VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2211/2017
PERMIT APPLICATION NO. 2014/3655

CATCHWORDS

Melbourne Planning Scheme; Section 80 of the Planning and Environment Act 1987; permit granted for new tower in eastern end of Melbourne CBD; Minister for Planning (as the Responsible Authority) has imposed a permit condition 1(a) requiring that the new building's height be lowered (by the time of the fresh Tribunal hearing) by 14.2 m, key issue is the extent of new shadow over part of the Birrarung Marr public park further to the south; this condition appealed and upheld by VCAT in 2017, this Tribunal decision then set aside by the Victorian Supreme Court with consent of the parties; new Division of the Tribunal considering the validity of Condition 1(a) afresh; held that this condition be deleted.

APPLICANT	63 Exhibition Street Pty Ltd
RESPONSIBLE AUTHORITY	Minister for Planning
REFERRAL AUTHORITY	Public Transport Victoria
SUBJECT LAND	63 Exhibition Street MELBOURNE VIC 3000
WHERE HELD	Melbourne
BEFORE	Philip Martin, Presiding Senior Member Rachel Naylor, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	10-13 March 2020
DATE OF ORDER	15 May 2020
CITATION	63 Exhibition Street Pty Ltd v Minister for Planning [2020] VCAT 498

ORDER

1 The decision of the Responsible Authority is varied.

2 The Tribunal directs that Planning Permit No. 2014003155 (Permit) must contain the conditions set out in the Permit issued by the Responsible Authority on 17 December 2017, modified as follows:

(a) Condition 1(a) is amended to read as follows:

> "Reduction in the height of the tower, so that no part of the building (including the integrated roof plant level) is above RL 209.0 AHD"

3 The Minister for Planning must issue an updated Permit in accordance with this order.

Philip Martin
Presiding Senior Member

Rachel Naylor
Senior Member

APPEARANCES

For applicant	Mr Christopher Townshend QC and Mr Barnaby Chessell, both of Counsel, instructed by Planning and Property Partners. They called the following expert evidence: • Mr Andrew Biacsi of Contour Consultants Aust Pty Ltd (planning) • Mr Michael Barlow of Urbis Pty Ltd (planning) The parties agreed that the author of the applicant's shadow diagrams (Mr Chris Goss) did not need to appear before the Tribunal.
For responsible authority	Ms Susan Brennan SC and Ms Emma Peppler, both of Counsel, instructed by DELWP. Ms Brennan called the following expert witnesses: • Mr Brodie Blades of SJB Urban (urban design) • Mr John Glossop of Glossop Town Planning (planning) • Mr David Sowinski of DELWP (shadow diagrams)
For referral authority	No appearance

INFORMATION

Nature of proceeding	Application under section 80 of the *Planning and Environment Act 1987* – to review condition 1(a) of the planning Permit No. 2014003155.
Planning scheme	Melbourne Planning Scheme
Zone and overlays	The relevant primary planning control is the version of the Capital City Zone Schedule 1 in force prior to the commencement of Amendment C262. It was strongly contested whether the Design and Development Overlay Schedule 10 has any relevance to this proceeding.
Relevant scheme policies and provisions	Clauses 12.03-1R, 15.01-1S, 19.02-6R, 21.06, 21.10-2, 21.12, 21.165-3, 22.01, 22.02, 65.01 and 71.02-3.

Land description	The subject land (which has been granted planning approval for a new apartment/hotel tower building) lies on the west side of Exhibition Street, in the block between Flinders Lane and Collins Street. The site area is 894 sqm and it currently features an older commercial building presenting as 14 storeys to Exhibition Street (albeit presenting as four storeys to Chester Lane). The Birrarung Marr public park lies further to the south, on the opposite side of the rail lines running westwards into Flinders Street station and the associated deck car park. Birrarung Marr was created as a new public park in 2002 and for its CAD location is unusually large at about eight hectares. The park is quite undulating, with its flat and lower section to the south next to the river. However it rises up to a terrace area at its northern end, which can be directly accessed from the main city grid via the Exhibition Street extension bridge. The art facility ArtPlay and its associated outdoor childrens' playground sits at the lower, western edge of the park. Someone moving roughly eastwards through the park can either connect to the extension of Exhibition Street, or follow the edge of the river, or rise up the William Barack pedestrian bridge, which connects through to the Jolimont precinct and the MCG/Melbourne Park tennis centre. A person in the park moving to the west alongside the river then connects to Princes Bridge and Federation Square.
Tribunal inspection	Whilst both Tribunal members were already familiar with this location, an unaccompanied inspection was done together after the hearing.

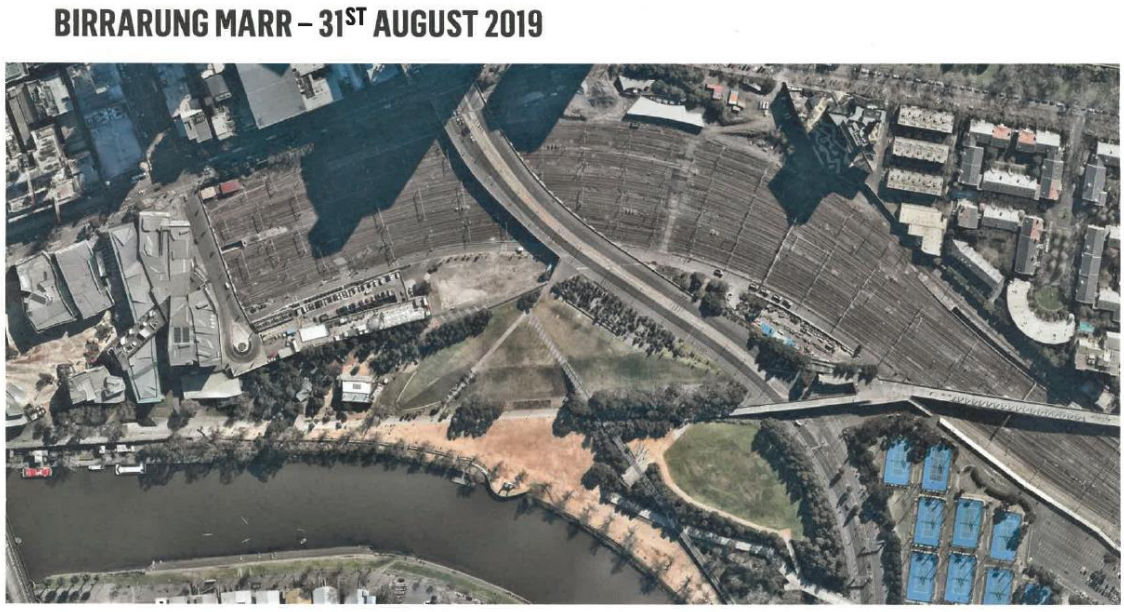
REASONS[1]

WHAT DOES THIS APPLICATION INVOLVE?

Background

1 As well as big hair, spandex, synthesiser music and shoulder pads, a key feature of Melbourne in the 1980s was the CBD construction boom. This led to the strikingly tall 101 and 120 Collins St tower buildings, which both opened in 1991. Given their height, these new buildings at certain times of the day and year threw a substantial shadow over what was then simply the Flinders St railyards to their south. Some other notable changes to this eastern section of the CBD were the demolition of the now infamous Gas and Fuel Corporation building in 1997, plus Federation Square opening in 2002 (ironically over a year after the 100 year anniversary of our Federation).

2 Unusually for a large western city with a history going back to 1835, in 2002 Melbourne 'birthed' a brand new CAD public park in the form of Birrarung Marr, which for convenience we shall hereafter refer to as 'the Park'. It was a joint project between Council and the State Government. The main features of the Park are already set out in the land description on the previous page.



Extract from Mr Barlow's evidence showing Birrarung Marr

[1] The submissions and evidence of the parties, the supporting exhibits given at the hearing, and the statement of grounds filed by Melbourne City Council have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

3 The Park is spacious for its CAD location at about eight hectares and attracts many visitors/passers by over any one year. Activities occurring in the Park range from the ArtPlay facility and associated playground, to commuters passing through, to loitering casual users, to more significant art or community activities such as the occasional circus or the Moomba festival rides and attractions.

4 Moving forward in time to recent years, in relation to the site at 32-34 Flinders Street, the Minister for Planning (Minister) issued a permit on 26 July 2016 approving a new mixed use tower building, with a permit condition 1(b) requiring that its height be lowered to 175 metres AHD. We understand that this condition reflected the Minister's concern about the extent of the additional overshadowing cast by this new building across the Park. Condition 1(b) was appealed to the Tribunal. In its decision dated 18 May 2017[2], the Tribunal upheld this condition. Even with the retention of this condition, it is common ground that when built, this new tower at 32-34 Flinders Street will (like the 101 and 120 Collins Street towers) cause some new overshadowing of certain areas of the Park, at particular dates and times throughout the year, particularly during the colder months.

Proposed redevelopment of 63 Exhibition Street site and its current status

5 Pursuant to a planning permit application which was lodged with the Minister on 19 August 2014 and then modified via plans lodged on 1 August 2016, it is proposed that the subject land at 63 Exhibition Street be redeveloped as follows. The amended plans (on which the Minister made his decision) show the existing 14 storey building being replaced with a RL 230 metre AHD apartment/hotel tower. For our purposes, this project has experienced various 'twists and turns' since 2014, as admirably summarised at paragraphs [21-34] of Mr Barlow's expert evidence.

