

“Three Strikes and You’re Out !”

A REQUEST FOR HERITAGE VICTORIA TO CONDUCT

A THOROUGH INVESTIGATION

AND

PUBLIC INQUIRY

INTO ALLEGED BREACHES

OF

HERITAGE PERMIT CONDITIONS

AT

KEW COTTAGES

BY

THE

DEPARTMENT OF HUMAN SERVICES

SUBMISSION FROM KEW COTTAGE COALITION

RE: CONDITIONAL HERITAGE PERMIT P9639

DATE: 28th April 2006

1. Preamble.

An extraordinary and disturbing situation has arisen at Kew Cottages concerning a decline in the health of numerous trees, and the state of the land in this unique 27 hectare State Heritage site adjoining Willsmere, and the Yarra Bend Park.

The Victorian Government's Department of Human Services (DHS) , applied for a Heritage Demolition Permit at Kew Cottages in June 2005. A Conditional Permit P9639 was granted to DHS by Heritage Victoria (HV) in September 2005.

DHS demolition and road construction works began at Kew Cottages in late 2005. Now a number of dead trees, and clusters of trees suffering severe dieback have been identified in the grounds. In January 2006, climatic conditions were blamed for the first tree stress reported at the Cottages. However, soil tests undertaken in February confirmed the presence of a virulent and incurable plant pathogen, *phytophthora cinnamomi* .

***Phytophthora* is suspected of causing the sudden dieback of at least one of the iconic trees on the site, a rare Bishops Pine. The Bishops Pine (Tree 295) is one of several hundred significant trees at Kew Cottages, it is located on the Brady Lane hillside adjacent to the Canoe Tree between Main Drive and Lower Drive, and was the first tree at the Cottages to be listed on the National Trust Victorian Tree Register.**

Kew Cottages Coalition has raised serious questions in the past about DHS's failure to properly supervise contractors undertaking high risk works near heritage trees on the site. We have requested that the site now be properly quarantined, and we have sought the intervention of both the Minister for Planning, and the Minister for the Environment , to address the broad environmental, planning and heritage policy issues involved.

Heritage Victoria has kindly undertaken preliminary inquiries, but many questions regarding DHS compliance with its Heritage Permit conditions remain unanswered. The current Responsible Planning Authority for Kew Cottages, the Minister for Planning (and Heritage), appears to be unfortunately now experiencing some considerable difficulty in even communicating with the public on the subject of *phytophthora* at Kew, and thus somewhat ironically it has been left up to the local government authority, Boroondara Council to commission the only independent expert report (ENSPEC, March 2006) that has been produced on the matter to date.

The ENSPEC Report provides clear evidence that breaches of basic hygiene procedures for managing phytophthora have already occurred in the high risk phytophthora zone. ENSPEC identifies the need to:

- 1. Immediately eliminate poor work practices before any further excavation works are commenced;**

2. Establish a “Total Phytophthora Management Plan” to ensure the spread of Phytophthora does not occur.

Unfortunately, the Report’s terms of reference and timeframe were understandably both limited and limiting. ENSPEC’s brief was limited in that only a preliminary site inspection was able to be conducted “to establish why a heritage listed tree had entered into a rapid state of decline”, and limiting in that no independent assessment of DHS’s compliance with Heritage Permit conditions was attempted, no further testing for phytophthora was undertaken in the grounds, and no attempt was made to map the then current (Autumn) spread of the pathogen, either within the Cottages grounds, or more widely in the border areas of neighbouring parkland, gardens, and Council reserves.

As a consequence, in our submission it is now necessary for Heritage Victoria to:

1. Investigate thoroughly the apparent failure of the DHS Conditional Heritage Permit to adequately and comprehensively protect the trees at Kew Cottages; and as part of that investigation,
2. Require that DHS publicly demonstrate precisely how the nature of DHS compliance with Heritage Permit conditions has at all times been both adequate and appropriate.

