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Summary

This report provides formal cultural heritage advice on the proposed construction at the car park and the current site of the bottle-shop at 95 Beach Road Mentone (the Study Area) and does not include the built structure of the Mentone Hotel. This report examines the requirements of the Aboriginal Heritage Act 2006 (Act) and the Aboriginal Heritage Regulations 2007 (Regulations), to determine whether a Cultural Heritage Management Plan (CHMP) needs to be undertaken for the Study Area prior to the proposed works. Advice is also offered as to measures available to minimise the potential likelihood of infringement of the Act and Regulations. Assessment is also undertaken of Historical Heritage liabilities under the Victorian Heritage Act 1995.

This review was completed by Michael Lever and Dr Ilya Berelov of Biosis. Michael and Ilya are qualified cultural heritage advisors as specified in the requirements of the Act.

This report finds that there is no requirement for a mandatory CHMP. The activity area has been subject to previous significant ground disturbance (SGD) as specified in the Office of Aboriginal Affairs practice note:

‘Significant ground disturbance’ is defined in r.4 of the Regulations as meaning disturbance of –

a) the topsoil or surface rock layer of the ground; or
b) a waterway –
   by machinery in the course of grading, excavating, digging, dredging or deep ripping, but does not include ploughing other than deep ripping.

The activity area is currently a bitumen carpark which could not have been built other than through mechanical means through grading and levelling of the land surface. As such it is consistent with the definition of SGD above, rendering the area of cultural heritage sensitivity (CHS) associated with the activity area as no longer an area of CHS.

The evidence provided above indicates that the Study Area has been subject to significant ground disturbance at a level of certainty better than the balance of probabilities. The forms of evidence reached in making this determination and the degree of confidence with which it has been made are both in full accord with the criteria of relevant legislation and legal precedents as to the interpretation of this legislation. Legal criteria used to determine significant ground disturbance are explained in detail in Appendix 2.

In brief, the Study Area at 95 Beach Road Mentone satisfies the evidentiary hierarchy of the Mainstay VCAT decision (Mainstay Australia Pty Vs Mornington Peninsula SC & Ors, 2009) at the highest level applicable, of ‘Common Knowledge’. It is commonly understood that there is a requirement to mechanically level, grade and excavate soils for the construction of a substantial building and sealed road surfaces as are evident in the Study Area.

Beyond this, the Study Area fits criteria of contextual evidence as defined in the Azzure Decision (Azzure Investment Group Vs Mornington Peninsula SC, 2009). The Study Area has been developed with construction material and methods that date to an era when mechanical mean of ground excavation and preparation were standard practice. It is therefore determined here to a degree of certainty well beyond the balance of probabilities that the Study Area at 95 Beach Road Mentone is therefore exempt from any mandatory CHMP.

This report further identifies that there is little benefit to the client in undertaking a voluntary CHMP prior to the proposed works.

There are no mandatory compliance requirements under the Heritage Act 1995.
The client is recommended to act to prevent possible infringement of the Heritage Act 1995 with regard to potential unknown subsurface archaeology.

The majority of the Study Area is listed on the Kingston City Council Planning Scheme Heritage Overlay as HO77. The client has noted that they are aware of this listing and wish to manage compliance with it separate to this report.
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1. Introduction

1.1 Location of the Study Area

The Study Area is located at the rear of the Mentone Hotel at 95 Beach Road Mentone, (Figure 1). The Study Area is situated between Beach Road Mentone to the south west and Mentone Parade to the north east. The Study Area is immediately across Beach Road Mentone, from the coastline of Port Phillip Bay at Mentone.

![Figure 1: Location of the Study Area (outlined in red). Area of Aboriginal cultural heritage sensitivity shaded light green.](image)

1.2 Description of the Study Area

The Study Area measures 3,700 square meters and is located on the rear slope of a sandy foreshore dune which trends downwards towards Mentone Parade. The Study Area is completely covered in built structure. To the south east this comprises the concrete and brick flat-roofed structures of a bottle shop, and associated...
storage and loading facilities. The remainder of the site comprises concrete loading aprons, tarmac parking facilities, and concrete planting beds.

1.3 The Activity

The proposed works are the construction of more than three residential apartments, with associated parking and amenities.

