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RELEVANT DOCUMENTS

1. The following documents that have been tendered are of most relevance to Marcellin's case:
   a) EES Map Book Horizontal Alignment Plans sheets 22 (part 1) and 23 (Part 2)
   b) 31a. Mr Briggs (civil engineer) expert report
   c) 31b. Mr Evans (acoustic consultant) expert report
   d) 31c. Ms Dunstan (traffic engineer) expert report
   e) 88a. Marcellin College - Opening submission - 26 July 2019
   f) 88b “ Marcellin College Statement by Mr Murphy “
   g) 88c “ Marcellin College Statement by Mr Reynolds
   h) 102. Technical Note R34 Bulleen Switch
INTRODUCTION

Background

3. These submissions are made on behalf of Marcellin College ("Marcellin").

4. Marcellin is concerned about the potential detrimental impact of the north-east link project ("the project") on the school.

5. Marcellin is a catholic school founded by the Marist brothers in Camberwell in 1950. It moved to its current Bulleen site in 1963.

6. Marcellin is a secondary boys school, with 1,430 students currently enrolled. It has an annual intake of 243 Year 7 students, with students mostly coming from within the boundaries of its 21 feeder parishes.¹

7. Annual tuition fees range from $11,180 for year 7 to $12,480 for year 12. Marcellin relies on these fees, and subsidies from Commonwealth and State Government to fund the continued operations of the school. Relevantly, the school fees constitute the majority of the school's income.

¹ These parishes stretch from Alphington to Donvale, and from Eltham to Kew.
8. Marcellin is part way through implementing its Master Plan (extracts attached to Mr Murphy's supplementary statement). The Master Plan report explains:

The Plan aims to transform the school’s capacity to provide 21st century learning opportunities for its students, provide its critical core of teachers with dynamic, flexible settings in which to work, and reshape the wider community’s understanding of the role of the college as a provider of quality educational programs.

This plan for Marcellin college weaves the social and teaching aspirations of the school with its unique topography and sense of community to develop a master plan vision based upon the characteristics of a traditional hill top village a model which incorporates all of the social and cultural aspects of daily life: civic, spiritual, learning, living, commerce and exchange into a series of specific locations that are interconnected through a series of flexible social and communal spaces. It is the importance of the spaces between and the interactions and uses they support that exemplify this vision for Marcellin.2

Project principles

9. The purpose of the EES is to provide a clear and sufficiently detailed description of the project to enable the effective assessment of its potential environmental effects.3

10. Moreover, the EES should detail the proponent’s approach to managing (avoiding, minimizing or offsetting/managing) the anticipated environmental effects. 4

11. Relevantly, there is a consistent reference to “avoiding, minimizing or offsetting/managing” the effects of the project in the EES scoping requirements, and the EES Assessment framework. For example:

a) The scoping requirements state that the EES main report should include “intended measures for avoiding, minimizing, managing and monitoring impacts.”5

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3 North-East Link – EES scoping requirements at p.4
4 North-East Link – EES scoping requirements at p.7.
5 North-East Link – EES scoping requirements at p.8.
b) The scoping requirements state that the Environmental Management Framework (“EMF”) should include Environmental Performance Requirements (“EPRs”) or management measures proposed in the EES to address specific issues, including “commitments to avoid, mitigate or manage adverse effects or enhance environmental outcomes.”  

6 North-East Link – EES scoping requirements at p.10.

c) Section 4.4 of the EES states that:

The EES assessment has used a systematic risk-based approach to understanding the existing environment, the potential impact of the project on the environment and to evaluate the effectiveness of measures to avoid, minimise or manage risks and impacts.

12. Accordingly, the EES must:

a) Set out a clear and sufficiently detailed description of the project so that the impacts of the project can be understood, and assessed.

b) Set out, as the first step, how the impacts have been avoided.

c) If an impact has not been avoided, provide a robust justification as to why the impact cannot be avoided, and demonstrate how the proponent will minimize and manage that impact.

13. It is also submitted that the burden on NELP is higher if the impact is significant and/or severe. If the impact is significant or severe, the justification for that impact must be clearly demonstrated. That is, there must be a clear and sufficient justification demonstrating that it is not practicable to avoid that impact, and, if it is not practicable not to avoid the impact, how the proponent will minimize that impact.

The Role of the IAC

14. In opening submissions on behalf of NELP, it was said that the EES has been based on a number of guiding principles, including the need to “minimise” impacts on communities during the construction of the project, and “to do all you can that is reasonable.”
15. This is consistent with the opening submissions of Marcellin, to the effect that impacts on landowners must be minimized as far as practicable.

16. Of course, avoidance is the best way to minimize the overall impacts of the project, and is the starting point.

17. The project is the largest construction project in Victorian history. It does have the potential to cause significant detrimental adverse impacts on adjacent landowners – both during the construction and operation of the project.

18. Given this - NELP should be to the held to its word, and the IAC should hold NELP to account.

19. The IAC should be satisfied that NELP has, as far as practicable, as a first step avoided any adverse impacts, and if avoidance is not practicable, minimised those adverse impacts. And if NELP has not done so, then the IAC should be forthright in making recommendations requiring NELP to address this deficiency.

20. In undertaking this task, it is submitted that the following principles should be applied:

   a) The burden of proof is on NELP to prove that it has as a first step, avoided the impacts of the project as far as practicable.

   b) If there are adverse impacts, NELP must provide a robust justification as to why the impact cannot be avoided, and must also set out how the impact will be minimized and managed.

   c) The burden on NELP is higher if the impact is significant and/or severe.

   d) It is appropriate to place these burdens on NELP, as the project proponent and the agent of change.

   e) The potential cost of avoiding or minimising an impact is not a sufficient justification for failing to avoid or minimize an impact, unless the cost is disproportionately to the benefit to be achieved in spending that money.

   f) While flexibility is no doubt required for a project of this scale, that should not be a carte blanche for applying the SCO to more land than is required for the project.
g) Where the statutory framework does allow for changes to the project, it must include robustly drafted, enforceable, controls that ensure that unacceptable outcomes do not occur.

h) If a variation to the reference design results in the potential for a significant adverse impact, the task of assessing that variation should be one for the Minister, employing a transparent process incorporating third party input.

21. Marcellin understands and accepts that the IAC must grapple with many issues, some that are more complex or of a greater degree of “significance” than the issues raised by Marcellin. Some may say Marcellin has taken up more “air time” than its issues deserve having regard to the project as a whole. However, the issues of concern to and the impacts on Marcellin are real, and they are significant. Further, Marcellin also provides a convenient “case study” upon which the IAC can judge the extent to which the EES has assessed impacts, and whether the proposed planning controls provide a sufficiently robust way forward in the context of a “reference design”.

IMPACT ON MARCELLIN

Avoidance and Minimisation

22. As set out in Marcellin’s submission dated 7 June 2019:

Marcellin generally supports the North East Link Project (Project) and recognises the community benefit of improved road infrastructure.

23. Marcellin acknowledges that there will be a long term benefit of the project in the form of a signalized intersection on Bulleen Road. However, the detrimental impacts of the project on the College – even if mitigated - far outweigh that benefit. Marcellin reluctantly accepts that it is inevitable that the project will have some impacts on the school:

a) It accepts that there will be disruption in some form arising from construction activities, probably over a time period in the ball park of between 5 and 10 years.

b) It accepts that there will be a long term visual impact of the proposed ventilation and elevated road structures, even if the design is of
exceptional quality. (The reference design, including the proposed ventilation structures, has been assessed by Mr Wyatt as having a "high impact" on Marcellin College (oral evidence)).

c) Marcellin also recognizes that there will be an impact of the ventilation structures on air quality, but accepts the impact is minor and will not affect the health or well-being of its students.

