IN THE MATTER of the Planning and Environment Act 1987 [the Act]

and

IN THE MATTER of draft Amendment GC81 to the Port Phillip Planning Scheme [the draft Amendment]

and

IN THE MATTER of the Fishermans Bend Framework [the Framework]

and

IN THE MATTER of the Fishermans Bend Review Panel [the Panel]

and

IN THE MATTER of Industry Business Hub Plan No. 607275B [the Industry Business Hub]

and

IN THE MATTER of 87 Gladstone Street, South Melbourne [the Subject Land].

WRITTEN OUTLINE OF SUBMISSIONS ON BEHALF OF THE INDUSTRY BUSINESS HUB

1. PREAMBLE

1.1 This Outline expands upon the grounds of the submission made on behalf of the Industry Business Hub on 27 April 2018 and the letter of objection on its behalf of 5 February 2018.
1.2 The Industry Business Hub is the Owners Corporation for the development on the Subject Land, comprising 77 primary lots, constructed in 2010/11 and subdivided by Plan No. 607275B registered on the 4th of March 2011.

1.3 The Subject Land is occupied by in the order of 70 businesses, predominantly start-up businesses, responding to the digital age, including:

- Designers – graphic;
- Photographers;
- Psychologists;
- Consultants – access, facilitation, coaching, productivity;
- Marketing, Branding, Sales;
- IT, tech, innovations;
- Fashion businesses;
- Social ventures;
- Law firms;
- Modelling agencies;
- Industrial design firms;
- Architects;
- Hospitality;
- Engineering;
- Property development; and
- Shipping brokers.

1.4 Were the Subject Land to be compulsorily acquired each owner and lessee would be entitled to compensation under the provisions of the Land Acquisition and Compensation Act 1986 [the LAC Act] for disturbance as well as the market value of their interest in the Subject Land.
1.5 The building constructed on the Subject Land is built to all four boundaries, as can be easily ascertained by a view or from Near Map, and has been fully occupied since prior to the preparation of the Fishermans Bend Vision September 2016, which is said to underpin the Fishermans Bend Urban Design Framework 2017 [the Framework].

1.6 Draft Amendment GC81 seeking to apply the Framework and the Framework itself would directly apply to, *inter alia*, the Subject Land but the Framework is not shown as incorporated in clause 81 by the draft Amendment.

1.7 Unless part of the Planning Scheme clause 61.06 for determining boundaries would not apply to the figures in the Framework.

1.8 No Amendment seeking to apply the Framework has been exhibited under the provisions of the Act and the Industry Business Hub reserves its rights under Part 3 of the Act.

1.9 The timescale identified in the Framework is up to 2050.

1.10 The Subject Land is developed with a building without significant development potential unless the existing building, constructed as recently as 2010/11 and held in multiple ownerships, were demolished.

1.11 The building on the Subject Land has an estimated economic life well beyond 2050.

1.12 Under the draft Amendment the Subject Land would remain in the Capital City Zone [CCZ] and is proposed to be the subject of the proposed Schedule 1 [CCZ1], the Design and Development Overlay – Schedule 30 [DDO30], the
Environmental Audit Overlay [EAO] and the Parking Overlay – Schedule 1 [PO1].

1.13 Significantly the Subject Land is not included in a Public Acquisition Overlay [PAO] nor has there been or proposed a declaration of the Minister under Section 113 of the Act that the Subject Land is proposed to be reserved for a public purpose.

1.14 Under the Framework Figure 13, the Subject Land is located within Mixed Use High Intensity (Core Activity) in the Montague precinct and is or is as to part designated as “New public open space” in Figure 17.

1.15 Under proposed clause 22.15-2 the first objective is to implement the Framework and the same objective is to be found in clause 1.0 of DDO30 and in the purpose of CCZ1.

1.16 The effect of clause 4.0 of CCZ1 would be that there can be no new development on the Subject Land without forfeiture of the land depicted in Map 3 in the Framework as New public open space.