1.4 Aboriginal Stakeholders

At the time of this report there was no Registered Aboriginal Party (RAP) for the Study Area. There are three applicants to RAP status for the Study Area. These are the Boon Wurrung Foundation, the Bunurong Land and Sea Association Inc. and the Wurundjeri Tribe Land & Compensation Cultural Heritage Council Incorporated. It was not within the remit of this report to undertake consultation with these or other local Traditional Owner groups.

1.5 Aboriginal and Historical Heritage

The assessment provides information on the archaeological and cultural heritage values of the Study Area in order to provide advice with regards to the Victorian Aboriginal Heritage Act 2006, Victorian Aboriginal Heritage Regulations 2007, and the Victorian Heritage Act 1995, specifically the statutory and non-statutory obligations under these Acts.

It must be emphasised, however, that the report is not intended to meet the requirements of a formal assessment under the Office of Aboriginal Affairs Victoria guidelines.
2. Investigation – Aboriginal Cultural Heritage

2.1 Criteria

The following section examines in turn the three applicable criteria as to whether a CHMP needs to be undertaken at the Study Area. These are:

- Is the Study Area an area of cultural heritage sensitivity?
- Are the proposed works a high impact activity?
- Has there been significant ground disturbance to the Study Area?

2.1.2 Is the Study Area an area of cultural heritage sensitivity?

The following information and databases were reviewed on 7 May 2015:

- Victorian Aboriginal Heritage Register sensitivity layers – accessed through Geovic3
- Council and Local Government Heritage Overlays.
- Aerial imagery.
- Geological and geomorphological databases and mapping.

The Study Area is located within an area of cultural heritage sensitivity as indicated on a search of the Aboriginal Cultural Heritage Register and Information System as crosschecked with GeoVic geological databases. The Study Area is wholly within 200m of the high water mark of the Port Phillip coast at Mentone:

Regulation 28 Coastal land

(1) Subject to subregulation (2), land within 200 metres of the high water mark of the coastal waters of Victoria or any sea within the limits of Victoria is an area of cultural heritage sensitivity.

(2) If part of the land specified in subregulation (1) has been subject to significant ground disturbance, that part is not an area of cultural heritage sensitivity.

Registered Aboriginal places are themselves also areas of cultural heritage sensitivity as defined in Regulation 22. The Study Area does not contain any Registered Aboriginal Places (VAHR) or other places protected under the Act or Regulations.

2.1.3 Are the proposed works a high impact activity?

The proposed works are the development of the Study Area for more than three residential apartments. This is a high impact activity under Regulation 45.

Regulation 5 Dwellings

(1) The construction of three or more dwellings on a lot or allotment is a high impact activity.

(2) The carrying out of works for three or more dwellings on a lot or allotment is a high impact activity.

(3) This regulation does not apply to the construction of or the carrying out of works for a retirement village within the meaning of the VPP.
2.1.4 Has there been significant ground disturbance to the Study Area?

Clause (2) of Regulation 23 stipulates that an area of cultural heritage sensitivity where significant ground disturbance has taken place is no longer an area of cultural heritage sensitivity and is therefore exonerated from mandatory CHMP. Significant ground disturbance is defined as:

**Regulation 4 Definitions**

(1) In these Regulations—significant ground disturbance means disturbance of—

(a) the topsoil or surface rock layer of the ground; or

(b) a waterway

by machinery in the course of grading, excavating, digging, dredging or deep ripping, but does not include ploughing other than deep ripping;

**Aboriginal Heritage Act 2006 Practice Note: Significant Ground Disturbance**

The words ‘disturbance’, ‘topsoil’, ‘surface rock layer’, ‘machinery’, ‘grading’, ‘excavating’, ‘digging’, ‘dredging’, ‘ploughing’ (other than deep ripping) are not defined in the regulations and therefore have their ordinary meanings.

The Victorian Civil and Administrative Tribunal (VCAT) has determined that the words “topsoil or surface rock layer” include the former topsoil or former surface rock layer if that topsoil or surface rock layer is a naturally occurring surface level that is readily ascertainable and does not include the current topsoil or current surface rock layer if established by the mere filling of the land.

