

[\[Home\]](#) [\[Databases\]](#) [\[WorldLII\]](#) [\[Search\]](#) [\[Feedback\]](#)

# Victorian Civil and Administrative Tribunal

You are here: [AustLII](#) >> [Databases](#) >> [Victorian Civil and Administrative Tribunal](#) >>  
[2010](#) >> [\[2010\] VCAT 104](#)

[\[Database Search\]](#) [\[Name Search\]](#) [\[Recent Decisions\]](#) [\[Noteup\]](#)  
[\[Download\]](#) [\[LawCite\]](#) [\[Help\]](#)

**Fosters Group Ltd v Mornington Peninsula  
SC (includes Summary) (Red Dot) [2010]  
VCAT 104 (4 February 2010)**

## Victorian Civil and Administrative Tribunal

[\[Index\]](#) [\[Search\]](#) [\[Download\]](#) [\[Help\]](#)

**Fosters Group Ltd v Mornington Peninsula  
SC (includes Summary) (Red Dot) [2010]  
VCAT 104 (4 February 2010)**

Last Updated: 17 February 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 NOS.  
P1006/2009 & P1399/2009  
PERMIT NO. TP97/1029

**IN THE MATTER OF** Fosters Group Ltd v Mornington Peninsula Shire  
Council  
**BEFORE** Helen Gibson, Deputy President  
Bill Sibonis, Member

<b>NATURE OF CASE</b>	Amendment of permit that establishes an existing use right
<b>POTENTIAL GUIDELINE DECISION</b>	Yes
<b>LOCATION OF PASSAGE OF INTEREST</b>	Paragraphs [36] – [103]
<b>REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE</b>	
<b>LAW – issue of interpretation or application</b>	Whether a permit can be amended so as to permit use and development that would be otherwise prohibited under the planning scheme. In particular, whether conditions in an existing use permit can be amended in respect of the existing use; and whether an existing use permit can be amended to introduce a new use in addition to or in substitution for the existing use.

### SUMMARY

T’Gallant, a Mornington Peninsula winery and restaurant, seeks to amend one of its permits to consolidate all aspects of its use and development into the one permit, to increase patron numbers in the restaurant from 60 to 274, to use the land for a function centre, and for new buildings and works that will significantly increase the floor area.

A new permit for restaurant or function centre could not be granted today because of limits on these uses in the Green Wedge Zone, which restrict the number of persons on the site to 150 and require the land to be at least 40 hectares in area. Notwithstanding this, the applicant says that an existing permit may be amended in a way that would not be permitted if a new application for permit was made.

The Supreme Court in the *Seventh Columbo* case<sup>[1]</sup> held that conditions in a permit that establishes an existing use right can be amended. Therefore, legally it would be possible to amend the permit to allow an increase in restaurant patron numbers above the limit specified in the planning scheme. However, the ability to amend a permit does not extend to allowing a new, prohibited use. Therefore, it is not possible to allow the new use of function centre. On planning grounds though, the scale and intensity of the proposed changes that might be made cannot be supported and the conclusion is that the permit should not be amended.

## **VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

### **ADMINISTRATIVE DIVISION**

#### **PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NOS.  
P1006/2009 & P1399/2009  
PERMIT NO. TP97/1029

#### **CATCHWORDS**

Section 79 and Section 149B [Planning and Environment Act 1987](#); Mornington Peninsula Planning Scheme; Amendment to planning permit; Existing use rights; Green Wedge Zone; Policy; Vineyard; Restaurant and Function Centre; Wastewater treatment; Car parking and traffic; Acoustic impact

#### **APPLICANT**

Fosters Group Ltd (P1006/2009)  
Mornington Peninsula Shire Council  
(P1399/2009)

#### **RESPONSIBLE AUTHORITY**

Mornington Peninsula Shire Council

<b>RESPONDENTS</b>	<u>P1006/2009</u> E & B Porter D Harrison, Red Hill Community Action Group C & M Porter Manton & Stony Creek Landscape Group VicRoads
<b>SUBJECT LAND</b>	<u>P1399/2009</u> Fosters Group Ltd 1385 Mornington-Flinders Road, Main Ridge
<b>WHERE HELD BEFORE</b>	Melbourne Helen Gibson, Deputy President Bill Sibonis, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	14, 15, 16, 22 & 23 September and 10 & 11 November 2009
<b>DATE OF ORDER</b>	4 February 2010
<b>CITATION</b>	Fosters Group Ltd v Mornington Peninsula SC (includes Summary) (Red Dot) <a href="#">[2010] VCAT 104</a>

## **ORDER**

1. Application No. P1006/2009 is amended pursuant to Section 127 and Clause 64 of Schedule 1 of the [Victorian Civil and Administrative Tribunal Act 1998](#) by substituting the plans identified as Existing Site Plan – SK01-A; Proposed Site Plan – SK02-E; Existing Main Building Floor Plan – SK03; Main Building Furniture Plan – SK04-E; Finishes Plan – SK05-E; Elevations – SK06B; Proposed Site Plan Liquor Consumption Area – SK07-A; Proposed Site Plan-Entire Site Plan – SK08-B; Finishes November 2008; Exterior Perspective November 2008 and Interior Perspective November 2008 for the application plans.
2. Application No. P1006/2009 is amended pursuant to [Section 127](#) and Clause 64 of Schedule 1 of the [Victorian Civil and Administrative Tribunal Act 1998](#) by extending the proposed hours of operation to 11.30pm.

3. In application P1399/2009, pursuant to [section 149B](#) of the *Planning and Environment Act 1987*, the following declarations are made:
  - a. Permit TP97/1029 for restaurant use can be amended to increase patron numbers from 60 to 274 under a [section 72](#) application.
  - b. The permit cannot be amended to include the new use of a function centre.
  - c. The use of function centre could be considered as an alternative, but not additional, use pursuant to a permit application under clause 63.08 of the Mornington Peninsula Planning Scheme.
  - d. There is no difference in the way that a permit can be amended lawfully under either [sections 72, 87](#) or [87A](#) of the *Planning and Environment Act 1987*, in terms of the type of amendments that may be made.
  - e. The permit can be amended to include permission to waive or to vary car parking under clause 52.06 of the Mornington Planning Scheme.
  - f. The permit can be amended to create or alter access to a road in a Road Zone Category 1 under clause 52.29 of the Mornington Planning Scheme.
4. In application P1006/2009, the decision of the responsible authority is affirmed. No amendment of planning permit no. TP97/1029 is granted.

**Helen Gibson**  
**Deputy President**

**Bill Sibonis**  
**Member**

## APPEARANCES

For Fosters Group Ltd

Mr S Morris QC instructed by Maddocks Lawyers.

The following witnesses were called:

- Mr K McCarthy, Winery Manager and Senior Wine Maker T’Gallant, of Fosters Group Ltd.
- Dr J T Bellair, Environmental Science Consultant of CEE Consultants.
- Mr H Turnbull, Traffic Engineer of Traffix Group Pty Ltd.
- Ms Elizabeth Hui, Acoustic Engineer of Marshall Day Acoustics.
- Mr Stuart McGurn, Town Planner of Fulcrum Town Planners.

For Mornington Peninsula Shire Council

Mr J Gobbo QC and Mr P O’Farrell of Counsel, instructed by Deacons Lawyers.

The following witnesses were called:

- Mr J Rennie, Senior Scientist of Water Technology Pty Ltd.
- Ms K White, Senior Process Engineer, SMEC Australia Pty Ltd.

For Barbara, Euan, Craig and Margaret Porter

Mrs Barbara Porter

For Red Hill Community Action Group

Mr D Harrison

For Manton and Stony Creek Landscape Group

Mr D Maddocks

## INFORMATION

### Description of Proposal

Amendment of Planning Permit No. TP97/1029 to allow:

- An increase in the seating capacity from 60 to 274 patrons;
- Introduce a Function Centre use on the land;
- Construct buildings and works; and
- Increase the hours of operation.

### Nature of Applications

Section 79 [\*Planning and Environment Act 1987\*](#). (Application P1006/2009)

Section 149B [\*Planning and Environment Act 1987\*](#). (Application P1399/2009)

### Zone and Overlays

Green Wedge Zone – Schedule 1.

Environmental Significance Overlay – Schedules 10 (Upland Basalt Slopes), 17 (Streamlines) and 28 (Mornington Peninsula Bushland).

Significant Landscape Overlay – Schedules 1 (Ridge and Escarpment Areas) and 6 (National Trust Classified Landscapes).

Erosion Management Overlay – Schedule 1.

Vegetation Protection Overlay – Schedule 2 (Significant Treelines).

### Permit triggers

cl 35.04-1 (use of land in the Green Wedge Zone for a restaurant and function centre)

cl 35.04-5 (construction of buildings and works in the Green Wedge Zone)

cl 42.01-2 (construction of buildings and works in the Environmental Significance Overlay)

cl 42.03-2 (construction of buildings and works in the Significant Landscape Overlay)

cl 52.06-1 (car parking requirements)

cl 52.27 (use of land for the sale or consumption of liquor)

cl 52.29 (alteration of access to a road in a

## Land description

Road Zone Category 1)  
cl 52.34 (bicycle facilities)  
cl 63 (existing uses)

Area 15.81 hectares

The subject land is located on the east side of Mornington-Flinders Road, Main Ridge. It has a frontage to Mornington-Flinders Road of 228 metres and sideages of 303 metres and 220 metres to Shands Road and Tucks Road respectively. Manton Creek bisects the land, with a corresponding fall toward the creek displayed from both the east and west. The land also displays a fall to the south-east.

The land is used as a vineyard.

Approximately 10 ha are planted with vines. Buildings sited proximate to the frontage of the site are used for the purpose of cellar door sales and two restaurants – known as La Baracca and Spuntino Bar. These uses are accommodated within former farm buildings, which have been modified and extended. Other structures on the land include a former dwelling, used as an office, and a large shed used in association with the vineyard operation.

Informal car parking areas are provided to the north and south of the restaurant/cellar door sales areas. The northern car parking area can accommodate 41 vehicles. Parking also occurs on the road reserve adjacent to the accessway that connects these two areas. Surrounding land uses are predominantly hobby farms and there is a range of other uses in the locality including galleries, restaurants, cafes and other vineyards/cellar door sales operations.

