

Legislative Council Committee Inquiry Submission.

## **Death by a thousand cuts?**

### **Kew Cottages (H2073) Heritage Protection 2000-2021**

### **A Case Study on the need for better Regulatory Protection**

**Kew Cottages Coalition 31 January 2022**

INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN PLANNING FRAMEWORK

#### **RECOMMENDATIONS**

##### **Summary of Kew Cottages Coalition's Recommendations (Highlighted – Text Colour Red)**

**with respect to the Inquiry's Terms of reference**

##### **Terms of Reference**

On 28 October 2020 the Legislative Council agreed to the following motion:

That this House requires the Environment and Planning Committee to inquire into, consider and report, by June 2022, on the adequacy of the Planning and Environment Act 1987 and the Victorian planning framework in relation to planning and heritage protection, and in particular the Committee is to examine

—

- (1) the high cost of housing, including but not limited to —
- (a) provision of social housing;
  - (b) access for first home buyers;
  - (c) the cost of rental accommodation;
  - (d) population policy, state and local;
  - (e) factors encouraging housing as an investment vehicle;
  - (f) mandatory affordable housing in new housing developments;

##### **KCC Recommendation 1:**

**We strongly recommend against the State ever again using the Kew Cottages Public Private Partnership (PPP) Model for any form of public housing development.**

(2) environmental sustainability and vegetation protection;

**KCC Recommendation 2:**

State environmental and vegetation protection measures be amended to be consistent with National Environmental Standards, and the reform pathway for the EPBC Act recommended by the Independent Review of the EPBC Act (2020).

The State participate in the Commonwealth's Digital Environmental Assessment Pilot Program to help promote the development of a common national digital platform.

(3) delivering certainty and fairness in planning decisions for communities, including but not limited to —  
(a) mandatory height limits and minimum apartment sizes;

**KCC Recommendation 3(a).**

State Planning Standards be established to support Councils setting mandatory height limits, lot sizes, minimum open space, and apartment sizes.

(b) protecting Green Wedges and the urban growth boundary;

**KCC Recommendation 3(b).**

Establish State Environmental Standards for Green Wedges. Improve public access to Green Wedge data, and update overlays in LASSI to display historical data, including the cumulative impact of changes to the Urban Growth Boundary over time, with particular attention to the secret removal of the Kew Cottages landscape from the Yarra Green Wedge by the Bracks Government in 2002. (Ref:Melbourne 2030)

(c) community concerns about VCAT appeal processes;

**KCC Recommendation 3(c).**

Amend the Planning and Environment Act to require VCAT to give effect to the planning policies of local Councils.

(d) protecting third party appeal rights;

**KCC Recommendation 3(d).**

Amend the Planning and Environment Act to require the Minister to annually review and report to Parliament on any restriction on third party appeal rights as part of all planning approval assessments, including the assessment of Permit Applications, Planning Scheme Amendments, Development Plans, and Addendums.

(e) the role of Ministerial call-ins;

**KCC Recommendation 3(e)..**

Insert a 'sunset clause' in all Ministerial call-ins that ensures the call-in expires when the outcome cited as the grounds for the call-in has been achieved.

(4) protecting heritage in Victoria, including but not limited to —

(a) the adequacy of current criteria and processes for heritage protection;

KCC Recommendation 4(a).

- I. Establish State Heritage Standards consistent with National Heritage and Environment Standards.
- II. Use cost effective new technologies to substantially improve monitoring and enforcement of heritage permit conditions.
- III. Publish all Heritage Statements of Significance, Permits, Management Plans, Heritage Victoria and State Planning officer reports on Permit Applications online.
- IV. Progressively review and revise Heritage Victoria online files to produce both an updated Statement of Significance, and a current Statement of Protection and Management for each registered place.
- V. Update current criteria and processes to take account of the accumulated impacts that development has on Victorian heritage.

(b) possible federal involvement in heritage protection;

KCC Recommendation 4(b).

- I. Help establish and pilot joint Federal/State protection programs to avoid duplication and/or fragmentation in heritage protection.
- II. Ensure all Victorian Heritage Registered places identified by an accredited expert as having 'potential national heritages significance' are nominated by the State for National Heritage protection.

(c) separating heritage protection from the planning administration;

KCC Recommendation 4(c).

Appoint a Victorian Minister for Heritage separate from the Minister for Planning (As is already the case in NSW, Queensland, South Australia, ACT, WA, and the Northern Territory.)

(d) establishing a heritage tribunal to hear heritage appeals;

KCC Recommendation 4(d).

Either establish a heritage tribunal to hear local heritage appeals, or alternatively consider expanding the role of the State Heritage Council to also hear appeals about local heritage decisions.

(e) the appointment of independent local and state heritage advisers;

KCC Recommendation 4(e)

That Councils appoint fulltime heritage officers.

(f) the role of Councils in heritage protection;

KCC Recommendation 4(f).

That Councils be encouraged to play a more active role in working together with Heritage Victoria to help monitor and enforce heritage protection measures on both State and Local Heritage registered places.

(g) penalties for illegal demolitions and tree removals;

KCC Recommendation 4(g).

Increase the nature and extent of corporate penalties for illegal demolition and tree removals in order to:

1. Fund a comprehensive tree replacement program;
2. Act as an adequate corporate damage deterrent;
3. Apply penalties to both the company and to the individual directors of the company responsible for the damage.

(5) ensuring residential zones are delivering the type of housing that communities want; and

KCC Recommendation 5.

Victoria must immediately ban developer political donations, as both NSW and Queensland have done.

(6) any other matter the Committee considers relevant.

