

PLANNING PANELS VICTORIA

MELBOURNE PLANNING SCHEME AMENDMENT C245

**SUBMISSIONS ON BEHALF OF THE
NATIONAL TRUST OF AUSTRALIA (VICTORIA)**

1. These submissions are made on behalf of National Trust of Australia (Victoria) ('the Trust') in relation to proposed Amendment C245 to the Melbourne Planning Scheme ('the Amendment').

Scope of the Amendment and matters before the Panel

2. The Amendment before the Panel proposes to do nothing more than what is summarised on the second page of the explanatory memorandum – to rezone land, amend the content and coverage of DDO14, apply a new DPO11 and amend the policies in clauses 21.12 and 22.02.
3. There is nothing in the Amendment which could be interpreted as a permission or condition precedent to the entire market renewal project that Council has put before the Panel, in particular in Professor Adams' presentation, the long list of benefits in paragraph 3 of Council's Part B submission and the extensive collection of benefits it instructed Dr Spiller to consider.
4. The State Agreement does not bridge that logical gap.¹ The sections of the agreement that Council took the Panel through show nothing more than the fact that Council is contractually bound to undertake a renewal project. Nothing in the agreement links Council's obligation to undertake that project with whether or not this Amendment is approved in its exhibited form, or even at all.
5. At most, a few specific (and for the most part uncontroversial) parts of the Amendment touch upon a few isolated aspects of the project – the public open space, realignment of Franklin Street and the Queens Corner building – which are all matters for which

¹ State Agreement & Deed of variation of State Agreement (Green folder, document 10).

Council could already obtain a planning permit under the current controls.² Even if that were not the case, the failure to deliver any one of those things would not, within the terms of the agreement, have any legal or logical bearing on Council's obligation to undertake any other aspect of the renewal project.

6. Other aspects of the Amendment, in particular the dramatic change to desired built form character, have no logical connection at all beyond having been packaged in the same Amendment.
7. In oral submissions, the existence of such a correlation was simply declared to exist, repeatedly and with a variety of different words – that the entire renewal project '*cannot be delivered without the Amendment*', cannot be '*divorced*' from it, is '*tied inextricably*', '*will not proceed without it*' – without any articulation of how that is said to be so (save for reference to terms of the State agreement which actually show the opposite).
8. Dr Spiller did not state at any point in his evidence that the Amendment and the renewal project are 'an integrated package that needs to be considered in an integrated manner'. What he said was that he was *instructed* to consider them in that manner. In cross examination he specifically added – in response to a question seeking to break down which parts of his analysis would apply only to the Amendment – that he *could* also do a cost benefit analysis of the Amendment itself, but 'not on the run'.
9. Council's conflation of the economic effects flowing from the entire renewal project with the economic effects it is to take into account under s 12(2)(c) of the *Planning and Environment Act* is therefore misconceived.
10. Section 12(2)(c) requires consideration of the social and economic effects *of the Amendment*, not the entire suite of whatever projects the proponent of the Amendment might have in mind to undertake in future, regardless of whether and to what extent those projects require or are even logically affected by the fate of the proposed Amendment.
11. Especially remarkable is the inclusion of 'revenue' among the factors that Council submitted make the Amendment an '*indispensible precursor*' to the entire renewal project.

² 'Road' and 'Informal outdoor recreation' are both Section 1 uses in the CCZ1, and the current DDO14 allows for a two (possibly three) storey building on Development Parcel C.

12. A landowner affected by an amendment cannot, in effect, ‘manufacture’ a relevant social and economic effect by having bound itself to spend the windfall from the approval of the amendment on something entirely unrelated which happens to be socially or economically beneficial.
13. Even if that were permissible in principle, it could have no application to a project which the landowner has already bound itself contractually to undertake regardless of whether the Amendment is approved, and in the absence of any evidence that it will lack the funds to fulfill that obligation unless the value of its landholdings is sufficiently boosted by the approval of the amendment.
14. Council’s plans to renew the market are certainly a commendable exercise of its functions as a municipal government. But nothing is stopping Council from pursuing those plans whether or not the Amendment is approved, and certainly whether or not it is approved with changes in the nature of those sought by the Trust.³
15. In the context of this hearing, extensive evidence and submissions about the entire renewal project are therefore nothing more than a distraction at best – and at worst, a distortion of what the Panel actually has to consider in assessing the planning merits of Amendment C245.

