

Heritage Council Regulatory Committee

Nicholas Building, 31–41 Swanston Street, Melbourne,
Melbourne City (H2119)

Record of reasons in relation to conclusions on the recommendation to amend the Victorian Heritage Register, and, on the question of confidentiality of nominators.

Hearing – 15 August 2024

Members – Mr Justin Naylor (Chair), Dr Helen Doyle, Mr Adrian Finanzio SC

Decision Date – 23 December 2024

PREAMBLE

This matter was commenced as a recommendation to the Heritage Council made by the Executive Director, Heritage Victoria, on 18 September 2023, pursuant to section 62 of the *Heritage Act 2017* ('the Act').¹ The Executive Director recommended that the Heritage Council amend the Victorian Heritage Register ('the Heritage Register') in the manner specified in the application, by:

- amending the reasons why the place is included in the Heritage Register based on the Heritage Council criteria; and
- determining categories of works or activities which may be carried out in relation to the place for which a permit is not required (permit exemptions).

As matters have transpired, and as these reasons explain, the application to amend the Heritage Register was largely misconceived.

In the course of the preliminary procedural stages of the hearing an important issue arose as to whether or not it was permissible or desirable for the identity of the nominator to be kept confidential from the owner.

The Committee considered this question after having received submissions from all the parties, and ultimately concluded that the landowner was entitled to know the identity of the nominator.

These reasons record the deliberations and conclusions of the Committee in relation to:

- 1) the application to amend the Heritage Register (on pages 4–12 of this determination); and
- 2) the questions of confidentiality of the nominators, as they arose in the course of the proceeding (on pages 13–22 of this determination).

¹ Amendments to the *Heritage Act 2017* ('the Act') commenced operation on 1 February 2024. Pursuant to Part 14 of the amended Act transitional provisions apply to various processes. Section 265 of the amended Act stipulates that the unamended Act applies to all nominations made before 1 February 2024, to which a recommendation had already been made as of 1 February 2024. As the Executive Director's recommendation was made in 2023, this matter was determined pursuant to the Act as unamended prior to 1 February 2024.

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.

APPEARANCES/HEARING SUBMISSIONS

EXECUTIVE DIRECTOR, HERITAGE VICTORIA ('THE EXECUTIVE DIRECTOR')

The Executive Director made a recommendation to the Heritage Council to amend the existing registration of the Nicholas Building in the Victorian Heritage Register. The Executive Director was a party to the hearing and made written and oral submissions. The Executive Director was represented by Mr Geoff Austin, Manager, Heritage Register and Ms Clare Chandler, Senior Heritage Officer (Assessments).

DYMBRO NOMINEES PTY LTD, LYNNLEA NOMINEES PTY LTD, MYGRO PTY LTD AND AVILLINO PTY LTD ('THE OWNERS')

Dymbro Nominees Pty Ltd, Lynnlea Nominees Pty Ltd, Mygro Pty Ltd, and Avillino Pty Ltd together are the registered proprietors of the Nicholas Building. The owners filed a section 44 submission objecting to the Executive Director's recommendation. The owners engaged Gadens lawyers to represent them throughout the course of the proceedings, and Ms Emily Porter SC and Ms Ella Delany of Counsel. Ms Kate Gray, Principal and Director, Lovell Chen, was engaged by the owners as an expert witness in the field of heritage. The owners made written and oral submissions. The hearing was adjourned before the owners called the expert witness.

NICHOLAS BUILDING ASSOCIATION

The Nicholas Building Association was represented by Dr Dario Vacirca, President of the Association. The Nicholas Building Association represents the interests of the community of tenants of the Nicholas Building. The Nicholas Building Association engaged expert witnesses Dr Cristina Gardūno Freeman and Ms Natica Schmeder in the fields of architecture and heritage. The Nicholas Building Association made written submissions, the hearing was adjourned part heard before the Nicholas Building Association made oral submissions or called expert witnesses.

INTRODUCTION/BACKGROUND

THE PLACE

- 01.** The Nicholas Building was included in the Heritage Register on 1 November 2007. On 20 June 2022 the Executive Director accepted an application to amend the registration of the Nicholas Building in the Heritage Register.
- 02.** On 18 September 2024 the Executive Director made a recommendation to the Heritage Council, that it amend the existing registration of the Nicholas Building, pursuant to section 62 of the Act.
- 03.** The Nicholas Building is described as follows:

The Nicholas Building at the corner of Swanston Street and Flinders Lane, Melbourne was designed by architect Harry Norris and constructed by Nicholas Buildings Pty Ltd in 1925-26. It does not appear that the Nicholas company ever occupied the building, rather it was built as a speculative office building development.

The building contains nine floors and was designed to terminate at the 132 ft (40.3 metres) height limit in force in the City of Melbourne from 1916 until 1957. A consistent skyline was established in Melbourne as a result of this height limit. Influenced by the design of commercial buildings in America, the Nicholas Building adopts a Renaissance palazzo form with mannered Greek revival styling in its facade treatment. The two main facades feature an implied piano nobile, containing two floors with a Doric colonnade, and heavy corniced attic storey above. Between these two levels, the mass of the facade is dominated by giant Ionic pilasters which divide the upper facades into bays and provide verticality to the composition.

The Nicholas Building is a hybrid structure with a steel frame adopted for the basement and first three floors, and reinforced concrete for the upper floors. Economic considerations influenced this decision, with maximum floor area achieved at the favourable lower levels, and a cheaper construction method, and subsequent reduced floor area, used for the upper floors. Grey terracotta faience, manufactured as 'Granitex' by Wunderlich, was used to clad the exterior of the building, selected for the longevity of the material and ease of maintenance.

The basement, ground, and first floor were designed as retail spaces and the interior includes a glazed leadlight barrel vaulted arcade at ground level, Cathedral Arcade, providing a link between Swanston Street and Flinders Lane. The shop fronts, particularly at first floor level, remain largely intact and few major structural alterations have been made to the internal fabric of the building. An addition was made to the ground floor of the building in 1939. The Coles retail company occupied the ground floor and basement until 1967.

Planned around a central light well, the top six floors are utilitarian, comprising of an outer ring of studio spaces around the building's perimeter and second tier of studio spaces that back onto two sides of the light well. The light well is enclosed on a third side by the lift and stair core and is open to the corridor that encircles the floor between the two rows of studio spaces on its fourth wall. The corridor spaces are relatively spartan, with cream tiled walls, linoleum floors and varnished timber joinery to the doors and windows. Other features throughout the building include letter chutes and directory boards made by Brooks Robinson shopfitters on all floors and the manually operated passenger lifts.

Of interest are the remnant signs and elements of decoration throughout the building indicating the building's diverse range of activities and occupants. Initially the building was home to businesses that included those associated with the Flinders Lane garment trade, commercial artists, medical practitioners and architects. Harry Norris maintained his architectural office at the Nicholas Building until 1955. The building continues to house some of these activities, particularly those associated with fashion, but it has more recently housed studios and exhibition spaces for numerous artists.²

² Taken verbatim from the [Victorian Heritage Database](#) webpage for the Nicholas Building (H2119).

PLAN OF EXTENT OF REGISTRATION

04. The Extent of Registration for the Nicholas Building is shown in Diagram 2119 held by the Executive Director.

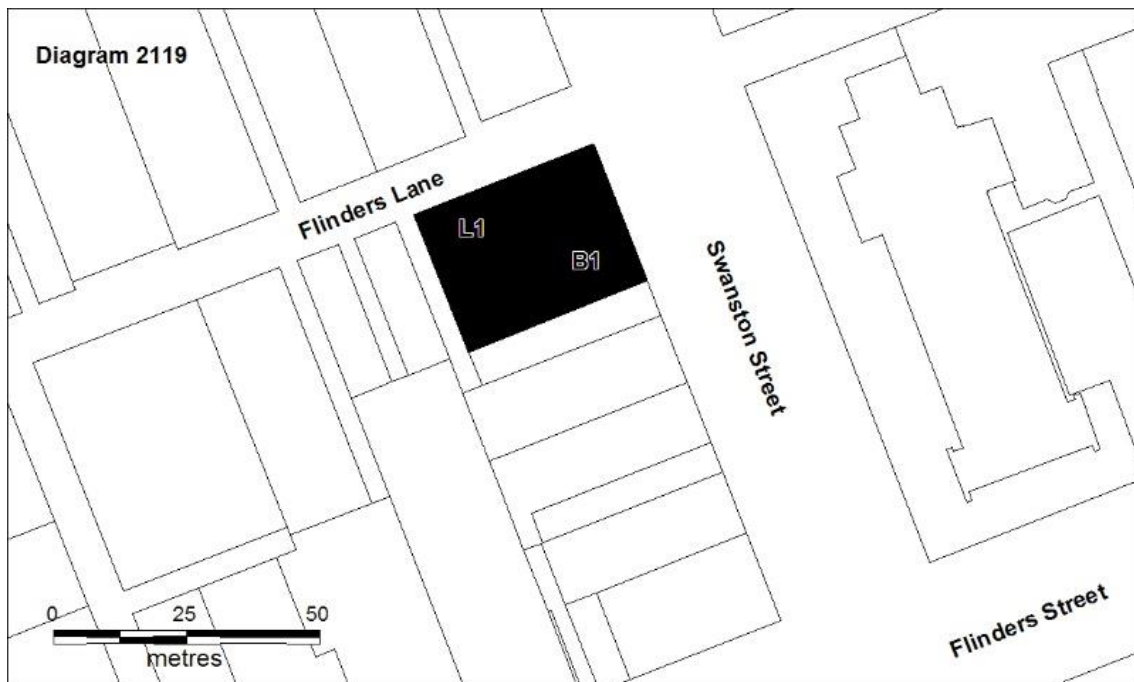


Figure 1. Extent of Registration of the Nicholas Building (Source: [Victorian Heritage Database](#) entry for the Nicholas Building)

