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Fishermans Bend Planning Review Panel
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Attention: Ms Kathy Mitchell, Chair

Dear Ms Mitchell

Fishermans Bend Planning Review Panel – Written Record of Submissions made by Stuart Morris QC

Further to our letter dated 11 May 2018, we now enclose for filing the written record of submissions made by Stuart Morris QC on 3 May 2018.

If you have any questions or require further information please do not hesitate to contact David Passarella on +61 3 8568 9527 or dpassarella@millsoakley.com.au

Yours sincerely

DAVID PASSARELLA
PARTNER

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RECORD OF SUBMISSIONS MADE ON BEHALF OF DELTA GROUP

BY STUART MORRIS QC

Amendment GC81 - Review Panel

3 May 2018

Essential elements of Amendment GC81

1. Planning for urban renewal areas requires a clear vision. Amendment GC81 ("the Amendment") sets out a clear vision.

2. But more is required. Another *essential* ingredient is a realistic and fair financial plan. Amendment GC81 lacks such a plan.

3. A realistic financial plan is necessary to understand how a vision is to be implemented. It also promotes wise choices, as decisions are made in the context of how the outcomes sought will be paid for and who will pay for them. To use the language of Nassim Taleb, in his latest book, this means that the person with the vision has 'skin in the game'.

4. In planning for outer metropolitan areas, funding mechanisms such as Development Contributions Plans are often utilised. Planning for brownfields areas is more complicated.

5. Critically, a financial plan must provide funding to match the infrastructure contemplated by the Vision.[1]

6. We note the difference between the position of the Minister and the Councils in this matter. The Councils are more aware of funding issues, because they have 'skin in the game'. They are cognisant of the fact that if infrastructure is not funded, as part of the financial plan, they will be required to 'pick up the cheque'. The City of Port Phillip, in particular, is keen to have an appropriate funding plan.

[1] *Fishermans Bend Vision – the next chapter in Melbourne's growth story* (September 2016), Department of Environment, Land, Water and Planning.

7. As a matter of common experience, trust is more readily given to advisors or stakeholders who are invested in the outcome for the long term. The Minister no doubt cares about the long term, but he has not invested any 'skin in the game'. We might see some skin if there was a financial plan; or, at least, see where some skin is necessary!

8. Such a sound plan would generally include the following elements:

   (a) Public funding;

   (b) A value capture mechanism in respect of the development rights of individual landowners in respect of infrastructure indirectly needed as a consequence of development generally;

   (c) Contributions from developers in respect of infrastructure directly needed as a consequence of individual development;

   (d) Private delivery of assets often delivered by public agencies. For example, open space may be delivered in the form of communal open space within developments, which acts as a 'near equal' proxy for public open space. (There is a very real question as to whether the quantum of proposed open space contemplated by the Framework (and Ms Thompson's proposed amendments) has 'gone overboard' – a consequence of a lack of skin in the game. As Nassim Taleb teaches us, free goods are always over-consumed.); and

   (e) Finally, decisions about funding must operate within a legal framework. The *Planning and Environment Act* 1987 ("the P&E Act") includes express and implied controls and restrictions on the manner in which both land can be set aside for future public use and the funding mechanisms that may be applied.

9. It is tempting for the Panel to make decisions about the proposed Amendment that *avoid* the need to make legal findings. But the Panel's recommendations will be useless if not based on a solid legal foundation.

10. Questions of fairness are also relevant and important. Fairness is the first adjective in the first objective in the P&E Act. There is also a nexus between

fairness and legality. The Review Panel needs to be satisfied that its recommendations are founded on a sound legal basis. And fairness is a guiding principle that overlays the Review Panel's task.

An active role in transition

11. The Government should take an active role in assisting the transition of Fishermans Bend from an industrial to a commercial and residential area. More particularly, the Government should assist the owners of existing businesses in Fishermans Bend to relocate, especially where the business in question will assist the renewal of the area, and have a strong connection to the CBD. The transition process should not just be left to market forces.

12. In the case of Delta, most, if not all, alternative landholdings that would be suitable for relocation are government owned. Despite extensive efforts, Delta has not been able to identify a suitable parcel of land. It is essential that the Government participates in the transition process by making land available to Delta (and like businesses) and by facilitating the grant of the requisite permits and licences.

13. This is not a new proposition. In 1984, I adjudicated a dispute involving a residential subdivision near a smelly industrial use in Rowville. Instead of hearing the matter, I mediated an outcome whereby the residential developer, the Council, the Government and the smelly industrialist agreed to share to the cost of the relocation of the industrial use to an appropriate area in Dandenong South.

14. Thus there is a role for the Government to play in facilitating the renewal of Fishermans Bend by actively assisting in the relocation of existing industrial businesses, like Delta's. Government owned land at Dynon is one example of land that could be made available to existing business owners.

15. Delta's land is important in terms of the Vision for Sandridge. However, for Delta, a depot close to the CBD is also essential to its business operations. This is a case where the Government should be involved in relocating Delta's business.