## REASONS[2]

### INTRODUCTION

1. T’Gallant is a very successful winery and restaurant on the Mornington Peninsula. It is so successful that it has outgrown the constraints of the permits that govern its use, especially with respect to patron numbers in the restaurant, which regularly exceed the permitted number of 60.
2. T’Gallant is known for its Pinot Grigio and Pinot Gris wines. The vineyard was established on the site in 1994 and wine was made on the site between 1995 and 2006. T’Gallant is now owned by the Fosters Group and its wine is made elsewhere.
3. A number of permits have been issued over the years for various aspects of the use and development of the site. Whilst the applicant does not concede that it is in breach of its permits, it has nevertheless applied to amend its ‘main’ permit[3] so as to consolidate all aspects of its use and development into the one permit, to increase patron numbers in the restaurant from 60 to 274, to use the land for a function centre, and for new buildings and works that will significantly increase the floor area.
4. A new permit for restaurant or function centre could not be granted today because of limits on these uses in the Green Wedge Zone, which restrict the number of persons on the site to 150 and require the land to be at least 40 hectares in area. Notwithstanding this, the applicant says that an existing permit may be amended in a way that would not be permitted if a new application for permit was made.
5. The Supreme Court in the *Seventh Columbo* case[4] held that conditions in a permit that establishes an existing use right can be amended. Therefore, we find that legally it would be possible to amend the permit to allow an increase in restaurant patron numbers above the limit specified in the planning scheme. However, we find that the ability to amend a permit does not extend to allowing a new, prohibited use. Therefore, it is not possible to allow the new use of function centre. On planning grounds though, the scale and intensity of the proposed changes that might be made cannot be supported and we conclude the permit should not be amended.
6. We consider it would be desirable for all permits affecting the land to

be consolidated, but we should not do this as part of this proceeding because we are effectively refusing the applicant's primary request to increase patron numbers and for new buildings and works. The applicant should have the opportunity to make a fresh application for an amended, consolidated permit taking into consideration our comments.

## NATURE OF THE PROCEEDINGS

1. Application No. P1066/2009 concerns a proposal to amend Planning Permit No. TP97/1029 under [section 72](#) of the [Planning and Environment Act 1987](#). This permit authorises the use of the review site for the purpose of a restaurant in association with wine tasting and cellar door sales. In summary, the purpose of the amendment is to allow the construction of buildings and works, increase the seating capacity from 60 to 274 patrons and introduce a function centre use on the land.
2. The applicant has applied to the Tribunal for a review of the Council's failure to approve the amendment within the prescribed time.
3. The Council has since considered the proposal and has resolved to deny its support for the following reasons:
  1. The proposal fails to address the requirements of the Planning Scheme in relation to Wastewater Management. A Land Capability Assessment which clearly demonstrates that the land is capable of taking the treated wastewater has not been provided.
  2. The proposal fails to properly assess its car parking needs and adequately provide for on-site car parking. The proposal will result in a continuation of dangerous parking on the Mornington-Flinders Road during busy times.
  3. The proposal fails to adequately address the Noise Management issues which have been identified. It does not provide Council with confidence that noise escape and loss of amenity will not continue to be an issue. The design and construction of the development should be amended to ensure that noise generated by the uses is retained within the site.
4. The proposal is contrary to the provisions of the Green Wedge Zone, Clause 57 and the planning policies and provisions

identified in this report and the report of 20 April 2009.

4. Application No. P1399/2009 is an application by the Mornington Peninsula Shire Council for declarations pursuant to [Section 149B](#) of the [Planning and Environment Act 1987](#). The following declarations are sought:
  1. Whether the addition of function centre use approval can be considered under a [section 72](#) application where that consent did not form part of the Permit.
  2. Whether a car parking waiver can be considered under a [section 72](#) application where that consent did not form part of the Permit.
  3. Whether alterations to access to a Road Zone Category 1 road can be considered under a [section 72](#) application where that consent did not form part of the Permit.
  4. Whether the increase in restaurant seating from 60 to 274 is outside the scope of [section 72](#).
  5. Whether the subject of the Amendment Application is outside the scope of [section 72](#).
  6. Whether the subject of the Amendment Application is prohibited.
  7. Whether the subject of the Amendment Application could be considered under any other provisions of the Act or the Scheme.

## BACKGROUND AND NATURE OF AMENDMENTS

1. A number of other permits have been issued to the site. A list of the relevant permits, including details of notable conditions, is provided in Appendix A of this order.
2. When read in conjunction with each other, the permits place the following restrictions on the use of the land for the purpose of restaurant and cellar door sales:

- A maximum of 60 seats for patrons.

- Hours of operation:

Monday to Thursday: 9.00am to 5.00pm.

Friday and Saturday: 9.00am to 11.00pm.

Sunday: 9.00am to 5.00pm.

(with the exception of 1 November to 1 April and Queen's Birthday weekend Wednesday, Thursday and Sunday where the hours are 9.00am to

11.00pm. In addition, the restaurant and cellar door sales must be closed on Good Friday and Christmas Day. Provision is made for the Responsible Authority to vary these times up to four times per twelve month period).

1. It is common ground among the parties that the existing use of the land is operating outside these parameters as it accommodates up to 274 patrons; it includes the preparation of food on the land; and the restaurant use is made available to persons not attending the cellar door sales or wine tasting<sup>[5]</sup>.
2. The applicant is seeking approval for the following amendments to Permit TP97/1029. The other permits would be cancelled. The amendments include:

- The preamble to read:

*The use of an existing building as a restaurant and function centre in association with wine tasting and cellar door sales, the sale of liquor from the premises, a reduction of the car parking requirements of Clause 52.06 and the alteration of the existing access point to a Road Zone Category 1 road and the carrying out of buildings and works in accordance with the endorsed plans.*

- Condition No. 2 – hours of operation - amended to read:

*Monday to Thursday: 9.00am to 5.00pm.*

*Friday and Saturday: 9.00am to 11.00pm.*

*Sunday: 9.00am to 5.00pm.*

*Except during 1 November to 1 April and Queen's Birthday weekend – Wednesday, Thursday and Sunday the hours shall be 9.00am to 11.00pm. Restaurant and cellar door sales to be closed Good Friday and Christmas Day.*

- Condition No. 6 amended to read:

*Not more than 274 seats shall be provided for patrons of the restaurant and function centre at any one time unless with the further consent of the responsible authority.*

- Deletion of Condition No. 7, which states:

## ***Preparation of food***

*All food is to be prepared in an offsite registered premises. No food is to be prepared on the premises unless with the prior written consent of the Responsible Authority.*

- Deletion of Condition No. 8, which states:

## ***Serving of food***

*All food must be served in association with wine tasting and cellar door sales. The restaurant use can not be made available to persons not attending wine tasting or cellar door sales unless with the prior written consent of the Responsible Authority.*

1. In effect, what the applicant is seeking to achieve is an ‘omnibus’ permit whereby the development and use of the land is governed by one permit that would contain all relevant conditions.
2. It is also proposed to amend the endorsed plans to show the construction of buildings and works, including new ‘wine education’ and ‘wine experience’ areas, and an outdoor pergola area accommodating tables and chairs. Additional works include formalised car parking areas to the north and south of the buildings, and the provision of a wastewater treatment plant.
3. Mr Morris provided details of the proposed use of the various areas, and the number of persons to be accommodated in each. This can be summarised as follows:

### Cellar Door / Wine Experience Area

- Displays providing information about the history of T’Gallant.
- Wine tasting.
- Sale of wines and local produce.
- Information on the matching of food and wines.
- 40 persons accommodated (this number does not form part of the 274 seats as meals will not be served in this area).

### Wine School

- Introduction to wine.
- Master classes.
- Cooking classes.

- 40 persons accommodated (this number does not form part of the 274 seats as meals will not be served in this area).

#### Wine Making Demonstration Area

- Previously viticulture blending.
- Demonstration of wine making techniques/blending.

#### Spuntino and Outdoor Area

- Casual dining (wood fired pizza).
- 140 seats in the Spuntino Bar (including under the pergola).
- 54 seats in the outdoor area (not under the pergola).

#### La Baracca

- Restaurant with full table service.
  - 80 seats.
1. The total number of persons in the Spuntino Bar and the La Baracca restaurant will vary throughout the year. On weekdays the maximum number of patrons will not exceed 80 (with the exception of the December/January period where the total average patron numbers will be up to 150). This excludes functions. On weekends, the maximum number of patrons will increase to 274.
  2. On a peak season day, a maximum 314 patrons/customers may be present on the land, being 274 diners and 40 persons in the Cellar Door/Wine Experience Area.
  3. We were advised that during the evening period (between 5.00pm and 11.00pm) total patron numbers will not exceed 150. This figure would apply to both the restaurant use and functions.

#### PLANNING CONTEXT

1. The State planning policy in respect of 'Green Wedges' is a key policy in the consideration of this matter. In general terms, green wedge land is that land which is outside of the Urban Growth Boundary and identified as being of agricultural, conservation and resource value. The significance of these areas is recognised at both State and local levels.
2. The importance of green wedge land is acknowledged at Clause 12.02, Better Management of Metropolitan Growth, which has the objective of locating metropolitan growth close to transport corridors and services and providing efficient and effective infrastructure to

create benefits while protecting primary production, major sources of raw materials and valued environmental areas. This Clause outlines a number of strategies to protect green wedges from inappropriate development. These include:

- Ensuring strategic planning and land management of each green wedge area to promote and encourage its key features and related values.
  - Supporting development in the green wedge that provides for environmental, economic and social benefits.
  - Protecting important productive agricultural areas such as Werribee South, the Maribyrnong River flats, the Yarra Valley, Westernport and the Mornington Peninsula.
  - Protecting areas of environmental, landscape and scenic value.
3. The metropolitan strategy, *Melbourne 2030* documents the key environmental, social and economic values of each of the green wedges. In the case of the Mornington Peninsula Green Wedge, these are:
- Internationally recognised wetlands, such as Westernport.
  - Locations with productive agricultural potential.
  - Areas with potential for waste water recycling.
  - Areas of significant landscape, seascapes and environmental qualities.
  - Mornington Peninsula National Park.
  - Tourism and recreational facilities such as golf courses, beaches and horse riding.
4. The implementation of green wedge policy requires that a balance be struck between protecting the environment and allowing for appropriate development and use of land that will provide economic and social benefits. It is not the case that green wedge areas be ‘quarantined’ and set aside solely for environmental, landscape and/or agricultural purposes. The policy supports development in these areas, provided such development is responsive to its sensitive context and does not compromise the qualities which give green wedge land its significance.
5. The Local Planning Policy Framework of the Planning Scheme also acknowledges the importance of the Mornington Peninsula Green Wedge for a variety of reasons, as reflected in the following objectives of Clause 21.09 (Planning for Rural Areas) of the

### Municipal Strategic Statement (MSS):

- To maintain and enhance the natural values and ecological systems of the Peninsula.
  - To support the use of rural land for farming to the maximum extent that is environmentally sustainable and consistent with maintaining landscape character.
  - To maintain the recreational role of the Peninsula by protecting the qualities of its landscapes, natural environment and cultural heritage.
6. Throughout the MSS, there is a consistent theme of building upon comparative regional strengths of the peninsula - largely focussed on its landscape, scenic, conservation, agricultural and associated recreational values - while ensuring that this is done in a manner that does not undermine or compromise these unique and highly valued characteristics. There is also an acknowledgement of the importance of supporting the local economy through the development and use of land which is undertaken in a manner that is compatible with the special character of the Shire. There is clearly a balance to be struck.
7. This is further articulated in Clause 22.07, Commercial and Industrial Uses in Rural Areas, a policy which has objectives that include:

To maintain permanent non-urban areas of high landscape value for a variety of recreational activities and experiences and to support sustainable agricultural use of rural land.