1.17 The Framework recognises that public open space needs to be provided in a timely manner to support the growing community (Framework page 50) in the core area of Montague, within which the Subject Land is situate, which is envisaged, for the obvious reasons of proximity to the Central Activities District and it being within that part of Fishermans Bend that is served by existing public transport by fixed rail, to experience population growth from 280 persons to 4,450 persons by 2025 and 20,800 by 2050, generating a demand for open space well before there is any probability that the Subject
Land would be available for use for that purpose, other than if it were to be compulsorily acquired.

1.18 The Minister’s Submission B contends that there is to be no compulsory acquisition [paragraph 48].

1.19 Pursuant to Section 5(1) of the LAC Act a PAO is a condition precedent to the compulsory acquisition of an interest in land unless the land has been certified by the Governor in Council as land for which reservation is unnecessary, undesirable or contrary to the public interest.

1.20 Neither of the two exceptions under Section 5(4A) and (4B) of the LAC Act, relating to declarations under Section 172 of the Act and special project land, apply to the circumstances of the Subject Land.

1.21 The Industry Business Hub contends that it is intended by the Minister to effectively compulsorily acquire the Subject Land by compelling its transfer to the Council for the purpose of open space and there is no ground for contending that reservation is unnecessary, undesirable or contrary to the public interest.

1.22 It is submitted that it follows that, consistent with the Minister’s Part B submission, the draft Amendment does not contemplate that the Subject Land or any part of it will be expressly reserved for a public purpose or compulsorily acquired to meet the identified need for public open space but it will, in the terms of Section 4(2)(l) of the Act be set aside for use as public open space, albeit without provision for compensation.

1.23 Figures (v) and (vi) in Ms Thompson’s evidence are not dimensioned nor is there any text identifying what part of the Subject Land is identified as “New
public open space" in the Framework or in any proposed Planning Scheme map seen by the Industry Business Hub.

1.24 The open space Figure 17 in the Framework suggest that it is the full frontage of the Subject Land which is depicted as New public open space, which would leave the balance of the Subject Land without a frontage to Gladstone Street and left with access only off Gladstone Place, which is a service lane.

1.25 Figure 17 in the Framework appears consistent with this interpretation of Ms Thompsons’ Figures (iv) and (vi) (Document 107) but inconsistent with Figure 19 and Ms Hodyl’s Addenda 3 Figure 2 (Document 90) which depicts the proposed New public open space being confined to the south-western corner of Gladstone Street and Gladstone Place (as well as depicting substantial overshadowing of the open space by the postulated development).

1.26 Ms Hodyl’s said figure is consistent with Document 156(a) being the Minister’s revised DDO map.

1.27 Ms Hodyl’s Precinct overview for Montague and Figure 49 in the Framework depicts the approved development directly north of the Subject Land and Ms Thompson’s evidence is that the Subject Land will be “significantly impacted by overshadowing” which, it is submitted, makes it unsuitable for use for the purpose of public open space.

1.28 If required to pay compensation for taking the Subject Land or part of it for a public purpose, the burden on the public purse would be substantially increased compared to a site in single ownership because of the multiple rights to compensation including for each individual interest in land and for business disturbance.
1.29 The nature of the ownership of the Subject Land and the proposed setting aside without compensation combined with the constrained redevelopment opportunity proposed would mean there would be no incentive for redevelopment of the Subject Land and therefore there would be no alternative to compulsory acquisition if any part of the Subject Land were required to be used for public open space within the timescale attributed to development of the Montague precinct.

2. **OUTLINE OF SUBMISSION**

2.1 The Industry Business Hub advances two primary propositions:

2.1.1 first, that were the draft Amendment and the Framework incorporated into the Planning Scheme applying to the Subject Land in the manner proposed it would not achieve its purpose within the 2050 timeframe for full development of the Montague precinct and therefore the open space should be relocated in accordance with the only evidence about this open space proposal, being that of Ms Thompson; and

2.1.2 second, the proposed mechanism to coerce the owners to provide the open space to the Council is contrary to the first objective of planning in Section 4(1)(a) and the objective of the planning framework in Section 4(2)(l) of the Act and the purpose of State planning policy in clause 10 of the Planning Scheme, it would seek to avoid the detailed provisions in a range of primary legislation for the setting aside of land for use for a public purpose, and the consequence of such setting aside, would be unfair, inequitable and unlawful.
3. **ACHIEVEMENT OF THE PURPOSE OF DESIGNATION THE SUBJECT LAND AS OPEN SPACE**

