

IN THE MATTER OF  
PROPOSED AMENDMENT GC81 TO THE MELBOURNE  
AND  
PORT PHILLIP PLANNING SCHEMES  
  
FISHERMANS BEND REVIEW PANEL

**OUTLINE OF CLOSING SUBMISSIONS ON BEHALF OF  
LANDOWNERS GROUP**

**Introduction**

1. These submissions are made on behalf of the parties previously identified as the Landowners (**Landowners**)<sup>1</sup> in relation to proposed Planning Scheme Amendment GC81 to the Melbourne and Port Phillip Planning Schemes (**proposed Amendment**).
2. Contrary to what the Minister appears to believe, the Landowners are not a homogenous group of land developers. They are a wide, disparate and representative collection of individual landowners with very different interests.
3. Some (like Goodman) are long term owners of land upon which existing industrial or commercial uses operate. They have long term aspirations towards redevelopment of their holdings, but no short-term imperative or desire to do so.
4. Others (like Salvo) are land developers who acquired land in Fishermans Bend after the rezoning. They paid a price for that land commensurate with the value of that land at the time it was purchased, and gained no benefit from any “uplift” in value occasioned by that rezoning.
5. Some have subsequently secured planning permits to develop their land pursuant to the planning controls that existed at the time those permits were granted. Some of them have commenced construction of their permitted developments, others have

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<sup>1</sup> The submissions are made on behalf of the landowners numbered 1-10 in Appendix A of Norton Rose Fulbright’s Outline of Submissions on Behalf of Landowners Group (Document 253) and Inchcape Australia Limited.

been forced to put their development plans on hold until the uncertainties associated with the proposed Amendment are resolved.

6. Others have made applications for permits, again at significant cost (some at over \$1million), and based on the planning controls that existed at the time those applications were made. Often, those applications have had to be reviewed and recast to respond to the many changes that have been implemented to those controls over the years. Those applications have now been called-in by the Minister, without any indication as to when they might be determined by him, or by what process, or according to which planning controls. In many cases this has occurred despite assurance that the applications would be determined under to the current controls, and not measured against some possible future control.
7. Others (like Sel Reklaw Pty Ltd, Aquaino Pty Ltd, Inchcape Pty Ltd and Costa Fox Pty Ltd) have had their entire land (or significant parts of it) identified in the proposed Amendment as being required for a public purpose, without any clear mechanism being identified as to how they will be compensated for that loss, if at all.
8. The Minister has now made submissions that invite the Review Panel to conclude that each and every one of the Landowners collectively:
  - a) are greedy land developers whose only goal is to maximise profit and minimise their contribution;
  - b) support the maintenance of the existing controls; and/or
  - c) are deliberately trying to derail this process.
9. Each and every one of these propositions must be rejected. To the extent that Landowners have been critical of the proposed Amendment, it is with very good reason. The many flaws in the proposed Amendment are the fault of the Minister, not the Landowners.
10. The Landowners (and their witnesses) have been more than willing to identify those aspects of the proposed Amendment that they do not oppose, as well as those aspects they do.

11. Indeed, as the Minister has been eager to point out, no real criticism has been made of the vast majority of the Vision, or the basic urban structure proposed.
12. But none of the good things about this proposed Amendment can be realised if the flaws that are inherent in the proposed controls are not fixed.
13. Put simply, the simplistic assertion of the Minister at [17] of the Part C submissions that “*the need to align the planning controls for Fishermans Bend with the established vision for the area provides a clear and compelling justification for the draft Amendment as a whole*” must be rejected by the Review Panel.
14. The ends do not justify the means, and significant parts of the proposed controls are either unnecessary for, or not capable of, achieving good planning outcomes in Fishermans Bend.

### **Existing Permits**

15. The Minister’s Part C submissions at [16] – [21] endeavours to persuade the Review Panel that each and every permit that has been granted (or applied for) in Fishermans Bend should be considered to represent an unacceptable planning outcome, which is contrary to the Vision, and which would negatively impact on the community.
16. These submissions have been made even though the Minister has:
  - a) produced no evidence whatsoever with regarding any of those permits;
  - b) also paradoxically asserted that the Review Panel is not required to, and should not, seek to assess the merits of those permits;<sup>2</sup>
  - c) in many cases, been the Responsible Authority who has either granted the permits or agreed at mediation to settle VCAT proceedings giving rise to the grant of those permits; and
  - d) in many cases, recently approved extensions to those permits despite it being open to have refused such extensions on the basis that they are now inconsistent with the Vision, or the proposed Amendment.

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<sup>2</sup> Document 350 - Part C Closing submissions at [185].

17. Document 245 identifies that (as detailed in the Table below) the Minister has, since the Vision was released:
- a) approved five, new permits; and
  - b) approved extensions of time for 9 other permits issued prior to September 2016.
18. Two further extension requests for such permits are currently under consideration.

**PERMITS APPROVED OR EXTENDED BY THE MINISTER SINCE THE  
RELEASE OF THE VISION**

ADDRESS	Date approved	Date of EOT
101 Salmon Street	21.5.14	22.9.17
199-201 Normanby Road	1.9.14	19.3.17
15-18 Gladstone Street	1.9.14	23.3.17
6-78 Buckhurst Street	1.9.14	29.8.17
228-238 Normanby Road	20.5.15	19.3.17
60-82 Johnson Street	20.5.15	11.1.18
171-183 Ferrars Street	2.7.15	15.12.17
320 Plummer Street	12.8.15	21.5.2017
9A/339 Williamstown Rd	25.10.15	13.11.17
202-214 Normanby Rd	22.8.16	Being considered
150-160 Turner Street	6.9.16	Being considered
134-142 Ferrars St	10.4.17	
10-12 Williamstown Rd	18.5.17	
263 -329 Lorimer St	19.9.17	
253 Normanby Rd	15.12.17	
245 -251 Normanby Rd	25.1.18	

19. The Review Panel will also note that this has occurred despite the fact that the Minister has asserted in these proceedings that the Vision:

- a) is “settled government policy” and has been since it was published in September 2016;<sup>3</sup>
- b) is a document for which the Minister can apparently claim he has had a “democratic mandate”<sup>4</sup> to implement since 2014; and
- c) sets in place a clear, unambiguous and immutable set of guidelines for the future development of Fishermans Bend.

20. If all this is true, one might fairly pose the rhetorical question:

***Why has the Minister been granting and extending permits in Fishermans Bend that he regards as allowing inappropriate development that is contrary to the Vision?***

21. The Minister suggests that it is “significant” that the Landowners have not asked their expert witnesses to comment “*on the merits of the controls as currently in force*”.<sup>5</sup> This is not significant because:

- a) the Landowners do not suggest that the controls currently in force are the best possible controls. This is, in part, because they are controls introduced without consultation, exhibition or independent review by the Minister and they include several features (such as mandatory height controls) that it is now common ground are not appropriate;
- b) the current controls are not relevant to the appropriateness of the proposed Amendment; and
- c) the Minister has also called no evidence as to the merits of the controls as currently in force. Mr Glossop, for example, was not asked to comment of the current controls and nor was Ms Hodyl.

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<sup>3</sup> Document 350 - Part C Submission at [28(c)(i)].

<sup>4</sup> Ibid [28(d)(i)].

<sup>5</sup> Ibid [21].

22. It can also be noted that (contrary to what is said at [18] of the Part C submissions) the Landowners have never:
- a) denied that “any issue” exists in Fishermans Bend; or
  - b) insisted that “*the permits dictate the emerging character, which should be reflected and replicated in permanent controls*” but only that they need to be considered in determining any future built form controls, and not ignored completely, as the Minister and its witnesses have done.<sup>6</sup>

### **A summary of the Landowners’ submissions**

23. The Landowners submit that the Review Panel should recommend to the Minister for Planning that Amendment GC81 to the Melbourne and Port Phillip Planning Scheme is not appropriate, and should not be adopted, in the form proposed in the Minister’s “Revised Draft Part C Amendment documents” dated 14 May 2018 (**Part C controls**).
24. The Landowners submit that this is because:
- a) **First**, the starting point of the Amendment is fundamentally flawed; the *Vision* and the *Framework*’s reliance on a population target as a basis for the strategic planning of Fishermans Bend and the proposed controls is misconceived. This erroneous starting point infects all versions of the controls, including the Part C controls.
  - b) **Second**, the Amendment is premature because:
    - (i) Essential public transport infrastructure has not been decided or committed to. Without settling the proposed transport infrastructure, strategic planning decisions with regard to urban design outcomes, land uses and intensity of development are unable to be properly decided upon.<sup>7</sup>

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<sup>6</sup> Ibid at [18].