To prevent the establishment of use and development which would reduce the distinctive character of the Peninsula's rural landscapes.

To encourage tourism and recreation uses that minimise the adverse impacts on the amenity of local residents.

1. Notably, it is policy that:
- Applications for commercial uses in rural areas should be limited to those which demonstrate a direct link to rural activities or the provision of accommodation, services and facilities linked to the Peninsula's role as an area providing opportunities for outdoor and unstructured recreation, associated with the Peninsula's natural and cultural heritage values.

- Applications must be compatible and integrated with the primary land use on the site and that of surrounding land. Large scale proposals, including restaurants for 40 or more persons or galleries or similar uses with a floor area greater than 100 square metres must be supported by site analysis and design response plans. Restaurant proposals should demonstrate a clear link to the production of food or wine on the property, be associated with a significant recreational site or established tourism node or contribute to the conservation of buildings with heritage value.
  - Proposals for commercial and industrial development should be sited on lots with at least the minimum area required for the zone, unless it is clearly demonstrated that the proposed use will have no significant negative impact on the landscape character of the area, the amenity of adjoining land owners or on the agricultural use of rural land. The responsible authority must consider whether the site has sufficient area and dimensions to provide and maintain a suitable buffer area.
  - All buildings and works must be designed to contribute to the existing landscape character and should not seek to dominate, limit or reduce views available from public areas, including road sides.
  - All car parking required by commercial or industrial uses in the Green Wedge Zone and Farming Zone must be accommodated on the land and should be sited and constructed so as to minimise the impact on rural landscape character of the site and surrounding locality. Restaurant facilities in rural areas should generally avoid night time operation due to the potential impact on rural amenity from additional traffic, noise and light.
2. The Green Wedge Zone at Clause 35.04 is a key implementation tool of the green wedge policy. The provisions of this Clause also reflect the balance that is to be achieved between facilitating appropriate development/use within green wedge areas and protecting their inherent qualities.
  3. The purpose of this Clause is:  
To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

To recognise, protect and conserve green wedge land for its agricultural, environmental, historic, landscape, recreational and tourism opportunities, and mineral and stone resources.

To encourage use and development that is consistent with sustainable land management practices.

To encourage sustainable farming activities and provide opportunity for a variety of productive agricultural uses.

To protect, conserve and enhance the cultural heritage significance and the character of open rural and scenic non-urban landscapes.

To protect and enhance the biodiversity of the area.

1. Relevantly, a Restaurant and a Function centre are both [Section 2](#) uses for which a planning permit may be granted and are subject to conditions which, in summary, require that:
  - The use is in conjunction with Agriculture, Outdoor recreation facility, Rural industry, or Winery.
  - The number of persons on the site does not exceed 150.
  - The lot on which the use is conducted must be at least 40 hectares in area.
2. A Restaurant or Function Centre that does not meet the nominated conditions is a prohibited use in the zone.
3. Accordingly, while the provisions of the zone contemplate that a permit may be granted for these uses, they are restricted in their operation, scale and siting to ensure that they are consistent with green wedge policy. To this end, the explanatory report for Amendment VC43 (which introduced the restrictions relating to patron numbers and lot size) is instructive and states:

The amendment is required to:

- ...
- ensure the nature and scale of uses in green wedge areas do not conflict with green wedge policy by:
  - ensuring that the use of land for *Function Centre*, ..., and *Restaurant* is of a scale appropriate to green wedge areas...

KEY ISSUES

1. There are two key issues that must be determined in these proceedings:
  - Can the permit be amended lawfully having regard to the planning controls?
  - If so, should the permit be amended?
2. We will deal firstly with the legal issues and then whether the scale and intensity of the proposed use and development are acceptable. In considering the latter question, we consider:
  - The policy context;
  - Waste water management;
  - Traffic and parking; and
  - Noise.

## CAN THE PERMIT BE LAWFULLY AMENDED?

How should this question be approached?

1. The proposal that has been put forward raises the threshold question as to whether a permit can be amended so as to permit use and development that would be otherwise prohibited under the planning scheme.
2. It is common ground that it is not open to the applicant to make a fresh permit application for the proposed uses under the Green Wedge Zone. Each party referred to similar cases in support of their submissions – the applicant’s submission that the permit can be amended and the council’s submission that it cannot. The leading Supreme Court case dealing with amendments to permits in circumstances where the use or development is now prohibited is *Seventh Columbo Pty Ltd v Melbourne CC*[\[6\]](#).
3. The council suggests that none of the cases have dealt entirely with the issues that arise in this case. There are considerable overlaps, inconsistencies and themes that have emerged from the decisions. Notably, they have all been determined in the context of the particular facts and circumstances of each case.
4. The council submitted that the Tribunal was not bound by the decision of the Supreme Court in *Seventh Columbo* in the circumstances of this case because *Seventh Columbo* related to an application under [section 87](#) of the [Planning and Environment Act 1987](#), not [section 72](#), which is the provision that the current

application is made under.

5. The council relies on [section 73\(1\)](#) of the Act, which states (underlining added):

### **73 What is the procedure for the application?**

(1) Subject to this section, [sections 47](#) to [62](#) (with any necessary changes) apply to an application to the responsible authority to amend a permit as if—

(a) the application were an application for a permit; and

(b) any reference to a permit were a reference to the amendment to the permit.

1. Unlike [sections 87](#) and [87A](#), the process for an application under [section 72](#) is that it is treated as if it was an application for a permit whereas, as Deputy President Dwyer said in *Popular Pastimes*, “[Section 87A](#) ... empowers the Tribunal to cancel or amend a permit ‘if it considers it appropriate to do so’.”<sup>[7]</sup> It does not need to deal with the amendment in the same way as if it was a fresh application for a permit.
2. The council submitted that there are six main ways to formulate arguments on the issues:
  - a. The narrowest view is that if a proposal is put forward for a [section 3](#) use – it is simply prohibited and there is no way that permission can be obtained. Even if there is a power to amend a permit under [section 72](#), that power does not assist a non-conforming use because that use can only continue under the provisions of clause 63.05 (‘View 1 – that amendments for non-conforming uses are not possible’);
  - b. The second view is that it is possible to amend a permit for a non-conforming use but that such amendments are limited only to buildings and works (‘View 2 – that amendments are limited to buildings and works only’);
  - c. The next view is that permits for non-conforming uses are not ‘fixed-in time’ or ‘obsolete’ but they remain ‘alive’ and that secondary consent provisions within the permit allow modifications subject to the relevant tests for the consideration of secondary consents (‘View 3 – that permits remain alive but

modifications are limited to secondary consents’);

- d. The next view is that amendments to permits for non-conforming uses are possible in the broad sense (that is, discretionary and subject to an appropriate town planning outcome) but that this power of amendment cannot be used to introduce new uses to the permission (‘View 4 – Power to amend is discretionary but can’t be used to transform or introduce new uses’);
  - e. The most liberal view is that [section 72](#) provided the ability to amend any permit in any way and that the planning scheme is merely one consideration that must be taken into account (‘View 5 – Any permit can be amended in any way despite prohibition of use by planning scheme’);
  - f. The Council view – View 6. [An amendment cannot bring about the lawfulness of an otherwise prohibited use].
3. Whilst the council took the Tribunal to many different cases in analysing the various arguments that could be put, we have preferred to approach the issues differently, distinguishing between the key components of the amendments applied for, and between the process and the substance of what is applied for.

#### Binding nature of Supreme Court decisions

1. Mr Gobbo for the council conceded that a number of the views identified could not be supported unless the Tribunal says that *Seventh Columbo* was wrong or should be distinguished.
2. *Seventh Columbo* was a decision of the Supreme Court. The Tribunal is bound by Supreme Court decisions. The council referred us to two decisions by Senior Member Byard who took issue with the decision in *Seventh Columbo* in the cases of *Vomanda* [\[8\]](#) and *Malo* [\[9\]](#). Other members of the Tribunal have disagreed with the views expressed in *Malo* and *Vomanda* in a number of cases, most recently in *Popular Pastimes* [\[10\]](#). We have no intention of departing from *Seventh Columbo*. Any revisiting of the *ratio decidendi* of *Seventh Columbo* is properly a task for the Supreme Court. However, as will become apparent, we do not consider that the principles of *Seventh Columbo* necessarily extend to an amendment of a permit that introduces a new use not previously permitted. This was not an issue that the Court was called upon to decide or specifically considered.

What amendments to the permit are being applied for?

1. We have characterised the key components of what is being applied for as follows:
  - Buildings and works;
  - Alteration of conditions relating to the existing permitted use of restaurant, in particular an increase in the number of patrons;
  - Amalgamating other uses in conditions from existing permits into the one permit;[\[11\]](#)
  - Allow a new use of function centre;
  - Include new permissions under the planning scheme such as a reduction of the car parking requirements of clause 52.06;
  - The alteration of an existing access point to a Road Zone Category 1 road; and
  - The sale of liquor from the premises.[\[12\]](#)
2. There is no contention about the ability to amend the permit by amending the endorsed plans to allow new buildings and works. There is a clear authority for this under clause 63.05 of the planning scheme and the council seeks no declarations relating to the lawfulness of this aspect of the proposed amendment. Whilst it opposes the proposed buildings and works, it does so on the basis of their planning merits not their lawfulness.
3. With respect to the new permissions such as a car parking reduction and alterations of access to a Road Zone Category 1 road, there were no specific submissions made by the council or applicant on these issues, although they are included among the declarations sought by the council.
4. Instead, each party focussed on the lawfulness of the proposed permit amendment relating to the increase in restaurant seating from 60 to 274 and the new use of function centre.
5. We consider that these two matters raise different issues with potentially different outcomes. This is because there is an existing use right for the use of restaurant but there is no existing use right for the use of function centre. Therefore, we consider there are two questions we must deal with:
  - Can conditions in an existing use permit be amended in respect of the existing use?
  - Can an existing use permit be amended to introduce a new use in addition to or in substitution for the existing use?
6. Before addressing these issues, it is necessary to say something about

the process for amending permits.