Moreover, given the Victorian Government’s long standing conflict of interest at Kew Cottages as both the owner, administrator, planning authority, and developer, we also respectfully suggest that the public interest will best be served by Heritage Victoria establishing an independent and open public inquiry into the following associated matters.

2. Request for Inquiry.

The Kew Cottages Coalition respectfully requests:

A. That Heritage Victoria require DHS to demonstrate how, and in what manner, the supervision and contractual conditions of its Kew Cottages construction works during 2005 adequately addressed, potentially threatening processes for damage to tree roots, including those specifically identified in *Clause 15 of the Victorian State Policy Planning Framework* and the *Boroondara Planning Scheme*, namely the threat of *phytophthora cinnamomi* as a potentially threatening process identified under the *Flora and Fauna Guarantee (FFG) Act 1988*.

B. That Heritage Victoria establish an independent public inquiry to investigate the following alleged breaches of Kew Cottages *Heritage Permit 9639 Condition 10 (Conservation of Trees During Construction.)* by the Permit holder, the Department of Human Services (DHS).

It is alleged that between the grant of Permit 9639 on 9th September 2005 and Kew Cottages Coalition initial complaint on 23rd December 2005 the Victorian Government, Department of Human Services, as the Permit holder:

- 1. Failed to take the necessary steps to ensure all existing trees were properly protected during the construction phase of the project, as required by the Permit;**
- 2. Failed to ensure that the roots of trees were rigorously protected from damage, as required by the Permit;**
- 3. Failed to document the precise position of the canopies to enable an evaluation of the impact of the works, as required by the Permit;**
- 4. Failed to rigorously review the construction of or resurfacing of driveways to ensure that it did not result in a diminution of tree health as required by the Permit;**
- 5. Failed, thereby, to ensure all contract works and activities undertaken were in accordance with the approved Arboricultural Plan as specified in the Permit.**

In our submission:

- a) The specific works in question where the alleged offences were committed were the earthmoving, road, driveway, and pedestrian pathway construction and resurfacing works undertaken by DHS at several sensitive and significant locations throughout the site, including the Brady Lane, Main Drive, Lower Drive, Hutchinson Drive, and Stage 1/2 areas during 2005.**
- b) The alleged breaches of Permit conditions were due to DHS's negligence and failure to provide the level of care and protection specified in the Permit .**
- c) Heritage Victoria is aware of previous failures by DHS to adequately supervise contractors undertaking high risk activities that have threatened to damage Heritage trees at Kew Cottages. The latter failures include "Yarra Valley Water Works"(June 2004) , and "Yarra Tram Works"(April 2005). During the first incident tons of water pipes were stockpiled up against the trees in Main Drive, during the second tram rails were stockpiled and welded under the Canary Island Pines. Both incidents may well have already led to long term hidden damage to the trees that will not be apparent for some years.**
- d) Given DHS's previous record of failing to adequately supervise contractors at the Cottages, it is imperative that the September 2005 Heritage Permit conditions be applied with rigour, and strictly enforced by the regulator.**