Ploughing (other than deep ripping) to any depth is not significant ground disturbance. Deep ripping is defined in the regulations to mean ‘ploughing of soil using a ripper or subsoil cultivation tool to a depth of 60 centimetres or more’. None of the words used in this definition are defined, and therefore have their ordinary meanings. VCAT has determined that a ripper or subsoil cultivation tool must be distinguished from conventional ploughs or topsoil cultivation tools such as disc ploughs or rotary hoes which are not sufficient to show significant ground disturbance.

It is important to note that under this regulation and the Office of Aboriginal Affairs Victoria (OAAV) Practice Note, significant ground disturbance is not chiefly defined by the extent or depth of any disturbance, but rather by the mechanical means through which it has been caused. The application of this exonerating disturbance is also unaffected by the relative likelihood of archaeological remains being preserved in the Study Area. Such likelihood of preservation may affect the advisability of a voluntary CHMP, but does not bear on the criteria for a mandatory CHMP. The following section will comprehensively investigate and document the potential presence of significant ground disturbance in the Study Area.

2.1.5 Evidence of significant ground disturbance

**Site Inspection**

The site was inspected by M. Lever of Biosis on 7/05/2015. Direct access to the site was not necessary as the cyclone fencing surrounding the Study Area permitted all surfaces to be inspected – the Study Area could be viewed in entirety from boundary to boundary from a number of viewing points (Plate 1).

The entire study area contains evidence of significant ground disturbance, in the form of built structure and formed ground surfaces. The bottle shop structure is of solid brick and concrete construction, of construction materials and techniques that only emerged in the current era, well after the Second World War. Modern ground preparation for such construction characteristically involves mechanical clearance, followed by the mechanical excavation of footings and service trenches to depth. The concrete-slab flooring and footings of the bottle shop would characteristically be formed through the mechanical excavation of the entire building footprint, within which formwork for concrete pour would be formed. The preparation of ground for the
poured concrete loading aprons that abut the bottle shop would have involved similar processes of clearing and excavation. In the south east corner of the Study Area, ground has been significantly cut to provide a level access to the rear of the bottle shop (Plate 2).

The remainder of the Study Area is covered in level tarmac interspersed with poured concrete planting beds. Although the tarmac surface slopes to the west, it does so in a level manner which results from the grading and levelling of underlying soils to remove natural undulations. The poured concrete planting beds would characteristically have been excavated to permit formwork and concrete pour, and then refilled with soil and planted. No native trees of sufficient age to be scarred are present on the Study Area. One mature Eucalypt is present, this is a _Eucalyptus cladocalyx_ (Sugar Gum) – a South Australian hardy species that was historically widely planted in Victoria from the mid-19th century (Plate 3).

In the fragile sandy soils of the Study Area, all of the above activities will have resulted in considerably greater soil disturbance than would be the case in areas with firmer soils. The movements of construction machinery and trucks across such sands, are in themselves most likely to case disturbance to an extent that requires mechanical grading and excavation to restore or create level surfaces.
Plate 1: Study Area. Panorama view from north west

Plate 2: Cut ground levels at south east of Study Area
Plate 3: View across Study Area to coast
3. Conclusions – Aboriginal Cultural Heritage, Mandatory Requirements

The Study Area is within an area of cultural heritage sensitivity, and the proposed activity is a high impact activity. However the entire Study Area can be shown to a level of high certainty to have been subject to significant ground disturbance associated with the construction of a bottle shop and level sealed parking and loading surfaces.

The evidence provided above indicates that the Study Area has been subject to significant ground disturbance at a level of certainty better than the balance of probabilities. The forms of evidence reached in making this determination and the degree of confidence with which it has been made are both in full accord with the criteria of relevant legislation and legal precedents as to the interpretation of this legislation. Legal criteria used to determine significant ground disturbance are explained in detail in Appendix 2.

In brief, the Study Area at 95 Beach Road Mentone satisfies the evidentiary hierarchy of the Mainstay VCAT decision (Mainstay Australia Pty Vs Mornington Peninsula SC & Ors, 2009) at the highest level applicable, of ‘Common Knowledge’. It is commonly understood that there is a requirement to mechanically level, grade and excavate soils for the construction of a substantial building and sealed road surfaces as are evident in the Study Area.

