Planning and Environment Act 1987

Panel Report

Melbourne Planning Scheme Amendment C270
Central City Built Form Review

26 October 2016

VICTORIA State Government | Planning Panels Victoria

Planning and Environment Act 1987

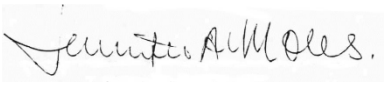
Panel Report pursuant to section 25 of the Act

Melbourne Planning Scheme Amendment C270

Central City Built Form Review

26 October 2016

Brett Davis, Chair



Jenny Moles, Member

Jim Holdsworth, Member

Katherine Navarro, Member

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List of Abbreviations

AIA	Australian Institute of Architects
AILA	Australian Institute of Landscape Architects
CBA	Cost Benefit Analysis
CBD	Central Business District
CCBFR	Central City Built Form Review
CCZ	Capital City Zone
Central City	Hoddle Grid and Southbank
CIL	Cash in lieu
DCP	Development Contributions Plan
DDO	Design and Development Overlay
DELWP	Department of Environment, Land, Water and Planning
DPO	Development Plan Overlay
DRP	Design Review Panel
EES	Environment Effects Statement
FAR	Floor Area Ratio
FAU	Floor Area Uplift
GAIC	Growth Areas Infrastructure Contribution
GDA	General Development Area
GFA	Gross Floor Area
GRV	Gross Realisation Values
HIA	Housing Industry of Australia
HO	Heritage Overlay
ICP	Infrastructure Contribution Plan
LPPF	Local Planning Policy Framework
MMRA	Melbourne Metropolitan Rail Authority
MSS	Municipal Strategic Statement
NLA	Net Leasable Area
PCA	Property Council of Australia
PIA	Planning Institute of Australia
PTV	Public Transport Victoria

SCA	Special Character Area
SOCN	Southbank Owners Corporation Network
TDR	Transferrable Development Rights
the Act	*Planning and Environment Act* 1987
the Minister	Minister for Planning
UDIA	Urban Development Institute of Australia
VCAT	Victorian Civil and Administrative Tribunal
VPP	Victoria Planning Provisions

Overview

Amendment Summary	
The Amendment	Melbourne Planning Scheme Amendment C270
Common name	Central City Built Form Review
Brief description	The Amendment proposes to introduce permanent built form controls across the Central City and introduce a Floor Area Ratio and Floor Area Uplift Scheme following the introduction of interim controls in September 2015 (Amendment C262).
Amendment area	Hoddle Grid and Southbank
Planning Authority	Minister for Planning
Exhibition	28 April – 30 May 2016
Submissions	91 submissions were received as listed in Appendix A

Panel Process	
The Panel	Brett Davis (Chair), Jim Holdsworth, Jenny Moles, Katherine Navarro
Directions Hearing	22 June 2016
Panel Hearings	29 Hearing Days between 12 July – 30 August 2016
Site Inspections	21 July and 16 August 2016 (accompanied)
Appearances	As listed in Appendix B
Date of this report	26 October 2016

Executive Summary

(i) Summary

Amendment C270 (the Amendment) to the Melbourne Planning Scheme (the Planning Scheme) has been prepared by the Minister for Planning as planning authority. It seeks to introduce a revised planning framework that introduces new built form controls to the Hoddle Grid and Southbank (the Central City). The Amendment is in response to the increase in the quantity, density and scale of recent developments proposed and approved within the Central City.

The Amendment as exhibited includes a mix of mandatory and discretionary built form provisions, building on the introduction of 'interim controls' through Amendment C262 in September 2015. The Amendment seeks to amend the Capital City Zone (CCZ) schedules 1-3 and associated mapping changes, applies various Design and Development Overlay (DDO) controls, amends local policy and introduces the concept of Floor Area Ratio (FAR) and Floor Area Uplift (FAU).

The Amendment is underpinned by the *Central City Built Form Review*, a comprehensive suite of expert reports and studies which focuses on understanding the extent of permanent planning controls the Central City needs to order to maintain its liveability.

The Amendment introduces a set of built form controls and two types of development areas in the Central City, namely:

- General Development Area (GDA) - where the emphasis is on growth and more intensive development. This is primarily where towers are envisaged, and will be encouraged, to be located.
- Special Character Areas (SCAs) - where the emphasis is to protect specific valued attributes, including a relatively lower built form scale appropriate for each area. There is commonality and overlap between some of the SCAs and heritage precincts or sites with individual heritage protection.

For developments in the GDA, the Amendment proposes through the FAU mechanism to specify the circumstances in which built form can exceed a specified FAR of 18:1. The ratio is based on a Gross Floor Area Calculation to enable an allowable floor area. The FAR is based on an all-inclusive (services, car parking etc) Gross Floor Area Calculation to enable an allowable floor area. For example, if the site area was 2,000 square metres, with a FAR of 18:1, the allowable floor area would be 36,000 square metres. Anything exceeding this figure would trigger the FAU Scheme. Such exceedance is proposed to be subject to contribution of approved 'public benefits' set out in the FAU Scheme. The category of a public benefit needs to be agreed on prior to proceeding.

There are five public benefit categories set out in the Guidelines, namely:

- Competitive design process (design excellence)
- Commercial office use on site for minimum 10 years
- Social housing on site
- Publicly accessible enclosed areas on site
- publicly accessible open space on the site.

The Panel acknowledges the unparalleled amount of work undertaken in the preparation of this Amendment. It notes the thorough analysis undertaken in areas such as comparative research and planning permit analysis, 3D modelling, architecture, urban design, history of controls, economics, feasibility, daylight and wind engineering assessments.

The key issues raised in submissions included:

- Strategic justification for the Amendment
- The use and need for the FAR of 18:1 and FAU Scheme, both individually and together
- Concerns about the Floor Area Uplift mechanism
- Potential impact on commercial floor space
- Public realm impacts and protection
- The use of a 'blanket' control or approach to built form
- The form and content of the built form controls including height limits, podium heights, street corners, blank walls, mandatory versus discretionary controls and building setbacks.

The Panel concluded that the majority of elements in the proposed package of built form controls will contribute to an enhanced public realm, including the FAR requirements and street wall, podium, daylight, overshadowing and setback requirements. These items were vigorously tested throughout the Hearing. The Panel supports the use of SCAs and would encourage further analysis and possible expansion of these areas into the future. The Panel supports the FAR controls in the GDA and SCA.

A common theme amongst opposing submissions was that the Amendment as an inappropriate '*one-size fits all*' or '*retrograde'* control. The Panel disagrees and found that Amendment does not prescribe a single response, but allows for flexibility in design responses and stronger built form controls.

A number of Southbank submitters argued that the Amendment was a '*blanket control'* and that the previous Amendment C171 had not had time to '*set*', while others were supportive of the Amendment. The Panel concluded that the recent 'hyper-dense' applications, approvals and development pipeline indicated to it that there was a need to address this through FAR controls. The Panel notes that this is not a significant departure from Amendment C171, however provides more guidance with regard to acceptable built form outcomes for the area.

The Panel recognises that there is broad support for the Amendment and applauds the initiative to value capture public benefits through the FAU Scheme. As the Hearing progressed there was much discussion on the FAU Scheme. The Panel concluded that the FAU Scheme, as currently proposed, is not strategically justified for the following reasons:

- it fails to clearly apply the principles of equality, consistency, accountability and transparency to the securing of benefits
- its implementation, including the Guidelines, is vague and may be open to misinterpretation
- the strategic justification for the scope of public benefits is absent
- there are too many opportunities for inconsistent outcomes in the "*negotiation*" of agreements for public benefits.

As such, it concluded that the FAU Scheme was not workable to warrant inclusion in the Amendment. The Panel had concerns that the 18:1 was also a very high trigger before the FAU Scheme could be contemplated.

As the Panel has recommended abandoning the part of the Amendment proposing the introduction of the FAU Scheme, the Panel recognises that the implementation of this recommendation effectively 'caps' the FAR at 18:1 in the GDA. However, the Panel is comfortable with this outcome, as based on submissions and evidence presented to it, the FAR of 18:1 is still substantially higher than key comparator cities. While the full detail and extent of just how the FAR worked in other jurisdictions was only briefly discussed, the Panel was still concerned that the Central City FAR was higher all of the comparators. It noted that the average FAR in 2015 across the Central City was 36:1.

The Panel is satisfied that in the absence of the FAU Scheme, there still remains sufficient strategic justification for proceeding with the remaining parts of the Amendment relating to built form controls. The Panel finds that these built form controls will assist in discontinuing the poor public realm outcomes that have arisen from recent developments and encourage a higher standard in the future.

The Panel strongly believes that a FAR of 18:1 in the GDA should be viewed as an absolute. Further, any future revision of the FAR should only look to lower this figure significantly. This is particularly important if a future value capture provision for the inclusion of public benefits is introduced. The Panel agrees with the statement of Professor Adams from the City of Melbourne that the FAR of 18:1 is not ideal but a "*good start to begin the process of reasonable repair to the Central City*."

Late in the Hearing, the Panel was briefly taken to the draft *Better Apartments Draft Design Standards* and it has concerns about the discrepancies between this Amendment's setback controls and those in the draft, and had noted that this be addressed as part of a number of 'further recommendations'.

As a matter of urgency, the Panel recommends that a viable and legislatively sound mechanism to capture the values associated with future development of the Central City be implemented. A mechanism to capture development contribution to invest in infrastructure and the public realm is urgently needed. The Panel is of the view that some of this work has already begun in this Amendment, with more fine tuning required. Until such a mechanism is developed and implemented, the 18:1 cap should remain in the GDA. The Panel has resolved to adopt the Amendment and the majority of the exhibited material.

(ii) Recommendations

Based on the reasons set out in this Report, the Panel recommends that Melbourne Planning Scheme Amendment C270 be adopted subject to the following:

1. **Adopt the exhibited controls known as Panel Version August 2016 V2 (Tabled document 165) noting variations specified in this report.**
2. **Abandon the exhibited Floor Area Uplift Scheme and look to implement a workable uplift mechanism or contributions scheme as a matter of urgency.**

3. **As a consequence of abandonment of the Floor Area Uplift Scheme, all references to it need to be deleted from the Amendment, including in the Capital City Zone schedules (or Design and Development Overlay Schedule 10 if the Floor Area Ratio provisions are relocated there).**

4. **Delete the policy at Clause 22.03 which, despite its heading, deals exclusively with the delivery of public benefits under the Floor Area Uplift Scheme.**

5. **Apply the capped Floor Area Ratio of 18:1 in conjunction with the built form controls of modified versions of the relevant Design and Development Overlay Schedules.**

6. **Relocate the General Development Area Floor Area Ratio provisions from the Capital City Zone to Design and Development Overlay Schedule 10.**

7. **Delete Design and Development Overlay Schedule 10 to the land at 213-237 Lonsdale Street and 222-230 Little Bourke Street (Golden Square Carpark) nor to 209-211 Lonsdale Street (part of the Papasavas land).**

8. **Remove Development Plan Overlay Schedule 1 from 209-211 Lonsdale Street and replace it with Design and Development Overlay Schedule 2 – Area 3.**

9. **Add additional guidelines in Clause 5 of all Design and Development Overlay schedules to the following effect:**
    - **Whether, in the case of a site being only partly proposed for development but its Floor Area Ratio floorspace allowance has utilised the total site area, an agreement is to be entered into to acknowledge that the calculation of the Floor Area Ratio occurred against the total site area and that the area of the site cannot be later reused to calculate Floor Area Ratio floorspace for undeveloped portions.**
    - **Whether in the case of a site being only partly proposed for development and with a heritage building being proposed for retention on another part of the site, an agreement is to be entered into to ensure the conservation of the heritage building in perpetuity.**
    - **In the case of a site which is being only partly developed, whether the building is sited so that adequate setbacks will likely be maintained in the event that the land is subdivided or separate land holdings are administratively effected to create a further development site.**

10. **Rewrite the transitional arrangements for the Design and Development Overlay Schedule 10 (from which the prohibition on amendment of permits is removed) as follows:**

    The requirements of this schedule do not apply to:

    - **development of land that is undertaken in accordance with a permit under the Building Act 1993 issued before the commencement of Amendment C270 to this planning scheme;**
    - **an application made before the commencement of Amendment C270 to this planning scheme.**

For an application made before the commencement of Amendment C270 to this planning scheme but after the commencement of Amendment C262, the requirements of this schedule, as they were in force immediately before the commencement of Amendment C270, continue to apply.

11. **Rewrite the transitional arrangements for the other Design and Development Overlay schedules in the Amendment as follows:**

    The requirements of this schedule do not apply to:

    - **development of land that is undertaken in accordance with a permit under the Building Act 1993 issued before the commencement of Amendment C270 to this planning scheme;**
    - **an application made before the commencement of Amendment C270 to this planning scheme.**

    For applications made before the commencement of Amendment C270 and before Amendment C262 the requirements of this schedule, as they were in force immediately before the commencement of Amendment C262, continue to apply.

    For applications made before the commencement of Amendment C270 to this planning scheme but after the commencement of Amendment C262 the requirements of this schedule, as they were in force immediately before the commencement of Amendment C270, continue to apply.

12. **Amend the schedules to the Design and Development Overlay to include a clause or clauses directly setting aside the ability to grant a permit not in accordance with the schedule or (a) provision(s) of it.**

13. **In conjunction with relocating the Floor Area Ratio provisions from the Capital City Zone schedules to Design and Development Overlay Schedule 10, remove all transitional provisions from the Capital City Zone schedules which are part of this Amendment.**

14. **Change the definition of street wall in Clause 2.1 of all DDO schedules in the Amendment to include any part of a building constructed within 0.3 metres of a lot boundary fronting a street.**

15. **Amend Table 1 in Design and Development Overlay Schedule 10 to:**
    - **Delete the words "*and setbacks*" from to *"height and setback that respects the scale of adjoining heritage places"* as street wall by definition is sited on the front boundary.**
    - **Add the following built form outcome regarding street wall: "*Maintenance of the prevailing street wall height and vertical rhythm of the street*".**
    - **Include in the 'Preferred Requirement' column, a street wall height range of 15-30 metres in main streets and 7 – 20 metres in streets.**

- **Change the 'Preferred Requirement' building setback above the street wall to 10 metres.**
- **Add to the 'Modified Requirement' for Building setback(s) from the street wall that "*and the street wall must be no higher than 40 metres and the tower or building addition must have a distinctly different form or architectural expression.*"**

16. **Split the overshadowing requirement under Clause 2.3 of Design and Development Overlay Schedules 2 and 10 into separate sentences, with the first sentence reading as follows:**
    - ***A permit must not be granted for buildings and works which would cast any additional shadow across a space listed below and shown in figure 2 of this schedule as a defined space during the hours and dates specified for that space*.**
    - **Amend the shadowing diagrams to refer to the hatched area as '*Defined Space*'.**
17. **Amend Clause 2.1 'Definitions' in each of the Design and Development Overlay Schedules forming part of this Amendment with regard to wind to state the following:**
    - **Comfortable wind conditions means a wind speed from all directions combined with probability of exceedance 80 percent of the time.**
18. **Amend Clause 2.3 'Requirements' in each of the Design and Development Overlay Schedules as they relate to Wind Effects by replacing the word 'lesser' with'greater' in each paragraph.**
19. **At 5.0 Decision Guidelines of Design and Development Overlay Schedule 10, include the sentence:**
    - **The location of the site and whether it has an interface with the Westgate Freeway and/or is an island site.**
20. **Modify Design and Development Overlay Schedule 2 - Area 1 (extension to the core retail area) by:**
    - **Deleting the northern part of the Melbourne Central site (within the block bounded by La Trobe, Swanston, Little Lonsdale and Elizabeth Streets) and retain in Design and Development Overlay Schedule 10.**
21. **Modify Design and Development Overlay Schedule 2 - Area 1 (extension to the core retail area) by:**
    - **Deleting the land at 385 Bourke Street as shown in Figure 13 of this report and retain in Design and Development Overlay Schedule 10.**
22. **Amend Table 1 in Design and Development Overlay Schedule 10 to:**
    - **Add reference to 'building additions' in the 'Built Form Outcomes' column in, the section on 'Side and rear setbacks'.**
    - **Refer to 'towers and building additions' in the 'Modified Requirement' column relating to situations where buildings on adjoining land are legally restricted to the street wall height.**

23. **Add a design objective to Design and Development Overlay Schedule 10 that states: "*To encourage intensive developments in the Central City to adopt a tower/podium format".***

24. **Retitle Design and Development Overlay Schedule 2 as 'Hoddle Grid Special Character Areas - Built Form'.**

25. **Retitle Design and Development Overlay Schedule 10 as 'Central City General Development Area - Built Form'.**

26. **Amend Clause 22.01-2 to:**
    - **include an additional 'Building Design' objective to the effect that the podium and tower elements of a building should be distinguished by setbacks and/or the adoption of different but complementary design approaches.**

(iii) ***Further recommendations***

The Panel makes the following further recommendations that the Minister:

a) Council should incorporate the transport system interface with land use and amenity considerations as part of its Land Use and Infrastructure Review.

b) Recommend that Council consider broader categories of public benefits as part of its Land Use and Infrastructure Review.

c) Consider amendments to third party rights in relation to development applications in the central city.

d) Direct that Council investigate the identification of additional Special Character Areas in line with Ms Hodyl's evidence.

e) Investigate, as a priority floorspace, 'transfer mechanisms' that may assist with conservation of the many heritage buildings in individual place Heritage Overlays in the Central City, especially in the General Development Area.

f) Investigate the extent to which site-specific built form controls conflict with more general built form controls on sites across the Central City area and resolve the conflict as required.

g) Consider altering the 25,000 square metre cut-off between developments for which the Council and Minister act as Responsible Authorities to 35,000 square metres.

h) Amend PPN59 to include the term "Floor Area Ratio" to the list of dot points relating to "When are mandatory provisions appropriate?"

i) Direct Council amend DPO Schedule 1 in light of changes to land use and development in the general area and modern day policy intents in relation to character areas and laneways.

j) Urgently resolve the inconsistency between the proposed side and rear building setbacks in the Better Apartments Design Standards and those in the

Amendment, which both purport to be seeking to achieve good on-site amenity (at least in part).

k) Consider devising an agreed methodology to assist planners understand technical wind requirements when considering planning permit applications that may trigger the relevant controls.

l) Consider converting the discretionary Floor Area Ratios in the Special Character Areas to mandatory ones.

m) The Minister should review the preferred heights in Design and Development Overlay Schedule 60 to more closely align with the FAR of 10:1 for this precinct.

n) Recommend that Council should consider extending Design and Development Overlay Schedule 2 on the western side of Elizabeth Street further northward to abut the southern edge of the Special Character Area near the Queen Victoria Market, once necessary work and consultation has been undertaken.

o) Consider whether the term 'potential development' is a workable inclusion in the decision guidelines in the Design and Development Overlays.

p) Recommend Council review the use of mandatory language in Clause 22.02 Sunlight to Public Spaces, such as "Development must not cast additional shadow…"

q) Review the consistent use of the now preferred term 'public space', 'public land' references and the use of 'public realm' throughout.

r) Recommend Council clarify that the fourth dot point under Clause 22.01-6, that refers to balconies having a clearance above any public space rather than horizontally 'from' that space.

s) Recommend Council correct the first retained dot point in Clause 22.01-3 referring to creation of mid-block links, by deleting the 'average length' and refer instead to the 'length' of a street block.

t) Consider the future application of air rights and transferable development rights for buildings such as Alcaston House and others of high heritage importance.

1 Introduction

1.1 The Amendment

(i) Amendment Area

The Amendment applies to land shown in Figure 1.

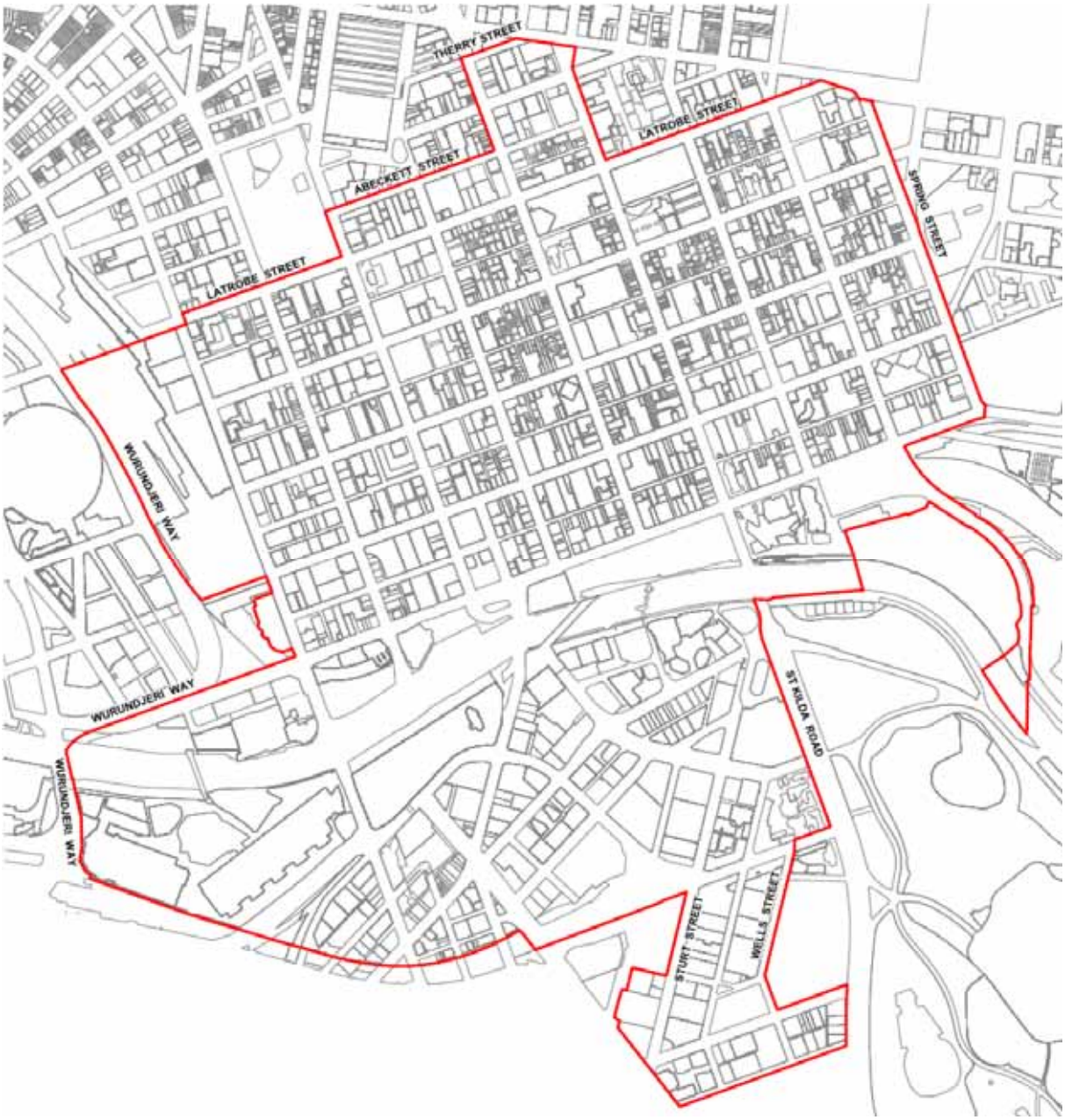

Figure 1 Amendment Area

(ii) Amendment description

As exhibited, the Amendment proposed to:

- Amend Schedules 1, 2 and 3 to the Capital City Zone to introduce floor area ratio and uplift requirements, with delivery of associated public benefit(s), in the schedules to the zone.
- Delete shadow prohibitions and permit requirements, and wind assessment application requirements from Schedules 1, 2 and 3 to the Capital City Zone.
- Amend Schedules 2 (Height Controls - Capital City Zone), 40 (River Environs), 60 (Southbank) and 62 (Bourke Hill) to the Design and Development Overlay to a mix of mandatory and discretionary height controls. Pre-existing mandatory height controls are to remain, and where the discretionary height controls are to apply include an associated discretionary floor area ratio and setback controls. These schedules include permit and application requirements related to overshadowing and wind impacts.
- Replace Design and Development Overlay Schedule 10 (DDO10) with a new schedule that applies street wall height, setbacks (to the street and to neighbouring boundaries), tower separation, overshadowing and wind impact requirements.
- Delete Schedule 7 to the Design and Development Overlay (Former Fishmarket Site Northbank).
- Amend Clause 22.01 (Urban Design within the Capital City Zone) and Clause 22.02 (Sunlight to Public Spaces) for consistency with the revised provisions within DDO2, DDO10, DDO40, DDO60 and DDO62.
- Introduce a new Clause 22.03 (Floor Area Ratio and Delivery of Public Benefits) to guide the delivery of the associated public benefit(s) sought in the schedules to the Capital City Zone.
- Amend map 8, DDOs 2, 14 and 62 by extending Area 1 of Design and Development Overlay Schedule 2 to align with Schedule 2 to the Capital City Zone (Retail Core).
- Amend map 8DDOPT3 to remove Schedule 7 to the Design and Development Overlay.
- Amend map 8DDO10 to:
    - Include the area previously affected by Schedule 7 to the Design and Development Overlay, and
    - Delete the area to be included within Area 1 of Schedule 2 to the Design and Development Overlay.

1.2 Background

1.2.1 The Central City Built Form Review (CCBFR)

The Central City Built Form Review (CCBFR) is focused on understanding the extent of permanent planning controls the Central City needs in order to maintain its liveability and to prosper in the long term by allowing for sustainable growth and development. The CCBFR was prepared by DELWP with inputs from the City of Melbourne and the Office of the Victorian Government Architect.

The Review has been assisted by the work of a consultant team. Matters investigated include:

- an audit of pre-existing built form controls and their effectiveness, including the evolution of the built form controls

- architectural testing of alternative built form scenarios
- site viability analysis on the basis of the architectural testing
- urban design review, particularly of the special character areas
- review of shadowing of key open spaces
- review of wind measurement controls and comfort criteria
- daylight testing of built form scenarios
- economic assessment of a floor area ratio system
- comparative research into built form controls both interstate and internationally.

The findings of the CCBFR are that:

> *(a) street wall height should be relatively low in most cases*
>
> *(b) tower separation from boundaries should be increased and should be proportionate to height*
>
> *(c) tower setbacks to streets should be a fixed minimum*
>
> *(d) controlled flexibility should be provided to allow proposed developments to adapt to site context in specified circumstances*
>
> *(e) shadowing protection to key public spaces should be increased for new sites and for extended times*
>
> *(f) wind impact controls should protect average comfort levels, not just against extreme gust events*
>
> *(g) plot ratio controls (in conjunction with 'uplift' or 'value sharing' schemes) are typical of global cities and include site plot ratios of up to 15:1.*

1.2.2 General Development Area and Special Character Areas

The Amendment introduces two types of development areas within the Central City, the General Development Area (GDA) and Special Character Areas (SCA), as contexts that require different built form controls.

The Amendment as exhibited includes a mix of mandatory and discretionary built form provisions. Most mandatory requirements are proposed in the SCA where they had been in place prior to the introduction of Amendment C262. They include mandatory height controls in some areas. In the GDA under DDO10, setbacks, street wall height and tower separation controls are discretionary or preferred, but are backed by mandatory limits. The areas are discussed below.

A summary of the requirements of the pre-C262 controls, interim controls (Amendment C262), exhibited controls (Amendment C270), and the revised version of the controls first presented to the Panel (response to public submissions) is contained at Appendix E.

(i) General Development Areas

The Explanatory Report sets out that the GDA has the emphasis on growth and development that is more intensive. The GDA is located primarily where towers are supported.

The controls in the GDA allow design flexibility in limited and well-defined circumstances in order to promote appropriate, site-specific design responses and innovation while ensuring that certainty around development outcomes is not undermined. No overall limit to development capacity is proposed subject to the FAR requirements.

The floor area ratio requirements trigger a '*value sharing*' mechanism in the form of investment in public benefits in the Central City. This aims to achieve two purposes:

(a) setting realistic and clear expectations about what the appropriate yield of a typical development site could be; and

(b) establishing a threshold density which triggers a value-sharing contribution towards public benefits.

The GDA and SCAs that apply to the Amendment area are shown in Figure 2 below:

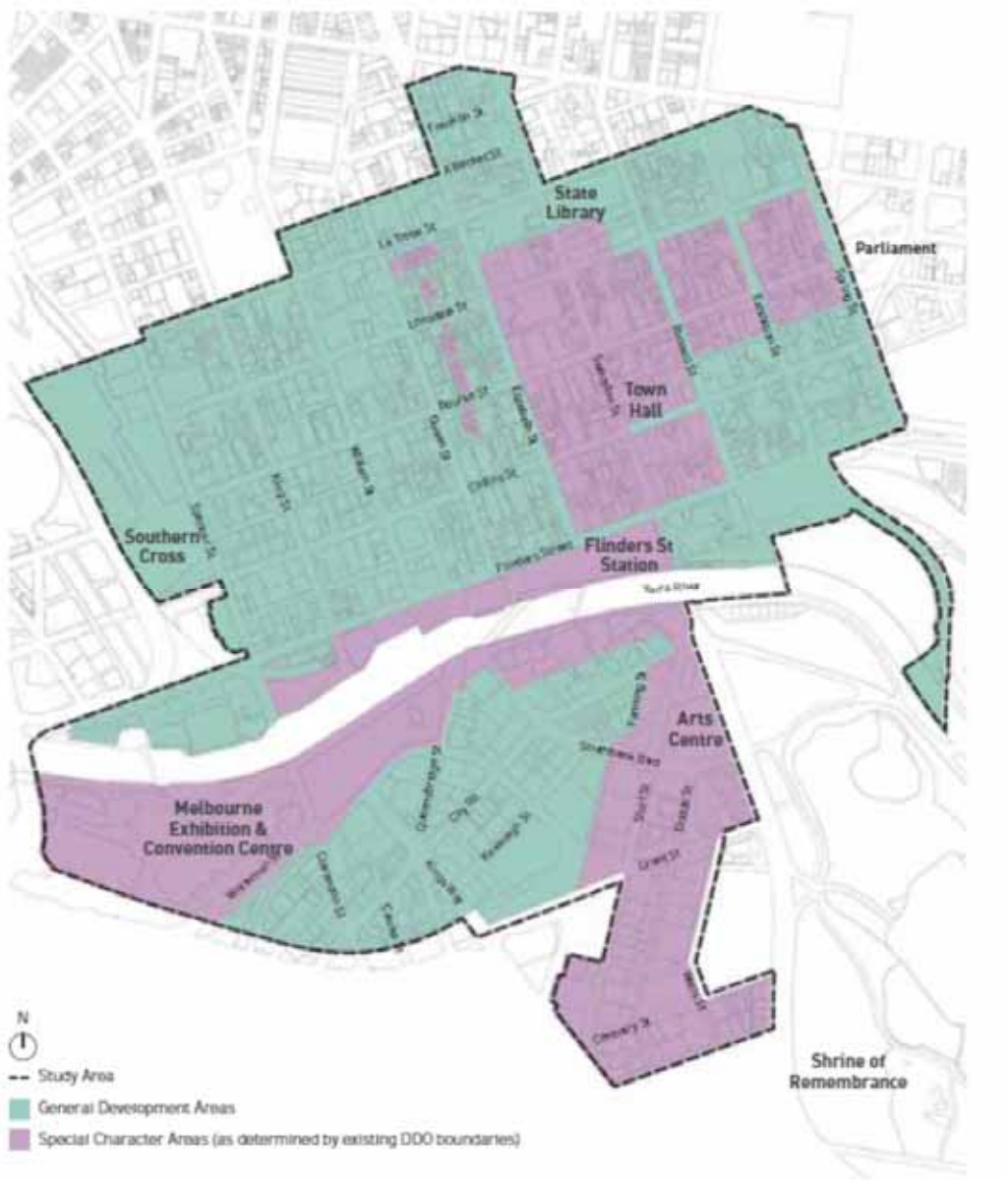

Figure 2 GDA and SCA areas

(ii) Special Character Areas

Special Character Areas (SCA) have an emphasis to protect specific valued attributes including a relatively lower built form scale appropriate for each area. For SCA

- where a mandatory height control was in place prior to the introduction of the interim controls, the mandatory height controls are proposed to remain
- where a discretionary height control was in place prior to the introduction of the interim controls, the discretionary height controls are reintroduced, but with the addition of an associated floor area ratio to guide the discretion that can be exercised in relation to overall height.

SCAs include key civic spaces such as:

- those near the Victorian Parliament, Town Hall and the State Library, cultural institutions, including the Arts Centre, Hamer Hall, Recital Centre
- the National Gallery of Victoria and Australian Centre for Contemporary Art, and the shopping district, Bourke Street Mall and the surrounding streets. They incorporate natural places such as the Yarra riverfront.

For retail areas within the SCA (Area 1 of Schedule 2 to the Design and Development Overlay) the Amendment proposes to extend the SCA to the properties along the western edge of Elizabeth Street and northwards to include Melbourne Central.

Ms Brennan SC, appearing for the Planning Authority (the Minister) submitted that this aligns the control with the '*long-standing Retail Core Boundary Schedule 2 to the Capital City Zone.'* Ms Brennan submitted that future development in SCAs in the majority of areas (DDO2, DDO40, DDO62) is required to protect the existing character. Regarding DDO60, Ms Brennan submitted:

> *…in the majority of areas (DDO2, DDO40, DDO62) is required to protect the existing character. In DDO60, future development is required to shape a preferred character. In both cases, development of the SCAs is intended to be less intensive than development in the General Development Areas (GDAs), and more focussed on the protection or creation of the relevant special built form character.*
>
> *The additional built form controls proposed by the Amendment in the SCAs (that is, street wall heights, setbacks and FAR) are discretionary. The FAR performs a wholly different function in the SCAs from the GDAs; in the SCAs, it is employed to moderate the impacts of additional height above the existing nominated heights, and is in that sense complementary. For sites with a discretionary height above 40 metres, a percentage increase of 30 percent was applied to each preferred height limit, from which the discretionary FAR was derived.*
>
> *This was explained in Hodyl and Co 'Central City Built Form Review- Urban Design Analysis Special Character Areas' April 2016 at page 30, as follows:*
>
> *In some areas 3d massing models were undertaken to further test potential built form outcomes, intending the overall development intensity suitable for an area. This enables the translation of preferred Floor Area Ratio (FAR). This*

has been recommended as a complement to the discretionary height controls as it articulates a degree of moderation for exceeding discretionary height limits (where a development meets all other design objectives).

The introduction of Floor Area Ratio enables a controlled amount of development without locking in a particular height or envelope, permitting the designer to respond to particular site context which is often varied in the Special Character Areas.

The discretionary nature of the proposed additional controls ensures a degree of flexibility is maintained for development within the SCAs, while ensuring that they do not inadvertently become more attractive for redevelopment than the GDAs.

Ms Hodyl's analysis of the SCAs as part of the Review, and her general approach to additional built form controls in those areas, are supported by Ms Sophie Jordan and Mr Mark Sheppard, subject to their additional recommendations.

It was neither appropriate nor necessary to review the boundaries of, or height limits within, each SCA for the purposes of the Review. In the case of DDO60 and DDO62, the relevant height limits were recently introduced following detailed Panel consideration. In the case of DDO2 and DDO40, those controls are longstanding and, on the whole, have not been overtaken by subsequent built form such that the relevant built form outcomes could be said to be superfluous or unachievable. It is necessary to emphasise that because no comprehensive evaluation of the boundaries or height limits in the SCAs has been undertaken, it is entirely un suitable and lacking in strategic foundation to seek site-specific adjustments based on site-specific analysis of a particular proposal on a particular site.

An obvious exception was the boundary of the Retail Core in DDO2, given the anomalous boundary of CCZ2, where a thorough assessment of all of the affected properties formed a core component of the Review.

(iii) Purpose of the Amendment

The purpose of the Amendment is to implement a revised framework of planning controls that provide for:

- certainty and consistency of built form outcomes
- improvement of public amenity
- sustainable investment and
- enhancement of the long-term liveability of Melbourne.

1.3 Panel process

The Amendment was placed on public exhibition between 5 May and 31 August 2016, with 91 submissions received.

A Directions Hearing was held on 22 June 2016 and the Panel Hearing was held over 29 days between 12 July and 30 August 2016 at Planning Panels Victoria offices. The parties listed in Appendix B appeared at the Hearing.

The Panel conducted two accompanied site inspections on 21 July and 16 August 2016.

The Panel considered all written submissions made in response to the exhibition of the Amendment; as well as further submissions, evidence and other material presented to it during the Hearing, as informed by its observations on inspections.

The Panel has reviewed a large volume of material. In the interests of expediency, the Panel sometimes has to be selective in referring to the more relevant or determinative material in the report. All submissions and materials have been considered by the Panel in reaching its conclusions, regardless of whether they are specifically mentioned in the report.

The key issues raised in submissions included:

- Strategic justification for the Amendment
- The use and need for the FAR of 18:1 and FAU Scheme, both individually and together
- Concerns about the Floor Area Uplift mechanism
- Potential impact on commercial floor space
- Public realm impacts and protection
- The use of a 'blanket' control or approach to built form
- The form and content of the built form controls including height limits, podium heights, street corners, blank walls, mandatory versus discretionary controls and building setbacks.

1.4 Procedural issues

There were a number of procedural matters where the Panel had to make a number of rulings. Some of the more pertinent issues are summarised as follows:

Non-compliance with Panel directions: Some parties continually failed to comply with the Panel directions nominating witnesses or advising the Panel as to the length of time they would take. This meant that the timetable had to be amended on a number of occasions to the inconvenience of others.

Opening presentation by Minister for Planning (the Minister): At the Directions Hearing, Ms Brennan indicated to the Panel that it would open its case by making presentations by a number of people associated with the development of the Central City and the Amendment and that this would include PowerPoint presentations. There was an objection to material being presented in this way on the basis that this was introducing evidence by stealth. The Panel ruled that the 'presentation summaries' would be allowed, but they were considered to be evidence, and those persons would be subject to cross-examination on matters arising out of those summaries.

Golden Square Carpark ruling: In summary, the submitter for this site, Ausvest Holdings Pty Ltd (Submitter 62 and 64), objected to the calling of Ms Hodyl's evidence on behalf of the Minister as it related to their site on the basis that if the Panel considered and implemented

one of Ms Hodyl's options it would amount to a 'transformation of the Amendment'. It submitted that this would be unlawful. The written ruling is attached as Appendix D.

Independence of witnesses: Some parties queried the independence of the Minister's witnesses. The Part C submission (Document 166) highlighted some of the "*collective nature of the work undertaken in preparing the Amendment*"[1] and the inappropriateness of such collective input. Ms Brennan strongly resisted these suggestions of lack of independence of witnesses, especially in the case of Ms Hodyl, Ms Jordan and Mr Sheppard whose independence, she said, cannot be disputed[2]. The witnesses were all subject to cross examination and their evidence was tested accordingly.

1.5 Structure of this report

This report deals with the issues under the following chapter headings:

- Relevant Planning Scheme Amendments
- Planning context
- Strategic assessment
- The evolution of built form in the CBD
- The Floor Area Ratio and Floor Area Uplift
- Form of controls
- Built form impacts
- Southbank
- Hoddle Grid
- Redrafting the Amendment (Post Workshop).

[1] Part C Submission - Minister for Planning [254]-[256], p60
[2] Ibid

2 Relevant Planning Scheme amendments

The following amendments are of particular relevance to this Amendment.

2.1 Melbourne C262 Interim Controls

In response to growing concerns regarding the high intensity of development and its detrimental impact on the long-term liveability and economic success of the city, Amendment C262 to the Melbourne Planning Scheme came into effect in September 2015. The interim planning controls introduced a discretionary plot ratio of 24:1, did not include specified bonuses and mandated maximum podium heights and minimum setbacks for towers. A site plot ratio of 24:1 was included in the amendment as it "*reflects a midpoint between recent approvals within the Central City and international examples*".

The Amendment, as exhibited, proposed to:

- Amend Capital City Zone, Schedules 1 and 2 to introduce mandatory controls to limit overshadowing to identified public spaces and introduce wind analysis application requirements;
- Amend Capital City Zone, Schedule 3 to introduce mandatory controls to limit overshadowing to the Shrine of Remembrance and its northern forecourt;
- Amend Design and Development Overlay Schedules 2 (Height Controls- Capital City Zone), 7 (Former Fishmarket Site Northbank), 40 (River Environs), 60 (Southbank) and 62 (Bourke Hill) to change discretionary height controls to mandatory height controls;
- Insert a new Design and Development Overlay Schedule 10 (DDO10) to apply mandatory podium height and setback requirements with a discretionary site plot ratio control to the remainder of the amendment area and include provisions to allow reconstructed and replacement buildings and transitional provisions for current applications;
- Amend Clauses 22.01 (Urban Design within the Capital City Zone) and Clause 22.02 (Sunlight to Public Spaces) for consistency with the revised shadowing controls and built form controls of DDO10;
- Amend the Schedule to Clause 66.04 to make City of Melbourne a recommending referral authority for planning applications for developments with a gross floor area exceeding 25,000 square metres, for which the Minister for Planning is the Responsible Authority, within Schedules 1, 2 and 3 of the Capital City Zone;
- Amend 8DDOPT3 by deleting Area 2 and Area 3 of Schedule 60 to the Design and Development Overlay; and
- Insert map 8DDO10 to show Design and Development Overlay Schedule 10.

The Amendment was gazetted on 4 September 2015 and the interim controls were applied for a period of twelve months while permanent built form controls were developed. The controls were due to expire on 4 September 2016, however were extended through Amendment C297 until 31 December 2016.

2.2 Melbourne C171

Amendment C171 to the Melbourne Planning Scheme proposed significant modifications to Southbank through the implementation of the *Southbank Structure Plan 2010* by modifying the existing planning controls.

The preferred outcomes for Southbank included:

- lower rise developments at sensitive interfaces (river, Arts Centre etc.)
- higher rise towers in the hinterland
- spacing between towers to allow sunlight and daylight for public realm and private amenity reasons
- street frontage activation
- pedestrian permeability within sites and through the precinct.

The Panel found that the initiatives of the Council in the Southbank Structure Plan were not strategically justified. It did not support mandatory provisions for heights and setbacks in the Design and Development Overlays. The Panel stated that the link between height, setback and poor design was not immediately apparent. The Panel supported limitations on on-site parking, consistent with controls in the CBD and Docklands. The Panel found that the public realm initiatives were "*unnecessarily prescriptive and therefore restrictive"*.

The Panel recommended that the Amendment be approved subject to changes.

2.3 Melbourne C190

Amendment C190 to the Melbourne Planning Scheme proposed new land use controls in the Arden Macaulay precinct to facilitate urban renewal in accordance with the Arden-Macaulay Structure Plan 2012. The Amendment implements the objectives and recommendations in relation to Stage 1 of the Structure Plan.

The Amendment introduced a set of built form controls that:

- set an overall building height
- set a street wall height and setback above that height
- set 'interface controls' with existing residential areas
- identified new laneway links and introduce setbacks from those laneways.

The Amendment, as exhibited, proposed to:

- rezone land from the Industrial 1 and 3 Zones to the Mixed Use Zone, Business 1, 2 and 3 Zones (now the Commercial 1 and 2 Zones) and Public Park and Recreation Zone, and from the General Residential Zone to the Mixed Use Zone
- apply building design controls for heights, boundary setbacks, active street frontages, weather protection and through block access links through the introduction of a new Schedule 60 to Design and Development Overlay (DDO)[3]
- apply Schedule 26 to the Design and Development Overlay to land being rezoned from industrial to a zone that allows residential and other sensitive uses – this DDO will require new, refurbished or converted residential developments and other

[3] This DDO Schedule will be given a different number if the Amendment proceeds. The panel has referred to it as DDO60 for consistency.

noise sensitive uses in the vicinity of existing industrial operations to include acoustic protection measures against noise arising from those existing industrial operations
- apply an Environmental Audit Overlay to manage potentially contaminated former industrial land where the rezoning will permit sensitive uses
- delete Incorporated Plan Overlays applying to the Hotham Estate and the north west corner of Mark and Melrose Streets because the requirements of these plans have been met.

The Panel was generally supportive of the overall design principles in the Amendment, such as mandatory controls for overall height and street wall heights. However, the application of the Amendment on a site-by-site basis was not deemed clear or appropriate. The Panel found that the fundamental issues were in relation to built form.

The Panel recommended that the Amendment be adopted subject to changes.

2.4 Melbourne C240

Amendment C240 to the Melbourne Planning Scheme proposed permanent heritage and built form controls to replace the interim controls for the Bourke Hill precinct. The new controls included a suite of new design objectives, buildings and works requirements, built form outcomes, decision guidelines and a mix of permanent mandatory and discretionary height controls for the Bourke Hill Precinct. Changes to the existing precinct based Heritage Overlay were also proposed.

The Amendment was intended to ensure the long-term protection of the unique character of Bourke Hill, high quality public realm amenity attributes, the view lines to and from Parliament House, the visual prominence of a number of other significant heritage buildings, as well as the precinct's heritage significance generally.

The Panel found that there was broad policy support for the amendment and that the background assessments and analyses completed were comprehensive. The Panel found that there was strategic justification for a mix of both mandatory and discretionary controls in particular parts of the precinct.

The Panel recommended that Amendment C240 be adopted as exhibited subject to changes.

2.5 Melbourne C245

Amendment C245 to the Melbourne Planning Scheme proposed to introduce a revised framework of planning controls to facilitate the implementation of a Master Plan for the Queen Victoria Market Precinct. The Amendment, as exhibited, proposed to:
- Rezone the majority of the Queen Victoria Market land and Queen Street extension currently zoned Capital City Zone (CCZ1) to the Public Use Zone (PUZ7)
- Rezone the QVM car park currently zoned Capital City Zone (CCZ1) to the Public Park and Recreation Zone (PPRZ)
- Apply a new Schedule to the Development Plan Overlay (DPO11), which incorporates a vision and design requirements for development of land, including Council owned land, adjacent to the Queen Victoria Market

- Delete existing Schedule 14 to the Design and Development Overlay (DDO14) from the Queen Victoria Market and land to which DPO11 applies to contract the area covered by DDO14
- Amend the existing Schedule 14 to the Design and Development Overlay (DDO14), which will apply only to the contracted area, to introduce revised built form controls for new development
- Make other supporting changes to the Hoddle Grid Policy (Clause 21.12) the existing Clause 22.02 (Sunlight to Public Spaces).

The Panel found that there was strategic justification for the Amendment and that a review of built form controls in the Queen Victoria Market Precinct was warranted in order to achieve good planning outcomes. The Panel considered that there were 'exceptional circumstances' that justified mandatory controls for the direct interface area with the Queen Victoria Market, and supported mandatory controls within DDO14 on an interim basis, based on a need for consistency between this area and other parts of the Hoddle Grid. The Panel noted that this should be reviewed once the outcome of C270 is known.

The Panel was concerned about the proposed rezoning of the majority of the Queen Victoria Market land and Queen Street extension. The Panel recommended abandonment of that part of the Amendment.

The Panel recommended that Melbourne Planning Scheme Amendment C245 be adopted as exhibited subject to changes.

2.6 Melbourne C188

Amendment C188 to the Melbourne Planning Scheme was proposed to implement the findings of the City of Melbourne's Central City (Hoddle Grid) Built Form Review 2011.

The Amendment, as exhibited, proposed to:

- *Introduce mandatory built form controls including:*
  - *A mandatory podium height of 40 metres*
  - *A minimum setback of 6 metres from the street to any tower above 40 metres*
  - *A minimum setback of 3 metres to laneways to any tower above 40 metres*
- *Require discretionary minimum tower setback of 5 metres from boundaries other than the street/laneway and minimum 10 metres spacing between towers*
- *Extend the 40 metre mandatory height control located centrally within the Hoddle grid and extend it north and west*
- *Extend the discretionary 24 metre height control along the Yarra River corridor eastwards to include Federation Square and the airspace above the Jolimont rail yards*
- *Introduce quantitative performance standards to consider active street frontages (including within podiums), sunlight to public spaces, laneways, weather protection, and mitigating wind effects associated with tall buildings*

- *Consolidate and rename a number of the existing controls into schedules/policy*
- *Revisit existing controls and include minor modifications i.e. increasing height control within the Queen Victoria Market environs to 40 metres and remove the maximum podium height in West Melbourne.*

The Minister for Planning deferred consideration of whether to authorise C188, noting that Council indicated an intention to undertake additional consultation with the community and development industry. The results of this additional consultation were considered to likely inform the amendment and result in further modifications to the Amendment.

The Council's Annual Report of 2011-2012 indicated that another reason for the delay was due to consideration of the outcomes of Melbourne C171. It indicated that the revisions to C188 would likely require the Council to abandon the amendment, adopt the revised amendment and again seek the Minister's authorisation to exhibit.

The Amendment was not progressed.

3 Planning context

The Panel has reviewed the policy context of the Amendment and the relevant zone and overlay controls and other relevant planning strategies.

3.1 Policy framework

3.1.1 State Planning Policy Framework

(i) Clause 9 – Plan Melbourne

Plan Melbourne is the metropolitan planning strategy for Melbourne and intended to guide urban growth and development to 2050. The relevant clauses of Plan Melbourne include:

Direction 1.4, which provides:

> *The central city will continue to play an important role as a major destination for tourism, retail, entertainment and cultural activities; and to enjoy the employment diversity that comes from the growth of these sectors;*
>
> *In order to maximise the opportunities from growth in the knowledge economy, the central city will need to retain its competitive advantages, and continue to provide choices in business accommodation.*

Initiative 1.5.5, which includes:

- *Ensure short term accommodation and tourism services are considered when developing or renewing state sporting, cultural and heritage sites;*
- *Strategic tourism locations will appeal to high-yield or emerging tourism markets (such as convention and exhibition facilities, a world-class hotel resort or iconic attractions); and*
- *Update regulations and approval processes to support identified strategic tourism investment in Melbourne and regional Victoria.*

Plan Melbourne specifically states:

> *Our aim is to plan for growth and change in Melbourne's Central Subregion to consolidate Melbourne's position as a highly competitive global city and to maintain the high standards of liveability, distinctiveness and character that make Melbourne special.*

(ii) Clause 11 – Settlement

Clause 11 addresses settlement planning, which anticipates and responds to the needs of existing and future communities. One of the key objectives under Clause 11.04-4 is in relation to Liveable communities and neighbourhoods. Its objective is "t*o create healthy and active neighbourhoods and maintain Melbourne's identity as one of the world's most liveable cities",* through the implementation of strategies such as:

- Protect Melbourne and its suburbs from inappropriate development.
- Create neighbourhoods that support safe communities and healthy lifestyles.
- Plan for future social infrastructure.

- Make the city greener.
- Create more great public places throughout Melbourne
- Respect heritage while building for the future
- Achieve and promote design excellence.

(iii) Clause 15 – Built Environment and Heritage

Clause 15 discusses the relationship between new land use and development and the existing valued built form and cultural contexts. Planning should ensure the protection of places with significant heritage, architectural, scientific and cultural value. The relevant parts of this clause include:

Clause 15.01-1 (Urban Design), which includes the objective "*to create urban environments that are safe, functional and provide good quality environments with a sense of place and cultural identity."*

Clause 15.01-2 (Urban design principles), which includes the objective *"to achieve architectural and urban design outcomes that contribute positively to local urban character and enhance the public realm while minimising detrimental impact on neighbouring properties."*

Clause 15.01-5 (Cultural identity and neighbourhood character), which includes the objective *'To recognise and protect cultural identity, neighbourhood character and sense of place'.*

Strategies include:

- *Ensure development responds and contributes to existing sense of place and cultural identity.*
- *Ensure development recognises distinctive urban forms and layout and their relationship to landscape and vegetation.*
- *Ensure development responds to its context and reinforces special characteristics of local environment and place by emphasising:*
  - *The underlying natural landscape character.*
  - *The heritage values and built form that reflect community identity.*
  - *The values, needs and aspirations of the community.*

(iv) Clause 17 – Economic Development

Clause 17 explains the role that planning has in contributing to the economic development of the State. It states that:

> *Planning is to contribute to the economic well-being of communities and the State as a whole by supporting and fostering economic growth and development by providing land, facilitating decisions, and resolving land use conflicts, so that each district may build on its strengths and achieve its economic potential."*

(v) Clause 18 – Transport

Clause 18 addresses transport and states that:

> *Planning should ensure an integrated and sustainable transport system that provides access to social and economic opportunities, facilitates economic prosperity, contributes to environmental sustainability, coordinates reliable movements of people and goods, and is safe.*

Clause 18.01 - 1 (Land use and transport planning) is of particular relevance to this Amendment and the objective is "*to create a safe and sustainable system by integrating land-use and transport"*.

3.1.2 Local Planning Policy Framework

The Explanatory Report outlined the following local planning objectives:

(i) Clause 21.04 – Settlement

Clause 21.04 relates to settlement in the Central City with particular focus on the *Original City Centre – the Hoddle Grid* at Clause 21.04 – 1.1. The *Growth Area Framework Plan* identifies the Hoddle Grid as one of five focus areas and states that Central City functions will be located within this area. The policy states, "*the area will be managed to facilitate continued growth where appropriate and limit change or the scale of development in identified locations to preserve valued characteristics. A strong emphasis will be placed on a quality public realm and good pedestrian amenity and connectivity."*

(ii) Clause 21.08 – Economic Development

Clause 21.08 supports the Amendment through the following statements:

- The Hoddle Grid will remain the State's pre-eminent retail centre and retailing in its Retail Core needs to be maintained and enhanced as a world class shopping district while respecting the "*character"* and heritage of this areas existing buildings and lanes.

The following strategy is included at Clause 21.08-2 (Business):

- *Strategy 1.2: Support the development of Docklands and Southbank as a vibrant business and retail areas along with the Hoddle Grid.*

(iii) Clause 21.12 – Hoddle Grid

Clause 21.12 relates to the Hoddle Grid and is of particular relevance to the Panel's finding. It generally supports the Amendment through the following objectives:

- *Encourage the development of a range of complementary precincts within the Hoddle Grid that offer a diverse range of specialist retail, cultural and entertainment opportunities.*
- *Encourage the retention and enhancement of specialised shopping and entertainment precincts within the Hoddle Grid, particularly, Hardware Lane, Chinatown, Collins Street and Little Collins Street.*
- *Support the Retail Core as a compact, high-density retail precinct and facilitate easy pedestrian access.*

- *Protect the scale of important heritage precincts, boulevards and other unique precincts that rely on a consistency of scale for their image, including the Retail Core, Chinatown, Hardware Lane, Flinders Lane, Bourke Hill, Parliament, the Melbourne Town Hall, and the churches on Flinders and Collins Streets.*
- *Ensure that the design of tall buildings in the Hoddle Grid promote a human scale at street level especially in narrow lanes, respects the street pattern and provides a context for heritage buildings.*
- *Ensure that new tall buildings add architectural interest to the city's skyline.*
- *Ensure tower buildings are well spaced and sited to provide equitable access to an outlook and sunlight for all towers.*
- *Ensure high quality and robust public space design in arcade and laneway upgrades.*
- *Ensure sunlight penetration in the middle of the day to key public spaces, appropriate to their role and function.*

(iv) Clause 21.13 - Urban Renewal Areas

Clause 21.13-1 relates to Southbank, and is of particular relevance to the Amendment. The objectives listed under the clause relate to housing, economic development, built environment and heritage, transport and infrastructure. Objectives that support the Amendment include:

- *Support medium scale residential development in the Residential Zones of Southbank Village.*
- *Support Southbank's development as an extension of the Central City, providing a mix of commercial and residential land uses.*
- *Maintain low rise development on the northern and southern sides of the Yarra River and Arts Precinct to maintain the low scale river edge to protect key views to the Arts Centre Spire and prevent overshadowing of the south bank of the River.*
- *Encourage high-rise tower development to the north of City Link and west of Moore Street.*
- *Encourage medium scale development in the Arts Precinct and the areas to the east of Moore Street and to the south of City Link.*
- *Encourage medium scale development in the Southbank Village.*
- *Ensure that buildings along St Kilda Road and in Sturt Street maintain the visual dominance of the Arts Centre Spire.*
- *Promote high-rise, high-density development, south of the Crown Casino and the Melbourne Exhibition Centre.*

(v) Clause 22.01 – Urban Design within the Capital City Zone

Clause 22.01 applies to land within the CCZ excluding the Fisherman's Bend Urban Renewal Area and City North. It includes the following commentary in the policy basis:

> *Melbourne's buildings, streets, open spaces and landscape features combine to give the Central City its unique appearance and feeling. These elements*

have created a complex and attractive urban environment, giving Melbourne a grand and dignified city centre filled with diverse activities and possessing unique charm, character and a pleasant street level environment.

Relevant objectives include:

- *To ensure that new development responds to the underlying framework and fundamental characteristics of the Capital City Zone while establishing its own identity.*
- *To enhance the physical quality and character of Melbourne's streets, lanes and Capital City Zone form through sensitive and innovative design.*
- *To improve the experience of the area for pedestrians.*
- *To create and enhance public spaces within the Capital City Zone to provide sanctuary, visual pleasure and a range of recreation and leisure opportunities.*

Policy objectives include:

Under 'Building design', it is policy to (as relevant):

- *Encourage buildings, including towers, to align to the street pattern and to respect the continuity of street facades.*
- *Retain views into and out of the Capital City Zone and vistas to important civic landmarks.*
- *Maintain the traditional and characteristic vertical rhythm of Melbourne streetscapes.*
- *Encourage buildings with wide street frontages to be broken into smaller vertical sections.*
- *Encourage buildings on street junctions to emphasise the street corner.*
- *When adjoining heritage buildings are located in a Heritage Overlay, the design of new buildings should have regard to the height, scale, rhythm of and proportions of the heritage buildings. Where Schedule 1 or Schedule 2 of the Capital City Zone apply, it is policy that the design of buildings is assessed against the following design standards, as appropriate:*
  - *The maximum plot ratio for any city block within the Capital City Zone should generally not exceed 12:1, unless it can be demonstrated that the development is consistent with the function, form and infrastructure capacity of the city block, including the capacity of footpaths, roads, public transport and services.*
  - *Towers should have a podium height generally between 35 to 40 metres except where a different parapet height already exists or where the need to provide a context for a heritage building or to emphasise a street corner justifies a variation from this norm.*
  - *Towers above the podium should be setback at least 10 metres from street frontages.*
- *Towers should be well spaced to equitably distribute access to an outlook and sunlight between towers and ensure adequate sun penetration at street level as follows:*

- *Development above 45 metres be set back 24 metres from any surrounding podium– tower development.*
- *Tower separation setbacks may be reduced where it can be demonstrated that towers are offset and habitable room windows do not directly face one another and where consideration is given to the development potential of adjoining lots.*

Under 'Public Spaces', it is policy to (as relevant):

- *Encourage the provision of high quality new public spaces*
- *Encourage new public spaces to cater for the needs of the City's diverse communities*
- *Discourage public space at street intersections to reinforce the form of the city grid*
- *Discourage small narrow spaces fronting streets.*

(vi) Clause 22.02 – Sunlight to public spaces

Clause 22.02 applies to public spaces such as parks and gardens, squares, streets and lanes, and includes privately owned spaces accessible to the public, such as building forecourts, atria and plazas within the municipality excluding the Docklands Zone.

Objectives include:

- *To ensure new buildings and works allow good sun penetration 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 achieve a comfortable and enjoyable street environment 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.*

It is policy that development proposals are assessed against the following standards:

- *Development should not reduce the amenity of public spaces by casting any additional shadows on public parks and gardens, public squares, major pedestrian routes including streets and lanes (including all streets within the retail core of the Capital City Zone), and privately owned plazas accessible to the public between 11.00 am and 2.00 pm on 22 September.*

This policy specifically applies a shadow control between 11.00am and 2.00pm on 22 June across St Paul's Square, Federation Square Plaza and Atrium, the City Square, Queensbridge Square and the State Library forecourt.

3.1.3 Other planning strategies or policies used in formulating the Amendment

Better Apartments Discussion Paper and Design Standards

This Amendment has the potential to significantly impact built form outcomes in the central city. In May 2015, the *Better Apartments Discussion Paper* was released for consultation. The responses from the public ranked the top five issues as Daylight, Space, Natural Ventilation, Noise and Energy and Resources, in that order.

In August 2016, the *Better Apartments Draft Design Standards* were released. Consultation on the Standards closed in September 2016 and the feedback received will assist in the production of a final set of Standards in late 2016.

These Standards are discussed in Chapter 7.

3.2 Planning scheme provisions

3.2.1 Zones

(i) Capital City Zone (CCZ)

The purpose of this zone includes:

- *To enhance the role of Melbourne's Central City as the capital of Victoria and as an area of national and international importance.*
- *To recognise or provide for the use and development of land for specific purposes as identified in a schedule to this zone.*
- *To create through good urban design an attractive, pleasurable, safe and stimulating environment.*

The Amendment proposes to amend Schedules 1, 2 and 3 of the CCZ.

The purpose of Schedule 1 to the Zone is:

> *To provide for a range of financial, legal, administrative, cultural, recreational, tourist, entertainment and other uses that complement the capital city function of the locality.*

The purpose of Schedule 2 to the Zone is:

> *To provide for the intensification of retail and other complementary commercial, community and entertainment uses within the established retail core.*

The purpose of Schedule 3 to the Zone includes:

- *To develop Southbank as an extension of the central city, providing for a mix of commercial and residential land uses that complement the capital city function of the locality.*
- *To comfortably accommodate a residential and worker population in a pleasant neighbourhood where all public spaces are comfortable, bright and safe.*
- *To develop Sturt Street as an arts and performance precinct with services and activities for local residents and visitors.*
- *To support commercial, retail and community uses along pedestrian corridors.*
- *To ensure that the mitigation of wind effects is incorporated into building design.*

3.2.2 Overlays

(i) Design and Development Overlay Schedule 2 (DDO2)

DDO2 relates to Height Controls in the Capital City Zone. The design objectives are:

- *To protect sunlight access to key public places and open space areas so as to provide a comfortable, pedestrian-friendly urban environment.*
- *To ensure that the height of new buildings reinforces the built form character of unique areas.*
- *To maintain the visual dominance of prominent landmarks.*

(ii) Design and Development Overlay Schedule 10 (DDO10)

DDO10 relates to Built Form Controls in the Capital City Zone. The design objectives include:

- *To ensure development supports a high quality of pedestrian amenity in relation to human scale and microclimate conditions within the public realm including acceptable levels of sunlight access and wind.*
- *To ensure that development respects the built form scale and urban structure of the Central City.*
- *To provide clear parameters to guide appropriate built form outcomes.*
- *To ensure development is consistent with the function, form and infrastructure capacity of the city, including the capacity of footpaths, roads, public transport and services.*
- *To encourage a quantum of development that maintains the valued public realm attributes of the Central City while providing equitable development opportunities.*
- *To ensure that new buildings respect the future development potential of adjacent sites and allow for equitable access to privacy, sunlight, daylight and an outlook from habitable rooms.*
- *To provide a high level of internal amenity for building occupants.*

(iii) Design and Development Overlay Schedule 40 (DDO40)

DDO40 relates to River Environs. The design objectives include:

- *To ensure development supports high levels of pedestrian amenity related to access to sunlight and sky views and a pedestrian friendly scale.*
- *To maintain the existing low-scale river edge urban form along the river corridor.*

(iv) Design and Development Overlay Schedule 60 (DDO60)

DDO60 relates to Southbank. Relevant design objectives include:

- *To ensure that the suitability of each development to its context takes precedence over the individual merit of the building.*
- *To ensure that new buildings respect the future development potential of adjacent sites and allow for an equitable spread of development potential on these sites.*

- *To ensure that new buildings respect the potential of future development on adjacent sites to access privacy, sunlight, daylight and an outlook from habitable interiors.*
- *To ensure the height of new buildings does not overwhelm the public domain.*
- *To allow daylight and sunlight to penetrate to the street and lower building levels.*
- *To ensure development supports high levels of pedestrian amenity in relation to daylight, sky views, wind and sunlight.*
- *To maintain the visual dominance and views to the Arts Centre Spire as a civic skyline landmark.*
- *To ensure that development provides a high level of amenity for building occupants.*

(v) Design and Development Overlay Schedule 62 (DDO62)

The objectives of this schedule, which relates to the Bourke Hill area are:

- *To protect the unique character of Bourke Hill.*
- *To protect the built form context of view lines to and from Parliament House to maintain its visual prominence.*
- *To ensure the scale and prominence of the landmark heritage buildings, the Princess Theatre and the Hotel Windsor, is maintained.*
- *To ensure development respects and maintains the heritage significance, low scale built form and valued public realm attributes of Bourke Hill.*
- *To protect sunlight access to streets and key laneways, the steps and 'forecourt' area of Parliament House and public spaces.*
- *To maintain a high level of pedestrian amenity within Bourke Hill.*
- *To retain expansive open air sky views for pedestrians along streets and key laneway.*

3.2.3 General provisions

(i) Clause 61.01 Administration and enforcement of this scheme

Schedule 1 to this clause states that the Minister for Planning is the Responsible Authority for administering and enforcing the scheme for a range of matters, including:

- *Matters required by a permit or the scheme to be endorsed, approved or done to the satisfaction of the responsible authority in relation to:*
  - *Developments with a gross floor area exceeding 25,000 square metres.*
- *For the purposes of clause 43.04 DPO (schedules 2 to 7) where the total gross floor area of the buildings in the Development Plan exceeds 25,000 square metres.*

3.3 Ministerial Directions and Practice Notes

(i) The Form and Content of Planning Schemes (s7(5))

The Amendment is consistent with the Ministerial Direction on the Form and Content of Planning Schemes under Section 7(5) of the Act. The Panel has made further recommendations about the form and content of the proposed Amendment in Chapters 7 and 11.

