

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

PART C SUBMISSION ON BEHALF OF THE MINISTER FOR PLANNING

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THE PURPOSE OF AMENDMENT GC81

1. Often in considering a matter of the scale and complexity of Amendment GC81 ('draft Amendment'), it is possible to get lost in the detail. The Review Panel has heard a good deal of evidence and submissions on the appropriateness of individual elements of the draft Amendment and on the consequences of the application of particular controls to particular sites. These issues are important, but they are not everything. In considering the matters set out in the Terms of Reference, it is respectfully submitted that a good starting point for consideration of the draft Amendment is to ask: what is this Amendment intended to achieve?
2. The purpose of the draft Amendment is simple: it is to ensure that, for the first time since Fishermans Bend was rezoned on 2 July 2012, the planning controls applicable to Fishermans Bend actually align with, and seek to deliver, outcomes that are consistent with the vision for Fishermans Bend as articulated in the *Fishermans Bend Vision* (September 2016) ('the Vision').
3. Alignment between policy and controls is not an optional extra in Victorian planning schemes. It is an essential element of orderly planning. As the Advisory Committee on the Victorian Planning Provisions observed:

The first purpose in every zone and overlay control in the VPPs is:

To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

There is a danger that because this purpose is repeated in each control, it will tend to be overlooked or ignored in favour of subsequent purposes, which more directly describe the nature of the zone or the control. This would be a mistake.

A key objective of the planning reform program is to make planning much more strategic and policy-based.¹

¹ [1997] PPV 121, pp. 11 and 12.

4. As is by now notorious, the rezoning of Fishermans Bend occurred effectively overnight and 'prior to comprehensive due diligence work and without the necessary planning for such a major urban renewal task.'²
5. The immediate consequence of this precipitate step was to enable a very significant level of development without providing any substantial strategic vision to direct it. As the Ministerial Advisory Committee ('MAC') recorded in its first report, dated October 2015 ('First MAC Report'):

Almost immediately upon the rezoning, the private sector took up the opportunity for redevelopment within the precinct. Permit applications for high rise, high density, residential developments with very small amount of mixed use, began being lodged from December 2012. Most of these applications were in the Montague precinct. Projected building scale and residential densities based on permits approved to date far exceed projected or anticipated development scenarios and there have been no applications for permits for the expected employment uses.³

6. The vision for Fishermans Bend was first articulated in the draft Vision in September 2013 ('the Draft Vision'). The Draft Vision, prepared by Places Victoria under the previous State government, states:

This document provides a vision for how the Fishermans Bend Urban Renewal Area may look in 2050. It outlines the overarching strategic directions and key moves needed to realise the vision and transform existing Fishermans Bend industrial areas into a thriving, mixed-use inner city environment.

The Fishermans Bend Urban Renewal Area (as shown below) provides a unique opportunity to expand Melbourne's central city to the south-west, connecting the existing Central Business District to Port Phillip Bay. By 2050, Fishermans Bend could accommodate up to 40,000 new jobs and 80,000 residents.⁴

7. The overall vision for Fishermans Bend has been refined and enhanced over time, but its fundamentals have never varied: Fishermans Bend is

² First MAC Report, p. 9.

³ Ibid., p. 10.

⁴ Places Victoria, *Fishermans Bend Urban Renewal Area: Draft Vision* (September 2013), p. 7.

intended to be a mixed use area, consisting of five distinct and diverse precincts,⁵ with a population of 80,000 residents in 2050.⁶

8. This consistent vision has never been effectually implemented in the applicable planning controls, however.
9. Initially, the direction of development of Fishermans Bend was sought to be regulated through pure policy or by 'light touch' guidelines found in the Fishermans Bend Strategic Framework Plan, incorporated into the Planning Schemes and to be considered in the determination of permit applications. However, as the MAC observed later:

In July 2014, the Fishermans Bend Strategic Framework Plan, prepared by the Metropolitan Planning Authority, was released. This included broad planning and design guidelines to inform permit applications and decision making. The guidelines are light-handed – of the 146 guidelines in the document, only 34 are mandatory and much of the Area did not even include suggested height limits.

At the time, the focus on 'flexibility', rather than 'prescription' in the Strategic Framework Plan was intentional. The purpose was to attempt to maintain sufficient incentive for diverse and innovative outcomes that satisfy the intent of the guidelines, as well as project viability. This approach has proved to be misguided.⁷

10. In late 2014, the current State government was elected on a platform which included 'recast[ing]' the vision for Fishermans Bend. As part of that process, in early 2015, it introduced Amendment GC29 which updated the Strategic Framework Plan and introduced mandatory maximum building heights on an interim basis 'as it is expected the detailed strategic work in respect of the neighbourhood plans will take some time to complete.'⁸ Amendment GC29 did not, however, introduce any further built form controls.

⁵ Ibid., pp. 24, 25 and 52.

⁶ State of Victoria, *Fishermans Bend Vision* (September 2016), p. 15.

⁷ First MAC Report, p. 11.

⁸ Minister for Planning, *Reasons for Intervention: Amendment GC29* (14 April 2015), [12] – [13].

11. In October 2015, the MAC published its first report. In relation to the permits granted and permit applications made between July 2012 and June 2015, it stated:

So far, 15 permits have been issued involving 20 individual high rise towers of between 20 and 49 storeys, and a number of lower profile buildings. These represent approval for approximately 6700 dwellings. An additional 23 applications have been lodged up to 30 June 2015. These applications propose another 26 towers between 20 and 64 storeys, and a number of lower profile buildings, representing an additional approximately 10900 dwellings.

A total of potentially 17,600 dwellings are either approved or proposed since 2013. This compares to the 5300 dwellings which have been developed over 20 years in Docklands.

A large proportion of these permits and permit applications are in the Montague Precinct, and all are for residential use. There have been no applications for office or large commercial use buildings to support the employment vision for the precinct. Once built, the opportunity to develop the land to support high end service employment and employment in the creative industries close to the CBD will be lost.⁹

12. The MAC noted that these outcomes arose from the inadequacy of the guidance provided by the existing planning controls:

In the absence of clear guidance being provided by the Strategic Framework Plan about appropriate density and development outcomes, land owners were left to use the planning permit application process to 'test' development capacity of their sites. This has resulted in confusion and uncertainty for the community and permit applicants, and a loss of confidence within the development industry overall about planning in the precinct.

The permits already issued in Fishermans Bend are legally binding and the developers have a clear right for up to five years to proceed in accordance with their approvals. However, a number of these permits and applications appear to be speculative in that the applicants have proceeded to permit in order to increase the value of the land for on-selling. In these circumstances it is difficult to determine the implications for community or utilities infrastructure planning.¹⁰

13. Turning to the planning controls at the time, the MAC commented:

After examination of the permits issued and applications lodged in Fishermans Bend to date an overall conclusion is that the problem is not with the implementation of the guidelines on a building by

⁹ First MAC Report, pp. 11 and 12.

¹⁰ First MAC Report, p. 13.

building process, but with the guidelines themselves, the light handed approach underpinning the guidelines and the implementation arrangements for the delivery of decontamination, open space, public realm, community facilities and transport. ...

The interim height controls have not been successful in modifying development activity. Eleven additional permit applications were lodged between April and June 2015, seven of them for high rise, high density residential towers in the Montague precinct.¹¹

14. Consequently, the MAC recommended:

Stronger Interim Planning Controls - *The current arrangements for the development of Fishermans Bend have no precedent in the Victorian Planning System and will lead to poor urban outcomes. Early consideration should be given to additional interim controls similar to those recently introduced via Amendment C262 to the Melbourne Planning Scheme (but tailored for the Fishermans Bend context). These interim controls could include plot ratio controls (with transparent density bonuses) and additional interim podium height and setback controls to supplement or replace the interim height controls introduced into the Capital City Zone in Fishermans Bend in April 2015.¹²*

15. In response, the Minister approved Amendment GC50 to the Planning Schemes. As the Explanatory Report makes clear, that Amendment was specifically aimed at restraining inappropriate development. The Report stated:

An urgent review of the planning controls, strategic framework plan and urban design guidelines is required to ensure the future liveability of the Fishermans Bend precinct.

Planning Permit applications have been lodged without due consideration to the amenity of the area, with little (if any) side and rear setbacks, little diversity in the size and make up of apartments, and little regard to future employment for residents.

The Fishermans Bend Recast Vision has been prepared to propose a future for Fishermans Bend and its distinctive neighbourhoods. Amendment GC50 is the first stage in implementing the vision by proposing to introduce mandatory design principles regarding front, side and rear setbacks and building separation. The amendment also introduces a new local planning policy, which provides guidance to the development industry regarding expectations about dwelling

¹¹ First MAC Report, p. 20.

¹² First MAC Report, p. 22.

*diversity, affordable housing and inclusion of employment uses, without setting mandatory targets.*¹³

16. Notwithstanding this, inappropriate development remains an issue in Fishermans Bend. As the MAC noted in its presentation on Day 1 there are:

13 buildings, all about 40 storeys, proposing about 4250 apartments, or about 8500 people in a couple of hundred metres of Normanby Road– about the population of Benalla with no planned for open space and with virtually no employment uses

On these trends Montague North was heading to a population density of 1300/ha – about the same as the densest part of Hong Kong and 4 times denser than the 2034 projections for Southbank – clearly not consistent with community expectations and inconsistent with the intentions of all the planning for the area since 2012

17. It is respectfully submitted that the need to align the planning controls for Fishermans Bend with the established vision for the area provides a clear and compelling justification for the draft Amendment as a whole.
18. The response of the landowners to this issue is to simply deny that any issue exists, to rely on the fact that permits have been granted and to insist that the permits dictate the emerging character which should be reflected and replicated in permanent controls. This is disingenuous.
19. The test for the grant of a permit is whether it produces an ‘acceptable outcome’, having regard to the planning scheme at the time of the decision. As such, acceptability is not some fixed and immutable characteristic of a development – rather, it is necessarily contingent on the state of the planning scheme at a particular time.
20. Here, for the reasons as set out above, there is a disconnect between the current controls under which any permit is to be assessed and the outcomes actually sought for Fishermans Bend. In this context, the approval of such applications demonstrates that there is a mismatch between what is sought – at a strategic level – for Fishermans Bend and what the planning controls enable to be delivered.

¹³ *Amendment GC50 Explanatory Report* (undated), p. 2. See, to the same effect, Minister for Planning, *Reasons for Intervention: Amendment GC50* (7 November 2016), [5] and [6].

21. In this regard, it is significant to note that none of the expert witnesses called by the landowners were asked to comment on the merits of the controls as currently in force, and whether they were achieving the objectives for Fishermans Bend articulated in the Vision or the Local Planning Policy Framework.

THE ROLE OF THE FISHERMANS BEND PLANNING REVIEW PANEL

22. The Fishermans Bend Planning Review Panel ('the Review Panel') is an advisory committee appointed by the Minister under Part 7 of the *Planning and Environment Act 1987* ('the Planning Act'). As stated in s 151 of that Act, its role is to 'advise on any matters which the Minister refers to [it].'
23. The Terms of Reference ('Terms'), dated 22 October 2017, define the matters on which the Minister has sought the Review Panel's advice. Clause 3 of those Terms states that the purpose of the Review Panel is:

to advise the Minister for Planning on the appropriateness of the proposed planning scheme amendment GC81.

24. Consistent with ordinary principles of legal interpretation, the meaning of 'appropriateness' should be understood in the context of the Terms read as a whole,¹⁴ rather than by trying to ascribe content to the word 'appropriateness' in isolation.
25. Of particular relevance to understanding what is meant by 'appropriateness' in this context are the Preamble and clauses 6, 11, 13, 27, 34 and 35 of the Terms:

- (a) The Preamble to the Terms states that the Review Panel is an:

Advisory Committee appointed pursuant to Part 7, section 151 of the Planning and Environment Act 1987 to report on the proposed Planning Scheme Amendment GC81 for Fishermans Bend, to ensure the vision for Fishermans Bend is realised. (emphasis added).

¹⁴ See, e.g., *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corporation* (1993) 178 CLR 379, p. 387 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ.

- (b) The section of the Terms entitled 'Background' sets out, in summary terms, the planning history of the Fishermans Bend Urban Renewal Area. Relevantly, it states:

The Fishermans Bend Urban Renewal Area Draft Vision was released in September 2013 by Places Victoria, in collaboration with the State Government, City of Port Phillip, City of Melbourne and Office of the Victorian Government Architect. The draft vision underwent six weeks of consultation.

...

On 3 October 2016, following extensive community consultation, the Minister for Planning released the Fishermans Bend Vision – The next chapter in Melbourne's growth story, September 2016.

...

Planning Scheme GC81 has been prepared to implement the Vision for Fishermans Bend through a suite of permanent controls ...¹⁵

- (c) Under the heading 'Hearing Process', clause 27 identifies certain matters that the Review Panel must consider. These include, relevantly:

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.

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

All relevant submissions made in regard to the proposed changes to the Port Phillip and Melbourne Planning Schemes. (emphases added)¹⁶

- (d) Clause 34 provides that the Review Panel must produce a written report for the Minister. Clause 35 sets out matters which must be dealt with in that report. These include:

A summary of the Review Panel's reasons for recommending (or otherwise) amendments to the proposed planning scheme amendment.

¹⁵ Clauses 6, 11 and 13, *Terms of Reference*.

¹⁶ Clause 27 (b), (c) and (d), *Terms of Reference*

...

Any changes required to the draft Fishermans Bend Framework as a result of recommendations made to the planning scheme amendment.

