

IN PLANNING PANELS VICTORIA
MELBOURNE PLANNING SCHEME
AMENDMENT C326

Metro Pol Investment Pty Ltd

Submittor

and

Melbourne City Council

Planning Authority

and

Others

Submitters

**SUBMISSIONS ON BEHALF OF THE METRO POL INVESTMENTS PTY LTD AS TO
 PROCEEDURAL MATTERS AND FUTURE CONDUCT OF HEARING**

Introduction

1. These submissions are made on behalf of Metro Pol Investment Pty Ltd which is the owner of land at 263-267 William Street, Melbourne. This land is developed with an established hotel known as the Metropolitan Hotel (Metro Pol).
2. Metro Pol has a permit application that is currently before VCAT that proposes to retain the Metropolitan Hotel and construct a building above the hotel.

Background

3. Until 16 August 2018, the Metro Pol land was not included in the heritage overlay.
4. Without notice, the Minister approved amendment C326 to apply an interim heritage overlay over the land¹. The land is designated as 'significant' and the statement of significance ascribes significance to the building and the use.

¹ It is stated in the Minister's Reasons for Invention 24 July 2018:

1. *Melbourne City Council has requested that the Minister for Planning use the powers of intervention under section 20(4) of the Act to prepare, adopt and approve Amendment C326 to the Melbourne Planning Scheme without notice.*

5. It is understood that some sixty-four other properties are subject of proposed C327 and C328 which seeks to apply interim and permanent controls.
6. C327 and C328 were presented to a council meeting on 21 August 2018. It is understood that because there was no quorum due to conflict declarations, the agenda item will be dealt with by an officer under delegation. It is understood that the decision made under delegation will be in accordance with the management recommendation printed in the agenda papers to seek interim controls pursuant to section 20(4) of the Act and seek authorization to exhibit C328.
7. The application of the interim control means that it is beyond dispute that Metro Pol's interests are now affected by Amendment C258. This proposition is even more stark given that the Council is aware that it is dealing with a live permit application on the land.
8. It is beyond fair debate that the proposed changes to clause 22.04 and 22.05 will have a direct impact upon the Metro Pol land and the interests of its owner.
9. The Panel should be left in no doubt that the Planning Authority is aware of the implications of this Amendment and the effect of the interim heritage control for which the Planning Authority advocated².

Background

10. Based upon a preliminary review of the Council's Part A submission:
 - i. Public consultation took place with the owners and occupiers of properties within the West Melbourne SP area and the owners of occupiers of site-specific and precinct Heritage Overlays within the municipality (paragraph 70);
 - ii. Notice was given directly to the owners and occupiers of properties including within the Heritage Overlay (paragraph 72);
 - iii. The Council re-exhibited the amendment to owners and occupiers of the corrected C258 (paragraph 81-87);

² See Minister's Reasons for Intervention relating to amendment C326.

- iv. Extensive information consultation took place with affected owners and other stakeholders (paragraph 88).
- 11. Notice of C258 for those properties not affected by a heritage overaly appears to have been left to chance. Metro pol were not given notice, even after the application of the interim controls. Metro Pol became aware of C258 late last week.
- 12. Immediately, Metro Pol instructed its solicitors to lodge a submission in relation C258 (see attached). That submission included Metro Pol's request for the opportunity to call expert evidence.
- 13. It is understood that upon receiving that submission, the Responsible Authority referred the submission to the Panel.
- 14. As a submitter Metro pol is entitled to a reasonable opportunity to be heard.
- 15. This quality of this right is not inferior to any other submitter.

Relevant statutory provisions

- 16. Under the provisions of the *Planning and Environment Act* 1987 ('the Act'):
 - i. A planning authority must give notice of its preparation of an amendment to a planning scheme to the owners and occupiers of land that it believes may be materially affected by the amendment (section 19(1)(b));
 - ii. 1 month of notice is the minimum time available for the notice period (s19(4)(b));
 - iii. the Panel must consider all submissions referred to it and give a reasonable opportunity to be heard to any person who has made a submission referred to it (section 24);
 - iv. a Panel may make directions about the times and places of hearings, matters preliminary to hearings and the conduct of hearings (section 159(1)).
 - v. a Panel may regulate its own proceedings (section 167);
 - vi. in hearing submissions, a panel:

- S161(1)(a) must act according to equity and good conscience without regard to technicalities or legal forms; and
 - S161(1)(b) is bound by the rules of natural justice.
- (iv) Section 161(4) - A panel may hear evidence and submissions from any person whom this Act requires it to hear.
- (v) Section 161(5) - Submissions and evidence may be given to the panel orally or in writing or partly orally and partly in writing.