- e) Given the significant penalties that apply under the Heritage Act, eg: up to \$480,000 for unauthorised works, and given the need to form a view on the extent of DHS compliance with the Act, the regulator must be given access to all works related documents including inter alia:
- i) Details of risk management plans and insurances;
 - ii) Details of contracts and penalty clauses;
 - iii) Details of vegetation, landscape, soil and water management plans;
 - iv) Details of work schedules, equipment movements, and hygiene procedures;
 - v) Details of contractor briefings and supervision;
 - vi) Details of all correspondence and communications related to the formal documentation prepared pursuant to all the Permit conditions (eg: the ‘Full design details ..’ and ‘HIA’ prescribed in Permit Condition 7 with regard to ‘works within the vicinity of any other significant trees on the site..’)
- f) A very serious situation has now arisen in 2006 with a number of dead trees having been identified on the site and a number of the supposedly ‘protected trees’ on the site having been confirmed to be suffering from severe dieback. *Phytophthora cinnamomi* has been identified as the most likely cause of the damage to the roots and the dieback of the National Trust Registered Bishops Pine Tree 295 – the first tree that we identified to HV on 23rd December 2005 as having apparently been put ‘at risk’ by DHS work practices
- g) Outstanding issues to be resolved include precisely how far the phytophthora has spread and why DHS:
1. Failed to take the necessary steps (eg: phytophthora testing, and hygiene mitigation measures) to ensure all existing trees were properly protected from phytophthora being spread by poor work practices during DHS 2005 construction works ?
 2. Failed to ensure that tree roots in particular were rigorously protected (eg: with phosphite chemical treatment) from phytophthora ?
 3. Failed to document the precise position and condition of the tree canopies (eg: photographic monitoring) to enable the required evaluation of the impact of the works (eg: dieback) ?
 4. Failed to rigorously review the standard operating procedures (eg: hygiene) used in the construction and resurfacing of new driveways including the Brady Lane car park, the Hutchinson Drive Contractor Entrance Road, and the Hutchinson Drive Emergency Access Driveway ?
 5. Failed to rigorously review the associated DHS works, and work practices in terms of how they might directly or indirectly increase the threat from phytophthora on site, and thus cause a diminution of tree health ?

3. Why DHS has a case to answer ?

3.1 A known problem..

Phytophthora is a well known plant pathogen that can cause significant damage to a very diverse range of tree roots.

Phytophthora is a known cause of significant dieback to susceptible tree canopies, and plants, particularly Australian indigenous plants.

Earthmoving, road, and driveway construction and resurfacing are known to have contributed significantly to the spread of Phytophthora in Victorian coastal areas.

In 2001 The Federal Government adopted a national threat abatement plan to help contain the spread of phytophthora.

3.2 Long standing Victorian Government guidelines...

According to the Victorian Government's own guidelines for reducing the spread of phytophthora during earth moving operations - published by the Department of Natural Resources and Environment in 2002: The primary sources of introduction of the pathogen to an area are:

- 1.) use of infested gravel in road constructions,*
- 2.) infested soil adhering to earth moving equipment, vehicles, trail-bikes and other machinery*
- 3.) use of infected nursery stock.*

3.3 A Statutory "Duty-of-care" Binding on all Victorian Public Authorities...

In 2002 Victoria moved to further contain the spread of the pathogen with additional statutory requirements on all public authorities to manage the threat of phytophthora. (FFG Act 1988)

3.4 Well Promoted National Precedents in Place

By 2004 precedents were in place throughout Australia for managing the threat posed by phytophthora, not only in National Parks and Forests, but also on construction sites and works in high value conservation areas not dissimilar to Kew Cottages, close to suburban developments in capital cities.

The WA "Dieback Working Group" was formed in Perth in 1996, and its comprehensive 'Guidelines for Local Government' were published in 2000.

Hobart City Council implemented "Soil and Water Management Guidelines" that included provision for managing transmitted vegetation fungal diseases (particularly Ameliaria and Phytophthora) in 1999.

Adelaide Councils, and the SA Phytophthora Technical group, not only had Phytophthora 'SOP's (Standard Operating Procedures) in place by 2003, but also GIS mapping for 'High Risk Phytophthora Zones on Council Roads, Reserves, and adjoining Properties throughout the region.

In 2003, Mosman Council in Sydney introduced phytophthora management protocols for contractors, and the Sydney Harbour Trust brought together a working group of landowners and experts in the field to share their knowledge and experience in the control of Phytophthora. In 2005 the Trust together with four Sydney Councils and other land management agencies formed the Sydney Harbour Dieback Working Group to protect bushland in the Sydney Harbour region by minimising the risk of the spread and impact of Phytophthora.

The Victorian State Government has been slow, compared to other States, to respond to the growing threat posed by phytophthora to the natural environment, parks, and bushland near urban centres. However Victorian Local Government Authorities have not been so tardy.

