

REVIEW OF VARROVILLE CURTILAGE EXTENSION RECOMMENDATION

OPINION

A INTRODUCTION

- 1 Our instructing solicitors act for the Catholic Metropolitan Cemeteries Trust (“**CMCT**”) in relation to a review by the Independent Planning Commission (“**IPC**”) of a Heritage Council recommendation to list an extension to the Varroville curtilage on the State Heritage Register. The extended curtilage that is the subject of the recommendation and review encompasses land owned by the CMCT that is proposed for use as a lawn cemetery.
- 2 On 24 January 2019, the IPC announced that it would provide the CMCT’s lawyers and heritage advisors with access to a document entitled ‘*Curtilage Study – Varroville*’ by Orwell & Peter Phillips dated May 2016 (“**Curtilage Study**”) on a view-only basis. The IPC also advised that it would accept submissions from interested parties including the CMCT until 29 January 2019. We are instructed that the document, which was commissioned by the owners of Varroville Homestead and part-funded under the NSW Heritage Grants Program, is approximately 150 pages in length and that it supports the extension of the Varroville curtilage to CMCT-owned lands. We are asked to advise on whether the provision of the Curtilage Study on the terms proposed by the IPC is sufficient to satisfy any obligations of procedural fairness owed by the IPC to the CMCT in connection with its review.
- 3 In summary, in our opinion the provision of the Curtilage Study on the terms proposed by the IPC in its 24 January 2019 announcement is unlikely to be sufficient to satisfy obligations of procedural fairness owed by the IPC to the CMCT in connection with its review.

B FACTS & ASSUMPTIONS

- 4 The CMCT is the registered proprietor of lands (being Lot B in DP370979, Lot 22 in DP564065 and Lot 1 in DP218016) that surround and adjoin the Varroville Estate near Campbelltown in south western Sydney. The Varroville Estate is an early farm estate dating to 1810, with early structures, a homestead dating to the 1850s, agricultural terracing and trenching, and evidence of an early access road. The CMCT lands that surround the Varroville Estate were rezoned in around 2016 to permit their use as a cemetery.
- 5 Based on the Heritage Council’s recommendation materials (DOC17/496224), we understand that the Varroville Homestead’s owners nominated an extended curtilage area for listing on the State Heritage Register in around May 2016. The materials indicate that the owners of the Varroville Homestead were granted Heritage Council funding of \$10,000 in 2015-16 to undertake a study that explored boundary and curtilage issues. It appears that the findings of that study were presented to the State Heritage Register Committee on 7 September 2016.
- 6 On 5 July 2017, the State Heritage Register Committee resolved (amongst other things) to consider that the item known as “Varroville Homestead and Estate”, incorporating an enlarged curtilage, may be of state heritage significance and to give affected owners or occupiers written notice of its intention to consider listing the item.
- 7 Between 12 July 2017 and 9 August 2017, the proposed listing of the extended Varroville curtilage was advertised for public comment. We are instructed that the Curtilage Study was not included in the exhibition materials made available to the general public, or the CMCT, during the exhibition period. Nevertheless, the exhibition resulted in 35 submissions and 2 late submissions, 9 of which supported an increased curtilage to match the ‘minimum curtilage’ recommended in the Curtilage Study. The CMCT’s submission broadly supported the listing, provided site-specific exemptions could be finalised in respect of CMCT’s land, once a development application for the proposed cemetery had been determined by the Campbelltown City Council. The CMCT also submitted that:
- (a) extension of the curtilage should not preclude sympathetic development in accordance with cl 7.8(a) of the *Campbelltown Local Environmental Plan 2015* (NSW);
 - (b) any extended listing ought to be gazetted with applicable site-specific exemptions to facilitate future works in accordance with an endorsed Plan of Management; and
 - (c) it ought to have an opportunity to liaise with the Office of Environment and Heritage (**OEH**) with regard to the accompanying revision to the statement of significance.
- 8 On 28 September 2017, the Heritage Council resolved to recommend a revision of the curtilage of Varroville at 196, 152, 166-176 St Andrews Road, Varroville under s 32(2) of the *Heritage Act 1977* (NSW) (“**the Act**”). In its ‘Recommendation to List’ report, the Heritage Council did

not propose site-specific exemptions. It appears that substantial parts of the analysis proffered by the Heritage Council in support of its recommendation simply reproduced sections of the Curtilage Study, especially section 7.1 of that document.