24. The reference design is shown in the Map Book (eg sheet 22 of the horizontal alignment plans and sheets 19 and 20 of the vertical alignment plans).7

25. The proposed construction compound is shown on the left figure, with the operations plan shown on the right figure:

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7 Marcellin has requested elevations of both the reference design and the Bullen switch to better understand the impacts on its frontage. VP37 of the visual assessment in the EES is a little difficult to understand having regard to the map book plans.
26. The montage of View Point 37 (App C to Technical Report H) shows the location of the ventilation structure in relation to Marcellin's entry and ovals.

27. These impacts in and of themselves will be significant. The life of the project is the equivalent to the whole period of time a boy may spend at the school. Further, the education marketplace in the eastern suburbs of Melbourne is competitive. Marcellin needs to retain and improve its facilities and educational program to remain competitive and attract students to the school, and maintain its current enrolment levels. Marcellin also seeks to maintain the high reputation of the school. If enrolments drop, the programs at the school may become more limited, and the community as a whole suffers. It is important that the impacts are not so great that the school's reputation suffers. If avoidable impacts are avoided, Marcellin is confident that it can continue to thrive.

28. What Marcellin is, however, particularly concerned about, is that the:

   a) Impacts from the reference design have not been avoided and minimized (and may not be mitigated) (in particular by the placement of the construction compounds on its land); and

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8 Mr Murphy’s statement at [19] (document 88b). Mr Murphy’s statement was consistent with the submissions of Carey’s principal, Mr Grutzner.
b) Proposed controls permit the design of the project to significantly change, without the impacts on Marcellin, and other affected landowners, being considered and taken into account, properly or at all.

29. Given the inevitable and significant impact on Marcellin as a result of the project, even assuming the principles of avoidance, minimization and mitigation are appropriately applied, Marcellin ought not be subject to additional impacts – impacts that can be avoided by a thorough process of assessment and by a thoughtful and well considered design.

30. It is these avoidable impacts that have the potential to cause the school, and hence the community, to suffer considerably.

Integrated Assessment

31. Marcellin requests that the IAC conduct an integrated assessment of the impacts on Marcellin, as opposed to a topic by topic analysis. It is only through an integrated assessment that the totality of the impacts, and hence the reasonableness of any proposed avoidance, minimization and mitigation can truly be judged.

32. Marcellin seeks through this process to ensure that its interests will be protected as the project progresses through the design and approvals phase.

33. It asks the IAC to make recommendations that will protect its interests, rather than to assume that the contractor will listen and respond to its concerns.

34. In particular, it asks the IAC to make a recommendation to ensure at the very minimum that the impacts of the project are no worse than the reference design, and to make recommendations to minimize the impacts of the reference design.

The Controls

35. It is proposed to apply a Specific Controls Overlay ("SCO") and associated Incorporated Document\(^9\) ("Incorporated Document") to the land within the proposed construction compound.

\(^9\) July 2019 version - documents 116a and 116b.
36. These controls exempt the project (including any variations to the reference project) from the requirement to obtain a planning permit.

37. The controls exempt the project as it currently stands, and any variation to it, from third party notice and review, no matter how significant any variation and its impacts may be.

38. Thus the control takes away the rights usually enjoyed by owners and occupiers to participate in the planning of uses and developments that affect them.

39. Unless the IAC recommends otherwise, is it highly likely that the final form of the planning scheme amendment will be approved by way of a section 20(4) process, excluding third party review and participation – justified on the basis that these IAC have provided a sufficient forum for community input into the planning controls.

40. The only controls on the project which require any form of further statutory approval are the conditions set out in clauses 4.4 – 4.7 of the Incorporated Document. These clauses require (amongst other things):

a) The EMF, incorporating the EPRs, to be to the satisfaction of and approved by the Minister for Planning ("Minister"). Again, the preparation and approval of the EMF and EPRs is not subject to any third party notice, scrutiny and review rights. The requirement includes the curiously worded statement:

   The EMF must:

   …

   be accompanied by a statement explaining any difference between it (including the EPRs), and the matters set out in the Minister’s Assessment dated [insert date] made pursuant to the EE Act.

   Perhaps this should say words to the following effect:

   be accompanied by a statement explaining any difference between it (including the EPRs), and the EPRs recommended by the Minister in the matters set out in the Minister’s Assessment.

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10 Clause 4.5 of the Incorporated Document.

11 Clause 4.5.2(b) of the Incorporated Document.
dated [insert date] made pursuant to the EE Act and identify any aspect of the EMF that is not in accordance with the recommendations in the Minister's Assessment.

b) The Urban Design Strategy ("UDS") to be approved by the Minister,\(^{12}\) which is likely to be a high level document that does not drill down to the actual design of the project (as illustrated by the exhibited UDS). There is only a confusing statement in the Incorporated Document with ties the UDS to the exhibited UDS, namely: \(^{13}\)

The UDS must be accompanied with a statement explaining any differences between it and relevant matters set out in the Minister’s Assessment dated [insert date] under the Environment Effects Act 1978.

Perhaps this should say words to the following effect:

The UDS must be accompanied with a statement explaining any differences between it and the North East Link Urban Design Strategy April 2019, and must address all relevant matters set out in the Minister’s Assessment dated [insert date] under the Environment Effects Act 1978.

c) Urban Design and Landscape Plans ("UDLPs"), which may be prepared in stages. \(^{14}\) Although there is a requirement for the UDLPs to be placed on public exhibition, the Incorporated Document should specify a minimum timeframe for making submissions, and notice should be more targeted. Further there are drafting issues with clause 4.7 of the Incorporated Document – eg the Urban Design Advisory Panel is not defined, the clause number is wrong etc.

Some of the changes that should be made at a minimum include:

4.7.4. Prior to the submission of an UDLP to the Minister for Planning for approval, an UDLP must be:

\(^{12}\) Clause 4.6 of the Incorporated Document

\(^{13}\) Clause 4.6.3 of the Incorporated Document.

\(^{14}\) Clause 4.7) of the Incorporated Document.
(a) Provided to the Urban Design Advisory Panel [INSERT DEFINITION] and relevant council/s for consultation.

(b) Where relevant, provided to the Roads Corporation, Public Transport Development Authority, Melbourne Water, Heritage Victoria and the Head, Transport for Victoria for consultation.

(c) Made available for public inspection and comment on a clearly identifiable Project website for 15 business days. The website must set out details about the entity and contact details to which written comments can be directed during that time and specify the time and manner for the making of written comments. The period for comment must be a minimum of 30 days.

For the avoidance of doubt, consultation in accordance with (a) and (b) can occur prior to, during and after the public inspection and comment period in (c).

Before, or on the same day as an UDLP is made available in accordance with clause 4.7.34(c), a notice must be:

(i) provided to the owners and occupiers of land which is within the project area to which an UDLP applies

(ii) provided to the owners and occupiers of land which are adjacent to the project boundary in the area to which an UDLP applies and

(iii) be published in a newspaper generally circulating in the area to which an UDLP applies

informing the land owners and occupiers and community of the matters set out in clause 4.7.34(c).

In any event, the UDLPs are almost certain to be put on public exhibition after the tender has been awarded and the design of the project largely finalized. Scope for change in response to public comments is likely to be almost non-existent. Further, there is nothing in the Incorporated Document that links the UDLPs to the reference design.

41. Even then, works which have the capacity to significantly impact Marcellin are exempt from these requirements. This is because preparatory buildings and works for the project, such as the establishment of construction compounds, are exempt from the requirement to have the EMF and EPRs
approved before those works commence (discussed further below in these submissions).\textsuperscript{15}

42. While a similar set of controls was used for the West Gate Tunnel project, that project was not a reference design. Further, the Incorporated Document for the West Gate Tunnel project (attached) provided a far greater level of certainty to the community. Among other things, it stated:

4.4 Development and Urban Design Plans
The use and development must be carried out generally in accordance with West Gate Tunnel Project Development and Urban Design Plans, December 2017 or amended Development and Urban Design Plans approved by the Minister for Planning under clause 4.4.2.

and

4.5 Environmental Performance Requirements
4.5.1 The use and development must be carried out in accordance with West Gate Tunnel Project Environmental Performance Requirements, December 2017 or amended Environmental Performance Requirements approved by the Minister for Planning under clause 4.5.2.