In 1996 Mornington Peninsula Council identified the need *“to ensure (with penalty clauses in contracts) that contractors and staff from service authorities involved in the installation and maintenance of services (particularly on high conservation value roadsides) are trained in and apply... hygiene measures for Cinnamon Fungus (phytophthora) control...”*

For the past decade the Council has continued to apply Phytophthora management controls at sensitive sites throughout the shire, using a wide range of measures, up to and including road closures, to help prevent the spread of the pathogen.

Other examples of landscape, soil and water management plans designed by local governments to actively address the threat of phytophthora spreading near high conservation value sites in Victoria include construction plans for an Educational Centre (Eltham 2002), a Walking Trail (Arthur’s Seat 2004), Roadside Gas Pipeline (Macedon 2005), and a Retirement Village (Cowes 2006)

By 2005, therefore, various Government authorities and land care agencies around Australia had phytophthora management guidelines and operating procedures in place for construction sites as varied as housing developments in Perth, walking tracks in Mosman, wineries in South Australia, equestrian facilities and roads on the Mornington Peninsula, and a school in Eltham.

Like Kew Cottages’ position next to Yarra Bend Park, all of the above examples also had an environmental context in terms of the need to protect vegetation and trees from phytophthora, but unlike Kew Cottages, none had had bestowed upon them by Government the high status of a *‘Project of State Significance’*.

3.5 Every Reason to Raise the Bar at Kew...and No Reason to Lower it ..

So it would be very strange indeed, in our submission if DHS either in September 2005, or now, sought to put a lower level of interpretation on how best to protect trees from the threat of *phytophthora* at Kew Cottages, than the level of hygiene protection (for example) already in place at politically simpler sites such as Road Reserves in Macedon, or Main Ridge on the Mornington Peninsular.

But that apparently is what has happened. Despite the rhetoric , the reality is that DHS appears to have simply paid lip service to its September 2005 Permit undertakings, and lowered the bar on tree protection.

4. What went wrong for DHS on a Kew hillside in 2005 ?

We now understand that DHS supervision in 2005 failed to address the threat of phytophthora (eg: the need for appropriate hygiene measures to be applied by contractors).

Similarly, we understand that DHS contractual arrangements failed to include the appropriate measures necessary to address the potentially threatening process of phytophthora as identified under the FFG Act. (Gazetted 23.7.2002)

As a consequence we submit that by the time the outbreak of Phytophthora was confirmed in the wet soil adjacent to the Bishops Pine on Brady Lane at Kew Cottages in February 2006 the 'horse had already bolted'

The damage was unlikely to be still containable within the immediate area because not only had:

- a) The hillside location and identified drainage problems had probably been helping spread the phytophthora down the slope for weeks;
- b) The drainage problems had been compounded by DHS deciding in January to increase, rather than decrease irrigation of the Bishops Pine;
- c) Even worse in terms of significant spread of phytophthora:

It was highly probable that the pathogen had already been widely spread by contaminated soil on the road construction equipment DHS used at the Cottages before Christmas, thereby threatening the roots of many other trees throughout the grounds.

We believe the phytophthora pathogen would most probably have spread unchecked during these works because we understand:

1. Phytophthora was first found in the topsoil of the Brady Lane car park extension area adjacent to the Bishops Pine. The Brady Lane fenced area was used as a secure road construction vehicle park for the whole site for several weeks. So many vehicles could have been contaminated in Brady Lane , and then moved to previously uninfested areas carrying phytophthora with them.
2. Due to its location the Brady Lane construction vehicle park was subject to significant down slope water run off, and drainage faults were still observable in the area for many weeks after phytophthora was found in the soil.
3. The Brady Lane soil was wet and muddy, and the earth moving equipment used there, was also used to excavate, and move materials around the site, including to help build cross-overs on roadside reserves, dig trenching works for utilities, and sink poles for new fencing in Lower Drive, Brady Lane, and the Stage 1 & 2

Construction zones. Many of the latter works – trenches, poles etc have been identified as being close to the roots of trees listed for protection by Permit 9639.