Amendment C61 and Council’s change of heart

16. Council has sought to explain its abrupt ‘about face’ on its preferred built form character around the market by characterising the current DDO14 as ‘out of date’ and its objectives as ‘unattainable’. Its new approach implicitly assumes that because the outcome it sought through Amendment C61 has since been eroded by facts on the ground, that outcome should be considered ‘unattainable’ in its entirety and the aspirations behind it should be thrown out completely.
17. The evidence before the Panel, however, shows that what is intended by Amendment C245 (and the proposed DPO11 in particular) is far more than an acknowledgement and

³ The changes sought by the Trust are directed at built form, and do not in any way inhibit Council from complying in full with every requirement in clause 3 of the State Agreement.

a response to the fact that a built form ‘transition’ as gradual as that sought by Amendment C61 – all the way back to A’Beckett Street – is no longer attainable.

18. It is also and above all an acknowledgement and a response to the fact that the DDO14 *has* successfully maintained a ‘transition’ (albeit to a lesser degree) and *has* maintained a low-scale interface around the periphery of the market.
19. Ms Heggen identifies the current experience of built form to the south and east as consisting of a low and mid-rise ‘foreground market interface’ and a visible but more distant ‘high rise backdrop’.⁴ Given the pattern of development in the area, the continued existence of the ‘foreground market interface’ can only be explained by the continued existence of the current height controls in the DDO14.
20. A clear purpose of the Amendment is to erase that ‘foreground market interface’ and bring the ‘high rise backdrop’ out of the backdrop and forward to the market itself, creating a ‘visual containment of the Market site’⁵ which does not currently exist and which is not going to exist unless the built form controls are changed so as to achieve it.
21. This is consistent with, and confirmed by, Mr Sheppard’s evidence that a few hundred metres makes a material difference in how building height is experienced.
22. It is therefore not the case that the outcome Council sought through Amendment C61, in response to strong community concern and on the basis of extensive strategic work underpinned by genuine community participation, is ‘unattainable’.
23. It has already been attained, to a lesser but still very meaningful extent. It is simply that Council has changed its mind and now wishes to attain the exact opposite outcome.
24. In its closing submission, Council identified three reasons for its abrupt reassessment of the character of the market environs.
25. The first is the emerging character of the City North area, insofar as the existence of any ‘transition’ between the market and the city would not make sense with development north of the market then stepping right back up to 40-60 metres.

⁴ Witness Report of Catherine Heggen (Message Consultants) at p 9.

⁵ *Built Form Review and Recommendations* (Jones & Whitehead, April 2015) at p 39 (Blue folder).

26. That rationale would be more convincing if development north of the market did or would actually rise to anywhere near such height. But the entire segment bordered by Victoria, Elizabeth and Peel Streets is part of the extensive North and West Melbourne Heritage Precinct HO3 and has a height limit of 24 metres in the DDO61, by reason of *‘the interface with the Queen Victoria Market, the transition to North Melbourne, and significant heritage fabric which exists in [the] area’*.⁶
27. In terms of both character and height, despite being within the CCZ, development in that large segment north of the market is clearly referable – and intended by the City North Structure Plan to remain referable – to the sweep of traditional low form that stretches out north-west and west from the market, and not to the higher and denser form further to the east beginning along Elizabeth Street. This distinction is clearly appreciable in the oblique aerial view on the second page of Ms Heggen’s presentation.⁷
28. The second reason Council gave for its change of mind was the ‘current condition’ of built form in the area in terms of high rise development, which is discussed above.
29. The third was Council’s investment in the market renewal project, which is also discussed above at the beginning of this submission.

Planning for heritage

30. The Queen Victoria Market is an integral part of Melbourne’s history and holds enormous cultural significance for the people of Victoria. In circumstances where Council is seeking National Heritage listing for the market and potentially a World Heritage nomination, it should have been taken for granted that the formulation of policy for development in and around the market would be shaped first and foremost around the conservation of its heritage values.
31. As Mr Lovell acknowledged in response to questions from Mr Pikusa, decisions affecting the future of a culturally significant place should follow the Burra Charter Process:

⁶ Melbourne C196 (City North Structure Plan) [2013] PPV 129 at p 45 (Pink folder, document 2, p 82 of 144).