Beyond this, the Study Area fits criteria of contextual evidence as defined in the Azzure Decision (Azzure Investment Group Vs Mornington Peninsula SC, 2009). The Study Area has been developed with construction material and methods that date to an era when mechanical mean of ground excavation and preparation were standard practice. It is therefore determined here to a degree of certainty well beyond the balance of probabilities that the Study Area at 95 Beach Road Mentone is therefore exempt from any mandatory CHMP.
4. Investigation – Historical Heritage

4.1 Historical Places and Reports

A search was undertaken on 7 May 2015 of recorded historic (non-Aboriginal) cultural heritage interests in the vicinity of the Study Area. The search included the following sources and the results are included in the following tables:

- Victorian Heritage Register and Victorian Heritage Inventory.
- Local Council Heritage Overlays and/or Planning Schemes (Mornington Peninsula Shire).
- National Trust Register (National Trust Victoria).

The Study Area is not currently listed on the Victorian Heritage Register or Victorian Heritage Inventory. The Study Area was previously listed on the Victorian Heritage Register, but has been delisted, as indicated by the dashed red outline applied to it on Plate 4. The Study Area is still listed on the Heritage Victoria HERMES register as a place of interest, with two separate listings obtaining for the hotel buildings proper –HERMES 197429, and the hotel car park –Hermes 197528.

The hotel and parts of the car park stippled in magenta (HERMES, 2009) are listed on the Kingston City Council Planning Scheme Heritage Overlay as item HO77. The client has indicated that they are aware of this council overlay and do not require advice on its management here.

The hotel building is listed on the National Trust Register, this does not appear to include the Study Area of this report. Advice on the heritage requirements of the existing hotel building is not within the scope of this report.

Plate 4: Historical heritage listings of the Study Area (HERMES, 2009)
5. Conclusions – Historical Heritage, Mandatory Requirements

No places of state registered or inventoried historical heritage significance have been identified within the Study Area, and no requirements currently apply to the Study Area under the Victorian Heritage Act (1995).

Council and National Trust heritage requirements, in particular all requirements relating to the historical hotel building are to be handled by the client independent of this report.

The following two sections deal with the voluntary management of Aboriginal and Historical Heritage risk at the Study Area.
6. Aboriginal Cultural Heritage – Risk Assessment

6.1 Risk assessment and options for voluntary heritage management measures

The Study Area has been shown to be exempt from the requirements for a mandatory CHMP. Nevertheless there are risks of infringing the Aboriginal Heritage Act 2006, associated with any ground disturbing activity, even where a CHMP has been undertaken and more so where a CHMP has not been undertaken.

Under sections 27 and 28 of the Act it is deemed illegal to knowingly or negligently harm, or to commit an act likely to harm Aboriginal cultural heritage. This section briefly assesses the likelihood of such harm occurring at the Study Area in the course of proposed works.

There are three primary points to be considered in assessing such risk:

- Is it likely that there remains in-situ Aboriginal cultural heritage material in the Study Area?
- Is it likely that any such material will be knowingly or negligently harmed during the proposed works?
- What measures can be taken to reduce any such potential harm?

Is it likely that there exists in-situ Aboriginal cultural heritage material in the Study Area?

No, it is not likely. The effects of modern construction associated with the bottle shop and parking area on the fragile sands of the Study Area make it unlikely that any part of the Study Area is undisturbed and contains in-situ archaeology. The hotel was constructed in 1889 (plaque on site), and it appears that the Study Area at the rear of the hotel has always functioned as a parking and loading facility. Other likely uses include sanitation facilities such as cesspits, prior to connection to sewers, and stabling and storage facilities for the hotel.

The Study Area has therefore been subject to over a century of mixed functions including likely construction and demolition of amenities and frequent and significant traffic. Prior to the sealing of the ground surface, the effects of this on sandy soils would have been highly damaging, likely to some depth.

Is it likely that any such material will be knowingly or negligently harmed during the proposed works?

No, having been informed that the presence of such material is unlikely, it is not likely that any such material would be knowingly or negligently harmed.

What measures can be taken to reduce any such potential harm?

The client may exercise measures to further reduce the risk of causing harm to potential Aboriginal cultural heritage material within the Study Area. These potentially include the undertaking of a voluntary CHMP which would serve to better define the presence or absence of Aboriginal cultural heritage material within the Study Area and would provide formally recognised heritage management recommendations for the Study Area. This would avoid the risk of substantial interruption to works which would be entailed in the initiation of a mandatory CHMP, were Aboriginal cultural heritage material identified within the Study Area in the course of works. Given the low likelihood of such material being present, a voluntary report may be of limited benefit to the client.
7. Historical Heritage, Risk Assessment

Sites of potential or known historical and archaeological potential in Victoria are generally listed on the Heritage Victoria Register or Inventory. The Register applies to built heritage, while the Inventory applies to sub-surface archaeological remains.