<sup>7</sup> Transport for Victoria (**TfV**) appeared before the Review Panel on 16 May 2018 and confirmed that even the use of the term “proposed” tram routes might be an overreach when it was pressed by the Review Panel on whether it would be appropriate for them to be shown in the CCZ maps, TfV suggested that the term “feasible” tram routes would be more appropriate.

- (ii) There is no settled financial or funding plan and no developer contribution plan or infrastructure contribution plan which provides an equitable framework to fund public infrastructure.
- (iii) There are no Public Acquisition Overlays being proposed despite considerable areas of private land being set aside for public purposes.
- (iv) There are no resolved Precinct Plans.
- (v) The Urban Design Strategy, which underpins the proposed controls (to a large extent) is fundamentally flawed as a consequence of:
  - its ambition to rigidly control population and density in Fishermans Bend to achieve a pre-determined figure;
  - the fact that it was decided in part to justify an unfair and unlawful mechanism for the acquisition of private land, which has now been abandoned by the Minister;
  - its ill-defined and unrealistic assumptions regarding “family friendly housing”; and
  - the significant and unjustifiable gap between development allowable under the FAR, and development allowable pursuant to FAU.
- c) **Third**, the FAU is unresolved and uncertain.
- d) **Fourth**, the proposed controls are overly-complicated, onerous in application and will result in highly inequitable outcomes (which are not compensated) when applied to individual land parcels.
- e) **Fifth**, there is inadequate justification for various heights, setbacks, overshadowing requirements and built form outcomes in the detail of some of the controls.
- f) **Sixth**, the achievability and viability of development under the proposed controls has not been taken into consideration in any real sense, and submissions and evidence raising these issues have been ignored.

- g) **Lastly**, there are no transitional provisions proposed to protect existing permit applications made in good faith and enormous expense under the current planning controls.

### **The Role of the Review Panel**

25. The Minister's argument as to the scope of the Review Panel's task is contradictory and inconsistent.
26. In his Supplementary Submissions to Part B Submissions [Doc 151], the Minister asserted, inter alia, that:

*The principal task of the Review Panel is to consider the extent to which the proposed changes to the planning controls allow for the Fishermans Bend Vision, September 2016<sup>8</sup> to be achieved ... hence the role of the Review Panel is not to review the Visions; it is not to interrogate how the background documents have informed the draft Framework; **and it is not to interrogate the draft Framework**, except to the extent that the proposed controls have been informed by the draft Framework<sup>9</sup> to achieve the Vision".<sup>10</sup>*

27. It appears that the Minister has now abandoned part of this argument. The Minister's Part C submissions at [22] to [30] argues only that the **Vision** cannot be reviewed by the Review Panel. Nothing is said about the draft Framework. This is perhaps not surprising given that the proposed Amendment now deviates significantly from the draft Framework.
28. Accordingly, the Review Panel can safely proceed on the basis that the Minister now accepts that his earlier submissions that the draft Framework cannot be "interrogated" by the Review Panel was wrong. Moreover, the Minister is now openly inviting departures from the terms of the draft Framework.
29. The arguments presented with respect to the consideration of the Vision are also unconvincing, and should be rejected by the Review Panel.

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<sup>8</sup> Hereafter referred to as "the Vision".

<sup>9</sup> Hereafter referred to as "the draft Framework".

<sup>10</sup> Document 151 – Part B Supplementary Submissions at [2].

30. It appears to be common ground that it is the Terms of Reference (**TORs**) alone which determine the scope of the Review Panel's task.
31. The TORs must also be read in the context of one critically important fact. **The Minister is the author of the TORs.** The Minister has now and always has had full control over what they say, and how they say it. The Minister has now, and always has had, the power to make whatever change he feels appropriate to clarify the TORs, or to enlarge or restrict the scope of the Review Panel's task. He does not need a request from the Review Panel to do this.
32. In that context, the proposition at [30] of the Part C submissions that it is the obligation of the Review Panel to request an amendment to the TORs to allow for consideration of the Vision, or clarify their intent, is absurd.
33. If it was truly intended that the Vision be placed beyond the scope of the Review Panel's consideration, then why is it that the Minister has never said this expressly in the TORs? Why has he sat on his hands while the parties to this hearing have wasted considerable time and effort arguing the point?
34. The arguments made by the Minister as to how the TORs should be interpreted are unconvincing, and self-serving.
35. This is because:
  - a) the preamble to the Terms refers to "the **vision** for Fishermans Bend". The word "vision" is not capitalised. The nature of the "vision" is not specified. This can be contrasted with the balance of the TORs, where specific reference is then made to (variously)
    - (i) "the Fishermans Bend Vision – The next chapter in Melbourne in Melbourne's growth story, September 2016" (see [11]); and
    - (ii) "the *Fishermans Bend Vision, September 2016*" (see [27(b)], [27](c)).

Had it been the intention of the Minister that the generalised reference to "vision" in the preamble was to be read and understood as a specific reference to the *Fishermans Bend Vision, September 2016*, he could (indeed should) have used

that specific terminology. That fact that it was not used compels the conclusion that the “vision” referred to in the preamble intended to be generic, and not specific.<sup>11</sup>

- b) As to [28] of the Part C submissions, it has never been suggested by the Landowners that it would have been “unlawful” for the Minister to have drafted TORs that clearly excluded the Vision from the scope of the Review Panel’s review. However, this is not what was done.
- c) It is, however, both “improper and unfair” to suggest that the Review Panel should be trying to assess whether the proposed Amendment is “appropriate”:
  - (i) without making any assessment of the merits of the Vision, which is said to provide its strategic basis; and/or
  - (ii) in circumstances where the TORs do not expressly or impliedly direct this.
- d) The proposition that the Vision represents a fixed and immutable expression of government policy is also inconsistent with the terms of the Vision itself, which states:
  - (i) Under the heading “**Disclaimer**” on the inside cover that: “*The content of this document requires refinement and further assessment of options and feasibility*”; and
  - (ii) At page 15, expresses a view as to what Fishermans Bend **could** be in 2050, not what it **must** be.
- e) The proposition at 28(d) of the Part C Submissions that the Vision cannot be reviewed because “*the Minister can fairly claim a democratic mandate for the current vision*” can also be disregarded. Either the TORs exclude the Vision from the scope of the Review Panel’s consideration or they do not. There is no legal basis for an interpretation of the TORs based on some assertion that the Minister has the “mandate” which is claimed.<sup>12</sup>

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<sup>11</sup> The Review Panel will note that at 26(a) of the Part C submission the Minister relies upon a proposition that does not appear anywhere in the TORs, namely that the purpose of the draft amendment is to “*implement the Vision for Fishermans Bend through a suite of permanent controls*”.

- f) Further, the Landowners did not “feint” towards requesting a determination of the Terms as is wrongly asserted in 28(e).<sup>13</sup> They made a request, and the Review Panel made a ruling that they would not accede to the request. The Landowners have never withdrawn their request for this matter to be determined. Further, even if they had, this would not relieve the Review Panel of their obligation to form a view as to what they can, and cannot, lawfully consider.
- g) It can be observed that in the Preliminary List of Key Issues dated 17 December 2017,<sup>14</sup> the Review Panel itself raised Population Assumption/Target as a Key Issue and questioned:

- “3. *To what extent does the planning of the area need to plan for a target population?*
4. *What is the basis of the assumed 80,000 people and 80,000 jobs? Should a different target be set?*
5. *If a target population (or population range) is set, is there a need to reconcile:*
- *Population and jobs  $\leftrightarrow$  floor area  $\leftrightarrow$  FAR and FAU?*
6. *What are the appropriate assumptions for the timing of development and the ‘build out’ in setting the Floor Area Ratios (FARs)?*
7. *How does the use of the Floor Area Uplift (FAU) affect the total population ‘assumed’ for each precinct? Are the uplifts intended to include population within or above the assumed levels?”<sup>15</sup>*

The Minister did not decline to respond to those questions on the basis that they were beyond the scope of the Review Panel’s mandate.

- h) At 27(f) the Minister conflates and confuses arguments about the fairness of the Review Panel process with arguments about whether or not the TORs (properly construed) allow for the Vision to be critically reviewed. The two are not related, (except to the extent that if the Review Panel were to wrongly interpret the

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<sup>13</sup> Document 350 – Part C Submissions.

