

**IN THE MATTER OF THE FISHERMAN'S BEND REVIEW PANEL  
ADVISORY COMMITTEE**

**SUBMISSION OF COUNSEL ASSISTING – RELATING TO EMAILS SENT ON 15 MARCH  
2018**

1. The Review Panel has adopted the procedure of keeping a numerical document list which records documents tabled during the course of the hearing ('the Document List').
2. The Document List is publicly available, as are the documents on the Document List subject to any directions made by the Review Panel as to availability.
3. As at the date of this submission, there are no directions that have been made by the Review Panel to confine any of the documents on the Documents List from public access.

**Background**

4. On 16 March 2018, the Review Panel disclosed to the hearing certain events that took place on 15 March 2018. By way of summary:
  - a. During the afternoon tea break of the hearing on 15 March 2018, the Review Panel Chairperson checked her emails and noticed an email from Jane Homewood, Executive Director, Statutory Planning Services, DELWP. In the time available, the Panel Chairperson was not able to read the email in detail.
  - b. Upon completion of the hearing for the day, at approximately 5.30pm, the Panel Chairperson read the email. The email contained 4 attachments. None of the attachments were opened by the Panel Chairperson.
  - c. The Deputy Panel Chairperson was also sent the email and he read the email. He did not open any of the attachments to the email.
  - d. The Panel Chairperson printed a copy of the email. This printed copy of the email remains in the possession of the Panel Chairperson.

- e. The Panel Chairperson reflected on the matter and telephoned Counsel assisting to explain what has occurred. Counsel assisting advised that he would reflect upon the matter. He subsequently asked the Panel Chairperson to forward the subject email.
- f. When the Panel Chairperson went to forward the email, the email had been deleted from her email system – it had apparently been retracted.
- g. The Panel Chairperson advised Counsel assisting.
- h. The Panel Chairperson and Deputy Chairperson received the email. The other members of the Review Panel did not received the email.
- i. The Panel Chairperson reiterated the Review Panel’s Direction 17 which states:

*Members of the Review Panel are not to be contacted or communicated with directly.*

5. The Panel Chairperson then called upon the Minister’s representative and the other parties in order to determine whether anything arose.
6. It was agreed that the matter would be stood down to provide the opportunity for discussions as between the parties.
7. It was agreed that Ms Brennan ought be provided with time to obtain instructions and to deal with the matter at a later time.

### **Application**

8. On 19 March 2018, Mr Canavan (representing several landowners) made application for the listing of the Documents on the Document List. Mr Canavan’s application was joined by other land owner parties.
9. In effect, there are two documents which are the subject of the application (‘the Documents’):

- a. An email sent by Ms Homewood to 'Planning Group – All staff'<sup>1</sup> at 3.47pm on 15 March 2018;
  - b. An email sent by Ms Homewood to the same email group at 5.04pm '*advising all staff it (the first email) was sent in error and requesting it be deleted*'<sup>2</sup>.
10. On 19 March 2018, the Review Panel deferred consideration of the matter on the request of the Minister's representative so as to provide time for instructions to be obtained.
  11. On 20 March 2018, Mr Canavan revisited his application. Oral submissions were made by Mr Canavan, Mr Wren and the Minister for Planning.
  12. The Minister for Planning opposed the listing of the document on the Document List.
  13. The Review Panel directed the Minister to file written submissions by 10.00am as to the basis upon which he opposes the listing of the document on the Document List.
  14. Other parties were provided with the opportunity to file submission on the matter by 10.00am 27 March 2018.

### **Summary of Minister's position**

15. By written submission dated 21 March 2018, the Minister submitted that he opposes the listing of the documents on the Document List on the following basis:
  - a. That listing of the documents is not required in order for the Review Panel to perform its tasks as set out in the Terms of Reference;
  - b. That listing of the documents is not required in order for the Review Panel to afford natural justice in circumstances where counsel for other parties have been invited to view the Documents, albeit on a confidential basis;
  - c. The Review Panel cannot reasonably compel the Minister to produce or table the emails as they are subject to Legal Professional Privilege (LLP);
  - d. That the Minister is not taken to have waived LPP;

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<sup>1</sup> Understood to be a distribution list of approximately 450 employees of the DELWP – per of Ms Brennan 20 March 2018. Bracketed words added.

