

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

FISHERMANS BEND REVIEW PANEL

**SUBMISSIONS ON BEHALF OF
LANDOWNERS GROUP**

What Can the Review Panel Consider?

1. The purpose of these submissions is to respond to certain submissions made on behalf of the Minister in the *Supplementary Submissions to Part B Submissions dated 28 March 2018 (Supplementary Submission)*.¹
2. In particular, they address the contention made at paragraph 2 of the Supplementary Submissions that:

“...the role of the Review Panel is not to review the Vision; 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 to achieve the Vision.”
3. The Review Panel should reject these contentions.
4. The Landowners submit these submissions seek improperly to curtail the consideration of the Review Panel; are not consistent with the manner in which the hearing has been conducted to date, and will not allow for the Panel to properly assess the strategic and planning merits of the Amendment.
5. The Review Panel is not only entitled to do the things identified in [2] above; it is legally obliged to do so in order to properly fulfil its purpose.

¹ Document 151

A Confused Position

6. The Supplementary Submission presents a series of confused and contradictory arguments in support of its contention that the *Vision* and the *draft Framework* are “off limits”.
7. Not even its authors seem prepared to fully commit to the argument. In paragraph [2] they suggest 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 ... Vision ... to be achieved.*”.
8. Even if this were to be accepted (for the sake of the argument) to be correct, identifying a **principal task** necessarily implies that there are other secondary (or even tertiary?) tasks for the Panel to perform.
9. Similar weasel words appear in [4] of the Supplementary Submission, where it is said that the **main exercise** of the Review Panel is to “assess the merits of the Amendment rather than the content of the draft Framework”.
10. It is one thing to seek to assign relative levels of importance to the Review Panels tasks, and another thing entirely to argue that anything that falls outside what the Minister regards as the **principal task** or **main exercise** of the Review Panel is a matter which it cannot consider.
11. But perhaps more significantly, is the way the Minister has conducted the hearing both before and after making the Supplementary Submission. There has been extensive submissions and evidence called by the Minister with regard to the *Vision*, and in particular the population targets included in the *Vision*, and the *draft Framework*.
12. Indeed, seemingly oblivious to the contradiction inherent in doing so, paragraphs [9] – [18] of the Supplementary Submission expand upon previous submissions made, and evidence given, on behalf of the Minister which invite the Review Panel to conclude that the populations target of 80,000 is a figure that has a “*proper strategic basis*”.

13. The Minister concedes at [4] of the Supplementary Submission that the case he has presented has “*sought to demonstrate that the 80,000 target for residential population is robust and that the core components of the draft Framework are sound*”. Indeed, in its Preliminary List of Key Issues, the Review Panel identified Population Assumption/Target as key issues at paragraphs 3-7.
14. No objection to questions regarding the *Vision* or elements of the *Vision* particularly the population target were made by the Minister’s representatives during the cross-examination of Ms Hodyl’s. No objection to submissions regarding the *Vision* have been made prior to Thursday 28 March 2018.
15. It is also conceded, correctly, that the Review Panel has also been asked to consider changes to the draft Framework.²
16. Further, pursuant to Outcome 35(e) of the TORs, the Review Panel is in fact obliged to provide in its report:

Any changes required to the draft Fisherman’s Bend Framework as a result of recommendations made to the planning scheme amendment.
17. However, no explanation as to how this can sit comfortably with a submission that the target and the Framework cannot be considered has been offered by the Minister.³
18. Perhaps even more remarkably, [85] of the Supplementary Submission seeks to place reliance on Ministerial Direction 11 and Planning Practice Note 46. The submission is made that these documents “*provide a framework for the evaluation of proposed planning scheme amendments*”. The Landowners agree.
19. Accepting this is the case, the Landowners note that, having regard to those documents, the contention that a proposed amendment can be evaluated without a critical appraisal of the strategic documents that are said to “undergird” them is a

² For example, in a recent letter from the DLEWP dated 4/4/2018 to parties affected by proposed relocation of open space, the Minister invites parties to make submissions about the *draft Framework* and the adjusted open space.

courageous submission. It flies in the face of the approach which is usually demanded of an assessment of a planning scheme amendment.

