

# Heritage Council Regulatory Committee

## Ballarat Railway Complex (H0902)

140 Lydiard Street North, Ballarat Central and 202 Lydiard Street North and Nolan Street, Soldiers Hill and Scott Parade and 60 Corbett Street, Ballarat East and 75 Humffray Street North, Bakery Hill, Ballarat City, Wadawurrung Country

**Hearing** – 15, 16 and 17 September 2025

**Accompanied site inspection** – 18 September 2025

**Members** – Mr Simon Molesworth AO KC (Chair), Dr Steve Campbell-Wright, Ms Ruth Redden

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### Determination of the Heritage Council

**To vary the determination under review** – After considering all submissions received in relation to the permit review and after conducting a Hearing and accompanied site inspection, the Heritage Council has determined, pursuant to section 108(7)(b) of the *Heritage Act 2017*, to vary the determination under review by varying the conditions of permit P39923.

Mr Simon Molesworth AO KC (Chair)  
Dr Steve Campbell-Wright  
Ms Ruth Redden

**Decision Date** – 17 November 2025

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## Acknowledgement

As a peak heritage body, we acknowledge the Traditional Owners of the Country that we call Victoria, as the original custodians of Victoria's land and waters, and acknowledge the importance and significance of Aboriginal cultural heritage in Victoria. We honour Elders past and present whose knowledge and wisdom has ensured the continuation of Aboriginal culture and traditional practices.

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## Parties to the Proceeding

### Executive Director, Heritage Victoria ('The Executive Director')

The Executive Director was represented at the Hearing by Ms Nicola Stairmand, Manager Statutory Assessments, and Mr Michael Galimany, Senior Heritage Officer, Major Projects also attending.

### Ballarat City Council ('BCC')

BCC is the owner of part of the Ballarat Railway Complex located at 3A Nolan Street, Soldiers Hill, and requested the permit review. BCC was represented at the hearing by Ms Maria Marshall of Maddocks Lawyers and engaged Professor Richard Mackay AM of Mackay Strategic as an expert witness in heritage.

### V/Line Corporation ('V/Line')

V/Line, on behalf of the State of Victoria, is a public authority operating the Ballarat Railway Complex pursuant to lease and franchise arrangements. V/Line is the regional rail operator and transport corporation established under the *Rail Corporations Act 1996* (Vic) and continued under the *Transport Integration Act 2010* (Vic). V/Line was represented at the hearing by Counsel Ms Serena Armstrong and engaged Ms Suzanne Zahra of Lovell Chen as an expert witness in heritage and Mr Peter Nelson-Furnell as an expert witness in rail safety.

### National Trust of Australia (Victoria) ('NTAV')

NTAV made written submissions to the proceeding. NTAV did not seek to make oral submissions at the Hearing and did not attend.

## Introduction / Background

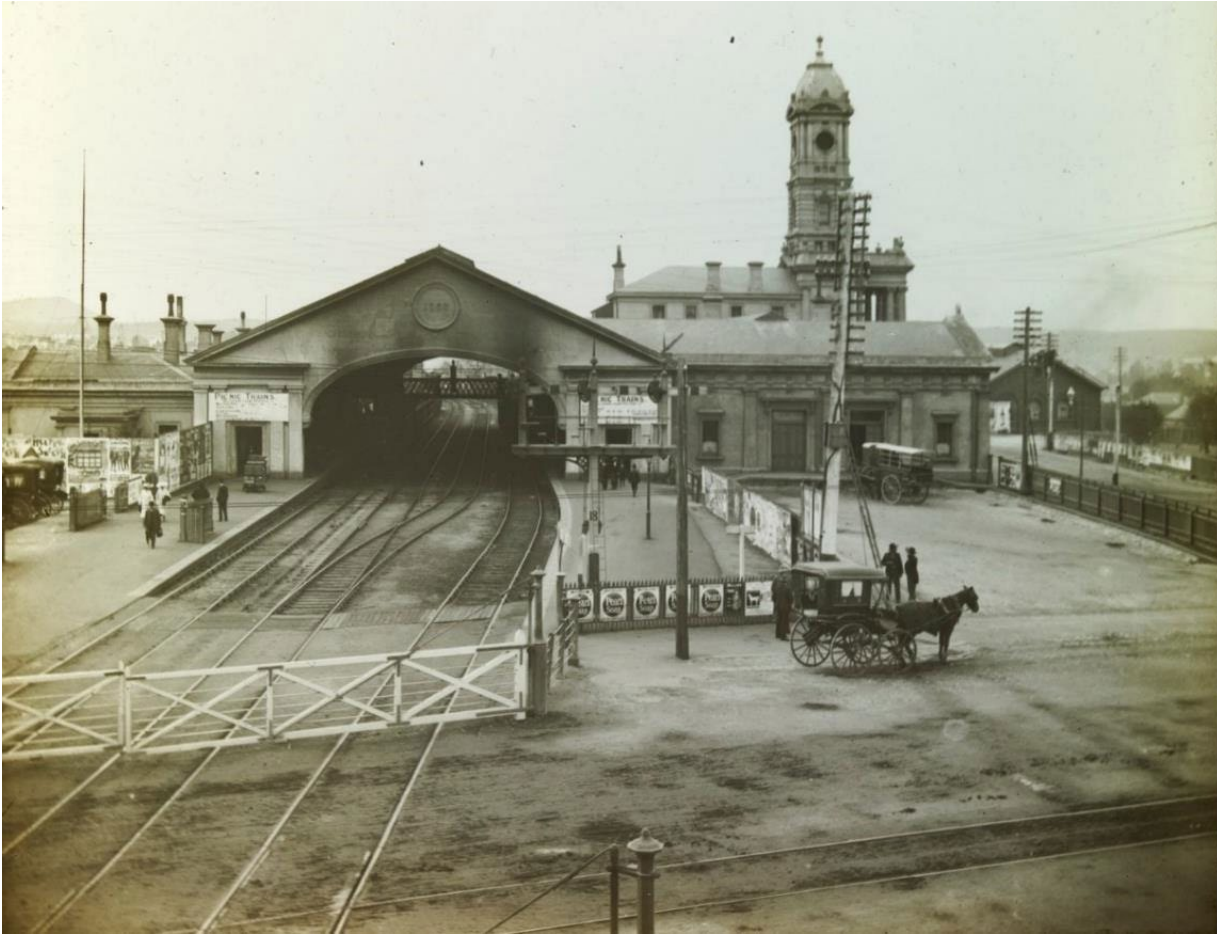
### The Place

- 01.** The Ballarat Railway Complex is located at 140 Lydiard Street, North Ballarat Central and 202 Lydiard Street North and Nolan Street, Soldiers Hill and Scott Parade and 60 Corbett Street, Ballarat East and 75 Humffray Street North, Bakery Hill, Ballarat City ('the Place').
- 02.** The Place was included in the Heritage Register in 1998, and is considered to be of historical, architectural, social and technological significance to the State of Victoria.
- 03.** The registered extent of the Place is recorded in the Heritage Register as being:

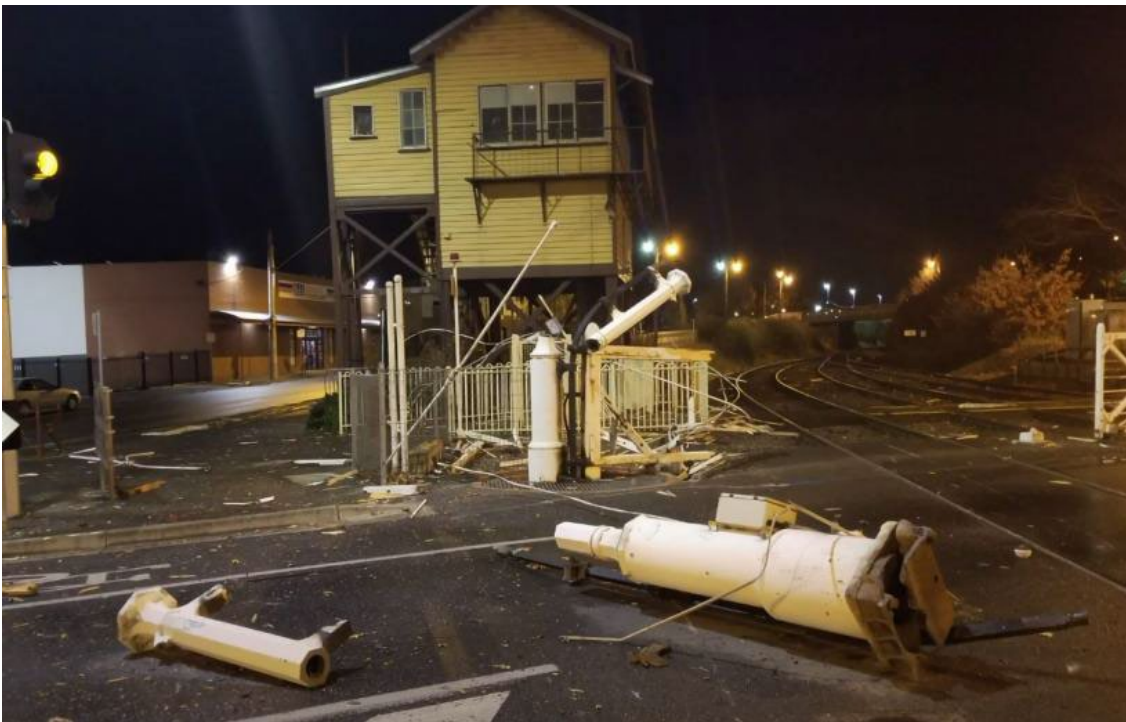
*All of the buildings and structures known as the Ballarat Railway Complex: Ballarat Railway Station Building, Ballarat West B1; former Railway Engine Shed, Ballarat West B2; Goods Shed, Ballarat West B3; former Engine Shed Remnants, Ballarat East, including remnant stone wall, brick wall and turntable B4; Peel Street Railway Bridge and Embankment B5; Queen Street Bridge B6; King Street footbridge B7; former goods shed, Ballarat East, including external island platform at east end and stone wing wall at West end, but excluding roof over platform at east end B8; former station site, Ballarat East, including platform walls, station building foundation walls to threshold level and roadside kerb B9; signal box, Ballarat East, including the signal level frame and all fittings, two sets of associated sector gates at Humffray Street and all gate and signal control rodding within the area adjoining the signal box shown hatched B10; Davies Street subways B11; Ballarat A signal box, including the signal level frame and all fittings, all signal control rodding within the area adjoining the signal box shown hatched B12; signal mast No. 21, complete with all fittings and signal control rodding extending to a point 2 metres from the base of the mast B13; Yarrowee Creek tunnels B14; former water supply tower B15; up-end signal gantry, complete with all fittings and including signal control rodding extending to a point 2 metres from the base of the gantry B16; down-end signal gantry, complete with all fittings and including signal control rodding extending to a point 2 metres from the base of the gantry B17; former weighbridge B18; weighbridge and associated office B19; former carriers office B20; Ballarat B signal box, including signal lever frame and all fittings, one set of associated sector gates at Lydiard Street and all gate and signal control rodding within the area adjoining the signal box shown hatched B21; signal mast No. 33, complete with all fittings and signal control extending to a point 2 metres from the base of the mast B22; signal mast No. 31, complete with all fittings and signal control rodding extending to a point 2 metres from the base of the mast B23; and shown on Plans 602746/1-602746/6 inclusive, held by the Executive Director, Heritage Victoria.*