KCC Recommendation 6.1

Expand the investigative powers of both IBAC and the Auditor-General in order to enable an adequate and comprehensive inquiry to be established into the outcome of the Kew Cottages Development, as recommended by The Age newspaper.

KCC Recommendation 6.2

Take the opportunity provided by the 15-year Kew Cottages Covenant Condition in Heritage Permit P26760 (25.9.2018) to establish Kew Cottages (H2073) as a reference site in a Test and Demonstration project designed to research and develop innovative heritage protection monitoring and enforcement measures at a landscape scale.

KCC Recommendation 6.3

Take the opportunity provided by the review of the EPBC Act to increase consistency between National and State Heritage and Environmental assessment practices and procedures.

KCC Recommendation 6.4

Review the new opportunities provided by the bilateral agreement between the Commonwealth and Victoria for environmental assessment with a view to developing a cost effective 'one stop shop' for the detailed online publication of both Commonwealth and State Environmental, Heritage, and Planning assessments.

KCC Recommendation 6.5

Invite witnesses to give evidence to the Inquiry on the above matters, including the relevant Government Ministers, the Secretaries of their Departments, the Executive Director of Heritage Victoria, Chief Executive Officer of Development Victoria, and the Managing Director of Walker Corporation.

## Introduction

[In 2003](#) the then Minister for Planning, Mary Delahunty declared the Bracks Government's Kew Cottages Development to be a Major Project of State Significance.

The following year, [in 2004](#) the Heritage Council of Victoria found Kew Cottages to be a place of State Heritage Significance.

The destruction of large swathes of the Kew Cottages historic cultural and scientific (botanical) heritage that subsequently followed is, therefore, a demonstration of regulatory failure at the highest level, and a category 1 example of not following leading practices.

This case study sets out key events and identifies leading practices against each.

The Mitigation Hierarchy is a widely used tool that guides users towards limiting as far as possible the negative impacts from development projects on biodiversity and cultural heritage. It emphasises leading practice of avoiding and minimising negative impacts, and then restoring sites when development outcomes have been achieved, and concludes with considering offsetting residual impacts.

## Why Kew Cottages is significant for this Inquiry.

The Legislative Council has played an important role in the history of Kew Cottages since the Cottages were established in 1887, and particularly in the last thirty years.

In 1989 at the time of the first Government sale of Willsmere and Kew Cottages public land we understand that the Upper House helped convince the Cain Government to add Kew Cottages' public land adjoining Main Drive, and the Wills Street entrance to Yarra Bend Park.

[In 2007](#) the Upper House established the Select Committee on Public Land Development that played a key role in identifying inherent faults in the Government's choice of a 'Public-Private Partnership (PPP) model for the Kew Cottages redevelopment.

[In 2008](#) the Upper House referred the probity of the Kew Cottages Walker Development Contract to the Ombudsman.

We are hopeful that this Upper House Planning and Environment Committee Inquiry will now be able to take up the challenge set by the latter inquiries and:

- Help the current Government learn from the mistakes of its predecessors in managing heritage and planning protection issues at Kew Cottages;
- Address the long-standing failure to properly protect the Kew Cottages 'heritage core' – land which today, two decades after the Bracks Government first announced its plan to redevelop Kew Cottages, is still under siege from inappropriate development proposals.
- Make recommendations on site restoration, and offsets to residual impacts.

## Lessons to be learnt from the repeated failures of both Labor and Liberal State Governments.

*... The undermining of public housing has been justified under the rubric of integrating the disadvantaged into the community. This raises the question of why it can't be done more cost effectively through public housing provision.*

*By far the most egregious example of this ruse was the decision in 2001 by the Bracks government to expel some 400 intellectually disabled people from the 27-hectare Kew Cottages site to make way for an upmarket real estate development under a public-private partnership.*

Kenneth Davidson, Senior Columnist, [The Age, 26 Jan 2014](#).

## 2000-2005 – The ‘Let it Rip’ Years.

[Steve Bracks 4 May 2001](#) announcement that the 27 hectare Kew Cottages site was to be redeveloped as a \$100 million land and residential development got off to a very bad start when the Premier blithely told the media that only 50-100 of the ‘460 people in our care’ would be permitted to continue living at Kew Cottages.

The Premier went on to praise the work of the Kew Cottages Parents Association, and said he was inspired by “their dedication to improving the lives of Kew residents.”

The Premier’s feelings, however, were not reciprocated by the Parent’s Association whose survey of their members confirmed that over 250 of the intellectually disabled residents in the Bracks Government’s care did not want to move, they actually wanted to continue living on the site that had been their home since they were children.

The Bracks Government’s secret [2002](#) expansion of the urban growth boundary to embrace the Lower Yarra Valley lands didn’t go down well with the Parents Association either. The [Yarra Valley land](#) including the 27 hectare Kew Cottages landscape, had previously been outside the urban growth boundary, and identified as the [Yarra Valley Green Wedge](#).

In [2003](#), the ‘planning and approval process’ referred to by the Premier turned from bad to worse. The then Planning Minister’s 2003 decision to call-in the Kew Cottages Development planning process not only removed Boroondara Council as the Planning Authority, but exempted the Kew Cottages Development from the protection afforded by the normal third-party appeal process. In intervening in this way, the Minister for Planning exercised her power to prepare Amendment C53 to the Boroondara Planning Scheme and exempted herself from all requirements of sections 17, 18, and 19 of the Planning and Environment Act 1987, and the regulations in respect of the Amendment.

Leading practice is to be guided by the Mitigation Hierarchy where planning seeks to avoid impact from activities as the first priority. However, the Planning Minister, appears to have simply rejected out

of hand Boroondara's advice that 50% of the Kew Cottages public land be protected as public open space.

