

IN THE MATTER OF
AMENDMENT GC81 TO THE
MELBOURNE AND PORT PHILLIP
PLANNING SCHEMES

SUBMISSION
ON TABLING OF INTERNAL DOCUMENT

Context

1. The Fishermans Bend Planning Review Panel (**Review Panel**) has requested the Minister for Planning (**Minister**) provide written submissions detailing the basis on which the Minister opposes publicly tabling two Department of Environment, Land, Water and Planning (**DELWP**) internal documents as called for by Mr Chris Canavan QC, counsel for various landowner submitters.
2. The subject documents comprise two emails. The first email was sent by a DELWP staff member to an internal email address - 'Planning Group - All staff' at 3.47pm on 15 March 2018 (**the first email**).
3. The staff member did not intend to send the email to this address, but to a much smaller sub-group of staff who report to the staff member. The email address includes the individual email addresses of 450 individual DELWP employees. Unbeknownst to the staff member who sent the email, these email addresses included two members of the Review Panel, being:
 - a) the Chair, Ms Kathryn Mitchell; and
 - b) the Deputy Chair, Mr Lester Townsend.
4. As the internal email address was not expanded in the first email, it was not immediately apparent to the staff member sending it that the recipients of the email included the two members of the Review Panel.
5. The staff member did not intend to correspond directly with the Review Panel about the matter outside of the Panel hearing.
6. When the staff member was made aware the recipients of the email included the Chair and Deputy Chair of the Review Panel, the staff member

immediately retracted the email advising all staff it was sent in error and requesting it be deleted. The retraction email was sent at 5.04pm (**the second email**). That is within 2 hours of the original email being sent.

7. The Chair of the Review Panel subsequently disclosed receipt of the emails to all parties at the commencement of the hearing on 16 March 2018.
8. The Chair advised the parties that she saw the first email in the afternoon break in the hearing on 15 March 2018 and at that time, she read its contents but not the attachments.
9. The Chair further advised the parties that when she returned to her office at the end of the day on 15 March and tried to open the email so that she could forward it to counsel assisting, she was unable to do so.
10. The Chair has advised the parties that neither she nor the Deputy Chair read the attachments to the first email.
11. On 16 March 2018, counsel for the Minister invited members of counsel attending the hearing to view a hard copy of the emails on a confidential basis. Mr Canavan was among the various members of counsel who accepted this offer.
12. After reflecting on the matter, Mr Canavan now calls for the emails to be tabled.
13. The Minister's position is that the emails are subject to legal professional privilege and therefore, should not be required to be tabled.

The power to require production

14. The Minister accepts the Review Panel is empowered in its capacity as an advisory committee, to require production of documents under sections 152(2) and 161(2) of the *Planning and Environment Act 1987 (P&E Act)*.
15. The combined effect of these provisions is that the Review Panel has the discretion to require a body or person to produce any documents relating to any matter being considered by the Review Panel under the P&E Act which it 'reasonably requires'.
16. At the outset, it could not fairly be said the Review Panel reasonably requires the emails to be tabled to perform its tasks as set out in the Terms of

Reference. Nor could it be said the emails are required to be tabled to afford natural justice to the other parties to the proceeding in circumstances where counsel for other parties have been invited to view the emails, albeit on a confidential basis. In the Minister's submission, it is not necessary for the emails to be tabled for Mr Canavan and other members of counsel to advise their clients about the significance of the emails and any legal consequences they consider might flow from them.

17. In any event, it cannot reasonably compel the Minister to produce or table the emails as they are subject to legal professional privilege.
18. The status of the emails as documents protected by legal professional privilege is clearly relevant to the exercise of the Review Panel's discretion in deciding if it ought to require the emails to be produced or tabled.
19. While the Review Panel is not bound by the rules of evidence, it would be unreasonable to require the emails to be tabled in circumstances where they are subject to legal professional privilege. Legal professional privilege has been recognised at common law for hundreds of years.
20. Further, while the *Evidence Act 2008* is not strictly applicable to the Review Panel powers in this hearing, its provisions are instructive to the extent it codifies the common law principles relating to legal professional privilege.
21. Section 119 of the Act provides:

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or*
- b) the contents of a confidential document (whether delivered or not) that was prepared—*

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

22. In the Minister's submission, both the first and second email are protected by legal professional privilege because their disclosure would result in disclosure of a confidential document, namely an email, for the dominant purpose of the Minister being provided with professional legal services relating to an the Review Panel hearing to which the Minister is a party.
23. Consistent with section 122(5) of the *Evidence Act 2008*, the Minister is not taken to have waived legal professional privilege merely because the emails have been disclosed by a staff member of DELWP in the course of making a confidential (and inadvertent) communication to all DELWP planning staff.
24. The email from a DELWP staff member to an internal email address - 'Planning Group - All staff' was a 'confidential communication' within the meaning of the Evidence Act.¹
25. In the Minister's submission, the email was a 'confidential communication' because it was made in such circumstances that, when it was made - the person who made it and the persons to whom it was made, were all under an express obligation not to disclose its contents.
26. Specifically, all email recipients were bound by the Code of Conduct for Victorian Public Sector Employees and the confidentiality obligation therein pertaining to official information.²
27. In the circumstances, it is appropriate for the Review Panel to resist any request for the DELWP emails to be tabled as public documents.
28. If despite these submissions, the Review Panel considers it ought to require the emails to be produced or tabled, the Minister respectfully requests the direction be made in the following terms:
- The Minister for Planning is directed to produce a copy of the following emails:*
- a) *#insert description of original email*
 - b) *#insert description of retraction email*

¹ See section 117 of the *Evidence Act*.

² See section 3.4 of the Code of Conduct for Victorian Public Sector Employees, made under the *Public Administration Act 2004*.

on a confidential basis to be retained on the file of the Review Panel and recorded as document number # ' DELWP confidential document ' in the Review Panel list of tabled documents.

29. In the Minister's submission, the Review Panel is empowered to regulate its own proceedings, subject of course, to the rules of natural justice and to the Review Panel's Terms of Reference.

30. Clause 32 in the Review Panel's Terms of Reference expressly facilitates the provision of documents to the Review Panel 'in camera'. It states:

32. Any written submissions or other supporting documentation provided to the Review Panel must be available for public inspection until the submission of its report, unless the Review Panel specifically directs that the material is to remain 'in camera'.

[Emphasis added]

31. The Minister observes the same approach was adopted by the Inquiry and Advisory Committee in the West Gate Tunnel EES hearing in respect of a document tabled by VicRoads on a confidential basis. That document was identified as document number 69 in the list of tabled documents in the hearing, even though it was not publicly accessible.

Susan Brennan

Isaacs Chambers

Instructed by Harwood Andrews

21March 2018