- 9 On 27 October 2017, the OEH issued a recommendation to the Minister to list a curtilage extension of Varroville on the State Heritage Register under s 34 of the Act.
- 10 On 12 October 2018, the Minister made a direction under s 34(1)(b) of the Act that the IPC review the Heritage Council's recommendation in accordance with s 36 of the Act and provide its report within three months as required by s 34(1A) of the Act and reg 21 of the *Heritage Regulations 2012* (NSW).
- 11 On 14 November 2018, the IPC wrote to the CMCT advising that the CMCT was entitled to appear before the IPC in accordance with s 36 of the Act as the IPC was conducting a review of the Heritage Council's proposed listing of the extended curtilage. The IPC indicated the CMCT would have an opportunity to make representations in relation to the Heritage Council's proposed listing before the panel of independent experts completed its review.
- 12 Between 23 July 2018 and 24 January 2019, correspondence was exchanged between the IPC and the owners of the Varroville Homestead and their legal representatives concerning publication and access arrangements for the Curtilage Study. The correspondence sent by and on behalf of the owners of the Varroville Homestead asserted confidentiality over the Curtilage Study on the basis that its disclosure might:
- (a) frustrate proceedings commenced in the New South Wales Civil and Administrative Tribunal under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) in respect of the access to the Curtilage Study; and/or
 - (b) identify elements in the landscape underpinning Varroville's state significance that could be destroyed without penalty by those seeking to develop the land.
- 13 In a letter dated 28 November 2018, the IPC advised the legal representatives for the owners of the Varroville Homestead that:

If your clients remain of the view that they wish the Commission to have regard to the Study, either in whole or in part, in undertaking its review, then the Commission considers that other interested parties participating in the review should be given an opportunity to consider and make submissions in respect of the same material. ...

If your clients confirm that they wish the Commission to have regard to the Study, either in its entirety or in a partially redacted form, the same material will be available to other interested parties, subject to the condition that access be limited to the interested parties' legal advisers and heritage experts only and on the basis that those parties will not disclose the contents of the Study.

14 In correspondence dated 30 November 2018, the IPC indicated that it did not consider it appropriate to have regard to the proceedings in the New South Wales Civil and Administrative Tribunal in carrying out its obligations in respect of the review. The IPC elaborated on this position in further correspondence dated 11 January 2019.

15 On 21 January 2019, the owners of the Varroville Homestead wrote to the IPC agreeing to make the Curtilage Study available on a ‘view only’ basis at the Commission’s offices to lawyers and heritage advisors of interested parties only and that the Commission would advise those accessing the study that no copies of the study were to be made.

16 On 24 January 2019, the IPC issued an announcement indicating it had received a study titled ‘*Curtilage Study – Varroville*’ by Orwell & Peter Phillips dated May 2016 as part of the review of the recommendation to list the extended curtilage of Varroville (“**Announcement**”). The Announcement stated that:

The Study will be provided on a view-only basis to lawyers and heritage advisors of interested parties at the Commission’s office at Level 3, 201 Elizabeth Street, Sydney NSW 2000.

Please note no copies of the Study are to be made. The Study will be available until 8th February 2019.

17 Based on the terms of the Announcement it is not clear that the Curtilage Study will be made available to officers of the CMCT itself.

18 We are instructed that, prior to the Announcement, the CMCT had not been provided with access to a complete copy of the Curtilage Study. An incomplete document titled ‘*Curtilage Study Varro Ville*, May 2016’ has been reviewed. That incomplete document was not made available as part of the IPC review process. We have assumed for the purposes of this opinion that the document reviewed by the CMCT and its advisors is an incomplete copy of the Curtilage Study, notwithstanding a slight difference in the documents’ apparent titles (‘Varroville’ against ‘Varro Ville’). However, our instructors have been unable to determine definitively whether the document is in the same terms as the Curtilage Study.

C STATUTORY SCHEME

19 The listing of items on the State Heritage Register is governed by Part 3A of the Act. The *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) contains provisions dealing with the constitution, functions and procedures of the IPC.

