SUPREME COURT OF VICTORIA

Dustday Investments Pty Ltd v Minister for Planning and Another

[2015] VSC 101

Garde J

9 December 2014, 20 March 2015

Administrative Law — Administrative process — Heritage planning controls — Heritage overlay — Panels — Duties of panels — Social and economic effects — Relevant considerations — Expert members — Tests to be applied by panel — Condition and conversion of heritage building — Adaptive re-use — Alleged misdirections and wrong tests — Alleged failure to take into account relevant considerations — Planning and Environment Act 1987 (Vic), ss 4(1), 4(2), 12(2), 23-27, 159-170 — Melbourne Planning Scheme (Vic), cll 22.05, 43.01.

The delegate of the then Minister for Planning, authorised the second defendant (the council) to prepare an amendment (Amendment C207) to the *Melbourne Planning Scheme* (Vic) (the scheme) to include a building and part of certain land (the affected property) in the Heritage Overlay of the scheme. The scheme required a permit before the building was demolished or the affected property developed.

The affected property contained a six-level red brick sawtooth profile building (the building), erected in 1956. The owner (Dustday) applied to the council for a permit under the *Planning and Environment Act 1987* (Vic) (the Act) to demolish the building (the application). Dustday did not provide any concept or development plans with the application.

A planning panel (the panel) appointed by a delegate of the then Minister recommended that Amendment C207 be adopted with the affected property included in the Heritage Overlay (the recommendation). The council resolved to adopt Amendment C207 with the affected property included in the Heritage Overlay, and to submit it for ministerial approval (the council resolution).

Section 12(2) of the Act provided that in preparing a planning scheme or amendment, a planning authority:

> (a) must have regard to the Minister's directions; and
>
> (aa) must have regard to the Victoria Planning Provisions; and
>
> (ab) in the case of an amendment, must have regard to any municipal strategic statement, strategic plan, policy statement, code or guideline which forms part of the scheme; and
>
> (b) must take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or development envisaged in the scheme or amendment; and

(c) must take into account its social effects and economic effects.

A municipal council was a planning authority for any planning scheme in force in its municipal district.

Held: (1) Panels are not planning authorities and s 12(2) of the Act does not in its terms apply to panels.

(2) A panel is, however, required to consider all submissions referred to it and, if a submission raises a significant effect on the environment, or a social or economic effect, a panel will be obliged to consider the matter raised by the submitter.

(3) The panel was obliged to give consideration to the matters raised by Dustday in its submission.

(4) A panel is not required to address matters contained in a submission referred to it which could not materially affect its report or recommendations or are insignificant having regard to the nature and contents of the amendment on which the panel is to report.

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; *R v Beary* (2004) 11 VR 151; *Rajendran v Tonkin* (2004) 9 VR 414; *O'Neil v City of Moonee Valley* (1999) 108 LGERA 122; *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14; 163 LGERA 145; *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301; 196 LGERA 372; *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; 166 LGERA 1; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, applied.

(5) Dustday did not have, and was unable to present to the panel, a proposal for the development of the land. Accordingly, it was not possible for the panel to consider whether restoration and adaptive re-use of the building was a feasible proposition having regard to the costs of restoration and re-use as against the returns achieved by redevelopment.

(6) Only if there is a development proposal can the relative physical, social and economic benefits and disbenefits of restoration as against demolition be assessed.

(7) Only if there is a development proposal can "net community benefit" be comprehensively evaluated.

(8) The Act gives a panel the broadest parameters and leaves it to the panel to determine what is required for it to be persuaded to make, or not to make, a particular recommendation. Apart from the legislative direction to consider all submissions referred to it, the contents of the report and the recommendations are matters within the domain of the panel.

(9) The merits of the panel's opinions and views are not a matter for the Court.

Attorney-General (NSW) v Quin (1990) 170 CLR 1, applied.

(10) The position of the panel that there should be serious justification and persuasive evidence before a building with heritage significance is permitted to be demolished at the amendment stage is an opinion that is entirely open to the panel to adopt, as is its recommendation to the planning authority and the Minister.

(11) The panel gave social and economic effects careful and comprehensive consideration both generally, and in the individual case.

(12) Dustday has failed to show any legal error on the part of the panel.

Cases Cited

1045 Burke Rd Pty Ltd v Boroondara City Council [2013] VCAT 1108.

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

ACN 005 565 926 Pty Ltd v Snibson [2012] VSCA 31.

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.

Attorney-General (NSW) v Quin (1990) 170 CLR 1.

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321.

Australian Conservation Foundation v Latrobe City Council (2004) 140 LGERA 100.

Boroondara City Council v 1045 Burke Road Pty Ltd [2015] VSCA 27.

Boroondara City Council v 1045 Burke Road Pty Ltd (2014) 202 LGERA 1.

Brettingham-Moore v St Leonards Municipality (1969) 121 CLR 509; 20 LGRA 299.

Buck v Bavone (1976) 135 CLR 110.

Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (2013) 215 FCR 301; 196 LGERA 372.

Church v Echuca Regional Health (2008) 20 VR 566.

Craig v South Australia (1995) 184 CLR 163.

Customs, Collector of v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280.

East Melbourne Group Inc v Minister for Planning (2008) 23 VR 605; 166 LGERA 1.

Hesse Blind Roller Co Pty Ltd v Hamitoski [2006] VSCA 121.

Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149.

Immigration and Citizenship, Minister for v Li (2013) 249 CLR 332.

Immigration and Ethnic Affairs, Minister for v Wu Shan Liang (1996) 185 CLR 259.

Immigration and Multicultural Affairs, Minister for v Bhardwaj (2002) 209 CLR 597.

Immigration and Multicultural Affairs, Minister for v Eshetu (1999) 197 CLR 611.

Immigration and Multicultural Affairs, Re Minister for; Ex parte Applicant S20/2002 (2003) 77 ALJR 1165.

Kentucky Fried Chicken Pty Ltd v Gantidis (1979) 140 CLR 675; 40 LGRA 132.

Kirk v Industrial Court (NSW) (2010) 239 CLR 531.

Klein v Domus Pty Ltd (1963) 109 CLR 467.

Lansen v Minister for Environment and Heritage (2008) 174 FCR 14; 163 LGERA 145.

Melbourne & Metropolitan Board of Works v Cullen [1981] VR 707; (1981) 45 LGRA 293.

O'Neil v City of Moonee Valley (1999) 108 LGERA 122.

Porchester Nominees Pty Ltd v Renfrey (1987) 65 LGRA 288.

Puhlhofer v Hillingdon London Borough Council [1986] AC 484.

R v Beary (2004) 11 VR 151.

Rajendran v Tonkin (2004) 9 VR 414.

Roncevich v Repatriation Commission (2005) 222 CLR 115.

Sherbrooke, Shire of v FL Byrne Pty Ltd [1987] VR 353; (1986) 63 LGRA 320.

Shock Records Pty Ltd v Jones [2006] VSCA 180.

Winky Pop Pty Ltd v Hobsons Bay City Council (2007) 19 VR 312.

Application

These proceedings concerned whether a planning panel's recommendation and the council's subsequent resolution were invalid and/or unlawful. The facts of the case are set out in the judgment.

S Morris QC and *E Nekvapil*, for the plaintiff.

N Tweedie SC and *E Peppler*, for the first defendant.

J Pizer QC and *B Chessell*, for the second defendant.

Cur adv vult

20 March 2015

Garde J.

Introduction

1 Dustday Investments Pty Ltd (Dustday) is the owner of a six-level red brick sawtooth profile building (the building) located at 85-105 Sutton Street, North Melbourne (the land). The building was formerly the Victorian Producers Co-operative Company Wool Store Number 5, and was constructed in 1956.

2 Dustday desires to demolish the building.

3 On 11 July 2013, Dustday applied to the second defendant (the council) for a permit under the *Planning and Environment Act 1987* (Vic) (the Act) to demolish the building (the application). Dustday did not provide any concept or development plans with the application. None have been submitted since.

4 On 21 March 2013, the delegate of the previous Minister[1] authorised the council to prepare Amendment C207 (Amendment C207) to the *Melbourne Planning Scheme* (Vic) (the scheme) to include the building and part of the land (the affected property) in the Heritage Overlay of the scheme. If Amendment C207 is approved, Dustday will be required to obtain a permit under cl 43.01-1 of the scheme before it can demolish the building or develop the affected property.

5 Dustday made a submission to the council opposing Amendment C207. The submission was referred to a planning panel appointed by a delegate of the previous Minister. The panel was constituted by Ms Jenny Moles and Mr Ray Tonkin (the panel), and conducted a four day hearing in November 2013.

6 In a report dated 21 January 2014 (the panel report),[2] the panel recommended that Amendment C207 be adopted with the affected property included in the Heritage Overlay (the recommendation). On 27 May 2014, the council resolved to adopt Amendment C207 with the affected property included in the Heritage Overlay, and to submit it for ministerial approval (the council resolution).

7 Dustday seeks a declaration that the recommendation and the council resolution are affected by legal error, and are invalid or unlawful.

---

1 Prior to the Victorian State election on 29 November 2014, Mr Matthew Guy MLC was the Minister for Planning (the previous Minister). On 4 December 2014, he was succeeded as Minister for Planning by Mr Richard Wynne MLA. On 9 December 2014, Mr Richard Wynne as Minister for Planning was substituted as the second defendant in the proceeding (the Minister).

2 Melbourne C207 (PSA) [2014] PPV 10.

Relevant statutory context

8 The objectives of planning in Victoria include objectives that relate both to development and to conservation and heritage:[3]

> (a) to provide for the fair, orderly, economic and sustainable use, and development of land;
>
> …
>
> (d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
>
> …
>
> (f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);
>
> (g) to balance the present and future interests of all Victorians.

9 The objectives of the planning framework established by the Act include:[4]

> (a) to ensure sound, strategic planning and co-ordinated action at State, regional and municipal levels;
>
> (b) to establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land;
>
> (c) to enable land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels;
>
> (d) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land;
>
> (e) to facilitate development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes;
>
> …

10 Section 12(2) of the Act[5] provides that in preparing a planning scheme or amendment, a planning authority:

> (a) must have regard to the Minister's directions; and
>
> (aa) must have regard to the Victoria Planning Provisions; and
>
> (ab) in the case of an amendment, must have regard to any municipal strategic statement, strategic plan, policy statement, code or guideline which forms part of the scheme; and
>
> (b) must take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or development envisaged in the scheme or amendment; and
>
> (c) must take into account its social effects and economic effects.

