

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

INTRODUCTION

1. These submissions are made in support of the Minister's application for an adjournment of the start of Stage 1 of the Planning Review Panel's ('Panel') hearing in relation to proposed Amendment GC81 to the Melbourne and Port Phillip Planning Schemes ('the Amendment').
2. As outlined in the Minister's letter of 25 January 2018, the Minister seeks that:
 - (a) The commencement of Stage 1 of the Panel hearing be adjourned until 13 March 2018; and
 - (b) The Panel make directions giving effect to the timetable enclosed with that letter.
3. The Minister submits that:
 - (a) The adjournment should be granted as it is necessary to enable the Minister to properly prepare and present the case in relation to the Amendment;
 - (b) The timetable, which has been agreed to by Melbourne and Port Phillip Councils ('the Councils'), provides a suitable framework for the conduct of Stage 1 and avoids causing prejudice to the parties involved in that Stage of the hearing;
 - (c) The adjournment will, if granted, assist with the efficient conduct of the hearing; and
 - (d) The adjournment, if granted, will not prejudice the conduct of the Stage 2 hearing and will not materially affect the ability of landowners to conduct their cases as they choose, including conducting cross-examination in Stage 1.

ROLE OF REVIEW PANEL

4. The purpose of the Panel is to advise the Minister on the appropriateness of the Amendment. In order to fulfil this purpose effectively, the Panel will need to receive and consider relevant information, in the nature of submissions, evidence and other material, in a timely, orderly and efficient manner. An approach to the conduct of the hearing which ensures the Panel is properly informed, particularly in relation to content of the Amendment which is opposed, contested or misunderstood due to uncertainty, confusion or inadequate explanation, should be preferred over an approach which generates ad hoc responses, risks further uncertainty and does not make the best use of the Panel's and parties' time and resources. For this reason, the Minister has welcomed the Panel's Preliminary List of Key Issues so that he can provide further information about the matters which have been raised in a constructive and expeditious fashion.

PREJUDICE TO THE MINISTER AND COUNCILS

5. As an advisory committee under the *Planning and Environment Act*, the Panel is bound by the rules of procedural fairness,¹ including the hearing rule. The fundamental requirement of the hearing rule is that a party to a proceeding should be given an adequate opportunity to present its case.
6. At present, the Panel's Directions, made 28 December 2017, require the Minister to file his evidence on 12 February 2018. As set out in the Affidavit of Ms Morris, regrettably and unexpectedly, the Minister has been unable to retain expert witnesses to complete statements of evidence on the issues of strategic transport, open space and economic feasibility within the timeframes contemplated by the Panel's Directions. While the Minister has now been able to retain witnesses in those areas, none of those witnesses will be able to provide their evidence by 12 February.
7. The Minister acknowledges that, in its letter of 23 January, the Panel sought to address this concern by stating that it would allow the evidence in relation to strategic transport, open space and economic feasibility to be filed on 6 March ('the

¹ Section 161(1)(b), *Planning and Environment Act 1987*.

Proposed Directions’), but respectfully submits that this fails to address the prejudice that the Minister will suffer if the commencement of the case is not adjourned.

8. The prejudice that arises is that, under both the current and proposed directions, the Minister would be required to advance key parts of his case in support of the Amendment – including by filing important documents such as the Part A submission and the Response to Key Issues – in circumstances where the evidence – even in draft form – of several experts is not and will not be available. In the circumstances, the Minister will not be unable to effectively address issues relating to strategic transport, open space and economic feasibility in those documents.
9. The Proposed Directions also create the risk that the Councils might have to deliver their case before receiving evidence from three of the Minister’s witnesses which is unsatisfactory. While this could perhaps – to some extent – be addressed by the Councils calling witnesses in Stage 2, the Minister notes the Panel’s advice that the demand for time in Stage 2 already exceeds the available supply.
10. Further, while the fields of strategic transport, open space and economic feasibility are, on one view, separate and distinct from each other and the other areas on which the Minister proposes to lead evidence, the reality is that in an amendment of this size and complexity, all these issues are interrelated. For example, the proposed Floor Area Ratios for the precincts are influenced, directly or indirectly, by several factors, including the availability of public transport, the need to deliver public open space and the need to allow for sufficient economic returns to developers to facilitate urban renewal in Fishermans Bend.
11. To seek to address this, the Minister has prepared, in consultation with the Councils, an alternative timetable for Stage 1. This timetable would delay the date for the filing of Part A submissions and other key documents until 26 February. It is anticipated that the additional two weeks would enable the Minister to be in a position to address issues relating to strategic transport, open space and economic feasibility in those key documents, rather than ‘in the running’.
12. The proposed timetable also seeks to accommodate concerns expressed by the Councils as to the order of the Minister’s witnesses and the timing of their presentations.