4. Failure of DHA contractors to observe even basic hygiene management protocols in the Bishops Pine area was observed by the author of the independent ENSPEC Report as late as March 2006. That was several weeks after Phytophthora in the soil at that location had been identified as a serious threat to tree roots, and several months after the major road works, driveway resurfacing, and trenching had been undertaken throughout the site.

5. The DHS Defence:

Deny and Delay...

DESPITE all of the above circumstances, DHS's response to HV in our understanding has completely ignored the substantive issues of precisely why DHS apparently failed to comply with the permit conditions that specifically required them to protect the trees from damage during the 2005 works at Kew Cottages.

DHS appears to have simply referred Heritage Victoria to its contractors (Walker Corporation et al) for comment.

In our view that approach by DHS is totally unacceptable. It is not a defence it is a disaster, and if accepted it will demonstrate that the permit conditions are worthless, and inevitably lead to more disasters, and the further loss of significant trees.

The substantive questions to be addressed regarding DHS's use of contractors are:

- a) Do the DHS contracts properly provide for the protection of the trees from phytophthora ?
- b) Are the tree protection provisions backed up with penalty clauses ?
- c) If not – why not ?

6. The DHS Fallback:

Apologise Profusely, and Plead Guilty with mitigating circumstances?

If challenged strongly enough DHS may well now:

- claim that it has fully complied with all aspects of the Arboricultural Plan,
- claim that the latter Plan does not specifically mention phytophthora, and

- claim that as a consequence DHS cannot reasonably be expected to have responded earlier to the threat of what DHS might like HV to regard as some ‘pre-existing’ and ‘unknown pathogen’, possibly infecting trees of ‘unknown’ susceptibility, in an environment of ‘unknown disposition..’

We say that is nonsense. Both the ‘letter’ and ‘spirit’ of the Plan are clear – tree roots must be protected from damage.

The threat of biological damage from the spread of phytophthora is not excluded.

Nor does the the Arboricultural Plan identify phytophthora as a pre-existing condition in the soil or any of the tree roots.

The Arboricultural Plan does not mention phytophthora by name, nor does it mention other potential threats to trees such chain saws, chemical poisons, copper nails, or bulldozers that are quite capable of knocking down protection fences, when driven by drivers under the influence of alcohol. The Plan is presented in a form capable of being interpreted by a reasonable and honest permit holder who also holds all the other ‘cards necessary to play the game’ in a fair and proper manner.

The latter ‘cards’ DHS may reasonably be required to hold while exercising its heritage permit rights and obligations would include professionally qualified arboricultural works supervisors, plus those contracts and plans required to manage all the other obligations it has with regard to tree protection (ie: beyond those specified in the September 2005 Heritage Permit conditions) .

We are aware of several examples of relevant vegetation protection obligations on DHS that pre-date the Heritage Permit conditions. So we say, even if we are wrong in our interpretation of the Permit conditions themselves then HV must also have regard to DHS environmental health and safety obligations in force at the time eg: with regard to the Boroondara Planning Scheme, FFG Act, VPO vegetation, etc.

And if HV accepts a claim by DHS that a particular Heritage Arboricultural Plan and Permit Condition is not specific enough with regard to the threat posed by phytophthora, then we say HV must then again address the question of there being other pre-existing requirements that obligated DHS to address the potential threat posed by phytophthora to trees, and to already have a phytophthora management plan in place at Kew, possibly long before the imposition of Heritage permit conditions themselves in September 2005.

7. Why DHS had a statutory obligation to address phytophthora as a potential threat to the environment at Kew as early as July 2002 and no later than June 2005.

DHS has always known, and promoted the fact that its proposed real estate development at Kew Cottages would have to address the Government policy to conserve biodiversity and protect the Victorian environment .

How best to protect the River Yarra and its environs has occupied the minds of Victorian Governments of all political persuasions for many years.