Process for amending permits

[Sections 72, 87](#) and [87A](#)[13]

1. Under the [Planning and Environment Act 1987](#) there are three ways to amend a permit – [section 72](#), [section 87](#) and [section 87A](#). [Sections 72](#) and [87A](#) are relatively recent additions to the Act.[14] Prior to that, [section 87](#) was the primary means of amending a permit and many of the decided cases, such as *Seventh Columbo*, were considering the amendment of permits under [section 87](#).
2. In various cases the Tribunal has emphasised that what can be done by way of amendment under each of these provisions ([sections 72, 87](#) and [87A](#)) is the same. No distinction should be drawn between a permit issued at the direction of the Tribunal and a permit issued by the responsible authority (in the absence of an application for review) in terms of the type of amendment that can be made (eg. amendment to a condition, plans, drawings and other documents approved under a permit).[15]
3. Each of the three mechanisms for amending a permit entails a different process even though what might be done by way of amendment is the same.
4. An amendment under [section 72](#) requires the same process as the grant of a permit. The procedure for amending a permit under [sections 87](#) or [87A](#) is set out in Division 3 of [Part 4](#) of the Act. It entails a different process.
5. We disagree with the council that [section 73\(1\)](#) constrains what can be done by way of amending a permit to something that can only be done by way of the grant of a new planning permit. [Section 73](#) is headed: *What is the procedure for the application?* In our view, it is only the process for amending a permit under Division 1A of [Part 4](#) of the Act that is the same as the process which applies to an application for a permit (as set out in [sections 47](#) to [62](#)). The content of an amendment, or what can be done by way of amendment, is governed by [section 72\(3\)](#), and the common law. [Section 72\(3\)](#) provides that a reference to a permit includes any plans, drawings or other documents approved under a permit. The Tribunal has held that the reference to “a permit” in [sections 87](#) and [87A](#) has the same

meaning as [section 72\(3\)\[16\]](#). [Section 72\(3\)](#) is an inclusive provision. A permit also includes conditions, a statement of what the permit allows and identification of the subject land. The extent to which these components may be amended, as well as plans, drawings and other documents, will be addressed later.

### Secondary consent

1. We disagree with the suggestion by the applicant that it could achieve the same outcome by way of secondary consent. Changes made by way of secondary consent can only be made pursuant to a condition in a permit which allows changes by way of secondary consent. The Tribunal has said that there are constraints to what can be changed by way of the secondary consent process.[\[17\]](#) We do not consider it is necessary to canvass the limits of the secondary consent process in the context of this decision because the applicant is not seeking to use the secondary consent process. We regard the applicant's comments as simply being made in the context of safeguarding its position in the event that this application is unsuccessful.

### Clause 63.08 – alternative use

1. The applicant also suggested that it might have used clause 63.08 of the planning scheme as a vehicle to achieve the amendments it seeks.
2. We note the comments of Member Komesaroff in *Wooling Hill Garden Estate Pty Ltd v Macedon Ranges SC* [\[18\]](#) that clause 63.08 relates to an alternative use not an additional use. The different use permitted by 63.08 must replace the existing use for which an existing use right is established rather than simply supplement it.
3. In our view, clause 63.08 is not a process provision but a substantive provision that enables a permit to be granted for a particular type of [Section 3](#) alternative use. The concept of an alternative use involves a choice between one use or another. It does not involve the concept of an additional use, which is what has been applied for here in the form of use for a function centre. We have therefore not considered clause 63.08 further because this is not an application for a permit under that provision.

### What rights are established by a permit?

1. The Courts and the Tribunal have recognised that there is a

difference between the grant of a new permit and amendment of an existing permit.<sup>[19]</sup>

2. In general terms, the [Planning and Environment Act 1987](#) sets out the process and procedure for the grant of planning permits, but it is planning schemes that set out the actual planning controls which govern the grant of permits.<sup>[20]</sup> Clause 61.05 of all planning schemes provides that land may be used or developed only in accordance with the scheme.
3. Once a planning permit is granted in accordance with a planning scheme, it establishes certain rights. First, a permit creates an accrued right within the meaning of [section 28\(2\)\(e\)](#) of the [Interpretation of Legislation Act 1984](#). Stripped of unnecessary verbiage, the effect of [section 28\(2\)](#) is as follows:

Where a planning scheme is amended, the amendment shall not, unless the contrary intention expressly appears, affect any right accrued under that planning scheme.

1. In the decision of *Lakkis v Wyndham CC* <sup>[21]</sup>, Deputy President Macnamara observed:

[29] ... Permits create substantive rights. Changes to the substantive law are presumed not to operate retrospectively. See *Maxwell v Murphy* <sup>[1957] HCA 7; (1957) 96, CLR 261, 267</sup> per Dixon CJ. Where a subordinate instrument such as a planning scheme expires, lapses or ceases to have effect, the expiry, lapsing or ceasing to have effect does not affect any right, privilege, obligation or liability acquired, accrued or incurred under that subordinate instrument or provision ([Section 28\(2\)\(e\)](#) of the [Interpretation of Legislation Act 1984](#)). In my view these principles preserve the operation of [the permit under consideration in that case] and it is not dependant at all for its preservation on Clause [63]<sup>[22]</sup> of the current Scheme or on [Section 6\(3\)](#) of the [Planning and Environment Act](#).

1. Thus it can be said that a permit creates substantive rights as an accrued right independently of the [Planning and Environment Act 1987](#) and the planning scheme.<sup>[23]</sup>
2. Second, a permit can also give rise to an existing use right. If a use commences under a permit, an existing use right is established under clause 63.01 of the planning scheme.
3. Clause 63.01 provides as follows:

## 63.01 Extent of existing use rights

An existing use right is established in relation to use of land under this scheme if any of the following apply:

- The use was lawfully carried out immediately before the approval date.
  - A permit for the use had been granted immediately before the approval date and the use commences before the permit expires.
  - A permit for the use has been granted under Clause 63.08 and the use commences before the permit expires.
  - Proof of continuous use for 15 years is established under Clause 63.11.
  - The use is a lawful continuation by a utility service provider or other private body of a use previously carried on by a Minister, government department or public authority, even where the continuation of the use is no longer for a public purpose.
1. It is relevant to note that it is not the permit that creates an existing use right, but the provisions of clause 63.01 of the planning scheme. Equally, an existing use right is not created by the [Planning and Environment Act 1987](#), although some existing use rights are protected by the Act in terms that [section 6\(3\)](#) provides that the planning scheme cannot prevent the continuation of certain uses.<sup>[24]</sup>
  2. The first dot point in clause 63.01 – *the use was lawfully carried out immediately before the approval date* – will often apply in situations where the use was being carried out under a permit, which was lawfully granted before the planning scheme was amended. It may also apply in situations where the use being carried out did not require a permit under the planning scheme (i.e. it was a [Section 1](#) use). In the present case, we are dealing with the first scenario – the use of restaurant was being carried out under a permit lawfully granted before the scheme was amended to now make the use (both current and proposed) prohibited. The current use is prohibited because it is not on a lot of at least 40ha. The proposed use is prohibited for this reason and also because the number of patrons will exceed 150.
  3. The second dot point in clause 63.01 – *a permit for the use had been granted before the approval date and the use commences before the permit expires* – refers to a situation where a permit was granted but not acted upon before the scheme was amended. The third dot point

– a permit for the use has been granted under clause 63.08 and the use commences before the permit expires – is self explanatory and refers to a permit for an alternative [Section 3](#) use. Neither the second or third dot points are relevant in this case, nor the fourth or fifth.

4. If the establishment of an existing use right is one that depends on a permit for the use having been granted, it is the use in the permit, subject to any conditions or restrictions in the permit applying to the use, that characterises the extent of the existing use right. Under clause 63.02, the extent of the existing use right is constrained by the purpose of the actual use at the relevant date, subject to any conditions or restrictions applying to the use at that date. In the case of a permit, the conditions or restrictions applying to the use would be the conditions in the permit.[\[25\]](#) In the case of a [Section 1](#) use, the conditions or restrictions would be the conditions or restrictions applying to the use under [section 1](#) or other provision of the planning scheme (eg. definition or particular provision).
5. For this reason, although it is common to say that a permit establishes an existing use right or that land has an existing use right under a permit, we do not consider this is strictly correct. The correct analysis is that an existing use right may exist under clause 63.01 of the planning scheme because the land was being lawfully used under a permit at the time when the scheme changed and that one needs to look at the permit to assess the extent of the existing use right.
6. In the present case and using this analysis, we find that the land has an existing use right for the purpose of a restaurant for 60 patrons. It does not have an existing use right for the purpose of a function centre.[\[26\]](#)

#### Amending permits

Can conditions in a permit that establish an existing use right be amended?

1. We have discussed earlier the process for amending permits. We will now discuss what type of amendments can be made to a permit. It is not contested that a planning permit can be amended in accordance with existing planning scheme provisions. The issue is whether it can be amended in a way that is not in accordance with existing planning scheme provisions either because:
  - The use is now prohibited; and/or

- The conditions are contrary to the planning scheme.
- 2. Based on *Seventh Columbo*, the clear answer is that as a question of law, a permit can be amended in either of these circumstances.[\[27\]](#)
- 3. We have noted that a new permit can only be granted in accordance with the planning scheme. However, the Supreme Court in *Seventh Columbo* held that [section 87\(1\)](#) of the [Planning and Environment Act 1987](#) vests in the Tribunal a discretionary power to “amend any permit” by which a permit holder enjoys the right to use the land for a prohibited use, including the power to amend the permit by directing that conditions be deleted or varied.
- 4. The primary reason for the Court’s decision in *Seventh Columbo* was that it was contrary to well established authority concerning the interpretation of statutes to read down the provisions of the [Planning and Environment Act](#) by reference to the planning scheme[\[28\]](#). In giving his reasons, McDonald J said:

[35] In my view, the Tribunal was in error in interpreting [s.87\(1\)](#) of the Act and in particular, the extent of the discretionary power vested in the Tribunal by that section to “amend any permit” by having reference to the provisions of the Melbourne Planning Scheme and in particular, [to the equivalent of what is now clause 63.05] of it. By interpreting the provisions of the statute by reference to the Planning Scheme, the Tribunal interpreted the meaning of the words by which it was vested with the discretionary power to amend any permit, “by reference to the terms in which a delegated power to legislate had been exercised.” By adopting this process the Tribunal was in error. Parliament enacted by that section that the Tribunal should have the discretionary power to “amend any permit”. By its clear terms there is to be found in that section no apparent intention of Parliament to exclude from that power, the power to amend a permit by which an owner or occupier of land enjoys non-conforming use rights in circumstances where the use is a prohibited use being a [section 3](#) use under the Planning Scheme. In my opinion, there is not to be found in [s.6\(3\)](#) or any other provision of the [Planning and Environment Act 1987](#) any basis to conclude that it was the intention of Parliament that the discretionary power vested in the Tribunal by [s.87\(1\)](#) of the Act, to amend a permit, should be limited in the manner as contended for by the respondent on this appeal.