11 A municipal council is a planning authority for any planning scheme in force in its municipal district.[6]

12 The Act contains provisions relating to panels in Pts 3 and 8.

---

3 *Planning and Environment Act 1987* (Vic) s 4(1)(a), (d), (f)-(g).

4 *Planning and Environment Act 1987* (Vic) s 4(2)(a)-(e).

5 Subsection 12(2)(c) used "may" instead of "must" prior to its amendment by s 71(2) of the *Planning and Environment Amendment (General) Act 2013* (Vic), effective 28 October 2013, into its current form.

6 *Planning and Environment Act 1987* (Vic) s 8A(1).

13 Part 3 of the Act includes:

23 Decisions about submissions

(1) After considering a submission which requests a change to the amendment, the planning authority must—

(a) change the amendment in the manner requested; or

(b) refer the submission to a panel appointed under Part 8; or

(c) abandon the amendment or part of the amendment.

(2) A planning authority may refer to the panel submissions which do not require a change to the amendment.

…

24 Hearing by panel

The panel must consider all submissions referred to it and give a reasonable opportunity to be heard to—

(a) any person who has made a submission referred to it;

(b) the planning authority;

(c) any responsible authority or municipal council concerned;

(d) any person who asked the planning authority to prepare the amendment;

(e) any person whom the Minister or the planning authority directs the panel to hear.

25 Report by panel

(1) The panel must report its findings to the planning authority.

(2) In its report, the panel may make any recommendation it thinks fit.

…

26 Reports to be made public

(1) The planning authority may make the panel's report available at its office during office hours for any person to inspect free of charge at any time after the planning authority receives the report and must make it so available forthwith if—

(a) the planning authority has decided whether or not to adopt the amendment; or

(b) 28 days have elapsed since it received the panel's report.

(2) A report made available for inspection under subsection (1) must be kept available for inspection until the end of two months after the amendment comes into operation or lapses.

27 Planning authority to consider panel's report

(1) The planning authority must consider the panel's report before deciding whether or not to adopt the amendment.

(2) A planning authority may apply to the Minister to exempt it from subsection (1) if the planning authority has not received the panel's report at the end of—

(a) 6 months from the panel's appointment; or

(b) 3 months from the date on which the panel completed its hearing—

whichever is earlier.

(3) The Minister may exempt a planning authority from subsection (1) if the Minister considers that delay in considering whether or not to adopt the amendment would adversely affect the planning of the area, and may impose conditions to which the exemption is subject.

14 Part 8 of the Act includes:

159 Directions about hearings

(1) A panel may give directions about—

(a) the times and places of hearings; and

(b) matters preliminary to hearings; and

(c) the conduct of hearings.

(2) The panel may refuse to hear any person who fails to comply with—

(a) a direction of the panel; or

(b) a direction of the directions panel.

160 Hearings to be in public

(1) A panel must conduct its hearings in public unless any person making a submission objects to making the submission in public and the panel is satisfied that the submission is of a confidential nature.

(2) A panel may by order exclude from its proceedings a person who does an act referred to in section 169.

161 General procedure for hearings

(1) In hearing submissions, a panel—

(a) must act according to equity and good conscience without regard to technicalities or legal forms; and

(b) is bound by the rules of natural justice; and

(c) is not required to conduct the hearing in a formal manner; and

(d) is not bound by the rules or practice as to evidence but may inform itself on any matter—

(i) in any way it thinks fit; and

(ii) without notice to any person who has made a submission.

(2) A panel may require a planning authority or other body or person to produce any documents relating to any matter being considered by the panel under this Act which it reasonably requires.

(3) A panel may prohibit or regulate cross-examination in any hearing.

(4) A panel may hear evidence and submissions from any person whom this Act requires it to hear.

(5) Submissions and evidence may be given to the panel orally or in writing or partly orally and partly in writing.

162 Who may appear before a panel?

A person who has a right to be heard by a panel or who is called by a panel may—

(a) appear and be heard in person; or

(b) be represented by any other person.

163 Effect of failure to attend hearing

A panel may report and make recommendations on a submission without hearing the person who made the submission if the person is not present or represented at the time and place appointed for the hearing of the submission.

164 Panel may hear two or more submissions together

A panel may consider two or more submissions together if the submissions concern the same land or the same or a related matter.

165 Adjournment of hearings

A panel may from time to time adjourn a hearing to any times and places and for any purposes it thinks necessary and on any terms as to costs or otherwise which it thinks just in the circumstances.

166 Technical defects

(1) A panel may continue to hear submissions and make its report and recommendations despite any defect, failure or irregularity in the preparation of a planning scheme or amendment or any failure to comply with Division 1, 2 or 3 of Part 3 in relation to the preparation of the planning scheme or amendment.

(2) A panel may adjourn the hearing of submissions and make an interim report to the planning authority if it thinks there has been a substantial defect, failure or irregularity in the preparation of a planning scheme or amendment or any failure to comply with Division 1, 2 or 3 of Part 3 in relation to the preparation of the planning scheme or amendment.

(3) The interim report may recommend that the planning authority give notice of the planning scheme or amendment to a specified person or body.

167 Panel may regulate its own proceedings

A panel may regulate its own proceedings.

168 Panel may take into account any relevant matter

A panel may take into account any matter it thinks relevant in making its report and recommendations.

…

170 Immunity for panel members

(1) A member of a panel is not personally liable for anything done or omitted to be done in good faith—

(a) in the exercise of a power or the performance of a duty under this Act or the regulations; or

(b) in the reasonable belief that the action or omission was in the exercise of the power or the performance of the duty under this Act or the regulations.

(2) Any liability resulting from an act or omission that would but for subsection (1) attach to a member of a panel, attaches instead to the State.

15 Section 12(2) of the Act imposes various duties on planning authorities in preparing a planning scheme or amendment. Planning authorities may be municipal councils, or they may be the Minister or other public authority.[7] Panels are not planning authorities, and I accept the submission by senior counsel for the council that ss 12(2) does not in its terms apply to panels. A panel is, however, required to consider all submissions referred to it,[8] and if a submission raises a significant effect on the environment, or a social or economic effect, a panel will be obliged to consider the matter raised by the submitter. Here Dustday's submission included concerns as to the condition and conversion of the building, and was referred to the panel. The panel was obliged to give consideration to the matters raised by Dustday in its submission.

16 However, a panel is not obliged to make findings and report on every single matter raised in a submission referred to it. The matter raised in the submission may not be material to the planning scheme amendment before the panel, or may be insignificant given the nature and contents of the amendment. A panel is not required to address matters contained in a submission referred to it which

7 See *Planning and Environment Act 1987* (Vic) ss 8, 8A, 8B and 9.

8 *Planning and Environment Act 1987* (Vic) s 24.

could not materially affect its report or recommendations or are insignificant having regard to the nature and contents of the amendment on which the panel is to report.[9]

Relevant strategic planning context

17 Conservation and heritage issues may arise at different stages of the planning process – for example, when land is rezoned, or subjected to a heritage overlay, or when application is made for a permit under a planning scheme for demolition or alteration of a building with heritage significance to facilitate redevelopment of a site. Likewise, the social and economic effects of a proposal may be relevant on rezoning, or when preparing an amendment to a planning scheme or adding an overlay control[10] or, if the effects are significant, when application is made for a permit under a planning scheme.[11]

18 In preparing a planning scheme or amendment, a planning authority is required to have regard to the Minister's directions.[12]

19 Ministerial Direction No 11 (Ministerial Direction) requires planning authorities in preparing amendments to evaluate and include in the explanatory report the following strategic considerations:[13]

> • Why is an amendment required?
> • How does the amendment implement the objectives of planning in Victoria?
> • How does the amendment address any environmental, social and economic effects?
> • How does the amendment address any relevant bushfire risk?
> • Does the amendment comply with the requirements of any other Minister's Direction applicable to the amendment?
> • How does the amendment support or implement the State Planning Policy Framework and any adopted State policy?
> • How does the amendment support or implement the Local Planning Policy Framework, and specifically the Municipal Strategic Statement?
> • Does the amendment make proper use of the Victoria Planning Provisions?
> • How does the amendment address the views of any relevant agency?
> • Does the amendment address the requirements of the *Transport Integration Act 2010*?
>
> …

20 In October 2013, the Department of Transport, Planning and Local Infrastructure published Planning Practice Note 46 "Strategic Assessment

9 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-42; *R v Beary* (2004) 11 VR 151 at [17]-[19]; *Rajendran v Tonkin* (2004) 9 VR 414 at [20]; *O'Neil v City of Moonee Valley* (1999) 108 LGERA 122 at [18]-[21]; *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14; 163 LGERA 145 at [81]-[125]; *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301; 196 LGERA 372 at [116]-[129]; *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; 166 LGERA 1 at [337]; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353.

10 *Planning and Environment Act 1987* (Vic) s 12(2)(c).

11 *Planning and Environment Act 1987* (Vic) s 60(1)(f); see *Boroondara City Council v 1045 Burke Road Pty Ltd* [2015] VSCA 27.

12 *Planning and Environment Act 1987* (Vic) s 12(2)(a).