Having appointed herself as the new Planning Authority for Kew Cottages the Minister immediately proceeded to slash the Kew Cottages public open space provision from 50% to 27%.

The Minister made her decision to slash the public open space landscape provision, despite clearly being aware that two years previously, in 2001, Biosys Research had presented new information that identified the historic Kew Cottages landscape to be potentially of State Heritage Significance.

Leading practice is to revise plans where new information indicates that the impact of activities has greater significance than originally understood. However, the Minister provided no explanation as to how her decision to slash the public open space provision could possibly help lessen the impact on the heritage significance of the Kew Cottages landscape.

Indeed, the Minister appears to have simply turned a blind eye to her responsibilities as Minister for Heritage, and she made no attempt to have her Government nominate Kew Cottages for listing on the State Heritage Register.

The view of the ousted Local Planning Authority was succinctly summed up by the Mayor of Boroondara Council, Jack Wegman, at the time who said, "The Government is the owner, the vendor, and now the planning authority, it's like appointing Dracula to run the Blood Bank..."

The Government's conduct profoundly distressed Kew Cottages residents and their families. In early 2004 the Kew Cottages Parents Association formally withdrew from the Government's Kew Cottages Taskforce because the 'big issues' relating to the redevelopment were not on the table for discussion. Leading practice is to seek free, prior, and informed consent from key stakeholders. Especially where a site has been found to have greater significance than originally known.

It was then left up to the Kew Cottages community groups and individuals to nominate Kew Cottages for State Heritage listing. Kew Cottages Parents Association Executive Officer, Louise Godwin, and the Kew Cottages Coalition successfully accomplished this, and the Heritage Council added the whole 27 hectares of the Kew Cottages site to the Victorian Heritage Register in November 2004. (H2073)

[By their action](#), the Heritage Council finally brought the 'Let Rip Policy' of the Bracks Government to an end. But the delay in the VHR listing came at a great cost, and the Government as the Cottages owner, through its PPP Kew Cottages Development Partner Walker Corporation, continued to challenge Heritage decisions and protection measures provided by way of Heritage Permit Conditions, and Management Plans.

[In September 2005](#) the Kew Cottages 'guiding heritage permit' also got off to a bad start by approving the demolition of 3 of the 6 remaining original Heritage Cottages. We are not aware of a destruction of this level of heritage assets ever being allowed before on a Victorian State Heritage Registered Place. Such an extraordinary level of destruction of heritage assets appeared to be totally at odds with leading practice, and the Burra Charter which defines the basic principles and procedures to be followed in the conservation of Australian heritage places.

The demolition of the 3 Cottages was apparently only allowed by Heritage Victoria because the Government (DHS) and Walker Corporation together put forward a financial loss argument. Although Heritage Victoria accepted the financial loss argument in good faith at the time, subsequent events showed the argument had no merit, because the proposed apartments that DHS claimed were essential to their development's success were in fact never built.

KCC Recommendation 3(a).

State Planning Standards be established to support Councils setting mandatory height limits, lot sizes, minimum open space, and apartment sizes.

KCC Recommendation 3(b).

Establish State Environmental Standards for Green Wedges. Improve public access to Green Wedge data, and update overlays in LASSI to display historical data, including the cumulative impact of changes to the Urban Growth Boundary over time, with particular attention to the secret removal of the Kew Cottages landscape from the Yarra Green Wedge by the Bracks Government in 2002. ( Ref: Melbourne 2030)

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Amend the Planning and Environment Act to require the Minister to annually review and report to Parliament on any restriction on third party appeal rights as part of all planning approval assessments, including the assessment of Permit Applications, Planning Scheme Amendments, Development Plans, and Addendums.

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Insert a 'sunset clause' in all Ministerial call-ins and that ensures the call-in expires when the outcome cited as the grounds for the call-in has been achieved.

KCC Recommendation 4(c).

Appoint a Victorian Minister for Heritage separate from the Minister for Planning (As is already the case in NSW, Queensland, South Australia, ACT, WA, and the Northern Territory.)

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Either establish a heritage tribunal to hear local heritage appeals, or alternatively consider expanding the role of the State Heritage Council to also hear appeals about local heritage decisions.

## 2006 – 2011 Follow the Money...

Despite [Heritage Victoria's permit conditions \(P9639\)](#), 2006 proved to be a bad year for environmental sustainability and vegetation protection at Kew Cottages. The year began with an outbreak of [Victoria's most significant plant pathogen, 'phytophthora cinnamomi'](#). The pathogen had potentially been brought onto the site by contractors' earth moving equipment working close to Main Drive. Leading practice indicated the site should be immediately quarantined, and before any further excavation works were commenced, a hygiene management procedure should have been implemented. The hygiene management procedure would have needed to include appropriate training for all managers, employees and contractors who conduct works on the site that could shift soil during their day to day work activities. However, a phytophthora cinnamomic (PC) Management Plan for the site was not approved by Heritage Victoria until July 2006, over 4 months after the site had tested positive to *PCinnamomi*. Some provisions of the plan, including long term monitoring for the duration of the development appear never to have been implemented, despite assurances made by Major Projects Victoria who were responsible for managing the Kew Cottages development at the time.

Despite the State Heritage listing, and the threat posed by the deadly plant pathogen, Planning Minister, Rob Hulls, appeared determined to push for the demolition of Kew Cottages to get underway as soon as possible. On 9 March, more than a week after the site tested positive to *PCinnamomi*, the Minister signed off on the 'Walker Development Plan Kew (WDPK)'. The Natural Environment section of the Plan approved by Minister Hulls made no mention of the outbreak of phytophthora, or its potential significant impact on the natural values of the landscape.

