

Transport Integration Act 2010 and “minimise”

Submission by WDA

- 1 This is a written submission by the WDA as to:
 - The operation of the *Transport Integration Act 2010* (“the TIA”) in relation to the West Gate Tunnel
 - The meaning of the word “minimise” where used in the TIA and in the performance requirements.

The Transport Integration Act - background

- 2 The WDA is a “transport body” under the TIA.¹
- 3 The WDA (as project proponent for the West Gate Tunnel) is also an “interface body” under the TIA.² So, too, will be the Minister for Planning in deciding whether to adopt and approve the planning scheme amendments that will facilitate the project. Although the Committee is not an interface body, the TIA is relevant as its report will need to take account of the obligations of the persons who will consider its report.
- 4 Section 24 of the TIA provides that a transport body must have regard to the transport system objectives and the decision making principles.
- 5 Section 25 of the TIA provides that an interface body must have regard to the transport system objectives, and the decision making principles, in making a decision (under any interface legislation) which is likely to have a significant impact on the transport system. A decision about the West Gate Tunnel is obviously a decision that is likely to have a significant impact on the transport system.
- 6 Section 26 of the TIA provides that a transport body or an interface body may determine the weight to give to each decision making principle.
- 7 Section 28 of the TIA provides that the transport system objectives and the decision making principles are not intended to create in any person any legal right or to give rise to any civil cause of action.

Submission - Transport Integration Act

- 8 The obligation to have regard to the transport system objectives and the decision making principles is an obligation cast on the WDA and the Minister for Planning.
- 9 The obligation on the WDA and the Minister for Planning is to have regard to the transport system objectives and the decision making principles. This

¹ Section 3 of the TIA provides that the Department (being the Department of Economic Development, Jobs, Transport and Resources) is a transport body as is the Secretary to the Department. WDA is an administrative office within the Department.

² Section 3 of the TIA.

means that these objectives and principles must be *considered*; it does not mean that the objectives and principles, or any particular objective or principle, must be *given determinative status*.³

- 10 Indeed, it is clear from s 26 of the TIA that both the WDA and the Minister may determine the *weight* to give to each decision making principle.
- 11 The transport system objectives extend to social and economic inclusion, economic prosperity and environmental sustainability. Moreover, there is an intention that the transport system provide for the effective integration of transport and land use and facilitate access to social and economic opportunities. These objectives extend to efficiency and coordination; as well as reliability, safety and health and wellbeing.
- 12 The nature of the transport system objectives is such that, in some instances, there will be a tension between different objectives. When this occurs, each of the objectives must be considered, but a judgment can be made as to which objective ought be accorded priority.
- 13 The decision making principles include principles relating to: integrated decision making; an assessment of all the economic, social and environmental costs and benefits taking into account externalities and value for money; the principle of equity; considering the transport user's perspective; the precautionary principle (as defined); stakeholder engagement and community participation; and transparency.
- 14 The nature of the decision making principles is such that, in some instances, there will be a tension between different principles. When this occurs, each of the various principles must be considered, but a judgment can be made as to which principle or principles ought be accorded priority.
- 15 It is also important to note that the obligation to consider the objectives and principles is cumulative with any other applicable obligation to consider matters (such as that imposed by s 12(2) of the Planning and Environment Act). Consideration of those matters may create further tensions which will then need to be resolved.
- 16 What this means is that it is inappropriate and irrelevant to grasp upon one transport system objective, or one decision making principle (or one part of such an objective or principle), and to *require* that that objective or principle be satisfied.

The word “minimise”

- 17 The word “minimise” (or the related word “minimising”) is used on 15 occasions in the TIA.⁴ The word is used on many occasions in the proposed performance requirements. Thus it is important that the Committee understand the meaning that ought be accorded to the word.

³ See *Glen Eira CC v Gory* (2001) 9 VPR 101 per Balmford J.

⁴ See ss 8(a), 10(b), 11(4), 12(2)(d), 13(2)(b), 79AD(2)(b)(iii), 79AE(1)(m), 79G(2), 86(2)(b)(ii), 87(1)(f)(iii), 87(1)(k), 95(2), 131(2)(b)(ii), 132(1)(h) and 137(2)(b)(ii).