*The land marked L1, L2, L3 and L4 on Plan Nos. 602746/1-602746/6 inclusive, endorsed by the Chairperson, HBC and held by the Director, Historic Buildings Council, being all of the land described in Certificate of Title Volume 1882 Folio 376320, Volume 386 Folio 77069 and Volume 2863 Folio 572428 and Allotment 2C Section B3 in the Township of Ballarat East, but excluding an 'operating corridor' as shown on Plan Nos. 602746/1-602746/6 inclusive, held by the Executive Director, Heritage Victoria.*

- 04.** This proceeding most specifically relates to the sector gates at Lydiard Street, referred to in the written extent of registration above.
- 05.** It is noted that the 'sector gates' referred to in the extent of registration and throughout this proceeding are partial replicas of the original nineteenth century timber sector gates, which were installed in 1993 following a traffic accident. The partial replica sector gates are included in the extent of registration for the Place.



**Figure 1:** Historical photograph showing the original nineteenth century sector gates closed across the railway tracks at Lydiard Street, Ballarat Railway Complex c.1890s. Source: State Library of Victoria, extracted from the expert evidence report of Ms Suzanne Zahra.



**Figure 2:** Image of debris from the destroyed partial replica sector gates, gate posts and associated fabric on Lydiard Street following the 2020 collision with a Velocity train on 30 May 2020. Extracted from the expert evidence report of Mr Peter Nelson-Furnell.

## Permit P34664

06. On 30 May 2020, a V/Line Velocity train entered Lydiard Street level crossing at a speed of approximately 100 kilometres per hour and collided with one of the two pairs of timber sector rail gates ('sector gates') that controlled the level crossing, located at the south-west and south-east of the level crossing. The impacted set of sector gates were destroyed in the collision. The remaining pair of sector gates remained closed across the roadway for the next 18 months. During this time, Lydiard Street North was closed to vehicular traffic and the rail corridor remained operational.
07. On 27 May 2021, V/Line applied to the Executive Director for a heritage permit under Part 5 of the *Heritage Act 2017* ('the Act') to:

*Temporarily remove to offsite storage at the V/Line Wendouree Depot the intact timber sector gates (Gates 2 and 3), and various supporting elements including Gate Post 3 and braces and stays initially for a period not exceeding eighteen (18) months.*

08. On 7 October 2021, the Executive Director approved the permit application and determined to issue heritage permit P34664. Accordingly, the intact sector gates and supporting elements were dismantled and stored at the V/Line Wendouree Depot on 13 and 14 November 2021.
09. Condition 11 of heritage permit P34664 required that:

*an options paper assessing permanent options for the level crossing and the future of the salvaged heritage elements is to be provided to the Executive Director, Heritage Victoria for review. The options paper must include an assessment of the feasibility of returning the level crossing to its earlier operational form with the timber sector gates in active use. The document should demonstrate that community consultation has formed part of its preparation, whether this be by the establishment of a stakeholder liaison group or by community information events, whether in real time or by a digital/online interface in the period leading up to its lodgement. Once reviewed, an endorsed copy of the options paper will be returned to the permit holder for their records. Once endorsed, a copy will be retained as part of the documentation associated with the permit.*

## Permit P39923

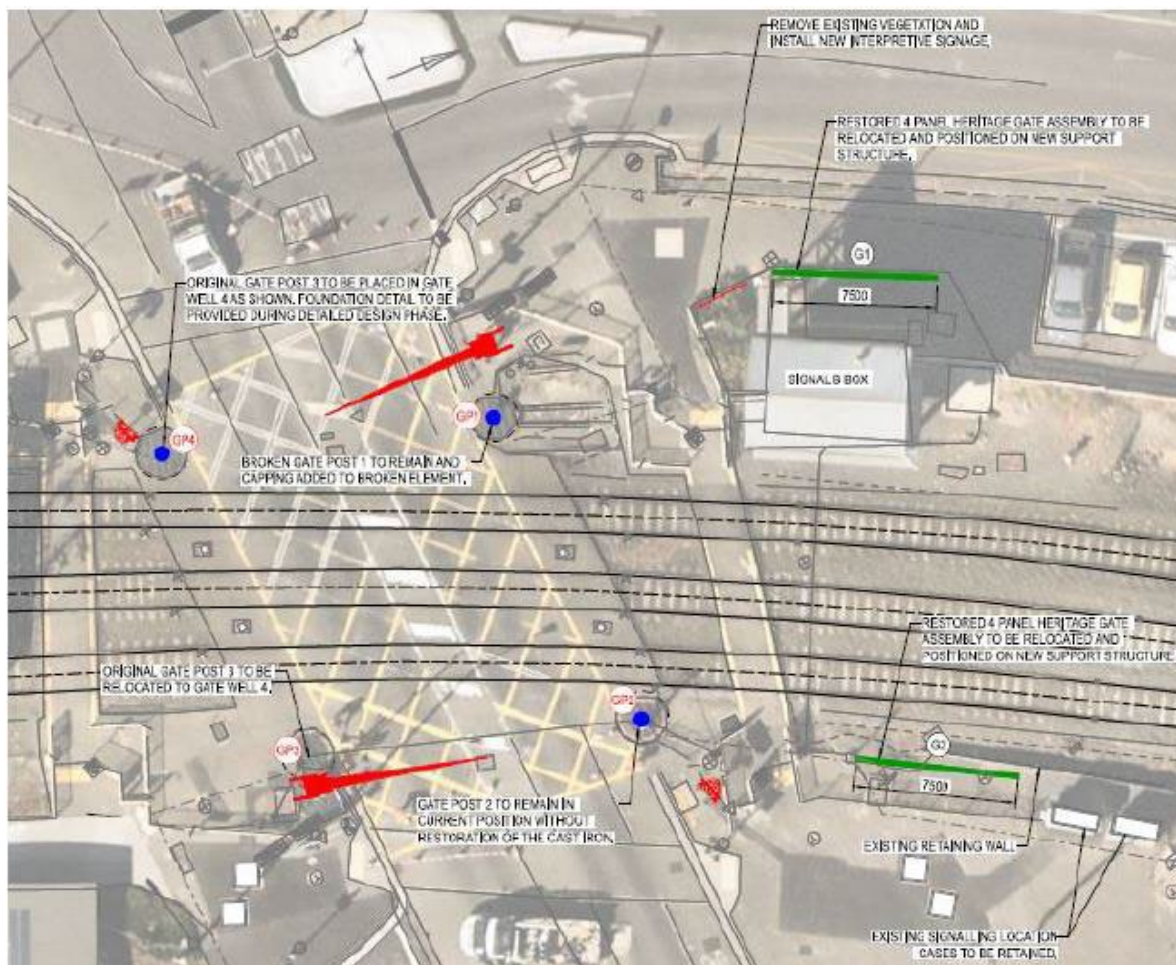
10. Following the satisfaction of Condition 11 to heritage permit P34664, and subsequent consultation with the Executive Director, V/Line applied on 10 July 2024 to the Executive Director for a heritage permit (permit application P39923) under section 93(1) of the Act to undertake:

*Works to the Lydiard Street North level crossing, including a combination of retention and/or relocation of significant heritage fabric (with associated conservation works), the decommissioning of salvaged heritage fabric, and the introduction of new elements.*

11. Permit application P39923 was publicly advertised between 24 July and 6 August 2024 in accordance with section 95 of the Act. A total of 15 public submissions were received, all of which objected to the proposal. No submission in response to the advertised permit application was received from BCC in accordance with section 100 of the Act.
12. On 7 February 2025, the Executive Director determined to issue heritage permit P39923 with conditions under section 101(1)(a)(i) of the Act for the following works:

*The return from offsite storage of significant heritage fabric (with associated conservation works) which was approved for removal from the Lydiard Street level crossing in accordance with permit P34664 in October 2021, the decommissioning of salvaged but now surplus heritage fabric, and installation of both the returned fabric and new elements within the setting of the Lydiard Street level crossing.*

13. Permit P39923 approved the return of the of the sector gates to a static position parallel to the tracks, immediately to the west of Lydiard Street, with one sector gate on each the north and south side of the railway line (see **Figure 3** below).



