

PERMIT REVIEWS & HEARINGS

This protocol outlines the Heritage Council's process for conducting reviews of determinations in relation to permits (Permit Reviews) and hearings into Permit Reviews under Part 5, Division 5 of the *Heritage Act 2017* (the Act). Permit Reviews and hearings will ordinarily follow the steps and timeframes set out below, although the steps and timeframes may be subject to change at the direction of the Heritage Council.

1. Requesting a Review of a Permit Decision

- 1.1 If the Executive Director refuses a permit application in full or in part, the permit applicant, owner or government asset manager, or a person with a real and substantial interest in the place or object may seek a review of the decision [s.106(1) of the Act].
- 1.2 If a permit is issued by the Executive Director, the permit applicant, owner or government asset manager can seek a review of any condition imposed on the permit [s.106(2)].
- 1.3 A request for a Permit Review must be in writing and should be made in the form of *Heritage Council Form C – Request for a Permit Review* (see <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>). A request for a Permit Review must be lodged with the Heritage Council within 60 days of the notice of refusal, part refusal, or the permit being issued subject to conditions [s.106(4)].
- 1.4 For the request to be valid, it must be accompanied by the prescribed fee.

2. Notification of a Permit Review and Hearing Requests

- 2.1 On receiving a request for a Permit Review, the Heritage Council must notify:
 - (i) the owner or government asset manager of the place or object if the person requesting the review is not the owner or government asset manager;
 - (ii) the responsible authority for the area in which the place or object is situated and if the responsible authority is not a municipal council, the relevant municipal council;
 - (iii) the National Trust if the National Trust has previously lodged a submission with the Executive Director in relation to the permit application [s.106(5)].
- 2.2 The Heritage Council will also notify the permit applicant (where the permit applicant did not request the Permit Review) and the Executive Director.
- 2.3 The Heritage Council will require the applicant and the responsible authority to specify whether they request a hearing into the Permit Review. The Heritage Council must conduct a hearing into the Permit Review if the circumstances require it [s.108(4)].
- 2.4 The rest of this protocol is confined to circumstances where a hearing is to be conducted into a Permit Review.

3. Before the Hearing

3.1 Hearing Notification & Directions

- 3.1.1 The Heritage Council will notify the following people and organisations and will give them with the opportunity to provide additional information in relation to the Permit Review in the form of a detailed Hearing Submission:

HERITAGE COUNCIL PROTOCOL 2

- (i) the permit applicant;
- (ii) the Executive Director, Heritage Victoria;
- (iii) the owner/s of the place or object;
- (iv) the responsible authority and, if the responsible authority is not a municipal council, the relevant municipal council;
- (v) the National Trust if the National Trust previously lodged a written submission with the Executive Director in relation to the permit application;
- (vi) any person whom the Heritage Council allows in order to inform itself.

3.1.2 The Act requires the Heritage Council to allow certain categories of person to participate in any Permit Review Hearing, namely those identified in paragraphs (i), (ii), (iii), (iv) and (v) above. Other persons are not able to participate in a Review Hearing unless the Heritage Council is satisfied that the person has a real and substantial interest in the determination of the Review. (In any case, all written submissions made under s.95 or s.100 of the Act will be considered by the Heritage Council in the determination of the Review.)

3.1.3 The Heritage Council may issue written directions on procedural matters prior to a hearing to ensure the efficient and effective running of the hearing [s.247(1)].

3.1.4 For complex matters, the Heritage Council may schedule a Directions Hearing to assist in managing the hearing process (for example to determine the number of hearing submitters, whether evidence is to be called, the time required for presentation of verbal submissions etc.). Detail on the conduct of Directions Hearings can be found at *Heritage Council Protocol 5: Directions Hearings* at <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>.

3.1.5 The Heritage Council may refuse to hear any person who fails to comply with a direction of the Heritage Council [s.247(2)].

3.2 Hearing Submissions

3.2.1 Any person wishing to participate in the hearing must lodge the necessary documents with the Heritage Council no later than 28 days prior to the hearing date.