(ii) PPN13 Incorporated and Reference Documents

This practice note explains the role of external documents in planning schemes, the difference between incorporated and reference documents and when a document should be incorporated or be a reference document. This is relevant to the proposed FAU Guidelines and DDOs.

(iii) PPN23 Applying the Incorporated Plan and Development Plan Overlays

The purpose of this practice note is to:

- Explain the functions of the Incorporated Plan Overlay (IPO) and the Development Plan Overlay DPO)
- Provide advice about when these tools should be used
- Provide guidance on how to use these planning tools.

(iv) PPN46 Strategic Assessment Guidelines

This planning practice note explains what strategic considerations should be made as part of the assessment against Ministerial Direction 11 (Strategic Assessment of Amendments). This is addressed in the Explanatory Report and issues arising from the strategic assessment guidelines are addressed throughout the report.

(v) PPN59 The Role of Mandatory Provisions in Planning Schemes

The purpose of this practice note is to set out criteria that can be used to decide whether mandatory provisions may be appropriate in planning schemes. The practice note generally seeks to avoid the use of mandatory controls unless in exceptional circumstances. This is addressed in Chapter 7.4.

(vi) PPN60 Height and Setback Controls for Activity Centres

This practice note provides guidance on the preferred approach to the application of height and setback controls for activity centres.

4 Strategic Assessment

4.1 The issues

The key issues for the Panel to consider are whether the Amendment is strategically justified and whether it delivers a net community benefit.

During the Panel process the exhibited Amendment controls was twice redrafted by the Minister.

The first version was in response to written submissions lodged in response to public notice of the Amendment. The Panel has reviewed the initial submissions received before the Hearing and the Minister's responses. Most of the redrafting suggestions by submitters arose directly from the changes they sought to the substance of the Amendment. Some, however, raised queries about the meaning of provisions and terms and the effect of provisions. Matters of substance and most issues of interpretation have been dealt with earlier in this report.

The second version of the revised Amendment (Document 165) was prepared in response to presentations at the Hearing including by witnesses and Panel questions. Earlier in the Hearing, Ms Brennan tabled the *Ministers Witness Recommendations* (Document 55).

4.2 Evidence and submissions

The Explanatory Report to the Amendment, sought to respond to the Strategic Assessment Guidelines. The key areas identified are summarised below:

- The current Planning Scheme provisions are not responding to the emerging development challenges in the Central City.
- The increase in density in the Central City has created poor amenity outcomes, which the proposed controls seeks to redress for future developments.
- The current planning controls are now outdated and inconsistent as they were last reviewed in 1999.
- The proposed controls will provide certainty and overall consistency in the application of discretion in relation to built form outcomes.
- The Amendment will ensure future development enhances long-term liveability in the Central City.
- The introduction of the FAU Scheme will set realistic and clear parameters.

The Explanatory Report outlined that:

> *The proposed provisions are also in the context of there being other significant central city urban renewal areas that will continue to facilitate development as recognised within Plan Melbourne including the expansion of the CBD into Fishermans Bend, Arden & Macaulay, E-Gate and Dynon. Overall it is considered that the amendment will have a net community benefit, economically and socially as identified in the proposed Reference Document the 'Central City Built Form Review Synthesis Report'.*

Ms Brennan submitted that in recent years there has been a dramatic increase in the quantity, density and scale of developments proposed and approved within the Central City.

Cumulatively, Ms Brennan submitted, this increase in density has created poor public amenity outcomes that have the potential to damage the investment attractiveness of the Central City and the renowned liveability of Melbourne.

Ms Brennan justified the Amendment on the basis that the current Planning Scheme provisions are not responding to the emerging development challenges, particularly over the last five years. As a result, development is starting to have adverse impacts on the amenity of residents, workers and visitors to the Central City. These impacts include:

- *poor building amenity due to closeness to neighbours (affecting light and privacy)*
- *impaired development opportunities on neighbouring sites (inequity)*
- *visual domination of historic and pedestrian scale streetscapes by new development*
- *increased overshadowing of public space*
- *uncomfortable wind effects in public space, and*
- *pressure on the capacity of public space facilities.*

Many submitters congratulated or welcomed the action the Minister was taking through this Amendment and supported the broad aims of the Amendment as responding to the current situation of negative amenity impacts arising from developments. However, whilst most agreed broadly with its intentions, some submitters raised significant concerns regarding the controls and proposed implementation of the Amendment.

The Panel received numerous submissions from both industry groups and individuals which addressed the general strategic justification for this Amendment. Submissions that addressed or raised particular are discussed in the relevant sections throughout this report. The Panel received varied responses from professional organisations in relation to the appropriateness and strategic justification of the Amendment. Industry groups such as Australian Institute of Architects (AIA), Victorian Planning and Environment Law Association (VPELA), Planning Institute of Australia (PIA), National Trust and Australian Institute of Landscape Architects (AILA) generally provided qualified support for the Amendment.

Broadly, the City of Melbourne supported the Amendment, although it differed from the Minister's view in relation to cash in lieu contributions. The Council considered that cash in lieu payments might be made through the FAU Scheme. This issue is discussed further in Chapter 6.

Industry groups such as Urban Development Institute of Australia (UDIA) and Housing Industry Association (HIA) generally did not support the Amendment. The Property Council of Australia (PCA) provided qualified support for aspects of the Amendment, such as noting that an unintended consequence of the Amendment appears to be that small sites that are less than 25 metres wide will be rendered undevelopable as a result of the proposed setbacks.

4.2.1 Individual submitters and community groups

In addition to the industry groups, the Panel received submissions from a number of individual submitters and community groups about the strategic basis of the Amendment.

Housing Choices Australia (Submitter 89) welcomed provisions in the Planning Scheme that recognise that social housing as a public benefit. Mecone Town Planning (Submitter 60) indicated their general support of the Amendment, in particular the public benefit of design excellence through design competitions.

Some submitters submitted that the Amendment was not strategically justified. For example, Professor Michael Buxton (Submitter 61) argued that the Amendment increases uncertainty and "*the amendment should be recast extensively"*. Similarly, Claredale Consolidated Pty Ltd (Submitter 21) did not consider the Amendment to be strategically justified nor necessary to achieve certainty or overall consistency in the application of discretion in relation to built form outcomes. They argued that the more appropriate response to achieving this outcome would be better decision making, advocacy and evidentiary justification in the context of explicit criteria, rather than what were described as "*arbitrary planning controls*".

Professor Rob Adams AM gave evidence on behalf of the Minister. It was his view that there was a "*balance between continuity and change"* required. Professor Adams spoke to the extensive pipeline of approvals in the system for towers and argued:

> *There is substantial quality still left in the city. Is it too late? No changing controls is exactly the right time – we are at tipping point of reasonable repair. Is it time to reset the planning controls? We have been through a period of rapid growth. It is time to reset these mechanisms to ensure we don't totally annihilate the community. Building heights are getting higher and size of dwellings is getting smaller.*

In responding to some of these individual submissions, Ms Brennan stated that there have been dramatic shifts and incredible advances in construction technology that had resulted in an "*explosion in the Hoddle Grid*" in foreign investment transforming the shape and form of the City.

Ms Brennan noted the "*cracks in the current system*". It was submitted that:

> *Most of the city has operated with policy / discretionary controls for 20 years. Some of the limitations of this include:*
>
> - *Inconsistency of decisions*
> - *Individual decisions not taking into account cumulative impacts*
> - *Departures from policy preference that erodes policy.*

Ms Brennan submitted:

> *The point about past decision making is that the outcomes, individually and cumulatively, are eroding the public realm and that a policy and discretionary based approach has not protected against those outcomes.*

Mr Darren Camilleri (Submitter 2) supported the principles of the Amendment, however submitted that the FAR was too high and should be reduced to 10:1. He argued that the FAU should be mandated in other ways, such as through a Development Contributions Plan (DCP). A. Parr (Submitter 9) offered similar views and qualified support, and argued that the "*FAR should not be more generous that what exists in other Australian and international cities"*.

A number of submitters, including Mr Michael Finn (Submitter 4), Katri Virta (Submitter 5), Mr Denny Haryono (Submitter 6), Mr Mark Stewart (Submitter 8), Mr Brendan Eager (Submitter 15) and Mr David Hamilton (Submitter 16), supported the strategic justification of the Amendment.

Some submitters offered qualified support for the Amendment generally, however did not support the FAR of 18:1 and questioned the purpose of the FAU Scheme in the context of a built form control planning scheme amendment. Mr Danny Hahesy (Submitter 60) made relevant submissions on this point stating that whilst the Amendment provided a "*much needed degree of certainty and consistency*" which will go towards ensuring the long-term liveability of Melbourne, the proposed built form controls are "*unclear and rigid*".

4.3 Net Community Benefit

The Panel was presented with expert evidence from Dr Marcus Spiller of SGS Economics that presented a Cost Benefit Analysis (CBA) to demonstrate a net community benefit of the Amendment, together with an economic impact analysis. The key conclusions of Dr Spiller relating to net community benefit were that:

- *this is a measure of net community benefit in the parlance of the Victorian Planning Provisions (VPP)*
- *the State as a whole is better off by $2.3 billion as a result of all costs and benefits*
- *the CBA commissioned by the Department is important as it asks the question of "is that cost more than the compensation from public benefit?", and the answer is yes.*

(i) Evidence and submissions

A number of submissions questioned the market appetite and feasibility of the FAR and architectural modelling exhibited with the Amendment. To support the Amendment, Mr Luke Mackintosh of Ernst and Young on behalf of the Minister provided evidence outlining:

- An overview of development trends in the central city and Southbank over 25 years.
- Feasibility modelling of various hypothetical developments for land which is located within the study area.

Mr Mackintosh outlined the recent history of development in the CBD and Southbank. He noted that it was not until January 2014 with the transaction of 70 Southbank Boulevard that land values significantly increased by "*circa 50 per cent to 100 per cent in a relatively short period".* This increase in land values brought with it an increase in FARs to support the values paid.

Mr Mackintosh gave evidence that acquisitions by overseas investors has accelerated by 2013. Sales analysis revealed unprecedented increases in CBD land values, in some cases increasing to above $30,000 per square metre from an average base of $12-15,000 per square metre in 2012.[4] In addition, it was Mr Mackintosh's evidence:

[4] Feasibility Review January 2016 Ernst and Young pg: 7

> *In correlation with the increase in land values, there was a distinct increase in development FARs. Analysing permits granted over the last eight years indicates FARs … which averaged 8:1-12:1 in 2008 have increased to well over 30:1 by 2015, with an average of circa 55:1 by the end of 2015 and as high as 60:1.*[5]

Mr Mackintosh presented a comparison of land value reflected under the proposed GFA versus previous sales (Table 1). The findings presented by Mr Mackintosh concluded that the development scenarios applied by Ms Buckeridge of Hayball Architects were predominately financially feasible. It was his conclusion that:

- *There is no doubt that a reduction in the proposed GFA and subsequently the FAR has a direct negative impact on land value.*
- *It is likely that anyone who has purchased a development site within the last two years and not commenced the planning process will see a reduction in their land value should more stringent planning parameters be implemented.*

Address	Land Value reflected under Hypothetical Development	Previous Sale price / estimate of value prior to Amendment C262	Hypothetical Change in Value
134-160 Spencer Street, Melbourne (CBD Precinct A)	$31,200,000 @ FAR 18:1	Sold $44,500,000 in 2014	-30%
131-135 King Street, Melbourne (CBD Precinct G)	$12,650,000 @ FAR 13.3:1	Sold $22,500,000 in 2014	-44%
626-636 Little Collins Street, Melbourne (CBD Precinct M)	$11,000,000 @ FAR 13.2:1	Estimate of land value $13,650,000	-19%
133 Queensbridge Street, Southbank (Southbank Precinct A)	$8,600,000 @ FAR 14:1	Estimate of land value $9,850,000	-13
84-90 Queensbridge Street, Southbank (Southbank Precinct K)	$11,300,000 @ FAR 13.7:1	Sold in $22,100,000 in 2014 Excluding estimated value of improvements $15,980,000	-29%
58 Queensbridge Street, Southbank (Southbank Precinct M)	$52,000,000 @ FAR 18:1	Estimate of land value $70,000,000	-26%

Source: EY Research, City Scope

Table 1 Comparison of land value reflected under the proposed GFA vs. previous sale price/estimate of value[6]

It was Mr Mackintosh's evidence that should land values return to pre-2014 prices, more stringent planning controls would have minimal effect on the viability of the sites chosen in the study. Ms Hodyl outlined in the CCBFR that there has been escalating demand for residential development, and this was reinforced in the evidence of Mr Mackintosh. Ernst and Young provided a sales history of a site at 134 Spencer Street to highlight this rapid rise in value.

[5] Ibid pg:7

[6] Source: Ernst and Young Feasibility Review January 2016

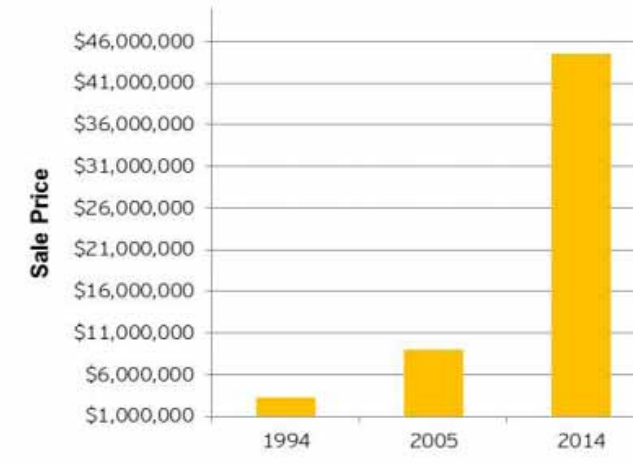

Figure 3 134 Spencer Street Sales History[7]

Mr Papaleo, on behalf of the UDIA, gave evidence that the Amendment and its tighter FAR put investment at "*flight risk*". Mr Mackintosh disagreed, and proffered the view that "*investment groups out of Singapore and Malaysia would welcome this as it brings certainty*." Under cross-examination, Mr Mackintosh explained that a lot of supply was coming to market, there were changes to lending requirements and this cumulatively aligned with a 'perfect storm' of an Asian market slowdown. When questioned on the vulnerability of the market, it was Mr Mackintosh's view that "*issues with changes to lending requirements won't stop it. There will be other methods and groups establishing funds to assist. Most developers have bought long".*

A number of submitters such as UDIA, Dexus and Phillip Nominees claimed that the use of the Gross Realisation Values (GRV) was a flawed method of deriving values for the calculation of any uplift and FAR. Mr Mackintosh disagreed, stating:

> *Using GRV is a more reliable tool because there's more sales data available and it's not subject to uncertainty of site sales. It is a well-held source used by the Valuer General.*

Under cross-examination, Mr Mackintosh was asked what developers would pay for a site. He responded that if developers can get a FAR of 40:1 for a site, then the developer will pay the equivalent value. Similarly, this would be the case if it the FAR of 18:1 was the relevant yield for the site. Mr Mackintosh noted that developers will need to build those assumptions into their feasibility model. When questioned on whether it is reasonable proposition that vendor expectations will adjust with the introduction of FAR / FAU Scheme, so that the constant land price adjusts downward, thereby increasing or maintaining viability of return on investment, Mr Mackintosh responded that "*developers will reset their expectations and long term developers would land bank*."

Mr Mackintosh informed the Panel that he was not instructed to provide a commercial analysis. He considered that in the present market, the highest and best use of sites within the Central City was residential.

[7] Source: Synthesis Report Central City Built Form Review April 2016, Page 54.

Dr Spiller's CBA assumptions were tested through cross-examination, in particular the 'ifs and buts' of a number of measurable values. Dr Spiller was questioned as to whether he had used CBAs in similar planning scheme amendments and responded:

> *The challenge in a CBA is putting a value on all costs and benefits. In Victorian Government practice it is common place to put monetary values on all aspects…Outside the planning area I would be required to prepare a regulatory impact statement requiring an investigation of all the costs and benefits regardless of them being bought and sold. There is a 100 years of theory research and practice on this.*

Dr Spiller gave evidence that there are benchmarks and provisional default rates for evaluation of these rates. Dr Spiller noted that it was commonplace in transport to put values on travel time, accident rates etc. It was Dr Spiller's evidence that:

> *The difference with planning (has the same challenge) to demonstrate there's a net community benefit. Planning amendments are exempted from normal regulatory impact statements. The only reason is because we have panel processes to generate light and do the work of the CBA, taking into account all the impacts … It is part of good policy practice.*
>
> *I have used this on a number of occasions. When and if this amendment goes before Cabinet table, the Treasurer will want to see a CBA.*

A number of submitters questioned Dr Spiller as to whether the Amendment was effectively reducing the development capacity of the Central City into the future. Dr Spiller responded in the negative, noting that this is not a "*choking off of development opportunities*". Dr Spiller argued that there is a sufficient development pipeline of at least two decades plus of growth in the Hoddle Grid and more than four decades worth in Southbank. Dr Spiller did note that it is still an "*economic cost to us to lose development capacity. What this amendment does is shrink the capacity and it's importantly to put a value on this, contrasted with the benefits*."

(ii) Discussion

Mr Mackintosh and Dr Spiller provided an in-depth and rigorous assessment of market conditions and feasibility modelling on a number of the test cases provided by Ms Buckeridge in formulating the Amendment. It is clear to the Panel that the underlying message is that whatever the situation, unless you had bought without a planning permit in the last two years, the relevant market and developers would adjust their expectations to the applicable regime of planning controls. It was stressed to the Panel that for these more recent landowners would only see any reduction in their expectations if they sought to realise their site, thus it is a 'book value' loss for a minority.

The Panel accepts the approach taken by Dr Spiller in considering the net community benefits of the Amendment in an integrated manner. The components of the FAU Scheme are discussed more specifically in Chapter 6.

4.4 Transport

(i) Submissions and evidence

Melbourne Metro Rail Authority (MMRA) (Submitter 41) made a brief written submission during public consultation noting the broad range of community benefits that can be leveraged from an investment such as the Melbourne Metro Rail Project (Melbourne Metro) at vital interchange points, particularly within the Central City.

MMRA made two key submissions. In relation to the first submission, MMRA noted the C262 controls whereby developments could exceed the plot ratio of 24:1 where they had been declared to be of State significance. MMRA submitted that this "*exemption*" to the built form controls was not replicated in the Amendment and requested that this be remedied so as to not only include developments declared to be of State significance but developments that were important to the effective integration of transport and land use.

MMRA's second submission was that the proposed public benefit categories under the FAU Scheme are narrowly defined and exclude transport and accessibility benefits. MMRA requested the Panel include "*integrated transport and land use outcomes which provide a wide range of community benefits*" as an additional public benefit category.

It became evident during the Panel Hearing that Urbis had completed a number of studies of not only the Central City but other urban renewal areas such as Arden Macaulay and E-Gate for MMRA with a particular focus on the Melbourne Metro[8]. This discovery arose through various witnesses, discussing different versions of the report entitled *Urbis Expanded Central City Floor Space Demand and Capacity*.

A number of witnesses stressed the importance of infrastructure such as the Melbourne Metro to adapt to growing populations in the Central City. The key aspects of their evidence is summarised generally below.

Ms Hodyl stated in her report that the Amendment C262 controls allowed for an unspecified plot ratio bonus if the development seeking to exceed the plot ratio of 24:1 was of State or regional significance. Ms Day, who gave evidence for the Minister, made similar observations in her report. Ms Hodyl gave evidence that the walking economy is key to the economic functionality of the Central City and noted the lack of infrastructure funding within the Central City.

Dr Spiller gave evidence that proximate infrastructure investment such as railways will cause an episodic value uplift against the background trend in growth.

Professor Adams submitted that streets are quite important in determining high quality public realm, as the streets make up 80 percent of the public realm, which are impacted on by the surrounding built form. He discussed whether there was a need to modify planning controls, in particular development controls, on the back of Melbourne Metro, in particular around station entrances such as CBD North and CBD South. It was stated that there are benefits to work within harmony with transport to make it a better city.

[8] Documents 18 and 50

Professor Adams also highlighted that as there are no levies in the CBD, this means that only very big developments will contribute and therefore infrastructure will miss out.

Mr Barlow's involvement in drafting a report to MMRA involved an analysis for the various precincts including redevelopment prospects and optimizing land. Whilst Melbourne Central was not considered to be pushed out in the future, Mr Barlow noted there may be additional development of it in conjunction with any interface with CBD North arising out of Melbourne Metro. Mr Barlow gave evidence that major transport investments such as Melbourne Metro are being prioritised in the Central City. PCA submitted that increased FARs in areas with proximate access to transport and infrastructure should be introduced.

(ii) Discussion

Clauses 18 and 19 in the Melbourne Planning Scheme provide guidance and direction in relation to transport and infrastructure considerations in the Central City. The Panel also notes section 11 of the *Transport Integration Act* 2010 (the TIA), which importantly sets out the requirements for the integration of transport and land use. Subsection (3) discusses the alignment of the transport system and land use so that transport decisions are made considering the current and future impact on land use and that land use decisions are made having regard to the current and future development and operation of the transport system. Subsection (4) states broadly that the transport system should improve the amenity of communities and minimise its impacts on adjacent land uses.

The Panel was cognisant of the fact that the Melbourne Metro is currently undergoing its own Environment Effects Statement (EES) process. The EES process will consider the Melbourne Metro Urban Design Strategy, which sets out the integration of the Project with the city's existing public spaces, as well as its proposition to create new public precincts and setting design guidelines for those precincts. This will consider pedestrian access and movement.

As the Panel did not receive any submissions on the EES documents, it cannot comment further on the Urban Design Strategy, nor is it appropriate to do so with the separate EES process in train. However, there are common issues that arose for the Panel to consider, such as pedestrian movement and footpaths in the context of the FAU Scheme. Ms Brennan recognized that north of La Trobe Street there will be increased pedestrian activity arising out Melbourne Metro. This issue is considered in more detail in Section 6.4.3 Public Benefit Categories.

Ms Brennan submitted that the decision guidelines in the CCZ had regard to transport infrastructure, density and transport infrastructure when determining how the development may impact on the function, form and capacity of public spaces and infrastructure. Ms Brennan welcomed any recommendation the Panel may make with respect to how transport capacity and infrastructure might be more explicitly reflected in the Amendment.

It is unclear to the Panel why the exemption for exceeding the plot ratio of 24:1 was brought into Amendment C262 and not continued in some form in the Amendment. Neither MMRA nor Public Transport Victoria (PTV) requested to be heard during the Panel Hearing to expand on MMRA's earlier written submissions. Ms Brennan did not directly respond to this particular issue, but instead clearly stated that neither MMRA nor any other public authority

or charity can be exempted from having to provide public benefits should any proposed development extend beyond 18:1. It was also stated that those public authorities/charities would have to provide a public benefit that was not in the same form as the primary use or purpose of the land/building of the proposed development. This is something that the Minister may wish to consider for future planning scheme amendments involving transport infrastructure.

4.5 The built form strategic justification of the FAU Scheme

(i) Evidence and submissions

Ausvest Holding submitted that absent the validity of the FAU Scheme, there is no strategic justification, direct or substantial, for the built form connection of the FAU Scheme with the FAR controls. Ausvest Holdings Pty Ltd (Ausvest) (Submitter 62 and 64) submitted the underlying purpose of the FAU Scheme is not to control the use or development of land, nor the purposes of the built form requirements, but to implement a social and economic outcome.

Whilst Mr Milner on behalf of the Southbank Owners Corporation Network (SOCN) (Submitter 53) supported the FAU Scheme as a public value capture mechanism, he queried whether the built form outcomes being sought through the Amendment would be eroded. Mr Milner suggested the FAU Scheme could benefit from further work such as a strategic plan to examine a number of issues that have been highlighted through this Amendment process in the Central City for the next five years. Mr Milner suggested utilising the current program of works that City of Melbourne is undertaking and expand on this in its Land Use and Infrastructure Strategy Review to provide a complete and thorough strategic basis for a FAU Scheme in the Central City. This work would determine an equitable public contribution to which all developers in the Central City would be subject.

Mr Milner contended that this concern extended to whether the base FAR should be so high before the FAU Scheme is triggered and allowing further FAR to be developed on the subject site, with what appears to be limited return of public benefit.

Professor Buxton (Submitter 61) raised similar submissions querying whether the FAU Scheme "*will significantly increase the height of these buildings and is seriously flawed both in its formulation and intent*". He submitted that the FAU Scheme will allow public contributions to the detriment on the public realm from an increase in height with little in return from the proposed public benefits. It was also submitted by Professor Buxton that the 'base' FAR is too high. He made a number of suggestions, using overseas comparators, as to how Victoria could consider creating mandatory public benefit as a condition for the right to develop, with a number of prescriptive and well defined factors in exchange for density bonuses.

UDIA (Submitter 91) submitted that whilst the concept of proponents paying for an uplift in value is not a new concept, there has not been a proper and robust analysis of the social and economic implications. UDIA provided the Panel with a copy of the Future Melbourne (Planning) Committee Meeting between City of Melbourne officers on 17 May 2016[9]. In

[9] Document 168

those minutes, UDIA claims it is evident that there is uncertainty surrounding the FAU Scheme and the strategic basis for it as it lacks transparency and does not have planning robustness to be applied fairly even if it is valid and lawful.

UDIA made a number of criticisms of the Amendment including querying whether there is any strategic justification for it and whether a FAR of 18:1 is a reasonable maximum for a typical site. UDIA submitted that the FAR should represent a "*reasonable*" quantum of development for a typical site and therefore the FAR should remain at 24:1. UDIA contended that the strategic basis for a FAR of 18:1 was absent, with the number of '18:1' being determined on the back of the architectural testing of only two sites.

PIA (Submitter 69) submitted to the Panel that a FAR of 18:1 was still too generous and was not a limitation to development in the Central City. PIA was particularly concerned that there is a lack of upper limit, noting that the proposed FAU Scheme allows the proposed development to exceed beyond 18:1. PIA suggested a two-year review to consider whether further revision of a FAR of 18:1 is warranted.

PCA (Submitter 90) noted that other industry groups had supported FARs and so did not want to make any particular submission in relation to the nominal FAR of 18:1. However, PCA did submit that 24:1 should be maintained for commercial developments, including exempting these developments from any setback controls. PCA submitted the proposition that a FAR of 18:1 skews the market in favour of residential and that this is reflected in the drafting of the Amendment, as the provisions are written for the residential market.

AILA (Submitter 37) supported the Amendment noting it:

> *… strongly encourage boldness in the pursuit of high quality outcomes at all scales. It is vitally important that the Department link Amendment C270 to the positive work completed to date on the 'Better Apartments' and be forthright in asking developers to innovate and change their modus operandi to contribute to the value of our city.*

AILA expressed their concern at the resulting additional density that could be achieved through the application of the FAU Scheme.

(ii) Discussion

The Panel noted that whilst there is a requirement for a development that proposes to exceed a FAR of 18:1 to comply with the built form controls of the Amendment, there does not appear to be a clear link between the public benefits discretion to be exercised and the built form controls. The Panel agrees that this appears to be disjointed. The Panel recognises that the *Planning and Environment Act 1987 (the Act)* provides for regard to the net community benefit when considering the strategic basis for a planning scheme amendment.

The Panel notes again the work City of Melbourne is undertaking through its Land Use and Infrastructure Review, which the Council regards will consider the requirements, framework and standards for different (public?) spaces needed within the Central City.

The Panel is sympathetic to the submissions that the FAR of 18:1 is not low enough, is generous to the passive land owner and, without accounting for the FAU Scheme, is already

high as compared to international standards. The Panel notes the feasibility modelling and evidence undertaken that reveals 18:1 is justified. The Panel suggests that 18:1 may be justified, but believes that the 18:1 should not be increased in any further review for reasons explained throughout this report.

Mr Sheppard opined that whilst the current plot ratio control seeks to achieve built form outcomes, the FAU Scheme is purely a trigger for the provision of public benefits. Further, the FAU Scheme does not seek to constrain the potential development of the site, but simply compels the provision of one or more public benefit. The Panel, which discussed the FAU Scheme in detail in Chapter 6, was still of a mind that even if the FAU Scheme was not adopted, that the FAR should result in a net community benefit as the built form outcomes would lead to higher amenity standards in future development.

The Panel notes that Mr Sheppard recognised that some of the public benefits have positive and clear urban design outcomes. The Panel cannot see an obvious relationship between the FAU Scheme and most of the built form controls proposed under the Amendment. To this end, the Panel is of the view that parts of the Amendment have clear strategic justification and should be adopted, such as the built form controls and the FAR in the GDA and SCAs. Similarly, there are parts of the Amendment where the strategic justification is not clear or is absent, such as the FAU Scheme and allowing developments to exceed a FAR of 18:1. This is discussed at Section 6.3.

4.6 Conclusions

The Panel concludes:

- The Amendment is strategically justified with the exception of the FAU Scheme. This is discussed further in Chapter 6.
- The Amendment is generally supported by and implements the relevant sections of the State and Local Planning Policy Framework.
- There is a sufficient development pipeline of at least two decades plus of growth in the Hoddle Grid and more than four decades worth in Southbank.
- The feasibility modelling supporting the FAR is sound, and that whatever the nominal figure, the market (landowners and developers) will adjust accordingly.
- A reduction in the proposed GFA and subsequently the FAR has a direct negative impact on land value.
- Even in the absence of the FAU Scheme, the Amendment is required to achieve good built form outcomes for the Central City and will deliver a net community benefit.
- The Panel generally supports the Panel Version August 2016 V2 (final version of the controls) presented by the Minister (Document 165).

The detailed assessment of the appropriate use of the proposed zone and overlays and policy, together with consideration of the relevant Planning Practice Notes for the component parts of the Amendment, is discussed in the following chapter.

4.1 Recommendation

The Panel recommends:

1. **Adopt the exhibited controls known as Panel Version August 2016 V2 (Tabled document 165) noting variations specified in this report.**

4.2 Further work

a) Council should incorporate the transport system interface with land use and amenity considerations as part of its Land Use and Infrastructure Review.

5 The evolution of built form in the CBD

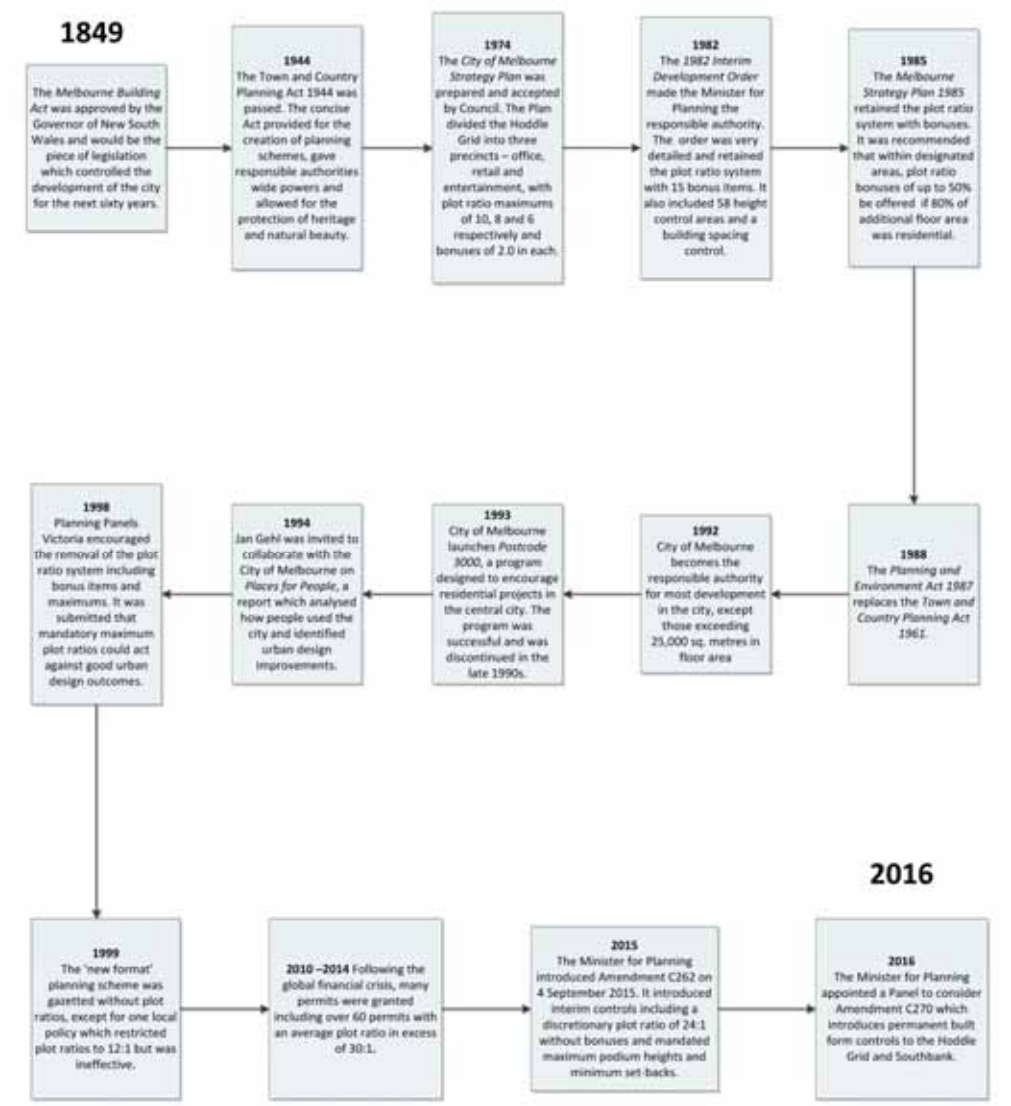

Figure 4 Summary of the recent history of planning controls 1849 – 2016[10]

5.1 The early years

Before the settlement of Victoria, development in New South Wales had occurred in an unstructured manner for a number of years until the 'Darling Regulations' were introduced in 1829, with building regulations following in 1833.

Permanent European settlement commenced in Victoria from 1834 and a town plan for Melbourne was prepared by surveyor Robert Hoddle in 1837. The plan was generally consistent with the Darling Regulations, although the main streets were 99 feet wide rather than 66 feet wide. This was done on the grounds of better air circulation and public health.

In 1842, Melbourne was officially incorporated as a town and declared a city in 1847.

[10] Source: *A History of Built Form Control in Central Melbourne*, Ramsay Consulting

In 1849, the *Melbourne Building Act* was approved by the Governor of New South Wales and this would be the piece of legislation which controlled the development of the city for the next sixty years.

In 1851, Victoria was established as a new and separate colony from New South Wales.

Immigrants arrived from all over the world during the Gold Rush period of 1851-1860. Population growth and finance boomed.

In 1901, Victoria became a State in the Commonwealth of Australia and was the capital of Australia between 1901 and 1927 while Canberra was under construction.

The *Melbourne Building Act* was revised a number of times during these decades. The final form did not control volume or spacing of buildings, nor did it contain land use controls.

In 1915, the *Local Government Act* came into effect and Councils were given the power to limit heights of buildings and distances between them. It also gave Councils the power to restrict land uses. Melbourne specified a maximum building height of 132 feet, being one and one-third times the width of the main streets. Similarly, the maximum heights for buildings abutting the 'Little' streets were defined as three times the 33-foot width of the street.

The *Metropolitan Town Planning Commission Act* was passed on 31 December 1922. The Commission published a report titled "*Plan of General Development*" in December 1929 which considered land use control, transport, public recreation, housing supply, housing standards, subdivision and the legal framework to manage all of the above. With respect to built form in the central city, it compared the controls in place in Melbourne with those of 35 other cities around the world.

The *Town and Country Planning Act* 1944 was passed. It provided for the creation of the planning schemes, gave responsible authorities wide powers, and included in the schedule of matters which could be provided for in planning schemes the item *"... the preservation of objects of historical interest or natural beauty*".

5.2 The Hoddle Grid

The Hoddle Grid, bounded by Spring, Flinders, Spencer and La Trobe Streets, is a defining element for Melbourne's CBD with its rectilinear arrangement of straight, broad streets with long vistas to open sky or to significant public buildings.

The traditional axis of the ceremonial spine of Swanston Street (and St Kilda Road) and the transverse axes of Collins Street as the commercial street anchored by the Treasury and Bourke Street as the legal and office street anchored by Parliament are powerful determinants of the CBD's character. This grid of wide streets is complemented by the 'Little' streets and by the increasingly popular network of lanes and alleys.

The valued character and ambience of the CBD today is a direct function of Hoddle's foresight, overlaid with generations of development and intensification and a broadening range of land uses and activities.

Initiated by the massive wealth that accrued from the gold rush of the 1850s, '*Marvellous Melbourne*' enjoyed unprecedented growth in grand public and private buildings and in

social sophistication. This era is reflected in many ornate buildings of heritage significance, a feature of some being the inclusion of shopping arcades, often running north-south due to the subdivision pattern, and which are integral parts of the pedestrian environment, adding to the complexity and attraction of the central city, particularly the retail core.

In terms of today's built form, a significant policy to constrain the height of buildings was introduced in the 1880s when heights were limited to one and one-third times the width of the street. For the main 30 metre wide streets this equates to 40 metres.

This maximum height on the wide streets led to a consistency in the facade heights of new buildings, which remains as a prominent element of some parts of the Hoddle Grid. The north side of Collins Street between Elizabeth and Swanston streets is one example of this.

Today, there is support for the principle that a comfortable street wall height; that is, one of 'human scale' and not overbearing for the pedestrian; being one that has a ratio of street width to facade height of between 1:1 and 1:1.5.

The introduction of a Block Plot Ratio in 1974 for each city block was seen as a mechanism to determine and control the amount of development that could occur on a particular site. Over time, this control was not rigorously applied and taller buildings with higher plot ratios appeared.

In the 1960s, with advances in construction techniques and improved technology in lifts and fire protection, buildings exceeded this strongly defined maximum height.

5.3 The recent past

The Melbourne Metropolitan Planning Scheme was gazetted in May 1968. The *City of Melbourne Strategy Plan* was adopted by the Council in December 1974. It retained a plot ratio system with bonuses and proposed a maximum podium height to major streets outside the retail core of 30 metres and recommended plot ratio bonuses in designated areas. The Central City Interim Development Order was approved in June 1976. The *Planning and Environment Act* 1987 replaced the *Town and Country Planning Act* 1961 in February 1988. The "*plain English*" Melbourne Planning Scheme came into effect to replace the 1982 Interim Development Order. Plot Ratio and built form controls generally remained unaltered. In 1992, City of Melbourne became the responsible authority for most development except for developments with a floor area greater than 25,000 square metres.

In 1993, the City of Melbourne launched *Postcode 3000*, a program designed to facilitate residential use in the central city by offering a range of incentives for residential projects. This program was successful and the residential population began to increase rapidly. The first applications for multi-storey towers in Southbank were lodged following its transfer to the City of Melbourne in 1995.

The City of Melbourne produced a report entitled *Places for People 1994* in collaboration with Professor Jan Gehl. The report identified urban design improvements and warned against sun loss to public spaces.

In 1998, a major change saw the removal of plot ratio controls and associated bonuses from the Melbourne Planning Scheme.

This more performance-based approach to building form, density and height, led to applications being assessed on a case-by-case basis which generated applications for taller buildings based on nearby precedents. This has resulted in the plethora of new and very tall buildings in the CBD, which is also evident in Southbank.

As noted in the CCBFR, the built form controls for the Central City have been modified a number of times in the past fifteen years, however, "*they have not been significantly altered for more than 30 years.*"[11]

5.4 Today

Community disquiet about the loss of some of the central city's valued attributes and physical appearance that has been the result of this development boom has been one catalyst for the introduction of Amendment C262 and this Amendment. Another has been community concerns about poor standards of apartment design, the impacts of increased residential density on public transport and road congestion in some locations, and a consequent reduction in the quality of the street environment in terms of overshadowing and increased wind impacts.

The question of whether or not the "*horse has bolted*" or "*is it too late to be fixed?*" was raised throughout the Panel Hearing. In this regard, the Panel heard from Professor Rob Adams, Director of Design at City of Melbourne and RMIT University's Associate Professor Michael Buxton, amongst others, who urged immediate action to prevent the adverse impacts of the recent apartment and building boom from continuing into the future, and for the rate of development to be slowed if not halted.

It is evident, that, if all approved developments proceed, the consequences of added density will exacerbate an already undesirable situation. The public realm is largely a product of private development and the built form that is permitted.

It is important to recognise the significant role of building facades as determinants of the public realm despite their being the product of private development. It also reinforces the essential role of statutory built form controls in managing the character of the public realm.

This Amendment is primarily about the built form of new buildings, both their three-dimensional shape and the interrelationship of one building to another. The CCBFR states:

> *The new controls aim to balance short-term economic growth and investment in the Study Area with the overarching primary objective which is to protect Melbourne's long-term worth, as both a valued and much-loved place, and its financial value as an investment / economic asset. In fact, growing acceptance internationally is that these two cannot be easily separated. A city's competitiveness and capacity to attract investment and knowledge-based workers, depends on its liveability which is directly influenced by the quality of its built form and infrastructure provision.*[12]

[11] *Synthesis Report, Central City Built Form Review*, Hodyl & Co, April 2016 pg.21.
[12] Ibid. pg.99.

As both the Hoddle Grid and Southbank are evolving entities in terms of built form, the current situation is an important moment in this evolution. Proposed changes to current planning and built form controls must recognise the many varied 'starting points' that exist across the area of the Amendment to ensure that future development responds appropriately to those differing contexts.

Permitted development in the Central City has boomed over the past five years as is illustrated in Figure 4.

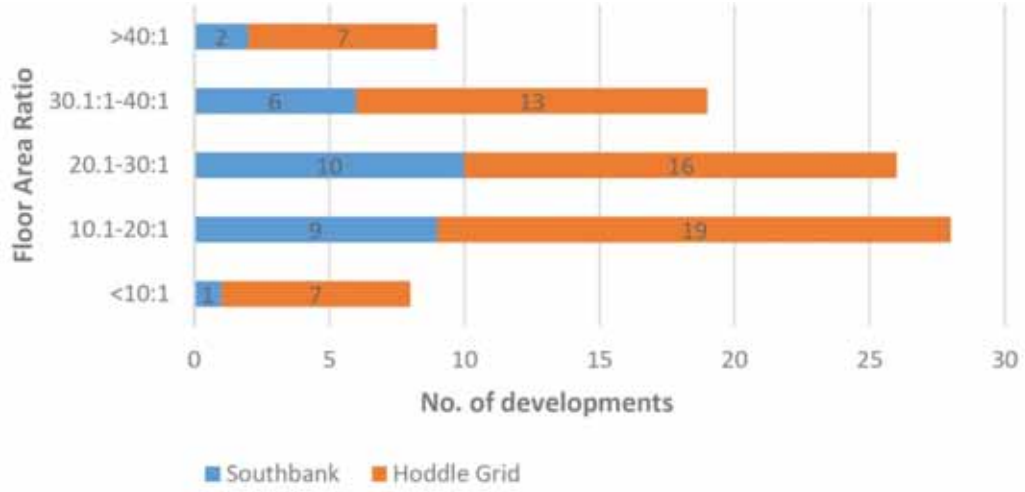

Figure 5 Site based FAR for permitted development 2010-2015 in the Central City

The CCBFR provides details that:

> *Of the permits approved for major developments since January 1 2010, 12 towers (2,900 apartments) have been constructed, approximately 23 towers are under construction (9,700 apartments) and 60 towers (21,200 apartments) have been approved but are yet to commence.*[13]

The scale and "*hyper dense*" development referred to throughout the Hearing is illustrated in the graphic below, showing recent approvals now and into the future, sometimes referred to as the "*development pipeline*."

[13] *Synthesis Report, Central City Built Form Review,* Hodyl & Co, April 2016 pg.12.

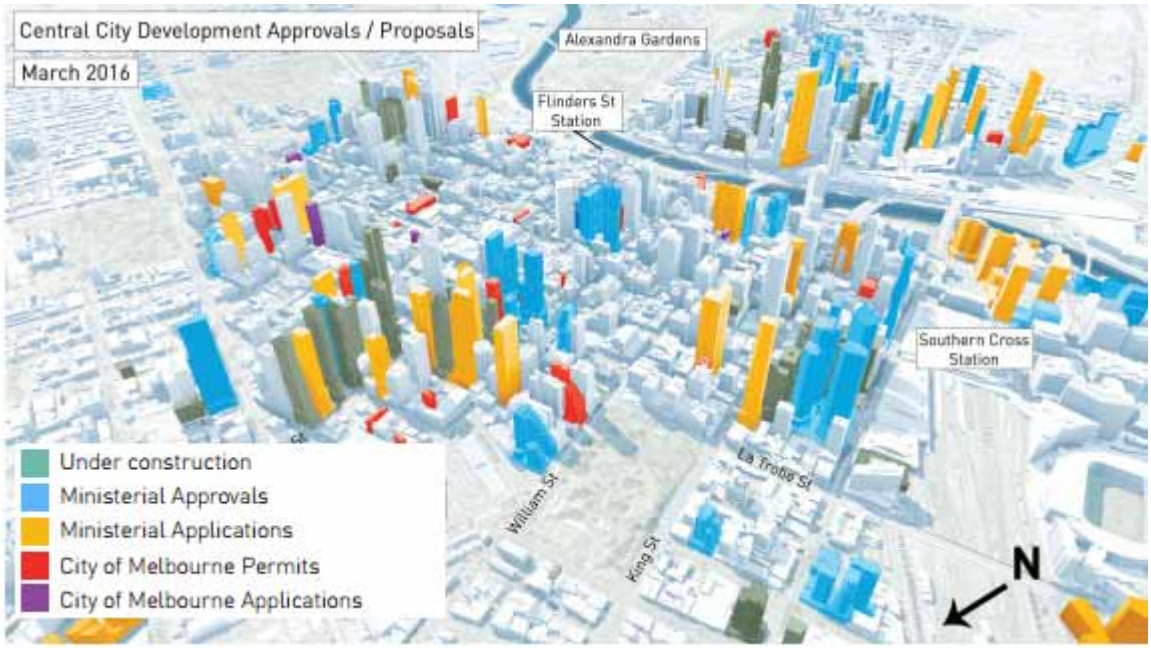

Figure 6 Major Development Permits approved since 2010 and under construction[14]

5.5 Built form in the Amendment area

Within the Hoddle Grid numerous types of built form exist: modest Victorian-era warehouses and factories, nineteenth-century office buildings built to side boundaries and creating lengths of street wall, post-war towers occasionally with blank walls on side boundaries and the more recent phenomenon of very tall towers.

Ms Brennan tabled an extensive list of existing permits, reports and plans (document 30) highlighting recent developments in the Central City.

A number of submitters and experts pointed to the fact that a built form typology that has become common in the Central City in recent years is that of a podium and tower, with the tower element set back from the perimeter of the podium on one or more sides. This typology has become popular for several reasons, including:

- built form controls which require or encourage it
- the economic benefit of providing on-site car parking above ground rather than in a basement
- soil conditions that make basement construction exceptionally expensive.

Concern about poor facade design due to car parking areas facing the public realm has led to a trend towards habitable space occupying the front part of podiums and, where site size allows, with car parking behind.

The podium and tower form continues to be used on sites other than those of relatively small size. There are recent examples of very tall towers being built on small sites with no podium, but a tower occupying most or all of the site, with no or minimal setbacks, particularly from the street frontage. On narrow sites, buildings frequently have zero setbacks to some or most of the site's side and rear boundaries.

[14] Source: Synthesis Report, Central City Built Form Review, Hodyl and Co, April 2016 pg 12

Southbank was, until most of the way through last century, an area of single and two-storey offices and light industry. The urban revitalisation of Southbank commenced with the development of Southgate in the 1980s followed by the development of the Crown complex and the Melbourne Exhibition Centre.

Mr Mackintosh gave evidence on behalf of the Minister that Southbank exhibits the result of massive land value increases in recent years which has seen a rush of applications, approvals and buildings creating a residential density unprecedented in Australia and exceeding that found in almost any other city in the world.

Today, the precinct of tall residential towers, concentrated north of the elevated Westgate Freeway, is in contrast to that part of Southbank centred along Sturt Street, comprising the expanding Arts Precinct at one end and predominantly low-rise development extending south to Kingsway.

The Panel has been advised that the area north of the Westgate Freeway contains a number of sites where planning permits for tall residential buildings have been approved but construction is yet to commence. While the recently-commenced Australia 108 tower, on the south-east corner of City Road and Power Street, is to exceed the height of the prominent Eureka tower, at least two buildings have been approved of similar or slightly greater heights.

The Panel thus considers that built form controls for Southbank need to respond to these two very different existing built form conditions and to ensure that the uniquely very high density in Southbank north of the Westgate Freeway does not occur in the Sturt Street precinct.

5.6 Land Use and Built Form

The Panel received several submissions that discussed the broad issue of commercial land use and development of office buildings, particularly in the Hoddle Grid.

A number of issues were raised in submissions, in particular:

- the recent emphasis on residential development its adverse impact on the extent of commercial floorspace either under construction or under consideration
- the long lead-time required for office developments involving feasibility analyses, securing a suitable parcel of land, negotiating to secure a head tenant, and responding to ever-changing market conditions
- evidence of a recent trend for large employers to seek to move from Docklands, which has been a popular office location, back to the CBD. This was said to be for a variety of reasons but including superior access to public transport, kindred businesses, retail and other services
- the limited availability of sites large enough to incorporate office floorplates of around 1100 square metres - a strong preference for Premium and A Grade tenants
- the difficulties associated with the possible conversion of office space to residential, and vice versa, having regard to the features of one type of occupancy that are not present in the other, such as floor-to-floor heights, air conditioning and plumbing, balconies, fire rating, floor layouts, lift service, outlooks, orientation, and the design requirements of daylighting and ventilation.

It was noted in several submissions that, as well as Premium and A Grade office space, the CBD provides a range of lower specification and smaller office options and that there is a wide variety of tenants who seek such office space, but that the significant driver of demand is the large organisations seeking large floorplate areas.

While the many issues relating to office and/or residential land use were canvassed during the Hearing and are discussed in more detail in Chapter 8, the Panel reinforces the fact that this Amendment is about managing built form and not about land use, although there is clearly some inter-relationship.

The Panel in responding to the submissions, notes a pertinent comment in the Arden Macaulay Structure Plan Amendment C190 Panel report. That Panel commented "*the controls have been prepared and justified in terms of broad and admirable aims, but will be experienced on a site by site basis*. *The application at this detailed level has not always been clear or appropriate.*"[15] This same issue arose in the Panel's assessment of the built form outcomes arising from the present Amendment.

5.6.1 Conclusions

The Panel concludes:

- The recent spate of very tall residential buildings and very high residential density that has resulted in certain parts of the Hoddle Grid and Southbank has led to low levels of amenity for residents and adverse impacts on the public realm. These are problems that should not have occurred and which are not easily rectified.
- Steps are urgently required to address the current situation by reducing the extent of future development both in these very high density areas and in the remainder of the Central City, particularly in the General Development Area.
- Notwithstanding the current situation, there is potential for further development in some areas of the Central City but this must be managed appropriately. The Amendment generally addresses this.

[15] Melbourne Planning Scheme Amendment C190 Panel Report pg. i.

6 The Floor Area Ratio and Floor Area Uplift Scheme

6.1 The issues

In the final version of the controls (Document 165), it was proposed by the Minister to include a definition of FAR in each of the SCAs and DDOs, so that cross-referencing within the Planning Scheme is not required and avoiding the potential for confusion[16].

The matter of the workability of the FAR and FAU Scheme was the subject of many in depth submissions throughout the Hearing.

Key issues raised in submissions about the FAR and FAU Scheme included:

- Use of the FAR rather than the more familiar plot ratio tool
- Application of the FAR in the SCAs
- Appropriateness of a FAR of 18:1 in the GDA
- Adequacy of the public benefit categories
- Use of the FAU Scheme guidelines
- Validity of the FAU including whether it is a tax.

(i) FAR / FAU Defined

For developments in the GDA, the Amendment proposes through the FAU mechanism to specify the circumstances in which built form can exceed a specified FAR of 18:1. The ratio is based on a Gross Floor Area Calculation to enable an allowable floor area. The FAR is based on a Gross Floor Area Calculation to enable an allowable floor area. For example, if the site area was 2,000 square meters, with a FAR of 18:1, the allowable floor area would be 36,000 square metres. Development exceeding this figure would trigger the FAU Scheme. Such exceedance is proposed to be subject to contribution of approved 'public benefits' set out in the FAU Scheme. The category of a public benefit would need to be agreed on prior to proceeding.

There are five public benefit categories set out in the Guidelines, namely:

- Competitive design process (design excellence)
- Commercial office use on site for minimum 10 years
- Social housing on site
- Publicly accessible enclosed areas on site
- publicly accessible open space on the site.

The Floor Area Ratio (FAR) and Floor Area Uplift (FAU) Scheme comprises:

- The provisions of Clause 3 of the Schedules 1, 2 and 3 of the Capital City Zone
- The policy at Clause 22.03 which is expressed to apply to land within Schedules 1, 2 and 3 of the CCZ subject to DDO10
- The Guidelines entitled "*How to Calculate Floor Area Uplifts and Public Benefits*" dated April 2016.

[16] In Section 7.2, the Panel has recommended that the FAR provisions should be relocated to DDO10.

The FAU Scheme is discussed in detail at 6.3.

6.2 The use of Floor Area Ratio

(i) Submissions and evidence

Dr Spiller gave evidence on behalf of the Minister that "*while development in the Central City of Melbourne had been subject to 'floor area ratio' controls, this had not been the case for some decades*". Dr Spiller noted that FARs are used for a range of planning purposes, including limiting development density, managing infrastructure demand, and restricting development bulk.

In evidence, Ms Day illustrated the allowable FAR under Amendment C262 (Figure 7). Ms Day outlined that concept of the FAR was pioneered in New York in 1961. It was her evidence that:

> *Strictly speaking, FAR is a ratio of gross floor area to gross site area….FAR does not determine a built form or design outcome, in and of itself. It is the role of other complimentary planning tools such as tower setbacks, street wall heights, tower floorplate size and building height to influence the built form envelope.*[17]

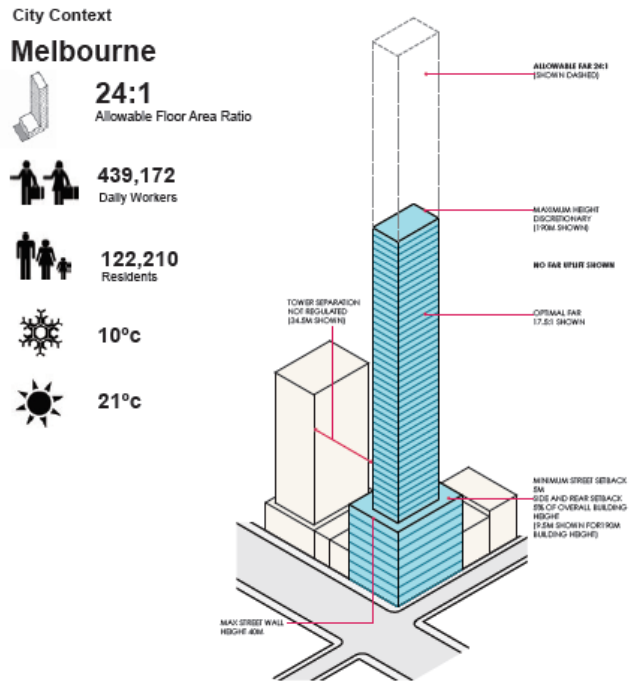

Figure 7 Applied Planning Controls diagram Melbourne Amendment C262[18]

[17] Comparative Planning Controls Report, Helen Day Urbanism, pg.30
[18] Helen Day Evidence Presentation (Document 20)

Mr Stuart Worn of Bosco Johnson (Submitter 88) argued that the FAR was a "*retrograde planning policy that the City of Melbourne abandoned decades ago due it not working*", and many opposing submissions argued that "*one size did not fit all"* for these controls. Mr Worn argued that hotels and commercial buildings should not be subjected to these prohibitive requirements.

Central Equity Pty Ltd (Submitter 55) submitted, amongst other things, that the FAR was a 'blunt tool' and the setting of 18:1 was too low. Concerns were expressed about the matrix of controls including FAR policy basis and the FAR uplift. It was said that it was an uncoordinated approach and would not deliver true public benefits.

Mr O'Farrell who presented for Capital Eight Pty Ltd (Submitter 38) (Capital Eight) questioned whether it is appropriate to introduce the new concept of a FAR rather than employ the similar density tool of Plot Ratio already available in the VPPs.

FAR is defined in Clause 22.03 as follows:

> *… means the gross floor area above ground of all buildings on a site, including all enclosed areas, services, lifts, car stackers and covered balconies, divided by the site area. Voids associated with lifts, car stackers and similar service elements should be considered as multiple floors of the same height as adjacent floors or 3.0 metres if there is no adjacent floor.*

'Plot Ratio' is a VPP term and defined in the Planning Scheme at Clause 72 as:

> *The gross floor area of all buildings on a site, divided by the area of the site.*

Gross Floor Area (GFA), which appears in both definitions, is in turn defined as:

> *The total floor area of a building, measured from the outside of external walls or the centre of party walls, and includes all roofed areas.*

A number of submissions suggested that some building elements needed to be excluded from the FAR definition or calculation, such as above ground parking or lift voids etc.

Mr Glenn Alman of Wood and Grieve Engineers (Submitter 50) expressed concerns regarding the definition of GFA including building services and plant zones. Mr Alman addressed this definitional issue and opposed service areas being included in the GFA and recommended adoption of net Leasable Floor Area (LFA) in calculating the FAR.

Mr Peter Brook gave architectural evidence for Capital Eight. He argued that above ground parking should not be included in the FAR, as in some parts of Southbank it was not possible to put parking underground at reasonable cost, due to unstable silty soils or acid sulphate soils. These sites would be at a disadvantage in terms of the component of achievable saleable floor space in the FAR when compared to other sites.

Mecone Town Planning (Submitter 60) reiterated this, addressing the difficulty of basement car parking in parts of Southbank and recommending that the FAR provisions in DDO10 should be varied between the Hoddle Grid and Southbank. Mr Biles, who gave urban design and planning evidence for Capital Eight, was of the same view as Mr Brook and suggested that a site-specific exemption might relate to this and other such sites.

Mr Brook further argued that if all enclosed areas including amenity areas such as corridors and community spaces were counted as contributing to the FAR, developers would seek to minimise their provision in favour of saleable floor space with resultant lesser quality of on-site amenity. Mr Todd, who presented for AMP Capital (Submitter 56), also suggested that developers would tend to 'meanness' in development extras.

There was a suggestion that FAR should be redefined so that it included (above ground) Net Floor Area only. Net Floor Area (NFA) is defined in the Planning Scheme as:

> *The total floor area of all floors of all buildings on a site. It includes half the width of any party wall and the full width of all other walls. It does not include the area of stairs, loading bays, accessways, or car parking areas, or any area occupied by machinery required for air conditioning, heating, power supply, or lifts.*

It was similarly suggested by Mr O'Farrell that to overcome the concern about amenity areas being squeezed out by saleable floor space, FAR might instead refer only to Leasable Floor Area. This is already defined in the Scheme as:

> *That part of the net floor area able to be leased. It does not include public or common tenancy areas, such as malls, verandahs or public conveniences.*

Ms Brennan responded that above ground car parking or amenities were not to be excluded from the definition of FAR, because:

- *it is desirable to have one clear, simple, readily applicable definition of FAR*
- *the provision of car parking should be encouraged to be limited, particularly within a podium, consistent with parking limitation and urban design policy*
- *communal amenities influence the acceptability and value of a proposed development, and will continue to be provided*
- *if one or more of those items is to be excluded from the definition of FAR, the relevant FARs nominated in DDO10 and in each SCA would need to be revised down in the order of 15 percent on the evidence of Ms Hodyl (noting that no party has undertaken a calculation to identify the revised threshold FAR).*[19]

She stated that a new FAR definition was introduced to exclude below ground floor space, which is counted when plot ratio is considered.

The application of a discretionary FAR was a contentious aspect of the controls proposed for SCAs. FAR provisions are proposed to apply where heights are discretionary (for most of the sub-areas of DDO2, in DDO40, some of the sub-areas of DDO60 and most of the sub-areas of DDO62). They would apply because setbacks and street wall heights are generally discretionary.

Mr Milner, on behalf of SOCN (Submitter 53) suggested that perhaps the 'base' FAR should be recalibrated in order to create a real and genuine threshold. He submitted that it was too high to begin with before seeking a contribution or public benefit.

[19] Minister Part C Submission (Document 177) pg.13

The University of Melbourne (Submitter 42) and KAPS Corp Pty Ltd (Submitter 51), raised issues about the application of the FAR in the SCAs. Ausvest Holdings Pty Ltd (Ausvest) (Submitter 62) and 3 Project Pty Ltd (Submitter 72?) suggested there should be no FAR at all in these areas. The Uniting Church in Australia (Victoria and Tasmania) (Submitter 31) misunderstood that the FAR was not mandatory but discretionary in one of the SCAs. The inconsistent operation of the FAR (as only a built form tool) in the SCAs compared to its use as a trigger for FAU in the General Development Area, was said to be problematic by KAPS Corp Pty Ltd and Bundy Enterprises Pty Ltd (Submitters 51 and 70). Others supported a discretionary FAR as proposed such as R and Y Pty Ltd (Submitter 78).

Mr Marco Negri gave expert evidence for Ausvest (owner of 392-406 Bourke Street) and expressed the view that the application of a discretionary FAR in the SCA was unnecessary as discretionary heights would be adequately guided by the design objectives, built form outcomes sought and the decision guidelines.

Mr Michael Barlow gave expert evidence for Ausvest that the comprehensive nature of the controls in DDO2 meant that a FAR was not needed. He argued:

- *The proposed controls also introduce a floor area ratio (FAR) of 4:1 possibly with a view to providing flexibility and another 'measure' of the appropriateness or otherwise of a proposed increase in height above the preferred maximum.*
- *In the instance of Hardware Lane the FAR is unlikely to provide additional flexibility beyond the built form controls or significantly inform the consideration of such an application.*
- *The FAR is also discretionary therefore the decision on whether to approve any application to increase the height (or FAR) will be determined having regard to the specific Design Objectives and Built Form Outcomes of DDO 2 for Hardware Lane ...*

It was argued by Ms Brennan in relation to discretionary heights and the use of the FAR in SCAs that:

- *the policy and discretionary approach has not protected against …* [adverse built form] *outcomes. Podiums treated as architectural elements rather than serving public realm, such as access to sunlight, shadowing. Once these are built what we can see is that those outcomes have proven to be not good for the city.*

Ms Brennan submitted that the FAR is intended to moderate the impacts of additional height above the existing nominated heights and is in that sense complementary to those heights. Flexibility is offered, however, in terms of the shape of built form that might be acceptable. She submitted that its use is preferred as an alternative to mandatory height controls (as were introduced by Amendment C262) or revisiting of the built form outcomes.