**Figure 3:** Concept design (facing south) for the proposal to return the sector gates and associated fabric to the Place, in accordance with permit P39923. The relocated sector gates, positioned parallel to the rail line, are shown in green, the gate posts in blue, and mechanical boom gates and flashing-light masts in red. Source: Kinsley Group for V/Line, extracted from *Addendum to Options Paper* (December 2023), prepared by Lovell Chen in satisfaction of condition 11 for permit P34664, and forming the proposal approved by permit P39923.

### Request for review of permit P39923

14. On 7 April 2025, BCC lodged a request for permit review in relation to heritage permit P39923 with the Heritage Council of Victoria ('the permit review').
15. BCC requested a review of the Executive Director's determination to conditions 1, 4 and 9 on permit P39923, which are set out below:
  - **Condition 1** - Prior to the commencement of works, the registration of the Ballarat Railway Complex must be reviewed and amended, subject to the review of the Heritage Council of Victoria to allow for the interlocking timber sector gates to be installed on registered land. Once this has been completed, the Executive Director, Heritage Victoria (**Executive Director**) will write to the applicant informing them of the outcome of the amendment of the registration and provide them with the proposed date of gazettal of the amended registration.
  - **Condition 4** - Prior to the commencement of any of the works approved by this permit, an updated set of issued for construction drawings are to be provided to the Executive Director for review and approval. Once these have been endorsed a set will be provided to the permit holder for their records. A further set will form part of the documentation associated with the permit.
  - **Condition 9** - Prior to the commencement of any of the works approved by this permit, the applicant must submit a heritage interpretation plan to the Executive Director for approval. Once approved, the plan will be endorsed and will then form part of the documentation associated

with the permit. The plan must be prepared by a suitably qualified interpretation specialist and must:

- Outline an approach to content, graphics and design for the interpretation including a setout plan showing the location of the proposed interpretation devices on registered land and within the immediate surrounds of the Lydiard Street level crossing;
- Communicate the role of the interlocking timber sector gates and incorporate a timeline of their history up to and including the events of May 2020 and enable the relationship between Signal Box B and the operation of the interlocking timber sector gates to be understood;
- Provide the full text and images for two (2) formal interpretation devices to be installed on registered land and within the immediate surrounds of the Lydiard Street level crossing;
- The interpretation devices are to be fabricated and installed within the period of permit validity.

**16.** BCC requested a review of each above condition for the following reasons:

- **Condition 1** - The permit applies to a heritage place that is not listed as part of the registered place. The precondition to amend the boundaries of the registered place to incorporate the heritage fabric distant from its original location and out of context, makes the condition and heritage permit misconceived. The condition acknowledges the disconnect between the heritage fabric and the proposed location of re-siting. The proposal will adversely affect the significance of the place and the heritage fabric itself. Further, the extended heritage place will in part include land managed by [BCC]. That part of the heritage fabric which is proposed to be returned to land managed by [BCC] will require [BCC's] permission in its capacity as land manager. That permission has not been sought nor given. Neither the Heritage Council nor the permit applicant can compel [BCC] to give its permission for the heritage fabric to be placed on the [BCC] land. Accordingly, condition 1 is ineffective as it requires the permit applicant to do something that is outside its control.
- **Condition 4** - The proposed works take the heritage fabric outside the heritage place, and importantly, outside the heritage context not in accordance with accepted conservation standards. The condition for updated construction drawings should prescribe required amendments to relocate the heritage fabric to a location within the current extent of the registered place.
- **Condition 9** - Any heritage interpretation plan would be frustrated by the unsatisfactory heritage outcomes contemplated by the heritage permit, namely, to place heritage fabric outside the registered place. The heritage interpretation place condition should prescribe the location of the proposed interpretation devices to a location within the current extent of the registered place, alongside relocated heritage fabric.

**17.** In submitting its request for a review, BCC stated that:

*Further to [BCC] being the relevant municipal council for the area in which the registered place is situated, [BCC] is the government asset manager of part of the registered place[...] to which the heritage permit applies, being Scott's Parade, Ballarat.*

## Regulatory Committee

**18.** Pursuant to section 13(1) of the Act, a Regulatory Committee of the Heritage Council ('the Committee') was duly constituted to consider the permit review, and to conduct a hearing into the matter.

## Preliminary, procedural and other matters

### Request to the Executive Director to provide permit materials

**19.** On 11 April 2025, the Executive Director was requested by the Heritage Council to provide material related to the application and assessment of, and determination to issue, permit P39923.

**20.** The Executive Director provided this material on 16 April 2025.

### Standing of BCC to cause the permit review

21. In correspondence accompanying the provision of permit materials to the Heritage Council on 16 April 2025, the Executive Director queried the standing of BCC to cause the permit review in accordance with the Act.
22. The Executive Director referred to section 106(2) of the Act, which states:

*The applicant or the owner or the government asset manager of a registered place or registered object may make a written request to the Heritage Council to review a determination by the Executive Director to impose a condition on a permit in respect of the place or object.*
23. The Executive Director requested that the Heritage Council confirm if BCC was the 'government asset manager' for any part of the Place in its current extent of registration.
24. It was the view of the Executive Director that, if BCC were not currently a government asset manager for the registered Place, but would become so should the Place's registration be amended (as contemplated by condition 1 of permit P39923), then BCC would not be eligible to request a review of the permit conditions.
25. On 15 May 2025, BCC was requested to respond to the Executive Director's query regarding its standing to cause the permit review in accordance with section 106(2) of the Act.
26. BCC responded to this request on 23 May 2025, submitting it had standing to cause the review for the following reasons:
  - The address of the registered Place, as specified in the Victorian Heritage Database as '140 LYDIARD STREET NORTH BALLARAT CENTRAL AND 202 LYDIARD STREET NORTH AND NOLAN STREET SOLDIERS HILL AND SCOTT PARADE AND 60 CORBETT STREET BALLARAT EAST AND 75 HUMFFRAY STREET NORTH BAKERY HILL, BALLARAT CITY';
  - BCC is the owner and government asset manager for 3A Nolan Street, Soldiers Hill;
  - The location specified in permit P39923 is '75 HUMFFRAY STREET NORTH BAKERY HILL AND 140 LYDIARD STREET NORTH BALLARAT CENTRAL AND SCOTT PARADE AND 60 CORBETT STREET BALLARAT EAST AND 202 LYDIARD STREET NORTH AND NOLAN STREET SOLDIERS HILL, BALLARAT CITY';
  - BCC is also government asset manager for not-yet registered locations subject to permit P39923, being the road reserves to which the sector gates would be returned in accordance with permit P39923.
27. The Committee considered the information provided and concluded that BCC had sufficient standing to commence the permit review in accordance with section 106(2) of the Act.
28. On 3 June 2025, interested parties were advised that the Committee had formed the view that BCC had sufficient standing to cause the review.
29. Interested parties were offered the opportunity to request a preliminary hearing and make any final submissions regarding the standing of BCC.
30. No requests for a preliminary hearing were received, and the matter of BCC's standing was considered by the Committee to be resolved.

### Notification of permit review hearing

31. The Committee advised interested parties on 12 June 2025 that it found the request for review to be valid, and that a permit review hearing pursuant to section 108(4) of the Act would be conducted in relation to the matter.
32. Interested parties were invited to submit a *Heritage Council Hearing Participation Form* ("Form D") to indicate whether they would participate in the Hearing.

**33.** The Committee received four Form D responses from:

- The Executive Director;
- BCC;
- V/Line; and
- NTAV.

### **Directions Hearing and Hearing arrangements**

**34.** The Committee conducted a Directions Hearing on 24 July 2025 via videoconference using the Microsoft Teams platform.

**35.** The following matters were discussed and resolved during the Directions Hearing:

- The legal framework for the permit review;
- The legal standing of BCC to commence the review;
- Any confirmed legal representation of parties;
- Timing of and arrangements for the Hearing;
- Timeframes for submitting expert evidence, hearing submissions, and hearing submissions in reply;
- Timing of and arrangements for the site inspection; and
- Any additional information to be circulated to parties.

**36.** The Committee confirmed that the hearing would take place over three days between 15-17 September 2025 ('the Hearing'), followed by an accompanied site inspection on 18 September 2025.

### **Accompanied site inspection**

**37.** On 18 September 2025, the Committee undertook a site inspection of the Place. Heritage Council Secretariat staff (Megan Rowland, Hearings Manager and Hannah Fairbridge, Project Officer) were also in attendance.