***Important note:** If a person does not provide (i) below (as a minimum), the Heritage Council will consider that the person does not wish to participate in the hearing process, will not circulate Hearing Submissions to them, and may not provide them with an opportunity to be heard at the hearing.

(i) A Request to Participate in a Permit Review Hearing

If a person wishes to participate in a Permit Review hearing process they must complete and return *Heritage Council Form D – Permit Review Hearing Participation Form* (see <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>). A timetable for the hearing will be prepared and circulated on the basis of information provided on this form. If, after receiving a circulated timetable, it is felt a longer time is required for the hearing than initially allocated, the Hearings Manager must be notified immediately.

All Form Ds will be circulated by the Hearings Manager to all other people participating in the hearing and may also be obtained by members of the public through the provisions of the *Freedom of Information Act 1982*.

(ii) Detailed Hearing Submission

If a person intends to advance any arguments or make any points at the hearing, that are beyond what is included in either their *Form C* or *Form D*, as referred to at, respectively, paragraphs 1.3 and 3.2.1(i) above, that person must provide a detailed written submission on the Executive Director's determination (known as a Hearing

HERITAGE COUNCIL PROTOCOL 2

Submission), along with any written evidence and any photographic or audio/visual evidence upon which the person intends to rely (including material that may be used for the purposes of any powerpoint, photographic or audio visual presentation at the hearing).

Hearing Submissions will be circulated by the Hearings Manager to all other people participating in the hearing and may also be obtained by members of the public through the provisions of the *Freedom of Information Act 1982*.

A Hearing Submission must relate to the matters set out in s.101(2), being:

- (a) the extent to which the application, if approved, would affect the cultural heritage significance of the registered place or registered object;
- (b) the extent to which the application, if refused, would affect the reasonable or economic use of the registered place or registered object;
- (c) any submissions made under s.95 or s.100;
- (d) if the permit applicant is a public authority, the extent to which the application, if refused, would unreasonably detrimentally affect the ability of the public authority to perform a statutory duty specified in the application;
- (e) if the application relates to a listed place or to a registered place in a World Heritage Environs Area, the extent to which the application, if approved, would affect:
 - (i) the world heritage values of the listed place; or
 - (ii) any relevant Approved World Heritage Strategy Plan;
- (f) any matters relating to the protection and conservation of the registered place or object that the Executive Director considers relevant.

Hearing Submissions should be in A4, double-sided and two hole punched. Plans and other diagrammatic information may be in A3 double-sided and two hole punched.

(iii) **Evidence**

If a person proposes to call a witness to provide evidence at the hearing, a written statement of that evidence must be provided.

If a person proposes to call an expert to provide evidence at the hearing, a written statement of the expert's evidence must be provided. Further details relating to the evidence and conduct of experts can be found at *Heritage Council Protocol 6: Expert Evidence* (see: <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>).

All statements of evidence will be circulated by the Hearings Manager to all other people participating in the hearing and may also be obtained by members of the public through the provisions of the *Freedom of Information Act 1982*.

(iv) **Without Prejudice Draft Permit Conditions**

In relation to any hearing arising from a request to review a determination by the Executive Director to refuse an application to issue a permit, pursuant to s 106(1)(a) of the Act, the Executive Director must provide without prejudice draft permit conditions.

Any without prejudice draft permit conditions provided by the Executive Director will be circulated by the Hearings Manager to all hearing participants.

3.2.2 Submissions in Reply

HERITAGE COUNCIL PROTOCOL 2

People participating in the hearing process will have an opportunity to respond to other submissions, evidence and draft permit conditions in writing prior to the hearing. A 'Submission in Reply' is not compulsory but it allows the opportunity to challenge the claims of others and to refine the matters in dispute prior to the hearing.

A 'Submission in Reply' must be lodged with the Heritage Council 14 days prior to the hearing date.

'Submissions in Reply' will be circulated by the Hearings Manager prior to the hearing and may also be obtained by members of the public through the provisions of the *Freedom of Information Act 1982*.

3.2.3 Other Hearing-Related Correspondence

Other hearing-related correspondence received will be circulated to other hearing participants, unless it is of a purely administrative nature.