Ms Brennan submitted that if the City of Melbourne wishes to revisit the height controls of the SCAs (which was not part of the CCBFR process) in the future, the Minister is not opposed to that course, especially in instances where the height controls have been in place for a long time. In relation to Bourke Hill and Southbank, their very recent assessment and introduction suggests that a further review at this time may be premature, she said.

Ms Hodyl's response to questions raised in submissions about the operation of the FAR in the SCA, said:

> ***Providing guidance on application of discretion above preferred height controls/need for FAR control***
>
> *All street wall heights and setback controls in the Special Character Areas are discretionary.*
>
> *In all of the Special Character Areas the FAR control has been introduced to moderate any potential increase in heights, and to ensure that overall, the preferred character and levels of amenity are achieved and, that greater intensity of development does not detract from the generally low-mid scale feel and character of these areas.*
>
> *The exhibited version of Amendment C270 indicates that a development should meet the preferred height limit and the preferred FAR control. This does not accurately reflect the intention of introducing a FAR to moderate the impacts of additional height. As noted in the Urban Design Analysis – Special Character Areas report, a FAR control is recommended as a 'complement to the discretionary height controls as it articulates a degree of moderation for exceeding discretionary height limits (where a development meets all other objectives)' (p30).*
>
> *Nominating the FAR control as a modified control rather than an additional control, would more accurately represent the intention of the introduction of a FAR in these areas.*

Her evidence included a consideration of different measures that might be used to 'back up' the preferred height. One was defining a maximum height limit. This was rejected on the basis that a blanket upper height limit would in effect become a default mandatory control and was too blunt a tool given site capacity variations. She said that adding a percentage to the preferred height had been considered and adopted:

> ***Nominating a percentage increase on the preferred height limit*** *– This approach has been used in the method to determine the preferred FAR control. A percentage increase of 30 percent was applied to each preferred height limit in the built form testing. This means that the FAR generally aligns with a 30 percent increase on height, without defining this as a maximum height limit, which as outlined above, is considered too blunt an approach.*

Ms Sophie Jordan and Mr Mark Sheppard, in their evidence for the Minister, supported use of a discretionary FAR in the SCA.

Concerning the choice of a FAR of 18:1 in the GDA, experts on behalf of the Minister gave evidence that a FAR of 18:1 was appropriate.

Ms Buckeridge, an expert in architectural design, gave evidence that:

> *Several submissions requested 24:1 as base. My feeling was setting the FAR is about setting a threshold and managing potential negative built form outcomes. The testing process we have talked through established in my view*

> *the 6 percent setbacks from 80m achieve that suitable balance. When the FARs were tabulated they resulted in a 18:1 across empirical testing and not predetermined. There will be separations below 20m when this FAR is applied and this strikes right balance to reduce to 10m while maintaining separation is a valuable addition as it provides additional flexibility to respond to site conditions.*

Ms Helen Day gave evidence for the Minister concerning comparative controls in other cities. She noted that in many cities the FAR and uplift were capped including Sydney and Chicago.

Dr Spiller gave evidence that there was "*no one rationale for the setting of the FARs*." It was Dr Spiller's evidence that:

> *A FAR indicates to the market a reasonable expectation for development yields on typical sites within the Central City. Determining the level of the FAR is a policy matter for Government to resolve. FAU above the standard FAR will be subject to value sharing arrangements.*

Ms Brennan submitted:

> *As the Panel would appreciate, the work of Ms Sarah Buckeridge and Mr Cormac Kelly was critical in the formulation of the proposed DDO10. Their work led to the nomination of preferred and modified setback and tower separation requirements, while Ms Buckeridge's testing was instrumental in the nomination of 18:1 as the threshold FAR in CCZ1, 2 and 3. The importance of their work was explained in Ms Hodyl's synthesis report. All of this work was exhibited with the Amendment.*
>
> *It was therefore surprising that neither the subsequent evidence of Ms Buckeridge nor Mr Kelly was tested in cross-examination. Indeed, Ms Buckeridge gave her evidence largely to an empty room.*
>
> *It was also surprising to hear the following assertions from parties not present to hear or test Ms Buckeridge's evidence:*
>
> *Phillip Nominees in paragraph 38 of its written submission (document 80) asserts no testing of commercial floor plates was undertaken. Ms Buckeridge did this, and gave evidence about it.*
>
> *Counsel on behalf of Ausvest and Capital Eight asserted orally that the FAR of 18:1 was "arbitrary," "dartboard planning" and "nothing justified it". Ms Buckeridge explained in some detail how that figure was derived. It was also benchmarked against comparable jurisdictions by Ms Hodyl and Ms Day, and is generous even taking into account differences in the calculation.*

Many submitters, however, considered the FAR of 18:1 to be too high in comparison to global standards, including Professor Buxton (Submitter 61), Mr Camilleri (Submitter 2), Mr Echberg (Submitter 18), AILA (Submitter 37), PIA (Submitter 69). Whilst supportive of the Amendment, the AILA believed the FAR of 18:1 was too high as compared to other cities.

However, the Panel notes no evidence was submitted to support an alternative FAR. The Ministers' own evidence, nevertheless, revealed that, at 18:1, the FAR was high amongst world standards.

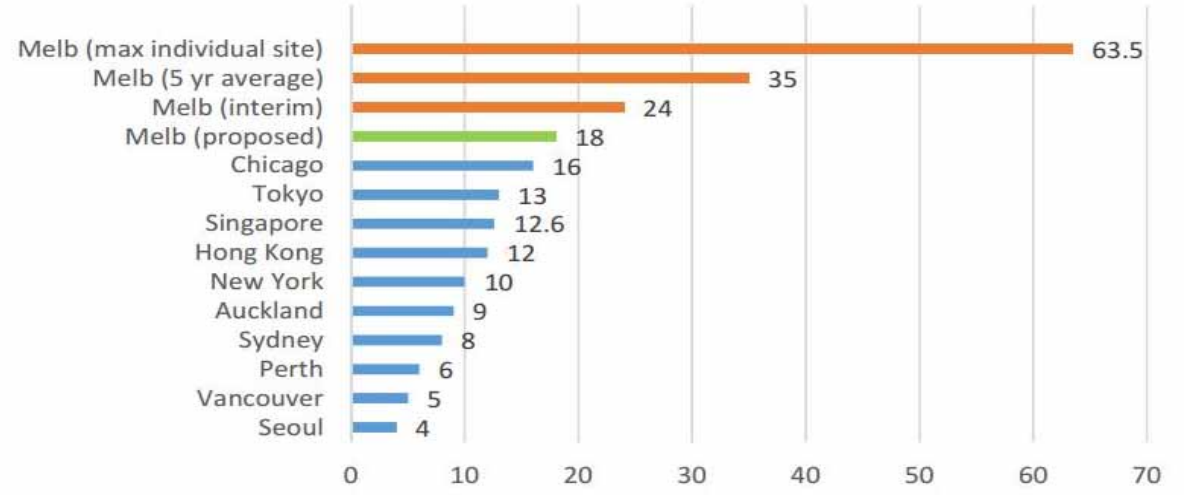

Figure 8 International comparison of allowable FAR (base without any uplift)[20]

(ii) Discussion

There are three main issues to be addressed in relation to the use of FAR:

- The matter of the definition and types of floorspace to be used in the definition/calculation of the FAR
- The use of the FAR in SCAs
- The choice of a FAR of 18:1 for the GDA.

Definitional issue

The existing VPP term 'plot ratio' is defined by reference to the Gross Floor Area of all buildings on a site. This can include floor area below ground as well as above ground. In as much as the CCBFR and this proposed Amendment are concerned only with floor area above ground due to its capacity to directly influence the public realm, it is appropriate that the density control refers only to above ground floor space.

The Amendment does this by introducing the new term 'Floor Area Ratio' and specifically excluding basement floor area from its calculation.

However, it is noted that a modified definition of plot ratio is already included in the existing DDO10 as introduced by Amendment C262. That modified definition is:

> *For the purpose of this schedule plot ratio is defined as the gross floor area of all buildings on a site divided by the area of the site, excluding the gross floor area below ground level.*

It might, therefore, instead have been possible to continue with that modified definition for the purposes of this Amendment.

[20] Source: Central City Built Form Review Synthesis Report, Hodyl & Co, April 2016, Page 103

The new replacement FAR definition, however, has the virtue of specifying more clearly how voids and the like are to the considered. The Panel considers, as was submitted for the Minister, that there is virtue in adopting a simple, hence readily understood, definition. In addition, while non-leasable or non-saleable areas are to be counted in the FAR, the Panel agrees that communal amenities influence the acceptability and value of a proposed development, and would continue to be provided. The Panel considers that service elements of a building contribute to its form and bulk and it is only appropriate that they be counted in the FAR.

Further, while it is recognised that some sites will be disadvantaged by ground conditions that could preclude economical basement provision of car parking, it is not considered that car parking should be excluded from the FAR for all sites as this would fail to encourage below ground car parking wherever possible.

Importantly, the Panel considers that the introduction of the new FAR definition would assist in avoiding adding to the confusion arising from multiple definitions of plot ratio in the Scheme.

The use of the FAR in SCAs

The Panel understands that the FAR is intended to serve as a backup to the preferred height controls applying in the DDOs applying in SCAs. As indicated above, the FARs adopted in the Amendment represent a density of development that is an approximate 30 percent increase on that achieved if the preferred height is met. It was intended, according to Ms Hodyl's evidence, to guide discretion in relation to proposals that exceeded the preferred height limit.

Notwithstanding Ms Hodyl's justification for adopting a discretionary FAR rather than mandatory maximum height (above the preferred height), the Panel has some difficulty with the logic and effectiveness of having two discretionary controls regulating the scale of development. It would seem that an applicant would likely approach a development proposal by comparing it against the higher 'modified outcome' measure and may well seek to go beyond that measure (without being required to make any FAU contributions). Even if the extent of exceedance of the discretionary FAR was modest (say 20 percent), when compared with the lesser preferred height, the departure may be substantial.

The Panel notes that Ms Hodyl's consideration of the options for 'backing up' the preferred height did not include a mandatory FAR.

The Panel considers that it would clarify intents and increase certainty of outcomes for the low to medium scale of development in the SCAs and the operation of the FAR in these areas if the FAR was a mandatory limit.

In this respect, the Panel notes that the heights or plot ratios above the specified preferred figure in other cities referred to in presentations on behalf of the Minister were mandatory limits – specified in metres or as a percentage increase over the preferred figure.

The Panel's further concern is that some SCAs where the height control is not modest (such as sub-areas B5 and B6 in DDO62 in Bourke Hill where the preferred heights are 60 and 100 metres respectively), and the discretionary FARs are considerable (13:1 and 15:1 respectively

in B5 and B6), may become preferred areas for development, rather than being seen as areas where development should be limited and needs to be carefully managed.

The favouring of these areas for development may come about because they would have substantial preferred heights and discretionary FARs, which can be exceeded without the FAU requirement that applies in the General Development Area. The Panel notes that Ms Brennan raised a concern that the same sort of inadvertent pressures might occur in the SCAs if there was to be no FAR applying above the preferred height. However, the Panel considers that in the absence of FAU requirements and a mandatory FAR, such pressures may occur in some SCAs.

This possible redirection of development pressures is another reason to look to application of mandatory FARs in the SCAs.

The Panel recognises that this matter received little or no airing at the Hearing and that to convert the SCAs' discretionary FARs to mandatory ones in some or all cases prior to adoption of the Amendment raises issues of transformation of the controls across a number of areas and at the very least, further notice requirements would have to be considered.

The choice of a FAR of 18:1 for the GDA

The Panel accepts the critical contribution of the work of Ms Buckeridge (whose evidence was not tested by any other party to the Hearing)[21] and Mr Cormac Kelly to the formulation of the proposed DDO10 controls including (indirectly) the FAR of 18:1, and notes the support given by Mr Sheppard and Ms Jordan.

The Panel considers that the 18:1 FAR provides a realistic expectation for yield on GDA development sites. The accompanying built form controls proposed should avoid the negative impacts that have been apparent with many recent developments.

The Panel remains concerned, however, that an 18:1 FAR is high in comparison with other cities (especially if unlimited FAU applies). The Minister's own evidence reveals this and this was reinforced with the illustration shown in Figure 8, as to where Melbourne sits in terms of FAR when benchmarked globally.

Given the adverse effects upon the public realm which have resulted from hyper-dense and high developments in recent times, especially much of Southbank and Elizabeth Street north), while acknowledging that the other DDO10 provisions will go a long way to avoiding the continuation of past problems, the Panel considers that a FAR of 18:1 in the General Development Area must be viewed as an absolute. Any future revision of the FAR should only look to lower this figure significantly. This is particularly important if a future value capture provision for including public benefits is introduced.

The Panel is concerned that the Central City's public realm is an important economic driver for the city and acknowledges that this Amendment is putting together controls to reverse the recent trend of inappropriate built form outcomes to ensure that this matter is addressed.

[21] Ms Buckeridge's work is discussed further in Section 8.2.

The Panel was satisfied with the comparable jurisdictions analysis undertaken by Ms Day and Ms Hodyl that provided a sufficient snapshot to highlight, without digging into the absolute details, that the 18:1 was still very high.

The Panel agreed with Mr Milner's view that the base FAR of 18:1 was a significant before any uplifts could be considered. Any future revision of the FAR should only look to lower this figure significantly. This is particularly important if a future value capture provision for the inclusion of public benefits is introduced. The Panel agrees with the statement of Professor Adams that the FAR of 18:1 is not ideal but a "*good start to begin the process of reasonable repair to the Central City*."

The Panel understands that the City of Melbourne is commencing a study of *Land Use and Infrastructure Review* for the Central City. This work will be pivotal and the Panel suggests that there may be value in varying the FAR across the GDA to encourage more distinctly varied development outcomes across the Central City once this work has been completed. If linked to a soundly based FAU Scheme, a variable FAR might be used to achieve land use outcomes.

The Panel is comfortable that even if the FAR of 18:1 in the GDA is 'capped' (as a result of abandoning the current FAU Scheme as discussed in Section 6.3 below), it is still a considerably generous figure and should not be exceeded. In particular, the Panel notes that:

- Amendment C262[22] has applied 'interim' controls at 24:1 until the end of 2016 and transitional provisions would apply to applications in train
- Even without bonuses, the proposed density would exceed comparative examples (illustrated at Figure 8)
- Recent developments at higher FARs have been unacceptable
- Towers will continue to be built with these controls.
- The built form controls go a long way to addressing better amenity and public realm outcomes.

(iii) Conclusions

The Panel concludes:

- The Panel concludes that the term FAR and its definition should be adopted as exhibited
- The FAR provides a useful back up to discretionary heights in SCAs but consideration should be given to making it a mandatory cap
- The FAR of 18:1 is still substantially higher than key comparator cities
- The FAR of 18:1, even if capped, affords the opportunity for significant development on large sites
- A FAR of 18:1 in the General Development Area must be viewed as an absolute. Any future revision of the FAR should only look to lower this figure significantly
- The package of built form controls will ultimately provide an improved public realm outcome.

[22] The application of these provisions were subsequently extended by Amendment C297.

- The full potential of FAR may not always be achievable because of site constraints, layout and other planning controls. It cannot be expected that all sites will have the same development potential.

6.3 The Floor Area Uplift Scheme

The Amendment seeks to insert planning scheme provisions which require a s173 agreement to secure the provision of 'public benefits' as determined under the FAU Scheme. The FAU Scheme would apply to land in DDO10 only through the CCZ Schedules 1, 2 and 3, and a new local policy would be introduced through Clause 22.03 for the FAR and FAU Scheme.

The issue is whether the provisions of Clause 22.03 and CCZ1, 2 and 3 are workable, and sufficient hook for the FAU Scheme to be adopted as part of the Amendment.

Ms Brennan summarised the elements of the FAU Scheme as follows:

- For a proposed development that will exceed a FAR of 18:1, a category of a public benefit needs to be agreed on and provided.
- The category of public benefit to be provided needs to be secured through a s173 Agreement (or financial bond depending on the circumstances).
- In addition to providing the public benefit, the proposed development must still satisfy the built form and any other relevant planning controls.
- The category of public benefit and the valuation such public benefit represents is set out in the *How to Calculate Floor Area Uplifts and Benefits Guidelines* (the Guidelines).

Ms Brennan explained that the Guidelines are designed to assist in the interpretation and application of the FAU Scheme and calculating the value equivalent of the public benefits that need to be provided.

Ms Day provided a summary comparison of density and built form controls and found that with the exception of Sydney and Melbourne's interim controls (C262), all jurisdictions cap a maximum allowable FAU.

(i) Submissions and evidence

It was submitted by Ms Brennan that the two key purposes of the FAR/FAU Scheme are to set clear and realistic expectations as to reasonable yield of a typical development site in the GDA in the Central City and to establish a threshold density via the FAR which triggers value-sharing contribution towards public benefits.

The FAU Scheme was described as being a "*public*" value capture scheme as the lift in the value associated with granting the additional development rights above the FAR of 18:1 is not subject to land tax or other taxes. This value has been determined to be captured through this mechanism.

Ms Brennan contended the premise of this value sharing concept is in order to give something back to the public realm and that it is not a new concept to Melbourne. Ms Brennan submitted it is important to ensure the value sharing concept is enforceable, consistent and demonstrates a clear method for determining the value of the public benefit.

The Panel received a number of submissions that supported in principle the concept of value sharing for public benefit, the nature of the public benefit categories suggested and the benefit of the FAU Scheme in general.

Mr Milner submitted that the:

> *securing of public benefits from the intensity of development enabled by the development is reasonable and justified.*

A number of industry groups supported expansion of the public benefit categories, while others opposed it altogether.

What type of contributions scheme is the FAU?

Several submissions challenged the proposed introduction of the FAU Scheme on the basis that it was another form of tax, or an incorrectly-formulated Development Contributions Plan (DCP).

HIA (Submitter 89) submitted to the Panel that the Amendment was not supported and HIA objects to the proposed FAU Scheme, particularly the public benefits aspect. HIA submitted that the proposed FAU Scheme lacks clarity, transparency and nexus. HIA submitted that the private gains or private uplift should not be passed onto the public.

UDIA (Submitter 91) canvassed the issue of the nature and validity of the FAU in its written submission and addressed it in greater depth at the Hearing. The Property Council of Australia (PCA) (Submitter 90) and Urban Development Institute of Australia (UDIA) both submitted that the FAU Scheme was a "*DCP in disguise*." UDIA contended that the role of the planning system is to manage growth by regulating the use and development of land and its impacts. UDIA noted that the planning system already provides a transparent and accountable way of funding in part or in whole that infrastructure and that the FAU Scheme is either a development tax or DCP. UDIA submitted that the FAU Scheme is seeking to have developers or owners contribute to the cost of new or improving existing infrastructure, which is in fact the underlying principle of the DCP legislative provisions.

UDIA supported a "*proper, reasonable, transparent and accountable DCP/ICP system to apply to all development*". UDIA claimed that the FAU Scheme does not have a planning principle like a DCP, rather it is "*welfare economics*".

UDIA acknowledged that s173 agreements are capable of requiring works and contributions that legitimise DCPs. The caution in using the s173 agreement is that an informal DCP could be sought to be entered into across multiple developers in the absence of a formal, strategic DCP/ICP.

While supporting the concept of public benefit, Mr Milner questioned the mechanism:

> *The proposed policy and associated guidelines need to be comprehensively revisited to address serious weaknesses and integrate with other infrastructure planning, housing and development strategies for the Central City.*

He submitted that *the "FAU is great idea poorly executed*." He proffered that the FAU Scheme was entirely random – what benefits, who delivers and who receives were key

questions left hanging. He argued the Central City would be better served by specifying the projects. He submitted that "i*t is strange that if you have to pop over 18:1, you contribute*." It was Mr Milner's view that the zoning of the land has given the landowner a windfall – as such the demand for and nexus between the development and public benefits required should be derived from the whole of development.

The validity of the FAU Scheme was addressed at the Hearing by Mr Tweedie SC on behalf of Ausvest. The issue of validity had not been earlier raised in its written submission. Other parties such as Dexus and UDIA adopted Mr Tweedie's submissions on validity.

Ausvest submitted that the FAU Scheme is clearly a DCP type scheme that has no connection with the impacts of the developments sought and cannot be justified in its current form. Ausvest submitted that even though it may appear to be more akin to a DCP, it differed to a DCP in that it is not fair, transparent, equitable or appropriate and raised significant governance issues.

Ausvest submitted that the Minister's interpretation of s6(2)(k) of the Act as enabling agreements concerning development contributions and thus authorising the FAU Scheme was misconstrued, as it was not possible to implement a control that requires the developer to deliver unspecified and unqualified public benefits when there is no nexus or connection to impacts of development that is being proposed.

Other submitters contended that public benefits should be mandated in other ways such as DCPs and not be linked with FARs[23]. Professor Buxton asserted that the FAU Scheme was not lawful.

Mr Rantino, on behalf of City of Melbourne, submitted that the FAU Scheme "*is and isn't a DCP*." Mr Rantino submitted that the FAU Scheme seeks to capture public benefit from development, that there's strategic basis for it and a legislative amendment is not required for the FAU Scheme to operate. On that basis, Mr Rantino submitted, the FAU Scheme differs to a DCP.

The City of Melbourne generally endorsed the Amendment, submitting that the FAU Scheme provides a tool to capture the benefit from the development above a pre-determined threshold in the Central City, which goes towards funding much needed infrastructure and facilities.

Mr Rantino stated that the Amendment is a good first step and requires time to bed in before a review be carried out in two or three years' time to determine whether further revisions are required.

In reply to the challenges to the FAU, Ms Brennan submitted that the FAU Scheme is not a tax or DCP but is a value sharing mechanism which differs to the other concepts, as neither cash in lieu contributions nor money being sought. Ms Brennan submitted that there may be legal issues if the FAU Scheme sought cash in lieu (CIL) contributions to be paid. She originally submitted that CIL may not be lawfully applied, which is why it is absent from the FAU Scheme and is not sought to be brought in. She later submitted that the Minister does

[23] Mr Camilleri (Submitter 2)

not want to risk the validity of the FAU Scheme by allowing CIL and so has not included this capacity.

Ms Brennan stated that the FAU Scheme is not a DCP or Growth Areas Infrastructure Charge (GAIC) and one is not being sought, as a DCP is not the only mechanism to secure public benefits. Ms Brennan explained that the FAU Scheme is not a "*user pay*" model, unlike a DCP. Ms Brennan noted the difficulty in applying a DCP in an established urban setting. Ms Brennan submitted that if the City of Melbourne requires a DCP it can independently pursue one.

Ms Brennan submitted that s62(6) of the Act provides wide ranging powers to impose conditions on the grant of a planning permit, such as requiring a s173 agreement. In particular, the application of subsections (6)(a) and (b) was relied upon. Ms Brennan submitted that the drafting of the controls in the CCZ and Clause 22.03 achieved compliance with this subsection.

Subsection 62(6)(a) of the Act states that a condition requiring a proponent to pay or provide works, services or facilities in a planning permit is only permitted if collecting a DCP levy, s46GG or in accordance with subsection (5). Ms Brennan submitted that the relevant subsection is s62(5)(b), in that a condition can be included in a permit requiring the proponent to enter into a s173 agreement requiring specific works, services or facilities provided or paid for by the permit applicant.

Ms Brennan submitted that s6(2)(k) of the Act authorises the Melbourne Planning Scheme to provide for the condition of development in a planning permit and the imposition of the FAU scheme through a s173 agreement.

To assist the Panel in relation to these issues, Ms Brennan provided the Panel with a copy of an advice from Stuart Morris QC dated 25 August 2016 in relation to the validity of the Amendment, in particular the FAU Scheme.

Dr Spiller in his evidence for the Minister noted that the FAR has dual roles, namely it is a broad brush urban design management tool as well as being the trigger for value sharing under the FAU Scheme. Dr Spiller noted the FAU Scheme is designed to maximise value sharing whilst not deterring construction activity and is accessible by paying a 'licence fee' which is the value of the public benefit to be provided. He said that the FAU Scheme makes it clear what is expected of a developer for proposals exceeding a FAR of 18:1.

Dr Spiller opined that value sharing is commonplace in the planning system, noting that the GAIC amounts to a licensing fee for potential development rights bought in the urban growth areas. Dr Spiller supported the FAU Scheme as providing transparency for discussion of major developments in the Central City that otherwise occurs behind closed doors.

Dr Spiller gave evidence that the FAU Scheme is not a DCP. He conceded that the FAU Scheme is not as certain as a DCP, where the amount of contribution is known and can be factored into the price (though Ms Brennan submitted that the Guidelines do in fact provide this certainty of price). Dr Spiller conceded under cross-examination that most of the items he identified in Table 23 of his report (such as Family Services Hubs or Libraries) can be funded through a DCP, with the exception of social housing and a Cultural Centre. Dr Spiller stated that the logic of the FAU Scheme is similar to that of a GAIC, in that there is a granting

of development rights through a statutory granting of development approvals that generates value, part of which can be shared with the community.

Under cross-examination, Dr Spiller stated that if a DCP was needed, then what is required, costs and governance of that can occur and public consultation be sought. Dr Spiller conceded that the DCP also provides a wider community benefit.

In Ms Hodyl's *Synthesis Report*, she acknowledged that the City of Melbourne does not have a DCP for the Central City for community or physical infrastructure, other than contributions for an open space levy. Ms Hodyl noted the difficulty in introducing a DCP in an area undergoing urban intensification, as the contributions can generally only recoup a portion of the predicted infrastructure costs leaving a significant funding gap.

Ms Brennan cautioned that it is not for the Panel to adjudicate whether the FAU Scheme is a DCP, GAIC or a tax. Ms Brennan contended that the Panel is not charged with determining the validity of the FAU Scheme, but rather the Panel's role is to generally be satisfied the FAU Scheme is lawful and workable.

Intention to make the FAU scheme non-reviewable

One aspect of the FAU Scheme that received attention at the Hearing was how '*agreed to*' by the Responsible Authority under the CCZ Schedule was to be interpreted - in relation to the public benefit contribution, and to what extent if differed, if at all, with the well-established planning phrase '*to the satisfaction of the responsible authority*'.

Ms Brennan submitted that the requirement to provide public benefits under the FAU Scheme is a precondition to being able to develop above 18:1 and is linked to the purpose and object of Act to secure a 'pleasant working, living and recreational environment for Victorians.' Ms Brennan contended that unless there is compliance with the FAU Scheme, a planning permit application cannot be considered and no jurisdiction is triggered. Both Ms Brennan and Mr Rantino submitted that as the compliance with the FAU scheme is a condition precedent, any decision arising from this aspect cannot be reviewed at VCAT through the usual statutory merits review process or under s149 of the Act.

Ausvest submitted that there is no real difference in the interpretation of "*agreed to*" as compared to '*to the satisfaction of*', as both would enable a merits review. Ausvest expressed its concern that the Responsible Authority may ignore the Guidelines.

Conversely, Ausvest noted that even though the Guidelines can be considered under s60 of the Act, whether or not they are a reference or incorporated document, the Guidelines cannot and should not constrain the decision-maker. Ausvest submitted that it was concerning that what was being proposed was a contributions scheme which intended to preclude any review of its application to a particular property.

Ms Brennan submitted that the entering into a s173 agreement was voluntary. Ms Brennan's contention that the exercise of the discretion of the responsible authority in relation to the category of public benefit falls outside the usual legislative merits review processes, renders obsolete the argument of a s173 agreement being voluntarily entered into by the proponent.

Extent and nature of public benefits and desirability of Cash In Lieu

Several submissions included that the term "*public benefit*" was not defined and the notion was vague. Professor Buxton submitted that one of the issues with the FAU Scheme was the reliance on developer applications to determine the location of public benefits such as social housing, rather than locating such benefits in appropriate locations.

The Panel received a number of submissions that the scope of public benefit categories should be expanded. Ms Brennan advised that the public benefits needed to be within the scope of benefits contemplated within the Act, including any additional public benefits. Ms Brennan went onto explain that the public benefits set out in Guidelines aligned with the various objects of the Act and served a clear planning purpose.

Some submissions suggested that the FAU Scheme should allow for a cash in lieu (CIL) arrangement for the provision of benefits, similar in concept to a 'works-in-kind' provision under a DCP or the GAIC. Some submitters, such as HIA, stated that CIL was not precluded by its drafting and was concerned that this was a significant option not available to proponents. PCA suggested that if there was doubt as to the legality of CIL under the FAU Scheme that legislative amendments be made to alleviate such doubts. Phillip Nominees (Submitter 43) noted that the CIL option is not canvassed in the Amendment.

Ausvest queried the nexus of any cash in lieu (CIL) payments, but noted that on the face of it, s62(5)(b) of the Act did not appear to prevent CIL as an option save for it has not been exhibited as part of the Amendment.

Similarly, City of Melbourne strongly submitted that CIL was possible under the FAU Scheme as it is lawful due to the application of s62(1)(a) of the Act. Further, to maximise the benefits of the FAU Scheme, the pooling of funds option should be adopted and implemented, with any doubts being remedied by legislative amendment.

City of Melbourne stated that no additional public benefit categories were required, however supported a review and identified that this could occur through its *Land Use and Infrastructure Review*.

Ms Brennan submitted Ms Day's inter-city research for the Panel's consideration. In that research, Ms Day highlighted additional public benefit categories that were in place in the other jurisdictions. Additional public categories Ms Day identified included public realm – major public transit connections; heritage conservation; community infrastructure such as public school improvement fund, performing arts, library, sports and recreation, elderly person services; ESD; strategic land use and transfer of FAR to an approved "*receiving site*".

Ms Day stated that the approved public benefits should be located within or proximate to planned development site, as increased site density generates additional precinct based needs for existing and incoming residents, workers and visitors.

The National Trust (Submitter 73) made a number of suggestions as to additional public benefits that could focus on heritage conservation and regeneration in the Central City, and raised the issue of using Transferrable Development Rights (TDR). Portland House (Submitter 19) made submissions that a building on an adjoining site that cannot be developed above street wall height due to a legal restriction will benefit the site it adjoins. These air rights for such buildings should be tradable and transferrable accordingly.

It was suggested that this additional public benefit might be achieved through moneys being paid into the existing Melbourne Heritage Restoration Fund to provide for restoration of heritage places that may not otherwise occur. As an additional public benefit category, this pooling of funding can extend into different precinct bases throughout the Central City.

The National Trust provided information in relation to the Heritage Floorspace Scheme (HFS) in Sydney which allows owners of heritage buildings to sell any unused development rights for their site. The focus of this scheme has been on private buildings. National Trust submitted that when a heritage item owner completes conservation works, the City of Sydney awards HFS, which is then sold to a site in the city that requires such HFS to form part of an approved development application. In providing for this transfer, the money raised "*offsets*" the cost of conserving heritage items. AMP Capital (Submitter 56) discussed the application of this for its site in Sydney and its possible adaptability in Victoria. The National Trust briefly discussed a similar mechanism the City of Perth has for heritage items, known as a transfer of plot ratio, which may be more readily adaptable in Victoria.

Mr Brook in his evidence for Capital Eight, identified additional public benefit categories from his proposed development that could be incorporated into the FAU Scheme. These additional public benefit categories are crisis accommodation, linking in solar panels into façade, retirement living and aged care facilities linking into on-site medical centre within the development.

The Australian Institute of Architects (AIA) (Submitter 74) made submissions in relation to the adoption and expansion of the OVGA's Design Review Panel (DRP) process by way of strengthening the design excellence public benefit category. The AIA noted that a lot of projects are already referred through this process and that the process can be expanded upon to further support the design excellence public benefit category. The AIA noted that there is no weight on design excellence in the Amendment and that design should be already integrated into the planning permit. To this end, it should not be a public benefit category. The AIA referred to the DRP that was undertaken for Public Private Partnerships (PPPs) such as the Royal Children's Hospital and Bendigo Hospital that could be incorporated in supporting this public benefit category.

The AIA supported the introduction of the controls and sought to have the referral to a DRP as a mandatory requirement for developments exceeding a FAR of 18:1, as it will force good design and urban design outcomes. The AIA made the comment that architects are not developers and so 'don't care' about a FAR of 18:1 as architects are not designing for a personal benefit. The AIA stressed the need for better design outcomes for the livability of the city. The AIA suggested various ways in which the DRP process could provide establish a wide range of design principles, utilising the input of industry recognised and awarded architects. The AIA was concerned that the expertise of the assessor was not reflected in the particular public benefit category, so that the outcome of the design competition becomes the primary focus rather than the result.

The AIA submitted that good design should be integrated into the planning permit process, and that this can be achieved through mandatory requirements or some form of incentive that will achieve excellence of design, possibly by allowing increased yield.

The AIA advocated for the mandatory engagement of an independent architectural company for all projects with a FAR exceeding 18:1 as another means to achieve good design outcomes. The use of architectural competitions was suggested as a means, although not guaranteed, of getting better design.

Ms Brennan noted that AIA agreed with the Amendment as a "*mechanism to ensure that development outcomes and public realm amenity impacts are effectively managed into the future*". Ms Brennan highlighted the role the OVGA plays in providing expert advice on urban design quality of projects and expressed his preference for the DRP role option through the OVGA to continue.

The AIA suggested consideration of a precinct based approach of public benefit categories, examining and proposing solutions relating to heritage, sustainability and a broad range of other precinct issues. A precinct based solution would allow the subject site to be appropriately designed in its precinct and allow consideration of public benefits offsite but with relevance to the immediate precinct of the subject site. The AIA suggested that perhaps a precinct masterplan could be considered with the FAU Scheme categories a starting point. The AIA made suggestions as to additional public benefit categories such as health and educational benefits and infrastructure that provides benefits across a number of aged groups. Such a focus of aged care, child care, kindergartens (and schools) could be provided in a precinct response.

PCA supported additional public benefit categories such as retirement villages, hotels, medical services, education facilities and services, indicating there was a need to provide a greater choice in community benefits. AILA strongly supported the promotion of social housing, stating that such housing should be mandated in order to provide a mixed use development.

AILA (Submitter 37) made written submissions as to additional work the FAU Scheme could achieve in requiring further public open space in addition to, and distinct from, the public open space contribution currently provided for in Clause 52.01 of the Planning Scheme. In particular, AILA noted that the 1964 plot ratio controls that introduced plazas and passageways for additional floor space are now being in-filled. AILA gave 80 Collins Street and 447 Collins Street as examples of this in-fill and loss of public space. AILA made submissions seeking clarification as to what precisely constitutes publicly accessible enclosed areas within a proposed building – whether these are foyers and lobbies or something more innovative.

In relation to affordable housing public benefit category, UDIA submitted that this issue goes beyond the FAU Scheme and should be addressed holistically.

The City of Melbourne advised the Panel that it is undertaking an integrated *Land Use and Infrastructure Review* with the aim to complete a planning scheme amendment with a particular focus on urban renewal areas and community infrastructure requirements in those areas.

The status of the Guidelines

The status of the Guidelines was examined at the Hearing, in particular, what, if any, is their statutory hook to the Planning Scheme and Act.

The Panel received varying submissions as to whether the Guidelines should be incorporated into the Planning Scheme or not. Phillip Nominees submitted that the proposed Guidelines go beyond the usual guidelines expected to assist in implementing the provisions of the Planning Scheme. Phillip Nominees recommended that the Guidelines be brought into the planning system through an appropriate statutory framework, with all the necessary statutory protections. Phillip Nominees queried the weight the Guidelines should be given if the Guidelines are not a reference or incorporated document. PCA did not think the Guidelines should be incorporated, whereas PIA disagreed with that proposition, submitting that the Guidelines should be an incorporated document.

Ms Brennan submitted that the Guidelines should not be given the status of either a reference or incorporated document. Ms Brennan contended that the Guidelines have sufficient status, and therefore a statutory hook, through the Minister adopting and considering them under s60(1A)(g) of the Act. This means that even though the Guidelines sit outside the planning scheme, they must still be considered when deciding on an application due to the operation of s60(1A)(g) of the Act. As the proposed policy makes sufficient reference to the Guidelines, any relevant planning permit applications will be expressly invited to ensure consistency of any decision with the Guidelines.

The Panel has been mindful of Ms Brennan's caution about it not being charged with responsibility for determining the validity of the FAU Scheme. The Panel has addressed validity issues only to the extent necessary to determine the feasibility of the FAU Scheme.

In this respect the Panel records that it has reviewed the advice from Mr Morris on validity but concluded that it went beyond what was necessary for consideration of this issue of the legal basis for and feasibility of the FAR/FAU Scheme.

(ii) Discussion

What type of contributions scheme is the FAU?

The FAU Scheme is clearly not a GAIC because the City of Melbourne is not one of the municipalities where this charge is levied. The Panel formed the view that an ICP is not applicable as the ICP legislation as it has been applied only applies to growth areas and designated 'strategic development areas.'

The FAU Scheme has many of the same features of a DCP, including the Guidelines to set out the implementation of the mechanism. The Panel sees the FAU Scheme having some of the characteristics of a DCP in that it applies a standard contribution rate (based on the Gross Realisation Value) for any exceedance above the FAR.

However, it is not a DCP however, because the items to be paid for or contributed have not been systematically identified, the contributions have not been costed and the cost is not shared across an area in a standard way. The Panel notes there is no obligation on the Responsible Authority to back up on any shortfall. Additionally, the developer can choose which item of contribution they can make to the required value, subject to agreement with the Responsible Authority.

On the matter of CIL, the Panel is of the view that s62(5)(b) of the Act clearly provides for the capacity for CIL to be considered as part of the FAU Scheme. The Panel notes Ms Brennan's

submission that it does not seek to authorise CIL as part of the Amendment, noting that it would not do so in the absence of a statutory power. This submission supports the Panel's view that but for the CIL authorisation, the FAU Scheme could be considered to be similar to a DCP but without a specific statutory power.

It was contended for the Minister that the public benefit contributions would be in the nature of a licence fee in return for the capacity to develop beyond the FAR of 18:1 (rather than a development contribution).

The Panel disagrees with this interpretation. The nature of a licence fee is a temporary one, one that is generally resubscribed to on an annual basis subject to ongoing meeting of set requirements and one that cannot expect to be granted in perpetuity. A licence is not generally an exclusive right or expectation. Rather, it is something where a person is given temporary access to an entitlement with the residual exclusivity residing with the person agreeing to provide the licence in exchange for a fee.

The Panel notes there are two ways in which development contributions can be secured through a s173 agreement. The first is as part of an approved DCP where the provision of a contribution is secured. The other way is a development contribution through a s173 agreement where the individual developer provides particular infrastructure contributions which directly arise from the development as a condition of development approval.

The Panel was concerned as to whether the imposition of a s173 agreement arising out of the FAU Scheme is in fact voluntary. Phillip Nominees queried this and noted that if the proponent is not able to challenge the exercise of the discretion of the public benefit category, entering into a s173 agreement would not be voluntary where the proponent disagrees with the '*approved*' public benefit.

The Panel concluded that the FAU scheme was less than clear as to what type of contributions scheme it was and it highlights the many aspects of it that are not workable.

Intention to make the FAU scheme non-reviewable

The Panel received several submissions setting out concerns as to the absolute nature in which the Responsible Authority will determine the category of public benefit the proponent will provide seemingly without any consent or input of the proponent. The City of Melbourne described this exercise of discretion as being an absolute exercise, which cannot be reviewed under the usual pathways at VCAT. This meant that rights to review decisions such as refusal to issue a planning permit, lapse of time to make a decision with respect to a planning permit and conditions being placed on a planning permit could not be exercised as a result of the interpretation of a schedule to the CCZ.

Both the City of Melbourne and Ms Brennan indicated that the agreement of the category of a public benefit is a condition precedent, which results in an automatic rejection of a planning permit application, which does not activate review rights.

The Panel does not agree with the interpretation that compliance amounts to a condition precedent. The Panel does not agree it can override the usual VCAT merits review process. The Panel is of the view that the reliance of '*condition precedent'* by both Ms Brennan and the City of Melbourne to support the proposition that a proponent cannot seek a merits review of the exercise of discretion in relation to public benefits is misguided.

It is the Panel's view that the notion of the FAU scheme, including the Guidelines, is a condition precedent, and therefore not reviewable, is contradictory to the submission that the Minister can adopt and is required to consider the Guidelines for a planning permit application under s60(1A)(g) of the Act.

Ms Brennan sought to rely on s62(2)(c) of the Act to argue that there is a general statutory power to impose a condition requiring a proponent entering into a s173 agreement in a permit. The Panel disagrees with this interpretation of the subsection and does not share the view that the power is open ended. Rather, the Panel is of the view that this subsection is limited to matters that are otherwise valid and authorised.

The Panel disagrees with Ms Brennan's submissions that what is proposed through the schedule of the CCZ and Clause 22.03 is voluntary. The Panel cannot see how a proponent can enter into a s173 agreement with respect to a public benefit that it does not agree to and on the face of it, cannot seek review of that decision in VCAT. This is particularly in light of the possible application of s184 of the Act.

The Panel remains uncertain that if the FAU Scheme was to be implemented that appeals could not still occur because of the 'satisfaction of' issue. It notes that the approach of trying to make this non-reviewable is trying to use the DCP approach whereby you must require and pay for the DCP once it is in place.

Simply put, if the proponent does not have a choice (or a voice) in choosing the category of public benefit, then the Panel cannot see how this can be characterised as a voluntary entry into a legally binding agreement. The Panel is of the view that either the exercise of discretion is reviewable (and therefore voluntary) or not (and is therefore a mandatory requirement whereby a DCP is recommended). On that basis, the Panel is of the view that any challenges on this point either in VCAT or at the Supreme Court may not withstand legal scrutiny.

Clause 19 of the Melbourne Planning Scheme sets out one of the objectives in relation to infrastructure in which "*planning authorities are to consider the use of development contributions (levies) in the funding of infrastructure*".

The Act has an established mechanism in place to include DCPs in planning schemes for the purpose of levying contributions for infrastructure. The Planning Scheme cannot authorise any condition or specification that extends beyond what is provided for under the Act.

The Panel notes the principles in interpreting sub-ordinate legislation under the *Interpretation of Legislation Act* 1984, in particular Section 22. Clause 22.03 and Schedules 1, 2 and 3 of the CCZ form part of the Planning Scheme and therefore cannot exceed the power of that Scheme. The Schedules of the CCZ are a further sub-ordinate instrument under the Planning Scheme and cannot exceed the planning controls or requirements set out in the zone.

It is unclear to the Panel whether the FAU Scheme is reaching beyond its authorising provisions and whether legislative amendment can address this.

Extent and nature of public benefits and desirability of CIL

The Panel notes there were a number of questions raised on public benefit categories and there was a lot of uncertainty from submitters. With respect to the practical application of public benefits, the Panel is of the view that further work is needed.

The Panel considers that the City of Melbourne's proposed *Land Use and infrastructure plan* could provide an appropriate strategic basis for various public benefit requirements.

It was unclear to the Panel how the commercial use category of public benefit was to operate. Mr Barlow noted that '*commercial*' was not a term recognised in the planning system. Of concern was the temporary nature of 10 years of leasing as opposed to a development approval for additional FAR for the life of the building. A number of submitters to the Panel explained that obtaining a commercial tenant requires long-term approach as lead times were substantial.

One of the causes for confusion or clarification related to commercial use category, particularly for a period of 10 years. There were concerns as to whether the lack of permanence being provided at the expense of a building being constructed.

The Panel is aware that different legislative and/or policy requirements may hinder a direct translation in Victoria of TDR for heritage buildings in the Central City, but the Panel is of the view that this should be explored. The Panel recognises Ms Brennan's suggestion that the Amendment may create an incentive to incorporate heritage buildings into development sites, which can in turn provide a potential opportunity to enhance their protection.

The Panel believes there is merit at considering what statutory or policy impediments are in place that could be removed so as to enable pooling of funds for heritage places within the Central City or whether the 'Bushbroker' system for native vegetation offsets can be expanded to support such trading of heritage floor space. There are issues that need to be further explored such as whether TDR or a similar concept can exist within Victoria. The Panel notes that such a system has not been drafted in the Amendment and requiring additional public benefit categories such as a heritage floor space type scheme or CIL for heritage places could amount to a transformation of the Amendment.

The status of the Guidelines

The Panel considers that the Guidelines are the next step in the process once a DCP has been adopted. The Panel agrees with the Ms Brennan's comment that the Guidelines are intended to guide relevant parties as to the operation of the FAU Scheme however the Panel is of the view that the Guidelines are just that and cannot take the place of a DCP in solely determining the value of any public benefit. It is a secondary tool to guide, rather than being the primary and only valuation tool.

(iii) Conclusions

The Panel concludes it cannot recommend to the Minister the adoption of the FAU Scheme. This is because in order to remedy a number of perceived issues, "*gaps*" or uncertainties, requires a number of legislative amendments. It appears to the Panel that whilst the principle of the FAU Scheme, particularly the notion of the contribution of public benefits is indeed a worthy one, its inclusion in this Amendment is premature and further work needs to be undertaken. The Panel was not convinced that the uplift should only be triggered after substantial FAR of 18:1 was achieved.

As the Panel has recommended abandoning the part of the Amendment proposing the introduction of the FAU Scheme, the Panel recognises that the implementation of this recommendation effectively 'caps' the FAR at 18:1 in the GDA. However, the Panel is comfortable with this outcome, as based on submissions and evidence presented to it, the FAR of 18:1 is still substantially higher than key comparator cities.

It is satisfied that in the absence of the FAU Scheme, there still remains sufficient strategic justification for proceeding with the remaining parts of the Amendment relating to built form controls. The Panel finds that these built form controls will assist in discontinuing the poor public realm outcomes that have arisen from recent developments and encourage a higher standard in the future.

Although it has concerns as to the operation of the FAU Scheme to implement the proposed public benefit categories, the Panel is supportive of the principle of public benefit categories and encourages the City of Melbourne to consider the following categories of public benefits as part of its *Land Use and Infrastructure Review*, including the capacity in which developers can provide CIL such as:

- Additional heritage conservation/restoration with moneys going into Melbourne Heritage Restoration Fund
- Precinct footpath capacity and widening
- Artists/creative workers shared spaces or studios – low or minimal rent
- Community facilities infrastructure such as libraries, sports and recreation centres
- Vertical schools
- Early childhood centres such as kindergartens, child care centres and maternal child health nurse
- Medical facilities associated with aged care and retirement living spaces within a mixed use context
- Transferrable Development Rights (TDR)
- Commercial spaces with a general purpose occupancy for use for initiatives such as in business incubators or shared spaces
- ESD innovations, noting Mr Brooks' inclusion and treatment of solar panels in the façade of his design for the proposed development in Southbank
- Small scale manufacturing spaces.

The Panel concludes the following, without making a recommendation as to whether the FAU Scheme is valid or lawful:

- The FAU Scheme as proposed is in some ways similar to a DCP, but without meeting the requisite statutory requirements. The Panel was unable to identify any other existing statutory basis for the FAU scheme as proposed.
- The intention to exclude reviews of the development contribution for a particular projects does not seem likely to be achievable.
- The requirement to enter into a s173 does not appear to be a voluntary requirement when coupled with the proposition that the exercise of discretion as to the agreed public benefits category cannot be reviewed under the usual statutory processes.
- The FAU Scheme fails to clearly apply the principles of equality, consistency, accountability and transparency to the securing of benefits and its implementation, including the Guidelines, is vague and may be open to misinterpretation.
- The strategic justification for the scope of public benefits is absent.
- There are too many opportunities for inconsistent outcomes in the '*negotiation*' of agreements for public benefits.
- The absence of CIL makes the scheme less workable.
- The FAU Scheme should be abandoned.

6.4 Recommendations

2. **Abandon the exhibited Floor Area Uplift Scheme and look to implement a workable uplift mechanism or contributions scheme as a matter of urgency.**

3. **As a consequence of abandonment of the Floor Area Uplift Scheme, all references to it need to be deleted from the Amendment, including in the Capital City Zone schedules (or Design and Development Overlay Schedule 10 if the Floor Area Ratio provisions are relocated there).**

4. **Delete the policy at Clause 22.03 which, despite its heading, deals exclusively with the delivery of public benefits under the Floor Area Uplift Scheme.**

5. **Apply the capped Floor Area Ratio of 18:1 in conjunction with the built form controls of modified versions of the relevant Design and Development Overlay Schedules.**

6.5 Further work

b) Recommend that Council consider broader categories of public benefits as part of its *Land Use and Infrastructure Review.*

7 Form of controls

7.1 The controls as proposed to the Panel

At the outset of the Hearing, Ms Brennan SC represented the Minister and presented a revised version of the exhibited controls that incorporated changes responding to some matters raised in public submissions.

Towards the conclusion of the Hearing, a second revised version of the controls was presented, incorporating other changes in response to matters raised at the Hearing. This version of the proposed Amendment was later the subject of a drafting 'workshop' at the end of the Hearing during which a number of parties suggested further changes on a without prejudice basis.

In discussing the form of the controls, unless otherwise specified, this report makes reference to the final draft presented on behalf of the Minister, dated August 2016 (Document 165).

The revisions which were made to the controls after exhibition for the most part picked up on omissions, errors and inconsistencies. There were some changes in response to submissions and witness recommendations, and others in response to issues raised by the Panel. The changes were generally not substantial. The changes did not transform the Amendment. Avoiding transformation of the Amendment by changes responding to submissions has been a concern of the Panel.

As with the exhibited version, the final version of the Amendment (Document 165) provided by the Minister essentially would make three main[24] groups of changes to the Planning Scheme ordinance: policy changes, changes to the zone provisions and changes to development overlays. There are limited mapping changes proposed. It is also proposed to make available a set of guidelines relating to the calculation of FAU and public benefits. The FAR, FAU, and the guidelines and their relationship to the Planning Scheme, are discussed in the Chapter 6 and other controls in this chapter.

The structure of the controls in the final version is set out below.

7.1.1 Changes to policy provisions at Clause 22

The Amendment proposes to revise Clauses 22.01 and 22.02 and introduce a new Clause 22.03.

(i) Clause 22.01 Urban Design within the Capital City Zone

Changes to this existing clause include:

- restricting the policy application to Schedules 1-3 of the CCZ (Schedules 1 and 2 apply in the Hoddle Grid and Schedule 3 in Southbank)
- restatement of the policy basis to recognise that built form parameters make a contribution to the liveability and economic prosperity of the Central City

[24] There are other changes to mapping and deletion of other existing provisions not relevant to the assessment of the key aspects of the Amendment and submissions.

- restatement of policy objectives for the Central City with additional objectives for Southbank
- introduction of eight policy sections relating to aspects of building design and public spaces
- adding the CCBFR Synthesis Report, DELWP, April 2016 as a new reference document.

(ii) Clause 22.02 Sunlight to Public Places

The changes to this clause:

- augment the current policy basis to recognise that not all public spaces have the same sunlight access and seek to improve guidance of the assessment of sunlight impacts
- list seven key public spaces where additional overshadowing is precluded and 18 others where it is discouraged
- introduce a general policy discouraging unreasonable overshadowing of public spaces
- introduce guidelines for decision making
- add the CCBFR Synthesis Report, DELWP, April 2016 and the CCBFR Overshadowing, Technical Report, DELWP, April 2016 as new reference documents.

(iii) Clause 22.03 Floor Area Ratio and Delivery of Public Benefits

The policy of this new clause applies to the land in the CCZ Schedules 1-3 which is in DDO10 only. This includes land in the Hoddle Grid and Southbank nominated as the General Development Area. The policy includes:

- policy objectives relating to ensuring that public benefit is delivered and ongoing when floor area uplift is sought
- intents that the public benefit is agreed by the responsible authority and the receiving agency
- policy implementation statements relating to appropriate calculation of benefits and delivery, and consistency with policy and guidelines
- definitions of FAR and FAU
- adding the CCBFR Synthesis Report, DELWP, April 2016 as a new reference document.

7.1.2 Changes to zone provisions

The Amendment proposes to revise the provisions of Schedules 1 (Outside the Retail Core), 2 (Retail Core) and 3 (Southbank) of the CCZ.

The changes are in summary:

- removal of provisions relating to overshadowing (to be consolidated in the revised Clause 22.02) and wind effects (to be relocated to DDO schedules)
- introduction of the 18:1 FAR and uplift requirements for permits and amendments to permits in the parts of the CCZ1, CCZ2 and CCZ3 also affected by DDO10, implementing the new policy at Clause 22.03

- addition of acoustic assessment requirements and standards for residential developments in all three of the schedules (previously these applied only in Schedule 3)
- some additions to decision guidelines
- new transitional arrangements in similar form to those introduced at the time of Amendment C262. These provide exemptions from the provisions of the CCZ schedules as introduced by this Amendment, uses and developments undertaken in accordance with a building or planning permit, and those for which a permit had been applied, before the introduction of Amendment C270
- removal of some interim controls.

7.1.3 Changes to overlay provisions

The Amendment proposes to revise the provisions of DDO Schedules 2, 10, 40, 60 and 62.

(i) DDO2 – Part of Hoddle Grid

DDO2 applies to the Special Character Areas in the Hoddle Grid (except for Bourke Hill which is subject to DDO62). It is currently proposed to be headed 'Height Controls - Capital City Zone (Hoddle Grid)'.

The main changes to this clause are in summary:

- introduce new definitions relating to aspects of the built form controls
- list buildings and works that have no or only minor impact on the public realm for which no permit is required
- introduce extensive built form requirements including building heights, FARs, street wall heights and setbacks - all of which are discretionary with the exception of the 40 metre height control in the Area 1 and 'mandatory' qualitative statements of design objectives and built form outcomes
- introduce new mandatory wind and overshadowing standards and some qualitative shadowing standards
- introduce new application requirements (which may be waived in part or in whole) relating to urban context, wind analysis and 3D digital modelling
- include new decision guidelines relating to high quality architectural response; cumulative development impacts; solar access and wind effects
- reference to the CCBFR as earlier in the policies
- transitional arrangements as earlier in the CCZ.

(ii) DDO10 General Development Areas of Hoddle Grid and Southbank

This clause is proposed to be simply headed 'Built Form Controls'. It applies to all areas outside the Special Character Areas.

The main changes to be introduced are:

- some amendments and additions to existing definitions
- new extensive built form requirements including building heights, street wall heights and setbacks - all of which are discretionary with the exception of the 'mandatory' qualitative statements of design objectives and built form outcomes, and the 'modified requirements' of the table of controls relating to

street wall height, building setbacks above the street wall and side and rear boundaries and tower separation on a site
- new mandatory wind and overshadowing standards and some qualitative shadowing standards
- new application requirements (which may be waived in part or in whole) relating to 'equitable outcomes', wind analysis and 3D digital modelling
- new decision guidelines relating to high quality architectural response; street wall height; restrictions on development of adjoining land; and wind impacts
- reference to the CCBFR as earlier in the policies
- transitional arrangements as earlier in the CCZ.

(iii) DDO40 River Environs

This DDO applies to the immediate northern environs of the Yarra River.

The main changes proposed are:
- addition of a new design objective relating to sunlight
- new definitions for the purpose of the buildings and works controls
- listing buildings and works for which no permit is required
- new buildings and works requirements which are all discretionary except for the qualitative design objectives and built form outcomes
- mandatory and discretionary standards for wind and mandatory and qualified standards for sunlight
- new application requirements (which may be waived in part or in whole) relating to urban context, wind analysis and 3D digital modelling
- modified decision guidelines including in relation to high quality architectural response; cumulative effects; and wind impacts
- inclusion of the CCBFR Overshadowing, Technical Report, DELWP, April 2016 as a new reference document
- transitional arrangements as for the CCZ.

(iv) DDO60 Southbank

This schedule applies to two areas of Southbank: one along the Yarra River generally north of Normanby Road and Whiteman Street; and the other being the Arts/Sturt Precinct generally along St Kilda Road as far as Grant Street and along Sturt and Dodds Streets as far south as Dorcas Street. The two areas are designated as Special Character Areas in the CCBFR. The design objectives of the DDO, however, divide affected area into four precincts:
- Areas 1 and 7 (being the River Environs and the Arts Centre and immediate environs, southwards to Grant Street, respectively)
- Area 4 - Sturt Street (and Dodds Street)
- Area 5 – Dorcas Street (northern side)
- Area 6 – Southbank Village (generally between Wells and Dodds Street extending as far south as Coventry Street).

The DDO changes proposed include:

- addition of a general design guideline relating to pedestrian amenity, sunlight and wind; and new objectives for the Sturt Street precinct relating to midrise development and enhancement of culturally significant buildings
- new definitions for the purpose of the buildings and works controls
- listing buildings and works for which no permit is required
- introduction of new buildings and works requirements including FARs, street wall height and setbacks, which are all discretionary except for the four maximum building heights specified in Table 1 (applying in Dodds Street (Area 4B), the eastern end of Wells Street (Area 5B), Southbank Village (Area 6) and the Arts Centre precinct (Area 7)); and the qualitative design objectives and built form outcomes for all precincts
- mandatory and discretionary standards for wind and mandatory and qualified standards for sunlight
- new application requirements (which may be waived in part or in whole) relating to urban context, wind analysis and 3D digital modelling
- advertising sign controls and related decision guidelines for Area 4B
- additions to the general Decision guidelines including in relation to high quality architectural response; cumulative effects; and wind impacts
- inclusion of the CCBFR Overshadowing, Technical Report, DELWP, April 2016 as a new reference document
- transitional arrangements as for the CCZ.

(v) DDO62 Bourke Hill

These controls would apply to the small Special Character Area at the eastern end of the Hoddle Grid centred on Bourke Street between Lonsdale Street and Little Collins Street.

The changes proposed include:

- new definitions for the purpose of the buildings and works controls
- listing buildings and works for which no permit is required
- introduction of new buildings and works requirements including building heights and FARs which are all discretionary except for the qualitatively expressed design objectives and built form outcomes and the maximum building height specified in Table 1 for three parts of the DDO area – Bourke Street and Lit Bourke Street (15 metres); the Princess Theatre and Hotel Windsor (25 metres); and the rear of Hotel Windsor facing Meyers Place and the area west of the Princess Theatre (40 metres)
- new application requirements (which may be waived in part or in whole) relating to urban context, wind analysis and 3D digital modelling
- additions to the general decision guidelines including in relation to high quality architectural response; cumulative effects; and pedestrian impacts of wind and overshadowing
- inclusion of the CCBFR Overshadowing, Technical Report, DELWP, April 2016 as a new reference document
- transitional arrangements as for the CCZ.

7.1.4 Mapping changes

The Amendment proposes limited mapping changes to the Scheme:

- extending Area 1 of DDO2 to align with the boundary of CCZ2 (Retail Core) (replacing DDO10). This includes its extension to the properties along the western side of Elizabeth Street and to the Melbourne Central retail centre
- removal of DDO7 (former Fishmarket Site, Northbank)[25] and its replacement with DDO10.

7.2 Structure of controls

(i) The issue

The matter of the general structure of the controls received scant attention at the Hearing. It is necessary, however, to see that the proposed controls are consistently and clearly structured.

(ii) Submissions and evidence

Claredale Consolidated Pty Ltd (Claredale Consolidated) (Submitter 21) referred directly to the structure of the controls. The submitter said '*Development parameters should not be split between a Schedule to the Capital City Zone and a Design and Development Overlay*' and all development controls should be in the applicable DDO.

(iii) Discussion

The Panel considers that the general approach of providing a particular policy basis and implementing requirements for the various built form issues is appropriate, as is the relocation of sunlight controls into the DDOs. Subject to some complicating precinct fragmentation of the DDO areas for Southbank (DDO60) and Bourke Hill (DDO62), the approach taken to the structuring of the zones and overlays is generally consistent across all schedules, which assists with clarity.

The Panel's only reservation in relation to structure is the inclusion of the General Development Area FAR provisions in the CCZ rather than directly in DDO10 as referred to in Claredale Consolidated's submission.

The FAR provisions in the General Development Area were said by the Planning Authority to have a dual purpose: they act as a trigger for the provision of public benefits if FAU is pursued are a density control which in turn contributes to built form outcomes.

The Minister's response to submissions (appended to Document 1) included that it was considered appropriate to include the FAR and FAU mechanism in the zone schedules "*as it relates to uses and buildings and works which may be delivered*."

The Panel considers that it would be more consistent and transparent to include the General Development Area FAR provisions directly in DDO10. This approach is particularly recommended if the FAU is to be abandoned, at least for the time being, leaving the FAR with a single purpose – relating to built form management. It is noted that the FAR (referred

[25] DDO7 is also removed from the ordinance. This matter is not further discussed.

to as a 'modified requirement') for the Special Character Areas is included in the built form tables for the DDOs.

The interaction of subdivision controls with the FAR provisions is discussed in Section 7.8 below. It is noted that no subdivision control is scheduled into the DDOs but subdivision controls apply in the CCZ. The Panel does not consider that relocating the FAR provisions to DDO10 requires changes beyond those recommended in Chapter 7.

7.3 General approach to site-specific requests

(i) The issue

During the course of the Hearing, various submitters requested that site-specific exemptions should be made to provisions of the Amendment to allow a variation in controls which would otherwise apply to their property.

The question which arises is whether such site-specific exemptions should be introduced into the Amendment where the case to vary the controls for a particular property has been well argued.

(ii) Evidence and submissions

The changes which were recommended by the Minister in response to written submissions and presentations at the Hearing avoided making site-specific exemptions for submitters' properties of this kind even where there may have been strategic justification for modifying a provision. Ms Brennan's submission in reply for the Minister (Document 177), in what was referred to by Mr Peake for Bourke Hill Pty Ltd as a 'pre-emptive strike', included that the Minister did not wish to see site-specific controls being introduced as part of what is a precinct-wide Amendment. Mr Sheppard in evidence for the Minister in relation to 310 Queen Street indicated that he did not support site-specific controls throughout the city. A small number of modifications were made by the Minister in response to individual site submissions where it was appropriate that they apply more generally throughout the Amendment area.

(iii) Discussion

The Panel agrees with this approach. It is considered to be inappropriate to pepper area-wide zone and overlay provisions in a scheme with numerous site-specific exemptions.

Instead the Panel like the Minister has given consideration to whether the site-specific submission raised a general issue applicable throughout the area of the control. It has been necessary to fully understand the implications for other sites of adopting a new general provision. If the full implications were clear, a new general qualification to the provision which was strategically justified has been considered.

The Panel considers that in other circumstances where only a site-specific variation is appropriate for the submitter's property, this could be instead dealt with by introduction of a Clause 52.03 site-specific exemption from aspects of the controls. This might be processed as a combined amendment and permit under s96A of the Act.

(iv) Conclusion

The Panel concludes that it is inappropriate to introduce site-specific exemptions from the proposed controls. Where an issue has general applicability it is appropriate to consider its inclusion. Particular issues applying to a single site may justify a site-specific provision in Clause 52.03.

7.4 Mandatory controls over General Development Area

(i) The issue

The Amendment as exhibited includes a mix of mandatory and discretionary built form provisions. Most mandatory requirements are proposed in the Special Character Areas where they had been in place prior to the introduction of Amendment C262. They include mandatory height controls in some areas. In the General Development Area under DDO10, setbacks, street wall height and tower separation controls are discretionary or preferred, but are backed by mandatory limits.

The issue is whether the Amendment should incorporate any mandatory provisions especially in the General Development Area.

(ii) Submissions and evidence

A number of submitters and witnesses addressed the issue of whether the proposed built form controls should be mandatory or discretionary.

Mr Townshend QC for the University of Melbourne (Submitter 42) and a group of other landowners in the Sturt Street precinct of Southbank (DDO60 Area A4A) opposed the introduction of mandatory controls. Mr Townshend strongly argued against departing from discretionary controls as supported by the planning system based on the Victoria Planning Provisions (VPP). He said that despite assertions to the contrary on behalf of the Minister, the planning system based on discretionary controls was 'not broken' and 'does not require repair'.

Mr Peake for Bourke Hill Pty Ltd (Submitter 59) spoke against mandatory controls referring to the comments in the VPP Advisory Committee Report of 1997 about the intention to widen discretion and make decisions based on policy and strategic objectives.

Portland House Pty Ltd (Submitter 19), owner of 8 Collins Street, opposed mandatory controls arguing that they prevent the opportunity for architectural expression and site responsive design. It was said that mandatory controls precluded cooperative efforts between the owners of abutting land.