13 Ministerial Direction No 11 "Strategic Assessment of Amendments" dated 19 October 2013 [3(1)].

Guidelines for preparing and evaluating planning scheme amendments" (the guidelines). The guidelines do not have statutory force and are advisory only.[14] They state:

> …
>
> *Does the amendment implement the objectives of planning and address any environmental, social and economic effects?*
>
> Does the amendment implement the objectives of planning in Victoria (sections 4(1) and 12(1)(a) of the Act)?
>
> Does the amendment adequately address any environmental, social and economic effects (sections 12(2)(b) and (c) of the Act)? The normal way of assessing the social and economic effects is to consider whether or not the amendment results in a net community benefit.
>
> An environmental, social and economic assessment should include an evaluation of the costs and benefits to businesses and the community arising from any requirement of the amendment.
>
> The types of environmental, social and economic issues that need to be considered are dependant [sic] on the nature and scale of the amendment. Issues may include:
>
> - the likely effect on air, land and water quality of the area
> - potential impact on buffers and threshold distances, and the likely effect on community amenity
> - the likely effect on the health of ecological systems and the biodiversity they support (including ecosystems, habitats, species and genetic diversity)
> - the likely effect on sites with significant historic, architectural, aesthetic, scientific and cultural values
> - the likely effect on natural resources including energy, water, land, flora and minerals
> - the likely effect on the economic well-being of the community
> - potential changes to the economic and social life of the existing community
> - the vitality and viability of existing agriculture, industry, tourism and commercial or retail activity in surrounding areas
> - the likely effect on future public and private sector investment in the immediate and surrounding areas
> - the likely effect on the range of goods and services in the immediate and surrounding areas
> - the likely effect on potential capacity for growth of the immediate and surrounding areas, including the likely effect on the opportunities for expansion, improvement or redevelopment
> - the impact on employment in the area
> - the impact of likely changes in travel patterns for shopping, employment and social and leisure activities
> - the impact on transport movement, services and infrastructure, including public transport
> - the likely effect on community infrastructure in the immediate and surrounding areas
> - the likely effect on public infrastructure in the immediate and surrounding areas
> - potential changes to the attractiveness and physical condition of the immediate and surrounding areas

14 See *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; 166 LGERA 1 at [38], [135].

- the likely effect on the attractiveness, amenity and safety of the public realm
- the achievement of high quality urban design and architecture

…

21 Clause 22.05 of the scheme sets out the policy that applies to all places within the part of the Heritage Overlay Area relevant to the land. The objectives stated in cl 22.05 include:

- To conserve all parts of buildings of historic, *social* or architectural interest which contribute to the significance, character and appearance of the building, streetscape or area.
- To ensure that new development, and the construction or external alteration of buildings, make a positive contribution to the built form and amenity of the area and are respectful to the architectural, social or historic character and appearance of the streetscape and the area.

…

22 Clause 22.05 also contains policy to be taken into account when considering planning applications for heritage places within the Heritage Overlay. The policy is detailed and includes:

> In considering applications under the Heritage Overlay, regard should be given to the buildings listed in the individual conservation studies and their significance as described by their individual Building Identification Sheets. The Building Identification Sheet includes information on the age, style, notable features, integrity and condition of the building.
>
> *Demolition*
>
> Demolishing or removing original parts of buildings, as well as complete buildings, will not normally be permitted in the case of "A" and "B", the front part of "C" and many "D" graded buildings. The front part of a building is generally considered to be the front two rooms in depth.
>
> Before deciding on an application for demolition of a graded building the responsible authority will consider as appropriate:
>
> - The degree of its significance.
> - The character and appearance of the building or works and its contribution to the architectural, social or historic character and appearance of the streetscape and the area.
> - Whether the demolition or removal of any part of the building contributes to the long-term conservation of the significant fabric of that building.
> - Whether the demolition or removal is justified for the development of land or the alteration of, or addition to, a building.
>
> A demolition permit should not be granted until the proposed replacement building or works have been approved.
>
> *Renovating Graded Buildings*
>
> Intact significant external fabric on any part of an outstanding building, and on any visible part of a contributory building, should be preserved. Guidelines on what should be preserved are included in *Urban Conservation in the City of Melbourne*.
>
> In considering a planning application to remove or alter any fabric, consideration will be given to:
>
> - The degree of its significance.
> - Its contribution to the significance, character and appearance of a building or a streetscape.
> - Its structural condition.

- The character and appearance of proposed replacement materials.
- The contribution of the features of the building to its historic or social significance.

23 It is significant that the policy states that a demolition permit should not be granted until the proposed replacement building or works have been approved.

24 The policy provides for the grading of buildings and streetscape levels.[15] Its provisions include:

> Every building of cultural significance has been assessed and graded according to its importance. Streetscapes, that is complete collections of buildings along a street frontage, have also been graded for planning control purposes. The individual buildings are grade A to D, the streetscapes from Level 1 to 3, both in descending order of significance. The grade of every building and streetscape is identified in the incorporated document *Heritage Places Inventory 2000.*
>
> …
>
> "C" Buildings
>
> "C" buildings. Demonstrate the historical or social development of the local area and /or make an important aesthetic or scientific contribution. These buildings comprise a variety of styles and building types. Architecturally they are substantially intact, but where altered, it is reversible. In some instances, buildings of high individual historic, scientific or social significance may have a greater degree of alteration.

25 Clause 43.01 of the scheme sets out the purposes of the Heritage Overlay. They are:

> To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
>
> To conserve and enhance heritage places of natural or cultural significance.
>
> To conserve and enhance those elements which contribute to the significance of heritage places.
>
> To ensure that development does not adversely affect the significance of heritage places.
>
> To conserve specifically identified heritage places by allowing a use that would otherwise be prohibited if this will demonstrably assist with the conservation of the significance of the heritage place.

26 The decision guidelines relating to permit applications concerning heritage places are:[16]

> Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate:
>
> - The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
> - The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.
> - Any applicable statement of significance, heritage study and any applicable conservation policy.
> - Whether the location, bulk, form or appearance of the proposed building will adversely affect the significance of the heritage place.

15 Scheme cl 22.05.

16 Scheme cl 43.01-4.

- Whether the location, bulk, form and appearance of the proposed building is in keeping with the character and appearance of adjacent buildings and the heritage place.
- Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.
- Whether the proposed works will adversely affect the significance, character or appearance of the heritage place.
- Whether the proposed subdivision will adversely affect the significance of the heritage place.
- Whether the proposed subdivision may result in development which will adversely affect the significance, character or appearance of the heritage place.
- Whether the proposed sign will adversely affect the significance, character or appearance of the heritage place.
- Whether the lopping or development will adversely affect the health, appearance or significance of the tree.

27 The considerations relevant to permit applications relating to heritage places are discussed in *Boroondara City Council v 1045 Burke Road Pty Ltd*.[17]

The panel's report

28 The two panel members were described by senior counsel for Dustday as highly trained and skilled professionals. He described Ms Moles as "an extremely intelligent, hard-working and knowledgeable person who has been in the system for 30 years plus; has served as an advocate, as a VCAT member, as a panel member; and has written an enormous number of heritage reports, including the advisory committee report on heritage in 2007". Mr Tonkin was a former "executive director of Heritage Victoria".[18]

29 Following public exhibition of Amendment C207, six supporting submissions, and 14 opposing submissions were received. Two submissions did not object to Amendment C207 but provided additional information.

30 Most of the submissions made to the panel relating to individual places raised aesthetic, historic or related issues. Social issues were raised by some submitters. Only one submitter, other than Dustday, raised economic effects in its submission.

31 At the panel hearing, the council called Mr Graeme Butler, heritage architect and social historian. Dustday called three expert witnesses. They were Mr Bryce Raworth, architectural historian; Mr Kevin Campbell, structural engineer; and Mr Rob Milner, town planner. A number of other parties were represented before the panel. Some called planning or heritage witnesses.

32 In the report, the panel acknowledged that this was the first major amendment concerning heritage controls for which legal submissions would be presented in relation to the recent changes to s 12(2) of the Act. The panel commented:[19]

> The changes have meant that the Act now provides that a planning authority (and Panels) "*must* [rather than 'may'] take into account … [an amendment's] *social effects and economic effects*" (as well as its environmental effects).

17 *Boroondara City Council v 1045 Burke Road Pty Ltd* [2015] VSCA 27.

18 Transcript of Proceeding, *Dustday Investments Pty Ltd v Minister for Planning* (Supreme Court of Victoria, S CI 2014 03410, Garde J, 9 December 2014) pp 13-14 (Transcript).

19 Panel report 9.

33 Section 3.1 of the panel report examines whether the changes to s 12(2)(c) affect the way that panels have in the past considered social and economic effects.

34 After referring at some length to Dustday's submissions, the panel cited a passage from the panel report in relation to Amendment C99 to the *Boroondara Planning Scheme* as describing the traditional panel approach to heritage significance deciding whether a place should be included in a Heritage Overlay:[20]

> Panels have generally been consistent in their view that consideration of matters beyond the issue of whether or not an individual site or a precinct has the requisite level of local significance, lie outside the proper scope of the assessment of a proposal to apply a Heritage Overlay. These views have normally been expressed in response to submissions about personal disadvantage to the submitter as a result of the heritage listing such as economic consequences for a landowner, costs of repair of a building in poor condition, a desire to demolish and rebuild, and the like.
>
> It is our view, however, that even when the competing issues raised are broader and of a public nature such as urban consolidation, they remain outside the proper scope for consideration in relation to the matter of whether a Heritage Overlay should be applied.
>
> The decision as to whether a planning scheme overlay which signals and regulates particular characteristics of land should apply to any site is not a decision which is normally taken having regard to "trade-offs" against other competing objectives and controls of a scheme. Places are not excluded from the Environmental Significance Overlay, for example, because the planning authority wishes to see the land developed. The consideration of application of that overlay is based on whether or not the land has significance. Similarly areas are included or not included within flooding overlays purely on the basis of whether flood liability applies. In the same way, when a Heritage Overlay is proposed to be applied to a property or area, the consideration should be whether or not it has local heritage significance.
>
> We would also say that planning scheme overlays with few exceptions do not impose prohibitions on development but require that certain values pertaining to the land are taken into account in any proposal to develop the land. Some development proposals may be judged to be inappropriate having regard to all the factors relevant to the permit decision and refused as a result, but others will be judged as satisfactory. This is true of the Heritage Overlay.
>
> In the present case, the Panel is in effect being requested to make a decision in the context of the Amendment about potential demolitions in the area(s) proposed to be made subject to the Heritage Overlay. In our view, these matters are normally and properly dealt with under planning permits. It is only when a permit application outlining the proposed use and development is before a planning body that the proper trade-offs or balancing of policies can be made.

35 The panel then referred to the report of the panel considering Amendment C140 to the *Whitehorse Planning Scheme* where that panel said:[21]

> Panels have consistently held that whenever there may be competing objectives relating to heritage and other matters, the time to resolve them is not when the Heritage Overlay is applied but when a decision must be made under the Heritage Overlay or some other planning scheme provision. *The only issue of relevance in*

20 Panel report 19-20.

21 Panel report 20.

deciding whether to apply the Heritage Overlay is whether the place has heritage significance.

(Emphasis added in the panel report)

36 In essence, the traditional panel approach to an amendment seeking to add overlay control is to consider whether the land has particular characteristics or significance which ought to attract the application of the overlay control rather than to engage in "trade-offs" against other competing objectives and controls of the scheme. This is because planning scheme overlays with few exceptions do not prohibit development, but apply additional policies and factors to the decision-making process when a permit application is made to the responsible authority. The amendment and panel process thereby assumes a strategic role in setting the appropriate planning scheme framework around the statutory planning process. Later, when a permit application is made to the responsible authority the policy framework governing the application is appropriate having regard to the particular characteristics or significance of the land or the buildings on the land.