<sup>14</sup> Document 20.

<sup>15</sup> Ibid page 1.

TORs as excluding the Vision from the scope of its review, it will have denied the parties procedural fairness, in addition to other legal errors).

36. It is worth bearing in mind that the “recast” Vision has never been independently reviewed. It would be an odd thing for the Minister to seek independent review of a proposed set of controls, and yet seek to avoid independent review of the recast vision that they purport to be based on.
37. It can be noted that, as is becoming common, the Minister has resorted to attacking the Landowners’ motivations, rather than simply addressing the merits of the argument. The Review Panel will, however, note that the CoM shares the Landowners’ views as to the correct interpretation of the TORs.<sup>16</sup> Where is the criticism of the motivations of the CoM in making these submissions?
38. Finally, the Minister appears to want it both ways. Having argued that the Vision is excluded from the scope of the Review Panel’s considerations by the TORs, the Minister then proceeds to argue its merits. If the Minister truly did not want the Review Panel to express any view as to the merits of the Vision, then why does he care what is said about it? He can, if he wishes, simply ignore anything he regards as irrelevant or beyond the scope of the TORs. If he doesn’t need to hear the Review Panel’s views as the Vision then why even bother to make submissions about it?
39. At the end of the day the Review Panel has a simple choice to make. If it considers and comments on the Vision, the Minister can simply ignore its views if he so chooses. Nothing is lost.
40. On the other hand, if the Review Panel doesn’t review the Vision, and the TORs (properly construed) do not say what the Minister claims they say, then it will have committed a significant legal error.

### **Procedural Fairness**

41. At [28](f) to [29] the Minister seeks to argue that this process has been procedurally fair<sup>17</sup>.

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<sup>16</sup> See: Document 348 Closing Submission on Behalf of the MCC, dated 24 May 2018 at [3] and [14].

<sup>17</sup> Document 350 – Part C Submissions.

42. The Landowners vehemently disagree. The process has not afforded procedural fairness, despite the best efforts of the Review Panel. Once again, the fault for this lies at the feet of the Minister.
43. The Landowners contend that the transformative changes embodied in the Part C controls have fatally compromised the hearing. Further, the decision by the Review Panel to allow the Minister to present and advocate for those changes has resulted in a breach of its duty to provide procedural fairness.
44. This is because:
- a) the Part C changes are very significant. The adoption of an entirely new form of overlay control, (and one that did not even formally exist as a VPP planning tool until 15 May 2018) as a mechanism by which to extract development/infrastructure contributions, (combined with the abandonment of the former mechanism) represents (together with the myriad of other, significant changes made in the course of this hearing) a transformation of the proposed Amendment.<sup>18</sup> The appropriate response to a transformation of an **actual** planning scheme amendment would normally be an adjournment, re-exhibition and a new hearing. This has not occurred here;
  - b) the Part C controls were presented over the objection of the Landowners on 14 May 2018, after the Landowners had presented legal arguments (including submissions on the legality of the amendment by Mr Canavan QC, Mr Morris QC, Mr Wren QC and Mr Tweedie SC), after the presentation of all of the Landowners' general evidence and after they had closed their case;
  - c) prior to 14 May 2018, the proposed use of the ICP as a component of the proposed Amendment (and in place of the FAR mechanism) was never foreshadowed by the Minister. Indeed, the position of the Minister up to that point had been to vehemently defend the initially proposed acquisition mechanism;

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<sup>18</sup> See, for example the discussion of transformative changes in the context of planning scheme amendments in Greater Dandenong C96 (PSA) [2010] PPV 71.

- d) as a consequence of the above, the Landowners have been denied the opportunity to present any evidence as to the merits of the proposed mechanism, or its impacts on Landowners;
- e) the Landowners have also been denied the opportunity to put questions to expert witness as to the merits of the use of the ICP. This includes the following expert witnesses:
  - (i) Mr Glossop, who was called by the Minister to give town planning evidence as to whether the proposed amendment included whether the proposed amendment made use of appropriate planning provisions;
  - (ii) Mr Milner, whose evidence addressed development/infrastructure contribution issues and the appropriateness of the initially proposed mechanism;
  - (iii) Mr Szafraniec, whose evidence addressed economic issues;
  - (iv) Mr Shipp, whose evidence was directly concerned with the appropriate mechanism for obtained development/infrastructure contributions;
  - (v) Ms Hodyl, whose evidence addressed the merits of the FAR acquisition mechanism, and whose credibility as a witness is affected by her election to employ it as a device; and
  - (vi) Mr Mckintosh, whose evidence addressed development viability issues.

45. The Landowners' evidence did not address in any detail the positive use of the DCP/ICP because it was not proposed to form any part of the proposed Amendment until after Day 37, 14 May 2018. Indeed, it was not even a VPP control until 15 May 2018.

46. It is no answer to say that any issue with respect to procedural fairness has been cured by providing an opportunity to make **submissions** in response. Submissions do not carry the same weight as expert evidence, and a denial of an opportunity to present evidence on what is now a key aspect of the proposed controls is a denial of an

opportunity for the Landowners to present their best possible case concerning that aspect of the proposed Amendment.

47. Put simply, because of these late and transformative changes to the proposed Amendment, it can no longer be said that the Landowners have had a “fair crack of the whip”.
48. It follows that, if the Review Panel proceeds to make recommendations about the suitability of the ICP it will have fallen into legal error. At best, it can observe that the ICP presents as a possible mechanism, the merits of which have not been able to be properly considered in this hearing.
49. As to the legal propositions made by the Minister at [28](f)(ii) of the Part C submissions:
  - a) The fact that the Minister can adopt an amendment under Section 20(4) without notice and without hearing submission is irrelevant. First, this is not a planning scheme amendment, it is merely **a proposed amendment**. Second, whatever may be said to be the position with regard to a Minister acting under Section 20(4), the Review Panel is required by law to afford procedural fairness to participants in this hearing. What would be required under an entirely different process is of no consequence.
  - b) The Landowners’ position is that the Review Panel should recommend that any actual future amendment should proceed through the “normal process” that would apply to a planning scheme amendment. This is, in part, because of the problems created for all participants in this hearing by the unusual (and disjointed) hearing process that has been adopted. It is also, in part because of the significant changes that have occurred to the proposed Amendment over time (the consequences of which will be addressed later in these submissions), and the many, many questions that remain unanswered, and things that need to be to be finalised.<sup>19</sup>

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<sup>19</sup> These include, but are not limited to: Precinct Plans, confirmation of the proposed tram routes, confirmation of the metro rail routes and stations, details of the freight route, details of changes to road grading and crossings, FAU guidelines etc., etc.

## The Population Target

50. The Minister has devoted considerable time and effort **in submissions** trying to defend the 80,000 population target.
51. However, not one shred of expert evidence from a suitably qualified person has been produced as to how it was determined, why it was set at 80,000, or why it is either necessary or desirable.
52. As with much of the Minister's case, the submissions that have been made with regard to how the 80,000 "target" should be viewed by the Review Panel have shifted over the course of the hearing to suit the convenience of the Minister.
53. For example, in the Part B submissions, the Minister claimed that the 80,000 resident figure was **not** to be interpreted as "*the ultimate, desired population outcome in the nature of a total cap on development*"<sup>20</sup>. Instead, it was said that the "supposed" 80,000 population target was "*... in many ways an informed expectation rather than a specific figure which the government is hoping to achieve*".<sup>21</sup>
54. The Minister's case now appears to be that, in order to "ensure that the vision for Fisherman's bend is realised" that it is necessary for the proposed Amendment to establish planning controls that ensure that the 80,000 population target is not materially exceeded.
55. It appears that it is now being argued that planning controls that would result in a material exceedance of that target would be unacceptable because such controls would be:
  - a) inconsistent with the Vision, which nominates 80,000 as a fixed figure;
  - b) inconsistent with Plan Melbourne, and the Implementation Plans;

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<sup>20</sup>Document 94 - Minister's Part B Submission at [15].

<sup>21</sup>Ibid at [16].