6 To summarise where we understand the project is now at:

a. By way of context, Amendment C270 was introduced on 23 November 2016.[3]

b. The Minister on 17 September 2017 issued a planning permit No. 2014003155 approving the new tower building (Permit) on the review site. The Permit contains Condition 1(a) requiring the maximum height of the tower to drop from 230 metres AHD to 194.8 AHD as set out below.

> Reduction in the height of the tower, so that no part of the building (including the integrated roof plant level) is above 168.4m (or 194.8m AHD) to reduce shadowing to Birrarung Marr.

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2 *Dexus Property Group Ltd v Minister for Planning* [2017] VCAT 619 (the *Dexus* decision).

3 See the helpful summary of same at page 4 of the Minister's main written submission.

c. This condition (amongst other points of review) was brought to the Tribunal for review and upheld in the decision by SM Rickards and M Nervegna[4] dated 4 June 2018.

d. The applicant then initiated a Supreme Court review of this Tribunal decision. The parties prepared a Joint Memorandum agreeing that a vitiating error of law had occurred and that, by consent, this conditions appeal should be remitted to the Tribunal for re-hearing. The Court duly endorsed this outcome and so ordered.

e. In the lead up to the fresh hearing before ourselves, the applicant amended its Statement of Grounds. Rather than seeking the full deletion of Condition 1(a), the applicant now seeks a Tribunal order that Condition 1(a) should be modified to read as follows:

> Reduction in the height of the tower, so that no part of the building (including the integrated roof plant level) is above RL 209.0 AHD.

f. Hence , the 'height dispute' in Condition 1(a) is now whether the total height of the approved tower should be reduced by 14.2 metres, or approximately five storeys.

Hearing before us/overview of the position of each party

7 The parties agreed that the Tribunal needed to:

a. First make a legal ruling on the correct statutory framework to be applied, and how to properly apply the same.

b. Then make a 'planning merits' finding regarding Condition 1(a) having regard to the correct statutory framework.

8 As we said at the hearing, it is both a curious and unhelpful situation where the history of this proceeding involves a Supreme Court appeal (which can only be on points of law), yet the scope of this fresh Tribunal hearing before us still includes a significant legal point in dispute about the applicable statutory framework. In particular, the planning and urban design expert evidence and the general planning merits submissions were complicated and drawn out by the need to 'cover off' on the different scenarios that might arise, depending upon what the correct statutory framework for the Tribunal to utilise is.

9 In summary, the legal dispute about the 'correct statutory framework' largely revolved around whether or not the Design and Development Overlay Schedule 10 (DDO10) plays any role at all in the consideration of this application. The Minister urged the Tribunal to find that, in relation to potential overshadowing of the Park by the approved tower, the DDO10 nominated assessment period of 22 April to 22 September should be the relevant focus of the Tribunal. The Minister argued that the relevant

[4] *63 Exhibition Street Pty Ltd v Minister for Planning* [2018] VCAT 861

planning policy context also supported such a broader overshadowing assessment, which would take account of the colder months of the year when the sun is lower.

10 By contrast, the applicant submitted that the DDO10 was completely irrelevant due to its transitional provision. Following this approach, the Tribunal should focus on any overshadowing of the Park as at the 22 March and 22 September Equinoxes (the Equinoxes), pursuant to the relevant text in the pre-Amendment C262 version of the Capital City Zone Schedule 1 (CCZ1). This is due to CCZ1's transitional provision. Whilst conceding that the Tribunal can still have regard to any overshadowing impacts on the Park during the colder period of year, the applicant argued that such a broader assessment carries limited weight and (on the facts here) does not justify the retention of Condition 1(a).

11 With respect to the planning merits, taking the broader 'overshadowing assessment' approach being espoused, the Minister urged the Tribunal to find that the extent of overshadowing of the Park at the relevant period between 22 April and 22 September would only be an acceptable planning outcome if Condition 1(a) is retained.

12 At its highest, the applicant sees its planning merits case as overwhelmingly in its favour, as the approved tower at a height of 209 metres AHD would not even come close to casting any shadow on the Park at the Equinoxes (making Condition 1(a) excessive and unnecessary). As a fall-back position, the applicant argued that even if the Tribunal was to focus on the broader 'overshadowing assessment' period espoused by the Minister, the degree of anticipated overshadowing of the Park is quite tempered and still acceptable.

Summary of Tribunal's main findings

13 In relation to the Tribunal's legal findings, the appropriate starting point for assessing Condition 1(a) needs to be establishing the relevant planning control or controls, rather than starting with any relevant planning policies and 'working backwards from there'.

14 With the applicable statutory framework, it is the pre-Amendment C262 version of the CCZ1 that is the primary planning control in this case, because of the relevant transitional provision forming part of that CCZ1. The applicable CCZ1 provisions include at page 3 a separate potential 'overshadowing' permit trigger, where proposed buildings or works would cast a shadow on the Park. This provision requires that the overshadowing assessment be done between 11.00am and 2.00pm at the Equinoxes. It is common ground that the approved tower at 209 metres AHD would not cast any shadow on the Park at these times and dates - hence the potential overshadowing permit trigger is <u>not</u> activated.

15 The Tribunal accepts that this fact constitutes a very strong statutory indication that the overshadowing impacts of the proposed tower are

acceptable at 209 metres AHD. The Tribunal does not accept that this prima facie position is altered in any way by the DDO10, as it finds that the transitional clause in the DDO10 makes the DDO10 completely irrelevant to this proceeding.

16 As acknowledged by the applicant, the Tribunal still has a discretion per se to consider any more generic relevant planning policies which seek to avoid any year-round overshadowing impacts on public parks. Relevant planning policies can and should be considered to carry more limited weight than the specific applicable statutory controls. The year-round overshadowing situation on balance does not justify overturning the aforementioned 'very strong statutory indication' that (at the Equinoxes) any overshadowing of the Park is within acceptable parameters.

17 If hypothetically:

- there was no separate 'overshadowing' permit trigger at page 3 of the pre-Amendment C262 CCZ1 to take into account; and
- the overshadowing impact on the Park of the approved tower at 209 metres AHD were simply assessed on a 'year-round planning outcomes' basis with the focus on the colder months of the year,

we might have dealt with our overshadowing findings differently.

18 However, that situation is merely hypothetical and it is not open to any party to seek to retrospectively 'change the goalposts' with how the relevant transitional provisions apply. Rather, if the DDO10 transitional clause was to have a more qualified scope in the manner Ms Brennan was advocating vis-à-vis the approved tower, this should have been overtly written into that clause when the DDO10 was first prepared.

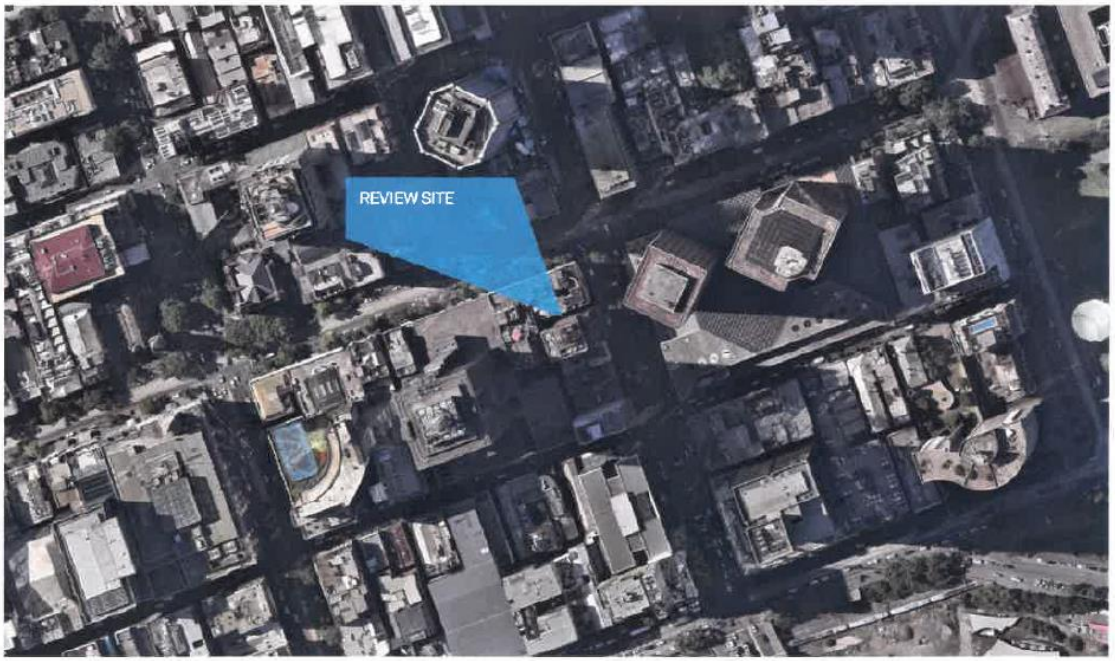
19 The balance of these Reasons further discuss the physical context and the main features of the approved development, clarifies various matters not in dispute between the parties, briefly mentions relevant caselaw on conditions appeals, explains why we are focusing on the substantive issues before us, then deals in turn with the Tribunal's legal and then planning merits findings.

PHYSICAL CONTEXT AND KEY ASPECTS OF THE APPROVED DEVELOPMENT

20 The subject land itself lies on the western side of Exhibition Street, quite close to the 101 Collins Street existing tower.

