

National Trust Advocacy Toolkit



Advocacy Guide No. 2:

Objecting to an application for a permit to change a place or object included in the Victorian Heritage Register

About the National Trust of Australia (Victoria)

The National Trust of Australia (Victoria) is the state's leading independent heritage advocacy organisation. We advocate for the recognition, protection, and celebration of our diverse natural, cultural, social, and Indigenous heritage in our cities and regions.

The National Trust's vision is for our diverse heritage to be protected and respected, contributing to strong, vibrant and prosperous communities.

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OBTAINING INDEPENDENT LEGAL ADVICE

This publication is intended only to provide a summary and general overview of relevant matters. It is not intended to be comprehensive nor does it constitute legal advice. While care has been taken to ensure the content is current, we do not guarantee its currency. You should seek legal or other professional advice before acting or relying on any of the content.

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Introduction

About this Advocacy Guide

The National Trust Advocacy Toolkit is a free online resource developed by the National Trust of Australia (Victoria) to support communities to advocate for the protection of places of cultural heritage significance. The purpose of this Advocacy Guide is to provide a broad overview of the processes for objecting to an application for a permit to change a place or object included in the Victorian Heritage Register. It is not intended to be a substitute for the detailed guidelines published by Heritage Victoria and the Victorian Heritage Council.

Works that need a permit

Once a place or object has been registered and included in the Victorian Heritage Register (the Register), a person or body will require a permit or permit exemption from Heritage Victoria to carry out works or activities that affect that place or object. This includes:

- building extensions, interior works, demolition or relocation of buildings and structures, changes of colour schemes and signage
- construction of new buildings and garden structures such as fences or decks, pathways and driveways, and changes of materials
- works to registered trees and gardens which are not regular maintenance works
- excavations at registered sites or damage or alteration to an archaeological artefact, and
- relocation, repair and conservation treatment of objects.

There are significant penalties if a person or body changes any place or object included in the Register without either a permit or a permit exemption.

Permit exemptions

A permit exemption may be issued if the works will not harm the cultural heritage significance of a place or object. For example, minor repairs, or the replacement of like-with-like materials such as a tin roof replaced with tin roofing may be exempt from requiring a permit. Several examples are set out in the permits section of the Heritage Victoria website.

Permit application open for public comment

Once a permit application has been received by Heritage Victoria, the Executive Director of Heritage Victoria must first determine whether the proposed works **may harm the place or object**. If it is determined that they will, the application will be open for public comment and must be advertised.

The application will remain open for public comment for 14 days from publication of the advertisement. Heritage Victoria will accept submissions from interested people or bodies during this period. This public submission phase is your one opportunity to affect the Executive Director's decision, so if you wish to do so you should make a submission within this time frame.

➤ Find out more in the permits section of the Heritage Victoria website at heritage.vic.gov.au/permits/apply-for-a-permit

Heritage places can be changed, reinvented and adapted for new uses.

2017 Owner's Guide, Heritage Victoria & Heritage Council of Victoria

First chance: Public comment phase

If the Executive Director determines the proposed works may harm the place or object and invites public comments, the owner will be required to advertise the application in a local newspaper, display a sign at the site and it will be listed on the currently advertised permits section of the Heritage Victoria website.

Heritage Victoria generally updates its website each Wednesday, so if there is an application you are concerned about you should set a reminder to yourself to check the website each week.

You only have 14 days to prepare your submission from the date that notice is published—meet this deadline to make sure that it will be considered. The Executive Director can extend the period for submissions in exceptional circumstances, but only with the agreement of the applicant and owner of the registered place or object.

1. Read and understand the nature of the permit application

When reviewing the permit application, make sure you read and understand it. It is important your submission appropriately addresses **the extent** of the proposed changes or works to the registered place or object.

 For assistance call the Permit Enquiries line on 03 9938 6891.

2. Prepare your submission

Anyone may make a submission during the public comment period. There is no prescribed form or format, but a submission usually takes the form of a letter, sometimes with supporting documentation attached. Set out below are some tips on how to prepare a good submission.

Visit the Victorian Heritage Database and search for the registered place or object, and then download its report. This report will include a Statement of Significance, which is a succinct summary of what is significant about the place or object, and why it is significant. Review this document and prepare your submission with it in mind.

 Search the Heritage Database: vhd.heritagecouncil.vic.gov.au/

3. Link the granting of a permit with the potential to cause harm to the cultural heritage significance of the object or place

In your submission, make direct links between the cultural heritage significance of the place or object and the harm which the proposed works or changes are likely to cause. Your submission will be more effective if you can focus on this, such as by referencing the reason(s) for cultural heritage significance as set out in the statement of significance and the possible effect of the proposed works.

4. If possible, propose a compromise

In determining whether to approve an application for permit, the *Heritage Act 2017* obliges the Executive Director to consider:

- the effect on the “cultural heritage significance” of the registered place or registered object if the permit was granted, and
- the effect on the “reasonable or economic use” of the registered place or registered object if the permit was refused.