43. The Incorporated Document for the West Gate Tunnel set out a detailed process of approving amendments to the EPRs. That can be compared to the NE Link Incorporated Document which simply provides:

The EMF may be amended from time to time, to the satisfaction of the Minister for Planning.

44. The final form of the West Gate Tunnel Incorporated Document reflected the recommendations of the IAC, namely that the Incorporated Document contain the following paragraph (pdf p289 West Gate Tunnel IAC Report):

Development and Urban Design Plans
5.1 Development of the Project must be carried out generally in accordance with the document titled “West Gate Tunnel Project Development and Urban Design Plans” dated May 2017 (\textit{date to be inserted after the Development and Urban Design Plans and Project boundary have been modified in consultation with Council and relevant authorities in accordance with the findings and}}

\textsuperscript{15} Incorporated document, clause 4.9.
recommendations of the IAC’s Report), including Attachments 1, 2 and 3, and in accordance with the Environmental Performance Requirements set out at Appendix A of the document (collectively referred to as West Gate Tunnel Project Development and Urban Design Plans and EPRs).

45. It appears that the NE Link project is not only far less certain, due to the use of a reference design, but then is being combined with a more relaxed set of controls to decide future decision-making.

46. It is for this reason, that it is important that the IAC does not simply make recommendations in relation the EPRs, but also makes very specific recommendations in relation to the design of the project which is ultimately adopted.

Operational Impacts

47. Relevantly, for the purposes of the operational phase of the project, Marcellin seeks to minimise the impact of the project in the long term:

a) The Bulleen Road frontage is important to Marcellin. It attracts students to the school. It gives the school a presence. It advertises the facilities of the school. The Marcellin fencing and signage is prominent. This is reinforced by the view of Marcellin’s playing fields and education buildings from Bulleen Road.

b) Accordingly, Marcellin seeks to retain its presence on Bulleen Road.

c) Marcellin currently has its own access off Bulleen Road. This reinforces its presence on Bulleen Road. The sharing of access with Manningham Hotel will reduce its presence on Bulleen Road.

d) Further, the sharing of access with Manningham Hotel, a licensed hotel function centre and gaming venue, will create a negative perception of the school. It is “totally inappropriate” according to Mr Murphy. Mr Weston and Mr Begg agreed it would be preferable not to have a shared access between the pokies/licenced hotel and the school.

e) The ventilation stack and building are large structures. The ventilation stack is around 40 metres high. Presumably it needs to be this high to fulfil its required function, and will be maintained at that height in the
final design. The ventilation building in the reference design is around 15 metres high, 25 metres wide and 67 metres long. Marcellin is vulnerable to the visual impact of this structure, particularly when viewed from its sporting facilities. Not only that, people associate ventilation stacks with negative health impacts, even if empirical evidence does not support that association. Marcellin seeks to ensure that the ventilation structure will be sited and designed to minimize and mitigate impact on Marcellin.

f) The ventilation stack and building have been brought significantly closer to Marcellin in the Bulleen switch option and have the potential to further decrease Marcellin’s presence along Bulleen Road, if located between Bulleen Road and the school.

g) It should be a 'given' that the final design of the intersection accessing Marcellin is appropriately designed. However, the traffic volumes in the EES for the intersection with the school are less than Marcellin would likely generate in the EES peak periods ie the modelling of the intersection was based on incorrect data. (conclave report doc 109). Clearly this would need to be fixed in the final design.

h) Marcellin also seeks to ensure that the controls put in place a measure (for both to the classrooms and the active open space areas of the school) to ensure that the long term noise levels from the project are acceptable.

**Construction Impacts**

48. Relevantly, for the purposes of the construction phase:

a) Sport, Health and Physical Education classes are an integral part of Marcellin’s education program. Health and Physical Education is a subject offered at Marcellin, and classes are conducted on a daily basis on the school ovals.
b) Marcellin prides itself in providing sports grounds that are some of the best in the state, and spends around $150,000 annually to maintain its sporting facilities to a high standard. \(^{16}\)

c) Marcellin has an advantage over the other schools in the area. This is because its ovals are located at the school. Students learning programs are not disrupted by having to travel to grounds away from the school. Of course, the flipside is that Marcellin is more significantly impacted than other schools by any occupation of its ovals – in that it will have to arrange for students to be transported to alternative venues, in circumstances where it does not currently have to do so.

d) Marcellin’s ovals are used regularly – and not just by Marcellin. The Old Collegians Cricket, Soccer and Football Clubs, Baldies over 35s footballers and other schools and community groups also use the ovals. \(^{17}\)

e) The reference project shows a construction compound over much of the Lyons Oval and the rugby and soccer pitches on the Gartner fields.

f) The occupation of these ovals would result in Marcellin students having to use alternative venues, off-site. Even if the costs of transportation of the students to these venues (assuming that the previously proposed tunnel or bridge option to the Bulleen ovals are now off the agenda) were compensated, the inconvenience would significantly disrupt student learning programs and could lead Marcellin to lose its competitive advantage over other schools.

g) Most importantly, there are also potential reputational impacts on the school. Construction hoarding along Bulleen Road and within the campus will cause detriment to the amenity of the school. Activities associated with a construction compound (and particularly higher impact activities such as the transport and storage of spoil, or the testing of machinery) will also cause detriment to the amenity of the school.

\(^{16}\) Refer to the statement of Mr Reynolds at [23] – [24] (document 88c).

\(^{17}\) Refer to the statement of Mr Reynolds at [9] – [21] (document 88c).
h) In short, prospective parents are likely to be concerned about the impacts on the school, and if they know a construction site is proposed at the school, may choose to enroll their sons elsewhere.\(^{18}\)

i) Marcellin is also likely to lose its Bulleen Road frontage during the construction phase – an important element of its advertising campaign and the pull for its enrolments, as discussed above.

j) The school needs convenient access to the school at peak times. This includes convenient access for the public transport buses which provide a link between Heidelberg station and the school, and for other buses, noting that buses must enter and exit via Bulleen Road. The location of the construction compounds on Marcellin’s ovals will disrupt its access. To what extent is presently unknown. At a minimum Marcellin requests that the project approval documentation provides for continuing access, and that capacity of access is maintained at peak times.

k) The experts in the conclave agreed that bus access via Sandra Street is not appropriate due to road geometry and function and access to Marcellin is required via Bulleen Road during construction (Marcellin conclave report doc 109).

49. All of these factors have the potential to negatively impact the school. The evidence before the IAC is that:

a) Unless appropriately mitigated, there will be a significant impact on the school by reason of the construction compound occupying the ovals for up to 7 years (Mr Weston);

b) Marcellin’s presence along Bulleen Road is important, and a construction compound along Bulleen Road would reduce the attractiveness of the school (Ms Stoetrup);

c) NELP has not assessed the economic impact on Marcellin. Instead, the school is in the best position to assess the impact (Ms Stoetrup);

\(^{18}\) Refer to the statement of Mr Mark Murphy at [24](document 88b). According to Mr Murphy he leads tours of the school to prospective families and is regularly asked by what impact the project will have on the school.
d) Mr Murphy's evidence is that there will be detrimental impacts on the school as a result of the construction compounds.

50. There are some less negative aspects of the reference design, in comparison to other proposals which have emerged since the commencement of the IAC hearing:
   a) Marcellin retains its Bulleen Road frontage.
   b) NELP does not propose to acquire any of the Marcellin land.
   c) Marcellin has its own access, (and the access is not shared with others, including the Manningham Hotel, and Park and Ride facility).
   d) The ventilation stack and building are located around 60 or more metres from Marcellin (at its closest point), with Bulleen Road providing a buffer to this structure (albeit that the impact is still ‘high’ according to Mr Wyatt).