RJ International (Submitter 30) for the site owner at 28 Clarendon Street welcomed the re-introduction of discretionary controls for the Tea House. TBT Victoria Pty Ltd (Submitter 33) opposed all mandatory controls in the Bourke Hill area.

Capital Eight Pty Ltd (Capital Eight) (Submitter 38) included commentary on this matter as follows:

Loss of Discretion:

The intention of the Amendment's proposed DDO10 to facilitate high quality development with adequate tower separation is supported. However, the method in which this is to be implemented is not. The exhibited Amendment's proposed height and setback guidance is overtly prescriptive, with the proposed distinction between towers under and above 80m (and consequent 'variations' for each) being a well-intended but unsatisfactory attempt at recognising the many instances where site-specific context warrants discretion in the application of built form guidance. Figure 3 below demonstrates the illogicality of the proposed built form guidance on sites such as the subject site, and the negative impact it would have on any future development opportunities across the site and other similar areas to the detriment of all stakeholders.

It is submitted that the Amendment should be refined to allow built form discretion for instances where the blanket application of the Amendment's proposed built form guidance is clearly unwarranted or is inappropriate.

Examples were included.

The Inner Melbourne Planning Alliance (Submitter 46) included that "*Southbank and all areas should have mandatory height controls." It was said that "discretionary height controls are never taken seriously".*

Mr Milner for Southbank Owners Corporation Network (Submitter 53) noted in his submission (Document 163) that "*one of the strongest messages of the recent past has been that discretion and enabling flexibility has not delivered the promised benefits of urban design and architectural excellence".* He said:

Setbacks, podiums, preferred heights, the quality of living environments, the separation of towers and a high quality public realm have individually or collectively been compromised, casting doubt on the wisdom of and weight placed upon the consistent application of discretionary controls.

He said that the planning system has been delivering outcomes that bear limited relationship to the preferred outcome causing community groups to lose faith in its efficacy. The Network sought through its submission to support mandatory controls.

While some submitters (such as Tierney Properties - Submitter 39) and witnesses (such as Capital Eight - Submitter 38) supported discretionary controls on the basis that they would enable more site responsive and creative designs by architects, other designers indicated that they could work within set built form controls. Indeed, the Australian Institute of Architects (AIA) (Submitter 74) supported defined mandatory limits on the basis that it would assist a designer in persuading a client not to overdevelop a site. Professor Rob Adams in his evidence for the Minister expressed the opinion under cross examination that mandatory controls would not stifle architectural creativity. Rather, he said, "*most creative architecture comes from the most constrained environments".*

Ms Sophie Jordan's planning evidence for the Minister included a careful analysis of the issue of mandatory controls and assessed it against Planning Practice Note 59: *The role of*

mandatory provisions in planning schemes (PPN59). She noted that PPN59 refers to discretionary controls being the norm but that mandatory controls may be appropriate in some situations including "*exceptional circumstances*". Her evidence included:

> *It could be argued that "exceptional circumstances" applies to the unique environment that is the central city, where development pressures and built form outcomes are significantly different to any other urban environment in Victoria.*
>
> *This is acknowledged in the purpose of the Capital City zone that applies to the area, and which stipulates land use planning must seek to:*
>
> > *… enhance the role of Melbourne's central city as the capital of Victoria and as an area of national and international importance.*
>
> *The application of controls in this environment can and should be considered differently to other metropolitan areas and this could include the use of mandatory provisions in order to achieve a desired outcome.*

In relation to the issue of the need for design flexibility, she noted:

> *The case study work undertaken for the CCBFR has shown severe impacts on the quality of the urban environment, with some buildings lacking the innovation or architectural excellence that one would expect maximum flexibility would be able to deliver.*

The Minister's submissions nevertheless included that there was a considerable degree of variability allowed for in street wall heights and side and rear setbacks within the mandatory limit. It was said that the standards had been put forward only after careful testing against development requirements by Ms Buckeridge. Importantly, they included the opportunity to modify floor plates to allow more site responsive building approaches. This included the ability to build to one boundary for developments up to 80 metres.

Ms Brennan's submissions noted that most panel reports have dealt with mandatory height provisions rather than other built form controls and the Amendment does not propose to change these except by reinstating discretionary controls where they pre-dated Amendment C262. She noted Mr Sheppard's support for the controls as 'sophisticated' and 'not blunt'.

Ms Brennan said that the mandatory controls are supported because:

- the CCZ is an area of state, national and international significance
- the controls are appropriate to the majority of proposals
- the mandatory controls provide for preferred outcomes
- the majority of proposals not in accordance with the controls would be clearly unacceptable
- the controls have been carefully formulated having regard to legitimate planning objectives
- the mandatory controls will reduce administrative costs.

She cited multiple recent examples of mandatory development controls being approved.

(iii) Discussion

This Amendment, as noted, includes a variety of mandatory and discretionary built form controls.

The Panel accepts that, as submitted on behalf of the Minister, long standing or recently introduced mandatory controls over height in the Special Character Areas are simply being retained in the Amendment, with some controls being restored to discretionary after temporarily being made mandatory under Amendment C262. In these circumstances it has not been necessary or appropriate to review those controls as part of the strategic background to this Amendment.

The issue of the mandatory v discretionary nature of the Amendment's requirements is therefore principally required to be addressed for the built form controls in the General Development Area.

It is convenient in addressing this issue to refer to the report of the panel considering Amendment C240 to the Melbourne Planning Scheme, albeit that area is in a Special Character Area in terms of the present Amendment. That amendment proposed the introduction of new heritage and built form controls in the Bourke Hill area of the CBD between Exhibition and Spring Streets. As in the case of the present Amendment, a central issue was whether building height and other controls should be mandatory or discretionary. The issue was the subject of numerous and lengthy submissions. Reference was made to the tests set out in PPN59 and the then recent report of the Advisory Committee concerning the proposed Hotel Windsor development.

The C240 panel said in its report of May 2015:

> *The arguments advanced against mandatory controls in the main related to the nature of the VPP system of planning – it being one designed to optimise the exercise of discretion with applications assessed against performance standards and policy, rather one where absolute controls which restrict discretion are normally applied. These submissions referred to PPN59 and the views of other panels and advisory committees on mandatory v discretionary controls. A second common argument advanced was that the mandatory height restriction would preclude a site responsive design and prevent developments responding to the site opportunities such as orientation or proximity to taller buildings …*
>
> *The Panel has considered the objecting arguments raised around the issues of the nature of the VPP, the content of PPN59 and the findings of other review bodies. Our response to those arguments are as follows:*
>
> ***Consideration of Advisory Committee findings***
>
> *Comments against the imposition of mandatory height controls in the Precinct by the Windsor Hotel Advisory Committee have been given little weight in the current context. The Committee's principal function was to consider a single permit proposal …*

> *The Panel considers that the present assessment of height controls for the Precinct is a 'first principles' strategic inquiry involving an analysis of the values of the area as a whole and whether the proposed controls support those values. It is essentially a different type of assessment from that required of the Committee.*
>
> *The Advisory Committee process also was more than five years ago now when development conditions in the Precinct or CBD may have been different. The Panel agrees with those submissions that have argued that the Precinct and nearby areas have been subject to recent development pressures or are now potentially subject to such pressures. These do not appear to have been an issue at the time the hotel proposal was first being considered. Recent development pressures are represented by the Palace Theatre proposals, another high-rise proposal just outside the Precinct in Spring Street. The recent sale of the Job Warehouse may also be seen as presenting an opportunity for redevelopment.*
>
> *Importantly also the Plan Melbourne initiative suggesting mandatory height controls in Bourke Hill was not in place when the Advisory Committee made its recommendations.*

With regard to PPN59, in particular with regard to mandatory controls the C240 Panel said:

> *The present Panel believes that this is indeed a case of 'exceptional circumstances'. The 'unique' characteristics of Bourke Hill are stressed throughout the strategic background documents. We have been persuaded that it is the only low scale precinct in the CBD where nineteenth century buildings from the pre-boom period make a major contribution to streetscape and heritage values. The submitters and witnesses, with few exceptions, agreed that the area has these special values. The view to Parliament House along the Bourke Street central spine to the Precinct is also an 'exceptional' feature of the area …*
>
> With regard to the criterion 'Are the controls justified?', the Panel believes that they are in as much as the Precinct is under some development pressures *… The present Panel considers, as was true of Doncaster Hill, the strategic and analytical design work including a detailed analysis of alternative urban forms has now been conducted for Bourke Hill in the form of the Precinct Review and is adequate to support the imposition of mandatory controls for some parts of the Precinct.*
>
> *The Panel also considers that the application of mandatory controls is an efficient response in parts of the Precinct as the design requirements for development can be clearly defined. A number of submissions supported mandatory controls on the ground of efficiency and certainty.*

Height controls and impacts on site responsive design were pertinent to this Amendment and covered by Amendment C240. That Panel acknowledged site responsive design is a desirable approach and one which underpins the VPP. The Panel considered that " *where an*

absolute height is strategically justified and is applied, that height limit is capable of being viewed as another site constraint to be taken into account by a designer."

The Panel concluded that a mix of mandatory and discretionary heights are appropriate in the Precinct.

These sections of the C240 panel report provide an adequate response to the issues again raised concerning mandatory v discretionary controls including exceptional circumstances, recent development pressures, excessive departures from preferred height controls, a sound strategic basis for the controls and the problem of constraints on site responsive design. The Panel generally adopts the views expressed in the C240 report.

It is noted, however, that the 'exceptional circumstances' justifying the application of mandatory height controls along Bourke Street were rather more particular than any nominated in the case of Amendment C270.

With respect to whether exceptional circumstances apply in the wider General Development Area that might justify mandatory controls, the Panel agrees with Ms Jordan's evidence that it is sufficient that the controls are being proposed for the unique Central City environment and the unique CCZ with its associated overlays. This was the view of Mr Sheppard who gave urban design evidence for the Minister at least in relation to street wall heights. He said that the controls were well supported strategically as referred to in the Practice Note, and the Panel agrees.

Perhaps most significantly, the Panel considers that the very recent 'perfect storm' described by Mr Mackintosh, of large numbers of overseas funded ultra-high[26] apartment blocks being developed with scant regard to the discretionary controls and with adverse effects upon the public realm and the liveability of the Central City, is also an 'exceptional circumstance' warranting the introduction of a number of mandatory controls. The Panel considers that such discretionary controls as have been in place have been treated cavalierly by applicants and have not proven to be effective tools for decision makers.

The Panel further notes that the certainty provided by mandatory controls was supported by some witnesses and submitters involved directly in the design of major developments, including presenters for the AIA.

(iv) Conclusions

The Panel concludes that the application of some mandatory controls as proposed is warranted.

[26] Or 'hyper-dense' developments at plot ratios of 52:1, 58:1 and 30:1 as referred to in Ms Hodyl's expert evidence for the Minister. See also Chapter 5.

7.5 Land holding divided by boundary between two controls

(i) The issue

The issue is whether some special provision should be added in response to the situation where a land holding would be divided by the boundary between two controls.

(ii) Evidence and submissions

Concerns were expressed in relation to this matter by Ausvest as owner of the car park and associated commercial developments at 392-406 Bourke Street and 24-32 Hardware Lane (Submitter 62). Here the land at the north-east corner of the street/lane intersection is included in the one zone (CCZ1) but two DDOs apply. The eastern part of the site is included in DDO10 where the FAR of 18:1 applies and the western part closest to Hardware Lane is included in DDO2 – Area 2. In this part of the site, a discretionary 15 metre height limit and discretionary FAR of 4:1 would apply.

The submissions for the owner were to the effect that the total site area (including the land in DDO2) should be able to be used in calculating the allowable floorspace for the site under the 18:1 FAR applying to the eastern portion of the land.

Ms Brennan for the Minister opposed the introduction of a provision of this kind particularly on the basis that it could introduce unforeseen outcomes in the case of other existing and future divided sites.

(iii) Discussion

The particulars of the Ausvest site are discussed in Chapter 10. The Ausvest submission is not supported.

On a more general level, the Panel advises that it considers that it is not appropriate to introduce an Amendment-wide provision allowing for the 18:1 FAR to be calculated across the whole of a site where two DDOs apply, rather than only for the part of the land within DDO10. It would not only be necessary to include such a provision in DDO10 or the CCZ schedules, but it would need to be paired with a provision in the overlays with a common boundary with DDO10 which would allow the area of the part of the site outside DDO10 to be counted towards the FAR floor area calculation for the land in DDO10. Additionally, there would need to be some arrangement to acknowledge that the FAR entitlement had been 'transferred' between the overlay areas and not re-used.

The Panel agrees with the Minister's submission that calculating the FAR across the whole site, including the part outside DDO10, would reward the site in a way which is inequitable compared with sites entirely within the General Development Area. Further, the Panel concurs with the Minister's view that allowing such a method of calculating the FAR may inappropriately encourage General Development Area sites on the border of a Special Character Area to consolidate land within the Special Character Area. The Panel considers that Ms Brennan is correct in asserting that it is impossible to predict which contiguous lots might in future be consolidated and subject to a common planning application. This could create additional cases of two DDOs applying to the one site.

Because of the difficulties of inserting such a provision on a general level and the unknown effects across the Amendment area now and in the future, the Panel does not support making special provision to allow the DDO10 FAR of 18:1 to be calculated against parts of sites not in DDO10.

(iv) Conclusion

The Panel concludes that no change should be made to the Amendment in response to this issue.

7.6 Transitional sites

(i) The issue

The issue here is whether a general change should be made to the Special Character Area controls that allows for the form of development at the boundary of a Character Area to transition to the form allowed by the adjoining General Development Area.

(ii) Evidence and submissions

Consideration of this issue arose from the submissions made by KAPS Corp Pty Ltd (Kaps Corp) (Submitter 51) in relation to the property at 310 Queen Street. It has frontage to the eastern side of Queen Street between Little Lonsdale Street and La Trobe Street on the corner of Guildford Lane. This is a 620 square metre site developed at present with a 2/3 level building. The property is included within the Special Character Area applying to Guildford Lane (DDO2 - Area A2).

The DDO2 controls for the site impose a recommended height control (and street wall height) of 15 metres and a 'modified requirement' of a discretionary 4:1 FAR. Other discretionary built form controls are:

- a setback above the street wall of 5 metres
- a setback of 5 metres from a side boundary for levels above 40 metres
- for side and rear boundaries, a minimum setback for levels above 20 metres of 5 metres from the centre of a laneway[27]
- for a rear boundary that is not a laneway, a minimum setback for levels above 20 metres of 5 metres.

DDO10 controls for adjoining land in Queen Street, in addition to a 18:1 FAR, include:

- a preferred street wall height of 20 metres; and mandatory maximum of 40 metres or 80 metres at a street corner where at least one street is a main[28] street
- a setback above the street wall of at least 5 metres
- preferred setbacks from side and rear boundaries and the centre of adjoining laneway, for levels above the street wall or 40 metres (whichever is lesser), of 5 metres or 6 percent of the total building height (whichever is the greater) except as below

[27] Defined as being less than 9 metres in width.
[28] Defined as wider than 20 metres.

- towers and additions up to 80 metres in height may be constructed up to one side or rear boundary (excluding a laneway) if an existing, approved or proposed building on an adjoining site is built to the boundary and if a minimum 5 metre setback is met to all other side and rear boundaries; and where a building on an adjoining site cannot by legal restriction benefitting the application site, be developed above the street wall, a tower may also be constructed to the boundary of that adjoining site
- for towers over 80 metres in height, the tower floor plate (determined from the preferred setbacks above the street wall) may be adjusted in terms of location and/or shape, but must not:
  - increase the size of the floor plate
  - be less than 5 metres from a side or rear boundary or from the centre of an adjoining laneway
  - be less than 5 metres from a street boundary
- within a site, towers above the street wall height or 40 metres (whichever is the lesser) should be separated by 6 percent of the combined total height of the adjacent towers but must not be less than 10 metres apart.

The two sets of controls, assuming the preferred controls in Guildford Lane are respected, would recommend appreciably different built form outcomes.

Mr O'Farrell on behalf of Kaps Corp argued that it was appropriate to recognise the site as being suitable for built form that would transition between the low intimate scale of Guildford Lane and its historic warehousing and more robust development in Queen Street. It was noted that, in Queen Street, the Republic Tower is situated to the north-east and the recently approved 148 metre tall development (48 levels) at the Celtic Club site on the south-eastern corner of La Trobe and Queen Streets. He suggested that the Amendment should be altered by introducing a new height limit for the site at 310 Queen Street of 48-50 metres or for Area A2 generally, and removing the discretionary FAR for 310 Queen Street.

He put to Mr Sheppard in cross examination the possibility of a provision referring to a transition to be allowed between the 15 metres in Guildford Lane and the main street. Mr Sheppard acknowledged the issue but was cautious about what the particular height should be adopted for the purpose of the transition. Mr Sheppard expressed the view in cross examination that it might be possible to make an exception to the DDO2 provisions for the immediate area for sites with a main street frontage such as 310 Queen Street. In answer to a Panel question, he further said that it would be reasonable to include the transition to the main street as a matter to be taken in account in DDO2 – Area A2.

In response to this submission, the final draft of the Amendment by the Minister included an additional mandatory built form outcome in Table 2 in relation to the preferred height and discretionary FAR for DDO2 – Area A2 – "*To provide a comfortable scale transition between the precinct and the broader area".*

(iii) Discussion

The Panel agrees that the Queen Street site has particular contextual difficulties affecting development outcomes: a small two-storey free-standing heritage building is located across

Guildford Lane to the south well set back from its street frontages, the site abuts the very tall potential development on the Celtic Club site, there is small low rise building to the east across a laneway and a permit for a 6-8 storey development at 28 Guildford Lane.

The Panel has earlier commented upon the undesirability of introducing site-specific exemptions to general precinct wide controls (Section 7.3).

The possibility of a more general provision relating to transitional sites or sites abutting widely varying built form, such as here, has also been considered. The Panel agrees that there is some appeal to the argument that the built form parameters should be able to be varied in such circumstances.

The Panel notes, however, that there are many instances where a Special Character Area has abuttal to a main street and numerous instances of adjoining disparate scales of development. The Panel considers that there has to be some concern about the unknown consequences of introducing a general provision dealing with these issues beyond its being a decision guideline. The Special Character Areas are not extensive compared to the General Development Area and make a particularly valuable contribution to Melbourne's liveability. In general, every endeavour should be made to avoid undermining the qualities of the Special Character Areas. Given the provisions in the character areas are in many cases discretionary, it is appropriate simply to add a decision guideline to address the issue.

The Panel would comment that it is unclear that the submitter's development aspirations will be met in this case even if the controls were to be modified as requested. The Panel reiterates that not all sites, because of their size, location or context, can be developed to an extent that may initially appear achievable.

(iv) Conclusion

The Panel concludes that, in the context that the Special Character Area controls are for the most part (certainly in Queen Street) discretionary, it is sufficient to address this transitional site issue by a decision guideline as proposed by the Minister in the final draft of the Amendment.

7.7 Inconsistency with other built form controls

(i) The issue

The issue of the relationship of the Amendment provisions and other existing or proposed controls in the Planning Scheme arose in submissions in relation to the Ausvest Holdings Pty Ltd (Ausvest) site in Lonsdale Street where specific built form controls already apply and additional DDO controls are proposed. An adjoining land holder also made submissions on this topic as her land is already partly subject to the same specific built form control as well as general DDO controls.

The site at 213-237 Lonsdale Street and 222-230 Little Bourke Street, owned by Ausvest (Submitter 64), is some 3493 square metres in area. It is developed and operated as the multi-level Golden Square Carpark. The site is included within a Development Plan Overlay Schedule 1 (DPO1). Albeit the overlay contains specific built form controls as well as use

requirements relating to the site, the site was proposed for inclusion in DDO10 in the exhibited Amendment.

Some of the adjoining land to the east, an L-shaped 598 square metre parcel at 203-207 Lonsdale Street and 209-211 Lonsdale Street owned by Submitter 80 (Elly Papasavas), is also partly included in DPO1 – though it seems incorrectly. The site currently accommodates attached three storey buildings built to street boundaries, and is used for a range of commercial purposes. The DPO1 portion of the site is proposed to be retained in DDO10 with the eastern portion remaining in DDO2 – Area 3.

All of the Ausvest land (with the exception of 217-231 Lonsdale Street) and the Papasavas land is included in the Heritage Overlay.

Overlapping specific and general built form controls was referred to again in relation to a third site. This was in the submission by the owner of the Melbourne Central mixed use centre (Submitter 85). While the focus of the submission was opposition to the northward extension to the DDO2 – Area 1, it became clear that the southern part of the land is subject to a DDO as well as a particular Scheme control (an Incorporated Document) in a similar way to the Ausvest land.

A general issue of overlapping site-specific built form controls and general DDO controls has therefore been raised across the Amendment area which warrants consideration.

The question is whether it is problematic or appropriate to have dual or multiple controls relating to built form applying to particular sites, where one set of controls is peculiar to the site.

Dual built form controls with very different built form objectives is another related issue requiring consideration in relation to the properties in DDO10 which are included in individual place Heritage Overlays. It arose indirectly from consideration of the Ausvest matter.

Some of the precinct Heritage Overlays in the Central City are and would be included in Special Character Area DDOs. In these generally lower rise DDOs, the design objectives and outcomes referring to built form character and heritage landmarks and the like would clearly play a major role in decision making. Many heritage precincts, however, fall outside those DDOs.

Moreover, the General Development Area, included in DDO10, is peppered with scores of individual place Heritage Overlays. There has to be some concern about the comfortable co-existence of the HOs and development controls imposing a discretionary FAR of 18:1.

It is to be noted that the DDO, DPO and HO are all grouped as Heritage and Built Form overlays under Clause 43 of the Planning Scheme.

(ii) Evidence and submissions

Golden Square carpark and surrounds

The Ausvest site was included in DDO10 under Amendment C262 and is proposed to be retained under that overlay as part of the Amendment. The total site is also included in DPO1. DPO1 has been in place since 1998.

DPO1 requires that a Development Plan must be prepared before a planning permit is granted; and the land must be used for a combination of "*one or more*" of a list of uses including public car parking. The DPO head clause excludes all third party input including under other controls of the Scheme. The schedule has particular requirements relating to vehicle access from Lonsdale Street. Most relevantly, the schedule imposes discretionary height limits to parts of the site. They are shown in the table below.

Area	Maximum Building Height	Extent of Height Control Area	Outcomes
Total site frontage to Little Bourke Street	15 metres	a depth of 10 metres from the alignment of Little Bourke Street extending the full frontage of Little Bourke Street	To ensure that any future development constructed to the street alignment of the Little Bourke Street frontage respects the character of the buildings along that frontage To enhance the pedestrian environment of Little Bourke Street
Total site frontage to Lonsdale Street	30 metres	a distance of 10 metres from the alignment of Lonsdale Street extending the full frontage of Lonsdale Street	To provide for architectural detail, excitement and interest along this podium base
Rear portion of the site known as 222-230 Little Bourke Street	24 metres	commencing at a distance of 10 metres from the Little Bourke Street frontage extending into the site for a distance of 29.80 metres.	To ensure that the design of new development does not adversely affect the amenity of Little Bourke Street
Central podium component of the whole site; but also to the rear eastern and western edges of the Lonsdale Street site	40 metres	Commencing 10 metres from the Lonsdale Street frontage for part of the 68.92 metre frontage to Lonsdale Street, (53.20 metres) inclusive of all land for a distance of 45.88 metres from the Lonsdale Street boundary in an area of 919.9 square metres as indicated by the hatched area	To provide for architectural detail, excitement and interest along these elevations

Eastern boundary fronting Lonsdale Street	60 metres	Setback 10 metres from the Lonsdale Street frontage and 11.85 metres from the eastern boundary of the site for a distance of 20.73 metres providing a total are of 245.7 square metres	To achieve a stepped transition in building bulk to the tower component.
Tower component of the Lonsdale Street site	90 metres	Setback a minimum of 10 metres from the Lonsdale Street frontage extending from 11.85 metres from the eastern boundary of the site to a distance of 10 metres from the western boundary indicated by the shaded area annotated "A" on the Building Envelope Plan.	To promote a high quality, multi-storey landmark built form which contributes to the revitalisation of Lonsdale Street To provide for architectural detail, excitement and interest at both skyline and pedestrian levels To facilitate city views into and out of the city

Table 2 Table 1 to Schedule 1 of the DPO

In summary, a tower with a discretionary height of 90 metres is permitted centrally to the site, the street wall to Lonsdale Street is a discretionary 30 metres (for a depth of 10 metres) and the street wall to Little Bourke Street is a discretionary 15 metres (for a depth of 10 metres). There is also a discretionary 40 metre height area of 10 metres depth along Tattersalls Lane, which abuts to the west and along the abuttal to the north-south section of Celestial Lane at the eastern boundary. The most easterly portion of the land behind the 30 metre street wall on Lonsdale Street has a 60 metre discretionary height control. This area partly abuts Celestial Lane and the Papasavas land.

A Development Plan was approved in March 1999 (Document 9) which shows these building envelopes.

The DDO10 provisions that would apply to the land include the 18:1 FAR; a preferred street wall height of 20 metres and a mandatory maximum of 40 metres; a mandatory setback of 5 metres above the street wall; discretionary setbacks from side and rear boundaries above the street wall or 40 metres whichever is the lesser of 5 metres or 6 percent of the total building height, whichever is the greater; and towers of less than 80 metres in height may be constructed up to one side or rear boundary (excluding a boundary with a laneway) where an existing or proposed building on the adjoining site is built to the boundary and a 5 metre setback is applied to all other boundaries; towers exceeding 80 metres in height may have

their floor plate adjusted but are to meet preferred boundary setbacks of 5 metres to boundaries or the middle of an abutting laneway.

The Papasavas site abuts the Ausvest land to the east and to its east abuts 201 Lonsdale Street, a narrow property which runs along the western side of Heffernan Lane (a Class 2 Lane). Like the Ausvest land, the Papasavas property has an abuttal to part of Celestial Lane in the Chinatown Precinct. The land is wholly within CCZ2, but is split, and proposed to be split, between DDO2 and DDO10. Ms Papasavas' land is also already partly included in DPO1. This is proposed to be retained under the exhibited Amendment.

The proposed controls would see the western part of the Papasavas land (209-211 Lonsdale Street) included in DDO10 with its FAR of 18:1 and no defined height limit. A preferred street wall height of 20 metres and a 40 metre maximum would apply. These controls contrast with the requirements in DPO1 as set out in the table above. The eastern part of the land (203-207 Lonsdale Street) would be included in DDO2 – Area 3 with a 20 metre discretionary height limit, and a 6:1 discretionary FAR. In DDO2, a discretionary street wall height of 20 metres would apply.

The written submission by Ausvest noted the presence of DPO1 and said that the owner had (unspecified) concerns about the mandatory nature of some of the proposed controls.

Mr Tweedie SC and Mr O'Farrell appeared for Ausvest at the Hearing. In response to the suggestion in Ms Hodyl's written evidence for the Minister that the DPO should be removed to avoid any inconsistency of built form provisions (and a DDO alone applied), Mr Tweedie indicated that his client opposed the removal of the DPO1, arguing that to do so would amount to a transformation of the Amendment - at least so far as this property was concerned. It was said that it would be unfair to do for his client and adjoining property owners given that this had not been proposed as part of the Amendment. He noted that Ms Brennan for the Minister had indicated that the Minister did not propose nor did he support the removal of the DPO.

Mr Tweedie argued that the DDO should not be applied. He said that it would be confusing and inappropriate to have a DPO and DDO in place and that the DPO was capable of delivering acceptable outcomes. In this respect, he referred to the design objectives of the DPO which he suggested were appropriate to the site. He said that the provisions of the two controls were significantly different and if an application was to be made which would meet the DDO requirements, it would not be 'generally in accordance' with the Development Plan already approved under the DPO, as is required by the Scheme.

The written submission (Submitter 80) from Ms Papasavas included:

- *Current planning controls governing built form over the three sites are varied and include mapping inconsistencies. These controls prescribe future built form that is out of step with the built form envisioned for the Lonsdale Street (Golden Square Carpark) Area adjacent to the west of the site.*
- *Proposed planning controls will not facilitate a well resolved built form response to the context by way of an appropriate transition between the lower scale China Town Precinct to the east and the large scale built form presenting along Swanston Street to the west, as policy encourages.*

- *We suggest changes to the controls proposed by Amendment C270 across the three sites to facilitate an improved future built form response and a more economically viable future development and revitalisation of the site.*
- *The amendments proposed by Amendment C270 do not remedy existing inconsistencies in built form controls, and we therefore recommend changes to these to provide consistency and an improved future built form outcome.*
- *We support the application of discretionary controls as they relate to our site, in providing built form flexibility that will enable a contextually appropriate design response for future developments.*

Mr Andrea Pagliaro of Urbis appeared for Ms Papasavas at the Hearing and elaborated on his client's position. He said that his client was concerned that the controls would not facilitate an appropriate transition between the lower scale of the Chinatown Precinct and the large scale development forms to the west (Ausvest) and north of her land (on the opposite side of Lonsdale Street). He said that there was concern that the height controls on the Ausvest site did not provide an appropriate transition in built form across that site and in relation to abutting properties. It was submitted for Ms Papasavas that the mandatory setbacks applying to 209-211 Lonsdale Street would not allow a contextually appropriate design response and she was concerned that the street wall requirements along the street were inconsistent and would result in a poor urban design outcome. Mr Pagliaro suggested a form of development across the Ausvest and Papasavas land which he said would achieve a suitable transition between sites and street presentation.

It became clear at the Hearing that the DPO1 has been wrongly mapped as applying to the western portion of the Papasavas land. DPO1 is headed "*Lonsdale Street (Golden Square Carpark) Area"* and includes a site description which says that the development site is 213-237 Lonsdale Street and 222-230 Little Bourke Street and comprises three titles. The Development Plan which was prepared in 1999 does not extend to the Papasavas land.

Ms Papasavas sought to have both DPO1 and DDO10 removed from the western part of her land and the total land included in a discretionary planning control that enabled a 30 metre street wall height and upper levels set back from the street. She sought the removal of the FAR.

Two other written submissions addressed these properties.

Mr Rohan Storey (Submission 26) referred to the fine grained character areas of the city and to what appeared to be a longstanding absence of height controls over the Golden Square Carpark site and abutting properties[29]:

> *Furthermore, there is one 'fine grained' area that has not been mentioned that should also be included in this amendment if at all possible. This is the small area on Lonsdale Street that has been lacking any height control at all since they were first introduced in 1982, despite being surrounded by controls on all sides.*

[29] A map was provided.

> *One site is occupied by an at grade car-park, but the rest are occupied by low-scale, fine grained buildings, exactly like those surrounding it, including a Victorian building, a 1925 building, and Melbourne's oldest intact multi-storey carpark (the Golden Square carpark at 225-231 Lonsdale, 1955) …*
>
> *This area should logically be covered by a low height limit like that of the fine grain development around it. Height limits apply either side on Lonsdale Street; to the east (15m) and to the west (20m).*
>
> *Furthermore, the block of the QV centre immediately to the north has a height limit of 40m. That limits apply on all sides and not here makes no sense.*
>
> *Logically this site should have a limit of 15m.*
>
> *In fact, the two random blocks to the east that are 20m instead of 15m should be regularised down to 15m as well.*

The National Trust of Australia (Victoria) and Melbourne Heritage Action (Submitter 73) referred to this carpark area. It was identified as a gap in the height controls applied in the Hoddle Grid since 1982. The submission included:

> *Part of this gap is occupied by an at grade car-park, but other parts are occupied by low scale fine grained buildings, including a Victorian building, a 1925 building, and Melbourne's oldest intact multi-storey carpark (1955), and should logically be covered by a low height limit like that of the fine grain development around it on Swanston Street and Lonsdale Street. Height limits also already apply further along Lonsdale Street to the east, and we submit it would be reasonable to resolve this gap given its location in the heart of Chinatown.*

Ms Hodyl as part of her written expert evidence (Document 6) expressed her concern that there should not be two controls applying to this land – which she described as confusing.

Her written evidence indicated that the Development Plan for the car park site would not meet the requirements of DDO10 as the setbacks and street wall heights are insufficient.

She was concerned that the DPO would support a building envelope out of scale with the low- to mid-rise precinct subject to height limits of 15-40 metres and that a development height (potentially of 40 metres) abutting Tattersalls Lane would affect the amenity and character of that laneway.

She considered three options for resolving the inadequate and dual control problem. Two options involved the removal of the DPO. She preferred the removal of the DPO and the inclusion of the site in DDO2 with a preferred height limit of 60 metres and a modified requirement of a FAR of 10:1 and a height limit of 90 metres[30].

Ms Hodyl under cross examination at the Hearing, however, conceded that a development of suitable scale might occur on the land under the DPO. In this respect the nearby presence of 60-metre-high developments in Chinatown were acknowledged as well as developments of 110-130 metres tall to the north of Lonsdale Street. She conceded that a 40 metre street

[30] See procedural ruling on the objection to her giving evidence on this matter included in Appendix D.

wall on Lonsdale Street may be satisfactory. She conceded that her preferred and mandatory maximum heights for the site of 60 and 90 metres respectively could be accommodated by the DPO controls. She nevertheless maintained her concern that the DPO would allow unsuitably high development along the laneways and did not concede that activation at lower levels of buildings along laneways was the only consideration.

The Minister's submissions included that "*the DPO is not being removed nor is the Minister seeking to have it removed as a result of the Amendment".* Ms Brennan submitted, however, that the Panel could and should consider the issue of what other more restrictive controls might be applied to the land given the issue was squarely raised in a number of submissions that were referred to the Panel by the Minister. The Minister's response to submissions suggested that a varied DDO2 should apply to the site rather than DDO10 as exhibited. Ms Brennan nevertheless said in her closing submission that the Minister's position was that DDO10 should apply to the Ausvest site.

Ms Brennan submitted that the application of the DPO and DDO10 could both apply to the land as the DPO1 and the development plan did not require development to meet a prescribed height, rather permission is required to exceed the maximum height. She said that this implied that a lesser height may be necessary and appropriate. She said that two controls are necessary to manage the interface with laneways and adjoining street walls, relying on Ms Hodyl's opinion that heights of 40 and 60 metres to Celestial Lane and 40 metres to Tattersalls Lane puts at risk the laneway qualities. The lane interface needs, she said, to be managed by the side and rear setback control of the DDO. She noted that the DPO is some years old and that greater attention to laneway qualities has developed since it was prepared.

There was general support for the correction of the controls across the western part of Ms Papasavas' land.

Other sites with specialised built form controls

The written submission and presentation at the Hearing in relation to the Melbourne Central property concerned the extension of DDO2 – Area A1 controls to the northern part of the site replacing the existing DDO10. That issue is addressed in Chapter 10 below.

It became apparent that part of the southern portion of the Melbourne Central site (south of Little Lonsdale Street) to which DDO2 – Area A1 already applies, is already subject to particular controls introduced in 2002 through the schedule to Clause 52.03 as an incorporated document. The document allows, subject to the submission and approval of detailed plans, the redevelopment of the site including a building of 12 storeys or 73 metres. The Panel was advised that the redevelopment under this permission is not being pursued at the present time.

While this duality of controls was not of concern to the submitter in this case, when considered together with the Golden Square Carpark properties, it raises a general issue of the extent to which dual controls (including one of a site-specific nature) might apply to other properties in the Amendment area and whether integrated decision making under the two controls is possible or required.

Individual Heritage Overlays in DDO10 area

As noted earlier, there are and will be many properties throughout the Central City, especially in the Hoddle Grid, which will be subject to both a Heritage Overlay and the DDO10 with its 18:1 FAR (introduced through the CCZ).

It is recognised that both these requirements of the Planning Scheme (along with policy and other relevant controls) will have to be taken into account when decisions are made on development applications. The Panel considers that the juxtaposition of the two Scheme requirements sets up tensions, however, in terms of appropriate development outcomes.

In recognition of development pressures upon sites with heritage values, the written submission by the National Trust of Australia (Victoria) and Melbourne Heritage Action (National Trust) (Submitter 73) referred to various schemes to make available additional funding for the conservation of heritage places. They suggested that payments for heritage works could be included in the FAU scheme as it is in equivalent schemes elsewhere. They described interstate '*transfer of development rights'* schemes which might be used in the Central City to assist in protecting heritage places by their entitlements to floorspace being transferred elsewhere:

> *In NSW, there is currently a Heritage Floor Space Scheme in the City of Sydney (Sydney Local Environmental Plan 2012 clauses 6.10 and 6.11). According to the City of Sydney website:*
>
> *The heritage floor space (HFS) scheme provides an incentive for the conservation and ongoing maintenance of heritage items in central Sydney by allowing owners of heritage buildings to sell unused development potential from their site, known as heritage floor space. When a heritage item owner completes conservation works they may be awarded HFS by the City of Sydney. The awarded HFS can then be sold to a site that requires it as part of an approved development application. The money raised offsets the cost of conserving the heritage item. …*
>
> *Selling or transferring HFS is a private transaction between the owner and the prospective buyer – the City acts as the scheme administrator. The cost of legal agreements, transactions and other documentation associated with the award and allocation, or change of HFS ownership is met by the owner and prospective buyer. The Sydney Development Control Plan 2012 (section 5.1.9) details how HFS is awarded and allocated.*
>
> *The City of Perth City Planning Scheme No. 2 has a similar control to that of City of Sydney for transfer of plot ratios (clause 34), but it also incorporates heritage as one of the public benefits eligible for consideration for awarding bonus plot ratio to developments (clause 28).*
>
> *The City of Perth Scheme provisions are underpinned by planning policies, Policy 4.5.1 Bonus Plot Ratio2 and Policy 4.5.2 Transfer Plot Ratio3, which detail the principles and requirements of the programs. The Bonus Plot Ratio performance requirements include that:*

- The development must ensure the retention of as much as possible of the significant cultural heritage fabric of the place. The retention of only a heritage place's façade will not be supported.
- *The heritage place must be retained in an appropriate setting that highlights and facilitates the appreciation of the place …*

The Minister's reply included that the notion of transferable development rights was problematic, in that it assumes that development rights were inherent in a site in the absence of a permit, but this is not the case in Victoria. A right is only created upon the grant of a permit. It would be wrong, Ms Brennan submitted, to assume there is an as of right envelope applying to any site given that there is always a discretion to be exercised having regard to design objectives and built form outcomes.

She acknowledged that since the FAR will be calculated across an entire application site, there may be an incentive to incorporate heritage buildings into development sites thereby offering an opportunity to enhance their protection.

Ms Hodyl gave evidence that additional SCAs should be investigated by the Council in a limited number of parts of the Central City where fine grained subdivision and associated heritage fabric remain.

(iii) Discussion

Golden Square Carpark and surrounds

The Panel has considered the submissions and evidence in relation to the carpark and surrounds. While not entirely agreeing that the two sets of provisions (in the DPO and DDO10) could not be met, the Panel agrees that dual built form controls over the carpark and Papasavas land may be problematic in terms of the owners meeting the required level of accord with the DPO as well as some DDO requirements. At the least the dual controls would inappropriate and confusing. It is poor practice to apply two sets of built form controls which serve the same purpose or similar intents.

The Panel considers that so far as the Papasavas land is concerned, the DPO should be removed from the western portion of the land and the land retained only in DDO2 as requested at the Hearing.

So far as the Ausvest land is concerned, the Panel considers that neither DDO10 nor DDO2 should be applied as part of the Amendment. The DPO should be retained at present, as proposed by the Minister and owner. As noted, it deals not only with built form but also land use and provides the owner with the special benefit of exclusion of third party rights in relation to any application under the Scheme applying to the land.

The Panel considers that a satisfactory design outcome which represents a transition between the taller building forms to the north and the lesser scale of the Chinatown Precinct might be achieved under the DPO.

However the Panel considers that given the DPO schedule is now some decades old, it would be appropriate to revisit its provisions in light of changes to land use and development in the general area and modern day policy intents in relation to character areas and laneways.

One aspect of such a review should be how best to achieve an appropriate scale of development abutting Celestial and Tattersalls Lanes. The inconsistent street wall heights in existing controls along this section of Lonsdale Street referred to in Ms Papasavas' submission should be addressed in the review.

Other sites with specialised built form controls

While the Panel has resolved the issue of dual controls across the sites on and around the carpark in Lonsdale Street by recommending that only one control should apply, it is not clear to what extent duality of built form controls (besides Heritage Overlays) is a larger issue across the Amendment area (or simply applies to the Melbourne Central land) and whether any problems arise in complying with two sets of controls (one of which being peculiar to the site).

As has been said above, however, at the least the dual controls could be confusing and it appears to be poor statutory practice to apply two sets of built form controls which serve the same purpose or similar intents. The Panel notes that there are more than two dozen incorporated documents in the schedule to Clause 52.03 alone which relate to sites in the Central City.

This is a matter which should be investigated though not necessarily before this Amendment is considered for approval.

Individual Heritage Overlays in DDO10 area

The matter of the relationship of individual heritage controls and built form controls was of similar concern to the panel considering Amendment C240 in relation to one site – the Comedy Theatre at the south-east corner of Exhibition and Lonsdale Streets.

The theatre which is between 15 and 19 metres in height is included on the VHR but was exhibited in C240 as to be within the proposed discretionary 100 metre height control area of DDO62 - Area B6. A number of submitters opposed the 100 metre control saying the site should instead be in a 25 metre height control or simply excluded entirely.

The panel supported the removal of the B6 height provision because that control "*may appear to invite or encourage redevelopment aspirations for the site at odds with its heritage values as recognised by the existing VHR listing*." It was recommended that a lesser mandatory height control be applied.

The Panel is unable to find an immediate answer to the tension between the two sets of built form controls – the Heritage Overlay and the FAR of 18:1 – which will occur across scores of Central City sites under this Amendment. Development outcomes which involve preservation of heritage building facades only, as have occurred all too often, should not be the way forward. The Panel considers that this matter warrants serious attention if the identity of the Central City is not to be lost.

The Panel has supported the further exploration of transfer of development 'rights' in Section 6.5. It is to be noted that the Minister's concerns about the incorrect assumption that entitlements inhere to a site are apparently overcome by the New South Wales approach. The Panel suggests that the approach apparently adopted in New South Wales whereby floorspace credits are given for conservation works and can be transferred

elsewhere should be investigated as part of a revised FAU scheme. Alternatively, or additionally, a transfer of rights scheme may need to be legislated.

The Panel supports Ms Hodyl's recommendations for investigation of additional SCAs.

(iv) Conclusions

The Panel concludes:

- It is generally undesirable that two built form controls with inconsistent objectives should apply to a site.
- Where one of the controls is peculiar to the site and specifies a precise form of development, it may be confusing or unnecessary to apply a more general precinct wide control. This issue warrants general investigation throughout the Central City.
- In the case of the Golden Square Carpark and surrounds, the dual controls should be removed by removal of one of the controls as described above.
- There should be urgent investigation of floorspace 'transfer mechanisms' that may assist with conservation of the many heritage buildings in individual place Heritage Overlays in the Central City, especially in the General Development Area.
- The Council should investigate the identification of additional Special Character Areas in line with Ms Hodyl's evidence.
- Given the DPO schedule is now some decades old, it would be appropriate to review its provisions. One aspect of such a review should be how best to achieve an appropriate scale of development abutting Celestial and Tattersalls Lanes. The inconsistent street wall heights in existing controls along this section of Lonsdale Street referred to in Ms Papasavas' submission should be addressed in the review.

(v) Recommendations

The Panel makes the following recommendations:

6. **Relocate the General Development Area Floor Area Ratio provisions from the Capital City Zone to Design and Development Overlay Schedule 10.**
7. **Delete Design and Development Overlay Schedule 10 to the land at 213-237 Lonsdale Street and 222-230 Little Bourke Street (Golden Square Carpark) nor to 209-211 Lonsdale Street (part of the Papasavas land).**
8. **Remove Development Plan Overlay Schedule 1 from 209-211 Lonsdale Street and replace it with Design and Development Overlay Schedule 2 – Area 3.**

7.8 Subdivision

(i) The issue

The submissions at the Hearing in relation to a small number of sites that are only partially developed or contain low scale buildings (sometimes of heritage value), and already have permission for tall buildings on part of the site, indirectly alerted the Panel to the issue of how the subdivision controls of the Planning Scheme might interact in an unplanned manner with the FAR provisions.

The issue is whether subdivision of a site to excise an undeveloped or underdeveloped portion, after a permit is granted for development on another part of the site with a FAR floorspace which relies on the total site area, may allow 'double dipping' of FAR entitlements.

The Panel has considered whether the interaction of subdivision and FAR arrangements may have potential to be beneficially used to require conservation of heritage buildings on parts of sites.

(ii) Evidence and submissions

The submissions for the Uniting Church in relation to its property in Lonsdale Street (Submitter 32) and for Phillip Nominees in relation to 1 Spring Street (Submitter 43) related to situations where further development potential applies only to part of the site - either due to approvals already having been granted for high-rise development on another part of the land or heritage assets requiring conservation.

Mr Echberg (Submitter 18) referred to site consolidation in his area having provided the opportunity for very high building developments on parts of the expanded sites.

The Minister for Planning, in addressing the issue of multiple DDOs applying to single sites (Document 56), mentioned that it is impossible to predict which contiguous lots might become part of a single ownership or part of a single planning permit application in the future.

The Panel raised with the Minister and the Council representatives its concern that consolidation and subdivision have the potential to allow FAR floorspace 'entitlements' to be claimed twice (at least in part).

It was suggested in response by the Council that agreements made under section 173 of the Act may be a mechanism used to preclude such 'double dipping'.

(iii) Discussion

As noted earlier in Section 6.3, both the definition of FAR and of plot ratio make reference to the "*gross floor area of all buildings on a site*".

This raises the issue of what is the site that the allowable FAR is to be calculated against.

In circumstances where the site comprises a single lot and the proposed development is to occupy the whole of the site (except for required setbacks), the issue is straightforward.

The situation is more complex where a proposed development is to occupy only part of the site, especially when the site comprises multiple lots on a single land title or multiple titles[31].

[31] This is a tenement in terms of the Planning Scheme – defined as:

Land comprised in:

a) a lot which does not adjoin another lot in the same ownership; or

b) lots in the same ownership and which adjoin each other. Lots are considered to adjoin each other if they are separated only by a stream, stream reserve, or unmade or unused government road or rail reserve.

The question then is whether the site for the purpose of calculating allowable FAR floor area is the entire land holding or tenement, or only part of it.

The Panel expects that in order to maximise the allowable developable floorspace under the FAR, applicants would seek to nominate the entire holding as the site even though they would propose to develop only part of it. If the parts of the site not to be developed were vacant or supported only low rise buildings, the floorspace that is to be developed on the remaining part of the site could be advantaged by the 'unused' FAR 'entitlements' of the parts of the site not to be developed. The Panel envisages that applicants for high-rise buildings might seek to expand the 'site' by acquiring, and consolidating[32] with the title to the land, an adjoining property with relatively low rise or no development.

Such arrangements are not unlawful. They might indeed be used beneficially to achieve the retention of low rise buildings which have heritage significance. The ongoing retention of the heritage building might be the subject of a restrictive covenant or section 173 agreement.

The Panel's concern is, however, that subsequent to the initial development of floorspace maximised in a FAR calculation using the area of the entire holding, the owner may then seek to subdivide the total site or holding, thereby creating a new site for the undeveloped or underdeveloped part of the land. In the case of a total site or holding comprising multiple lots on the one title or multiple titles, no subdivision permission would be required. Application could then be made for another high-rise development on the excised lot(s) to which another FAR floorspace allowance might then be applied.

The extent of 'double-dipping' of this kind which is possible across the Amendment area is not clear (especially given the extent of opportunities which exist for site consolidation is unknown), but it is a matter which should be addressed if FAR is to be employed to regulate the intensity of development.

The Panel concurs with the Council suggestion that a section 173 agreement should be applied, where considered appropriate by the Responsible Authority, to acknowledge, in circumstances where only part of the site is to be developed, the floorspace proposed is the maximum allowable under the FAR calculated against the total site area; and that if the FAR has been 'spent' by the first development, the area of the site cannot be later reused to calculate FAR floorspace for undeveloped portions. The Panel notes that a permit condition would not likely be appropriate to ensure this restriction in perpetuity, given that subdivision has the potential to remove the obligation[33]. This issue is likely best included as a decision guideline given it will arise only in the case of some developments.

Consideration of what the FAR calculation includes in the site area when only a portion of a holding is proposed to be developed, raises the issue of how required setbacks to boundaries are addressed. When a portion of the site not proposed to be developed is excised from the developed portion (whether or not by subdivision), it could bring the allowed development much closer to the new site boundary.

[32] No planning permission is required for consolidation of land.

[33] See Whittlesea CC v Jala Pty Ltd [2000] VCAT 242 (31 January 2000) cf Box v Moreland CC [2104] VCAT 246.

Potentially the setback to the newly defined boundary may be in non-compliance with the Scheme. It may constrain development opportunities on the excised land. Situations can be envisaged where there is an older or only relatively recent low to midrise building occupying part of the total site and the new development may be built around it. Later, the land which is developed with the low to midrise building may be proposed to be excised and more intensively developed.

Where such an excision requires subdivision approval, matters of required boundary setback and equitable development could be considered. While the Panel notes that in all cases of the DDO schedules in this Amendment, no permission is required for subdivision, such approval is required in the CCZ. As mentioned above, however, where the total site or holding comprises multiple lots on the one title or multiple titles, no subdivision permission would be required in any case.

(iv) Conclusion

The Panel considers this issue may again best be dealt with by a decision guideline in relation to development proposals. It might be added to the decision guidelines at Clause 5 of the proposed DDO schedules. It might also or instead be added to the decision guidelines applying to subdivision in the schedules to the CCZ. The Panel notes that the decision guidelines of the CCZ head clause at Clause 37.04-3 include "*Any guidelines in the schedule to this zone*". The proposed Amendment has no additional matters for consideration of subdivision applications in the schedules at present, but this consideration might be added.

(v) Recommendation

The Panel makes the following recommendations:

9. **Add additional guidelines in Clause 5 of all Design and Development Overlay schedules to the following effect:**
    - **Whether, in the case of a site being only partly proposed for development but its Floor Area Ratio floorspace allowance has utilised the total site area, an agreement is to be entered into to acknowledge that the calculation of the Floor Area Ratio occurred against the total site area and that the area of the site cannot be later reused to calculate Floor Area Ratio floorspace for undeveloped portions.**
    - **Whether in the case of a site being only partly proposed for development and with a heritage building being proposed for retention on another part of the site, an agreement is to be entered into to ensure the conservation of the heritage building in perpetuity.**
    - **In the case of a site which is being only partly developed, whether the building is sited so that adequate setbacks will likely be maintained in the event that the land is subdivided or separate land holdings are administratively effected to create a further development site.**

7.9 Prohibition of amendment of permits

(i) The issue

The Amendment includes a number of provisions which purport to preclude the amendment of permits in certain circumstances. An example is in the CCZ1, CCZ2 and CCZ3 at Clause 3 Buildings and works - Permit requirements:

> *A permit must not be granted, or amended (unless the amendment would not result in additional floor area above 18:1) to construct a building or carry out works with a floor area ratio in excess of 18:1 on land to which schedule 10 to the Design and Development Overlay applies unless:*
> - *a public benefit as calculated and specified in a manner agreed to by the responsible authority is provided; and*
> - *the permit includes a condition (or conditions) which requires the provision of a public benefit to be secured via an agreement made under section 173 of the Planning and Environment Act 1987.*

In DDO10 Clause 2.3 Buildings and works requirements, the following provision appears:

> *A permit must not be granted or amended (unless the amendment does not increase the extent of non-compliance) for buildings and works that do not meet the Modified Requirement for any relevant Design Element specified in Table 1 to this schedule.*

At the Hearing, the Panel queried whether it was lawful or effective to seek to preclude the amendment of permits via a Planning Scheme control given the provisions of the Act at section 87 (and s72) and the decision by the Supreme Court in *Seventh Columbo Pty Ltd v City of Melbourne* (1998) VSC 7; 22 AATR 325 (the Seventh Columbo decision).

(ii) Evidence and submissions

This issue was later included in the Capital Eight Pty Ltd presentation at the Hearing by Mr O'Farrell (Submitter 38). Mr O'Farrell said that his client takes issue with the Minister's arguments relating to the prohibition of amendment of permits. Mr O'Farrell submitted that the Minister was effectively proposing that a subordinate instrument of the Act to argue that the planning scheme (a subordinate instrument of the Act) could dictate to the Act that amendment to permits can be prohibited. It was his submission that the Minister's arguments in that respect were *"guilty of the very thing that was found [*not - *sic] to be possible in the Seventh Columbo and Foster's*[34] *cases".*

Ms Brennan made submissions on behalf of the Minister. She relied on legal advice provided by Stuart Morris QC dated 7 October 2015 (Document 54) in responding to the issue raised. The advice considers whether such a provision might lawfully be included in the Planning Scheme and whether it would be effective.

[34] *Fosters Group Ltd v Mornington Peninsula SC* [2010] VCAT 104.

(iii) Discussion

The Supreme Court Seventh Columbo decision was review of a Tribunal decision which had held that a permit for a Section 3 existing use could not be amended under s87(1) of the Act so as to increase its hours of operation because it would be in breach of what is now Clause 63.05 of the Planning Scheme. Relevantly, at that time the clause provided in part that: "*Any condition or restriction on the use continues to be met*"[35]. The Tribunal indicated a view that if the use no longer complied with the terms of the existing condition restricting hours of operation, the use would no longer have the benefit of existing use rights.

The Supreme Court held that the Tribunal had wrongly used the Scheme, a form of delegated legislation, to read down the Act. It was noted that s87 of the Act enabled **any** permit to be amended. The Court said that the Scheme provision should be read as a requirement to meet conditions or restrictions as amended and in place from time to time.

This case, in affirming that the Act should not be read down by reference to a scheme, questions the ability to include the proposed provision that a permit cannot be amended (except where no greater non-compliance with the Scheme would arise) in the proposed Amendment.

The VCAT case of *Fosters Group Ltd v Mornington Peninsula SC* [2010] VCAT 104 (Fosters case) has more recently affirmed this approach and has been followed in subsequent cases. It discusses the avenues for amending permits and holds at paragraph 74 onwards:

> *74. It is not contested that a planning permit can be amended in accordance with existing planning scheme provisions. The issue is whether it can be amended in a way that is not in accordance with existing planning scheme provisions either because:*
> - *The use is now prohibited; and/or*
> - *The conditions are contrary to the planning scheme.*
>
> *75. Based on Seventh Columbo, the clear answer is that as a question of law, a permit can be amended in either of these circumstances.*
>
> *76. We have noted that a new permit can only be granted in accordance with the planning scheme. However, the Supreme Court in Seventh Columbo held that section 87(1) of the Planning and Environment Act 1987 vests in the Tribunal a discretionary power to "amend any permit" by which a permit holder enjoys the right to use the land for a prohibited use, including the power to amend the permit by directing that conditions be deleted or varied.*
>
> *77. The primary reason for the Court's decision in Seventh Columbo was that it was contrary to well established authority concerning the interpretation of statutes to read down the provisions of the Planning and Environment Act by reference to the planning scheme.*

[35] Clause 63.05 now reads: '*Any condition or restriction to which the use **was** subject continues to be met*' (Panel emphasis).

The Tribunal went on to conclude at paragraph 79 that this ability to always amend permits applied equally to s87, 87A and 72 applications.

Mr Morris in his advice for the Minister acknowledges these cases but goes on to say that the inclusion of a provision purporting to preclude amendment of permits in the Scheme via this Amendment would both be lawful and effective.

So far as lawfulness is concerned he notes that Clause 3 of CCZ4 relating to the Fisherman's Bend Urban Renewal Area and CCZ1 in the Port Phillip Planning Scheme both contain such a provision. He argues for lawfulness on the basis that the provision relates to the regulation of the development of land within the meaning of s6(2)(b) of the Act. He comments that "*there is no reason why* ... [s6(2)(b)] *cannot apply to amendment of permits."*

Mr Morris's analysis of the 'effectiveness' of the proposed provision is more complex and is addressed from paragraph 33 of his advice onwards. He considers amendments which might be made under s72 and s87 or s87A of the Act.

In arguing that the provision would be effective, he relies in the case of s72 amendments on the fact that s73, which sets out the procedure for a s72 application, indirectly calls up s60 of the Act, specifically s60(1)(a), which requires consideration of the planning scheme when deciding on an amendment application.

He relies in the case of an amendment under s87 or 87A upon the provisions of section 90A of the Act which require VCAT to take account of the matters set out in s84B of the Act, as if the request were an application for review, and hence again (indirectly) requires the Tribunal to have regard to the matters set out in s60.

The advice goes on to acknowledge case law which has held that considering a matter or taking account of a matter does not require its implementation. The advice suggests, however, that while this is the correct approach in relation to **policy** in a scheme, if the matter to be considered is a **provision** which specifies a certain outcome in **mandatory terms**, the scheme provision would have to be applied - as to do otherwise would be equivalent to not taking it into account.

The Panel's concern about this analysis is that:

- It results in an outcome that is directly at odds with Seventh Columbo and Fosters and the clear statements that 'any permit' can be amended.
- It assumes that s72 or 87 decision makers will take the view that they must **implement** a mandatory provision of the Scheme when considering a permit amendment, based on the 'logic' that to do otherwise would be to fail to properly take into account or properly consider the Scheme. There is simply no certainty that this will be the view taken by a decision maker in any particular circumstance.
- If, alternatively, this opinion about the approach that will necessarily be taken by a decision maker is correct, it has wide ramifications for consideration and application of all other mandatory scheme provisions.

Overall the Panel remains uncomfortable about a provision in the Scheme that a permit cannot be amended (except in certain ways). It would result in a situation where the ability to amend any permit. Seventh Columbo specifically rejected the Tribunal's misreading down of the Act by the Scheme provisions in the case of the then existing use provisions.

If there is any doubt about the effectiveness of the provision, it would not be good policy to include it in the Scheme.

(iv) Conclusion

The Panel concludes that the effectiveness of the provisions relating to a prohibition on amendment of permits remains doubtful.

7.10 Transitional arrangements

(i) The issue

The proposed Amendment includes a lengthy set of transitional provisions for each affected zone and overlay. They are the same in all cases. They provide for application of earlier versions of the zone or overlay schedules in particular circumstances – either the pre C262 controls or the post Amendment C262 version. The transitional provisions read as follows:

> *The requirements of this schedule do not apply to:*
> - *use or development of land that is undertaken in accordance with a permit under the Building Act 1993 issued before the commencement of Amendment C262 to this planning scheme;*
> - *use or development of land that is undertaken in accordance with a planning permit that was issued before the commencement of Amendment C262 to this planning scheme;*
> - *an application made before the commencement of Amendment C262 to this planning scheme.*
>
> *For applications made before the commencement of Amendment C262 the requirements of this schedule, as they were in force immediately before the commencement of Amendment C262, continue to apply.*
>
> *The requirements of this schedule do not apply to:*
> - *use or development of land that is undertaken in accordance with a permit under the Building Act 1993 issued after the commencement of Amendment C262 and before the commencement of Amendment C270 to this planning scheme;*
> - *use or development of land that is undertaken in accordance with a planning permit that was issued after the commencement of Amendment C262 and before the commencement of Amendment C270 to this planning scheme;*
> - *an application made after the commencement of Amendment C262 and before the commencement of Amendment C270 to this planning scheme.*
>
> *For an application made after the commencement of Amendment C262 and before the commencement of Amendment C270 to this planning scheme the requirements of this schedule, as they were in force immediately before the commencement of Amendment C270, continue to apply.*

The Panel was advised that the Minister, in acknowledgement of the introduction of Amendment C262 via section 20(4) of the Act without notice, wishes to preserve transitional

arrangements for 18 outstanding applications lodged before Amendment C262. He also wishes to provide transitional arrangements for five applications lodged after the introduction of Amendment C262[36].

The Panel accepts that an amendment may provide transitional arrangements for the benefit of persons who have commenced the process of obtaining approvals for developments. This is not unusual. The proposed transitional provisions of Amendment C270, however, deal with matters beyond applications.

The question is whether these provisions are all necessary, effective or required given the broader statutory context.

(ii) Submissions and evidence

Urbis submitted on behalf of 600 Collins Pty Ltd (Submitter 23), the owner of 582-606 Collins Street who is the applicant for Planning Permit PA16000065 included that:

> *PA1600065 was lodged on 18 December 2015 against the backdrop of the interim C262 controls – involving the discretionary 24:1 plot ratio control.*
>
> *The purpose of this submission is to seek clarification that the proposed C270 controls will not be applicable to the consideration of the above planning permit application.*
>
> *While it is understood the proposed C270 controls are not yet finalised and have not yet taken effect in the Melbourne Planning Scheme, it is possible PA1600065 will not be determined prior to the completion of the Central City Built Form Review. Given this potential eventuality, it would be an unfair and unreasonable outcome if the Melbourne Planning scheme was amended in such a way that required the decision-maker to determine the application against the newly proposed 18:1 plot ratio controls.*
>
> *As it presently stands the proposed transitional provisions within Amendment C270 (which commenced on 27 April 2016) 'back date' to the commencement of C262 (i.e. 4 September 2015).*
>
> *This does not align with established principles around transitional provisions and is considered inappropriate – the transitional provisions associated with the proposed new C270 controls should take effect from the C270 commencement date, i.e. 27 April 2016. This would provide greater clarity for applications such as PA1600065 that have been submitted during the interim control period and prior to 27 April 2016, by ensuring that these would be appropriately assessed under that same interim planning framework.*
>
> *We request that this change be uniformly made to the proposed transitional provisions within the updated C270 Zone and Overlay schedules.*

Wing Lam (Submitter 22) referred to the effect of the transitional arrangements proposed at the time of exhibition. The submitter is seeking to amend an existing permit granted some

[36] These are additional to 9 pre-C262 applications and 2 post- C262 applications already determined.

months before the introduction of Amendment C262 for a 31-metre-high apartment development at 27 Tattersalls Lane. The site is included in DDO2 where there was a discretionary height of 15 metres pre-C262, a mandatory height of 15 metres under C262 and now proposed preferred height of 15 metres. The section 72 application for a 39 metre-high building was lodged five days after C262 came into effect. The concern is that the revised development which is the subject of the section 72 application will not be able to be approved under either the C262 or C270 provisions. The submitter sought a site-specific transitional provision applicable to his property.

The Owners' Corporation of Freshwater Place Residential (Submitter 25) requested that there be no transitional provisions and that all applications in train should be considered against the incoming provisions.

Andrew Wong (Submitter 34) by the owner of the land at 93-119 Kavanagh Street, South Melbourne raised concerns about how the new provisions might affect Planning Permit 2015/32991 granted on 21 December 2015. A subsequent letter of 25 July 2015 from the submitter's lawyers indicated that the submitter was content with the revised version of the transitional provisions presented in the first redraft of the provisions by the Minister. The submitter withdrew conditionally based on the on the final version of the controls (Document 165). The Panel has recommended changes to the transitional provisions and considers the revised controls do not materially alter the submitter's entitlements.

Capital Eight (Submitter 38) noted the absence of transitional provisions in the exhibited Amendment for applications lodged between the introduction of Amendment C262 and Amendment C270.

The Inner Melbourne Planning Alliance (Submitter 46) raised issues about the transitional provisions requesting that applications prior to the Amendment should all be assessed under the pre-C262 provisions.

In response to submissions on the transitional arrangements and Panel questioning at the outset of the Hearing, the exhibited transitional provisions were expanded in the Minister's first revised draft to include a second part dealing with events in the period between the approval of Amendments C262 and C270.

The Panel raised other concerns about the provisions, including questioning why it was necessary to include reference to use being exempted from the current controls given the provisions of Clause 63 and section 6(3) of the Act, and what the general rationale was for the inclusion of the full range of the transitional provisions.

The Minister's response on these matters was that it was necessary to include reference to use approved under the Building Act which was said to differ from the exemptions for use under Clause 63 of the Scheme. It was conceded that 'use' could be deleted from the second point in each of the two transitional periods.