Figure 4.3
AERIAL IMAGE – REVIEW SITE

Image as at 4 May 2017 obtained from Near Map Pty Ltd



Extract from Mr Biacsi's evidence of the location of the subject land

21 With the hearing before us essentially being confined to 'overshadowing' issues, most of the submissions and evidence focussed on the features and activities associated with the Park. However the various planning and urban design expert reports contain useful descriptions of the main city grid features near the subject land.[5]

22 With respect to the Park itself, Ms Brennan took us to certain strategic documents associated with the creation and operation of the Park. Pursuant to such documentation, the Park is considered to operate with certain precincts. The discussion before us focussed in particular on the upper/more northern precincts which lie closer to the subject land i.e. the ArtPlay, Upper Terrace and Embankment areas.

23 The higher areas (whilst potentially hosting events on the upper flat area) tend to feature less through-traffic, offer excellent longer distance views and lend themselves to a person/group[6] sitting down and enjoying these views. The river-side, flatter area of the Park by contrast has a major 'through-traffic' character featuring what is known as 'Princes Walk' and on occasion can host significant events such as Circus Oz and Moomba rides and activities. Princes Walk is part of a key Melbourne cycle network in the form of the Main Yarra Trail. It also provides access via the William Barak Bridge to the MCG/Melbourne Park tennis precinct.

24 In relation to the main features of the approved development, this is well described at [47] of Mr Barlow's report. Notably, the new tower as

5 A copy of these reports are retained on the Tribunal file.
6 We say 'group' in a pre-pandemic sense.

proposed (assuming condition 1(a) is deleted) would provide for 59 storeys plus plant, 119 dwellings, 185 hotel rooms, 70 sqm of retail, 85 car parking spaces, 41 bike spaces, 72 stores, a loading bay and a through-link to Strachan Lane and Chester Lane.

EXTENT OF COMMON GROUND BETWEEN THE PARTIES

25 Before launching into the detail of this dispute, it is worth acknowledging that a number of relevant points were agreed between the parties, making the extent of the dispute more confined.

26 Ms Brennan helpfully clarified from the outset that, in relation to the approved tower, the Minister's 'overshadowing' concerns are simply confined to the implications for the Park.

27 Mr Townshend acknowledged at [2] of his written legal submission that the Park is a valued place. The strategic documents referred to show that over any one year, large number of persons visit/pass through the Park. Even the applicant's own expert witnesses (Messrs Barlow and Biacsi) made similar acknowledgements whilst presenting their evidence.

28 In relation to the general planning policy framework, Mr Townshend's same [2] also acknowledges that the Melbourne Planning Scheme cannot be said to be "…ignorant of the values attributed to public open space".

29 Counsel before us were in agreement that the Tribunal should take the benefit of suitable case law on statutory interpretation and application. Pages 19-20 of Ms Brennan's main written submission discusses 'principles of statutory interpretation'[7]. None of these principles were not disputed.

30 Turning to the relevant planning controls, with reference to the Joint Memorandum prepared by the parties, the as-resolved position jointly explained to us was that:

- The primary planning control here is the version of the CCZ1 in force prior to Amendment C262 commencing i.e. prior to 3 September 2015;
- This version of the CCZ1 control creates a generic 'buildings and works' permit trigger for the approved tower on the subject land, pursuant to its Clause 37.04-4;
- Where page 3 of this CCZ1 includes three bullet points which each deal with 'overshadowing' as a potential permit trigger, the last of these three is the relevant one, but is not activated on the facts here. That is, the Minister acknowledged that the approved tower on the subject land at a height of 209 metres AHD would not create any shadow on the Park between 11.00am and 2.00pm at the Equinoxes.
- There is no permit trigger created by the DDO10 and it does not 'apply' to the facts of the planning controls that apply here (but noting that the

[7] Notably from *Shadda Abercrombie v Salter Architects & Anor* [2018] VSCA 74

Minister puts a particular meaning on the word 'apply' – see the discussion further below).

- Beyond the pre-Amendment C262 CCZ1 and the debate whether or not the DDO10 plays any role at all in our discretion, the parties otherwise agreed that it is the current version of the Planning Scheme that is to be applied i.e. the current version at the time of our decision. This is consistent with the general position laid out in *Ungar v City of Malvern* [1979] VR 259.

RELEVANT CASE LAW ON CONDITIONS APPEALS

31 With both parties being legally represented and the key principles being uncontentious in themselves, it is appropriate that we simply acknowledge in brief the relevant case law for this type of conditions appeal.

32 In the Supreme Court decision of *Melbourne Water Corporation v Domus Designs Pty Ltd* (2007) 16 VR 539, Justice Gillard formulated the relevant test as being whether the condition in question is "..reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised?".

33 In *Scott v Maroondah CC* [2007] VCAT 1474 the Tribunal summarised the common law test for the validity of a permit condition in the following terms:

- The condition must fairly and reasonably relate to the permitted development.
- The condition must be in aide of a planning purpose.
- The condition must not be imposed for an ulterior purpose.
- The condition must not be vague and uncertain.

FOCUS OF THE TRIBUNAL ON THE SUBSTANTIVE ISSUES

34 On the one hand, it was a great assistance to us that both parties were represented by senior and junior Counsel, that we received considerable expert evidence, that we had the benefit of very detailed A3 size computer-generated overshadowing diagrams and shadow analysis, and that Counsel provided us with very detailed written submissions. In addition, we together conducted an unaccompanied inspection of the Park after the hearing.

35 On the other hand, Sections 97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998* provide a mandate that Tribunal hearings are to be fair but conducted efficiently, with a focus on resolving the substantive issues in dispute (whilst avoiding undue technicality).

36 In this spirit, the balance of our Reasons will not attempt to address every one of the very wide range of issues raised by the submissions and/or expert evidence before us. To do so would require a response more akin to a

University Honours thesis. Rather, our proper task is to discern from the range of detailed information the substantive issues arising and provide a path of reasoning to deal with same, in reaching our overall finding. This is consistent with the emphasis in *Knox City Council v Tulcany Pty Ltd* (2004) VSC 375 on achieving acceptable (rather than optimal or ideal) planning outcomes.

LEGAL FINDINGS OF TRIBUNAL – CORRECT STATUTORY FRAMEWORK

37 The legal analysis and findings set out below about the 'correct statutory framework' are made by Senior Member Martin alone, as the Legal Member of this Division of the Tribunal. However, for the record, SM Naylor agrees with this reasoning and has encouraged that this section be written in plain English as much as possible to assist, particularly local government planners, in understanding the complexity and sensitivity that can be associated with transitional provisions.

38 Given the complexity of the issues, there seems value in first summarising the competing cases put to me, before setting out my findings on the correct statutory framework to be applied here.

Summary of each party's case

39 As stated earlier, there is no dispute between the parties that the version of CCZ1 prior to Amendment C262 is the relevant planning control and that the DDO10 does not apply as a planning control in this case.

Case put by the Minister

40 With the case put by the Minister, it seems fair to say that the starting point is the current version of Clause 22.02 (Sunlight to Public Spaces). The Minister urged the Tribunal to give major weight to this local policy being contemporaneous, directly relevant to the 'overshadowing' debate at hand, and a local policy which specifically refers at page 2 to Birrarung Marr. To avoid duplication, we have reproduced Clause 22.02 at the Appendix to this decision.

41 The Minister also saw it as important that Clause 22.02 was created in tandem with the DDO10 i.e. both were introduced by Amendment C270 and the Minister submitted that they are intended to work in conjunction with each other. It was highlighted that the first paragraph of the DDO10 under the heading 'Overshadowing' at page 3 of 12 relevantly provides that new buildings or works should not cast a shadow across a space listed in Table 2, during the nominated hours and dates. The specific words used are:

> Development should not cast additional shadow across the following spaces at key times and dates identified in the planning scheme.

42 Page 6 of 12 of the DDO10 provides a starting point that a planning permit must not be granted for buildings and works which would cast any additional shadow over a listed Table 2 space (where one such listed space is Birrarung Marr) in relation to the hours of 11.00am-2.00pm and the period between 22 April and 22 September. However for all such spaces, there is a proviso that such a permit may still be granted if "…the overshadowing will not unreasonably prejudice the amenity of the space".

43 With the current Clause 22.02 and the DDO10 being created in tandem and with both of them specifically naming Birrarung Marr as an affected public park, the Minister argued that these specific references to the Park and this overlap require the Tribunal to find that the 'key times and dates' at the top of page 2 of Clause 22.02 must be those found in the DDO10. Following this line of thinking, it was the draftsperson(s) intent in using these words 'key times and dates' to cross reference to the requirement at page 6 of the DDO10 that any potential new overshadowing of the Park shall be assessed between 22 April to 22 September. This includes the colder months of the year when the sun is lower and shadows are longer.

44 The Minister submitted that this emphasis on the period 22 April to 22 September is consistent with the broader planning policy emphasis on the benefits of ensuring the availability of year-round sunlight in this type of public park, not just at the Equinoxes or during the warmer months of the year. This submission was based on relevant strategic documents and the Clause 12.03-1R regional policy, which includes the listed strategy of:

> - Avoiding overshadowing of the river, its banks and adjacent public open space to ensure that the amenity of the public realm is maintained year-round.
>
> (Underlining is my emphasis)

45 The Minister acknowledged that the DDO10 includes the following relevant transitional provisions at Clause 7 of its last page:

> The requirements of this schedule do not apply to:
>
> - An application (including an application to amend the permit) made before the commencement of Amendment C262 to this planning scheme. For such applications, the requirements of this scheme, as they were in force immediately before the commencement of Amendment C262, continue to apply.