**38.** Representatives of the following parties to the hearing were in attendance:

- BCC; and
- V/Line.

**39.** Representatives for the Executive Director and NTAV were invited to attend the accompanied site inspection, but chose not to attend.

**40.** No submissions were sought, made or received during the site inspection. Questions of clarification and identification were permitted by the Committee Chair.

**41.** The site inspection included the entirety of the area subject to permit P39923, including the Lydiard Street level crossing and its surrounds. Additionally, the Committee attended the V/Line Wendouree Depot to inspect the intact timber sector gates (Gates 2 and 3), and various supporting elements including Gate Post 3. The Committee additionally visited the level crossing located at 75 Humffray Street North, Bakery Hill, which forms part of the registered extent for the Place.

### **Conflicts of interest**

**42.** The Chair invited Committee members to consider whether written declarations or otherwise were required to be made in relation to any matters that may potentially give rise to an actual or apprehended conflict of interest.

**43.** The Chair declared at the Directions Hearing his association with NTAV, having served previously in executive roles as NTAV Chair and President, with such positions concluding 20 years earlier in 2005. He was subsequently awarded the honorary lifetime designation of State Patron.

44. All members were satisfied that there were no real or perceived conflicts of interest, and no parties made objections to the Committee as constituted in response to the Chair's declaration.

## Issues

45. The following section is not intended to be a complete record of submissions that were made to the Committee. It is a summary of what the Committee considers to be the key issues, followed by an explanation of the position that the Committee takes on each key issue.

## Summary of positions

46. The position of each party to this matter is summarised below:
- BCC accepted that the Lydiard Street sector gates and associated fabric could not be safely reinstated in an operational manner, but objected to the new location as allowed by permit P39923 because it would result in 'a poor heritage outcome'. BCC called and adopted the expert evidence of Professor Richard Mackay AM, which contemplated an alternative location for the returned sector gates. BCC sought the deletion of condition 1 and amendments to conditions 4 and 9 to align with options put forward by Prof Mackay. BCC further submitted that permit P39923 would be 'futile' without BCC's consent.
  - V/Line agreed to the deletion of condition 1, but objected to amendments to conditions 4 and 9 as requested by BCC. V/Line rejected the submissions of BCC that permit P39923 is futile. It was the view of V/Line that works associated with permit P39923 resulted in a positive heritage outcome while allowing for the safe and compliant operation of the Place as a railway complex. V/Line called and adopted the expert evidence of Ms Suzanne Zahra and Mr Peter Nelson-Furnell in forming its view.
  - The position of the Executive Director largely aligned with that of V/Line. It was the view of the Executive Director that works allowed by issued permit P39923 are appropriate and balance the cultural heritage significance of the Place with safety and operational constraints, as required by section 101(2) of the Act.
  - NTAV objected to the works associated with permit P39923 and submitted that the determination of the Executive Director was conflicted due to Heritage Victoria's position within the Department of Transport and Planning. NTAV further submitted that the consultation processes for permit applications P34664 and P39923 were flawed and inadequate. It was the submission of NTAV that the operational reinstatement of the sector gates in their original location is the only acceptable outcome in accordance with the objectives of the Act.

## Scope of review

### Summary of submissions and evidence

47. It was submitted by V/Line that, as the matter before the Committee is a review of permit conditions pursuant to section 106(2) of the Act, and not a permit review pursuant to section 106(1) of the Act, no weight should be given to submissions contemplating alternative proposals for the relocation of the timber sector gates and associated fabric.
48. In substantiating this view, V/Line cited previous Heritage Council permit review decisions, including those in relation to *Former Ardoch Educational Centre H0969* (2018); *Former Kew Cottages H2073* (2018) and *ANZ Bank H0034* (2019), all of which made similar findings.
49. It was the submission of V/Line that the changes proposed by BCC to permit P39923 cannot be considered to be minor, and constitute a separate proposal to what was publicly advertised, assessed and issued in accordance with the relevant provisions of the Act. It was the submission of V/Line that the amendments as requested by BCC are transformational, untested and 'ask too much', going beyond the scope of what amendments are appropriate to make within the context of a permit conditions review pursuant to section 106(2) of the Act.
50. The Executive Director put forward the view that it was not appropriate for BCC to object to the proposal approved by permit P39923 in the context of a permit conditions review. It was the view of the Executive Director that the appropriate time for such an objection was when the permit application for P39923 was

publicly advertised between 24 July and 6 August 2024, pursuant to section 95 of the Act. The Executive Director noted BCC did not make a submission at that time, despite the application being submitted to the Statutory Planner, City of Ballarat. The Executive Director further noted that, had BCC made a submission in response to the permit application, section 100 of the Act would have required the Executive Director to consider any written material lodged by the responsible authority in relation to that application. In this event, any alternative proposal put forward by BCC would have been referred to the permit applicant for consideration and assessment.

- 51.** It was the submission of BCC that it is within the legal power of the Heritage Council in the course of this permit conditions review pursuant to section 106(2) of the Act to examine the merits of the original decision when considering whether to affirm, vary or set aside the conditions imposed by the Executive Director. In support of this view, BCC referred to section 108(8) of the Act, which states that:

*In determining a review, the Heritage Council must consider the matters set out in section 101(2) and may consider the matters set out in section 101(3) [of the Act].*

- 52.** BCC concluded it was appropriate within the scope of a permit conditions review for condition 1 to be deleted and conditions 4 and 9 be varied to align with BCC's preferred proposal for the relocation of the sector gates and associated fabric as put forward by Professor Mackay in his expert evidence, which involved:

*static reinstatement of the [sector gates] at their original locations, hung on reconstructed posts and positioned at varying angles to reflect their historical configuration.*

- 53.** NTAV objected to relocation of the sector gates as allowed by permit P39923, and submitted that the only acceptable heritage outcome was for the return of the sector gates to their original location in an operational manner. NTAV did not make specific submissions as to whether or not the Committee was empowered to consider an alternative proposal within the context of the permit conditions review pursuant to section 106(2) of the Act.
- 54.** NTAV called on the Heritage Council to 'refuse' permit P39923.

### **Committee discussion and conclusion**

- 55.** The Committee notes all submissions received regarding the appropriate scope for this permit conditions review.
- 56.** The Committee accepts that BCC did not make a submission pursuant to either section 95 or section 100 of the Act at the time at which permit application P39923 was advertised. The Committee agrees it would have been preferable had BCC done so, and notes the intention of section 100 to facilitate a process by which the responsible authority may meaningfully contribute to a permit application process. However, the Committee also acknowledges that BCC's failure to make a submission at that time does not preclude BCC from commencing and participating in the permit conditions review process pursuant to section 106(2).
- 57.** However, the Committee is not satisfied that the submissions of BCC are, in essence, a request for a review of permit P39923's conditions, but rather constitute a request to review the proposal as approved by issued permit P39923. The Committee accepts the submissions of V/Line that previous Heritage Council decisions have established that the Heritage Council has no power to reconsider a proposal approved under an issued permit within the scope of a conditions review caused under section 106(2) of the Act. In short, the scope of the Committee's task in a section 106(2) conditions review has a somewhat narrow compass. Nevertheless, providing the permitted proposal is not obliquely negated, the Committee does have the power to revise or vary conditions, including improving conditions if in its view the result is a better heritage outcome.
- 58.** It is the view of this Committee that the intention of section 106(2) is to allow a review of the *circumstances* in which the approved works are carried out, and not to review *what* those approved works are. The Committee agrees with the submissions of V/Line that the Act provides a process for reviewing and amending a proposal which has been approved by a permit, being the permit amendment process under Part 5, Division 4 of the Act. After considering the submissions and material before it, the Committee has formed the view that the submissions of BCC substantially relate to *what* the permitted works are and are not limited to *how* those works are carried out. Clearly Permit P39923 cannot be interpreted as an approval of the reinstatement of operating sector gates in their original historic position,

as preferred by the National Trust, nor can the Permit be interpreted as the approval of the reinstatement of the sector gates in a non-operational state in a position proximate to their original historic position, as preferred by BCC. Rather the application sought and the permit granted permission for an entirely different proposal: a static placement of one set of the original two sets of sector gates as merely an interpretative display within the historic precinct with no pretence of being in a location even proximate to their original location. The difference between the BCC's preferred treatment of the remaining sector gates, let alone the preference of the National Trust, and that which was proposed and permitted by permit P39923, is as distinct as the proverbial chalk and cheese. Understanding that distinction is essential to appreciating the very limited scope of the Committee's discretion under a review brought pursuant to section 106(2).

