Yarra’s Edge Class Action Committee (YCAC) Submission to Fisherman’s Bend Review Panel 15th May 2018

My name’s Catherine Dawson and I am here today representing the interests of over 3000 apartment owners, business owners, berth owners and yacht owners who have various assets down at Yarra’s Edge. YCAC, or Yarra’s Edge Class Action Committee was formed to represent those parties in an opt-out class action. YCAC is the applicant in the proceedings with the class members being the apartment owners, business and berth owners at Yarra’s Edge. It is important to note that all class members will be bound by the outcome of the proceedings and all will benefit from compensation unless they chose to ‘opt out’. We are effectively representing all of those parties and seeking compensation for same unless they make an application to the court to negate that claim.

Based on our legal advice, sought over the last 5 years we will seek to bring damages in the amount of $300,000 million dollars, the largest class action in Victoria’s history outside of the bush fires for the depreciation in the apartment asset values, business values, and berth owners when the proposed fixed tram bridge is built taking away the amenity of Yarra’s Edge Marina.

For a long time, it has been incorrectly perceived that the affected parties of the proposed infrastructure at Yarra’s Edge is just 40-50 rich yacht owners. This has been widely reported in the Media, in government presentations and smaller gatherings of property developers, politicians and financiers that our firm and others have become aware of. In fact, the proposed fixed tram bridge threatens the life of the Marina, the vitality of the businesses along Yarra’s Edge and the value of the property prices of all apartments that have currently enjoy views over the Marina.

I have worked in the finance industry for over 20 years in investments and in more recent years become more specialised in the Melbourne property market after having international property buying experience.

Along with finance I studied business law and have had extensive experience in managing legal agreements and contracts for major financial institutions. This experience put’s me in a good position to manage the stakeholders and lawyers on behalf of YCAC.
I have for some time been engaged on behalf of the Yarra's Edge Class Action Committee with a number of legal firms that are seeking to represent our group in the event that the fixed tram bridge is built.

The proposed bridge will cut off water access to the entrance of the YE Marina for all vessels other than those which rise less than three metres above the water level. At present, there are some 149 berths in use at YE Marina with the majority having masts well exceeding the height of the proposed bridge. In essence, the proposal to construct the Collins Street Bridge will result in the YE Marina being inaccessible to all but the smallest of boats which are not the type of boat presently moored in the berths at the YE Marina. This proposed tram bridge will have the effect of rendering the Marina useless to most vessels and therefore it will no longer be viable as a going entity.

Our group first sort advice on this issue back in 2013 and have had ongoing legal advice on this issue. These are some of the more notable points to come from that advice

1. The Yarra River at the point where the YE Marina is situate is a navigable river which is in effect a public highway navigable by all members of the public who seek to exercise the right of navigation for a reasonable purpose and in a reasonable way. The right of navigation on tidal waters such as the Yarra River is simply a right of way for all of the public for all purposes of navigation, trade or intercourse. The right of navigation extends *prima facie* over the whole space over which the tide flows and is not suspended when the tide is out. The right carries with it all rights necessary for the full use and enjoyment of the rights of convenient passage, such as the rights to pass and to ground anchor, to remain for a reasonable time for the purposes of loading and unloading or completing repairs; or of waiting to the wind or weather, or the season permits a vessel to leave.¹

¹ Denaby & Cadeby Main Collieries Ltd v Anson [1911] 1 KB 171.
2. The river bed of the Yarra River is vested in the Crown. The ownership by the Crown is for the benefit of the public generally. The Crown cannot derogate from or interfere with the exercise by the public of the right of navigation which by law belongs to members of the public.\(^2\)

3. In our view, members of the public who own boats who seek to use the navigable river to gain access to the berths which they have leased from the Melbourne City Council have a *prima facie* right not to have the Yarra River interfered with or obstructed in a substantial or material manner which affects their full use and enjoyment of their right of access to the YE Marina. The extent of the interference with the right of navigation must be material rather than trivial. It has also been said that “public benefit” may afford a justification for interfering with a right of navigation. However, in our view the question of “public benefit” is but one matter to be weighed in the scale when determining whether or not an obstruction to navigation is substantial and material. It follows that, if it be held that an obstruction is substantial and material, it matters not that some public benefit may flow from its construction.\(^3\)

4. The Yarra River at the point where the YE Marina is situate is a navigable river which is in effect a public highway, effectively the ‘People’s River’ navigable by all members of the public who seek to exercise the right of navigation for a reasonable purpose and in a reasonable way. The right of navigation on tidal waters such as the Yarra River is simply a right of way for all of the public for all purposes of navigation, trade or intercourse. The right of navigation extends *prima facie* over the whole space over which the tide flows and is not suspended when the tide is out. The right carries

\(^2\) *Gann v Free Fishers of Whitstable* (1865) 11 HL CAS 192.

