Introduction

1. These submissions are made on behalf of Banyule, Boroondara and Whitehorse City Councils ("the Councils" unless one or other Council is referred to specifically).

2. The Councils adopt the submissions made on 25 July 2019.

3. The intention of the Councils was to be constructive from the outset, and it remains their intention. They have appointed independent experts to contribute to the TRG process, and met regularly with representatives of NELP.

4. The Councils have adopted a pragmatic attitude to the question of whether this is the right corridor. They understand that the Government has, at least for the moment, come to the conclusion that this is the preferred corridor.

5. The Councils do not accept that this road project should proceed in this corridor at all costs.

   (a) A large part of the alignment of this corridor is highly significant - environmentally, culturally and aesthetically – it is and has been
important to indigenous communities for thousands of years; it is an area the subject the works of great Australian painters, it contains regionally and internationally significant flora and fauna, and a lot of people live here;

(b) This alignment would not come to fruition as an above ground freeway;

(c) NELP deserves no congratulations for not proposing an above ground freeway through this area;

(d) If an above ground freeway through this area was the only option, we would be looking at another corridor;

(e) Underground is the only way this project can proceed in this corridor – and one live question is – can it safely proceed?

6. Whether the project proceeds depends upon whether it can be said that the significant environmental effects have been adequately dealt with.

7. The construction of this road is not a fait accompli. There was no environmental assessment of this corridor or this project as part of the Business Case. All government decisions properly understood as supporting this project in this corridor, have an important qualification – all of that support is subject to the project being capable of achieving an acceptable environmental outcome.

8. It has always been for NELP to demonstrate that it can.

9. In other words, it has always been the responsibility of NELP to demonstrate that this project in this location, can achieve the necessary environmental performance required to proceed.
10. The directions given by the Minister oblige NELP to prepare an EES which is adequate to assess the significant environmental impacts.

11. The IAC’s terms of reference require it to determine whether the project is capable of achieving an acceptable environmental outcome.

12. Discovering whether there are any environmental show-stoppers is the whole point of this process.

13. Do we need this freeway alignment more than we need the Bolin Bolin Billabong, or the riparian environment of the Banyule Swamp? No.

14. Before anybody says “yes” to this project they have to have a reasonable understanding of what its effects could be, they have to know what the worst case scenario is, and whether they know enough about how to manage to avoid that scenario to exclude that possibility.

15. At the very least, that requires an identification of the potential environmental impacts, and the gathering of evidence in order to assess the degree of impact.

16. Procedurally – the whole process demands that when the EES is published there is within it:

   (a) A proper assessment of the environmental impacts; and

   (b) Proper data upon which to base that assessment.

17. The appointment of this Inquiry is incredibly important.

18. The IAC’s job in this process is to demand accountability. Governments who want to pass through this process have to know that, at some point
along the chain, they will face an independent reviewer, who will test whether or not they have done their job properly.

19. Why have a hearing?

20. The purpose of the hearing, at its most fundamental – at its core – is to assist the Inquiry in undertaking its task of scrutinizing the project.

21. How is that achieved?

22. It’s achieved by the Inquiry having the benefit of a proper contradictor.

23. In this case the IAC unlikely to have that benefit.

24. In this case the Councils (Banyule, Boroondara and Whitehorse) have taken the unusual step of joining together. While Manningham is separately represented, on most issues they are aligned, and in this case many expert witnesses are shared.

25. They have gone to the expense of engaging numerous expert witnesses. They have engaged the services of two law firms, and four counsel. By any measure, it is a not a team which could be described as “under-resourced”.

26. This is day 2 of the hearing. The Councils are meant to be opening their case, and on a number of key factual issues we still don’t know what that case will be.

27. Expert evidence was filed in these proceedings on 15 July 2019 – 11 days ago.
28. A total of 53 expert witness statements were filed, all of which traverse highly technical material. Most of those witness statements interrelate with the subject matter of other experts in some way or another.

29. On 17 July 2019, two days after the expert reports were filed, the proponent filed 28 “Technical Notes” in response to further information requested by the IAC. All of the information requested by the IAC was relevant to the preparation of evidence. The IAC made orders permitting that material to be filed after evidence was circulated.

30. There were 28 Technical Notes filed on that day, though 29 were foreshadowed.

31. Technical Note 26 turned up late on Friday 19 July 2019.

32. Something needs to be said about Technical Note 26.

33. One of the things the IAC is asked to do is make a about whether the project is capable of achieving acceptable environmental outcomes.

34. The Councils take the view that if the construction or use of the project could have any material impact on the existing riparian condition of key waterways such as the Bolin Bolin Billabong or the Banyule Swamp or its tributaries then, simply, the project is in the wrong spot.

35. Groundwater behavior in this area has been identified, from the very beginning of the process, as a matter of critical importance to a whole range of matters – not just hydrology and flooding, but all aspects ecology.

36. The EES identifies groundwater as an area that needs to be investigated.
37. The Council’s case is that it doesn’t actually conduct a proper level of investigation to provide an adequate level of confidence relative to the importance of the resources involved.

38. The Councils and those involved in the TRG have sought information from NELP about the groundwater from the outset – because it is relevant to everything.