The terms of reference

16. If the Review Panel does not test the Vision, the process has no credibility. What is the point in publishing a report that will be sneered at, laughed at, and regarded as a sham? For the Review Panel's sake, and that of the community, it must present a report that has credibility. A credible report will consider the wisdom of the Vision.

17. The Review Panel has a policy role – to give fearless advice to the Government regarding the right response in respect of planning controls that identify land for a public purpose.

The reservation of land for a public purpose

The Planning and Environment Act

18. The question arises as to how the Scheme ought provide for the reservation (and future acquisition) of land. The P&E Act at section 4(2)(l) includes the following objective:

> *to provide for compensation when land is* ***set aside*** *for public purposes and in other circumstances.*

19. This provision deals with land that is not acquired, but rather is identified or (used interchangeably) *reserved* for a public purpose. The Public Acquisition Overlay ("the PAO") is the VPP tool for the reservation of land. It does not represent the only way that land can be reserved, but it is *the way* that is contemplated by the Victorian Planning Provisions.

20. The P&E Act at section 98 sets out a scheme for compensation when land is reserved. The *Land Acquisition and Compensation Act* 1986 ("the LAC Act") works 'hand in hand' with the compensation provisions of the P&E Act. Section 98(1) of the P&E Act is predicated on land being reserved (or the equivalent). The compensation 'trigger' in section 99 is usually the refusal of a permit application on the basis that the land is or may be required for a public purpose.

21. In practice, when land is required for a public purpose, the outcome is often negotiated in such a way that the land is also transferred to the public authority responsible for the payment of compensation.

When should land be reserved?

22. The question of when land should be reserved for a public purpose raises important legal and philosophical issues.

23. In 1982, the Government was concerned to preserve land in the Latrobe Valley for future coal extraction over the next 300 years. (In hindsight, how ironic!) I was asked to advise the Government on the appropriate means to achieve this outcome. In preparing that advice, I undertook a five month review of the legislative regime relating to compensation for land acquisition, the reservation of land, and the issue of planning blight. I prepared the report which is discussed further below (extracts are from document 285)("the 1983 Report").[2]

24. Importantly, in relation to the reservation of land, I recommended that the existing legal framework remain in place.

25. My recommended approach was adopted by the Parliament in the 1987 and remains the philosophical basis underpinning Victorian planning law. Why is this important? It is important because it is in stark contrast to the approach embodied by the Amendment. The mechanisms by which the Minister proposes to effectively reserve privately owned land for public purposes are a radical departure from that enshrined in the P&E Act. This is not to say that they lack a philosophical basis (which is always a matter of opinion and judgment), but, rather, if implemented this must be done by legislation.

26. The Minister has relied on an opinion of Counsel (document 155) in relation to related aspects of the Amendment. The authors cite *Van Der Meyden v MMBW*

[2] *Land Acquisition and Compensation: Proposals for New Land Acquisition & Compensation Legislation: Report to the Minister for Planning,* 1983. See paragraph 803 for a summary of the circumstances in which compensation was available for loss suffered as a result of the operation of planning controls.

[1980] VR 255 for the authority that 'land cannot be reserved by mere implication arising from a restriction on the private use and development of it'.[3]

27. That statement of principle is correct. However, it is beside the point. In *Van Der Meyden* the Court considered the impact of Conservation zones on the use and development of land, and found that the restriction did not amount to a reservation *for a public purpose* because the land was not needed for *use* by a public agency.

28. This approach is consistent with *Commonwealth v Tasmania* [1983] HCA 21 (known as the Tasmania Dam case), in which the High Court of Australia considered a proposal for the construction of a hydro-electric dam on the Gordon River. The Tasmanian Government supported the proposal, however it was opposed by the Australian Federal Government and environmental groups. Central to the case was a consideration of section 51(xxxi) of the Australian Constitution, which provides that the Federal Government has the power to appropriate property "on just terms" for any purpose it has powers to make laws about.

29. The Tasmanian Government argued that the Federal Government had, by passing the *World Heritage Properties Conservation Act* 1983, unjustly deprived it of property. That legislation prohibited clearing, excavation and other activities within the area proposed for the construction of the dam. The Court found that the Tasmanian Government had no proprietary rights over the land and therefore it had not been deprived. More particularly, the Court made a distinction between legislation that:

    (a) Diminished what could be done on privately owned land; and

    (b) Sought to provide a benefit to a public agency in the sense of a proprietary interest in land.

30. In discussing options for legislative reform (and the related philosophical justification), the 1983 Report cites the Commission of Inquiry into Land Tenures ("the Else Mitchell Inquiry"), Final Report, February 1976.[4] The Else Mitchell Inquiry considered a radical new approach involving the compulsory

[3] At para [25].
[4] At [816].

acquisition of development rights to all land without compensation, based on the socialistic idea that land capability is communally owned.

31. Indeed, it is impossible to deal with questions relating to land acquisition and compensation without engaging in philosophy, as it relates to the relationship between private property rights and public interest. There is no right or wrong philosophical approach. However, the Review Panel is bound by the current legislative framework.