⁷ (Document 18).

6.1 The cultural significance of a place and other issues affecting its future are best understood by a sequence of collecting and analysing information before making decisions. Understanding cultural significance comes first, then development of policy and finally management of the place in accordance with the policy. This is the Burra Charter Process.

6.2 Policy for managing a place must be based on an understanding of its cultural significance.⁸

32. The Burra Charter makes clear that the *sequence* of investigations, decisions and actions is critical. Policy should not be developed before the cultural significance of a place has been understood, assessed and the obligations arising from that significance and the future needs, resources, opportunities, constraints and condition have been identified in order to shape the policy.⁹

33. In developing Amendment C245 Council has turned the proper sequence on its head, and the proposal that has resulted ably demonstrates why the sequence in the Burra Charter Process is so important.

34. The primary outcome sought by the Amendment is a fundamental change to the current scale of built form around the market. It anticipates a dramatic change to the aesthetic of the market's setting.

35. Cultural heritage significance includes aesthetic value, and is embodied among other things in the setting of a place.¹⁰

36. The Burra Charter provides that:

5.1 Conservation of a place should identify and take into consideration all aspects of cultural and natural significance without unwarranted emphasis on any one value at the expense of others.¹¹

37. In accordance with the Burra Charter Process, policy affecting the aesthetic of the market setting should be formulated after, and around, a full understanding of the cultural significance of the aesthetic values embodied in the market's setting.

⁸ *Burra Charter*, Article 6 (Document 12) (emphasis added).

⁹ *Burra Charter*, p 10 (Document 12).

¹⁰ *Burra Charter*, Article 1.2 and 1.12 (Document 12).

¹¹ *Burra Charter*, Article 5.1 (Document 12).

38. It seems apparent from the two reports exhibited in support of the Amendment that Mr Lovell's task in the preparation of the Amendment was simply to 'review' a policy that had already been developed.
39. In so doing, and in the further consideration he gave to the Amendment for his statement of evidence, he has considered the 'assessed significance' as defined by what is contained within the four corners of existing statements of significance¹² and the National Heritage List Assessment Scoping Report.¹³
40. The NHL Assessment Scoping Report clearly states that the assessments Mr Lovell relied upon – and, it follows, Mr Lovell's view as to what is 'significant' about the market's heritage – are focused on 'the physical form of the QVM and its architectural qualities' and do not take into account 'the human perceptions of a place, expert and non-expert views'.¹⁴
41. This particular shortcoming of expert heritage assessments in Australia is not uncommon. As Chris Johnston, director of Context Pty Ltd and one of the authors of the NHL Assessment Scoping Report observes:

*... the incorporation of social significance into legislative and regulatory frameworks and heritage assessment practice is still an ongoing process, and social significance is still problematic for some heritage professionals and decision-makers. The effort that needs to go into understanding the relationships between people and place is seen as a distraction from 'real' conservation, that of the fabric. Yet it is these relationships that are truly fragile and so often at risk, especially from government. Once gone, they may be hard to recover.*¹⁵

...

No longer is heritage assessment simply expert-driven. And yet, social significance is still the poor cousin, with project budgets still directed to fabric and history-based assessments, while the

¹² In the Victorian Heritage Register (Red folder, document 2) and in cl 22.04.

¹³ *National Heritage List Assessment – Scoping Report* (Context, 12 November 2014) (Red folder, document 3).

¹⁴ *Ibid* at p 13 (Red folder, document 3).

¹⁵ Chris Johnston, 'Inhabiting Place: Social Significance in Practice in Australia' (2014) 45(2) *Association for Preservation Technology International Bulletin* 39 at 39.