13. In considering the Minister's adjournment request, it is submitted that the prejudice to the parties rather than punishment of a party for any misstep in its preparation for the hearing is the most important factor. In *The Warehouse Group (Australia) Pty Ltd v Bevendale Pty Ltd and Ors* (No 2) [2002] VSC 291, Balmford J, in considering an appeal against the refusal of the Victorian and Administrative Tribunal to grant an adjournment, held at paragraph 53:

Those extracts are echoed in the well-known passage from the judgment of Dawson, Gaudron and McHugh JJ in State of Queensland v JL Holdings Pty Ltd² which was cited by Ms Brennan in her written submissions to the Tribunal in support of the application for an adjournment. Their Honours said:

In our view, the matters referred to by the primary judge were insufficient to justify her Honour's refusal of the application by the applicants to amend their defence and nothing has been made to appear before us which would otherwise support that refusal. Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties.

While that passage does not relate directly to an application for an adjournment, it is equally apposite in that context.

14. It is to be noted that the availability of Counsel is not the basis on which the Minister's adjournment request is made. In *Saric v Tehan* [2011] VSCA 224, the Court of Appeal explained,

² (1997) 189 CLR 146 at 155.

*Notwithstanding that there are no hard and fast rules, it is well accepted that the non-availability of particular counsel cannot, of itself and without more, be a ground that would justify an alteration of the appeal date.*³

EFFICIENCY

15. The Minister submits that, insofar as an adjournment will enable him to present a more cogent case at the beginning of Stage 1 of the hearing, it is also likely to assist in the more efficient conduct of the hearing as a whole.
16. In the absence of an adjournment, it is likely that the Minister will have to seek accommodations from the Panel and will have to provide additional relevant information in a piecemeal way, rather being able to provide more comprehensive information in a timely and orderly fashion. This is particularly so in relation to the Response to Key Issues where responses to certain issues would have to be provided mid-way through the Minister's case.

NO PREJUDICE TO STAGE 2

17. The Minister considers that the proposed adjournment will not adversely affect the conduct of Stage 2 of the hearing or the presentation of submissions and evidence on behalf of developers during that stage. This is because, even if the adjournment is granted, the Minister will complete his case and call his evidence prior to the commencement of Stage 2. No change is proposed to the Directions affecting the conduct of Stage 2 cases (e.g. dates for filing evidence).
18. Further, given the absence of any previous timetable for the appearance of witnesses, the Minister submits that the rearrangement of Stage 1 should not materially prejudice any party who wishes to examine those witnesses.⁴

³ This principle has been expressed by the Deputy Chair of the Review Panel in relation to Whittlesea C41, 2007 in the following terms: "In general, availability of Counsel is not sufficient grounds to delay a hearing".

⁴ In this regard, the Minister notes the deposition of Ms Brezzi that she was unable retain suitable Senior Counsel for the whole of the February 2018 hearing dates in any case.

CONCLUSION

19. Given the circumstances of this case, in particular the absence of any irremediable prejudice to other parties, the benefit to the Panel of receiving the Minister's evidence prior to commencement of the Minister's submissions and the prejudice to the Minister if he is required to conduct his case in an incremental, piecemeal and incomplete fashion, it is submitted that considerations of fairness and efficient management of the hearing weigh strongly in favour of the granting the adjournment.
20. For the above reasons, the Minister respectfully submits that the adjournment sought should be granted in accordance with the timetable agreed between the Minister and the Councils.

Susan Brennan

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2 February 2018