05. The Extent of Registration comprises the following:
1. All of the structure shown as B1 on Diagram 2119 held by the Executive Director known as the Nicholas Building.
 2. All of the land shown L1 on Diagram 2119 held by the Executive Director being all of the land described in Certificate of Title Volume 4426 Folio 042.

THE APPLICATION TO AMEND THE REGISTER

06. An application to amend the register may be made to the Executive Director under section 62 of the Act. Section 62 of the Act is brief. Section 62(1) confers power on the Heritage Council to amend or remove an item from the Heritage Register. It provides that Divisions 2 to 6 of Part 3 of the Act, apply.³
07. The effect of this provision is that an application to amend the Heritage Register is made under section 27 of the Act as though it were a nomination. Section 27(2) provides that a nomination must be made to the Executive Director in the prescribed form. Regulation 5 of the *Heritage Regulations 2017 (Vic)* ('the Regulations') provides that the prescribed form for making a nomination is at Schedule 1.
08. Importantly, there is currently no separately prescribed form for making an application to amend the Heritage Register.
09. Heritage Victoria has previously developed its own form for making an application to amend the Heritage Register. In many respects, it appropriately borrows from the prescribed form for a nomination, but in several respects it varies from the prescribed form.

³ In fact, the provisions says 'Divisions 2 to 6 of this Division'. In all likelihood, the provision meant to read: 'Divisions 2 to 6 of this Part' because this reading is the only one which makes sense.

- 10.** The form provided by Heritage Victoria asks an applicant to specify the nature of the amendment that is proposed. It does so by providing a check-box list of possible amendments to the Heritage Register as follows:

How do you want to amend a registration?

*Under s.62 of the Heritage Act 2017, the Heritage Council may amend the Heritage Register by amending or removing an item in the Heritage Register. **Please tick a box(es) below which tell us how you want to do this.***

Tick	Description
	<i>Include additional land to a Registered Place</i>
	<i>Add objects integral to a Registered Place</i>
	<i>Remove a place or object from the Victorian Heritage Register (in part or in full)</i>
	<i>Remove land which has been subdivided and has no State level cultural heritage significance</i>
<input checked="" type="checkbox"/>	<i>Amend permit exemptions</i>
	<i>Amend the category(ies) of registration</i>
<input checked="" type="checkbox"/>	<i>Amend the reasons for a registration</i>
<input checked="" type="checkbox"/>	<i>Amend the Statement of Significance</i>
<input checked="" type="checkbox"/>	<i>Correct a technical, mapping or other minor error</i>
	<i>Other</i>

- 11.** In the present case, the applicant seeking an amendment to the Heritage Register checked the categories of amendment as shown in the table above. The applicant in the present case sought amendments to:

- permit exemptions
- the reasons for a registration
- the Statement of Significance; and
- to correct a technical, mapping or other minor error.

- 12.** The form goes on to ask an applicant to explain the basis upon which they seek amendment to the Heritage Register.

- 13.** On 18 September 2023 the Executive Director purported to determine the application. The Executive Director stated that:

In accordance with section 62 of the Heritage Act 2017 (the Act), I suggest that the Heritage Council determine to:

- *Amend the reasons why the place is included in the VHR based on the Heritage Council criteria*
- *Determine categories of works or activities which may be carried out in relation to the place for which a permit is not required (permit exemptions)*

- 14.** In setting out his recommendations, the Executive Director stated:

This recommendation:

- 1) *Proposes an amendment to the reasons for registration, suggesting that the place meets the state-level threshold for social significance (Criterion G)*
- 2) *Does not propose an amendment to the extent of registration*
- 3) *Proposes minor amendments to:*
 - *the statement of significance*
 - *permit policy*

- *permit exemptions.*

4) *Proposes a new history as part of the registration documentation, should an amendment be made by the Heritage Council*

- 15.** Notwithstanding the content of the form which has been prepared by Heritage Victoria to guide applicants seeking amendment to the Heritage Register and the determination of the Executive Director, the question which arises in this case is whether any of the things proposed by the application (and determined by the Executive Director) are concerned with the content of the Heritage Register as it presently stands.
- 16.** Section 23 of the Act empowers the Executive Director to establish and maintain a register called the Victorian Heritage Register.
- 17.** Section 24 of the Act, which is headed the 'content of the Heritage Register' provides that:
The Executive Director must record in the Heritage Register
- all places and objects of State-level cultural heritage significance that are registered under this Part; and
 - all objects integral to registered places that are registered under this Part; and
 - any place in the State that is included in the World Heritage List; and
 - all historic shipwrecks and historic shipwreck artefacts to the extent they are known; and
 - all places and objects included in the Heritage Register under the Heritage Act 1995 immediately before the commencement of section 257.
(underline emphasis added)
- 18.** Section 24 of the Act provides that a place or object must be recorded in one or other of certain specified categories.
- 19.** Section 26 of the Act, under the heading 'Details to be included in the Heritage Register' provides that:
- (1) The Executive Director must include in the Heritage Register sufficient details to identify a place or object included in the Heritage Register.
 - (2) The Executive Director is not required to include the name or exact location of a shipwreck or shipwreck artefact in the Heritage Register if the name or exact location of the shipwreck or shipwreck artefact is unknown.
 - (3) If the Heritage Council determines that a place or object may be harmed if it is fully identified in the Heritage Register, the Heritage Council may direct the Executive Director to limit the identifying details in the Heritage Register to those specified by the Heritage Council.
(underline emphasis added)
- 20.** It is apparent that the statutory provisions do not require that the Register include:
- permit exemptions
 - the reasons for a registration
 - the Statement of Significance; or
 - a written history of the place or object.
- 21.** If none of these matters in fact form part of the Heritage Register, then it must follow that they cannot be the subject of an application to amend the Heritage Register, and nor can any purported decision of the Executive Director in relation to such an application be the subject of any decision by this Committee.

22. These matters were raised with the parties on the first day of the hearing. After having considered the matter, Senior Counsel for the landowner submitted that the proceedings were misconceived, and that this Committee did not have the power to grant the applications.
23. Having considered the position, the Committee adjourned the hearing to provide those parties who were without legal representation (including the Executive Director) the opportunity to consider the matters raised by the landowner. The Committee made orders requiring the landowner to first supply written submissions summarising the matters which it raised in oral argument, to be followed by an opportunity for the other parties to respond in writing. Those written submissions and the responses have been very helpful to this Committee.

PERMIT EXEMPTIONS

24. Section 92(1) of the Act provides that:

The Heritage Council, on the recommendation of the Executive Director, may determine categories of works or activities which may be undertaken in relation to any registered place, registered object or class of registered place or registered object without a permit under this Part.

(underline emphasis added)

25. Section 92(6) of the Act provides that:

The Heritage Council, on the recommendation of the Executive Director, may amend or revoke a determination made under subsection (1).

(underline emphasis added)

26. While it is usually the case that consideration to the possibility and scope of permit exemptions is given at the same time as the consideration of whether or not land or buildings should be included in the Heritage Register, it is important to note that the determination of permit exemptions (or their amendment):

- is made under the statutory authority of section 92 of the Act;
- is not a determination as to registration, but rather is one that can only be made consequent upon a place being entered in the Heritage Register.

27. Importantly, section 92 of the Act sets out the circumstances in which permit exemptions might be amended and by what means. That section does not provide for an application to be made by any person, or prescribe any particular form. The existence of these provisions regulating exemptions and their amendments tend toward the conclusion that determinations as to the scope of permit exemptions do not form part of the Heritage Register and are not amenable to amendment under section 62 of the Act, contrary to what the Heritage Victoria form suggests.