Five days later on [14 March 2006 the Herald Sun](#) reported the Planning Minister as saying, "While I recognise that new Heritage permits will be required, I am keen for the projects first stages to get underway as soon as possible."

The Minister appeared not to be concerned that Heritage Victoria's resources were already stretched to limit. The watchdog had only one botanist on staff, who was responsible for the whole of the State, and the Heritage Victoria Kew Cottages Heritage Tree Management Plan which was to form the basis for tree protection measures on the development site was still only in draft form when the demolition started, and was to remain so for another 3 years..

To help comply with the Minister's wishes 'to get underway as soon as possible' Heritage Victoria appears to have [rushed to approve a Heritage Permit Application for Stage 1 on 14 April 2006](#) without even calling for public submissions as required by the Act. Leading practice was for public submissions to be called: "... if the Executive Director considers that the proposed works or activities may detrimentally affect that place or object." (S.68 Heritage Act (1995))

The evidence appears clearly to show that the Executive Director had already formed the view that the proposed works or activities may detrimentally affect that place, because the [permit he issued included a permit condition requiring a phytophthora cinnamomic management plan to be prepared](#) and implemented before works commenced.

The rush to issue permits for the development to begin in 2006 only appears to have been beaten by the rush of the contractor's bulldozers and other demolition and construction equipment that began working on the site in May and June well before Heritage Victoria's approval of a 'Phytophthora cinnamomi Management Plan for Kew Cottages in July 2006.

The Planning Minister went on to approve in secret further permits for Stage 1 works without reference to the outbreak of the deadly pathogen, [including a permit application that claimed exemptions applied for the removal of nearly 200 eucalypts, wattles, she-oaks, and other native vegetation](#). Leading practice was guided by the State's Environmental off-set policy at the time. However it is still not clear whether that policy was ever implemented in full, because the permit applicant sought an exemption from that too – making the extraordinary claim that the Government should delay making any decision on how to replace any of the native trees at Kew Cottages until after new houses had been built.

Leading practice in avoidance and minimisation of damage from activities requires monitoring basic performance of staff and contractors, and monitoring the implementation of environmental management plans. However, by the end of 2006 it was clear Heritage Victoria did not have the resources to undertake those tasks. Complaints to Heritage Victoria that contractor's earth works in in Red Gum Park appeared dangerously close to the Heritage protected stand of Red Gums were not acted upon until the Kew Cottages Coalition pursued the matter with Boroondara Council. The Council did have resources available and authority to enter the development site and inspect the trees for damage, but only Heritage Victoria had the power to prosecute under the Heritage Act. Long story short, the

developer was finally taken to court, and over a year later in 2008 fined \$50,000 for damaging the heritage listed trees in Red Gum Park.

These incidents demonstrated the regulatory failure that it was clear needed to be rectified for everyone's benefit.

In the normal course of events one might have expected subsequent changes in both State Government, and State legislation to have helped mitigate that failure. This did not happen. Despite numerous amendments to both environmental and heritage legislation after 2006, and the Labor Government being voted out of office in 2010 the regulatory failure at Kew Cottages continued.

That the inherent problem lay not with particular individuals, departments, or which major party was in government but the way in which Victoria is governed became clearer over the next 5 years.

[In 2007 The Age revealed the activities of the former Senator Graham Richardson](#) in lobbying the Bracks Government over the \$400 million redevelopment of Kew Cottages.

The Government opened itself to suggestions of possible misconduct and even corruption when it was revealed that [Senator Richardson's lobbying](#) had been [accompanied by two large political donations](#) to the Victorian Labor Party within weeks of the Walker Contract being signed shortly before the November 2006 State Election.

The Select Committee of the Legislative Council on Public Land Development Inquiry concluded in 2008 that:

*The involvement of former Senator Richardson in the Kew project has left many questions as to the model the government has chosen to use where it is the responsible planning authority, developer, and financial beneficiary*

***The Committee has recommended that an independent anti-corruption commission be established. This recommendation moves directly from our concerns about public land development in Victoria and the evidence put before us...***

*The Committee has recommended that several matters be referred to the Ombudsman. This in part is due to the Government's refusal to co-operate with the inquiry and to block access to key information.*

However, the subsequent Inquiry by the Ombudsman into the probity of the Government's Kew Cottages Development contract was similarly frustrated due to a lack of transparency and 'missing documents'...

***"... [My investigation](#) was hampered because there were obvious gaps in the documents held on file and some important documents could not be located...***

***... A full set of records simply did not exist...***

George Brouwer, [Ombudsman Victoria](#), June 2010

As [The Age reported](#), the Ombudsman slammed the \$400million project as 'inept', and recommended an inquiry.

Nothing, however, has changed, and the Ombudsman's recommendations appear to have subsequently been honoured more in the breach than the observance by successive governments eg:

### ***Ombudsman Recommendation 10***

*The Department of Human Services report on the financial return to the State Government from the Kew Residential Services project in its Annual Report.*

*However, over a decade later DHS has still not reported on the financial return to the State Government....*

### ***Ombudsman Recommendation 11***

*The Secretary of the Department of Innovation, Industry and Regional Development conduct a review of Major Projects Victoria's current projects to ensure that the State Government's obligation to disclose contracts on the Contracts Publishing System website is met.*

However, both Major Projects, and later, its successor, Development Victoria still appear to ignore and/or obscure the Government's obligation to disclose contracts on the Contracts Publishing System (CPS) website, by claiming a series of contrived 'exemptions'. Eg:

Development Victoria's current favourite way of avoiding online disclosure on the CPS website during COVID appears to be to regularly claim a third-party copyright exemption eg:

***".. Contract available for inspection at Development Victoria's offices as contract cannot be published due to copyright ownership by third party..."***

In summary, between 2005 and 2011 the State as both the owner and planning authority of the land, consistently failed to adapt and follow leading practice. Mitigation opportunities clearly became available not only with the assessment of each Planning and Heritage Permit Application, but also as follows:

1. In January 2005, following Kew Cottages being added to the State Heritage Register (H2073);
2. In March 2006, following scientific advice received confirming the outbreak of Victoria's most deadly plant pathogen at Kew Cottages;
3. In June 2006 during preliminary works and contract negotiations;
4. In March 2007 in response to the establishment of the Public Land Development Inquiry;
5. In June 2008 following Premier Brumby's announcement that the Government's objective of building new accommodation for Kew Cottages intellectually disabled residents had been successfully completed;
6. In December 2008, in response to the Select Committee on Public Land Development's report to Parliament;
7. In 2009, in response to the NSW Government's decision to ban developer donations to political parties;
8. In June 2010 in response to the Ombudsman's report to Parliament.
9. In 2011 after the Brumby Government had been voted out of office, and the incoming Baillieu Government made an election promise to refer numerous concerns about the redevelopment of Kew Cottages to the Independent Broad-based Anti-corruption Commission once it is established in July 2011.

During 2005-2011, according to press reports:

1. Walker Corporation continued to make large annual profits;

2. Walker continued to pay large political donations to both major political parties;
3. The Government's Kew Cottages Partnership with Walker Corporation continued to lose money.

### **Conclusion:**

The Public-Private Partnership (PPP) Model had no merit. The original policy formulation process that led to the establishment of the PPP was flawed. There is evidence of this PPP model 'design' problem being recognised by the Upper House Public Land Development Inquiry. But when it came to reviewing mitigation opportunities at Kew Cottages there is no evidence of the lack of transparency and Ministerial accountability in the underlying Government policy formulation process being adequately and comprehensively addressed by any of the Bracks, Brumby, or Baillieu Governments.

Indeed, leading practice appears to have been consistently ignored by all the government departments and Ministers involved. Major Projects Victoria, Department of Human Services, the Attorney-General, the Ministers for Major Projects, the Ministers for Planning, the Ministers for Community Services, the Ministers for the Environment, and the three Premiers of Victoria between 2005 and 2001 all appeared to have turned a blind-eye to leading practice.

### **RECOMMENDATIONS.**

#### **KCC Recommendation 1.**

We strongly recommend against the State ever again using the Kew Cottages Public-Private Partnership (PPP) Model for any form of public housing development.

#### **KCC Recommendation 2.**

- I. State environmental and vegetation protection measures be amended to be consistent with National Environmental Standards, and the reform pathway for the EPBC Act recommended by the Independent Review of the EPBC Act (2020).
- II. The State participate in the Commonwealth's Digital Environmental Assessment Pilot Program to help promote the development of a common national digital platform.

#### **KCC Recommendation 3(c)**

Amend the Planning and Environment Act to require VCAT to give effect to the planning policies of local Councils.

#### **KCC Recommendation 4(a)**

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- II. Use cost effective new technologies to substantially improve monitoring and enforcement of heritage permit conditions.
- III. Publish all Heritage Statements of Significance, Permits, Management Plans, Heritage Victoria and State Planning officer reports on Permit Applications online.
- IV. Progressively review and revise Heritage Victoria online files to produce both an updated Statement of Significance, and a current Statement of Protection and Management for each registered place.

#### **KCC Recommendation 4(b).**

- I. Help establish and pilot joint Federal/State protection programs to avoid duplication and/or fragmentation in heritage protection.

- II. Ensure all Victorian heritage Registered places identified by an accredited expert as having 'potential national heritages significance' are nominated by the State for National Heritage protection.

KCC Recommendation 4(e)

That Councils appoint fulltime heritage officers.

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That Councils be encouraged to play a more active role in working together with Heritage Victoria to help monitor and enforce heritage protection measures on both State and Local Heritage registered places.

KCC Recommendation 4(g).

Increase the nature and extent of corporate penalties for illegal demolition and tree removals in order to:

4. Fund a comprehensive tree replacement program;
5. Act as an adequate corporate damage deterrent;
6. Apply penalties to both the company and to the individual directors of the company responsible for the damage.

## 2012 – 2017 How to out gun the Regulator?

Up until the 2010 State Election it was to be hoped that legislative reforms to Victorian Anti-corruption, Planning, Environment, and Heritage Acts would go some way to helping better protect cultural heritage by not only avoiding and minimising damage from ill prepared planning policies and regulations, but also by helping with the restoration of State Heritage listed sites damaged by inappropriate developments.

However, that did not happen at Kew Cottages.