<sup>2</sup> Paragraph 7 of Minister's submission 21 March 2018.

- e. The documents were a 'confidential communication' within the meaning of the *Evidence Act 2008* as all recipients were bound by the *Code of Conduct for Victorian Public Sector Employees*<sup>3</sup> and the confidentiality obligation therein pertaining to official information.
16. If despite these submissions, the Review Panel considers that it ought require the Documents to be listed, the Minister submitted that the following direction ought be made:

*The Minister for Planning is directed to produce a copy of the following emails:*

*a) [the Documents]*

*on a confidential basis to be retained on the file of the Review Panel and recorded as document number # 'DELWP confidential document' in the Review Panel listed of tabled documents.*

17. On 26 March 2018, Counsel assisting enquired of the Minister's representative what was intended by this direction in terms of who would be given access to the document if the Review Panel made such a direction. The Minister advised that the intention was that access would be given to '*lawyers representing parties and unrepresented parties upon entering an appropriate agreement to retain confidentiality*'.

### **Summary of other submissions**

18. Written submissions were filed by:
- a. Mr Wren;
  - b. Mr Canavan.

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<sup>3</sup> A copy of this document can be found at:  
[https://vpvc.vic.gov.au/wp-content/uploads/2015/03/VPSC\\_Code\\_VPSE\\_WEB.pdf](https://vpvc.vic.gov.au/wp-content/uploads/2015/03/VPSC_Code_VPSE_WEB.pdf)

19. The submissions made by Mr Wren and Mr Canavan are that the Documents ought be disclosed.
20. The basis of these submissions are by way of summary:
  - a. That the Documents are not subject to LPP;
  - b. That it would be a denial of natural justice not to provide access to the Documents;
  - c. That the Documents are not confidential.

### Relevant considerations

21. The Review Panel ought take into account the written and oral submissions of the Parties.
22. It ought also take into account relevant provisions of the *Planning and Environment Act* 1987 and the Terms of Reference. In particular<sup>4</sup>:
  - a. Section 161(1), in hearing submissions, an Advisory Committee—
    - (a) *must act according to equity and good conscience without regard to technicalities or legal forms; and*
    - (b) *is bound by the rules of natural justice; and*
    - (c) *is not required to conduct the hearing in a formal manner; and*
    - (d) *is not bound by the rules or practice as to evidence but may inform itself on any matter—*
      - (i) *in any way it thinks fit; and*
      - ...
  - (2) *A panel may require a ~~planning authority~~<sup>5</sup> or other body or person to produce any documents relating to any matter being considered by the panel under this Act which it reasonably requires*

<sup>4</sup> Noting section 152 of the *Planning and Environment Act* 1987 applying certain parts of the Act to an Advisory Committee.

<sup>5</sup> Struck out as per section 152(2)(c).

- b. section 151 which states that an Advisory Committee may regulate its own procedure;
  - c. Section 159 – an Advisory Committee may give directions about the conduct of hearings.
23. Upon considering these matters, the Review Panel ought then determine whether the Documents ought be placed on the Document List, either by way of direction to the Minister to produce the document, or otherwise, by itself disclosing the Documents (noting that a copy of the Documents – or at least the earliest of the Documents, is in the possession of the Panel Chair) rather than require any other person to produce it.
24. There is authority to the effect that in affording natural justice, a judicial officer (read here the Review Panel<sup>6</sup>) must not receive private communications from a party or the representatives of a party without the knowledge and consent of the other party (*R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 ('the Ciccone case')):

*Certain rules of conduct for judicial officers have, therefore, been evolved over the centuries to ensure firstly that they "act in good faith and listen fairly to both sides" (Board of Education v Rice, [\[1911\] AC 179](#), at p. 182; [\[1911-13\] All ER Rep 36](#), at p. 38), and secondly that they do not appear to act unfairly, as, for instance, by taking evidence or representations from or hearing the submissions of one party behind the back of the other: see *Errington v Minister of Health*, [1935] 1 KB 249; [\[1934\] All ER Rep 154](#); *R v Birmingham Justice*, [1970] 3 All ER 945; [1970] 1 WLR 1428, at p. 1433G (per Lord Parker, CJ) and at p. 1434 (per James, J). And of course no judicial officer should so act as to give any ground for suspicion that there has been any secret dealing or arrangement between himself and one of the parties.*

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<sup>6</sup> There is authority to the effect that consideration must be given to the particular forum in question, but for relevant purposes here, it is submitted that the obligation to afford natural justice is not relevantly altered as a result of this matter being heard by an Advisory Committee as compared to a Court forum.