59. The Committee accepts, with the qualifications set out below, the findings of previous Heritage Council Regulatory Committees in relation to the scope of permit conditions reviews. The Committee particularly notes the conclusion of the Heritage Council Regulatory Committee responsible for determining the permit conditions review in relation to the *Former Ardoch Educational Centre H0969* (2018), which found that:
  - *An appeal against a condition does not provide an opportunity for an appellant to argue for the permit to be subject to substantial additional restrictions or limitations;*
  - *Any power [of the Heritage Council] to effectively bolster the existing conditions should only be exercised with considerable caution (if at all);*
  - *An appeal against a permit condition does not present an opportunity to reconsider the appropriateness of a decision to grant the permit.*
60. While the Committee notes that the *Former Ardoch Educational Centre H0969* (2018) was determined in accordance with the now-repealed *Heritage Act 1995*, it notes and accepts, subject to the observations and qualifications made in the next paragraph, the submissions of V/Line that the principles remain relevant to a determination under the current Act. The Committee accepts that former sections 76(4)(c) and 75(3) of the *Heritage Act 1995* find their equivalents under sections 108 and 106 of the Act. Although the Committee understands V/Line's submission that there is nothing in the current Act to indicate the power to impose conditions is now of a different scope from that under the previous legislation, the Committee is of the opinion that preferable course is not to rely upon an interpretation of the previous Act, but rather expresses its view regarding its functions and powers under subsection 106(2) as explained in the paragraph that now follows.
61. With respect to the quoted first and second point in the Ardoch determination, (at paragraph 40 of that determination), this Committee accepts that the revision of conditions should always be carried out cautiously, as indeed all its actions should be. Judicially is a more apt word. However, the Committee does not agree that the strengthening or 'bolstering' of conditions is inappropriate or impermissible. Providing the approval of the permitted proposal is not reversed or made untenable, at all times in the exercise of its functions the Council should strive for the most desirable heritage outcome for the registered place. When the Committee is performing its review under sub section 106(2), it is exercising the Council function found in sub section 11(1)(j) '*to conduct reviews of decisions of the Executive Director in relation to nominations, permits and consents*'. The exercise of such a function never occurs within a vacuum, it takes place within a context set by the Act itself wherein its purpose is set out in section 1, which can be interpreted as giving primacy to '*(a) provide for the protection and conservation of the cultural heritage of the State*'. The remaining paragraphs in section 1 are all, in effect, machinery provisions or functions to achieve the purpose set out in (a).
62. Once the Council, via its committees appointed pursuant to section 13, has been charged with the responsibility to carry out its review under sub section 106(2), in accordance with its function and power found in sub section 11(1)(j), the Committee is then empowered by sub section 11(2) to exercise '*the power to do all things necessary or convenient to be done for, in connection with or incidental to, the performance of its functions*'. It therefore follows that there is a paramount context within which all its functions are carried out, that is, the protection and conservation of the cultural heritage of the State. Accordingly, if in its opinion the improvement, indeed strengthening or bolstering of conditions under review would better achieve that primary purpose, then the Committee has a clear power by virtue of s.11(2) to act accordingly. In this regard, it is instructive to note that almost invariably committees of the Council in their determinations have accepted that the *Burra Charter: the Australia ICOMOS Charter for Places of Cultural Significance, 2013* ('Burra Charter') sets the benchmark for best practice in achieving

the protection and conservation of the cultural heritage of the State. In his evidence to the Committee, Professor Mackay reinforced this important and influential status of the Burra Charter.

63. The Committee notes NTAV's submission that the Committee should 'refuse' permit P39923. The Committee considers that the refusal of an issued permit is not available, in law, to the Heritage Council in the context of a permit conditions review pursuant to section 106(2) of the Act.
64. The Committee reiterates, as explained in the foregoing paragraphs, that, ultimately, it is constrained in what it can consider as part of the permit conditions review process. The findings of the Committee must relate to *how* the permitted works are carried out, not *what* the permitted works are. The Committee has framed its findings in relation to this matter accordingly.

## Futility of permit P39923

### Summary of submissions

65. It was the submission of BCC that Ararat Street and Doveton Crescent, both of which are approved locations for the returned sector gates in accordance with issued permit P39923, are roads listed in the Municipal Road Register maintained by BCC. BCC submitted that it is the government asset manager for Ararat Street and Doveton Crescent pursuant to clause 4 of Schedule 5 of the *Road Management Act 2004* (Vic), which states that:

*a road vests in fee simple in the municipal council of the municipal district in which it is located upon becoming a road.*

66. BCC referred to section 93(3) of the Act, which states:

*If the [permit] applicant is not the owner or government asset manager of the registered place or registered object, the applicant must obtain the written consent of the owner or government asset manager of the place or object.*

67. It was the submission of BCC that in accordance with section 93(3) of the Act, the return of the sector gates to land managed by BCC would require BCC's permission in its capacity as owner of the relevant land. It was the submission of BCC that without this consent permit P39923 is futile. The inference inherent in this submission was that even if permit P39923 with its conditions is ultimately upheld by the Committee, then V/Line could not act on the permit as BCC could or would decline to grant whatever subsequent approval is required to be obtained from it.
68. V/Line rejected the submissions of BCC that permit P39923 is futile.
69. V/Line submitted that the plans associated with permit P39923 show all works occurring within VicTrack land, and that V/Line is the relevant government asset manager for the works approved by that permit.
70. It was the position of V/Line that BCC is not the government asset manager responsible for works associated with permit P39923. In support of this view, V/Line referred to section 93(3A) of the Act, which states:

*Despite [section 93(3)], if the works or activities for which a permit is sought relate to only part of a registered place or a registered object, the applicant is only required to obtain the written consent of the owner or government asset manager of that part of the registered place or registered objects.*

71. Accordingly, it was the conclusion of V/Line that BCC is not the government asset manager for the *part* of the registered place or registered object to which permit P39923 relates, and therefore, the consent of BCC is not required.
72. Further, V/Line challenged BCC's ability to qualify as a 'government asset manager' in accordance with the definition of the term under the Act. V/Line noted that the definition of 'government asset manager' in the Act refers to a 'Minister or any entity responsible for the care, management or control of' either a 'building on government land', 'government land', or a 'government object'. V/Line further considered the definition provided in the Act for 'government land', which is limited to:

- a) *Crown land; or*
- b) *Land vested in a Minister; or*

c) *Land vested in a public authority.*

- 73.** It was the submission of V/Line that BCC could not meet the definition of ‘government asset manager’ under the Act, because the definition provided in the Act for ‘public authority’ specifically excludes a municipal council, stating:

***Public authority** means any body corporate or unincorporate established by an Act for public purpose, but does not include a municipal council.*

- 74.** It was the position of V/Line that BCC had not adequately demonstrated that its consent to works associated with permit P39923 is a requirement under the Act. It was the conclusion of V/Line that, on this basis, the permit is not futile.
- 75.** V/Line further submitted that, regardless of the above, if the Committee were to determine to amend the conditions of permit P39923 to align with the alternate proposal preferred by BCC for the return of the sector gates to the Place, the permit would be equally futile. This is because BCC’s proposal would require the consent of V/Line (the government asset manager for the works) and VicTrack (the owner of the sector gates and land on which the works are to occur), which had not been sought or given.

### **Committee discussion and conclusion**

- 76.** The Committee notes submissions made by BCC and V/Line in relation to futility and sections 93(3) and 93(3A) of the Act.
- 77.** The Committee is not persuaded that BCC has demonstrated it is the owner or government asset manager of the *part of the registered place or registered place* to which permit P39923 applies in accordance with section 93(3A), nor that its consent is required in order for permit P39923 to be valid.
- 78.** The Committee notes the material included in V/Line’s submissions demonstrating its role as government asset manager for the registered place, and VicTrack as the owner of the registered place. Specifically, the focus of the Committee must primarily be on the proposed locations for the display, as distinct from reinstatement, of the sector gates, and accepts the legal status of V/Line and Vic Track with respect to those locations.
- 79.** Based on the information provided, the Committee is not persuaded that permit P39923 would be rendered nugatory in the absence of consent provided by BCC.
- 80.** The Committee finds that permit P39923 is not futile, and has proceeded accordingly.

### **Condition 1 - extent of registration for the Place**

#### **Summary of submissions**

- 81.** In its request for a permit preview, BCC submitted that condition 1 be deleted because permit P39923 applies to a heritage place that is *not* listed as part of the registered place. It was the view of BCC that:

*The proposed works take the heritage fabric outside the heritage place, and importantly, outside the heritage context not in accordance with accepted conservation standards.*

- 82.** V/Line submitted that it is incorrect that the works approved by permit P39923 will result in heritage fabric being placed ‘outside the current extent of the registered place’.
- 83.** In support of this view, V/Line referred to the written extent of registration for the Place, which states (emphasis added by V/Line in submissions):

*Extent:*

*1. All the buildings and structures known as the Ballarat Railway Complex:*

*Ballarat B signal box, including signal lever frame and all fittings, one set of associated sector gates at Lydiard Street and all gate and signal control rodding within the area adjoining the signal box shown hatched B21;...*

*and shown on Plans 602746/1-602746/6 inclusive, held by the Executive Director, Heritage Victoria,*

*2. The land marked L1, L2, L3 and L4 on Plan Nos. 602746/1-602746/6 inclusive ... being all of the land described in Certificate of Title Volume 1882 Folio 376320, Volume 386 Folio 77069 and Volume 2863 Folio 572428 and Allotment 2C Section B3 in the Township of Ballarat East, but excluding an 'operating corridor' as shown on Plan Nos.602746/1- 602746/6 inclusive, held by the Executive Director, Heritage Victoria.*

- 84. Based on this information, it was the concluding view of V/Line that the sector gates form part of the registration for the Place in their own right, and remain so regardless of where they are located. It was noted that the 'operating corridor' referred to in the written extent above, the original location of the sector gates, was not considered to be registered land.
- 85. It was the conclusion of V/Line that the sector gates currently form part of the registered place, and that this will not change in accordance with the works approved by permit P39923. V/Line therefore agreed that condition 1 was superfluous and could be deleted.
- 86. The Executive Director agreed with the submissions of V/Line regarding the extend of registration for the Place, and was satisfied that condition 1 could be deleted from permit P39923.