It may be possible to propose a solution which strikes a balance between these two considerations.

It is unusual for a permit application to be refused outright. However, if you can suggest changes to the proposal that would reduce the risk of harm or lead to a better heritage outcome, then your objection is more likely to be viewed as reasonable, considered and aware of the assessment the Executive Director must make. For example, you may recommend a permit condition that heritage conservation works be undertaken.

Be clear about what outcome you would be unwilling to accept, versus what you would be willing to compromise on.

“Reasonable or economic use”

Some permit applications approved by the Executive Director will inevitably result in works or changes that cause harm to the heritage values of a registered place or object. This may include granting permission for full or part demolition, or the construction of a new development. Examples of these include the approved demolition of the Princess Mary Club on Lonsdale Street in Melbourne and the approval of a high-rise development within Pentridge Prison. While these

decisions may seem confusing, they reflect the balancing exercise required to be made by the Executive Director between the effect on the cultural heritage significance of the registered place or object if a permit was granted versus the effect on the reasonable economic use of the place or object if it was refused.

Decisions like this usually occur when the permit applicant or owner makes a convincing argument that if the permit application were refused the economic viability of the registered place or object would be **unreasonably** affected. The significant cost required to conserve and maintain heritage places or objects may also be a relevant factor in these decisions. The applicant or owner must provide economic evidence to support an argument made on these grounds.

Heritage Victoria seeks to balance these competing objectives. If a permit is granted, it may specify permit conditions that try to lessen negative impacts.

5. General style tips

Be succinct—submissions which are concise and to the point will be received well. Edit your submission and ask someone to proofread it before you submit it.

Choose your best arguments—give your time to your strongest arguments and be ruthless and cut out weaker arguments, which may take the focus away from your main argument.

Avoid personal grievances—personal attacks on the character of the owner, special interest groups, or the property manager are not relevant to the Heritage Council's considerations and will distract attention from your genuine objections.

6. Make your submission to Heritage Victoria by the deadline

Once a permit has been issued by the Executive Director, there is no appeal process for members of the public, so it is crucial to make your submission within the 14-day public comment period.

Determination of permit applications

After considering an application, the Executive Director may:

- issue a permit for the proposed works or activities
- issue the permit for only some of the proposed works or activities, or
- refuse the application.

The Executive Director may impose any terms and conditions on a permit.

Once the Executive Director has made a determination, usually only the applicant or owner may request a review of the Executive Director's determination before the Heritage Council.

A request for review must be made within 60 days from the date a notice of refusal of the application is given or from the date the permit is issued.

The amount of change to a place and its use should be guided by the cultural significance of the place and its appropriate interpretation.

The Burra Charter
(The Australia ICOMOS Charter for Places of Cultural Significance, 2013)

Second chance: Review of a permit application determination

Those who can seek a review

Usually only the applicant or owner can appeal the refusal of a permit application or the conditions of a permit, but if a review is granted, other people and bodies may apply to be heard.

How to request a review

Complete Heritage Council “Form C—Request for a Permit Review”, giving reasons for requesting a review, and lodge it within 60 days of the Executive Director’s decision.

 The permit review content on the Heritage Council website provides a step-by-step overview of how to prepare for and participate in the permit review hearing process, as well as relevant forms. See more at heritagecouncil.vic.gov.au/registrations-reviews/permit-reviews

Permit Review is conducted

A committee appointed by the Heritage Council will conduct the Review. A review hearing may or may not be held. If it is, the committee will set a date for the hearing, allowing time for the following people to lodge detailed submissions:

- the permit applicant
- the Executive Director, Heritage Victoria
- the owner
- the responsible authority
- the relevant Municipal Council
- the National Trust (if the National Trust lodged a written submission with the Executive Director in relation to the permit application), and
- any person the committee allows who can provide more information.

1. Prepare a detailed submission

You can include detailed material in your submission to the review, and you must do so if you intend to rely on it in any hearing that is listed and that you are granted permission to attend. This includes evidence from an expert witness. See “Fourth chance”, below.

The permit review content of the Heritage Council’s website (see above) sets out a list of what you should include. This may be more detailed than what you included in your initial response to the advertisement for public comment.

Make sure you allow enough time to gather and prepare your materials, so you can submit by the deadline.

2. Request to participate in the hearing

You must also submit the Heritage Council’s “Form D—Permit Review Hearing Participation Form” if you wish to present your submission in person or have someone present it on your behalf (such as a lawyer). This form is available on the Heritage Council’s website.

3. Submit all material by the relevant deadlines

Check the closing dates by which you need to have made your submission and any request to participate. The Heritage Council review hearing and submission filing dates are listed on the Heritage Council’s website, at heritagecouncil.vic.gov.au/registrations-reviews/permit-reviews/scheduled-permit-reviews.