Kew Cottages along with Yarra Bend Park, and all other publicly owned land in the immediate environs of the Yarra River between Dight's Falls and Bourke Road has been part of the *Middle Yarra Concept Plan* for over 20 years. The boundaries of the Middle Yarra Concept Plan were gazetted in November 1985.

The "paramount aim of the Middle Yarra Concept Plan is to protect the water course and its environs."

The Plan 'recognises the need for conservation of significant vegetation and wildlife habitats' including wetlands and billabongs, riparian vegetation, open woodlands and native grasslands. It strongly emphasises the need to protect, manage and restore this vegetation. It includes a list of indigenous species appropriate to the area.

The Plan is a referenced document under the Boroondara Planning Scheme, which in turn provides for a number of planning processes to help protect the environment for example:

Clause 65 of the Scheme specifically requires consideration of a number of conservation and vegetation protection issues before planning approval can be given in Boroondara including inter alia:

The proximity of the land to any public land.

The extent and character of native vegetation and the likelihood of its destruction.

Whether native vegetation is to be or can be protected, planted or allowed to regenerate.

Whether, in relation to subdivision plans, native vegetation can be protected through subdivision and siting of open space areas.

So by May 2001 when Premier Bracks announced his Government's intention to build a new housing estate in Kew Cottages, the need for the Government to closely consider all the conservation and **vegetation protection** issues involved was already firmly established.

The need for restoration of a diverse range of native vegetation, as well as protection and management of existing vegetation were clearly issues to be addressed at Kew, together with proximity to public land, and the need to conserve wetlands, and wildlife habitats, all of which according to the Plan had clearly been under threat from a range of sources, for a number of years.

One such threat, *phytophthora* had been recognised as such in Victoria since the 1970's. By 2000 *phytophthora* infected gravel used in road making was listed as a threatening process under both the Federal ENBP Act, and the State FFG Act.

In 2001 a National Threat Abatement Plan came into effect for phytophthora, requiring Victoria along with all other States to prepare their own State plans.

In July 2002 the listing of phytophthora as a threatening process in the Victorian FFG Act was extended by the then State Minister for the Environment, Sherryl Garbutt.

Victorian public authorities who engaged in earthmoving and road building activities henceforth not only had a statutory responsibility to have regard to and manage the environmental threat posed by phytophthora being spread by infected gravel, **but also the threat of phytophthora's spread from infected sites into parks or reserves, including roadsides, under the control of a state or local government authority.**

The Victorian Government has itself administered Kew Cottages for over a century and, therefore, knows the environmental significance of the site well in terms of its relationship to and potential impact on neighbouring parks, reserves, and roadsides.

Kew Cottages sits on a ridge overlooking, adjoining, and draining into, on its western border, Yarra Bend Park and the former Willsmere Hospital Heritage site; and on its northern border, local government roadside reserves, a VicRoads Depot, a medical research, site, and the Willsmere and Chandler Parks and Billabong.

DHS knows all of the above better than anyone so the need for DHS to address the potential threat of phytophthora's spreading from an infected construction site at Kew Cottages to neighbouring reserves is in our view self evident..

More importantly perhaps, none of the environmental reports commissioned by DHS during that period suggested in anyway that DHS's responsibility to manage phytophthora at Kew was limited in anyway (eg: none suggested that phytophthora was not present on the site, or was constrained to particular areas of the site. Nor did they suggest that adjacent reserves such as Yarra Bend Park might be disregarded, as being already contaminated by phytophthora, or because, "the majority of vegetation communities within the park are considered tolerant of the pathogen." .)

As a consequence, it is not unreasonable, therefore, in our submission to have expected DHS to have taken appropriate steps to comply with its new 2002 obligations for phytophthora threat abatement at Kew long before the issue of its later Heritage Permit obligations arose in September 2005.

We suggest the date by which DHS should have started down that path was July 2002 – the date when the Victorian Minister for the Environment, Sherryl Garbutt, gazetted the threat of phytophthora's spread from infected sites into parks or reserves, including roadsides, under the control of a state or local government authority.