37 The panel then evaluated the effect of the changes to s 12(2)(c) of the Act on the traditional panel approach noting that "consideration of social and economic matters by a planning authority is clearly mandated at the time of preparation of an amendment".[22]

38 In the view of the panel, consideration of the new provisions raised a number of issues:

(1) What is meant by the phrase "In preparing a planning scheme or amendment"?

(2) Is the panel as well as the planning authority required to adopt the approach in s 12(2)(c)?

(3) What is the nature of the social and economic matters to be taken into account by the panel and planning authority?

(4) Do the economic and social effects point only one way?

(5) How is the balancing of effects to be done?

(6) What to make of the "presumption against demolition"?

39 The panel successively discussed each of these matters in the report. Senior counsel for Dustday submitted before me that part of the panel's discussion of the last of these matters was legally wrong. Senior counsel did not submit that the panel's discussion of any of the other matters was legally erroneous or open to complaint.

40 As to the first matter, the panel decided that the preparation of a scheme or amendment by a planning authority is to be viewed as a process involving a number of steps including the resolution to prepare the amendment; its adoption for exhibition; consideration of submissions received upon exhibition and, if required, the request for a panel; and consideration of any report and the decision as to whether and in what form to adopt an amendment. While it was not clear that it was necessary to consider social and economic impacts at every step of the process, it appeared that the council had done so. The panel noted the occasions when the council had considered social and economic effects in the preparation of Amendment C207.[23]

22 Panel report 20.

23 Panel report 21.

41 The panel observed that the council could additionally consider social and economic matters when deciding whether and in what form to adopt Amendment C207 where "[t]he opportunity exists to again consider social and economic matters will arise again" and at the final stage of preparation of the amendment, when the social and economic matters to be considered will be the matters raised in submissions. The panel considered that "[t]hey may provide a 'new take' on the general issues the Council earlier considered".[24]

42 As to the second issue, the panel considered that its advice would be less helpful if it did not address the full range of relevant matters to be considered by the council and may be found wanting if the full range of matters directly and indirectly raised in submissions were not addressed.[25]

43 As to the third issue, the panel agreed with senior counsel for Dustday that the social and economic effects most likely to be relevant at the amendment stage are those of a broad community nature rather than of a personal kind.[26] Personal economic and social impacts, as against effects on the community as a whole, are generally not matters taken into account in planning decisions. The panel then referred to some of the considerations listed in the guidelines as suggestive of the types of broad effects that might need to be considered at the amendment stage.[27] The panel agreed that personal or private social and economic effects may overlap with public effects and in this way they may become relevant.[28]

44 Despite a submission on behalf of Dustday that financial hardship and reasonable economic use of heritage properties are matters which might become relevant, the panel was cautious about considering personal financial hardship, believing that "it might be more pertinent to consider the economics of the building itself when assessing the economics of retention v demolition".[29]

45 As to the fourth issue, the panel commented that while social and more particularly economic effects were raised by submitters to persuade the panel that the heritage controls should not be applied, there could be offsetting positive social or economic effects. Property values can be enhanced by heritage character when recycling industrial buildings or warehouses for residential use when compared with a modern rebuild, noting that a private economic effect would have to be capable of translating into a community-wide benefit.[30] In many instances, the positive effects, particularly the social effects, are qualitative and not capable of quantification, such as adding character, appeal and interest to the city or affording a sense of place or providing a physical key to an understanding of past values and practices.[31]

46 As to the balancing of effects, the panel considered that the qualitative nature of many of the considerations, especially those that support heritage listing,

24 Panel report.

25 Referring to *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100.

26 Following *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675; 40 LGRA 132.

27 See [20] above.

28 Panel report 22-23.

29 Panel report 23.

30 The panel gave the illustration of increased rate revenue.

31 Panel report 23-24.

meant that it will always be a matter of judgment as to how the relevant factors are to be weighed. The panel then referred to the guidelines which state:[32]

> The normal way of assessing social and economic effects is to consider whether or not the amendment results in a net community benefit.

The panel commented that Dustday's submission was that the economic arguments advanced against the listing of Dustday's former wool store suggested a view that the marginal social benefits (to the community of conserving a lowly graded building) can be offset by adverse economic effects (for the community). It was not submitted before me that this was an erroneous summary of Dustday's submission to the panel.

47 The sixth and final matter considered by the panel in Section 3.1 was what to make of the "presumption against demolition"? As to the traditional panel approach to heritage significance, senior counsel for Dustday submitted to the panel that there have been three significant developments in the planning landscape of which the amendment of s 12(2)(c) was the critical change.[33] One of the significant developments suggested was the application for leave to appeal to the Court by Boroondara City Council against the decision of the Tribunal in *1045 Burke Road Pty Ltd v Boroondara City Council*.[34] If successful, the consequences were that a balanced assessment of all relevant planning considerations would not be allowed at the permit application stage because only heritage considerations will be taken into account in deciding whether to grant a planning permit for demolition.[35]

48 The panel responded to these submissions in its report in the following terms:[36]

> In summary it was Mr Morris' submission that as inclusion in the Heritage Overlay depends upon reaching a threshold of significance, and, later, impact on the significance of the place is the principal consideration when a permit is sought for demolition under the Heritage Overlay, there is a presumption against demolition that occurs. In the case of a building in poor condition, he said, this presumption against demolition and the building's condition therefore need to be taken into account at the listing stage.
>
> The Panel agrees with Mr Morris's submission that, while there is no express provision giving pre-eminence to effect on significance, that effect will be the principal consideration when a demolition or other works application is later considered for a place in a Heritage Overlay. It is also self evident that the total demolition of a building will be judged as a loss of significance.
>
> The Panel does not agree, however, that the outcome of a demolition application, despite the loss of significance, must always be unsuccessful. Other factors relevant to demolition, such as the necessary extent of replacement fabric (or the resultant level of integrity of the altered building) if the building were to be retained, which is a bi-product of condition, is at least one factor which might come into play at that stage.

---

32 Panel report 24.

33 Written submissions of Dustday, dated 22 November 2013 [10]-[20].

34 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108.

35 The appeal by Boroondara City Council to the Trial Division was subsequently dismissed in *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1. The further appeal to the Court of Appeal was also dismissed in *Boroondara City Council v 1045 Burke Road Pty Ltd* [2015] VSCA 27.

36 Panel report 24-27.

With respect to consideration of other planning objectives, Mr Morris also expressed concern about the consequences of the outcome of the appeal to the Supreme Court by Boroondara City Council against the decision by the Victorian Civil and Administrative Appeals (sic) Tribunal (VCAT) concerning the proposed demolition of the heritage building at 1045 Burke Road, Camberwell. In that case, relying on established case law, the Council argued that a decision about whether to grant approval for demolition must be determined independently of any other application and only heritage considerations are relevant. If this argument succeeds, Mr Morris said, there will be no opportunity for integrated decision-making at the permit stage which balances all relevant planning considerations as is contemplated by the Act and planning schemes – and therefore it must be done at the Amendment stage.

At the time of writing, there has been no decision in relation to this matter. The extent of "narrowing" of the matters for consideration at the permit stage remains unclear. It would seem unlikely, however, that at least the issues of building integrity and condition would fall within the ambit of relevant matters in considering a permit.

Also in relation to this issue, the Panel notes that this conundrum potentially generated by the outcome of the Burke Road case was recognised in the Advisory Committee Report on the Review of Heritage Provisions in Planning Schemes 2007. That report supported an approach to consideration of demolition permits consistent with the position now advocated by Boroondara Council, recognised the difficulties faced when decision-making was potentially (largely) fettered and made recommendations to overcome the difficulty. The Committee's report at Section 4.2.5 discusses the variable views that then existed in relation to the ambit of discretion in permit decisions. It included:

> The view of the Committee is that the "National Trust principle" clearly applies to the exercise of discretion. That is, when the only permit trigger is the HO the only relevant considerations are those related to the purpose of the HO. The problem is that many decision makers, and those involved in lodging or responding to permit applications, apparently do not fully appreciate that there is such a restriction.
>
> It is understandable that decision makers – be they local Councils (and their delegates), or VCAT on appeal – are reluctant to feel constrained about the range of matters they can consider – especially if the relevant considerations lead them to a conclusion that they are not comfortable with. They are, however, constrained by the law. Furthermore, those involved in lodging or responding to applications are disadvantaged by any uncertainty about the range of matters that can be considered.
>
> … We consider that it would be useful if decision makers were to be provided with opportunities for training or education on this matter. A Practice Note could also be of value. Furthermore, thought should be given to the way in which notice of planning permits is given, so as to alert potential objectors to the matters they can validly raise.
>
> … it would also be appropriate to amend the decision guidelines at Clause 43.01-4 so that there was no requirement to consider "the decision guidelines in Clause 65". The broad lists in Clause 65.01 and Clause 65.02 of matters to be considered, "as appropriate", are at odds with the fundamental principle that discretion is confined to considerations that are relevant to the purpose of the particular provision. The inclusion of Clause 65 in the decision guidelines for all overlays, and many particular provisions, is apparently a relic of the time when planning schemes principally comprised zoning controls and general considerations – principally about amenity impacts – applied.

> It may be that if the future Burke Road decision is politically viewed as inconsistent with orderly planning, that the above or other legislative changes might be made.
>
> In all we were not persuaded by the arguments presented on this issue that the nature of the decision-making framework, including the limitations applying to decisions on permits, is such that condition should normally be taken into account at the listing stage.
>
> Having said this we do acknowledge that condition may sometimes be relevant in extreme cases of dilapidation where demolition is an inevitable outcome. In such circumstances, the case for demolition would have to be irrefutable and the community-wide costs and benefits of the demolition versus conservation outcomes would have to be clearly identified.
>
> As Mr O'Farrell submitted:
>
> > It is conceivable that there could be an amendment that presents sufficient negative environmental, social and economic effects that a Panel might find that the amendment results in a net detriment to the community.
>
> He suggested that it might be found that it would be a waste of community resources to go to the permit stage to consider the whether demolition should be allowed. He nevertheless said that there would have to be a very high certainty threshold to be passed to make the decision at the amendment stage. We agree that the case for demolition would have to be unassailable.
>
> We also consider that it is possible that condition may become relevant in the circumstances where the necessary renovations of a building, which is being considered for listing/retention, are so extensive that the original fabric of the building is in large measure lost and the form and nature of the heritage place would no longer be able to be appreciated. In that way, the significance of the place would be degraded. Again we would expect that the certainty threshold would be a very high one.