What did happen was that despite the Baillieu Government's election promises:

1. The Kew Cottages Development continued uninterrupted after the Baillieu Government was elected in 2010.
2. The 2012 expiry of the 'guiding' 7-year Heritage Permit P9639 appears to have been simply ignored by the 'new' PPP development partners, as were some of the heritage permit conditions that had been imposed during the 7-year term of Permit P9639. (eg: Significant Heritage Tree Replacement Conditions.)
3. By the end of 2013, according to Major Projects Annual Reports, the Kew Cottages PPP Project appeared to have accumulated total losses of \$45.8 million.
4. Meanwhile, the developer Lang Walker's private company reported a 64 per cent increase in annual revenue to \$298 million.
5. Shortly before the next election, exemptions in the revised Walker Development contract dated 18 June 2014 struck out the long-standing Government promise to deliver medical, dental, hydrotherapy, recreation, and other 'heritage core' community facilities for the intellectually disabled residents. In exchange for the latter exemptions Walker Corporation paid the Baillieu Government \$10 million.
6. The revised contract also encouraged Walker to increase PPP project revenue by seeking planning approval to build apartments on Kew Cottages public open space. The 2014 amendment said, "**the State will use its reasonable endeavours to assist the Developer to obtain all relevant Planning Permits and other Authorisations which are necessary or**

- desirable..”** As a consequence, Walker proceeded to challenge every State Heritage and Planning regulatory hurdle facing the construction of the proposed apartments on public open space.
7. However, criticism of the Government’s conduct continued to mount, and in January 2014 The Age’s Senior Columnist, Kenneth Davidson supported the Ombudsman’s call for an inquiry into the development: “..***The 2010 Ombudsman report on the development found it couldn't unravel the mystery of the losses and recommended an inquiry. In the absence of a functional corruption commission, it should be undertaken by the Auditor-General. (The Age, 27 Jan 2014)***
  8. No expense appeared to be spared in Walker’s challenges to the State Heritage and Planning protection measures that followed.
  9. In Walker’s 2015 appeal to VCAT, Walker was represented by a QC who called 5 expert witnesses to challenge the Planning Minister’s refusal to grant Walker a Planning Permit to build apartments on public open space. But, by way of contrast, the Planning Minister himself was only represented before VCAT by a barrister who appeared poorly briefed, and failed to call a single expert witness.
  10. In Walker’s 2015 Appeal to the Heritage Council against Heritage Victoria’s refusal to grant Walker Heritage approval to build the proposed apartments (P22396) Walker was represented by a QC who called 7 expert witnesses. Heritage Victoria, by way of contrast, was not even represented by its Executive Director, Tim Smith, but merely by a Senior Heritage Officer, who was left to defend the Executive Director’s refusal, without the benefit of any form of legal representation, and without any supporting statements of evidence from independent expert witnesses.
  11. In Walker’s 2015 Appeal to the Heritage Council Walker even went so far as to make history by calling for the Heritage Council to be reconstituted. Walker claimed to be concerned that they were not receiving a fair hearing from the Heritage Council Committee conducting the Hearing.
  12. When Walker’s call for a reconstituted Heritage Council was unsuccessful Walker simply withdrew their appeal, waited for a while and then lodged a new permit application for apartments to be built on the public open space.
  13. Meanwhile in March 2017 *The Age* Investigative Unit revealed that hundreds of millions of dollars now appeared to be unaccounted for from the Kew Cottages development. The Age reported that, “*Major Projects minister Jacinta Allan did not answer a list of written questions. Instead, she issued a brief statement in which she stressed that the government would "use the experience of the Kew Cottages development to improve the delivery of future projects"*.”

The Sunday Age Editorial on 18 March 2017 concluded [\*\*“Kew Cottages deal must be examined”\*\*](#) :

***If the government truly wishes to learn from the experience of the development at Kew Cottages, an independent inquiry should be established into the outcome. At the very least, the auditor-general should be asked to examine the circumstances surrounding the deal.*** (18 March 2017)

RECOMMENDATION.

**KCC Recommendation 5.**

**Victoria must immediately ban developer political donations, as both NSW and Queensland have done.**

## 2018 - 2023 Days of Reckoning and Restoration?

### The Rhetoric...

It is essential that the Victorian Government leads by example and sets the standard for other owners and managers of heritage places and objects.

**Hon. Richard Wynne MP**  
**Minister for Planning**

[HON. RICHARD WYNNE, MINISTER FOR PLANNING 2015](#)

### v. The Reality....

#### State Heritage Appeals..

Heritage Victoria's new Executive Director, Steven Avery, was not persuaded by Walker's 2017 Heritage Permit Application (P26760).

Walker's Stage 8 apartments application was clearly seen as another attempt to overcome the long-standing permit conditions that Heritage Victoria had imposed in 2005 - permit conditions designed to mitigate damage throughout the lifespan of Walker's Main Drive Kew housing estate development.

Heritage Victoria's Oct 2017 refusal to grant a permit for the proposed residential apartment building was, therefore, blunt and to the point.

#### **WHAT HAS BEEN REFUSED?**

**Construction of an apartment building within the land bounded by Main Drive (F4) and Oak Walk (F7)**

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#### **REASONS FOR REFUSAL:**

- The proposed residential apartment building is intended to be located on land identified in the Site Concept Plan endorsed as part of permit P9639 as open space devoid of buildings. The Site Concept Plan was intended to apply for the duration of the staged redevelopment works on the broader site. Any construction on that part of the registered land bounded by Main Drive (F4) and Oak Walk (F7) is considered detrimental to the cultural heritage significance of both this registered place and of the adjacent registered place - being the Former Willsmere Hospital (H0861).
- The island site where construction is proposed has served historically as one of the chief features contributing to the parklike setting on the final approach to the Willsmere Asylum. Any construction on this site would have an unacceptable detrimental impact on Willsmere's cultural heritage significance.

Undeterred, Walker appealed once again to the Heritage Council, this time with an even bigger legal team, and more expert witnesses.

This time, perhaps understandably, to help avoid a repeat of the 2015 Appeal Committee being challenged, the Heritage Council responded by appointing a new 'reconstituted' Committee to hear Walker's 2018 Appeal.

Harder to understand regarding both the 2015 and 2017 Appeals was why two different Heritage Victoria Executive Directors, Mr. Timothy Smith (ED,2015) and Mr. Steven Avery, (ED, 2017) not only failed to give evidence in the Heritage Council Appeal proceedings themselves, but also failed to even appoint legal Counsel to defend their respective refusals to grant Walker a Permit to build the proposed apartments on public open space at Kew Cottages.