- c) inconsistent with the government’s alleged “democratic mandate” to plan for the future development of Fishermans Bend in a manner which does not deviate from the terms of the Vision; and
  - d) inappropriate, because (amongst other things) they would result in an overly dense urban environment, and run the risk of population exceeding the capacity of planned infrastructure.
56. The problem is, however, that the proposed Amendment will **not ensure** the 80,000 target is met.
57. On the contrary, the planning controls have been drafted with the specific and deliberate intention of both allowing (and in fact **encouraging**) a significant exceedance of the 80,000 target. The reason for this (as has repeatedly been observed in this hearing by the Landowners and the CoM) is the proposed FAU mechanisms.
58. The proposed FAU mechanism is specifically and intentionally designed to encourage exceedance of the 80,000 population target. This is because:
- a) the base FAR figures have been determined on the basis that they will deliver an 80,000 population (based on certain assumptions); but
  - b) the FAU is now proposed as the sole mechanism by which the 6% Social Housing target is to be delivered; and
  - c) The use of the FAU to deliver the 6% Social Housing would, on the Minister’s own calculations, result in **39,124 additional residents** in Fishermans Bend,<sup>22</sup> almost a 50% increase on the supposedly sacrosanct 80,000 population target.
59. Once again, this obvious contradiction has been pointed out repeatedly during the hearing, by both the Landowners and the CoM during the course of this hearing.<sup>23</sup> The CoPP’s urban design evidence also pointed this out.<sup>24</sup> The Minister has never offered any argument as to how this contradiction can be reconciled. The Part C submissions are conspicuously silent on this issue.

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<sup>22</sup> See Document 351 - SIN 20, Attachment 1.

<sup>23</sup> See reference to “unintended consequences” in Document 348 - Closing submissions on behalf of MCC at [40]; Document L11 – Interim submission on behalf of MCC at [65]

<sup>24</sup> See Document 140 – Urban design evidence by Mr McPherson Part 1 at [156]-[158].

60. It can be observed that the Vision says nothing about FAU's. It says nothing about encouraging exceedances of the population target (let alone exceeding it by in the order of 40,000). It says nothing about encouraging the development of social housing by private developers at no cost to government in exchange for offering increased development yield.
61. It follows that, the Minister is once again "hoist on his own petard". If the Review Panel agrees that the 80,000 target referred to in the Vision is either beyond review, or defensible on its merits, it must reject the entire UDS, and its two significant structural elements-the FAR Control and FAU.
62. In his Part B Submissions, the Minister conceded that the use of the FAU could lead to exceedances of the population target. The Minister also acknowledged (at [68]) that:
- "...adopting an uncapped FAU necessitates the monitoring of the number of dwellings delivered in order to ensure that sufficient infrastructure is provided to meet any additional need".**
63. At [69] one option, involving a series of elaborate mechanisms to mitigate or avoid this outcome were identified, none of which are included in the Part C controls.<sup>25</sup> Nor has any alternative mechanism been suggested.
64. Indeed, given that the use "dwelling" remains an as of right use in the Non-Core Areas, it is difficult to see how such a mechanism could ever be successfully developed.
65. The Minister has also failed to:
- a) propose any form of an amendment to the Guidelines to allow for "adverse impacts on infrastructure" to be considered when considering whether to grant a permit that includes an FAU; or
  - b) identify how such a guideline could realistically operate in the context of an individual permit application.<sup>26</sup>

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<sup>25</sup> See Document 151 - Part B Submission at [69].

<sup>26</sup> See Document 151 - Part B Submission at [67].

66. The above reflects a relatively consistent pattern by the Minister in this hearing, which is:
- a) to propose a “novel” control;
  - b) eventually concede it may have “unintended consequences”;
  - c) assert that there is a solution;
  - d) fail to propose a workable solution; and
  - e) assert that the solution can be worked out later.
67. However, if the Minister’s assertion that it is possible to develop a means by which the number of dwellings being established in Fishermans Bend can be measured and regulated so as to ensure there are no adverse impacts on infrastructure is accepted by the Review Panel, then:
- a) this is yet another reason why there is no need to adopt a fixed population target; and
  - b) there is no need for a mandatory FAR to be implemented to avoid this outcome.
68. Simply put, the Minister cannot have it both ways. If the Vision demands that population must be constrained in Fishermans Bend to 80,000, and the proposed Amendment must give effect to this aspect of the Vision, then the controls in the proposed Amendment must be regarded as a failure to realise that aspect.
69. On the other hand, if a final resident population of in the order of 120,000 people in Fishermans Bend can also be regarded as realising the Vision, then it must be accepted that the population target is not a fixed figure, and that controls that allow for a greater population than 80,000 can be recommended by this Review Panel.
70. Indeed, on the Minister’s own case, a planning scheme amendment that encourages this is the desired outcome.

## What About the Employment Target?

71. There is another compelling reason for the Review Panel to reject the Minister's position regarding the population target.
72. The Minister's Part C submissions address only the position with respect to the **residential population target** and make no reference to the **employment target**.
73. There is an obvious reason for this omission. If the Minister is correct that the residential population target is beyond review and unable to be changed, then the same must, logically, be true of the employment target identified in the Vision.
74. If one target cannot be reviewed by the Review Panel, how can the other?
75. The Vision expressly includes the Employment Precinct. It identifies a jobs target of 60,000 jobs for the **entire** Fishermans Bend area – including the Employment Precinct. The location of those 60,000 jobs, or their possible allocation between precincts is not specified.
76. It follows that if the Minister's current argument of convenience is accepted, the employment target is also fixed, not open for consideration and its merits, are beyond the scope of the Review Panel's consideration pursuant to the TORs.
77. However, the draft Framework (and the proposed Amendment) purport to establish a different employment target when compared to the Vision. That new target is **80,000 jobs**, with 40,000 in the four CCZ precincts, and 40,000 in the Employment Precinct.<sup>27</sup> Accordingly, the draft Framework is inconsistent with the Vision, and if the Vision is beyond change or variation, and beyond the scope of the Review Panel's consideration, this change to the employment target is both unacceptable, and unable to be considered by the Review Panel.
78. Which then raises the question as to why Mr Szafraniec was produced by the Minister to give expert evidence to support the increase in the job target.

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<sup>27</sup> In other words, if the Vision is to be followed, the Employment Precinct can only be permitted to accommodate 20,000 jobs pursuant to any future planning control that is developed to give effect to the Vision.

79. Is the Minister seriously now suggesting that he made a deliberate choice to present expert evidence on an issue that he regarded as beyond the scope of the Review Panel's consideration based on TORs that he has prepared?
80. If the Minister's submissions as to the status of the Vision, and the scope of the Review Panel's review are to be accepted, it necessarily follows that the proposed new employment figure should be rejected by the Review Panel because:
- a) it is inconsistent with the Vision;
  - b) would not ensure that the vision for Fishermans Bend is realised; and
  - c) the Review Panel has no power to recommend that the new controls give effect to any employment figure that varies from that contained in the Vision.
81. This would be an absurd outcome. Indeed, as absurd as proceeding on the basis that the 80,000 population figure is also fixed and beyond critical review.

### **The Target is Not Fixed**

82. The proposition that either target is "fixed" by the Vision is not correct in any event.
83. This is because:
- a) at page 15, the Vision identifies what Fishermans Bend **could** be like in 2050, not what it **must** be like;
  - b) it states that the neighbourhoods will support **around** 80,000 residents and 60,000 workers (and not **exactly** or **only**); and
  - c) at page 36, under the Heading "**What Happens Next**" it is said that "*Key objectives and strategies will be developed to ... guide the future development of Fishermans Bend community including ... population and demographic analysis*".
84. The Vision is a planning policy document, not a piece of legislation. It is to be read sensibly and intelligently as establishing a broad basis for the future discussion of planning controls.

85. When read in this proper way, the suggestion that the Vision does not contemplate that there could be more people or more jobs successfully established in Fishermans Bend must be rejected.

### **The Population target is consistent with Plan Melbourne**

86. The Minister asserts that the 80,000 population target is consistent with Plan Melbourne. This is incorrect, both in terms of the population target and the employment target.
87. Whatever Plan Melbourne 2014 said is irrelevant. Plan Melbourne has now been “refreshed” and the current version is what matters.
88. In this regard, as the Minister has himself identified, the *Implementation Plan* for Plan Melbourne 2017 – 2050 states as part of Outcome 1 that one of the “Initiatives” underway is:

#### ***Recasting the vision for Fishermans Bend urban Renewal Precinct.*<sup>28</sup>**

89. The “vision” that is to be “recast” is then identified as “the *Fishermans Bend Vision ...September 2016*”. It must therefore be assumed that this process forms a part of that “recasting” of the September 2016 Vision.<sup>29</sup>

### **What is the Minister Really Afraid of Here?**

90. It is difficult to escape the conclusion that the Minister’s attempt to insulate the 80,000 population target from independent, critical review in this hearing is motivated primarily by the weakness of its case in support of maintaining that target.
91. The Minister has produced no expert evidence of any kind that either explains, justifies, far less supports the adoption of this target. The Minister’s failure to produce that evidence is significant.
92. It is especially significant in the face of the expert evidence called by the Landowners (particularly that of Mr Shimmin).