A summary of all submitters heard that presented on matters outside the consideration of the Review Panel. (emphasis added.)¹⁷

26. What emerges from a reading of the Terms as a whole is that:
- (a) The purpose of the draft Amendment is to ‘implement the Vision for Fishermans Bend through a suite of permanent controls’;
 - (b) The purpose of obtaining advice from the Review Panel is ‘to ensure that the vision for Fishermans Bend is realised’ through the draft Amendment;
 - (c) To this end, the Review Panel is required to consider the extent to which the proposed changes to the relevant CCZ and other planning controls allow ‘the Fishermans Bend Vision ... to be achieved’;
 - (d) Consistent with the above, the Review Panel is required to report on any recommended changes to the proposed planning controls and any consequential changes required to the Framework, but is not asked to recommend any changes to the Vision.
27. The overall effect is that the Terms take as their premise the desirability of the implementation of the Vision and ask the Review Panel to consider whether the planning controls proposed in the draft Amendment are a suitable – or ‘appropriate’ – vehicle for implementing the Vision. Nothing in the Terms requests the Review Panel to review the Vision and, although not expressly excluded, it is respectfully submitted that such a review is inconsistent with the clear intent of the Terms.
28. There is nothing improper or unfair – let alone unlawful – about the Minister seeking advice on whether the draft Amendment appropriately

¹⁷ Clause 35 (a), (e) and (f), *Terms of Reference*.

implements the Vision without also seeking advice on whether the Vision should be implemented:

- (a) Section 151 permits the Minister to establish Advisory Committees to seek advice on matters 'which the Minister refers to [them]'. It does not require him to refer any matter(s) to an Advisory Committee.
- (b) This may be contrasted with the position of a planning panel appointed under Pt 8 of the Planning Act which must be appointed in certain circumstances and must consider every submission made to it.
- (c) Here, the Minister has no need for further advice on the Vision as:
 - (i) It is settled government policy, having been adopted in September 2016;
 - (ii) It is consistent with *Plan Melbourne*, being explicitly referenced in the *Five Year Implementation Plan for Plan Melbourne 2017*;¹⁸
 - (iii) It has been the subject of consideration by a separate Advisory Committee, the MAC, which was comprised of 12 persons, including experts in urban renewal, community engagement, transport planning, architecture and urban design, strategic and statutory planning, and private sector property development.¹⁹ The MAC 'strongly supported' the Vision;²⁰ and

¹⁸ State of Victoria, *Five Year Implementation Plan - Plan Melbourne Five Year Implementation Plan 2017 - 2050*, p. 8. The previous *Plan Melbourne* had also incorporated reference to the redevelopment of Fishermans Bend and, in particular, contemplated a population of 80,000 residents: see *Plan Melbourne* (May 2014), p. 39.

¹⁹ MAC, *Report to the Minister for Planning on the Draft Fishermans Bend Framework* (October 2017), p. 4.

²⁰ *Ibid.*, p. 8.

- (iv) It has been through at least two rounds of community consultation, in the draft phase²¹ and as part of the recasting process.²² Landowners who wished to participate in that process were, of course, free to do so.
- (d) It is also significant, that the recasting of the Vision was an election commitment prior to the 2014 State election:
 - (i) Labor's policy document, *Keeping it Liveable: Labor's Plan for your Community*, was critical of the existing development patterns in Fishermans Bend and expressly committed to recasting the Vision.²³ In this context, the Minister can fairly claim a democratic mandate for the current Vision. In the event that the voters of Victoria – including the landowners – regard the Vision as unsatisfactory, they can take action at the ballot box.
 - (ii) This may be contrasted with the position of the landholders whose actions have the potential to directly and materially affect the long-term development of Fishermans Bend, whilst remaining wholly unaccountable to anyone.
- (e) Nor can it be said that there is any unfairness in the Minister only seeking advice on certain matters. The Review Panel's Terms have been public since shortly after they were issued. Their meaning has not changed over time. Any person who wished to participate could not be ignorant of what they said. In this regard, it is significant that, having feinted towards requesting a determination on the meaning of the Terms before Easter, the NRF landowner group ultimately decided not to pursue the matter.

²¹ See Places Victoria, *Community Engagement Report* (December 2013), available at <http://www.fishermansbend.vic.gov.au/documents>

²² See State of Victoria, *Public Engagement Report: Fishermans Bend Recast Vision and Ferrars Street Education and Community Precinct* (September 2016), available at <http://www.fishermansbend.vic.gov.au/documents>

²³ Victorian Labor, *Keeping it Liveable: Labor's Plan for Your Community* (November 2014), p. 5.

- (f) In terms of procedural fairness, the landowners have sought to argue that the process adopted has been unfair. This should be rejected:
- (i) First, it should be noted that the structure of the process has conferred significant advantages on the landowners by:
- (A) allowing their evidence to be prepared after all of the evidence of the Minister and most of the evidence of the Councils has been delivered; and
- (B) enabling them to refine their submissions and evidence over the course of multiple appearances before the Review Panel.
- (ii) Second, nothing that has occurred in this Review Panel process constitutes a denial of procedural fairness:
- (A) It is established that any claim of denial of procedural fairness needs to be evaluated in light of the statutory framework in which the process occurs.
- (B) Here, the Minister has always had the power, under s 20(4) of the Planning Act, to exempt a planning scheme amendment from notice and to adopt and approve it without receiving submissions, provided the criteria set out in that sub-section are satisfied.
- (C) As such, any claim that the hearing process provided by the Review Panel is inadequate or that the landowners had some 'legitimate expectation' of further consultation needs to be judged against the fact that the Minister could have adopted the draft Amendment without any consultation at all. Indeed, as the High Court has said:

The 'legitimate expectation' of a person affected by an administrative decision does not provide a basis for determining whether procedural fairness should be accorded to that person or

for determining the content of such procedural fairness. ... Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question: namely, what is required in order to ensure the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made.²⁴

- (D) To the extent it has been said that s 20(3) of the Planning Act prohibits the Minister from exercising his power under s 20(4), this is incorrect. Section 20(3) applies to the exercise by the Minister of the power under s 20(2) to exempt any planning authority from the requirement to give notice under s 19. The power conferred on the Minister specifically under s 20(4) is a separate and distinct power, as is expressly confirmed by s 20(5) which refers to the exercise of the ‘powers under subsection (2) or (4)’ disjunctively. That s 20(3) applies to the power under s 20(2) is confirmed by the fact that it refers to the exemption of a planning authority rather than a planning authority or the Minister.

29. As such, the Minister respectfully submits that:
- (a) The Review Panel has not been requested to provide advice on the Vision and has no power to do so;
 - (b) There is, in any event, no need to do so, having regard to the matters identified above; and
 - (c) Fairness does not require that Review Panel to do so.

²⁴ *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, [30] per Kiefel, Bell and Keane JJ

30. Having said that, if the Review Panel wishes to consider the merits of the Vision, it is always open to the Review Panel to request an amendment to the Terms and that request will be considered.

THE POPULATION TARGET

31. If, contrary to the above submissions, the Review Panel considers that it is empowered to examine the Vision, then it is appropriate to observe that only one element of the Vision appears to actually be controversial, namely, the population target of 80,000 residents ('population target').²⁵
32. The proposed population target has been criticised as being too low and failing to sufficiently respond to Fishermans Bend's role as a major urban renewal precinct. These criticisms should not be accepted.

The population target is consistent with Plan Melbourne

33. First, the population target of 80,000 was expressly adopted in both *Plan Melbourne 2014* and in the *Five Year Implementation Plan for Plan Melbourne 2017*:
- (a) The 80,000 population target was expressly included in *Plan Melbourne* when it was first published in 2014. Under the heading 'Expanding the Central City to Retain Competitive Advantages and Attract Diverse Value-Adding Businesses', *Plan Melbourne* stated:
- Future development of the Fishermans Bend Urban Renewal Area, which could accommodate up to 40,000 new jobs and 80,000 residents, provides an important opportunity to expand the central city and to consolidate Melbourne's position as one of the world's most liveable cities, with a highly creative and competitive economy.*²⁶
- (b) In fact, the Draft Vision expressly foreshadowed this, observing that the Draft Vision was 'aligned with the draft Metropolitan Planning Strategy due for release in Spring 2013.'²⁷

²⁵ The issue of the employment target was addressed briefly by Mr Shimmin. This will be considered further under the heading of employment generating uses.

²⁶ State of Victoria, *Plan Melbourne* (2014), p. 39.

²⁷ Draft Vision, p. 8.

- (c) In late 2014, the Plan Melbourne Ministerial Advisory Committee was reformed and *Plan Melbourne* was ‘refreshed’. As part of that process, the job target for Fishermans Bend contained in *Plan Melbourne* was increased to 60,000 to align with its new status as a National Employment and Innovation Cluster.²⁸ No change was made to the population target.
- (d) In addition, actions and initiatives included in *Plan Melbourne 2014* were updated and included in a separate five-year ‘Implementation Plan’ which sets out how *Plan Melbourne* is to be delivered.²⁹
- (e) The *Implementation Plan for Plan Melbourne 2017 – 2050* expressly refers to both the 2016 Vision and the 80,000 population target, stating:

Recasting the vision for Fishermans Bend Urban Renewal Precinct, which includes a 205-hectare employment precinct. Capitalising on its strategic location between the Melbourne Central Business District and the Port of Melbourne, Fishermans Bend will attract international investment and provide 60,000 jobs and housing for 80,000 people.

*The Fishermans Bend Taskforce released the Fishermans Bend Vision in September 2016.*³⁰

- (f) Again, this alignment is not surprising. The 2016 Vision expressly observed that one of the objectives of the ‘recasting’ process was to ensure that the Vision aligned with *Plan Melbourne* in a number of areas, including ‘[h]ousing supply, diversity and choice.’³¹

34. In this context, the suggestion that the population target is inconsistent with *Plan Melbourne* is simply unsustainable. The target was expressly included in *Plan Melbourne 2014*, and has been expressly included in the *Implementation Plan for Plan Melbourne 2017 - 2050*. Moreover, it is

²⁸ State of Victoria, *Plan Melbourne: What’s Changed?*, p. 2.

²⁹ State of Victoria, *Plan Melbourne: What’s Changed?*, p. 1. See also *Plan Melbourne 2017 – 2050*, pp. 3 and 136; and *Five Year Implementation Plan - Plan Melbourne Five Year Implementation Plan 2017*, p. 4.

³⁰ State of Victoria, *Five Year Implementation Plan - Plan Melbourne Five Year Implementation Plan 2017 – 2050*, p. 8.

³¹ Vision, p. 26.

apparent from the increase in the job target for Fishermans Bend that some consideration was given to the appropriateness of the Fishermans Bend targets as part of the refresh process in 2015 – 2016. In those circumstances, it is reasonable to infer that the drafters of *Plan Melbourne 2017 – 2050* did not consider the population target to be inappropriate

The population target results in high density development

35. Second, the population target on any view results in high density development:

- (a) As stated in the Urban Design Strategy and confirmed in the evidence of Mr Shimmin,³² the overall residential density of Fishermans Bend, based on a population of 80,000, is 323 residents per hectare. At final build out, with a population of 106,400,³³ the density would rise to 429 residents per hectare. If the FAU were taken to deliver 6% affordable housing, resulting in a population of 149,639, the density would rise to 603 residents per hectare.³⁴
- (b) All of these densities are higher than the residential densities of other urban renewal areas such as Southbank (predicted to be 305 residents per hectare in 2034),³⁵ the Hoddle Grid (predicted to be 309 residents per hectare in 2034),³⁶ City North (predicted to be 254 residents per hectare at 2040),³⁷ Arden Macaulay (predicted to be 139 residents per hectare at 2040),³⁸ or Docklands (predicted to be 169 residents per hectare at 2034).³⁹

³² UDS; Shimmin, Appendix B, Table B.4. This figure is derived by dividing the population by the gross area of Fishermans Bend, i.e., $80,000 / 248 = 322.6$, rounded to 323.

³³ Calculated from 75% build out by 2051: Statement of Leanne Hodyl (Document 53), p. 25, Table 4.

³⁴ Statement of Leanne Hodyl (Document 53), p. 26, Table 7.

³⁵ City of Melbourne, *City North Structure Plan* (2012), p. 5.

³⁶ Id.

³⁷ City North Structure Plan

³⁸ City of Melbourne, *Arden Macauley Structure Plan* (2012), p. 5.

³⁹ Addenda 5 to the Evidence of Leanna Hodyl, p. 3, Table 1.

- (c) At the individual precinct level, with the exception of Wirraway, the proposed densities are either similar to or materially higher than the overall average. Ms Hodyl's evidence is that Sandridge will have a density of 314 residents per hectare, Lorimer will have a density of 480 residents per hectare, and Montague will have a density of 580 per hectare.⁴⁰
- (d) The impact of these kinds of densities is illustrated in the population predictions provided by Mr Shimmin for the City of Port Phillip. By 2041, id consulting predicts that the three Port Phillip precincts of Fishermans Bend are expected to have a population of 37,130,⁴¹ delivering 22% of the total population of Port Phillip, on 11% of the land,⁴² and making it the most populous single 'sector' in the city.
- (e) A similar calculation can be done in respect of the figures provided by Mr Shimmin for the Central Urbis sector (comprising Melbourne, Port Phillip and part of Yarra) as a whole. In his evidence, Mr Shimmin articulated three scenarios:⁴³
- (i) A 'base case' scenario based on adjusted *Victoria in Future 2016* scenario, with an ultimate population of 705,000 in the Central sector;
 - (ii) A 'higher growth' scenario based on an increase in projected population across Melbourne, with an ultimate population of 811,000 in the Central sector;

⁴⁰ Addenda 5 to the Evidence of Leanna Hodyl, p. 15, Table 6. These figures are broadly consistent with Mr Shimmin's calculations in Table B.4 in Appendix B of his evidence, save that the figures for Sandridge and Montague reflect the changes to the core areas recommended by Ms Hodyl in her evidence.

⁴¹ Noting that this is approximately 5,000 lower than the population predicted in the Demographic Paper at 42,280: State of Victoria, *Fishermans Bend Population and Demographic Paper* (April 2017), p. 6.

⁴² id consulting gives the land area of the City of Port Phillip as 2,058 ha: see <https://profile.id.com.au/port-phillip>. The combined area of the three Port Phillip Precincts is 223 ha.

⁴³ Summarised in Evidence of Ian Shimmin, p. 29, Table 12.

- (iii) A 'redistributed' scenario based on a redistribution of the location of the growth in the base case scenario, with an ultimate population of 870,000 in the Central sector.
- (f) Depending on which scenario is adopted, Fishermans Bend at 80,000 would contain 9% (under the redistributed scenario), 10% (under the higher growth scenario), or 12.5% (under the base case scenario) of the projected population of that sector across less than 5% of the area.⁴⁴
- (g) In terms of dwellings, a population of 80,000 is expected to be delivered by 36,900 dwellings. Again, this represents a significant proportion of all dwellings expected to be delivered in the inner metro area under *Plan Melbourne 2017* – representing 17% of all dwelling additions under the 'VIF 2016' scenario or 16% of all dwelling additions under the 'Aspirational' scenario.⁴⁵ A contribution of close to 1/5th of all proposed dwellings in the inner Melbourne area between 2015 and 2051 across an area of 248 hectares cannot reasonably be regarded as anything less than significant.
- (h) Further confirmation of the general appropriateness of the proposed densities is confirmed is provided by Infrastructure Australia's *Future Cities* paper⁴⁶ and, in particular, the interactive maps provided on the associated website.
- (i) The *Future Cities* paper considered three development scenarios for Melbourne, including a 'Centralised High Density 2046' scenario which, consistent with *Plan Melbourne*, sought to enhance density

⁴⁴ It is difficult to calculate the area of the Urbis Central Sector, given that it does not align with municipal boundaries, but, according to id consulting, the combined area of Melbourne and Port Phillip is 5,301 ha. The 248 ha of the Fishermans Bend CCZ precincts comprise 4.67% of that area. If a portion of Yarra were included, the overall area of the sector would be larger, and the percentage of land taken up by Fishermans Bend correspondingly reduced.

