IN THE MATTER OF
THE WESTGATE TUNNEL PROJECT

SUBMISSIONS ON THE PRODUCTION OF DOCUMENTS

1. The Inquiry and Advisory Committee (IAC) has requested that the WDA provide it with submissions on the basis on which the WDA (on behalf of the State) opposes a direction that it produce documents being the Allard reviews and allied documents.

2. Fundamentally, the WDA's position is that the Allard reviews should not be required to be produced as these reviews:

   (a) are not reasonably required to enable the Committee to perform its tasks, and

   (b) in any event, such production is privileged as it is contrary to the public interest.

THE POWER TO REQUIRE PRODUCTION

3. The WDA accepts that the IAC has a power, in its capacity as an advisory committee and in order to carry out its tasks under the Terms of Reference, to require production of documents under s 152(2) of the *Planning and Environment Act*.

4. Section 152(2)(c) provides, *mutatis mutandis*,[1] that the IAC

   > *may require a … body or person to produce any documents relating to any matter being considered by the [IAC] under this Act which it reasonably requires* [Emphasis by underlining added.]

5. It is clear that this power is discretionary. It is expressed to be a power that the IAC 'may' exercise in respect of a defined class of documents. It certainly does not impose a duty on the IAC to require the production of every document which relates to a matter being considered by the IAC. Nor does it mean that the IAC

[1] Section 152(2) is expressed, relevantly, to confer on the Advisory Committee, 'with any necessary changes', the same power to require production of a document as a planning panel would have under s 161(2) of the Planning and Environment Act 'as if the reference to a planning authority were omitted'. The paragraph set out reflects this.

ought require the production of a document simply on the basis of a request by a submitter to the proceeding.

6. The power is confined to documents that the IAC "reasonably requires". The word "requires' may not mean "is essential", but it certainly connotes a degree of importance to the Committee's tasks.

7. In exercising its discretion, the IAC will need to consider a number of competing factors in addition to the perceived relevance and importance of the document to the Committee's tasks. In particular, the IAC will need to consider whether the production of the document would be contrary to the public interest. Moreover, the power cannot extend to a document that is privileged, whether that document be protected by legal professional privilege or public interest privilege or some other common law privilege.

RELEVANCE AND IMPORTANCE OF DOCUMENTS TO THE IAC'S TASK

8. The Initial Allard Assessment and the Allard Status Report referred to in the Affidavit of Paul Smith (together the 'Allard reviews') were prepared for the purpose of informing the Business Case for the Project. They were not prepared for the purpose for the Environment Effects Statement.

9. This is explained in section 4.4 of Appendix F to Technical Report A as follows:

> *4.4 Modelling scenarios*
>
> *This assessment has used the following modelling runs to analyse the impacts of the project:*
>
> - *2014 base case (existing conditions)*
> - *2031 no project case ('no project' scenario)*
> - *2031 project case (with West Gate Tunnel project)*
>
> *A 2011 model was originally used for the assessment to represent existing conditions as it was the closest modelled year in the VLC Zenith model to the current time period. In response to the peer reviewer's comments during the development of the Business Case, VLC agreed to construct an updated 2014 base model (including 2014 demographic, land use, road network and public transport network*

assumptions) for validation. In order to address comments from the peer reviewer, it also included model calibration improvements, including:

- *the balance between freeway and arterial roads*
- *West Gate Freeway travel times*
- *commercial vehicle trip generation rates for the Port of Melbourne*
- *commercial vehicle validation in the inner west*
- *commercial vehicle trip generation rates across the entire model.*

This 2014 model has been developed specifically for this project, which addresses the concerns of the peer reviewer.

The future year assessment is typically based on a 10-year horizon after the opening of the project. The 2031 horizon year has been selected to assess the impacts of the project as it is the closest modelled year in the VLC Zenith model to the 10-year horizon.

10. To the extent that the comments made during the Business Case phase are relevant to the later, 2014, VLC model, this has already been revealed and dealt with in the evidence of Mr Tim Veitch.[2]

11. Simply, the peer review during the Business Case phase has been overtaken by an updated model – the 2014 model – which has been used in the EES.