3.1 The only evidence on behalf of the Minister as to the quantum and distribution of open space in the Montague precinct is the evidence of Ms Joanna Thompson which includes in respect of Sub-Precinct M6 and specifically relating to the Subject Land the following:

- "The proposed Neighbourhood open space is located on a site that has redeveloped recently and is unlikely to redevelop in the 2050 timeframe and therefore alternative sites have been investigated for this open space.

- The other Neighbourhood open spaces are located on Thistlewaite Street. The site on Gladstone Street is unlikely to become available in the medium and long term."

and the first two paragraphs of the applicable conclusion are as follows:

"Recommend that the proposed Neighbourhood open space on Gladstone Street is replaced with a new Neighbourhood open space on Thistlewaite Street opposite the proposed Neighbourhood open space to the north.

The reason for selecting this location is that these two open spaces will be within 200 metres safe and easy walking distance of the north-western area of this sub-precinct. With the proposed building heights in the north of this sub-precinct, future open space between Gladstone and Buckhurst Streets will be significantly impacted by overshadowing."
3.2 Paragraph 174 of the Stage 1 submission on behalf of the City of Port Phillip provides as follows:

"174. As per Council’s endorsed submission, the space earmarked in the Framework at 87 Gladstone Street is not ideal given that the building on the site is a recent development and is strata titled to a series of small businesses that are in line with the Vision for Montague. Council considers that the car park at the rear of 552-558 City Road would be a suitable alternative site."

3.3 Ms Thompson’s evidence essentially agrees with the thrust of Port Phillip’s submission, albeit not the exact location for replacement public open space.

3.4 Any use of the Subject Land for public open space would be compromised by development to the north and under Ms Hodyl’s Figure 2 by development to the south and east.

4. **PLANNING BLIGHT**

4.1 Planning blight is where it is known that land may be compulsorily taken as required for a public purpose and the owner has no legal remedy: Land Acquisition and Compensation Report, Stuart Morris, January 1983, paragraphs 901-904 and Report of Committee of Inquiry into Town Planning Compensation [the Gobbo Report], March 1978, paragraph 3.1.

4.2 The decision in *Analed Pty Ltd v Roads Corporation* [1998] VSC 174, upheld in the Court of Appeal [2000] VSAC 160, was that the owner was not entitled to compensation for financial loss in circumstances where land was not reserved and had not been the subject of a declaration that the land was required for a public purpose (although the relevant Minister had been
requested to make such a declaration and had refused) where there was a publicly known proposal for an arterial road through the land at the time of purchase.

4.3 The decision in *Halwood Corporation Limited v Roads Corporation* (1995) 89 LGERA 280 upheld by the Court of Appeal [1998] 2 VR 439 is authority for the proposition that only the owner of the land at the date of any reservation or a declaration that the land is required for a public purpose is entitled to compensation for financial loss under Section 98 of the Act.

4.4 Clause 4.0 in the proposed CCZ1 as it would apply to the Subject Land would prohibit the grant of a permit for development unless public open space generally in accordance with Map 3 is provided with no provision for compensation.

4.5 Document 156(a), being the Minister's revised CCZ1, would substitute for the displayed CCZ1 a requirement that a landowner enter an Agreement under Section 173 of the Act to transfer to or vest in the local Council the land depicted in the Framework for the purpose of use as New public open space at no cost to the Council.

4.6 It is proposed by the Minister that there be no reservation or declaration of requirement of land for a public purpose and the Minister apparently contends that there would be no refusal on the ground that the Subject Land is required for a public purpose because any development would be prohibited by clause 4.0 of CCZ1 without the taking of the New public open space and therefore no permit would be refused on the compensable ground and the Minister would contend no loss because of the public open space requirement over the Subject Land in the Planning Scheme.
4.7 The Minister's position needs to be seen in the context that where land is unequivocally required for use for a public purpose, such as having been so set aside in the Planning Scheme, it is an open question whether the Responsible Authority is obliged to refuse a permit on the compensable ground [Fitzgerald Pty Ltd v Whittlesea CC [1998] VSC 105 at page 60; [1998] 98 LGERA 28 at 68].