1. The Court also held that the conditions of the permit that are required

to be met by the equivalent of what is now clause 63.05[29] of the scheme, were those existing and affected by the amendment[30]. Thus in the event of the power under [section 87\(1\)](#) of the Act being exercised to delete or add a condition to the permit, the amended conditions will need to be read along with other conditions.

2. We consider that because there is no difference in the type of amendment that may be made under any of the mechanisms available under the Act ([sections 72, 87 or 87A](#)), the principles established by *Seventh Columbo* mean that conditions of a permit can be amended after the use has become prohibited and the power to amend a permit under the [Planning and Environment Act 1987](#) cannot be restricted by reference to the current provisions of the planning scheme.
3. Therefore we find that, in law, there is no reason why the permit cannot be amended to increase patron numbers for the restaurant use to 274 notwithstanding a maximum number of 150 is specified in the planning scheme.

Can a permit which establishes an existing use right be amended to introduce a new use in addition to the existing use right?

1. Neither *Seventh Columbo* or any of the other cases we are aware of that have considered amendments to permits which establish existing use rights have involved a change of use.
2. There have been cases, such as *Bestway* [31] and *Australian Slate-Crete Supplies*[32], that say a permit can be amended by amending what the permit allows and that an additional primary permission required under the planning permit can be added within certain limits. As the Tribunal said in *Australian Slate-Crete Supplies*:  
[29] It is essential that this amendment process extends to what the permit allows and that additional primary permissions required under the planning scheme can be added. However, there are limits to this. The process of amending a permit would stop short of allowing a transformation. In this respect, the principle of *Addicoat v Fox (No 2)* remains relevant – “changes made may be considerable without necessarily bringing it about that the permit granted is a different as opposed to a modified permit.” [[1979] VR 347 at 363] Thus for a completely new or unrelated use or development, I consider that the proper procedure is to apply for a new permit rather than applying to amend an existing permit in such a way that would result in a different permit as distinct from modified permit.

1. Similarly in *Bestway*, the Tribunal said:

[23] If a proposed use or development is totally unrelated to the permit as it exists and would entail completely new conditions, I consider that the amendment process would be inappropriate. There would be no point in attempting to amend a permit in such circumstances where nothing would be left of the original permit. An application for a new permit should be made. However, where the permit is not transformed but retains significant elements of its previous content, and simply adds to, expands or alters what has been previously allowed, I consider that amending a permit, rather than always having to apply for a new permit, is now clearly contemplated by the provisions in the Act.

1. The rationale in *Australian Slate-Crete Supplies* and *Bestway* for allowing certain sorts of amendments to what the permit allows is based on efficiency of process; the concept of a permit as “a comprehensive document containing all consents relevant to a piece of land and evolving over time as circumstances change, a business expands or alters, and as further development occurs”[\[33\]](#); and the fact that the component elements of permit include the use or development or other things allowed by the permit, the land description and the conditions. As the Tribunal said in *Bestway*:

[14] ... There is no suggestion in the words of any of these provisions of the Act that changes could not be made to any of these elements subject to proper notice being given to potentially affected persons. ...

1. However, in each of these cases it is implicit that any additional primary permission included in the permit is a permitted use under the planning scheme. There has not been any consideration of whether a permit can be amended to include a use that is prohibited by the planning scheme.

2. We do not consider that the power to amend a permit can be taken this far so as to include a new prohibited use[\[34\]](#). Whilst McDonald J in *Seventh Columbo* said that the power to amend a permit under [section 87\(1\)](#) of the Act was not constrained by the provisions of the planning scheme, we do not consider that he turned his mind to amending a permit by amending the use. He was concerned with an amendment of conditions. This is evident from his conclusion where he says:

[43] For the reasons expressed I have concluded that there was error of law in the Tribunal in determining that it did not have power under [s.87\(1\)](#) of the Act to amend the permit, the subject of these proceedings, by deleting condition 4 of the same. [Section 87\(1\)](#) of the Act properly interpreted does vest in the Tribunal a discretionary power to amend the subject permit by which the appellant enjoys the right to use the land as a brothel notwithstanding that that use is a prohibited use under [section 3](#) of the relevant zone in the Planning Scheme. That power includes the power to amend the permit by directing that condition 4 be deleted.

1. Allowing a permit to be amended by including an additional prohibited use or changing a permitted use to a prohibited use would enable the planning controls in a planning scheme to be circumvented. All it would take to obtain a permit for a prohibited use would be to obtain a permit for a permitted use and then apply to amend the permit, or apply to amend any existing permit. We do not consider that this is consistent with the principles of interpretation discussed by Osborn AJA in *Popular Pastimes Pty Ltd v Melbourne City Council*[\[35\]](#) and in particular *CIC Insurance Ltd v Bankstown Football Club* [\[36\]](#), where the High Court said:

Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous...[I]f the apparently plain words of a provision are read in light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

1. Osborn AJA also refers to [section 35\(a\)](#) of the *Interpretation of Legislation Act 1984*, which further provides that in the interpretation of a provision of an Act, a construction that would promote the

purpose or object underlying the Act (whether or not that purpose or object is expressly stated in the Act) shall be preferred to a construction that would not promote that purpose or object.

2. In this context, we consider that an interpretation of the power to amend a permit (however this power arises) to include a new prohibited use would be contrary to the objective of the planning framework established by the [Planning and Environment Act 1987](#) under [section 4\(2\)\(b\)](#), which provides:

#### 4 Objectives

...

- (2) The objectives of the planning framework established by this Act are—

...

(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;

1. It would be contrary to this objective of the planning framework established by the Act, namely that planning schemes are the principal way of controlling the use of land, if planning scheme provisions prohibiting certain uses could be circumvented by simply amending a permit to include a new prohibited use.
2. We consider this would be a strange outcome and one that is counter-intuitive as recognised by Member Komesaroff in *Wooling Hill Garden Estate*[\[37\]](#) where she considered the scope of [section 87A](#) of the Act dealing with permit amendments. On this issue, she said:  
[44] If, therefore, a prohibited use of land cannot be applied for under the planning scheme provisions, can one obtain such permission by way of the [s.87](#) or [s.87A](#) amendment powers?

[45] In *Seventh Columbo Pty Ltd v Melbourne City Council* the Supreme Court of Victoria held there was power under [s.87](#) to delete a condition restricting the hours of operation of a brothel expressed in its permit, even though the brothel had become a use prohibited in its zone. That was because the exercise of the [s.87](#) power did not alter or expand the primary use permission, which was for a brothel. It only amended the regulatory

conditions. In *Beaufonte v City of Yarra & Ors* the Court held that there was power under [s.87](#) to amend the permit to extend the hours of operation expressed in a condition, notwithstanding that such a brothel had become a prohibited use as a result of being within 100 metres of a dwelling. Again, the exercise of the [s.87](#) power did not alter or expand the primary use permission, which was for a brothel. It only amended the regulatory conditions.

[46] What the applicant wishes me to do here, however, is use the [s.87A](#) amendment power to add another primary permission for a separate and distinct land use that is now prohibited.

[47] [Section 87A](#) does not allow me to do more thereunder than I could do in the first place under the planning scheme. Permit amendments operate under the primary permit or permission; they may expand the operation of the primary permission, as in *Seventh Columbo* and *Beaufonte* but they cannot alter the permission to include a separate and distinct permission.

1. A further reason why we consider that a permit cannot be amended to include a new prohibited use relates to the nature of existing use rights established under the scheme.
2. As we discussed earlier, an existing use right established under the first dot point of clause 63.01 is a right to continue to use the land for the purpose of the use which was being carried out under the permit immediately before the scheme changed. Clause 63.01 would not operate to protect another prohibited use (apart from one authorised by a permit under clause 63.08) that was not being lawfully carried out immediately before the scheme changed.
3. Equally, the extent of any accrued right protected by [section 28\(2\)\(e\)](#) of the [Interpretation of Legislation Act 1984](#) is restricted to the terms of the permit, including the use, at the time the scheme is amended. This would not encompass a new use added subsequent to amendment of the scheme.
4. For these reasons, we find that a permit, which establishes the lawful basis for an existing use right under the planning scheme, cannot be amended to introduce a new prohibited use in addition to the use for which an existing use right exists.
5. We therefore find that in law the permit in the present case cannot be amended to include the new use of a function centre.

## Conclusions about declarations

1. On an application under section 149B of Act, the Tribunal may make any declaration it thinks appropriate in the circumstances.[\[38\]](#)
2. The council's application for declarations poses a series of questions, rather than requesting specific declarations. Based on the conclusions we have reached about the way in which permits may be lawfully amended, we propose to make the following declarations with respect to the restaurant and function centre uses:
  - Permit TP97/1029 for restaurant use can be amended to increase patron numbers from 60 to 274 under a section 72 application.
  - The permit cannot be amended to include the new use of a function centre.
  - The use of function centre could be considered as an alternative, but not additional, use pursuant to a permit application under clause 63.08 of the Mornington Peninsula Planning Scheme.
  - There is no difference in the way that a permit can be amended lawfully under either sections 72, 87 or [87A](#) of the [Planning and Environment Act 1987](#) in terms of the type of amendments that may be made.
3. There remains to consider the issues of whether a car parking reduction and alterations to access to a Road Zone Category 1 road can be considered in the context of this amendment of permit.
4. The need to provide car parking arises as a consequence of the use of land, whether that be a new use or an increase in floor area of an existing use.[\[39\]](#) In our view, a permit for an existing use can be amended to provide for or amend a car parking reduction in accordance with the principles of *Seventh Columbo*.
5. The need for a permit to create or alter access to a road in a Road Zone Category 1 arises under clause 52.29 of the planning scheme. There are no prohibitions within the planning scheme relating to this permit requirement. In our view, any permit may be amended to include a permission under clause 52.29 to create or alter access to a road in a Road Zone Category 1.[\[40\]](#)
6. Accordingly, we propose to make the following additional declarations:
  - The permit can be amended to include permission to waive or to reduce car parking under clause 52.06 of the Mornington

Peninsula Planning Scheme.

- The permit can be amended to create or alter access to a road in a Road Zone Category 1 under clause 52.29 of the Mornington Peninsula Planning Scheme.
7. These declarations all relate to the lawfulness or otherwise of amendments to the permit. They do not relate to the planning merits, which must be separately assessed. We now turn to a consideration of whether the permit should be amended in respect of those aspects of the application which we have found we can lawfully consider. In particular, we address the proposed increase in patron numbers for the restaurant use, the new buildings and works, the provision of car parking, and access to Mornington – Flinders Road.