12. It is open for any party to question or challenge the 2014 model. However, a document that comments on the 2011 model lacks a sufficient connection with the model used for the EES.

PUBLIC INTEREST AND PUBLIC INTEREST IMMUNITY

13. The common law has long recognised that requiring the production of certain documents may be contrary to the public interest.

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[2] Tim Veitch, *West Gate Tunnel Panel Hearing Presentation,* slides headed 'Issues raised during development of the model (including Business Case)'.

14. The nature of public interest immunity involves a balance. As Gibbs ACJ stated in *Sankey v Whitlam*,

> *The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence.*[3]

15. In assessing claims for public interest immunity, the common law draws a distinction between 'class' claims – that is, claims that a particular document should be exempt from production because it belongs to a class of documents the disclosure of which the law recognises as generally injurious to the public interest – and 'contents' claims – that is, claims that a particular document should be immune from production due to its particular contents.[4]

16. In this case the State claims public interest immunity in relation to the Allard reviews and the Final Allard Comments on both bases and, in respect of the VLC Response, the second basis.

17. In *Matthews v SPI Electricity (No. 11)*, the Supreme Court set out a three step process to be followed in evaluating a claim of public interest immunity:

    (a) The first step is to decide whether there is a risk that production and inspection of the documents in issue would be injurious to the public interest;

    (b) The second step is to determine whether there is a public interest in a party having access to those documents because such access is in the interests of the fair administration of justice; and

    (c) The third step is to determine whether the public interest in the fair administration of justice outweighs the desirability that the information not be disclosed.[5]

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[3] (1978) 142 CLR 1, pp. 38 – 39. See also *R v Young* (1999) 46 NSWLR 681, [126], where Beazley JA observed that 'the immunity cannot be waived' and 'is not dependent on a claim being made by the parties'.

[4] See, e.g., *Ryan v State of Victoria* [2015] VSCA 353, [56].

[5] *Matthews v SPI Electricity (No. 11)* [2014] VSC 65, [25] ('Matthews').

DISCLOSURE WOULD BE CONTRARY TO THE PUBLIC INTEREST

18. WDA submits that the disclosure of the Allard reviews and the Final Allard Comments would be contrary to the public interest as they belong to a class of documents – namely, Cabinet documents – the production of which is generally contrary to the public interest ('the Class Claim').

19. In any event, production of the Allard reviews, the Final Allard Comments and the VLC Response is contrary to the public interest ('the Contents Claim') as:

    (a) It would interfere with the State's ability to obtain frank and fearless advice regarding the merits of infrastructure projects

    (b) The documents are in the nature of on-going commentary.

The Allard reviews and the Final Allard Comments are Cabinet documents

20. The common law recognises a 'rough, but acceptable' distinction between claims of public interest immunity based on a documents membership of a particular class and claims based on the document's specific contents.[6]

21. 'Cabinet documents' are one class of documents the production of which is generally accepted to be contrary to the public interest. The rationale for this was explained by the High Court in *Commonwealth v Northern Land Council*,

> *… it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made … the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential … The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny … It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one*

[6] See, e.g., Matthews, [24](b).

> *may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support.*[7]

22. Significantly, the courts have recognised that the class of 'Cabinet documents' extends beyond documents actually recording the deliberations of Cabinet. In *Kamaesee v Commonwealth (No. 4)*, the Victorian Supreme Court stated:

> *Different formulations have been given in the authorities for documents that are prima facie subject to public interest immunity as Cabinet documents. Drawing from authorities, they would include:*
>
> *(a) documents that record the deliberations and decisions of Cabinet (said to have 'pre-eminent claim to confidentiality'), such as Cabinet minutes;*
>
> *(b) documents submitted to and considered by Cabinet, including documents that are both identical in all relevant respects to those considered by Cabinet and precursors of documents submitted to Cabinet;*
>
> *(c) documents brought into existence within governmental departments and instrumentalities for the purpose of preparing a submission to Cabinet;*
>
> *(d) documents and communications passing between a Minister and the head of his department, or between heads of departments, relating to Cabinet proceedings and material prepared for Cabinet; and*
>
> *(e) documents relating to framing of government policy at a high level.*[8]