3.3 Adjournments

3.3.1 The person requesting the Permit Review may seek an adjournment. The request should be made as soon as practicable, in writing, in the form *Heritage Council Hearings Form E – Request for Adjournment* (see: <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>). Reasons for the request must be provided [s.107(3)].

3.3.2 The Heritage Council may adjourn the Permit Review if it is satisfied the request is reasonable.

3.3.3 The Heritage Council may adjourn the Permit Review in other circumstances it considers appropriate.

3.4 Site Inspection

3.4.1 The Heritage Council may conduct a site inspection prior to, during, or following the hearing.

3.4.2 Ordinarily site inspections will be unaccompanied, except for the Hearings Manager. A representative of the owner may be in attendance if it is necessary to obtain access or for security reasons.

3.5 Amended Plans

3.5.1 The permit applicant may request to amend any plan subject to a Permit Review by submitting *Heritage Council Form F – Request to Amend Plans* (see: <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>). The request must be made within seven (7) days of being notified of the hearing date by the Heritage Council and must be accompanied by *Heritage Council Form E – Request for Adjournment* (see: <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>). The adjournment request is required to enable the proper consideration of the request to amend plans, and the period of the requested adjournment should reflect this.

3.5.2 The request to amend plans must include eight (8) copies of the following documents:

- (i) Request to amend plans (see *Heritage Council Form F – Request to Amend Plans* at <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>); and

HERITAGE COUNCIL PROTOCOL 2

- (ii) Request for an adjournment (see *Heritage Council Form E – Request for Adjournment* at: <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>); and
- (iii) Clearly legible, scaled amended plans; and
- (iv) A statement in writing describing the changes from the previous plans and reasons for the changes.

3.5.3 The Hearings Manager will circulate the request and will advise of any directions from the Heritage Council. Any person notified of the hearing in 3.1.1 above may, within 7 days of the request plans being circulated, lodge with the Heritage Council:

- (i) A written objection to the request to amend plans, setting out the reasons for the objection; or
- (ii) A written request for the Heritage Council to issue directions in relation to the request to amend plans, including directions that further notice of the amended plans be given by the applicant.

3.5.4 Having considered the request to amend plans and any responses provided under 3.5.3 above, the Heritage Council may:

- (i) Request further information from the applicant;
- (ii) Direct the applicant to give additional notice of the amended plans and to provide the Heritage Council with information on any submissions made during further notice;
- (iii) Direct that the amendment application be dealt with at the commencement of the hearing;
- (iv) Conduct a Directions Hearing to resolve matters associated with the request to amend plans (see *Heritage Council Protocol 6 – Directions Hearings* at <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>);
- (v) Make any other direction as it thinks fit.

3.5.5 After considering the request to amend plans and any further material provided under 3.5.3 and 3.5.4 above, the Heritage Council may:

- (i) Allow the request;
- (ii) Disallow the request;
- (iii) Allow the request in part.

3.6 Withdrawals

3.6.1 A 'withdrawal' is written notification from a person advising that they either no longer wish to participate in a hearing process and/or that they wish to withdraw their request for a Permit Review.

3.6.2 A person who wishes to withdraw from the process must advise the Heritage Council in writing as soon as practicable.

3.6.3 The Heritage Council will notify people participating in the hearing process of the withdrawal. The Heritage Council will provide advice on the implications of the withdrawal and may issue directions as to how the hearing will proceed.

HERITAGE COUNCIL PROTOCOL 2

4. At the Hearing

- 4.1 A Committee of at least three (3) members of the Heritage Council will conduct the hearing.
- 4.2 All hearings are open to the public and the media. Members of the media must identify themselves to the Committee prior to the commencement of the hearing.
- 4.3 Photography, as well as the video or audio recording of proceedings, is prohibited unless specifically approved by the Committee in advance.
- 4.4 All people participating in the hearing are expected to treat others with respect and adhere to any directions provided by the Committee. The Committee may refuse to hear any person who fails to comply with a direction of the Committee [s.247(2)].
- 4.5 A person who is participating in the hearing may be represented by another person (e.g. a legal representative).
- 4.6 The order in which the Committee will hear verbal submissions and evidence is as follows:
- (i) The Executive Director
 - (ii) The responsible authority
 - (iii) The National Trust
 - (iv) Other persons
 - (v) The owner/s or government asset manager
 - (vi) The permit applicant

A right of reply will only be afforded at the discretion of the Committee.