28. In fact, under section 92, permit exemptions might be varied at any time. The process of variation commences with a recommendation by the Executive Director to the Heritage Council. While the Executive Director's position might be informed by the views of interested third parties, such as the applicants in this case, there is no statutory process which would permit those third parties to commence an application seeking a determination. It is entirely at the discretion of the Executive Director whether to advance a change to permit exemptions.

29. The only way in which the merits of the proposed change to the permit exemptions could be addressed by this Committee is if it were to ignore all of the steps which have led to this hearing, and to treat the Executive Director's recommendation to amend the permit exemptions as one properly made under section 92 of the Act, rather than the way in which it was considered (as an amendment to the Register under section 62 of the Act).

This Committee was not inclined to do that, but even if it were, it would have come to the conclusion that the proposal to amend the permit exemptions was itself misconceived.

30. In the present case, the applicants sought to achieve (among other things) additional protection for the internal areas of the Nicholas Building.
31. Once land is included in the Heritage Register no works of any kind can occur unless either:
 - a permit has been granted for the works under section 101(1)(a) of the Act; or
 - the works are the subject of an exemption granted under section 92 of the Act.
32. Indeed, carrying out works or activities without a permit or exemption is a criminal offence which carries a significant penalty.
33. The Committee was advised that the current permit exemption sought to be amended is as follows:

In any works within the individual office space on floors 4 to 9 that do not require the removal of any original fitting fixture or joinery element and which has no permanent impact on the original fabric or structure of the building is permit exempt.
34. The proposed change to this permit exemption is as follows:

Any works within the individual office space on floors 3 to 9 that do not require the removal of any original fitting fixture or joinery element and which has no permanent impact on the original fabric or structure of the building is permit exempt.
35. It will be immediately apparent that under the current exemptions a permit must be obtained for all works on level 3 at present. The effect of the proposed exemption would have been to allow some works to occur on that level without the need for a permit.
36. The thrust of the application taken as a whole was the assertion that the current level of heritage protection insufficiently matched the level of heritage significance. An application to increase the types of works which could occur without a permit on level 3 of the building, however, would seem at odds with improving the protection for the building.
37. In summary, this Committee does not regard the permit exemption proposal to be properly before it.

STATEMENTS OF SIGNIFICANCE

38. Before the hearing, the Committee made orders dated 23 April 2024 inviting the parties to address whether the reasons for registration and the Statement of Significance form part of the Heritage Register, and whether the Heritage Council has the power to amend them.
39. At the outset it is worth observing that, if Statements of Significance and reasons for registration are not part of the Heritage Register, then neither are amenable to amendment under section 62 of the Act.
40. In response to the order, the Executive Director filed written submissions dated 18 July 2024. The Executive Director made reference to submissions made on his behalf in the Heritage Council registration hearing of Federation Square (VHR H2390) in 2019 on the basis that the Executive Director was present at that hearing, asked the same question, and relied upon the same position.
41. The attached material included a letter from the Executive Director dated 8 May 2019. The salient part of the letter reads as follows:

Legal status of the “permit policy” and “statement of significance” following determination under s.49

15. *Once the Heritage Council has determined that a place or object is to be included, the Executive Director's statement of recommendation (required under s.40) no longer plays any formal role in the statutory framework. As such, the permit policy and statement of*

significance (being the means adopted to fulfil the Executive Director’s obligations under s.40) no longer play any formal role either.

16. *Further, neither the Executive Director nor the Heritage Council have any explicit power in the Act to “approve” or “endorse” the elements known as “statements of significance” or “permit policy”.*

42. The Committee agrees. Indeed, this has been the position of both the Heritage Council and Heritage Victoria since 2014, recorded in a document titled *Heritage Victoria and Heritage Council of Victoria Policy Guideline – The purpose and maintenance of the “statement of significance” for a registered place or object*. A copy of this document was provided with the Executive Director’s submissions, an extract of the policy is provided below.

43. While this policy guidance was produced under legislation which is now repealed (the *Heritage Act 1995*), the substantive provisions establishing the Heritage Register and its content are not materially different. The position adopted by the Executive Director in May 2019 is a consistent approach with the 2014 policy guidance notwithstanding the intervening amendment to the legislation.

Policy purpose

This policy is intended to provide guidance on:

- *the purpose of the Statement of Significance under the Heritage Act 1995 (the Act); and*
- *the process the Executive Director of Heritage Victoria (the Executive Director) and the Heritage Council of Victoria (the Heritage Council) will adopt to maintain the Statement of Significance. This includes the process for informing or consulting with owners and interested parties, as relevant.*

Purpose of the Statement of Significance

The Statement of Significance for a place or object does not form part of the ‘registration’ of the place or object (see section 21 of the Act, “What details are to be included in the Heritage Register?”).⁴

The Statement of Significance satisfies the Executive Director’s obligations under section 34(2) of the Act, which requires that a statement including “a brief statement of the cultural heritage significance of the place or object” be provided to the owner, nominator and local council of a place or object recommended for inclusion in the Heritage Register.⁵

The Statement of Significance informs the decision-making of the Heritage Council under section 42 of the Act when considering whether to include or not include a place or object in the Heritage Register.⁶

The Statement of Significance is the starting point when the Executive Director considers the extent to which a permit application affects the cultural heritage significance of a registered place or object (section 73(1)(a) of the Act).⁷

It is therefore a useful tool for managing impacts on registered places and objects. There is no legislated process for updating or amending the Statement of Significance to ensure its currency over time.

Maintaining the Statement of Significance

Statements of Significance require updating from time to time to maintain their currency and usefulness as a tool for guiding management decisions affecting registered places or objects.

An amendment to the Statement of Significance will generally take one of the following two forms:

⁴ Section superseded by the *Heritage Act 2017*, replaced by section 26 of that Act.

⁵ Section superseded by the *Heritage Act 2017*, replaced by section 40(1) of that Act.

⁶ Section superseded by the *Heritage Act 2017*, replaced by section 49 of that Act.

⁷ Section superseded by the *Heritage Act 2017*, replaced by section 101(2) of that Act.

- *Changes that are purely of a technical or factual nature, or are a correction of a manifest error, and do not have an impact on an understanding of the significance of the place or object.*
- *Changes that may or will affect an understanding of the significance of the place or object and therefore may or will affect how the place or object will be managed into the future.*

(underline emphasis added)

44. At the hearing of this matter, in answer to a direct question from the Committee as to the legal status of the Statement of Significance, the Executive Director agreed that the Statement of Significance was not part of the Heritage Register.
45. The Committee does not suggest that Statements of Significance are not an important element in the management of heritage places. In the Executive Director's advice of 8 May 2019, he states:

17 ... in practice, after registration, the information contained in these documents serves a further important practical function. This function is that of a stable record of the State-level cultural heritage significance of the place or object as at registration, to serve as a starting point for future consideration and assessment under Part 5 and for landowners to understand how to make informed decisions around the development of their land.

18. As such, the Executive Director submits it is open to the Heritage Council to continue to settle (or "endorse" or "approve") a final form of the information currently set out in permit policy and statement of significance documents, and that it is important for the proper and effective administration of the Act that it continue to do so.

19. The following submissions firstly outline the need for a document (irrespective of what it may be titled), settled by the Heritage Council, containing the information now set out in permit policies and statements of significance. Secondly, the submissions outline two bases for the Heritage Council to contribute to such a document.

46. This Committee considers that notwithstanding how useful or otherwise Statements of Significance might be in the management of heritage places, if they do not form part of the Heritage Register, they cannot be amended under section 62 of the Act.
47. The Executive Director submits in his written submissions of 18 July 2024 that:

The ED notes that in its determination for the Federation Square matter (26 August 2019), the Registrations Committee stated:

"When it comes to making a determination to include a place or object in the Register, the Heritage Council may explicitly agree or disagree with the Executive Director's relevant statement of significance, either in part or in whole. In circumstances where the statement of significance is central to the Executive Director's recommendation, it may in some cases be appropriate or convenient for the Heritage Council to express its opinion in relation to that statement of significance (including overall agreement, overall disagreement, or any particular aspects in which the Council disagrees)."

However, this is not the same as the Heritage Council issuing an "approved" or "amended version" of the statement of significance.

Since then, the Heritage Council has made determinations on that basis, stating that its reasons "are generally in accordance with the reasons of the Executive Director" or otherwise. Although it may at times express a view on the reasons for registration in its determination, the Heritage Council no longer "approves", "endorses" or provides its own version of a statement of significance. The ED is unsure why the Committee's approach would differ in the case of the Nicholas Building, given that the principles established in August 2019 have underpinned all determinations made by the Heritage Council for the last five years.