Listing on Register or Inventory affords both sorts of places specific protections under the Victorian Heritage Act (1995). The study area in the car park of the Mentone Hotel is not listed on the Heritage Victoria Inventory and has recently been recommended by Heritage Victoria not to be included on the Heritage Register, subsequent to nomination for it and the Mentone Hotel to be so listed (Heritage Victoria, 2015).

It is understandable that the car park is recommended by Heritage Victoria not to be included on the Register, as the Register is the incorrect instrument for listing of a site with no above-ground or built heritage. The car park would be correctly nominated for inclusion in the Heritage Inventory.

The absence of an existing Inventory listing for the car park largely indicates that there is not sufficient evidence to define the archaeological potential there. It does not denote that there is no archaeological potential there.

The Victorian Heritage Act (1995) (s127) provides protection to archaeological historical material that is not known, but is suspected to be present:

127 Offence to damage or disturb unregistered relics and unregistered archaeological sites

(1) A person must not knowingly or negligently deface or damage or otherwise interfere with an archaeological relic or carry out an act likely to endanger an archaeological relic except in accordance with a consent issued under section 129.

Penalty: In the case of a natural person: 600 penalty units or imprisonment for 12 months or both.

In the case of a body corporate: 1200 penalty units.

(2) A person must not knowingly uncover or expose an archaeological relic or disturb or excavate any land for the purpose of uncovering or discovering an archaeological relic except in accordance with a consent issued under section 129.

Penalty: In the case of a natural person: 600 penalty units or imprisonment for 12 months or both.

In the case of a body corporate: 1200 penalty units.

The Mentone Hotel has functioned in the same location since 1889. It is considered highly likely that its car park contains buried remains of historical features, possibly including outbuildings, hygiene infrastructure and artefact deposits. It is likely that the development of the site into the present car park will have disturbed such remains. However historical archaeological remains are characteristically far more robust than Aboriginal archaeological material, and are far more likely to have at least partially survived the redevelopment to the current car park.

It is concluded here that the client would face likely risk of infringing Section 127 were the proposed construction to proceed with no heritage management or mitigation measures in place.
8. Recommendations

This section sets out a series of management measures developed in accordance with the requirements of the *Aboriginal Heritage Act* 2006 and Aboriginal Heritage Regulations 2007. The recommendations reflect the results of the risk assessment provided in Section 3.

8.1 Recommendations

**Recommendation 1. Requirement for Mandatory CHMP**

There is no requirement that a mandatory CHMP need be undertaken before council issuing statutory approval for the proposed buildings and works.

**Recommendation 2. Requirement for Voluntary CHMP**

There is no recommendation that a voluntary CHMP need be undertaken.

**Recommendation 3. Requirement for Mandatory Historical Heritage Management**

There is no recommendation for Mandatory Historical Heritage Management.

**Recommendation 4. Requirement for Voluntary Historical Heritage Management**

It is strongly recommended that the client mitigate the potential risk of infringing Section 127 of the *Victorian Heritage Act* (1995). This could be undertaken through preliminary historical background study of the Study Area to better define potential heritage sensitivity. Subsequent to the outcomes of this study, any further suitable management methods could be formulated. At minimum it is recommended that the removal of tarmac and soils from the Study Area be monitored and supervised by a suitably qualified heritage consultant who would be capable of identifying any buried items of potential archaeological value, preventing unwarranted damage to them, and formulating suitable responses for their management.

**Recommendation 5. Discovery of Aboriginal Cultural Heritage During Construction Works**

Contingency measures to manage cultural heritage found during the course of works are detailed in Appendix 1. This consists of a structured framework in which the requirements for recording and salvaging of Aboriginal places will be assessed, and action taken, within the course of ground works during the life of the project.

**Recommendation 6. Custody of all Cultural Heritage Material**

Contingency measures are provided in Appendix 1 for the appropriate curation and custody of Aboriginal cultural heritage material that may be found during works.