23. It is clear from the terms of the *Market-Led Proposals Interim Guideline* and the final *Market-Led Proposals Guideline* (collectively, 'the Guidelines') published by the State that documents relating to market-led proposals will usually constitute 'Cabinet documents' as described above:

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[7] (1993) 176 CLR 604, p. 615–6 ('Northern Land Council').

[8] [2016] VSC 438, [16].

(a) As depicted in Diagram 2 of the Guidelines, approval of a market led proposal involves a five step process. In four of these steps – steps 2 through 5 – approval is required from a Cabinet sub-committee.[9]

(b) One of the documents informing that approvals process was the Business Case prepared by the Department of Treasury and Finance and the Department of Economic Development, Jobs, Transport and Resources ('DEDJTR').[10] At the time the Business Case was under preparation, the Project was at Stage 3 of the process described in the Guidelines.[11]

(c) As part of the preparation of the Business Case, DEDJTR requested VLC to prepare strategic traffic modelling regarding the impacts of the Project.[12]

(d) Quite properly, DEDJTR requested that a peer review be undertaken of this modelling to assess its rigour. This is standard State practice in the preparation of Business Cases for projects the size and scale of the Project. The purpose of undertaking this process was to ensure that the Business Case to be put to Cabinet could be confident in its predictions.

24. This context is important because it makes clear that the Allard reviews were documents 'brought into existence within governmental departments and instrumentalities for the purpose of preparing a submission to Cabinet.' At the very least, the Allard reviews are 'document[s] relating to the framing of government policy at a high level.'

25. In addition, the Final Allard Comments that was bought into existence after the Business Case went to Cabinet is a Cabinet document, notwithstanding that it was brought into existence after submission of the Business Case to Cabinet. This is because:

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[9] Department of Treasury and Finance, *Market-Led Proposals Interim Guideline* (February 2015), p.5; Department of Treasury and Finance, *Market-Led Proposal Guidelines* (November 2015), p. 7.

[10] Department of Economic Development, Jobs, Transport and Resources, *Western Distributor: Business Case* (November 2015), p. 1.

[11] Ibid, p. 3.

[12] Paul Smith Affidavit.

(a) Publication of that document may reveal information which was contained in the Allard reviews and thus reveal matters which may have been considered by Cabinet; and

(b) That document is, in any event, a document relating to the framing of government policy at a high level.

26. It is also relevant that the issue of the appropriateness of the Project is clearly both current and controversial. These are matters which enhance any claim to immunity.[13] In *Northern Land Council*, the High Court stated:

> *... for our part we doubt whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings. The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of a litigant seeking to vindicate private rights.*[14]

27. The Allard reviews also contain commercially sensitive material relevant to the State's tendering process for the Project. The State's interests may be prejudiced if some elements of the Business Case were available to potential tenderers.

28. If the IAC accepts that the Allard reviews and the Final Allard Comments are properly characterised as 'Cabinet documents' then, *prima facie*, the disclosure of those documents is contrary to the public interest in the effective functioning of government.

NO SUFFICIENT BASIS TO REQUIRE PRODUCTION

29. WDA has not been provided with detailed submissions explaining the basis on which the documents should be produced. As the WDA understands it, the submission is fundamentally that the documents are relevant and therefore its production should be required.

30. This is not the correct approach. Recent decisions of the Supreme Court make clear that relevance alone is not sufficient to justify requiring production of Cabinet documents.

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[13] Matthews, [24](r)

[14] (1993) 176 CLR 604, p. 618.