Mr O'Farrell's submissions at the Hearing included that a person seeking to benefit by transitional provisions might be given the opportunity to choose which provisions should apply to them and obtain the benefit of the less restrictive aspects of both. Ms Brennan's submissions described such a proposal as 'bizarre'. She said that as each amendment represents a package of controls, they should not be the subject of 'cherry-picking'.

Ms Brennan submitted in closing for the Minister, however, that it would be possible for the Special Character Areas to have their own transitional arrangements given that the C262 requirements were in some cases more onerous than those which would be introduced by C270.

(iii) Discussion

The Panel has reviewed the controls further. The Panel provides the following comments.

Ordinarily an application for permit is to be considered under the planning provisions in place at the time of the decision rather than those in place at the time of the application – see *Unger v City of Malvern* [1979] VR 259 and restated in *The Sisters Wind Farm Pty Ltd v Moyne Shire Council* [2012] VSC 324 (The Sisters). The provisions in place at the time a decision is to be made may include transitional arrangements that apply in certain specified circumstances and that may apply earlier versions of the control. This is not an uncommon practice.

The practice is most often applied only to applications for permits, however. There are a number of reasons for this.

Uses of land lawfully established before the introduction of a scheme or relevant amendment, which may include uses established as of right or under permit, are not disturbed by the incoming provisions because of the effect of section 6(3) of the Act and section 28 of the *Interpretation of Legislation Act* 1984.

The decision in *Lakkis v Wyndham CC* [2001] VCAT 863 discusses the accrued right which is afforded by a planning permit:

> *... Permits create substantive rights. Changes to the substantive law are presumed not to operate retrospectively. See Maxwell v Murphy [1957] HCA 7; (1957) 96, CLR 261, 267 per Dixon CJ. Where a subordinate instrument such as a planning scheme expires, lapses or ceases to have effect, the expiry, lapsing or ceasing to have effect does not affect any right, privilege, obligation or liability acquired, accrued or incurred under that subordinate instrument or provision (Section 28(2)(e) of the Interpretation of Legislation Act 1984). In my view these principles preserve the operation of [the permit under consideration in that case] and it is not dependant at all for its preservation on Clause [63] of the current Scheme or on Section 6(3) of the Planning and Environment Act.*

The Tribunal in *Fosters Group Ltd v Mornington Peninsula SC* [2010] VCAT 104 (4 February 2010), comments that thus "*it can be said that a permit creates substantive rights as an accrued right independently of the Planning and Environment Act 1987 and the planning scheme".* It was observed that "*a permit can also give rise to an existing use right. If a use commences under a permit, an existing use right is established under clause 63.01 of the planning scheme".*

So far as development permits which were granted before a relevant amendment was approved are concerned, the provisions at section 28(2)(e) of the *Interpretation of Legislation Act* would afford the permit holder an accrued right in the same manner as in

relation to a use permit as discussed above. The permit can be acted upon at any time before it expires.

In terms of the usual transitional provisions, therefore, there remains a need to provide for permit applications for use or development or both – as no (relevant) right to use and develop the land has been accrued (see The Sisters decision).

In the present case the transitional conditions do not refer only to applications for planning permits, however, but refer also to existing planning permits.

The Panel has given consideration to whether the provisions might have been drafted to refer to existing permits, in an effort to accommodate the unusual provision elsewhere in the CCZ schedules that an existing permit cannot be amended in certain ways (see the discussion in Section 7.9). It seems to the Panel that this cannot be the case, however, as having introduced a provision that purports to restrict the amendment of existing permits, it would not be logical on the part of the Planning Authority to introduce another provision which would exempt a group of existing permits from that requirement. In any case, the FAU provision is, in its own terms, only triggered where there is an application for a permit (or amendment of a permit). If someone is proceeding under a development permit already granted and there is no proposal to amend that permit, then the new provision would not apply.

The Panel view is that the provisions are largely unnecessary and ineffective for a number of reasons:

- There are no new use provisions to be introduced by this Amendment and none were introduced at the time of Amendment C262. Transitional arrangements for use are simply not required.
- In the Panel's understanding, the *Building Act* does not deal with the use of land except in a peripheral way in terms of certificates of occupancy. It does not appear to provide for use permits as the transitional provisions imply.
- It may be that reference to use and development proceeding under a building permit has been included to address the circumstance where a development is proceeding in the absence of a planning permit, as none is required. In terms of the Planning Scheme and the Act, no planning right would have been accrued, which might expose the development to new incoming development controls. Examples of this might be a building use conversion from office to accommodation where no external works are involved. See the discussion of the accruing of planning rights in The Sisters decision.
- If this provision is required, it should not refer to use being undertaken in accordance with a permit under the *Building Act*. Reference to development is at best all that is required, as the rights to use the development for the purpose for which it was or is being lawfully constructed are protected by section 6(3)(b) and (d) of the Act.
- So far as the exemption for development proceeding under a planning permit is concerned, as discussed above, the *Interpretation of Legislation Act* makes this unnecessary. In case it is said that the provision has been included as it is informative about the effects of the *Interpretation of Legislation Act*, the Panel

would comment that it is not necessary and may be problematic to repeat in the Scheme provisions from other legislation.

- If the FAR requirements are relocated from the CCZ schedules to the DDO10 schedule as suggested in Section 7.2, the only remaining new provisions being introduced in the CCZ schedules would be an acoustic report as part of an application for residential use in CCZ1 and 2, and referral of large floorspace applications (where the Minister is the Responsible Authority) in the case of all CCZ schedules. Neither of these new requirements would seem to warrant transitional exemptions. Perhaps no transitional arrangements at all would then be required in the CCZ schedules.
- The DDO schedules, however, would require some transitional arrangements given the considerable built form control changes.
- As drafted, the first part of the transitional arrangements dealing with the time frame before the introduction of Amendment C262, having set out the circumstances in which the exemptions from the current schedules apply, goes on to provide:

  For applications made before the commencement of Amendment C262 the requirements of this schedule, as they were in force immediately before the commencement of Amendment C262, continue to apply.

The Panel was advised by the Minister that the exhibited version of this provision had not referred to the requirements of this schedule but of this scheme. It was considered that the exemption was drawn too widely. A problem, however, is that before Amendment C262, there was no Schedule 10 to the DDO.

If transitional arrangements are to introduce pre C262 provisions, this will have to be done in another way in the case of DDO10. It is suggested that it would be sufficient to make no reference to what provisions do apply but simply say the current schedule provisions do not.

An applicant may choose to resubmit under the incoming less onerous provisions. Nor does the Panel support the suggestion that an applicant for a planning permit, where the application was lodged prior to Amendment C270 being approved, might choose which set of provisions the application is to be assessed under. That is a decision for the legislator. Nor does the Panel support 'cherry-picking' of controls pre- and post- Amendment C270.

With regard to Yarra Park City Pty Ltd (Submitter 34), the revised controls on transitional arrangements proposed by the Panel sufficiently covers their concerns.

(iv) Conclusions

The Panel does not believe it is appropriate to include special transitional arrangements for the SCAs DDOs which include some more onerous (mandatory rather than discretionary) provisions under the C262 version than under the incoming controls.

The Panel concludes that the transitional provisions require a thorough review.

(v) Recommendations

The Panel makes the following recommendations:

10. **Rewrite the transitional arrangements for the Design and Development Overlay Schedule 10 (from which the prohibition on amendment of permits is removed) as follows:**

    The requirements of this schedule do not apply to:
    - ***development of land that is undertaken in accordance with a permit under the Building Act 1993 issued before the commencement of Amendment C270 to this planning scheme;***
    - ***an application made before the commencement of Amendment C270 to this planning scheme.***

    For an application made before the commencement of Amendment C270 to this planning scheme but after the commencement of Amendment C262, the requirements of this schedule, as they were in force immediately before the commencement of Amendment C270, continue to apply.

11. **Rewrite the transitional arrangements for the other Design and Development Overlay schedules in the Amendment as follows:**

    The requirements of this schedule do not apply to:
    - ***development of land that is undertaken in accordance with a permit under the Building Act 1993 issued before the commencement of Amendment C270 to this planning scheme;***
    - ***an application made before the commencement of Amendment C270 to this planning scheme.***

    For applications made before the commencement of Amendment C270 and before Amendment C262 the requirements of this schedule, as they were in force immediately before the commencement of Amendment C262, continue to apply.

    For applications made before the commencement of Amendment C270 to this planning scheme but after the commencement of Amendment C262 the requirements of this schedule, as they were in force immediately before the commencement of Amendment C270, continue to apply.

12. **Amend the schedules to the Design and Development Overlay to include a clause or clauses directly setting aside the ability to grant a permit not in accordance with the schedule or (a) provision(s) of it.**

13. **In conjunction with relocating the Floor Area Ratio provisions from the Capital City Zone schedules to Design and Development Overlay Schedule 10, remove all transitional provisions from the Capital City Zone schedules which are part of this Amendment.**

7.11 DDO head clause v schedule

(i) The issue

An issue which arose during the course of the Hearing was whether the schedules to the DDO adequately set aside the provision in the DDO head clause at Clause 43.02-2 that:

> *A permit may be granted to construct a building or construct or carry out works which are not in accordance with any requirement in a schedule to this overlay, unless the schedule specifies otherwise.*

The consequence of a failure to adequately set aside this provision of the head clause would be that all mandatory provisions in the schedule(s) would effectively become discretionary.

(ii) Submissions and evidence

The Minister's response when this issue was raised by the Panel was that the provisions in the DDO schedules which are expressed in mandatory terms – 'must meet' and similar, rather than 'should meet' – would be adequate to set aside the head clause provision. Reference was made in particular to the built form section of the requirements at Clause 2.3 which refer to "*a permit must not be granted… with the exception of…".*

(iii) Discussion

As commented at the Hearing, the Panel is not persuaded that this would be sufficient to set aside the head clause provision. The Panel is aware that in some DDO schedules, the following clause has been added in relevant parts:

> *No permit may be granted to construct a building or construct or carry out works not in accordance with the requirements of …* (this schedule) or (this clause of the schedule).[37]

This is a relatively straightforward insertion and the Panel believes that it should be included.

7.12 Developments warranting Ministerial management

(i) The issue

For some decades, the Minister for Planning has been the responsible authority for applications and other procedures for larger developments, that is for those with a floor area of greater than 25,000 square metres.

The Planning Scheme provides in the schedule to Clause 61 at Clause 2:

> *The Minister for Planning is the responsible authority for matters under Divisions 1, 1A, 2, and 3 of Part 4 and Part 4AA of the Act and matters required*

[37] Since the Hearing, the September 2016 edition of *Planning News* published by PIA has carried an article on this issue (page 16) and referred to the decisions by two other panels and in *Gull Lane Property Pty Ltd v Moreland CC* [2016] VCAT 1088 which support this Panel's view.

by a permit or the scheme to be endorsed, approved or done to the satisfaction of the responsible authority in relation to:

- *Developments with a gross floor area exceeding 25,000 square metres …*

The issue was raised as to whether the nominated floorspace was not set at too low a figure.

(ii) Evidence and submissions

As discussed in Section 7.14, the submission by Mr William Allan raises the issue of the absence of formal third party involvement in relation to development proposals in the CCZ. He said that while there are non-statutory consultative processes with third parties, they were made difficult by the Central City having two responsible authorities – the Council and Minister - and two different appeal avenues. He expressed the residents' frustrations with keeping abreast of applications and decisions which affect their living environment.

The issue is raised of whether it is appropriate to retain the dual responsible authority role or at least that the current cut-off between Ministerial matters and Council matters. It was suggested in the submission that the 25,000 square metres was effectively too small a development in today's terms to warrant Ministerial management and perhaps 35,000 square metres would be a suitable cut-off.

Mr Tony Penna who appeared for the Southbank Residents' Association (Submitter 83) also supported the lifting of the floorspace figure to 35,000 square metres. He said that he believed that the City of Melbourne should play a larger role in decisions on development as "*the Council understands the needs of the City".*

The written submission by the Southbank Owners Corporation Network (SOCN) (Submitter 53) which represents some 13 buildings, addressed this issue as well. It was said that the SOCN would like to see more responsibility afforded to the City of Melbourne with regard to decisions on applications. They again supported lifting cut-off for the Council and Ministerial responsibilities to 35,000 square metres.

The City of Melbourne's (Submitter 24) written submission included:

In the Central City both the Minister and the City of Melbourne undertake the role of responsible authority, with the Minister assuming the role for developments over 25,000 square metres.

The arrangement began some decades ago, and developments of this scale are now significantly more common. As a result, the State is required to make decisions on a large number of developments compared with when the 25,000 square metres threshold was set, and on many developments that are not in any sense 'State significant'.

The City of Melbourne is readily equipped as responsible authority to administer these developments and seeks a review the current responsible authority arrangements within the Central City. This review would include whether a higher decision-making threshold is warranted to focus the State's decision-making back onto developments of State significance. The review would consider increasing the State significant development threshold to 35,000 or 40,000 square metres. This measure would reduce duplication and

overlap, significantly improve efficiency in the development application process and ensure greater consistency in the application of planning policy within the City.

The Minister's reply was that there was no proposal to modify this aspect of the Planning Scheme and it lay outside the Amendment. It was noted that the Amendment provides for the Council to be a recommending referral authority for developments over 25,000 square metres in floor area.

(iii) Discussion

The Panel considers that there is merit in the argument that the dividing line for Ministerial and Council management of applications is set too low. The 25,000 square metre limit was set at or before the introduction of the Melbourne VPP-based Planning Scheme in March 1999 when the scale of development was appreciably lower than that occurring today.

The role of the Council as recommending (rather than determining) referral authority gives the Council an only secondary role in the outcome on permit applications.

The Panel agrees with the Minister, however, that this is a matter of some significance and cannot receive attention as part of this Amendment. Nevertheless, in the Panel's view, the submission was a valid one and it should be given separate consideration.

7.13 Third party rights

The Amendment proposes to continue the practice within the Capital City Zone (CCZ) schedules of exempting permit applications for subdivision, buildings and works associated with a Section 1 use (including accommodation, office and retail premises), demolition and advertising signs, from notice, third party objection and review. In the proposed schedules to the Design and Development Overlay (DDO), permission is only required for buildings and works, and permit applications similarly are exempt from notice, objection and third party review.

The issue is whether third party rights should continue to be excluded in relation to CBD development proposals.

(i) Evidence and submissions

The written submission by Mr William Allan (Submitter 48), a member of various resident organisations in the Hoddle Grid, raised the matter of the absence of formal rights of objection and review for third parties affected by CBD developments. The written submission indicated that there are resident groups such as Residents 3000 and EastEnders who are active in lobbying City of Melbourne in relation to planning matters and who have been pressing for CBD residents' rights to participate formally in the planning process. The submission expressed frustration about the absence of firm grounds upon which to base an argument against intrusions into existing residents' light and air outlook.

At the Hearing, Mr Allan indicated that he was a member of the Exhibition Street Regency Towers residents' group and elaborated further upon the third party rights issues. He described how north-west facing apartments in that residential building below level 12 had been built around on two sides but were excluded from participating in the review hearing

before the Victorian Civil and Administrative Tribunal (VCAT). He expressed frustration about the process by which developments are approved "*building by building*" and the general absence of resident involvement. He noted that those living in the CBD were disadvantaged by having to deal with two responsible authorities.

His submission included:

> *The C270 amendments should help protect the area from similar decisions* [adversely affecting the public realm and heritage values]*, but surely it's desirable for residents to have some more say in negotiating what happens in the future.*

Mr Allan requested that there should be improved access to 3D mapping and it should be used in Council decision-making processes as well as in State level decision-making - as already occurs. He recommended that pilot studies of resident/business involvement in planning decisions in selected areas, such as the 'Little Lonsdale' heritage area, should occur. He said that 'consultation' on plans and planning schemes fell short of participation and resident rights.

Professor Buxton's submissions referred to this matter of resident rights. His presentation at the Hearing (Document 136) addressed inadequacies of the Amendment through omissions. They included:

> *Use provisions and notification remain problematic. The rights of Melbourne's CBD residents under the Capital City Zone arguably have been the most seriously disadvantaged of any group in Victoria.*

Mr Tony Penna who spoke on behalf of the Southbank Residents' Association (Submitter 83) noted the absence of notice requirements and third party appeal rights and said that residents should "*at least have a say"* given developers "*have access to decision makers"*.

A Parr (Submitter 9) referred to this issue:

> *Objection rights need to be reinstated and reasonable amenity provided for - the current no rights and no amenity protection regime must end. Residential owners have billions of dollars of their personal wealth invested in the CBD and this investment must be given reasonable levels of protection. The gold rush days for developers should be permanently ended. In the long run, residential owners and residents contribute far more to the sustainable economy of Melbourne CBD than developers and this should be respected.*

Similarly, Submitter 18 (Bruce Echberg) addressed this issue in his written submission. He said:

> *Approvals by past planning ministers under the "state significance" rules has had an unfortunate impact of the central city allowing numerous permits for buildings that are badly designed and break the fundamentals of good urban and sustainable design. There has been no possibility of public scrutiny of these significant changes to the city or proper urban design based documentation of the justification of decisions. This "state significance"*

decision making rule together with the funding of politicians at local and state level by developer interests has led to extremely poor built outcomes.

In her reply on behalf of the Minister (Document 177), Ms Brennan noted that third party notice and appeal rights exemptions have been in place since the introduction of the new format planning schemes and any alteration to this arrangement "*would have wide ranging ramifications for development within the CCZ."* She further said *"Indeed, the absence of third party notice and appeal rights in the CCZ is an important component of delivering on the purposes of this unique zone".*

(ii) Discussion

The Panel acknowledges the special nature of the CBD as the key economic and social centre for the metropolis and that the current CCZ introduced as part of the new format scheme, including its notice and third party rights exclusions, was intended to efficiently manage and facilitate its development. The Panel expects that the third party exclusions in the Design and Development Overlays in the CBD were introduced to ensure the CCZ exemptions were not undermined.

The Panel considers, however, that it would be timely to revisit the issue of third party rights in relation to development applications. The CBD has fundamentally changed since the 1990s. While it continues to be a place for government, business, retail and entertainment, some two decades later the CBD now has a substantial resident population – in large part encouraged by the Council's Postcode 3000 campaign.

As the Panel understands it, the current population of the study area is in the order of 124,000 people.[38] Further, Mr Larry Parsons as part of his evidence for the Minister indicated that as at January 2016, there were some 10,000 apartments under construction, 21,000 approved under permit and a further 18,000 proposed in applications, which could see an additional 100,000 residents added to the central city.

The CBD can no longer be viewed as a place where residents are few and transitory – predominantly tertiary students, overseas and interstate visitors. Rather there are and will continue to be tens of thousands of residents living permanently in the CBD. It has become a residential neighbourhood for that community. It is only to be expected that the residents will become increasingly disenchanted about the absence of opportunity for formal input to decisions affecting their neighbourhood.

While any recommended changes to third party rights in relation to central city development applications would go beyond the scope of the exhibited Amendment, the Panel suggests that this is a matter which warrants further consideration and possible future action. The much lauded liveability of Melbourne is the product of a planning system which, with the exception of the CCZ area, has a strong third party rights component. That improved development outcomes are a benefit of third party involvement in planning decision-making is well accepted in the planning industry. Changes to third party involvement in planning decisions could see the same benefit accrue to the CBD.

[38] Leanne Hodyl expert evidence for Minister.

(iii) Conclusion

The Panel concludes that changes to third party rights in relation to development applications in the central city fall outside the scope of this Amendment but warrant further consideration and possible action.

7.14 Better Apartment Draft Design Standards

(i) The issue

During the period of the Panel Hearing, on the 15 August 2016, the Minister for Planning released the *Better Apartment Draft Design Standards* (Better Apartments). The standards have been released for public comment and are expected to be implemented by the end of 2016.

The building setback standard departs significantly from the setback standard included in the Amendment.

The question which arises is whether the standards should be the same or can be complementary.

(ii) Evidence and submissions

The Better Apartments setback standard seeks amongst other things to "*ensure that new apartment buildings are setback an appropriate distance from side and rear boundaries to receive an adequate amount of daylight and privacy*". The setback standard provides:

> *Standard*
>
> *A habitable room window or a balcony should be set back from a side or rear boundary at least the distance specified in Table 1.*
>
> *A habitable room window or a balcony should be set back from another building within the site at least the distance specified in Table 1.*
>
> *The setback is measured from the external surface of the habitable room window or the open side of the balcony, whichever is the lesser.*

Building Height	Minimum setback from side and rear boundaries	Minimum setback from buildings within site
Up to 13.5 metres	6 metres	12 metres
13.5 to 25 metres	9 metres	18 metres
Over 25 metres	12 metres	24 metres

> *Note: The building setback requirements only apply to new apartment buildings of five or more storeys in height. Clause 55.04-1 Side and rear setbacks objective and Standard B17 will continue to apply to an application*

> *to construct two or more dwellings on a lot in a development up to four storeys (excluding a basement).*

The proposed standard therefore increases apartment building setbacks with increased height. For those over 25 metres in height (or around 8 storeys), a separation of 24 metres is proposed both for buildings on the one site and adjoining sites (by addition of the setbacks applying to the adjoining sites).

This is very different from the discretionary side and rear setback requirements of the DDO schedules in the Amendment – a setback of 5 metres or 6 percent of building height from the side boundary or the middle of an abutting laneway - either above the street wall, or above a height of 20 or 40 metres. The particular standard varies according to which schedule applies. A special provision enables building to the boundary to a height of 80 metres in DDO10 where there is a building on an adjoining site built to the boundary.

Mr Sheppard's evidence for the Minister included:

> *I also consider that the proposed tower separations are at the minimum end of the acceptable range for apartments facing another tower in terms of visual amenity or outlook.*

The submission at the Hearing by Mr Milner for the Southbank Owners Corporation (Submitter 53) (Documents 163 and 164), made reference to the inconsistency between the proposed provisions of the Amendment relating to setbacks between towers (generally 5 metres on the same site and 10 metres on separate sites) and the Apartment Code standard of 24 metres. He noted that the Apartment Code figure was similar to the 20 metres considered appropriate by the Amendment C171 panel (and included in the approved version of that amendment). He argued that applying a tower separation standard which was guided by standard applying in a suburban house and garden situation (of 9 metres) was misguided. He said that 5 metres from boundaries for towers (resulting in a possible 10 metre tower separation when on adjoining sites) was too tight to achieve appropriate levels of privacy, light and amenity. The application of balcony screening was a poor solution depriving residents of outlook.

Ms Buckeridge's evidence for the Minister included that the tower separation requirement in New York is 18 metres, in Sydney 24 metres and in Toronto and Vancouver 25 metres. She nevertheless supported the tower separation requirements of the Amendment as achieving an appropriate balance of design outcomes and commercial viability based on her testing of floor plates.

(iii) Discussion

The disparity between the two building setback standards is concerning. It is proposed to introduce two standards into the Planning Scheme that are very different but which purport to have the same objectives – at least in part.

Like the setback standard in the Better Apartments document, the DDO requirements, in addition to design objectives relating to the protection of the public realm, have the stated objective of achieving good on site amenity. The built form design objectives of DDO10, for example, include:

- *To encourage a level of development that maintains and contributes to the valued public realm attributes of the Central City.*
- *To ensure that new buildings provide equitable development rights for adjoining sites and allow reasonable access to privacy, sunlight, daylight and outlook for habitable rooms.*
- *To provide a high level of internal amenity for building occupants.*

The particular built form outcomes sought to be achieved by the rear and side boundary setbacks in DDO10 (see Table 1 of DDO10) include:

Towers are designed and spaced to ensure:

- *Sunlight penetration and mitigation of wind impacts at street level*
- *Provision of reasonable sunlight, daylight, privacy and outlook from habitable rooms, for both existing and potential developments on adjoining sites.*

While it is not unknown for schemes to include variants on a standard which might apply in particular parts of the municipality, that is not what is proposed here. Effectively two state-defined standards are being put forward - contemporaneously and with the same intents (at least in part) - and they bear no resemblance to each other. The Better Apartments standard is a general one which would apply in the Central City as well as elsewhere.

The Panel considers that both standards and their design objectives cannot proceed as currently drafted. If the Scheme were to contain such widely different requirements purporting to achieve the same amenity outcome it would not only be confusing but would challenge the credibility of the planning controls.

This raises real resolution difficulties. Tower setbacks have a significant effect upon site capacity as mentioned by Mr Sheppard. To dramatically change the tower setback requirements in the DDOs would risk transforming the Amendment and at the least would require further notice. If a changed discretionary setback requirements were to be introduced (perhaps after further notice) to exactly or nearly match those of the Apartment Guidelines, it would likely generate Central City applications proposing substantial departures from the preferred requirement and would continue the problem of scant regard being given to discretionary controls.

Alternatively, it is not desirable to amend the Better Apartments standard applying across the State simply to suit Central City conditions.

The Panel notes that the setbacks in the Better Apartments document are more akin to those adopted in comparable cities. It is also noted that the Amendment C171 Panel was supportive of a 20 metre tower separation.

The disparity of controls is an issue which must be resolved before both the Amendment and the Better Apartments standards can satisfactorily co-exist in the Planning Scheme.

(iv) Conclusions

The Panel concludes:

- The matter of the inconsistency between the proposed side and rear building setbacks in the Better Apartments Design Standards and those in the Amendment

which both purport to be seeking to achieve good on-site amenity (at least in part), requires urgent resolution.

- As a short term solution to allow the Amendment to proceed, it would be possible to exclude the operation of the Better Apartments setback standard from developments in the CCZ.

7.15 Further work

The Panel recommends that the Minister:

c) Consider amendments to third party rights in relation to development applications in the central city.

d) Direct that Council investigate the identification of additional Special Character Areas in line with Ms Hodyl's evidence.

e) Investigate as a priority floorspace 'transfer mechanisms' that may assist with conservation of the many heritage buildings in individual place Heritage Overlays in the Central City, especially in the General Development Area.

f) Investigate the extent to which site-specific built form controls conflict with more general built form controls on sites across the Central City area and resolve the conflict as required.

g) Consider altering the 25,000 square metre cut-off between developments for which the Council and Minister act as Responsible Authorities to 35,000 square metres.

h) Amend Planning Practice Note 59 to include the term "Floor Area Ratio" to the list of dot points relating to "When are mandatory provisions appropriate?"

i) Direct Council to review Development Plan Overlay Schedule 1 in light of changes to land use and development in the general area and modern day policy intents in relation to character areas and laneways.

j) Urgently resolve the inconsistency between the proposed side and rear building setbacks in the Better Apartments Design Standards and those in the Amendment, which both purport to be seeking to achieve good on-site amenity (at least in part).

8 Built form impacts

8.1 Overview

Submissions and evidence covered a range of issues relating to the impacts of built form, both in terms of on-site building envelopes and setbacks and in terms of off-site impacts such as shadowing of public spaces, relationship with adjacent sites and buildings or the effects of changed wind conditions.

In both the General Development Area and the Special Character Areas it is evident that the proposals for managing built form of new development was seen by many submitters as having implications for the capacity of a site to achieve a certain floorspace that is achievable under pre-Amendment C262 controls or under the C262 interim controls.

The principal focus of the Amendment is on protecting the public realm. The Panel notes that issues that are internal to a building do not affect the amount of sunlight or daylight to the public realm, the wind conditions on the street, or sky views between buildings. Further, uses within buildings can change over time, particularly given the number of uses that are as-of-right within the CCZ.

8.2 Architectural testing

Research was undertaken to assess the built form capacity of a number of sites in specific areas in the CBD and in Southbank.

This research was commissioned by DELWP and undertaken by Ms Sarah Buckeridge from Hayball Architects. The report, *Architectural Testing of Built Form Controls, Melbourne Hoddle Grid / Southbank*, describes the process of test modelling which considered a range of parameters such as street wall heights, front, side and rear setbacks, tower site coverage and floor area ratios. The modelling made assumptions in terms of floorspace efficiency (the ratio of leasable floor area to gross floor area), minimum floor plate sizes, apartment sizes and car parking ratios.

Ms Buckeridge explained:

> *The two precincts used for the research were:*
>
> - *the CBD block surrounded by Spencer, Bourke, King and Little Collins streets, and*
> - *two blocks in Southbank bounded by Whiteman Street, Power Street, City Road and Kings Way and bisected by Queensbridge Street.*
>
> *These blocks were selected as they included varied site sizes and street interfaces and included heritage elements or other buildings likely to be retained as part of future development.*

Testing was applied to a variety of alternative building envelopes and for different building heights and tower setbacks under different built form controls. These controls were:

- pre Amendment C262 conditions
- Amendment C262 interim controls and 5 metre setbacks for buildings up to 100 metres in height

- Amendment C262 interim controls and tower setbacks of 5 percent above 100 metres
- alternative side and rear setbacks controls, of 6 percent above 80 metres and 8 percent above 60 metres
- alternative street wall heights (20 metres, 40 metres, and a street width to wall height ratio of 1:1)
- FARs of 12:1, 15:1, 18:1, 24:1 and the maximum achievable for selected sites within the two precincts.

Ms Buckeridge gave evidence that sites were selected with particular features in mind suitable for testing. She noted that there were a number of sites still available for development, namely eight sites identified in the Hoddle Grid and ten in Southbank where there were no sites covered by Heritage Overlays. She noted that strata titled blocks were difficult to redevelop due to separate ownership issues. It was important that study blocks had a range of site sizes and orientation, especially widths. Southbank had the benefit of larger site sizes and frontages.

The modelling was first used to illustrate a pre-Amendment C262 development scenario, using recent development approvals as benchmarks to establish minimum setbacks and building heights. The modelling then analysed the interim controls applying under Amendment C262 by testing two options; built form up to 100 metres in height, and maximised development options for buildings above 100 metres.

The testing found that development opportunities would not be unreasonably restricted by the imposition of a discretionary FAR of 24:1, this figure being reached on only a few larger sites when typical floor plates were adopted. The testing also found that the minimum 5 metre interim mandatory side setbacks above 40 metres height resulted in inadequate building separations between some tower forms up to approximately 180 metres in height, and made sites with frontages less than about 20 metres difficult to develop.

The testing found that street wall heights up to 40 metres were frequently undesirable as this resulted in deep floor plates with poor access to light and ventilation.

The provision of a minimum 5 metre setback of towers from the street frontage was found to result in generally workable floor plates and a clear delineation between podium and tower when viewed from the street.

Additionally, alternative side and rear setback dimensions were tested for tower forms above 60 and 80 metres, which demonstrated that increased setbacks were required to improve tower separations.

One finding was that where sites abut more than one street, the requirement for mandatory tower setbacks limited the floor plate size on small or medium sizes sites, reinforcing that some flexibility for corner conditions would improve development capacity.

A key finding was that the floor area potential generally fell in the range of 13:1 to 24:1 for six selected study sites, with an upper target of 18:1 FAR easily achieved for the larger, regularly shaped or unencumbered sites.

The report's conclusion includes these points:

> *Testing of pre-interim controls resulted in intensive development of the precincts with an average FAR above 30:1. Tower separations were on average 10 - 15m, resulting in poor internal and public realm amenity.*
>
> *The Amendment C262 interim control testing indicated an average FAR above 20:1 was achieved across the block. Testing revealed that minimum 5m mandatory setbacks above 40m created insufficient building separations between some tower forms up to approximately 180m and made narrow frontage sites less than approximately 20m difficult to develop.*
>
> *The testing of setbacks calculated as 6 percent or 8 percent of overall height applied from a lower level, allowed for improved tower separations (average 15-20m).*
>
> *The testing of 6 percent tower setbacks from 80m resulted in an average FAR of 18:1 across the study precincts while 8 percent tower setbacks from 60m resulted in an average FAR of approximately 15:1 across the study precincts.*
>
> *The 6 percent tower setbacks above 80m balanced the ability to maintain developable floor plates and to achieve appropriate tower separation, public realm and internal amenity.*
>
> *These parameters established the maximum allowable floor plate area for each site.*
>
> *Further investigation tested how building envelopes could be reconfigured within the established maximum floor plate area (providing minimum 5m setbacks were maintained).*
>
> *This generally resulted in more site responsive design outcomes where envelopes could address specific interfaces such as existing and heritage structures and improve internal amenity through directing views and maintaining privacy.*

The testing demonstrated that adequate built form outcomes could be achieved with the application of a setback of 6 percent of the building's height for towers with height greater than 80 metres to achieve acceptable separation of towers.

The Panel considers that the testing of built form controls undertaken by Ms Buckeridge and the detail of the analysis and assessment that was carried out was an important piece of primary research in the context of this Amendment. The FAR maximisation process highlights it will always be a trade-off between height and floor plate area.

It served as a major contributor to the consideration of revised built form controls. Despite the limited number of test sites in the context of the overall investigation area, it was a comprehensive analysis which has demonstrated the excessive density that could be achieved if the pre-Amendment C262 controls were to continue. Importantly, this research and testing provided the key benchmark for the future density proposed under C270, namely a maximum Floor Area Ratio of 18:1.

In addition to this testing, Mr Sheppard provided urban design advice as to the built form impacts of the controls and made various suggestions to improve the controls.

8.3 Podium and street wall heights

(i) Submissions and evidence

The Panel heard evidence about sites such as 130 Little Collins Street which is a narrow site in an environment where buildings are not of the podium-and-tower typology but have high street walls.

Oz Property Group (Submitter 27) and Larkfield Estate (Submitter 65) raised concern that mandatory controls limit opportunities for minor additions.

Mr Echberg (Submitter 18), an architect and urban design consultant, noted the excessive heights that have been achieved particularly in parts Elizabeth Street.

Ms Hodyl explained that the height of a street wall has a direct impact on the experience of the pedestrians within the street. The CCBFR modelled street wall heights across the Central City and this is shown in Figure 5.

Mr Sheppard gave evidence that DDO10 contains a preferred street wall height of 20 metres (notably not a minimum or a maximum) and a mandatory maximum street wall height of 40 metres. This may be increased to 80 metres on corner sites (discussed in Section 8.4). Mr Sheppard opined:

> *The main reason put forward for the preferred street wall height of 20 metres is that 20 metres is the prevailing street wall height across the Central City. Whilst this is undoubtedly true in some parts of the Central City, it is not universally the case … I consider that outside the Special Character Areas, the character should be allowed to evolve in order to accommodate growth.*

It was Mr Sheppard's evidence that the preferred street wall height should be amended to include heights up to 30 metres in main streets. Ms Brennan submitted that the combination of a preferred street wall height of 20 metres and a modified street wall height of 40 metres maximum (and up to 80 metres in certain circumstances) in DDO10 was arrived at following what is perhaps:

> *The first detailed analysis of existing street wall heights in the Central City. This exposed the myth of 40m as the 'Melbourne' street wall height. In fact, of the total length of street wall surveyed, only 10 percent was between 30 and 40 metres in height, while 54 percent was 20 metres or lower in height.*

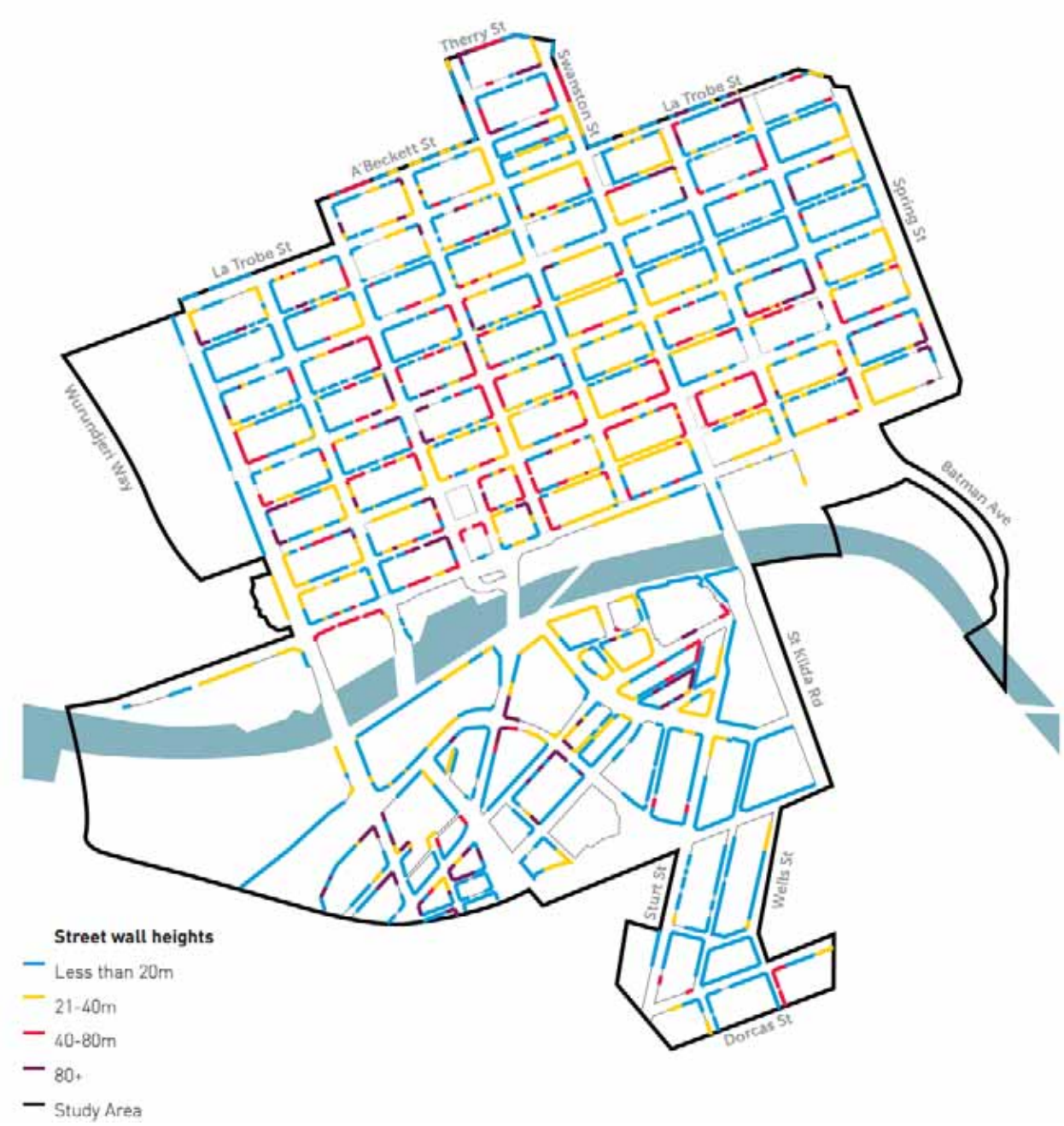

Figure 9 Map of street wall heights in the Amendment area[39]

The CCBFR outlines that a number of the technical reports support the preferred 20 metre street wall height control, including:

- Daylight modelling assessment
- Existing conditions analysis – permits
- Comparative planning controls inter-city research
- Architectural testing of built form controls.

[39] Source: Synthesis Report, Central City Built Form Review, Hodyl & Co, April 2016, Page 65 , Figure 38

Mr Sheppard gave evidence supporting the principle of limiting street wall height to maintain good public realm amenity. Mr Sheppard gave evidence that 30 percent of street wall heights in the Central City are between 10 and 20 metres, followed by 17 percent at 20-30 metres. He considered that new 30 metre high street walls would sit comfortably in the range of existing heights (at least in main streets).

(ii) Discussion

Podium-and-tower forms, where the podium forms the street wall, are used frequently as a means of accommodating above ground car parking within a podium with little or no setbacks (and occasionally with residential accommodation facing the street), above which a tower is set back to achieve the required minimum separation between habitable spaces on adjoining sites.

The Panel noted the work undertaken by Ms Day in the *Comparative Planning Controls Report, April 2016* which considered a number of cities around the world in terms of typical built forms, allowable densities and achievable heights. The prevalence of the podium-and-tower typology as a standard building form for tall buildings was notable, with Chicago - where no setback of built form above a nominated height is required resulting in towers rising from ground level - being an exception.

Submissions often focused on the setback and podium or street wall conditions on adjoining sites as justification to apply reduced setbacks to their sites.

The Amendment proposes a variety of measures to determine how the allowable floorspace is massed on the site. Factors that determine the built form include required setbacks from site boundaries, minimum or maximum street wall heights, overall height and the position of any tower element on the site. The existing conditions on adjacent sites, the orientation of the site with regard to its street frontage, the impact of additional shadows and the proposed uses of the building also affect the possible built form.

Detailed modelling prepared by Ms Buckeridge highlighted how the podium and street walls are applied to built form and design outcomes. It was noted that the particular planning controls that apply to a site can also affect the potential built form.

The Panel agrees with Mr Sheppard that the DDO10 preferred street wall height should be increased to 30 metres in main streets to reduce the visual dominance of towers. The Panel notes Amendment C245 specified ranges for preferred minimums.

Mr Sheppard made a number of suggestions for further changes to the controls applying to built form in the Amendment. They included a street wall preferred range which the Panel supports and increasing the minimum setback of towers above the street wall to 10 metres where the street wall is no higher than 40 metres and requiring the tower to have a distinctly different architectural expression or form.

The Panel supports the inclusion in the built form outcomes of Table 1 to DDO10 of reference to distinguishing of the tower/additions and the street wall of buildings by different architectural expression or form.

Some of the suggestions by Mecone Town Planning (Submitter 60) in its written submission made in response to public notice of the Amendment were incorporated by the Minister in Document 165. These included:

- In DDO10 Table 1 in the section on street wall – it is not appropriate to refer to *"height **and setback** that respects the scale of adjoining heritage places"* as street wall by definition is sited on the front boundary.
- Add the following further built form outcome in DDO10 Table 1 re street wall: "*Maintenance of the prevailing street wall height and vertical rhythm of the street".*

Mr Sheppard suggested:

> *In DDO10, the definition of a street wall does not include a building façade constructed close to (say 300mm from) a street boundary. I recommend that the definition be expanded to include any part of a building constructed within, say, 0.5m of a lot boundary fronting a street.*

The Panel generally supports these changes.

(iii) Conclusions

The Panel draws the following conclusions:

- It is appropriate to amend the preferred street wall height to 15-30 metres in main streets and 7-20 metres in little streets.
- The suggestion to increase the preferred setback above the street wall to 10 metres where the street wall is no higher than 40 metres and requiring towers to have a distinctly different architectural expression or form is supported.
- The changes recommended by Mecone Town Planning are supported in relation to deleting the reference to setback of the street wall in DDO10 Table 1; and adding a further built form outcome in DDO10 Table 1 relating to maintenance of the prevailing street wall height and vertical rhythm of the street.

(iv) Recommendations

The Panel makes the following recommendations:

14. Change the definition of street wall in Clause 2.1 of all Design and Development Overlay Schedules in the Amendment to include any part of a building constructed within 0.3 metres of a lot boundary fronting a street.

15. Amend Table 1 in Design and Development Overlay Schedule 10 to:

- **Delete the words "*and setbacks*" from to *"height and setback that respects the scale of adjoining heritage places"* as street wall by definition is sited on the front boundary.**
- **Add the following built form outcome regarding street wall: "*Maintenance of the prevailing street wall height and vertical rhythm of the street*".**
- **Include in the 'Preferred Requirement' column, a street wall height range of 15-30 metres in main streets and 7 – 20 metres in streets.**

- **Change the 'Preferred Requirement' building setback above the street wall to 10 metres.**
- **Add to the 'Modified Requirement' for Building setback(s) from street wall that the "*and the street wall must be no higher than 40m and the tower or building addition must have a distinctly different form or architectural expression.*"**

8.4 Corner sites

(i) Submissions and evidence

The Amendment, at DDO10, allows the street wall height of buildings on corners where at least one street is a main street to have a maximum height of 80 metres for a distance of 20 metres along each street frontage. The general maximum for street walls is 40 metres, with sites opposite large areas of open space or very wide streets being an exception.

Submitter 70 supported the allowance for extra height at street corners as applied in DDO10 and suggested that this approach should also be applied in Special Character Areas.

The Minister's response to submissions disagreed saying that there was adequate flexibility in the controls in the Special Character Areas to enable corner site responses and transition to adjoining areas, without the need to modify the provisions.

Evidence was presented at the Hearing in support of this corner height and length, Mr Sheppard recommending that the length of built form to 80 metres should be extended to 25 metres along a frontage. Ms Buckeridge supported this in her evidence:

> *The ability to build up to 80 metres on street corners could be more problematic. It is an unintended consequence because you end up with a long wall on the corner – the controls are limited to 20 metres. I would point to the urban design evidence of Mr Sheppard that suggested 25 metre lengths.*

Ms Hodyl's *Synthesis Report* included:

> *Placing taller buildings on street corners to reinforce that corner is an established urban design principle and there are a number of precedents found within the Study Area (locations has very few sites that punctuate long axial views, it is therefore on street corners that taller, more prominent buildings have been located.*
>
> *Taller buildings in these corner locations are less likely to dominate neighbours or adjacent public spaces, as, on corner sites, there is more public space available around the buildings. Drawing from local examples, a maximum height of 80 metres is considered appropriate, as shown by examples such as the Australian Institute of Architect's building on the corner of Exhibition Street which doesn't overly dominate the surrounding context. In all circumstances it must be demonstrated that wind impacts or overshadowing.*

Ms Brennan submitted the street wall height control provides considerable discretion for an outcome of anywhere between 0-40 metres, and 80 metres on certain street corners and fronting public space. The modified requirement recognises the role of site context,

sharpening what might elsewhere be used as a blunt tool to give flexibility while still protecting the public realm.

Larkfield Estate (Submitter 65) outlined that the need to satisfy the built form outcome of consistency with the dominant parapet height is at odds with the notion of an 80 metre street wall height at street corners.

Mr Sheppard recommended that this be amended to clarify the built form outcomes to distinguish between prevalent parapet height and the definition of main street corners. The final version of the controls (Document 165) shows this change.

Mr Sheppard sought further clarification in the controls as the written provisions in DDO10 – Table 1 did not clearly state that an 80 metre high street wall is not acceptable on a corner of a main street and a lane. He supported the principle that greater height can be accommodated on main street corners due to the greater sense of openness created by intersecting streets.

Mr Sheppard's evidence outlined that it was appropriate for the main streets and "Little" streets to continue to have notably different characters – "*the former being more open and the latter more enclosed – and that different levels of amenity are an acceptable outcome of this."*

(ii) Discussion

The ability to build up to 80 metres on both frontages of a site on a main street corner is proposed as an urban design technique to mark such corners by more imposing built form.

The Panel notes that a maximum street wall height of 40 metres on main streets in the Hoddle Grid was a characteristic of much of the built form up to the 1950s and remains as a prominent feature of some streets and intersections.

The Panel had some concern that the proposed 80 metre provision could have undesirable consequences in terms of additional overshadowing of the public realm at intersections and may create an undesirable change in street wall height that undermines the effectiveness of the more generally applicable maximum 40 metre height. Ms Brennan had noted that the levels of daylight at street level were impacted by taller street wall heights.

The Panel, however, noted that the corner sites approach was supported in evidence by Mr Sheppard and Ms Hodyl based on detailed research and testing.

Ultimately, the Panel supported the proposal to allow greater height at main street corners for a distance of 25 metres and agreed with Mr Sheppard's concerns that to extend an 80 metre street wall for 20 or 25 metres along lanes or 'Little' streets would be to reduce daylight and the sense of human scale in those confined spaces. It supported the view of Mr Sheppard in Recommendation 20 of his evidence statement that it is necessary to "*clarify the circumstances in which an 80m high street wall is acceptable."* The Panel accepts the changes to address this in Document 165.

(iii) Conclusions

The Panel considers that:

- Allowance of street wall heights on main street corner sites to exceed 40 metres is appropriate.
- The length of built form to 80 metres should be extended to 25 metres along a main street frontage.
- The changes in the Panel final version (Document 165) relating to corner sites is accepted.

8.5 Blank walls

(i) Submissions and evidence

Several submitters raised the issue of blank walls on existing buildings on the common boundary with adjacent sites, proposing that new development should be able to abut those walls. Instances cited included small sites where blank walls provided opportunities for new buildings to be built against them to increase floorspace and produce a better design outcome as well as covering an unsightly blank wall.

Mr Michael Barlow gave evidence on behalf of the Uniting Church regarding its property at 148 Lonsdale Street (Submitter 32). He said that, where an existing blank wall exceeds 80 metres in height, a new building should be allowed to be built to that wall for its full height, rather than only to the allowable maximum of 80 metres - above which a setback is required.

The Panel was advised by Ms Brennan for the Minister of the many instances of blank walls in the Hoddle Grid: a review by the Department identified 48 instances of blank walls with heights exceeding 80 metres on the side boundaries of sites. The potential for such sites to have a new building constructed against these blank walls creates the potential for a 'wall of buildings' with adverse consequences in terms of views and outlooks from nearby buildings, and overshadowing of the public realm.

In her written evidence, Ms Hodyl stated:

> *An upgrade to the design of a space – the layout, quality of materials and landscaping - is important, but can be undermined by poor adjacent development that creates uncomfortable conditions, for example, buildings that ... have poor interfaces to the street, for example, blank frontages or service areas.*

Ms Hodyl provided the following example at 496-504 Elizabeth Street, a site occupied by a tower built to the boundary with a blank concrete wall. The figures below demonstrate how a tower form with a poorly designed façade can visually dominate its urban context.

Figure 10 496-504 Elizabeth Street, Melbourne

Figure 11 Views of 496-504 Elizabeth Street from Elizabeth Street (left) and Therry Street outside the QVM (right)[40]

[40] Source: Synthesis Report, Central City Built Form Review, Hodyl & Co, April 2016, Page 38

(ii) Discussion

The above instances and others demonstrate the variety of site-specific conditions that have emerged in the Amendment area as various phases of development have occurred and different built form controls have applied.

Should compelling cases emerge then there may be recourse to a site-specific provision in the schedule to Clause 52.03. The Panel was not presented with any compelling cases during the Hearing to warrant inclusion.

(iii) Conclusion

The Panel concludes that the proposed controls for blank walls are appropriate.

8.6 Tower setbacks and building separation

(i) Submissions and evidence

Submitters and experts generally agreed that towers should be set back from the street wall of the podium a minimum of 5 metres. As well as providing a visual break and one that assists in mitigating downward wind currents, it also provides a differentiation in in architectural facade treatment.

Mr Sheppard noted that DDO10 contains preferred and mandatory minimum 5 metre front tower setback requirements. It was his evidence that this requirement be amended to increase the preferred setback to 10 metres and add a proviso to the 'Modified Requirement' that "*the street wall be no higher than 40 metres and the tower must have a distinctly different form or architectural expression*."

Ms Buckeridge's scenario testing led to the maximum building envelopes allowed under DDO10, from which the base FAR was then derived. Ms Brennan explained:

> *That is, the FAR resulted from testing of other built form controls, and in particular the setback and tower separation controls. As Ms Buckeridge stated in evidence in chief, "the diversity and richness of built form is experienced in the street"; she explained that the relationship of street wall height to street context, and for higher forms, the separation of towers from one another, are the key determinants of access to sky views and daylight at street level.*

While the Amendment allows zero setback to side boundaries in some situations, the general provision of setbacks from side and rear boundaries was supported by the Minister's submissions and evidence as necessary for several reasons. The resultant separation of buildings has the advantages of providing some level of privacy between apartments, provision of outlooks even if only obliquely, and access for daylight and sunlight. The *Architectural Testing of Built Form Controls* report specifically considered issues of tower orientation to enhance outlook and levels of privacy. The evidence of Ms Buckeridge indicated that tower forms are difficult to achieve above 80 metres on small sites and that the potential to realise viable developments may require site consolidation.

Yang Clarendon Pty Ltd (Submitter 86), referred to the relatively small site at 54-62 Clarendon Street and the presence of tall buildings in the vicinity and the issues of loss of development potential if setbacks to achieve tower separation were rigidly applied and sought a level of discretion in applying these controls. The issue of equitable development between two abutting sites was raised.

For the large site at 392 - 406 Bourke Street (Submitter 62), Mr Goss gave evidence that the setbacks had differing implications for residential and commercial floor plates, potentially making a commercial use unviable. The capacity to vary the position of a tower on a site to achieve a better design outcome with regard to reducing shadows and improving the building's relationship to adjoining buildings, impacts side and rear setbacks. This is discussed in further detail in Section 10.3.3.

Clem Newton-Brown (Submitter 87) referred the Panel to two small sites in the Hoddle Grid (295 King Street and 278 Lonsdale Street). He said that the calculation of required setback should not be an inhibitor to creative design particularly on narrow sites where varying and lesser setbacks can improve amenity and outlook.

Mr Newton-Brown raised the situation of setback for a tower facade that is curved or otherwise not parallel to the podium facade or the street frontage. He suggested that the required setback should be determined as the average of the maximum and minimum setbacks of the tower. Where a tower is fully curvilinear, the street facade would be that part of the tower's perimeter that is between two lines drawn at 45 degrees to the site's frontage at each corner of the site, with the setback determined as for a curved facade. This site is discussed further in Section 10.3.2.

(ii) Discussion

Prior to the introduction of Amendment C262, there was no clarity on setbacks between towers. The Panel sees it as a positive move to introduce controls to address and manage this aspect of built form.

The extent of building mass reduces the amount of direct sunlight that reaches streets, footpaths and other public spaces, resulting in shaded, windy and uncomfortable conditions for pedestrians.

There are adverse public realm effects when towers with little space between them, appear from certain viewpoints as a solid 'wall' of built form. This is evident when viewing the very densely built up part of Southbank from Sturt Street near Grant Street and the northern part of Elizabeth Street where several towers have recently been constructed. There are other parts of the Central City where similar circumstances exist.

There was considerable concern expressed by a number of submitters and their experts that residential towers should not be constructed with inadequate spaces between them for reasons of internal amenity. The Panel agrees that the consequence of inadequate tower separation is a lack of real privacy (even though windows of apartments may be further apart than the minimum 9 metres required by ResCode) with balconies located within this separation distance.

Evidence of narrow distances between buildings can be seen in parts of the Hoddle Grid, particularly where buildings abut narrow streets or lanes, and in Southbank where, in part due to the street and allotment patterns, towers are close to site boundaries.

The Panel agrees with the view of the importance of adequate tower separation in affecting resident and public realm amenity.

To redress this situation, the Amendment proposes that towers be separated by minimum distances, with the separation increasing as the building becomes higher, imposed by increasingly large setbacks from property boundaries.

The Amendment envisages the building typology of podium and tower to continue to be a predominant built form within the CBD and Southbank. While the podium element of a building, being the lower part constructed with zero or minimal setback from the street frontage, will be permitted to continue to extend to both side boundaries, the tower element above the podium will have a variety of controls to determine its position on the site.

While side and rear setbacks and separation of towers are good measures to improve internal amenity and better quality public realm outcomes in terms of sunlight and openness to the street, the exhibited form of the controls sought to achieve a minimum separation of towers of 10 metres or 6 percent of the tower's height once the height exceeds the 167 metre preferred height.

The Panel considers this general approach to be appropriate.

However, it was evident from submissions and evidence that the width of tower to tower and boundary setbacks has a significant impact on the development capacity of sites and the floorspace that can be achieved.

The key question is whether the proposed controls achieve a good balance between avoiding unnecessary constraints on development and achieving good built form outcomes and desirable levels of amenity in the public realm. Setbacks can have a greater impact on development capacity than other controls, such as street wall height or maximum FAR, particularly on smaller sites and sites with tall buildings on adjacent sites.

Small sites present particular challenges with regard to prescribed setbacks. In these instances, and potentially for minor additions, discretion to allow reduced setbacks is desirable. This is generally available. Nonetheless, that the capacity of some sites is constrained by the proposed setback controls is a consequence of the site's dimensions and it has to be accepted that the development of some sites is limited. Not all sites can accommodate towers. In this respect, the Panel concurs with the evidence of Mr Sheppard that for sites with a frontage of less than 25 metres, the development potential may be limited. The Panel notes the tall residential tower of the Phoenix apartment building in Flinders Street is, and should be regarded as, an anomaly and one that should not be repeated.

The Panel discusses the Better Apartments Design Standards (Document 134), in Section 7.15. Of concern to the Panel is the extreme difference in setback standards between this document and the Amendment controls.

(iii) Conclusions

The Panel concludes:

- The tower to tower and boundary setbacks as exhibited are supported.
- Upper level setbacks above the street wall/podium, a 5 metre setback for towers is the minimum necessary to create some level of visual distinctness of the tower and podium/street wall.
- Controls that seek to determine a podium-and-tower configuration, including the provision of street walls, being the facades of podiums having zero setback from the street frontage are supported.
- Architectural expression and the form of the facade can also contribute to creating that visual distinction. If the facade of the podium and the tower are similar, however, a 5 metre setback may not be sufficient. The Panel does not support the exclusion of building services from the setback requirements.
- Tower separation is a key element in ensuring the retention of daylight to streets, and the provision of increased setback as a towers height increases is supported.
- Separation of towers should ensure high levels of internal amenity within the building and its neighbours.

8.7 Daylight and overshadowing

(i) Submissions and evidence

Mr Kelly, of Wood & Grieve Engineers, presented evidence for the Minister based on computer simulations of varying podium and tower heights and distances apart to provide data on expected daylight performance at ground level for different sky conditions. Reflectance of building facades was taken as a constant despite different conditions existing.

The findings of the research included that the separation of buildings had a greater impact on daylight levels than lower podium heights and the height of buildings. However, buildings below 60 metres in height generated exponential increases in daylight at street level and that this levelled off above 60 metres up to 200 metres. The 3D modelling by Mr Sowinski who presented evidence for the Minister was informative about the overshadowing effects of existing and potential developments. This was reinforced by the evidence of Ms Hodyl, and outlined in the CCBFR shown below showing the positive relationship between tower buildings and the street (above) and negative relationship (below):

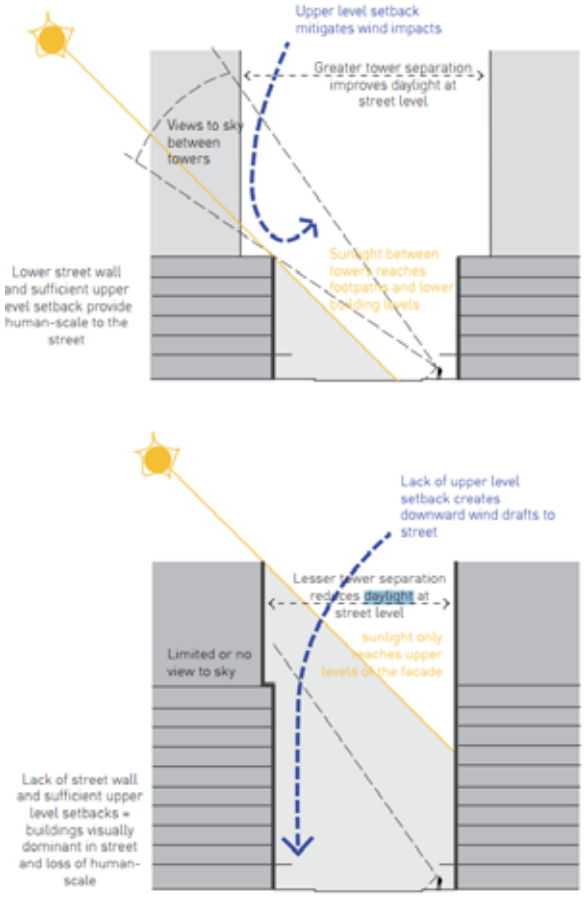

Figure 12 Public realm quality diagram[41]

Mr Goss, of Orbit Solutions, presented visualisations in his evidence for Submitter 31 relating to 130 Little Collins Street showing different building envelopes for the site. Mr Goss demonstrated the capacity for built form on the site to be adjusted to ensure the building's shadow causes little or no additional loss of sunlight to adjacent roads or public spaces given the extent of existing shadowing.

Ms Kelly of Urbis, for GBT Group (Submitter 85), referred to the existing built form in the Little Bourke Street and Elizabeth Street area near Melbourne Central and that the imposition of a 40 metre mandatory height limit is inappropriate. Ms Brennan advised the Panel that this control is, in part, to ensure that the public realm around the site is protected in terms of sunlight and daylight.

Regarding 54-62 Clarendon Street (Submitter 86), Ms Macklin of Urbis argued that the existing built form in the immediate area impacts the levels of daylight and sunlight to the street.

Professor Jacques, for the University of Melbourne (Submitter 42) provided recommendations on minor changes to overshadowing controls for the area. The changes include words in italics. "A permit should not be granted for buildings and works which would cast any *additional* shadow across a space listed below during the hours and date(s)

[41] Source: Synthesis Report, Central City Built Form Review, Hodyl & Co, April 2016

specified, unless the overshadowing will not *unreasonably* prejudice the amenity of the space."

The topic of shadows cast by a proposed building where its shadow would be largely or wholly within the area of an existing shadow was raised in regard to the Siddeley Street/World Trade centre site Mr Touzeau for Abacus Group (Submitter 66), where an existing building with a defined shadow over the Yarra River is to be replaced by a new building with a shadow footprint of the same size but different shape and hence different impacts.

Mr Touzeau suggested:

> *The overshadowing requirement under clause 2.3* [of DDO2 and DDO10] *should be split into separate sentences, with the first sentence reading as follows: "A permit must not be granted for buildings and works which would cast any additional shadow across a space listed below and shown in figure 2 of this schedule as a defined space during the hours and dates specified for that space".*
>
> *The exemption for minor works (which we understand pertains to structures on the river itself such as pontoons and the like) could then read separately in a second sentence: "This does not apply to minor works or minor changes to existing buildings or structures in the defined space".*
>
> *This change would provide greater clarity that building additions or modifications could be considered – so long as 'additional shadow' (as defined in the schedule) is not cast …*

Ms Brennan submitted that the proposed overshadowing controls are clear: if a proposed development does not add to the existing shadow across the Yarra River corridor at the relevant time, it will meet that component of the control and did not support this change. The Panel agrees as by virtue of the demolition trigger in the CCZ, and the requirement that a permit and prior approval for the redevelopment of the site are required for demolition (see clause 4.0 of CCZ1, 2 and 3), a replacement building will have the benefit of being assessed against the existing level of shadow prior to demolition.

(ii) Discussion

The retention of sunlight to streets and public spaces is an important element of the public's enjoyment of the Central City. The current level of overshadowing is significant in some streets and the Panel was advised of situations where some public spaces, especially mid-block locations on east-west 'Little Streets' which have tall buildings on their northern side, receive no beneficial sunlight.

It is evident that in certain instances, given the existing shadows, a building can fail to meet required setback or height controls but not create additional overshadowing due to the presence of existing shadows.

The Panel was informed by Mr Kelly on the accompanied site inspections about the measured relatively low levels of daylight near some newer developments.

With regard to whether building shadows occupying the same overall area as existing shadows but in with a different footprint (in a changed location) would be allowed by the incoming controls, as referred to by Submitter 66, the Minister advised that the controls anticipated this and allowed for a change of shadow location to be addressed at the application stage.

The Panel did not agree with the clarification changes suggested by Mr Touzeau for Abacus Group (Submitter 66) in the written input to the workshop concerning shadowing. It is not within the contemplation of the overshadowing controls to allow a different, but potentially lesser, shadow profile than the existing situation. In that scenario, a site-specific amendment would need to be sought. This is appropriate given the importance of the Yarra River corridor. The Panel did agree with Mr Touzeau's suggestion of:

> *Consideration be given to whether the legend in 'figure 2' should be modified to refer to the hatched area as "Defined Space (Yarra River Corridor)" because in combination the current drafting and diagrams could be misinterpreted such that adjacent buildings / sites / public areas shown in the diagrams were unintentionally read as forming part of the defined space and hence subject to mandatory overshadowing controls.*

The Panel notes that the final version of the controls (Document 165) had incorporated the overshadowing amendments suggested by Professor Jacques across all of the DDOs at Section 2.3 and supports these as they provide additional flexibility.

(iii) Conclusions

The Panel concludes:

- The controls that prescribe existing levels of sunlight to public spaces that are appropriate.
- The consideration of the effects on sunlight and daylight of setbacks, tower separation, podium or street wall heights or overall building height are appropriate.
- The replacement building amendment proposed by Mr Touzeau is not supported.
- All of the shadowing diagrams should refer to the hatched area as 'Defined Space'.
- Overshadowing controls as amended are supported.