*The instances I have given are not to be taken as exhaustive. It is impossible to formulate any set number of tests which will be applicable in the infinite variety of circumstances that may exist: see Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation [\[1963\] HCA 41](#); [\(1963\) 113 CLR 475](#), at pp. 503-4; [\[1963\] HCA 41](#); [\[1964\] ALR 517](#), in the judgment of Kitto J But certain canons of conduct for judges and legal practitioners have, by long experience, been found desirable both in the interests of ensuring that justice is done in fact (or as near as may be, in this imperfect world) and that the judge is not exposed to suspicion of bias.*

*The sound instinct of the legal profession--judges and practitioners alike--has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.*

25. The Review Panel is:

- required to act according to equity and good conscience without regard to technicalities or legal forms; and
- bound by the rules of natural justice

26. In these circumstances, it is submitted that there is no apparent reason as to why the Review Panel ought not be subject to the principles in the *Cicccone* case.

27. As to claims of LPP and confidentiality, the submissions of the respective parties provide a summary of relevant considerations in the context of LPP and confidentiality. There is considerable authority as to LPP and confidentiality - including general considerations as to whether a document is subject to LPP and whether any privilege has been waived<sup>7</sup>. It is submitted in the present circumstances however, the Review Panel does not need to determine whether the Documents are subject to LPP nor does it need to determine whether any such LPP has been waived.
28. This is because of the circumstances here where the Documents have already been made known to the Review Panel (or members of it). I have been unable to find authority to the effect that non-disclosure of the document by the Review Panel could be seen as affording natural justice to the parties. This is based upon the notion as outlined in *Ciccone* that in affording natural justice, the judicial officer (here the Review Panel) must not receive private communications from a party or the representatives of a party without the knowledge and consent of the other party.
29. In this respect, even if the Review Panel was required to determine whether the Documents were subject to LPP or confidentiality (and it is submitted that here it is not necessary for the Review Panel to do so), it would still be open to the Review Panel to disclose the Documents if it found that it was in the interests of natural justice to do so.

#### **Minister's draft proposed form of direction**

30. The Minister has submitted a draft proposed form of direction in the event that the Review Panel directs the placement of the Document on the Document List. This draft direction is:

*The Minister for Planning is directed to produce a copy of the following emails:*

*a) [the Documents]*

*on a confidential basis to be retained on the file of the Review Panel and recorded as document number # 'DELWP confidential document' in the Review Panel listed of tabled documents.*

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<sup>7</sup> The Victorian Government Solicitor's Office website contains a useful summary of the principles. <https://www.vgso.vic.gov.au/content/understanding-legal-professional-privilege>

31. In support of his submission to deal with the documents on a confidential basis, paragraph 30 of the Minister's submission points to clause 32 of the Terms of Reference. He submits that it '*expressly facilitates the provision of documents to the Review Panel "in camera"*'.
32. Term of Reference 32 states:

*Any written submissions or other supporting documentation provided to the Review Panel must be available for public inspection until the submission of its report, unless the Review Panel specifically directs that the material is to remain "in camera"*.

The Review Panel ought consider whether the Documents are properly characterised as '*written submissions or other supporting documentation*'. If the Review Panel does not consider that the Documents fall into this category, then it is submitted that Term of Reference 32 would not be applicable to present circumstances.

33. The Minister at paragraph 29 refers to the Review Panel's power to regulate its own procedure. This is found at section 151 of the Act.
34. This power would allow the Review Panel to make procedural orders so as to deal with the Documents 'in camera' or otherwise provided parties are afforded natural justice.

**Peter O'Farrell**

**Counsel Assisting**

**Fisherman's Bend Planning Review Panel**

**28 March 2018**