(a) In *Kamasaee v Commonwealth (No. 5)*, the Victorian Supreme Court found it appropriate to begin with

> *… the proposition that in respect of a document meriting PII protection as a member of the 'Cabinet document' class, it is only in an exceptional case, where the material in the document is crucial to the proper determination of the proceeding, that the public interest in the administration of justice will outweigh the public interest in preserving its confidentiality.*[15]

(b) Similarly, in *Matthews*, the Supreme Court observed:

> *In order for the public interest in the administration of justice to arise in the balancing process, the documents must contain 'material evidence'. Relevance to the proceedings is of itself insufficient. The documents must have an important bearing upon the ultimate decision on the relevant questions;*
>
> *In civil cases it will only be where exceptional circumstances give rise to a significant likelihood that the public interest in the proper administration of justice outweighs the very high public interest in the confidentiality of documents recording Cabinet deliberations that it would be necessary or appropriate to order production of the documents to the Court*[16] [Emphasis by underlining added.]

31. Here, there is no proper basis to assert that the peer review is 'crucial' to fair resolution of the matters before the IAC. This is for three reasons:

(a) First, the unavailability of the peer review does not raise any procedural fairness issues. The documentation accompanying the Transport Impact Assessment provides considerable detail on the 2014 Zenith model, which is the model used in the preparation of the Environment Effects Statement. It has, at all times, been open to the parties such as the City of Melbourne to lead evidence on the deficiencies of that model based on the information available. Indeed, Mr Keys specifically agreed that the Zenith model was

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15 [2016] VSC 595, [35].

16 [2014] VSC 65, [24](k) and (l).

a suitable strategic network planning, subject to identified limitations.[17] As such, this is not a matter in dispute and indeed not a matter which City of Melbourne is entitled to dispute.

(b) Second, the documents do not relate to the 2014 Zenith Model that was used to produce the figures that informed the Environment Effects Statement. As set out in the EES, the peer review occurred as part of the preparation of the Business Case when the 2011 Zenith Model was being used.[18] As a consequence of that review, the model was updated to the 2014 Zenith model. As a result, the peer review is necessarily limited in what it can reveal about the current model. This is especially in circumstances where evidence has been given that the comments of the peer review were incorporated into the updated model. No evidentiary basis has been identified to doubt that assertion.

(c) Third, to the extent that there is a difference between the outputs derived from the 'loop through' and 'single distribution' report, the differences are discussed in the VLC paper, *Review of Travel Forecasting Methodologies – Draft Internal Working Document* (September 2015) and the extent of the differences quantified. This is sufficient to give affected parties, if there are any, the opportunity to make submissions. Fundamentally, however, WDA does not understand it to have been suggested that, for example, the difference of 200,000 car trips in 2031 or 1.2km in average car trip lengths to materially affect the merits of the Project.

32. Further, even if the non-provision of the documents might raise procedural fairness issues, that does not mean that they must be produced. As Martin CJ observed in *Gypsy Jokers Motorcycle Club Inc. v Commissioner of Police*,

> *No Australian authority has been cited in support of the proposition that unrestricted access by a party to all the information upon which a court relies for its adjudication of the case before it, is an essential or indispensable aspect of a fair trial. My review of the decisions of the*

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[17] Conclave Statement of Veitch and Keys, Items 1 - 4.

[18] GHD, *Western Distributor Authority: West Gate Tunnel Transport Modelling Summary* (May 2017), p. 18 at Appendix F to the Technical Report A.

> *European Court of Human Rights, and the courts of the United Kingdom, New Zealand, Canada and the United States leads me to conclude that the courts in those jurisdictions have not concluded that the right of a party to have unrestricted access to all the information, upon which a court relies, is an essential or indisputable component of a fair trial.*
>
> *Rather, my review of those jurisdictions leads me to conclude that in each of the jurisdictions, it has been acknowledged that the content of the requirements of procedural fairness or fundamental justice will depend upon the particular circumstances of the case and cannot be prescribed in the abstract. Further, in each jurisdiction, it has been expressly recognised that the ordinary requirements of procedural fairness, including the ability of a party to know the case that he or she has to meet, must sometimes yield to a countervailing public interest in the protection of the confidentiality of evidentiary material, even as against a party to the proceedings.*[19]

33. This judgment was upheld by the High Court on appeal.[20] Significantly, *Gypsy Jokers* was concerned with a far more serious infringement on proprietary and procedural rights than the present case. In that case, the Western Australian Supreme Court was permitted to make 'anti-fortification orders' against certain premises and to do so on the basis of information that was provided to the Court, but was not available to the recipient of the order.