46 The Minister submitted that the Tribunal can still give major weight to the broader overshadowing assessment period of 22 April – 22 September provided for at page 6 of the DDO10, because the transitional provision relates to the DDO and Clause 22.02 requires consideration of key dates and times. In other words, Ms Brennan opined that it is feasible and appropriate for the Tribunal (whilst not 'applying' the DDO10) to focus on this broader DDO10 overshadowing assessment period when considering Clause 22.02.

47 Hence, the Minister urged the Tribunal to interpret the relevant statutory framework as ultimately requiring a broader focus on the extent of the 11.00am – 2.00pm overshadowing of the Park, over the broader period between 22 April and 22 September.

Case put by the applicant

48 By contrast, the applicant argued that it would be inappropriate to start with and strongly focus on Clause 22.02, as it is a mere planning policy (providing broad guidance) rather than a prescriptive planning control.

49 Where the Victorian statutory planning framework has a hierarchical structure, the applicant submitted that the Tribunal should first establish which planning controls apply, then take guidance from the planning policy context as applicable.

50 The applicant submitted that the default position here is that the overshadowing assessment for the approved tower at 209 metres AHD needs to mainly focus on any overshadowing impacts at 11.00am to 2.00pm at the Equinoxes, as per the relevant CCZ1 provisions.

51 The applicant argued that this default position is not changed at all by the DDO10. This is because the transitional provision at its Clause 7 totally excludes the DDO10 from playing any role with the consideration of this permit application. The applicant argued the transitional provision is a total exclusion, and is not a qualified or limited exclusion as suggested by the Minister.

Findings of Tribunal

The Tribunal needs to work with and give suitable weight to the applicable statutory planning framework, in making its decision in this proceeding

52 At the risk of stating the obvious, in this proceeding, the Tribunal needs to makes its decision within the parameters of the applicable statutory planning framework. Where the relevant draftsperson(s) and Parliament have made particular judgments in framing the relevant statutory controls in a certain way, it is not for the Tribunal to disregard or double-guess same.

53 On this issue, the applicant's written legal submission (with the italics from the quote itself) states as follows at [2-3]:

> …The more pertinent observation is that the decision maker must be guided by the relevant planning provisions in determining what is an acceptable outcome in any one case. It is not the task of the Tribunal, nor the Minister acting as the Responsible Authority, to impose different or other expectations than those fairly and appropriately derived from the planning scheme itself.
>
> This case does not ultimately turn on unarguable but general principles supporting solar access to public spaces year-round. Instead it turns on how the proposal responds to the guidance that the

> Scheme provides *in respect of this application* concerning the degree of overshadowing that should be considered acceptable.

54 These are fair points and observations. Whilst any of us might have our own personal views about preserving sunlight in public parks year-round, it would create a kangaroo-court type of situation if the Tribunal made judgements about same simply using a 'first principles' approach or loose notions of 'fairness'. The relevant planning framework is there (as part of our democratic system) to provide important guidance on how these types of planning judgements are to be made.

The Tribunal needs to first establish the applicable planning controls, then utilise planning policy guidance as applicable

55 For the following reasons, it is the proper assessment approach, with any one contentious planning application, to first establish the relevant planning controls, then to utilise the relevant planning policy guidance (not the other way around).

56 It is common sense that with our Victorian planning system, planning controls play a critical and specific role with any one proposal, in telling us what planning permit trigger(s) arise. Some proposals are complex, where multiple planning permit triggers arise. Other proposals might have challenging planning policy implications, yet involve no planning permit trigger because the proposal is a Section 1 use and as-of-right. This latter type of proposal presumably then would only require a building permit.

57 Hence from a 'chicken and egg' point of view, it is essential to start with the relevant planning controls, when assessing any one proposal. Even if it might suit one of the stakeholders involved, it would be inappropriate for the planning assessment process to start with a certain planning policy and 'work backwards from there' with understanding the applicable planning framework. That is to say, the 'policy tail should not be wagging the planning control dog'.

58 The Minister's main written submission at page 12 in fact reinforces this approach. In discussing the relevant planning framework for this proceeding, [65-68] refer to the relevant CCZ1, then [69] confirms the situation with the 'overlay controls'. Only after dealing with these matters, does [70] onwards deal with the relevant planning policies.

What are the applicable planning controls here?

59 It is common ground that the primary planning control in the circumstances here is the pre-Amendment C262 version of the CCZ1.

60 As to whether any other planning control has any role, the only other control in debate before us was the DDO10. In this regard, the applicant submitted that the DDO10 is completely irrelevant to this proceeding because of its transitional provision, whereas the Minister argued that it still plays a role in association with Clause 22.02.

What is the 'default position' with the appropriate time of year for the Tribunal to assess the potential overshadowing of the Park by the approved tower?

61 It is clear cut that on the facts here, the default position is that the appropriate time of year for the Tribunal to be assessing any potential overshadowing of the Park is 11.00am to 2.00pm at the Equinoxes, as per the relevant CCZ1. This is the primary and relevant planning control, particularly the third 'overshadowing' bullet point at page 3.

62 It is reasonable and appropriate for the Tribunal to place major weight on the fact that with this third bullet point, the draftsperson(s) of the CCZ1 simply chose the Equinoxes as the time of year to assess whether this potential 'overshadowing' permit trigger is activated. The draftsperson(s) could have chosen a broader assessment period more oriented to the cooler months of the year, but this was not the case. It is also reasonable to take the approach that this third bullet point was inserted for a reason and 'has work to do' – it creates a separate potential permit trigger, above and beyond the generic 'buildings and works' one. This third bullet point cannot just be conveniently disregarded or 'read down', just because it suits one party's case to do so.

63 All parties agree that this potential permit trigger from the third bullet point is not activated on the facts here.

What implication should be taken from the approved tower not triggering any necessary 'overshadowing' approval from page 3 of the relevant CCZ1?

64 Paragraph [7(d)] of the applicant's written legal submission makes the following submission (with the highlighting taken from the quote):

> Fourth, within this statutory framework, the zone control [i.e. the CCZ1] provides direct and specific guidance as to the planning scheme's expectations for shadow impacts. The necessary implication of the way that the planning control is formulated is that an application that does not trigger the need for particular planning permission in respect of shadows cast by the proposed development across public parks (including Birrarung Marr) should be considered at least *prima facie* acceptable in this respect.

65 I find this proposition to be convincing – it has the ring of logic and common sense to it. Where the draftsperson(s) of the CCZ1 at page 3 chose the Equinoxes as the time of year to assess if any 'overshadowing' permit trigger arises and where no such trigger arises on the facts here, it is reasonable to treat this situation in itself as constituting a very strong statutory indication that the overshadowing is acceptable.

66 In other words, this 'very strong statutory indication' is reasonable to adopt, in giving suitable planning recognition to the fact that the draftsperson(s) of the relevant CCZ1 chose to impose a separate potential 'overshadowing' permit trigger at page 3 and that the approved tower at 209 metres AHD does not activate this trigger.

Prima facie position pursuant to the CCZ1

67 In summary then, if one applies the applicable provisions of the relevant CCZ1 to the facts here, I accept that the prima facie position which arises is that:

- The default time of year for assessing the overshadowing impacts of the approved tower at 209 metres AHD is 11.00am to 2.00pm at the Equinoxes.
- Applying this assessment, the relevant shadows cast do not even come close to casting a shadow on the Park at these times and dates.
- Hence no 'overshadowing' planning permit trigger arises pursuant to page 3 of the relevant CCZ1.
- It is reasonable to take this situation as a very strong statutory indication that the extent of overshadowing cast by the approved tower at 209 metres AHD is acceptable.

Is this prima facie position changed by the role of the DDO10?

68 The sixty-four dollar question then becomes whether this prima facie position is altered due to any role which the DDO10 plays here.

69 In this regard, my finding is that there is no change, because I accept that the DDO10 Clause 7 transitional clause makes the whole of the DDO10 completely irrelevant to this proceeding. I rely on the following points in making this finding.

70 First, with the debate before us, even the Minister conceded that the DDO10 creates no permit trigger here and that DDO10 does not 'apply' to this application. The online definition of the word 'apply' is 'be applicable or relevant'. The Macquarie Dictionary relevant definition is '…to put to use, employ'. With respect, I find that it is contrived 'hair splitting' for a party to suggest that a planning control does not 'apply', yet still has some on-going qualified role or influence e.g. for information purposes. I am not seeing in the word 'apply' the type of more nuanced/qualified operation that Ms Brennan was urging on me. Rather, in considering how the ordinary person in the street might regard the word 'apply' and also the aforementioned definitions, my view is that any one planning control simply applies, or it does not.

71 Second, I note that the Minister was not able to provide me with any previous court or tribunal decision upholding this more qualified view as to how the word 'apply' operates with this transitional provision (I suspect that no such case exists).

72 Third, it goes against the Minister's position here that the relevant transitional clause at page 12 of the DDO10 is couched in very conventional language. Indeed, this was properly acknowledged by Ms Brennan in response to a query from myself.

73 Both as a long-time VCAT legal member and before that as a solicitor/planner, it has always been my understanding that (in simple terms) transitional provisions in Victorian planning controls are intended to totally exclude new planning provisions, in relation to live permit applications that had been lodged in good faith at an earlier point in time. Hence the aim is a fair outcome, in terms of avoiding an earlier planning permit applicant feeling like he or she has been 'ambushed' by the commencement of a new planning control part way through the processing of that permit application.