In previous high-profile appeals, the Heritage Victoria Executive Director had strongly defended his decisions by both giving evidence and being represented by Senior Counsel. For example, in the [Windsor Hotel appeal to the Heritage Council in 2010](#) Mr. Christopher Townshend SC appeared for Mr. Jim Gard'ner, Executive Director of Heritage Victoria and called expert evidence:

## **APPEARANCES**

### **Executive Director, Heritage Victoria**

Mr Christopher Townshend SC, instructed by Department of Planning and Community Development Legal, appeared for the Executive Director.

Mr Townshend called Mr Jim Gard'ner, Executive Director of Heritage Victoria, and Mr Matt Ainsaar, Town Planner and Land Economist from Urban Enterprise, to give expert evidence.

Heritage Victoria's 2016 and 2018 failure to mount a reasonable defence of their refusal to grant Walker a Heritage Permit, therefore, appeared to totally inconsistent with established practice.

The lack of a well resourced defence by Heritage Victoria was also at odds with the increased scale of the potential damage that could result from Heritage approval of either of the two Permit Applications (P22396 and P26760), because the two Executive Directors had both formed the view that Walker's proposed apartments would have an unacceptable detrimental impact on the cultural heritage significance of not just one, but two (2) registered places - ie on both Kew Cottages (H2073), and the adjacent Former Willsmere Hospital (H0861)

Leading practice is to be guided by the Mitigation Hierarchy where planning seeks to avoid impact from activities as a first priority. Avoiding impact was clearly still an option to be pursued as a first priority at the Appeal Stage in both 2015 and 2018.

Therefore, on the evidence available, the Government's failure to provide a reasonable defence of Heritage Victoria's refusal to a grant a permit was clearly inconsistent with leading practice, and remains to be explained.

In the 2018 Heritage Council Appeal Hearing, the Heritage Victoria Officer delegated to defend the Executive Director's refusal to grant a permit batted on bravely by himself, as he had had to do in the previous proceedings in 2015.

However, the loan Heritage Officer didn't stand a chance by himself up against Walker's army of legal eagles and hired guns. Walker argued that the 'guiding permit' Heritage Permit P9639 that Heritage Victoria relied on was no longer legally valid, that the heritage place had changed significantly during the course of the development, and that further potential damage could be mitigated by changes to the design of the proposed apartments.

The outcome of these grossly unfair 'legal' appeal contests in the end delivered Walker the heritage and planning permits Walker required to build the proposed apartments that had previously been refused not only twice by the State Heritage watchdog, but also on separate occasions by two Planning Ministers ie: one Liberal, Mathew Guy (2014), and one Labor, Richard Wynne (2015).

The outcome, not surprisingly, opened the Government to suggestions of having deliberately failed to follow leading practice in its defence of Victoria's Planning and Heritage laws.

### [The Walker Contract.](#)

According to the Victorian Government Contract Publishing System (CPS) as at 30.1.2022 the Walker Contract expired on 31<sup>st</sup> December 2020 (See below).



#### **2.4 Project Term**

2.4.1 Clause A5.1 is deleted and replaced with the following clause:

##### **'A5.1 Project Term**

- (a) The Project Term commences on the Operative Date and, subject to clause A5.2, expires on the earliest to occur of:
  - (i) the date when all Sale Lots forming part of the Project are the subject of a Dealing and the State has received the Guaranteed Land Payment and Revenue Share Land Payment in respect of all Dealings in accordance with Part D;
  - (ii) an agreement between the parties to end the Project Term; and
  - (iii) 31 December 2020.

Kew Residential Services project (KRS) - Seventh deed of variation signed by DV - 20180410.pdf (115 KB)

Kew Residential Services project (KRS) - Seventh deed of variation signed by DV - 20180410.pdf (115 KB)

However, construction work on the Stage 8 Apartments continued throughout 2021.

Despite the Ombudsman’s Recommendation 11 (see above) Development Victoria does not appear to have provided any explanation, or updated contractual information related to the Main Drive Kew Apartments currently being built in accordance with Heritage Permit P26760.

According to the same Deed of Variation (18.4.2018) published on the CPS, the vacant Heritage Core Lot 48D Main Drive Kew identified in the Contract as ‘Stage 9’ was to be sold as a Vacant Lot, and notwithstanding any other provision of Schedule 12 that the State will paid an amount of **\$320,000 from sale of Stage 9.(see below)**

**2.3 Stage 9 Payment**

Clause D1.5 is deleted and replaced with the following clause:

