed works. (NB: This assessment is considered on an estimation of the form of the roof structure based on conventional roof framing practice.)”. That is correct. The permit submission was non-compliant, mis-leading and deceptive because not all relevant information was submitted even though it existed (e.g. structural works design and drawings already existed for works on common property, and had been submitted to other approval agencies, but not Heritage Victoria).
- 8.30 “However, should the appellant be correct and additional works are required to be undertaken beyond those shown in the endorsed drawings, the applicant would be in breach of their permit, and the Heritage Act 1995, if they were to undertake them without obtaining an amendment to their permit. The normal course of events would be to request an amendment to the permit.” The appellant was shown to be correct, and the structural drawings were belatedly submitted by the applicant. But the resultant further breaches, defects and effects could be not considered (e.g. the demolition of heritage property of primary significance) because only the applicant can seek a permit amendment, and it was not in their interest to do so.
- 8.31 “The ED submits that the concerns raised should be addressed by the building surveyor pursuant to the Building Act 1993 and that an amendment to the heritage permit be requested if required” and “It is submitted that the Executives Director's decision should be upheld and the considerations of the Building Act 1993 be allowed to occur in the usual way”. Again, this illustrates the absurdities of the permit and appeal processes and the dilemma when agencies ignore the interaction of legislation. This is effectively saying to the applicant that the planning permit as issued does not comply with heritage requirements or building legislation but go away and get the building design and approval fixed, then come back and we will look at it again. Of course, there is no incentive or imperative for the applicant to do so, resulting in heritage property of primary significance being destroyed.

### **Heritage Victoria post-permit**

- 8.32 During the construction period works the site was hoarded in such a way that there could not be any observation of what was happening. However, it was apparent that works were not proceeding in accordance with all approvals, and the Building Approvals Board (BAB) had found that certain conditions of concern expressed by the Executive Director of Heritage Victoria had transpired.
- 8.33 For example, the Executive Director had said that your “. . . concerns raised should be addressed by the building surveyor pursuant to the Building Act 1993 . . .”. The BAB determined that “Despite the Director of Heritage Victoria requiring the RBS (Relevant Building Surveyor) to consider these matters in his Determination, he

failed to do so.” The referral to the Building Act by the Executive Director was also noted above, but in the interaction of different legislation simply falls away as no-one is prepared or available to deal with this.

- 8.34 By letter direct to the Executive Director, Heritage Victoria was requested to review what was happening on site in the context of the ED advice and consider and support the protection of the remaining heritage elements.
- 8.35 The letters were simply referred to the original assessment officer whose trust and competency was of concern so there was no independent compliance review, and he had no imperative to reconsider his earlier errors and reconsider what was happening. After the officer again visited the site, he reported that there was no concern regarding any breach, although he then acknowledged that the works were not confined to the subject property, load-bearing walls were impacted, and additional works were being undertaken (although the ED had said that “. . . *if such additional works are undertaken the heritage permit planning permit will be breached.*”)
- 8.36 In discussion with the officer after his inspection a number of surprising comments were made, and more concerning matters revealed:
- The officer advised that there was no obligation to inform or respond to any third party co-owner even though the roof structure at risk covers multiple properties.
  - He could now see and agreed that load-bearing walls were being removed (but the day before said they were not) and that new structural steel roof structure was to be installed replacing the original timber heritage structure.
  - When asked why new steel beams were required, he replied “the structural engineer thought it would be a good idea to install extra (new) works”.
  - He said he did not inspect the roof space but commented on its structural nature. When questioned further, he shut down discussion about the engineering, saying “you are not qualified, but I am”. At that time the officer had an architectural qualification but was neither a registered architect nor a registered building practitioner in engineering or any other category.
  - The officer said that “we changed our view based on the amended permit” and that “the works conform to the amended permit”. They did not, because the amended drawings changed nothing, and works were still outside the property boundary (which was not shown on the drawings).
  - The officer said that, in any case, “if the roof collapses it is only over (the subject property), not (your property) and should not affect you”. This is an astounding comment given that the same roof structural members covered both properties, and that this concerns the protection of heritage listed property.
- 8.37 The post-permit construction phase events of this project and the Heritage Victoria position were deeply concerning.

### **Ardoch Owners Corporation**

- 8.38 An owners corporation responsibility is to manage and administer common property, repair and maintain common property, and undertake other roles associated with insurance, owner registers, owners certificates and similar. It does not own common property. Furthermore, committees or delegates of an owners corporation must also act honestly and in good faith, must exercise due care and diligence, and must not make improper use of their position to gain, directly or indirectly, and advantage for themselves or any other person.

- 8.39 As part of the heritage permit process the owners corporation chairperson must provide consent if works are proposed for common property.
- 8.40 It is not directly relevant to this submission to canvass or report on the behaviour of the committee in these and continuing matters, other than to say that the owners corporation approval to this permit was widely disputed within the community for lack of due process, lack of competency in assessments and lack of any independent reviews (despite receiving legal advice to do so). Several committee members more knowledgeable and experienced in these matters resigned at the time, including the then chairperson (a practising senior partner solicitor) due to the collusive and devious methods adopted by a very small non-representative group of the remaining committee supporting the applicant for personal reasons.
- 8.41 Along with other defective conditions, the question of insurance of the registered place was an issue of concern at the construction phase of the works. The owners corporation had not scrutinised or independently reviewed the requisite insurances, but others were concerned and followed up with independent legal advice. The outcome was that the seriously deficient insurances proposed were replaced with alternative policies. This circumstance should be of concern to Heritage Victoria for any heritage place, but the failures of the permit process frustrated these imperatives.
- 8.42 The lack of any independent review led to the good faith and duty of care being placed in the relevant authorities, particularly Heritage Victoria, to apply their knowledge and experience to the application and ensure the protection of the listed heritage property. In this Heritage Victoria failed the Ardoch community, and an important part of the heritage place was lost forever.
- 8.43 This project proceeded with devastating heritage consequences; but on a positive note, further challenges culminated in changes to the Owners Corporations Act 2006 on 1 December 2021 that should ensure that lot owners can no longer alter common property under such circumstances.

#### **Applicant's solicitor's submission**

- 8.44 Senior solicitors were engaged to support and protect the applicants permit at appeal. Their submissions were consistent with any legal analysis which understandably addressed only the explicit words and nature of the relevant legislation and the legislative framework.
- 8.45 They repeated the same errors contained in the permit submission, notably and for example, addressing the wrong building B6 instead of building B4. They also referred to the "appropriate certificate of insurance" which was subsequently shown to be defective, acknowledged by the applicants and replaced. They also said that Condition 6 can be satisfied simply because a permit has been issued – no recognition that if built under the submitted documentation the roof would collapse, other than to suggest that this was someone else's problem, not Heritage Victoria.
- 8.46 They argued that the Heritage Act does not allow any appeal and put forward substantial commentary on other legislative obligations under other Acts and their processes and interaction with this project. This turns to and supports the need for agencies assessing and issuing permits to consider such legislative interaction.
- 8.47 The legal frameworks and processes put forward by the solicitors were valid but inadequate, and these require significant change if fair and equitable processes of permit applications, reviews, appeals and enforcement are to be accepted and trusted by communities and the people of Victoria.