#### IS THE SCALE AND INTENSITY OF THE PROPOSED DEVELOPMENT AND USE ACCEPTABLE?

1. In *Seventh Columbo*, the court said that the Tribunal was not constrained in the exercise of its discretion to amend a permit by the provisions of the planning scheme, this does not mean that the provisions of the planning scheme are not a relevant consideration to have regard to when exercising its discretionary power.
2. When it comes to considering whether we should amend the permit to increase patron numbers for the restaurant use and to approve the proposed buildings and works, the primary issue will be whether the scale and intensity of the proposed development and expanded use are acceptable. In assessing this, we find it is relevant to have regard to the policy context of the planning scheme.

#### Policy context

1. The exercise of discretion under the provisions of the Green Wedge Zone is guided by the decision guidelines at Clause 35.04-6. These guidelines are extensive and require that consideration be given a wide range of matters including the capability of the land, the relationship of the use to the rural use on the land, the compatibility with adjoining uses and the visual impacts of proposed buildings and works.
2. In addition, the land is affected by a number of Overlays that recognise the environmental, landscape and scenic values of the site. These include the Environmental Significance Overlay (Schedules

10, 28 and 17) and the Significant Landscape Overlay (Schedules 1 and 6). In general terms, the Overlays seek to ensure that development is sited and designed to be responsive to the landscape and environmental context of the land.

3. As a fundamental starting point, the fact that the scale and intensity of the proposed uses is well beyond that contemplated by the zone provisions must weigh against the approval of the proposal.
4. We consider the policy intent is that a restaurant and/or function centre should be of a modest scale and intensity, and sit comfortably within the rural context without detracting from the inherent qualities from which the area derives its significance. Although how this might be achieved depends on the context of the site, the constraint imposed by the restriction on patron numbers, and by the minimum lot size, is a clear indicator that any such uses are to be of a relatively small scale such that they do not present as incongruous elements within the broader non-urban environment within which they are situated.
5. Whilst we acknowledge the benefit to the local economy, including employment opportunities, of having a restaurant of the scale proposed, we are not persuaded that the resultant built form and operation will represent an outcome which is sufficiently respectful of its context.
6. By any measure, it will be a large development - not only in terms of the numbers of people that would be accommodated on the land, but also in terms of its physical form and extent both in respect of the new buildings and the associated car parking areas and accessways. It will represent a significant change from the current conditions where the use is largely accommodated within former farm buildings and in informal outdoor spaces. The existing development, in our view, is not obtrusive and sits comfortably within the surrounding agricultural/rural context. It reflects the form of development which we believe is encouraged by the policies of the planning scheme.
7. The buildings and works proposed by the application will transform the existing development into a much larger and more 'refined' establishment such that it will lose the rustic appearance and ambience that we consider are very much part of its attraction. It will be significantly larger than any similar development in the immediate locality and will not be consistent with the overall policy

intent that the scale of these types of uses be such that they appear as an almost incidental part of the overall rural land use and landscape.

8. Although we do not consider the buildings, of themselves, to be unattractive or highly intrusive, they are nonetheless extensive in comparison to what currently exists and, by virtue of their scale, are not consistent with policy.
9. Aside from the physical presence of the proposed built form, the scale and intensity of the uses are such that they will have impacts on the amenity of the area that will go significantly beyond what we consider is contemplated by green wedge policy. These impacts include traffic, noise and light, which will result in disturbance and detract from the quiet, rural environment.
10. These amenity impacts are addressed in the following sections of our reasons.

#### Wastewater management

1. The treatment and disposal of the wastewater generated by the proposal was the subject of considerable discussion at the hearing. Witnesses gave evidence on behalf of the applicant and the council. In addition, both Mrs Porter and Mr Maddocks made detailed submissions on this issue.
2. Several policies within both the State Planning Policy Framework and the Local Planning Policy Framework of the planning scheme underscore the importance of managing wastewater appropriately, particularly in environmentally sensitive locations.
3. At the broadest level, Clause 11.03-2 states that planning is to contribute towards the protection of water quality and notes that planning should adopt best practice environmental management and risk management to avoid or minimise environmental degradation and hazards.
4. Clause 15.01 - Protection of catchments, waterways and groundwater - has the objective of assisting the protection and, where possible, restoration of catchments, waterways, water bodies, groundwater, and the marine environment. As part of the implementation of this policy, responsible authorities should ensure that land use activities with the potential to discharge contaminated runoff and wastes to waterways are sited and managed to minimise such discharges and to protect water quality.

5. Clause 18.09-2 encourages the re-use of wastewater (including runoff and treated sewage effluent) where appropriate, consistent with relevant Environment Protection Authority Guidelines.
6. At the local level, the MSS recognises the environmental significance of the Mornington Peninsula and identifies the importance of adopting best practice environmental management. Strategies nominated at Clause 21.09 – Conserving environmental values – include only allowing development where the long term protection of the environment is ensured; and protecting the land, air, waterways and ground water resources from polluting discharges and activities in accordance with the relevant State Environment Protection Policies and best practice environmental management guidelines.
7. The Mornington Peninsula Land Units Policy applies to all land within the Environment Significance Overlay Schedules 1 – 16, inclusive. The objectives of this policy relate to achieving sustainable use and development of rural land. It is policy that environmental sustainability is applied as a guiding principle and that a best practice environmental management approach be required as part of use and development proposals. Relevantly, the decision guidelines require the responsible authority to consider the capacity of land to accommodate the proposed development, having regard to the disposal of sewage, sullage and effluent on site. Where it is proposed to locate sewage, sullage or effluent within 60 metres of a streamline wetland, the responsible authority must be satisfied that no reasonable alternative site is available and that the requirements of State Environment Protection Policies will be met.
8. The applicant is proposing to replace the existing wastewater treatment system, comprised of a septic tank and dispersal field, with a packaged treatment plant that will produce Class A effluent. This effluent is to be used for toilet flushing and irrigating the vineyard. Concerns were expressed by the council and objectors about the acceptability of such an arrangement, with specific reference to the potential resultant impacts on the environment.
9. The council called evidence from Mr James Rennie, a scientist with expertise in river management and stormwater management, and from Ms Kay White, an engineer with expertise in the design of wastewater treatment plants and the re-use/disposal and wastewater

effluent.

10. In summary, Mr Rennie's evidence was:
  - Manton Creek has a very high quantity of nutrients, and significant elevations of nitrogen and E. coli – particularly in that section which runs through the review site;
  - The existing sewage treatment facility on the review site is sub-standard and requires a significant upgrade;
  - The provision of a vegetated buffer along the riparian zone of the creek would improve the quality of the water entering the waterway;
  - Irrigation across the site would mitigate the impacts when compared with existing conditions, and would not result in a significant change to local hydrology;
  - Storage of treated effluent in a wetland would have benefits over storage in tanks, from a broader environmental perspective, particularly by further reducing nutrient loads;
  - The introduction of a wastewater treatment facility which produces Class A effluent would be a significant improvement upon existing conditions;
  - The risk of adverse impacts on Manton Creek as a result of the re-use or disposal of treated effluent is low if the water is treated to a high quality.
11. Ms White's evidence was that, subject to the recommendations contained in her evidence, the proposal treatment facility would be acceptable on the basis that it would produce Class A effluent with nutrient reduction. In response to questions from Mr Morris, Ms White agreed that the details of the treatment plant's design and operation would be addressed at the EPA Works Approval stage. Ms White also stated that drip irrigation was ideal for this site and that the 8 hectares of vines was well over what would be required to adequately utilise the effluent which is produced by the treatment plant.
12. The applicant called evidence from Mr Bellair. In addition to confirming the high performance nature of the proposed treatment plant, Mr Bellair advised that measurements conducted on the land had demonstrated maximum wastewater flows of 10kL/day, while the average wastewater flow was found to be 3kL/day. Any spikes in wastewater flow could be addressed by the installation of a balance

tank to regulate the flow into the plant. The 3kL/day average wastewater flow would require a storage tank capacity of 600kL.

13. Mr Bellair stated that the use of drippers to irrigate the vines would mean that there was a low potential for runoff and that the overall application of treated effluent to the vines would be approximately 14mm per annum. He stated that such application equates to less than 25% of optimal application and would be therefore be fully utilised on the site.
14. As it transpired, Mr Bellair agreed with all but two of Ms White's recommendations. These relate to the organic loads and the capacity of the tanks which will be used to store the treated effluent.
15. In her detailed submission, Mrs Porter raised particular concerns regarding the impact on the environment of the salt which is contained in the effluent. Mrs Porter submitted that salt from the previous and current operations on the site has ended up on her land and adversely affected soil and vegetation. Concerns were also expressed in respect of the potential for the effluent to carry pathogens, thereby creating a health hazard, and of the effect of nutrients in the effluent upon ecosystems and the environment as a whole.
16. We are generally satisfied, on the basis of the evidence and information before us, that the wastewater generated on the site can be treated and utilised in a manner which will not have an unacceptable impact on the environment.
17. The proposed treatment plant will produce a high quality effluent of a Class A standard, with nutrient reduction. In addition, the facility incorporates a membrane which will filter matter up to 1/100th of a micron (thereby removing microbes, viruses and pathogens).
18. The re-use of this high quality recycled water for toilet flushing and irrigation of the vineyard is appropriate, as it will reduce demand for potable water. The irrigation will not only represent an efficient use of the treated wastewater, but will also assist in the on-going agricultural use of the land, consistent with state government policy for the green wedge areas.
19. The concerns expressed by Mrs Porter in respect of salt contained in the treated effluent are acknowledged. Both Mr Rennie and Mr Bellair did not consider that salt in the soil would be an issue, while Ms White stated that even if all the salt in the effluent was to end up

in Manton Creek, the resultant increase would not be significant. Mr Rennie stated that salt was not seen as a major factor given the size of the land. Given the agreement of the three experts on this matter, we accept that the treated effluent will not result in unacceptable levels of salinity in either the soil or water environment.

20. In respect of the outstanding matters of organic loads and the capacity of the storage tanks, we accept that these would be addressed at the Works Approval stage. Suffice to say that we are satisfied that these matters can be resolved.

#### Traffic and parking

1. One of the grounds upon which the council opposes the application relates to the proposed car parking provision. Specifically, the council considers that the car parking demands of the proposal have not been adequately assessed and will result in the continuation of overflow parking on Mornington-Flinders Road.
2. Mornington-Flinders Road is within a Road Zone Category 1 and has a speed limit of 100km/hr. It has unmade verges and makes no provision for roadside parking. Notwithstanding this, the roadside is currently being used by patrons for overspill parking, when the on-site parking areas are fully occupied.
3. We accept that the proposal must be self-sufficient in accommodating all its car parking on the review site, given that parking on the roadside is potentially dangerous.
4. Mr Turnbull gave evidence on behalf of the applicant. He said that the proposed car parking provision was sufficient to cater for the demands of both staff and patrons and would avoid the need for persons to park outside the review site within the road reservation. His recommended car parking rates of 0.47 space/patron and 0.83 space/staff member were derived from a case study conducted on the site during a peak operating time (a Sunday afternoon in September 2008). The application of these rates results in a requirement for 171 car spaces.
5. We note that this calculation is based on the available seating in the dining areas only and does not take into account the 40 persons attending the cellar door/wine experience area. At its peak operation, the site would accommodate 314 patrons and 35 staff. The application of the rates derived from Mr Turnbull from his case study

of the site would result in a requirement for 177 spaces.