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<sup>28</sup> At page 8.

<sup>29</sup> It would be absurd to suggest that the “recasting” was completed in 2016. If this is so, how could it be said that an “Initiative underway” is a document (or vision) that was completed in 2016?

93. At the end of the day, however, the Review Panel faces a relatively simple choice between two alternatives. It can:
- a) accept the Minister’s arguments, refuse to consider the 80,000 population target and potentially fall into serious legal error that will vitiate these proceedings and its recommendations to the Minister; or
  - b) it can adopt the Landowners’ position, review the Vision and the population and employment targets on their merits (and the controls that give effect to them) and make its recommendations to the Minister. He can then choose to ignore those recommendations if he so chooses, and nothing is lost.

### **The FAR Control Remains a Fundamentally Flawed Concept**

94. At the heart of the Landowners’ concerns about the proposed Amendment is the FAR Control.
95. The Landowners have comprehensively demonstrated why the FAR Control, both as originally (and now currently) proposed, is fundamentally flawed.
96. In this regard, it must be borne in mind that the debate before the Review Panel is not whether **some form of density control** may be appropriate for Fishermans Bend, but only whether the one in the proposed Amendment is appropriate.
97. No support can be gained for this FAR Control from the C270 FAR (or indeed any other used in another country or jurisdiction) which is fundamentally different in both terms, intent and effect.<sup>30</sup>
98. For example, the FAR of 18:1 that was approved in the C270 Panel hearing was presented to the Panel by the Minister on the basis that it represented:

*“...a reasonable threshold that is commensurate with a scale of development that can be accommodated on a typical site without causing the negative built form and amenity impacts that have been apparent with many recent developments”.*<sup>31</sup>

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<sup>30</sup> Ms Hodyl also accepted this under cross examination on 21 March 2018.

<sup>31</sup> See: Part B Submissions of the Planning Authority, Amendment C270 at [114].

99. In contrast, the FAR Control is not, and is not intended to represent, a “reasonable threshold” for what development can be accommodated on a “typical site”. It is, in truth, not directly related to built form or amenity impacts at all, but only to population density.
100. With this in mind, concessions by witnesses (such as Mr Sheppard) that a density control in some form **may** be a useful tool for use in some future planning controls cannot be regarded as an expression of support for the FAR Control as proposed. It is intellectually dishonest to suggest otherwise.
101. In his Part B submission, the Minister identified five reasons why the FAR Control is *“appropriate and will serve a number of useful functions”*.<sup>32</sup>
102. As to those five reasons:
- a) First, there is no evidence that the FAR Control is required to ensure that development is consistent with infrastructure capacity. In fact, the evidence is to the contrary.  
  
Further, the current proposal to use an ICP means that the FAR Control (or any other density control) would have no role to play in this regard, since the ICP is now said to represent the mechanism by which infrastructure provision can be matched to need generated by future development.
  - b) Second, sending a clear signal to the market about development expectations is only a good planning outcome if those expectations are, in fact, reasonable and accord with good planning outcomes for Fishermans Bend. The weight of evidence compels the conclusion that the development expectations set by the FAR Control are inappropriately low.
  - c) Third, there is no evidence that the FAR Control **as proposed** is necessary to deliver a series of distinct neighbourhoods. Indeed, even Ms. Hodyl readily conceded in her evidence that the development outcomes she modelled, which extend to the limit of the discretionary height limit and in accordance with the other built form controls (and which would be possible to achieve through the

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<sup>32</sup> Document 94 – Minister’s Part B Submission at [25].

mechanism of the FAU), would deliver distinctive and diverse neighbourhoods and liveable, high quality built form outcomes.

- d) Fourth, it is now proposed that the FAR Control now has no role whatsoever to play in providing for the provision of open space, new streets and laneways. Further, it has been demonstrated that it would not have achieved equitable or lawful outcomes in this regard in any event.
- e) Finally, it is true that it does establish a “threshold density”. Unfortunately, it is an arbitrary and unjustifiably low density threshold. Further, it is a threshold density whose exceedance is being actively encouraged in order to secure the provision of Social Housing at no cost to government.

103. The Part C controls now represent the fourth attempt by the Minister to produce a workable, set of controls that give effect to the FAR Control.<sup>33</sup> But they remain unworkable.

104. One of the major problems with the FAR Control has always been the desire to employ it as a device by which to **mandate** separate FARs for overall development, **dwelling** and **non-dwelling** uses respectively.

105. The Minister has repeatedly, and conspicuously, failed in his past attempts to produce workable controls to achieve this objective, and it has taken the Landowners to point this out. Again, repeatedly.

106. The Part C controls now seek to deal with the problem by creating a concept of the “**Dwelling Floor Area Ratio**” which is to apply as a mandatory control in a Core Area.<sup>34</sup>

107. However, the term “Dwelling Floor Area Ratio” remains undefined in the CCZ. Presumably, it is intended to mean “the floor area ratio associated with the use of land for a dwelling” or something similar.

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<sup>33</sup> There have been the exhibited controls, the Panel Day 1 version, the Part B version and now the Part C version.

<sup>34</sup> See Clause 4.0 of the CCZ

108. However, in the absence of any definition of how to calculate a “Dwelling Floor Area Ratio” it will be virtually impossible in a mixed use building to identify whether there has, or has not, been compliance with this mandatory control.
109. This is because:
- a) **Floor Area ratio** is defined to mean: “gross floor area divided by the gross developable area”;
  - b) Gross developable area is defined to mean: “the total site area, including any proposed road, laneway and public open space”; and
  - c) Gross floor area is defined to mean “the area above ground of all buildings on a site, including all enclosed areas, services, lifts, car stackers and covered balconies. Dedicated communal residential facilities and recreation spaces are excluded from the calculations of gross floor area. Voids associated with lifts, car stackers and similar service elements should be considered as multiple floors of the same height as adjacent floors or 3.0 metres if there is no adjacent floor.”
110. In a mixed-use building, there will necessarily be parts of the building that are used by both dwelling and non-dwelling uses. These include services, lifts, accessways, parts of the basement, rubbish disposal areas and lobbies to name but a few.
111. Accordingly, it will (presumably) be necessary to proportionally allocate these shared floor areas between “dwelling” and “non-dwelling” uses to arrive at a “Dwelling Floor Area Ratio”. And yet the CCZ gives no guidance as to how this manifestly difficult exercise is to be undertaken.
112. This is a recipe for disaster, and for endless and pointless confusion and debate between applicants and responsible authorities. More importantly, it is a problem that does not need to be created if an alternative, and non-mandatory, form of density control were to be developed, or alternatively no density control employed at all.
113. The Landowners identified this issue several weeks ago in their general submissions. It has also been raised repeatedly in submissions made on behalf of individual landowners in the individual precinct hearings.

114. Notwithstanding this, the Minister:

- a) has made no attempt to address this issue in the Part C controls; and
- b) has made no reference to it in the Part C submissions.

115. The Review Panel can safely infer that this is because the Minister has no answer to this conundrum. It remains yet another “unintended consequence” of the FAR Control that has, to date, stubbornly and steadfastly refused every increasingly desperate attempt by the Minister to make it workable.

116. The FAR Control is not needed. Now that its prime purpose, to justify the acquisition of private land without compensation, is no longer being pursued, it can be dispensed with. It is an unnecessary complication, impediment and distraction to the development of a series of built form controls and policies that can be implemented through one or more DDOs and/or local policy provisions that can ensure that Fishermans Bend delivers a high quality, liveable built environment.

### **A Different Result Will Definitely Yield Better Results**

117. At [41] to [46] of the Part C submissions, the Minister crudely summarises two of the alternatives to the use of a rigid, mandatory FAR Control to enforce a pre-determined, and inflexible, population target.