74 Surely this spirit of seeking fair planning outcomes would be highly compromised, if common transitional clauses such as this were to have a more qualified operation. Rather than 'earlier in time' permit applicants simply being able to totally rely on this type of transitional provision, the type of more qualified effect being advocated by Ms Brennan would, in practice, require such 'earlier in time' permit applicants to have to 'look behind' the operation of a relevant transitional provision. This would be a potentially challenging, time-consuming and subjective exercise, which surely is not what Parliament intended with the operation of transitional provisions in our planning system.

75 Paragraphs [107-109] of the Minister's main written submission explores the concept that the applicant will still partially benefit from the Clause 7 DDO10 transitional/exemption provision, even if the overshadowing assessment here applies the broader times and period set out at page 6 of the DDO10. Similar to my comments in the paragraph above, surely it would be inappropriate, going against common practice and 'opening a can of worms' to take the view that transitional provisions can operate so as to confer 'partial benefits'. I make the same 'surely not what Parliament intended' comment.

76 Fourth, completely disregarding the DDO10 surely is fair and consistent given the simple fact that, at the time this planning permit application was lodged in 2014, DDO10 did not exist at all. Whereas with the CCZ1, the exercise is clarifying 'which version to apply'.

77 Finally, whilst this is more a secondary aspect, I note that [20] of the Joint Memorandum between the parties provides (with my emphasis) that:

> In this way, the DDO10 transitional provision operates to preclude the application of DDO10 in its entirety to permit applications made before Amendment C262…

So, the DDO10 is not precluded partially or in a qualified way, but "in its entirety".

Alternatively, is this prima facie position changed by the role of Clause 22.02 or the Overshadowing Technical Report?

78 For the following reasons, I do not see this prima facie position as altered by the contents of the current Clause 22.02.

79 I recognise that Clause 22.02 is detailed, is very directly on point in dealing with 'Sunlight to public spaces' and, at page 2, it does overtly refer (amongst many other relevant places) to Birrarung Marr.

80 However it also needs to be said that Clause 22.02 is a planning policy not a planning control, where there is now a long line of Tribunal case law providing that planning policy (properly viewed) is intended to provide broad guidance. See for example SM Liston's comments in *SMA Projects v Port Phillip CC* (1999) VPR 270 at pages 272-275. I also refer to the statement by SM Byard in *Subaru Melbourne v Casey CC* (Red Dot) [2006] VCAT 449 that:

> Planning policies are intended to provide guidance in relation to the exercise of planning discretions, but they are not intended to be a set of rules to be applied rigidly. If they were, they would appear as control provisions in the planning schemes, rather than as policy provisions intended to provide discretion.

81 With the situation here, if it was the intent of the Minister to introduce very prescriptive and/or mandatory overshadowing requirements, it is reasonable for the Tribunal to expect that same would be achieved through a planning control.

82 As mentioned above, it would be 'the tail wagging the dog' to take the view that a policy rather than a control dictates the overall planning outcome. Remembering that the DDO10 does not apply and transitional provisions are meant to give a benefit to a planning permit application lodged in good faith, it is correct to say one should consider the planning scheme relevant in this case as if the DDO10 did not exist. This means the content of Clause 22.02 needs to be read in light of the requirements of the relevant planning control, which is the relevant CCZ1.

83 The text at the top of page 2 of Clause 22.02 cross-references to 'key times and dates identified in the planning scheme'. This necessitates looking elsewhere (beyond Clause 22.02) to find the key times and dates. I see major weight in the submission by Mr Townshend that this 'cross-referencing drafting technique' provides a greater level of flexibility, which in turn enables a 'connecting of the dots' between the words 'key dates and times' in the 'later in time' Clause 22.02 with the times and dates set out in the third bullet point at page 3 of the 'earlier in time' relevant CCZ1.

84 I am unconvinced by Ms Brennan's submission that these words 'key times and dates' from Clause 22.02:

- Inherently cannot apply to a planning control which was created earlier in time than Clause 22.02 itself.
- Can only be referring to the broader 'overshadowing assessment' times and dates set out at page 6 of the DDO10.

85 With the first of these propositions, on a plain reading of the relevant Clause 22.02 text, there is nothing in such text pointing to the more confined position being advocated by Ms Brennan and she did not provide me with any precedent cases substantiating same. Given the dynamic nature of our planning schemes and the relatively common role of transitional clauses in them, my view is that the draftsperson(s) of Clause 22.02 would have wanted to retain the flexibility to cross reference to other planning scheme provisions created earlier or later in time.

86 It was common ground between the parties that all planning policies including Clause 22.02 apply as at today. Indeed, it is our understanding that essentially policy never operates with a transitional aspect to it. This makes sense because policy is only a guideline, so it has inherent flexibility built into it in terms of how it should be considered and applied.

87 With the second of these propositions, I consider it to be fatally flawed, given my finding that the transitional provision in Clause 7 of the DDO10 makes the DDO10 completely irrelevant to this proceeding.

88 Where the Minister placed great emphasis on the Amendment C270 tandem introduction of the DDO10 and Clause 22.02 with how to interpret the words 'key times and dates in the planning scheme' from Clause 22.02, again I do not see this 'tandem introduction' as changing the basic operation and effect of the transitional provision in the DDO10. If it was the true intent of the Amendment C270 draftsperson(s) that certain aspects of a relatively new planning control like the DDO10 should apply to a long-standing project like this, which was lodged with the Minister over five years ago, it is reasonable for the Tribunal to expect that this more nuanced position should have been overtly spelt out in the wording of the DDO10 transitional provision (but this is not the case here).

89 For the removal of any doubt, I similarly do not see the prima facie position as altered by the role of the '*Central City Built Form Review Overshadowing Technical Report, DELWP, April 2016*'. Whilst recognising the broader nature with how this report considers overshadowing of public parks year-round, it nevertheless carries limited weight due to it merely being a reference document in Clause 22.02 and in the DDO10, rather than a control or local policy in the planning scheme itself.

Final points with legal ruling

90 Near the end of the hearing, Ms Brennan provided the Tribunal with written 'Reply submissions'. At page 4 of same, an argument is run along the lines that the Tribunal should give priority to those provisions which, currently, are actually in the planning scheme. Following this argument, the transitional provision at Clause 7 of the DDO10 does not change the fact that the DDO10 forms part of the Melbourne Planning Scheme today, whereas the pre-Amendment C262 version of the CCZ1 no longer does.

Ms Brennan makes a similar point at [90] and [105] of her main written submission – in the latter paragraph she submits that it would be inappropriate to treat the DDO10 as if it is "…missing from the Scheme".

91 The implication here seems to be that this current situation with the planning scheme diminishes the role of the DDO10 transitional provision and strengthens the case that the Tribunal should still be giving weight to the broader overshadowing times and dates set out at page 6 of the DDO10 when considering Clause 22.02.

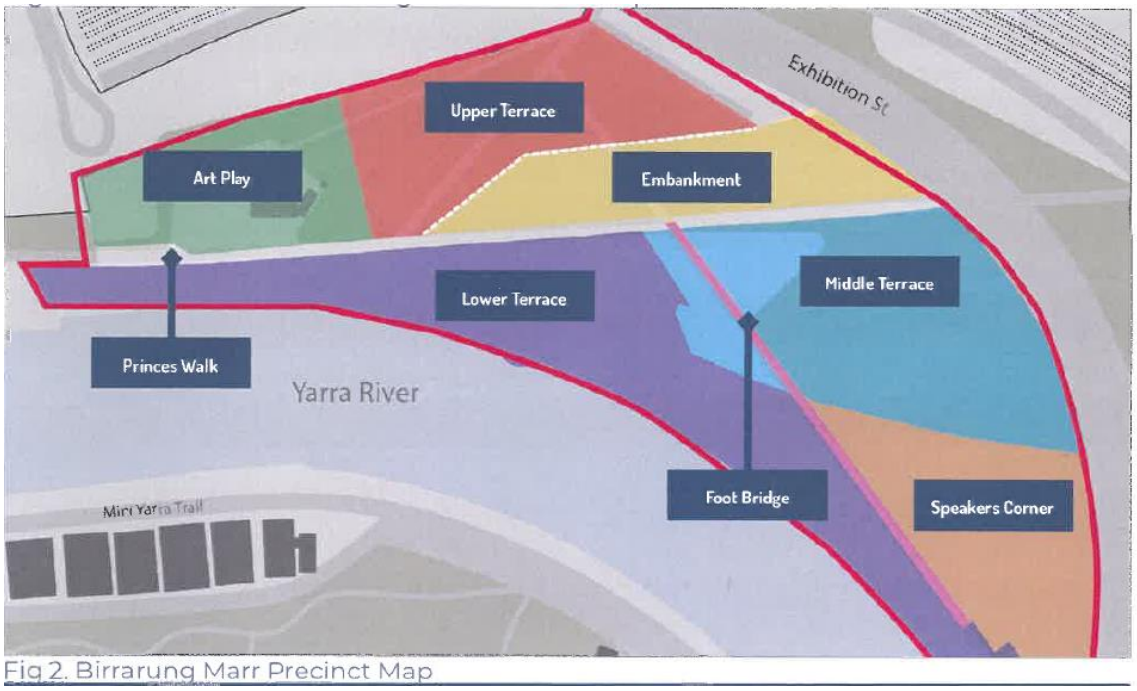
92 With respect, I find this line of thinking to be fatally simplistic, in conveniently ignoring the fundamental and long-standing role of transitional clauses in Victorian planning schemes. The whole point of transitional provisions is that you have to go beyond what version of any one planning scheme exists today. To simply give priority to the current contents of any one planning scheme would emasculate the role of transitional provisions and make this aspect of the Victorian planning system unworkable. Surely that is not what the draftsperson(s) of Clause 22.02 intended.