*community engagement that is fundamental to social-significance assessment is often left underfunded. As a result, many heritage studies offer generic assessments ...*¹⁶

42. In this respect, Mr Lovell's assessment is not only incomplete but also potentially misleading, insofar as his methodology carries with it the implicit assumption that if a value has not been formally assessed, then it is not significant.
43. Indeed, that assumption moves beyond the implicit in his consideration of the appropriateness of massing high rise development around the market, where he states that *'from a heritage perspective' the question is 'whether or not the change will adversely impact on the assessed significance of the impacted place'*, and then goes on to explicitly rely upon the fact that *'the assessed significance at a State and local level is not one in which emphasis has been placed on the low scale surrounds'* but rather on *'the history and physical form of the market'*.¹⁷
44. When regard is had to the NHL Assessment Scoping Report it is clear that the relative emphasis on different aspects of aesthetic significance, which Mr Lovell has taken as an indication of relative significance, is instead only an indication of the relative rigour with which those different aspects have actually been assessed.
45. The 'assessed significance' – and, therefore, Mr Lovell's view as to what is 'significant' at all about the market's heritage – does not adequately consider or even identify the very values that are most relevant in considering (and, if the Burra Charter Process is respected, in formulating) policy intended to dramatically change the aesthetic of the market's setting.
46. The Panel therefore has before it a proposal to dramatically change the aesthetic of the market's setting which has not even been assessed against – much less designed around – the potential heritage value most likely to be affected.
47. Council does appear to dispute that Mr Lovell's methodology carries with it the assumption that if a value has not been formally assessed, then it is not significant. Rather, its oral submission was to the effect that the Panel should *also* consider that any value that has not been formally assessed is not significant.

¹⁶ Ibid at p 44.

¹⁷ Witness Report of Peter Lovell (Lovell Chen) at [70]-[71].

48. While the aesthetic value of the market's setting has not been *adequately* explored in any assessment to date, there is material upon which a person attempting to identify that value could gain at least *some* understanding of it:
- a. The NHL Assessment Scoping Report specifically notes that '*[t]he community engagement and consultation work undertaken by Capire (2014) addresses aesthetic values of a non-architectural type*', albeit not in sufficient detail.¹⁸
 - b. The report which formed the basis for Amendment C61 was based upon a consultation process which identified valued characteristics of the market precinct and the community's aspirations for its built form.¹⁹
 - c. A substantial number of objections to this Amendment articulate the manner in which the built form envisaged by Council is contrary to the aesthetic value submitters place on the market's setting.
49. In coming to a view about what is 'significant' about the market's heritage, Mr Lovell did not have regard to the consultation work undertaken by Capire – notwithstanding that the NHL Assessment Scoping Report (upon which he did rely) specifically identifies that work as addressing at least to some extent the heritage values missing from the market's 'assessed significance'.²⁰
50. Nor did he have regard to the report which formed the basis for the current built form controls in DDO14 – notwithstanding that those controls are clearly intended to achieve a particular aesthetic outcome for the market's setting, and it could have been reasonably assumed that the aesthetic values of the market might have been examined in substantiating the merits of such controls.
51. The material which is available shows, at the very least, that there is a reasonable possibility that the aesthetic heritage significance of the market includes a sense of 'openness' that depends on the low and mid-rise 'foreground market interface' described by Ms Heggen, and that the 'high-rise backdrop' remains a 'backdrop' rather than an interface.

¹⁸ *National Heritage List Assessment – Scoping Report* (Context, 12 November 2014) at p 13 (Red folder, document 3).

¹⁹ *Queen Victoria Market Precinct – Built Form Review* (Hansen Partnership, July 2003) at pp 42-6 (Green folder, document 8).

²⁰ *National Heritage List Assessment – Scoping Report* (Context, 12 November 2014) at p 13 (Red folder, document 3).

52. A sense of ‘openness’ was identified as a valued aspect of the market atmosphere both in the Capire Phase 1 report and in the C61 report, the latter also more specifically identifying ‘*the lack of a sense of enclosure created by the scale and spacing of buildings around the market*’.²¹

53. The significant public opposition to the built form outcome envisaged by the Amendment, and its expression in the substantial volume of submissions, is also informative in revealing the values underlying that opposition – the ‘*open, sunny and expansive feel of the precinct*’,²² ‘*an oasis in the midst of the high-rise madness*’,²³ and the apprehension of an outcome that would be ‘*like being in a fish bowl*’.²⁴

54. As Ms Johnson observed:

*The threat of loss to a beloved place is often a spur to action, requiring a community to quickly mount a case and articulate its social and other values.*²⁵

55. If it does turn out to be the case that a sense of openness and lack of enclosure is part of the aesthetic heritage significance of the market, then there can be no doubt that a valued part of the market’s heritage will be taken away from the community by a decision to have tall buildings massed around it to create a ‘visual containment’ of the site and a distinct sense of enclosure.