(Footnotes omitted)

49 As to the implications of the changes to s 12(2)(c) of the Act, the panel concluded:[37]

> The Panel recognises that the changes to s 12(2)(c) of the Act in relation to preparing amendments have implications for the manner in which various social and economic matters raised in relation to heritage amendments are to be treated. Where the social and economic effects raised in submissions are of a community nature, they may well be relevant matters. To meet the requirements of the Act, planning authorities and Panels will have to endeavour to consider those matters when preparing an amendment along with other relevant issues.

No issue was taken by Dustday as to this conclusion.

The panel's consideration of Dustday's submission

50 Having discussed general economic and social considerations at length in Section 3.1 of the panel report, the panel gave specific consideration to Dustday's case at Section 5.4. First, the panel set out the substance of the statement of significance relating to the building:[38]

> What is significant?
>
> This six-level red brick sawtooth profile building of 1956 includes:
>
> - Modernist design character devoid of any of the stylistic ornament of most previous wool stores in the City;

37 Panel report 27.

38 Panel report 51-52.

- a vast floor space with the requisite sawtooth roof on the top floor;
- roof clad with deep profile corrugated fibre cement sheet;
- continuous aluminium framed horizontal glazing strips encircle the building, divided by cavity brick clad spandrels;
- window glazing with heat absorbing glass;
- a concrete encased steel frame expressed on the exterior of the building;
- metal clad sliding timber doors regularly spaced along the ground floor, broken only where they meet a vertical glazed curtain wall extending the height of the building at its south end;
- an interior of broad expanses of suspended concrete floor slabs, punctuated only by the drop elevator enclosures for the bails; and
- originally a large goods lift was located next to the reinforced concrete escape stair at the south end of the building's west elevation.

How is it significant?

Victorian Producers Co-operative Company Ltd No 5 Wool Store is significant historically and aesthetically to North Melbourne and the City of Melbourne.

Why is it significant?

Victorian Producers Co-operative Company Ltd No 5 Wool Store is significant:

- Historically, as a major built symbol of the importance of primary production and in particular, wool growing and marketing, to Australia, particularly in the post Second War period, and the strength of growers in successfully organising this market. The building is one of the few surviving structures built for a company that received wide national press coverage because of its representation of growers from many parts of Australia, its evolution being part of a national primary producer cooperative movement: the Victorian Producers Co-operative Company became one of the biggest. Also by its scale as indicative of the special role played by North Melbourne and Kensington in industrial expansion for the City of Melbourne and the State and the traditional link with primary industry (Criterion A); and
- Aesthetically, as an austere but totally functional example of the Modernist approach to a building type that has simple and lingering requirements from the Victorian-era onwards as indicted by its layout, open floor space, and sawtooth top level (Criterion E).

51 The key issue was whether or not the social and economic arguments advanced by Dustday against the inclusion of the building in the overlay are relevant and whether they should prevail given that some acknowledgement of the building's heritage significance was forthcoming from Mr Raworth, Dustday's own expert.[39]

52 The panel summarised Dustday's case:[40]

Essentially the position presented was:

- The place is only of borderline heritage significance and thus the social benefits of its retention are limited. In this respect reliance was placed on Mr Raworth's evidence; the fact that the place had not been identified in previous reviews of North Melbourne heritage; and the building being constructed after the boom period in Australian wool and not being clearly legible as a wool store

39 Panel report 53.

40 Panel report.

- Against this, the building is in very poor condition and costly to repair, and thus in any reuse option additional costs would be imposed – running counter to affordable housing
- It would be difficult to recycle the building for another use because of the relatively closely spaced internal columns and limited natural light
- If the building was retained it would limit the development options for this part of the Structure Plan area which is anticipated for intensive development
- If the building were retained it would overshadow a proposed urban park shown in the Structure Plan for the area to the disbenefit of the community.

53 The council's submissions and evidence included that:[41]

- The building is a worthy candidate for the Heritage Overlay and its significance is as set out in the Statement of Significance above
- The significance of the building should be the primary consideration in considering whether the overlay should be applied
- Panels have traditionally held that when listing is proposed, this is not the time to consider trade offs against other social or economic objectives.

54 The panel set out its thinking on the building and its condition under three headings:

(1) Is the building of local heritage significance?

(2) Condition and conversion considerations.

(3) Public cost of frustrating strategic development imperatives.[42]

55 The local heritage significance of the building was not in doubt. The evidence of Mr Butler (heritage architect and social historian called by the council), Mr Raworth (architectural historian called by Dustday), and Mr Vines (industrial archaeologist called by the National Trust of Australia (Vic)) were all to the same effect viz that the affected property should be placed in the Heritage Overlay. The panel accepted that the building was of local heritage significance and properly graded C, although not a highly significant building in the local context.[43]

56 The panel made a number of salient factual findings and observations as to Dustday's case on building condition and conversion:[44]

> In relation to these issues, Mr Kevin Campbell was called to give expert evidence for Dustday. Mr Campbell is experienced in concrete technology, construction and repair.
>
> It was his evidence that the façade of the building is in an advanced stage of deterioration and that extensive reconstruction would be required to meeting current day building requirements. He said the structural steel columns are extensively corroded and severely pitted, requiring grit blasting and a zinc epoxy coating for durability. He also said the concrete fireproofing would require replacement as do all the steel window frames and glazing. He noted that there are no expansion joints in some of the brickwork which should also be rectified. He advised that if the total building was required to be retained:

41 Panel report.

42 Panel report 54-58.

43 Panel report 54-55.

44 Panel report 55-57.

> Gary Georgeson of Veritech Australia had nominated a budget in the order of ten million dollars ($10,000,000) for façade reconstruction for the North and Western Facades.

He further advised that Mr Georgeson had said that a budget of $2 million would be required to restore four of the bays of the building façade if only part of the building was retained.

He did note, however, that while some of the internal concrete floors, columns and beams required extensive repair, they are generally in good condition.

In terms of conversion difficulties, it was Mr Campbell's evidence and that of Mr Rob Milner, who was called to give planning evidence for Dustday, that the closely-spaced internal columns (10 foot spacings) would be restrictive in terms of planning for apartments. Mr Campbell also said the façade could not be retained in that scenario and would require rebuilding. He further said that only the structural beams and columns may remain. The introduction of additional light was also said by Mr Milner to be problematic in any residential conversion.

Mr Campbell in response to questioning identified some of the particular repair options available.

Mr O'Farrell submitted for the Council that these repair costs were not excessive in the context of the large floor area of the building and that the many internal columns were a typical but not unsurmountable problem in warehouse conversions to dwellings. He suggested that they might add a "quirky" internal design element.

As we have indicated in Section 3.1, there may be situations when the structural condition of a building is such that it would be a waste of public resources to include it in a Heritage Overlay for it then to have to go through a permit process in relation to the inevitable demolition. The case for demolition would have to be irrefutable as we have said. We do not consider we are dealing with such a scenario here.

We have also considered whether the issue of the extent of replacement of heritage fabric, and the consequent loss of building integrity – a matter argued as pertinent to the Panel's consideration by Mr Morris and about which Mr Campbell gave evidence. In summary we were told that "little of the original fabric will be retained".

We found the broad analysis unhelpful and, while the types of repair required were described, the extent of repair was lacking in sufficient detail to give it a role in our consideration. As we have indicated this matter may become an issue if the integrity of the building is very seriously eroded or the required repairs result in an outcome where the heritage value of the property can no longer be appreciated. We are also satisfied that this remains a matter which might be considered in a permit context when more detail may be available.

We also agree with the Council submissions that the difficulties of conversion to dwellings presented by the original wool store design are not insurmountable.

The further issue is whether the allegedly high costs and difficulties of reuse of the building in some way convert to public social and economic costs that would recommend against its inclusion in the overlay with its alleged "presumption against demolition".

We have not been persuaded that these costs and difficulties have been converted successfully into public costs weighing against the public benefits of listing.

In this respect we would firstly say that we found the case in terms of the private costs incomplete. In particular we were not presented with evidence that the rehabilitation costs when added to other costs, and importantly also as off set by returns, are exorbitant or even unreasonably high when compared to those that would be associated with other rebuild redevelopment options for the site.

> Secondly, Mr Georgeson, the person who estimated the rehabilitation costs for the façade, was not called to give evidence, and advice about his expertise was merely asserted by Mr Campbell. The figures provided at best can be regarded as a "guestimate".
>
> In terms of converting these private costs to public costs which might weigh against application of the overlay, at the Hearing, Mr Morris asserted that the resultant housing would be less affordable because of the costs of rehabilitation of some of the original fabric if retained.
>
> We agree that the resultant effect for affordable housing is an economic outcome that is in the nature of a public cost. Because of the inadequacies in terms of the detail of the private costs behind this asserted public outcome, we are unable to give this issue weight here.

57 As to the public cost of frustrating strategic development imperatives that might arise if the building were listed, it was the panel's view that the conflict between intensive development and heritage conservation had already been resolved by the council. In preparing the structure plan, the council had resolved to investigate places of heritage significance and proceed with an amendment to implement the outcomes. The four bay retention option suggested by Dustday was best resolved in the context of a clear redevelopment proposal.[45]

58 Finally, the public costs of including the building in the overlay and its potential retention were not such as to set aside the public benefits of heritage conservation.[46] The panel recommended that the affected property be included in the Heritage Overlay as proposed in Amendment C207.

Review of the panel report

59 The objective stated in s 4(1)(d) of the Act includes the conservation and enhancement of buildings of architectural or historical interest or of special cultural value.

60 Dustday was dependent on its evidence as to social and economic effects to seek to overcome the unanimous view of the heritage consultants, consistent with the Arden Macauley Heritage Review, that the affected property should be placed on the heritage overlay as the building was of local heritage significance.