93 At [96] of her main submission, Ms Brennan argues that applying the relevant CCZ1 overshadowing assessment times and dates rather than those from the DDO10 would render the current version of Clause 22.02 "worthless'. This is overstated. This permit application for 63 Exhibition Street appears to be one of the last (if not the last) project lodged early enough in time to take the benefit of the DDO10 transitional provision. The on-going situation with projects lodged with the Responsible Authority after the September 2015 commencement of Amendment C262 is that the transitional provision is irrelevant and such projects will have to comply with the DDO10 in the usual way.

94 For the removal of any doubt, I do not see the *Dexus* decision as offering any real assistance with resolving these legal issues and accordingly give it little weight. The *Dexus* decision did not directly tackle much of what I have addressed above and its findings have been somewhat superseded anyway by the Joint Memorandum relevant to this proceeding, which was endorsed by the Supreme Court.

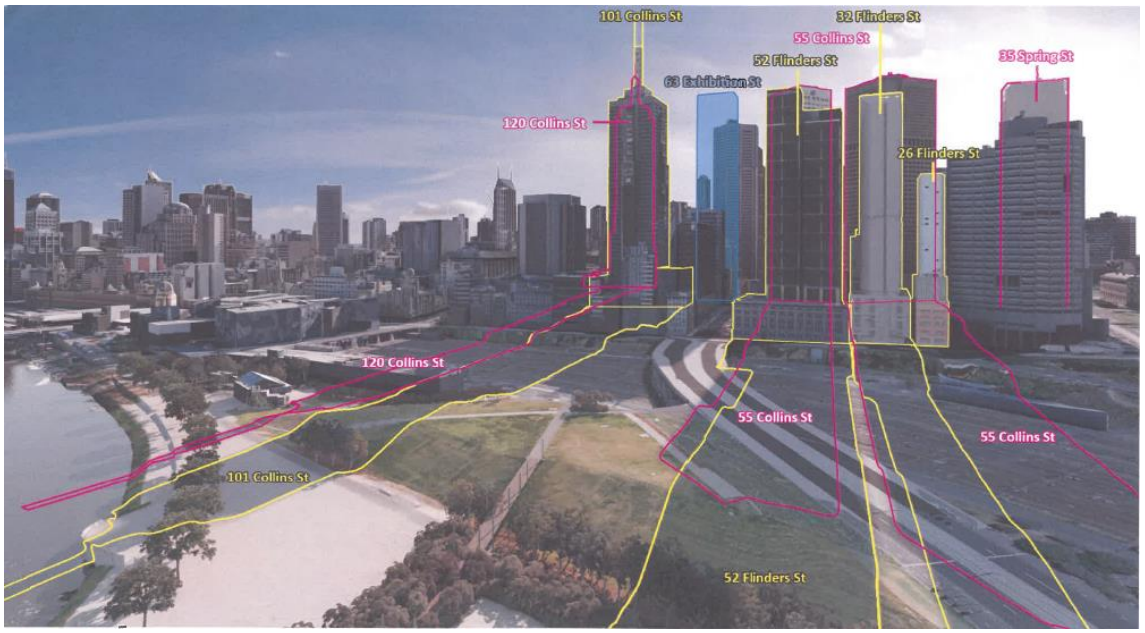
FINDINGS OF TRIBUNAL ON PLANNING MERITS

95 The Park is effectively broken down into precincts that contain different opportunities for public engagement. The concerns expressed in this case relate generally to the area north of Princes Walk. More specifically, the concerns relate to the ArtPlay area, including the rock sculpture component and to the Upper Terrace area, including the grassed Embankment at the south/southwest end of the Upper Terrace area.



Extract of the precincts of Birrarung Marr in Mr Goss' evidence

96 Mr Goss' shadow analysis helpfully provides a general illustration at Figure 4 of the existing situation (of existing and approved shadow) in proximity to the Upper Terrace and the Embankment.[8] An extract of this follows:



[8] Figure 4 does not specify a time of day or time of year.

97 In particular, this illustration (on the previous page) provides a general depiction of the shadow already cast by the towers of 101 Collins Street and 52 Flinders Street[9] and the existing sunlight that exists between these two towers, penetrating the Park. This break in the shadow is assisted by the existence of Exhibition Street. The key merits dispute between the parties is the impact of the new shadow cast by this approved tower onto parts of the Park that benefit from this existing break in the shadow. Further, the Minister's case, including the urban design and planning evidence, focussed particular concern on the impact in the winter months, including near the winter solstice on 22 June.[10]

98 Overall, the Minister considers the analysis of this impact should be based on 11.00am to 2.00pm of each day between 22 April and 22 September (which are the key times and dates in the DDO10). This is a period of about five months and includes the colder/winter months of the year. The Minister submits the extra shadow cast by the tower, particularly on or near the winter solstice in the middle of the day, is unacceptable.

99 In contrast, the applicant's submission is that the analysis of the shadow impact should be based on 11.00am to 2.00pm at the March and September Equinoxes, as set out in the relevant version of the CCZ1. The applicant conceded by the end of the hearing that it is appropriate for the Tribunal to also look at the broader shadow impact having regard to the relevant planning policies (including clause 22.02) and the purpose and decision guidelines of the relevant version of the CCZ1.[11]

100 Hence, our analysis of the shadow impact has, firstly, considered the Equinoxes and, secondly, considered the broader period throughout the year, including between 22 April and 22 September.

The shadow cast at the Equinoxes

101 The existing towers and this approved tower cast no shadow on the Park at the Equinoxes. Indeed, the shadow of the approved tower at its full RL 209.0 AHD height does not even come close to overshadowing any part of the Park. This is illustrated in the following 1.00pm extract from Mr Sowinski's shadow analysis:

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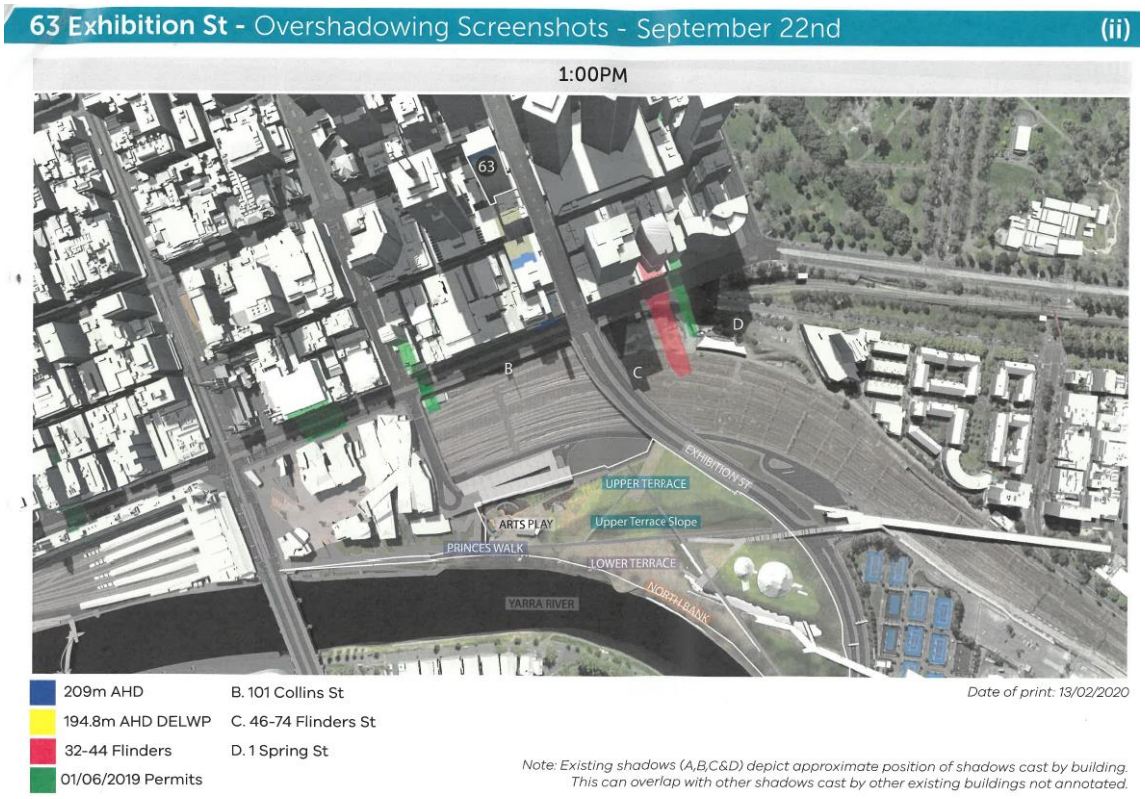
9 Note that Mr Sowinski's shadow analysis labels this tower a little differently as '46-74 Flinders Street'.

10 The solstice and equinox dates in Australia each year can change as there is no exactly 365 days in a year, so we have considered the dates for these occurrences that are referred to in the submissions and expert evidence presented.

11 The purpose of the relevant version of the overarching CCZ includes implementing State and local planning policies and 'to create through good urban design an attractive, pleasurable, safe and stimulating environment'. The relevant version of the CCZ1 includes a decision guideline to consider 'the effect of the proposed works on solar access to existing open spaces and public places'.