(iv) Recommendations

The Panel makes the following recommendations:

16. Split the overshadowing requirement under Clause 2.3 of Design and Development Overlay Schedules 2 and 10 into separate sentences, with the first sentence reading as follows:

- ***A permit must not be granted for buildings and works which would cast any additional shadow across a space listed below and shown in figure 2 of this schedule as a defined space during the hours and dates specified for that space*.**
- **Amend the shadowing diagrams to refer to the hatched area as '*Defined Space*'.**

8.8 Wind

(i) Submissions and evidence

The Panel directed that before the Hearing, the two key wind experts, Dr Seifu Bekele and Professor Bill Melbourne, discuss their respective witness statements/submissions and identify areas of agreement or commonality and areas of dispute.

Ms Porter, Barrister on behalf of the Minister, submitted Document 1 which set out the areas upon which both experts agreed:

- the intention of the Amendment to improve the experience of pedestrian wind levels
- the wind comfort criteria and wind speeds
- the appropriateness of a proposed height trigger of development exceeding 40 metres for requiring a wind assessment
- wind mitigation strategies would be helpful
- areas of gust wind speed in a city is important, as is mean wind speed
- AWES *Guidelines for Pedestrian Level Wind Effects Assessment Distance Guidelines* should be used.

Ms Brennan advised the Panel that the two experts disagreed on the following issues:

- describing wind by 0.1 percent probability or 20 percent probability of exceedance (80 percent non-exceed)
- the length of surveys which should be undertaken
- the definition of unsafe wind conditions
- the definition of uncomfortable wind conditions.

Wind 0.1 percent probability or 20 percent probability exceedance

Mr Eaddy appeared before the Panel in place of Professor Melbourne, but adopted Professor Melbourne's views. The Panel accepted this adoption and, without objection from Ms Porter, proceeded to hear Mr Eaddy with respect to the matters Professor Melbourne had previously raised. Mr Eaddy commented that exceedance of 0.1 percent has a defined point in the probability curve and can be changed to another level of exceedance such as 20 percent. Mr Eaddy noted that the 22.5 degree sector was an historical figure obtained from BOM.

Dr Bekele gave evidence that this was not a simple shift in the probability curve as it can result in a significant change in the wind analysis and final values.

Unsafe wind conditions

Mr Eaddy stated that there is difficulty accounting for wind directionality, as no individual wind direction should exceed safety level. Mr Eaddy made recommendations that the definition be changed to mean: *peak gust speed during the hourly mean with a probability of exceedance of 0.1 percent in any 22.5 degree wind direction sector exceeds 23m^{-1}.* Mr Eaddy stated that to process all of that information requires a significant understanding of maths, but this could be made easier to understand if the controls include wind direction as part of the methodology.

Dr Bekele stated that the requirement for max 3 second gusts not exceeding 20m/sec is a conservative measure that is more likely to ensure public safety, noting that the city of Wellington in New Zealand has adopted 20m/sec wind speed for safety at this level. Dr Bekele agreed that directionality is important.

Uncomfortable wind conditions

Mr Eaddy submitted that the definition didn't account for wind directionality but agreed with the proposed mean wind speed. Mr Eaddy indicated that the drafting should be whichever is greater. Mr Eaddy advised that for the uncomfortable wind definition, the reference to *mean* for wind speed should be deleted as to leave it in would create a different meaning to what was intended. This is particularly important if the intent is to define uncomfortable wind from all wind directions if the wind speeds exceed more than 20 percent. Mr Eaddy recommended the Panel consider defining the time.

Dr Bekele stated that the wind comfort criteria is based on the most frequent winds and maintains his support for the exhibited controls, which includes a proposed all directions approach.

Ms Porter confirmed that a number of amendments would be made to the exhibited wind controls to include the following:

- amend the assessment area to use AWES *Guidelines for Pedestrian Level Wind Effects Assessment Distance*
- amend the safety and comfort criterion
- a diagram Ms Jordan suggested to clarify the assessment area.

Ms Porter indicated that the Minister was considering Mr Sheppard's views in providing additional guidance as to when uncomfortable wind conditions may be acceptable but did not make further submissions on that point.

(ii) Discussion

Through the introduction of these controls, the focus is now looking at the gust criteria and gust equivalent mean criteria in order to obtain 80 percent comfort wind as an average from previous effects of built form. The Panel accepts the evidence that setback controls are a vital tool for wind as they mitigate the wind impacts, including addressing wind channelling through gaps between buildings. The Panel heard evidence that integrating podiums into buildings or towers could reduce the downward impact of wind.

The Panel notes the C262 controls sought to avoid extreme wind events and the application requirements for wind that previously existed in Southbank CCZ3 were extended to the Hoddle Grid[42]. The exhibited controls introduced unsafe and uncomfortable wind conditions definitions and specific permit trigger requirements.

The final version of the controls sought to refine further the definitions so that:

- *Unsafe wind conditions* means the hourly maximum 3 second gust which exceeds 20 metres per second with probability of exceedance of 0.1 percent of the time from all wind directions combined.

[42] Document 184

- *Uncomfortable wind conditions* means a mean wind speed from all wind directions combined with the probability of non-exceedance 80 percent of the time (equivalent to probability of exceedance 20 percent of the time), equal to or less than:
  - 3 metres per sec for sitting areas;
  - 4 metre per sec for standing areas; and
  - 5 metre per sec for walking areas.

The final version of the controls also sought to further refine the permit trigger controls to include the words in bold for both unsafe wind conditions and uncomfortable wind conditions: *"Wind effects: A permit must not be granted for buildings and works with a total building height in excess of 40 metres that would cause unsafe wind conditions in publicly accessible areas within a distance equal to half the longest width of the building above 40 metres in height measured from all facades or half the total height of the building, whichever is greater as shown in Figure 1). For uncomfortable wind the controls are discretionary in that a permit should not be granted, etc."*

Ms Porter accepted the proposal set out by Mr Eaddy in revising the "*whichever is greater*" wording for uncomfortable wind definition. The final version of the controls were amended accordingly and is the version the Panel adopts.

There were significant discussions at the Hearing in order to determine the best way to define (un)comfortable wind so as to provide the best operational environment of these controls in the public realm. The Panel understood that the definition of (un)comfortable wind as was agreed through the mark ups of the final version of the controls should be changed from *uncomfortable wind conditions to comfortable wind conditions***.** The Panel notes this change to the definition does not appear to have occurred. The Panel has made a recommendation to change these controls as discussed.

(iii) Conclusions

The Panel concludes:

- The wind controls are strategically justified and will mitigate the impact of the built form on the public realm regardless of whether a person is standing, walking or sitting in the envelope of the building.

(iv) Recommendations

The Panel makes the following recommendations:

17. Amend Clause 2.1 'Definitions' in each of the Design and Development Overlay Schedules forming part of this Amendment with regard to wind to state the following:

- **Comfortable wind conditions means a wind speed from all directions combined with probability of exceedance 80 percent of the time.**

18. Amend Clause 2.3 'Requirements' in each of the Design and Development Overlay Schedules as relate to Wind Effects by replacing the word 'lesser' with 'greater' in each paragraph.

8.9 Further work

k) Consider devising an agreed methodology to assist planners understand technical wind requirements when considering planning permit applications that may trigger the relevant controls.

8.10 Commercial floor plates

(i) Submissions and evidence

A number of submitters questioned the built form outcomes and their potential impact on commercial floor plates. The Panel heard evidence regarding the different floorspace requirement of commercial uses and the different levels of occupant amenity that apply to commercial floorspace compared with residential. Mr Wren in particular made presentations on this issue on behalf of a number of commercial clients (Submitters 31, 43 and 52).

Brookfield Properties (Submitter 75) described the specific requirements of a commercial development, particularly new developments that are designed to meet the requirements in terms of floor plates and amenities of Premium and A Grade tenants. He described how these requirements do not accord with some of the controls proposed by the Amendment and that these can adversely impact a site's floorspace yield.

The Panel was also advised of such factors that impact the provision of commercial or office space in the Hoddle Grid, including the increasingly fewer sites large enough to accommodate floor plates of around 1500 square metres, and market indications that some corporations who moved to large open-plan offices in Docklands are returning to the better-serviced Hoddle Grid with its better access to clients and associated firms.

A number of submitters (Submitters 31, 43, 49, 52, 56, 69, 74, 75, 90 and 91) were concerned about preserving commercial capacity in the city and the Amendment imposed an unfair burden on commercial development.

Dexus, Phillip Nominees Pty Ltd, Lt Col JV Pty Ltd, AMP and Ausvest (Submitters 31, 43, 52, 56 and 64) argued for relaxed controls on commercial development. They argued commercial floor space requires larger land take up, it does not require high quality amenity by way of side and rear setbacks and residential development is taking up key sites to support large floor areas.

AMP (Submitter 56) argued that *FAR bonuses are uncapped for commercial/mixed use proposal than residential proposals in order to ensure that the economic drivers of the CBD are sustained*. They submitted that the Panel consider the potential for the FAR to be varied across the city to align with the needs of the community and the economy in order to ensure that over time, all sites with the commercial core can reach their full potential.

It was Dr Spiller's evidence for the Minister that residential use had surpassed commercial uses now for investment in the Central City, and this was cyclical.

Mr Christopher Wren QC appeared on behalf of Dexus, Phillip Nominees Pty Ltd and Lt Col JV Pty Ltd. Dexus operates an investment trust with over $22b worth of office assets under its ownership.

Dexus' interests in the Melbourne CBD include:

- 360 Collins Street
- 385 Bourke Street
- 180-222 Lonsdale Street
- 180 Flinders Street
- 452 Flinders Street and
- 8 Nicholson Street.

Mr Wren submitted that the Melbourne CBD plays a key and obvious role in the provision of commercial office space for Greater Melbourne. He referenced the definition of Melbourne CBD at Clause 21.02-5 *Prosperous City* and protection of business areas at Clause 21.08 reinforcing this role. Mr Wren outlined that *Plan Melbourne* identifies the strength of the Central City's economic contribution by aiming to build an expanded Central City.

Mr Wren submitted:

> *Until recently, the application of CBD planning controls and market forces have provided a fertile environment for residential development in the CBD. This has given rise to significant numbers of approvals for major residential towers in the traditional CBD area.*

Mr Wren submitted that the proposed Amendment will render the traditional CBD area (being Melbourne's principal area for employment) less competitive in both national and global markets.

Mr Wren called for the planning framework to remain flexible. It was argued that:

> *The planning controls have not been prepared having regard to use. The proposed amendment favours residential development in the traditional CBD. This flies in the face of planning objectives for business.*

Mr Wren tabled a timeline, prepared by Urbis tracking the physical outcomes of development of the CBD.

Address	Building Name	Date of Build	Levels	Net Leasable Area By Floor
160 Harbour Esplanade, Docklands	Channel 7 Melbourne Broadcast Centre	2001	5	1,400
380 La Trobe Street, Melbourne	380 La Trobe Street	2003	24	1,250
460 Lonsdale Street, Melbourne	380 La Trobe Street	2003	18	1,135
800 Bourke Street, Docklands	National Australia Bank	2004	9	4,097
700 Collins Street, Docklands	Australian Bureau of Meteorology Building	2004	15	3,000
180 Lonsdale Street, Melbourne	BHP Buildings	2004	28	1,800
501 Bourke Street, Melbourne	RACV Building	2005	22	1,510
11 Exhibition Street, Melbourne	11 Exhibition Street	2005	16	1,670
50 Lonsdale Street, Melbourne	The Urban Workshop	2006	33	1,600
121 Exhibition Street, Melbourne	SX1 Tower	2006	41	2,150

Address	Building Name	Date of Build	Levels	Net Leasable Area By Floor
8 Exhibition Street, Melbourne	Ernst & Young Building	2006	34	1,650
1010 La Trobe Street, Docklands	Customs House	2007	3	2,020
818 Bourke Street, Docklands	818 Bourke Street	2007	8	3,450
750 Collins Street, Docklands	AXA Headquarters	2007	14	1,900
370 Docklands Drive, Docklands	370 Docklands Drive	2008	7	1,600
825 Bourke Street, Docklands	The Gauge	2008	8	1,500
737 Bourke Street, Docklands	737 Bourke Street	2008	11	1,450
550 Bourke Street, Melbourne	CBW Melbourne	2008	19	1,500
181 William Street, Melbourne	CBW Melbourne	2008	27	1,900
655 Collins Street, Docklands	Media House	2009	7	2,505
833 Collins Street, Docklands	ANZ Centre	2009	12	6,970
111 - 129 Bourke Street, Melbourne	SX2 Tower	2009	22	2,200
380 Docklands Drive, Docklands	380 Docklands Drive	2010	11	1,293
800 Collins Street, Docklands	The Myer Headquarters	2010	14	2,865
717 Bourke Street, Docklands	717 Bourke Street	2010	18	3,100
990 La Trobe Street, Docklands		2012	9	1,450
733 - 747 Collins Street, Docklands	ATO Tower	2012	16	2,375
700 Bourke Street, Docklands	700 Bourke Street	2013	15	5,000
850 Collins Street, Docklands	850 Collins Street	2013	8	2,150
719 - 731 Collins Street, Docklands	Collins Square	2013	23	1,750
171 Collins Street, Melbourne	171 Collins Street	2013	19	1,720
150 Collins Street, Melbourne	Westpac Headquarters	2014	14	1,520
570 Bourke Street, Melbourne		2015	18	2,700
567 Bourke Street, Melbourne		2015	26	2,106
313 Spencer Street, Melbourne	Victoria Police Headquarters	2015	14	1,866

Table 3 Major CBD office buildings built since 2001 illustrating the increasing average floor plate size[43]

Table 4 outlined the average size of tenancy being approximately 16,500 square metres. Mr Wren outlined some of the minimum requirements for A-Grade office buildings as set out in the Property Council of Australia (PCA) *Guide to Office Building Quality 2012.*

It was submitted by Mr Wren that any planning for commercial space in the Melbourne CBD must viewed over a long-term horizon. He concluded:

[43] Source: Document 169, Page 9

> *It is critical in CBD locations, where commercial space is of State or even national significance, planning frameworks need to be flexible to respond to tenant requirements.*

Mr Wren argued on behalf of Submitter 43 that the Amendment has not adequately considered commercial development. He highlighted that in the SGS Economics *Central City Narrative Final Report February 2016,* Dr Spiller, for the Minister gave evidence that:

> *Very high demand for commercial floor space in the existing Central City will increase the cost of locating there and this could mean that some firms are discouraged from locating there, ultimately resulting in jobs growth being lost from Victoria.*

Mr Wren submitted that the Minister has asserted that supply within the Central City is not a critical issue given the size of the expanded Central City. He argued that such an analysis "*belies the reality of anticipated employment growth within the Hoddle Grid".*

Ms Brennan submitted that the Central City of Melbourne has highest concentration of civic engagement and employment and Plan Melbourne requires that high standards of liveability are to be maintained. These are not competing aspirations with commercial but complimentary. Ms Hodyl's evidence was that liveability should not be disconnected from the economic success of the city.

Ms Hodyl was questioned on whether the controls inadvertently constrained commercial investment in the CBD. Ms Hodyl's view was that the quality of public realm was the key consideration, be it for commercial or otherwise. She reiterated that the expansion of central city is ideal for unconstrained land for commercial outcomes should they arise.

Professor Adams was questioned as to whether great care needed to be taken to ensure commercial uses weren't being "*thrown out with the bathwater*." Professor Adams responded that there will be a need for commercial now and into the future. He gave evidence that:

> *We are not at danger from losing commercial and commercial is going through a change. I do not think we have to bend the rules to allow for boundary to boundary for commercial development.*

Professor Adams gave evidence that the Amendment framework, in his opinion, was appropriate to achieve the quality built form outcomes. When questioned on his involvement in the Amendment, Professor Adams advised that he had little "*hands on*" participation.

Submissions and questions during the Hearing were put to Ms Buckeridge that in the Hoddle Grid premium floor plates could not be easily delivered. Ms Buckeridge's view was:

> *There are limited remaining sites in the Hoddle Grid to achieve large commercial floor plates. This is largely to do with pre-existing subdivision. We did not test when consolidated sites. If we take an open-ended view and combine sites we would end up with larger floor plates.*

Mr Barlow gave evidence on behalf of Ausvest Holdings (Submitters 62 and 64) and argued that there were other ways to incentivise commercial development. It was his evidence that:

> *Good planning strongly suggests that it is necessary to ensure that future commercial opportunities are preserved in the CBD.*

On behalf of the Uniting Church in Australia (Submitter 31), Mr Jamie Govenlock provided expert evidence in planning and Mr Roger Poole in Urban Design and architecture. In cross-examination, both conceded that commercial floor plates were getting smaller and Mr Michael Barlow agreed that floor plates for office will decline over time.

AMP Capital (Submitter 56) argued that the market is demanding larger floor plates. The submitter was concerned that the Minister did not explicitly consider impacts of the Amendment on the commercial market and on what the market demands. AMP Capital submitted that CBD and Hoddle Grid will need to expand by 0.4 percent per annum (in the order of 1.9 million square metres) for 30 years, and that providing jobs is a genuine public benefit.

MAB Corporation (Submitter 81) argued that the Amendment does not consider that residential and commercial buildings have the same amenity requirements and believes that applying a standard requirement across both types of development is a blunt tool.

Ms Brennan submitted that the Panel should be alert to the slippage between "*commercial*" and "*office*" in the language of submitters. The controls do not vary for commercial versus residential uses, these uses are interchangeable within the Capital City Zone over time. She submitted that it was not considered appropriate to modify the FAR and FAU to uncap commercial development.

A number of submitters (Submitters 31, 42, 52, 56, 64) raised Sydney's proposed controls for its CBD. Whilst arguing that Amendment C270 was a 'blanket control', the Panel questioned AMP Capital on how it was different to Sydney, where an 8:1 FAR with a capped uplift is proposed.

A number of submitters (Submitters 31, 43, 49, 52, 56, 69, 74, 75 and 90) also questioned the definition of using Gross Floor Area (GFA) versus Net Leasable Area (NLA) to determine floorspace requirements. Various arguments were raised into the ramifications of including or excluding lifts, carparking, podium void spaces and the like. It was argued in the majority of submissions that NLA would be the appropriate measure.

Ms Brennan advised the Panel that GFA exercise reinforces Ms Hodyl's evidence that amending the GFA means changing the FAR to bring the outcomes back into line with definitions.

Ms Brennan argued that the Table 3 submitted by Dexus shows that irrespective of the Amendment, the "*ability to secure floor area of 1800-2200 square metres in the Hoddle Grid is extremely limited (there are only 6 examples where an area greater than 1800 square metres has been achieved in the Hoddle Grid)".*

On behalf of Phillip Nominees Pty Ltd (Submitter 43), Mr Wren invited the Panel to recommend that further work for consideration of commercial development be undertaken. He submitted:

> *Future capacity and competitiveness of Australia's second largest city is simply too important to risk compromising. Before any significant and permanent changes are made to the City's planning framework, the cumulative impacts of such changes must be appreciated.*

It was argued by the Minister that it is not apparent that references to areas under pressure refers to the Capital City Zone, or areas zoned Mixed Use and Commercial around the Central City. Ms Brennan submitted:

> *Even if the former is the case, the policy does not support artificial suppression of residential supply to make way for commercial opportunity. If this is to be adjusted, it will require a full and proper land use review, rather than a hijacking of a built form review.*

(ii) Floorspace demand and capacity analysis

*Expanded Central City: Floorspace Demand and Capacity Analysis Version 2 (*Document 18) was tabled during the course of the Hearing as it had been referred to by the Minister's expert Dr Spiller and by Mr Barlow in their evidence statements. Urbis had developed a Demand and Capacity Assessment Model to calculate floorspace demand and capacity through to 2051 for several key city precincts. Mr Barlow provided additional evidence (Document 102) that looked into this capacity analysis in more detail with relation to commercial floorspace.

The study highlights that floorspace capacity will become constrained within most Central City precincts where the demand for floorspace from increasing population and employment will be the highest. The CBD will only be able to accommodate 50 percent of the projected growth to 2051.[44]

Mr Wren highlighted that the *SGS Narrative Report* recognises the importance of the Hoddle Grid as being the key commercial centre of Melbourne and this point is reinforced by Document 18 in dealing with the floor area capacities of the respective precincts of the Central City.

The Property Council of Australia (PCA) (Submitter 90) tabled Document 96, which is an untitled, undated, unattributed document. Ms Brennan submitted that this document was "*apparently prepared by a consultant at Urbis, relating to the commercial development market*." That document was not put to any of the Minister's witnesses, such as Mr Mackintosh, Dr Spiller or Ms Jordan. The Panel explained to the PCA during their submission that this document would be afforded no weight in the Panel's consideration of the potential impact of the Amendment on development of commercial floorspace.

[44] Urbis *Additional Assessment of Potential Impacts on Commercial Uses (Document 102) pg.3*

Ms Brennan argued that land supply within the Central City is not a critical issue *"given the size of the Expanded Central City, within which the Hoddle Grid and Southbank represent only 25.8 percent*."

Mr Sheppard requested additional information from DELWP regarding development capacity in the GDA. It was his evidence that:

> *That analysis reveals a total capacity of 4,916,121 m^2 GFA in the Hoddle Grid, and 2,562,657 m^2 GFA in Southbank. Assuming growth remains stable at 2011 rates, this will meet demand to around 2041.*[45]

Ms Brennan submitted that this analysis was "*inherently conservative*", because it excluded:

(a) sites less than 25m in width;

(b) existing permits or current applications (some of which predate Amendment C262);

(c) Special Character Areas; and

(d) density above 18:1.

In addition, Dr Spiller's CBA also analysed the DELWP figures. It was submitted by Ms Brennan that Dr Spiller's figures were also inherently conservative in making no allowances as described above.

(iii) Discussion

The Panel notes the primacy and on-going popularity of the Hoddle Grid for commercial activity and the availability of office space of all standards, styles, sizes and costs. It notes the opportunities that exist and are increasing for office and commercial space in other areas outside the Central City.

This Amendment addresses built form. It is evident that much of the recent development in the Central City that has prompted the Amendment has been of residential buildings. While there are many reasons for this, it is, in part, a function of a cyclical pattern of supply and demand for these two types of land use.

The Panel agrees with the Minister that the definition of "*commercial*" was somewhat skewed when taking into account various submissions on the topic. Most of the evidence focused on floor space, yet submitters sought special consideration for a wider category of use by referring to commercial. The Panel was taken to numerous examples of limited commercial floorspace and the supposed difficulties in achieving the PCA 'Premium' floor plate requirement, yet was also met with submissions stating the pre-commitment process and timing meant that some projects take considerable time to gestate.

With AMP and Dexus for instance, the issue appeared to be premium clients wanting premium floorspace within the Hoddle Grid, namely Bourke and Collins Streets. The Panel sees this as more of a market demand issue, and with constant churn to and from Docklands

[45] Expert witness statement of Mark Sheppard July 2016 pg28

(and soon to be Arden-Macaulay) in the expanded Central City, the Panel takes no issue with built form objectives and their relationship to providing premium floor plates.

No submitter adequately demonstrated to the Panel that the ability to deliver viable office floor plates is compromised by the proposed controls, for example at 1 Spring Street. The only witness to give evidence about commercial floorspace capacity in the Central City was Mr Barlow who specifically stated that any additional analysis should not hold up the Amendment.

The Panel agrees with submissions put forward by the Minister that the Amendment is based on built form outcomes and the public realm and that submitters on this topic have confused two separate issues, namely incentives for commercial development land use on one side and relaxed controls for commercial built form on the other.

The Panel did not accept arguments to suggest that commercial floor space does not require high quality amenity. In order for Melbourne's Central City to remain viable and globally competitive, amenity must extend to commercial offerings and is equally as important as it is to residential development. This was highlighted through the detailed daylight modelling analysis to reinforce the point. The Panel agrees with Ms Brennan's assertions that commercial tenants want daylight, views and aspect where it can be achieved. Relaxing controls for commercial development is inappropriate as it would have clear consequences on the public realm.

The Panel accepts the submission by the Minister that if a land use review is required, then this should be undertaken, however, this is a different exercise to the CCBFR that informed this Amendment.

(iv) Conclusions

The Panel concludes:

- Land supply within the Central City is not a critical issue. The Minister's experts provided rigorous and detailed evidence to support this finding and this is supported.
- If a chronic shortage of commercial space arises then the development industry would respond accordingly.
- No evidence was called to support assertions that DDO10 will impose a greater level of constraint on commercial development than residential development.
- The market, rather than planning controls, dictates preferences for residential over commercial development, and this is cyclical.
- The Planning Scheme provides equal encouragement for office and residential development in the Central City, by way of the zone controls and policy framework.
- The Amendment does not prohibit or restrict the ability to obtain planning permission for office use.
- Commercial tenants want a quality of daylight, views and aspect where can be achieved, that is not available from a podium – reinforced by the PCA Guidelines 2012.
- The GFA definition used in the Amendment is supported (as earlier discussed in Section 6.2).

8.11 Architecture and design outcomes

(i) Submissions

The Australian Institute of Architects (AIA) (Submitter 74) made a comprehensive submission concerning the relationship of the Amendment to design outcomes. In its submission, the AIA noted that the Amendment places no weight on design excellence and that good design is critical to a good city outcome and should not be separated from planning.

The AIA submitted that good design should be integrated into the planning permit process, and that this can be achieved through mandatory requirements or some form of incentive that will achieve excellence of design, possibly by allowing increased yield.

The AIA supported the use of a Design Review Panel as part of the application assessment process and whether to allow a Floor Area Uplift, and cited the use of such panels in assessing recent major buildings in Victoria.

The AIA advocated for the mandatory engagement of an independent architectural company for all projects with a FAR exceeding 18:1 as another means to achieve good design outcomes. The use of architectural competitions was also suggested as a means, although not guaranteed, of getting better design.

(ii) Discussion and conclusion

The Panel affirms that the quality of the private realm is a major determinant of the quality of the public realm. It is supportive of Design Review Panels where the building is of importance due to its purpose or prominent location.

The Panel concludes that the potential role of the Office of the Victorian Government Architect as a form of Design Review Panel is warranted in significant circumstances.

9 Southbank

9.1 General issues

General issues for Southbank relate to whether or not the Amendment is strategically justified, how DDO10 would lead to uniformity across Southbank and built form outcomes. In addition, the low to mid form rise of the SCA in DDO60 was cause for concern for a number of submitters, in light of the *Southbank Structure Plan* (Amendment C171) only being recently undertaken. Sites in Southbank were generally effected by either DDO10 (GDA), DDOs 40 and 60 (SCA).

The *Central City Built Form Review 2016 (CCBFR)* undertaken by Ms Hodyl outlined that the pre-C262 controls demonstrated a very high density of development is achievable with the following development outcomes:

- *Buildings range in height from 18-70 levels*
- *Highest Floor Area Ratio on a site is 41.3:1*
- *Tower site coverage ranged between 53-77 percent.*

In the case study, the interim controls enabled the following:

- *Buildings ranged in height from 12-72 levels*
- *Floor Area Ratios ranged between 8.4:1 – 28.2:1*
- *Tower site coverage ranged between 39-64 percent.*

Mr Townshend QC, on behalf of the University of Melbourne (Submitter 42) as owner of land in DDO60 submitted broadly that the Amendment was a battle between a long-standing policy approach versus political interference. He noted that there will always be fluctuations – remember legislation provides that power to a Minister. He cautioned that the Panel should be concerned with long-term controls despite the one-off's.

It was his submission that the Amendment introduced controls as a "*knee-jerk reaction*" and would be "*tomorrow's barrier to investment when things slow down*."

Mr Townshend submitted that the Minister argues you need to change controls for Southbank because the system "*has a problem now*." He argued that this point should be assessed with rigour and questioned the fairness of what was being proposed.

He submitted that the VPP are based on performance-based controls and a limit on circumstances on what's not acceptable. Fundamentally, he argued that planning schemes are structured on a basis of facilitating decision making on good guidance and that this Amendment was a "*handbrake*" on controls.

Mr Townshend raised two extreme examples of proposed developments at three times the preferred heights that were refused in the Sturt Street precinct. He submitted that the *"it is broken*" argument for controls in Southbank is flawed. He argued:

> *Two people dared to make applications that were higher. If we react with C270 as proposed, we create a disincentive. Amendment C270 is a tweak to existing controls without full review. What is it about the momentum of C270 we need to be careful about?*

Professor Mark Jacques gave evidence across a number of Southbank sites in DDO60 for various submitters (36, 40, 42 and 45). His evidence related to the provision of massing and views developed through the *Southbank Campus Built Form Review* by NH Architecture, Aecom and Openwork that highlighted massing scenarios based on the C270 Controls and the recommendations of the Amendment C171 Panel Report.

Mr Milner, on behalf of Southbank Owners Corporation Network (Submitter 53) began his submission by observing that he had:

> *… looked at Southbank for the last 6 years from my office. Re C171 – clearly what has been approved doesn't relate too well to this amendment. It was a useful Panel report and it highlighted that the Hoddle Grid and Southbank presented different opportunities. It did not think one size fits all.*

He submitted that the key messages of Plan Melbourne has not been taken on board by the Amendment. Mr Milner said that:

> *… there's an acceptance that Docklands was wrong. We are pursuing Central City as if we are running out of opportunities. At what point did we debate other capacity before we go through another round of statutory controls in the central city?*

Mr Townshend questioned the objectivity of Ms Hodyl and argued that "*you'll see the similarity of arguments put to C171 and a similarity of personnel*." He argued that the current Amendment was:

> *Horse-trading to avoid further litigation. The Minister's witness has been reactive to bad proposals. What has gone wrong since C171?*

Ms Brennan submitted that Ms Hodyl had been called to give evidence about DDO60 in the full knowledge of her previous roles, and this was disclosed in her expert witness statement. Further, Ms Hodyl's familiarity with the history of planning for Southbank equipped her to provide invaluable background knowledge to both the review and Panel Hearing. In closing, Ms Brennan submitted that the suggestion that Ms Hodyl "*stuck to a script*" is unfounded.

The Inner Melbourne Planning Alliance (Submitter 46) submitted that Southbank and all areas that are subject to height controls should be mandatory. Heights of heritage buildings should also be considered. They argued that the FAR of 18:1 is generous when compared to other cities. Traffic and community impact assessments should also be required and the Alliance called for greater separation between buildings. Concerns regarding the consistency of decision making and open space be offered through the FAU.

Ms Brennan SC submitted that Amendment C171 introduced a number of new urban design provisions and that there was a material difference between the exhibited controls, the Panel recommendations, the controls adopted by the Council and the controls approved by the Minister.

9.2 University of Melbourne / Sturt Street (Submitter 42)

The Amendment proposes to introduce a range of controls to DDO60 Areas 4A and 7). The University had various concerns discussed below.

(i) Evidence and submissions

Mr Townshend outlined that the University has significant interests in the precinct. It owns (or is the committee of management for) substantial parcels in the Southbank Arts Precinct as shown below.

Figure 13 Plan illustrating the University of Melbourne's land parcels within the Southbank Arts Precinct[46]

The table below summarises the proposed built form controls in relation to University land.

Proposed Built Form Controls			
DDO60 (Area 4A – Sturt Street)			
University Land	Building Height	Floor Area Ratio	Built form Outcome
VCA West	Discretionary 40 metres	10:1	Development along Sturt Street that provides street definition, a sense of openness, reasonable solar access to street level and an intimate scale for

[46] Source: Document 115, Page 4

MCM Land	Discretionary 40 metres	10:1	pedestrians. The protection of the stature of civic buildings along Sturt Street.
MTC Land	Discretionary 40 metres	10:1	Development that provides a transition in scale and form between higher buildings to the west of Moore Street and the predominantly lower scale buildings to the east of Dodds Street.
Car Park Land	Discretionary 40 metres	10:1	The maintenance of the low to mid-rise streetscape scale of the area. Low scale development that enhances the sense of openness, maintains expansive sky views and solar access and provides a recessed backdrop of midrise buildings as viewed from Dodds Street between Grant and Coventry Streets. The maintenance of the dominance of the Arts Centre Spire silhouetted against the sky from the south along Sturt Street.
DDO60 (Area 7 – Arts Centre)			
VCA East	Mandatory 24 metres		The protection of the stature of heritage and civic buildings along St Kilda Road. The maintenance of the importance of St Kilda Road as a grand entrance to the City.

Table 4 Summary of the proposed built form controls as they apply to the University land.[47]

The Victorian College of the Arts was established by a government order in 1972. In 2007 VCA became a Faculty of the University of Melbourne. The University is in negotiations with the State Government to purchase / lease land at 33 Sturt Street, Southbank, in order to develop the Melbourne Conservatorium of Music (MCM). The proposed MCM building forms part of the ongoing redevelopment of the Southbank campus of the University.

The carpark site has an area of approximately 4000 square metres and Mr Townshend submitted is a prime redevelopment site. Mr Townshend submitted that there was a lack of strategic basis for the Amendment as it affected this precinct as it did not respond well to the Strategic Assessment Guidelines or Ministerial Direction No 11.

Ms Brennan SC submitted that this was:

> *…a curious way to open the case of submitters whose properties are not proposed to be affected by mandatory controls, and whose permit applications will continue to be assessed by way of discretionary, performance-based criteria.*

Ms Brennan submitted that the only changes to the built form controls that apply to Sturt Street in DDO60-Area 4A are a lowering of the preferred street wall height from 30 metres to 20 metres, and the introduction of a discretionary FAR of 10:1 if the 40 metre preferred height is exceeded.

[47] Source: Document 115, Page 13

The Sturt Street "*spine*" was discussed as a key component of the low-rise controls proposed. Mr Townshend outlined that Clause 21.02-4 *Creative City* singles out the Sturt Street spine.

Professor Jacques gave evidence that:

> *A review of the existing built form of Sturt Street and its immediate context reveals a streetscape containing a diverse variety of building types, footprints, materiality and grain. The pedestrian experience is one of varying quality: blank walls become set back shop fronts, which become the freeway edge, which becomes an expansive plaza, which becomes an intimate space at the Malthouse Café.*
>
> *The constant in this experience is Sturt Street itself, whose generous reserve gives the spine it's legibility. The peacemaking components that make the spine 'civic' (continuous tree canopy, furniture, places to occupy and dwell in the street etc.) are not yet in place and consequently, the street experience has a provisional or transitory character. This opinion is reinforced by the large a number of underdeveloped sites that will have a significant impact on the future character of the area.*

Under cross-examination, Ms Hodyl indicated her view that the SCA for Southbank in the Sturt Street precinct was still very much a lower built form area. On behalf of the University of Melbourne (Submitter 42) it was Professor Jacques' evidence that the Sturt Street spine requires "*enhancement not protection*." He saw the Arts Spire as the key viewpoint. He noted that "*human scale is poor and structure plan has tried to raise heights"*.

At Table 2 to DDO60 – Area A4, Professor Jacques agreed in part that the "*maintenance of the dominance of the Arts Centre Spire silhouetted against the sky from the south along Sturt Street*." It was his evidence that the 40 metre preferred height control is not conditional on maintaining the spire view, nor the stature of civic buildings. Professor Jacques tabled a comparative matrix to highlight this.

Figure 14 Sturt Street Precinct Comparative Matrix [48]

Mr Townshend queried why the Amendment is required for Southbank:

> *In a sense the Sturt St precinct is an amendment within an amendment. We query whether Sturt St belongs in C270 in the context of the strategic basis. The fact that it's included in the CCZ is the reason. It does not fit comfortably with the rest of the Amendment.*

Mr Townshend submitted that:

> *… there is a remarkable sameness in the argument being put before you on Sturt St that was in fact rejected by the C171 Panel. It's 2012 document. It's a recent assessment of a forward looking set of controls. Then we had the 'dead hand' placed over the precinct with interim controls (C262). We say this area has yet to be given a go with C171. You're being asked in a sense to look at this as an appeal against C171.*

Mr Townshend submitted that the best result would be to leave the precinct as was pre-Amendment C262:

> *History tells us post C171 there might be a case for lifting heights and restating built form outcomes for this area. It's not being delivered by a number. We would hope the Panel notes the remarkable sense of involvement*

[48] Professor Jacques Presentation (Document 114)

> *of independent submitters with development aspirations intended to be an Urban Renewal Precinct.*

On the matter of the Sturt Street Reserve, Professor Jacques gave evidence that:

> *The underutilisation of Sturt Street Reserve appears to be a consequence of the scale and noise of Kings Way, an eccentric shape that makes active use difficult, resulting in a lack of activation or engagement of its edges.*
>
> *The significant scale of the road infrastructure bounding this block, coupled with the ambition to create a civic spine extending to the Arts Precinct suggests that future development of this site should be as an urban marker, or southern gateway to the cultural precinct of Southbank.*

Mr Townshend submitted that the notion of the Amendment was contrary to start with height controls. He noted that "*in all cases for University, the Amendment introduces a FAR of 10:1 in addition to discretionary 40m*." On behalf of the University, Mr O'Farrell submitted that changes to Area 4A creates a "*mid-rise"* flavour and calls for visually recessive setbacks. He also argued that heights of 90 metres in this area would not be viewed as "*high-rise*." Mr O'Farrell argued that good design can be achieved by asking for it.

It was argued by Mr Townshend that the FAR is inappropriate for this precinct. Mr Townshend took the Panel to the report of the *Panel and Advisory Committee for the Melbourne New Format Planning Scheme (1998).* Notably, the report discussed the merits of plot ratio and remarked:

> *The Panel accepts that Councils' starting point for the consideration of all applications should be their urban context … If plot ratio is to be referred to at all, then its use should be confined to the outcome which it directly controls.*

Mr Townshend argued that it is clear that the Minister is seeking to control heights through the application of widespread FARs.

The University sought the following recommendations from the Panel:

- Recommend in favour of the status quo by not introducing a FAR
- Recommend that in relation to the Southbank Area, that the Minister ought revert largely back to the pre-C262 version so as to allow the outcomes of the C171 Panel recommendations to occur
- If motivated to make any changes to the existing controls, do so in a manner that gives effect to the matters raised in these submissions, the expert evidence and Panel findings in C171 by: revisiting the height of 40m to make it clearer that heights of 70 metres plus are in consideration; and other changes to the Amendment as set out in the attached version of the provisions.

Ms Brennan submitted that the Amendment does not propose to alter the discretionary 40 metre height control that has been applicable to Sturt Street under DDO60 since Amendment C171 was introduced. Ms Brennan highlighted that the Amendment C171 Panel recommended that:

- *The exhibited 40m height control be retained but made discretionary*

- *A built form outcome for Sturt Street should be the maintenance of the low to mid-rise streetscape scale.*[49]

Professor Jacques' gave evidence that the Sturt Street spine has "*a centre of gravity*" from Southbank Boulevard to Grant Street and that the controls could go further in their language to reinforce the spine. He noted a "*gap of intention*" between the controls. It was his evidence that the vista to the Arts Centre Spire is preserved through the existing road reserve width and street wall height controls, rather than the 40 metre preferred height limit.

Further, an analysis of the shadow studies and configuration of open spaces showed that although there is often overshadowing, there is still some access to sunlight to provide amenity. Professor Jacques submitted that buildings can also be agents for amenity, therefore arguably not requiring nuanced guidance. Spaces such as Federation Square and Victoria Green may not have been applicable under C270.

In response to these submissions, Ms Brennan submitted that it was unclear from oral and written submissions on behalf of the Sturt Street submitters exactly what their collective position is in relation to Amendment C171. On the one hand, they described C171 as "*shiny and new*" and not to be departed from. On the other, they submitted that the "*C171 Panel recommendations should be revisited*"[50], and although this was corrected to "*should not be revisited*", they then put forward an amended version of DDO60[51] that departed materially from the recommendations of the Panel that considered Amendment C171. Ms Brennan said the departures were in particular:

- *rewriting the general and Area 4 design objectives; and*
- *replacing the preferred building height of 40m in Area 4A with 70m, and rewriting the relevant built form outcomes.*

Ms Brennan maintained the position that Area 4A should not be rewritten to include a 70 metre preferred height limit for the following reasons:

- *This significant change was not exhibited, and other stakeholders (such as the residents in this part of Southbank) would no doubt hold strong opinions about it. This is evident from the submissions of the Southbank residents before this Panel.*
- *It was not supported by the recommendations of the Panel that considered C171.*
- *It is not supported by Professor Jacques' modelling (he only modelled approximately 50m on most sites in Sturt Street).*
- *It is not consistent with the concept of a "mid-rise" civic boulevard – and the Minister specifically takes issue with Mr O'Farrell's assertion that 90m is not "high-rise" given it allows some 30 residential storeys.*
- *The application of a FAR of 10:1 may in any case support a height of 70m on appropriate sites.*

[49] Part B Statement para 73 pg. 20
[50] Document 115, page 2, para (i)(a)
[51] Document 114, tab 9

With reference to the University of Melbourne's submissions at paragraph 75 of Document 115, Ms Brennan submitted that the Minister has never claimed the "*full support*" of Mr Sheppard, whether in relation to the Amendment as a whole or in relation to the preferred street wall height in DDO60.

Ms Brennan said that the Amendment was generally supported by Mr Sheppard, subject to a number of recommendations, to which the Minister has responded in detail. As for other witnesses allegedly "*sticking to the script*," and not being independent, Ms Brennan argued that submission is "*wholly inappropriate and objectionable"*, and disregards the fact that the preferred street wall height of 20 metres nominated for DDO60 in the Amendment was not tested with Ms Hodyl in cross-examination. Mr Townshend argued that "*the system is not broken*" and that the decision makers have sufficient tools to make the right calls, citing the extreme case of 248-250 Sturt Street Southbank.

(ii) Discussion

That an inappropriate one-size fits all approach has been taken in the Amendment was an argument put to the Panel by a number of submitters. The Panel agrees with Ms Brennan's response on this point, in that the Amendment does not prescribe a single response "*but allows for flexibility by the designer"*. This was strongly proffered by Ms Buckeridge during the Hearing. It was intriguing to the Panel that no party sought to cross examine Ms Buckeridge to test the veracity of her work, and the Panel has afforded some weight to the modelling exercise.

The Panel agrees with the Ms Brennan's assertion that:

> *It is worth reflecting that the performance-based system of controls so strongly endorsed by the Panel that considered C171 – where mandatory height limits and setbacks, and the podium/tower typology more generally, were rejected - has resulted in the Southbank we experience today.*

Indeed, the Panel is of the view that the application of a FAR of 10:1 may in any case support a height of 70 metres on appropriate sites. As mentioned previously throughout this report, not every site should be entitled to be built to sky-high proportions. The comparative matrix provided by Professor Jacques certainly revealed that the views to the spire along Sturt Street would not be impacted by an increase in the range of building heights, but the sense of enclosure of Sturt would only be increased with higher building forms.

The Panel empathises with the University on the matter of Amendment C171 and recent work not having time to '*set*', yet no compelling evidence was put to it as to why in light of recent approvals across Southbank it ought not be revisited. The strategic justification and assessment against Ministerial Direction 11 has been accepted by the Panel, and it did not accept the arguments put forward by Mr Townshend.

It is not clear which other witnesses are accused of "*sticking to the script*," and in what respect. The Panel agreed with Ms Brennan that such loose language is of no assistance to the Panel in its deliberations.

Despite Amendment C171, the Panel does not accept that the FAR should be rejected for Southbank. The suite of experts called by the Minister, clearly highlighted that sufficient

rigour applied to the background work for the Amendment and it was an approach that built upon C171 and refined it for Sturt Street.

The Panel considers that design and innovation will not be 'dumbed down' by the application of the FAR. Reverting back to pre-C262 controls is not an option for this precinct. Careful and respectful design can achieve innovative and contemporary results.

The Panel is mindful of C171 that stated "*there needs to be a height control regime in place if only as a guide to development which must be considered together with, and not in isolation from the design objectives."*

Consideration of the submissions and evidence in relation to the University highlighted a tension for the Panel between the preferred height control of 40 metres and the FAR of 10:1, whereby designs applying the FAR could realistically come out at 70 metres in height. From evidence and submissions heard on a number of sites, it seems to the Panel that the preferred heights envisaged by C171 are being ignored, and the Panel is concerned about future dangers of disparity, where no guidance is provided as to which control prevails. If the two development options are to be applied, it would be desirable that the preferred height and FAR development outcomes should be closer than in this case.

The Panel is mindful that if it was to recommend a preferred height of 70 metres for this area without this being formally exhibited would be a significant change to the Amendment and other submitters, most notably the residents in this part of Southbank, should be afforded the opportunity to make submission on any such change. Indeed, this height was not supported by the recommendations of the C171 panel. The Panel however feels in some respect the Amendment has brought this dilemma on itself, by recommending a FAR of 10:1 that testing revealed would bring heights to 70 metres.

The Panel found there were in fact two distinct Southbank precincts, the residential agglomeration in and around the Crown complex, and the low to mid-rise precinct along Sturt Street where there is a cluster of many of Australia's premier cultural institutions extending from Federation Square to the Arts Centre, to the Malthouse Theatre. The Panel concluded that the FAR proposed throughout Southbank would still be flexible enough to address these precincts accordingly.

Overshadowing amendments to wording are addressed at section 8.7.

(iii) Conclusion

The Panel concludes:

- For reasons explained in Chapter 4, the Amendment is strategically justified.
- Sturt Street is worthy of its SCA designation and the controls as exhibited be approved.

9.3 Further work

l) Consider converting the discretionary Floor Area Ratios in the Special Character Areas to mandatory ones.

m) The Minister should review the preferred heights in Design and Development Overlay Schedule 60 to more closely align with the FAR of 10:1 for this precinct.

9.4 Capital Eight - 11-13 Hancock Street and 42 Moray Street (Submitter 38)

(i) Submission and evidence

Mr O'Farrell, made submission on behalf of Capital Eight Pty Ltd (Capital Eight) which is the owner of land at the above address. Capital Eight submits that C270 represents an improvement when compared to the regime imposed by Amendment C262 but that is because C262 was a reactionary holding position. C270 is reactionary, it was asserted. The position of Capital Eight is that both amendment proposals have an over-reacted to what is perceived by some as a small number of poor planning decisions, and the implications of the proposed planning controls for sites such as their land were not considered.

The land holding (shown in Figure 9) is an island site comprised of several lots and is a large site with a total area of approximately 1180 square metres.

Figure 15 Capital Eight Land, Southbank[52]

Mr Biles who gave expert evidence for Capital Eight, highlighted that within this triangle, there are a number of buildings constructed, development permits approved or buildings under construction which range from 33 storeys to 74 storeys. This is illustrated in his plan 1 extracted below and is the contextual reality in within which the redevelopment of the Capital Eight land will occur.

[52] Source: Document 142, Page 2

Figure 16 Surrounding developments[53]

Mr O'Farrell outlined the particular zoning history of the sites including a pertinent VCAT decision on 11-31 Hancock Street, since acquired by Capital Eight and consolidated as part of the current site. He submitted that "*one size does not fit all*" and the need for flexibility with regard to this site.

Expert architect for Capital Eight, Mr Peter Brook argued that the C270 controls offered a "*one size fits all"* solution. He noted there was a long held design tradition of 10 metres above 40 metres and 5 metres from a side setback and flexibility to build up to the other boundaries. He cited developments at 530 and 380 Collins Streets as examples. He proffered that:

> *… not one of these would be possible now for this site under the controls proposed. The only way to build these is a process of acquiring more and more sites to make this happen. Relatively small buildings such as RACV building would not fit this setback regime.*

He questioned the study undertaken by Ms Buckeridge showing four units per floor for this site and did not consider it an acceptable development outcome.

Capital Eight's position is that it has concerns about the legality of the current FAR control but has greater concerns about the breadth, quantum and physical calculation of FAR as currently proposed.

Mr O'Farrell submitted that any legally enforceable FAR control, and the calculation thereof, should offer genuine incentives to promote preferential outcomes reflective of specific

[53] Source: Document 142, Page 3

community and public needs which may change over time. A number of these may be needed more than others in particular geographic areas or at different points of time.

Mr O'Farrell queried the FAR definition, taking the Panel to definitions of 'Plot Ratio' at Clause 72, Gross Floor Area, Leasable Floor Area and Net Floor Area at Clause 74. He submitted:

> *The definition proposed to be introduced through C270 is a jumble of definitions elsewhere in the scheme and then adds new elements. The meaning of the FAR definition is a little difficult to work out, but would also seem to require the floor space of a multi-level car stacker to be counted and also for voids at each level above lifts to be counted as floor space.*

Leasable Floor area is defined as clause 74 as:

> *That part of the net floor area able to be leased. It does not include public or common tenancy areas, such as malls, verandahs, or public conveniences.*

Mr O'Farrell submitted that if there is to be a FAR set for Southbank, that the definition should be based upon the definition of Leasable floor area, divided by the area of the site. He argued that this approach would also address the problems associated with the exhibited FAR definition which in effect further penalises developers in Southbank. This is because of the ground conditions in Southbank and the carparking consequences above ground. Mr Biles and Mr Brook took the Panel this issue (poor soil conditions for basement parking) in their evidence.

If, however, there is to be a FAR (floor area ratio as compared to the FAR control concept which includes the FAU concept), Capital Eight's position is that it ought be discretionary.

Capital Eight supported the concept of uplift bonuses, but questioned the validity of the FAU scheme, similar to those submissions of Ausvest and others discussed in Chapter 6.

Mr Brook and Mr Biles gave evidence that the West Gate Freeway forms another street edge the site has more development capacity. Mr Biles gave evidence that the definition of FAR and, specifically, the exclusion of above-ground car parking, services and amenity areas should be remedied.

Amongst other things, Capital Eight submitted that the Panel should recommend to abandon the FAR, or if it is retained in the CCZ schedule, apply the definition of Leasable Floor Area. It seeks that no additional reference documents to be placed in the scheme and that the transitional arrangements be amended.

Ms Brennan submitted that it is not considered appropriate to exclude service and particularly parking areas from the definition of the gross floor area. The total building volume causes off-site impacts and complex GFA calculations can be abused.

Under cross-examination, clear in stating that his own design response for the site had gone through a number of iterations in response to the interim and proposed controls, in some respects resulting in improvements to the outcome, and that there was no one "*best*" response to a site.

Ms Brennan submitted:

> *Mr Brook's opinion that tower setbacks should not increase in width as towers increase in height is out of step with all the other evidence before the Panel. Indeed, the lack of a mandatory control for tower setbacks and separation is one of the reasons Southbank now resembles "Kowloon in the 1970s" (in Mr Brook's words).*

In response to Capital Eight, Ms Brennan advised that the Minister has proposed minor amendments to DDO10. In particular, Ms Brennan noted that this site would have the benefit of greater podium height to the corner and along the freeway interface under the Minister's revisions presented to the Panel.

Ms Brennan submitted:

> *It is important to note that Mr Biles' evidence did not support Capital Eight's submission (at paragraph 3 of document 142) that DDO10 is "reactionary". Mr Biles was supportive of the intention behind the Amendment, and the work that supports it. His recommendations for further amendment were principally confined to:*
>
> *(a) the definition of FAR and, specifically, the exclusion of above-ground car parking, services and amenity areas; and*
>
> *(b) the ability to build to the boundary at the interface with the freeway.*

(ii) Discussion

Minor amendments are proposed to DDO10, in part to respond to the submission and evidence of Capital Eight (Submitter 38).

The Panel notes from its inspections that there has been some poor public realm outcomes in Southbank because of highly exposed car park structures within the podium. It's not an impossibility to construct these basements in Southbank as construction value rises. The recent ABC Radio building has constructed this (Coode Island silt). The broader question is these controls don't guarantee you a permit. Clearly, with building envelopes there's other aspects that are appropriate.

The Panel generally agrees with the Ms Brennan's proposition that "*one size doesn't fit all*" (paragraph 26), DDO10 plainly does not prescribe a single response, but allows for variation and flexibility by the designer, as Ms Buckeridge was at pains to emphasise in her evidence. It is presumably for this reason that the Amendment has the support of industry bodies such as VPELA, PIA and the AIA.

It was clear from Mr Biles that he had a level of comfort with the Amendment as it stood, save for definitional issues discussed above. The Panel did not place great weight on Mr Brook's evidence, as it was established that it was not formed on the basis of a sound understanding of the Amendment and its strategic basis.

The issue of the FAR definition is addressed in Section 6.2.

(iii) Conclusions

The Panel concludes:

- The FAR definition in the exhibited final version of the controls (Document 165) is accepted and no services should be excluded.
- The Reference Documents proposed are accepted and should be included within the Amendment.
- The GFA definition is discussed at section 8.9 and no change is supported.

(iv) Recommendations

The Panel makes the following recommendations:

19. At 5.0 Decision Guidelines of Design and Development Overlay Schedule 10, include the sentence:

- **The location of the site and whether it has an interface with the Westgate Freeway and/or is an island site.**

9.5 Yang Clarendon 54-62 Clarendon Street (Submitter 86)

(i) Evidence and submissions

This site is opposite the Crown Metropol Hotel complex.

Figure 17 Google Earth image of 54-62 Clarendon Street[54]

Ms Macklin of Urbis Pty Ltd represented Yang Clarendon, landowners. Ms Macklin submitted:

> *… the city is not a blank canvas … We say that a level of discretion is required in applying the proposed controls. In relation to the subject site we say*

[54] Source: Document 160, Page 3

> *discretion is appropriate in terms of a minimum tower separation on the site boundary to higher than 80m where an existing condition (or approval) applies.*

Ms Macklin argued that the C270 controls were too prescriptive and lacked flexibility and this only becomes apparent when trying to apply them to existing sites. Ms Macklin noted that this was also submitted by Mr Barlow on 148 Lonsdale Street in the Hoddle Grid.

Ms Macklin took the Panel to a modelling exercise undertaken by the architects for the site and spoke to the difficulties in interpreting the C270 controls. She recommended an evidence based approach to discretion.

Ms Brennan submitted that this approach explained by Ms Macklin illustrated how the proposed controls will operate in practice: "*planning advice will inform parameters within which talented architects will be able to explore multiple and varied design responses".*

Ms Macklin raised issues on tower separation, blank walls, daylight and shadowing. Having regard to the Wood and Grieve report, Ms Macklin argued that the existing built form context of sites, site orientation and proposed building all played a role in sunlight to the street. When questioned by the Panel on this, Ms Macklin agreed with the daylight assessment criteria put forward. She disputed the Minister's assertion of a 'wall of towers' being erected if the tower separation controls were relaxed or discretionary. It was her submission that:

> *There must be some acknowledgement of the impost of meeting minimum 10m tower setbacks on one site in terms of equitable development outcomes… The new controls should not seek to provide a 'first in best dressed' with respect to existing and approved development, to the total burden of adjacent sites.*

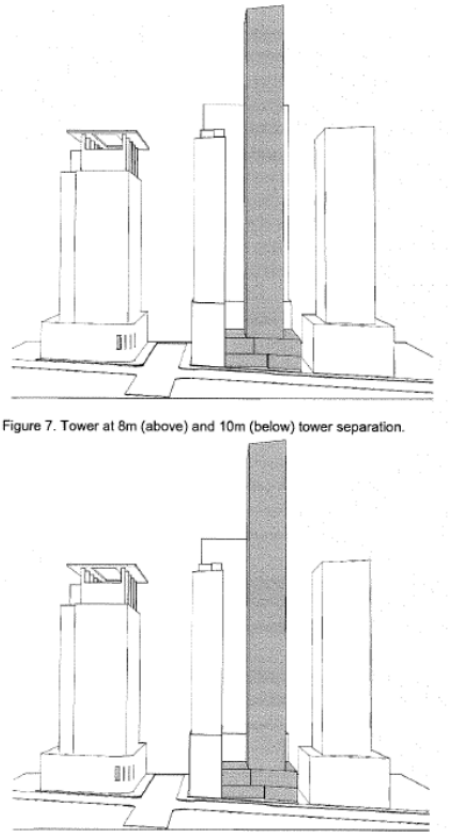

Figure 18 Tower separation at 8 metres and 10 metres[55]

When the Panel put to Ms Macklin that discretion and evidence to date in Southbank has not necessarily resulted in intended built form outcomes, she agreed in part and submitted that discretion should only apply to particular areas where mandatory minimums on tower separations provide burdens on adjoining sites.

On the issue of daylight access being addressed on a case by case basis, the Minister submitted that the Planning Scheme sets no uniform benchmark or standard for this and ultimately all require a subjective judgement about the adequacy of daylight overall. A number of cases were tabled highlighting this dilemma.[56]

With regard to the calculation of the FAR, Ms Macklin submitted that net saleable area or net leasable area be used to discourage yield optimisation.

(ii) Discussion

The Panel agrees with the view put on behalf of the Minister that some of the architect's unconstrained visions for a site may need to be tempered is not necessarily a bad thing. Part of the remit of any design team is to appropriately assess the controls and constraints represented by a site. These controls offer no additional impediment to that assessment, albeit a different quantum of consideration.

[55] Source: Document 160, page 13

[56] *Cross Coast v Yarra CC [2014] VCAT 568; Brat Investments Pty Ltd v Melbourne CC [2015] VCAT 2001; G3 Projects v Yarra CC [2016] VCAT 373.*

Ms Brennan submitted it did not agree that DDO10 should be amended to allow walls on boundaries to exceed 80 metres where they abut existing walls. Reasons for this and the FAR definition are explained in Chapter 6 of this report.

(iii) Conclusions

The Panel concludes that no change should be made to the Amendment in response to this submission.

9.6 Southbank residents

(i) Submission

Mr Tony Penna who spoke on behalf of the Southbank Residents' Association (SRA) (Submitter 83) raised a number of issues and some of these are dealt with in Sections 7.12 and 7.13 of this report. The SRA is a community group made up of residents that reside or own in Southbank.

The SRA in its written submission noted that the FAU calculation is an ingenious method to encourage developers to give something back to the community. It called for the provision for vertical schools should be given and open space should be calculated on the number of dwellings in the development.

Mr Penna spoke to the experiences of the residents. He submitted that there are "*two very different precincts in Southbank*" – the Arts Precinct across to St Kilda Road, then to the west there is an entertainment precinct, with Crown Entertainment Complex. He submitted that the SCA has been preserved, "*however I will say it's imperative that this Panel pays particular attention to the CCBFR and their review / recommendations. With reference to the Sturt Street spine we agree with the Hodyl report that discretionary controls are undermining this precinct."*

Mr Penna noted that if you're not in the river environs, the western precinct of Southbank is an unremarkable place. He outlined issues such as Power Street and City Road traffic volumes and subsequent wind / smell / odour effects. Mr Penna noted very little street level activation and no desire to be on the street. He highlighted that commercial spaces are generally occupied by real estate companies that covered up their windows with advertising and did not contribute to ground level activation.

Mr Penna's key issues included that Southbank has little amenity and lower open space access of about 2 square metres per person. He lamented the anticipated overshadowing of Boyd Park with a newly revised plan. Lack of educational facilities and family infrastructure meant a limited cohort were coming to Southbank, namely students. Poor urban design and built form outcomes were exacerbating this. Mr Penna called for immediate investment in the public realm and modifying the setback controls to include an 8 percent setback or 10 metres from the boundary.

(ii) Discussion

The issues raised by Mr Penna and other Southbank submitters on decreasing liveability is noted by the Panel. It was striking to the Panel on its accompanied site inspection: the wind

swept areas and lack of at ground activation is an immediate area of concern. Areas of building separation, podium controls, overshadowing and daylight controls in the Panel's mind go some way to alleviating this into the future. The Panel notes the SRA's support for Ms Hodyl's work with regard to the Sturt Street spine, and refers to earlier discussions in evidence raised by Ms Buckeridge that the Amendment was drafted in relatively simple terms, while embedding flexibility, allowing the a site responsive design and better built form outcomes into the future.

(iii) Conclusion

The Panel concludes:

- The public realm for Southbank, particularly in and around the entertainment precinct is in urgent need of upgrading to ensure higher quality street level experience.
- The application of an 8 percent setback or 10 metres from the boundary would severely limit the development potential of most sites in Southbank. The setback of 6 percent above 80 metres delivers sufficient separation.
- On the matter of the FAU, the Panel has recommended its abandonment and this is discussed this in Chapter 6.

9.7 Southbank Owners' Corporation

(i) Evidence and submissions

Mr Milner represented Southbank Owners Corporation Network (SOCN) (Submitter 53). He noted in his submission (Document 163) that SOCN represents 13 buildings, some 3,120 lots and 5,900 residents. They supported further reform in the management of development and built form as it applies to the Central City.

SOCN is mindful that only four years ago Amendment C171 applied the *Southbank Structure Plan.* Mr Milner submitted regarding Amendment C171:

> *Clearly what has been approved doesn't relate too well to this amendment. It was a useful Panel report and it highlighted that the Hoddle Grid and Southbank presented different opportunities. It did not think one size fits all.*

Mr Milner submitted that it was a struggle with how preferred heights and permit triggers were being interpreted. He argued what is the point of putting a preferred height in unless it has some meaning other than it is a trigger for a permit? It was Mr Milner's view that this be treated as an administrative tool and just the starting point for where the trigger should be. "*If we nominate a height we mean it or we don't.*" He argued that the controls encouraged excessive density, height and uniformity, and provided insufficient setbacks and building separation. Mr Milner submitted that the C171 design standards and draft standards of the *Better Apartments Guidelines* provided more sensible direction.

On the need for change, Mr Milner submitted that the GDA parts of Southbank behind buildings on the river's edge, exhibited poorer outcomes noted in the CCBFR for development approved since 2010. SOCN was concerned that giving priority to accommodating growth and high-rise built form in the Central City at the expense of liveability has been shown to be "*short sighted and damaging."*

Ms Brennan's general submission was that the Minister does not accept that proposed DDO10 will result in uniformity of built form in the GDA. Not all sites will be capable of achieving a FAR of 18:1, and the preferred and modified requirements allow for (and the built form outcomes require) designs to respond to context. In the SCAs, each Area within DDO2, DDO40, DDO60 and DDO62 has existing preferred height limits and its own FAR, again allowing for variation and response to context. In total, there are 23 distinct area controls within the SCAs.

Ms Brennan, in response to Mr Milner's submission that the "*privilege of discretion for excellence in design has been abused*", submitted that the Amendment does not seek to rely on abstract notions of design excellence, but rather to set minimum built form requirements to ensure a general lifting of the bar of design standards.

(ii) Discussion

The Panel asked Mr Milner whether recently approved development (built and planned) had passed the point of "*reasonable repair*" in Southbank. The Panel generally agrees with his response that, "*we have done irreparable damage for next 20 years which tells you the redress will need to be in public space and all the more reason the public benefit works need to go on steroids to address these inadequacies.*" Mr Milner urged that the works Professor Adams suggested be implemented as soon as possible to the public realm. The Panel agrees.

The Panel disagrees, however, with Mr Milner that the Amendment is a *"one size fits all"* approach. While the 18:1 FAR and the built form outcomes are standard across the DDO10 area, the sites are not the same size nor do they have the same dimensions and therefore differential outcomes on setback, design and street wall heights would eventuate. The Panel also agrees with Ms Brennan's response that the Amendment also provides specifically for a variation in controls within the Central City, through its recognition of the SCAs. Should the City of Melbourne pursue Ms Hodyl's recommendation to explore additional SCAs, this would further differentiate those precincts from the GDA.

(iii) Conclusions

The Panel concludes:

- No change should be made to the Amendment in response to this submission on the FAR.
- On the matter of the FAU, the Panel has recommended its abandonment and this is discussed this in Chapter 6.

9.8 Alston Post (Submitter 36), Tisza Pty Ltd (Submitter 45) and Sturt St Pty Ltd (Submitter 40)

(i) Evidence and submissions

Alston Post, Tisza Pty Ltd and Sturt St Pty Ltd made the one submission to the Panel in relation to the inclusion of the Sturt Street precinct in the Amendment. For ease of reference, this combined submission will be referred to as 'Alston Post', however such reference should be understood to mean a reference to all three submitters.

Alston Post submitted that Sturt Street was an amendment within the Amendment. It was noted that Amendment C171 that encompassed the Sturt Street precinct was only recent and it was suggested that perhaps this precinct was included in the present Amendment only because of the application of the CCZ. If this was the case, Alston Post contended, this was misguided and the precinct should be excised from the Amendment. Alston Post submitted that the C171 review process had been a thorough, deliberate and full strategic one as compared to this Amendment. In further comparison with C171, Alston Post contended that this Amendment is simply a "*tweak*" without a full strategic consideration. Alston Post stated that this conclusion is evident on the basis that what has been brought before the Panel was rejected in C171.