6. The council's desired staff car parking provision of 1 space per staff member was put to Mr Turnbull. Mr Turnbull subsequently tabled a copy of a modified plan which showed an additional 12 car spaces being accommodated on the land. This can be achieved by re-configuring the car parking layout, without altering the perimeter of the car park or the loss of any manoeuvring space for B-double vehicles associated with the vineyard use.
7. The revised plan submitted by Mr Turnbull shows the provision of 183 spaces on the site.
8. The council would like to have parking for patrons provided at a rate of 0.6 spaces per person, reflective of the restaurant car parking rate in Clause 52.06. No evidence, however, was presented to demonstrate that Mr Turnbull's recommended rate would result in insufficient car parking being provided on the review site for the restaurant uses. Further, the application of the 0.47 space/patron rate is above the 0.3 space/seat rate specified for a Place of Assembly (ie the function centre) in Clause 52.06. As the rate has been derived from a study undertaken on the review site at a time when there were 265 patrons on the site, we consider that this rate is reflective of the likely parking demand.
9. Nevertheless, we accept the Council's submissions that, unlike patrons, staff are more likely to make single occupant vehicle trips. This is due to their attendance being for work purposes (rather than for leisure, which would more likely involve multiple occupant trips) and the fact that the site is remote from urban settlements and public transport services. At the peak attendance of 314 patrons and 35 staff, 183 car spaces would be required. This number accords with that shown in Mr Turnbull's revised plan (and in the substituted plans).
10. To avoid any roadside parking, Mr Turnbull recommended that 'No Standing' signs be erected on Mornington-Flinders Road in proximity to the review site. Consideration was also given to the proposed 'Venue Operations Management Plan' which includes a requirement that signs stating "Car Park Full" be displayed at times when the car parking areas were fully occupied. Mr Turnbull advised that the content of the signs should read "Venue Full" to discourage persons from parking in Mornington-Flinders Road and seeking to

attend the facility.

11. The assessment undertaken by Mr Turnbull does not take into account the parking demands associated with the operation of the vineyard which results in an additional 8 staff being present on the site during the vintage period. In response to this issue, Mr Turnbull advised that tandem spaces can be placed to the south of the existing shed to accommodate workers' vehicles. We accept that this is a potentially workable solution.
12. Mornington-Flinders Road is under the control of VicRoads. There is no objection to the proposal from VicRoads subject to specified conditions. These conditions include the provision of a left turn deceleration lane and a right turn lane into the site. The applicant has agreed to these conditions. We are satisfied from Mr Turnbull's evidence that the traffic impacts of the proposal would be acceptable.
13. Mornington-Flinders Road carries significant volumes of traffic. We place weight on VicRoads' conditional support of the proposal and we also note that the council's grounds for not supporting the application did not include reference to traffic impacts. Nor do the council's Traffic Engineers (as detailed in the officer's report) express concerns regarding the traffic implications of the proposal, subject to conditions.
14. There is only one matter in dispute between the applicant and VicRoads. This relates to a VicRoads' requirement that the southern access point be modified to accommodate a left turn out only. VicRoads do not wish to have this access point used as an entry into the site. Mr Turnbull advised that he does not agree with this requirement as the southern access will only be used in association with the operation of the vineyard and will not be used by either staff or patrons of the restaurant/function centre/cellar door premises. He also suggested that a gate system and appropriate signs could be included to restrict use of the access point for vineyard operations only.
15. We agree with Mr Turnbull that use of the southern access point need not be banned altogether. For reasons associated with the safety and efficiency of the Mornington-Flinders Road, we agree that patrons and staff of the proposed restaurant/function centre/cellar door should not be permitted to access or exit the site from this opening. We consider, however, that it would be reasonable to restrict the use

of the southern access to vehicles associated with the vineyard operations, provided use of this access point is on the basis of left-in/left-out. This will allow the efficient operation of the vineyard without the need to use the main driveway, that will then be set aside for the sole use of patrons and staff.

16. Therefore, based on the provision of 183 car parking spaces and restrictions on the use of the southern access point, we consider that the traffic and car parking effects of the amended proposal would be acceptable.

#### Noise impacts

1. The rural context of the review site, by its very nature, is characterised by a low background noise level. Ms Hui gave acoustic evidence on behalf of the applicant. She stated that the measurements undertaken by her firm revealed a background noise level of 27dBA. In comparison, a suburban location displays a background noise level of 35dBA – 45dBA.
2. Within this context, the surrounding properties are particularly sensitive to noise disturbance. This sensitivity represents an important constraint on the operational characteristics of the use, as any noise emanating from the site is likely to be particularly noticeable and has the potential to have a greater impact on amenity than would be the case within an urban environment.
3. The three key noise sources which are required to be addressed are music noise, mechanical noise associated with plant equipment and patron noise (including noise generated by vehicles). It was Ms Hui's evidence that all three noise sources could be regulated by a variety of physical, operational and technological means to ensure that the acoustic impacts of the use are not unreasonable. These measures include alterations to the buildings, the enclosure of plant equipment, the use of noise limiters and restrictions on hours during which the outdoor areas are used.
4. We accept that mechanical equipment can be sited and treated to achieve compliance with SEPP N-1[41]. We accept Ms Hui's evidence that the noise limits for mechanical services can be achieved using low noise equipment, duct attenuators, acoustic enclosures and barriers. We note that this component of her evidence was not challenged.

5. According to the applicant's evidence and submissions, the containment of music noise to acceptable limits is able to be achieved utilising a combination of physical measures (such as air locks), noise limiters to control amplification and management measures which would restrict the playing of music to certain times. Ms Hui's evidence was that music noise associated with the proposed uses can be made to comply with SEPP N-2[42]. It was also stated that, in the event that the noise limiters restricted volumes to a level which was not satisfactory to the operator, then alterations to the buildings could be undertaken to provide acoustic insulation and allow music to be played at a higher volume.
6. Management measures to restrict entry and exit to selected doors which have air locks would also be required. For example, this would require the doors in the eastern elevation of the Spuntino Bar to be made unavailable for use at times when music is played, as the doors lead directly out into the adjoining courtyard and are not provided with an air lock arrangement.
7. Noise associated with patrons (and vehicles) is more problematic as there are no standards against which such noise can be objectively assessed. In the absence of relevant standards, Ms Hui advised that her analysis had utilised a combination of SEPP N-1, SEPP N-2 and sleep disturbance criteria (which is based on a review of sleep disturbance studies undertaken by the NSW Environment Protection Authority) to assess whether the noise generated by patrons in the external areas would be unreasonable.
8. Our greatest concern about noise management relates to the noise associated with patrons and vehicles – particularly during the evening and night-time periods when the background noise level will be at its lowest and any noise at its most audible.
9. There are three key external areas where noise will be generated: the outdoor seating area beneath and adjacent to the proposed pergola on the eastern side of the building; the external smoker's courtyard to the south of the proposed pergola; and the car parking areas.
10. In her evidence, Ms Hui stated that there was some concern that the assessment of night-time noise associated with people arriving or departing the venue, or smoking and talking in outdoor areas, against the sleep disturbance criteria may not be sufficient to protect amenity in areas where ambient noise levels are low, or where the hours of

operation of the venue extend into the night-time period. For this reason, Ms Hui used a combination of the three criteria detailed above to undertake the assessment of the patron noise.

11. Ms Hui undertook an analysis which assumed 140 persons in the outdoor dining area and with sliding doors and louvres of the pergola area fully open. This analysis found that noise from patrons would exceed the SEPP N-1 night time limit. This was also the case for the SEPP N-2 night time noise limit, which would be exceeded even if the sliding doors and louvres were closed. The sleep disturbance criteria would, however, be satisfied, regardless whether the pergola area was enclosed or not.
12. As a consequence of these findings, Ms Hui recommended that the outdoor courtyard either not be used after 10.00pm or that it be re-designed to incorporate a fixed roof and operable wall system so that it can be converted into a fully enclosed space during the night-time period. Mr Morris advised us that the applicant was willing to accept a condition that the pergola area – presumably being a reference to all the outdoor dining areas – not be used after 10.00pm.
13. Ms Hui found that noise from the car parking area, being a combination of cars braking, doors slamming and cars accelerating away from a stationary position, as well as general noise from people talking within the car park area, would not exceed the lower level of sleep disturbance criteria.
14. During cross-examination by the council, Ms Hui stated:
  - Consideration had not been given to the use of the courtyard area located directly to the south of the outdoor dining area. This courtyard is annotated on the plans as being a designated smoking area. In response to this issue, Ms Hui recommended that the smoking area be limited in size, that persons not be permitted to take alcohol or other drinks into this area in order to discourage congregating or protracted stays, and that the use of this area be policed to ensure that allowable numbers are not exceeded. No indication of what would be considered an acceptable number of people in this area was given.
  - The assessment of patron noise was only undertaken during the night-time period. No assessment of this noise during the daytime and evening period was undertaken. There is no tool for doing so.

- Sleep disturbance criteria is based on one-off noise events (such as a truck passing) rather than a constant noise source.
15. Given the scale and intensity of the proposed restaurant and function centre uses, we consider the noise generated on the site has the very real potential to adversely impact the amenity of this rural location. As stated earlier, this locality is characterised by low background noise, which will have the result of making any noise emanating from the site more audible than would otherwise be the case if background noise levels were higher.
  16. Although the evening and night-time are the more sensitive periods, this does not mean to say that noise generated during the daytime period will not affect the amenity of the residential properties which are proximate to the review site. This is particularly so during the weekend period when residents are more likely to be at home and expecting to enjoy the more tranquil qualities of a location such as this.
  17. While understanding the basis for Ms Hui's assessment of patron noise, We are concerned that:
    - SEPP N-1 specifically excludes noise from crowds and voices;
    - SEPP N-2 also specifically excludes patron noise, except noise from human voices and activities within the premises that are associated with the music sources;
    - Sleep disturbance is based on vehicle traffic noise and only applies to the night-time period.
  18. When it comes to assessing patron noise, and the impact it may have on this noise sensitive location, none of these criteria are to the point. Even when used in combination, we have doubts that the conclusions of such an assessment would be a reasonable indicator of the acceptability or otherwise of the likely impacts.
  19. The patron noise arising from a use of this scale can be significant. This noise will emanate from the outdoor dining areas, the smokers courtyard and the car parking areas. The constancy of this noise, together with spikes in volume which can be characteristic of the intermittent nature of interjections and laughter, for example, will have a continuing impact of the acoustic environment of the locality throughout the course of the day, but especially in the evening and night time.
  20. We also consider that the suggested mechanisms for limiting the

hours and numbers of people outside are unlikely to be effective because they are too prone to being poorly managed and enforced. The same can be said for the management measures restricting external access from some doors whilst music is playing. In our view, there are too many opportunities for management measures to be breached, which will increase the potential for noise and create ongoing problems of enforcement.

