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# Victorian Civil and Administrative Tribunal

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**National Trust of Australia (Victoria) v  
Minister for Planning (includes Summary)  
(Red Dot) [2010] VCAT 671 (27 May 2010)**

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Minister for Planning (includes Summary)  
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Last Updated: 16 June 2010

### RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as ‘Red Dot Decisions’. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows.

This Red Dot Summary does not form part of the decision or reasons for decision.

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P939/2010  
PERMIT APPLICATION NO.  
2009/001687

### IN THE MATTER OF

National Trust of Australia (Victoria) v  
Minister for Planning & Halim Group and  
Hotel Windsor Holdings Pty Ltd

### BEFORE

Jeanette G Rickards, Senior Member

<b>NATURE OF CASE</b>	Review of decision of Minister for Planning as Responsible Authority to issue a Notice of Decision to Grant a Permit for the redevelopment of the Windsor Hotel
<b>POTENTIAL GUIDELINE DECISION</b>	Yes
<b>REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE</b>	
<b>LAW – issue of interpretation or application</b>	Jurisdiction of Tribunal under section 82 <a href="#"><i>Planning and Environment Act 1987</i></a>
<b>PLANNING SCHEME – interpretation or consideration of VPP provision</b>	Clause 43.01-2 provides no permit is required under this overlay ...to develop a heritage place which is included on the Victorian Heritage Register.

### SUMMARY

The National Trust are seeking to review the decision of the Minister for Planning, the Responsible Authority to issue a Notice of Decision to Grant a Permit for the redevelopment of the Hotel Windsor. The Capital City Zone, Design and Development Overlay and Heritage Overlay in the Melbourne Planning Scheme affect the subject site. The application is exempt from the provisions of notice and review rights under the Capital City Zone and Design and Development Overlay. There is no exemption from notice or review rights under the Heritage Overlay. Under the Heritage Overlay, clause 43.01-2 provides 'no permit is required under

this overlay ...to develop a heritage place which is included on the Victorian Heritage Register'.The Hotel Windsor is listed in the schedule to the Heritage Overlay in the Melbourne Planning Scheme specifically under HO739 (Hotel Windsor) and it is contained generally in the area defined as HO500(Bourke Hill Precinct).The National Trust objected to the application and provided a written and verbal submission to the Advisory Committee appointed by the Minister to advise him on the application.

No permit is required for the heritage place referred to in the Heritage Overlay HO739 (Hotel Windsor) as it is included on the Victorian Heritage Register and therefore exempt pursuant to clause 43.01-2. As HO739 is exempt from the requirements of a permit then even though it is also included in HO500 the heritage place referred to as HO739 remains exempt.That part of the proposal referred to as the “services and recreational stick” that is to cantilever over Windsor Place which is outside of the site defined as HO739 falls within HO500 (Bourke Hill Precinct). This part is not included on the Victorian Heritage Register, a permit is therefore required for this part of the proposal under clause 43. This part of the decision to grant a permit can be reviewed by the Tribunal under [section 82](#) of the Act.The consideration of a part of the proposal that is proposed in HO500 and not in HO739 does not enliven the Tribunal’s jurisdiction to include the whole of the site that is on the Victorian Heritage Register to require a permit.The National Trust as an objector under [section 82\(1\)](#) of the Act can seek a review but such application for review is confined only to issues relating to the part of the proposal that falls within HO500 being that part of the proposal that falls outside of HO739 and is located only within HO500.