⁴⁵ *Plan Melbourne 2017 – 2050*, p. 47, Figure 7.

⁴⁶ An extract from that report was provided as Document 212. The maps can be found at: <http://infrastructureaustralia.gov.au/policy-publications/publications/future-cities-melbourne-maps.aspx>.

in the inner and middle suburbs. As part of this scenario, maps were prepared depicting the anticipated densities which would be required across the city. Relevantly, with the exception of a small area of Sandridge, Fishermans Bend was depicted as having a density of 100 – 500 residents per hectare.⁴⁷ Indeed, following the expansion of its core, Montague could exceed the anticipated density to deliver an average density of 580 residents per hectare.⁴⁸

36. These figures demonstrate that, on any view, Fishermans Bend will make a significant contribution to the densification of Melbourne and to meeting the desire for additional housing to accommodate population growth.
37. In this context, simplistic comparisons between the annual growth of Melbourne's population and the population target should be given no weight.
38. Similarly, care should be taken in placing any weight on percentage growth rates as indicative of some ongoing trend or necessarily identifying a significant level of absolute growth. This point can be conveniently illustrated by reference to the id consulting predictions for the three Port Phillip precincts of Fishermans Bend, which are projected to experience 92.1% growth in the period 2016 – 2021.⁴⁹
39. This astronomical growth rate, however, reflects the fact that the starting population of those three precincts is estimated at just 120. Even with the 92.1% growth rate between 2016 and 2021, the population of the three precincts in 2021 is still only 3,140 – a small proportion of the overall 2021 population of City of Port Phillip at 120,950:⁵⁰

⁴⁷ The maps can be found at: <http://infrastructureaustralia.gov.au/policy-publications/publications/future-cities-melbourne-maps.aspx>

⁴⁸ Addenda 5 to the Evidence of Leanne Hodyl, p. 15, Table 6.

⁴⁹ Evidence of Ian Shimmin, p. 21, Table 5.

⁵⁰ Evidence of Ian Shimmin, p. 21, Table 5.

Period	Rate of growth	Absolute increase
2016 - 2021	92.1%	3,020
2021 - 2026	27.8%	7,550
2026 - 2031	12.9%	8,930

40. Additionally, simple mathematical exercises such as those conducted by Mr Shimmin ignore the complex realities associated with housing choice, housing diversity and housing affordability, such as whether particular dwelling formats are suitable for particular family compositions or whether a particular location is actually affordable for people on particular incomes. Mr Shimmin's assessment might be useful if the only obstacle preventing people from living in the inner city was a shortage of apartments. This is clear not the case, however.

Different methods should not yield different outcomes

41. In criticising the population target, two different suggestions have emerged:
- (a) One, advanced by Mr Morris QC in submissions, was to use a population projection to determine the likely future population of Fishermans Bend;
 - (b) The other, advanced by Mr Sheppard, was to begin by establishing a preferred built form character for each precinct, determining built form controls and from this, deriving a future population and associated densities based, presumably, on how many people fit into the housing that can be built within a proportion of the built form envelope.
42. Neither of these methods have been demonstrated to yield a different outcome from adopting the population target, let alone a 'better' result.
43. In relation to a population projection, it is not clear that such a method could be applied to a large area like Fishermans Bend which is proposed to undergo a total transformation from industrial to residential use. The

existing population of Fishermans Bend is said to be about 200 persons. Even just delivering a population of 80,000 would infer an average growth rate of 4,433% per annum.

44. Turning to Mr Sheppard's proposed approach, it is not clear that it would yield a materially different result than what is proposed. There are several reasons for this:
- (a) First, given that the Fishermans Bend area is proposed for a total transformation, existing built form *within* the precinct cannot generally provide any meaningful guidance on the preferred outcomes. This is distinct from urban renewal areas such as City North or West Melbourne which seek to renew what might be characterised as 'greyfield' areas.
 - (b) Second, given the size of Fishermans Bend, built form *adjacent* to the precinct can only provide guidance in those locations which are relatively proximate to existing areas (e.g. the southern interface to Garden City, Lorimer's interface with Yarra's Edge, the interface with Docklands and Southbank). This is in contrast to, for example, Arden Macaulay, which specifically seeks to 'integrate new development with character and scale of adjacent suburbs'.⁵¹
 - (c) Third, apart from the Westgate Freeway and the existing large areas of open space, there are relatively few *existing* constraints and opportunities within Fishermans Bend which would suggest a particular built form outcome in a given part of Fishermans Bend.
45. The result is that the determination of the preferred built form in an area like Fishermans Bend is necessarily based on a series of policy choices about the future urban structure of Fishermans Bend, e.g., where future public transport will be located, where future open space will be located, the role of a given precinct or sub-precinct within Fishermans Bend and

⁵¹ City of Melbourne, *Arden Macaulay Structure Plan 2012*, p. 53. See also the Panel Report on Amendment C190, which introduced the *Arden Macaulay Structure Plan* to the Planning Scheme, which recognised the appropriateness of seeking to reflect the existing character in Arden Macaulay: [2015] PPV 125, p. 86.

potentially taller as a whole. Those choices will necessarily have implications for the preferred built form (e.g. lower buildings around open space and key boulevards, denser built form around public transport infrastructure). As discussed below, the basic urban structure proposed has not been the subject of any serious challenge.

46. Given this, it is not at all clear that, if Mr Sheppard had started from the same (or similar) structure, he would have arrived at any materially different result in terms of population outcomes and residential densities.

URBAN STRUCTURE

47. The Review Panel should proceed on the basis that the foundational elements of the urban structure have found almost universal acceptance. Its constituent components of streets, lanes, open space, public transport, core and non-core areas, active frontages and investigation areas for community infrastructure have not been criticised in evidence or submissions.

Elements of urban structure

48. No submitter and no witness has seriously challenged the need for new streets and new lanes in Fishermans Bend as essential ingredients for a finer grained, permeable network which will support walking and cycling and more sustainable living; no submitter and no witness has seriously challenged the need for new open space as essential ingredients for the health and wellbeing of residents and workers in a higher density environment.
49. Whilst a handful of submitters have questioned the need for a particular road on their site and a further few have made general and vague assertions that there is too much open space proposed for Fishermans Bend (usually, because they don't want open space on their land), no one has proffered an alternative series of principles for the spacing of the road and laneway network nor an alternative, evidence-based metric for the quantum or distribution of open space.

50. Ms Thompson's evidence that distribution matters more than quantum in high density settings has not been undermined by competing evidence or in cross examination; nor has her evidence that a safe and accessible walking distance of 200m should be utilised to determine appropriate locations for open space within a high density setting.
51. The Minister has accepted the majority of Ms Thompson's recommendations, balancing a wide range of considerations including improved utility and amenity, greater accessibility, implications for FAR, implications for overshadowing controls and additional cost, depending on whether open space is increased or relocated.
52. In response to the claim that the Minister has no "skin in the game" and hence has been too lavish in the provision of open space, the Minister disputes that the Framework has had inadequate regard to the cost of providing open space; the planning to date evinces a strong intention to maximise use of existing public spaces and to minimise costs of securing new public spaces. This is plain from:
- (a) reliance on linear spaces along existing roads which can be closed or narrowed;
 - (b) maximising availability of government owned land for public open space and other public infrastructure;
 - (c) rejection of unnecessarily generous recommendations for new or expanded open space.
53. The Minister is acutely conscious of the cost of delivering open space due to the heightened value of land in Fishermans Bend and has tried to reduce the cost to all future contributors, public and private alike, by testing a new way of securing additional parks and open spaces. The Minister put forward the proposed mechanism for provision of open space through the FAR; as emerged through the course of the hearing, the proposed mechanism was very poorly received and hence the Minister is proposing a more conventional mechanism with a clear legislative foundation to support delivery of open space through an ICP.

54. Although submitters have sought a level of certainty about the timing, alignment and acquisition mechanism for public transport, there has been no real suggestion that the proposed tram alignment or the metro alignment, which are shown in the Framework is misconceived. It is acknowledged that further work is intended by TfV to support its proposed tram alignment.
55. Similarly, the principle that precincts should be delineated into core and non-core areas to represent locations for higher density development most proximate to public transport has been accepted. Whilst all of Fishermans Bend is expected to be very well served by public transport in the future, the proposition that the land closest to the stations and stops should see the highest concentrations of activity is consistent with longstanding planning policy and is successfully implemented in the distribution of core and non-core areas in the proposed planning controls. The delineation of active frontages to correspond with designated boulevards and public spaces, public transport corridors, good solar access and the forecast quantum of retail floorspace is consistent with established city planning principles. SIN 17 provides further explanation of the selection of active frontages for specific locations. As the Minister's precinct closing submissions contemplate, further refinement of active frontages through the Precinct Planning phase will be appropriate.
56. Apart from Hansen querying whether an investigation area should be shown over its site, there is no suggestion that the investigation areas are in the wrong location. The broad areas nominated for community, sporting and education facilities have a logical relationship with public transport and open space. In the case of existing uses, such as Hansen, the timing of delivery of community infrastructure may coincide with the departure of existing uses; or if they have not moved on, there is scope for alternative sites within the investigation area to be pursued; or a site may be selected during Precinct Planning or preparation of an ICP which avoids sites where existing uses profess an intention to stay. Now that the Prohasky Reserve is included in the Wirraway investigation area, all sites preferred by Port

Phillip City Council for community infrastructure are incorporated in investigation areas.

57. Consequently, the Review Panel should proceed on the basis that the information contained in the proposed urban structure plans and the layout depicted within them represent sound and properly considered outcomes in accordance with which development in Fishermans Bend should progress.

CHARACTER

58. The principle that difference between and within precincts should be facilitated by the planning controls has also found support in the course of the hearing. A layering of tools has been employed to deliver distinctive character within precincts:
- (a) demarcation into subprecincts with unique statements of preferred character and associated typologies;
 - (b) discretionary heights informing the scale of development; and
 - (c) FARs based on core and non-core locations.
59. The relationship between these tools is helpfully captured in the response to the Panel's Request (Documents 305 and 306), which in tabular and mapped form shows how the three components work together to deliver distinctive character. This has been further aided by the Review Panel's production of Document 325 which, properly analysed, illustrates how the intended character for each subprecinct will be realised by the proposed controls.
60. The evidence of the planning and urban design witnesses for the landowners and the Councils in this regard is telling:
- (a) Mr Sheppard endorsed the vision for all four precincts but made no reference at all to the statements of preferred character for each sub-precinct or the associated text in the proposed MSS;
 - (b) Mr Biacsi did not address questions of character at all;

- (c) Mr McGurn cited the preferred character statements for the various subprecincts of the 11 sites analysed by him and made no adverse comment about the preferred character sought, offering support for Lorimer;
- (d) Ms Heggen offered no criticism of the preferred character for Sandridge and provided general endorsement of the comments of the Roberts Day submission for the Goodman land which in turn expressed support for the Sandridge vision;
- (e) Mr Milner and Mr Song agree with and support the vision, but again do not delve into the intended character for subprecincts;
- (f) Mr Barnes expressed his general support for the greater emphasis of the Lorimer, Sandridge and Montague Precincts being higher density precincts with a stronger commercial/employment emphasis, and a transition to a lower density precinct in Wirraway, albeit his evidence was that the core of Wirraway could absorb a more intense built form.⁵²
- (g) Mr McPherson regarded the preparation of a vision, with a distinct character for each precinct and with further distinction between core and non-core locations to be 'strongly aligned to best practice planning for urban renewal';⁵³and.
- (h) Mr de Keijzer was critical of the vision for Lorimer but on the basis that it provided *too little* guidance as to the form of development expected in Lorimer.⁵⁴

How the tools work together

61. The valuable exercise requested by the Review Panel in Document 294 to map the alignment of the core/non-core, typology, sub-precinct boundaries and heights has revealed the clear intent for the preferred

⁵² Evidence of Mr Barnes (Documents 175 and 195), [22].

⁵³ Evidence of Simon McPherson (Document 140), [44].

⁵⁴ Evidence of Koos de Keijzer (Document 190), 6.5.

character of each sub-precinct area. The exercise confirms the level of sophistication which has informed the suite of overlapping controls and serves as a useful reminder that cities are multi-dimensional and complex physical places and the high expectations we have for buildings in our cities need to be supported by built form tools which are fit for purpose and sufficiently sophisticated to meet the challenge of delivering high quality outcomes. This is why a layer of policy and controls which addresses matters such as the intensity of land use and development, proposed height and preferred typology must all work together to achieve preferred character outcomes. It is the crudeness of the current mandatory maximum heights and tower setbacks, which has generated the unfortunate monotony of the current applications which have been called in by the Minister. The existing approvals and current applications illustrate the need for a more highly evolved and more finely tuned set of directions for development.

Typology

62. The genesis of the proposed typologies is found in the Urban Design Strategy at pages 88 and 89. It is supplemented by the information in the tabled character statements for each precincts.
63. Amongst many other matters, the typologies selected reflect the need for housing diversity, particularly housing well suited to families with children. The best evidence is that this housing should be provided in lower levels of buildings with good visibility to open space, whether private, shared or public. This in turn informs the desire for low to mid rise forms including infill, courtyard and perimeter block development, being the dominant form proposed for Wirraway and Sandridge non-core.
64. Further, there is strong support for hybrid development outcomes across Fishermans Bend as a legitimate alternative urban design alternative to the dominant podium tower form which has been produced by the controls to date. For example, Mr Sheppard proposes two alternate models that can deliver hybrid outcomes: a 'Vancouver' model, and a 'Hybrid' model. They deliver hybrid development outcomes by including a mix of tower and low

to mid-rise developments. However, Mr Sheppard's examples (Vancouver and Hybrid) cannot be delivered on a site level except through prescriptive controls (refer SIN 15). By contrast, the proposed approach of a range of 'looser' fit FARs/height limits in the proposed controls deliver hybrid development on a site-by-site basis. This approach is equitable, has been tested and is demonstrated through the expert witness work of Ms Hodyl and the modelling by DELWP.

Subprecincts

65. By and large the boundaries of subprecincts (and their associated typologies) align with the delineation of core and non-core areas. In two areas (the boundary between S3 and S5 and between W1 and W2), the non-alignment is deliberate in supporting a transition between the unlimited scale of the Sandridge core against the Freeway down to the 24 storey heights proposed in S5 and a transition from the Wirraway core along Plummer Street to the 6 storey non-core area to the north. The effect of the intended transition between W1 and W2 is illustrated in Map B1 of Document 306 which shows how the Wirraway core at Plummer Street graduates down to the north. In S4, although the core reaches to the edge of the oval, the typology needs to adjust to the reduced heights associated with shadow protection to the oval and the lower forms which transition to established Port Melbourne on the south side of Williamstown Road. This is explained further in SIN 21 which provides commentary to Map C in Document 306 in response to the Review Panel's graph, Document 325.
66. Elsewhere, the exercise requested by the Review Panel has demonstrated a handful of corrections which should be made in the mapping to confirm the intended alignment between controls; these are shown in Document 342 tabled on 23 May 2018 at the drafting workshop.