34. In the present case, what is issue is access to a peer review (and associated documents) relating to a previous version of the Zenith model which was not used to undertake strategic traffic modelling for this Project in circumstances where no evidence has been called which seriously challenges either the appropriateness of the 2014 Zenith model for strategic network planning or suggests that the figures provided by that model are not sufficiently accurate for the purposes of the IAC's assessment.

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[19] (2007) 33 WAR 245, [56] – [57].

[20] (2008) 234 CLR 532

35. Accordingly, it is submitted that the question of balancing the competing public interests in this matter does not arise because there is no, or no sufficient, public interest in requiring the production of the document.

36. This outcome is consistent with the decision of the Victorian Civil and Administrative Tribunal in *Herington v Department of Transport, Planning and Local Infrastructure*[21] where the Tribunal refused to order the release of certain documents relating to the preparation of the Business Case for the East West Link under the *Freedom of Information Act*:

    (a) In that case, the applicant had applied for various documents relating to the preparation of the East West Link Business Case. The Department refused to release six documents, including:

        (i) A review of transport modelling and preliminary forecasts, described as Document 2;

        (ii) A preliminary review of the economic appraisal and recommendations, described as Document 3; and

        (iii) A traffic analysis, described as Document 4.

    (b) On review, the Tribunal upheld the decision of the Department not to release any of Documents 2, 3 or 4.

    (c) In respect of Document 2, the Tribunal stated:

        In July 2012, government officers agreed an independent peer review of traffic modelling was required to support, and strengthen the robustness of the Business Case. Mr Smith (on instruction) commissioned Arup Pty Ltd to prepare a peer review for submission as part of the Business Case, for consideration by Cabinet.

    (d) The Tribunal went on to conclude:

        Mr Smith's evidence as to the motive in commissioning Document 2, confirmed by the chain of events following its completion, as evidenced by him and Ms Renn, led me to conclude Document 2 was prepared by an agency (here the consultant commissioned by the agency) for the

[21] [2014] VCAT 1026.

purpose of submission for consideration by Cabinet, here the sub-committee.

(e) As a result, the Tribunal concluded that Document was immune from production.

(f) In relation to Documents 3 and 4, the Tribunal considered these documents together and stated:

In December 2012, government agencies agreed an independent peer review of the economic appraisal section of the Business Case was required, in order to ensure its accuracy and robustness. Mr Smith said that section is one of the most sensitive and important in the Business Case. In January 2013, Mr Smith (on instruction) commissioned Evans & Peck to prepare the peer review, and in February 2013 commissioned them to extend the scope of that review. While the separate documents created essentially one piece of work, they are here described as Documents 3 and 4.

This, peer review was not intended itself to be included with the Business Case for consideration by Cabinet. However, it was commissioned to provide opinion, advice and recommendation to help improve the accuracy and robustness of the Business Case being put to Cabinet.

The peer review was prepared in close consultation with the consultants who were drafting the relevant section of the Business Case. Documents 3 and 4 had a significant influence on the form of the economic appraisal section in the detailed form of the Business Case. It gave confidence in the content of that part of the Business Case. It also led to inclusion of further material in that section, and improvements to the way certain aspects were explained. It also identified the need for further work to be done on aspects of the Business Case, including the further matters to which Document 6 related.