56. This is relevant to the Panel’s consideration of net community benefit not only in terms of heritage in and of itself, but also insofar as it would have a considerable social effect within the meaning of s 12(2)(c) of the *Planning and Environment Act*.

57. The relevant social effect is the diminishing of a valued character and ‘sense of place’ in the market that contributes to citizens’ ‘*happiness with or contentment in their community*’.²⁶

²¹ *Queen Victoria Market Precinct – Built Form Review* (Hansen Partnership, July 2003) at p 42 (Green folder, document 8).

²² Submission 14 (Orange folder).

²³ Submission 21 (Orange folder).

²⁴ Submission 9 (Orange folder).

²⁵ Chris Johnston, ‘Inhabiting Place: Social Significance in Practice in Australia’ (2014) 45(2) *Association for Preservation Technology International Bulletin* 39 at 40.

²⁶ *Stonnington CC v Lend Lease Apartments (Armada) Pty Ltd* [2013] VSC 505.

Detriment to something of cultural significance has long been considered a relevant social effect within the meaning of the Act.²⁷

58. Dr Spiller’s evidence, which is for the most part (and unfortunately) of no relevance given that his instructions did not align with the actual scope of the Amendment, is at least instructive in revealing the enormous value that the community places on its enjoyment of the intangible cultural values of the market and the weight those values should be given in any assessment of net community benefit.
59. When Mr Lovell was referred to the Capire Phase 1 report, the Amendment C61 report and the community submissions during cross-examination, he said that they were not ‘specific’ enough to inform a view as to aesthetic significance.
60. That is a surprising characterisation of material that:
 - a. the NHL Assessment Scoping Report considered informative, at least to a limited degree, of ‘*aesthetic values of a non-architectural type*’ (in the case of the Capire Phase 1 report),²⁸ and
 - b. was prepared specifically to form the basis for the built form controls in Amendment C61 and was considered by the report’s author, Council, a Panel and the Minister to adequately support such controls (in the case of the Amendment C61 report).
61. In any event, if Mr Lovell is correct about the ability of that material to inform a view as to aesthetic significance, it just means that no-one has any idea whether or not the Amendment will spoil a valued aspect of the market’s heritage significance because no-one has any idea of what value the community places on the existing aesthetic of the market’s context.
62. If that is the case, then Council should either:
 - a. conserve the existing aesthetic attributes which may have significant value, or

²⁷ *Minawood Pty Ltd v Bayside CC* [2009] VCAT 440 at [30]-[63].

²⁸ *National Heritage List Assessment – Scoping Report* (Context, 12 November 2014) at p 13 (Red folder, document 3).

- b. go back and do the work required to adequately understand the market's aesthetic significance (which will need to be done in any event for inclusion on the National Heritage List) before trying to dramatically change it.

Height

63. The market's CBD location and the emphasis which has been placed on its location 'within the Hoddle grid' does not automatically justify an 'anything goes' approach to height, especially where built form has the potential to adversely impact on valued heritage character.
64. The Panel for Amendment C240 to the Melbourne Planning Scheme, in considering submissions to that effect in relation to proposed stringent height controls in the Bourke Hill precinct, recently stated:

The Panel does not agree that land in the CBD should be exempt from the normal range of planning intents and controls. The central city is an important public place for people living in and visiting the State. It is just as important, and probably more so, that policies and controls to protect the public realm are put in place in the CBD. In recognition of the values of the CBD, various parts of it have been subject to height controls for in excess of 30 years including this Precinct and the CBD's retail core.

... the height controls designed to protect the special urban and urbane characteristics of the Precinct are warranted and to abandon them in favour of permitting development akin to that occurring elsewhere in the CBD would be equivalent to 'killing the goose which laid the golden egg'.²⁹

DPO11 area

65. In Council's enthusiasm to absorb everything right up to the edge of the market into the full intensity of the CBD, it has put forward built form controls that would be overwhelming even from an urban design perspective, let alone a heritage perspective.

²⁹ Melbourne C240 (Bourke Hill) [2015] PPV 37 (4 May 2015) at pp 80, 82.