20 Section 31(2) of the Act provides that ‘*[i]tems can only be listed on or removed from the State Heritage Register at the direction of the Minister, as provided by [Part 3A].*’

21 Section 32 of the Act supplies the Minister with the power to direct that items be listed on the State Heritage Register. It relevantly provides as follows:

32 Minister can direct listing on State Heritage Register

- (1) *The Minister may direct the listing on the State Heritage Register of a place, building, work, relic, moveable object or precinct that the Minister considers is of State heritage significance, but only if the Heritage Council has recommended that the item be listed and the Minister has considered the following:*
- (a) *the recommendation of the Heritage Council that the item should be listed,*
 - (b) *whether the long-term conservation of the item is necessary,*
 - (c) *whether the listing would render the item incapable of reasonable or economic use,*
 - (d) *whether the listing would cause undue financial hardship to the owner, mortgagee or lessee of the item or the land on which the item is situated.*
- (2) *The Heritage Council may make a recommendation to the Minister that an item be listed on the State Heritage Register at the request of the Minister, on the Heritage Council's own initiative or at the request of the owner of the item concerned or the council of the area in which the item is situated.*

22 Section 33 of the Act sets out the procedure that the Heritage Council must follow in making a recommendation to the Minister. For present purposes, it relevantly provides as follows:

33 Procedure before recommendation for listing

- (1) *Before making a recommendation for the listing of an item on the State Heritage Register, the Heritage Council must follow this procedure:*
- (a) *the Heritage Council is to give notice that it is going to consider whether or not to recommend the listing of the item concerned (a notice of intention to consider listing):*
 - (i) *by written notice given to each person that it considers to be an affected owner or occupier (except in the case of the listing of a precinct), or*
 - (ii) *in the case of the listing of a precinct, by notice published in a manner that the Heritage Council is satisfied is likely to bring the notice to the attention of affected owners or occupiers and of members of the public, and*
 - (b) *within 14 days after notice of intention to consider listing is given under paragraph (a) (i), the Heritage Council is to cause a notice of intention to consider listing to be published in a manner that the Heritage Council is satisfied is likely to bring the notice to the attention of members of the public in the area in which the item is situated, and*

- (c) *a notice of intention to consider listing is to invite submissions on the listing and is to specify a date as the closing date for the receipt of submissions (being a date that is at least 14 days after notice under paragraph (a) (ii) or (b) was first published) and the manner in which submissions may be made, and*
 - (d) *the Heritage Council is to consider the submissions that are received before the closing date for receipt of submissions and is to decide within 30 days after that closing date whether or not to recommend the listing, and*
 - (e) *the Heritage Council is to give notice of its decision in the same manner as it is required to give notice of its intention to consider listing under paragraph (a) and is also to give notice to the council of the area in which the item is situated and to each of the persons who made submissions that were considered, and*
 - (f) *if the decision of the Heritage Council is to recommend the listing, the Heritage Council is to make that recommendation to the Minister within 14 days after notice is given of the decision under paragraph (e).*
- (2) *Without limiting the submissions that can be made for the purposes of this section, any of the following submissions can be made:*
- (a) *a submission that the item the subject of the proposed recommendation should not be subject to listing on the State Heritage Register by reason that it is not of State heritage significance,*
 - (b) *a submission that the item the subject of the proposed recommendation should not be subject to listing on the State Heritage Register by reason that its long-term conservation is not necessary,*
 - (c) *a submission that the item the subject of the proposed recommendation should not be subject to listing on the State Heritage Register by reason that listing would render the item incapable of reasonable or economic use,*
 - (d) *a submission that conservation of the item the subject of the proposed recommendation could not be achieved without causing undue financial hardship to the owner, mortgagee or lessee of the item or the land on which the item is situated.*

...

23 Section 34 of the Act sets out the procedure to be followed by the Minister following the making of a recommendation by the Heritage Council. It provides:

34 Action by Minister following recommendation for listing

- (1) *Within 14 days after the Heritage Council makes a recommendation for listing to the Minister, the Minister must:*
- (a) *decide whether or not to direct the listing and inform the Heritage Council of that decision, or*
 - (b) *request the Independent Planning Commission to review the matter.*
- (1A) *On receiving a request to review a matter, the Independent Planning Commission is to conduct its review and provide a report to the Minister within the time period specified in the regulations.*
- (2) *If the Minister requests a review by the Independent Planning Commission, the Minister must, within 14 days after the Commission provides its report:*
- (a) *consider that report, and*
 - (b) *decide whether or not to direct the listing, and*
 - (c) *inform the Heritage Council of that decision.*
- (3) *The Minister may make a request under this section on the Minister's own motion or after a request by an affected owner, mortgagee, lessee or occupier.*
- (4) *A decision of the Minister to direct, or not to direct, the listing on the State Heritage Register of an item that the Heritage Council has recommended be listed is to contain the reasons for listing or not listing the item and is to be made publicly available on the internet by the Heritage Council within 7 days after the decision is made.*