61 Dustday's position at the panel hearing is illustrated by the discussion at the trial between senior counsel for Dustday and the Court as to whether in the event of a permit application there was a presumption against demolition:

> His Honour: Why do you say there is a presumption against demolition?
>
> Mr Morris: The contention was that if a building is put in a heritage overlay and one then needs a permit to demolish that building, the central issue – or a central issue might be a better way of putting it – will be the effect on the cultural heritage significance of the place of demolishing and complete demolition will always have a major effect on the cultural heritage significance of the place. Hence – I don't know whether "presumption" is the right word—
>
> His Honour: What you really mean is that there would need to be powerful countervailing considerations to arrive at the demolition outcome that your client would seek.
>
> Mr Morris: I think that's a more appropriate way of putting it. We did argue in the case it was a presumption, but an equally appropriate way of articulating it, in fact the better way of articulating it, is that because of the policy provisions, including the policy provision in the planning scheme that states "demolishing a

45 Panel report 57-58.

46 Panel report 58.

building will normally not be permitted" except X, Y and Z, creates a situation where you need substantial, even powerful, countervailing factors to justify it.

62 Dustday did not have, and was unable to present to the panel, a proposal for the development of the land. In turn, this meant that it was not possible for the panel to consider whether restoration and adaptive re-use of the building was a feasible proposition having regard to the costs of restoration and re-use as against the returns achieved by redevelopment. Only if there is a development proposal can the relative physical, social and economic benefits and disbenefits of restoration as against demolition be assessed. Only if there is a development proposal can "net community benefit" be comprehensively evaluated.

63 The panel was highly experienced in the assessment of heritage buildings, and found:

(1) It was not dealing with a scenario where the case for demolition was irrefutable.

(2) The broad analysis provided on behalf of Dustday as to the extent of replacement of heritage fabric and the consequent loss of building integrity was unhelpful. While the types of repair required were described, the extent of repair was lacking in sufficient detail to give it a role in the panel's considerations, although it remained a matter which might be considered in a permit context when more detail may be available.

(3) It agreed with the council's submissions that the difficulties of conversion to dwellings presented by the original wool store design are not insurmountable.

(4) It was not persuaded that the high costs and difficulties of re-use of the building had been converted successfully into public costs weighing against the public benefits of listing.

(5) The case in terms of private costs was incomplete. The panel was not presented with evidence that the rehabilitation costs when added to other costs, and as offset by returns, were exorbitant or even unreasonably high when compared to those that would be associated with other rebuild development options for the site.

(6) Mr Georgeson, the person who estimated the rehabilitation costs for the northern and western façades at $10 million with a budget of $2 million if only four of the bays of the building façade were retained, was not called to give evidence, and his expertise was merely asserted.

(7) The figures provided by Dustday at best can be regarded as a "guestimate"[sic].

(8) Because of the inadequate detail of the private costs behind the asserted public outcome, the panel was unable to give the issue of resultant effect for affordable housing any weight as a public cost.

64 In view of the panel, Dustday's case suffered from significant weaknesses and evidentiary omissions. There were gaps in the case that Dustday was able to present at the hearing – as the panel identified.

Are the report and recommendations of the panel amenable to judicial review?

65 Senior counsel for Dustday submitted that the report and recommendations of the panel were amenable to judicial review for jurisdictional error. He referred to *Craig v South Australia* (*Craig*)[47] where the Court said:

> If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[48]

66 This passage was followed by the High Court in *Kirk v Industrial Court (NSW)* (*Kirk*).[49] In answer to a question from the Court as to whether the principles set out in *Craig* and *Kirk* applied to a panel, senior counsel referred to *Hot Holdings Pty Ltd v Creasy*.[50] In this decision, three members of the High Court held that a preliminary decision or recommendation which constitutes a condition precedent to an exercise of power that will affect legal rights will have the requisite legal effect to attract certiorari:

> The proposition that certiorari will lie only in respect of a decision which determines questions affecting rights has led to a number of cases, of which the present is one, where the contention has been that the decision in issue is merely advisory, provides a recommendation, or is made at a preliminary stage of a decision-making process.
>
> …
>
> Thus, for certiorari to issue, it must be possible to identify a decision which has a discernible or apparent legal effect upon rights. It is that legal effect which may be removed for quashing.
>
> This formulation encompasses two broadly typical situations where the requirement of legal effect is in issue: (1) where the decision under challenge is the ultimate decision in the decision-making process and the question is whether that ultimate decision sufficiently "affects rights" in a legal sense; (2) where the ultimate decision to be made undoubtedly affects legal rights but the question is whether a decision made at a preliminary or recommendatory stage of the decisionmaking process sufficiently "determines" or is connected with that decision.[51]

67 In *Winky Pop Pty Ltd v Hobsons Bay City Council*,[52] Kaye J applied these principles in the context of a council's decision upon a panel report in relation to the possible rezoning of land. Kaye J held that the council's decision was an essential step in a process that might have the effect of altering the legal rights or liabilities of the plaintiffs.[53]

---

47 *Craig v South Australia* (1995) 184 CLR 163.

48 *Craig v South Australia* (1995) 184 CLR 163 at 179.

49 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [67].

50 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

51 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ); see also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580.

52 *Winky Pop Pty Ltd v Hobsons Bay City Council* (2007) 19 VR 312.

53 *Winky Pop Pty Ltd v Hobsons Bay City Council* (2007) 19 VR 312 at [63]-[64].

68 In *Porchester Nominees Pty Ltd v Renfrey*,[54] Nicholson J held that the jurisdiction granted by the *Administrative Law Act 1978* (Vic) was available to review proceedings before a panel appointed under the *Town and Country Planning Act 1961* (Vic):

> It is clear from the remarks of the Full Court in *Melbourne and Metropolitan Board of Works v Cullen* that where a ruling has been made by a tribunal prior to the final determination of a matter the provisions of the *Administrative Law Act* are available to challenge it. I think that it is also clear that this is so despite the fact that the body in question's power is merely to report and recommend: see *Shire of Sherbrooke v F L Byrne Pty Ltd*; *Brettingham-Moore v Municipality of St Leonards* and *R v King*. If, as I am informed, the present proposal involves one of the biggest retail development proposals in Victoria's history, the potential effect upon other retailing centres such as those of the plaintiffs is obviously considerable, and the plaintiffs have a very real interest in protecting their position. The report and recommendation of the panel may have a considerable effect in this regard. I therefore think that these decisions do determine questions affecting the plaintiffs' rights, and that an application does lie under the *Administrative Law Act*.[55]

(Citations omitted)

69 The report and the recommendations of the panel were essential steps in a process which might have the effect of altering the legal rights or liabilities of Dustday. Section 25(1) of the Act provides that the panel must report its findings to the planning authority. Section 27(1) provides that the planning authority must consider the panel's report before deciding whether or not to adopt the amendment.

70 In addition, s 31 of the Act and subreg 10(e) of the *Planning and Environment Regulations 2005* (Vic) require a planning authority when submitting an adopted amendment to the Minister to submit prescribed information including the report of a panel appointed under Pt 8 of the Act and the reasons why any panel recommendations were not adopted. As a consequence, the panel's report, and the reasons (if any) why panel recommendations were not adopted (together with other information) are required to be provided to the Minister when deciding whether or not to approve a planning scheme amendment.

71 I accept that the report and recommendations of a panel appointed under the Act are amenable to judicial review for jurisdictional error. Neither the council nor the Minister contended otherwise.

72 A final preliminary point relates to the nature of the relief sought. The proceeding is commenced by writ albeit that the trial was conducted with the agreement of the parties on affidavit essentially as if it were an administrative law proceeding. No party sought to lead viva voce evidence or cross-examine. Dustday seeks declaratory relief. It does not seek relief by way of order for certiorari in the original jurisdiction of the Court or under O 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). The proceeding is not commenced by originating motion as would be appropriate for an application under O 56.

---

54 *Porchester Nominees Pty Ltd v Renfrey* (1987) 65 LGRA 288.

55 *Porchester Nominees Pty Ltd v Renfrey* (1987) 65 LGRA 288 at 299-300.

73 In reply, junior counsel for Dustday relied on the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,[56] where Gaudron and Gummow JJ said:

> In our view, logic and legal principle both direct the conclusion that the approach of the Supreme Court of Canada is correct. As already pointed out, a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all. Once that is accepted, it follows that, if the duty of the decision-maker is to make a decision with respect to a person's rights but, because of jurisdictional error, he or she proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains unperformed. Thus, not only is there no legal impediment under the general law to a decision-maker making such a decision but, as a matter of strict legal principle, he or she is required to do so. And that is so, regardless of s 33(1) of the *Acts Interpretation Act*.[57]

74 I accept Dustday's submission that a decision involving jurisdictional error has no legal foundation, and is properly to be regarded as no decision at all. The Court may declare the decision to be invalid and of no legal effect, just as it can grant an order in the nature of certiorari quashing the decision. Neither the council nor the Minister contended otherwise. Indeed, the parties were in agreement as to the form of declaratory relief which the Court should grant in the event that Dustday was successful.[58]

Are the panel report and recommendations invalid and of no effect by reason of jurisdictional error?

75 Dustday's amended statement of claim alleged that the report and recommendations of the panel are affected by legal error. The particulars given of the legal error are in substance:[59]

> (a) The panel correctly accepted the submission that s 12(2)(c) of the Act, as in force at the time of the panel hearing and at the time the panel reported

---

56 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

57 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [53].

58

> A. A declaration that Recommendation 17 in the report of the Panel on Amendment C207 to the Melbourne Planning Scheme dated 21 January 2014 was invalid.
> B. A declaration that the resolution of the Council on 27 May 2014 in respect of Amendment C207 to the Melbourne Planning Scheme at [sic] was invalid to the extent that the Council thereby resolved to:
> (a) adopt Amendment C207 in a form that included:
> (i) the Victorian Producers Co-operative Company Ltd No 5 Wool Store at 85-105 Sutton Street, North Melbourne (the Wool Store) in the Schedule to cl 43.01 of the Melbourne Planning Scheme;
> (ii) a shaded area, showing the location of the Wool Store; annotated "H01118" on part of Planning Scheme Map 4HO;
> (iii) the Wool Store in the Heritage Places Inventory February 2013, referred to in the Schedule to cl 81 of the Melbourne Planning Scheme;
> (iv) a statement of significance for the Wool Store.
> (b) submit Amendment C207 to the Minister having resolved to adopt Amendment C207 in a form that included those matters.

59 Amended Statement of Claim dated 10 December 2014 [19].

its findings and made its recommendation, required planning authorities, in preparing a planning scheme amendment, to take into account social effects and economic effects.