66. In this respect, Mr Sheppard is the witness who has taken the most serious, studied look at the impact of building height on the sense of scale that is experienced in open spaces. The Panel should accept his carefully explained reasoning as to why a height of 80-100 metres on the periphery of open space in this location is the point at which a sense of enclosure would become a sense of overwhelming enclosure.
67. Mr Lovell's evidence was that he *'hadn't really considered the issue of height'* but that he saw no need to diverge from typical CCZ heights on account of the market from a heritage point of view. Two things can be observed about that evidence:
- a. It does not appear that Mr Lovell has the same depth of understanding as Mr Sheppard about how building height would actually be experienced when one moves away from the streetscape and into more open spaces within the market; and
 - b. A lack of consideration of building height is perfectly consistent with Mr Lovell's narrow view as to what is 'significant' about the market's heritage. There is no need to consider building height if the aesthetic of the market's setting is not significant.
68. Mr Sheppard's evidence is a useful and considered guide as to what building heights would be appropriate to create a sense of enclosure around the market. In this context, the height limits sought by the Trust can be seen as a reasonable outcome of the 'balancing act' between urban design and heritage which, for the reasons explained earlier in this submission, does not support the creation of such a sense of enclosure.
69. On that basis, the Panel should recommend a 30 metre discretionary height limit for the area beyond the street setbacks of development parcels A and B on the Precinct Framework Plan.
70. On development parcel D, it should recommend a 20 metre discretionary height for the same reason, in combination with the additional reasons outlined later in this submission.
71. The height limits sought do not have any bearing on the improvements that can and should be made to the current public realm character of the streetscapes around the

market, such as frontage activation, pedestrian capacity and amenity and permeability of the large blocks.

72. Rather, what they would achieve is the reasonable facilitation of increased development in a way that does not create a sense of enclosure, but rather, maintains the sense of openness that the community values and enjoys in the market.

DDO14 area

73. Within the contracted area of the DDO14, there are two locations that also merit consideration of height controls.
74. The heritage precinct HO1125, recently approved through Amendment C198, covers the entire west side of Elizabeth Street between Therry Street and A'Beckett Street.
75. Mr Lovell notes the existence of the precinct (then subject to Ministerial approval) in his April 2015 review but makes no comment on it other than to observe that it is '*place focussed*' and '*without any particular reference to the Market*'.³⁰
76. The statement of significance for the HO1125 precinct notes that it is:
- ... of aesthetic significance as a high quality and relatively intact (above street level) example of the building stock which retains a consistent low-scale building form indicative of 19th century patterns of development. Although interspersed with later buildings, it is one of the few parts of the CBD where this can still be appreciated to a substantial extent ...*³¹
77. It is well established that a DDO is an appropriate planning tool to sharpen the understanding of, and place parameters around, design outcomes which are acceptable from a heritage point of view.³²
78. In this respect, a mandatory 15 metre height limit in the area covered by HO1125 would be a suitable control to maintain the relatively rare and high quality character of this strip from having its intactness compromised by facadism and tall development.

³⁰ *Queen Victoria Market Precinct Renewal – Review of Heritage Issues* (Lovell Chen, April 2015) at pp 9-11 (Blue folder).

³¹ City North Heritage Review 2013 Statements of Significance (revised June 2015) at pp 45-7.

³² See, eg, Melbourne C240 (Bourke Hill) [2015] PPV 37 (4 May 2015) at pp 98-101.

79. The second area is the remainder of the block bordered by Franklin and Therry Street, fronting the north side of Franklin Street.
80. The Trust does not consider that the height of development in this location would have as substantial an impact on the market aesthetic as in the areas where it seeks a 30 metre limit. However, it is still close enough to the market to have some degree of impact and also contains a number of buildings with a degree of heritage significance in their own right, as well as two evocative bluestone laneways.
81. For these reasons, there is merit in tempering the height on the north side of Franklin Street to some degree, and a 50 metre discretionary limit would be appropriate.