24 Section 36 of the Act deals with reviews by the IPC. It provides:

36 Independent Planning Commission

- (1) *At a review conducted by the Independent Planning Commission each of the following is entitled to appear before the Commission either personally or, unless otherwise provided by the regulations, by an Australian legal practitioner or agent:*
- (a) *an owner, mortgagee or lessee of land to which the proposed listing will apply or of land on which is situated the building, work or relic (being a relic that is attached to or forms part of land) that will be subject to the proposed listing,*
 - (b) *an owner of a relic (not being a relic that is attached to or forms part of land) or moveable object that will be subject to the proposed listing,*
 - (c) *the council of the area in which the item or precinct concerned is situated,*

- (d) *the Heritage Council,*
- (e) *the Secretary of the Department of Premier and Cabinet or a nominee of the Secretary,*
- (f) *any other person with the leave of the Commission.*

(2) *At the conclusion of the review, the Independent Planning Commission is to provide a report in writing to the Minister containing a summary of the submissions made to the review, the findings of the Commission with respect to those submissions and a recommendation as to how those submissions should be dealt with. The Minister is to make copies of the report available to the public after the Minister decides whether or not to direct the listing.*

25 Section 2.7(1) of the EPA Act constitutes the IPC as a statutory corporation and s 2.7(2) relevantly provides that the IPC is not subject to the the direction or control of the Minister. Section 2.9 sets out the functions of the IPC, which include:

- (a) by s 2.9(d) *‘to hold a public hearing into any matter into which the Minister requests the Commission to hold a public hearing’;* and
- (a) by s 2.9(g) *‘any other function conferred or imposed on it under this or any other Act.’*

26 Section 2.11(1) applies sch 2 of the EPA Act, Part 2 of which contains provisions relating to public hearings and the procedure of the IPC. Clause 3 of sch 2 provides for the conduct of public hearings of the Commission that are the subject of a request under s 2.9(d).

27 Clause 3(4) of sch 2 deals with the imposition of confidentiality restrictions by the Commission. It provides as follows:

- (4) *If the Commission is satisfied that it is desirable to do so in the public interest because of the confidential nature of any evidence or matter or for any other reason, the Commission may direct that part of any public hearing is to take place in private and give directions as to the persons who may be present.*

28 Clause 5 of sch 2 deals with restrictions on the publication of evidence and provides:

5 Commission may restrict publication of evidence

- (1) *If the Commission is satisfied that it is desirable to do so in the public interest because of the confidential nature of any evidence or matter or for any other reason, the Commission may direct that evidence given before the Commission or contained in documents lodged with the Commission is not to be published or may only be published subject to restrictions.*
- (2) *A person must not, without reasonable excuse, fail to comply with a direction given by the Commission under this clause.*

29 Clause 25(1) of sch 2 provides that ‘[t]he Independent Planning Commission may conduct its meetings in public, and is required to do so for the conduct of any business that is required by the Minister to be conducted in public.’

C ANALYSIS

30 In our view, there are two questions that must be answered in determining whether the provision of the Curtilage Study on the terms proposed by the IPC in the Announcement is sufficient to satisfy any obligations of procedural fairness owed by the IPC to the CMCT:

- (a) *First*, is the IPC required to afford the CMCT procedural fairness in undertaking its review pursuant to s 34(1A) of the Act?
- (b) *Secondly*, is the obligation to provide procedural fairness satisfied in circumstances where the CMCT’s lawyers and heritage advisors have been provided with access to the Curtilage Study on a view-only basis from 24 January 2019 where submissions on the review are due on 29 January 2019?

CI *Is the IPC required to afford the CMCT procedural fairness?*

31 There is a threshold question as to whether or not the IPC is required to afford CMCT procedural fairness in the conduct of its review. A decision to list an extended curtilage encompassing the CMCT’s lands clearly has significant implications for CMCT’s rights with respect to its real property, which would ordinarily engage principles of procedural fairness: see, eg, *Cooper v Wandsworth Board of Works* (1863) 14 CB(NS) 180. However, within the scheme of the Act, the decision to list an item on the State Heritage Register is ultimately in the hands of the Minister rather than the IPC.

32 In a case such as the present, where there is a question as to whether or not a person other than the ultimate decision-maker is required to afford procedural fairness, it is necessary to analyse carefully the statutory context in which the relevant review is undertaken. The fact that the IPC itself is not the ultimate decision-maker is not determinative of the question — it is necessary to consider the nature of the power that the IPC exercises in conducting its review: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576-7 (Mason CJ, Dawson, Toohey and Gaurdon JJ); cf *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353.