We submit the latest date by which DHS should have completed its phytophthora threat abatement management plan was June 2005 – the date when the Sherryl Garbutt, now Minister for Community Services, announced the Bracks Government's preferred developer for its proposed Kew Cottages housing estate.

That gave DHS three (3) years to come up with an appropriate phytophthora threat abatement plan for Kew Cottages. They had every incentive to do it. They had a very clear understanding at the very highest level, in the then Minister for Community Services, and former Minister for the Environment, Sherryl Garbutt, of the need to do it.

Unfortunately, DHS still did not come up with a phytophthora threat abatement plan. They did not do it, but they could have done.

By 2004 all DHS had to do was “Google” Phytophthora, and threat abatement plans, guidelines, and standard operating procedures for phytophthora would have literally poured out of their computer from the Phytophthora Centre at Murdoch University and CALM in WA, from local government authorities in SA, from Parks in Tasmania, from Sydney University, the Botanical Gardens, and the Sydney Harbour Development Trust in NSW, and many more. If they wanted a more local approach all they had to do was ring the Botanical Gardens here in Melbourne, or call Melbourne University, both organisations had the expertise, and both were working on ways to help contain the spread of phytophthora in their own backyards.

DHS did not do that. DHS went on with its real estate rhetoric about conservation of the environment at Kew, but did nothing to honour its statutory obligations to investigate and manage the potential threat phytophthora presented not only to the Cottages itself, but to “the parks, reserves, including roadsides under the control of a state or local government authority” on its borders eg: Yarra Bend Park, Willsmere, and DHS’s other neighbours.

A commitment to new indigenous planting at Kew featured strongly in the DHS Concept Plan released in November 2003, but still DHS apparently did nothing to examine the potential threat posed by phytophthora to native plants at Kew.

Additional warning bells should have started ringing at DHS when Boroondara Council formally approved the extension of its Yarra River Biodiversity Corridor to include a high priority biodiversity corridor link through Kew Cottages in 2004. But still DHS appears to have ignored the need to even test for phytophthora, let alone produce a threat abatement plan that would help protect a biodiversity corridor link from potentially spreading phytophthora west into Yarra Bend Park, and Willsmere, or north east via the main drainage line to Council roadside reserves, Chandler Park and the Willsmere billabong.

The final red light that DHS appears to have totally ignored came in early December 2005 when DHS ordered in their contractors and bulldozers to start constructing temporary entrances to Kew Cottages including new cross overs on Council road reserves in Hutchinson Drive. Residents received practically no warning, nor apparently did the Council fare much better. To the best of our current understanding we understand that:

- No phytophthora threat abatement plan was in place.
- No testing for phytophthora was undertaken before, or after the works, either in the Hutchinson Drive work area, or
- the Brady Lane vehicle storage area, where phytophthora was subsequently discovered in February 2006.

8. Conclusion.

Kew Cottages is both a Heritage site of State Significance, and a Public Crown Land Development site of State Significance. It deserves to be treated as such, and afforded the highest level of protection available to the State's heritage registered places under the Heritage Act 1995.

The September 2005 Heritage Permit P9639 issued to DHS specifically requires the permit holder to protect the trees on the site.

We say that protection has clearly failed and that trees are now not only dying from phytophthora, but that other trees covered by the Permit have also been put at risk because DHS failed between 9th September 2005 and 31st March 2006 to take reasonable steps to prevent the spread of phytophthora throughout the site during DHS construction works.

We say DHS was required to address and respond appropriately to the potential threat of phytophthora to tree roots at Kew Cottages:

- a) Owing to the DHS undertaking to comply with the P9639 conditions, and**
- b) Owing to DHS's pre-existing (FFG 2002) responsibility to manage the potential threat of phytophthora spreading from the Cottages to adjoining parks, reserves, and roadsides.**

We note that:

- 1) This is the third occasion on which we have had to draw Heritage Victoria's attention to failures by DHS to properly protect significant trees at the Cottages;**
- 2) That the Minister for Planning wrote to the Coalition on 18th October drawing our attention to the fact that: “.. the enforcement powers under the Heritage Act 1995, which were enhanced by the Government through amendments in 2004, provide for the protection of the State's heritage registered places.”**

As a consequence, we request the enforcement powers referred to by the Minister now be applied by Heritage Victoria with due diligence.