Conduct of this hearing to date

17. As Metro Pol understands it:

- i. The Panel held a directions hearing on 4 June 2018;
- ii. Presumably, specific directions were made by the Panel concerning timetable, expert evidence and other standard directions in relation to the conduct of the Panel hearing;
- iii. Other submitters have made submissions to the Panel and been permitted to call and test evidence;
- iv. Submissions and argument have been presented by the Planning Authority as the Proponent of the Amendment.

18. The Minister's intervention, and the correct decision of the Planning Authority to refer Metro Pol's submission are matters outside the control of the Panel and the Panel could not have foreseen this interruption to the process.

19. Nonetheless it falls to the Panel to ensure that procedural fairness is applied to the circumstances that now exist.

Rules of natural justice

20. The obligation to afford natural justice includes the provision of procedural fairness.

21. An email was received on 29 August 2018 from Planning Panels Victoria which stated:

The Panel has considered the request on behalf of your client, Metro Pol Investment P/L as owner of 263-267 William Street, to present to the

Melbourne C258 Panel as well as the Council's comments on that request. The Council provided us with your letter of 27 August.

The Panel has determined to allow your client a presentation time of 1.5 hours. This is the time remaining within the scheduled hearing days. It is only possible to accommodate your client on Monday 3 September in the morning before 12:15pm or Wednesday 5 September in the morning up to 12 noon. No evidence may be called as the Panel considers there is insufficient time to prepare and circulate that evidence allowing for adequate service on others.

Could you please advise urgently which time would be suitable.

22. Procedural unfairness is evident even by mere reference to what can be identified in the email of 29 August 2018:
 - i. Metro Pol was not invited nor present at the hearing on 27 August (or at any other time) and was not informed about nor able to respond to 'Council's comments on that request';
 - ii. The Panel has made a determination;
 - iii. A specific time and date allocation has been made according to the Panel's schedule without regard Metro Pol's position and the opportunity to consult and prepare;
 - iv. Metro Pol has been denied the right to call evidence or to test evidence on the regrettable and invalid ground that '*the Panel considers there is insufficient time to prepare and circulate that evidence allowing for adequate service on others*';
23. There may also be legitimate questions as to rehearing of evidence and the constitution of the Panel.
24. Metro pol is entitled to have time to consider and make representations as to all procedural steps.
25. This submission is made on the basis that it is open to the Panel to revisit its earlier determination set out in the email of 29 August 2018. With respect, it is a determination that is contrary to the obligation to afford natural justice.

Future conduct

26. Neither the Panel nor Metro Pol are to blame for the circumstances that have interrupted the hearings to this Amendment.
27. This is a consequence of the actions of the Minister and the Planning Authority.
28. The interests of completing the hearing according to a predetermined timetable, or the inconvenience of repetition, are not factors that outweigh the Panels obligations to afford Metro Pol a fair go.
29. In this case that means Metro Pol should get the same opportunity that was given to the Planning Authority and other submitters.
30. Those other participants and non-participants were:
 - i. given direct notice of the amendment;
 - ii. were given 1 month to make submissions;
 - iii. had several months leading into the directions hearing on 4 June 2018 to take advice, consider and prepare for the Panel hearing;
 - iv. able to attend the Directions Hearing and make submissions as to the proper conduct of the hearing;
 - v. able to read and consider the pre-circulated expert evidence;
 - vi. able to call lay and expert evidence ;
 - vii. able to hear the Council's case including submissions and expert evidence;
 - viii. able to cross-examine the Council's witnesses and any other experts in the hearing.
31. Metro Po, requires more time to consider the Amendment and to ensure that it has had an opportunity to fully participate.
32. In the circumstances, and on the assumption that others included within Amendment C327 and C328 may also wish to be heard, it is submitted that Directions should be made to the following effect:

- i. Adjournment of the balance of submissions and timetabled sessions for Amendment C258;
 - ii. direct notice of this Amendment/Panel process to be given to all land owners affected by C326, C327 and C328 including an invitation to participate in Amendment C258;
 - iii. A process for referral by the planning Authority of further submissions;
 - iv. Listing of Amendment C258 for a directions hearing in no less than 4-6 weeks.
33. The Panel should not underestimate the degree to which this Amendment affects Metro Pol's interests.
34. This is a deliberate outcome of the sudden application of the interim heritage controls on land currently the subject of a permit application before the City of Melbourne.
35. Anything less than full and fair participation in these proceedings ought trouble the Panel in light of its obligations.

Peter O'Farrell

Isaacs Chambers

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Instructed by Best Hooper Lawyers

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