**Recommendation 7. Discovery of Human Skeletal remains**

Contingency measures are provided in Appendix 1 that will enable human remains to be detected at an early stage, and to allow the legal requirements for such discoveries to be properly fulfilled.
Disclaimer

This report provides expert opinion on the requirements for heritage management in the Study Area. It is authored by qualified heritage professionals with considerable experience working with heritage legislation, but who are not legal practitioners. The client is advised to seek qualified legal advice prior to acting on the recommendations contained in this report.
9. Bibliography

Azzure Investment Group vs Mornington Peninsula SC, 1600 (VCAT August 14, 2009).


Appendices
Appendix 1: Mandatory measures if Aboriginal Cultural Heritage is identified during works.

Management of Aboriginal Cultural Heritage Identified During Works

If Aboriginal places or objects are identified during work, these steps must be followed:

- The item/s must be left in place where they were discovered.
- The person who identified the item/s will immediately notify the person in charge of the activity.
- The person in charge of the activity must then suspend any works at and within 5 m of the discovery. The discovery must be protected via the installation of a suitable barrier and the material to remain in situ.
- Works may continue outside of the 5 m barrier.
- The person in charge of works must notify a Cultural Heritage Advisor (CHA), who will advise the Secretary (OAAV) of the find within 24 hours of the discovery.
- The CHA must notify the RAP(s) or other agreed Aboriginal stakeholder(s) within 24 hours of the discovery and invite RAP(s) or other agreed Aboriginal stakeholder(s) to inspect the find.
- Within 24 hours of notification, a CHA shall attend the site to evaluate the find and advise on possible management strategies.
- RAP(s) or other agreed Aboriginal stakeholder(s) must be permitted to inspect the site within 24 hours of notification.
- Within a period not exceeding three (3) working days the client, in consultation with the CHA and RAPs or other agreed Aboriginal stakeholder, shall, if necessary, apply for a Cultural Heritage Permit (CHP) in accordance with Section 36 of the Aboriginal Heritage Act 2006.
- If a CHP application is lodged, works may only recommence following the issue of a CHP and compliance with any conditions including:
  - When the appropriate protective measures have been taken.
  - Where the relevant Aboriginal cultural heritage records have been updated and/or completed.

Custody and Management of Aboriginal Cultural Heritage Recovered

Any Aboriginal cultural heritage recovered or salvaged from the activity area remains the property of the RAP(s) or other agreed Aboriginal stakeholder(s). It is the responsibility of the CHA to ensure such materials are appropriately collected and managed.
Management in the event of Discovery of Human Remains

The following steps must be taken if any suspected human remains are found in the activity area:

**Discovery:**
- If suspected human remains are discovered, all activity in the vicinity must **cease immediately** to ensure minimal damage is caused to the remains; and,
- The remains must be left in place, and **protected** from harm or damage.

**Notification:**
- Once suspected human skeletal remains have been found, the Coroner's Office and the Victoria Police must be notified immediately;
- If there is reasonable grounds to believe that the remains could be Aboriginal, the DSE Emergency Coordination Centre must be immediately notified on 1300 888 544; and
- All details of the location and nature of the human remains must be provided to the relevant authorities.
- If it is confirmed that these are Aboriginal skeletal remains, the person in charge of the activity must report the existence of the human remains to the Secretary, Department of Victorian Communities.

**Impact Minimisation or Salvage:**
- As determined by OAAV, an appropriate strategy to recover or minimise damage to the remains as determined must be implemented.
Appendix 2: VCAT Precedent and Evidentiary Standards

The Office of Aboriginal Affairs Victoria has issued an advisory Practice Note regarding Significant Ground Disturbance (AAV 2009). This note is based on a number of recent VCAT ‘red dot decisions’ which have clarified the circumstances when a CHMP is required. In particular these VCAT decisions have established the modes of evidence and levels of investigation and proof required by a planning decision maker, to determine whether significant ground disturbance has occurred. It is of benefit to refer directly to the full text of these decisions rather than to the précis of them contained in the Practice Note (AAV 2009).