4.8 If the draft Amendment were approved no purchaser of any of the interests in the Subject Land would be prepared to pay market value for that interest, it having been set aside in the Planning Scheme for use for a public purpose but not reserved or declared to be required for that purpose and there being a prohibition on development on the Subject Land without the gifting of the open space area to the Council, which would require demolition of the existing building.

4.9 There is provision for compensation for loss on sale is contained in Section 106 of the Act but that provision only applies if the land or part of the land is reserved or proposed to be reserved for a public purpose.

4.10 It follows that the ploy of setting aside the Subject Land or a substantial part of it as required for use for a public purpose but failing to apply a PAO to the land would subject the Subject Land to planning blight by endeavouring to circumvent the legislative scheme whereby a PAO is a condition precedent to a compulsory taking and denying the owners of interests in the Subject Land of, under the de facto exhibited CCZ1, all development rights, for example, building works to create an entrance canopy, a rooftop terrace or partial rebuilding after a fire, until such far distant time a total redevelopment may be contemplated, with the intention of forcing the owners to surrender part of
their land for use for public open space without any consideration and without it being part of any agreed development quid pro quo [cf Minister’s Part B submission at 53(d)].

4.11 Such a scheme would have the consequence that a total redevelopment would be delayed for as long as possible delaying the provision of the proposed open space for decades after full or near full development of the Montague precinct is achieved.

4.12 It is acknowledged that if the amended CCZ1 were substituted for what was the de facto exhibited Schedule, development of the existing building would be possible with the grant of a permit but in practice, having regard to the experience with applications to develop reserved land in a PAO under clause 45.01, no permit would be granted if the Responsible Authority, or on review the Tribunal, considered the change would prejudice the purpose for which the land is to be acquired or any permit would be subject to no compensation condition.

4.13 The endeavour to subvert the compensation provisions of the Act is no oversight but rather is deliberate, as demonstrated by paragraphs 48-54 of the Minister’s Part B submissions.

4.14 The Minister’s Part B submission at 48 provides:

"The Public Acquisition Overlay in the Victoria Planning Provisions provides for the identification of land which has been reserved for a public purpose. No Public Acquisition Overlay, or reservation pursuant to other legislation is proposed as part of the Amendment."
4.15 The endeavour to obtain part of the Subject Land for public open space by prohibition of development unless part of the land is surrendered for use for the purpose of public open space under clause 4.0 of CCZ1, is alleged by the Minister to be offset by permission to develop the remaining part of the land to the same degree as if no part was required for a public purpose as a quid pro quo.

4.16 The notion of a quid pro quo is a choice of the landowner whether the price to be paid in terms of surrender of part of the land is justified by the benefit of a permitted development, but what is here proposed is no choice and a lesser development outcome and therefore the cases of *Lloyd v Robinson* and *271 William Street Pty Ltd v City of Melbourne* are not to point.

4.17 The proposed clause 4.0 of CCZ1 in the draft Amendment as it would apply to the Subject Land is not regulation; it is a prohibition on any development unless and until a total redevelopment is sought.

4.18 The Minister’s Part B submission, at paragraph 36(c), confirms that it is the intention that the owners of the Subject Land and other lands where land is identified on Map 3 to be required for New open space, “be transferred at no cost to the relevant authority”.

4.19 It may well be that it is not the role of the Review Panel to adjudicate the validity of this arrangement as though it were a Court of law but the conclusion of the C270 Panel was that the FAU scheme would require legislation (page 68) and that was in respect of an uplift which was a far lesser departure from the norm under primary legislation then seeking to acquire a large part of the Subject Land at no cost or meaningful quid pro quo and a recommendation to approve the draft Amendment in any form should
not be made unless the Panel is confident that the implementation of its recommendation would be lawful because a successful challenge in the Courts to the validity of the means of obtaining land for open space and streets and lanes would remove a fundamental plank of the draft Amendment, which could not be severed from the rest of the draft Amendment, setting back the proper planning of Fishermans Bend for years.