51. These aspects of the reference design are important to Marcellin. They reduce the impacts on Marcellin in the longer term.

52. Against this, the reference project shows a construction compound over part of the Marcellin land, for an unspecified use and for an unspecified time.

53. Obviously, a construction compound, necessitating the occupation of Marcellin land will significantly impact Marcellin. The extent of that impact will depend on the nature of the use, and the term of the occupation. Accordingly, the extent of the impact must be known, and the need to impose that impact, justified. And, if there is a demonstrated need for that impact, the extent of the impact must be minimized.

54. No justification has been provided for the significant impost that would be placed on Marcellin by the construction compounds on its land, for the reasons outlined below.

LIST OF MAIN RECOMMENDATIONS SOUGHT BY MARCELLIN

55. The IAC should recommend that the Marcellin land be removed entirely from the SCO on the following bases:
NELP has not assessed the impacts of the construction compound on the Marcellin land;
NELP has not justified the need for the construction compound on the Marcellin land;
There is no demonstrated need for the construction compounds on the Marcellin land – in particular car parks and site offices can be located elsewhere (Mr Briggs);
While NELP has suggested a sidetrack 'may be required' or is “likely to be required”\(^{19}\) it has not properly justified the sidetrack, and has certainly not provided any information to support the full extent of the sidetrack shown in the Bulleen temporary diversion plan (document 132) notwithstanding Marcellin calling for such information shortly after the document was tabled;
The EES proceeded on the basis that none of Marcellin’s land would be permanently acquired, and there has not been an assessment of the impact of the compulsory acquisition of Marcellin’s land; and
The impacts of the project on the school cannot simply be addressed by compensation – the school is a community facility, and negative impacts on the school impact the community as a whole.

Further, the IAC should recommend that project boundary be re-considered to allow access to the south from the Park and Ride via a right turn onto Thompsons Road (Ms Dunstan’s evidence).

The IAC should recommend that any variation to the reference design at minimum:

Does not provide a shared access between the school and Manningham hotel;

\(^{19}\) Traffic Engineering conclave report in relation to the Bulleen Road precinct 15 August 2019 (document 117), comment of Mr Frodsham at p.2
b) Does not require the acquisition (either permanent or temporary) of Marcellin land (unless required for the sidetrack in which case only the minimum amount of land must be temporarily acquired for that purpose);

c) Retains the entirety of the school’s Bulleen Road frontage in the long term (recognizing that part of that frontage may be an elevated road, as per the reference design); and

d) Does not bring the ventilation structure any closer to Marcellin’s frontage than that shown in the reference design.

58. The IAC should state explicitly in its report that:

a) The EES does not assess the environmental or social impacts of the “Bulleen switch” (including the proposed relocation of the ventilation stack and building), or the “shared Manningham Hotel/Park and Ride Access”;

b) The IAC has not been able to adequately assess the environmental or social impacts of those variations to the reference design on Marcellin; and

c) The evidence that is before the IAC demonstrates that such variations would have a detrimental impact on Marcellin and ought not be allowed in the final design of the Project.

59. The O’Brien option would also have a significant and unreasonable impact on Marcellin, with a tunnel under the Marcellin ovals and the ventilation structure in very close proximity to the College and should also be rejected by the IAC in its present form.

60. Further, the IAC should state explicitly in its report that the SCO in combination with the Incorporated Document will remove the need for a permit without putting in place a sufficiently robust alternative statutory approval process. Accordingly, if that tool is to be used, no significant variations to the reference design should be allowed (especially where the variation would increase the level of impact) absent a further process of assessment which involves third party notice and review. A significant variation – in so far as Marcellin is concerned - would include a variation to the location of ventilation stack and building,
alignment of any road, acquisition of any additional land, or change to any access arrangements.

61. If the IAC considers that the reference design is inappropriate, the IAC should recommend a further process for assessing:

   a) The impacts of the project within the general area of the Bulleen Road interchange, including the Marcellin land; and

   b) The impacts of any variations to the reference design (eg the “Bulleen switch,” (including the proposed relocation of the ventilation stack and structure), the “shared Manningham Hotel/Park and Ride Access,”, or the Councils’ “Andrew O’Brien option”).

62. The further process could involve:

   a) A supplementary (but clearly very confined) EES;

   b) A further advisory committee process to consider a more refined application of the SCO and Incorporated Document prior to the s20(4) amendment process; or

   c) A section 20(5) consultation process with those parties affected by the Bulleen Road interchange, or any significant variation to the reference design (prior to the Minister using the s20(4) power) (see attached s20 P&E Act).

63. The IAC should also recommend an appropriately worded new control to fill the gap created by the fact that construction (including establishment of construction compounds) can occur prior to the approval of the EPRs and the EMF.

64. Mr Evans' evidence is that, depending upon the type of activities located in the construction compounds, it is likely that the noise from those activities would exceed the target noise for construction set out in NV3 in relation to Marcellin's playing fields (Mr Evans’ expert statement at 3.10). He was also of the opinion that it would be preferable if there was a control (whether in the Incorporated Document or EPR) that required the noise impacts of activities in the

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20 Document 31b.
construction compounds to be taken into account before they are established, with noisier works located further away from sensitive uses (Mr Evans’ oral evidence).

65. As an alternative to our primary submissions that the compounds should be deleted from the school grounds, the new construction compound control should rule out certain outcomes such as:

a) Construction compounds on school grounds being used for high impact construction activities, such as the receipt and storage of spoil and other hazardous materials, and the storage and testing of project machinery or other noisy activities; and

b) Construction compounds in flood prone areas being used for the receipt and storage of spoil and other hazardous materials.

66. Proposed wording for a construction compound condition in the Incorporated Document will be put forward on the final day. Our first draft is as follows, but may need to be further refined:

4.9. Preparatory buildings and works

4.9.1. Subject to 4.9.2, the following buildings and works may commence before approval of the documents under clauses 4.5 to 4.7:

…

4.9.2. Prior to the development and use of any construction compound, a Construction Compound Plan (CCP) must be submitted to and approved by the Minister for Planning. The CCP may be submitted and approved in stages. The plan must include:

(a) A plan showing the location of the compounds and the structures and activities proposed within those compounds;

(b) The duration of activity within each compound;

(c) Demonstration that any compounds proposed on land which is not to be permanently acquired are reasonably required in the location in which they are proposed, including demonstration that alternatives which reduce the impact of the compounds on such land (such as leasing offices in the nearby area) are not feasible or practical;

(d) Demonstration that the compounds (and activities within each compound) have been sited to avoid, then minimise, then mitigate, impacts on sensitive uses (including non-residential sensitive receptors such as schools and active recreation areas);
(e) An assessment of the acoustic and air quality impacts of the activities within the compounds on sensitive receptors (including non-residential sensitive receptors such as schools and active recreation areas);

(f) Demonstration that the activities proposed within the compounds are appropriate having regard to whether the land is flood prone;

(g) Construction compounds on school grounds must not be used for high impact construction activities, such as the receipt and storage of spoil and other hazardous materials, and the storage and testing of project machinery or other activities that are likely to exceed the noise levels for schools and active recreation areas identified in NV3; and

(h) Construction compounds in flood prone areas must not be used for the receipt and storage of spoil and other hazardous materials.