48. This Committee does not depart from the observations of the Registrations Committee in the Federation Square matter, nor indeed from the approach adopted by other Heritage Council Committees over the last five years. Where a nomination invites consideration of a Statement of Significance as a basis for the inclusion of a place in the Heritage Register, or a permit application or some other properly commenced proceeding invites reconsideration of the terms of a Statement of Significance, the observations of the Registration Committee tasked with the Federation Square matter, are entirely appropriate. This case however, is different. The question that arises here is whether a proposed change to the content of a Statement of Significance alone can be the subject of an application to amend the Heritage Register. The Committee's view is that it cannot.
49. The Executive Director's submission dated 4 October 2024 in response to the landowner's submissions included the following passage:
- The ED invites the Protocols Committee of the Heritage Council to consider the intent of sections 23, 24, 25 and 26 of the Act (as at April 2020 and their corollaries under the current version of the Act) and whether additional information (such as a statement of significance) can form part of registration or be recorded alongside the category of registration and identifying details of the place or object. The Heritage Council's function to 'promote public understanding of the State's cultural heritage' (s11(1)(c)) and power to 'do all things necessary or convenient to be done for, in connection with or incidental to, the performance of its functions' (s11(2)) may be relevant.*
50. It is beyond the scope of this Committee to finally determine whether or not additional information (such as Statements of Significance) could form part of the Heritage Register. There are legal and policy arguments which tend both ways. The Executive Director submits that it may be possible to interpret the Act to mean that it is a matter for his discretion as to what, if any, additional information might be included in the Heritage Register, and that this may be considered in overall terms, advantageous to the administration and management of heritage places. Equally, it might be said, that Statements of Significance, like reasons for decision, record the considerations based on a state of knowledge at a point in time, subject to, even open to, the changes in that state of knowledge over time. Viewed in that way, it might be argued that Statements of Significance should never attain a status which implies enduring correctness, but rather should be regarded – like policy, as a good guide, and an important tool, but flexible enough to be amenable to scrutiny and review over time and never a substitute for critical evaluation arising on the facts of a particular case.
51. This Committee will refer this matter to the Protocols Committee of the Heritage Council for its consideration. Whatever might be the outcome of that consideration, it remains certain insofar as the matters before this Committee that, even if the current legislation enables or empowers the Executive Director to include additional documents (such as a Statement of Significance) in the Heritage Register, it is clear that the current practice, and the practice since at least 2014, is that the Heritage Register does not include such documents.
52. On that basis alone, insofar as the application before this Committee proposes a change to a Statement of Significance on the premise that the statement forms part of the Heritage Register, the application is misconceived.

REASONS FOR REGISTRATION

53. The Heritage Council publishes guidelines for the assessment of significance to assist it in determining whether or not a place is of State-level cultural heritage significance and to be included in the Heritage Register.
54. Like Statements of Significance, the reasons for inclusion in the Heritage Register do not form part of the Heritage Register. That is not to say that, over time, if and when more evidence becomes available about a place, a case might be made for de-emphasising some of the reasons for inclusion in the Heritage Register, or possibly even generating whole new bases which justify the original decision to include a place in the Heritage Register.

55. Whatever might be the case, while the reasons for inclusion in the Heritage Register do not form part of the Heritage Register itself, proposed changes to those reasons cannot be a proper basis to invoke section 62 of the Act. An application to amend the original reasons for inclusion in the Heritage Register cannot be an application to amend the Heritage Register.

PROPOSED AMENDMENTS – THE COMMITTEE’S DETERMINATION

56. As this matter proceeded to a hearing there were, in substance, four matters which were said to be for this Committee’s consideration:
- extent of registration
 - proposed changes to the statement of significance
 - proposed changes to the reasons for inclusion in the register; and
 - proposed changes to the permit policy and permit exemptions.
57. For the reasons already expressed, the last three matters are not part of the Heritage Register, and as such, cannot be the subject of an application under section 62 of the Act. Any decision by the Executive Director purporting to grant the application, whether in part or whole, cannot enliven a power of amendment which does not exist.
58. This leaves for consideration only a change to the extent of registration.
59. The proposal to alter the extent of registration was not made in the original application, but rather arose from the evidence called on behalf of a third party.
60. In substance, the existing registration extends to the title boundary of the building but does not include the verandah on Swanston Street (see **Figure 1**). It may be that this verandah warrants inclusion within the extent of registration. Even if that were the case, there is specific provision within the Act, and a process prescribed for including additional land within the extent of registration. That process has not been followed in this case. A further consideration is that the awning is located on publicly owned land within the control of Melbourne City Council. Melbourne City Council had not given consent to the inclusion of the awning within the extent of registration.
61. In the Committee’s view, it would be inappropriate to permit an application wrongly made under section 62 of the Act to morph, without notice to affected persons, into an application to include additional land within the extent of registration.
62. If the Executive Director now considers that the awning should be included within the extent of the existing registration, then it could and should commence the correct process. In its written submission the Executive Director properly agrees that this is possible.
63. For all of these reasons, the Committee declines to make the amendments sought.

CONFIDENTIALITY

64. The original application lodged with Heritage Victoria was made by two people who sought to have their identities remain confidential. While this request has had no bearing on the outcome of the matter before the Committee, a considerable amount of time was spent attempting to navigate the request and afford all parties an opportunity to be heard.
65. The request for confidentiality and the manner in which it was administered by Heritage Victoria, along with the complications which it gave rise to in the management of this matter, and the implications that it has for the transparent administration of the Act, demand that the Committee record the events and its rulings.

THE APPLICATION

66. A nomination made under section 27 of the Act must be made in the prescribed form. The prescribed form requires that the personal details of the nominator must be provided. The prescribed form includes a number of prompts asking questions which might be relevant to the Executive Director's consideration of the merits of the nomination. Finally, the prescribed form requires a declaration to the effect that the information provided in the form is correct to the best of the nominator's knowledge.
67. The structure of the Act makes it possible for any person to make a nomination.
68. The effect of a nomination on the owner of land that is the subject of a nomination may be significant. The nomination invites an inquiry as to whether the place should be subject to the requirements of the Act. Notice of a nomination must be given to the owner of the place affected. The owner is obliged to give notice of the nomination to any potential purchasers. The Act is intended to be an interference with the rights of landowners to provide for the protection and conservation of the cultural heritage significance of the State. That interference commences with the making of a nomination.
69. In this case the proposal was to amend the registration of land already in the Heritage Register, but the proposal was to be treated procedurally as though it were a nomination. The proposed amendments were intended to increase the level of protection to various elements of the place. The requirement to advise potential future purchasers of the application also applied as though the application were a nomination.
70. As discussed above, there is no prescribed form for an application under section 62. Heritage Victoria has previously utilised an application form for this purpose that follows in many respects the prescribed form for nominations made under section 27.
71. Importantly, there is nothing in the regulations or on the prescribed form which suggests any special way to deal with the personal details of applicants or nominators. Notwithstanding the absence of that guidance in the Regulations or the prescribed form, Heritage Victoria includes the following statement in its version of the application form:

Who will have access to my nomination?

Under the Heritage Act 2017 Heritage Victoria are required to inform the Local Council and the Owner of the place/object of the nomination. It is our practice to also inform the National Trust and other interested parties, and to provide an abridged version of the nomination form and any supporting documentation we feel may be relevant. If you do not wish certain information to be made public do not provide it. This applies to all attachments and supporting documents supplied with this application.

Who will have access to my personal details?

The sections 'Your details' and 'Nominator Statement' will not be provided to other parties at the time of nomination. However, it may be provided to the Heritage Council of Victoria for the purposes of decision making under the Act and to contact you. This nomination form, including your details, may be subject to a Freedom of Information request.

72. The first statement under the heading 'Who will have access to my nomination?' is obviously correct and consistent with the statutory framework. The second statement under the heading 'Who will have access to my personal details?' finds no foundation in the Act or in the regulations.
73. Rather, it amounts to a choice made by Heritage Victoria in the drafting of its application form as to the way in which it may or may not deal with the personal information of a person who seeks to make an application which could have the effect of interfering with the property rights of another.

NOTICE OF THE APPLICATION

74. Notice of the application to amend the register was given to the owner of the land. The application form to amend the Heritage Register was provided to the owner, but with the personal details of the nominator/applicant redacted. The application was supported by a number of submissions. The submissions made in support of the application were not provided to the owner at all.
75. The owner wrote to Heritage Victoria seeking an unredacted copy of the application and all submissions made in support.
76. Heritage Victoria agreed to provide one of the statements in support because it happened to be from a Member of Parliament who had stated in Parliament that she had made the statement in Parliament, and it had been recorded in Hansard. Otherwise, Heritage Victoria advised that it would not provide a full copy of the material submitted with the application, or any unredacted material and further advised the owner that an application could be made pursuant to the *Freedom of Information Act 1982* ('FOI Act').

THE FOI REQUEST

77. The owner made an application for access to the documents on 8 November 2023, via an FOI request. The owner was provided with the supporting submissions in full on 17 November 2023, but with the personal details/identities of the authors redacted. The owner was not provided with the personal details of the nominators.