Heights

67. Preferred heights have been informed by a range of considerations, all of which are based on cogent and sound urban design principles, including,

- (a) Concentration of height around public transport in the core;
- (b) The need to step down to sensitive heritage protected residential areas to the south;
- (c) The fine grain subdivision pattern in Montague South;
- (d) The imperative to protect selected new and existing parks and civic boulevards from shadow;
- (e) The opportunity presented by the non-sensitive interface to the freeway;
- (f) The desire for differentiation in character and feel between and within precincts.

A summary of the key drivers for heights is found in Figure 10 of SIN 21.

68. Only a handful of witnesses have sought specific adjustments to the proposed heights. For example, Mr Sheppard seeks unlimited heights in Lorimer north and increased heights in Wirraway non-core to 8 storeys, and Ms Bell and Mr Sheppard say heights in Montague North should be informed by existing approvals. Other witnesses such as Mr Song say the heights are too low, but do not volunteer an alternative preferred height. Otherwise, submitters rely on a general proposition that heights are “too low” because they are less than is currently allowed under the interim mandatory height controls and because they are based on densities which are “too low”.⁵⁵
69. Insofar as Mr Sheppard and Ms Bell have relied upon existing approvals to support taller buildings in Montague North, the Minister strongly opposes this proposition. First, there is no emerging character if the approved buildings are not constructed. Second, a replication of the existing approval is *not* the preferred character for Montague and a change to scale, typology and density in Montague North has been an important influence in adjusting the planning controls. To entrench the approved buildings as

⁵⁵ In a strangely circular argument, it is then argued that the densities are “too low” because the heights are “too low”.

the preferred character would undermine the intent of the draft Amendment. Third, it is not the case that lower forms cannot coexist acceptability with the taller approved buildings if they are ultimately built. The extent of variation in height could be accommodated as a legacy of the early era of controls but should not be allowed to dictate its future.

70. It is common ground that mid-rise form, proposed in Fishermans Bend between 8 and 12 storeys, is appropriately distinguished from high-rise form. There is also an important distinction between buildings at 18-24 storeys (or 60-80m) and those which exceed 100m. The difference helps to delineate the locations where most intense activity is to be found, and where heights are more typical of CBD conditions. Working together with the FARs and preferred typologies, areas identified for 18-24 storeys are intended to deliver hybrid forms not just podium tower forms.

“Degrees of fit”

71. The modelling undertaken by Ms Hodyl and Mr Sheppard demonstrates that of the tested sites (numbering more than 100), all but a handful achieve the Floor Area Ratio for their site, including with the provision of open space, streets and lanes.⁵⁶
72. It is also evident that many of the sites can accommodate FAU.⁵⁷
73. It is common ground that it is appropriate for the building form available pursuant to the FAR to sit within the building form available pursuant to the building envelope controls; this variation or “loose fit” contributes to building diversity, avoids building to the maximum permissible envelope and facilitates the provision of public benefits through the FAU. The concept of a “loose fit” was coined and endorsed by Mr Sheppard. It aligns with Ms Hodyl’s objective of “orchestrated diversity”.

⁵⁶ Ms Hodyl identified only one site at 118 Bertie Street which could not achieve the FAR. Mr Sheppard nominated 2 or 3 others where FAR may be hard to reach in a viable form.

⁵⁷ See the modelling in Addenda 2.

74. The criticism was made by Mr Sheppard and Ms Heggen that the degree of “discrepancy” between the building form available pursuant to the FAR and the building form available pursuant to the height controls is too great. In Ms Heggen’s case, the weight to be given to her opinion needs to be qualified by the shortcomings in her modelling which did not present a realistic building form. Nonetheless, the modelling work undertaken by Ms Hodyl and Mr Sheppard demonstrates that in some instances there is a substantial variation between the modelled form and the available building envelope defined by the discretionary height limit. This can be seen in SIN 18 which contains annotated versions of the screen shots from the Hodyl model presented for each precinct (Documents M14, S11, W10, L18). This looseness of fit is then relied upon by Mr Sheppard and Ms Heggen to argue that the FARs are too low.
75. It was established with Mr Sheppard that there is no “rule of thumb” for the degree of fit between FAR and height in settings where they are used together, but absent some other explanation for the extent of the variation, it might be thought that a large variation suggests one variable is too high or too low.
76. At first blush, Document 325 prepared by the Review Panel might appear to support the conclusion reached by Mr Sheppard and Ms Heggen about the discrepancy between the FAR and the building envelope controls. It should be appreciated that a diagram of this kind illustrates only the relationship between FAR and subprecincts on the one hand and height and subprecincts on the other; contrary to the suggestion in the heading, it is not a comparison of FAR and height; this relationship could be understood by graphing height against FAR, each of which uses a different unit of measure (one in metres, one in a ratio).⁵⁸ What the table does

⁵⁸ See SIN 21, Figure 11, for an illustration of how this might be done. This point can be illustrated by the proposition that if a different scale were adopted for the right hand y axis, the red and green plots on the graph would be much closer (or further apart) from the black, blue and grey plots. Nothing should be read into the variation between the green plots which represent maximum heights and red plots which represent minimum heights: the red plots are explained by shadow or low-rise interface conditions dictating lower heights.

enable is a comparison between subprecincts of the relative “gap” between FAR and height.

77. Irrespective of the graphing approach, when each of the subprecincts in which hybrid form is sought are identified, namely M1, M3, M5, S1, S2, S3, S5, L1, L3, L4 and W2, it can be seen that these are the precincts in which the greatest “gap” is available between FAR and height compared with those where more uniform lowrise or midrise form is sought. This is best shown on page 2 of Document 325 where all the subprecincts starting with S1 and moving to the right of the page have a preferred hybrid typology (this is also the case for W2 non-core for which the green plot should sit at 12 storeys not 8 storeys). All but five of these subprecincts are clustered around the 18-24 storey mark corresponding with the hybrid mid-rise typology; two others are hybrid high-rise where heights are unlimited; one is the City Road block which is principally hybrid mid-rise at 24 storeys with a component of unlimited height; the remaining two are S1 where lower heights are proposed to support campus style development and W2 where lower heights assist in the transition down to the Wirraway non-core at 6 storeys. The wider gap between FAR and height is provided for all the subprecincts where the hybrid typology is sought in order to achieve both taller and lower forms together on the same site. This is illustrated in Figure 1 shown in SIN 21. Document 325 and the illustrations and examples in SIN 21 show how the controls and in particular the looseness of fit between FAR and height deliver the preferred typology.
78. The general pattern which emerges from a study of Document 325 is that the areas with the greatest “looseness” are subprecincts where hybrid development is sought. If hybrid development is to be delivered on a site by site basis, rather than the block by block basis described by Mr Sheppard, this extent of “non-alignment” between FAR and height will be necessary.
79. It is worth noting Mr Sheppard’s concession that to deliver either of his Vancouver or hybrid models on blocks comprising multiple lots in separate ownership “there would need to be a mechanism for consolidating them or

equitably sharing the development benefits” between the lots where taller and lower forms are to be built.⁵⁹ The virtue of the FAR, height and typology combination embodied in the draft Amendment is that the outcomes can be delivered on individual sites rather than relying on consolidation or some other tool. Ironically, it is the much criticised looseness of the fit between FAR and height combined with the uniform FAR within core or non-core for each precinct which provides “the mechanism for equitably sharing development benefits” that Mr Sheppard refers to in his addendum.

80. It has been a familiar refrain in the submissions of opposing landowners that the proposed built form controls have not been derived from an identification of preferred character. It has been asserted that density has dictated the urban form of Fishermans Bend and that this is an unforgiveable case of “the tail wagging the dog”. The Minister rejects that characterisation of the genesis and evolution of the suite of proposed planning controls:

- (a) It is not borne out by a fair and balanced reading of the Urban Design Strategy. Whilst distributing density is an important feature of the work in the UDS, it is not the exclusive consideration which has informed the careful expression of preferred character and application of supporting heights.
- (b) It is not substantiated by the evidence of Ms Hodyl who was at pains to explain that the process for crafting the combination of typology, height and density was an investigative and iterative process which sought to achieve the character outcomes sought.
- (c) It is not supported by the tested evidence of the various witnesses for the landowners, including Mr Sheppard in particular, who conceded that density was not the exclusive consideration in the development of the built form controls.

⁵⁹ Document 323.

- (d) It is not consistent with a proper understanding of the way in which statements of preferred character, typology, FAR and height work together to achieve the distinctive character sought for each sub precinct.
81. So, notwithstanding assertions by various submitters, the Review Panel must not proceed on the basis that decanting 80,000 people into homes in Fishermans Bend was the sole criterion which informed the FARs.
82. The principal difficulty for the landowners in making this submission is that their own witnesses either did not refer to the preferred character for the various subprecincts they considered, suggesting an ignorance of the work which informed the subprecinct character and associated heights; or the witnesses referred to that work and made no adverse comment about it, inviting the inference that the witnesses supported the character and heights, or at least did not oppose them.

Derivation of density

83. While the population target of 80,000 residents by 2051 has been one important influence in the derivation of the Floor Area Ratios, it is important not to overlook the other assumptions which have informed the final figures proposed for the core and non-core for each precinct. Amongst the other inputs to the Floor Area Ratios are:
- (a) The distribution of population between precincts, informed by public transport provision, proximity to the CBD and opportunity for different sense of place between precincts.
- (b) The assumption that 90% of existing permits will be acted upon. This is an appropriate assumption to make, in light of the additional scarcity value attributable to these permits in light of the proposed changes to the controls. However, it is also the case that very little development in Fishermans Bend has actually occurred to date and very few landowners have demonstrated to the Review Panel a readiness or active intention to commence development, notwithstanding pending expiry dates. As would be predicted,

Table 1 in the sensitivity analysis in SIN 22 shows that a different assumption about the extent to which existing permits are acted upon makes a minor difference to FARs in Wirraway and Sandridge and a material difference in the Montague core and in Lorimer. For example, in the most extreme case, if only 10% of existing permits in Montague are acted upon, the FAR for Montague core would increase from 6.3:1 to 8.9:1.

- (c) The judgement about the extent of build out by 2051 is another important input into the calculation of the FARs. This was a figure which was strongly criticised by landowners for lacking a proper evidentiary base. In reality, it is difficult to reliably predict how quickly development in Fishermans Bend might proceed, particularly in circumstances where for some years there have been very many extant permits but very little development activity on the ground. Table 2 in the sensitivity analysis in SIN 22 is useful in showing the consequences of quicker development, in which case the FARs reduce by as much as 1.8, and the consequences of slower development, in which case the FARs effectively double. On the basis of permit activity to date, it might reasonably be surmised that development in Lorimer and Montague will proceed much more quickly than in Wirraway and Sandridge; indeed this is the prediction of the Departmental demographers in the Fishermans Bend Population and Demographics Report, 2016. If the non-core areas of Wirraway and Sandridge are the slowest to get going, a residential population of 80,000 by 2051 would be reflected in FAR of 3.2 and 5.1 respectively, as is illustrated in Table 3 of the sensitivity analysis in SIN 22.
- (d) The preoccupation of landowners with the 80,000 figure obscures the influence of other assumptions which have informed the calculation of the FARs. The sensitivity testing shows the effect of the various inputs and how the FARs might be adjusted if a judgement were made that a particular assumption was too

conservative or too ambitious. In particular, it provides an empiric basis on which to compare the information contained in Mr Sheppard's calculation of a FAR for Wirraway employing his representation of the Barcelona (between 3.1:1 and 3.6:1), Vancouver (3.2:1) or hybrid (3.4:1) models, noting that he has modelled a block which straddles core and non-core areas.

Built form tools

84. Just as the components of the urban structure have found favour (or generated little disfavour), the various built form tools employed in the planning controls have found support: height, street wall height, setback above the streetwall, building separation, overshadowing controls and wind controls have been universally endorsed as suitable mechanisms.
85. In the Minister's submission, the case for mandatory built form controls remains strong. Whilst some witnesses have expressed their general preference for discretionary controls, none has made a strong case for discretionary building controls by reference to Practice Note 59.
86. No one has disputed that Fishermans Bend is a unique place of State significance where a preferred new character for each subprecinct is expected to emerge.
87. It is worth recalling the vice which the mandatory controls introduced by Amendment C270 for the Hoddle Grid and Southbank sought to address. Contained within the Existing Conditions report exhibited with C270 is an account of how discretionary controls in Central City contexts under intense development pressure had been progressively relaxed until departure from preferred outcomes was routinely permitted without attention to cumulative impacts.
88. The Part C DDOs have introduced a preferred street wall height with clearly articulated built form outcomes accompanied by a mandatory maximum, informed principally by street widths, an appreciation of human scale, and a suitable sense of enclosure. This approach enables a contextual and

varied response, combined with the protection against towers built on, or very close to, the street.

89. Given the large size of most sites and the absence of existing built form character (with the limited exception of some low scale heritage forms in Montague South), there is no need in Fishermans Bend to provide opportunities to build tower forms to side boundaries. Mr Sheppard could point to only one site in Montague which has been constructed with a blank boundary wall (Gravity) and one site which has been designed with a tower on the boundary (199 Normanby Road).⁶⁰ This is not a CBD context where existing conditions invite higher forms on the boundary.
90. The way in which the FAR works within the building envelope means that mandatory controls do not constrain development yield or impact on scope for design quality, creativity, innovation or architectural excellence.
91. It was accepted by the urban design witnesses that building separation achieves positive public realm outcomes such as street amenity, solar access to streets, sky views between buildings, and a reduction in visual bulk as well as positive private amenity outcomes such as daylight, outlook, privacy and solar access for future residents and workers.
92. An important point in dispute relates to the mandatory solar protection of selected parks, linear spaces and boulevards.
93. One of the considerations in providing a lower quantum of open space, but greater accessibility than might typically be found in new suburbs is to ensure spaces are large enough to support a diverse range of activities and have strong solar protection to ensure year-round useability and enjoyment.
94. The Minister considers that solar access to the most important new parks and linear spaces should be protected by mandatory controls. There are several reasons for this approach:

⁶⁰ See Mr Sheppard's power point presentation, Document 205, p 14.