(b) But the panel failed to consider the social and economic effects flowing from imposing a Heritage Overlay on the building, when the evidence showed that it was in very poor condition.

(c) The panel held that the condition of a place could only be relevant if the condition meant that the place would inevitably be demolished.

(d) The panel thereby misdirected itself as to the nature of its task.

(e) Alternatively, the panel:

(i) made a finding for which there was no evidence.

(ii) acted unreasonably or irrationally.

76 Dustday's outline of submissions addressed two propositions which embodied the panel's errors:[60]

(1) The first is that the panel made an error of law causing it to identify a wrong issue or to ask itself a wrong question, which error affected the exercise of its powers.

(2) The second is that it failed to lawfully consider social and economic effects, because it failed to consider a key matter arising from the subject matter, and it thereby acted unreasonably.[61]

77 It is convenient to adopt the same framework and address the following questions:

(1) Did the panel err in law by identifying a wrong issue or asking itself a wrong question thereby affecting the exercise of its powers?

(2) Did the panel fail to consider social and economic effects, because it failed to consider a key matter arising from the subject matter, and thereby acted unreasonably?

78 Dustday did not press any submission that the council had erred in adopting Amendment C207 apart from accepting the recommendations.[62]

79 Dustday did not suggest that there was any denial of procedural fairness or natural justice, or that what was done or said by the panel was in contravention of the Act in any way other than the suggested errors set out above. Nor was it said that any particular finding of fact reached by the panel was manifestly unreasonable, or unreasonable in the *Wednesbury* sense.[63] Other than the two errors,[64] it was not contended that any finding of fact made by the panel was not open to it on the evidence presented by the parties to the panel. Finally, apart from the two errors,[65] it was not suggested that anything the panel had found was irrational, or that there was no discernible pathway of reasoning underlying any of its findings.

80 The effective contradictor in this proceeding was the council. In its amended defence, it denied the allegations of legal error. Its contentions included that:

60 Outline of plaintiff's submissions dated 24 November 2014 (Outline) [35].

61 Relying on *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [68], [72].

62 See Outline [36]-[40]; Transcript p 49 ln 11-28.

63 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. This was a central issue in *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; 166 LGERA 1.

64 See [76] above.

65 See [76] above.

(1) the panel was not required under s 12(2)(c) of the Act to take into account the social and economic effects of Amendment C207;

(2) in any event, the panel did consider the social and economic effects flowing from the imposition of a heritage overlay on the building;

(3) the panel's task was to consider the submissions referred to it. It did not misdirect itself as to the nature of its task;

(4) the panel's findings were open on the evidence and other material before it; and

(5) the panel did not act unreasonably or irrationally.

81 The Minister did not admit the main allegations made by Dustday, and stood neutral abiding by the result of the proceeding.

Did the panel identify a wrong issue or ask itself a wrong question?

82 Senior counsel for Dustday submitted that the panel misdirected itself when it concluded that the condition of the building was not relevant to its consideration because demolition was not "an inevitable outcome" or because the case for demolition was not "irrefutable" or "unassailable". Senior counsel contended that the panel imposed arbitrary restrictions such as these on the manner in which the building's condition could be relevant to its task causing it to misdirect itself and ask the wrong questions in a manner that affected the recommendations. This constituted a jurisdictional error.[66]

83 Senior counsel did not contend that the panel was bound to give any particular weight to the condition of a building. Rather, the panel's error was to confine its consideration of the likelihood of demolition by reference to an arbitrary standard finding no foothold in the Act or planning scheme. The panel was not satisfied that demolition was "inevitable", and refused to weigh in the balance the condition of the building.[67]

84 Senior counsel for the council resisted the characterisation that the panel had made, what he termed, legal holdings at all. The panel was not charged with the responsibility to make legal holdings. The panel was comprised by experts who were not lawyers. It would be strange indeed if Parliament were taken to have intended that a panel in those circumstances should be required or entitled to make legal holdings. What the panel had done was to express opinions to support the findings that it made. The panel was not empowered to definitively rule on the law. It was empowered to express opinions.

85 The duties of a panel appointed under the Act are defined and described in Pts 3 and 8 of the Act. The main duties of panels may be summarised:[68]

(1) to consider all submissions referred to it;

(2) to give a reasonable opportunity to be heard to the proponent, submitters, the planning authority, the responsible authority or municipal council concerned, any person who asked the planning authority to prepare the amendment, and any person whom the Minister or the planning authority directs the panel to hear;

---

66 Outline [9]-[10], [32]-[33].

67 Outline [34].

68 *Planning and Environment Act 1987* (Vic) ss 23-25; 160-168. Section 24(d) extended the panel's duty to give a reasonable opportunity to be heard to any person who had asked the planning authority to prepare the amendment, and was introduced by s 74 of the *Planning and Environment Amendment (General) Act 2013* (Vic).

(3) to conduct public hearings unless a person making a submission objects and the panel is satisfied that the submission is of a confidential nature;
(4) to act according to equity and good conscience without regard to technicalities or legal forms;
(5) to comply with the rules of natural justice;
(6) to regulate its own proceedings;
(7) to take into account any matter it thinks relevant in making its report and recommendations;
(8) to report its findings to the planning authority; and
(9) to make any recommendation it thinks fit.

86 Parts 3 and 8 of the Act give a panel a wide discretion as to how it approaches its primary duties of considering submissions, conducting a public hearing, reporting its findings and making recommendations. While all referred submissions stand to be considered, and relevant matters addressed, there are no specific tests found in the Act as to how a panel is to evaluate the extensive range of matters likely to arise such as planning, social, economic, environmental, scientific, aesthetic, architectural, historic and cultural matters. There are no legal tests or thresholds contained in the Act which govern the findings that a panel may make. There is no form which a panel is legally required to adopt in its report and recommendations. These are all matters which the legislature has left to the panel. The Act gives a panel the broadest parameters and leaves it to the panel to determine what is required for it to be persuaded to make, or not to make, a particular recommendation. Apart from the legislative direction to consider all submissions referred to it, the contents of the report and the recommendations are matters within the domain of the panel.

87 Parliament has left a wide degree of latitude to the expert panel to make findings, express opinions and make recommendations in the panel report. It is up to the panel members to make findings, express opinions and give advice as to the submissions referred to them, and so assist the planning authority and the Minister to decide on the merits of submissions and ultimately the planning scheme amendment itself. The members of the panel are not resolving legal claims or disputes – they are simply giving advice based on their expertise and their assessment of submissions. That advice may or may not be accepted by the planning authority or the Minister.

88 While in the case of many tribunals and administrative decision-makers, guidance may be found in the subject matter, scope and purpose of the enabling enactment, the Act directs a panel to consider all submissions referred and states that a panel may take into account "any matter it thinks relevant in making its report and recommendations".[69] Given the numerous and diverse submissions that may follow the public exhibition of an amendment, the subject matter that can be addressed in panel reports may be very wide ranging.

89 It was open to the panel to give such weight to the competing considerations of heritage, social and economic effects as they affect the building and the land in such manner as it saw fit. Given that the building had heritage significance, it was open to the panel to adopt the position that it would only give weight in its report to the dilapidation of the building "where demolition was an inevitable outcome", or where the case for demolition was "irrefutable" or other like findings. It was open to the panel to adopt the position that in such

69 See *Planning and Environment Act 1987* (Vic) ss 25(2) and 168.

circumstances, the community-wide costs and benefits of the demolition versus conservation outcomes would have to be clearly identified. There is no error of law in so doing.

90 In relation to a submission by counsel for the council about a theoretical case where "it might be found that it would be a waste of community resources to go to the permit stage to consider the whether [sic] demolition should be allowed", the panel responded that "the case for demolition would have to be unassailable".[70] Even where the necessary renovations of a building, under consideration for listing, are so extensive that the original fabric of the building would be lost, and the form and nature of the heritage place no longer able to be appreciated, the panel considered that the certainty threshold would be a very high one before it would recommend against listing the building on the Heritage Overlay.

91 The opinions and views of the panel expressed in terms of the objectives of planning in Victoria show the weight the panel gave to the conservation and enhancement of buildings of historical interest[71] as against the development options which would arise if the land were cleared of building. This is plainly a matter for the panel to determine. There is no legal standard in the Act which directs panels as to what they are required to find before making a recommendation, or conversely as to what a submitter opposed to an amendment must prove so that a panel must make an adverse recommendation concerning an amendment. The merits of the panel's opinions and views are not a matter for the Court.

92 The boundaries of judicial review of administrative decisions are clearly and concisely stated by Brennan J in *Attorney-General (NSW) v Quin*[72] when he said:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. … The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[73]

93 The relevant principles relating to the review of the decisions of administrative tribunals have been examined by courts on many occasions. In a seminal passage in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*,[74] Mason J said:

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.
>
> It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the

70 Panel report 26.

71 *Planning and Environment Act 1987* (Vic) s 4(1)(d).

72 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

73 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

74 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

> court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power. I say "generally" because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene MR in *Wednesbury Corporation*, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it.[75]

(Citations omitted)

94 The exercise of a very wide discretion such as that given to panels by the Act was discussed by Dixon CJ in *Klein v Domus Pty Ltd*:[76]

> This Court has in many and diverse connexions dealt with discretions which are given by legislation to bodies, sometimes judicial, sometimes administrative, without defining the grounds on which the discretion is to be exercised and in a sense this is one such case. We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case.[77]

95 The limits of judicial review in the context of a challenge to a planning scheme amendment approved by the Minister are set out by Ashley and Redlich JJA in *East Melbourne Group Inc v Minister for Planning*:[78]

> Judicial Review
>
> The proceeding sought judicial review of the minister's decision. The scope and purpose of judicial review is to ensure that powers are exercised for the purposes for which they were conferred and in the manner in which they were intended to be exercised. It is the extent of power and the legality of its exercise to which judicial review is directed.
>
> Restraint in review of administrative decisions
>
> Having regard to the way in which the litigation was conducted, both at trial and on appeal, it is necessary for us to consider the material in order to see what reason or reasons the minister gave for her exercise of the discretion to exempt. That said, we are conscious of the need to proceed with caution lest we exceed our supervisory role and trespass into the forbidden field of merits review. It would not suffice if we took the view that a different decision would have been more appropriate or that another minister might have reached a different result. As Brennan J said in *Attorney-General (NSW) v Quin*:

---

75 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39.

76 *Klein v Domus Pty Ltd* (1963) 109 CLR 467.

77 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473.

