IN THE MATTER OF
THE WESTGATE TUNNEL PROJECT

COMMENTS ON THE REPLY BY WDA

1. The paragraph numbers used below refer to the paragraph numbers in WDA's reply.

2. In respect of paragraph 2, the view that the limits of PII should be strictly confined is not limited to criminal and disciplinary cases. For example, in *Victoria v Seal Rocks Pty Ltd,*[1] Ormiston JA (with whom Phillips and Buchanan JJA agreed), while suggesting that the immunity was broader than the executive, nevertheless noted that:

> In my opinion, therefore, public interest immunity in a document or other communication is a right by way of an immunity or a privilege which enures in the body politic and indeed in the nation (or relevant polity) as a whole, and not merely in the executive, *being designed to protect the operation of the instruments of government at the highest level and for the benefit of the public in general*, subject only to a court's reaching a conclusion to the contrary on sound grounds that no other public interest, especially in the administration of justice, should prevail in the particular circumstances.[2] (Emphasis added.)

In *Royal Women's Hospital v Medical Practitioners Board of Victoria*[3], Warren CJ reflected that Ormiston JA's expression, "for the benefit of the public in general", was inextricably linked to the preceding exhortation, namely, "to protect the operation of the instruments of government at the highest level".[4]

3. At paragraph 3, WDA asserts that it is not sufficient to demonstrate that a matter may be "relevant" to engage the committee's power to require the production of documents. The WDA refers to the case of *Rajendran v Tonkin.*[5] The comments referred to in Rajendran concern the scope and purpose of section 168 of the Heritage Act 1995 and in particular

[1] (2001) 3 CR 1.
[2] Ibid at [17].
[3] (2006) 15 VR 22.
[4] Ibid at [26].
[5] [2004] VSCA 43 (***Rajendran***).

what considerations the court may take into account so as to make an order to remedy a contravention of the Act. In that context, it is undeniable that a "wide range of considerations" may be relevant.

By contrast, the ICA's role here is narrower. The ICA is required to make an informed and fair assessment of the reliability of the VLC model outputs and the weight that can be attached to the evidence of Mr Veitch. Accordingly, the Allard documents are highly relevant to this specific task.

4. In respect of paragraph 4, it is not in dispute that the VLC is a model only and not a precise projection of future events. However, this does not detract from the issue of the reliability of that model.

5. At 5, WDA assert that none of the documents over which PII has been claimed has been published to the world. At the heart of the issue of prior publication is whether the "necessity for secrecy"[6] continues to exist.

6. In order to determine whether the need for secrecy continues to exist, it is necessary to consider the extent of that publication. In this instant case, there have been a series of events that amount to publication:

    6.1.1 the Business Case itself has been publically released (albeit with redactions);
    6.1.2 Mr Vietch has also now given evidence to the IAC as to the contents of the peer review.

7. A distinction can be drawn with cases where there has been restricted publication of the documents. For example, in *Maritime Union of Australia v Geraldton Port Authority,*[7] disclosure to the other party's legal representatives and the subsequent return of all of the material was held not to be significant as there was no general unrestricted publication of the documents concerned. In this case, disclosure is not limited. The fact that Mr Allard peer reviewed and criticised the Zenith model are matters that are well known to the public.

[6] *Whitehall v Whitehall* [1957] SC 30 per Lord President Clyde.
[7] (1999) 88 IR 351 at [34] per Nicholson J.

8. In respect of paragraph 6, *Ahmet v Chief Commissioner of Police* provides authority for the proposition that in the context of a contents claim, it will normally require the judge to inspect the documents or the purpose of making a decision on whether or not the claim is made out.[8] The paragraphs referred to in *Matthews v SPI Electricity Pty Ltd* deal with cabinet documents only.[9] For the reasons stated in our submission, the Allard documents are not Cabinet documents.

9. At paragraph 7 the WDA assert that the WDA should be allowed to put on further evidence in respect of Mr Smith's affidavit. The WDA refers to *Kamasaee v Commonwealth of Australia (No 3).*[10] It is accepted per *Kamasaee* that if there is a defect that is apparent on the fact of the evidence that a court would usually require further evidence to be adduced rather than permitting cross-examination.[11] The primary basis for reluctance to permit cross examination is the inherent risk that it may reveal the very information that is sought to be disclosed.[12] However, in all cases, it is a matter for the court to determine whether further evidence (or cross-examination) should be permitted.[13]

10. At paragraph 8, WDA assert that "documents which inform a submission to Cabinet are Cabinet documents for the purposes of PII". In his affidavit, Mr Smith at [11] states that "it is common in Business Case preparation and particularly those for significant State projects, for traffic modelling inputs into the Business Case to be independently peer reviewed". The basis for Mr Smith's claim that such practice is "common place" is not made out.

11. Further, it is not clear whether any of the Allard documents were ever actually disclosed to Cabinet in any form or to what extent they informed the Business Case. [A distinction may be drawn here between the Allard documents themselves, for example the review of the VCL model and the minutes of any meeting involving Tim Veitch and John Allard to discuss the Allard review.

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[8] [2014] VSCA 265 at [32].
[9] *Matthews v SPI Electricity Pty Ltd* (No. 11) [2014] VSC 65.
[10] [2016] VSC 438 (***Kamasaee***).
[11] Ibid at [24].
[12] Ibid at [25].
[13] Ibid at [26].

12. At paragraph 9, WDA asserts that the issue of procedural fairness is inconsistent with the judgments in *Gypsy Jokers.* As recognised in the WDA's submissions, the *Gypsy Jokers* jurisprudence deals with a far more serious infringement on proprietary and procedural rights than the present case – namely 'anti-fortification orders'. The decision of the majority emphasised certain features of the particular legislative scheme in evaluating the validity of the process as a whole. It is accepted, as per the WDA's submissions that "*the content of the requirements of procedural fairness or fundamental justice will depend upon the particular circumstances of the case and cannot be prescribed in the abstract*". Given the the Business Case itself has been publically released (albeit with redactions) and in particular given that Mr Vietch has also now given evidence to the IAC as to the contents of the peer review, the circumstances of the present case require the Allard docuemnts to be produced.