118. It is then suggested that “[N]either of these methods have been demonstrated to yield a different outcome from adopting the populations target, let alone a ‘better’ result”.<sup>35</sup>

119. This is plainly incorrect.

120. The approach advocated by (amongst others) Mr Sheppard and Ms Heggen is that population capacity should be the **consequence** of a built form outcome. In other words, it should first be determined what controls are necessary to achieve a liveable, high quality urban environment, and then the future population of that urban environment can be estimated. This can then be used to assist in planning the needs of that community.

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<sup>35</sup> Document 350 – Part C submissions at [42].

121. In this regard:

- a) Ms Hodyl accepts that if Fishermans Bend were to be developed above and beyond the FAR limits, in accordance with the discretionary height controls she proposes (and other built form controls) through the use of the FAU, that this would result in a diverse, high quality and liveable built environment;
- b) this is also accepted by the Minister, who has asserted that having an uncapped FAU will be no problem since density and built form will still be able to regulated appropriately; and<sup>36</sup>
- c) it is common ground that employing the FAU to achieve the full objective of delivering 6% social housing would result in a significantly greater residential population, in the order of at least 120,000 people.

122. If the currently proposed mandatory FAR Controls are rejected, the ability to achieve this level of development and an increased accommodation of population will not be dependent on:

- a) arbitrary assumptions about levels of build out by 2050, or the extent of current permits that may be acted on, nor will the level of development be constrained to accord with such arbitrary assumptions; and/or
- b) developers being willing to take up the FAU, and to provide Social Housing as a component of their developments.

123. Based on [44], it appears the Minister has not properly understood the evidence called on behalf of the Landowners, including that of Mr Sheppard.

124. Mr Sheppard has never suggested that future built form outcomes in Fishermans Bend should be determined solely by reference to “existing built form within the precinct”. He and other witnesses have merely expressed the expert view that this built form cannot be ignored.

125. Further, he has accepted that while the built form of adjacent areas needs to be considered, it also is not determinative.

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<sup>36</sup> Ibid at [140]-[142].

126. It is also common ground that there are few existing constraints/opportunities that suggest a particular built form outcome. Further, it is also common ground that there needs to be decisions made about urban structure, and the basic urban structure proposed in the Vision is essentially sound.
127. But all of this simply begs the question. Why is it necessary to determine urban character within a suffocating and arbitrary strait jacket of a pre-determined population target?
128. Why is it necessary to limit development, either across Fishermans Bend as a whole, or in each individual precinct, to a figure that reflects a proportion of this pre-determined figure, notwithstanding that this would result in the gross underdevelopment of incredibly valuable urban renewal land?

## **THE FAU**

129. The FAU mechanism remains poorly resolved, and unlikely to achieve positive community benefits.
130. The first problem with the FAU controls is the significant disconnect between the extent of development allowable under the FAR, and the extent potentially allowable under the FAU.
131. The extent of that disconnect is graphically and helpfully depicted in Document 352, which has been prepared by the Review Panel. That document clearly illustrates the extent of the disconnect.
132. For example, in the critical S3, M3 and L4 Core Areas:
  - a) the FAR is likely to operate to restrict building heights to less than 10 storeys; and yet
  - b) unlimited building heights are proposed, which are only able to be achieved by using the FAU.
133. This makes no sense. Indeed, if this can be described as a “loose fit”, then it would be reasonable to describe Mount Everest as “a moderately tall hill”.

134. The only reason the FAR in many areas is so absurdly low is because of the limitations of the population target which lies at its core. The population target establishes a finite pool from which to draw development opportunity. It represents a cap across the entire Fishermans Bend area which cannot be exceeded, and must be divided up amongst the precinct.
135. While it may not have been the “sole criteria” that determined the individual FARs it is by far the most significant factor, in that it represents a non-negotiable upper limit which has effectively determined the upper limit of each individual FAR.
136. It is nonsensical to describe the allocation of a finite population density across a series of precincts as an “iterative” process. Nor can it be excused on the basis of it being simply a “loose fit”.
137. In the various individual precinct hearings, the Landowners have been able to bring the lack of justification for the FARs into sharp focus. They have, for example, identified land in the Wirraway precinct, within walking distance of a possible future underground rail station, and adjacent to the Westgate Freeway where a mandatory FAR of 2.2:1 is proposed, for no other reason than this is all that remains from the capped pool of density after it has been divided up amongst the other areas.
138. In addition to the non-negotiable, arbitrary upper limit for density across the precinct, the various modifying factors that have been applied by Ms Hodyl are also essentially arbitrary. They are not the result of careful, considered research, or indeed any research at all, in that:
- a) the assumption that 90% of existing permits will be acted upon is no more than a guess (and flies in the face of the Minister’s submissions that most permits have been obtained by land speculators and will never be acted upon);
  - b) as the Minister has now conceded, adopting another figure would result in a “material difference” to the FARs for Montague Core and Lorimer Precinct;<sup>37</sup>
  - c) the assumption concerning the level of build out by 2051 is also (according to Ms Hodyl) effectively a guess; and

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<sup>37</sup> Document 350 – Part C submissions, [83(b)].

- d) adopting another figure would also result in a “material difference” to the FARs for each precinct.
139. The Minister’s Part C submissions offers no solution to these manifest problems. There is not even an attempt to put up any defence to the use of these figures. It is simply said that “*in reality it is difficult to predict how quickly development in Fisherman’s Bend might proceed*”.<sup>38</sup>
140. The Landowners agree. But this is precisely why an FAR which is dependent upon on such predictions is a bad idea and should not be supported.
141. It is not for this Review Panel to revise the various FARs, or to substitute their own guess work as to what figures should be used -which is what appears to be suggested at [83(d)] of the Part C submission.
142. No evidence or other material has been presented by the Minister which would allow such judgments to be made by the Review Panel in any event.
143. For all the above reasons, the Landowners maintain that the Review Panel should recommend that the FAR Control in its current form (and which includes **all** the specified FAR figures) should not form the basis of any future planning scheme amendment for Fishermans Bend.
144. If the Review Panel considers that form of density related planning control should be developed for use as part of some alternative, future amendment, it is submitted that such a control would need to be (as a minimum):
- a) realistic, and determined on the basis that development opportunities within Fishermans Bend should be optimised, and not unduly constrained;
  - b) not determined from an arbitrary, 2050 population target of 80,000 people, or by reference to arbitrary assumptions about the rate of future development or the number of existing permits that will be acted on;

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<sup>38</sup> Ibid [83(c)].

- c) discretionary, so that it can be used to guide decision making and not dictate fixed, inflexible development outcomes; and<sup>39</sup>
- d) determined **after** an acceptable built form/urban design controls has been developed, rather than as a key determinate of those controls.

145. A density control which has these features has some potential to be a useful planning tool. However, the current FAR Control is not.

### **Applying The FAU – The Need For Transparency**

146. The mechanics of the implementing FAU remain poorly resolved.

147. The only public benefit that can now be delivered through the FAU is “social housing”. The CCZ defines “social housing” as having “*the same meaning as in the Housing Act 1983*”.

148. No reason has been identified as to why that definition should be preferred to the definition of social housing that now forms part of the P & E Act, and nor is there any good reason why any reference to the concept of “social housing” in the proposed Amendment should differ from what is in that act.

149. The public benefit to be delivered must, by definition, be one which is “**to the satisfaction of** the Responsible authority”. Consequently (and despite assertions to the contrary by the Minister)<sup>40</sup> under the proposed controls, there can be no real doubt that any decision by a Responsible Authority as to the whether the proposed provisions of social housing justify a proposed FAU **will** be able to be reviewed by VCAT under s 149 of the Act.<sup>41</sup>

150. This, in and of itself, is a good thing. However, the continued assertions of the Minister that this is not the case simply illustrate the current deficiencies of the controls as drafted. It should be obvious to everyone what exactly is being proposed here.

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<sup>39</sup> A further benefit of discretionary density control would be that the manifest, and now admitted, difficulties involved in calculating precise density figures are of less importance, because it is not as important that the actual density figures adopted by the scheme are “correct”.

<sup>40</sup> See Document 350 - Part C submission at [136].

<sup>41</sup> See, for example - *Deakin University v Whitehorse CC (includes Summary)* (Red Dot) [2009] VCAT 134; *Naroghid Wind Farm P/Ltd v Minister for Planning* [2013] VCAT at [94]-[109].