67. Marcellin suggests a number of other changes to the Incorporated Document, including but not limited to:

a) Clause 4.5 including the following underlined words:

4.5. Environmental Management Framework

4.5.1. Prior to the commencement of development (excluding preparatory buildings and works under clause 4.9), an Environmental Management Framework (EMF) must be prepared to the satisfaction of the Minister for Planning. The EMF must include Environmental Performance Requirements (EPRs) addressing the following areas and any other relevant matters:

- Noise and vibration, requiring among other things a Construction Noise and Vibration Management Plan;
- Social and community, requiring among other things a Communications and Community Engagement Plan;

With a corresponding requirement in cl 4.10 to include the following underlined words:

4.10.1. The current version of the following plans and documents must be available on a clearly identifiable project website during the construction of the Project and for at least five years after the commencement of operation of the Project:

- Environmental Management Framework approved under clause 4.5;
- Urban Design Strategy approved under clause 4.6; and
- Urban Design and Landscape Plans approved under clause 4.7;
- Communications and Community Engagement Plan; and
b) Clause 4.5.5 including the following underlined words:

4.5.5. The use and development of the Project must be carried out in accordance with the approved EMF (including with the EPRs and all plans and procedures required by the EPRs).

c) Clause 4.7.2 and 4.7.3 including the following underlined words:

4.7.2. The UDLPs must show the final built form design for the Project and include where relevant:

(a) A site layout plan that shows the location of permanent above-ground buildings and structures (including but not limited to proposed bridges, elevated roads, tunnel portals, ventilation structures, flood walls, noise walls, public transport infrastructure, and walking and cycling facilities);

…

4.7.3. An UDLP must be accompanied by the following where relevant:

(a) An explanation demonstrating how the UDLP is in accordance with the approved UDS

(b) An explanation demonstrating how the UDLP is in accordance with outline of the approach to compliance with the approved EPRs included in the EMF.

68. The EPRs as presently drafted are insufficient to ensure that the environmental and social impacts of the project (in whatever form it takes) are appropriately avoided, minimized and mitigated. They should be revised. For example:

a) A requirement that flooding of the Marcellin land is not to be made worse as a result of the Project. We attach a photo of Marcellin's oval in flood. EPR SW6 should be modified to read as follows:21

Avoid increased Minimise risk from changes to flood levels, flows and velocities

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21 Changes as shown in the 29 July 2019 draft of the EPRs (document 130) have been “accepted” and further changes requested by Marcellin are shown “tracked” and with new text also highlighted.
Permanent works and associated temporary construction works must not increase overall flood risk or modify the flow regime of waterways and adjacent floodplains without the approval in writing acceptance of the relevant drainage authority or asset owner (typically Melbourne Water) and in consultation with other relevant authorities (eg Council, VicRoads Department of Transport, Parks Victoria, SES, emergency services), and affected landowners.

In particular, the flood storage capacity of waterways and flood plains (such as the Yarra River and Koonung Creek) must not be reduced without the approval in writing acceptance of the relevant drainage authority or asset owner (typically Melbourne Water) and in consultation with other relevant authorities (eg Council, VicRoads Department of Transport, Parks Victoria, SES, emergency services), and affected landowners.

To assess overall flood risk, undertake modelling of the design of permanent and temporary works to demonstrate the resultant flood levels and risk profile in accordance with Standards for Infrastructure in Flood-Prone Areas (2019). This modelling analysis is to include sufficient events (at least up to and including the 1%, 5%, 10%, 20% and 100% AEP events) and scenarios (eg with and without blockage) to support the estimation of tangible (eg average annual damages) and intangible flood damages. …

b) ERP NV1 should be modified to include a requirement:22 to consider the road traffic noise levels at the Marcellin College playing fields (and equivalent uses) as this is not currently addressed by the EPRs, but was considered in the EES. I would consider a requirement for noise levels at open spaces with the Project to remain consistent with those stated in the EES to be a reasonable approach, rather than a specific noise target for open space or mandated noise wall heights.

c) EPR NV3 should be re-worded (and the grammar changed) as it is currently difficult to understand. It is not clear if action needs to be take where noise levels are predicted to be exceeded or they actually are exceeded. In our submission, mitigation should be taken if the levels are predicted to be exceeded and a noise sensitive receptor is likely to be

22 Mr Evans’ report at 17
adversely affected. We have tried to re-word the requirement without making wholesale changes:

For sensitive land uses (based on AS/NZS 2107:2016) implement management actions as per EPR NV4 if:
- construction noise is predicted to or does exceed the internal and external noise management levels in the table below; and
- a noise sensitive receptor is likely to be adversely impacted.

In determining whether a noise sensitive receptor is (or is likely to be) adversely affected:
- Consider the noise management levels in the table below;
- Consider the duration of construction noise
- Consider the existing ambient noise levels
- Consult with the owner or operator of the noise sensitive receptor
- Consider any specific acoustic requirements of land uses listed below to determine whether a noise sensitive receptor is adversely impacted

…

d) ERP NV4 should say:

Prepare, implement and maintain a Construction Noise and Vibration Management Plan (CNVMP) in consultation with EPA Victoria and relevant councils and other stakeholders listed in SC2.

There should be a process for direct input into the CNVMP by affected stakeholders, not round-about input through the CCEP process.

e) EPR NV4 should be modified to include a process for maintaining the CNVMP such that it be updated, at minimum, every 6 months with external stakeholder review (suggested by Mr Evans and agreed at the noise conclave but not take up by NELP to date); and
f) EPR NV6 should be modified to include a requirement that noise from the fixed infrastructure also be designed to achieve compliance with AS/NZS 2107 at noise-sensitive educational uses.23

69. The UDS should be amended as follows (section 7.1 (5)):

Large-scale elements such as ventilation structures and associated buildings are sensitively sited and designed, and well integrated to minimise negative impact on the surrounding area and adjacent communities.

Ventilation structures and buildings are to be high quality architectural and landscape design elements that are positive elements in the landscape when seen from outside the road corridor.

The ventilation structures and associated buildings are to be designed in the round with equal attention given to design of those parts of the structures visible from within the road corridor and those parts visible from locations external to the road corridor.

The architectural form, texture, colour and lighting of the ventilation structures and associated buildings are context sensitive and provide a positive contribution to the local environment.

Visual bulk and size is minimised through landform and vegetation and innovative design.

IMPACT ASSESSMENT – CASE STUDIES

70. NELP has not demonstrated that it has avoided, or even minimized the impacts of the project. Instead:

a) It has stated that the reference design is an indicative design and is subject to change.

b) It has made amendments to the reference design on the run, and without assessing the impacts of those amendments.

c) It has not demonstrated the need for the construction compound on the Marcellin land, or attempted to assess its impact. This is despite the fact that the construction compound will have a significant detrimental impact on Marcellin.

23 Mr Evans report p 19
71. Against this, it is anticipated that NELP will assert that stakeholders will continue to be consulted as the reference design is refined or varied, and that the EMF and EMRs provide a framework for the further assessment of the reference design, and variations to the reference design, and will ensure that any impacts will be appropriately minimized, and that the interests of stakeholders are adequately protected.

72. Marcellin’s experience to date, and the evidence of NELP’s witnesses does not provide Marcellin with any confidence that this will be the case.

73. Marcellin provides the following case studies of the project to date to demonstrate this.

The Bulleen Switch

74. All of the experts called by NELP agreed that they had not assessed the Bulleen switch, or did not provide any assessment of the impacts of the Bulleen Road switch in their evidence.

75. The IAC is not in a position to say that the Bulleen switch provides a preferable outcome, or even an acceptable outcome.

76. While apparently the Bulleen switch had been on NELP’s ‘table’ for 1 – 2 months before the hearing (evidence of Mr Begg and Mr Frodsham), it was tabled on 29 July 2019 (day 3), and hence was not assessed by Marcellin’s experts.

77. Something needs to be said about Document 102 (Technical Note R34).

78. It states:

An alternative design option for the alignment of Bulleen Road north of the Eastern Freeway has been prepared by NELP to facilitate discussion in response to feedback from the community concerning the impacts of the reference project at this location and the functionality of the intersection.

…

Feasibility

4. The modified design appears to be feasible from an engineering standpoint and could be delivered within the project boundary. It would not materially change traffic volumes and traffic functionality compared to the EES reference project.

