

IN THE HERITAGE COUNCIL OF VICTORIA
AT MELBOURNE

Application No. P22396

BETWEEN

KEW DEVELOPMENT CORPORATION PTY LTD

Permit Applicant/ Appellant

AND

HERITAGE VICTORIA

Name of Place/Object: Former Kew Cottages (Kew Residential Services)

Heritage Register Number: H2073

Location of Place/Object: Princess Street, Kew

APPLICANT'S REPLY SUBMISSION

1. By letter dated 1 March 2016, the appellant permit applicant, Kew Development Corporation Pty Ltd, was invited to provide a brief submission directed at any new issues raised by other parties in response to its application for the Heritage Council to be reconstituted.
2. This brief submission is not intended to be a comprehensive response to the submissions made by other parties. Many of the submissions are argumentative and do not address the two fundamental issues, namely:
 - a. whether any questions of law arise; and
 - b. the application of principles of natural justice and procedural fairness.
3. While the applicant doubts the appropriateness of a submission being made by the decision-maker of the decision the subject of the appeal, the executive director's submission is incorrect in any event. It is not the case that "only the appellant's summing up was to occur before the Committee could proceed with making its determination". Rather, in accordance

with the Heritage Council's direction, the applicant is still to file evidence relating to the new issue.

4. The applicant observes that executive director does not dispute that the new issue was absent from his grounds. Nor does the executive director address any of the procedural concerns raised by the applicant.
5. Mr Black QC correctly notes that he was not present during the hearing when any of the procedural irregularities occurred. Mr Black also confuses experience in planning practice, decision-making and policy formation with experience in planning law. As Balmford J observed in *Warehouse Group (Australia) Pty Ltd v Bevendale Pty Ltd* [2002] VSC 108 at [41], there is a distinction that must be drawn between experience in planning law and experience in planning practice, and in the absence of the requisite experience, the tribunal will not be properly constituted.
6. None of the parties dispute that the Heritage Council is required in this appeal to determine questions of law.
7. It is instructive to observe that the vast majority of expert tribunal appeals are heard and determined by the Victorian Civil and Administrative Tribunal (VCAT). An appeal to the VCAT on a question of law cannot proceed without a legal member unless the parties consent to that course (see eg *Woodward v Kingston CC* [2015] VCAT 1168 at [11]; *Colonial First State Global Asset Management Pty Ltd v Stonnington CC* [2013] VCAT 2022 at [4] and *Voges v Port Phillip CC* [2013] VCAT 1641 at [19]).
8. Further, the *Heritage Act 1995* (Vic) (the Act) provides two avenues for appeals:
 - a. where a decision is made at first instance by the executive director, the appeal is to the Heritage Council (under s 75 of the Act);
 - b. where a decision is made at first instance by the Heritage Council (pursuant to s 70 of the Act), the appeal is to VCAT (ss 75(1) and 77 of the Act).

9. There is no suggestion in the Act that the rights of litigants in appeals to the Heritage Council or the VCAT are intended to be different.
10. For the avoidance of doubt, the applicant otherwise joins issue with the submissions made by the other parties.

Dated: 7 March 2015

C. TOWNSHEND QC

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Instructed by Planning & Property Partners