### **Committee discussion and conclusion**

- 87. The Committee accepts the interpretation of the registered extent for the Place as set out by V/Line. The Committee agrees that the sector gates form part of the registration for the Place, regardless of where they are located, but only because permit P34664 ensured the continuance of a link or nexus to the registered place. Conceivably, had the retrieved portions of the original sector gates, following the 2020 destruction by a train, simply been removed to storage in a maintenance yard and, say, then moved to some railway museum as interesting artefacts, without the benefit of P34664, then it would be difficult for the gates to remain considered part of the registered extent for the Place 'wherever located'. The Committee notes that the land forming the 'operating corridor', being the original and historical location for the sector gates, is not part of the registered extent for the Place. The Committee is satisfied that no amendment to the registration for the Place is required in order to lawfully acquit the works approved by permit P39923.
- 88. The Committee notes that all parties present at the Hearing agreed that condition 1 could be deleted, albeit not necessarily for the same reasons.
- 89. The Committee accepts this agreed position, and determines to delete condition 1 from issued permit P39923.

### **Conditions 4 and 9 – balancing impacts to cultural heritage significance with other considerations required under section 101(2) of the Act**

#### **Summary of submissions**

- 90. BCC submitted that conditions 4 and 9 of permit P39923 required amendment to ensure an appropriate heritage outcome. BCC submitted that the Act:  
  
*requires the best heritage outcome be pursued, consistent with other legal obligations.*
- 91. It was the submission of BCC that in issuing permit P39923, the Executive Director had prioritised operational convenience over cultural heritage significance, and that this balance has been drawn incorrectly.
- 92. BCC submitted that it was not satisfied that the works allowed by permit P39923 represented the only possible outcome. BCC disputed that other options had properly been considered in V/Line's application for, and the Executive Director's determination of, permit P39923.
- 93. BCC called and adopted the expert evidence of Professor Richard Mackay AM in relation to heritage.
- 94. It was the opinion of Prof Mackay that the sector gates are integral to the cultural heritage significance and the 'completeness' of the Place. In his statement of expert evidence, Prof Mackay rejected the assertion of the Heritage Impact Statement for permit application P39923 that:

*the sector gates [are] among those elements performing a 'supporting role' at the heritage place, rather than those elements that are 'necessary' for the place to*

*demonstrate its significance. The [draft Conservation Management Plan for the Place] found that the gates and other elements supported the 'operation of the principal buildings'.*

**95.** In response to the above, it was the expert opinion of Prof Mackay that:

*a fundamental attribute of the Ballarat Railway Complex is the ability to demonstrate how a regional rail complex operated. The level crossing is part of the complex, and the interlocking mechanising and sector gates are part of its operations. Therefore, in my opinion, the sector gates are part of the 'completeness' of the Ballarat Railway Complex and are necessary to demonstrate its significance.*

**96.** It was the view of Prof Mackay that P39923's permission to return the sector gates to a location parallel to the tracks, in what he considered to be 'outside' of the level crossing context, was a poor heritage outcome. It was the view of Prof Mackay that better heritage outcomes were available that had not been considered.

**97.** Prof Mackay accepted the need to ensure a safe and compliant working environment for the level crossing located at Lydiard Street, but put forward the view that:

*the approach to deriving the optimal outcome for a 'State' significant heritage item should not merely defer to safe work requirements (such as the Rail Safety National Law), it should seek to meet those requirements, while maximising retention of heritage significance.*

**98.** In his statement of expert evidence, Prof Mackay referred to article 9.1 of the Burra Charter, which states that 'relocation is generally unacceptable unless this is the sole practical means of survival'. It was the opinion of Prof Mackay that the approved works associated with P39923 had not established the approved relocation proposal as being 'the sole practical means of survival' for that heritage fabric.

**99.** Prof Mackay questioned whether the prospect of moving the current pedestrian crossing had been adequately considered or pursued, which would allow the sector gates to hang from their original gate posts and return as close as possible to their original location.

**100.** In cross examination at the Hearing, Prof Mackay did not accept that it had been properly demonstrated by V/Line that hanging the sector gates from their original posts would result in unsafe and unacceptable pedestrian access across the rail corridor.

**101.** Prof Mackay supported amendments to conditions 4 and 9 of permit P39923 as requested by BCC.

**102.** It was the submission of V/Line that conditions 4 and 9 of permit P39923 should not be amended as requested by BCC.

**103.** It was the submission of V/Line that the Executive Director *must* consider multiple factors set out by section 101(2) of the Act when determining whether to issue or refuse a permit application. In addition to the consideration of the extent to which a permit application may detrimentally impact the cultural heritage significance of a registered place or object [101(2)(a)], the Executive Director is compelled to consider other factors, including:

- *Section 101(2)(b) – the extent to which the application, if refused, would affect the reasonable or economic use of the registered place or registered object;*
- *Section 101(2)(d) – if the 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.*

**104.** It was the position of V/Line that the Lydiard Street level crossing area is a highly complex transport interface of rail, road and pedestrian operations, and that V/Line and VicTrack are bound by a complex framework of Victorian and Commonwealth legislation including the Rail Safety National Law<sup>1</sup>. As such, it was the position of V/Line that sections 101(2)(b) and 101(2)(d) are highly relevant in this matter.

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<sup>1</sup> 'Rail Safety National Law' refers to *Rail Safety National Law (South Australia) Act 2012*, which was adopted in Victoria in 2013 in the form of *Rail Safety National Law Application Act 2013* (Vic).

**105.** V/Line rejected the submissions of BCC and submitted that there is nothing in the Act that requires the ‘best heritage outcome’, nor even an ‘ideal’ heritage outcome.<sup>2</sup>

**106.** It was the submission of V/Line that the requirement to balance all considerations set out in section 101(2) of the Act has been confirmed by previous Heritage Council Regulatory Committees. V/Line referred to the *ANZ Bank H0034* (2019) permit review decision which found:

*The Committee determines that the extent to which the cultural heritage significance of the Place would be negatively affected by the proposed doorway is outweighed by the extent of the negative impact on the proposed reasonable use of the broader Place bounded by Collins, Queen and Little Collins Streets.*

**107.** It was the view of V/Line that the approach above is the correct, and is reflected in the issue of permit P39923.

**108.** V/Line did not agree with Prof Mackay that the sector gates are part of the overall ‘completeness’ of the Place and did not agree that the sector gates are necessary to support the State-level cultural heritage significance of the Place. In support of this position, V/Line referred to the Draft Conservation Management Plan for the Place, being prepared at the time of the hearing by Lovell Chen for V/Line, which did not identify the level crossing and associated fabric as a ‘significant heritage zone’.

**109.** V/Line submitted that the spatial arrangement for the Place had changed over the years, including the transition to modern signalling equipment (with heritage signalling equipment no longer being operational), the construction of a multi-storey carpark, bus interchange and Quest serviced apartments, and changes associated with the redevelopment of the northern portion of the Place.

**110.** V/Line rejected alternative proposals for returning the sector gates to the Place as put forward by Prof Mackay on the grounds that:

- Returning the sector gates to operational use was not safe or compliant with National Rail Safety Law;
- Returning the sector gates to a static position across Lydiard Street was not feasible and would require the close of Lydiard Street to vehicular traffic; and
- Returning the sector gates to their original gate posts hung at varying angles would result in the need to either close or move the existing pedestrian crossings, which would reduce ease of use and increase safety risks for road and rail users and pedestrians. This option would be unacceptable in accordance with National Rail Safety Law. Additionally, this option may require truncation of the gates, thereby detrimentally impacting their integrity.

**111.** V/Line referred to and adopted the expert evidence of Mr Peter Nelson-Furnell regarding V/Line and VicTrack’s obligations under National Rail Safety Law. It was the view of Mr Nelson-Furnell that there was no way of returning the sector gates to being hung from their gate posts without unacceptably compromising the safety of road and rail users and pedestrians.

**112.** Mr Nelson-Furnell gave evidence regarding the pedestrian use of, and behaviour at, the Place, particularly noting research demonstrating that any relocation of the pedestrian crossing further away from an identified ‘desire line’ across the level crossing would lead to increased risk-taking from pedestrians.

**113.** When cross-examined at the Hearing, Mr Nelson-Furnell put forward the view that Prof Mackay’s evidence did not provide enough information for Mr Nelson-Furnell to undertake a fulsome and measured assessment of any alternative proposal to hang the rail sector gates off their gate posts at varying angles.

**114.** It was the concluding position of Mr Nelson-Furnell that the works allowed by permit P39923 provide an acceptable safety outcome, and therefore conditions 4 and 9 should not be amended.

**115.** Regarding heritage matters, V/Line called and adopted the expert evidence of Ms Suzanne Zahra. It was the opinion of Ms Zahra that, on balance, the works allowed by permit P39923 provide an

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<sup>2</sup> In the context of what the Committee has explained in paragraphs 61 and 62, the Committee does not accept these propositions. On the contrary, the Council through its committees should never stray from seeking an optimum heritage protection and conservation outcome, providing that is within the scope of a committee’s powers depending upon the particular type or nature of the review under consideration.

appropriate heritage outcome. On this basis, Ms Zahra rejected the position of BCC that conditions 4 and 9 of the permit P39923 require amendment.