151. Further, the Minister has offered no rational reason why such a planning decision should be beyond the scope of an independent, merits review, which he apparently intends. What precisely is the Minister scared of? Why should such decisions be made behind closed doors, without public scrutiny or the possibility of independent review to resolve any debate?
152. If an independent review of a “public benefit”/FAU decision is possible, the problem remains that such review will necessarily take place in a policy vacuum. There is nothing proposed for inclusion in any of the proposed controls which gives guidance (let alone mandates) how much social housing is required, for how much FAU.
153. This means that future decision makers, either the Responsible Authority or the VCAT, will be required to make a “stab in the dark” as to what is, or what is not sufficient.
154. Further, the definition does not require the delivery of the Public Benefit to occur within Fishermans Bend. This means that the planning control could be employed by a Responsible Authority to require the delivery of social housing anywhere within the State. This is not a satisfactory position.
155. The deficiencies with the Minister’s approach to the FAU were clearly and forcefully articulated by the C270 Panel when they recommended against a similar mechanism being implemented as the FAU as part of that Amendment.<sup>42</sup>
156. The Minister simply ignored that advice, and has offered no argument or explanation in this hearing as to why he did so, or why the concerns expressed by the C270 Panel, (which have been repeated in this hearing by the Landowners) should be disregarded.
157. The scope of the FAU has now been restricted so that it is only available in exchange for the delivery of Social Housing. There is no reason why, if a mechanism of this kind is to be employed, that it should be so restricted.

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<sup>42</sup> Panel Report Amendment C270 to the Melbourne Planning Scheme dated 26 October 2016 pages [68] – [69]

158. There appears to be no good reason to exclude the ability to allow for increased development yield on land in exchange for the delivery of other forms of public benefit, including:
- a) public open space;
  - b) roads and laneways;
  - c) commercial floor space; and/or
  - d) other community infrastructure (such as schools, community hubs etc.).
159. The Review Panel will note that, originally, the Minister opposed using the FAU to secure the delivery of public open space and/or roads or laneways on the basis that the FAR mechanism would achieve this without inequity to any landowner. Now that the Minister has finally accepted that this was a false proposition, and abandoned his original FAR based mechanism to acquire open space and roads/laneways, why should this not be an option under the FAU or any alternative form of “uplift” scheme?
160. If it is truly the case that it is too expensive (or too unfair) for the taxpayer to fund the delivery of all open space in Fishermans Bend, then why should it not be able to be delivered by agreement between government and the landowner, in exchange for allowing an increased (or different form of) development yield on land?
161. It seems nonsensical for the Minister to complain that the Landowners have had the temerity to demonstrate that his “novel” mechanism for the delivery of open space was unlawful and inequitable, and yet at the same time refuse to contemplate an alternative mechanism, that can deliver open space in exchange for development yield by way of co-operation and negotiation. This is especially so when the Minister has accepted such a mechanism pursuant to Amendment C270.
162. As the Minister has stated in the Part C submissions in response to the CoM proposal to cap the FAU, all this would do is require the state to fund more social housing.<sup>43</sup> And, to adapt the Minister’s own words:

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<sup>43</sup> Document 350 - Part C Submission at [142].

*“...while this is not problematic per se ... in the absence of a compelling reason to cap the private sector’s ability to deliver [public benefit/open space/community infrastructure] under the FAU, there is no obvious reason for interfering with the ability to achieve a good policy outcome at minimal cost”.*

163. The Landowners welcome the Minister’s belated concession that it is not problematic *per se* to expect the government to meet the costs of delivering government obligations like social housing. They also endorse the Minister’s position that there is no compelling reason to restrict opportunities for government and the private sector to work together to deliver public benefits and “good policy outcomes at minimal cost.”<sup>44</sup>
164. Indeed, a review of many of the permits issued by the Minister in recent times under the existing controls reveals that, even in the absence of a FAU (far less a mandatory requirement), permits have been issued for developments that incorporate:
- a) laneways and roads;
  - b) open space;
  - c) commercial floor space; and/or
  - d) other public benefits.
165. The Landowners are not opposed to the inclusion in any future amendment of some form of a scheme whereby development yield can be increased/varied in exchange for delivery of public benefit, however they maintain that:
- a) any such scheme should not be limited simply to the delivery of social housing in exchange for increased yield, but include a wide variety of development benefits that include social housing, public open space, roadways and community infrastructure;
  - b) any decision made with respect to the acceptability of any proposed benefit compared to the proposed uplift must be able to be independently reviewed by

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<sup>44</sup> Ibid [142].

VCAT, in the same way as any other planning decision made by a responsible authority; and

- c) the proposed controls must include detailed policy and/or guidelines to guide the exercise of discretionary judgement and these must be included within the Scheme, in order to promote transparency, clarity and consistency in decision making.

166. There are many examples of such provisions already being employed in planning schemes in this state, which operate effectively. None of them are dependent upon a mandatory FAR Control to operate effectively.

167. The Review Panel should recommend that the Minister prepare controls which include these features so that the details can be the subject of consideration as part of a future amendment.

### **Reservation of Land for Public Purposes**

168. The Minister now no longer proposes to use the CCZ as a means by which to require land reserved for public purposes to be delivered to a responsible authority without compensation.

169. However, the CCZ still proposes to:

- a) reserve private land for public purpose; and
- b) prevent the development of that land for any other purpose.

170. What has occurred is a shift away from controls which propose to **reserve** and **acquire** land, to controls that propose to **reserve** (or set aside) and then **sterilise** private land (in the sense that it cannot lawfully be developed for any other purpose).

171. Clause 2 of the Part C CCZ control provides that: “**The use of land must be generally in accordance with the Maps in this schedule.**” The same restriction is proposed to apply with respect to the subdivision of land (clause 3.0), and the construction of buildings and the carrying out of works.

172. The maps still include maps which show private land as (amongst other things) “new public open space”, and new (or widened roads).
173. For all the reasons set out in the Landowners’ main submissions, this represents, as a matter of law, the reservation (or setting aside) of land for a public purpose.
174. Further, (and again for all the reasons set out in the Landowners’ main submissions) it would be contrary to objective 4(2) (l) of the P&E Act to impose this control in circumstances where it is not proposed to “provide for **compensation**” for this setting aside.
175. “Compensation” is not defined in the P&E Act. It must accordingly be given its ordinary and natural meaning (consistent with the context in which it appears). It is submitted that, when used in this context, it contemplates that the person whose property is set aside is put in the same position as he or she would have been **but for** the reservation.
176. In other words it contemplates **full compensation** for any loss that flows naturally from the act of “setting aside” (or reservation) and not some form of **partial** or **incomplete** recompense for the loss suffered.
177. The loss suffered by a landowner from the setting aside of land does not flow merely from its later acquisition. Rather, it also flows as a direct consequence of the reservation or setting aside. This is especially so, where there is a significant time delay between the reservation and any subsequent acquisition (which is likely to occur in Fishermans Bend).
178. The negative, financial effects of the reservation or setting aside of land for a public purpose include (but are not limited to):
- a) an immediate, adverse impact on the land’s value, which may affect the ability to use it as collateral or to borrow against it; and<sup>45</sup>
  - b) a continuing need to pay outgoings with respect to the land, even though it cannot be used for anything other than open space or a road.

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<sup>45</sup> See: for example: Callinan J in Temwood at [126]

179. The ICP provides a mechanism whereby a private landowner may be entitled to receive a form of partial compensation for the acquisition of land. As to the fairness or adequacy of that compensation, the Landowners adopt the compelling submissions of Mr Morris QC made on behalf of Delta<sup>46</sup> and endorse his views that, having regard to the specific circumstances of Fishermans Bend, that the ICP provides inadequate and inappropriate compensation for the acquisition of that land.
180. **But even if this is not accepted, the ICP provides no mechanism by which proper compensation can be obtained for the reservation or setting aside of land.**
181. It follows that, the Landowners consider that the proposed Amendment remains an unacceptable and unlawful response to the reservation and acquisition of private land for public purposes.
182. Had they been given the opportunity to do so, the Landowners would have either presented expert evidence, or cross-examined witnesses called by other parties to make good these submissions. However, they have not had the opportunity to do so.
183. It is unclear to the Landowners what the status of Document 99<sup>47</sup> is given the Minister's recent abandonment of the exhibited, Day 1 and Part B mechanism for the acquisition of open space.
184. The Minister has not identified whether it is still intended to acquire land using a "standard" mechanism, and to pay full and complete compensation under the *Land Acquisition and Compensation Act 1986* where it is proposed that Land be either in its entirety (such as Aquaino Pty Ltd (submitter 68)) or in its majority, to be reserved for public purpose.<sup>48</sup>
185. Accordingly, the Landowners' ability to make informed submissions as to the fairness and legality of the newly proposed mechanism, and how it is to operate in conjunction with the proposed Part C CCZ control, is significantly compromised.
186. In the circumstances, the Review Panel can do no more than:

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<sup>46</sup> Document 326 – General submission on Minister's Part C submissions.