32. That framework adopts a clear philosophical position that distinguishes between planning controls that identify land required for use for a public purpose from those that merely diminish the development potential of land (consistent with the decisions of *Van der Meyden* and the Tasmania Dam case).

33. Where the purpose of the planning control is to pass land to the public for its use, the proper planning response is to reserve the land in a PAO, which enables the landowner to claim compensation for the restriction on its use.

The 1983 Report – blight and reservation

34. In 1987, the Parliament adopted my recommendations to retain the existing system for compensating landowners for the reservation of land.[5] Thus, the current regime in Part IV of the P&E Act has, in substance, been the same for more than 50 years.

35. The 1983 Report also considered the situation where land was earmarked for future public use where there was no compensation provided for; and called this land affected by blight.

36. Land blight historically arose in the context of the designation of land for major projects, like dams and airports. Such designations could remain in place for many years without the land ever being acquired. In the 1983 Report, I recommended legislative reform in relation to land blight, to avoid lengthy delay and hardship to persons affected by associated planning uncertainty.[6] I also

[5] At para [821].
[6] At paras [911] and [912].

recommended reform to ensure Authorities observe the spirit of town planning legislation in relation to requests to reserve land for public purposes.

37. The recommendations set out in the 1983 Report informed the current sections 98(1)(c) and 113 of the P&E Act, which empower owners and occupiers of land to seek compensation where the Minister responsible for administering the LAC Act declares under section 113 that land is proposed to be reserved for a public purpose. This has not worked in practice as the Minister typically declines to make a declaration contrary to the will of Cabinet.

The possible outcomes for the Amendment

38. Insofar as the Amendment identifies land for roads, lanes and open space there are three possibilities:

    (1) The identification of land for roads and open space will be determined to be a reservation in substance and thus attract compensation;

    (2) The provisions dealing with land will be declared to be ultra vires and bring down the Amendment; or

    (3) The provisions will be found to be lawful and valid.

39. We submit that the correct outcome is either (1) or (2). And, even if the Amendment is found to be lawful and valid, a question arises as to whether it would be fair.

A reservation in substance

40. There are examples of disputes about the nature and effect of the designation of land for a public purpose in a Precinct Structure Plan, however, so far, there has been no judicial decision to provide guidance. The closest case on point is *Whelan Kartaway Pty Ltd v Minister for Planning and Housing* [1993] 2 VR 59, which affirmed the proposition that, in the context of a permit refusal, one should look at the *substance* of the matter to decide whether it fell within the legislative parameters of section 99 of the P&E Act.

41. If the first possibility is the correct one and the identification of land for roads, lanes and open space is found to be a reservation in substance, this would be a disaster for the Amendment, as there has been no financial planning for the payment of compensation, for reservation or for acquisition.

Ultra vires

42. If the manner in which the Amendment proposes to reserve land were found to be ultra vires, the entire Amendment would be found to be invalid, as it is impossible to sever those parts of the Amendment dealing with reservation from the remainder of it. Another disaster!

Lawful and valid

43. If the Amendment is found to be lawful and no compensation is payable, it would be a grossly unfair outcome. It is wrong to suggest that the Amendment would be fair because the overall yield of a site remains the same, because, even if true, it wrongly equates overall yield with overall profit.

44. The question of fairness is not just relevant to legal validity - it extends to the method by which objectives are sought to be realised. For example there may be logic in pursuing value capture in the Fishermans Bend context, however the method used must be fair and equitable. Good public policy is not just about seeking objectives, but how you get there. The tools of regulation are often as important as what is sought to be achieved.

45. Traditionally, a DCP or ICP has been applied to raise some of the funds needed to implement a development scheme, usually with a land component and monetary component.

46. There is now a land equalisation method by which it is given a set value. That legislation is a way of resolving a problem of the system. And the right tool was used to bring about this change: legislation.

47. There are several mechanisms to achieve value capture. However, the reservation, acquisition, and compensation scheme proposed by the Minister for Fishermans Bend must be achieved by either new legislation, or under the

existing regime in the P&E Act (and LAC Act). Under the P&E Act, where it is proposed to set aside (or identify) land for a public purpose:

(a) Land is reserved;

(b) A PAO is applied; and

(c) Existing and future landowners know the status of the land.

48. The application of a PAO is an important 'stepping stone' on the way to fair compensation.

49. This compels the following conclusions about the Fishermans Bend proposals:

(a) If land is identified for a future public purpose it should be identified as such in the planning scheme;

(b) The proper method of setting aside land for a future public purpose is a reservation (that is, in the context of the VPPs, a Public Acquisition Overlay); and

(c) The fact that Fishermans Bend is designated as an area of State significance does not derogate from the principles set out above - Part 9A of the P&E Act merely adds powers (relating to road widening and similar).

50. The philosophical argument that supports value capture may be both logical and attractive. However, that rationale alone does not justify the approach adopted by the Amendment.

Stuart Morris

Nicola Collingwood

Instructed by Mills Oakley

14 May 2018