

Reply by WDA

- 1 This submission is a brief reply to the written submission of the Melbourne City Council (MCC). We refer to paragraph numbers in that submission.
- 2 Broadly speaking, there does not seem to be much dispute about the applicable principles of law. However, care should be taken in relying on criminal and disciplinary cases, such as *Brazel* (all of which concern direct personal interests in avoiding punishment and in personal safety) to justify the provision of PII material in a civil context.
- 3 It is not sufficient to demonstrate that a matter may be “relevant” to engage the committee’s power to require the production of documents. In an enquiry such as the present, the range of “relevant” matters will be extremely wide and millions of documents could pass the test of being relevant. As the Court of Appeal said in *Rajendran v Tonkin* [2004] VSCA 43 at [20]:

Where there are a wide range of considerations which may be relevant, in the sense that a decision maker is entitled to take them into account, it does not follow that the decision maker errs in law if he or she does not take a particular consideration into account. In many fields of administrative and judicial decision making the range of considerations which are potentially relevant is so broad that decision making would be impossible if every possible factor, which might bear upon the question, was required to be considered as if completing some gigantic check list.¹

- 4 At 2.4, the MCC asserts that the ‘reliability of the model’ is a ‘central issue’ in the case. Although the reliability of the model is obviously relevant, it is significant that:
 - The VLC model is a model, not a precise projection of future events.
 - It is common ground that any model, including the Zenith model, has limitations and can only provide an approximate guide to future traffic volumes.
 - Mr Keys and Mr Veitch agreed that the Zenith model was a suitable model to evaluate the project.
 - None of the other traffic experts have expressed a different view.
 - Nothing in any of the expert evidence produced by any party identifies any of the figures produced by the modelling as significantly implausible.

¹ Town planning decisions are a good example. See *Sweetvale Pty Ltd v Denton Corker Marshall Pty Ltd* [2004] VCAT 38 at [40] and *Hunnam v Evans* [2003] VSC 284 at [22].

- In fact, VicRoads has expressed support for the use of the VLC model and stated that that the forecasts generated appear reasonable.
 - Insofar as the Review of Forecasting Methodologies provides some quantification of the difference in outcomes between the different modelling methods, the scale of those differences is not such as to materially affect the project's environmental effects.
 - Indeed, on the basis of the material produced to date, the use of a loop through model would actually produce *lower* estimates of traffic volumes and correspondingly lower predictions of other impacts: whether traffic impacts, noise impacts or air impacts.
- 5 At 3.19, the MCC asserts that if a document is published to the world, then immunity is lost. None of the documents over which PII has been claimed has been published to the world.
- 6 At 3.33, the MCC asserts that it will 'normally' be necessary to inspect documents over which PII is claimed. No authority is identified for this proposition and it is inconsistent with the principles stated in *Matthews (No. 11)* at [24](l) and (m).
- 7 At 4, the MCC makes various complaints are made about the evidence of Mr Smith. If these matters are considered concerning (which we contest), the WDA should (in accordance with *Kamasae (No.3)* at [23]) be allowed to put on further evidence.
- 8 The extract of our submission at 5.3 is partial and misleading. The evidence and submissions make clear that the Business Case was to go to Cabinet and that the Allard reviews were intended to inform the Business Case. Document which inform a submission to Cabinet are Cabinet Documents for the purposes of PII. Again, this is consistent with *Kamasae (No. 3)* at [9](c).
- 9 At 5.12.1, the MCC asserts that any denial of access to the Allard documents is a denial of procedural fairness. No authority is provided. This is inconsistent with the judgments in *Gypsy Jokers*.
- 10 In relation to the issue of disclosure:
- First, the actual documents have not been disclosed at any time. Only the gist of the Allard Review has been provided, sufficient for the committee to understand the nature of the criticism and the VLC response to it.
 - Second, the provision of the gist of the peer review and VLC's response is consistent with case law (such as *Chief Commissioner of Police v Nikolic* [2016] VSCA 248 and *Jaffarie v Director General of Security* [2014] FCAFC 102) which has recognised that it may be appropriate to give a party 'the gist' of confidential information in order to allow them to make meaningful submissions without

disclosing the actual sensitive information. The consequence of Mr Veitch's evidence was that he was able to be cross-examined regarding the differences between the single distribution and loop through models and the Committee now has the benefit of that evidence.

Stuart Morris

Rupert Watters

1 September 2017