Alston Post observed Ms Hodyl's involvement in both C171 and the Amendment. Alston Post discussed the current permit for its site and invited the Panel to consider whether it was a mediocre mediated outcome as opposed to a good architectural one. Alston Post recognised the caution the Panel had received about poor precedents, but noted that precedents can sometimes be a good thing. Alston Post recommended the Panel should conclude that the existing controls remain in place. Should the Panel support this conclusion, Alston Post recommended that the Panel should provide comment as to whether the Amendment is fair in light of C171.

Alston Post also contended that the inclusion of this precinct in the Amendment was premature as the implementation of C171 had not been given sufficient time to mature and develop. On that basis, Alston Post contended that this Amendment was akin to an 'appeal' on C171 on limited issues.

Ms Hodyl gave evidence generally about the exercise of discretion and application of precedents to justify significant discretion with respect to height being exercised in the Southbank area and notably for this precinct. Ms Hodyl referred the Panel to one particular site where the proposed development was set to exceed the preferred building height by up to four times.

(ii) Discussion

The Panel accepts Ms Hodyl's evidence in relation to this precinct and does not accept Alston Post's observation of 'duplicitous means'. Both the submissions for the Minister and Ms Hodyl's evidence clearly set out for the Panel Ms Hodyl's involvement in C171 and more generally with the City of Melbourne in the recent years. This was an appropriate declaration to make.

The Panel considers that whilst Sturt Street may seem underdeveloped to some, it falls within the wider context of the distinctive art precinct through its view shed of the Art Spire. The Panel noted on its site visit to this Southbank precinct, that there is a stark contrast between the precinct and other parts of Southbank that are already heavily developed. There is a need to put in place SCA controls which will guide future development of the precinct and ensure an appropriate response to the special characteristics of this area which distinguish it from the rest of Southbank. The Panel is of the view that there is strategic justification for the inclusion of this precinct as exhibited in the Amendment.

(iii) Conclusions

The Panel does not support Alston Post's submission that the Amendment be abandoned in relation to Southbank broadly, and the Sturt Street precinct more specifically.

9.9 RJ International (Submitter 30) - 28 Clarendon Street (the Tea House)

(i) Evidence and submissions

The Submitter is the owner and occupier of the land known as 28 Clarendon Street, Southbank, located on the north-west intersection of Clarendon Street and Normanby Road, Southbank. The land is located within the CCZ3 and DDO60-A1.

On behalf of RJ International Pty Ltd (Submitter 30), Mr Ian Pitt QC presented submissions to the Panel that DDO10 is a more appropriate planning control that should be applied to his client's site which is developed with the heritage listed Tea House rather than that of the River Environs (DDO40).

Mr Pitt submitted that his client sought to have the boundary of DDO10 extended to encompass his client's site as it is an island site and is surrounded by significant developments such as Crown and Melbourne Convention Centre. Mr Pitt stated that Mr Sheppard supported such an inclusion on the basis that the Tea House site is a significant distance from the river and the Crown and Melbourne Convention Centres separate the Tea House site from any possible relationship to the river. Further, such an inclusion would not materially impact any other party due to its unique individual siting.

Mr Pitt tabled development plans in relation to the Tea House site that he claimed were halted as a result of the introduction of Amendment C262. These plans set out a substantial building that would be attached to the heritage building, creating an arrival plaza to the north of the Tea House and with a tower element to the south to be predominately used for the purpose of a Hotel. Mr Pitt sought through his questioning of Mr Sheppard to confirm that such a proposed development for the Tea House site would not offend any shadowing controls or otherwise impact on the river corridor.

Ms Brennan submitted that that the Tea House site should remain in DDO60. She argued:

> *As is evident from the axonometric views of the DDO60 area, the site is part of the "*front row*" block to the River. The casino, the Hilton and the convention centre towers exceed the generally low scale, but they are in the nature of exceptional buildings (approved under Clause 52.03 or separate legislative enactment) to perform tourist functions of State-wide importance.*

Ms Brennan submitted that the nearby ANL House mirrors the higher scale built form of Yarra's Edge, adjacent to the west. These buildings are the only exceptions to the otherwise low scale of the River environs in Area 1.

(ii) Discussion

The Panel notes that the Tea House is on a single title and acknowledges Mr Pitt's comments that the car park land will be developed and subdivided into the future.

The Panel, however, was somewhat taken aback by the scale of the proposed development as a response to a building that is included on the State heritage register. Mr Pitt reinforced to the Panel that his client was not seeking the Panel's approval for these proposed development plans, however, but they were being provided to give an indication of what would be possible under the DDO10 controls for this site.

The Panel is of the view that despite some distance between the river environs and the subject site, the presence of other substantial developments in the immediate surrounds, and no overshadowing of the river by a large development on this site, that application of DDO10 and a FAR of 18:1 on this site is not appropriate.

The Panel is of the view that the boundary for the river environs has been appropriately drawn and the site is recognisably part of the river area. This is discussed in Chapter 7. As the site has special heritage values, it may be a candidate for Clause 52.03 controls in future. The Panel notes that DDO60 contains discretionary controls to allow consideration of height greater than 24 metres, and heritage considerations mean that it is inappropriate to remove any overall height limit and to signal a potential intensity of 18:1, as inclusion of this site within DDO10 would do.

(iii) Conclusions

The DDO10 boundary should not be extended to encompass the Tea House site. The Panel concludes that no change is required to the Amendment.

9.10 Sites raised in written submissions

93-118 Kavanagh Street, Southbank (Submitter 34, Yarra Park City Pty Ltd)

The submitter sought clarification that their site and Planning Permit No. 2015/32991 was not affected by this development. On review of the Amendment documentation, they subsequently withdrew their submission. This is discussed in Section 7.10.

175 Sturt Street, Southbank (Submitter 72, G3 Projects Pty Ltd)

This matter relates to transitional arrangements and is generally addressed in Chapter 7.

84 Coventry Street, Southbank (Submitter 78, R and Y Pty Ltd)

This submitter offered support for the Amendment and the discretionary FAR, noting that opportunities for innovation were enabled. The submitter requested that varied design responses for corner sites should also apply in SCAs.

The Panel notes the proposed provisions are considered to give flexibility to the redevelopment of sites within the SCAs. This would also allow a response to corner conditions. No changes to the Amendment are supported.

Owners' Corporation of Freshwater Place (Submitter 25)

The submitter supported the Amendment but requested a lower FAR of 15:1 and a setback modification of 6 percent up to 80 metres. The submission called for retrospective powers to be introduced with the Amendment. Mention was also made of the variations in overshadowing.

The Panel agrees with the Minister that the application of 6 percent setback up to 80 metres would lessen the tower separation which is mandated at 10 metres (combining two setbacks of 5 metres to the title boundary on adjoining properties). The setback of 6 percent of total height above 80 metres delivers greater separation proportional to height.

The key public spaces for shadowing have been determined from robust testing as demonstrated in the report. The discretion exercised to spaces is a balance of what is reasonable and achievable and the strategic significance of space.

The Panel notes that the provisions cannot be applied retrospectively and consideration of an extension of time request must be made against current provisions and policy.

18-24 Moray Street, Southbank (Submitter 39)

The submitter argued that the mandatory built form controls ignores specific site opportunities and constraints, stifles architectural creativity and will generate uniformity in future buildings. It was argued that the mandatory built form controls unreasonably compromise the ability to deliver other key State and Local Planning Policies for Southbank.

The Panel considers that the mandatory aspects of the built form controls are appropriately designed to secure the requirements necessary to protect the amenity of the public realm. The Panel agrees with Ms Brennan in that architectural issues, achievement of adequate daylight and amenity, and site viability were all matters that informed both the FAR and the other built form controls.

The Panel does not consider that the proposed Amendment compromises the ability to deliver the objectives for Southbank within the State Planning Policy Framework or Local Planning Policy Framework.

231-241 Sturt Street, Southbank (Submitter 70)

The submitter supported the intent of the Amendment and sought to have the FAU extended where possible. The submitter questioned the discretionary FAR within the SCAs and supported the varied design response for corner sites. The submission is noted by the Panel.

117-135 Sturt Street, Southbank (Submitter 71)

The submission supported the FAR as the most appropriate tool to achieve better built form outcomes, and offered the following improvements:

- *Area 4A and 4B of DDO60 should be combined into Area 4A;*
- *The controls include a shadowing control which affects streets which is difficult to comply with depending on orientation of a development site, east-west bounded by north-south streets.*
- *Clarification is sought how the responsible authority will exercise discretion over what is meant by not unduly prejudice amenity of the space.*
- *If it is agreed that FAR's are an appropriate tool to guide built form outcomes, a broader range of uses which attract floor space bonuses in calculations of uplifts should be introduced, including arts and community uses; net leasable area rather than gross floor area should be used for calculations; clarify how GRVs will be changed over time and how FARs*

would be applied to sites which are partially affected by mandatory height controls.

The Panel does not support combining areas 4A and B into the one area, as each as distinct qualities based on desired built form outcomes. The question of what is meant by "*unduly prejudice amenity of the space*" is a fair one, and the Panel notes that Document 165 has changed this to "*unreasonably prejudice the amenity of the space*". The Panel accepts this change. The issues relating to GRVs are not applicable as the Panel has recommended that the FAU Scheme be abandoned.

175 Sturt Street, Southbank (Submitter 72)

The submission argued that transitional provisions should apply to an application made before Amendment C270 gazettal. It opposed the introduction of FAR controls to Area 4A in DDO60 and submitted that the reduction in podium height from 30 metres to 20 metres is considered to be inappropriate. The submission raised concerns regarding mandatory street setback of 5 metres and side and rear setbacks.

The Amendment as it affects DDO60 – Area 4A in Southbank introduces a discretionary FAR; discretionary preferred street wall height; discretionary above street wall, side and rear setbacks; to support the interpretation of the built form outcomes for the area. The 40 metre height is preferred rather than mandatory. The concerns regarding the mandatory nature of controls are unfounded.

85 Coventry Street, Southbank (Submitter 78)

This submission supports the intent of the Amendment and the discretionary FAR as appropriate to ensure development opportunities and innovation and avoidance of being stymied by a blunt, formulaic control. Similar to other submissions, it notes that the Amendment includes a varied design response for corner sites which is considered to be positive and should also be applied in the SCA's.

Ms Brennan's response to the submissions was that the proposed provisions are considered to give suitable flexibility to the redevelopment of sites within the SCA's. The Panel supports this submission. No changes should be made to the Amendment as a result of this submission.

10 Hoddle Grid

10.1 General issues

The main issues considered for the Hoddle Grid are similar to those set out in Southbank, however with some key differences. Examples of these key differences are the broader impact the FAR and FAU Scheme has within the Hoddle Grid, whether the built form controls for the western side of Elizabeth Street should be amended so that DDO2 applies and the impacts of the Amendment on the commercial space market to name a few.

Professor Rob Adams commenced the Panel Hearing with his view that the FAR of 18:1 was a good start but queried whether the Amendment was sufficiently in order to prevent further "*decimation*" of the public realm within the Central City.

The CCBFR report highlights the significant changes that the Central City has absorbed, particularly in the past five or so years. In evidence, Ms Hodyl discussed the international field trips she undertook to help inform the CCBFR. Ms Hodyl commented on the level of built form controls she witnessed in those cities as compared to the built form outcomes that were being achieved within the Central City.

Ms Hodyl and Mr Sheppard gave compelling evidence in relation to strategic justification of the SCAs, whilst providing sufficient protections for the GDA.

This Chapter will discuss the key matters raised within specific sites and whether the Amendment sufficiently addresses these matters or it should deliberately not.

Sites in the Hoddle Grid were generally affected by DDO10 (GDA), DDO2, DDO62 (SCA) and DDO40.

10.2 World Trade Centre – Siddeley Street (Submitter 66)

(i) Evidence and submissions

The submission in relation to this site developed with the World Trade Centre primarily focused on the application of the overshadowing controls in the context of a site where the existing built form may be changed. The submission sought clarification as to whether the proposed overshadowing controls in the Amendment would be applied afresh to any redevelopment of the site or whether any new development could instead take the benefit of the form and extent of the existing overshadowing.

Ms Brennan, on behalf of the Minister, submitted that the proposed overshadowing controls are clear in that if a proposed development does not add to the existing shadow across the Yarra River corridor at the relevant time, it will comply with that component of the control.

The Panel addresses this in more detail in section 8.7.

(ii) Discussion and conclusion

The Panel considers that by virtue of the demolition trigger in the CCZ, and its requirement that a permit and prior approval for the redevelopment of a site is required (see Clause 4.0

of CCZ1, 2 and 3), a replacement building will have the benefit of being assessed against the existing level of shadow prior to demolition.

10.3 Portland House – 8 Collins Street (Submitter 19)

(i) Evidence and submissions

The Panel heard from this submitter in relation to light and air easements registered on 4-6 Collins Street in favour of a development at 85 Spring Street. The Panel heard that the planning permit conditions for 85 Spring Street set out the requirement for the proponent to secure such easements for proposed balconies and windows in favour of owners of the subject land from extending from the south title boundary over the entire title of 4-6 Collins Street or 3.5 metres above existing roof level of Anzac House.

One of the main issues to arise for this site was the transition potential of sites between heritage and larger development. It was submitted to the Panel that the current development at 85 Spring Street would be incapable of being developed under the Amendment.

The issue submitted to the Panel for this site was that the submitter had been considering a combined tower at 8-12 Collins Street, with setbacks behind the registered buildings with 8 Collins Street built to the eastern boundary. The issue for the submitter now is whether such a proposal would meet the controls of the Amendment.

The Panel heard from Fender Katsalidis Mirams architects that, at first glance, Portland House being 13 metres wide was totally undevelopable. Witness acknowledged that 85 Spring Street sought air rights over Anzac House but not Alcaston House as the latter is undevelopable because of heritage constraints. There is no rear portion that can be developed at Alcaston House as opposed to Portland House.

One of the matters considered for the subject site was whether it was possible to consider using the combined site at 8-12 Collins Street for a tower to be built situated in the centre of the two sites. The witness agreed that this could happen if the site was amalgamated and developed together, however he couldn't say more definitively without further analysis.

Mr Kelderman gave evidence that Lovell Chen, heritage consultants, had been engaged to provide advice in relation to the impact of heritage requirements on the development potential of the subject site. The witness gave evidence that the submitter was well into the process of development applications when C262 was approved. Whilst agreeing with the built form outcomes, Mr Kelderman noted that mandatory built form controls do not always lead to the right or appropriate outcomes. Of particular note was the evidence that the proposed development on the subject site would have provided a transition from 85 Spring Street to Collins Street view shed and any built form would have been absorbed in the shadow of 85 Spring Street. Mr Kelderman noted that the critical setback was the one from Collins Street rather than the side setbacks.

(ii) Discussion

The Panel has discussed the concept of air rights and the transferability or tradability of the FAR for affected sites at Chapter 6.

The Panel acknowledges that the Minister has responded to the submissions of Portland House in the final version of the controls.

(iii) Conclusions

The Panel concludes:

- The Minister should consider future application of air rights and transferable development rights for buildings such as Alcaston House.

10.4 Whitemark Property and Planning (Submitter 87)

(i) Evidence and submissions

The key submissions of this submitter was in relation to the calculation of setbacks for buildings with curved facades, as well as the definition of building services and the impacts of the side setbacks for lift cores.

Mr Newton-Brown submitted the difficulty in determining the calculation of the setbacks when the building parameters are not flat, as well as the building services definition in determining the GFA. Mr Newton-Brown provided case studies of 295 Kings Street and 278 Lonsdale Street to provide context for the Panel to understand the submissions being made.

Mr Newton-Brown submitted that for the first building, the average calculations of the setbacks for curved building forms were considered to be relevant. In relation to the latter building, Mr Newton-Brown submitted that services on a rooftop are not taken into account in assessing the height of a building and such services core on the side of a building should be excluded when determining setbacks from the boundary. Mr Newton-Brown stated that the proposed design response was refused by the City of Melbourne, as it was considering mirroring the services core on the boundary of the adjoining building.

(ii) Discussion

The Panel received a number of submissions in relation to the definition of building services and whether lift cores should be included in the FAR or not. Consideration of this issue is in Chapter 6.

Mr Newton-Brown contended that the average calculation of setbacks for curved building forms should not be used as this will be a disincentive for interesting building forms. Mr Newton-Brown submitted that the Planning Scheme should set out means by which setbacks can be calculated to account for curved building forms. The Panel notes that this work has not been completed, but is something the Minister or Council can consider in future work on built form controls.

Mr Newton-Brown submitted that the exceptions to '*building services*' in DDO10 should include a lift core and stair well and that the Minister should set out clearly how services cores should be treated in assessing setbacks in proposed developments. Mr Newton-Brown submitted that in treating services cores in this way will not adversely impact on the desired separation of a building.

Ms Brennan SC stated that C262 included an exemption for building services from the definition of building height in DDO10 and Mr Newton-Brown was seeking to avoid

application of the five metre side setback if services abutted the boundary. Ms Brennan SC restated her disagreement with the proposition that the definition should exclude services, as the floor area occupied by services does not count as part of the building for the purposes of calculating FAR or side boundary setbacks. Ms Brennan SC formed the view that this has been addressed sufficiently in the definition of '*setback'* in the Amendment.

(iii) Conclusion

The Panel concludes that building services such as core services should not be an exemption to the setback requirements.

10.5 Brookfield Property Partners - 399-405 Bourke Street – (Submitter 75)

(i) Evidence and submissions

Mr Green made submissions with a particular focus on commercial space, noting that the Amendment places great importance on residential spaces rather than commercial spaces. Mr Green stated his view that the lift core needs to be shifted into the commercial space. Mr Green discussed the unnecessary burden on floor plates and the activation of office spaces. Mr Green highlighted the large floor plates in Docklands and contended that the optimum commercial office floor plate was 2000 square metres and usually a developer would seek to relocate the services core in order to be able to optimise that floor plate.

Mr Green queried the transitional arrangements of the Amendment, particularly whether there are any implications with respect to extensions of time for planning permits.

(ii) Discussion

On behalf of the Minister, Ms Brennan sought clarification from Mr Green in relation to extension of time issues, noting the extension of time matters raised in the Windsor Hotel case. Mr Green advised the Panel that his client had a three-year commencement period from 13 May 2013 and sought a two-year extension of time as this is the maximum period of time indicated to his client that they would receive.

There was discussion as to what consists of a '*feasible floor plate*' both prior to C262 and what can be achieved under the Amendment controls. Ms Brennan noted that the submitter had not provided evidence to the Panel that a commercial floor plate above 1500 square metres was not achievable at this site.

(iii) Conclusion

The Panel agrees with the Minister's contention that asking for the right period of time in an extension of time is important in order to avoid being caught by the transitional provisions that may not be as beneficial as the existing rights under the planning permit.

10.6 Ausvest - 392-406 Bourke Street and 24-32 Hardware Lane (Submitter 62)

(i) The issue

The issue is whether some special provision should be added in response to this situation where a land holding would be divided by the boundary between two controls.

(ii) Evidence and submissions

Concerns were expressed in relation to this matter by Ausvest as owner of the car park and associated commercial developments at 392-406 Bourke Street and 24-32 Hardware Lane (Submitter 62). This land at the north-east corner of the street/lane intersection is included in the one zone (CCZ1) but two DDOs apply. The eastern part of the site is included in DDO10 where the FAR of 18:1 applies and the western part closest to Hardware Lane is included in DDO2 – Area 2. In this part of the site, a discretionary 15 metre height limit and discretionary FAR of 4:1 would apply.

The submissions for the owner were to the effect that the total site area (including the land in DDO2) should be able to be used in calculating the allowable floorspace for the site under the 18:1 FAR applying to the eastern portion of the land. It was acknowledged at the Hearing that the overshadowing provisions would constrain development on the land to a limited height irrespective of the overlay - as is appropriate to the land's abuttal to the significant laneway.

It was submitted for the owner that there are some other Central City sites in two DDOs but none in DDO2 and DDO10.

Mr Barlow gave evidence for Ausvest outlining its development difficulties and supporting special arrangements for the site. He said that this site is one of the biggest sites in the Central City, but it would not be able to be optimally developed to achieve a FAR of 18:1 due to the dual controls over the site. He said that he did not believe the site needed to be partially covered by DDO2. Mr Barlow stated that the DDO10 should be amended to allow sites like this that are partially in the DDO2 to achieve an overall FAR of 18:1.

Mr Goss gave evidence for the owner in relation to various massing models. He noted the difficulties in constructing a building mass that meets the DDO2 built form controls, but is able to exceed 18:1 for the remaining part of the site subject to DDO10 controls.

Mr Goss discussed the difference between residential and commercial massing, stating that the floor plate modelled in compliance with the setbacks would suit residential use and the floor plate would produce the right number of apartments, that is of two bedrooms and with a floor area of 65 square metres. He nevertheless said that the shape of the building was determined by the daylight as well as setback controls.

Mr Goss opined that his modelling showed that only so much could be achieved in a tower before the controls impacted, particularly when considering the DDO2 controls. As a result of the DDO2 controls, the building would need to sit further back which would then require removal of the floor plate within the site, rather than being able to take advantage of moving the building around the site. As a result, Mr Goss contended that the commercial

floor plate was untenable and evidenced an unnecessary restriction on how and where to locate the floor plate.

Mr Goss advised that if a FAR of 18:1 is applied only to the land in DDO10, significantly fewer levels of development could be constructed (depending on use floor plates and setbacks) than if the area of the whole of the site including the land in DDO2 was considered in applying the 18:1 FAR.[57]

Ausvest suggested changes to the controls designed to allow the calculation of the FAR across the whole site including the part outside DDO10.

Ms Brennan's reply for the Minister (Document 177) opposed the calculation of FAR across the whole site where it straddles two controls. Rather than the site being 'penalised' as was asserted for the submitter, she said that calculating the FAR across the whole site, including the part constrained for character reasons, would reward the site in a way which is inequitable compared with sites entirely within the General Development Area. She further suggested that allowing such a method of calculating the FAR would inappropriately encourage General Development Area sites on the border of a Special Character Area to consolidate land within the Special Character Area.

Ms Brennan submitted (Document 56) that it was impossible to predict which contiguous lots might in future be consolidated and subject to a common planning application. This could create additional cases of two DDOs applying to the one site.

(iii) Discussion

The Panel is aware that the Planning Scheme contains special provisions dealing with the subdivision of land in two zones (Clause 64.03). There is no other provision, however, dealing with land split between two zones or overlays. The Panel agrees with Ms Brennan that the statutory requirement is that both controls would have to be met.

The Panel has given consideration to what special provision might be introduced to deal with the two controls issue. It would be possible, for example, to modify Clause 3 in the CCZ schedules relating to the FAR (or DDO10 if the FAR provisions are relocated there). The provision might refer to situations where a site is only partly in DDO10 and provide the discretion to allow the FAR to be calculated against the total site area even though part of the site lies outside DDO10. Mr O'Farrell's suggestion for this on behalf of Ausvest was in Document 190. He suggested that the definition of gross floor area in the CCZ schedules should be modified to always include the additional area as follows:

> *For the purpose of this schedule the floor area ratio is the gross floor area above ground of all buildings on a site* ***(inclusive of any land forming part of the development site that is not included within DDO10),*** *including all enclosed areas, services, lifts, car stackers and covered balconies, divided by the area of the site. Voids associated with lifts, car stackers and similar service elements should be considered as multiple floors of the same height as adjacent floors or 3.0 metres if there is no adjacent floor* (Panel emphasis).

[57] Some 22, 24 or 31 levels, some 37, 41 or 46 levels.

It would seem, however, that any special provision in DDO10 or the CCZ schedules would need to be paired with a provision in the overlays with a common boundary with DDO10 which would allow the area of the part of the site outside DDO10 to be counted towards the FAR floor area calculation for the land in DDO10. Additionally, there would need to be some arrangement to acknowledge that the FAR entitlement had been 'transferred' between the overlay areas and not re-used.

These provisions would appear to be quite complex. The frequency of occurrence of land in two controls is not known given the absence of detailed knowledge of the title arrangements for all lots at the boundary of DDO10[58] and the possibility of future site consolidations leading to more situations of dual DDOs. The full implications for other sites of such a change to the provisions are therefore unclear.

The Panel does not support adding these special provisions to the Amendment. Nor does the Panel support any boundary adjustment as a response to this issue as the Special Character Areas have been purposefully defined.

As discussed in Section 7.3, a site-specific provision for the Ausvest site might be added to Clause 52.03 if it was considered appropriate. The Panel nevertheless notes that consideration of the development options using 3D modelling indicated that substantial development could occur on the Ausvest site even if only the DDO10 land was used in the FAR calculation.

(iv) Conclusion

The Panel concludes that no change should be made to the Amendment in response to the Ausvest submission.

10.7 600 Collins Street Pty Ltd - 582-606 Collins Street (Submitter 23)

(i) Evidence and submissions

Mr Touzeau of Urbis made a written submission to the Panel in relation to 582-606 Collins Street, which is better known as the Hadid building. Mr Touzeau submitted that the current planning permit application for the site was lodged on 18 December 2015 following the introduction of the C262 imposing a 24:1 plot ratio control. Mr Touzeau sought clarification in relation to the wording of the transitional provisions in the exhibited controls, as the application of the wording of the transitional provisions differed to the established principles of drafting transitional provisions.

(ii) Discussion

The wording in relation to the transitional provisions in the exhibited controls for the Amendment essentially '*backdated*' to the commencement of the C262 introduction, that is 4 September 2015. The Panel agrees that this is unconventional drafting. Usually, the Panel would expect to see transitional provisions for the Amendment taking effect from the commencement date of the Amendment, that is 27 April 2016.

[58] The Panel notes that the land owned by Submitter 80 is partly in DDO10 and partly in DDO2.

The transitional provisions are discussed in more detail in Section 7.10.

(iii) Conclusion

Any planning permit applications submitted during the C262 period and before the C270 period would be required to be assessed under the interim control period and not the C270 period.

10.8 AMP Capital (Submitter 56)

(i) Evidence and submissions

AMP Capital made submissions predominantly in relation its site at 330 Collins Street, 600 Bourke Street and 548-558 Little Bourke Street. It submitted that the Amendment was a response to residential issues and had not properly considered commercial issues. In particular, AMP Capital queried whether a Postcode 3000 type concept was required in order to attract back office or mixed use before 2030/2040. AMP Capital submitted that neither SGS nor Ms Hodyl in their reports clearly identified the impacts of the Amendment on commercial land use. AMP Capital submitted that land supply was not the critical issue but qualified this to recognise that land is not the only determinant. AMP Capital stated that the commercial industry in the Central City provides the requisite investment and jobs, which should be considered to be a public benefit, and the public benefit categories be expanded.

(ii) Discussion

Like other submissions the Panel has received in relation to commercial matters, AMP Capital stressed the importance of size to commercial floor plates. AMP Capital raised the importance of workers in sustaining the fine grain of the commercial core.

The Panel have considered AMP Capital's submissions with respect to the Draft Central Sydney Planning Strategy and the possible transfer of development rights in other sections of this report.

AMP Capital expressed concern as to whether the GRV as set out in the Guidelines fail to provide incentives for office space over residential for development purposes. The Panel does not share those concerns. The Panel accepts the economic evidence provided to the Panel in relation to the basis for the GRV calculations and recognises that at this point in time, these values are reflective of the market favouring residential development in the Central City.

(iii) Conclusion

The Panel concludes:

- The economic evidence supports the contention that the phase of the market cycle is starting to move away from residential. From what the Panel understands of the updating requirements of the calculations in the Guidelines, this movement in the cycle will be reflected.

- The City of Melbourne Land Use and Infrastructure Review that is being undertaken will commercial development or land use priorities is the appropriate forum for this debate.

10.9 Bourke Hill Pty Ltd - 45 - 49 Bourke Street (Submitter 59)

(i) Evidence and submissions

This 485 square metre property is located within DDO62. The owner of this property is Bourke Hill Pty Ltd (Submitter 59). The company was represented at the Hearing by Mr Peake.

The property is developed with a 1980s three storey building of no heritage value. The front 23 metres of the property adjacent to Bourke Street is currently subject to a mandatory 15 metre height control (Area B1). The rear or southern 7 or 8 metres of the property is in a mandatory 40 metre height control area (Area B4).

Amendment C270 retains the mandatory 15 metre height limit in the B1 area but converts the B4 area to a discretionary 40 metre control and introduces a FAR (modified requirement) of 1:10. In the B4 area, a discretionary street wall height of 25 metres is proposed to apply with building levels above that having a preferred or discretionary setback of not less than 5 metres.

The written submissions for the owner included:

> *It is submitted that as part Amendment C270, the boundary between Area B1 and Area B4 in DDO62 should be moved northwards to either align with the south side of the road reserve of Bourke Street, or to a point 5 metres south of the road reserve, between Exhibition Street and Spring Street.*
>
> *This will bring the relevant built form controls into conformity with those that are proposed to apply elsewhere in the City of Melbourne, whilst retaining a mandatory 15 metre street wall and a mandatory 40 metre height control, the same height control as applied to the retail core …*
>
> *… this change would only create a discretion to consider an application for a planning permit that complied with a revised DDO62. Whether or not a permit would be granted to construct a building to the full extent of the available building envelope would depend upon the outcome of a consideration of:*
>
> - *the design objectives of Schedule 62 including:*
>
> *"To protect the unique character of Bourke Hill."*
>
> - *the decision guidelines of DDO62, including:*
>
> *"Whether the development adversely impacts on the unique character of the Bourke Hill precinct."*
>
> - *whether the proposed development is consistent with the purposes of HO500*
>
> *which include:*

> *"To ensure that development does not adversely affect the significance of Heritage places."*

The objections in this submission were supported in Bourke Hill Association Inc. (Submitter 63).

Mr Peake's submissions at the Hearing argued that that it was inappropriate that the parts of DDO62 with mandatory controls prior to Amendment C262 were simply treated under C270 as 'no go areas' and not reviewed. He said that the incoming controls were nevertheless a 'shandy' of the Amendment C240 and C270 controls and the reconstruction exception introduced with Amendment C240 is proposed to be amended.

He was critical that the incoming SCA controls were too varied or a 'mish mash' and that the additional setback provisions would reduce whatever development potential properties on the south side of Bourke street have retained. It was said that a significant number of properties are affected by a combination of mandatory and discretionary controls in the Bourke Hill area.

He particularly suggested that the mandatory nature of some of the C240 controls including the 15 metre height control along Bourke Street were unwarranted and inconsistent with the VPP philosophy of maximum discretion and decisions guided by policy. He said that the Amendment was driven by too great an emphasis on improved public realm amenity when compared to economic considerations.

Mr Peake submitted that the Panel should recommend that the proposed DDO62 controls should be reviewed as an overall package in light of the investigations and evidence presented in the course of Amendment C270.

While various witnesses for the Minister sometimes described the manner in which SCA height controls had been considered prior to the Amendment with imprecision (as also pointed out by Mr Peake), Ms Hodyl's evidence to the Panel and Ms Brennan's submissions confirmed that there was no review of those mandatory controls or the heights which had been in place prior to the introduction of Amendment C262 and those height controls which has been discretionary prior to Amendment C262, were simply re-instated (with the addition of a discretionary FAR).

The Minister's response to submissions (Appendix to Document 1) included that the Bourke Hill provisions are considered to give suitable flexibility to the redevelopment of sites within the precinct. The scope of the Amendment did not include realignment of boundaries within the Special Character Areas.

Ms Brennan's reply for the Minister also included that the Bourke Hill height controls had resulted from a detailed consideration by the Department and the Panel under Amendment C240 and were implemented just over a year ago.

She further said:

> *The Minister does not accept that it is inappropriate for land in the Hoddle Grid to be subject to different controls … Differentiation between the GDA and the SCAs is at the heart of the Amendment, and has been a feature of the Melbourne Planning Scheme for many decades.*

(ii) Discussion

The Panel notes the general and site-specific submissions made. The Panel considers that there is no justification to not proceed with the controls in the Bourke Hill area as proposed by the Minister. It is also not considered that a review of the Bourke Hill controls is required in the short term.

The issue of mandatory v discretionary controls is dealt with in Section 7.4. In that section the Panel concurs with the view of the C240 Panel concerning the special nature of the Bourke Hill are and that special circumstances apply warranting mandatory controls.

The Panel agrees with the Minister that variation to controls across the parts of the Central City is necessary and appropriate.

The incoming controls are largely consistent with those put in place only recently by Amendment C240. The Panel considers that the C240 controls were carefully considered and crafted and notes the C240 panel comment:

> *The Panel does not agree, however, that the basis for the Amendment is inadequate. The Precinct Review made a thorough investigation of the area and the various parts of it, reviewing the policy context for the area, identifying the characteristics of parts of the area, defining multiple planning objectives and testing the controls which might achieve the outcomes sought through the model.*

So far as opportunities for development are concerned, this matter was given consideration by the C240 panel. It commented in relation to the proposed mandatory 15 metre height limit along Bourke Street:

> *We were also advised by Mr McGauran, who gave urban design evidence for the Planning Authority … that, while a 15 metre limit did not match the height of the majority of buildings along that street, it was intended to provide for some modest upper level additions and alterations to the lower heritage buildings while avoiding erosion of the low scale Precinct objective. The Panel supports this approach.*

Concerning particular height proposals for the south side of Bourke Street put forward by Mr Peake's client and others, the C240 panel said:

> *We specifically reject the proposals that the mandatory height along Bourke Street should be 25 metres. We consider that the planning expectations for this area have been that 15 metres is suitable scale for development for many years; it allows some minor extension to buildings; and when combined with a suitable depth of setback will ensure that the sense of openness and wide sky, which is such a defining element of the character of the area, will remain.*
>
> *… creating a new scale of development is not what this Amendment is about – it seeks to preserve the current low scale which gives the area a uniqueness when considered in the CBD context, and which has other amenity, heritage and character benefits.*

> *We also reject the proposal for a 20 metre height limit for a depth of 10 metres which was put forward by Mr Akaoui in his reply. In the Panel's view it would allow buildings along Bourke Street to increase to a level appreciably different from that which the controls seek to maintain. We also consider that backing such a development by further development to 40 metres or more high, set back only 10 metres from the site's frontage, would be to further compound the unacceptability of the built form outcome.*

Bourke Hill Pty Ltd is now effectively proposing that the 15 metre height control should only apply for a depth of 5 metres from Bourke Street and the common boundary with the 40 metre discretionary height control should be moved northwards towards Bourke Street by some 18 metres. The Panel rejects this proposal on the same basis as the C240 panel rejected similar changes to the controls.

In relation to whether the Heritage Overlay alone together with policy statements would serve to achieve the built form objectives for the area, as is again asserted, the panel commented:

> *… it may be beneficial, as it is in the present case, to layer the HO with another planning tool which sharpens the understanding of, or places parameters around, acceptable design outcomes.*

The present Panel agrees.

So far as a 'shandy' and 'mish mash' of controls is concerned, the Panel does not accept these criticisms. The discretionary FAR has been added as a guide to the extent that height above the preferred 40 metre limit would be acceptable. The setback controls are a response to the particular circumstances of each part of the precinct.

Bourke Hill Pty Ltd complains that the setbacks will erode what development potential may be available on the rear of its site and others on the south side of Bourke Street in the 40 metre discretionary area. It should be noted that the setbacks are discretionary and site circumstances and the suitability of built form outcomes will be considered.

The Panel does not agree with the submitter that this Amendment places too much emphasis on improving the public realm and undervalues the economic role of the Central City. The package of controls proposed have been carefully developed to protect and enhance the public realm but their development has also had regard to economic impacts across the area and the feasibility of developments (see Ms Buckeridge's, Dr Spiller's and Mr Mackintosh's evidence).

Concerning the replacement building clause which would apply to extant buildings which already exceed the maximum height of 15 metres in Area B1, the clause again allows a replacement building to the same height as the existing building, but would add a new provision that setbacks for the new building cannot be reduced from those of the existing building. On the south side of Bourke Street, these provisions would principally affect side and rear setbacks. In the absence of more detailed information about the effect of this provision for Mr Peake's client's property and that of others, the Panel is not able to identify any problems which the addition would present. The Panel recommends no change to the replacement building clause.

(iii) Conclusion

The Panel considers that no change should be made to the Amendment in response to this submission and does not support its call for an early review of the Bourke Hill DDO62 provisions.

10.10 Schutz Consulting, 428 Little Bourke Street (Submitter 29)

(i) Evidence and submissions

This is a small site of 459 square metres situated west of Queen Street on the corner of Barry Lane. The owner made a written submission (Submitter 29) and Ms Schutz, planning consultant appeared and made a presentation at the Panel Hearing (Document 162).

Essentially the concern was that this site which has particular site constraints should not be subject to the same Scheme requirements as other properties within DDO10. The submission was directed to the site in question and did not purport to raise general issues.

On 29 August 2016, however, Ms Schutz wrote on behalf of her client withdrawing the submission (Document 183).

(ii) Discussion

In these circumstances, the Panel does not need to provide advice in relation to this submission and no change should be made to the Amendment in response to it.

10.11 Golden Square Car Park Precinct (Submitters 64, 80 and others)

The issues raised in relation to this site are discussed in Chapter 7.

10.12 310 Queen Street (Submitter 51)

The issues raised in relation to this site are discussed in Chapter 7.

10.13 130 Little Collins Street (Submitter 31)

(i) Evidence and submissions

This property is owned by the Uniting Church in Australia, Synod of Victoria and Tasmania. Mr Christopher Wren QC made submissions at the Hearing on behalf of a prospective developer of this site, Lt Col JV Pty Ltd. The site is currently occupied by an eight storey commercial building on the north side of Little Collins Street and is constructed to its site boundaries. A lane, Coromandel Place, abuts the property to its west.

The site is in Area A7 of Design and Development Overlay Schedule 2 (DDO2). Area A7 is a small area essentially comprising the site and others to its east which face Little Collins Street from Russell to Exhibition Street. The large Southern Cross development is partly within Area A7 and partly within Area A5.

Mr Wren submitted that DDO2-A7 does not adequately or accurately reflect the existing built form context of this small precinct and that this creates difficulties with the discretionary built form parameters and the mandatory 'Built Form Outcomes' that guide this discretion. He noted that the DDO2-A7 controls have, with little change, applied for over 17 years and that, during that time, there has been significant development in the

precinct including the Southern Cross complex which has a maximum height of about 161 metres and the 'Hero' apartments on the corner of Little Collins Street and Russell Street (the latter being in Area A5).

Mr Wren's submissions were that, under current and proposed controls, a building which is significantly lower in height than others in Area A7, and lower than the site can accommodate, is the maximum built form that can be achieved.

Mr Wren called Mr Chris Goss of Orbit Solutions who presented three-dimensional modelling of a 'compliant scheme' and another that could be built on the site which was prepared by Ellenberg Fraser, architects, to demonstrate both what the Amendment allows on the site, and what could be developed.

Mr Wren presented shadow diagrams at various times of day at the equinox, also prepared by Ellenberg Fraser Architects for the 'compliant building', which showed that such a building casts insignificant additional shadows on the public realm of Little Collins Street, and only at limited times at the middle of the day.

Ms Brennan, for the Minister, presented an image of a built form for the site that showed how, with a podium of 20 metres across the site and a tower set back 2.5 metres from the Coromandel Lane frontage and 5 metres from other site boundaries, FARs of between 11.9 and 13.0 for heights between 71 and 80 metres can be achieved.

Mr Wren called Mr Jamie Govenlock, of Urbis Pty Ltd, who stated that, while he had broad support for the controls for Area A7 they needed some tweaking to respond to the changed context of building heights - the controls are out of date. As an example he cited the fact that Parliament House is no longer visible from the area given recent developments nearby. He said that he considered the building at 120 Collins Street, close to the site but across Little Collins Street, to be part of the site's context, despite it not being in Area A7 or in a Special Character Area.

Mr Govenlock considered that, while the preferred maximum building height for the area is 80 metres, this site can accommodate a higher building, subject to appropriate wind analysis.

He considered that the street wall height should be discretionary, as there is no consistent podium height in this part of Little Collins Street. He considered that a podium height of about 20 metres to be appropriate and tower setbacks from side and rear boundaries of 5 metres is appropriate and that these should be discretionary.

He also proposed that a decision guideline be included in the schedule to allow variations to setbacks at upper levels to respond to specific conditions on adjoining sites and to enable a site-responsive development to occur.

In cross-examining Mr Govenlock, Ms Brennan referred to Schedule 2 to the DDO which sets a mandatory maximum height limit of 80 metres for Area A7. The Amendment proposes this height to be discretionary, which Mr Govenlock considered to be appropriate.

Mr Wren called Mr Roger Poole, architect and former director of Bates Smart Architects, who expressed caution as to whether the Amendment works well for small sites such as this. He considered the 'proposed scheme' prepared by Ellenberg Fraser to be preferable to the

'compliant scheme', which he described as an 'odd result'. He expressed the opinion that better built form outcomes could be achieved if Council officers were able to apply some discretion in assessing proposals that were flexible in their footprint and design response to local conditions. Mr Poole believed architectural quality to be more important than building height and that we "*need to find the balance between regulation and discretion*".

Ms Brennan responded by stating that the Amendment does allow the 'proposed scheme' to be considered as there is no absolute height limit in the General Development Area.

Mr Wren called Dr Graeme Gunn, a prominent Melbourne architect, who stated that a site's context is the key to its development potential, with amenity for occupants and the amenity at the street interface being key factors. Dr Gunn considered height, in itself, to not be of concern, although he referred to the need for tall buildings to be well terminated as part of the skyline.

Dr Gunn considered a pre-meeting with Council to define the guidelines for a site to be a critical early step in the design process, with a later review of the design to achieve a high level of support from both Council and the applicant for a particular scheme.

In answer to questions from Ms Brennan, Dr Gunn stated that he is "*dead against mandatory controls*", favouring a performance-based approach within defined guidelines.

He indicated support for an independent review panel as a means to achieve better built form solutions.

Mr Wren's conclusion was that the wording of the Outcomes for Area A7 in Table 2 of DDO2-A7 to, in effect, recognise the existence of medium to high-rise buildings in the precinct in place of the description of the precinct as 'low scale'. He recommended the FAR of 12:1 be either removed or revised, or lifted to 20:1.

In this regard, the Panel notes that Ms Hodyl (Urban Design Analysis - Special Character Areas) at *Table 2: Analysis of potential FAR control suitable for Special Character Areas based on site attributes*, proposes, for Little Collins North, an FAR of 20:1 based on a site coverage of 80 percent.

(ii) Discussion

The issues raised in submissions and evidence were that, for this site and Area A7, the current controls are out of date, largely due to the extent of recent development in the area which has seen much higher buildings and greater density of development. In this context, and having regard to the site's location, size and the heights of buildings on nearby sites, a flexible approach to the future building envelope on the site is required.

Evidence also asserted that a building with a FAR of up to 20:1 could be achieved without adverse off-site impacts such as additional overshadowing of the public realm.

In response to evidence and submissions, the Minister has proposed minor amendments to the built form outcome for Area A7. The Panel considers these minor amendments to be appropriate.

The Panel considers this case to be an example of a site whose development capacity has been somewhat constrained by recent development which limits the potential floor plates

and hence impacts the floor area. While the controls place a discretionary 80 metre height limit on any proposed building, the site conditions suggest there is merit in the principle of allowing the normally achievable FAR to be reconfigured on the site, having regard to the various constraints and which avoids any unacceptable off-site impacts. Pursuing a collaborative approach between the Responsible Authority and the applicant to determine an optimum built form outcome, using the facility of 3D modelling to avoid off-site impacts and to respond to conditions on adjacent sites, is a process that the Panel supports and considers can be beneficially applied in this instance.

(iii) Conclusions

Having regard to the analysis for this area by Ms Hodyl, the Panel considers the development potential of this site can be realised within the proposed control of a discretionary height of 80 metres, and concurs with the amendments proposed by the Minister for Area A7.

The Panel considers that reference in the schedule to long vistas to Parliament House and the description of the surrounding precinct as low-rise should be deleted from the schedule as such vistas are no longer attainable from within the area given the scale of recent development that has occurred and the surrounding built form can no longer be described as low rise.

10.14 148 Lonsdale Street (Uniting Church) (Submitter 32)

(i) Evidence and submissions

This site is part of the larger landholding of the Uniting Church which extends to Little Lonsdale Street and to Jones Lane to the east. The site includes, in addition to the church, a number of heritage and other buildings, including Nicholas Hall which is on the Victorian Heritage Register. On the east of the site, an office tower has been approved but construction has not commenced.

Mr Sutton, for the Uniting Church, made submissions relating to the redevelopment of the south-west part of the overall site that faces Lonsdale Street and has an abuttal to the property at 150 Lonsdale Street which is occupied by a building with a height of some 110 metres and whose eastern wall is built to the common site boundary.

Mr Sutton's submission was that the proposed DDO10 controls in respect of walls on boundaries have not adequately considered situations such as this, where existing walls on a site boundary exist with heights greater than 80 metres, and that such situations are rare in the Hoddle Grid. Mr Sutton stated that an ability to provide a site-responsive outcome in cases such as this is both essential and common sense.

Mr Sutton referred to the fact that DDO10 allows for consideration of a wall constructed to a side boundary up to 80 metres in height whether there is an existing wall on the adjoining boundary or not, but does not consider the situation of an existing wall greater than 80 metres in height, as is the case here.

Mr Sutton called Mr Barlow, of Urbis Pty Ltd, to give evidence.

Mr Barlow stated that the absence of measures to address this unusual circumstance can be readily quantified and remedied. He proposed the inclusion of some additional text to be

inserted at the end of the *Modified Requirement* relating to *Tower setbacks from side boundaries and rear boundaries (or from the centreline of an adjoining lane)*, namely:

> *Except where a site has an adjacent building over 80 metres in height built to a shared site boundary. Where this condition occurs, a building may be constructed abutting the adjoining building if a minimum setback of 5 metres is met to all other boundaries, providing the building does not exceed the height of the adjacent building.*

Mr Barlow considered that some discretion be allowed within DDO10 in circumstances such as this, with measures relating to daylight access, wind impacts and shadowing impacts being used to determine whether such discretion should be exercised, and to what extent.

The Minister's Part C Submissions noted the particular constraints that affect this site but contended that this was not a good example of how the inability to build to a boundary above 80 metres in DDO10 inappropriately constrains development opportunities. The construction of walls on boundaries above 80 metres, where they abut an existing wall which exceeds that height, was opposed.

(ii) Discussion

The core issue is whether, given the presence of a wall that exceeds 80 metres in height on a boundary, a building may be constructed abutting that existing building, to an equivalent height.

This site enables the various issues that this topic raises to be considered.

Each site and situation is different, but in this case, while there may be merit in the proposal in principle, practical issues must be considered, such as:

- whether the existing building is of a tower-and-podium or other built form that is sought for new buildings in the area
- whether it allows for good design in terms of efficient floor plates and setbacks from the street
- the dimensions of the development site
- the prospect of the existing building being demolished in the suture, revealing another blank wall, and
- the visual benefit of 'hiding' a bland and unattractive blank wall.

The Minister's Part C submission indicate disagreement with the proposition that DDO10 should allow walls on boundaries to exceed 80 metres in height where they abut an existing wall on the common boundary that exceeds 80 metres in height. This is due to the overall height and visibility of such a building, the limited visual benefit of 'masking' a wall at that height above street level, and, on sites wider than the example under consideration, a 'wall of towers' could ensue, leading to restricted daylight to the street.

Ms Brennan noted that the Department had identified 48 instances of built form above 80 metres on a side boundary in the Hoddle Grid, citing the 'Abode' building at 318 Russell Street as an example, it being recently constructed to both side boundaries and to a height of 188 metres.

(iii) Conclusions

The Panel considers that there can be, in principle, sound urban design reasons to encourage the construction of buildings to abut the wall of an existing building on the common boundary as a means of 'hiding' an unattractive blank wall. However, given the width, height and position of that existing wall, there is little likelihood of a close or exact match between it and any proposed wall due to built form controls affecting setbacks from front or rear boundaries for podiums and towers and the likely design of the new floor plate.

Having regard to the various factors that determine a building's siting and design, the Panel considers that, where a blank wall exists on an adjacent site, a new building which may abut that boundary up to a height of 80 metres should, above that height, meet the side setback requirements.

Above 80 metres, the new building can respond to the abutting blank wall by locating areas such as vertical circulation cores and service areas facing the setback to that blank wall.

The Panel concurs with the position of the Minster and the evidence of Mr Sheppard and Ms Hodyl in this respect.

10.15 71 Collins Street (Submitter 61)

(i) Evidence and submissions

71 Collins Street is located on the south-west corner of Collins and Exhibition Street and is owned by Larkfield Estate. The site is currently occupied by a six storey heritage building with ground floor retail and offices above. The site is affected by DDO10 and heritage overlays.

Tract Consultants represented the land owner at the Hearing and raised a number of points in relation to the site. The main concern was with the drafting of the controls being too generalised and focussed on larger scale development. The submitter stated that:

> *… whilst the control places clear emphasis on an appropriate built form outcome for taller buildings within Melbourne's CBD, it has not yet adequately considered or provided sufficient discretion to smaller scale building additions for buildings that are already generally low-medium rise in scale.*

The submitter did not consider the wording of DDO10 to be appropriate or relevant to the subject site, as it made reference to 'towers'. It was considered that "*a building of up to 40 metres is not and should not be considered a tower*" and "*… smaller and more modest additions to heritage buildings can contribute to the long term preservation and can enhance a heritage place".*

(ii) Discussion

The Minister for Planning responded to the submission with the following statement:

> *Consideration of heritage buildings was also given and there may be the opportunity to construct a building to boundaries in part, which would be considered as a Modified Requirement within DDO10.*

The wording was amended in the control to clarify references to 'towers' to also include 'additions'.

The wording of the DDO10 was subsequently amended to clarify the definitions of the words 'tower' and 'addition' and clarify the modified building requirements. It appeared that any development envisaged by Larkfield Estate would be accommodated by the revisions to the requirements of the schedule.

(iii) Conclusion

The Panel concludes that the issues raised by the submitter were adequately addressed by the Minister in the final version of the Amendment (Document 175).

10.16 Melbourne Central (Submitter 85)

(i) Evidence and submissions

The GPT Group has a number of properties (at 349-373 Swanston Street, 183-265 and 214-252 La Trobe Street, 316-364 Elizabeth Street, 198-262 and 285-307 Little Lonsdale Street and 284-310 Lonsdale Street) which together constitute the multi-level mixed use development known as Melbourne Central. The consolidated property comprises the majority of the block bounded by La Trobe Street, Swanston Street, Lonsdale Street and Elizabeth Street, with the exception of two properties facing Swanston Street - a student accommodation building and a church.

The Amendment proposes to remove the northern part of the site and the remainder of the land in the block north of Little Lonsdale Street from DDO10 and apply DDO2 – Area 1 relating to the core retail area.

A written submission was made by The GPT Group (Submitter 85) as owner of the Melbourne Central site. The owner opposed the change of DDO control on the northern part of the site as follows:

> *We consider that this proposed amendment is inappropriate. The northern part of the site has long been recognised as a precinct with a variety of building heights, and includes the 51 storey office Tower at 360 Elizabeth Street. Little Lonsdale Street has long been recognised as the boundary between the Central Core lower area, and higher development form to the north.*

The GPT Group was represented at the Hearing by Jane Kelly of Urbis.

The Group's submission was that the Amendment C270 proposal to delete the northern part of its site from DDO10, which has no height limit, and impose a mandatory 40 metre height limit by the extension of Design and Development Overlay 2 - Area 1 (DDO2-A1) (which already applies to the southern part of the land)[59] is unwarranted and should not proceed.

The submission noted that the Amendment proposes a range of revisions to DDO2-A1 including identification of preferred street wall heights and setbacks and that these were

[59] See discussion of southern part of the site in Chapter 7

supported. However, it was said that the introduction of a 40 metre mandatory height limit would adversely impact the capacity to reasonably respond to opportunities to strengthen the role of the retail core.

The submission also included that the Urban Design Analysis *'Special Character Areas'* (Hodyl & Co) references to Elizabeth Street and the extension of DDO2 – A1 made only limited reference to this site, and that the site should be distinguished from other land holdings in the retail core due to such factors as its location on the periphery of the retail core, the significant size of the site and the extent of development on it, including a 51 storey office tower of 246 metres in height, and the different characteristics of the site compared to those properties on the western side of Elizabeth Street.

The submission indicated that the owner considers that the imposition of a 40 metre mandatory height control would achieve little in terms of protecting the retail core given the range of existing controls on the site and that it would stifle valid development outcomes.

Ms Jordan, as part of her evidence for the Minister, addressed the justification for the expansion of DDO2 to coincide with the boundary of the retail core of the Hoddle Grid (CCZ2). In relation to this extension to the north to apply to Melbourne Central, she said of the centre:

> *It has a city loop rail station in the basement, which will be linked to the Melbourne Metro rail project, bringing increased pedestrian movement through the precinct. It has direct connections with RMIT to the north and the State Library to the east, making this block a focus for pedestrian and retail activity. Whilst accommodating a mix of built form at present, including some historic buildings, it acts as a book end to the retail core of the city.*

She also said:

> *The Melbourne Central block is significantly more modern* [than the western side of Elizabeth Street] *in its presentation to all road frontages but it does contain historic buildings. The vast majority of the Melbourne Central complex is within the 40 metre height with five buildings puncturing this limit, one of which is the glass conical building housing the brick clock tower and another constructed nearly 70 years ago.*
>
> *In my view there is strong strategic justification for the 40 metre height control of DDO2 A1 to be extended to cover both areas, given both the existing activity and anticipated growth ... For Melbourne Central, the desire to see this precinct maintain its current form and presentation again reinforces its role in the retail core and focus on pedestrian amenity.*
>
> *Whilst I appreciate it is preferable that the zone and western edge of DDO2 A1 boundary align, the expansion of a height control, particularly a mandatory control, must be focused more on the outcome it is seeking to achieve rather than an alignment with a zone boundary.*
>
> *I acknowledge that there is an existing planning permit for further development of a tower at 385 Bourke Street that has not yet been acted on*

at this stage and which would exceed the 40 metre height. This permit would ultimately be the last change to the streetscape outside of the new control.

Equally so, development approved by the Incorporated Plan for the Melbourne Central block could also introduce one new building at 300 Lonsdale Street that has not yet been constructed and would complete the more intensive development at this end of the retail core. However it is noted that this site is already within DDO2 A1 and is permitted due to the existence of a long standing Incorporated Plan.

In closing, Ms Brennan reiterated the reasons for the proposed extension of DDO2 to the site, including that the public realm in and around the site should be protected including sunlight access and openness to the sky, and so as to avoid additional towers and their associated impacts in the retail core. It was also suggested that the site appeared to be one which lends itself to specific approvals under Clause 52.03 of the Scheme – including a possible variation from the mandatory height limit.

(ii) Discussion

The Panel supports the extension of Design and Development Overlay 2 - Area 1 (DDO2- A1) and the resultant imposition of a mandatory 40 metre height limit to part of the area on the western side of Elizabeth Street (as discussed in Chapter 7).

It is clear, however, that the built form, site size and extent of development on the Melbourne Central site sets it apart from the characteristics of properties on the western side of Elizabeth Street, and the Panel considers that the purpose of introducing DDO2-A1 to the west side of Elizabeth Street is not applicable to this site. The Panel considers that the likelihood of future development of the Melbourne Central site, in a manner that jeopardises the existing qualities and amenity of the public realm in the vicinity, is remote.

The Panel does not consider that the argument that there should be an exact coincidence of the DDO2 –A1 and the retail core under CCZ2 is compelling. The Panel considers that the other controls of the Scheme, including the Heritage Overlay, will see only modest further change to the built form of the northern part of the Melbourne Central land.

(iii) Conclusions

The Panel concludes that Design and Development Overlay 2 - Area 1 (DDO2- A1) should not apply to the northern part of the Melbourne Central site within the block bounded by La Trobe, Swanston, Little Lonsdale and Elizabeth Streets. DDO10 should apply instead. The remainder of that block (the church and student housing sites) should be included in DDO2 as exhibited.

(iv) Recommendations

20. Modify Design and Development Overlay Schedule 2 - Area 1 (extension to the core retail area) by:

- **Deleting the northern part of the Melbourne Central site (within the block bounded by La Trobe, Swanston, Little Lonsdale and Elizabeth Streets) and retain in Design and Development Overlay Schedule 10.**

10.17 385 Bourke Street (Submitter 52)

(i) Submissions and evidence

Mr Wren QC appeared for Dexus and their property portfolio of which this site forms part. The general issues raised about the impact of the Amendment on commercial development are discussed in Section

With regard to 385 Bourke Street, Mr Wren argued that the extension of DDO2-Area A1 should be abandoned entirely, or their land should not be included in DDO2-Area A1 at all. He requested that this site be excluded from the FAR, setback and podium requirements.

Ms Brennan submitted that the strategic justification for DDO2 was that future development in SCAs, including DDO2 was to protect the existing character. Ms Brennan, relying on evidence from Ms Hodyl, noted that Elizabeth Street has already been the subject of very intensive development to the north of La Trobe Street, and has been earmarked for significant public investment in the near future by the City of Melbourne.

Ms Brennan argued that the lack of alignment between CCZ2 and DDO2 is an '*anomaly*' in the Scheme. Ms Hodyl gave evidence that the CCZ2 area not currently subject to DDO2 is generally "*low to mid-scale, with only a few buildings taller than 40 metres*." Ms Brennan submitted all the exceptions above 40 metres were in corner locations.

Mr Wren queried the extension of DDO2 and the associated 40 metre height control and stated that:

> *It has been put to this Panel that the extension of DDO2 and the associated 40 metre height control is motivated by a need rectify some type of planning anomaly. This is simply not true. There is in fact no evidence before this Panel to suggest that there is any unintentional lack of alignment between the CCZ2 and DDO2. To the contrary, the exclusion of the western side of Elizabeth Street from the retail core height control (DDO2) is evidence of a conscious decision. The evidence and background reporting before this Panel confirms that this is the case.*

Mr Wren took the Panel to the Amendment Background report prepared by Ramsay Consulting titled *A History of Built Form Control in Central Melbourne.* Mr Wren argued the report clearly identifies Elizabeth Street as the traditional boundary of the low scale retail core. The western side of Elizabeth Street has historically been planned as an office precinct with higher plot ratio expectations. This was reinforced by references to previous historical planning documents such as the *City of Melbourne Strategy Plan (1974)* and *Zoning and plot ratio map from Borrie (1954).* Mr Wren submitted that a review of this historical planning context does not reveal any form of planning anomaly and suggests that in fact the decision to exclude the western side of Elizabeth Street from the 40 metre height control associated with Special Character Areas (SCA) was, and still is, well justified.

In cross-examination, Mr Wren put to Ms Hodyl that for their site at 385 Bourke Street, his client had a permit for an office tower in the order of 90 metres. He argued they would unlikely get another permit renewal if this Amendment was to go through. Ms Hodyl gave evidence that the primary concern and utilisation of the DDO was to protect views of the

clock tower at Flinders Street. She said that plane trees affected the view of clock tower at Flinders Street until the GPO is reached. Ms Hodyl argued that the western side of Elizabeth Street was an appropriate candidate for a SCA.

Mr Wren argued that character areas are bigger than one site. It's appropriate to consider character across a broader site. He queried whether the anomaly site be constrained by a mandatory requirement. Mr Wren argued that the site should be included within DDO10 and provided map showing the deletion of an area to be excluded from DDO2.

Figure 19 Area to be excluded from DDO2 [60]

Ms Brennan argued that the benefits of extending DDO2 to the whole of this area include:

- *Maintaining very high levels of public realm amenity, including access to sunlight and daylight*
- *Introducing a height limit that is commensurate with the significant number of heritage buildings*
- *Protecting fine grain character and subdivision patterns*
- *Providing well-framed views to the Flinders Street clock tower*
- *Providing a consistent built form height to both sides of the street*

[60] Source: Document 169, page 25

Ms Brennan noted that the delegate's report for the new office permit at 385 Bourke Street is another example where, notwithstanding objection from the City of Melbourne, the policy aspirations for tower separation were not met.

(ii) Discussion

On the issue relating to the permit expiry, the Panel agrees with Ms Brennan in that it is not right to expect that a permit is static, especially where use and development have been controversial. As far as the Panel sees it, Dexus has options – if it lets permit lapse it will be subject to controls appropriately applied to that land at present this would be DDO10 maximum subject to C262 controls.

The Panel was somewhat confused about the reasoning of Ms Hodyl and her evidence concerning the view lines to the Flinders Street Station clock tower. Regardless of the DDOs on either side of Elizabeth Street, it was demonstrated through a site inspection that the view to the clock tower would not be disrupted. Framing of that view is perhaps the issue. Nevertheless, the Panel placed greater weight on the arguments of Mr Wren that there is no place for DDO2 in this particular precinct of Elizabeth Street, given dominant development on street corners - such as the IOOF building and the Commonwealth Bank building.

This was illustrated by photos contained in the Dexus submission:

Figure 20 View of Flinders Street Station clock tower from intersection of Elizabeth Street and Bourke Street looking south[61]

The reasons given by Ms Brennan for the extension of DDO2 are agreed in part by the Panel, but only to the north of Bourke Street. The Panel agrees with the excision suggested by Mr

[61] Source: Document 169, Page 24

Wren as there already exists a significant development and built form to the Galleria precinct. This is highlighted in Figure 19.

Figure 21 Eastern side of Elizabeth Street exhibiting SCA traits, western side showing significant height and modern development [62]

The Panel agrees with Ms Brennan that as Queen Victoria market intensifies its role as a core retail anchor at the northern end of Elizabeth Street, the levels of pedestrian activity along that spine will increase, again deserving protection of a very high quality environment. It felt strongly however that the precinct submitted by Mr Wren for excision was warranted, as it did not meet the criteria of the Minister's own arguments for inclusion.

(iii) Conclusion

The Panel concludes:

- The part of the precinct containing the Galleria Plaza and associated buildings is not considered worthy of a SCA designation.
- The land at 385 Bourke Street and as shown at Figure 13, should be deleted from DDO2 Area A1 and included within DDO10.
- Remaining land shown on the plan is to be included within DDO2-A1 with the exception of Melbourne Central.

(iv) Recommendations

The Panel recommends:

21. Modify Design and Development Overlay Schedule 2 - Area 1 (extension to the core retail area) by:

- **Deleting the land at 385 Bourke Street as shown in Figure 13 of this report and retain it in Design and Development Overlay Schedule 10.**

[62] Source: Document 169, Page 22

10.18 Matters raised in written submissions

This section outlines matters raised in written submissions that the Panel agreed with the Minister's response, subject to any additional comments in this section.

Site-specific exemptions

This section of the report deals with matters raised in written submissions that have not been covered within the body of the report, or references where these issues are generally discussed.

Transitional arrangements – include in transition section 7.6

Some submissions (1, 3, 6, 34, 27, 54, 72) expressed confusion over the consideration of the interim controls and the proposed controls for site-specific permits and applications.

Sites with constraints

Submitters 27, 29, 65, 88 and 91 submitted that there is insufficient discretion to allow for smaller and more discrete building additions to existing medium-scale buildings. The Panel notes the preferred built form requirements is intended to provide flexibility for redevelopment of smaller scaled developments and that setbacks are to ensure a reasonable level of amenity. No changes were supported by the Panel.

134-148 Little Lonsdale Street and 17-23 Bennetts Lane, Melbourne (Submitter 21)

The submitter was not supportive of the Amendment and made recommendations that the FAR criteria be deleted, overshadowing criteria amended to delete private open space and include all development controls in the applicable DDO. Changes proposed were not supported by the Minister and the Panel.

43 Therry Street, Melbourne (Submitter 27)

This site has an existing permit granted under Melbourne C262 for the redevelopment of the site. The submitter was concerned about the transitional arrangements and sought clarification on how an amended permit application could be considered. The Minister supported the changes in part and addressed within the final version of the Amendment.

55-59 A'Beckett Street, Melbourne (Submitter 54, MSY Investment)

This submission related to transitional arrangements that is discussed in section 7.6.

12-18 Meyers Place, Melbourne (Submitter 33, Hannah Fong)

Ms Fong supported the introduction of a discretionary height control in DDO62-Area B4 and opposed the introduction of a discretionary FAR. Concerns were raised in relation to the reduction in podium height from 25 metres to 20 metres, mandatory street and side setbacks and the 'onerous' nature of the urban context report requirements.