- (a) The importance of solar access to highly utilised spaces in high density environments must not be overlooked. Spaces are expected to experience a high intensity of use, with many users vying for a patch of sunshine.
- (b) The suggestion that sun is not required on cycle paths or at the ground plane, being the two exceptions to a mandatory control suggested by Mr Sheppard, is totally subjective and reveals the perils of leaving the judgement about acceptability of additional shadow to individual decision makers.
- (c) There is a real risk of incremental decision making which allows minor shadow increases on the basis of individual assessment, without appreciation of the cumulative impact of multiple minor incursions.
- (d) This is linked to a problem of inequity arising from a 'first in, best dressed' approach to permitting shadow in public parks.
- (e) Preferably shade should be designed into parks, rather than produced as a by-product or unplanned consequence of off-site building form. That is, tree planting, shade cloths and other devices for shelter from direct sun should be the considered choice of city park designers rather than solid shadow cast by an accumulation of buildings around a park.

MECHANISM FOR PROVISION OF OPEN SPACE, STREETS AND LANES

- 95. In response to the concerns expressed by the landowners, the Minister proposes to delete clauses 3 and 4 and to utilise the Infrastructure Contributions Plan mechanism to deliver open space in Fishermans Bend.
- 96. Local street and lanes will be delivered by landowners as part of the development of their sites, consistent with ordinary practice.

The Suitability of the ICP for Fishermans Bend

- 97. The legality of the ICP process cannot credibly be questioned. Moreover, the criticisms of the ICP, which have been made thus far, are misconceived.

98. The submissions made by Mr Morris on behalf of Delta Group (Document 326) assert that the new infrastructure contribution provisions have been devised for outer metropolitan growth areas and contend that there are important differences between the outer metropolitan growth areas and Fishermans Bend which make the ICP scheme unsuitable and unfair for Fishermans Bend. The Minister rejects these submissions.
99. A series of points were made in support of the assertion that an ICP scheme is unsuitable and unfair for Fishermans Bend. Each of those points is addressed below:

Application of the ICP system to urban renewal areas

100. It was said that the ICP system is intended to be used for greenfield areas and not for urban renewal areas.
101. It is accepted that the ICP system has been implemented in metropolitan greenfield areas first. However, it has always been intended that the ICP system would be implemented first in greenfield areas, with the express intention that ICPs will be used to fund the provision of infrastructure in urban renewal and 'strategic development areas'. This much is clear from the second reading speech, for the Planning and Environment (Infrastructure Contributions) Bill 2015 on 10 June 2015, in which Minister Wynne stated:

Part 2 of the bill introduces part 3AB into the Planning and Environment Act 1987 to establish the new infrastructure contributions system.

*The bill enables the new system to be used anywhere in Victoria. However, initially the new system will be used in greenfield growth areas and strategic development areas, in both metropolitan and non-metropolitan areas, followed by Melbourne's CBD. Greenfield growth areas include areas on the periphery of urban areas that will accommodate urban growth. Strategic development areas are sites or precincts that provide development opportunities close to public transport and other infrastructure. (Emphasis added).*⁶¹

102. And also:

⁶¹ Hansard, Legislative Assembly, 19 June 2015 at 1886.

Proposed section 46GF establishes a broad head of power for the minister to issue directions on the preparation and content of infrastructure contributions plans. This power will be used to define where the new system may be used, the types of development that may be levied, the kinds of infrastructure that may be funded, and how much of the infrastructure levy may be spent on certain classes of infrastructure items. Planning authorities must comply with these directions. (Emphasis added)

103. Nothing in the PLC Act suggests that the intended application to and operation of ICPs for strategic development areas has been diluted or removed.
104. Indeed, the contrary intention is apparent from proposed s46GH of the Planning Act (which will commence operation upon the commencement of the *Planning and Environment (Public Land Contributions) Act* ('PLC Act')).⁶² Section 46GH provides that an ICP must not be incorporated in a planning scheme if the plan proposes to impose a contribution in relation to land for which a contribution is to be imposed under Part 9B (Growth Areas Infrastructure Contributions for State infrastructure), demonstrating the clear intention that the ICP system as amended by the PLC Act is intended to be used outside GAIC areas.
105. Nonetheless it was said that it was inappropriate to use the ICP system for Fishermans Bend.

Relevance of 'betterment' and 'value capture'

106. It was noted that the prospect of, and event of, urban rezoning in outer metropolitan areas typically has the effect of increasing the value of the land by an order of magnitude over the existing use value. It was next said that the extent of betterment above the existing use value created by rezoning is substantially different between outer metropolitan areas and urban renewal areas. It was then said that because the increase in land value in strategic development areas (including Fishermans Bend) is comparatively lower then it is not appropriate to "value capture". There are two problems with this proposition: first, if it is correct, then

⁶² Section 46GH reflects the current provisions in s46GC of the Planning Act.

development contributions would never be appropriate for a strategic development area; second, it wrongly proceeds on the basis that an ICP is a form of value capture.

107. If it were the case that the scale of increase in land value is to be considered the test for 'fairness' in a contributions scheme, then Fishermans Bend could never be eligible (and landowners or developers would never be liable) for any development contributions, on the basis that the increase in land value associated with rezoning has already occurred.
108. The notion that a windfall gain in land value can only be captured at the time of rezoning is untenable. Although Mr Biacsi suggested that the government 'should pay for the consequences of the (former) government's mistake in premature zoning', this position ignores the fact that it is tax payers who would foot that bill and it is landowners (particularly those who have obtained the windfall gains from rezoning of their land) who would effectively obtain a further benefit by having the infrastructure costs associated with their development subsidised by all taxpayers, the vast majority of whom will derive no benefit from development at Fishermans Bend whatsoever. The unfairness of that approach should be readily apparent to all.
109. In any case, the Minister does not accept that the concept of 'betterment' or 'value capture' is a relevant matter when determining development contributions. As popular as the language of 'value capture' is at present, an ICP with a land contribution is not properly characterised as a value capture mechanism.
110. Victoria's *Value Capture Framework* defines 'value capture' in the following terms (at page 13):

Value capture refers to government capturing a portion of the incremental economic value created by government investments, activities and policies. These actions may generate alternative revenue streams, assets or other financial value for Government which could assist in funding those investments and activities.

For example, when developing rail projects, the Victorian Government could consider the potential for granting rights to develop new sites

created above or next to train stations for commercial and residential development.

This opportunity could create economic benefits for the community (value creation), and generate alternative revenue for Government through the sale or lease of commercial properties. This revenue could partly offset the costs of delivering government services and enhance the wider social benefits and objectives associated with urban renewal.

However, the implementation of value creation mechanisms may not always be followed by the implementation of corresponding value capture mechanisms. The feasibility of implementing an efficient and fair value capture mechanism varies for each project.⁶³

111. The ICP system is not a form of ‘value capture’. It is a development contributions regime whereby essential infrastructure necessary to support urban development is delivered through contributions collected from developers for urban renewal. The amendments introduced by the PLC Act supplement the existing arrangements by requiring transfer of land for public purposes to be provided rather than requiring payment of money to acquire that land.
112. The PLC Act public land provisions can be distinguished from the application of the FAU which may be characterised as a ‘value capture’ mechanism because a public benefit is provided in exchange for the grant of additional development rights over the identified FAR.⁶⁴

Differential values of land within strategic development areas

113. It was then argued that land values in outer metropolitan areas being rezoned for urban purposes are relatively even and usually reflect land value only, which makes an equalisation scheme more practical.
114. The application of an equalisation mechanism wherever it is employed will ensure that the obligation to provide public purpose land will be spread equitably across all landowners in the ICP area. Land for which the parcel

⁶³ https://www.parliament.vic.gov.au/images/stories/committees/paec/2017-18_Budget_Estimates/presentations/MP_-_Victorias_Value_Creation_and_Capture_Framework.pdf

⁶⁴ See Mr Spiller’s analysis of the value sharing in Amendment C270, reproduced in Figure 5 of Mr Spiller’s report Document 77(a). He distinguishes between user pays contributions (such as DCP levies), impact mitigation (such as permit conditions), value sharing (such as GAIC) and inclusionary requirements (such as clause 52.01 and cash in lieu schemes for parking).

contribution percentage is above the ICP land contribution percentage will be entitled to a credit for the exceedance of the contribution above the ICP land contribution percentage. To ascertain the credit payable, all public purpose land will be valued on a site-specific basis. Any land credit amounts will be specific to that parcel of land. Therefore, depending on the methodology for land valuation which is adopted in the Ministerial Guidelines, the land valuation for a particular parcel may reflect improvements on an affected parcel. Any public land on a parcel which is required to be transferred as public purpose land will be valued specifically for that parcel. In that way variation in values between parcels will be taken into account.

115. In any case, even if it is claimed that the arrangements in the PLC Act are inequitable, they are nonetheless lawful. They are embedded in legislation which has been passed by both Houses of Parliament.⁶⁵
116. Section 20 of the *Charter of Human Rights and Responsibilities Act 2006* ('Charter') provides as follows:

20 Property rights

A person must not be deprived of his or her property other than in accordance with law. [Emphasis added]

117. As the Minister's Statement of Compatibility highlighted, this right is engaged in relation to the PLC Act. However, the PLC Act is not inconsistent with the s20 property right protected by the Charter. As a matter of strict statutory interpretation, even if the requirement to transfer land under an ICP prepared in accordance with the PLC Act were characterised as a deprivation of property, it is nonetheless a deprivation of property *in accordance with law*, that is, in accordance with the relevant provisions of the Planning Act (as amended by the PLC Act). As the Minister's Statement of Compatibility highlighted, the powers conferred by the PLC Act are not arbitrary. The requirement to transfer land identified for public purposes will be implemented by a structured and transparent process. Landowners

⁶⁵ And with the support of peak bodies representing the property industry.

will have the opportunity to challenge the valuation accorded to public purpose land as part of this process.⁶⁶

118. The provisions removing compensation for compulsory acquisition if a parcel contribution amount is equal to or less than land contribution amount (s172G) or limiting it to a land credit amount (s172F) have clear and express statutory provision and are not arbitrary.
119. If it is suggested that the mechanisms identified in the PLC Act are contrary to the Charter, then that is a matter to be considered in another forum.⁶⁷
120. The submissions by Delta also seem to have ignored that Clause 52.01 already provides a mechanism in planning schemes for the transfer of land for public open space in metropolitan contexts. That mechanism is utilised at the time of subdivision of land (and is therefore unrelated to any increase in land value associated with a rezoning of land) and is assessed by reference to the value of the land at the time of the subdivision.
121. If, as is contended, a requirement to transfer public purpose land to the responsible authority is unlawful, and in breach of the Charter, then presumably it is also contended that a requirement to provide land (or its cash equivalent) for the purpose of open space across an identified area, the benefit of which may not be limited to the site required to make the contribution, is also unlawful and in breach of the Charter. This would be an ambitious and erroneous contention, and demonstrates the error in asserting that a transfer of land per se without compensation is unlawful and inequitable.⁶⁸

⁶⁶ See Division 4 – Valuation and dispute resolution process for inner public purpose land.

⁶⁷ Section 33 of the *Charter of Human Rights and Responsibilities Act 2006* provides that a question of law which arises in relation to the application of the Charter or the interpretation of a statutory provision in accordance with the Charter is to be referred to the Supreme Court. The Supreme Court may make a declaration that a statutory provision is inconsistent with a right under the Charter. However, the Supreme Court cannot declare the provision to be unlawful. Section 35(5) of the Charter provides that a declaration of inconsistency does not in any way affect the validity, operation or enforcement of the statutory provision in respect of which the declaration was made or create in any person any legal right or give rise to any civil cause of action.

⁶⁸ The Minister further notes that in previous submissions to the Review Panel, Senior Counsel for Delta referred to his report to the Minister for Planning ‘*Land Acquisition and Compensation – Proposals for New Land Acquisition and Compensation Legislation*’, January 1983 which made

122. Insofar as the Statement of Compatibility contemplated the opportunity for a landholder to challenge the need for public open space, that opportunity has been provided through this Review Panel process. There has been a full opportunity to test the only witness who has been called in relation to the provision of open space. No party has demonstrated that the provision of open space in Fishermans Bend is excessive or unnecessary to meet the reasonable needs of the intended community.
123. Instead, the criticism has been of the decision to require particular parcels of land (in whole or part) for the purpose of public open space, the mechanism by which that land will be secured, and the quantum, mechanism and timing of compensation for landowners.

Timeframes for development

124. It was then argued that development in outer metropolitan areas usually occurs within a defined window (say 10 to 15 years) whereas urban renewal in Fishermans Bend will take much longer. It was asserted that the extended timeframe for urban renewal makes the use of a land contribution ICP problematic for the timely delivery of land for public purposes.
125. It is incorrect that development in outer metropolitan areas usually occurs within a defined window of 10 to 15 years. For example, the Mt Atkinson and Tarneit Plains ICP and Precinct Structure Plans, July 2017 were approved and gazetted into the Melton Planning Scheme by amendments C162 and C183 in September 2017. The ICP provides that the development timeframe for that precinct which is covered by the ICP is 20 years, and this may be subject to review.⁶⁹ Similarly, the Plumpton and Kororoit ICP

a number of recommendations regarding acquisition and compensation provisions in Victoria. The Minister highlights that the Morris Report expressly noted that “there is no general right to compensation for loss as a result of a provision which specifies the purposes for which land may be used or which prohibits, restricts or regulates the use of land for specified purposes”: [803].

⁶⁹

[http://dsewebapps.dse.vic.gov.au/Shared/ATSAttachment2.nsf/\(attachmentopen\)/035B58D81C1ECFDBCA258198000A6D2F/\\$File/Melton+C183+Incorp+Doc+Mt+Atkinson+&+Tarneit+Plains+Metropolitan+Greenfield+Growth+Area+Standard+Levy+ICP+July+2017.pdf](http://dsewebapps.dse.vic.gov.au/Shared/ATSAttachment2.nsf/(attachmentopen)/035B58D81C1ECFDBCA258198000A6D2F/$File/Melton+C183+Incorp+Doc+Mt+Atkinson+&+Tarneit+Plains+Metropolitan+Greenfield+Growth+Area+Standard+Levy+ICP+July+2017.pdf)

which was exhibited in April 2018 (which includes a land contribution component) projects development to be 20 years after the date of gazettal of the ICP and also foreshadows review of that timeframe.⁷⁰

126. In terms of timely delivery of infrastructure, under the PLC Act, the ICP system will not require waiting until a developer seeks to develop their land before land can be provided for the identified 'public purposes'. It is possible for land to be acquired in advance of the development of the land by the developer (s 172D as introduced on commencement of the PLC Act). This ensures that there is the ability for the development or collecting agency to enable timely delivery through power to acquire land early. Under the PLC Act, compensation for the acquisition will be assessed by reference to the identified ICP land contribution percentages for the land in the ICP area and not under the *Land Acquisition and Compensation Act* (s 172F).
127. The critics of the ICP sought to distinguish between 'developers' and landowners who may wish to remain in occupation of their land. However, this distinction has no real purpose. A requirement to make a contribution for a development will be triggered by the approval of a permit authorising development. In respect of existing landowners who may wish to remain in occupation, there is scope to exempt particular classes of land or particular uses from the requirements of an ICP and to set different rates for particular types of land use or development.⁷¹

Land size

128. Lastly, it was submitted that the size of lots in outer metropolitan areas in proportion to the area of land required for a public purpose tends to be much larger than in an urban renewal area such as Fishermans Bend. This means that in outer metropolitan areas, few landowners have all or most of their land identified for a public purpose.