PROCEDURAL STEPS BEFORE THIS COMMITTEE

78. On **18 September 2023** the Executive Director made a recommendation to the Heritage Council on the application to amend the Heritage Register.
79. On **18 October 2023** the owners' representatives requested 'a copy of the complete file held by Heritage Victoria with respect to the Recommendation'. Heritage Victoria provided a copy of the document titled 'Application to amend or remove a place or object in the VHR' with personal details of the nominator redacted.
80. On **3 November 2023** the owners' representatives requested that the Heritage Council provide appendices referred to in the application to amend.
81. On **20 December 2023** the Heritage Council notified parties that a hearing would be conducted.
82. On **21 December 2023** this Committee of the Heritage Council was appointed.
83. *Hearing Participation Forms* (Form B) were lodged by the following parties:
 - Gadens Lawyers, on behalf of the property owners – 20 December 2023
 - Heritage Workshop (Mr James Lesh) – 13 January 2024
 - Executive Director – 25 January 2024; and
 - Nicholas Building Association (Dr Dario Vacirca) – 15 February 2024.
84. On **15 February 2024** this Committee notified parties that a directions hearing in the matter was to be held. The Committee invited submissions as to 'the suitability of an order requiring the Executive Director provide unredacted copies of the Nomination and Appendices for disclosure to all parties of the proceeding'.
85. On **16 February 2024** Mr Lesh wrote to the Heritage Council in the following terms:

I continue to support the recommendation of the ED, but not the extent of registration. I also hold the view that the Nicholas Building should be listed for Criterion H for its associations with Vali Myers, per the original nomination. Too few sites on the VHR are listed for their associations to women, and this is an exemplar for its association to this trailblazing woman artist.

As an entirely separate matter, I also seek to address the issue of releasing the unredacted nomination to the property owners. The property owners have sought these documents, which is highly unusual and must be disallowed.

There is no relevance of the nomination and associated personal details to the property owners, in terms of the remit of the Heritage Council and its role in making this determination of revised listing under the Heritage Act.

Procedural fairness is irrelevant, because it does not come into play given how nominations and the Act operates, in terms of the personal details of those involved in the nomination, and the role of Heritage Victoria as defined in the Act.

Furthermore, it is possible these property owners will use the personal information contained in the nomination for further retribution. For example, after the applicant was notified of the Executive Director nomination, the applicant cancelled a cultural festival arranged by the building tenants, that the applicant had previously supported.

In addition, the people involved in the nomination had a reasonable expectation that their privacy would be maintained, given the standard operating procedure to not release personal details. A release now would violate this reasonable expectation and likely breach relevant state and federal laws.

Finally, the release of personal details is a precedent that must be avoided. It will likely result in members of the public avoiding nominating heritage places in future, should their privacy be at risk or should negative activities by property owners then become possible against nominees. It will inevitably have repercussions for personal reputations and professional standing for persons involved in nominating heritage places.

The role of Heritage Victoria (and the Heritage Council) is to independently and objectively evaluate nominations to the Register. The personal details of those involved in nominations is irrelevant to this process. And the release will have both predictable and unintended consequences that will undermine public confidence and community participation in the heritage system.

I strongly suggest the Heritage Council seek independent legal advice before making any determination and does not rely on the submissions made by the property owners for the above reasons.

- 86.** Mr Lesh subsequently withdrew from any participation in the hearing and did not attend the directions hearing. The Committee discusses the substance of the submissions made by Mr Lesh later in this determination.
- 87.** On **16 February 2024**, *hearing participation forms* (Form B) were received from the owners (represented by Gadens), and the Executive Director (represented by Ms Clare Chandler). On that same day, the Committee also accepted a late Form B from the Nicholas Building Association (represented by Dr Dario Vacirca) seeking to make submissions on matters to be discussed at the directions hearing.
- 88.** On **8 March 2024**, the owner's legal representatives filed submissions contending that they should be provided with an unredacted copy of the application. The Executive Director filed submissions about the release of nominators' details. The written submissions of Heritage Victoria helpfully set out Heritage Victoria's approach:
7. *In relation to point 5 above, Heritage Victoria advised Gadens Lawyers that a request for the remaining letters/emails should be made to the Department of Transport and Planning (DTP) FOI Unit.*
 8. *An FOI request was subsequently lodged with DTP on 08 November 2023 requesting copies of:*

appendices referred to at pages 29 to 33 of the attached application to amend the registration of the Nicholas Building (Nomination), which are statements in support of the cultural and social value of the Nicholas Building from various community leaders.

9. *All documents were released apart from personal identifiable information which the FOI applicant had agreed to exclude from the terms of their FOI request on 14 November 2023. A copy of these redacted materials is also enclosed.*
10. *The appropriate place to raise issues with the release or non-release of materials is with the Office of the Victorian Information Commissioner (OVIC), with that organisation being the 'primary regulator and source of independent advice to the community and Victorian government about how the public sector collects, uses and discloses information'. However, because the documents were released in full, the Applicant was not provided their right to a review.*
11. *Also, the applicant cannot request a review to OVIC because they agreed to exclude personal identifiable information redacted and marked as "Not Relevant" prior to this material being released. However, they may still contact OVIC to complain if they are unhappy with how DTP has processed their FOI request, noting that the complaint period window is generally within 60 days from 17 November 2023, the date of the FOI notice of decision.*

89. At the directions hearing on 15 March 2024, the owner renewed their request for the release of an unredacted copy of the application documents. By the time of the directions hearing, the controversy as to the identity of the authors of the letters of support had been resolved. The only issue for consideration was whether the personal details of the nominators should be provided to the owner.
90. No person appeared for the nominators. Dr Vacirca claimed to know the identity of the nominators but did not have instructions or authority to speak on their behalf.
91. At the directions hearing, the Committee made known that it had, at that point in time, only been provided with the redacted application form, and that it was not aware of the identity of the nominator.
92. During the course of the hearing, the Committee explored the relevance that the identity of the nominators might have, if any, to the resolution of the matters to be decided in a hearing of this kind.
93. The Executive Director submitted that the proceedings were a review of his Recommendation, and as such the identity of the nominator was not relevant to the Recommendation. The Executive Director explained that once a nomination was made, the Executive Director took carriage of investigating the matter, and that the ultimate recommendation was a matter for the Executive Director. In this way, the Executive Director made submissions that were similar in substance to some of the matters raised by Mr Lesh in his letter of 16 February 2024 (see paragraph 85).
94. In substance, the Executive Director submitted that any recommendation to the Heritage Council made on the basis of a nomination was based upon evidence, and that the task carried out by the Executive Director did not depend upon the identity of the nominator.
95. The owner submitted that it was impossible to know if or how the identity of the nominator might be relevant without knowing the identity of the nominator.
96. There can be little doubt that the Committee has the power to conduct its hearings in a way in which some material is kept confidential, or where limited access to material is managed because of the sensitive nature of that material. This has occurred in cases before the Heritage Council where, as part of a permit application, an applicant seeks to advance an argument that the proposal facilitates the reasonable or economic use of the registered place, and proposes to rely upon commercially sensitive information to make the argument.
97. Section 249(1) of the Act provides that the Heritage Council is bound to act in accordance with general procedure, equity and good conscience. Section 249(1) is sufficiently ample to permit the Heritage Council to consider whether or not material should be treated as confidential and to make orders to maintain that confidentiality throughout the course of the hearing provided that it is satisfied that there is a proper basis for doing so.