Within the market

82. The height limits and built form outcomes in the current areas A16 and A17 of the DDO14 were arrived at through a detailed expert review (conducted by a heritage specialist separately and in addition to the strategic report prepared by Hanson Partnership for areas outside of the market itself)³³ and careful consideration by the Panel in Amendment C61.³⁴
83. Whatever may have changed in relation to the market environs since then, nothing has changed within the market itself so as to render the rationale for those controls any less relevant.
84. Council has not provided any coherent explanation for the complete removal of the DDO14 from the market itself (in the area coextensive with the proposed PUZ7).³⁵ The existing control is discretionary, based on a comprehensive and ‘holistic’ assessment which has already been carried out by a heritage expert, and allows for a ‘holistic’ consideration of heritage *and* design issues in relation to any future development proposal in that area.

³³ *Queen Victoria Market – Review of Height Controls* (Meredith Gould Architects, December 2004).

³⁴ Melbourne C61 (QVM precinct built form review) [2005] PPV 138 at pp 17-18, 51-3 (Green folder, document 9).

³⁵ It is assumed to arise from the *Built Form Review and Recommendations* (Jones & Whitehead, April 2015) at pp 54-55 (Blue folder).

85. Heritage is not the exclusive domain of Heritage Victoria; it is also a consideration that can be and often is a critical component in the matrix of issues that arise in a planning assessment. The use of a DDO has long been accepted as an appropriate tool to control design outcomes that are informed by heritage considerations,³⁶ and its purpose in this instance has been adequately substantiated by the review which supported Amendment C61 and the report of the Panel that considered it.
86. Council itself seems to contradict its own assertion that built form controls are inappropriate within a VHR registered area, insofar as it proposes controls some of which relate only to the VHR registered extent of the stores in development parcel D – formulated at least in part on heritage considerations – and even appears to consider it important to explicitly suggest a cantilever in that location despite Mr Lovell’s protestations.³⁷
87. The Panel should recommend that the area coextensive with the proposed PUZ7 remain subject to a DDO to the same effect as the present control.

Podium and setbacks to Therry and Queen Street

88. Given the focus of Mr Lovell’s assessment, the proposed controls for these interfaces in a street context are far more responsive to heritage values than the (lack of) controls concerning building height in the wider market context.
89. The Trust does, however, submit that what is proposed is ‘balanced’ somewhat less towards heritage than it could be, when the full weight of the market’s heritage significance is taken into account. It would prefer to see the 10 metre podium height as a discretionary maximum rather than a minimum (particularly on Therry Street), and more generous front setbacks of 15 metres.
90. Such controls would more rigorously protect heritage without preventing the effective activation of frontages or unreasonably compromising the development potential of

³⁶ See, eg, Melbourne C240 (Bourke Hill) [2015] PPV 37 (4 May 2015) at pp 98-101.

³⁷ Mr Lovell’s recommendation to remove the wording has not been addressed in the *City of Melbourne Administration Response to Witness Recommendations* (Document #).

what is, in the case of development parcel A, an enormous site; and of parcel B, the potential of which is limited by other factors.

Development Parcel C (Queen's corner building)

91. Development parcel C is the paradigm example of policy developed without first understanding and identifying the constraints arising from heritage significance.
92. It proposes to create a new built edge condition to the market itself that would rise up to three times higher than the adjacent historic market sheds, an outcome which does not appear to be necessitated (or even to facilitate) any particular purpose Council can identify that could not just as well be achieved with a building of two storeys.
93. The Panel should recommend that it be subject to a 7 metre discretionary height limit, in accordance with the outcome that was determined appropriate both by:
 - a. the considered opinion of Mr Lovell when formulating the market's conservation management plan,³⁸ and
 - b. the considered opinions of Ms Gould and the Panel in Amendment C61 which, as explained above, are no less relevant in respect of the built form in the market area itself than they were in 2004-5.³⁹
94. If the Panel were to prefer Mr Lovell's height limit of 13 metres than the control should be mandatory.

Development Parcel D (Franklin Street stores)

95. The same can be said for development parcel D in terms of the level of consideration that was given to heritage in conceptualising a preferred built form for the site.
96. Even after Council's last minute contemplation of a 15 metre setback from the façade of the stores, Mr Lovell's comfort with the proposed controls appears to be underpinned

³⁸ *Queen Victoria Market Conservation Management Plan* (Allom Lovell & Associates, April 2003, updated November 2011) at [5.4.1] (Red folder, document 1).

³⁹ See paragraphs 82-87 above.

by his faith that Heritage Victoria will require any development to diverge significantly from what is set out in the Precinct Framework Plan.