⁷⁰ <https://vpa.vic.gov.au/project/plumpton-kororoit-icp/>

⁷¹ See s 46GI(1) and (2) and Clause 2 of the ICO, Document 309, SIN 15, Attachment 5a.

129. It is incorrect that the landholdings in outer metropolitan areas tend to be larger than those at Fishermans Bend. See, for example, the Officer Precinct Structure Plan: of the landholdings in that precinct, 68% are less than 2 hectares in area, and 20% fall within the range of 2 to 8 hectares.⁷²
130. Moreover, there are some very large parcels of land in Fishermans Bend. This is demonstrated by a review of the table in SIN19 which updates Documents 99 and 138 and identifies the land area, the percentage of land to be provided for public open space and the number of titles affected as 'public purpose' land. SIN 19 identifies that there are 38 titles affected from a total of 491 titles in the 4 precincts. Of the 38 titles identified as including 'public purpose land', only 12 are identified as being required in full.
131. Most importantly, it has been demonstrated in the modelling prepared by Ms Hodyl, that each parcel of land part of which has been identified as required for public open space can still achieve the FAR on the balance of that site.
132. The Minister submits that the use of an ICP utilising the land contributions mechanism available as a result of the PLC Act for Fishermans Bend is lawful, fair, appropriate and timely and that for the reasons given above, the arguments advanced to the contrary are unconvincing. They represent a further attempt by landowners to avoid making a fair and reasonable contribution to the infrastructure requirements which Fishermans Bend so desperately requires.

THE OPERATION OF THE FAU SCHEME

133. Over the course of the hearing, the proposed floor area uplift scheme has been refined. A decision has now been made that an uplift will only be available for the delivery of social housing.
134. While the Minister considers that it would have been desirable to retain the delivery of community infrastructure within identified investigation

⁷² <https://vpa-web.s3.amazonaws.com/wp-content/uploads/2017/06/Officer-Precinct-Structure-Plan-September-2011.pdf>

areas as a public benefit, he acknowledges that there were significant implementation issues that needed to be overcome, particularly around the appropriate 'benefit ratio' where the actual benefit is the *early* delivery of infrastructure.

135. On the other hand, one benefit in narrowing the range of public benefits is that it creates a stronger incentive for the delivery of social housing and, as a result, increases the prospect of achieving the goal of delivering 6% social housing in Fishermans Bend.

The Mechanics of the FAU

136. Clause 2 of the Part C CCZ prohibits the grant of a permit unless a s 173 agreement has been entered into providing for the delivery of a public benefit. As this is a precondition to the grant of a permit, it will not be open to merits review.
137. Having said that, the Minister also notes that the utility of such review would be limited in any event, given the narrow scope of the FAU under the current proposal and the fixed benefit ratio of 8 market dwellings for every social dwelling proposed.
138. Transparency will be afforded by the definition of 'Public Benefit' in the CCZ, which makes it clear that the public benefit is to be provided as social housing. The preparation of a reference or an incorporated document which sets out the relevant benefit ratio and decision making criteria to inform responsible authorities in deciding whether to enter into a s 173 agreement is supported by the Department, and subject to the Minister's final assessment.

Accessibility

139. The Minister acknowledges that not every site will be able to deliver the same level of FAU. That is, however, a reflection of the underlying physical realities of the site in question and its basic development potential rather than a problem arising from the operation of the FAU *per se*.

Capping the FAU

140. The Councils and Mr de Keijzer have raised the prospects of capping the FAU on the basis of concerns about built form outcomes and infrastructure capacity arising from the ability to receive an uplift.
141. The Minister does not support a cap on the available uplift at this time. The Minister has prepared SIN 20 which assesses the impact of capping the FAU, including modelling the impact on a handful of sites.
142. One significant consequence is that any cap of 30% or lower of the total floor area will mean that the social housing target of 6% cannot be met by developer contributions alone and would require direct funding of social housing by the State to meet that target. While this is not problematic *per se*, the Minister's view is that, in the absence of a compelling reason to cap the private sector's ability to deliver social housing under the FAU, there is no obvious reason for interfering with the ability to achieve a good policy outcome at minimal cost.

ARRANGEMENTS FOR EXISTING USES

143. The fundamental intent is that an existing (non-residential) use should be permitted to operate without the draft controls inhibiting their operation. However, the continued operation of existing non-residential uses should not prejudice the urban renewal of Fishermans Bend.
144. Existing uses fall into two categories:
 - (a) employment generating, low amenity impact commercial uses. These uses are encouraged in Fishermans Bend and will form part of the ongoing employment base. They are still expected to contribute to the finer grain, permeable urban structure sought for Fishermans Bend over time; and
 - (b) high amenity impact industrial uses. These uses are inherently incompatible with residential development. Within this category are uses which should be encouraged to move out of Fishermans Bend over time, and those which can directly support its

transformation.

145. In general, it is expected that land uses in Fishermans Bend will transition from industrial and warehousing uses to commercial and residential uses over the life of the Framework. Many industrial and warehouse activities are expected to relocate from Fishermans Bend to other areas, including the Employment Precinct, as the value of the land increases relative to the value of other land suitable for those uses elsewhere in Melbourne. Accordingly, the mid to long-term expectation is the transition of incompatible uses including high amenity impact industrial uses out of Fishermans Bend or into the Employment Precinct of Fishermans Bend.
146. Nonetheless, there remains the prospect that industry and warehouse uses with the potential to create off-site amenity impacts may remain operating in Fishermans Bend for some time. Moreover, there are some existing industrial activities which have a role in actively supporting the urban renewal of Fishermans Bend. For these reasons, the planning controls must provide a mechanism to address potential land use conflict between existing industry and sensitive uses.

Expansion of existing industrial and warehouse uses

147. Where an existing industrial or warehouse use seeks a permit to alter or extend its operations (or to subdivide land) the “agent of change” principle would be moderated by requiring such uses not to exacerbate existing impacts.
148. Where additional building and works are proposed, the permit applicant would need to demonstrate ‘the amenity of the area is not damaged or further damaged by a change in the activities beyond the limited purpose of the use protected by the existing use right’ (Clause 63.05). This will ensure that any amenity impacts from the existing industrial or warehouse use will not be increased as a result of any approved buildings and works associated with an existing industrial or warehouse use.
149. The requirements to be generally in accordance with the Urban Structure Plan in the CCZ and other permit requirements and conditions application

and permit requirements and conditions on permits in clauses 3 and 4 of the draft CCZ will not apply to permits for subdivision and buildings and works associated with an existing use.

150. Specific decision guidelines have been introduced in respect of permits associated with an existing use to require consideration of the amenity of the urban renewal area and whether the grant of a permit will prejudice the achievement or orderly development of the future urban structure for the area. The responsible authority will also be required to consider, as appropriate, whether the buildings and works or subdivision facilitate an important ongoing use of the land during the transition from an industrial area to a high density mixed use precinct. In that way, uses which support urban renewal will be given strategic support and encouragement.
151. All existing uses would continue to be subject to all relevant State Environment Protection Policies as these requirements operate independently of planning controls and place the onus on the industrial operator to comply. The consequence of the requirement to maintain ongoing compliance with the SEPPs, particularly in respect of noise, may mean that, notwithstanding the intent of the planning framework to require appropriate measures to mitigate amenity impacts on residential developments as the agent of change, the difficulties associated with compliance with the SEPPs may lead to the relocation of businesses.

Uses which support the urban renewal of Fishermans Bend

152. It is accepted that there are a discrete number of existing industries, including, for example, the concrete batching plants operated by Barro and Hansen which have an obligation to comply with the relevant State Environment Protection Policies and other environmental requirements (including permit requirements) but by the very nature of their operations have the potential to create conflict with sensitive uses in the form of dust, noise and truck movements.
153. The concrete batching plants not only draw a benefit from their existing location due to the accessibility and proximity to the Central City and the Westgate Freeway, but have a clear economic imperative to remain in their

present locations. Indeed, Barro have submitted that it is their intention to operate their concrete batching plant 'forever'.⁷³ For its part, Hansen have asserted that it is their intention to remain for the 'long term'.⁷⁴

154. The Minister acknowledges that both the Hansen and the Barro concrete batching plants are strategically located to their major markets including the Melbourne CBD, Docklands, Fishermans Bend and to major projects including the Metro Rail and West Gate Tunnel projects. The existence of these concrete batching plants, and their continued function is acknowledged by the Minister to be of particular importance to supporting the construction activity required to deliver urban renewal in Fishermans Bend.
155. The Minister accepts that it is appropriate for the MSS, local policy and CCZ to include provisions directed to providing an appropriate level of protection to the operation of the concrete batching plants. While the Minister supports the ongoing operation of industries which support the urban renewal of Fishermans Bend, that support for continued operation is not unqualified as acknowledged by the concrete batching plants themselves.

Agent of change and application requirements for sensitive uses

156. The draft CCZ has been amended to introduce an objective which acknowledges the importance of the continued operation of industry which facilitates the urban renewal of Fishermans Bend and also introduces the 'agent of change principle.'
157. The implementation of the agent of change principle will place the onus on the applicant proposing a new sensitive use or development to take measures to mitigate the potential amenity impacts associated with an existing industrial or warehouse use (identified in Clause 52.10).

⁷³ Submission 89

⁷⁴ Evidence of Mr Barnes at [47], Document 175.

158. The agent of change principle is well established in Victoria.⁷⁵ The EPA's publication '*Recommended Separation Distances for Industrial Residual Emissions*' No. 1518, March 2013 also supports implementation of the agent of change principle.⁷⁶

Amenity Impact Plans and Audit of Uses with Adverse Amenity Potential

159. The Minister acknowledges that the ad hoc identification of uses with adverse amenity potential is likely to be insufficient to address potential land use conflicts between residential uses and industrial uses.
160. There is the risk that existing uses may not be detected by permit applicants, or their impacts underestimated or not considered because the permit applicant would be required to investigate potential impacts and may not be aware of the full range of activities that occur on a particular site.
161. The Minister supports Mr Negri's recommendation that a detailed Audit of Uses with Adverse Amenity Potential (**Audit**) be undertaken in the Fishermans Bend Urban Renewal Area.
162. The *Fishermans Bend Buffer Assessment Report, October 2016*, and *GHD Buffer Study, June 2013* provide an important foundation for the Audit. The GHD assessments provide an assessment of existing industries with adverse amenity potential, maps which identify the location of each use, the key source of impacts associated with the industrial use and the address of the use. The study assesses a number of potential amenity impacts including noise, air quality, odour and light spill and a number of buffer diagrams are provided.⁷⁷
163. The GHD Study and Buffer Assessment could be readily augmented to provide the detailed Audit. The Minister accepts that the Audit should be an Incorporated Document in the Melbourne and Port Phillip Planning

⁷⁵ See for example, *Bagnato v Moreland City Council* [2016] VCAT 5 and *Mylonas v Darebin City Council* [2016] VCAT 1583

⁷⁶ p 13.

⁷⁷ See for example Figure 6 at page 27 the EPA default buffers for air emissions are also identified for key industrial uses including the Delta, Hanson, Kraft and Symex sites amongst others.

Schemes and reviewed regularly, say every two years and updated as required.

164. In non-core areas, Accommodation (including Dwelling and a range of sensitive uses) are a Section 1 use, subject to a condition requiring satisfaction of the Clause 52.10 threshold distances. In core areas, Dwelling will be a section 2 use.
165. Where distances (including distances other than 52.10 threshold distances) are not satisfied, clause 2.0 will require the proponent to prepare an Amenity Impact Plan, thereby implementing the agent of change principle.
166. The Audit would then be used as a document which will inform the preparation of the Amenity Impact Plan by permit applicants within the threshold distances to industries specified in Clause 52.10.
167. The draft CCZ (clauses 2 and 4) require applicants to provide an Amenity Impact Plan which responds to the Adverse Amenity Potential Incorporated Document (which will be the output of the Audit) and provides measures to mitigate potential amenity impacts from existing industrial uses referred to in the table to Clause 52.10 in Port Phillip, and the concrete batching plants in Melbourne. The draft CCZ will also require an assessment of the impact of the proposed sensitive use on any existing or industrial use referred to in Clause 52.10 for Port Phillip or the concrete batching plants in Melbourne.
168. The local policy will also support decision making in this regard. It includes policy to ensure that where a new use or development is sought the amenity impact from pre-existing uses is considered by:
 - (a) preparing an Amenity Impact Plan that identifies existing industrial activities and contains measures to mitigate adverse amenity impacts from those activities; and
 - (b) encouraging new uses and developments to implement measures to mitigate against adverse amenity impacts from existing industrial uses

169. The Minister has also accepted that it is appropriate to make changes to the draft MSS and draft local policy for Fishermans Bend to provide support for the continued operation of existing industrial uses which facilitate the urban renewal of Fishermans Bend and to apply the agent of change principle to ensure that new development for sensitive uses incorporates measures to mitigate potential amenity impacts from those industrial uses.

EPA as referral authority

170. Mr Negri supported the EPA becoming a recommending referral authority to support the responsible authority in determining whether the Amenity Impact Plan is acceptable. However, for reasons which are not entirely apparent, the EPA has opposed being identified as a referral authority in the CCZ for applications involving sensitive uses within the threshold distances specified in Clause 52.10.
171. In light of the EPA's reluctance to accept this role, the Minister considers that it is inappropriate to identify the EPA as a referral authority.

Public Open Space and the impacts of existing uses

172. The Lorimer Central public open space is located within the default air quality separation distance for the Barro concrete batching plant.
173. Mr Negri has recommended that use of that land for a park (informal outdoor recreation) should trigger a permit for use. The Minister does not accept that recommendation.
174. The GHD Study recommends that parks are suitable uses for buffer areas to existing industry. It is inappropriate for use of land identified as a park in the planning scheme to require a planning permit for its intended purpose. It is also unnecessary for the use of a park to trigger the requirement for an Amenity Impact Plan.
175. Any potential for reverse amenity issues associated with the concrete batching plant could be addressed in the design and construction of the park.