The blue in the legend identifies the proposed tower's shadow, which is difficult to discern and sits generally between B and C

102 All the urban design and planning witnesses agreed or properly conceded during cross-examination that, if the overshadowing analysis was to be based solely on the Equinoxes, this approved tower would not have a shadow impact on the Park at all. If this was the extent of analysis and consideration necessary, the approved tower at its full height would clearly be acceptable.

The shadow cast throughout the year

103 The Minister submits a broader consideration of the shadow impact is necessary, and the applicant and its expert witnesses acknowledge a broader consideration is appropriate and reasonable as part of the overall consideration of the planning merits of the approved tower.

104 The objectives of Clause 22.02 do not generally refer to a particular time of year when sunlight access needs to be considered. Rather, the objectives seek a 'comfortable and enjoyable public realm', 'good sunlight access to public spaces', an enhancement of public spaces and no significant loss of sunlight or diminution of the enjoyment of public spaces. The one objective of clause 22.02 that does have a more specific focus is:

- To protect, and where possible increase the level of sunlight to public spaces during the times of the year when the intensity of use is at its highest.

105 There was no dispute between the parties that this objective would include the warmer summer months of the year. The Minister identified that the first shadow cast by the proposed tower onto the Park occurs at 2.00pm on 11 May and then continues through to 26 July, a period of about 10 weeks. The applicant relies on Mr Goss' shadow analysis that the shadow cast by this proposed tower occurs between 18 May and 20 July, and generally only after 1.00pm during this period. The Minister's expert witnesses have focussed upon the time of year between 22 April and 22 September.[12] In support of this, the Minister referred us to a user survey of the Park in May 2017.[13] This survey recorded 6,864 people using the park on a representative weekday and 9,519 people using it on a representative weekend. This survey revealed peak usage occurred in the morning and afternoon commuter peaks and at lunchtime, between 12.00noon and 2.00pm. The survey also revealed the Lower Terrace and ArtPlay areas were the most utilised overall. The Minister submits the Upper Terrace area usage in the survey is demonstrative of this area being valuable, and used principally for lunchtime recreation. All of the urban design and planning expert witnesses accepted that the key times at issue in this case coincide with the surveyed peak lunchtime usage of the Park.

106 Mr Biacsi made the point that, between 11.00am and 2.00pm, the approved tower at its full height casts no new shadow over the Park at all for almost 9 months of the year. Mr Glossop calculated that the approved tower would cast shadow on the Park on 97 days during the entire period of 22 April to 22 September (that is 97 out of 154 days).

107 Returning to the areas of the Park of concern to the experts (the ArtPlay area and the Upper Terrace including the Embankment), much of the focus was upon the shadow impact around the winter solstice. Mr Blades conceded there would be no real impact on the Park until 1.00pm. His analysis indicates the Embankment is affected by winter solstice shadow between approximately 1.40 and 2.00pm, and the ArtPlay precinct is affected between 12.30 and 1.10pm (including the playground and rock sculpture component). Similarly, Mr Glossop conceded it is only 1.15pm onwards where the shadow impact to the Upper Terrace and the Embankment is of concern. These concessions are not far apart from Mr Barlow's evidence that the shadow impact really occurs from about 1.30pm.

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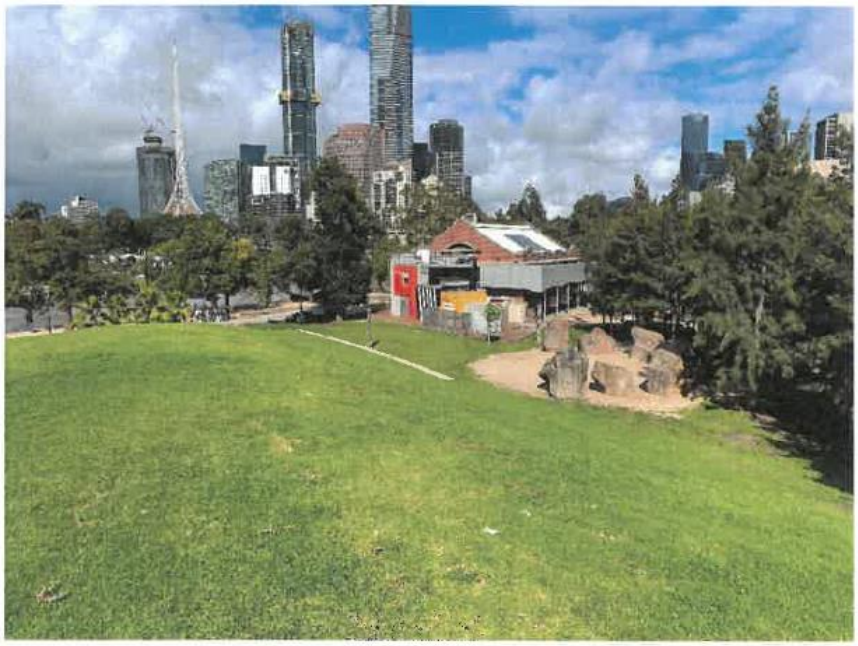
12 These are the key times and dates identified in the DDO10 and in the Central City Built Form Review Overshadowing Technical Report, DELWP, April 2016', which is a reference document to both Clause 22.02 and the DDO10.

13 Birrarung Marr: People counting and park usage. May 2017

The ArtPlay precinct, including the rock sculpture component



Picture 3 – The western embankment of the upper terrace leading to the art play space - looking west

108 Mr Blades estimates that there will be 46 days in winter when additional shadow will be cast onto the ArtPlay precinct. The applicant relies on Mr Goss' shadow analysis that this area is affected by shadow between 15 May and 29 June at and around 1.00pm, with the winter solstice shadow cast by this approved tower impacting on 2% of it. Mr Blades considers the availability of solar access during the colder months contributes to the enjoyment, vibrancy and function of this precinct. The other witnesses did not have the same extent of concern about the impact upon this precinct. Mr Barlow points out the vegetation along each side of the path leading to the rock sculpture component and beyond it to the playground are Australian natives and therefore evergreen, creating a dense and relatively shaded entryway to this precinct from Upper Terrace. Mr Blades' concern focuses upon the time between 12.30 and 1.10pm on 22 June. The 1.00pm shadow is illustrated on the following page.

109 We have chosen not to replicate all the shadow diagrams in this decision. At 12.30pm, the additional shadow cast onto the ArtPlay precinct is minor. The 1.00pm shadow diagram above illustrates the blue shadow of the approved tower does sweep over that part of the ArtPlay precinct around the rock sculptures. However, it must be remembered that this extent of shadow is the worst impact at the winter solstice and it is a shadow that sweeps across, so it is transient, which assists in limiting its impact. In isolation, this extent of additional shadow upon the ArtPlay precinct is an acceptable impact. We note Mr Glossop holds a similar view as he described the impact upon the ArtPlay precinct as 'not unacceptable'.

The Upper Terrace and the Embankment

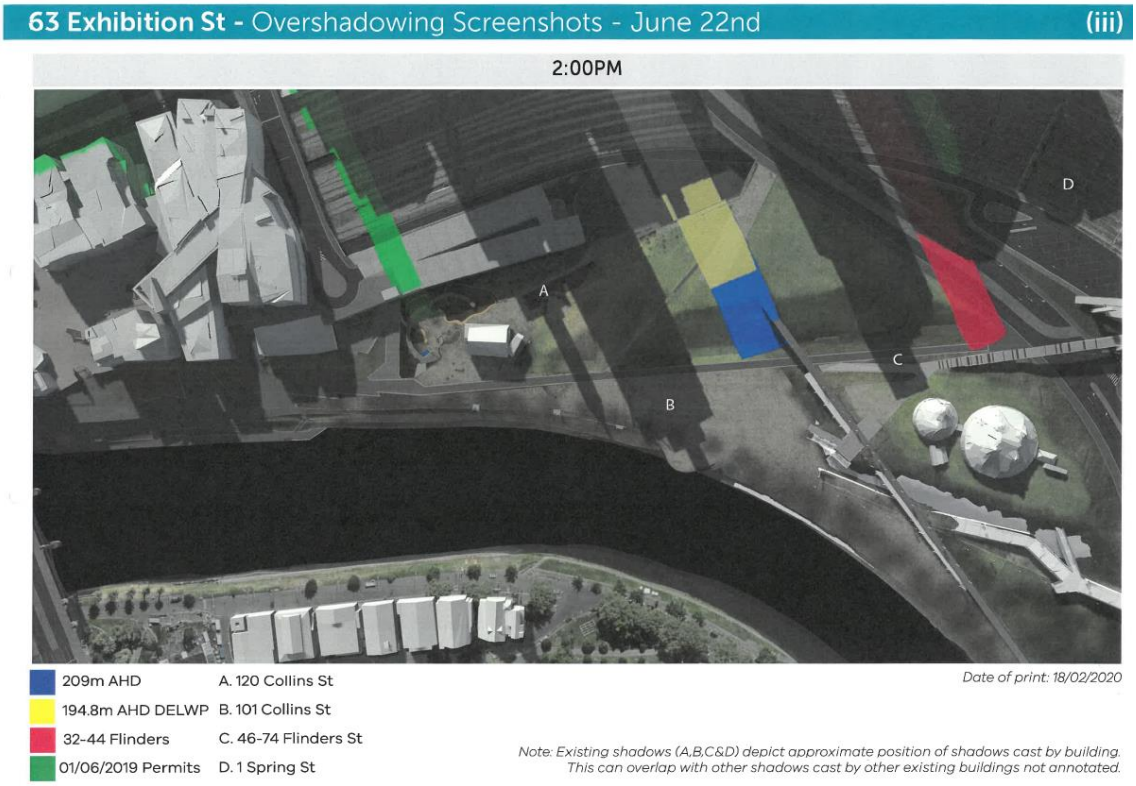
110 The Upper Terrace and the Embankment that slopes down to Princes Walk has an ambience that is enhanced through its sunlight access and expansive views. One aspect of this is highlighted in the photograph on the following page.