## **VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

### **ADMINISTRATIVE DIVISION**

**PLANNING AND  
ENVIRONMENT LIST**

VCAT REFERENCE NO. P939/2010  
PERMIT APPLICATION NO.  
2009/001687

### **CATCHWORDS**

[Section 82 Planning and Environment Act 1987](#) – jurisdiction of the Tribunal –  
Heritage Overlay – exemption

<b>APPLICANT</b>	National Trust of Australia (Victoria)
<b>RESPONSIBLE AUTHORITY</b>	Minister for Planning
<b>RESPONDENT</b>	Halim Group and Hotel Windsor Holdings Pty Ltd
<b>SUBJECT LAND</b>	103-11 Spring Street & 1-17 Bourke Street, Melbourne
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Jeanette G Rickards, Senior Member
<b>HEARING TYPE</b>	Preliminary Hearing
<b>DATE OF HEARING</b>	21 May 2010
<b>DATE OF ORDER</b>	27 May 2010
<b>CITATION</b>	National Trust of Australia (Victoria) v Minister for Planning (includes Summary) (Red Dot) <a href="#">[2010] VCAT 671</a>

## **ORDER**

1. The application to strike out the application for review is refused.
2. The Tribunal declares the application for review is confined to only that part of the proposal that is within HO500 under clause 43 Melbourne Planning Scheme.
3. Leave is granted to the applicant to amend its grounds of review to relate only to that part of the proposal that is within HO500, any such amendment is to be filed and served within 28 days of the date of this order.
4. The application is listed for a three (3) day hearing commencing on 29 November 2010 at 10.00am at 55 King Street, Melbourne.
5. The matter is adjourned for administrative mention on 29 July 2010. By that date each party must advise the Tribunal in writing:
  - whether the matter is resolved or is proceeding to a hearing,
  - if that party is ready for a hearing,
  - whether the hearing scheduled to commence on 29 November 2010 is likely to proceed;
  - whether any other procedural orders are required; and
  - whether a further directions hearing or mention is requested.

No attendance is necessary.

1. Liberty to apply.

**Jeanette G Rickards**  
**Senior Member**  
**APPEARANCES**

For Applicant	Mr H McM Wright QC with Mr D O'Brien, Barrister instructed by Logie-Smith Lanyon Lawyers
For Responsible Authority	Mr A Salmon, Department of Planning and Community Development
For Respondents	Mr C Canavan QC, Barrister instructed by Norton Rose Australia

**REASONS**

1. The National Trust of Australia (Victoria) ('the National Trust') are seeking review of the decision of the Minister for Planning, the Responsible Authority to issue a Notice of Decision to Grant a Permit (2009/001687) for the development of a residential hotel comprising part demolition of existing hotel and construction of a new 26-storey tower and north wing extension at 103-137 Spring Street and 1-17 Bourke Street, Melbourne. Otherwise known as the Windsor Hotel redevelopment.
2. The application for review is brought under section 82 [\*Planning and Environment Act 1987\*](#) which provides:
  - (1) An objector may apply to the Tribunal for review of a decision of the responsible authority to grant a permit.
  - (2) A planning scheme may set out classes of applications for permit the decisions on which are exempted from subsection (1).
  - (3) If a planning scheme exempts a decision of an application from subsection (1) an application for review cannot be made under that subsection in respect of that decision.
1. As a preliminary issue the permit applicant, the Halim Group and Hotel Windsor Holdings Pty Ltd ('the Halim Group') are seeking to have the application for review struck out on the basis that there are no third party appeal rights and the Tribunal therefore has no jurisdiction to hear the application.
2. The planning controls in the Melbourne Planning Scheme that apply

to the land are the Capital City Zone, Schedule 1 (clause 37.04), the Design and Development Overlay, Schedules 1, 2, 3, 4, and 56 (clause 43.02) and the Heritage Overlay Schedule HO500 (Bourke Hill Precinct) and HO739 (Hotel Windsor) (clause 43.01). Under these provisions a permit is required to construct a building or construct or carry out works, demolition and to construct any part of a building exceeding a height of 40 metres within 10 metres of a road frontage.