Ms Brennan on behalf of the Minister responded that the street and side setbacks were discretionary. With regard to the podium height it was submitted that there has been no change to the discretionary heights on this site. It was noted that for clarification for *Table 3 Podium Height* should take precedence over *Table 4 Street Wall Height*.

The Panel notes that the change to the Tables has occurred and makes no additional comments.

Temple Court, 422 Collins Street, Melbourne (Submitter 57, Michelle Buckle)

Ms Buckle's submission did not seek changes to the Amendment. It noted that the Amendment did not affect their particular building at 422 Collins Street.

Challenger Limited (Submitter 67)

The submission objected to the Amendment in the Hoddle Grid due to the reduction in the FAR, new controls protecting Northbank and that the 24:1 FAR be reintroduced. The FAR and setback requirements are a result of extensive architectural, daylight, site viability and economic impacts review. The provisions were formulated carefully and seek to ensure that the amenity to both occupants within the towers and within the public realm are achieved.

The key public spaces for shadowing has been determined from robust testing as demonstrated in the report. The significance of the Yarra River corridor is justified and includes the north bank of the river. The testing demonstrates a degree of shadows along its length, but not in its entirety. Protection of this space is warranted. With regard to shadowing, changes by the Minister were supported in part, and the Panel agrees.

273-279 Little Collins Street, Melbourne (Submitter 77, Paragon Development Pty Ltd)

Paragon Development's submission disputes the introduction of setback requirements within the SCA. It submitted that the setbacks be made mandatory as is the case for DDO10. DELWP submitted that the proposed provisions are considered to give suitable flexibility for redevelopment sites within the SCA. It was not suggested to mandate a setback from the street.

Mecone Town Planning (Submitter 60)

This submission related to distinguishing between Southbank and the Hoddle Grid and noting the parking issues for Southbank. In addition, a number of modified changes to DDO10 were proposed. A number of these changes were supported in part by the Minister and the Panel and are addressed in Section 11.

670-696 Bourke Street, Melbourne (Submitter 82, Mail Exchange Hotel)

The submitter supports the intent of the Amendment and requested that the setback controls should apply to buildings over 100 metres not 80 metres in total height proposed. The submission considered that the FAR of 24:1 is more appropriate than the 18:1 proposed. Reservations are given regarding the certainty afforded to the ability to incorporate the FAU and public benefits required.

For the reasons explained in Chapter 6, the changes are not supported as the FAR and setbacks are based on extensive background, testing and research.

Sterling Global Pty Ltd 383 La Trobe Street, Melbourne (Submitter 79,)

The submitter questioned the effect of transitional provisions as they had lodged a recent planning approval with the Minister for their site. They submitted queries on the FAU Scheme and public category benefits, and sought modification to the definition of GFA. For

reasons explained throughout the report, the GFA definition as exhibited is supported by the Panel and no changes were recommended. The FAU Scheme has been discussed at 6.5.

10.19 Areas outside the Central City Amendment Area

Concept Blue Owners Corporation (Submitter 35), was generally supportive of the Amendment and sought to apply similar controls to an area outside of the Amendment. The Panel makes no further comment on this.

10.20 Queen Victoria Market submissions

A number of submitters (10, 11, 12, 13, 14, 18, 44, 47 and 84) made submission on the effect of the recent Amendment C245 and how C270 would impact on their sites. There was some confusion in submissions as to whether or not the Queen Victoria Market precinct (QVM) was being revisited. At the Hearing, Mr Echberg (Submitter 18) raised the issue of sustainability and adaptability of buildings over time versus the tilt slab highly ineffective forms of development. He noted that high property values in the CBD were discouraging this type of adaptation.

Mr Echberg questioned the benchmarking of international cities and that the Amendment C270 did not propose to cap development even at 18:1 FAR was "*almost laughable*."

On the matter of the FAU it would just confuse the matter with even more random built form outcomes, complex negotiations and no guarantees. He submitted:

> *Planning negotiations within the CCZ are already inequitable and open to corruption or advantage based on expert leverage.*

Mr Echberg argued for the need for shadow controls on primary city streets. He spoke to Amendment C245 that sunlight had not been adequately catered for. The north of the city is now a residential area, with no open space other than the QV space (more of an events space) and already RMIT had developed a hard court area to recreate. The residents have yet to move in in their entirety.

In its response to these submissions Ms Brennan submitted that the Panel should note that much of the land referred to in Mr Echberg's submission is not the subject of this Amendment, but relates either to City North or the QVM. The Panel that considered Amendment C245, relating to the QVM Precinct, recommended that DDO14 (generally north of A'Beckett Street and west of Elizabeth Street) be amended generally in accordance with proposed DDO10 until the outcomes of this Amendment are known. The City of Melbourne agreed with that recommendation in the adopted version of C245.

Responses from the Minister to the other submissions in this precinct was that the Amendment is considered to protect the liveability of the Central City.

10.21 Further work

n) Recommend that the Council should consider extending Design and Development Overlay Schedule 2 on the western side of Elizabeth Street further northward to abut the southern edge of the Special Character Area near the Queen Victoria Market, once necessary work and consultation has been undertaken.

11 Redrafting the Amendment (Post Workshop)

11.1 Overview

As outlined throughout this report, Document 165 was the subject of a drafting workshop at the conclusion of the Hearing. Some submitters who did not attend the workshop forwarded written redrafting suggestions. They included Mecone Town Planning (Submitter 60); Bourke Hill Association (Submitter 63); Abacus Group (Submitter 66); Lt Col JV Pty Ltd (Submitter 31); the Uniting Church re 148 Lonsdale Street (Submitter 32); Property Council of Australia (Submitter 90) and Portland House (Submitter 19). The Council acknowledged during their presentation to the Panel that there are opportunities for improvements in relating to existing Scheme wording. Mr O'Farrell attended the drafting workshop for Ausvest (submitter 62) and Capital Eight Pty Ltd (Submitter 38).

The Panel has reviewed the suggestions for changes and the Minister's responses and provides comment below where the issues raised have not already been addressed in this report.

11.2 Conclusions and recommendations

The Panel concludes:

- General support for the 'Ministers Witness Recommendations' and accepted changes (Document 55) except where discussed throughout this report.

(i) Side and rear setbacks

During the drafting session, Mr O'Farrell suggested that the sections dealing with setbacks from side and rear boundaries in Table 4 in DDO62 should make the same exception for the areas referred to in Table 3 (which have their own requirements in this regard). The Panel agrees.

(ii) Built form diagrams

The Panel recommends that the Planning Authority should consider the written comments by Mecone Town Planning (Submitter 60) in relation to the built form diagrams in DDO10. The written drafting submissions by Capital Eight Pty Ltd (Submitter 38) suggested that the diagrams were unhelpful. The Panel agrees and suggests deletion of Figure 3 to Table 1 in DDO10.

(iii) Potential v proposed development

The Property Council of Australia (Submitter 90) (PCA) by letter dated 29 August 2016 raised a number of drafting concerns which have already been addressed elsewhere in the report. One concern not addressed was about the references made to '*potential development*' on adjoining sites. The letter included:

> *There are a number of clauses, which make reference to the Responsible Authority being required to consider 'adjoining, existing and potential development' (see DDO, Schedules 2, 10, 40, 60, 62 clause 5 and DDO10 Table 1)'.*

The Property Council's concern is in relation to the use of the word 'potential'. This is not the same as a 'proposed' development. It is submitted that there is no clarity as to what may be considered to be a potential development and there is concern about how an analysis may be made as to what potential development on a site could be. For example, will it be the Responsible Authority who makes a judgement as to what potential development may be, which may not involve an assessment of the commercial realities of such a development ever proceeding?

Will the Responsible Authority require an Applicant to provide details of potential development options to all adjoining sites? This would involve considerable extra cost if schemes for adjoining sites need to be prepared.

It is submitted that such consideration should be limited to 'proposed' proposals only, i.e. proposals that are before the Responsible Authority.

The City of Melbourne supported the inclusion of consideration of potential development on adjoining sites, however, rather than merely proposed development.

The Panel expects that this provision is designed to address equitable development opportunities as between adjoining sites. This is supported in principle. The Panel, however, shares the PCA concern about the practicalities of having to define and consider 'potential development' and recommends that consideration be given to whether this is a workable inclusion in the Planning Scheme.

(iv) Towers v building additions

Changes were made to the DDO10 requirements to refer not only to towers above the street wall but building additions. However, the changes are incomplete in the final version.

The Panel recommends:

22. Amend Table 1 in Design and Development Overlay Schedule 10 to:

- **Add reference to 'building additions' in the 'Built Form Outcomes' column in, the section on 'Side and rear setbacks'.**
- **Refer to 'towers and building additions' in the 'Modified Requirement' column relating to situations where buildings on adjoining land are legally restricted to the street wall height.**

(v) Reference documents

The drafting submissions for Capital Eight Pty Ltd (Submitter 38) included the proposed deletion from Clause 22.01-10 and other parts of the Amendment of the *Central City Built Form Review Synthesis Report*, Department of Environment, Land, Water and Planning, April 2016 which was proposed as a Reference Document.

The Panel does not support the deletion on the basis that this document provides a convenient summary of the basis for the new controls.

(vi) Ausvest changes

Mr O'Farrell for Ausvest (Submitter 62) provided various versions of rewrites of the Amendment documentation according to whether different matters of substance had been agreed by the Panel such as deletion of the FAU Scheme, the method of calculation of the FAR in DDO10 (across the whole site including the part in DDO2), deletion of the DDO2 discretionary FAR, special provisions for the part of the site abutting Bourke Street. Most matters have been addressed earlier. For the reasons set out Chapters 7 and 10, the Panel does not support these modifications of the controls.

An outstanding issue is the suggested inclusion of an additional DDO10 design objective as follows: *"To encourage growth and intensive development in the form of towers in the Central City".* This bears some resemblance to Mr Sheppard's suggestion in his written evidence for the Minister that there should be a design objective relating to accommodating growth and responding to built form context. The Panel does not agree with the suggested addition for the reason that site responsive design is already referenced in the application requirements at Clause 2.5, but does support: "*To encourage intensive developments in the Central City to adopt a tower/podium format"*.

The Panel recommends:

23. Add a design objective to Design and Development Overlay Schedule 10 that states: "*To encourage intensive developments in the Central City to adopt a tower/podium format*"

(vii) Other drafting changes

Some issues arose with respect to Clause 22.01-6 and its references to 'public space' as to whether this was intended to apply to land in private ownership available to the public as referred to in Clause 22.01-8. The Panel has identified this and other minor drafting changes arising post-workshop to assist in the interpretation of the controls and has recommended 'further work.'

The Panel recommends:

24. Retitle Design and Development Overlay Schedule 2 as 'Hoddle Grid Special Character Areas - Built Form'.

25. Retitle Design and Development Overlay Schedule 10 as 'Central City General Development Area - Built Form'.

26. Amend Clause 22.01 to:

- **include an additional 'Building Design' objective in Clause 22.01-2 to the effect that the podium and tower elements of a building should be distinguished by setbacks and/or the adoption of different but complementary design approaches.**

11.3 Further work

o) Consider whether the term 'potential development' is a workable inclusion in the decision guidelines in the Design and Development Overlays.

p) Recommend Council review the use of mandatory language in Clause 22.02 Sunlight to Public Spaces, such as "*Development must not cast additional shadow…"* This policy pre-dates the Amendment. The Panel understands that use of mandatory language is not generally supported in policy.

q) Recommend review the consistent use of the now preferred term 'public space', 'public land' references and the use of 'public realm' throughout.

r) Recommend Council clarify that the fourth dot point under Clause 22.01-6 that refers to balconies having a clearance above any public space rather than horizontally 'from' that space.

s) Recommend Council correct the first retained dot point in Clause 22.01-3 referring to creation of mid-block links, by deleting the 'average length' and refer instead to the 'length' of a street block.

t) Consider the future application of air rights and transferable development rights for buildings such as Alcaston House and others of high heritage importance.

Appendix A Submitters to the Amendment

No.	Submitter	No.	Submitter
1	Chaozhen Ma	26	Rohan Storey
2	Darren Camilleri	27	Oz Property Group
3	Khoo Heng Soon	28	Tri Setyani
4	Michael Finn	29	428 Little Bourke Street Pty Ltd
5	Katri Virta	30	RJ International (Aust) Pty Ltd
6	Denny Haryono	31	The Uniting Church in Australia (Vic Tas) & Lt Col JV Pty Ltd
7	Ross Gloury	32	The Uniting Church in Australia (Vic Tas)
8	Mark Stewart	33	TBT (Victoria) Pty Ltd
9	A Parr	34	Yarra Park City Pty Ltd
10	Frances Separovic	35	Concept Blue Owners Corporation
11	Cheryl McKinna	36	Alston Post
12	Margot Burrows	37	Australian Institute of Landscape Architects - Victorian Chapter
13	Annamaria & Max Sabbione	38	Capital Eight Pty Ltd
14	Catherina Toh	39	Tierney Properties
15	Brendan Eager	40	Sturt St Pty Ltd
16	David Hamilton	41	Melbourne Metro Rail Authority
17	The Victorian Planning and Environmental Law Association (VPELA)	42	The University of Melbourne
18	Urban initiatives Pty Ltd	43	Phillip Nominees Pty Ltd
19	Portland House (No. 8) Pty Ltd	44	Katherine Greening
20	Maudie Palmer AO	45	Tisza Pty Ltd
21	Claredale Consolidated Pty Ltd	46	Inner Melbourne Planning Alliance
22	Pho Bo Ga Mekong Vietnam (Aust) Pty Ltd	47	Ralph Domino
23	600 Collins Street Pty Ltd	48	William Anderson Allan
24	City of Melbourne	49	Housing Industry Association (HIA)
25	Owners Corporation of Freshwater Place Residential	50	Wood & Grieve Engineers
51	KAPS Corp Pty Ltd	78	R & Y Pty Ltd

No.	Submitter	No.	Submitter
52	DEXUS Funds Management	79	Sterling Global
53	Southbank Owners Corporation Network	80	Elly Papasavas
54	MSY Investment	81	MAB Corporation
55	Central Equity Ltd	82	Exchange Corner Pty Ltd
56	AMP Capital	83	Southbank Residents Association
57	Michelle Buckle	84	Philip Carryon Rounsevell
58	David Chiam Chia Luk Chiew	85	GPT Group
59	Bourke Hill Pty Ltd	86	Yang Clarendon Pty Ltd
60	Mecone Town Planning	87	Whitemark Property and Planning
61	Professor Michael Buxton	88	Bosco Johnson
62	Ausvest Holdings Pty Ltd (392-406 Bourke Street and 24-32 Hardware Lane, Melbourne)	89	Housing Choices Australia
63	Hani Akaoui for Bourke Hill Association	90	The Property Council of Australia
64	Ausvest Holdings Pty Ltd (213-237 Lonsdale Street and 222-230 Little Bourke Street, Melbourne)	91	Urban Development Institute of Australia (Vic)
65	Larkfield Estate Pty Ltd		
66	Abacus Property Group		
67	Challenger Limited		
68	Save Live Australia's Music (SLAM)		
69	Planning Institute of Australia (Vic)		
70	Bundy Enterprises Pty Ltd		
71	Sturt St Properties Pty Ltd		
72	3 Project Pty Ltd		
73	National Trust of Australia (Victoria) and Melbourne Heritage Action		
74	Australian Institute of Architects		
75	Brookfield Property Partners		
76	MEL Consultants Pty Ltd		
77	Paragon Developments Pty Ltd		

Appendix B Parties to the Panel Hearing

Submitter	Represented by
Minister for Planning	Susan Brennan SC and Emily Porter, Barrister, instructed by DELWP Legal. They called the following witnesses to give expert evidence: • Larry Parsons, Director Development Approvals, Central City, DELWP • Rob Adams of City of Melbourne on Central City history/emerging issues • Leanne Hodyl of Hodyl & Co in Urban Design (Special Character Areas) • Helen Day of Helen Day Urbanism in Research and Permit Analysis • David Sowinski of DELWP in 3D Modelling Tool • Cormac Kelly of Wood & Grieve Engineers in Daylight Modelling • Sarah Buckeridge of Hayball in Architectural Testing • Luke Mackintosh of Ernst & Young in Feasibility • Mark Sheppard of David Lock Associates in Urban Design • Sophie Jordan of Sophie Jordan Consulting in Urban Planning • Marcus Spiller of SGS Economics and Planning in Economics • Seifu Bekele of Global Wind Technology Services in Wind
City of Melbourne (24)	John Rantino, Maddocks lawyers and Robyn Hellman
University of Melbourne (42)	Chris Townshend QC and Peter O'Farrell, barrister, instructed by Norton Rose Fulbright, lawyers. They called the following witness to give expert evidence: • Professor Mark Jacques on urban design
Phillip Nominees Pty Ltd (43)	Chris Wren QC instructed by Planning and Property Partners. He called the following witnesses to give expert evidence: • Chris Goss, Orbit Solutions, on built form modelling
Uniting Church of Australia Synod of Victoria and Tasmania and Lt Col JV Pty Ltd (31)	Chris Wren QC instructed by Planning and Property Partners re 130 Little Collins Street. He called the following expert witnesses to give evidence: • Jamie Govenlock, Urbis Pty Ltd, on planning • Roger Poole on architectural design • Dr Graeme Gunn on architecture

Submitter	Represented by
KAPS Corp Pty Ltd (51)	Peter O'Farrell, barrister, instructed by Rigby Cooke, lawyers. He called the following witnesses to give expert evidence: • Professor Mark Jacques on urban design
Alston Post (36)	Chris Townshend QC and Peter O'Farrell, barrister, instructed by Norton Rose Fulbright, lawyers
Tisza Pty Ltd (45)	Chris Townshend QC and Peter O'Farrell, barrister, instructed by Norton Rose Fulbright, lawyers
Sturt St Pty Ltd (40)	Chris Townshend QC and Peter O'Farrell, barrister, instructed by Norton Rose Fulbright, lawyers
Ausvest Holdings Pty Ltd (62 and 64)	Nick Tweedie SC and Peter O'Farrell, barrister, instructed by Planning and Property Partners. They called the following witnesses to give expert evidence (in relation to 392-406 Bourke Street and 24-32 Hardware Lane): • Chris Goss, Orbit Solutions, on built form modelling • Michael Barlow, Urbis, on planning • Marco Negri, Contour, on planning
Capital Eight Pty Ltd (38)	Peter O'Farrell, barrister, by direct instruction from David Lock Associates. He called the following expert witnesses to give evidence: • Peter Brook, Peddle Thorpe, on architectural plans • Tim Biles, Message Consultants, on planning
Portland House (No. 8) Pty Ltd (19)	Ian Pitt QC, Best Hooper, lawyers. He called the following expert witnesses to give expert evidence: • Robert Mirams, Fender Katsalidis Mirams, on architecture • Robert Kelderman, Contour, on planning
Uniting Church of Australia Synod of Victoria and Tasmania (32)	Nick Sutton of Planning and Property Partners (148 Lonsdale Street, Melbourne). He called the following witness to give expert evidence: • Michael Barlow, Urbis Pty Ltd, on planning
Urban Development Institute of Australia (91)	John Cicero of Best Hooper, lawyers. He called the following witness to give expert evidence: • Robert Papaleo, Charter Keck Cramer, on planning and economic policy
Dexus Funds Management (52)	Chris Wren QC instructed by Minter Ellison, lawyers
Bourke Hill Pty Ltd (63)	Graham Peake, barrister
Regency Tower Residents Group (48)	William Allan

Submitter	Represented by
MEL Consultants Pty Ltd (76)	Michael Eaddy
Planning Institute of Australia (Victoria) (69)	Laura Murray
AMP Capital (56)	Lino Caccaro and Damien Todd
National Trust of Australia (Victoria) and Melbourne Heritage Action (73)	Anna Foley
GPT Group (85)	Jane Kelly, Urbis Pty Ltd
Housing Industry Association (49)	Mike Hermon
Australian Institute of Architects – Victorian Chapter (74)	Alison Cleary and others
Larkfield Estate (65)	Daniel Soussan, Tract and Robert Ades
Whitemark Property and Planning (87)	Clem Newton Brown, barrister
Brookfield Property Partners (75)	Andrea Pagliaro, Urbis Pty Ltd
Professor Michael Buxton (61)	
Elly Papasavas (80)	Andrea Pagliaro, Urbis Pty Ltd
Bruce Echberg (18)	
Abacus Group (66)	Nick Touzeau, Urbis Pty Ltd
Yang Clarendon (86)	Sarah Macklin, Urbis Pty Ltd
428 Little Bourke Street Pty Ltd (29)	Megan Schutz, Schutz Consulting
Southbank Residents Association (83)	Tony Penna
Southbank Owners Corporation Network (53)	Rob Milner, 10 Consulting
RJ International (Aust) Pty Ltd (30)	Ian Pitt QC of Best Hooper, lawyers
Property Council of Australia (90)	Amanda Johns, Thompson Geer Lawyers

Appendix C Document list

No.	Date	Description	Presented by
1	12/07/2016	Statement of agreed facts (wind)	Minister for Planning
2	12/07/2016	Map of Sturt Street	Chris Townshend
3	04/07/2016	Part A submission	Minister for Planning
4	12/07/2016	Professor Rob Adams - PowerPoint presentation	Minister for Planning
5	13/07/2016	Map of land ownership	Minister for Planning
6	13/07/2016	Leanne Hodyl - Expert Evidence Statement	Minister for Planning
6a	13/07/2016	Leanne Hodyl - PowerPoint presentation	Minister for Planning
7	14/07/2016	Postcode 3000 booklet	Minister for Planning
8	14/07/2016	Clause 43:04 DPO and Schedule to Clause 52.06-2	Ausvest Holding (62 + 64)
9	14/07/2016	Clause 43:04 DPO Endorsed Plans	Ausvest Holding (62 + 64)
10	14/07/2016	Schedule 3 – Parking overlay	Ausvest Holding (62 + 64)
11	14/07/2016	Written Submissions	Minister for Planning
12	14/07/2016	Bundle of Planning overlay maps	Minister for Planning
13	14/07/2016	Melton C52 Panel Report	Ausvest Holding (62 + 64)
14	14/07/2016	Melbourne C171 Panel Report	University of Melbourne (42)
15	14/07/2016	Maps and photos	Ausvest Holding (62 + 64)
16	14/07/2016	Orbit Visualisation Report	Ausvest Holding (62 + 64)
17	14/07/2016	Central City Zone – Clause 37.04	Minister for Planning
18	14/07/2016	Urbis Expanded Central City Floor Space Demand + Capacity Analysis	Minister for Planning
19	18/07/2016	Jacques Report - Southbank Campus Review	University of Melbourne (42)
20	18/07/2016	Helen Day – PowerPoint presentation	Minister for Planning
21	18/07/2016	David Sowinski - PowerPoint presentation	Minister for Planning
22	18/07/2016	Cormac Kelly - PowerPoint presentation	Minister for Planning
23	18/07/2016	Submitter Locations	Minister for Planning
24	19/07/2016	Sarah Buckeridge – PowerPoint presentation	Minister for Planning
25	19/07/2016	Sarah Buckeridge – response to C270 submission	Minister for Planning
26	19/07/2016	Walking Tour Map	Minister for Planning

No.	Date	Description	Presented by
27	19/07/2016	Map showing undetermined permit applications	Minister for Planning
28	19/07/2016	Map showing post C262 applications	Minister for Planning
29	19/07/2016	Summary of requirements of interim controls	Minister for Planning
30	19/07/2016	Single set of plans vols 1 and 2	Minister for Planning
31	19/07/2016	Property council Australia – Office quality grade matrix – New building	Minister for Planning
32	20/07/2016	Luke Mackintosh - CV	Minister for Planning
33	20/07/2016	Summary of project return	Minister for Planning
34	20/07/2016	Luke Mackintosh - PowerPoint presentation	Minister for Planning
35	20/07/2016	Luke Mackintosh – developer interviews	Minister for Planning
36	20/07/2016	Revised Walking Tour Map	Minister for Planning
37	25/07/2016	Email and attachment	Minister for Planning
38	25/07/2016	Aerial photo of a number of sites	Minister for Planning
39	25/07/2016	Mark Sheppard – PowerPoint presentation	Minister for Planning
40	25/07/2016	Orbit visualisation – Ltd Col Pty Ltd	Lt Col JV Pty Ltd (31)
41	25/07/2016	Mark Sheppard – VPELA C270 Presentation	Ausvest Holding (62 + 64)
42	25/07/2016	Photo of 392-406 Bourke/ 24-32 Hardware Lane	Ausvest Holding (62 + 64)
43	25/07/2016	Cadastral Plan - Guildford Lane	Ausvest Holding (62 + 64)
44	26/07/2016	Seifu Bekele (GWTS) – PowerPoint presentation	Minister for Planning
45	26/07/2016	Letter from PPV re Yarra City withdrawal	Planning Panels Victoria
46	26/07/2016	Sophie Jordan – PowerPoint presentation	Minister for Planning
47	27/07/2016	Dr Marcus Spiller – overview of evidence on economics	Minister for Planning
48	27/07/2016	Dr Marcus Spiller – review of evidence provided by Rob Papaleo	Minister for Planning
49	27/07/2016	Dr Marcus Spiller – appendix: Monetisation of costs and benefits	Minister for Planning
50	27/07/2016	Central city narrative – Final report SGS	DEXUS Funds Management (52)
51	27/07/2016	Table of commercial floor spaces	DEXUS Funds Management (52)
52	28/07/2016	Letter dated 27/07/2016 from Minister for Planning re correspondence from Planning & Property Partners	Minister for Planning
53	28/07/2016	C270 Panel Drafting Questions	Minister for Planning
54	28/07/2016	Advice from Stuart Morris QC dated 07/10/2015	Minister for Planning

No.	Date	Description	Presented by
55	28/07/2016	Minister's witness recommendations	Minister for Planning
56	28/07/2016	Part B submissions of Planning Authority	Minister for Planning
57	28/07/2016	Bundle of VCAT cases referred to in Part B submissions	Minister for Planning
58	28/07/2016	Examples of delegated reports	Minister for Planning
59	28/07/2016	Brady Lonsdale Pty Ltd v Melbourne CC [2007] VCAT 349	Minister for Planning
60	28/07/2016	CK Design Works v Melbourne CC [2011] VCAT 584	Minister for Planning
61	28/07/2016	Map depicting built form 780 metres within 1 metre of property boundary	Minister for Planning
62	01/08/2016	C245 Panel Report dated 12/7/16 Extract pages 66-73	Minister for Planning
63	01/08/2016	C245 Panel Report dated 12/7/16 Extract pages 74-80	Minister for Planning
64	01/08/2016	C245 Panel Report dated 12/7/16 Figure 2 – Plan showing proposed zone + overlay change	Minister for Planning
65	01/08/2016	Copy of section 98 of the Act and Land acquisition and compensation report by Stuart Moms January 1983	Minister for Planning
66	01/08/2016	Extracts from the Act – Section 62	Minister for Planning
67	01/08/2016	Extracts from the Act – Section 1-6	Minister for Planning
68	01/08/2016	Extract from various planning schemes	Minister for Planning
69	01/08/2016	Amendment VC129 Explanatory Report	Minister for Planning
70	01/08/2016	NYC Planning – A Survey of Transferable Development Rights Mechanisms in NYC 26/2/15	Minister for Planning
71	01/08/2016	Planning Practice Note 13	Minister for Planning
72	01/08/2016	Folder 3: Office sites	Minister for Planning
73	01/08/2016	Series of Index – Submitter sites	Minister for Planning
74	01/08/2016	A review of Central Sydney Planning Strategy	Minister for Planning
75	01/08/2016	Folder 1: Submitter sites	Minister for Planning
76	01/08/2016	Folders 2A and 2B: Other Sites	Minister for Planning
77	01/08/2016	3D Modelling as applied to various submitter's sites	Minister for Planning
78	01/08/2016	Calculation of FAR to go with documents 77	Minister for Planning
79	01/08/2016	(2 Documents) – 1 - City of Melbourne Council Minutes and 2 - Management Report Council re C245	Minister for Planning
80	02/08/2016	Outline of submissions of Phillip Nominees	Phillip Nominees (43)
81	02/08/2016	Report to Sydney City Council Transport, Heritage and Planning subcommittee dated 17/07/2016	Phillip Nominees (43)
82	02/08/2016	Appendix A - Central Sydney Capacity Study 2012	Phillip Nominees (43)

No.	Date	Description	Presented by
83	02/08/2016	Australian Financial Review article 'Call to curb CBD apartments' 22/07/2016	Phillip Nominees (43)
84	02/08/2016	Central Sydney Planning Strategy – Context – Chapter 2-7 Land Use	Phillip Nominees (43)
85	02/08/2016	Sydney DCP 2012 – Section 5 specific area	Phillip Nominees (43)
86	02/08/2016	Central Sydney Planning Strategy – Planning for Growth – 3 Planning for Growth	Phillip Nominees (43)
87	02/08/2016	Lt Col JV Pty Ltd - Model	Minister for Planning
88	03/08/2016	Outline of submissions – Lt Col JV	Lt Col JV (31)
89	03/08/2016	Extract of Melbourne Planning Scheme – DDO2 4/3/99	Lt Col JV (31)
90	03/08/2016	Shadow Studies – Ellenberg Fraser	Lt Col JV (31)
91	03/08/2016	Extracted from Melbourne Central City Development 1982 - 130 Lt Collins Street site	Minister for Planning
92	03/08/2016	Melbourne Planning Scheme – DDO2 - C262	Lt Col JV (31)
93	03/08/2016	Photo of space between 130 Little Collins Street and immediate property to the east	Lt Col JV (31)
94	03/08/2016	52 Park Street Pty Ltd v Port Phillip cc [2013] VCAT 2199	Minister for Planning
95	04/08/2016	Property Council of Australia - Submission	Property Council Australia (90)
96	04/08/2016	Urbis documents – Ben Koops dated 03/08/16	Property Council Australia (90)
97	04/08/2016	William Allan - submission	William Allan (48)
98	08/08/2016	Planning Institute of Australia - submission	Planning Institute of Australia (69)
99	08/08/2016	City of Melbourne - submission	City of Melbourne (24)
100	08/08/2016	City of Melbourne vs Minister for Planning (2015) VCAT 370	City of Melbourne (24)
101	08/08/2016	AMP Capital - submission	AMP Capital (56)
102	9/08/2016	Additional Assessment of potential impacts on commercial uses	Ausvest Holdings (62 + 64)
103	9/08/2016	National Trust – submission	National Trust (73)
104	9/08/2016	GPT Group - submission	GPT Group (85)
105	9/08/2016	GPT Group – PowerPoint presentation	GPT Group (85)
106	9/08/2016	KAPS Corp - submission	KAPS Corp Pty Ltd (51)
107	9/08/2016	KAPS Corp - mark ups of DDO2: 2 Documents: 1 DLA Urban Design Statement - 310 Queen Street 6/9/12	KAPS Corp Pty Ltd (51)

No.	Date	Description	Presented by
108	9/08/2016	Rothe Lowman Urban Contract Report + Design Response 12/9/12 on 310 Queen Street	KAPS Corp Pty Ltd (51)
109	9/08/2016	Prof Mark Jacques Expert Evidence - 310 Queen Street	KAPS Corp Pty Ltd (51)
110	9/08/2016	Map no. 8, DDO2, 14 and 62	Minister for Planning
111	9/08/2016	300 Queens Street – Victorian Heritage Database Report	Minister for Planning
112	9/08/2016	Delegated Planning Application Report – 310 Queen Street	Minister for Planning
113	9/08/2016	Delegated Planning Application Report – 310-314 Queen Street	Minister for Planning
114	10/08/2016	Sturt Street submission documents	Uni of Melb (42)
115	10/08/2016	University of Melbourne - submission	Uni of Melb (42)
116	10/08/2016	Alston Post, Tisza Pty Ltd, Sturt St Pty Ltd: combined written submission	Alston Post (46), Tisza Pty Ltd (40), Sturt St Pty Ltd (45)
117	10/08/2016	135 Sturt Street Redevelopment proposal	Tisza Pty Ltd (40)
118	10/08/2016	Mark Jacques – PowerPoint presentation	Alston Post (46), Tisza Pty Ltd (40), Sturt St Pty Ltd (45)
119	10/08/2016	Clause 21.13 Melbourne Planning Scheme	Minister for Planning
120	10/08/2016	DDO60	Minister for Planning
121	11/08/2016	Housing Industry Australia - submission	Housing Industry Australia (49)
122	11/08/2016	Australian Institute of Architects - submission	Australian Institute of Architects (74)
123	11/08/2016	Larkfield Estate - submission	Larkfield Estate (65)
124	11/08/2016	Whitemark Property and Planning - submission	Whitemark Property + Planning (87)
125	11/08/2016	Brookfield Pty Partners - submission	Brookfield Property Partners (75)
126	15/08/2016	Letters to submitters and documents	Minister for Planning
127	15/08/2016	Visual Amenity - statement of methodology addendum update	Ausvest Holdings (62 + 64)
128	15/08/2016	Barlow – PowerPoint presentation	Ausvest Holdings (62 + 64)
129	15/08/2016	Ausvest Holdings written submission – Bourke Street	Ausvest Holdings (62 + 64)
130	15/08/2016	Ausvest Holdings written submission – Lonsdale Street	Ausvest Holdings (62 + 64)
131	15/08/2016	Metricon Apartments Pty Ltd v Minister for Urban Affairs + Planning [200] NSWLEC	Ausvest Holdings (62 + 64)

No.	Date	Description	Presented by
132	15/08/2016	Rockdale Municipal Council v Tandel Cooperation	Ausvest Holdings (62 + 64)
133	15/08/2016	Examples of VCAT consideration of 'public benefit' definition	Ausvest Holdings (62 + 64)
134	16/08/2016	Better Apartments Draft Design Standards	Minister for Planning
135	16/08/2016	Additional Plans and covering email	Brookfield Property Partners (75)
136	16/08/2016	Professor Buxton – submission	Brookfield Property Partners (75)
137	16/08/2016	Elly Papasavas – submission	Elly Papasavas (80)
138	16/08/2016	Heritage Overlay HO507 extract	Elly Papasavas (80)
139	17/08/2016	Clause 61.02 DDO extract – Melbourne Planning Scheme	Minister for Planning
140	17/08/2016	Expanded Central City: Floorspace Demand + Capacity Analysis – Urbis, Version 4	Minister for Planning
141	17/08/2016	Branson Group Pty Ltd v Melbourne cc[2014] VCAT 1034	Minister for Planning
142	17/08/2016	Capital Eight Pty Ltd – submission	Capital eight (38)
143	22/08/2016	Bourke Hill Pty Ltd – submission	Bourke Hill Pty Ltd (59)
144	22/08/2016	Copy of title and plan of subject site	Bourke Hill Pty Ltd (59)
145	22/08/2016	Extract of DDO62 map Melbourne Planning Scheme	Bourke Hill Pty Ltd (59)
146	22/08/2016	Extract of VPPs Advisory Committee Report – August 1997	Bourke Hill Pty Ltd (59)
147	22/08/2016	Photo of subject site	Bourke Hill Pty Ltd (59)
148	22/08/2016	Portland House Group – submission + exhibits	Portland House Group (19)
149	23/08/2016	Jinshan Investments Group Pty Ltd v City of Melbourne [2016] VCAT 626	Minister for Planning
150	23/08/2016	Bruce Echberg – submissions	Bruce Echberg (18)
151	23/08/2016	Abacus Group – submissions	Abacus Group (66)
152	23/08/2016	Uniting Church of Australia – submissions	Uniting Church of Australia (32)
153	23/08/2016	Extract – Victorian Heritage Database Wesley Church Complex 15/7/16	Minister for Planning
154	23/08/2016	2 sets of plans – in Wesley Church precinct	Minister for Planning
155	23/08/2016	Wesley Upper Lonsdale – Public realm and landscape architecture report	Minister for Planning

No.	Date	Description	Presented by
156	23/08/2016	Planning Permit – 118-148 Lonsdale Street	Minister for Planning
157	23/08/2016	Addendum 1 – Public Realm Concept	Uniting Church of Australia (32)
158	23/08/2016	Massing Model prepared by Plus Architecture	Uniting Church of Australia (32)
159	23/08/2016	Planning Officer Report – Wesley Church 118-148 Lonsdale Street – Planning Permit	Minister for Planning
160	24/08/2016	Yang Clarendon – submission	Yang Clarendon (86)
161	24/08/2016	Shadow and additional shadow plans	Yang Clarendon (86)
162	24/08/2016	428 Little Bourke Street Pty Ltd – submission	248 Little Bourke Street (29)
163	24/08/2016	Southbank Owners Corporation Network – Written submission	Southbank Owners Corporation Network (53)
164	24/08/2016	Photos of Southbank	Southbank Owners Corporation Network (53)
165	25/08/2016	Panel Version August 2016 V2	Minister for Planning
166	25/08/2016	RJ International – Written submissions and plans	RJ International (30)
167	25/08/2016	Extracts of Hodyl Synthesis Report	Minister for Planning
168	25/08/2016	UDIA – Written submissions	UDIA
169	29/08/2016	Dexus – written submission	Dexus
170	29/08/2016	DPCD Planning report – 385 Bourke Street	Minister for Planning
171	29/08/2016	DDO10 preferred requirement envelope modern plan 1 Spring Street – Phillip Nominees (52)	Minister for Planning
172	29/08/2016	FAR with proposed DDO10 preferred requirement envelope	Minister for Planning
173	29/08/2016	FAR calculations – 148 Lonsdale Street Model Plan – UCA (32)	Minister for Planning
174	29/08/2016	FAR calculations – 148 Lonsdale Street Model Plan – UCA (32)	Minister for Planning
175	29/08/2016	26/08/2016 Building under construction, approvals and applications	Minister for Planning
176	30/08/2016	Southbank Development Snapshot	Minister for Planning
177	30/08/2016	Part C Submissions	Minister for Planning
178	30/08/2016	Legal advice by Stuart Morris QC	Minister for Planning
179	30/08/2016	Schedule to clause 66.04 – Melbourne Planning Scheme	Minister for Planning
180	30/08/2016	Terms of reference between OVGA and DELWP re Ministerial Permit Applications – 10/12/2015	Minister for Planning
181	30/08/2016	Amendment C188 Melbourne Planning Scheme	Minister for Planning
182	30/08/2016	Letter from Minister for Planning to Lord Mayor of	Minister for Planning

No.	Date	Description	Presented by
		Melbourne re C188 – 27/02/2012	
183	30/08/2016	Letter from Schutz Consulting dated 29/08/2016 withdrawing submission	Minister for Planning
184	30/08/2016	Summary of pre C262, C262, C270 exhibited and C270 Panel Controls	Minister for Planning
185	30/08/2016	Various parties submissions redrafting of controls	Minister for Planning
186	30/08/2016	Letter from Portland House to Planning Panels	Minister for Planning
187	30/08/2016	Marks ups of extracts of various clauses of Melbourne Planning Scheme	Capital Eight
188	30/08/2016	Version 1 – Mark ups of extracts of various clauses of Melbourne Planning Scheme	Ausvest Holdings (62 + 64)
189	30/08/2016	Version 2 – Mark ups of extracts of various clauses of Melbourne Planning Scheme	Ausvest Holdings (62 + 64)
190	30/08/2016	Version 3 – Mark ups of extracts of various clauses of Melbourne Planning Scheme	Ausvest Holdings (62 + 64)
191	30/08/2016	Information from Table 1 Dexus submission	Minister for Planning
192	30/08/2016	Letter from Maddocks to Minister for Planning dated 03/06/2016 re Melbourne Central	Minister for Planning
193	30/08/2016	Central Redevelopment Incorporated Documents	Minister for Planning

Appendix D Ruling

Planning Panels Victoria
Department of Environment, Land, Water and Planning

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19 July 2016

Parties to the Hearing

Dear Party

Melbourne Planning Scheme Amendment C270: Central City Built Form Review
213-237 Lonsdale Street and 222-230 Little Bourke Street (Golden Square Carpark)

Background

On Day 3 of the Hearing on 14 July 2016, Mr Tweedie SC, acting for Planning and Property Partners on behalf of Ausvest Holdings (submitter 64) requested to be heard as to whether the Minister for Planning could call one of its expert witnesses, Ms Leanne Hodyl, to give her additional evidence in relation to the 213-237 Lonsdale Street and 222-230 Little Bourke Street, which is colloquially known as Golden Square Carpark (the subject site). The Panel directed, amongst others, that Ms Hodyl be allowed to give that evidence. Following the Panel's ruling, Mr Tweedie SC requested written reasons for its decision.

Submissions by Planning and Property Partners on behalf of Ausvest Holdings (submitter 64)

Mr Tweedie SC made oral submissions which can be summarised as follows:

- It is unlawful for the Panel to make a recommendation to remove or alter the Development Plan Overlay (DPO) affecting the subject site as such removal does not form part of the Planning Scheme Amendment (the Amendment) that the Panel is constituted to hear.
- To allow this evidence to be called and have the Panel consider the option of removing the DPO amounts to a transformation of the Amendment, which is beyond the scope of the Amendment and the Panel should not consider it. It is not fair to transform the Amendment in the manner proposed in Ms Hodyl's evidence.
- The evidence of Ms Hodyl is irrelevant to the Panel's assessment of submissions, as the Panel should only consider submissions relevant to the Amendment rather than the views expressed by an expert witness. The Panel should not allow such evidence to become a submission.
- The concept of the removal of the DPO was raised for the first time in Ms Hodyl's expert evidence on 4 July 2016, and was not stipulated in Ms Hodyl's exhibited reports.
- The DPO is about land use and development rather than built form control. A number of matters such as carparking, access to the site and heritage raised in Ms Hodyl's evidence may require experts of their own which Mr Tweedie has not had the benefit of obtaining. Therefore, Mr Tweedie is not in a position to cross-examine Ms Hodyl without having that expert advice.

Submissions by Minister for Planning

Ms Susan Brennan SC, acting for the Minister for Planning, provided to the Panel written submissions in reply and elaborated on them in the Hearing. Ms Brennan's submissions can be summarised as follows:

- Through the exhibited controls, the Minister for Planning proposes that the DPO remain in place for the subject site.
- The Minister for Planning seeks the proposed Design and Development Overlay (DDO) to apply in addition to the DPO for the subject site. The Department does not intend to recommend to the Minister that the existing DPO for the subject site be removed as part of the Amendment process. Therefore, there is no transformation of the Amendment as submitted by Mr Tweedie.
- New proposed built form controls for the subject site are based on urban design expertise and advice. Questions relating to appropriate built form outcomes are a live issue. This is an issue that has been known to submitter 64 since the proposed controls were exhibited. The fact that two controls will apply to the subject site has been exhibited.
- There have been four submissions made in relation to the subject site and alternative options were identified in the Minister's response to submissions. These options were outlined in Ms Hodyl's additional evidence. This means that the application of the DDO and the built form controls that may apply to the subject site is a live issue, and one that is raised by a number of submitters.
- The Minister for Planning noted that submitter 64 has chosen not to attend the first day of Hearing and had determined not to call evidence in relation to the subject site but made that election for other affected sites. The Minister for Planning agreed to accommodate Mr Tweedie's request to defer Ms Hodyl's evidence regarding the subject site until a ruling by the Panel.

Panel's directions and reasons for its decision

The Panel stood the matter down to consider the submissions and after deliberation directed that it will hear Ms Hodyl's evidence in relation to the subject site at a date to be fixed. The reasons were communicated verbally at the Hearing and are detailed further as follows:

- The Minister for Planning submitted that the DPO is not being deleted nor is it seeking to have it removed as a result of this Amendment. Rather, the Panel will consider whether the DDO as exhibited should apply to the subject site in addition to the existing DPO.
- The Panel notes that submitter 64 raised in its submissions the essence of the interface of the DDO with its existing DPO for its site. Ms Brennan submitted that the land was the subject of four submissions, including that of submitter 64. In considering the built form controls set out in the proposed DDO for the subject site, the Panel needs to understand the existing DPO height controls and how these will interact with the proposed DDO.
- The Panel notes its various powers under the *Planning and Environment Act* 1987 (the Act) in hearing submissions relating to the Amendment. In particular, subsection 161(1)(d) of the Act allows the Panel to inform itself on any matter in any way it thinks fit. This section also requires the Panel to conduct its hearing of the Amendment so as to accord with the principles of procedural fairness and provide the relevant parties with the opportunity to a fair hearing.
- Under section 168 of the Act, the Panel may take into account any matter it thinks relevant in making its report and recommendations. The Panel considers understanding this interface between two planning controls to be relevant and notes that the Minister has exhibited the DDO to apply to the subject site in addition to the existing DPO.
- The Panel notes that the exhibited Amendment, including exhibited expert evidence supporting the proposed controls, did not specifically set out the option to remove the

existing DPO from the site. All relevant parties were to file their expert evidence on 4 July 2016, Directions which the Minister for Planning, amongst others, complied with. Ms Hodyl's additional expert evidence was drafted in response to four submissions and set out in more detail the built form controls and options for the subject site.

- Mr Tweedie submitted that this additional expert evidence raised new evidence in setting out the option of removing the existing DPO from the subject site. Mr Tweedie contended that due to the short timeframe between the filing of the additional evidence and Ms Hodyl's timetabled appearance in Week 1 of Hearings, his client was unable to cross-examine Ms Hodyl without the benefit of obtaining expert advice on these additional matters.
- Based on the above, the Panel determines that Ms Hodyl's additional expert evidence in relation to the application of the proposed DDO with the existing DPO for the subject site should be called and the opportunity for it to be tested. If there is a proposition that Ms Hodyl puts forward that submitter 64 disagrees with, the Panel will provide all submitters with the relevant opportunity to test this evidence.
- The Panel notes that submitter 64 did not raise any concerns in relation to this additional evidence for almost 10 days following its filing on 4 July 2016. Nevertheless, the Panel has directed that Ms Hodyl's additional evidence in relation to the subject site will be deferred until Week 5 or 6 of the Hearings. The Panel directed submitter 64 to determine whether it will call expert evidence on the matters raised in the additional evidence by Monday 18 July 2016. The Minister for Planning did not object to this proposal.
- The Panel considered the other matters raised in the parties' submissions but have not addressed it in further detail in these reasons.

On 14 July 2016, the Panel made the following directions:

1. The evidence of Ms Hodyl is to be heard at a date to be determined in Week 5 or Week 6 of Hearings for the Amendment.
2. The Panel may take into account any matter it thinks relevant in making its report and recommendations. The Panel notes that the Minister for Planning proposes through this Amendment that both the existing DPO and proposed DDO will apply to the subject site. On that basis, the Panel is of the view that it can hear Ms Hodyl's evidence to understand the interface of the proposed DDO with the existing DPO.
3. Submitter 64 is to inform the Panel by Monday 18 July 2016 whether they intend to call expert evidence and the areas in which they will call the expert evidence arising out of Ms Hodyl's evidence in relation to the subject site.
4. Upon resolution of an acceptable date, any expert evidence called by submitter 64 will be due five working days prior.

The Panel notes that submitter 64 did not advise the Panel of their intention to call expert evidence as directed. Ms Hodyl has been scheduled to appear on Friday, 12 August 2016 in the latest timetable (version 5, dated 18 July 2016).

If you have any queries please contact Ms Emily To at Planning Panels Victoria on (03) 8392 6838 or emily.to@delwp.vic.gov.au.

Yours sincerely

Brett Davis

Panel Chair

Appendix E Summary of the controls

Interim controls, exhibited controls, and Panel versions 1 and 2 of the controls

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
GENERAL DEVELOPMENT AREAS				
Street Wall Design (Podium Height)	CCZ1 & CCZ2: 35-40m (discretionary) DDO60 (A2 and A3): 30m (discretionary)	40m maximum (mandatory)	Preferred: 20m maximum (discretionary) Modified: Up to 40m to reflect the prevalent street wall height (mandatory)	Preferred: 20m maximum (discretionary) Modified: up to 40m or up to 80m where: • one street is a main street (limited to 20m along each street frontage); and/or • fronts a public space/road reserve wider than 80m (mandatory)
Tower setbacks to streets	CCZ1 & CCZ2: 10m (discretionary) DDO60 (A2 and A3): 10m (discretionary)	5m minimum (mandatory)	Preferred: more than 5m (discretionary) Modified: 5m minimum (mandatory)	Preferred: more than 5m (discretionary) Modified: 5m minimum (mandatory)
Tower setbacks to side and rear boundaries	CCZ1 & CCZ2: Not applicable. DDO60 (A2 and A3): 10m	Buildings up to 100m height. 5m minimum (mandatory)	Buildings up to and equal to 80m height. Preferred: 5m minimum (mandatory) Modified: discretion to build to one side or rear boundary (mandatory)	Buildings up to and equal to 80m height. Preferred: 5m minimum (mandatory) Modified: discretion to build to one side or rear boundary if: 1. an existing, approved or proposed building on an adjoining site is built to the boundary and a minimum

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
				setback of 5m is met to all other side and rear boundaries; or 2. a building on an adjoining site cannot, by legal restriction benefitting the application site, be developed above the street wall height, a tower may also be constructed to the boundary of that adjoining site (mandatory).
	CCZ1 & CCZ2: Not applicable. DDO60 (A2 and A3): 10m	Buildings above 100m height Minimum 5% of overall building height (mandatory)	Buildings above 80m height Preferred: Minimum 6% of overall building height (discretionary)	Buildings above 80m height Preferred: Minimum 6% of overall building height (discretionary)
			<u>Discretion to allow building floor plate adjustment:</u> 1. To displace towers within the site. 2. To modify the shape of towers. <u>Modified requirement permitted where:</u> a) There is no increase in floor plate area (compared with standard setbacks solution) b) There is a minimum setback of at least 5m to all	<u>Discretion to allow building floor plate adjustment:</u> 1. To displace towers within the site. 2. To modify the shape of towers. <u>Modified requirement permitted where:</u> c) There is no increase in floor plate area (compared with standard setbacks solution) d) There is a minimum setback of at least 5m to all boundaries, above 80m in height(mandatory).

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
			boundaries, above 80m height(mandatory)	
Tower separation within sites	CCZ1 & CCZ2: no controls Policy in Clause 22.01 referred to development above 45m be setback 24m to any surrounding podium-tower development. DDO60 (A2 and A3): 20m (preferred), 10m (minimum)	No control	Preferred: Minimum 6% of combined height of adjoining towers (discretionary) <u>Discretion to allow building floor plate adjustment:</u> 1. To displace towers within the site. 2. To modify the shape of the towers. <u>Modified requirement- permitted where:</u> a) There is a minimum tower setback of at least 5m to all boundaries above 80m height. b) The separation between adjoining towers is at least 10m (mandatory).	Preferred: Minimum 6% of combined height of adjoining towers (discretionary) <u>Discretion to allow building floor plate adjustment:</u> 3. To displace towers within the site. 4. To modify the shape of the towers. <u>Modified requirement- permitted where:</u> c) There is a minimum tower setback of at least 5m to all boundaries above 80m height. d) The separation between any point of adjoining towers is at least 10m (mandatory).
Floor Area Ratio (Plot Ratio)	CCZ1 and CCZ2: Block plot ratio 12:1 (within policy at Clause 22.01) CCZ3: not applicable	24:1 Discretion to increase for: 1. Projects of state significance 2. Contribution of significant public benefit to	18:1 Prohibited to exceed Floor Area Ratio unless development provides an appropriate and equivalent Public Benefit.	18:1 Prohibited to exceed Floor Area Ratio unless development provides an appropriate and equivalent Public Benefit. Discretion to exceed Floor Area Ratio

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
		satisfaction of the Responsible Authority (discretionary)	Discretion to exceed Floor Area Ratio where the development meets all the built form controls (height, setbacks, wind and shadowing controls). Values for Floor Area Uplifts and kinds of Public Benefits sought will be updated annually.	where the development meets all the built form controls (height, setbacks, wind and shadowing controls). Values for Floor Area Uplifts and kinds of Public Benefits sought will be updated annually.
SPECIAL CHARACTER AREAS				
Street Wall Design (Podium Height)	DDO2: not applicable DDO7: not applicable DDO40: not applicable DDO60 (excluding A2 and A3): 30m (discretionary) DDO62: not applicable	DDO2: not applicable DDO7: not applicable DDO40: not applicable DDO60 (excluding A2 and A3): 30m (discretionary) DDO62: not applicable	DDO2: 20m or the preferred building height whichever is lower (discretionary) DDO40: not applicable DDO60: 20m or the preferred building height whichever is lower (discretionary) DDO62: 20m or the preferred building height whichever is lower (discretionary)	DDO2: 20m or the preferred building height whichever is lower (discretionary) DDO40: not applicable DDO60: 20m or the preferred building height whichever is lower (discretionary) DDO62: 20m or the preferred building height whichever is lower (discretionary)
Tower setbacks to streets	DDO2: not applicable DDO7: not applicable DDO40: not applicable DDO60 (excluding A2 and A3): 10m (discretionary) DDO62: not applicable	DDO2: not applicable DDO7: not applicable DDO40: not applicable DDO60 (excluding A2 and A3): 10m (discretionary) DDO62: not applicable	DDO2: 5m (discretionary) DDO40: not applicable DDO60: 5m (discretionary) DDO62: 5m (discretionary)	DDO2: 5m (discretionary) DDO40: not applicable DDO60: 5m (discretionary) DDO62: 5m (discretionary)
Tower setbacks to	DDO2: not applicable DDO7: not applicable	DDO2: not applicable DDO7: not applicable	DDO2, DDO60 and DDO62 Side boundaries:	DDO2, DDO60 and DDO62 Side boundaries:

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
side and rear boundaries	DDO40: not applicable DDO60 (excluding A2 and A3): 10m (discretionary) DDO62: not applicable	DDO40: not applicable DDO60 (excluding A2 and A3): 10m (discretionary) DDO62: not applicable	• Above 40m, 5m (discretionary) • Above 20m, 5m (discretionary) Rear boundaries: • above 20m, 5m (discretionary) DDO40: not applicable	• Above 40m, 5m(discretionary) • Above 20m, 5m (discretionary) Rear boundaries: • above 20m, 5m (discretionary) DDO40: not applicable
Tower separation within sites	DDO2: not applicable DDO7: not applicable DDO40: not applicable DDO60 (excluding A2 and A3): 20m, minimum 10m (discretionary) DDO62: not applicable	DDO2: not applicable DDO7: not applicable DDO40: not applicable DDO60 (excluding A2 and A3): 20m, minimum 10m (discretionary) DDO62: not applicable	Not applicable	Not applicable
Height / Floor Area Ratio (Plot Ratio)	DDO2: A1 – 40m mandatory A2 – 15m discretionary A3 – 20m discretionary A5 – 40m discretionary A6 – 30m discretionary A7 - 80m discretionary A8 - 60m discretionary A9 - 30m discretionary	DDO2: A1 – 40m mandatory A2 – 15m mandatory A3 – 20m mandatory A5 – 40m mandatory A6 – 30m mandatory A7 - 80m mandatory A8 - 60m mandatory A9 - 30m mandatory	DDO2: A1 – 40m mandatory A2 – 15m discretionary (4:1 FAR) A3 – 20m discretionary (6:1 FAR) A5 – 40m discretionary (10:1 FAR) A6 – 30m discretionary (8:1 FAR) A7 - 80m discretionary (12:1 FAR) A8 - 60m discretionary (13:1 FAR) A9 - 30m discretionary (7:1 FAR)	DDO2: A1 – 40m mandatory A2 – 15m discretionary (4:1 FAR) A3 – 20m discretionary (6:1 FAR) A5 – 40m discretionary (10:1 FAR) A6 – 30m discretionary (8:1 FAR) A7 - 80m discretionary (12:1 FAR) A8 - 60m discretionary (13:1 FAR) A9 - 30m discretionary (7:1 FAR)
	DDO7: 24m discretionary	DDO7: 24m mandatory		
	DDO40: 24m discretionary	DDO40: 24m mandatory	DDO40: 24m discretionary (6:1 FAR)	DDO40: 24m discretionary (6:1 FAR)
	DDO60:	DDO60:	DDO60:	DDO60:

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
	Area 1 - 24m discretionary Area 2 - 160m discretionary Area 3 - 100m discretionary Area 4A - 40m discretionary Area 4B - 14m mandatory Area 5A - 60m discretionary Area 5B - 70m mandatory Area 6 - 14m mandatory Area 7 - 24m mandatory	Area 1 - 24m mandatory Area 2 - 160m mandatory Area 3 - 100m mandatory Area 4A – 40m mandatory Area 4B - 14m mandatory Area 5A - 60m mandatory Area 5B - 70m mandatory Area 6 - 14m mandatory Area 7 - 24m mandatory	Area 1 - 24m discretionary Area 2 - 160m discretionary Area 3 - 100m discretionary Area 4A – 40m discretionary Area 4B - 14m mandatory Area 5A - 60m discretionary Area 5B - 70m mandatory Area 6 - 14m mandatory Area 7 - 24m mandatory	Area 1 - 24m discretionary Area 2 - 160m discretionary Area 3 - 100m discretionary Area 4A – 40m discretionary Area 4B - 14m mandatory Area 5A - 60m discretionary Area 5B - 70m mandatory Area 6 - 14m mandatory Area 7 - 24m mandatory
	DDO62: Area B1: 15m mandatory Area B2: 25m mandatory Area B3: 40m mandatory Area B4: 40m discretionary Area B5: 60m discretionary Area B6: 100m discretionary	DDO62: Area B1: 15m mandatory Area B2: 25m mandatory Area B3: 40m mandatory Area B4: 40m discretionary Area B5: 60m discretionary Area B6: 100m discretionary	DDO62: Area B1: 15m mandatory Area B2: 25m mandatory Area B3: 40m mandatory Area B4: 40m discretionary (10:1 FAR) Area B5: 60m discretionary (13:1 FAR) Area B6: 100m discretionary (15:1 FAR)	DDO62: Area B1: 15m mandatory Area B2: 25m mandatory Area B3: 40m mandatory Area B4: 40m discretionary (10:1 FAR) Area B5: 60m discretionary (13:1 FAR) Area B6: 100m discretionary (15:1 FAR)
Over-shadowing	Public spaces, public parks and gardens, public squares, major pedestrian routes including streets and lanes, and privately owned plazas open to the public between 11.00am and 2.00pm on 22 March and 22 September	Public spaces, public parks and gardens, public squares, major pedestrian routes including streets and lanes, and privately owned plazas open to the public between 11.00am and 2.00pm on 22 March and 22 September (discretionary)	Mandatory controls for: • Yarra River Corridor (between 11.00 and 2.00pm on 22 June) • Fed Square (between 11.00 and 3.00pm on 22 April and 22 September) • City Square (between 11.00 and	Mandatory controls for: • Yarra River Corridor (between 11.00 and 2.00pm on 22 June) • Fed Square (between 11.00 and 3.00pm on 22 April and 22 September) • City Square (between 11.00 and

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
	(discretionary) South bank of the Yarra River between 11.00 am and 2.00 pm on 22 June (mandatory). North bank of the Yarra River between 11.00 am and 2.00 pm on 22 June (discretionary). Any part of Federation Square, City Square, Queensbridge Square and the State Library Forecourt between 11.00 am and 2.00 pm on 22 June to 22 September (discretionary).	South bank of the Yarra River between 11.00 am and 2.00 pm on 22 June (mandatory). Additional shadow on North bank of the Yarra River (15m north from its edge) between 11.00 am and 2.00 pm from 22 March to 22 Sept (mandatory). Any part of Federation Square, City Square, Queensbridge Square and the State Library Forecourt between 11.00 am and 2.00 pm from 22 March to 22 September (mandatory). Parliament House steps and forecourt between 11.00 am and 4.00 pm on 22 September (mandatory). Shrine of Remembrance and forecourt between 11.00am and 4.00pm on 22 September (mandatory).	3.00pm on 22 April and 22 September) • State Library Forecourt (between 11.00 and 3.00pm on 22 April and 22 September) • Bourke Street Mall (south of Tram Tracks) (between 12.00 and 2.00pm on 22 April and 22 September) • Shrine of Remembrance its northern forecourt (between 11.00 and 3.00pm on 22 April and 22 September) • Boyd Park (between 12.00 and 2.00pm on 22 April and 22 September) Discretionary controls for: • Parliamentary steps and its forecourt • Treasury Building and its steps • Batman Park • Birrarung Marr • Hardware Lane • Elizabeth Street South • Old Treasury Gardens • Gordon Reserve	3.00pm on 22 April and 22 September) • State Library Forecourt (between 11.00 and 3.00pm on 22 April and 22 September) • Bourke Street Mall (south of Tram Tracks) (between 12.00 and 2.00pm on 22 April and 22 September) • Shrine of Remembrance its northern forecourt (between 11.00 and 3.00pm on 22 April and 22 September) • Boyd Park (between 12.00 and 2.00pm on 22 April and 22 September) Discretionary controls for: • Parliamentary steps and its forecourt • Treasury Building and its steps • Batman Park • Birrarung Marr • Hardware Lane • Elizabeth Street South • Old Treasury Gardens • Gordon Reserve • Parliament Reserve • Bourke Street & Little Bourke

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
			• Parliament Reserve • Bourke Street & Little Bourke Street (within Bourke Hill) • Sturt Street Reserve • Grant Street Reserve (ACCA) Discretionary controls on development that casts additional shadows on any public pace, public park, gardens, public squares, major pedestrian routes including streets and lanes, open spaces associated with worship and privately owned plazas accessible to the public.	Street (within Bourke Hill) • Sturt Street Reserve • Grant Street Reserve (ACCA) Discretionary controls on development that unreasonably casts additional shadows on any public pace, public park, gardens, public squares, major pedestrian routes including streets and lanes, open spaces associated with worship and privately owned plazas accessible to the public. Consideration of reasonableness of additional shadow on other public spaces included as a new policy consideration. Inclusion of overshadowing report as a policy reference document.
Wind impacts	Consideration of pedestrian comfort and amenity in public places provided as a Decision Guideline in CCZ1 & 2.	Application requirement of Southbank extended to Hoddle Grid. Wind controls focus on avoiding	Unsafe and uncomfortable wind conditions definitions introduced: 1. *'Unsafe wind conditions'*: means 3 second gust which exceeds 20m per second for more than 0.1% of the time; and	Definitions refined: 1. *'Unsafe wind conditions'*: means 3 second gust which exceeds 20m per second with probability of exceedance of 0.1% of the time from

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
	CCZ3 - Southbank is the only schedule with application requirements for wind: 1. 'Active street frontages' to be generally acceptable for stationary long term wind exposure (where peak gust speed during hourly average with a probability of exceedance of 0.1% in any 22.5 degree wind direction sector must not exceed 10ms -1); and 2. all other areas be generally acceptable for short term wind exposure (where peak gust speed during hourly average with a probability of exceedance of 0.1% in any 22.5 degree wind direction sector must not exceed 13ms -1); unless: 3. a trafficable area, where	extreme events.	2. *'Uncomfortable wind conditions':* means for 20% of the time, the mean wind speed exceeds : - 3m per/sec for sitting areas; - 4m per/sec for standing areas; - 5m per/sec for walking areas. Permit trigger introduced providing reformed wind criteria: 1. Mandatory controls: for buildings > 40m a permit must not be granted where "unsafe" wind conditions (within a distance equal to twice the longest width of the building); and 2. Discretionary controls**:** a permit should not be granted where "uncomfortable" wind conditions (within a distance equal to twice the longest width of the building).	all wind directions combined; and 2. *'Uncomfortable wind conditions':* a mean wind speed from all directions combined with probability of non-exceedance 20% of the time, equal or less than: - 3m per/sec for sitting areas; - 4m per/sec for standing areas; and - 5m per/sec for walking areas. Refinement of permit trigger controls: 1. Mandatory controls: for buildings > 40m a permit must not be granted where "unsafe" wind conditions (within a distance equal to half the longest width of the building (whichever is greater); and 2. Discretionary /preferred controls**:** a permit should not be granted where "uncomfortable" wind conditions (within a distance equal to half the longest width of the building (whichever is greater). Introduction of Figure 1 equation.

Design Element	Pre- C262	Interim Controls (C262)	Exhibited Controls (C270)	Panel versions 1 and 2 (C270)
	probability of exceedance of 0.1% in any 22.5 degree wind direction sector must not exceed 16ms -1.			