78 *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; 166 LGERA 1.

> … The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

In *Buck v Bavone*, Gibbs J observed:

> However, where the matter of which the [decision-maker] is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached.

Gleeson CJ and McHugh J, in their joint judgment in *Minister for Immigration and Multicultural Affairs v Eshetu*, referred to the following passage from the judgment of Lord Brightman in *Puhlhofer v Hillingdon London Borough Council*:

> … Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.

We recognise that "minor infelicities or trivial lapses in logic in cases where [a decision-maker's] satisfaction as to a factual state provides the jurisdictional foundation for the exercise of power" would not warrant judicial review. As Kirby J stated in *Re Minister for Immigration and Multicultural Affairs*:

> The degree of restraint that a court will exercise in circumstances where the fact-finding process is said to have miscarried to a significant degree, so as to amount to jurisdictional error, will to a considerable extent depend upon the nature of the applicable power, the statutory context and the effect of the impugned decision. For instance, where an assessment and evaluation of complex evidence is required by an expert administrative agency, a greater degree of restraint may be called for. Similarly greater caution is appropriate where the subject matter of the decision involves a significant element of governmental policy or allocative determinations, making it more remote from ordinary judicial experience.[79]

(Footnotes omitted)

96 In the same decision, Warren CJ said as to the distinction between merits review and judicial review:

> More recently, in *Minister for Immigration and Multicultural Affairs v Eshetu*, Gleeson CJ and McHugh J stressed that merely asserting that a decision was unreasonable is not sufficient to establish an error of law:
>
> > … [s]omeone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as "illogical" or "unreasonable", or even "so unreasonable that no reasonable person could adopt it". If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.
>
> The statement confirms the well-established principle that, when reviewing administrative action, the court does not engage in a review of the merits of the decision. The distinction between a review on the merits and a review of the

79 *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; 166 LGERA 1 at [174]-[178].

> legality of a decision is fundamental to administrative law. The power to engage in administrative action resides with the repository of the relevant power. The court's jurisdiction centres on determining whether the decision was taken within power, "the Court has no jurisdiction simply to cure administrative injustice or error". Establishing *Wednesbury* unreasonableness requires a "major step further" than simply establishing an error in reasoning. This is particularly so "where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste".[80]

(Footnotes omitted)

97 The panel's requirement of compelling proof before it would entertain a recommendation that the building not be protected within the Heritage Overlay may be disappointing to Dustday. Opinions may vary across the community as to the relative importance of the preservation of buildings with heritage significance as against economic development without heritage constraints. But the weight to be given by the panel in its report to heritage considerations as against other considerations is a matter for it. It is not for the Court to revisit the merits of the panel's deliberations. The issues are quintessentially for the panel, and in turn the council and the Minister.

98 It follows that the contention that the panel identified the wrong issue or asked itself a wrong question must fail.

Did the panel fail to consider social and economic effects by failing to consider the condition of the building and likelihood of re-use?

99 The second ground relied on by Dustday is that the panel failed to lawfully consider social and economic effects, because it failed to consider a key matter arising from the subject matter and thereby acted unreasonably. The key matter was said to be the condition of the building and the likelihood that the building would or could be adapted for re-use if it were included in the Heritage Overlay. It is further said that the panel erred when it said that the condition of the building was not relevant to its consideration because the case for demolition was not irrefutable.

100 Senior counsel for the council highlighted the key findings of the panel where it had regard to the condition of the building. The panel was not persuaded that the nature of the decision-making framework, including the limitations applying to decisions on permits, was such that condition should normally be taken into account at the listing stage.[81] This was a response by the panel to the argument by Dustday that if the appeal by Boroondara City Council to the Supreme Court concerning the proposed demolition of the heritage building at 1045 Burke Road, Camberwell, were successful, there would be no opportunity for integrated decision-making at the permit stage which balances all relevant planning considerations, and therefore the balancing process must be done at the amendment stage.[82] In the event, the appeal failed, and the Court of Appeal confirmed that integrated decision-making and the balancing of considerations were to be applied at the permit stage.[83]

---

80 *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; 166 LGERA 1 at [111]-[112].

81 Panel report 26.

82 Panel report 25.

83 *Boroondara City Council v 1045 Burke Road Pty Ltd* [2015] VSCA 27 at [30]-[31] (Warren CJ), [58] (Santamaria JA), [88], [90] (Garde AJA).

101 Where planning authorities are directed to consider conservation or heritage matters, or social and economic effects, consideration must inevitably be given as to the stage in the planning process that has been reached, and the nature of the consideration that is to be given to these matters or effects at that stage. The nature and level of information available at the rezoning or amendment stage will often be significantly less than that available at the permit stage. By the time of a permit application, much more detail is likely to be available as to the proposed use and development including development plans, building specifications, site information, expert reports and the like. At the permit application stage, the considerations the responsible authority is required to take into account include the matters listed in s 60 of the Act, the decision and comments of referral authorities and the considerations relevant to the application under the operative planning scheme.

102 Given the stages in the planning process, consideration will often need to be given by panels as to the strategic nature of the assessment to be undertaken at the amendment stage as against the more detailed evaluation undertaken at the permit application stage. Where, as here, no use or development plans are available at the amendment stage, the consideration of conservation and heritage matters by a panel is inevitably more circumscribed than that which is possible at the later stage. Assessment of costs associated with restoration and adaptive re-use of a heritage building in poor condition is crucially informed by an understanding of the overall scheme of development, including the nature of the proposed use, and the likely costs and returns. The economics underlying restoration and redevelopment will often be a pivotal component of decision-making concerning buildings with heritage significance.

103 The panel gave careful consideration to Dustday's evidence as to condition and conversion.[84] It is fair to say that it found Dustday's evidence to be unimpressive, the broad analysis presented unhelpful, and the evidence to the extent of repair lacking in detail. The evidence as to condition was insufficient to persuade the panel that condition should be given any weight in the panel's ultimate decision. As I have said, the panel considered that the high costs and difficulties of re-use of the building had not been successfully converted into public costs weighing against the public benefits of listing. Dustday's case was incomplete in terms of private costs. The panel was not presented with evidence that the rehabilitation costs when added to other costs, and importantly when offset by returns, were exorbitant or unreasonably high compared with those associated with other rebuild development options for the site. Mr Georgeson's cost estimates were important evidence, but he was not called.[85]

104 When a panel considers that the information before it is inadequate, insufficient, or incomplete as to a subject matter, and that the same subject matter is better or more comprehensively or more fairly addressed at the later permit application stage of the planning process, this does not mean that the panel is failing to take the subject matter into account at all. The reverse is the case, namely that the subject matter is being taken into account, and that as a result of being taken into account, it considered to be better or more comprehensively or more fairly addressed and decided at the later stage.

---

84 Panel report 55-57.

85 Panel report 56.

105 Far from failing to consider the condition and conversion of the building, the panel gave comprehensive consideration to these matters. Dustday's evidence and submissions were fully considered as to condition and conversion but they were in the panel's view ultimately found to be wanting. Dustday's real complaint is that the panel was left unpersuaded by its evidence as to the building, its condition and conversion. As I have said, the position of the panel that there should be serious justification and persuasive evidence before a building with heritage significance is permitted to be demolished at the amendment stage is an opinion that is entirely open to the panel to adopt, as was its recommendation to the planning authority and the Minister.

106 When the panel in its report enquired whether the social and economic effects advanced by Dustday were "relevant"[86] to the panel did not mean that social and economic effects were not being considered at all, or had no place in its deliberations, because it is apparent from the panel's reasons as a whole that they were addressed at length.[87] Rather it meant that in its opinion the social and economic effects contended for by Dustday were not entitled to any or any significant weight, or were greatly outweighed by the consideration of heritage. In this respect, I agree with the submission that the panel is entitled to some tolerance in the use of language. The panel's reasons must be read fairly and as a whole with a focus on substance. They should not be read "minutely and finely with an eye keenly attuned to the perception of error" particularly when legal terms such as "relevant" or "irrelevant" are found in submissions prepared by senior and junior counsel, and presented to a non-legally qualified panel.[88] Far from failing to take into account social and economic effects, here the evaluation and discussion of social and economic effects by the panel is extensive.[89] The panel would be entitled to a similar tolerance in relation to the expression "presumption against demolition" which was also used by senior counsel appearing before the panel[90] to describe an idea even though as a matter of legal analysis no such presumption exists.

107 As I have said, it is not the role of the court to review the merits of the panel's report and recommendations. Merits are a matter for the panel, the council and later the Minister. I am satisfied that the panel gave social and economic effects careful and comprehensive consideration both generally, and in the individual case. Issues of condition and conversion were fully reviewed by the panel in the terms urged in Dustday's submissions and presented in evidence, albeit that the panel's findings and opinions were not supportive of the result desired by Dustday.

108 Dustday's arguments must be rejected. Dustday has not shown that the panel has made any legal error by failing to take into account social or economic matters or the condition and potential for conversion and adaptive re-use of the building.

---

86 See, for example, panel report 22, 52, 53, 54.

87 Panel report 17-27, 55-57.

88 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; *Shock Records Pty Ltd v Jones* [2006] VSCA 180 at [85]; *Hesse Blind Roller Company Pty Ltd v Hamitoski* [2006] VSCA 121 at [3], [19]-[22]; *Church v Echuca Regional Health* (2008) 20 VR 566 at [91]; *ACN 005 565 926 Pty Ltd v Snibson* [2012] VSCA 31 at [81]; *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at [64].

89 Panel report 17-27, 55-57.

90 Panel report 24.

Conclusion

109 Dustday has failed to show any legal error on the part of the panel. As a result, the proceeding must be dismissed.

110 Amendment C207 has been adopted by the council. It is now a matter for the Minister to consider whether Amendment C207 should be approved. The merits of Amendment C207 are entirely a matter for the Minister.

111 In the event that the Minister approves Amendment C207 as it affects the land, it will be open for Dustday to apply for a planning permit for demolition in accordance with cll 22.05 and 43.01 of the scheme. Such an application would stand to be considered on its own merits by the council and by the Victorian Civil and Administrative Tribunal.

112 The Court will order that the proceeding is dismissed.

Application dismissed

Solicitor for the plaintiff: *SBA Law*.

Solicitor for the first defendant: *Department of Transport, Planning and Local Infrastructure*.

Solicitor for the second defendant: *Hunt & Hunt Lawyers*.

J VENEZIANO