116. Ms Zahra did not accept the submissions of BCC that the heritage outcome of permit P39923 is unacceptable in accordance with the Act.
117. Ms Zahra put forward the view that the works endorsed under permit P39923 provide for the relocation of the sector gates in an acceptable context to appreciate the significance of the Place, and that the works properly balance the Place's heritage significance with the legislative framework within which it operates and its ongoing operation for rail purposes.
118. Ms Zahra accepted the view of Prof Mackay that a 'preferred heritage outcome' of returning the sector gates to the level crossing may have been achieved, were the pedestrian crossings able to be relocated. However, it was the opinion of Ms Zahra that this option and others had been thoroughly investigated during the permit application and assessment process. Ms Zahra indicated she was satisfied such options were not feasible due to the increased risk to safety.
119. Ms Zahra stated that she was satisfied that the interpretation requirements set out by condition 9 will facilitate an understanding of the historical use of the relocated sector gates in the positions endorsed by permit P39923.
120. It was the concluding view of Ms Zahra that permit conditions 4 and 9 should not be amended to align with the submissions of BCC.
121. The Executive Director shared the view of V/Line that conditions 4 and 9 should not be amended to align with the submissions of BCC.
122. The Executive Director rejected the submissions of BCC that the balance of considerations set out in section 101(2) of the Act had been drawn incorrectly.
123. In verbal submissions at the Hearing the Executive Director submitted that impacts to the heritage significance of the Place had been appropriately considered in issuing permit P39923.
124. The Executive Director accepted and agreed that returning the sector gates to operation would be the ideal heritage outcome, and stated in verbal submissions that this was the Executive Director's starting position at the time of issuing permit P34664 in 2021.
125. The Executive Director submitted that it was satisfied that rigorous work had been completed to find an appropriate relocation setting for the sector gates, forming the basis for its determination to issue permit P39923.
126. The Executive Director submitted that it was unsure as to how BCC arrived at the conclusion that insufficient work to investigate relocation options for the sector gates had been undertaken. The Executive Director submitted that it was difficult to recall another permit application that had been subject to as much consultation, discussion and consideration as permit application P39923 had been.
127. The Executive Director submitted that any alternative proposal to hang the sector gates from their gate posts requiring their truncation or 'cutting down' would likely be inappropriate, and not a fair representation of their original use. It was the view of the Executive Director that the proposal approved by permit P39923 allow the intactness and integrity of the sector gates to be retained.
128. The Executive Director submitted that the Act requires the Executive Director to consider impacts to cultural heritage significance and other matters including safety and the operation of public authorities. The Executive Director did not support the position of BCC that conditions 4 and 9 require amendment.
129. NTAV did not specifically make submissions in relation to conditions 4 and 9. NTAV objected to the works as endorsed by issued permit P39923.
130. It was the position of NTAV that:

*Reconstruction must be prioritised as the permanent and long-term solution. We strongly believe that this is the only outcome which will ensure the ongoing conservation as one of the state's most significant railway precincts, satisfy community expectations, and ensure swift and safe access through Lydiard Street for motorists, pedestrians, and rail users. We submit that the permanent replacement of [the sector gates] with boom gates will adversely impact on the significance of the Ballarat Railway Complex as a whole.*

- 131.** NTAV acknowledged in submissions that V/Line had an obligation to ensure the safety of its rail operations, but was not satisfied that options set out in the permit application for P39923 had 'meaningfully explored or proven' that operational reinstatement of the sector gates was not reasonably practicable.

### **Committee discussion and conclusion**

- 132.** In line with paragraphs 57-62 above, the Committee does not consider itself empowered to alter the issued permit in a way which introduces an alternative proposal which has not been subjected to the rigour of the permit application process.
- 133.** This above notwithstanding, the Committee wishes to record its views regarding the heritage outcome of the proposal allowed by P39923.
- 134.** It is the position of the Committee that the works allowed by permit P39923 ultimately will result in a heritage outcome that is disappointing. The Committee is of the opinion that a better heritage outcome may have been available to V/Line than what was put forward in permit application P39923. The Committee is of the view that the treatment of the decommissioned nineteenth century sector gates at the Ballarat East level crossing at Humffray Street north is preferable, indeed it is exemplary. Although it is conceded that the Humffray Street gates have not suffered catastrophic damage, and it is noted that the interface between road and rail at Humffray Street appears to be less complex compared to Lydiard Street, the sensitive treatment of the gates at Humffray Street is indicative of a demonstrative effort to achieve a desirable heritage outcome, albeit without gates still operating. Further, the Committee notes that the sector gates were presented during their operational life as a pair – either across the road or across the rail corridor – only momentarily breaking that formation when in transit. It is the view of this Committee that a preferable heritage outcome may have been available to V/Line which allowed this formation to be better appreciated.
- 135.** The Committee does, however, recognise the merits of the Executive Director's position that the proposal approved by permit P39923 does allow for the intactness and integrity of the sector gates to be retained, albeit as little other than an interpretative display, with no functional use. The Committee further records its view that, in the event that the Lydiard Street level crossing should become closed to vehicular traffic in the future, it would be highly desirable for the sector gates to be returned to their original location, closed in a static position across Lydiard Street. If that were to be achievable, then a far better means of interpreting the sector gates would be the outcome, in particular creating more of the heritage ambiance. The Committee accepts that the current proposal requires no 'cutting down' or truncation to the sector gates, and thereby presents a reversible option. In this regard, the Committee did not agree that a proposal requiring cut down or truncated gates, albeit suspended from posts in a more historically accurate location, as contemplated by the expert evidence of Professor Mackay, was a better option. To a certain extent the Committee preferred the evidence of Professor Mackay over that of Ms Zahra with respect to the significance of the sector gates themselves and their contribution as part of the heritage place, but it was that acceptance of that significance of a full gate which led the Committee to differ with respect to the thought of shortening the gates.
- 136.** The Committee accepts that sections 101(2)(b) and 101(2)(d) *must* be considered when determining whether to issue or refuse an application. The Committee is satisfied with the submissions made by V/Line and the Executive Director on this point. Although the review before the Committee was brought only with respect to conditions pursuant to section 106(2), it would be illogical for the considerations in s.101(2)(d) not to be responsibly weighed in this matter. In short, to consider whether the treatment of the sector gates would '*unreasonably detrimentally affect the ability of the public authority to perform a statutory duty*' arises when rail safety comes into the equation. Although the Committee did not have a review of the grant of permit P39923 before them, rather the Committee had a limited condition review, nevertheless V/Line placed great stress on the safety considerations arising out of the alternative propositions put before the Committee by BCC and the National Trust. The Committee had the benefit of hearing the evidence of Mr Nelson-Furnell addressing rail safety considerations, including the movement of pedestrians crossing the railway line. In circumstances where Mr Nelson-Furnell's expert evidence was before the Committee, and no other safety evidence was called by other parties, it would be difficult for the Committee to take a different stance to that of such an expert witness. Whereas the Council and its committees comprise members who have relevant expertise as required by section 10 of the Act, and so will frequently bring their own expert experience to a hearing to assist in Committee deliberations, in

the area of rail safety, specific experience and expertise would be difficult to find amongst Council members. In such circumstances, a cautious approach is demanded of the Committee.

- 137.** The Committee determines not to vary conditions 4 and 9 to align with the position and submissions of BCC.
- 138.** The Committee nevertheless makes the following comment. In the context of the placement of the sector gates being an exercise intended to provide railway heritage installations, using the gates as displayed artefacts for historic interpretation, adherence to the 'package' of conditions in permit P39923 requires effective interpretation and ongoing retention and maintenance of that interpretation. Without meeting that objective, apart from the retention of original historic fabric, albeit in a different location, there would be little purpose in going to the trouble of placing the gates as proposed. During the Committee's site inspection, it was noted the existing interpretation board regarding the sector gates was degraded, weathered and suffering graffiti, as were other parts of the historic place. The Committee expects vigilant and ongoing attention to ensuring the on-site interpretation of the historic place, especially that created for the sector gates, never wanes.

### **Without prejudice permit conditions**

- 139.** At the conclusion of the Hearing, V/Line prepared and submitted 'without prejudice' permit conditions with marked up amendments to reflect the agreed position of parties in attendance at the Hearing that condition 1 should be deleted.
- 140.** Proposed amendments by V/Line contemplated changes to condition 2 regarding the timeframe in which the permission granted by permit P39923 would expire. V/Line proposed to change this stipulated period from being 'within one (1) year of the gazettal of the revised extent of registration referred to condition 1', to 'within two (2) years of the original date of this permit.'
- 141.** The Executive Director supported the without prejudice amended permit exemptions as drafted by V/Line.
- 142.** Noting there remained a dispute between BCC and V/Line as to whether or not further amendments to conditions 4 and 9 were required, BCC did not object to the without prejudice amended permit conditions as submitted by V/Line.

### **Committee discussion and conclusion**

- 143.** The Committee notes the general agreement between all parties in attendance at the Hearing regarding the without prejudice permit conditions as drafted and submitted by V/Line.
- 144.** In light of the Committee's determination not to vary conditions 4 and 9 to align with the submissions of BCC, the Committee determines to accept the without prejudice permit conditions as submitted by V/Line, and to vary the conditions of permit P39923 in accordance with section 108(7)(b).
- 145.** The varied permit P39923 is provided at **Attachment 1**.