- 18 The legal meaning of a word must be gleaned, not just from a dictionary meaning, but also from the context: *Project Blue Sky Pty Ltd v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384.
- 19 In every case where the word is used in the TIA and in the performance requirements (and for that matter, in the scoping requirements) the word is used in the context of a suite of quite different considerations.
- 20 The leading authority in Victoria on the concept of “minimisation” – where used as a guide in a public policy context - is the decision of the Court of Appeal in *Kordister v Director of Liquor Licensing* [2012] VSCA 325. In that case the Court was concerned with s 4 of the *Liquor Control Reform Act* 1998, which sets out an objective “to contribute to minimising harm arising from the misuse and abuse of alcohol”.
- 21 The majority of the Court explained the concept thus (at [13-15]):

Harm minimisation is directed to the practical reduction of harm resulting from the consequences of alcohol and other substance misuse. It is not a synonym for a form of prohibition. Rather, it responds to the reality that prohibition has proved, and continues to prove, a very blunt and ineffective tool for the control of the use of addictive substances and their consequences.

In turn, as the Tribunal has held, the general concept of harm minimisation does not mean that every application for a liquor licence should be refused⁵ nor would it, of itself, justify every application for a variation of licence which reduces trading hours.

As Ipp J has put it in considering the harm minimisation object contained in the Western Australia liquor licensing legislation, the relevant object is:

to ‘minimise’ harm or ill-health, not to prevent harm or ill-health absolutely. The word ‘minimise’ is consistent with the need to weigh and balance all the relevant considerations.⁶

- 22 In the context of the TIA and the performance requirements the word “minimise” is not used in the sense of imposing any absolutes; as, in each case, it is expressed in the context of other, possibly competing, objectives or requirements.
- 23 In the context of the TIA, where there is reference to:
- minimising barriers to access so that so far as is possible the transport system is available to as many persons as wish to use it;
 - minimising ... harm to the local and global environment including through the loss of biodiversity;
 - minimise impacts of the transport system on adjacent land uses;

⁵ *Black and Cooke v Liquor Licensing Victoria* [2000] VCAT 459; *Avery v Director of Liquor Licensing Victoria* [2001] VCAT 2455; *Nardi v Director of Liquor Licensing* [2005] VCAT 323.

⁶ *Executive Director of Health v Lily Creek International Pty Ltd* (2000) 22 WAR 510, 515.

- minimise any inconvenience caused by disruptions to the transport system; and
- minimise the risk of harm to persons arising from the transport system;

this is to be taken as meaning reducing any impact to the extent reasonably practicable whilst still seeking to achieve, or satisfy, or address, other objectives.

- 24 Inevitably, as Ipp J explained, this will mean that in considering whether any particular impact has been satisfactorily “minimised”, the decision maker can, and ought to, have regard to the need to weigh and balance all the relevant considerations.
- 25 This means that the objective to minimise impacts must be read as a desire to minimise impacts to the extent that is reasonable and practical *in the implementation of the project*.
- 26 This is consistent with the approach that has regularly been taken by VCAT in considering planning policies that include objectives to “minimise” certain impacts. For example, in *AusGroup Property Pty Ltd v Stonnington CC* [2011] VCAT 672, at [51] – [52], the tribunal said:

It is our view that the proper approach to assessing shadow is to take into account the strategic context of the site. Comparing the shadows from this proposal to existing shadows simply does not recognise that Chapel Vision and the interim DDO controls encourage development of up to 19 metres on this site. We think Council must have considered the likely overshadowing that would result from buildings of its preferred height and deemed that, when balanced against other outcomes, some additional overshadowing is acceptable. We also note the scheme provisions require overshadowing to be “minimised” rather than a more onerous benchmark.

Within this strategic context, we think we should compare the likely shadows cast by this proposal with those cast from development contemplated under Chapel Vision and the interim Design and Development Overlay. To put it another way, we think the extent of overshadowing should be compared to the shadows cast by the building that meets Council’s proposed building envelope of six storeys, set back 3 metres from the eastern boundary and 6 metres at the upper levels.

- 27 In *Oxdra Pty Ltd v Stonnington CC* [2012] VCAT 312, the Tribunal referred with approval to this decision and said (at [48]):

As Chapel Vision and the DDO7 indicate a preferred maximum height of 31 metres, it follows that one would expect that any number of potential designs for the re-development of the review site which fully comply with this benchmark would still cause a degree of overshadowing which would not comply with the “overshadowing” benchmarks mentioned above. As per the comments of the Tribunal at paragraphs 51-52 of the AusGroup decision, this suggests that the real

issue is whether the extent of the additional overshadowing is unreasonable, rather than an expectation that there will literally be no additional overshadowing at all. We also note that in relation to the potential overshadowing of public spaces, a key word in this section of the DDO7 is “minimise”, as opposed to “must avoid”.

- 28 Thus the word “minimise” (and its variants), whether in the context of the TIA, the Scoping Directions or the Performance Requirements, must be understood as embodying a need to weigh and balance all the relevant considerations – in the context of implementing the project - rather than seeking to impose absolute an requirement or requirements that would dictate that the project cannot be implemented.

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