97. The Panel should not be content to ‘pass the ball’ to Heritage Victoria in this manner, for two reasons.
98. First, the scope of restrictions on development (and therefore the circumstances in which a heritage permit is required) under the *Heritage Act* is delineated by the extent of the registered place.⁴⁰
99. Most of development parcel D falls outside of the VHR registered extent and there is therefore substantial uncertainty about whether, and to what extent, development on parcel D as a whole will actually be subject to assessment by Heritage Victoria.
100. The adverse heritage impact of the form of development proposed for parcel D arises, on any view, from matters both within and outside of the VHR registered extent (for example, the podium heights on the east and west sides).
101. Second, the purpose of a DPO is to coordinate development in advance and to provide certainty about the general form of development. It is futile and contradictory for a DPO to positively set out a desired built form outcome that is so inconsistent with the heritage significance of a place that it is likely to be in conflict with the built form outcome that can actually be achieved with a heritage permit.
102. It is also inadequate to rely on Heritage Victoria to ‘fix’ the fundamental unsuitability of an outcome that is positively sought by the DPO.
103. The form of development sought in a DPO is not only relevant to a planning permit application, but also sets regulatory parameters for the expectation of what constitutes a reasonable and economic development on the site – a matter which Heritage Victoria is required to take into account in determining an application for a heritage permit.⁴¹
104. In this respect, the approval of a framework plan that is directly at odds with the proper treatment of a heritage place risks giving rise to a circularity insofar as:

⁴⁰ *Heritage Act 1995* (Vic) ss 64 and 67.

⁴¹ *Heritage Act 1995* (Vic) s 73(1)(b).

- a. the framework plan is considered appropriate, on the basis that Heritage Victoria will step in to ensure an appropriate outcome by approving something different; and
 - b. Heritage Victoria's decision is affected by the very fact that the framework plan, in being approved, was implicitly considered to set out the most reasonable future development of the site.
105. The Panel cannot predict what specific requirements Heritage Victoria may impose on any future heritage permit, but it can ensure that the Precinct Framework Plan at least broadly sets out a development which:
 - a. is generally appropriate from a heritage point of view;
 - b. is generally reflective of a built form outcome that is actually likely to be permitted on parcel D; and
 - c. does not create an unjustified expectation as to what constitutes a reasonable and economic use of the site.
106. The Franklin Street stores have particular heritage significance in the context of this Amendment that goes beyond their aesthetic value. They also mark the southern boundary of the historic extent of both the graveyard and the original market. Mr Lovell agrees that it is important to maintain the legibility of the connection of the stores to the rest of the market, and that this is an important consideration to have particular regard to in circumstances where a new road will separate them.
107. In this respect, the Trust submits that the primary risk to the legibility of that link is a built form outcome in which the stores are effectively 'swallowed up' by a much taller and potentially wider new development over and around them. Yet that is exactly what the Precinct Framework Plan contemplates.
108. In a context in which critical significance lies not only in the heritage fabric of the building but also in retaining the legibility of its relationship to the rest of the market, development on parcel D needs to not just respect the scale of the stores themselves, but also to be perceived as unambiguously separate from them.

109. Mr Lovell's observations about what he considered Heritage Victoria would most likely require on parcel D, although not his own personal opinions, are informative as to what form of development should be considered appropriate from a heritage perspective. They also generally align with the views of the Trust.
110. The Panel should recommend that the Precinct Framework Plan be modified so as to show, in relation to parcel D:
- a. the northern building line set back 6 metres from the southern façade of the stores, including the area east of the stores at the corner of Queen Street; and
 - b. a 20 metre discretionary height limit for the area beyond the street setbacks (which would only apply in practice, if not also in form, to the wider triangular western portion of the site once the northern building line is pulled back from the stores).

Conclusion

111. For all of the above reasons, the Panel should recommend that:
- a. the Amendment be adopted with the changes sought by the Trust;⁴² or
 - b. the Amendment not be adopted, that further work be undertaken to identify and understand the aesthetic heritage values of the market's context and that such work inform the preparation of any future amendment affecting the built form controls in the Queen Victoria Market Precinct.

Daniel Robinson
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10 May 2016

⁴² See paragraphs 69, 70, 78, 81, 87, 89, 93-94 and 110.