### **Conclusion**

- 146.** After considering all submissions received in relation to the permit review and after conducting a Hearing and accompanied site inspection, the Heritage Council has determined, pursuant to section 108(7)(b) of the *Heritage Act 2017*, to vary the determination under review by varying the conditions of permit P39923.
- 147.** The Committee thanks all interested parties for their submissions and participation in the Hearing.

# Attachment 1

## Permit P39923 (Varied)

**THE PERMIT ALLOWS:** The return from offsite storage of significant heritage fabric (with associated conservation works) which was approved for removal from the Lydiard Street level crossing in accordance with permit P34664 in October 2021, the decommissioning of salvaged but now surplus heritage fabric, and the installation of both the returned heritage fabric and new elements within the setting of the Lydiard Street level crossing, generally in accordance with the following documents:

PUBLIC TRANSPORT VICTORIA V/LINE KINSLEY GROUP LYDIARD STREET, BALLARAT HERITAGE GATES  
RENEWAL FINAL DESIGN ISSUE (NFC) 2 JULY 2024

1. 1731\_C0001 LOCALITY PLAN AND DRAWING INDEX REVISION C
2. 1731\_C0002 GENERAL NOTES AND SPECIFICATIONS REVISION C
3. 1731\_C0011 GENERAL ARRANGEMENT PLAN REVISION C
4. 1731\_C0015 TYPICAL CROSS SECTIONS - SHEET 1 REVISION C
5. 1731\_C0016 TYPICAL CROSS SECTIONS - SHEET 2 REVISION C
6. 1731\_C0017 TYPICAL CROSS SECTIONS - SHEET 3 REVISION C
7. 1731\_C0021 TYPICAL DETAILS - SHEET 1 REVISION C
8. 1731\_C0022 TYPICAL DETAILS - SHEET 2 REVISION C

THE FOLLOWING CONDITIONS APPLY TO THIS PERMIT:

\_\_\_START\_NUMBERED\_LIST\_\_\_

1. The permission granted for this permit will expire if one of the following circumstances applies: the permitted works have not commenced within two (2) years of the original date of issue of this permit, or are not completed within five (5) years of the original date of issue of this permit unless otherwise agreed in writing by the Executive Director Heritage Victoria.
2. The Executive Director is to be given five working days' notice of the intention to commence the approved works.
3. Prior to the commencement of any of the works approved by this permit, an updated set of issued for construction drawings are to be provided to the Executive Director for review and approval. The plans must be generally in accordance with the plans listed in the preamble to this permit but modified to show:
  - Deletion of the 'proposed addition to Victorian Heritage Register Overlay – VHR H0902';
  - Deletion of the words 'outside Heritage Victoria Site Boundary'.Once these have been endorsed a set will be provided to the permit holder for their records. A further set will form part of the documentation associated with the permit.
4. Prior to the commencement of any of the works approved by the permit, an experienced consulting conservation architect is to be nominated in writing to the Executive Director, Heritage Victoria, who shall approve the nomination in writing. The approved conservation architect shall then be appointed by the permit holder to provide advice to assist with the fulfilment of the approved works including the requirements of Condition 5 and Condition 6.
5. Once appointed, the consulting conservation architect approved under Condition 4 shall prepare a methodology/work statement which will demonstrate the appropriate means of achieving minimal detriment to the interlocking timber sector gates, gate braces, rear stays, cast iron gate posts and square rotating shafts during their reinstatement at the broader

Lydiard Street level crossing setting by compliance with best conservation practice. The methodology/work statement shall be submitted to the Executive Director, Heritage Victoria for review and endorsement. Once endorsed, a copy of the endorsed methodology/work statement will be provided to the permit holder, allowing the reinstallation works to proceed. Another endorsed copy will then form part of the documentation associated with the permit.

6. Prior to the commencement of any of the works approved by this permit, the consulting conservation architect approved under Condition 4 must prepare a Heritage Maintenance and Management Plan (HMMP) which must be submitted to the Executive Director for approval. Once approved, the HMMP will be endorsed and will then form part of the documentation associated with the permit. The plan must include:
  - Detail of the maintenance actions and frequency required to achieve the ongoing management of the interlocking timber sector gates, their supporting posts and stays, and registered elements and the interpretation at the level crossing;
  - Detail of the approach proposed for the management of other works that are of a non-regular nature, eg repair of damage, surface water management, management and removal of graffiti by an approved method, and replacement of materials that have reached end of life;
  - Nomination of the authority responsible for carrying out different aspects of the maintenance and management works affecting the heritage place.
7. Prior to the commencement of any of the works approved by this permit, a financial security in the form of an unconditional bank guarantee in favour of the Heritage Council of Victoria (ABN 87 967 501 331) regardless of the financial status of the permit holder, is to be lodged with the Executive Director. The sum of the financial security will be \$500,000.00 (Five Hundred Thousand Dollars). The period of validity of the financial security is to be unspecified. The financial security shall be released on written application to the Executive Director, once the permit expires, subject to the satisfactory completion of the works approved by the permit including any identified actions within the Heritage Maintenance and Management Plan required by Condition 6.
8. Prior to the commencement of any of the works approved by this permit, the applicant must submit a heritage interpretation plan to the Executive Director, Heritage Victoria for approval. Once approved, the plan will be endorsed and will then form part of the documentation associated with the permit. The plan must be prepared by a suitably qualified interpretation specialist and must:
  - Outline an approach to content, graphics and design for the interpretation including a setout plan showing the location of the proposed interpretation devices within the immediate surrounds of the Lydiard Street level crossing;
  - Communicate the role of the interlocking timber sector gates and incorporate a timeline of their history up to and including the events of May 2020 and enable the relationship between Signal Box B and the operation of the interlocking timber sector gates to be understood;
  - Provide the full text and images for two (2) formal interpretation devices to be installed within the immediate surrounds of the Lydiard Street level crossing;
  - The interpretation devices are to be fabricated and installed within the period of permit validity.
9. Within six (6) months of the reinstallation of the elements of the heritage place at the Lydiard Street level crossing, an inventory of elements removed from the level crossing in accordance with permit P34664 and surplus to the reinstallation and interpretation of the interlocking timber sector gates is to be prepared and provided to the Executive Director, Heritage Victoria, for review and endorsement. Once this has been reviewed and endorsed, a copy will be

returned to the permit holder. Another endorsed copy of the inventory will form part of the documentation associated with the permit.

10. At the date of expiration of the permit, the approved heritage conservation architect required under condition 4 must submit to the Executive Director Heritage Victoria, for their approval, a brief written report of acquittal, confirming that any identified actions required within the Heritage Maintenance and Management Plan and which have arisen during the during the period of validity of the permit have been completed. The acquittal report may form the basis of the applicant's submission to the Executive Director in regard to requesting the return of the bank guarantee lodged in accordance with Condition 7.
11. Should further minor changes in accordance with the intent and approach of the endorsed documentation become necessary, correspondence and supporting documentation must be prepared and lodged in accordance with the permit condition for endorsement by the Executive Director Heritage Victoria. If the Executive Director considers that the changes are not minor, an amendment to the permit or a new application will be required.
12. Approved works or activities are to be planned and carried out in a manner which prevents damage to the registered place. However, if other previously hidden original or inaccessible details of the object or place are uncovered, any works that may affect such items must immediately cease. The Executive Director Heritage Victoria must be notified of the details immediately to enable Heritage Victoria representatives to inspect and record the items, and for discussion to take place on the possible retention of the items, or the issue of a modified approval.
13. All works must cease, and Heritage Victoria must be contacted if historical archaeological artefacts or deposits are discovered during any excavation or subsurface works.
14. The Executive Director Heritage Victoria must be informed when the approved works have been completed.
15. The works approved by this permit must be carried out in their entirety unless otherwise agreed in writing by the Executive Director Heritage Victoria.

\_\_END\_NUMBERED\_LIST\_\_

**NOTE THAT PERMISSION HAS BEEN GIVEN FOR INSPECTIONS OF THE PLACE OR OBJECT TO BE UNDERTAKEN DURING THE CARRYING OUT OF WORKS, AND WITHIN SIX (6) MONTHS OF NOTIFICATION OF THEIR COMPLETION.**

**TAKE NOTICE THAT ANY NATURAL PERSON WHO CARRIES OUT WORKS OR ACTIVITIES NOT IN ACCORDANCE WITH THE PERMIT OR CONDITIONS IS GUILTY OF AN OFFENCE AND LIABLE TO A PENALTY OF 120 PENALTY UNITS (\$23,710.80 FROM 1 JULY 2024) OR IN THE CASE OF A BODY CORPORATE 600 PENALTY UNITS (\$118,554 FROM 1 JULY 2024) UNDER s104 THE HERITAGE ACT 2017.**

**WORKS UNDERTAKEN WITHOUT A PERMIT OR PERMIT EXEMPTION CAN INCUR A FINE OF UP TO 4800 PENALTY UNITS (\$948,432 FROM 1 JULY 2024) FOR A NATURAL PERSON OR 5 YEARS IMPRISONMENT OR BOTH AND UP TO 9600 PENALTY UNITS (\$1,896,864 FROM 1 JULY 2024) IN THE CASE OF A BODY CORPORATE UNDER SECTION 87 OF THE HERITAGE ACT 2017.**

**THE ATTENTION OF THE OWNER AND/OR APPLICANT IS DRAWN TO THE NEED TO OBTAIN ALL OTHER RELEVANT PERMITS PRIOR TO THE COMMENCEMENT OF WORKS.**