21. We are therefore not satisfied that the acoustic impacts will be able to be controlled to ensure that detriment will not result to the amenity of the area. We consider that the extent of the impact is a direct function of the scale of the proposed use.

#### Conclusions about planning merits

1. We are not persuaded that the proposal, due to its scale and intensity, could comfortably co-exist with the rural character and activities of this locality.
2. A facility accommodating up to 274 patrons, with provision for functions/ celebrations, serving of alcohol and the playing of amplified music is a marked departure from the hobby farms, rural residential living and agricultural land uses that prevail in the surrounding area. That is not to say that a restaurant and/or function centre is not permissible on land within the Green Wedge Zone. These uses are clearly contemplated by the provisions of the Green Wedge Zone, albeit with restrictions on land size and patron numbers. Each case must, however, be assessed on its merits. The context of properties within the Green Wedge Zone can vary from site to site. Some sites may well lend themselves to a greater intensity of use than others. Some sites with existing use rights may well be able to have their permits amended to a greater extent than others. But in this location, the rural context demands a more moderate scale of operation than is proposed. The proposal as it currently stands will detract from the character of this area, with consequential adverse impacts on the amenity of the neighbouring and nearby properties.
3. We therefore conclude that the permit should not be amended to allow an increase in patron numbers for the restaurant to 274 or the proposed buildings and works and consequential changes to carparking and road access.

**Helen Gibson**  
**Deputy President**

**Bill Sibonis**  
**Member**

## **APPENDIX A – RELEVANT PLANNING PERMITS**

• Permit P1376/95 was issued on 21 August 1995 and authorised a Winery and Cellar Door Sales. There are no restrictions on the number of patrons/customers. A document endorsed as part of the permit specifies that the ‘envisaged hours of operation for the cellar door sales are Noon to 5pm 7 days a week’.

• Permit TP97/1029 was issued on 7 October 1997 and authorised the use of an existing building as a restaurant in association with wine tasting and cellar door sales. Condition No. 2 of the permit states that, except with the further written consent of the Responsible Authority, the use may only operate between the hours of 12.00pm (noon) – 5.00pm seven days a week. Condition No. 6 restricts the number of seats to not more than 16, unless with the prior written consent of the Responsible Authority. Additional conditions also include restrictions on the preparation and serving of food.

• Permit No. P981005 was issued on 1 October 1998 and authorised alterations and change of use to an existing building for wine tasting and restaurant. Conditions restrict the number of seats to 60, and the hours of operation to 9.00am – 5.00pm seven days a week, without the written consent of the Responsible Authority.

• Permit No. P00/2232 was issued on 21 May 2002 (amended on 30 August 2002 and 14 November 2003). This permit was the subject of an application to the Tribunal for a review of conditions. The permit authorises an extension of hours for the existing restaurant and cellar door sales. Condition No. 8 of this permit states:

*The restaurant and cellar door sales must not be open to the public (including private functions) outside the hours of:*

- *Monday to Thursday 9 am - 5 pm*
- *Friday and Saturday 9 am – 11pm*
- *Sunday 9am – 5pm*

*except during the period 1 November – 1 April and the Queens Birthday weekend Wednesday, Thursday and Sunday to be 9 am – 11pm.*

*The restaurant and cellar door sales must be closed on Good Friday and Christmas Day.*

*These times may be varied by the Responsible Authority at its discretion for a maximum of four times during any twelve month period.*

Condition No. 10 states:

*Unless with the permission of the Responsible Authority, not more than 60 seats must be provided for patrons of the approved restaurant use. This includes any seating provided outdoors. After 5pm no more than 60 seats must be provided to patrons of the restaurant.*

[1] *Seventh Columbo Pty Ltd v Melbourne City Council* [1998] VSC 7; 22 AATR 325 [2] We have considered all submissions, evidence and accompanying material. We do not recite all of the material presented as all documentation is retained on the Tribunal's file. All questions of law have been determined by Deputy President Gibson notwithstanding any language to the contrary used in these reasons.

[3] Permit No TP97/1029 for restaurant in association with wine tasting and cellar door sales.

[4] *Seventh Columbo Pty Ltd v Melbourne City Council* (1998) VSC 7; 22 AATR 325 [5] The applicant did not specifically concede that it was in breach of its permits. The permit amendment application is an attempt to avoid enforcement action. As these are not enforcement proceedings, we therefore make no specific findings on whether the current operations actually breach the permits.

[6] [1998] VSC 7; 22 AATR 325

[7] *Popular Pastimes Pty Ltd v Melbourne CC* [2008] VCAT 1184 at [62]

[8] *Vomanda Pty Ltd v Melbourne CC* [1999] VCAT 554; (1999) 2 VPR  
91

[9] *Malo Pty Ltd v Mornington Peninsula SC* [2008] VCAT 510[10] *Popular Pastimes Pty Ltd v Melbourne CC* (red dot) [2008] VCAT 1184 at [51]- [58]. See also *Peacock Amber Pty Ltd v Frankston CC* [2000] VCAT 1663 and *Lakkis v Wyndham CC* [2001] VCAT 1046[11] In certain respects we do not consider that this aspect of the application is particularly well considered. For example, permit P1376/95 authorises a winery and cellar door sales. The land is no longer used for a winery as this use is presently defined in the planning scheme because the land is no longer used for the manufacture of vineyard products (wine). Cellar door sales may have been a separate land use in the planning scheme when this permit was first granted, but such a use is no longer separately defined. Rather, it would be covered now by clause 52.27, which requires a permit to use land to sell or consume liquor. The application proposes to amend the use to include the sale of liquor from the premises, but it purports to limit the use to *the use of an existing building as a restaurant and function centre in association with wine tasting and cellar door sales*. Conditions in the permit continue to refer to cellar door sales. We are not certain what purpose is served by this limitation to an *existing* building (as the restaurant proposes to operate in both the existing and new buildings) and why there is a continued reference to the redundant use of *cellar door sales*. [12] This permission presumably replaces the use allowed by permit P1376/95, which authorised *cellar door sales*. Cellar door sales may have been a separate use in the planning scheme when this permit was first granted, but there is no longer any such separate use defined. Rather, clause 52.27 now requires a permit to use land to sell or consume liquor.[13] We refer to these sections by way of shorthand. In fact, [section 72](#) is part of Division 1A of [Part 4](#) of the Act and [sections 87](#) and [87A](#) are part of Division 3 of [Part 4](#). The whole of each Division deals with the relevant process and the way the power to amend permits must be exercised.[14] Division 1A – Amendment of permits by responsible authority ([sections 72-76D](#)) were included in 2004 and [section 87A](#) in 2007. [15] See *Jolin Nominees Pty Ltd v Moreland CC* (Red Dot) [2006] VCAT 467; *Zuzek v Boroondara CC* (Red Dot) [2007] VCAT 2174; *Bestway Group Pty Ltd v Monash CC* (Red Dot) [2008] VCAT at 60[16] *Zuzek v Boroondara CC* (red dot) [2007] VCAT 2174; *Bestway Group Pty Ltd v Monash CC* (Red Dot) [2008] VCAT 860

[17] See *Westpoint Corporation Pty Ltd v Moreland CC* (Red Dot) [2005]

## [VCAT 1049](#)

[18] [2007] VCAT 2226 at [43][19] See *Beaufonte v Yarra City Council* (1995) 17 AATR 233 where the Supreme Court held that the prohibition in section 74(1)(b) of the *Prostitution Control Act 1994* only applied to the grant of a new permit and did not (at least as the law then existed) affect an application to modify an existing permit under [section 87](#) of the *Planning and Environment Act 1987*. See also *Popular Pastimes Pty Ltd v Melbourne CC* (Red Dot) [2008] VCAT 1184.[20] [Section 4\(2\)\(b\)](#) *Planning and Environment Act 1987*. There are some exceptions to this, such as [section 61](#) subsections (2), (3) and (4), but they do not detract from this general principle.

[21] [2001] VCAT 863[22] Deputy President Macnamara refers to clause 62 in this passage but this appears to be a typographical error and should refer to clause 63.[23] For a further discussion of accrued rights and the limitations associated with them, see *Glenelg CC v Printz Pty Ltd* (Red Dot) [2009] VCAT 2477

[24] See *Kraan v Cardinia CC* [2006] VCAT 1629 at [28]- [29]

[25] *Seventh Columbo Pty Ltd v Melbourne City Council* [1998] VSC 7; 22 AATR 325[26] For the purpose of this analysis, we have ignored other uses for which permits have been granted, such as cellar door sales.

[27] Whether it should be amended on the planning merits is a separate issue.

[28] *Accident Towing and Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529[29] Clause 63.05 provides (in part) that a use in [section 2](#) or [3](#) of the zone for which an existing use right is established may continue provided:

- *Any condition or restriction to which the use was subject continues to be met. This includes any implied restriction on the extent of the land subject to the existing use right or the extent of activities within the use.*

[30] [1998] VSC 7 at [41]

[31] *Bestway Group Pty Ltd v Monash CC* (red dot) [2008] VCAT 860 at [20]- [23]

[32] *Australian Slate-Crete Supplies v Casey CC* (Red Dot) [2008] VCAT 6 at [25]- [29]

[33] *Bestway Group Pty Ltd v Monash CC* (Red Dot) [2008] VCAT 860 at [16]

[34] In this discussion we exclude any reference to an alternative [section 3](#) use under clause 63.08.

[35] [2007] VSCA 188 at [52] – [55][36] [1997] HCA 2; (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow W J J, quoted with approval by Osborn AJA in *Popular Pastimes*.

[37] *Wooling Hill Garden Estate Pty Ltd v Macedon Ranges SC* [2007] VCAT 2226

[38] [Section 149B\(2\)](#) of the [Planning and Environment Act 1987](#)

[39] Clause 52.06-1 Mornington Peninsula Planning Scheme.[40] *Seventh Columbo Pty Ltd v Melbourne CC* [1998] VSE 7; [1998] VSC 7; 22 AATR 325; *Bestway Group Pty Ltd v Monash CC* (red dot) [2008] VCAT 860; *Australian Slate-Crete Supplies v Casey CC* (red dot) 2008 VCAT 6.

[41] State Environment Protection Policy (Control of Noise from Commerce, Industry and Trade) No. N-1.

[42] State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2.