The Correct Approach: The Terms of Reference

20. Contrary to what the Minister is now arguing, a determination of the relevant matters that the Review Panel can (or cannot) consider begins and ends with the Terms of Reference (**TORs**)

21. Significantly, the Supplementary Submissions of the Minister has made no reference to the TORs.

22. The TORs define the purpose of the Review Panel to be as follows:

“... to advise the Minister for Planning on the appropriateness of the proposed planning scheme amendment” (**Purpose**)

23. In giving effect to this purpose, clause 27 provides that the Review Panel may “... *inform itself in any way it sees fit ...*”. The same clause provides a list of things that the Review Panel must consider, as follows (emphasis added):

27. *The Review Panel may inform itself in anyway it sees fit, but it must consider:*

a. The State policy context of Fishermans Bend area.

b. The extent to which the proposed changes to the Capital City Zone Schedule 1 (Port Phillip Planning Scheme) and Capital City Zone Schedule 4 (Melbourne Planning Scheme) allows for the Fishermans Bend Vision, September 2016 to be achieved.

c. The extent to which all other proposed changes sought by GC81 allows for the Fishermans Bend Vision, September 2016 to be achieved.

d. All relevant submissions made in regard to the proposed changes to the Port Phillip and Melbourne Planning Schemes.

e. *An assessment of whether the proposed planning provisions make proper use of the Victorian Planning Provisions and are prepared and presented in accordance with the Ministerial direction on The Form and Content of Planning Schemes.*

24. Significantly, there is nothing in the TORs that expressly constrains the matters that the Review Panel **must not consider** in carrying out the Purpose.
25. It was, of course, open to the Minister to have provided limits or constraints on the matters that the Review Panel was entitled to consider. Indeed, the Minister may at any time redraft the Terms of Reference to redefine the Purpose, or resolve any ambiguity as to the scope of this inquiry if he so chooses. To date, he has not elected to do so.
26. It follows that it is a matter entirely for the Review Panels to determine what it needs to consider to properly carry out its Purpose, if it considers those matters to be relevant to that task. The only limit is that the matter considered must be reasonably capable of being regarded as relevant to the Purpose.
27. In addition, the following matters are also significant:
 - a) The Purpose of the referral is to advise the Minister of the “appropriateness” of the Amendment. The word “appropriateness” is an ordinary English word of wide meaning. It carries with it the implication that the Review Panel should approach their task with a generous, as opposed to a constrained, view as to the scope of the purpose. The choice of that word as the primary guide to the Review Panel as to what it is being asked to do could be contrasted to words that imply a more restrictive scope (such as “legality” or “lawfulness”).
 - b) The Minister has published guidelines that address how the “appropriateness” of a “normal” planning scheme amendment should be considered. There is no logical reason to conclude that the Minister intended that the Review Panel would not have regard to those matters in carrying out the Purpose. The Minister has expressly conceded that it should.

- c) In drafting the TORs, the Minister must be taken to be aware of well-established principles of planning law in this state regarding the assessment of planning scheme amendments. The most fundamental of those (inherent in the guidelines) is that it is necessary to consider the strategic basis for an amendment, and (in doing so) to consider the appropriateness of any alleged strategic basis.
- d) The Framework itself is identified as both a “draft” and as a “draft for consultation”. This does not sit comfortably with the proposition that it represents a fixed, immutable government policy which cannot be considered as part of this process. Nor is this implied by the express words of the Minister’s Foreword at page 5 of the Framework, which include the following statement:

If you have views about the future of Fishermans Bend we want to hear them – so please, look at the details of this Framework and tell us what you think, and how it can be refined.

28. The *draft Framework* and *Vision* are both proposed to be included in the Scheme as reference documents. This requires them to be considered by the Review Panel to see if they are suitable for that role. It is submitted that the TORs necessarily require a consideration of the appropriateness of the *Vision* by the Review Panel:

- a) Firstly, the Purpose clearly envisages a broad assessment of the appropriateness of the Amendment generally – the assessment of the *Vision*, as the lynchpin and heart of the Amendment, must necessarily be a part of this assessment;
- b) Secondly, the requirement of the Review Panel to report to ensure the *Vision* “is realised” and to consider how the Amendment allows the *Vision* to be realised is clearly, one task, but not the only task, of the Review Panel; and
- c) Thirdly, the requirement to consider the “*State policy context of Fishermans Bend*” includes consideration of State planning policy such as *Plan Melbourne*, Clauses

9, 10, 15, 16 and 17 of the Melbourne and Port Phillip Planning Schemes. These State planning policies themselves require consideration of a broad number of matters which may, or may not, be achieved by the *Vision* and/or the *Framework*. It is nonsensical to require consideration of these State policies with regard to Fishermans Bend but then to ignore whether or not the *Vision* and the *draft Framework* are consistent with, or give proper effect to, these policies.

29. For all the above reasons, it is impossible for the Review Panel to properly carry out its Purpose without critically examining the *Vision*, the *draft Framework* and supporting background documents. If it were to do otherwise, it would be approaching its task in a legally erroneous manner.

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