AMENDMENTS TO EXISTING PERMITS

176. The Minister acknowledges the submissions by SM253 Pty Ltd (regarding 253 Normanby Road) and others, that the controls should not apply to an application to amend a permit granted before the commencement of Amendment GC81.
177. The Minister accepts that it is appropriate that amendments to proposals authorised by existing permits should be able to be considered without triggering the requirements for 'general accordancy' with the urban structure plans but should be subject to a requirement that the extent of non-compliance with the Floor Area Ratios is not increased in any amendment to such a permit.
178. To address this issue, the draft CCZ has been revised to provide express exemptions for permits issued before the commencement of Amendment GC81 in respect of use, subdivision and for buildings and works.
179. In respect of use, the permit requirements will not apply to an application for the use of land in accordance with a planning permit for buildings and works issued before the approval date of Amendment GC81 (Clause 2).
180. In respect of buildings and works, the requirement for the construction of a building, and the carrying out of works, to be generally in accordance with the relevant Maps of the schedule does not apply to an application to amend a permit issued before the approval date of Amendment GC81 (Clause 4).

TRANSITIONAL PROVISIONS FOR PERMIT APPLICATIONS

181. The Minister remains of the view that transitional provisions for extant permit applications are not only unnecessary, but would actively undermine the ability to implement the Vision. As such, it is respectfully submitted that transitional provisions should not be imposed.
182. It is useful to recall the MAC's snapshot of certain applications and approvals in Fishermans Bend:

13 buildings, all about 40 storeys, proposing about 4250 apartments, or about 8500 people in a couple of hundred metres of Normanby Road– about the population of Benalla with no planned for open space and with virtually no employment uses⁷⁸

183. Further, as set out in SIN15, assuming the population target is retained, the adoption of transitional provisions would have a significant impact on the viability of the development of the remaining land in Fishermans Bend by pushing down the yields available (through a reduced FAR) whilst increasing the cost per unit as future developers would have to meet the cost of infrastructure not provided by earlier developers. In this way, the
184. The Minister does not accept the supposed ‘moral’ argument for transitional provisions. While fairness is an objective of planning in Victoria, another objective of planning is ‘to balance the present and future interests of *all* Victorians’.⁷⁹ As such, in considering what is ‘fair’, it is inappropriate to focus exclusively on the interests of a small class of property developers in a particular locality who made a permit application prior to notification or adoption of the draft Amendment. This is particularly so in a context where Amendments GC29 and GC50 were, expressly, interim controls.⁸⁰ Other interests that are also relevant to an assessment of the fairness of including transitional provisions would include:
- (a) the interests of future developers in Fishermans Bend;
 - (b) the interests of future residents; and
 - (c) the interests of taxpayers of Victoria and the ratepayers of Melbourne and Port Phillip who will have to pay for additional

⁷⁸ Document 57, slide 15.

⁷⁹ Section 4(1)(g), Planning Act.

⁸⁰ Minister for Planning, Reasons for Intervention: Amendment GC29 (14 April 2015), [13] and [18] <http://planning-schemes.delwp.vic.gov.au/updates-and-amendments/amendment?id=12471927E160CA4CCA257E05007D3EA7> and Amendment GC50, Explanatory Report (undated), p. 2 https://engage.vic.gov.au/application/files/5015/1735/7131/Document_21_-_GC50ReasonsforInterventionApprovalGazetted.pdf

infrastructure not funded by the developers regardless of whether they derive any personal benefit from it.

185. Further, the applications and an assessment of their merits or demerits is not before the Review Panel and the Terms do not include any request to review permit applications presently on foot.
186. There has been no assessment of the existing applications by reference to existing or proposed controls presented by any witness before the Review Panel. In fact, in cross-examination, Mr Song conceded that his support of transitional provisions was uninformed by any detailed consideration of the substance of those applications. The same would appear to be true for most other witnesses who advocated this position.
187. To the extent it has been said that changes such as the introduction of the reformed Residential Zones were accompanied by transitional provisions, that is correct. However, there is a material difference between applying a new set of controls across the metropolis – where it may affect many hundreds or thousands of permit applications at various stages of the planning process – and applying a new, carefully tailored set of controls to an urban renewal precinct of State significance which is threatened by inappropriate development.

SPECIFIC ISSUES

EMPLOYMENT GENERATING USES

188. An important, if relatively uncontroversial, aspect of the Vision is the 80,000 job target, which is composed of a 40,000 jobs target for the CCZ precincts and a further 40,000 jobs target for the Employment Precinct.

The job target is reasonable

189. Mr Shimmin was critical of the 80,000 job target for Fishermans Bend as representing a potential missed opportunity, although he conceded in cross-examination that, at 2.17 jobs per household, Fishermans Bend would have a higher jobs per household rate than metropolitan Melbourne or Sydney as a whole or than the Cities of Port Phillip and Yarra.

190. The Minister's view is that this is an area in which it is preferable to underpromise and overdeliver rather than *vice versa*. The Minister is satisfied that 40,000 jobs in the CCZ precincts is a reasonable target, having regard to:
- (a) The fact that there are presently, on 2016 census data, 16,645 jobs in Fishermans Bend;
 - (b) Existing employment levels in Montague and Wirraway already exceed target levels in the Framework; and
 - (c) The conversion of the land from industrial to residential will produce new jobs aimed at serving the resident population.
191. At the same time, the Minister acknowledges that there will also be a loss of jobs as some industrial and other non-residential uses depart from Fishermans Bend and that it is likely that commercial development in some parts of Fishermans Bend may not be viable for some time. Accordingly, the Minister considers it is best to adopt a moderate target, noting that target of 40,000 jobs is in no way a 'cap'.

Mechanisms for promoting employment generating uses

192. A key concern for the Framework and the draft Amendment is facilitating the delivery of commercial floor space in circumstances where the most economic use of land is likely to be residential, at least in the short term. No permit applications for predominantly commercial development of any intensity have been received.
193. In its current form the draft Amendment contains two mechanisms which facilitate the delivery of commercial floor space:
- (a) The first is a policy mechanism which identifies an amount of commercial FAR which should be delivered as part of any development.
 - (b) The second is the allocation – in core areas – of an amount of FAR equal to the policy minimum for non-dwelling uses in the CCZ

schedules, noting it would always be open to a developer to deliver the entire permitted floor area as commercial FAR.

194. Importantly, neither of these mechanisms *mandates* the provision of commercial floor space. A developer may be excused from complying with the policy requirement, whilst the allocation of non-dwelling FAR under the CCZ does not prevent a developer from simply delivering the dwelling FAR by itself. At the same time, the availability of additional FAR for non-dwelling uses creates an incentive for developers to deliver commercial uses.
195. The Minister is evaluating whether, in light of the proposal to adopt an ICO, it may be appropriate to allow developers to deliver an unlimited commercial FAR in core areas, whilst noting this may have built form and other consequences. However, the Minister has not proposed the reinstatement of unlimited commercial FAR in the Part C controls and acknowledges that this option needs further consideration.
196. Beyond this, the Minister is also open to consider other mechanisms to encourage the provision of floor space, such as the proposals from the Councils to utilise s 173 agreements to effectively 'pool' commercial FAR to enable the development of commercial buildings.

ESD

197. Sustainability standards for buildings have traditionally focussed largely on environmental performance. Local policies on sustainable development have focussed on resource efficiency and occupant amenity. However, the sustainability goals for Fishermans Bend are broader, and look at a broad range of elements which combined will result in environmentally sustainable development in Fishermans Bend. Those elements include addressing energy consumption, public space, smart cities and sustainable transport. Those goals have enjoyed broad support from submitters to the Review Panel.
198. The Vision and Framework establish the planning framework to 2050. It is unrealistic to consider that all of the goals expressed in the Framework

will be achieved in the short term or that the highest possible standards should be mandated immediately. A more realistic approach is that targets to achieve the overall objectives will be subject to review during the life of the Framework to monitor performance and achievement of relevant targets. The Framework expresses an expectation that there will be future increases in performance requirements. The Framework is clear that over time the strategies, objectives and commitments within it will be refreshed and adapted as Fishermans Bend develops [p 24].

199. Mr Williamson, who was called by the Councils in relation to sustainability issues acknowledged in his evidence to the Review Panel that the existing planning controls will not achieve the sustainability goals expressed in the Framework. Indeed, no one has contended otherwise. The question then is whether the draft planning controls and policies go far enough in seeking to implement sustainability principles.
200. The Minister submits that an appropriate balance has been struck between implementing and supporting sustainability requirements and providing feasible and achievable strategies to achieve sustainability objectives.
201. Mr Williamson accepted that the position advanced by the draft planning controls and policies would be an improvement, and are considered preferable to the existing position regarding environmentally sustainable design. This becomes evident when the existing policies are reviewed. Clause 22.13 in the PPPS provides, as noted by Mr Williamson, an '*implied*' 4 star Green Star rating but the policy does not prescribe performance outcomes, let alone require that the performance outcomes be independently verified. Clause 22.19 in the Melbourne Planning Scheme does not, as acknowledged by Mr Williamson in cross examination 'require' a building over 5,000m² to reach a 5 Star Green Star standard. Rather, the policy provides encouragement for ESD outcomes, but does not mandate this outcome. In neither policy is there a provision requiring verification that the building, as constructed, achieves the relevant rating.

202. It therefore not correct, as contended in Mr Williamson's evidence⁸¹ that the requirement for 4 star "design and as built" rating in the Fishermans Bend CCZ is lower than what is currently *required* by the City of Melbourne's Water and Waste Efficiency Local Policy 22.19. Clause 22.19 *encourages* as part of that policy a 5 star Green standard for developments larger than 5000m.² This is not a 'requirement' but is what is encouraged by the provisions of the local policy. Further, the encouragement for 5 stars is not required to be verified post construction or before occupation of a building.
203. By contrast, the Framework requires 'new developments to meet 4 Star Green Star Standards or their equivalent now, and clearly indicates future increases to performance requirements'. It will be a requirement (not mere policy encouragement) within the CCZ that development meet the 4 star Green Star standard.
204. When determining the appropriate star rating to include as a planning control (as opposed to providing policy encouragement), there is a need to balance the community needs and interest in sustainability with other imperatives including affordability, providing encouragement for early development and encouraging a mix of development types. It is also important to provide a mechanism which is suitable for Fishermans Bend. The Minister submits that as the first iteration of the planning controls, the requirement for buildings to meet a Green Star rating of 4 stars (or equivalent) is appropriate for Fishermans Bend for the following reasons:
- (a) The relevant strategies in the Framework include at 7.2.1 (page 64) a requirement for 4 Star Green Star Standard or equivalent and also clearly indicate future increases to performance requirements. Introducing a requirement for 4 stars is considered to be a step in the right direction, while flagging future increases to performance requirements.

⁸¹ Document 74 at 2.1.3.

- (b) A rating of 4 stars is identified as being 'best practice.' The 4 star Green Star (or equivalent) requirement will be implemented in the CCZ. This represents a significant advance on what amounts to policy encouragement for sustainability measures in the Councils' local policies. The CCZ will also require compliance with the standard to be verified at three stages: before buildings and works commence, before occupation of the building and within 12 months of occupation of the building (CCZ 4.0 p23 to 25).
- (c) Some developments may not be able to achieve certain Green Star credits in current conditions. For example, early developments may not meet Green Star access by Public Transport and other sustainable transport requirements under Credit 17A until transport infrastructure is built. Consequently, these developments will need to obtain credits from other categories to achieve the required rating.
- (d) The majority of applications in Fishermans Bend are expected to include multi dwelling residential use. None of the buildings approved to date in Fishermans Bend and none or any of the applications lodged to date have been Green Star rated. While commercial office buildings have taken up Green Star in substantial numbers, the residential market has taken up Green Star more slowly. The Green Building Council of Australia noted: 'In the case of the residential tool, the consumer market is yet to understand the value of a Green Star rating'. That statement is well demonstrated by the certification figures. There have been 1767 Green Star certifications across Australia (with 471 of these in Victoria). Of the total certifications, 719 relate to office buildings. The number of multi residential projects which have been certified as 5 Green stars is insignificant. A mere 29 projects have been certified for multi residential development at 5 stars, representing 1.65% of all applications for Green Star rating.⁸² Of those projects which have

⁸² Source: Green Building Council website www.gbca.org.au, accessed 1 May 2018.

been certified, most of them are in two urban renewal areas: Barrangaroo in New South Wales, a Lend Lease project and Bowden Village in Adelaide. The remaining 5 star projects are for education facilities, public buildings, internal refits and commercial buildings.

- (e) The statistics establish a very low take up for assessment under Green Star for residential development in the development community. Given the very low numbers of residential certifications, it is highly likely that for many developers at Fishermans Bend, it will be the first time they have participated in the Green Star scheme. It is for this reason that starting with a 4 Star requirement, with a view to transitioning to a higher star rating is considered the appropriate course. It is not intended that the 4 Star rating will remain in place in perpetuity. The initial 4 star rating is intended to communicate to the market that this is the current control, and that increases to performance requirements will be implemented in the future. It is intended to monitor the development outcomes and to review the threshold in future revisions to sustainability standards.
- (f) The 4 Star standard required by the draft controls represents a significant increase in sustainability and liveability performance above the current minimum compliant residential developments. The 4 Star standard represents a good starting point for Fishermans Bend and will be the platform from which future improvements in sustainability performance for development in Fishermans Bend will be based. Over time and with increased familiarity with sustainable design processes, materials and products, this standard could be increased.
- (g) The Fishermans Bend- Review of Sustainability Standards (Arup 2018) section 4.4 recommends a 4 Star Green Star Design & As-Built rating (or equivalent third party accredited benchmarking tool) for development over 5,000sqm, in line with the current draft planning controls.

Green star communities – no star target

205. Mr Williamson made a recommendation that the Framework identify that Fishermans Bend will be a 6-star Green Star Community. The Minister does not accept this recommendation. Green Star communities are primarily delivered by urban design, precinct and community infrastructure. Sustainability performance is assessed across five impact categories: Governance, Innovation, Liveability, Economic Prosperity and the Environment. These matters all involve assessment of aspects of the urban design of Fishermans Bend which sit outside the draft planning controls.
206. While a 6-star rating would be laudable, it is highlighted that other examples of communities which have become Green Star rated communities are all urban regeneration projects which are of substantially lesser scale (in terms of the size of the community) and where the land has been owned by a single entity or government.⁸³ Achieving a 6-star rating would not be without difficulty.
207. It is not appropriate to include reference to a 6-star Green Star Community rating for Fishermans Bend in the planning controls as suggested in Table 1 of Mr Williamson's recommendations.