(g) In respect of Documents 3 and 4, the Tribunal concluded:

In my view, release would be contrary to the public interest. In terms of the criteria set out in Friends of Mallacoota:

- *The documents are sensitive and contentious in terms of the document being commercially sensitive and sensitive in that they relate to the high level workings of government and the contentiousness of the Project;*
- *They are preliminary advices and opinions in the sense that their function was to contribute to the quality of the Business Case. The Business Case was the final document which went to Cabinet for consideration and decision;*
- *In part, they reflect possibilities considered but not eventually adopted. Thus the release may well lead to confusion and ill-informed debate giving promoting pointless debate; and/or*
- *Their release could have an impact on the tendering process now under way, as described by Mr Smith.*

THE PUBLIC INTEREST IN NON-PRODUCTION OUTWEIGHS ANY INTEREST IN PRODUCTION

37. Alternatively, if the IAC is satisfied that there is a public interest in requiring production, then for substantially the same reasons set out above, the public interest in non-production outweighs any interest in production.

THE CONTENTS CLAIM

38. Separately, WDA submits that the public interest would be damaged if the Allard reviews, the Final Allard Comments and the VLC Response were to be released because it would inhibit the provision of frank and fearless advice to Government.

39. It was recognised in *Sankey v Whitlam* that the provision of frank and fearless advice to government is desirable.[22] This principle has also been affirmed in more recent cases:

    (a) In *Secretary, Department of Justice v Osland*, Maxwell P. stated, in the context of an application under the *Freedom of Information Act 1982*, that

[22] (1978) 142 CLR 1, p. 40.

the elements of the public interest protected by the 'internal working documents' exemption of that Act:

> *… include the efficient and economical conduct of Government, protection of the deliberative processes of Government, particularly at high levels of Government and in relation to sensitive issues, in the preservation of confidentiality so as to promote the giving of full and frank advice.*[23]

(b) Similarly, in *Friends of Mallacoota Inc. v Department of Planning and Community Development,* Judge Hampel, sitting as a Deputy President in the Victorian Civil and Administrative Tribunal, commented on the circumstances in which the disclosure of internal working documents would be contrary to the public interest:

> *Draft internal working documents or preliminary advices and opinions are more generally than not inappropriate for release. That is particularly so when the final version of the document has been made public.*
>
> *It is contrary to the public interest to disclose documents reflecting possibilities considered but not eventually adopted, as such disclosure would be likely to lead to confusion and ill informed debate, to give a spurious standing to such documents or promote pointless and captious debate about what might have happened rather than what did.*
>
> *Decision-makers should be judged on the final decision and their reasons for it, not on what might have been considered or recommended by others in preliminary or draft internal working documents.*
>
> *It is contrary to the public interest to disclose documents that would have an adverse effect on the integrity or effectiveness of a decision-making, investigative or other process.*[24]

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[23] [2007] VSCA 96, [77]. This decision was overturned on other grounds.

[24] [2011] VCAT 1889, [51].

40. In particular, it is undoubtedly in the public interest that large infrastructure projects such as the Project which entail the expenditure of significant sums of public money are subject to as full and rigorous a process of scrutiny as is possible. This is so even prior to embarking on an inquiry under the *Environment Effects Act*.

41. In this context, it is highly desirable that the State be able to retain peer reviewers and that those peer reviewers should not feel in any way constrained in their ability to criticise the relevant project.

42. Publishing the contents of the documents has the potential to have a chilling effect on the ability of the State to obtain frank and fearless advice on the merits of projects it is considering investing in as person involved in the preparation of those reports will be aware that their reports may be published and may choose to tone down their criticism in order to avoid being perceived to criticise the government of the day or be exposed to public ridicule if the criticism is misplaced.

43. Accordingly, this provides a separate and independent basis on which the production of the documents would prejudice the public interest.

44. If that is accepted, then the IAC is required to undertake the same balancing exercise described in relation to the Class Claim. WDA submits that, for the same reasons given above, there is either:

    (a) No public interest in the production of the documents; or,

    (b) Any public interest in the production of the documents is outweighed by the public interest in the non-production of the documents.

Stuart Morris

Rupert Watters

Instructed by Sallyanne Everett of Clayton Utz

29 August 2017