33 Importantly, in the scheme of Part 3A of the Act, the Minister’s decision to request a review by the IPC under s 34(1)(b) triggers a series of mandatory procedural steps:

- (a) the act of requesting the review has the consequence that the IPC *must* undertake such a review and provide a report to the Minister under s 34(1A);
- (b) where a review has been commenced, s 36(1)(a) relevantly confers upon an owner of land to which the proposed listing will apply a relevantly unconditional right to appear before the Commission either personally or by an Australian legal practitioner;

- (c) at the conclusion of the IPC's review s 36(2) imposes a mandatory duty on the IPC to provide a report in writing to the Minister '*containing a summary of the submissions made to the review, the findings of the Commission with respect to those submissions and a recommendation as to how those submissions should be dealt with*';
- (d) once a report is provided to the Minister, sub-ss 34(2)(a) and (b) impose a mandatory duty on the Minister to consider the report and decide whether or not to direct the listing;
- (e) finally, after the Minister decides whether or not to direct the listing, they are obliged to make copies of the IPC's report available to the public.

34 By the series of mandatory procedural steps set out above, the Act contemplates that the IPC review will function as a vehicle by which representations made by persons whose property interests are affected by a potential listing are relayed to the ultimate decision-maker (the Minister). The Act is otherwise silent as to the receipt of submissions by the Minister following the review: cf *Greyhound Racing NSW v Cessnock & District Agricultural Association* [2006] NSWCA 333 at [98] (Basten JA, with whom Beazley and Hodgson JJA agreed).

35 In our view, the procedure described above is broadly analogous to that at issue in *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 (*South Sydney*). There ss 218F and 263 of the *Local Government Act 1993* (NSW) relevantly provided a mechanism for the Minister to refer proposals for the alteration of local government boundaries for examination and report to the Boundaries Commission. The Minister was at liberty to accept or reject the Commission's findings. In concluding that a failure to afford procedural fairness on the part of the Boundary Commission could not be ignored on the basis that the Minister could afford the respondent procedural fairness at a later stage in the decision-making process, Spigelman CJ (at 392-3) referred to a number of aspects of the legislative scheme which resulted in procedural fairness obligations attaching to the Commission's review, including:

- (a) the fact that the scheme indicated that the most detailed consideration of relevant issues was to occur before the Commission;
- (b) the fact that the Commission alone was empowered to conduct a public inquiry;
- (c) the fact that the Commission alone was obliged to take into account a range of relevant considerations;
- (d) the expertise and technical knowledge of persons constituting the Commission;
- (e) the degree of independence enjoyed by the Commission; and
- (f) the effect of the Commission's report on the decision-making process, including at the later stage at which the Minister's powers became involved.

36 Although there are clearly differences as between the *Local Government Act 1993* (NSW) at issue in South Sydney and the scheme of the Act in this case, similar considerations are engaged. The present scheme is an illustration of what Mason CJ characterised in *South Australia v O’Shea* (1987) 163 CLR 378 at 389 as:

a legislative model which entails the holding of an inquiry by a body authorized to make a recommendation to a Board or Minister which may make a decision rejecting the recommendation without conducting any further inquiry. The hearing before the recommending body provides a sufficient opportunity for a party to present his case so that the decision-making process, viewed in its entirety, entails procedural fairness.

37 In our opinion, the better view is that the IPC is obliged to afford the CMCT procedural fairness in discharging its functions under the Act.

C2 *Content of procedural fairness obligations*

38 The next question is whether the IPC’s obligation to provide procedural fairness is satisfied in circumstances where it appears the CMCT’s lawyers and heritage advisors are to be provided access to the Curtilage Study on a view-only basis from 24 January 2019 where submissions on the review are due on 29 January 2019. The IPC’s announcement raises two issues:

- (a) *first*, whether the period of time in which to inspect the Curtilage Study is sufficient to provide CMCT with an opportunity to participate in the review; and
- (b) *secondly*, whether it is procedurally fair for the IPC to deprive the CMCT itself of access to the Curtilage Study and simply provide lawyers and heritage advisors with access to the document on a view-only basis.

39 As to the first issue, the purpose of providing notice of adverse material is to alert the person whose interests may be affected by a decision to the issues that are required to be addressed and to provide sufficient information and opportunity to address those issues: *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [100]-[103] (Lord Reed, with whom Lord Neuberger, Lady Hale and Lords Sumption and Hodge agreed).