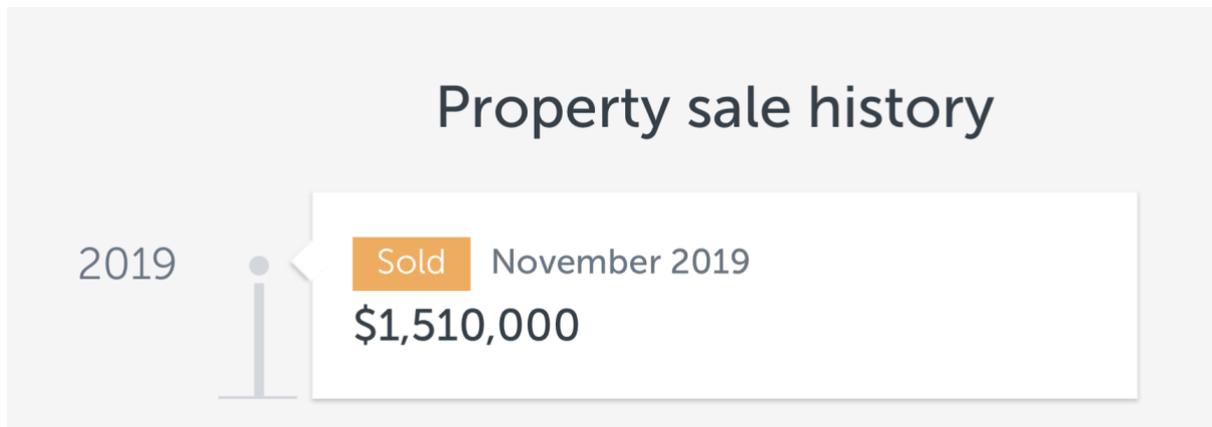
**‘D1.5 Stage 9 Payment**

- (a) The State and the Developer agree that the Developer will Market and Sell Stage 9 as a Vacant Lot.
- (b) The Developer agrees that notwithstanding any other provision of Schedule 12, that the State will be paid an amount of \$320,000 from the sale of Stage 9.

[5558207: 21104835\_1]

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According to realestate.com.au Lot 48D Main Drive Kew was subsequently sold as a vacant lot in Nov 2019 for [\\$1,510,000](#)



According to Planning Victoria website Planning approval to construct two double storey dwellings on this lot (48D) PA2000936 was refused on 25 September 2020.

PA2000966	25 September 2020	Construction of two double storey dwellings on one lot.	D/48 Main Drive Kew VIC 3101	Refused 29 July 2021	<a href="#">View details</a>
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And as of 10 Dec 2021, we understand no decision had yet been made by Heritage Victoria in response to an application for a Heritage Permit for the two proposed dwellings submitted by former Walker Kew Cottages Development Project Manager, Brad Evans, on behalf of a private client.

The lack of transparency since the Andrews Government and Development Victoria took over the State's role in the Walker PPP development is most disappointing, however on a more positive note, if Minister Wynne's commitment to 'best practice' is taken at face value then the Mitigation Hierarchy suggests two opportunities should now be explored in order to help identify suitable restoration prospects and offsets for this State Heritage listed place. Eg:

1. Establish a 'Community Hub' in the Kew Cottages Heritage Core ?

The delay in proceeding with further works on the remaining Heritage Core vacant Lot 48D appears to provide an opportunity for the Government to address the need to consider buying back the vacant lot in order to:

- help offset the damage caused by the Baillieu Government's 'Contract exceptions' deal with Walker in 2014 (see above)
- establish a small-scale community hub to support the needs of Kew Cottages and Willsmere residents;

2. Establish a Heritage Protection Test and Demonstration Project at Kew Cottages ?.

The 15-year Kew Cottages Covenant Condition in Walker's Stage 8 Apartments Permit P26760 provides an opportunity to research and develop new and more cost-effective heritage protection measures on a landscape scale. Eg:

- Advanced Digital Mapping of Heritage Tree canopies for the duration of Permit Conditions. (Mapping the Kew Cottages tree canopies was one of the Heritage Permit Conditions in 'Guiding' Permit P9639 that appears to have been simply ignored by both Walker and Major Projects Victoria.)
- Advanced long-term Environmental Monitoring procedures recommended in the ENSPEC *Phytophthora Cinnamomi* Report prepared on behalf of Boroondara Council (2006).

## Recommendations.

### KCC Recommendation 6.1

Expand the investigative powers of both IBAC and the Auditor-General in order to enable an adequate and comprehensive inquiry to be established into the outcome of the Kew Cottages Development, as recommended by [The Age newspaper](#).

### KCC Recommendation 6.2

Take the opportunity provided by the 15-year Kew Cottages Covenant Condition in [Heritage Permit P26760 \(25.9.2018\)](#) to establish Kew Cottages (H2073) as a reference site in a Test and Demonstration project designed to research and develop innovative heritage protection monitoring and enforcement measures at a landscape scale.

### KCC Recommendation 6.3

Take the opportunity provided by [the review of the EPBC Act](#) to increase consistency between National and State Heritage and Environmental assessment practices and procedures.

### KCC Recommendation 6.4

Review the new opportunities provided by the [bilateral agreement between the Commonwealth and Victoria](#) for environmental assessment with a view to developing a cost effective 'one stop shop' for

the detailed online publication of both Commonwealth and State Environmental, Heritage, and Planning assessments.

**KCC Recommendation 6.5**

Invite witnesses to give evidence to the Inquiry on the above matters, including the relevant Government Ministers, the Secretaries of their Departments, the Executive Director of Heritage Victoria, Chief Executive Officer of Development Victoria, and the Managing Director of Walker Corporation.

Kew Cottages Development questions still to be answered include:

1. What is the current contract status of the Kew Cottages PPP development?
2. What has been the financial return to the State ?
3. Which recommendations of the Select Committee on Public Land Development Inquiry (2008), and the Ombudsman's Kew Cottages Probity Investigation (2010) have not been implemented? and
4. Why ?
5. What has the Government learnt from the mistakes of its predecessors ?

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Note: This document includes hyperlinks to online resources including:

[The Kew Cottages Coalition website](#)

[www.kew.org.au](http://www.kew.org.au)

[The Victorian Government Contract Publishing System](#)

Eg: The Kew Cottages Walker Development Contract 3669

<https://www.tenders.vic.gov.au/contract/view?id=45557>

[The Age Newspaper](#)

An online version of this submission is also available on the Kew Cottages website, and

further links and resources can be accessed [here](#)

For further information please email: [admin@kew.org.au](mailto:admin@kew.org.au)