39. The Councils reiterated their request in written correspondence, leading up to the Directions Hearing.

40. The Councils were told at the Directions Hearing that the Councils would get the information that they sought by 26 June 2019.

41. Nothing of any substance about groundwater came on that day.

42. In an apparent show of magnanimity, the Authority invited all of our witnesses to meet with the experts of the Authority prior to the preparation of expert witness statements to answer any questions we might have.

43. A number of our witnesses attended those meetings.

44. All of our witnesses asked whether there was any additional information that was not in the EES that they should have to consider before preparing their report. No further information was provided.

45. When evidence was published, the Proponent’s groundwater evidence includes reference to a further “factual report”. The factual report, upon which the Proponent’s evidence was in part based, was clearly available to the Proponent’s witnesses in the preparation of their reports.
46. The “factual report” was not provided with the evidence. It was provided 5 days later. The excuse given for the delay is that the Authority was redacting the names of people in the document.

47. The “factual report” is over 600 pages long.

48. It comprises bore logging data that goes back more than a year.

49. The most recent results conclude in about June 2019.

50. That this material was not provided at any point sooner than 19 July 2019 is breathtaking.

51. We don’t know whether this data answers the concerns that the Councils have had in relation to the groundwater issue.

52. A member of the public might be left to wonder….why would this data, as extensive as it is, that NELP has been collecting for so long, on such a critical issue, be hidden from public view for so long? What are we missing?

53. On any view, the existence of this data, and the data itself was highly relevant to the preparation of the EES.

54. People should have been able to examine at length and in detail, the adequacy of the testing, the locations, the results – as part of the preparation of their submissions to the EES itself.

55. At this point, the Councils don’t really know what their position on the evidence at the moment. There are community groups whose principal interest is in the health and vitality of these significant waterways – what hope have they got.
56. On top of all of that, yesterday we received the IAC’s subject matter expert’s report of 57 pages.

57. According to the current schedule, we are meant to be cross examining groundwater experts next Friday. The Conclave is happening today. At some point between now and next Friday we are meant to have conferred with our witness after the conclave report has been produced and then determine what the impact of that report is on the way we handle not only the Proponent’s groundwater evidence, but also all of the related area experts.

58. That process is meant to be occurring while we are engaged in the process of cross-examining the key traffic witnesses for the proponent.

59. We are unsure whether we will be ready to question these witnesses at that time. It is highly likely that at some point we will need to seek leave to recall witnesses to be cross-examined.

60. The traffic and transport modelling is attended by similar problems.

61. Because of the time constraints, Mr Kiriakidis has not conducted a conclave – he’s conducted individual interviews with traffic witnesses on the premise that each of the witnesses mostly raise discrete issues.

62. We don’t have those reports and we are unlikely to have them before sometime next week.

63. Rather than save time, those reports may create the need for the Councils to cross-examine witnesses for parties other than the Authority.
We understand why Mr Kiriakidis has approached it in this way – there isn’t enough time to do it properly before he gets in the witness box next week.

This is not orderly and proper planning.

Parties to a dual occupancy case in Moonee Ponds get more time to consider much less complex material in preparation for a hearing than is occurring in this case.

This cannot be the level of scrutiny that is intended by this process.

The Minister has imposed no time limit on the completion of the hearing.

Is this what passes for “rigourous” or “best practice” environmental assessment in this State?

This is the biggest infrastructure project in the State.

There are more to come. What stands for adequate (let alone Best Practice) environmental assessment of projects of this scale in this case will be the measure for other cases in the future.

What this IAC accepts as an appropriate standard will, unless challenged successfully elsewhere, be regarded as the standard going forward.

A “can do” attitude is appropriate in many aspects of life – but in this context it would be dangerously wrong to simply try and get on with it, muddling through as best as possible, not minding too much about what
would be regarded as gross denials of procedural fairness in any other forum.

74. What’s required here is a proper integrated assessment of all of the different moving parts. It’s about understanding how each of the different parts of the project interrelate. That can’t be done if important information is missing, or turns up after it is too late to consider or action.

75. The process which has been adopted here, and the position in which we now find ourselves, is no substitute for the formal planning scheme amendment process.

76. The published EES has been significantly augmented by new material since the completion of the public notice and submission phase. In the ordinary course of a planning scheme amendment, re-notification would be at the forefront of a Panel’s thinking. Extensive and potentially game changing evidence has been filed within days of the start of the hearing, ordinarily a Panel would be querying why that is the case. Non-government proponents would be called to task about late service highly technical material, and at the forefront of the Panel’s mind would be the impact of allowing the case to proceed upon unrepresented parties who often don’t know enough to complain.

77. The parties appearing before you are hopelessly hamstrung by the situation they find themselves in.

78. It is not possible for anyone to describe the process to date as fair or rigorous – when the volume of material involved demands time and consideration, and there has not been an adequate amount of both.
79. It is highly unlikely that at the conclusion of this case anybody will be able to say that the IAC had the benefit of a proper contradictor.

80. As things presently stand, there is considerable doubt as to whether the Minister will be able to say that this process is any basis for him exercising his powers under section 20(4).

81. The Councils will consider their position over the weekend and advise the IAC on Monday morning as to how they intend to proceed.

26 July 2019

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