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Middle Yarra River Dights Falls to Burke Road –
Map of Concept Plan Boundaries (1988) :
Including Kew Cottages

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Appendix A.

DHS and its Record of Care for Trees in the Grounds of Kew Cottages 2004-2006

2004 Illegal Water Pipe Dump, Main Drive



2005 Illegal Tram Rail Workshop, Princess Street.



2006. Dying Pines found with Phytophthora, Brady Lane Roadworks



Dieback on Princess Street



Dieback on Boundary Road

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Appendix B.

Australian Best Practice for Phytophthora 2004:

What DHS failed to do at Kew 2005

In October 2004 Professor David Guest and Dr Rosalie Daniel from the Faculty of Agriculture, Food and Natural Resources, The University of Sydney summarised best practice procedures for Phytophthora used in Australia (Table 1) and compared them to the 'Protocols for Preventing Spread of Phytophthora' used by the Sydney Harbour Federation Trust.

Their summary of the 20 Best Practice procedures is attached.

At the time the report was prepared the SHFT had already scored 17 out of 20 for 'Best Practice', with 2 post-construction procedures still to be completed, leaving only 1 procedure "not able to be met."

By way of comparison, over a year later in December 2005, with its initial road works already completed:

DHS at Kew Cottages scored 0 out of 20.

The full report:

Sydney Harbour Federation Trust:
Management of *Phytophthora cinnamomi*
Review - Stage 1. Construction of the Penguin Walking Track
between Balmoral and Georges Heights, Middle Head
is available online at:

www.harbourtrust.gov.au/downloads/acrobat/otherpubs/trackreport2004.pdf

SUMMARY

A draft of the national 'Best Practice' procedures for Phytophthora is expected to be available in November. We have summarised best practice procedures for Phytophthora used by a those developed by a variety of land managers (CALM 2004; Parks and Wildlife Service Tasmania 2003; Picone and Kern 2004) in Australia (Table 1) and compared them to the 'Protocols for Preventing Spread of Phytophthora' used by the SHFT.

Table 1. Best practice procedures used by national land managers and those met by the Sydney Harbour Federation Trust.

Best practice	SHFT
Preconstruction	
Testing as prerequisite to project planning and design	✓
Write Phytophthora hygiene specifications into all contracts	✓
Brief contractors and personnel on Phytophthora hygiene protocols	✓
Track design	
Construct tracks to shed water and provide mud-free surface	✓
Ensure drains carry run-off to nearest natural watercourse	✓
Avoid positioning tracks on ridges where possible	✓
Construction and maintenance procedures	
Fence/isolate known occurrences within site	✓
Erect signs with an explanation of Phytophthora and hygiene protocols	✓
Install washdown points where tracks cross into uninfected areas	✓
Where possible, work in Phytophthora-free areas first	*
Clean tools, equipment and footwear before entering or leaving site	✓
Minimise soil disturbance and movement	✓
Ensure all introduced material is certified free of Phytophthora	✓
Monitor and enforce contractor hygiene protocols	✓
Avoid working in wet conditions	✓
Obtain plants from accredited nurseries	✓
Post-construction	
Install information signs for walkers with explanation of hygiene procedures	»
Install and maintain washdown stations	»
Monitor occurrence and distribution of Phytophthora	✓
Maintenance should be subjected to procedures as per construction	✓

✓ = best practice met

* = best practice breached and reassessed or not able to be met

× = best practice not met

» = to be conducted

Three Strikes and You're Out!

APPENDIX C.

Middle Yarra River Dights Falls to Burke Road –
Map of Concept Plan Boundaries (1988) : Including
Kew Cottages