4.20 The effect of the proposed mechanism to deprive the owners of the Subject Land, and the owners of other land set aside in Map 3 as required for use as public open space, needs to be viewed in the context of, inter alia, the first objective of planning in Section 4(1)(a) of the Act to provide for the fair, orderly, economic and sustainable use and development of land, Section 4(2)(l) of the Act to provide for compensation when land is set aside for public purposes and the equalisation provisions were a public infrastructure plan under Part 3AB of the Act implemented or under the new regime under the Planning and Environment (Public Land Contributions) Act 2018 if and when it comes into operation.

4.21 Section 20 of the Charter of Human Rights and Responsibilities Act 2006 provides that a person must not be deprived of his or her property other than in accordance with law. The relevant law embodied in primary legislation includes the detailed scheme to be followed in setting aside and/or taking land for use for a public purpose and the consequences of such setting aside and/or taking in Sections 98 to 113 and 172 of the Act and Sections 5(1), 6 to 17, 19 to 24 and 30 to 44 of the LAC Act.
4.22 It is not only the provisions of the Act and incorporated into the Act that have not been fully analysed in the alleged justification for the proposed funding mechanism.

4.23 Any purported requirement for public open space needs also to be seen in the context of Section 18A(4) and (5) of the Subdivision Act 1988 which provides as follows:

"(4) A public open space requirement may be made only once in respect of any of the land to be subdivided whether the requirement was made before or after the commencement of this section, unless subsection (5) applies.

(5) A further open space requirement may only be made when a building is subdivided and a public open space requirement was not made under section 569H of the Local Government Act 1958 or section 21A of the Building Control Act 1981 when the building was constructed."

4.24 There appears to have been no enquiry as to whether a public open space requirement has been previously made for lands depicted as New public open space in Map 3 of the Framework.

4.25 Clauses 52.01 and 52.01-1 of the Port Phillip Planning Scheme provides as follows:

**PUBLIC OPEN SPACE CONTRIBUTION AND SUBDIVISION**

A person who proposes to subdivide land must make a contribution to the council for public open space in an amount specified in the schedule to this clause (being a percentage of the land intended to be used for residential, industrial or commercial purposes, or a percentage of the site value of such land, or a combination of both). If no amount is specified, a contribution for
public open space may still be required under section 18 of the Subdivision Act 1988.

52.01-1 Exemption from public open space requirement specified in the scheme
A subdivision is exempt from a public open space requirement specified in this scheme if:

- It is one of the following classes of subdivision:
  - Class 1: The subdivision of a building used for residential purposes provided each lot contains part of the building. The building must have been constructed or used for residential purposes immediately before 30 October 1989 or a planning permit must have been issued for the building to be constructed or used for residential purposes immediately before that date.
  - Class 2: The subdivision of a commercial or industrial building provided each lot contains part of the building. It is for the purpose of excising land to be transferred to a public authority, council or a Minister for a utility installation.
  - It is for the purpose of excising land to be transferred to a public authority, council or a Minister for a utility installation.
  - It subdivides land into two lots and the council considers it unlikely that each lot will be further subdivided.

4.26 The Schedule to clause 52.01-1 provides as follows:

SCHEDULE TO CLAUSE 52.01

<table>
<thead>
<tr>
<th>Type or location of subdivision</th>
<th>Amount of contribution for public open space</th>
</tr>
</thead>
<tbody>
<tr>
<td>All land in the municipality</td>
<td>5%</td>
</tr>
<tr>
<td>Fishermans Bend Urban Renewal Area</td>
<td>8%</td>
</tr>
</tbody>
</table>

4.27 It is clear from whichever of the iterations of the part of the Subject Land that it is proposed to be set aside for New public open space that it far exceeds 8% of the Subject Land or of the site value of the Subject Land or a combination of both and it cannot be assumed that any future redevelopment of the Subject Land would not be for a commercial purpose, noting that “Office” is a Section 1 use in CCZ1.
4.28 The Industrial Business Hub contends that whether land is reserved for a public purpose for the purposes of Part 5 of the Act is a question of interpretation and what is proposed in the draft Amendment would be a reservation for a public purpose albeit clause 45.01-6 applying to the PAO is proposed not to apply. That clause provides:

**45.01-6 Reservation for public purpose**

Any land included in a Public Acquisition Overlay is reserved for a public purpose within the meaning of the Planning and Environment Act 1987, the Land Acquisition and Compensation Act 1986 or any other act.