- 98.** The Committee also notes that while section 248 of the Act obliges the Heritage Council to conduct hearings publicly, provision is made explicitly for the Council to hear submissions confidentially. Section 248 permits the Heritage Council to conduct a hearing that is not public, but only where there is an objection to a public hearing, and then only in circumstances where the Heritage Council is satisfied that the submission is of a confidential nature. While that provision deals with the receipt of submissions, and not the situation of a nominator who might be unwilling to disclose their identity – the combination of sections 248 and 249 of the Act together suggest that the Heritage Council should exercise great caution before acceding to any request which has the potential to create the impression (if not the reality) of a proceeding that is anything less than completely transparent.
- 99.** For the avoidance of doubt, the Committee explicitly reject the submission made by Mr Lesh of 16 February 2024. The proceedings of the Heritage Council are intended to be open and transparent. The fact that the identity of the nominator should not have a bearing on the ultimate recommendation of the Executive Director does not mean that the nominators are necessarily irrelevant. There are many possibilities in which the identity of the nominator might be relevant. Each case needs to be determined on its merits. There is no general rule that the identity of the nominator is irrelevant. Rather, the starting position is that there is no presumption of anonymity, but instead an expectation that all information will be made available, at the very least to the landowner, unless there is a good reason to depart from that course.
- 100.** The owner’s counsel addressed the following written submission in their oral submission at the hearing:
- Pursuant to s 249(1)(b) of the Heritage Act 2017 (Vic), the Heritage Council “in hearing submissions ... is bound by the rules of natural justice.” The rules of natural justice have been held to require:*
- a. that a person who may be affected by a decision be informed of the case against him or her;*
 - b. that a person be afforded the opportunity to hear and test evidence and submissions advanced against him or her;*
 - c. that a person be informed of relevant matters adverse to his or her interests which the administrative decision-maker proposes to take into account. That is, where no confidentiality issue arises, a person should be able to address adverse information that is credible, relevant and significant to the decision to be made.*
- As to the identity of the nominator, procedural fairness mandates that the Owner should be informed of the identity of this person. Procedural fairness mandates that the Owner should have the same relevant information before it as the Executive Director and Heritage Council.*
- The Owner may wish to make submissions relevant to the nominator’s identity (e.g. whether that is a resident of the Nicholas Building or otherwise). Further, the Owner is entitled to fully understand (and make submissions concerning) the basis upon which a decision may be made by the Heritage Council concerning its property, absent any cogent reason to the contrary.*
- As to the last point, the Owner is not aware of any reason why the identity of the nominator should remain confidential. The identity of the nominator is routinely disclosed in other heritage decisions. There is no reasonable expectation of privacy in those circumstances. The Owner is not seeking a release of personal details to the general public.*
- 101.** There is much force in the submissions of the owner.
- 102.** The Act creates no expectation of privacy. In fact, the opposite is true.
- 103.** The process of nomination is, at its core, a statement of intent by a private individual to engage the processes of the Act in a way which may affect the rights and interests of another person.

- 104.** There is no provision of the Act or the Regulations which contemplate that the identity of nominators is intended to be kept from the owners of land nominated for inclusion in the Heritage Register.
- 105.** Heritage Victoria's application form makes clear that other information which is included in the application will be disclosed to certain persons (such as the municipal council) and publicly. In the Committee's view, the form regrettably creates an impression that personal information is different to other information provided in the application.
- 106.** At the directions hearing, no person attended on behalf of the nominators to explain whether, and if so, why their identities should remain confidential. The Committee was uncomfortable assuming that there was no reason to keep the identities of the nominators confidential. The Committee was also concerned that the nominators, acting on the content of Heritage Victoria's application form, may have proceeded on the expectation that their identity would be kept confidential. The Committee was also conscious of the fact that the nominators may not have obtained reliable advice in relation to these matters, and that they had not had a proper opportunity to be heard on this question.
- 107.** On 23 April 2024 the Committee made procedural orders and provided its reasons. For completeness, those reasons and orders are attached as **Appendix 2** to this decision. The Committee made the following directions:
1. *The Executive Director provide an unredacted version of the nomination to the Heritage Council Secretariat by email to katerina.axiarlis@delwp.vic.gov.au by 30 April 2024.*
 2. *Once the unredacted nomination is received from the Executive Director the Secretariat will make contact in writing with the nominator, advising that:*
 - *The owner of the land seeks access to an unredacted copy of the nomination, including the details of the nominator;*
 - *On the material presently before the Committee, there is no basis for the Committee to keep any part of the application for nomination confidential;*
 - *If the nominator seeks to have their identity kept confidential, the nominator must write to the Committee setting out their reasons within 7 days;*
 3. *If the Committee receives such a request from the nominator, the request will be provided to the owner's legal representatives on their undertaking not to disclose the identity of the nominator or their reasons for seeking confidentiality until further order of this Committee;*
 4. *The owner's legal representatives will be required to indicate in writing within 7 days the relevance of the identity of the nominator and whether further orders should be made permitting to the disclosure of that material to their clients.*
- 108.** On 22 May 2024 the Committee wrote to the parties in the following terms:

We refer to the Committee's directions letter dated 23 April 2024 ('directions'), enclosed for your reference.

The Committee has received a copy of the unredacted nomination and has made contact with the persons who submitted that nomination in accordance with orders 1 and 2 of those directions.

On 9 May 2024 the nominators advised in writing that they wished to maintain the confidentiality of their identity. In accordance with orders 3 & 4 of the directions, the Applicant's legal representatives will be provided with a copy of the unredacted nomination and copies of responses from the nominators, on their written undertaking that the unredacted parts of the nomination will not be shared with their clients until further order of the Committee.

The Committee invites the legal representatives of the Applicant to make submissions to the Committee as to the future treatment of the unredacted material. Any submission should address the relevance of the identity of the nominators to the matters before the Committee, the extent and nature of disclosure of the information sought (if any), the manner in which the Committee should treat the information it has received and any procedural orders which might be made to manage the treatment of the confidentiality of the nominators if required.

The nominators will be provided an opportunity to respond to those submissions before the Committee rules on the matter.

- 109.** On 19 June 2024 the Owner's lawyers made written submissions to the effect that the information should be disclosed to the owners. The submissions reiterated the submissions made at the directions hearing, but addressed the specific bases upon which confidentiality was claimed.
- 110.** In broad terms, the nominators sought to remain anonymous on three separate bases:
1. fear of retribution
 2. an assertion of a reasonable expectation of privacy; and
 3. concerns about the confidence in the system.

EXPECTATION OF PRIVACY, AND INTEGRITY OF THE SYSTEM

- 111.** It is convenient to deal with the second and third matter together.
- 112.** The nominators imply that some harm will be done to the system of heritage management if the identity of nominators is known. They suggest that potential nominators may be discouraged from making nominations if their personal privacy is at risk for any number of reasons, including because it will likely result in members of the public being disinclined to nominate heritage places if their privacy is put at risk. It is said that this might result in damage to reputations and/or professional standing. It is also said that this may ultimately have an impact on the confidence in the system.
- 113.** The Committee is of the view that the greater threat to public confidence in the system is the impression that the business of Heritage Victoria and the Heritage Council is not conducted in an open and transparent manner. The community of heritage experts is small, but in the context of the Act, it wields significant power. In those circumstances, the steps leading to a recommendation should be open and transparent. This is particularly so when the deliberations of the Executive Director and the Heritage Council concerns subject matter which at times calls for judgement which is subjective, such as cultural heritage significance. Those deliberations should not only be, but be seen to be, beyond reproach. A greater risk to the public confidence of the heritage system would be the impression that nominations could be made anonymously by heritage 'insiders', the identity of whom might (whether actually or implicitly) influence the deliberations of the Executive Director or the Heritage Council.
- 114.** The safest way to protect the integrity of the system is openness and transparency in all aspects of the processing of the application. The Committee believes that this approach conforms with the expectations of the legislation.
- 115.** For the reasons the Committee has already stated, nominators enjoy no reasonable expectation of privacy. No expectation is created by the statutory framework. Rather, the contrary is the case. The processes of the Heritage Council are required to be conducted publicly. The making of a nomination brings with it the consequence that a public process will be commenced. The expectation created by the legislative framework is that the process will be conducted in a fair, open and transparent manner.
- 116.** It is the Committee's view that in this case, regrettably, some expectation might have been created by the application form created by Heritage Victoria. Neither the Regulations nor the Act require any statement as to how the personal details of the applicants will be managed. The Committee also notes that the form in this case does not provide a guarantee that personal details will not be disclosed. Indeed, the form identifies at least two ways in which personal details might become known more broadly i.e. through an FOI request, or alternatively through a Heritage Council review of the recommendation. The form does make clear that Heritage Victoria will not disclose the personal details of the nominators while the application is under consideration by the Executive Director. It is apparent that this approach

has, at least, contributed to an expectation on the part of the nominators in this case, that their privacy would be protected.

- 117.** The Committee does not mean to suggest that there will never be a case where it is necessary and desirable for the identity of a nominator to remain confidential. As the Committee has said, the Heritage Council and Heritage Victoria have the ability to maintain that confidentiality *in appropriate cases*. The problem with the form created by Heritage Victoria is that it adopts, as a starting point, the protection of the personal details of a nominator and does not sufficiently temper expectations of the nominator. A simple fix might be for the form to adopt wording to the effect that in making a nomination the person is commencing a process which may involve a public hearing and that ordinarily, all details contained within the application are made available to at least the owner and the relevant local councils. A statement of this kind adjusts the expectation away from an entitlement to privacy. The form might go on to state ‘arrangements can be made to protect your personal details from disclosure if there is a good reason to do so – please advise in writing if this is the case’.
- 118.** Ultimately, it is the Committee’s view that the form should be reviewed to ensure that it conforms with the requirements of the Act. This review process may be a matter for Heritage Victoria and the Protocols Committee of the Heritage Council.