When to engage an expert witness

Engaging an expert witness to support your submission isn’t essential, but it can help to strengthen your case. If you wish to rely on expert evidence, a report by the expert should be submitted with your detailed submission. If you engage an expert witness to provide evidence at the review hearing, they must be available to attend the hearing to present their evidence and be cross-examined.

The role of an expert witness is different from that of other participants in the hearing. An expert witness has established credentials in a field, usually through a combination of qualifications and professional experience. While an expert might be hired by a property owner or other participant, their duty is to provide fair and impartial evidence to the Heritage Council and not to advocate for the party relying on their evidence.

When an expert witness provides evidence at a review hearing, they may be cross-examined by any other party. This allows their evidence to be “tested” and explains why the Heritage Council is likely to give expert opinion

more weight than untested submissions.

You can find heritage experts in a range of fields in the Consultants Directory on Heritage Victoria's website. Sometimes experts may provide pro-bono or discounted services to community groups, but you should be prepared to raise funds. Always ask about what fees will be charged.

Visit the Consultants Directory
heritage.vic.gov.au/consultants-directory

Third chance: Submissions in reply

Before the permit review hearing, you will receive a copy of all other submissions made about the recommendation, including any expert evidence to be relied on by other parties at the hearing. The submission in reply is your opportunity to respond to these in writing before the hearing. These reply submissions will be circulated to all parties at the hearing.

Remember no new information may be introduced at the hearing. If you have discovered something since lodging your detailed submission or submission in reply you will not be able to rely on it at the permit review hearing.

Fourth chance: Presenting your submission

1. Permit review hearing

Permit review hearings are managed by the Heritage Council's secretariat. Contact them prior to the hearing if you have any questions about the process. The hearings are designed to be more informal than a court environment. A committee of at least three members of the Heritage Council will conduct the permit review hearing.

At the beginning of the hearing, the chairperson will begin by explaining how things will run. The chairperson will make sure people stay to the time allocated for presentations and do not repeat points or comments made by others. There will also be an opportunity to ask questions at the beginning of the hearing.

All parties should be respectful of the committee and other participants. Be careful not to interrupt those making submissions, or experts, while they are presenting to the committee.

2. Presenting your submission

You can choose to present your submission yourself or be represented by someone else (such as a lawyer).

The order of hearing submissions will generally be:

- the Executive Director
- the responsible authority
- the National Trust
- other persons, and
- the owner(s) or government asset manager, and
- the applicant.

Tips for making your presentation

- Be as brief as possible.
- Reflect the main arguments of the written material you have lodged—the more time you spend in preparation (including reviewing expert evidence and other submissions) the better you will be able to focus on these.
- Avoid restating points made by previous speakers. This may require editing your submission on the day of the hearing.
- Avoid introducing new material that has not previously been circulated.
- Use images and plans where this is useful to help you make your argument. You can include images in your written submission or prepare a visual presentation in a program such as Microsoft PowerPoint to show at the hearing. Avoid including images, maps or plans which do not support your main arguments. A few key images can be more effective than a lengthy or repetitive slideshow of historic images.
- You may only use material (including images) that was in your initial submission or submission in reply or has otherwise been circulated—no new material can be introduced.

3. Asking questions and cross-examination

Submitters cannot generally be questioned by other parties. However, questions are allowed for the purposes of clarification, with the chairperson's permission.

Any party can directly question an expert witness. The chairperson may disallow questions that they consider inappropriate or badgering of the witness.

If you have not engaged your own expert witness, but another party at the hearing has, you may still ask the expert witness questions within an allocated time if you wish to establish something which will assist your argument. You should not interrupt an expert witness while they are giving their evidence but wait until the appropriate time. Once the evidence has been presented, the chairperson will ask you if you have any questions,

Generally, limit your cross examination to one or two relevant questions and only ask closed questions (which have a clear “yes” or “no” answer). You should read the expert’s witness statement (which you will have received in advance) to assist you in preparing your questions. Asking questions just for the sake of doing so or asking the wrong question can hinder rather than help your case. If you ask a question which is not directly relevant, the chairperson may direct the expert not to answer it.

Heritage Council’s determination

After conducting the review (whether there was a hearing or not), the Heritage Council may determine to:

- affirm the decision under review
- vary the determination under review, or
- set aside the determination under review and make another determination in substitution for it.

If the Heritage Council determines to approve the permit application, the Executive Director must, within seven days of the determination, issue the permit to the applicant and give written notice to:

- the applicant for the review and/or the owner
- the responsible authority, and
- any other person or body that was a party to the hearing.

The decision will also be published on the Heritage Council website, at heritagecouncil.vic.gov.au/hearings-appeals/permit-appeals/recent-permit-appeal-decisions.

Once the Heritage Council has made a determination after a permit review, there are no further avenues for review.

An important factor in the success of new work is the quality and sensitivity of the design response. New work should respect the context, strength, scale and character of the original, and should not overpower it. The key to success is carefully considered design that respects and supports the significance of the place.

Australia ICOMOS Practice Note Burra Charter Article 22—New Work