40 In *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* (2011) 195 FCR 318 (***Dunghutti***) at [86]-[91], the Full Federal Court identified a number of factors that could be considered in determining whether reasonable notice had been given to a person whose rights or interests may be affected by a decision. Although the Court was dealing with a particular legislative scheme that required a “reasonable period specified in the notice”, the factors have been applied more broadly: see *Ogawa v Minister for Immigration and Citizenship* (2011) 199 FCR 51 at [33]-[37] (Flick J). The factors identified by the Court in *Dunghutti* were as follows:

- (a) the number of issues raised;
- (b) the factual complexity of each of those issues;
- (c) the need to assemble factual material if any “representations” are to be meaningful;
- (d) the need for prompt action to be taken; and
- (e) the need or desirability of obtaining independent legal or other advice.

41 In the present case, the Curtilage Study appears to have formed the basis for the Heritage Council’s recommendation in that substantial parts of the analysis were simply reproduced in its analysis. We are instructed that the document runs to approximately 150 pages and contains detailed and complex analysis of a technical nature. We understand the material that is the subject of the Curtilage Study will require careful analysis by legal and heritage experts.

42 In the circumstances, we consider that a period of 5 days (including a three-day long weekend) is an insufficient period within which to review and respond to the Curtilage Study. It appears that other parties to the review have had access to the Curtilage Study for some time. The provision of such a short period of time would appear to deprive the CMCT of a meaningful opportunity to participate in the review by making submissions in relation to the Curtilage Study in the context of the recommendation and IPC review.

43 As to the second issue, procedural fairness generally requires that a person be alerted to the critical issues or factors on which a decision or recommendation is likely to turn: *Kioa v West* (1985) 159 CLR 550 at 587 (Mason J). In the absence of countervailing considerations, parties appearing in a review are generally entitled to access material relied upon by the decision-maker or deliberative body in reaching their decision: *McLachlan v Australian Securities and Investments Commission* (1993) 85 FCR 286 at [34], [42]-[55] (Kenny J, with whom O’Loughlin and Mansfield JJ agreed).

44 Procedural fairness does not necessarily require that verbatim copies of all materials to be relied upon be given to a person whose rights or interests may be affected if the ‘*gravamen or substance of the issue*’ is disclosed: *Pilbara Aboriginal Land Council Corporation Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 103 FCR 539 at 557. As the High Court observed in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 99 (*per curiam*), ‘[t]he application of principles of procedural fairness in a particular case must always be moulded to the particular circumstances of that case’. However, where confidentiality concerns are raised, parties should ordinarily be afforded an opportunity to be heard on confidentiality orders: *Percerep v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 483 at 504 (Weinberg J).

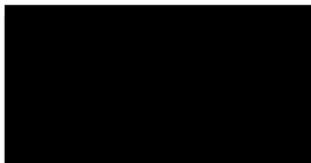
45 In the present circumstances, it is not possible for us to express a concluded view on whether or not procedural fairness requires the disclosure of the Curtilage Study to CMCT (in addition to its advisers) in the absence of a complete copy of the document. We note that the Curtilage Study appears to be central to the Heritage Council's reasoning and that CMCT may be required to provide instructions to its professional advisers in relation to the material contained within the study. The centrality of the study to the Heritage Council's recommendation and the present review would tend to weigh in favour of its disclosure to CMCT.

46 The IPC is also yet to identify the reason for the confidentiality restrictions proposed in the Announcement. Generally, confidentiality restrictions ought only be imposed where they are justified by well-founded confidentiality concerns and where they are properly adapted to addressing those concerns. Depending on the justification for the confidentiality restrictions and the content of the Curtilage Study, it may be that the failure to provide the CMCT itself with access to the document would be procedurally unfair in the circumstances, but we are not able to express a concluded view on that question at this stage.

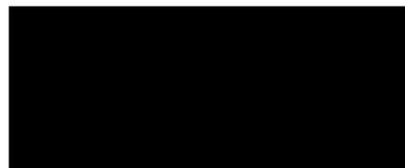
D CONCLUSION

47 For the reasons above, we consider that the provision of the Curtilage Study on the terms proposed in the Announcement is unlikely to be sufficient to satisfy obligations of procedural fairness owed by the IPC to the CMCT in connection with its review.

29 January 2019



Neil Williams SC



Matt Sherman

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