4.7 Verbal Submissions

- 4.7.1 Verbal submissions should be concise and directed to the main arguments of the written material lodged and the matters outlined in 3.2.1(ii) of this protocol. The lengthy restatement of points made by previous speakers should be avoided. Submitters should adhere to the time allocated in the circulated timetable.
- 4.7.3 The Committee may ask questions of any submitter.
- 4.7.4 Direct questioning of submitters or their advocates by others is not permitted. Questions of clarification may be allowed at the discretion of the Committee.

4.8 Evidence

- 4.8.1 A person may call a witness (including an expert witness) at the hearing where a written statement of evidence from that witness has previously been received and circulated to all people participating in the hearing.
- 4.8.2 Witnesses must be made available for cross-examination by other people participating in the hearing.
- 4.8.3 The conduct of expert witnesses is outlined in *Heritage Council Protocol 6: Expert Evidence* (see: <http://heritagecouncil.vic.gov.au/registrations-reviews/documents-for-registrations-and-reviews/>).

4.9 New Material

- 4.9.1 Given the procedure of circulating Hearing Submissions, evidence and Submissions in Reply prior to the hearing, new written or visual material (including photographic evidence, plans, maps or powerpoint presentations) will not be allowed at the hearing except with the leave of the Committee.

HERITAGE COUNCIL PROTOCOL 2

4.9.2 In some circumstances the allowance of new material may be grounds for an adjournment and/or an opportunity to respond to the new material in writing.

4.10 Adjournments

4.10.1 An adjournment may be sought at the hearing. In considering the request, the Committee will have regard to the reasons given for any request, s.107 of the Heritage Act, and the views of other hearing participants.

4.10.2 The Committee will determine whether the adjournment will be granted [s.253].

4.10.3 The Committee may adjourn a hearing if it considers an adjournment necessary [s.253].

4.11 Additional Information

4.11.1 The Committee may ask for any additional information that the Committee considers necessary to assist the determination of the Permit Review [s.108(2)].

4.11.2 Any requested further information received by the Committee will be circulated to all hearing participants and an opportunity may be afforded to provide comment on the further information within a specified period of time.

5. After the Hearing

5.1 The Committee must make a determination on the Permit Review within 60 days of the Permit Review request being lodged with the Heritage Council [s.108(1)]. However, the time within which the Committee must decide a Permit Review:

- (i) stops when an adjournment has been granted and starts at the end of the determined adjournment period or 6 months from the date of adjournment of the review (whichever is earlier) [s.107(4)]; and
- (ii) stops when a request for additional information is requested from the applicant and starts only when the information is provided [s.108(3)].

5.2 In determining the Permit Review, the Committee may make one of the following determinations [s.108(7)(a)-(c)]:

- (i) Affirm the decision of the Executive Director to issue the permit with certain conditions or to refuse to issue the permit (in whole or part).
- (ii) Vary the decision of the Executive Director (for example, to vary permit conditions).
- (iii) Set aside the decision of the Executive Director and make another determination in its place (including, for example, to issue a permit that has been refused or refuse to issue a permit that has been issued).

5.3 A report detailing the reasons for the Committee's determination will be provided to all people who participated in the hearing and will be made available through the Heritage Council's website and Australian Legal Information Institute's Victorian Law Resources at www.austlii.edu.au/au/vic.

5.4 Each person participating in the hearing is to bear their own costs. The Heritage Council is not able to award costs and determinations will not address any claims for costs.

6. Further Reference

- (i) *Heritage Act 2017* (Vic)
- (ii) Heritage Council Hearings Manager (phone (03) 9194 0868 or email heritage.council@delwp.vic.gov.au)