<sup>47</sup> Document 99 – Options for open space.

<sup>48</sup> See the List that is Attachment 1 to SIN19, Document 351.

- a) observe that the Minister has abandoned the original mechanism for the acquisition of land using the FAR Control and the CCZ;
- b) infer that, in doing so, the Minister has considered that it is was not an appropriate mechanism;
- c) note that the Minister has, at a very late stage in the hearing, proposed an alternative mechanism which would include the use of an ICP;
- d) observe that the parties and the Review Panel have not been given a sufficient or fair opportunity to consider properly the merits of the new approach in the context of Fishermans Bend; and
- e) recommend that, if an ICP is to form a part of any future amendment, that the future amendment be subject to exhibition, notification and independent review to allow this mechanism to be fully and fairly considered.

### **Protection for Existing Uses**

187. The Part C controls do not adequately protect all existing uses, or allow them to expand their existing operations.

188. Clause 2.0, 3.0 and 4.0 should be amended to include the following:

*This requirement does not apply to:*

*The use or development of land which occurs pursuant to a permit issued before the approval date of Amendment GC81;*

*An application or request to amend a permit issued before the approval date of Amendment GC81.*

*An application for buildings and works associated with an existing use.*

### **Overshadowing**

189. Supported by the evidence of Mr Sheppard, Ms Heggen and Mr McGurn, the Landowners submit that the overshadowing controls should be discretionary equinox controls.

190. The existing and proposed open spaces areas are not of a status that warrant mandatory solstice controls. Most of the proposed open space is yet to be acquired (and it is highly uncertain when and if they will be acquired) and most has not be planned in any form at all.
191. The mandatory application of equinox or solstice overshadowing controls may result in an absurd outcome where minor and fleeting overshadowing at the edge of an allotment nominated as open space area significantly and unreasonably constrains development in an activity centre next to public transport.
192. A discretionary equinox control provides decision-makers the opportunity to assess the implication of shadow on a case by case basis. Decision-makers have the skill and judgement to do this.

## **Conclusion**

193. Throughout the hearing, the Landowners have endured repeated accusations from the Minister (and less frequently the CoPP) to the effect that they are greedy spoilers, seeking to maximise profit and avoid paying infrastructure contributions.
194. These submissions are baseless, and reflect poorly on the Minister.
195. In assessing what weight to give to these unfortunate submissions, the Review Panel is invited to reflect on the following:
  - a) The Landowners' submissions are supported by a considerable body of independent, expert evidence from a number of highly experienced, well regarded and independent experts, all of whom can rightly be regarded as leaders in their respective fields. For the Minister to imply that the evidence of Mr Sheppard, Ms Heggen, Mr McGurn, Mr Biacsi, Ms Dunstan, and Mr Shimmin (amongst others) is motivated by anything other than their own genuine, independent expert concern about this proposed Amendment is highly improper. Tellingly, no such proposition was ever put to any one of these witnesses in cross-examination.
  - b) The Landowners' submissions are also supported by the evidence of Mr Milner and Mr Shipp, both of whom expressed forthright and independent views as to

the significant flaws in the proposed Amendment, including the proposed method for funding of infrastructure and the delivery of open space.

- c) That vast body of independent evidence can be compared to the paucity of the Minister's. The only planning witness called was Mr Glossop who was, for reasons best known to the Minister, specifically instructed not to consider the merits of the proposed Amendment, but only the mechanics of its implementation. Even on that limited basis, Mr Glossop expressed considerable discomfort about certain aspects of the controls, including what he described as the "Orwellian" policies seeking to mandate "family –friendly housing".
  - d) The Landowners' submissions as to the illegality and inequity of the proposed mechanism for the acquisition of open space and roadways were supported by the CoM, and have been proven to be correct. The Minister has chosen to abandon his ill-conceived proposal, at the 11<sup>th</sup> hour rather than submit to the Review Panel's judgement as to its merits.
  - e) The Landowners have successfully identified numerous flaws in the proposed controls, many of which have required the Minister to embark on repeated significant rewrites of the proposed controls. A comparison between the Part C controls as now proposed, and the original exhibited controls reveals transformative change, much of which can be attributed to the submissions of the Landowners, other affected individuals and the independent, expert witnesses.
196. Suggestions that the Landowners are seeking to "derail" the preparation of improved planning controls for Fishermans Bend are also baseless. The biggest hurdle facing the proposed Amendment has proven not to be the Landowners, but the poor quality of the proposed controls and the clumsy drafting of whoever prepared them.
197. Had it been the Landowners intention to merely derail the proposed Amendment, then the simpler (and far less costly) tactic would have been for the Landowners not to waste time and money in participating in the hearing, but to simply sit back, let the Review Panel recommend (and presumably the Minister approve) flawed and unlawful controls, and then challenge their validity in the courts. Instead, the

Landowner's have elected to assist the Review Panel to identify the Minister's many mistakes and misjudgements, and to attempt to achieve a better outcome for the community.

198. But it is not the role of the Landowners, or indeed this Review Panel, to redraft this Amendment. This is supposed to represent the commencement of a process through which an actual amendment will be prepared, not its conclusion.
199. In this vein, the Landowners attach, at Appendix A, suggested revisions to the Part C Controls (the CCZ and DDO) which they submit should be included in the drafting of an amendment for exhibition in the future.
200. However, as is evident from these submissions, and the submissions of the Landowners throughout this process, the Landowners submit the starting point of a population target of 80,000 is flawed. Until a new approach to proposed planning scheme controls is adopted, which starts with a built form outcome that recognises the strategic opportunity of Fishermans Bend and builds the controls around this, rather than an arbitrary population target. Simply "fiddling around the edges" is a pointless exercise.
201. The Landowners suggest that a new draft of proposed planning scheme controls should, at the very least, include:
  - a) An exhibited Infrastructure Contributions Plan;
  - b) Detailed precinct plans;
  - c) An urban structure that carefully and realistically examines existing land uses and subdivision patterns and nominated areas of open space and public networks accordingly;
  - d) Deletion of the Floor Area Ratios in the CCZ and related policy;
  - e) Deletion of Floor Area Uplift in the CCZ and related policy;
  - f) Transitional provisions for existing planning permit applications;

- g) Provisions for existing permits to be amended in accordance with the controls they were decided upon;
- h) Protection for existing uses and future development of existing uses as drafted above;
- i) Provision in the CCZ to provide permit exemptions where there is an approved development plan overlay in place;
- j) Provision of a development plan overlay for land owned by the Goodman's Landholding;
- k) Discretionary height and setback controls as included in the appended DDOs;
- l) Discretionary equinox shadow controls as included in the appended DDOs;
- m) Further amendments to heights and setbacks as included in the appended DDOs; and
- n) Corrections to the Fishermans Bend Framework Plan (Figure 18) regarding the areas of land "Recommended for heritage designation (subject to further investigation)".

202. The Landowners reiterate that although these suggestions are made to this Panel, a "tinkering around the edges" of the controls put forward by the Minister is not the answer. A re-think of the Vision is required with a fundamental re-drafting of proposed controls before an amendment is exhibited.

203. In the event that the Review Panel comes to the view that interim controls should be implemented whilst an amendment is being prepared, the Landowners suggest that the CCZ controls stay as currently in the scheme and that the revised DDOs appended to this submission be included until an amendment is approved.

204. In absence of any advice from the Minister to the contrary, the Landowners, and everyone else interested in Fishermans Bend, is entitled to proceed on the basis that the next stage will be:

- a) the preparation, exhibition and consideration of an **actual** planning scheme amendment; and
- b) further opportunities for all parties to comment and review, and have considered submissions about that future amendment.

205. If this occurs, then it is likely that the community will be better off. The value of rigorous, independent testing and review that includes all affected persons has never been made more apparent than in the course of this hearing.

206. It is only through such a process that a final set of fair, lawful and equitable planning controls will be able to be implemented for Fishermans Bend.

**13 June 2018**

**Chris Canavan QC**

**Nick Tweedie SC**

**Jane Sharp**

Instructed by Norton Rose Fulbright