Beneficial and Detrimental Environmental Effects by Comparison to the Reference Project
5. The environmental effects of the potential modification would be similar to those assessed in respect of the reference project at this location.

6. The modified design would, however, not require the temporary diversion of Bulleen Road into the school properties during construction and would remove the need for a raised Bulleen Road bridge. This would reduce the impact on the private schools to the east of Bulleen Road. It would also reduce the duration of disruption to users of Bulleen Road as the realignment would be done once.

7. The sensitivity analysis undertaken as part of the Air Quality Impact Assessment forming part of the works approval application assesses the air quality impacts of locating the ventilation structure in different locations, including the location for this modified design where the ventilation structure is situated approximately on the present alignment of Bulleen Road.

(emphasis added)

79. The Bulleen switch was, therefore, put forward to the IAC by NELP on the explicit premise that it responded to feedback from the community on the reference design. That was misleading.

80. Mr Frodsham confirmed in oral evidence that the Bulleen switch had been put forward because it is more ‘constructable’ (ie more cost effective).

81. The technical note fails to recognize that the switch would result in a significant detrimental impact on Marcellin including:

a) An increased visual impact on Marcellin (confirmed by Mr Wyatt);

b) The loss of Marcellin’s Bulleen Road frontage.

82. Further, when asked, NELP did not agree that the Bulleen switch would mean that there would not need to be a construction compound on Marcellin’s land.

83. The Bulleen switch is a prime example of what can, and is likely to happen, where there is a ‘reference design’ that is ‘assessed’ but the detail is left to EPRs. Someone makes a decision that it is a good idea (especially if it is cost effective, or it is preferred by a more powerful lobby group) to put forward some alternative, that alternative is then ‘justified’ on some misconceived basis (eg as per R34) and that alternative is adopted without any rigorous process to assess impacts, let alone consultation with those directly affected.
NELPs approach to the Bulleen Switch is in direct conflict with its obligations under the Model Litigant Guidelines. As the Court said in Comaz (Aust) Pty Ltd v Commissioner of State Revenue [2015] VSC 294:

74 The Model Litigant Guidelines have evolved from the recognition at common law that governments should play fairly, and seek to bridle excessively adversarial behaviour by setting acceptable standards and boundaries for the conduct of litigation. It has been said that the guidelines reflect the expectations citizens have of their government and its agencies to respect the rule of law, to observe the spirit as well as the letter of the law, and to be fair, honest and even-handed when dealing with members of the public.

75 There are a number of policy considerations behind the reasons for governments and their agencies to act as model litigants, including the inherent power of government; the need for government and its agencies to act in the public interest, rather than holding any legitimate private interest in the outcome of litigation; the large quantity of resources at the government’s disposal; and the importance of having the government and its agencies set benchmarks for behaviour and appropriate conduct across the legal system.

(emphasis added)

Construction compound

85. The EES shows part of Marcellin’s land set aside as a construction compound.

86. The impact of a construction compound, occupying a significant portion of Marcellin’s playing fields, for a period of 7 years, or longer, is significant, for the reasons set out above.

87. However, the EES does not provide any information regarding the use of the construction compound, or the period of its use. Nor does it provide any justification of the need for the construction compound on Marcellin’s land, or any explanation as to why the significant impost on Marcellin cannot be avoided.

88. Instead, there was no assessment of the impacts of the construction compound, in the EES, or by the NELP experts in the course of giving their evidence. All of NELP’s relevant witnesses advised that they had not modeled or assessed the potential adverse impacts of the construction compound. For example:

a) Dr Nadebaum advised that he had no information or instructions regarding the use of the construction compound.
b) Mr Fuller agreed that he was not aware of any modeling of the flood levels during the construction phase.

c) Mr Tardio agreed that the EES had not assessed the noise from the construction compound. He did say that SLR had done some further work which he had briefly reviewed. However he did not provide any evidence to the IAC regarding this further work.

89. During the hearing, NELP has:

a) Indicatively shown the construction compound as a 6,600 square metre car park (on Gartner fields) and “main site offices and welfare facilities” (on Lyons Oval).  

b) Also shown the construction compound as being occupied by the diversion of Bulleen Road.

90. In the absence of any meaningful information in the EES, Marcellin engaged Mr Briggs to advise and give evidence regarding the potential uses of the proposed construction compound.

91. Relevantly, Mr Briggs has concluded that:

a) From the documents provided, it is unclear exactly what the proposed construction site will be used for.

b) The Marcellin land could remain unaffected and its students not impacted, by removing the construction compound from the Marcellin land, or reducing its size.

c) The size of the construction compound and its impact on the Marcellin land is inappropriate.

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24 NELP technical note 44 (document 144), tendered on 7 August 2019.
25 Document 132. This document was provided to Marcellin's instructors and tendered by Marcellin on 1 August 2019.
26 Mr Briggs' evidence at footnote 10 (document 88a).
27 Mr Briggs’ evidence at [17] (document 88a).
28 Mr Briggs' evidence at [18] (document 88a).
92. In truth, as submitted by Mr Morris for NELP, the boundary of the construction compound has been set by reference to the (new) proposed alignment of the sewer (an alignment that is contained in a plan that was not in the EES and was not even produced to the IAC until a fortnight into the hearings). The compound line has therefore, has been set opportunistically and not by any demonstrated need for the facility. This purported justification is unfounded, as (as far as we are aware) no planning permit is required for the relocation of the sewer.

93. Mr Briggs has identified the most likely uses of the construction compounds:
   a) Placement of either primary or satellite site sheds, for engineering, surveying, supervision, management and support staff, with associated car parking, toilet blocks, food vendors, small and medium plant storage, and a substantial amount of car parking.
   b) Material storage, either from the site or to be utilized from the site. This would include the storage of spoil from the site, bitumen and other hazardous materials, materials used in the construction of the project (small concrete drains to larger items such as bridge beams) and a washout facility.
   c) Location for plant to enter the site and be stored. This would include the testing of machinery, makeshift maintenance facilities to maintain plant, refueling and diesel storage facilities, and plant and equipment wash facilities.

94. The second and third potential uses have significant off-site impacts, by way of noise, air borne emissions, and the potential contamination of the school grounds from any contaminated soil excavated from the former landfill in the area and stored on the site. They also have the potential to adversely affect the playing surfaces of the ovals, with the weight, constant vibrations, loading and unloading and compaction rendering the soil and fields below it unable to be used for their intended purpose, requiring extensive rehabilitation or full
reconstruction, and adding to the effective period for which the ovals are unable to be used by the school.

95. The visual impacts of designing bunds and acoustic barriers to seek to manage these impacts are also likely to be significant. The risks of placing spoil and machinery in a flood prone area are also significant. Indeed, the risks were such that Dr Nadebaum did not support the storage of spoil in a flood prone area.

96. Mr Fuller advised that a 4 metre high bund would be required to ensure that any spoil was protected from the 1 in 100 flood event, although, according to him, it may be acceptable to design to a higher flood risk event.

97. On its face, the location of a high intensity construction compound with significant risks of potential adverse impacts adjacent to a sensitive use such as school and on a flood plain is inappropriate, and offends basic planning principles.

98. Notwithstanding this, and the evidence, the SCO, Incorporated Document, as currently drafted, does not prevent this outcome. Indeed, the controls go even further, and exempt the construction of the compound from the requirement that the EMF and EPRS be approved before the constructions of the compound commences.

99. Almost inevitably, lesser risks to or impacts to Marcellin comes at a cost to NELP. Costs can be saved by increasing risks – such as, for example, designing a bund for a 1 in 20 flood event instead of a 1 in 100 flood event. Whether the risk is acceptable requires a judgment call by the decision-maker – after the balancing of competing interests.

100. When the decision – maker is the proponent, there is an inherent bias towards minimizing costs, and passing the burden of increased risks to others.