Picture 2 – The upper terrace - looking south-east

111 The approved tower has a noticeable impact upon the sunlight access, particularly in the middle of winter. This is evident in the 1.00pm 22 June shadow on the previous page and in the 2.00pm 22 June shadow on the next page. The extent of new shadow sweeps across the Upper Terrace and the sloping Embankment. The Minister supports the additional shadow impact upon the Upper Terrace (the yellow shadow), but not the new shadow that, for some time, affects the Upper Terrace and then the sloping Embankment (the blue shadow). The applicant explained the yellow shadow at the winter solstice would cover 8% of the Upper Terrace (including the Embankment) whereas the blue shadow of the whole of the approved tower would cover 16%. Mr Glossop expressed some concern about the shadow impact on the Upper Terrace that begins around approximately 25 May at 2.00pm and then extends to begin about 1.15pm between 15 and 29 June. The May shadow is not a concern as 2.00pm is the end of the lunchtime period. What is of concern is the shadow impact that occurs from 1.15pm to 2.00pm. It must be remembered that what is in dispute is condition 1(a) that concerns the blue shadow shown on Mr Sowinski's shadow analysis. The yellow shadow does affect parts of the Upper Terrace and this extent of impact is accepted by the Minister.

112 The 1.00pm winter solstice shadow on the previous page and the 2.00pm winter solstice shadow on the following page illustrates that, fortuitously, there is a large expanse of sunlight access existing between the shadows cast by the towers at 101 Collins Street (marked 'B') and 52 Flinders Street (marked 'C'). This approved tower will diminish the potential for

uninterrupted sunlight access for over one hour for about five weeks of the year, which the applicant described as occurring between 8 June and 6 July.



113 Mr Barlow considers this adverse shadow impact is acceptable because it is transitory, as it sweeps across the sunlit space. He indicated the impact would be more likely to be unacceptable if the relevant one hour of sunlight was completely removed. Mr Biacsi described the character of the Park as having fingers of shadow exposure that create a patterning of shadow movement. He thinks this approved tower is consistent with that existing pattern of shadowing. Mr Barlow also pointed out this adverse shadow impact occurs at a time of year when the grassed Embankment is not likely to be well used, because it may be moist grass. These observations are fair, but we remain concerned that this proposal will result in the fragmentation of what is otherwise likely to be a reasonably rare occurrence of uninterrupted sun access in the middle of winter to a grassed passive open space area during part of its likely peak time of usage.

Picture 4 – The embankment - taken from Princes Walk

Picture 5 – The embankment - taken from top of the upper terrace looking south-west

114 If the considerations before us required a focus upon the winter months of the year, the importance of this concern would be elevated. Some of the witnesses made passing reference to Amendment C278 to the Melbourne planning scheme.[14] Mr Biacsi described this amendment as including changes to the policy basis and the objectives of Clause 22.02 so that references to the intensity of use are removed and winter sunlight references are included. Again, if such a policy with a focus upon winter shadow

[14] We understand the amendment has reached the stage of being referred to an Independent Panel hearing, which has been adjourned due to circumstances associated with COVID-19.

impacts was in the planning scheme, the importance of this concern would be elevated. But, that is not the situation before us.

115 As already explained, the broader consideration of shadow impact before us involves having regard to the shadow impact throughout the year. Also, Mr Biacsi pointed out that the decision guidelines of Clause 22.02 require consideration of the shadow impact on the whole of the Park, and not just the impact on a 'cherry-picked' precinct or two within the Park. Mr Biacsi stated five of the seven hectares of the Park are unaffected by shadows in winter (based on Mr Goss' shadow analysis). He also stated the worst case on 22 June was an additional 4% of shadow cast onto the Park as a whole. He described this extent of impact as very small and inconsequential, and this is a relevant consideration. So too are the facts that this additional shadow impact occurs for around one hour for five weeks of the year in comparison to the overall five month period between 22 April and 22 September or in comparison to the whole of the rest of the year. In light of these broader considerations, this adverse impact is unfortunate and not ideal. However, it is not of sufficient magnitude in land area, time of day, weeks or months to warrant the imposition of condition 1(a) requiring this impact to be effectively removed.

CONCLUSION

116 For the above reasons, the shadow cast by the approved tower at its full proposed height is an acceptable impact upon Birrarung Marr. Therefore, the Permit is varied to amend condition 1(a) to require the height of the tower to be no higher than RL 209.0 AHD.

Philip Martin
Presiding Senior Member

Rachel Naylor
Senior Member

APPENDIX – CLAUSE 22.02

SUNLIGHT TO PUBLIC SPACES

This policy applies to public spaces throughout the municipality including parks and gardens, squares, streets and lanes, and privately owned publicly accessible spaces within developments, including building forecourts, atria and plazas.

The policy does not apply to land within the Docklands Zone and Schedule 5 to the Capital City Zone (City North).

Policy Basis

The State Planning Policy Framework sets out objectives for a high quality public realm. Similarly, the Municipal Strategic Statement sets out objectives for public realm quality. A fundamental feature of Melbourne's character, liveability, comfort and attractiveness is its ability to offer sunlight to its streets and public spaces at the times of the year when the intensity of pedestrian activity is highest.

The policy recognises that sunlight contributes to the amenity and useability of public space, public health and well being and supports trees and other plants.

The policy recognises that not all public spaces have the same sunlight access requirements. Public spaces make a contribution to Melbourne's character and cultural identity, where specific controls are required to maintain sunlight access and prevent additional overshadowing when the spaces are intensively used.

The policy provides guidance for the consideration of the impact of additional overshadowing on the amenity, quality and useability of the public space.

Objectives

To achieve a comfortable and enjoyable public realm.

To ensure new buildings and works allow good sunlight access to public spaces.

To ensure that overshadowing from new buildings or works does not result in significant loss of sunlight and diminish the enjoyment of public spaces for pedestrians.

To protect, and where possible increase the level of sunlight to public spaces during the times of the year when the intensity of use is at its highest.

To create and enhance public spaces to provide sanctuary, visual pleasure and a range of recreation and leisure opportunities.

Policy

It is policy that development proposals are assessed against the following requirements.

Key Public Spaces

Development must not cast additional shadow across the following spaces at key times and dates identified in the planning scheme:

The Yarra River corridor, including 15 metres from the edge of the north bank of the river to the south bank of the river

Federation Square

City Square

State Library Forecourt

Bourke Street Mall south of the tram tracks

Shrine of Remembrance and its Northern Forecourt

Boyd Park

Development should not cast additional shadow across the following spaces at key times and dates identified in the planning scheme:

Parliament Gardens

Treasury Gardens

Flagstaff Gardens

Gordon Reserve

Parliament Steps and Forecourt Old

Treasury Steps

Flinders Street Railway Station Steps

Batman Park

Birrarung Marr

Sturt Street Reserve

Grant Street Reserve and the Australian Centre for Contemporary Art Forecourt, south side of Grant Street between Sturt Street and Wells Street

Dodds Street between Southbank Boulevard and Grant Street

Swanston Street between south bank of the Yarra River and La Trobe Street

Elizabeth Street between Flinders Street and Flinders Lane

Hardware Lane and McKillop Street

The southern footpath of Bourke Street between Spring Street and Exhibition Street

The southern building line of Little Bourke Street between Spring and Swanston Streets and Cohen Place/ Chinatown Plaza

Liverpool Street and Crossley Street

Market Street between Collins Street and Flinders Lane

Other Public Spaces within the municipality

Development should not unreasonably reduce the amenity of public spaces by casting additional shadows on any public space, public parks and gardens, public squares, major pedestrian routes including streets and lanes, open spaces associated with a place of worship and privately owned plazas accessible to the public between 11.00 am and 2.00 pm on 22 September.

Policy Implementation

In considering the impact of additional overshadowing as set out in this policy, the responsible authority will assess whether the additional overshadowing adversely affects the use, quality and amenity of the public space. The following matters will be considered as appropriate:

The area of additional overshadowing relative to the area of remaining sunlit space compared to the total area of the public space;

Any adverse impact on the cultural or social significance of the public space;

Any adverse impact on the natural landscaping, including trees and lawn or turf surfaces in the public space;

Whether the additional overshadowing compromises the existing and future use, quality and amenity of the public space;

Whether allowing additional shadows on other public spaces such as streets and lanes, is reasonable having regard to their orientation and shadows cast by adjacent buildings.

Definitions for the Purpose of this Policy

The south bank is the north edge of the existing physical boundary bordering the south side of the river.

The north bank is the south edge of the existing physical boundary bordering the north side of the river.

Policy Reference

Places for People (1994)

Bourke Hill Heritage, Planning and Urban Design Review, Department of Transport, Planning and Local Infrastructure, September 2014

Central City Built Form Review Synthesis Report, Department of Environment, Land, Water and Planning, April 2016

Central City Built Form Review Overshadowing Technical Report, Department of Environment, Land, Water and Planning, April 2016