\(^3\) *York Brothers (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391 at 397-398.
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derogate from or interfere with the exercise by the public of the right of
navigation which by law belongs to members of the public.\(^5\)

6. Members of the public who own boats who seek to use the navigable river
to gain access to the berths which they have leased from the Melbourne
City Council have a *prima facie* right not to have the Yarra River interfered
with or obstructed in a substantial or material manner which affects their
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the question of “public benefit” is but one matter to be weighed in the scale
when determining whether or not an obstruction to navigation is
substantial and material. It follows that, if it be held that an obstruction is
substantial and material, it matters not that some public benefit may flow
from its construction.\(^6\)

7. The proposed Bridge is, *prima facie*, such a substantial and significant
obstruction that at common law the fact that there may be some public

\(^4\) *Denaby & Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171.

\(^5\) *Gann v Free Fishers of Whitstable* (1865) 11 HL CAS 192.

\(^6\) *York Brothers (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391 at 397-398.
benefit to flow from the construction of the bridge would not outweigh the interference with the navigable waterway and the public’s right to access for the purposes of navigation, trade or intercourse.

8. It follows that if the Tram Bridge built in the manner proposed would constitute a public nuisance and provide those affected with a good cause of action in public nuisance to obtain an injunction to restrain its construction.

9. On the basis of our present instructions, we are of the opinion that boat owners who lease berths in the YE Marina would have claims in public nuisance against the authority constructing the Yarra’s Edge Tram Bridge. As those claims all arise out of the same, similar or related circumstances namely the proposed construction of the YE Tram Bridge excluding access to the boat owners to their berths at YE Marina those persons could commence a Group Proceeding (class action) under Part 4A of the Supreme Court Act 1986 seeking an injunction to restrain the building of the Collins Street Bridge and damages.

10. A further group who will have claims against the authority which proposes to construct the Yarra’s Edge are those apartment owners in the towers adjacent to the YE Marina who purchased in order to have access to their boats which are berthed in the YE Marina. It appears to us, that apartment owners who purchased their apartments in order to have access to their boats at YE Marina would also have claims arising out of the same, similar or related circumstances which would found a Group Proceeding in public nuisance if the proposed Tram Bridge was to preclude access to the Yarra River as a waterway and exclude access to boats owned by apartment owners seeking to berth at the YE Marina.
11. There will also be a third group who will have a cause of action against the authority proposing to construct the YE Tram Bridge. That third group are apartment owners who will be subjected to traffic noise in particular noisy trams using the YE Tram Bridge which is so very proximate to the windows and verandas of some of the apartments in the towers.

12. There will also be a 4th group who will have a cause of action against the authority proposing to construct the YE Tram Bridge. That 4th group are the apartment owners who will experience depreciation of the value of their property on the construction of the YE Tram bridge and effectively the removal of the amenity of the Marina.

Another key point to mention is that the government has known for some time about this impending Class Action and the conservative figure of $300,000 million that will be brought against them and yet they have not followed through on costing viable alternatives.

A number of alternatives, including an opening tram bridge were investigated by the Port Philip council when this bridge was tabled some years ago and to our knowledge was costed at a figure well below this $300,000 million. This ‘opening bridge’ scenario, used widely in many countries around the world would elevate the issue for a class action. There was in fact a delegation made to Europe to investigate suitable viable options some years ago with very positive results concluding that this was indeed feasible. The cost of this was notably lower than $300,000 million dollars.

As well there have been a number of conversations and options lobbied by various parties, including a submerged tube under the Yarra that would also elevate this class action that have also not been followed up by the government regards a cost analysis.

This shows a clear negligence on the part of the government in being aware that a $300 million-dollar class action will be brought against them and yet they failing to look at alternatives that could save that large outlay of taxpayers money.
Our preference of course is that the planning body and the government seriously look at other alternatives to the fixed tram bridge at Yarra's edge so that this matter may not need to be brought.

In the event the government determines to proceed with building a fixed tram bridge at Yarra’s Edge. When the exact proposal for the construction of the bridge is known our group will commence proceedings in the Supreme Court on behalf of the 3,000 residents, business owner's and berth owners based on a cause of action in public nuisance against the authority proposing to construct the Bridge.