101. However some uses are inherently incompatible with adjacent sensitive uses, as the risks and the adverse consequences associated with those risks are too high, and should be ruled out at the outset of the project.

29 Mr Brigg’s evidence at [35] (document 31a).
102. Accordingly, if, contrary to these submissions, the option of a construction compound on the Marcellin land is left open, the use of the construction compound for a high impact use should be ruled out, as set out above.

103. That leaves the issue of the potential use of the construction compound for the primary or satellite site sheds, or “car park” (on Gartner fields) and “main site offices and welfare facilities” (on Lyons oval). 30

104. According to Mr Briggs, the project does not need to place its site offices on the Marcellin land, and these uses could easily be relocated to adjacent lands or established buildings, which would be more appropriate and avoid any impact on Marcellin and its students.

105. The significant impact to Marcellin can be easily avoided. This demonstrates the failure by NELP to avoid, minimize and manage the significant impacts of a construction compound on Marcellin.

106. Finally, there is the issue of the temporary re-alignment of Bulleen Road as justification for the construction compound.

107. Again, it is of concern that the temporary re-alignment of Bulleen Road was not disclosed in the EES documentation. Nor was any evidence provided by NELP’s traffic engineers as to why the re-alignment is required, and if so, why it has to deviate so far into Marcellin’s land.

108. All that has been provided, (and after NELP’s traffic evidence was called) are the following statements by Mr Frodsham and Mr Kiriakidis in the 7 August 2019 conclave: 31

a) There was no detail or understanding at the time of the preparation of the TTIA, however as the project progressed it became apparent that to construct the reference design, it is likely a side-track on the east side of Bulleen road will need to be built to maintain Bulleen Road functionality during construction of the tunnel (Mr Frodsham) (emphasis added).

30 As set out in Technical Note 44 – “Additional Overview of Construction Activities” (document 166).
31 Document 217.
b) The advice from NELP was that the side-track was estimated to be required for three years (Mr Kiriakidis).

109. This falls well short of demonstrating that the adverse impacts of the project have been avoided and if not avoided, minimized. That said, it does demonstrate that the impact of the project can be minimized by aligning the side track so as to minimize its impact on Marcellin, and by minimizing the period for which the side-track is required. These options should be fully explored.

110. If the construction compound was reduced to the sidetrack only, and the land required for the sidetrack was minimized and pushed as close to Bulleen Road as possible, then there is potential scope of Marcellin to be able to 'make do' with the remaining areas left of the ovals on its land. That analysis has simply not been done.

111. Leaving the balancing of competing interests and the judgment call that this requires to NELP, is fraught with danger, and runs the risk that economic considerations will be given undue weight.

Shared Manningham Hotel/Park and Ride access.

112. It is worth setting out the background to this issue. The full history is set out in the chronology attached:

a) In 2018, an animation video was placed on the NELP website, which shows a shared access to Marcellin and the Manningham Club.32

b) NELP advised Mr Murphy that there was no proposal to provide access to the Manningham Hotel and that the line on the map was an error on the plans which he was advised had been corrected. 33

c) The EES as exhibited, does not show Marcellin sharing its access with the Manningham Hotel or the Park and Ride facility. Mr Frodhsam agreed that this was so.

32 Ms Dunstan’s evidence at p.17 (document 31c).
33 Mr Murphy statement at [29] (document 88b).
d) In late June/early July, the Bulleen switch proposal was crystallized as an option to put to the IAC, but was not revealed to Marcellin. It shows access to the Park and Ride and Manningham Hotel shared with Marcellin.

e) On 9 July 2019 Clayton Utz on behalf of NELP advised the solicitors for the Manningham Hotel that the northern access to Bulleen Road “would be combined with access to Marcellin College.” However there was no reference at this stage to the access also being used to provide access to the Park and Ride. 34

f) On 12 July 2019 this information was passed onto Marcellin’s solicitors, by the solicitors for the Manningham Hotel.

g) On 24 July 2019, in the morning, Mr Kiriakidis and Mr Frodsham advised the Manningham Hotel traffic conclave that the Bulleen Road access was proposed to be shared between Marcellin, the Manningham Hotel, and the Park and Ride.

h) On 24 July 2019, in the afternoon, Mr Kiriakidis and Mr Frodsham did not disclose to the Marcellin traffic conclave that the Bulleen Road access was proposed to be shared between Marcellin, the Manningham Hotel, and the Park and Ride. Accordingly, Ms Dunstan was unaware that access was proposed to be shared with the Park and Ride.

i) On 29 July 2019 at around noon, the Bulleen Road switch option was tabled.35 It did not show shared access between Marcellin, the Manningham Hotel, and the Park and Ride.

j) On 30 July 2019, at 5.34PM, the more detailed design of the Bulleen Road switch option was emailed to Marcellin’s solicitors.36 It showed a shared access road, which is located on the Marcellin land (and which would require the acquisition of part of Marcellin’s land).

34 Attachment to the Manningham Hotel/NELP traffic 24 July 2019 conclave report (document 118).
35 Document 113.
36 Document 102.
On 31 July 2019 the oral traffic evidence commenced and Mr Kiriakidis confirmed his recommendation from the Manningham Hotel conclave that the Bulleen Road access be shared between Marcellin, the Manningham Hotel, and the Park and Ride.

On 7 August 2019, Mr Kiriakidis provided a further design of the Bulleen Road access, showing an alternate shared access road, which appears to be located outside the Marcellin land, with shared Marcellin, Manningham Hotel and Park and Ride access, but with a new access to the Park and Ride.37

None of the traffic experts have assessed the proposed shared access to the Manningham Hotel. Nor have they ascertained whether it is necessary to have this shared access, and whether alternative arrangements which avoid or minimize the impacts on Marcellin are practicable. For example:

a) Access to the Park and Ride for people to the south of the freeway be provided via a modified Thompsons Road/Sandra Street intersection, as suggested by Ms Dunstan, instead of the shared access and through, in the case of the most recent Park and Ride access, what appears to be canopy vegetation adjacent to Koonung Creek.

b) Access provided to the Manningham Hotel and the Park and Ride via a separate left in/left out access to Bulleen Road in addition to the Marcellin access.

This case study demonstrates that the project will no doubt be further refined in response to particular constraints or project imperatives, including the preferences of the contractor, and cost considerations. A change to accommodate one project imperative (such as the need to provide further access to the Park and Ride facility) may have adverse impacts on others, which, in the absence of any further notice and review, are not appreciated by NELP or the Minister, or are not taken into account by NELP and the Minister.

37 Attachment to the 7 August 2019 traffic conclave, document 217.
115. It also demonstrates that “consultation” without a full disclosure, and with a
  certain outcome in mind, is meaningless.

**Access to irrigation water**

116. Marcellin has been advised by NELP that there will be a disruption to its
  irrigation water supply arrangements with Trinity during the construction
  phase.\(^{38}\)

117. However, Mr Fuller’s evidence was to the effect that it was important to retain
  the Trinity water supply, and to ensure that the access to that water was
  maintained. He also supported an EPR (SW12) to this effect, given the
  importance of this issue.

118. This is an example of another disconnect between the advice NELP apparently
  receives from its experts, and NELP’s response.

119. Marcellin would expect that the water supply to the Trinity oval and Marcellin’s
  irrigation systems would be retained during the construction phase, in
  accordance with the evidence of Mr Fuller, and the EPRs as currently drafted.

**Alternative sporting venues**

120. The SIA review by Public Place says this about Marcellin (and no more) at p34:

   All options identified in Table 3-3 are based on the reference design and
   are subject to change. The Project would also require acquisition of land
   occupied by private recreational facilities:

   - Permanent acquisition of the Bulleen Swim Centre site (a private
     business that would be acquired for the project), displacing this facility.
   - Permanent partial acquisition of land within the Carey Grammar
     Sporting Complex currently occupied by multi-use playing courts
     (netball/tennis courts).
   - Temporary occupation of land within Marcellin College grounds
     occupied by playing fields.
   - Temporary occupation of land within Trinity Grammar currently
     occupied by playing fields and tennis courts.