FEAR OF RETRIBUTION

- 119.** The nominators also claimed that their personal identity should not be disclosed for fear of retribution. The context of this concern is peculiar to the background of this application.
- 120.** The Nicholas Building is occupied by a large number of tenants of varying disciplines (including artists and artisans) who rent small studio spaces. The owners of the building had been contemplating a sale. The application to amend the Heritage Register was, on its face, directed to accentuating or elevating the importance of the building having regard to its social connections in the artistic community of the State. Owing to the Committee’s decision that there is no part of the Heritage Register which it can amend to give effect to these matters, the Committee has not considered whether or not the current Statement of Significance is an accurate statement of the full extent of the significance of the building. This may be explored in the future, whether by the current owners or a new owner, in the context of some future permit application, where the question of significance is properly enlivened.
- 121.** The fear of retribution is said to have arisen because, shortly after the application was lodged, the owners cancelled an artistic festival which was due to be conducted in the building. It was inferred by the tenants’ association (Nicholas Building Association) that the cancellation of the festival, in substance, was the owner of the building punishing the tenants as a whole for the application made to Heritage Victoria.
- 122.** No evidence of the connection between the cancellation of the cultural event and the application to Heritage Victoria was produced. The owners maintained that the cultural event was cancelled because it was concerned about building security and crowd management.
- 123.** Neither of the nominators were, or are, tenants of the building.
- 124.** Only one of the two nominators is a creative/artistic person who says that, at some point in the future, they may seek to become a tenant of the building. That person expressed concern that disclosure of their identity may impede their access to grants in the future. It was said that the owners had connections to contributors and that those connections could be used to prejudice access to those funding opportunities. The Committee considers the potential for this risk to be remote. The nominator conducted only preliminary research, and had only a minor role as a student in the preparation of the nomination as an unpaid intern working for or with the principal author of the nomination. The Committee also notes that, after the nomination was made, Dr Vacirca made an application to join the hearing and advance a case on behalf of the Nicholas Building Association, which is in fact an association largely

comprised of existing tenants of the building. The likelihood that the nominator would be any more or less prejudiced (if at all) as compared with the balance of existing tenants in the building is remote.

- 125.** The remaining nominator, who was the principal author of the nomination, relies on the assertion that there is a general expectation of privacy which the Committee has already addressed.
- 126.** None of the matters raised outweighed, in the Committee's view, the need to ensure that the proceedings be conducted openly and transparently, and that the owner of the land be entitled to have access to all of the information that was before Heritage Victoria.

FINDING

- 127.** Accordingly, on 23 July 2024 the Committee wrote to the parties in the following terms:

The Committee refers to its letter of 11 July 2024 and has considered all submissions and correspondence received in response.

The Committee has decided to release the lawyers for the owners from their undertaking to maintain the confidentiality of the nominators for reasons that it will publish at a later time.

The effect of so doing will permit the lawyers to confer with their client and obtain instructions and determine what (if any) relevance the identity of the nominators has on the deliberations of the Committee.

The Committee does not propose to name the nominators in this letter or more broadly at this time.

- 128.** The Committee has recorded these matters in detail because, as the detail shows, managing expectations of privacy in what is otherwise a public process is time consuming and difficult. It is inevitable that there will be occasions where sensitive information needs to be protected, but the Committee expects that these will be and should be the exception rather than the rule. In the Committee's view, it is desirable that the material supplied to potential applicants and nominators more accurately manages expectations.

Appendix 1

PROCEDURAL STEPS UNDERTAKEN

RECOMMENDATION OF THE EXECUTIVE DIRECTOR

01. On 18 September 2023, the Executive Director made a Recommendation to the Heritage Council pursuant to section 62 of the *Heritage Act 2017* that the existing registration of the Nicholas Building be amended in the Victorian Heritage Register. The Executive Director recommended that the Heritage Council determine to:
 - amend the reasons why the place is included in the VHR based on the Heritage Council criteria; and
 - determine categories of works or activities which may be carried out in relation to the place for which a permit is not required (permit exemptions).
02. The recommendation proposed an amendment to the reasons for registration, suggesting that the Place meets the State-level threshold for Criterion G, under the Heritage Council's *Victorian Heritage Register Criteria and Threshold Guidelines*.
03. The recommendation did not propose to amend the extent of registration and proposed amendments to:
 - the statement of significance; and
 - permit policy; and
 - permit exemptions.
04. The recommendation also proposed a new history as part of the registration documentation.

SECTION 44 SUBMISSIONS

05. After receiving the recommendation, the Heritage Council caused notice of the recommendation on 25 September 2023, for a period of 60 days, in accordance with section 41 of the Act.
06. Twenty-six (26) submissions were received in response to the recommendation.
07. Of the submissions, 25 supported the Executive Director's Recommendation, with one submission filed by the owners who objected to the recommendation. The owners requested a hearing, as did two other submitters who supported the recommendation.

REGULATORY COMMITTEE

08. Pursuant to section 13(1) of the Act, a Regulatory Committee of the Heritage Council was duly constituted to consider the Recommendation, all submissions received and to conduct a hearing and make a determination.
09. The Regulatory Committee was formally appointed on 21 December 2023.

CONFLICTS OF INTEREST

10. During the directions hearing, the Chair of the Committee invited Committee members to consider whether declarations were required to be made in relation to any matters that may potentially give rise to an actual or apprehended conflict of interest.
11. Dr Helen Doyle declared that she worked for Context Heritage (now GML Heritage), who had prepared the Hoddle Grid report in 2019, but noted that she had no role in the preparation of that report.

12. Mr Adrian Finanzio SC declared that he had professional relationships with the legal representatives engaged by the owners to attend the directions hearing and make submissions.
13. No questions or issues were raised by parties or representatives with respect to any of the declared matters.

DIRECTIONS HEARING

14. The Committee held a directions hearing on 15 March 2024.
15. The Executive Director, Nicholas Building Association and owners were in attendance.
16. The Committee advised parties that at the directions hearing it would discuss procedural steps necessary in preparation for the hearing, including:
 - *the suitability of an order requiring the Executive Director provide unredacted copies of the Nomination and Appendices for disclosure to all parties of the proceeding;*
 - *the precise nature of the amendments to the Victorian Heritage Register ('VHR') including the provision of a tracked changes version of the proposed registration;*
 - *mode of the hearing (virtual);*
 - *the site inspection; and*
 - *experts and timing.*
17. On 26 February 2024, three weeks prior to the directions hearing, the Committee sought submissions from the Interested Parties on the matters to be discussed at the directions hearing.
18. All parties filed submissions with the Committee and made oral submissions during the directions hearing.
19. Those submissions have informed the Committee's ruling in relation to the question of confidentiality.

HEARING

20. The Committee scheduled a hearing to be held over two days on 15 and 16 August 2024.
21. On 23 April 2024, the Committee advised parties of the hearing date and sought written hearing submissions. The Committee requested that in their hearing submissions parties advise whether:
 - *the reasons for registration form part of the Heritage Register? If so, on what basis? If not, advise whether the Heritage Council has the power to amend a statement of reasons for inclusion in the Register?*
 - *Statements of Significance form part of the Heritage Register? If so, on what basis? If not, advise whether the Heritage Council has the power to amend a Statement of Significance?*
22. All parties filed written submissions and the Committee's requests were addressed in written or oral submissions by the parties.
23. The hearing commenced on 15 August 2024.
24. As per the Heritage Council's *Protocol 1 – Registration Hearings*, the Executive Director was invited to present their submission, followed by the owner.
25. The owner's submission raised jurisdictional matters, that had previously been raised in written submissions.

26. The owners submitted that the reasons for registration (being the Criteria set out in the Heritage Council's Criteria and Threshold Guidelines), nor the Statement of Significance form part of the Heritage Register and that therefore the Heritage Council does not have the power to amend those documents under the Act.
27. Given the submissions raised by the owners questioned the legislative powers of the Heritage Council to make the determination before them, the Committee adjourned the hearing part heard.
28. The hearing did not reconvene following 15 August 2024.

SUBMISSIONS FOLLOWING HEARING

29. Following the hearing, the Committee sent directions to all parties seeking written submissions on the jurisdictional matter raised by the owners.
30. The Committee made the following directions:
 1. *The Owner is directed to file written submissions outlining their position on jurisdictional matters raised in yesterday's hearing on or before Friday, 30 August 2024.*
 2. *The Executive Director and the NBA are directed to file written submissions responding to the Owner's submissions on or before Monday, 23 September 2024.*
31. The Executive Director sought and received an extension of time to respond to the owners' submission and filed their written submission on Friday 4 October 2024.
32. The Nicholas Building Association did not file submissions.
33. The written and oral submissions made during and following the hearing have informed the Committee's ruling in relation to the question of jurisdiction to amend the Heritage Register.