3. It is common ground that under the Capital City Zone and Design and Development Overlay there is exemption from the provision of notice of the application and the review rights of [section 82\(1\)](#) of the [Planning and Environment Act 1987](#) ('the Act').
4. The remaining provision under which a permit is required is the Heritage Overlay. There is no exemption under the Heritage Overlay regarding notice and of the application and the review rights of [section 82](#) of the Act. The Heritage Overlay however contains provisions that indicate in certain circumstances a permit is not required and in such circumstances there is no need to apply for a permit to the Responsible Authority and there is therefore no review rights.
5. It is contended by the Halim Group that the exemption under the provisions of the Heritage Overlay apply to the application and accordingly no permit is required under the Heritage Overlay. Clause 43.01-2 provides that 'No permit is required under this overlay ... to develop a heritage place which is included on the Victorian Heritage Register'.
6. Under the Heritage Overlay the Hotel Windsor is referred to specifically in HO739 which indicates it is included on the Victorian Heritage Register (referred to in the register as HO764). If that was the only reference then there would be no issue but the Hotel Windsor is also located within HO500 (Bourke Hill Precinct) under the overlay.
7. The Halim Group submit the exemption refers to 'a heritage place' not 'the heritage place' and the Bourke Hill Precinct is not on the Victorian Heritage Register. Clause 43.01-2 therefore precludes rights of review to the National Trust as there is no requirement for a permit under the provisions of clause 43. as no permit is required the Responsible Authority is unable to grant a permit under the

provisions of the Heritage overlay and the Tribunal has no jurisdiction to hear an application for review.

8. Mr Salmon advised the Tribunal the Department of Planning and Community Development determined that notice of the permit application should be given to affected parties. He did not provide any analysis as to why notice was given, he did acknowledge that no notice is required under the provisions of the Capital City Zone and Design and Development Overlay, he however indicated it was the view of the Department that notice should be given in relation to HO500.
9. The report<sup>[1]</sup> of the Advisory Committee appointed by the Minister for Planning to advise him on the permit application indicates that as a result of notice being given, 30 'community' submissions from local residents, business operators and other interested parties were considered. The report also indicates that in addition to the community submissions consideration was given to responses from referral agencies and other relevant organisations, as well as other organisations which did not fall within the description of community or referral.
10. The National Trust responded to the notice and provided both written and verbal submissions to the Advisory Committee.
11. The Advisory Committee concluded that no permit was required as a result of HO739 because the place is included on the Victorian Heritage Register. It stated 'there is some debate as to whether a permit is required for the proposed development as a result of HO500' and went on to state 'whether or not a permit is required is a complex legal issue which we are not in a position to definitively resolve. We will proceed on the basis that [a] permit is required, but take care to make it clear where we are considering issues under the Heritage Overlay'.
12. The National Trust contends that there is no exemption under HO500 as it is not listed in the Victorian Heritage Register. If there is a dual or multi control then each control must be complied with. The purpose of HO739 is to protect the heritage values of the building itself, whereas the purpose of HO500 is the protection of the surrounding area and ensuring the integrity of the heritage values of the precinct.
13. The National Trust drew a distinction between the extent of HO739

which applies to the site on which the Hotel Windsor is located and the extent of HO500 which applies to the area known as the Bourke Hill Precinct which includes roads and laneways within the area defined.

14. The proposal is contained within the site defined in HO739 but also includes what is described as a “services and recreational stick’ which is proposed to cantilever over Windsor Place. Windsor Place is included in HO500 but not in HO739. The National Trust submitted that this built form element that extends beyond HO739 and is within HO500 provides the Tribunal with jurisdiction to consider the application for review under [section 82](#) of the Act.
15. The National Trust further submitted, as the Tribunal has jurisdiction, this should extend further than merely the section that cantilevers over Windsor Place. It was contended that where there are two heritage controls intended to serve different purposes, that is the control under HO739 which relates to the heritage building itself and which is assessed under the *Heritage Act*, and the other HO500, intended to protect the heritage value of the surroundings, then clause 43 should be constructed to give effect to the intent of the planning controls.
16. One provides an exemption to give primacy to decisions under the *Heritage Act* and to avoid possible conflicting heritage decision if a permit was required under both planning and heritage legislation, whereas the other has no requirement under the heritage legislation therefore consideration can be given under the planning legislation, as there is no conflict.
17. In two earlier decisions the Tribunal has determined that no permit is required under clause 43.01-2 for that part of the heritage place that is on the Victorian Heritage Register but for the portion, if any, of the proposal that is not on the register, but falls within a schedule to the Heritage Overlay, then that portion of the proposal can be considered under clause 43[2].