Bike Parking

208. In relation to Mr Williamson's recommendations to increase the bicycle parking provision rates to one space per bedroom and one space for 20% of building occupants, this is not supported by the Minister.⁸⁴ This recommendation is at odds with the existing provisions in the Melbourne and Port Phillip Schemes which are based on net Floor Area. It is also a recommendation unsupported by any empirical analysis.

⁸³ For example, Barangaroo South (government land and single developer, Lend Lease) housing 1,500 residents, office space for 23,000 workers, more than 80 new retail outlets and over 50% of the precinct will be open public space. Bowden Village in Adelaide at full development will provide for 3500 residents, and is an ambitious government-led urban infill project.

⁸⁴ Document 74: Evidence of Euan Williamson, p. [2.2.9].

209. The requirement for 1 space per dwelling provided by the draft planning controls is already a significant improvement on rates currently being delivered under existing provisions. The Minister notes that Ms Dunstan expressed support for the proposed rate of 1 bicycle space per dwelling as a means to help achieve the desired 80:20 mode split.
210. Bicycle parking rates could be increased in future revisions to the planning scheme.

Change in terminology

211. The Minister accepts Mr Williamson's recommendation that there be a change in terminology in the CCZ from 'Environmentally Sustainable Design Statement' to 'Sustainability Management Plan', in line with current industry terminology throughout the draft controls and policies.⁸⁵

Development of complementary strategies

212. Mr Williamson has recommended the development of a number of strategies by the Victorian Government and its agencies at the soonest opportunity to best guide the development of the planning controls.⁸⁶ Those strategies include: precinct plans, water sensitive urban design infrastructure, a Zero Net Emissions Strategy and Climate Readiness Strategy. The Minister accepts this recommendation, and notes that these background reports and precinct plans are already in development.
213. Mr Williamson has also recommended rainwater collection strategies within the local policies of the Councils (Clause 22.27 MPS and P Clause 22.15 COPP) include strategies to maintain stormwater quality to Best Practice standards.⁸⁷ The Minister accepts this recommendation. Accompanying guidance for the detailed design and operation of third pipe

⁸⁵ Document 74: Evidence of Euan Williamson, p. [2.2.10].

⁸⁶ Ibid., p. [2.2.13].

⁸⁷ Document 74: Evidence of Euan Williamson, p. [2.2.8].

plumbing and rainwater capture and reuse is currently under development, led by South East Water.

Flooding

214. The issue of flooding and drainage in Fishermans Bend has been addressed in paragraphs [126] – [133] of the Minister’s Part B submissions and paragraphs [71]-[74] of the Minister’s Supplementary Part B submissions. Those submissions noted that while laudable in principle, the ‘conceptual’ approach recommended by the Ramboll Study should not be considered appropriate for incorporation into the Framework or the planning controls.
215. None of the initiatives identified in the Ramboll Study would be precluded by the draft planning controls or the Framework. The initiatives identified in the Ramboll Study require detailed modelling and there is no certainty that increased floor levels would not be required in conjunction with the various strategies identified. Mr Patterson’s evidence before the Review Panel supported a position where strong encouragement was provided for creative and integrated solutions to address flooding. However, he acknowledged that the solution should retain the ability to raise floor levels as part of that package if ultimately required to address flood risk.
216. The issue of flood risk has been given further consideration by the Minister in the local policy.
217. The local policy makes clear the expectation that there will be a combination of physical and management measures to address sea level rise and flooding from storm events without compromising urban form at the ground level. The policy requires that potential flood impacts be addressed in the first instance with measures that would maintain activity at ground level. Relevant measures include the construction of a levy which is adequate to ensure that the expected sea rise does not impact on new urban areas. Encouragement is provided to design elements and materials that will be resilient to flood events and to facilitate uses at ground floor that are able to recover from the impacts of temporary flooding. The policy also provides that ‘raising of internal ground floor

level above street level should only be considered as a last resort where the implementation of other measures coupled with an evidence based approach to risk management reasonably necessitates raising internal floor levels above street level.'

218. The policy provides that where level changes are required between street level and an internal ground floor that the level changes be integrated into the design of the building so as to maintain good physical and visual connection between the street and internal ground floor. Examples of some of the design techniques that have been used in other flood-affected areas have been provided in the presentation by Melbourne Water to the Review Panel (see Document 330).
219. Melbourne Water has advised the Review Panel that concessions to elevated floor requirement levels might be considered for some commercial lobby and retail spaces and where there are compatible uses which can recover from flood events. The Minister concurs with the position advanced by Melbourne Water that 'further work is needed to model and cost innovative, integrated water management and water sensitive city solutions. There is sufficient flexibility within the controls to enable innovation' (Document 330 at p 34).
220. Melbourne Water has provided an outline of the 'next steps' in the process of designing and implementing an integrated flood management strategy for Fishermans Bend as required by the Framework (strategy 5.1.4).⁸⁸
221. Melbourne Water has indicated that it would be its preference to be a referral authority at the planning stage (and not at the building permit stage where the building regulations require the Council to specify a floor level at least 300mm above the flood level set by Melbourne Water: *Building Interim Regulations 2017* r 802). The Minister would support such a recommendation.

⁸⁸ Document 330 at page 35.

Pipelines

222. In response to the submissions by APA (Document 189), the draft CCZ has been amended to include permit requirements which require a permit allowing a sensitive use on land within 450 metres of the South Melbourne to Brooklyn pipeline or the Dandenong to West Melbourne pipeline or within 100 metres of the Port Melbourne to Symex Holdings pipeline (as shown on the Map within the Schedule) to include a condition requiring that before development starts, including demolition, a construction management plan addressing the protection of the pipeline must be submitted to, and approved by the responsible authority.
223. The construction management plan will be required to be prepared in consultation with the operator of the relevant high pressure pipeline.
224. The decision guidelines have also been amended to require the consideration of the views of the relevant pipeline operator in relation to any application for buildings and works for a sensitive use within specified distances from the relevant pipelines. An associated mechanism for notifying the pipeline operator would also be required.

THE PORT OF MELBOURNE

225. The Minister acknowledges the importance of the Port of Melbourne, which is a significant State and national asset. The Minister also acknowledges that it is desirable that, as far as practicable, the redevelopment of Fishermans Bend does not interfere with the operations of the Port.
226. At the same time, the Minister would emphasise that Fishermans Bend is itself a project of State significance. The redevelopment of Fishermans Bend is a key step in meeting the growth challenge faced by Victoria over the next 30 or so years.

227. Further, while it is possible that the Port will ultimately move away from the Yarra entirely,⁸⁹ Fishermans Bend will necessarily always be where it is.
228. The Minister considers it is important to find ways to address access to and from the Port, which do not compromise the delivery of a world class urban renewal precinct.
229. The Minister considers that the most satisfactory results are likely to be able to be achieved through well informed consultations between the Department, the Department of Economic Developments, Jobs, Transport and Resources, Transport for Victoria, and Port of Melbourne Operations based on proper empirical assessment of port traffic patterns.
230. Having said that, the Minister considers that the suggestion that Plummer Street not be used as a civic spine is not a reasonable one. The Minister notes designation of Plummer St as a civic boulevard formed part of the Integrated Transport Plan which was prepared by Transport for Victoria having regard to, among other things, the needs of the Port.
231. It is clear that the provision of high quality public transport through Fishermans Bend is critical to the overall success of the urban renewal project. No evidence has been provided that a satisfactory alternative cannot be identified to the use of Plummer Street for freight traffic, particularly in light of the fact that Sandridge and Wirraway are not expected to begin significant development for some time.
232. In relation to the question of bicycle traffic along Lorimer Street, the Minister recognises the need for separation between truck and bicycle traffic. This was contemplated by the Integrated Transport Plan.⁹⁰ How that separation is provided – and in particular whether cycle route is on the northern or southern side of Lorimer Street – is a matter that will need to be resolved at the detailed transport planning stage.

⁸⁹ Infrastructure Victoria, *Advice on Securing Victoria's Port Capacity*, pp. 102 - 104.

⁹⁰ Transport for Victoria, *Fishermans Bend Integrated Transport Plan*, p. 15.

233. In relation to the Port's opposition to the flood levy being considered by Melbourne Water as part of the Flood Strategy, resolution of this issue will be a matter for further consideration by Melbourne Water in the design and implementation of the Flood Strategy.

WIND CRITERIA

234. It is important that appropriate wind criteria are incorporated into the DDO to ensure that the pedestrian environment and the public realm are inviting places.
235. The Minister's primary objective is to adopt wind criteria which require taller buildings to mitigate the effects of wind and produce good quality climatic conditions for sitting, standing and walking. Competing evidence and substantial debate was heard in Amendment C270, following which the Minister adopted new criteria for comfortable wind conditions and for unsafe wind conditions. This included new wind speeds, new probability of exceedance percentages, and a new approach to capturing wind direction information. The adjustments were directed to ensuring that both constant wind conditions as well as fluctuating (or extreme) wind conditions are captured.
236. Dr Eaddy's preferred approach did not prevail before the C270 panel, which recommended alternative criteria based on research and review of other cities around the world. It was apparent from Dr Eaddy's evidence in the Wirraway precinct hearing that opinions of wind engineers are divided about the best approach and that professional opinions amongst experts in the field reasonably differ.
237. It is highly desirable that a common approach to wind is adopted and to this end, the language of C270 should be used in the proposed DDOs. This will require a minor adjustment to the text which was exhibited to refer to "all wind directions combined" in the definition of comfortable wind conditions instead of "any wind direction".

GOVERNANCE ARRANGEMENTS

238. The issue of the appropriate governance arrangements for Fishermans Bend is, as stated in the Minister's previous submissions, one which extends beyond the boundaries of the draft Amendment. The decision on the final governance will be a matter for the whole of government.
239. Having said that, the Minister accepts that, in planning terms, it is desirable that, in cases where the Minister is the responsible authority, then the relevant Council should be given the status of a recommending referral authority.
240. In many ways, this simply formalises the existing position. As the Tribunal observed in *Port Melbourne Land Custodians Pty Ltd v Minister for Planning*,
*At present all major development applications made to the Minister have been provided to the Council for comment and preparation of draft permit conditions.*⁹¹
241. The Tribunal then referred to the earlier decision of *Resling Pty Ltd v Port Phillip CC*, where the Tribunal ordered the joinder of Port Phillip on the basis that Fishermans Bend was an important urban renewal area and the Council would be the responsible authority for enforcing and administering the scheme once it was granted.⁹²
242. Formalising the participation of the Councils will also benefit applicants by adding a degree of rigour to their participation by requiring the Councils to comply with the obligations applicable to referral authorities under the Planning Act.
243. Appropriate amendments to clause 66 should be made to reflect this formal status.

INFRASTRUCTURE

244. The Minister accepts that it is desirable for public transport to be provided as early as possible. Suggestions otherwise are misconceived, in particular

⁹¹ [2016] VCAT 1135, [6].

⁹² *Ibid.*, [9] – [11]. See, to the same effect, *Buckhurst Developments Pty Ltd v Minister for Planning* [2015] VCAT 1048, [11] – [15].

any claim that the government is deliberately delaying delivery of the tram system misunderstands the processes required before government commits expenditure of such magnitude. The strong support for public transport is evident in the series of public transport interventions – in the form of buses, trams and potentially trains – which are proposed over the life of Fishermans Bend.

245. The absence of a funding and finance package addressing public transport as part of the draft Amendment is not a basis for recommending that the draft Amendment not proceed. One would not expect to find planning controls requiring provision of substantial public transport infrastructure. For instance, funding for development for public transport is not usually included in Development Contributions Plans because it is paid for by the State, although the ICP does allow for a component of a standard levy to pay for state infrastructure (outside a Part 9B area).⁹³
246. In the circumstances, it is entirely proper for the Review Panel to proceed on the basis that the government intends to deliver the infrastructure that it has said that it will deliver as part of the Framework.
247. That is not to say that a business case will not have to be prepared for the proposed public transport infrastructure. This approach is entirely consistent with the *Five Year Implementation Plan for Plan Melbourne* which states:

Decision-making processes to support the delivery of Plan Melbourne

Plan Melbourne is a statement of policy intent. Detailed decisions about the implementation and timing of actions and infrastructure delivery will be made in line with the normal government policy and budget processes.

The government will continue its commitment to rigorous decision-making about initiatives that require funding, statutory amendments or new regulations in line with its economic and fiscal strategy, including the government's long-term financial management objectives.

⁹³ For example, the recent Lockerbie PSP was prepared on the basis that a train station will be provided in Lockerbie. Nothing in the Lockerbie DCP, however, proposes to fund that train station.

*In particular, all projects and initiatives requiring budget funding will be carefully assessed against budget capacity, with rigorous business cases and cost-benefit analyses applied as part of their economic impact assessment.*⁹⁴

248. It is reasonable to expect that – given the level of development expected for Fishermans Bend – the provision of public transport will be cost effective.
249. The Review Panel is entitled to regard the alleged ‘uncertainty’ over the delivery of infrastructure as confected and primarily directed to attempting to derail the draft Amendment.

THE PRECINCT PLANNING PROCESS

250. The next step in the planning process for Fishermans Bend is more detailed precinct planning.
251. The precinct planning process is expected to refine and resolve a number of aspects of the urban structure of each precinct. These include:
- (a) Preferred locations for community hubs;
 - (b) The size, location and role of laneways;
 - (c) Specify the core retail area (if any);
 - (d) Further guidance on the preferred built form for each precinct; and
 - (e) Design of the public realm.
252. At this stage, the Minister does not propose to re-examine FARs or building heights as part of the precinct planning process, although obviously if the Review Panel considers this should be done, the Minister will give it serious consideration.

CONCLUSION

253. In light of the further closing submissions to be made by other submitters on or before 20 June 2018, the Minister reserves the opportunity to reply to these. In the Minister’s submission, the hearing has confirmed the

⁹⁴ Implementation Plan, p. 6.

complexity of the challenges facing Fishermans Bend as an urban renewal precinct with multiple competing demands, which must be weighed and balanced to realise the Vision. There are no simple solutions and a real risk that waiting for comprehensive resolution of all outstanding issues will further jeopardise and endanger good outcomes at Fishermans Bend.

254. The short term thinking of those landowners which seek to achieve extreme densities and to avoid infrastructure contribution must be rejected. So too must any suggestion that all issues need be finally resolved to everyone's complete satisfaction before the Amendment proceeds.

255. Fishermans Bend is too important to get it wrong and too important to wait to get everything right to a standard of perfection.

256. The right outcome is to be found in endorsing an appropriate set of planning controls for inclusion into the Planning Schemes and making recommendations for further work to be progressed to enable key governance, infrastructure and funding mechanisms to be put in place to support the urban renewal of Fishermans Bend.

Susan Brennan

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Instructed by Harwood Andrews

24 May 2018