Appendix 2

Ruling on provision of unredacted materials (23 April 2024)

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Attachment 1 - Ruling on provision of unredacted materials

Nicholas Building [RHC20213/H2119]

31–41 Swanston Street Melbourne, Melbourne City

BACKGROUND

On 22 June 2022 the Executive Director determined to accept a nomination made to amend the Victorian Heritage Register ('the Register') in relation to the Nicholas Building.

The *Heritage Act 2017* ('the Act') facilitates proposals for the amendment of the Register to be made. Section 62 has the effect that the process for seeking an amendment to the Register is the same as that which is to be followed for nomination for inclusion in the Register.

Section 27(2) of the Act provides that a nomination must be made in the prescribed form. The form invites the nominator to express their views as to matters which include:

- the significance of the place;
- the condition of the place; and
- whether or not the place meets the Heritage Council's criteria for inclusion in the Register.

Upon deciding to accept a nomination the Executive Director is required to give notice of his decision to the owner and to the person or body that made the application within 14 days: s 34(1) of the Act.

The Executive Director provided notice of the nomination, but redacted the name of the nominator, along with the names of others who had provided letters in support of the nomination. This is in accordance with established practice by the Executive Director.

On or around 3 November 2023 representatives of the owner sought to obtain the identity of the nominator from the Executive Director, and to obtain the names of the people who have supported the application for amendment to the Register. The Executive Director has not provided this information to representatives of the owner to date. The owner's representatives also sought release of the information under the *Freedom of Information Act 1982* (Vic) ('FOI Act') and after consideration by the Department of Transport and Planning, it also provided redacted information to the owner's representatives.

Upon receipt of the application to review the Executive Director's decision to amend the Register on or around 8 March 2024, Heritage Victoria forwarded the nomination form to the Secretariat of the Heritage Council in its redacted form. At the time of the directions hearing (15 March 2024), the identity of the nominator was not known to the Committee.

RULING

It is not this Committee's role to review decisions made under the FOI Act or to review the management of information supplied to the Executive Director in the course of his assessment.

It is this Committee's role to conduct proceedings in accordance with the Act.

The owner's Form A submission and submission of 8 March 2024 makes application to this Committee for an order requiring the production of an unredacted copy of the nomination, on the grounds of procedural fairness and natural justice. It notes that requests were also made to the Executive Director and the Department of Transport and Planning.

Section 47 of the Act requires the Executive Director to provide any information in relation to his recommendation if requested by the Heritage Council.

It is not immediately apparent how the identity of the nominator is necessarily relevant, important or potentially determinative in this proceeding. These proceedings amount to a review of the Recommendation of the Executive Director, and not the Executive Director's decision to accept the nomination.

That said, it is not possible for the Committee or the owner to know whether the identity of the nominator is relevant in any way to the hearing without that knowledge.

The owner submits that, in seeking review of the Executive Director's decision, it is entitled to have available to it all of the material that was before the Executive Director – unredacted. The owner says that it is inappropriate for it to be asked to assume the irrelevance of material which it has not been permitted to see.

There is much force in that submission.

Section 248(1) of the Act requires the Heritage Council to conduct its hearings publicly. Section 249(1)(b) provides that the Heritage Council is bound by the rules of natural justice.

The owners submitted that the rules of natural justice have been held to require:

- that a person who may be affected by a decision be informed of the case against him or her;
- that a person be afforded the opportunity to hear and test evidence and submissions advanced against him or her; and
- that a person be informed of relevant matters adverse to his or her interests which the administrative decision-maker proposes to take into account. That is, where no confidentiality issue arises, a person should be able to address adverse information that is credible, relevant and significant to the decision to be made.

This Committee is presently unable to say whether the identity of the nominator is relevant to the proceedings, but without knowing their identity, it is impossible for this Committee to make any decision as to the relevance of the identity of the nominator.

The Executive Director advises that it is the usual practice of Heritage Victoria not to provide the personal details of the nominator. In substance, the Executive Director submits that the identity of the nominator is not relevant, in this or any other nomination. This committee doubts whether that is in fact always the case.

First, nothing in the Act gives any assurance that the identity of a nominator will be kept confidential or, more importantly, that it is irrelevant in all cases.

Instead, the prescribed form in Schedule 1 of the *Heritage Regulations 2017* ('the Regulations'):

- requires that the name of the nominator and their details must be provided;
- makes explicitly clear that anonymous applications will not be accepted; and
- requires that the nominator make a statement to the effect that the information supplied with the nomination is correct to the best of the nominator's knowledge.

The requirement that nominations be made in a prescribed form, that they require the identity of the nominator to be disclosed and for that person to give assurances that the material provided is correct to the best of their knowledge suggests that, at least in some cases, the identity and veracity of the nominator and the material supplied to the Executive Director may, at least in some cases, be a matter which could be relevant.

The prescribed form contained in Schedule 1 of the Regulations is intended for use by nominators proposing inclusion of a place in the Register for the first time. It is not a form specifically designed for applications to amend the Register.

The form completed by the nominator in this case seeking amendment is the standard form supplied by the Executive Director. It is entitled "Application to amend or remove a place or object in the Victorian Heritage Register". There is no such prescribed form in the Regulations. It is apparent that the amendment form has been prepared and is used to make the process of seeking amendment more "user friendly".

The form prepared and provided by Heritage Victoria contains the following statement:

Who will have access to my nomination?

Under the Heritage Act 2017 Heritage Victoria are required to inform the Local Council and the Owner of the place/object of the nomination. It is our practice to also inform the National Trust and other interested parties, and to provide an abridged version of the nomination form and any supporting documentation we feel may be relevant. If you do not wish certain information to be made public do not provide it. This applies to all attachments and supporting documents supplied with this application.

Who will have access to my personal details?

The sections 'Your details' and 'Nominator Statement' will not be provided to other parties at the time of nomination. However, it may be provided to the Heritage Council of Victoria for the purposes of decision making under the Act and to contact you. This nomination form, including your details, may be subject to a Freedom of Information request [Emphasis added].

These statements do not appear in the prescribed form under the Regulations but they serve to reinforce the fact that the process of nomination, recommendation and review is a public process, and that at some point, the details of a nominator may become known.

There are many ways in which confidentiality can be maintained in hearings of this kind, but maintaining confidentiality should be regarded as the exception rather than the rule. Confidentiality needs to be claimed by the person who asserts it, and that person needs to provide a good reason for the maintenance of that confidentiality in hearings which are expressly required to be conducted in public.

In the Committee's view, a proper construction of the Act favours the view that transparency in decision-making should be the norm.

At present, the Committee is in a position where the owner seeks to know the identity of the nominator. The Committee cannot rule out the possibility that the identity of the nominator is relevant to the proceeding. The Committee has had no direct communication with the nominator, nor has the Committee received any request to keep confidential the identity of the nominator by the nominator themselves.

A representative of the Nicholas Building Association appeared before the Committee at the preliminary hearing and was given leave to rely upon submissions received at late notice. The representative was of the view that the nominator would wish to remain anonymous.

The Committee is conscious of the fact that the nominator may not be legally represented and may have assumed that the confidentiality of their identity would not be disturbed in these proceedings. For that reason, the Committee is of the view that the nominator should be asked to consider whether to ask this Committee to keep their identity confidential.

In the absence of a statutory basis for confidentiality, the starting point should be transparency. There are many cases in which the maintenance of confidentiality is necessary, but implementing processes to maintain confidentiality is complex and should only occur where there is good reason to depart from the norm. In this case, because the Committee does not know the identity of the nominator, it is reluctant to order the provision of the unredacted nomination to the owner without providing the nominator the opportunity to make their argument in support of maintaining the confidentiality of their identity.

In all the circumstances, it is the Committee's view that it should exercise its power to require the Executive Director to provide to it an unredacted version of the nomination.

DIRECTIONS OF THE COMMITTEE

1. The Executive Director provide an unredacted version of the nomination to the heritage Council Secretariat by email to katerina.axiarlis@delwp.vic.gov.au by **30 April 2024**.
2. Once the unredacted nomination is received from the Executive Director the Secretariat will make contact in writing with the nominator, advising that:
 - The owner of the land seeks access to an unredacted copy of the nomination, including the details of the nominator;
 - On the material presently before the Committee, there is no basis for the Committee to keep any part of the application for nomination confidential;
 - If the nominator seeks to have their identity kept confidential, the nominator must write to the Committee setting out their reasons within 7 days;
3. If the Committee receives such a request from the nominator, the request will be provided to the owner's legal representatives on their undertaking not to disclose the identity of the nominator or their reasons for seeking confidentiality until further order of this Committee;
4. The owner's legal representatives will be required to indicate in writing within 7 days the relevance of the identity of the nominator and whether further orders should be made permitting to the disclosure of that material to their clients.

The Committee will also make orders upon receipt of the unredacted nomination in accordance with what we have outlined above and depending upon the position ultimately adopted by the nominator.

Date: 23 April 2024