## Conclusion

1. No permit is required for the heritage place referred to in the Heritage Overlay HO739 (Hotel Windsor) as it is included on the Victorian Heritage Register and therefore exempt pursuant to clause 43.01-2.

2. As HO739 is exempt from the requirements of a permit then even though it is also included in HO500 the heritage place referred to as HO739 remains exempt. The provisions of clause 43.01-2 refer to no permit being required under the overlay, HO739 is part of the overlay and although located within a precinct referred to under the overlay there is nothing that requires HO500 to take precedence over the provisions in clause 43.01-2.
3. That part of the proposal referred to as the “services and recreational stick” that is to cantilever over Windsor Place which is outside of the site defined as HO739 falls within HO500 (Bourke Hill Precinct). This part is not included on the Victorian Heritage Register, a permit is therefore required for this part of the proposal under clause 43. This part of the decision to grant a permit can be reviewed by the Tribunal under section 82 of the Act.
4. Further, as there is no exemption from the provision of notice and review rights under this provision and the National Trust were an objector it can as specified in section 82(1) of the Act apply for a review of the decision of the Responsible Authority, but only in relation to that part of the proposal for which the Responsible Authority can consider the granting of a permit.
5. Whether the Director will consider the wider issues of cultural significance of the heritage place in determining a permit on the Victorian Heritage Register under the provisions of the *Heritage Act* is not a matter that is required to be considered. ‘The circumstances where no permit is required under the Heritage Overlay are to be ascertained from the schedule to the overlay’[\[3\]](#). Clause 43.01-2 clearly states that it applies to the overlay and HO739 contained in the overlay indicates it is on the Victorian Heritage Register therefore no permit is required for the heritage place contained in HO739. The heritage place contained in HO500 is not on the Victorian Heritage Register therefore a permit is required for that part of the proposal that falls only within this overlay.
6. The consideration of a part of a proposal that is proposed in HO500 (Bourke Hill Precinct) and not in HO739 (Hotel Windsor) does not enliven the Tribunal’s jurisdiction to include the whole of the site that is on the Victorian Heritage Register to require a permit. Therefore any application for review by the National Trust is confined to that part of the proposal that is located only in HO500

being that part that is to cantilever over Windsor Place.

7. That part of the proposal that falls only within HO500 requires a permit under clause 43 of the Melbourne Planning Scheme for buildings and works. A requirement for a permit under clause 43 is not exempt from review rights under section 82 of the Act. The National Trust is therefore entitled to seek review, but such application for review is confined only to issues relating to the part of the proposal that falls within HO500. It may be necessary for the National Trust to amend its grounds of review, leave will therefore be given for this to occur.
8. The application to strike out the application for review is refused.

**Jeanette G Rickards**  
**Senior Member**

[\[1\]](#) Melbourne Planning Scheme Permit Application 20009/1687 Hotel Windsor - Advisory Committee Report – February 2010 [\[2\]](#) *Sweetvale Pty Ltd and JGL Investments Pty Ltd v Minister for Planning* [\[2004\] VCAT 37](#); *PT Limited v Minister for Planning* [2008] VCAT 1240 [\[3\]](#) *Sweetvale Pty Ltd and JGL Investments Pty Ltd v Minister for Planning* [\[2004\] VCAT 37](#) at [\[7\]](#)

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