It will be seen that it does not say that only land in a PAO is so reserved.

4.29 What is proposed is not a regulation of the development of the Subject Land; it is a setting aside of part of the Subject Land for use for a public purpose and that is a reservation of that part of the Subject Land for use for a public purpose.

4.30 The Industrial Business Hub contends that the proposed device to avoid the usual consequences of setting aside land for a public purpose is also, inter alia, unconscionable and should be rejected by the Panel.

4.31 The Industry Business Hub adopts the submissions, in particular at paragraphs 19(c), (iv), (v), (d), 85(b) and 109 to 188 (both inclusive) of the Outline of submissions of Mr C J Canavan QC, N Tweedie SC and Ms J Sharp and the Submission of Stuart Morris QC and Nicola Collingwood of 3 May 2018 as they apply to the Subject Land on the manifest shortcomings of the manner in which it has been sought to circumvent the consequences of setting aside land to be transferred to the local Council for a public purpose.
4.32 The Industry Business Hub would add that a mandatory requirement to enter an Agreement under Section 173 of the Act would be to seek to avoid by subordinate legislation the detailed Development Contributions Framework in Part 3B, Section 62(5) and (6) of the Act as well as the detailed and comprehensive provisions in respect of compensation in the provisions of Part 5 of the Act and the detailed process and substantive provisions of Parts 10 and 11 and Section 37 of the LAC Act, all of which are embodied in primary legislation.

4.33 It is submitted that a mandatory requirement to enter an Agreement to forego rights under the applicable primary legislation is not an “agreement” authorised by Section 6(1)(k) of the Act but seeking a surrender of property rights by coercion.

4.34 Whatever may be the philosophical basis for capturing part of the uplift in value as a windfall from the rezoning to CCZ that opportunity has been lost in respect of those sites which have been on-sold or redeveloped and no part of the structure of the draft Amendment and the Framework is tied to the outcome of that rezoning.

4.35 To the knowledge of the Industry Business Hub nowhere in the material before the Panel is there any analysis of the equivalence of a building contemplated by Figure 2 of Ms Hodyl’s Addenda 3 (being a document unknown to landowners or the general public unless they troll through the documents tendered to the Panel) compared with a regular shaped building with full frontage to Gladstone Street on the Subject Land. The Industry Business Hub contends that such building would self-evidently be more difficult and costly to build and be a less valuable building upon completion.
than a more regular shaped building with a full frontage to Gladstone Street containing the same floor space.

5. **CONCLUSION**

5.1 Consistent with the evidence led on behalf of the Minister the proposed setting aside of the Subject Land or any part of it as New public open space should be deleted from all figures and drawings and from the text of the Framework and the draft Amendment or any replacement of either or both of them.

5.2.1 If, contrary to the primary submission of the Industry Business Hub, it is proposed to continue to set aside the Subject Land or any part of it as New public open space in the Planning Scheme or any Framework given effect by the Planning Scheme, the Subject Land should be included in a PAO because its use and development for public open space has no nexus with any potential redevelopment of the Subject Land within the foreseeable future that could be said to be quid pro quo for the effective reservation and ultimately the taking of the set aside land for public open space because, first, any potential for redevelopment in the event the scheme of the draft Amendment was lawfully implemented would not be a quid pro quo for the planning blight created and which would be of effect for many decades and ultimately would provide an inadequate development opportunity compared with that should no part of the Subject Land be required for a public purpose or compared with other sites without a requirement to provide land for a public purpose.
5.2.2 The draft Amendment has not been properly and thoroughly thought through and should be revisited and founded on a legally valid, fair and equitable basis.

21 May 2018

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