   The relocation options outlined in Table 3-3 exclude relocation options for
   the private schools: Trinity College, Marcellin College and Carey Grammar.

   **Separate discussions are underway with the private schools**

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\(^{38}\) Statement of Mr Murphy at 24(iv) (document 88b).
regarding options to address the impact on their respective facilities and needs.

Notwithstanding, the Project may interrupt the activities that these facilities support, potentially inconveniencing those who rely on them.

[emphasis added]

121. So just because 'discussions' are being had, does that mean it is ok just to ignore the impacts? How can this IAC assess the impacts and the proposed mitigation measures when the impacts and mitigation measures have not been described and assessed?

122. It is disappointing that the discussions have not lead to a solution. In the circumstances, the IAC should not be satisfied that there is an appropriate solution. This supports the argument that Marcellin’s ovals should not be used as a construction compound.

“Consultation” generally

123. "To consult" is to take information or advice from, as well as to provide information and advice to. It is a two way street. Or at least, it is meant to be.

124. Prior to this IAC process, Marcellin had not been consulted (there may have been meetings, but they had not be consulted). Impact mitigation had not been developed in consultation with Marcellin. Information was provided, but not complete information.

125. Even up to and including the exchange of correspondence in the lead up to the IAC, NELP's response to Marcellin's requests for information contained many words but no substance. We attach letters dated 19 and 26 July between the solicitors for both parties to demonstrate this point.

126. Giving NEPL the benefit of the doubt, one could say that NEPL has been indifferent when it comes to planning the operational access to the school and hotel. A more cynical mind may say that NEPL's lack of planning has not stemmed from indifference but rather a desire to either minimize costs or to appease more powerful interests. In either scenario, what has occurred is not acceptable.
127. Why does the past matter? It makes it absolutely plain that a post IAC NEPL (free from the pressure of a public hearing) cannot be relied upon to deliver good outcomes for Marcellin in the future. The mitigation measures for this project must be locked in now, when the Amendment is gazetted, not left to future discretion (devoid of Ministerial approval, let alone third party rights of review).

128. If the IAC forms the view that the construction compound on Marcellin's land has not been justified, (or even that its shape has not be drawn to minimize impacts) the IAC should recommend that the Marcellin land is deleted from the SCO.

OTHER RECOMMENDATIONS

Air Quality

129. Regardless of whether the air quality near the school meets relevant EPA standards, there will undoubtedly be a perception that the air quality near Marcellin College is impacted by the ventilation structures.

130. It is imperative that Marcellin have timely access to good quality monitoring data to put to rest any concerns raised by parents and guardians, and prospective parents and guardians.

131. The Air Quality assessment assesses the impacts of the air ventilation systems and project surface roads at a residential receptor which is located close to the school, in Ben Nevis Grove. The results of the assessment for scenario B1 (projected traffic volume and fleet mix for 2036 under normal operating conditions using 2020 emissions factors) are set out in the following table at p252 of the Air Quality Tech Report. While they demonstrate that the contribution from the tunnel ventilation and surface road traffic is comparatively small, they still increase the extent of non-compliance with the "comparison" only objectives. 39

39 Refer also to the “North-East Link Project” Comparison of Ambient Air Quality Monitoring Data” Golder Associates, July 2019 (Appendix C to Mr Fuller’s evidence) (document 24f) and the air quality modelling for the Trinity College location.
Evidence to date indicates there are more cost-effective mechanisms for reducing air pollution in metropolitan Melbourne with the potential for greater health benefits (such as reducing the use of wood heaters).

In addition, introducing and enforcing more stringent fuel standards and adopting new vehicle technology through State and Commonwealth legislation are more practicable measures for controlling pollutant emissions from vehicles. These measures would have a flow on effect through the reduction of pollutant emissions from the North East Link tunnel ventilation system.

Marcellin acknowledges that, based upon the information presented, the operational effects of the project are small. With changes in the vehicle fleet and a reduction in vehicular emissions, Marcellin acknowledges that the air quality at its site is likely to improve over time, and that the project will not give rise to any actual (as opposed to perceived) health issues.

The impacts of the project are likely to be exacerbated by the removal of vegetation along its frontage, which currently reduces the impact of vehicular emissions on its students.

It is important that the amenity planting is protected and augmented by the project.
136. Given that the project will have an overall negative impact on air quality around its site (no matter how small), Marcellin would like to see steps taken to reduce the impact of vehicular emissions on its students and the wider community as part of the Project mitigation.

137. It would also like to ensure a comprehensive monitoring program for both construction and operations.

138. The IAC should recommend that:

a) A set of criteria be developed for assessing such projects (it is incomprehensible that no such criteria yet exists); and

b) Notwithstanding that the contribution is small in percentage terms, mitigating action should be taken.

139. Marcellin also supports the EPA’s submissions to the effect that the ventilation structures should be constructed to facilitate the retrofitting of air pollution control equipment. NELP does not have a crystal ball. It is necessary to plan for the long term. Air quality standards may change, and pollution abatement equipment control may become cost effective. The project, as an individual project, will be a comparatively large emitter of particulates. The reduction of particulates from the project through pollution control equipment may provide an important community benefit in the future. It is important not to prevent this occurring by reason of the ultimate design of the project.

**Visual Impact**

140. There will be a long term visual impact on Marcellin from the elevated Bulleen Road and the tunnel ventilation structures.

141. The Landscape and Visual Assessment Technical report describes the impacts only from a viewpoint over 400m away from the ventilation structure. There was no assessment from the Lyons oval, the Gartner fields or the school exit looking at the elevated Bulleen Road and tunnel exit ramp, notwithstanding assessments at close range were done for Trinity and Carey.

142. Marcellin accepts that visual impact is an inevitable consequence of the reference design.
143. The visual impact adds to the cumulative impacts of the project on Marcellin and makes it even more important that impacts are minimized where possible.

144. Relevantly, the Bulleen switch increases the visual impact of the ventilation structures. However, its impact has not been assessed.

145. As a result, the IAC is not in a position to assess the impacts of the Bulleen switch, let alone make any finding that the Bulleen switch would result in an acceptable outcome.

146. Accordingly, a further assessment process is required if NELP wishes to pursue this option.

Vegetation Removal

147. The extent of vegetation removal is unknown.

148. The Ecology report states:¹⁴⁰

Areas containing amenity plantings (including planted native vegetation) have not been considered as part of this impact assessment. It is acknowledged that amenity plantings are of interest to various stakeholders but they have been excluded from this impact assessment as their removal does not hold direct legislative implications under the EPBC Act, P&E Act and FFG Act (refer to Section 5.4.4).

149. The "amenity planting" along the Marcellin site is shown on Fig 11-13 of the Ecology Report:

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150. There does not appear to be a vegetation removal plan. Sheet 22 of the Map Book indicates, however, that some if not all of that amenity planting may need to be removed at least around the entry way and along the Gartner Fields. Some trees around the Lyons oval will need removing to provide the single lane egress road. Many more would need removing if the dual carriageway proposal (for the hotel) was constructed. Even if some of the trees are retained, they are vulnerable from construction activities unless properly managed.

151. If the construction compounds are not needed and the sidetrack is not required, then Marcellin's trees may be able to be saved. This would provide a long term benefit, and mitigate the impact of the ventilation structures.

CONCLUSION

152. Given that:
   a) NELP has not presented a Part B submission addressing the matters that Marcellin has raised;
   b) Marcellin expects more material to be forthcoming from NELP (eg whether the sidetrack is required and if its footprint can be reduced); and
   c) Marcellin hopes that NELP will address the issues that it has raised-

Marcellin seeks to reserve a right of reply - as a matter of procedural fairness – to respond to any new matters raised by NELP between now and the end of the hearing.

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18 August 2019