The Mainstay decision (2009 VCAT 145) specifically provides a hierarchy of acceptable modes of evidence, and the level of proof required to be adduced from them. An extract of the Mainstay Decision (2009) is provided below:

Many parts of the state are not areas of cultural heritage sensitivity, and many activities are exempt requiring a CHMP. Use should be made of the AAV on-line ‘Aboriginal heritage planning tool’ to determine if a CHMP is required;

It is the fact of significant ground disturbance that creates an exception under the Regulations, and determines if a CHMP is not required. The actual likelihood of Aboriginal heritage existing in the area is irrelevant to this determination;

The timing of the significant ground disturbance is irrelevant. It may have occurred many years ago in the early history of European settlement in the state;

If only part of the land has been subject to past significant ground disturbance, and the remaining part is still in an area of cultural heritage sensitivity, a CHMP will still be required for the whole development activity;

The burden of proving that the land has been the subject of significant ground disturbance rests with the applicant. The planning decision maker (and, on review, the Tribunal) must feel an actual persuasion of the existence of that fact to its reasonable satisfaction. This should not be derived or produced by inexact proofs or indirect inferences, and little weight should be given to a mere assertion by an applicant or landowner;

In assessing whether significant ground disturbance has occurred, there are four levels of inquiry that might commonly arise, and the assessment should be dealt with at the lowest applicable level. These levels are:

(1) common knowledge,

(2) publicly available records,

(3) further information from the applicant, and

(4) expert advice or opinion.

If the decision maker is not persuaded by the applicant that there has been significant ground disturbance, the ‘default’ position is that a CHMP is required. This accords with the purpose and intent of the Aboriginal Heritage Act 2006;

‘Significant ground disturbance’ is defined in the Regulations. The disturbance must have been caused by machinery in the course of grading, excavating, digging, dredging or deep ripping. Ploughing other than deep ripping is expressly excluded. ‘Deep ripping’ is also a defined term that requires the use of a ripper or subsoil cultivation tool to a depth of 60 cms or more. By reference to these definitions, past ground disturbance caused by conventional ploughing (such as by a disc
plough or a rotary hoe) does not constitute significant ground disturbance. Both the depth of ploughing and the type of machinery used are relevant to whether deep ripping (as defined) has occurred.

The Mainstay decision (2009 VCAT 145) therefore establishes that the onus of proof of significant ground disturbance rests on the applicant. It defines the modes of acceptable evidence, and the need to establish such disturbance through direct reliance on evidence, to a level of reasonable satisfaction. It also reinforces explicitly that the exception from undertaking a CHMP is triggered purely by legislative criteria such as significant ground disturbance, and not by the potential absence or presence of archaeological material.

The Azzure decision is particularly relevant to the criteria of determining significant ground disturbance on small urban or suburban lots. In the Azzure decision, the Tribunal accepted that in the absence of ‘smoking gun’ evidence (i.e. proof beyond doubt) that firmly establishes significant ground disturbance as defined in Regulation 4 (i.e. disturbance of topsoil by machinery), evidence for significant ground disturbance can still be established to a sufficient level from comparative and contextual information. Such information might include:

- the urban context; the timing of subdivision;
- the shape, size, topography and configuration of lots;
- the actual development of dwellings and outbuildings and pattern of use over time;
- the provision of underground drainage and services;
- the style and configuration of the house and garden;
- and the lack of remnant vegetation.

The following statement from the Azzure decision (2009 VCAT 1600) is reproduced here in verbatim:

The comparative and contextual information must still reasonably satisfy the decision maker that the relevant land has been disturbed in the past by machinery in the course of grading, excavating, digging, dredging or deep ripping (other than ploughing) – i.e. the definition of the AH Regulations must still be met. However, in the absence of a single item of proof, the contextual approach may assist in achieving this level of satisfaction though a reasonable inquiry and examination of a range of relevant information (none of which necessarily conclusive itself) and ‘joining the dots’ to reach a common sense conclusion from the available information....The standard of proof is on the ‘balance of probabilities’ – not proof beyond doubt.

The Azzure Decision thus provides far clearer parameters for establishing the presence of significant ground disturbance through the combination of a number of contextual or indirectly indicative pieces of evidence which combine to establish that there exists better than 50% probability of significant ground disturbance having occurred. The Azzure Decision (2009) is therefore clear that for instance, where it is known that the methods of subdivision, preparation and development of residential blocks in an area, had historically characteristically taken place in a manner that entailed mechanical disturbance to the ground surface consistent with the definition of significant ground disturbance – then such significant ground disturbance may be contextually argued to be present in any similarly developed block.